

John B. Carter
Daniel J. Decker
Attorneys for Confederated Salish and Kootenai Tribes
P. O. Box 278
Pablo, MT 59855
(406) 675-2700
Fax (406) 675-4665
jccskt@cskt.org
danield@cskt.org

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

FLATHEAD JOINT BOARD OF)	
CONTROL and JERRY LASKODY,)	Cause No. DV-15-73
BOONE COLE, TIM ORR, TED HEINS,)	
BRUCE WHITE, SHANE ORIEN,)	Judge: James A. Manley
WAYNE BLEVINS AND GENE)	
POSIVIO, all members of the)	MOTION AND BRIEF TO
Flathead Joint Board of Control,)	INTERVENTION AS A
)	DEFENDANT
Plaintiffs,)	
)	
vs.)	
)	
STATE OF MONTANA,)	
)	
Defendants,)	

MOTION TO INTERVENE

Comes now the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (Tribes) and moves this Court for an Order granting intervention as a Defendant in this matter. This Motion is based upon Rule 24(a)(2), and alternatively, Rule 24(b) of the Montana Rules of Civil Procedure.

This case involves a Constitutional challenge to the water rights compact between the Tribes, the State of Montana and the United States. That Compact was signed into Montana law on April 24, 2015 and is codified at 85-20-1901, M.C.A. Neither the Tribes nor the United

States were named as parties to this case, even though the case challenges significant interests of the Tribes and of the United States.

The Tribes have contacted attorneys for the Plaintiff, who oppose this Motion, and the Office of the Montana Attorney General, who supports the Tribes' Motion to Intervene.

DRAFT OF 12/08/15

MEMORANDUM IN SUPPORT OF INTERVENTION

I. INTRODUCTION

The water rights compact (Compact) between the Confederated Salish and Kootenai Tribes (Tribes) and the State of Montana (Montana) is a complex bridge between the state-based water laws of Montana and the federal reserved and aboriginal water rights of the Tribes. The Montana Supreme Court has done an admirable job over the years of recognizing and explaining those substantial differences. See for example, State ex rel Greely v Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985).

The few brief sentences of the Compact that Plaintiffs allege violate Article II Section 18 of the Montana Constitution are perfectly sound renditions of Montana law and are essential to place those Montana persons charged with implementing the Compact on an equal footing with other Montana governmental employees. The Office of the Montana Attorney General has briefed the issues of State law that justify dismissal of this suit under Montana law. The State's briefing is silent on Tribal interests based in federal law. Had dismissal been granted there would be no Tribal interests before the Court. Now that dismissal has been denied, essential, substantial, and material Tribal interests are before this Court. As this Court noted in its December 2, 2015 order denying dismissal, "the doors to the courthouse should be open to the public as a forum for their serious disputes." (Docket #42, p.2).

The challenged Compact provisions are essential for Tribal implementation and enforcement of the Compact. The provisions address the long-standing federal jurisprudential doctrine of tribal sovereign immunity. They represent an express waiver by the Tribes of their

sovereign immunity from State Court jurisdiction. Absent the challenged provisions of the Compact, the Tribes and its employees charged with implementing the Compact could not be subject to State Court jurisdiction.

II. INTERVENTION OF RIGHT IS PROPER IN THIS CASE

Intervention of right is controlled by Rule 24(a)(2) of the Montana Rules of Civil Procedure, a Rule identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Accordingly, the Tribes rely upon both Montana and federal case law in this brief.

Intervention of right is to be construed liberally and the Courts are guided primarily by practical and equitable considerations. State Ex rel. Thelan v. Mont. Dist. Ct., 93 Mont. 149, 158, 17 P.2d 57 (1932); U.S. v. Aerojet Gen. Corp., 606 F.3d 1142, 1148 (9th Cir. 2010). Any doubt should be construed to the benefit of the moving party. S.W. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001). Additionally, the Tribes' pleadings should be construed as true for the purpose of granting intervention. *Id* at 819-820. There are four elements necessary for intervention. The Tribes meet all four.

1. The Intervenor Must Have a Direct Interest Relating to the Property or Transaction Which is The Subject Matter of the Action.

