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COUNSEL FOR DEFENDANTS

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

FLATHEAD JOINT BOARD OF CONTROL, et al.,	Cause No. DV-15-73
Plaintiffs	BRIEF IN SUPPORT OF MOTION TO STAY DISCOVERY OR, ALTERNATIVELY, TO MODIFY THE SCHEDULING ORDER, VACATE THE CURRENT DEADLINES, AND SET A RULE 16 SCHEDULING CONFERENCE
v.	
STATE OF MONTANA,	
Defendant.	

Defendant State of Montana (State) has moved to stay discovery in this action pending a ruling on the State's motion to dismiss for lack of a justiciable controversy and for Plaintiffs' failure to state a claim. The State files this brief in support of the motion to stay. Alternatively, the State requests that the Court vacate the current deadlines and

order a Rule 16 conference to set new deadlines. Opposing counsel has been contacted and objects to the motion to stay and objects to any motion that would have the effect of moving the trial date.

INTRODUCTION

Plaintiffs filed an amended complaint, alleging constitutional violations and seeking declaratory relief. Doc. 20. The State has not yet filed an answer, and has moved to dismiss based on ripeness and failure to state a claim. Docs. 21-22.¹ The State's motion to dismiss has been fully briefed and is pending before the Court. The pending motion to dismiss is a dispositive motion that will resolve this case. Thus, this Court should stay discovery and all other matters in this case until it has an opportunity to rule on the State's motion to dismiss.

If this Court declines to issue a stay, the State asks this Court to vacate the current deadlines and set a Rule 16 scheduling conference to allow for additional discovery, which is necessary given Plaintiffs' last-minute disclosure of expert witnesses and expert reports. Though the scheduling order reflects the Court's and parties' understanding that no experts would be called, Plaintiffs nevertheless disclosed--on the day before discovery is scheduled to close--two experts who have written reports. The State relied on the Plaintiffs' representation as reflected in the scheduling order, and the State is unfairly prejudiced by Plaintiffs' unexpected, late disclosure. The State should be provided time

¹ Pursuant to Mont. R. Civ. P. 12(a)(4), the State's Answer is not yet due in this action.

to review the expert reports, depose the experts, and potentially obtain its own rebuttal experts. Additionally, Plaintiffs appear to have asserted new factual allegations that have not yet been verified. Accordingly, the State asks the Court to vacate the current deadlines for discovery, dispositive motions, trial, and any other deadlines and order that the dates be reset at a scheduling conference.

ARGUMENT

I. THIS COURT SHOULD STAY DISCOVERY PENDING THE STATE'S MOTION TO DISMISS.

This Court has inherent broad discretion to stay discovery or trial proceedings.

Brown v. Montana Twelfth Judicial Dist., OP 12-0249 at 4, 365 Mont. 559, 286 P.3d 592 (2012); *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (a district court has “broad discretion to stay proceedings as an incident to its power to control its own docket.”). When faced with a dispositive motion, staying discovery is a proper exercise of this jurisdiction. See *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (“A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”); *Steele v. McGregor*, 1996 Mont. Dist. LEXIS 982 (Sherlock, J.) (granting discovery stay pending resolution of a defendant’s motion to dismiss). In fact, it is a “recognized and appropriate procedure” for courts to limit discovery at the outset to determine jurisdictional matters. *United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79-80 (1988).

In this case, the State has raised a jurisdictional challenge based on lack of ripeness. Docs. 21-22. Whether a case is ripe is a threshold question for determining whether a court has jurisdiction. *Havre Daily News v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont. 331, 142 P.3d 864 (2006). As argued in the State’s motion, Plaintiffs’ hypothetical claims are based on their speculation about possible future harms that might happen if the State were to claim immunity at some unknown time in the future. Doc. 22 at 6-10. Thus, Plaintiffs’ lawsuit is not ripe because it depends on “uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Chandler v. State Farm Mut. Auto Ins.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Accordingly, this Court should exercise its inherent discretion to stay discovery pending the determination of the State’s dispositive motion to dismiss as it would be an efficient use of judicial resources.

II. ALTERNATIVELY, THIS COURT SHOULD VACATE THE CURRENT DEADLINES AND ORDER A RULE 16 SCHEDULING CONFERENCE TO RESET DATES.

A scheduling order “controls the course of the action unless the court modifies it.” Mont. R. Civ. P. 16(d). The civil procedure rules provide express authority for the Court to modify a scheduling order for good cause, and courts have discretion over trial management issues. Mont. R. Civ. P. 16(a)(4); *Brown*, OP 12-0249 at 4. Here, good cause exists to modify the scheduling order and reset the deadlines.

At the scheduling conference, both parties informed the Court that they did not anticipate calling expert witnesses in this case, and the scheduling order reflects that understanding; regarding expert witnesses, the order states: "None anticipated." Doc. 23 at 2. Thus, the State was surprised yesterday when it received an email with Plaintiffs' answers to the State's discovery that disclosed and identified--for the first time--two experts whom Plaintiffs expect to call at trial and rely on for dispositive motions. *See* Plaintiffs' Answers to Defs' First Set of Discovery Requests to all Plaintiffs at 4-5 (attached as Ex. A). Additionally, Plaintiffs claim that their experts have written reports which set forth the subject matter, facts, and opinions the experts are expected to testify about. *Id.*

Extending discovery and setting new deadlines is necessary for the State to avoid prejudice. Under the current scheduling order, discovery must be completed by October 7, 2015. Doc. 23 at 2. "Completed" means that all responses are due and that depositions have been completed. *Id.* The deadline for dispositive motions is October 23, 2015, and trial is set for December 3, 2015. *See* Docs. 23 at 2; 30. Given that Plaintiffs have just now identified expert witnesses and expert reports, these dates are no longer feasible. Under the current deadlines, it is impossible for the State to depose Plaintiffs' experts or meaningfully rebut the expert opinions. At a minimum, the State is entitled to review the expert reports, depose the expert witnesses, and assess the credibility and validity of the expert witnesses' opinions. The State may also need to obtain its own experts to rebut the opinions of Plaintiffs' experts.

While the State seeks to vacate and extend the deadlines, the State has no interest in unnecessarily delaying the case. On the contrary, the State looks forward to resolving the issues. But holding to the current deadlines would sacrifice fairness for speed. Further, Plaintiffs should not be rewarded for their dramatic departure from this Court's scheduling order, which the State has relied upon in preparing this case for summary judgment and trial. If this Court does not grant the State's motion to stay discovery pending the outcome of the motion to dismiss, then the State respectfully asks the Court to grant the State's motion to vacate the current deadlines.

CONCLUSION

If this Court grants the State's pending motion to dismiss, there is no need to engage in any further discovery or to involve the Court in preliminary matters. Thus, to conserve judicial resources, a prudent course would be to stay discovery until the State's motion to dismiss can be decided. If the motion to dismiss is granted, the case is over. If the motion to dismiss is denied, then a scheduling conference can be held to set new deadlines and a new trial date.

Given the fast approaching deadlines, however, the State asks that, if this Court denies the motion to stay that it grant the State's alternative motion to vacate the current deadlines and set a Rule 16 conference to set new deadlines in this matter.

Respectfully submitted this 6th day of October, 2015.

TIMOTHY C. FOX
Montana Attorney General
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Deputy Attorney General
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Helena, MT 59620-1401

By: Matthew T. Cochenour
MATTHEW T. COCHENOUR
Assistant Attorney General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed
and emailed to:

Mr. Bruce A. Fredrickson
Ms. Kristin L. Omgig
ROCKY MOUNTAIN LAW PARTNERS, LLP
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bruce@rmtlawp.com
kristin@rmtlawp.com

Date: October 6, 2015

Matthew T. Cochenour
MATTHEW T. COCHENOUR

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Attorneys for Plaintiffs

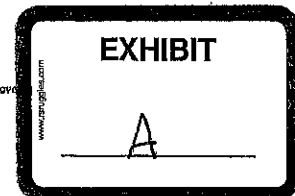
MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

<p>FLATHEAD JOINT BOARD OF CONTROL and JERRY LASKODY, BOONE COLE, TIM ORR, TED HEINS, BRUCE WHITE, SHANE ORIEN, WAYNE BLEVINS AND GENE POSIVIO, all members of the Flathead Joint Board of Control,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>STATE OF MONTANA,</p> <p style="text-align: center;">Defendant.</p>	<p>Cause No. DV-15-73</p> <p>Judge: James A. Manley</p> <p style="text-align: center;">PLAINTIFFS' ANSWERS TO DEFENDANT'S FIRST SET OF DISCOVERY REQUESTS TO ALL PLAINTIFFS</p>
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Plaintiffs, Flathead Joint Board of Control, Jerry Laskody, Boone Cole, Tim Orr, Ted Heins, Bruce White, Shane Orien, Wayne Blevins and Gene Posivio, all members of the Flathead Joint Board of Control, hereby respond to Defendant's First Set of Discovery Requests to All Plaintiffs as follows:

GENERAL OBJECTIONS

1. Plaintiffs object to Defendant's "Definitions" and instructions as an attempt to impose upon Plaintiffs duties and obligations beyond those authorized in the Montana Rules of Civil Procedure, and to the extent they do, they are oppressive, burdensome and overreaching.