This element of Rule 24(a)(2) is easily met. This case challenges the Constitutionality of the Compact. The Compact is a Montana statute, codified at 85-20-1901 *et seq*, Mont. Code Ann. The Tribes are a necessary party to that Compact but were not named as a party in the District Court. The Montana Supreme Court has previously recognized in a Constitutional challenge to a Montana statute, "Intervention in a case *publica juris* should be allowed, in protection of the Court, as well as the Legislature." State Ex rel. Abel v. Mont. Dist. Ct., 140 Mont 117, 126, 368

P.2d 572, 577 (1962). Furthermore, in a constitutional challenge to a legislative act, “it is the duty of the Court to uphold them on any rational basis.” Id.

An Intervenor’s interest must be “direct, substantial and legally protectable.” Dilks v. Aloha Airlines, 642 F.2d 1155, 1157 (9th Cir. 1981). The Tribes have a direct and substantial interest in the outcome of this litigation. The Tribes have expended millions of dollars and countless hours negotiating the Compact with Montana and the United States following a process dictated to the Tribes by the Montana Legislature and the Montana Courts. The alternative to the Compact is a State-wide general *inter sese* water rights adjudication of the likely “pervasive” nature of the Tribes’ reserved and aboriginal water rights. Confederated Salish & Kootenai Tribes v. Stults, 312 Mont. 420 ¶ 28, 59 P.3d 1093 (2002). Such a litigation would impact water users throughout the State on and off the Flathead Indian Reservation, take decades, and cost all parties substantially more time, money and social unrest than the pragmatic finality that the Compact affords. If two sentences of the multipage Compact are deemed unconstitutional, not only the Tribes but many thousands of Montana State water rights claimants will suffer direct and substantial harm.

2. Absent Intervention, the Tribes May Be Impaired Or Impeded In Their Ability to Protect Their Interests in the Action.

A ruling that the Compact is unconstitutional will significantly impair the Tribes’ ability to protect its interests. The Tribes satisfy this element of Rule 24(a)(2) as well. The Rule does not set a high standard to qualify for intervention. It merely requires the Tribes to show that lack of intervention “may” impair or impede its interests. Brumfield v. Dodd, 749 F.3d 339, 344-345 (5th Cir. 2014). A movant’s interests are plainly impaired if disposition of the suit will prevent

future attempts by the movant to pursue its interests. The ruling Plaintiffs seek here would open the floodgates of water rights claims adjudication the Compact avoids.

As Montana Supreme Court found in Burgess v. Hooks, 103 Mont 245, 257-258, 62 P.2d 228 (1936), a case dealing with an earlier version of Rule 24,

The purpose of this section is to avoid circuitry of action and multiplicity of suits, if intervener's interest is such that he would be prejudicially affected as a necessary consequence of the determination of the action without his presence as a party. [citations omitted]. Under this section, intervention is permissible in any case, provided only the person seeking to intervene can show either an interest in the subject-matter of the action, or an interest in the success of the parties, or an interest in the subject- matter as against both. (emphasis added)

The Tribes' interest in the subject matter lies in its efforts to peaceably resolve the conflict between state and federal water law in the manner most beneficial to the Tribes and its membership. This Court has observed the parties and the Intervenor Tribes in numerous and repetitive litigations over water for the last thirty years. If the Tribes are not allowed to protect their interests in this case, the likelihood of yet more circuitry of action and multiplicity of suits is inevitable.

3. The Existing Parties Do Not Adequately Represent the Tribes' Interests.

The United States Supreme Court established the standard for application of the adequacy of representation portion of Rule 24(a)(2) in Trobovich v United Mine Workers, 404 U.S. 528, 538 n. 10 (1972). See also, Est. of Schwenke v. Beckett, (1992) 252 Mont. 127, 131, 827 P.2d at 811. All that is necessary is that an intervener show that the representation of other parties "may" be inadequate and that required showing is minimal. Here, it is clear that the Plaintiffs' representation is antithetical to the interests of the Tribes. Representation by the Office of the Montana Attorney General is adequate to represent the purely state-law based interests it raised, but the Attorney General is silent on the interests of the Tribes.