1 Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No.
2 406.745.2090; Ted Hein, Individually and as a Member Flathead Joint Board of Control, P.
3 O. Box 639 St. Ignatius, Montana 59865; Phone No. 406.745.2090; Shane Orien,
4 Individually and as a Member Flathead Joint Board of Control, P. O. Box 639 St. Ignatius,
5 Montana 59865; Phone No. 406.745.2090; Bruce White, Individually and as a Member
6 Flathead Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No.
7 406.745.2090; Jerry Laskody, Individually and as a Member Flathead Joint Board of Control,
8 P. O. Box 639 St. Ignatius, Montana 59865; Phone No. 406.745.2090; Wayne Blevins,
9 Individually and as a Member Flathead Joint Board of Control, P. O. Box 639 St. Ignatius,
10 Montana 59865; Phone No. 406.745.2090; and Gene Posivio, Individually and as a Member
11 Flathead Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No.
12 406.745.2090.

13 **Interrogatory No. 2:** Identify the name and, if known, the address and telephone
14 number of each individual likely to have discoverable information along with the subjects of
15 that information that you may use to support your claims or defenses.

16 **Answer:** Any and all House of Representative and Senate members of the Montana
17 64th Legislature; Governor Stephen Bullock; Attorney General Timothy Fox; and any and all
18 witnesses identified by the Defendant. Upon information and belief Defendant already
19 possesses the addresses and telephone numbers of those individuals and such information is
20 more readily available to Defendant.

21 **See also:** Johanna Clark, General Manager, Flathead Joint Board of Control,
22 P. O. Box 639 St. Ignatius, Montana 59865; Phone No. 406.745.2090; and Boone
23 Cole, Individually and as a Chairman, Flathead Joint Board of Control, P. O. Box 639
24 St. Ignatius, Montana 59865; Phone No. 406.745.2090; Tim Orr, Individually and as
a Member Flathead Joint Board of Control, P. O. Box 639 St. Ignatius, Montana
59865; Phone No. 406.745.2090; Ted Hein, Individually and as a Member Flathead
Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No.
406.745.2090; Shane Orien, Individually and as a Member Flathead Joint Board of
Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No. 406.745.2090; Bruce
White, Individually and as a Member Flathead Joint Board of Control, P. O. Box 639
St. Ignatius, Montana 59865; Phone No. 406.745.2090; Jerry Laskody, Individually
and as a Member Flathead Joint Board of Control, P. O. Box 639 St. Ignatius,
Montana 59865; Phone No. 406.745.2090; Wayne Blevins, Individually and as a
Member Flathead Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865;
Phone No. 406.745.2090; and Gene Posivio, Individually and as a Member Flathead
Joint Board of Control, P. O. Box 639 St. Ignatius, Montana 59865; Phone No.
406.745.2090. Richard E. Everaert, 5 Limestone Court, Helena, Montana 59601;
509-440-3853. Barry Dutton, 2815 Tivoli Way, Missoula, Montana 59802.

The afore-mentioned individuals possess personal knowledge, information, and facts relevant
to the pre-implementation of the 2015 CSKT Water Compact, alleged adoption of the 2015
CSKT Water Compact by the 64th Montana Legislature and damages resulting therefrom.

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Request for Production No. 1: Please produce copies of all documents that you anticipate using at trial or in support of a motion for summary judgment in this case.

Answer: See Response to Request for Production No. 1 attached hereto as Bates Numbers FJBC-0001-FJBC-0377. Plaintiffs also anticipate using Senate Bill 262, all appendices, legislative history pertaining to SB 262, meeting and hearing transcripts (as well as audio and visual recordings), and legislative records pertaining to SB262, vote tallies relating to SB262, all of which is the possession of Defendant. Plaintiffs may also use meeting minutes, hearing transcripts, notes and documentation generated or provided to the Water Policy Interim Commission pertaining to the Confederated Salish and Kootenai Tribes Compact dating from 2008 to present, all of which is in the possession of Defendant. In addition, all documentation produced by Defendant in discovery.