The Tribes' interests originate in federal law. It is well-established that absent an express waiver of tribal sovereign immunity, neither a Tribe nor its employees may be sued in a State Court. Kiowa Tribe of Okla. v. Mfg. Tech., 523 U.S. 751, 759 (1998); U.S. v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940). Absent an express waiver by a tribe, tribal sovereign immunity protects tribal officials and tribal employees acting within the scope of their authority. Hardin v. White Mt. Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). Tribal sovereign immunity applies to suits brought by States in State Court, or subdivisions of State government, and to cases filed by individuals. Mich. v. Bay Mills Indian Community, 134 S. Ct. 2024, 2032 (2014).

Importantly, a narrowly defined and limited waiver of tribal sovereign immunity for a specific purpose does not waive tribal sovereign immunity for cross claims or counterclaims arising from parties to the same action. U.S. Fid., *supra* at 511-512. Nor does it waive tribal sovereign immunity against a third party seeking review of the same subject matter. Kescoli v. Babbit, 101 F.3d 1304, 1310 (9th Cir. 1996); Koke v. Littleshell Tribe of Chippewa, 303 MT 121, notes 8 & 9, 315 Mont. 510, 516, 68 P.2d 814, 818; Thompson v. Crow Tribe, 1998 MT 161, 289 Mont. 358, 962 P.2d 577.

The Tribal employees who will be responsible for implementing the Compact cannot be sued in State Court absent the Compact provision waiving tribal sovereign immunity. The same principle applies to the Tribes as a tribal government. To make the Compact work, the Tribes expressly agreed to a limited waiver of tribal sovereign immunity for purposes of Compact implementation. The Montana Legislature accepted this waiver when it passed the Compact.

The logic is clear. Absent a limited waiver of sovereign immunity by the Tribes, the Compact simply will not work. The waiver places Montana and Tribal employees responsible

for implementing the Compact on an equal footing legally. The State's briefing is silent on this point and therefore does not adequately represent the Tribes' interests.

4. Intervention is Timely.

Rule 24 does not specify what constitutes "timeliness". Rather, it is left to the discretion of the Court and is to be liberally construed. U.S. v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004); State Ex rel. Thelan v. Mont. Dist. Ct., et al, 93 Mont. 149, 156 (1932). There, Supreme Court found for intervention under an earlier version of the Rule, reasoning that

Prompted by a desire to do no injustice, and to render complete justice, Courts allow intervention in an equity case with liberality, when the petitioner's rights will be directly affected by the decree.

"Timeliness is determined from the particular circumstances surrounding the action."

Connell v. Mont. Dept. Soc. & Rehab. Serv., 2003 MT 361, ¶ 21, 319 Mont 69, ¶ 21, 81 P.3d 1279, 1283. In Connell, the Supreme Court found untimely a request for intervention filed twelve years after the initiation of an agency proceeding and three years after a District Court final judgement. That is far from the case here. The District Court issued its Order Motion to Dismiss on December 2, 2015. (Docket #42). Furthermore, due to Plaintiff's untimely compliance with discovery, the Tribes have been informed that this Court has postponed the December 3, 2015 trial for summary judgement until March 18, 2016.

Tribal intervention at the time Montana moved for Dismissal was not necessary, for the State adequately justified Dismissal. If dismissal had succeeded, the case would be over. However, now that the District Court is proceeding on the merits, the Tribes' interests are directly implicated in this case. The Tribes do not intend to conduct any discovery, as the

question of Constitutionality is purely a question of law. Accordingly, the Tribes do not anticipate any undue delay in the progress of this case.

There is no lack of timeliness in the Tribes' filing to intervene. The fact that the Tribes seek to intervene now is perfectly acceptable from a timeliness standpoint. As this Court addressed in Aspen Trails Ranch, LLC v Simmons, 2010 MT 79, ¶ 35, 356 Mont. 41, ¶ 35, 230 P.3d 808, 817, intervention even after a District Court final decision was proper because (1) it "caused no delay in this matter", (2) the intervener's "interests are substantial," and (3) the intervener was "not adequately represented."

III. PERMISSIVE INTERVENTION IS ALSO PROPER

Should this Court determine that intervention of right is not appropriate, the Tribes alternatively request permissive intervention under Rule 24(b)(1)(B), which allows permissive intervention if a petitioner "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, the question of the Constitutionality of the Compact is that common question of law and fact. Rule 24(b)(3) also requires that permissive intervention not "unduly delay or prejudice the adjudication of the original parties rights." Again, as addressed above, the Tribes' petition is timely, and the Tribes will adhere to the schedule this Court lays out for proceeding with this matter. Accordingly, a grant of intervention will not unduly delay or prejudice the original parties' rights.