Interrogatory No. 3: Identify the name, address, and telephone number of all experts you have retained or conferred with concerning this action and who you expect to call at trial. Please state:

- a. the subject matter on which that expert is expected to testify;
- b. The substance of the facts and opinions to which that expert is expected to testify;
- c. The grounds for each opinion; and
- d. Whether any written reports have been received from the expert

Answer: Richard E. Everaert, 5 Limestone Court, Helena, Montana 59601; 509-440-3853.

- a. See attached Reports;
- b. See attached Reports;
- c. Mr. Everaert's independent review and analysis of 2015 CSKT Water Compact and the Flathead Irrigation Project; and
- d. See attached Reports.

Barry Dutton, 2815 Tivoli Way, Missoula, Montana 59802.

- a. See attached Reports;
- b. See attached Reports;
- c. Mr. Dutton's independent review and analysis of 2015 CSKT Water Compact, the Flathead Irrigation Project, and Mr. Dutton's accumulated data and analysis of the Flathead Irrigation Project; and

1 d. See attached Reports.

2 **Request for Production No. 2:** Please produce any reports, including preliminary
3 draft reports and final reports of experts referenced in the preceding interrogatory. Also
4 produce copies of all communications between you and/or your attorneys and any expert
5 identified in response to this Request for Production and any document relied upon by your
6 experts including a copy of any treatise or article upon which the expert placed any reliance
7 in formulating his or her opinions.

8 **Answer:** See Response to Request for Production No. 1.

9 **Interrogatory No. 4:** If the Mission and Jocko Irrigation Districts have withdrawn
10 from the Flathead Joint Board of Control (See request for admission No. 1), please describe
11 how the Joint Board of Control is validly constituted without those Irrigation Districts.

12 **Answer:** See Response to Request for Admission No. 1. No further response is
13 required.

14 **Request for Production No. 3:** Please include all documents that support or are
15 related to the preceding interrogatory.

16 **Answer:** See Response to Request for Production No. 3, attached hereto as Bates
17 Numbers FJBC-0378-FJBC-0384.

18 **Interrogatory No. 5:** Please describe in detail all harm that each Plaintiff has
19 suffered or will imminently suffer from implementation of the CSKT Water Compact.

20 **Answer: Objection.** Plaintiffs object to Interrogatory No. 5 on the basis that it is
21 overly broad, burdensome and misstates the allegations contained in the Amended
22 Complaint. However, without waiving said objection the Plaintiffs can provide that the
23 Amended Complaint challenges the validity of the legislative vote which allegedly passed
24 Senate Bill 262. Further, although the 2015 Compact has not yet been ratified by Congress,
CSKT or the Montana Water Court as required by its term, implementation has nevertheless
been illegally commenced. Subjecting Plaintiffs to the mandates of unconstitutional
legislation is harm that is *per se* irreparable. Irrigators have also experienced actual and
substantial economic damages in the form of, among other things, crop loss and forced
livestock liquidation as a direct result of pre-ratification implementation, project
mismanagement, inadequate water deliveries and inadequate water supplies. The full extent
of Plaintiffs' actual damages is unknown at this time.

Request for Production No. 4: Please include all documents that support or are
related to the preceding interrogatory.

Answer: Objection. See Plaintiffs' Objections and Response to Interrogatory No. 5
which objections and response are expressly incorporated herein. See also Response to
Request for Production No. 1.

1 **Interrogatory No. 6:** Please describe in detail the steps that the Flathead Joint Board
2 of Control has made to comply with MCA, 85-7-1914 for the last three years.

3 **Answer: Objection.** Plaintiffs object to Interrogatory No. 6 on the basis that it is
4 overly broad and requests information beyond the scope of discoverable information
5 contemplated by Rule 26, M.R.Civ.P. The interrogatory is not calculated to lead to the
6 discovery of admissible evidence. Further, it would be unduly burdensome to detail each and
7 every step taken to comply with, and prepare documentation in satisfaction of, MCA § 85-7-
8 1914.

9 **Request for Production No. 5:** Please provide all documents that support or are
10 related to the preceding interrogatory, including but not limited to the sworn reports filed
11 with the county clerk and county recorder, and a copy of the newspaper publication of that
12 report.

13 **Answer: Objection.** Plaintiffs object to Request for Production No. 5 on the basis
14 that it is overly broad and requests information beyond the scope of discoverable information
15 contemplated by Rule 26, M.R.Civ.P. The request is not calculated to lead to the discovery
16 of admissible evidence. Further, it would be unduly burdensome to detail each and every step
17 taken to comply with, and prepare documentation in satisfaction of, MCA § 85-7-1914.
18 Responsive documentation may be obtained from the appropriate authorities.

19 **Interrogatory No. 7:** Please describe whether and how the Flathead Joint Board of
20 Control received authority from its board of commissioners to file the above referenced
21 lawsuit. Please also indicate when that authority was granted.

22 **Answer: Objection.** Plaintiffs object to Interrogatory No. 7 on the basis that it is
23 attempts to invade the attorney client privilege. However, without waiving said objection the
24 Plaintiffs can provide that, among other things, FJBC has opposed the 2015 Compact as
25 drafted since its inception, has adopted position statements and resolutions evidencing its
26 opposition all of which necessitated the filing of the pending lawsuit.

27 **Request for Production No. 6:** Please provide all documents that support or are
28 related to your answer to the preceding interrogatory.

29 **Answer: See** Objections and Response to Interrogatory No. 7, which are expressly
30 incorporated herein by reference, and Response to Request for Production No. 6 attached
31 hereto as Bates Numbers FJBC-0385-FJBC-0410.

32 **Request for Production No. 7:** Please produce all correspondence between you and
33 any other person that touches or concerns this lawsuit, except correspondence that is
34 protected by the attorney client privilege.

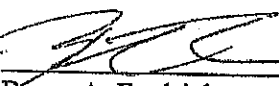
35 **Answer: Objection.** Plaintiffs object to Request for Production No. 7 on the basis
36 that it seeks information protected by the attorney client privilege and information protected
37 by the attorney work product doctrine. Further, the request is overly broad, unduly
38 burdensome, vague and is subject to a variety of interpretations. The term "touches" is not

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defined. However, without waiving said objection Plaintiffs provide that they have not located any non-privileged or otherwise protected responsive documentation to date. This Request may be supplemented as necessary under the Montana Rules of Civil Procedure.

DATED this 5 day of October, 2015.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

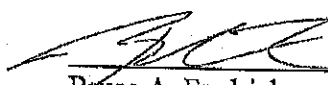
By: 
Bruce A. Fredrickson
Kristin L. Omvig
Attorneys for Plaintiffs

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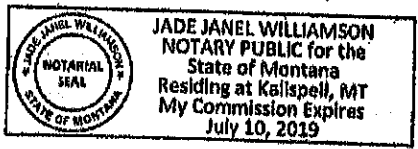
STATE OF MONTANA)
) ss:
County of Flathead)

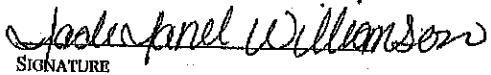
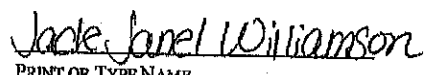
Bruce A. Fredrickson, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys with Rocky Mountain Law Partners, PLLP, which firm has been retained by the Plaintiffs, in the above-captioned action; that he has read the foregoing objections to Plaintiffs' Answers to Defendant's First Discovery Requests to all Plaintiffs and believes substantial grounds exist for the said objections.


Bruce A. Fredrickson

SUBSCRIBED AND SWORN to before me this 5th day of October, 2015.




SIGNATURE

PRINT OR TYPE NAME

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CERTIFICATE OF SERVICE

I, Bruce A. Fredrickson, one of the attorneys of **ROCKY MOUNTAIN LAW PARTNERS, PLLP**, do hereby certify that on the 5th day of October, 2015, I served a duplicate original or true and correct copy of the foregoing document as indicated upon the person(s) named below, at the address set out below, either by mailing, hand delivery, or Federal Express, in a properly addressed envelope, postage prepaid, or by telecopying a true and correct copy of said document.

TIMOTHY C. FOX Attorney General ALAN JOSCELYN Deputy Attorney General P.O. Box 201401 Helena, MT 59620-1401 Duplicate Original	<input type="checkbox"/> U.S. Mail (first class postage) <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-Mail
DALE SCHOWENGERDT Solicitor General J. STUART SEGREST MATTHEW COCHENOUR Assistant Attorneys General P.O. Box 201401 Helena, MT 59620-1401 True and Correct Copy	<input type="checkbox"/> U.S. Mail (first class postage) <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-Mail