IV. LIMITED WAIVER OF TRIAL SOVEREIGN IMMUNITY¹

The signature of the undersigned Tribal Attorneys constitutes a certification to this Court that the Tribal Council of the Confederated Salish and Kootenai Tribes has authorized a limited

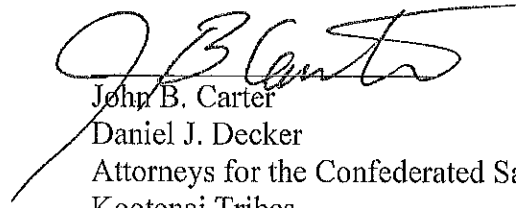
¹ In a prior challenge to the then-draft Compact, involving many of the same parties, the District Court found that "the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either." See, Conclusion of Law #2 in Exhibit A. The Montana Supreme Court reversed that decision on other grounds in Western Water Users Association v. Mission Irrigation District, Joeko Irrigation District, Flathead Irrigation District and the Flathead Joint Board of Control, 2013 MT 92 (2013).

waiver of Tribal sovereign immunity for the purpose of addressing the Constitutionality of the Compact only, and do not waive Tribal sovereign immunity for any crossclaims, counterclaims or third party actions arising out of or resulting from this case.

V. CONCLUSION

The Tribes respectfully submit that their request for intervention satisfies all the elements for both intervention of right and for permissive intervention, and request an Order granting Intervention.

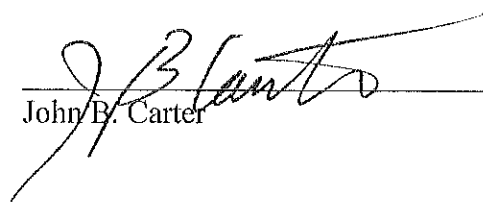
Submitted this 10th day of December, 2015.


John B. Carter
Daniel J. Decker
Attorneys for the Confederated Salish and
Kootenai Tribes

CERTIFICATE OF SERVICE

I, John B. Carter, Attorney for the Confederated Salish and Kootenai Tribes, do hereby certify that on the 10th day of December, 2015, I served a duplicate original or true and correct copy of the **MOTION TO INTERVENE AS A DEFENDANT**, 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 tele-copying a true and correct copy of said document.

TIMOTHY C. FOX Attorney General ALAN JOSCELYN Deputy Attorney General DALE SCHOWENGERDT Solicitor General J. STUART SEGREST MATTHEW COCHENOUR Assistant Attorneys General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401	<input checked="" type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input type="checkbox"/> Other: E-Mail
BRUCE A. FREDRICKSON KRISTIN L. OMVIG ROCKY MOUNTAIN LAW PARTNERS, PLLP 1830 3 rd Avenue East, Suite 301 P.O. Box 1758 Kalispell, MT 59903-1758	<input checked="" type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input type="checkbox"/> Other: E-Mail



 John B. Carter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Hon. C.B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860
(406) 883-7250

CLERK OF DISTRICT COURT
FEB 15 2013 9:00

McNeil

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

WESTERN MONTANA WATER USERS ASSOCIATION, LLC, on behalf of its members, who own irrigated lands with appurtenant water and other water rights within the Mission, Jocko Valley, and Flathead Irrigation Districts,

Plaintiff,

vs.

MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, AND FLATHEAD JOINT BOARD OF CONTROL,

Defendants.

Cause No. DV-12-327

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
WRIT OF MANDATE**

The above cause came before the Court February 14, 2013 pursuant to Mont. Code Ann. § 27-26-301 for a return and hearing upon the Alternate Writ of Mandate issued by this Court December 14, 2012;

Plaintiff appeared by its counsel, Brian C. Shuck and Bob Fain; Defendants appeared by their counsel Jon Metropoulos;

Good cause appearing therefore, the Court makes the following:

29

FINDINGS OF FACT

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
1. That on December 12, 2012, Plaintiff filed a Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief.
2. That Mont. Code Ann., § 27-26-102 provides for a Writ of Mandamus to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station.
3. That Plaintiff's first claim for relief relies upon Mont. Code Ann., § 27-8-101, *et seq.*, the Uniform Declaratory Judgment Act and upon Mont. Code Ann., § 27-19-101 *et seq.* for Injunctive relief.
4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court issued on December 14, 2012 an Alternate Writ of Mandamus commanding Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-1957 OR that Defendants file an Answer within 30 days of the Alternate Writ.
5. That Defendants did file an Answer January 16, 2013. That ¶ 15 of Defendants' Answer admits that approval of the FIP Agreement by the Flathead Joint Board of Control (hereinafter "FJBC") would be illegal for several reasons.
6. That Plaintiff is an LLC organized under the laws of the State of Montana and its members (hereinafter "Irrigators") all own fee simple lands with appurtenant water rights within the Defendants' Irrigation District and all are physically located within the exterior boundaries of the Flathead Indian Reservation.
7. The Defendants Mission, Jocko Valley and Flathead Irrigation Districts were all formed under the laws of the State of Montana for the purpose of providing effective public agencies for the improvement, development, operation, maintenance and administration of Irrigation systems.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

8. That the creation of said districts under Mont. Code Ann., § 85-7-101, *et seq.* expressly states that said law does not contemplate the acquisition by the districts of the existing water, water rights or systems or works owned by the irrigators who are respective water rights owners within the districts.

9. That the Defendant Flathead Joint Board of Control was created under Montana Law under Mont. Code Ann., § 85-7-1601 *et seq.* when the Board of Commissioners of the three irrigation districts deemed it advisable for the best interest of their district to operate, manage, supervise and maintain the operation of their district jointly with other districts. That said FJBC has no ownership interest in any water rights.

10. That Article IX, Section 3 of the Montana Constitution recognizes and confirms all existing rights to the use of any waters for beneficial purposes, provides that all waters within the boundaries of the State are the property of the State subject to appropriation for beneficial uses as provided by law.

11. That Article II, Section 16 of the Montana Constitution provides that courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or character.

12. That Article II, Section 17 of the Montana Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

13. That Article II, Section 29 prohibits the taking of private property without just compensation.

14. That Title 3, Chapter 7 of the Montana Code Annotated established water courts to adjudicate water rights in the State of Montana.

15. That Title 2, Chapter 15, Part 33 RCM established the Montana Department of Natural Resources and Title 85 Chapter 2, Mont. Code Ann., § 101, *et seq.* provided for the administration, control and regulation of water rights and established a system of centralized records of all water rights.

1 16. That Plaintiff has alleged that its members' fee lands would have less or little
2 value without their water rights. This Court accepts as a truism requiring no further
3 proof that irrigated fee lands with a water right are more valuable than irrigable fee
4 lands with no water rights.

5 17. That the statutory procedure for dissolution of an irrigation district is Mont. Code
6 Ann., § 85-7-1001, *et seq.* and requires a petition signed by an equal number of
7 holders of title as were required to sign the original petition for creation of the district.

8 18. That in the draft agreement found on the 34th page of Exhibit "A" to Plaintiff's
9 Complaint, numbered page 16, contractually provides that Plaintiff-Irrigators transfer or
10 assign their water rights to the Salish and Kootenai Tribes of the Flathead Nation
11 (Tribes) In order to Join the Flathead Indian Irrigation Project (FIIP).

12 19. That the draft agreement contains no provision for any compensation to any
13 individual irrigator for the transfer of his water rights to the Tribes.

14 20. That said draft agreement contains no contractual obligation on the part of the
15 Tribes to issue any FIIP Tribes-owned water right to any of the Irrigators.

16 21. That ¶ 18, page 12 of said agreement sets a maximum quantum water right of 1.4
17 acre feet per acre of water per year, which may be substantially less than the
18 individual irrigator's water right assigned to the Tribes, but there is no minimum
19 requirement in the agreement for any "reallocated" water right to be provided to said
20 irrigators.

21 22. That said draft agreement is incomplete with ¶12, page 11 containing a
22 highlighted phrase "review after completing compact language".

23 23. That the 16th through and including 33rd pages of Exhibit "A", each of which
24 contain non-sequential numbers, contain an extensive list of rehabilitation and
25 betterment improvement projects which will be owned by the Tribes, but said draft
26 agreement at ¶ 26, page 14 contractually would require that this Montana District

1 Court designate the Irrigators' fee simple land as Irrigation District lands pursuant to
2 Mont. Code Ann., § 85-7-107, which would subject said lands to tax assessments to
3 pay for said projects without said lands having any water rights.

4 24. That ¶ 26, page 14 of said agreement contractually obligates the Defendant
5 FJBC to defend the Tribes' claim before the Montana Water Court to all water rights on
6 the reservation even though that is a direct conflict with Individual water rights' claims
7 of the Irrigators before the Montana Water Court.

8 25. That ¶ 78, the last page of said agreement, numbered page 26 on the 44th page
9 of said draft agreement, contains a provision that the forum for disputes between the
10 parties shall be federal court. Such a provision would be contractually binding upon
11 the parties but would not be binding upon the U.S. District Court which has its own
12 statutes and court rules for determining its jurisdiction. The two parties to the draft
13 agreement who are not parties to this litigation, the United States and the Tribes,
14 undoubtedly could invoke federal court jurisdiction because they are federally
15 recognized legal entities. However, the third party to the agreement, the FJBC is not.

16 26. If the FJBC were to seek to invoke the jurisdiction of the U.S. District Court for the
17 resolution of a dispute arising under the agreement, the federal court could very well
18 determine that the legal residency of the Tribes is Pablo, Montana within the Flathead
19 Reservation; that all of the Irrigators' fee property is within the exterior boundaries of
20 said reservation and therefore there is no diversity of citizenship and decline
21 jurisdiction. Such a result would deprive Plaintiff of any legal forum for the resolution
22 of any dispute arising under the agreement contrary to the State of Montana
23 Constitution.

24 ///

25 ///

26 ///

1 Based upon the foregoing Findings of Fact, the Court makes the following:
2

3 CONCLUSIONS OF LAW

- 4 1. That Plaintiff's Petition and Complaint is based upon an Exhibit "A", Public
5 Review Draft Agreement between the Confederated Salish and Kootenai Tribes of the
6 Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the
7 the U.S. Department of Interior, and the Flathead Joint Board of Control of the
8 Flathead, Mission and Jocko Valley Irrigation Districts.
9 2. That the Tribes and the United States are not parties to this litigation, and this
10 Court has no jurisdiction over either.
11 3. That the Flathead Joint Board of Control and all the irrigation districts were all
12 created under Montana law and are subject to the jurisdiction of this Court.
13 4. That the statutory purpose for which the three irrigation districts and the Flathead
14 Joint Board of Control were created is to operate irrigation districts. That the irrigation
15 districts and FJBC have no ownership interest in any water rights which are
16 individually owned by the irrigator members of the Districts. The statutes authorizing
17 the creation of said districts and Joint Board of Control for such purpose are void of
18 any authority for the FJBC to enter into any agreement which provides for the
19 assignment of the water rights privately owned by the irrigators to the Tribes.
20 5. That there also is a void of any authority for the FJBC to enter into an agreement
21 which provides for the assignment of the irrigators' water rights to the Tribes without
22 just compensation for their valuable water rights in violation of the Montana
23 Constitution.
24 6. That there also is no authority for the FJBC to enter into any agreement which
25 provides for an assignment of the irrigators' water rights to the Tribes as a pre-
26 condition to becoming members of the FIIP when such agreement contains no
contractual agreement by the Tribes to issue any water right to any irrigator whether
designated "reallocated right" or otherwise.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

7. That there also is a void of any authority for the FJBC to enter into an agreement which provides for an agreement to a forum for disputes which deprives the Irrigators of their Montana Constitutional right to access to the state courts of justice, including the State District Courts, State Water Court and the Montana Supreme Court and further deprives the Irrigators of the protection of their water rights by the Constitution of the State of Montana.

8. That there also is no authority for the FJBC to enter into an agreement which provides that the Irrigators are contractually obligated to defend the Tribes' application to the Montana Water Court for all water rights on the reservation, which claim is in direct conflict with the Irrigators' own rights to apply to the Montana Water Court to have their water rights adjudicated by the Water Court under Montana law.

9. That there is also no authority for the FJBC to enter into an agreement requesting the Montana District Court to designate lands held in fee simple status as Irrigation District land. This would result in such lands being assessed and taxed to pay for the 17 pages of projects set forth in the draft agreement and which projects would be owned by the Tribes and which fee lands would no longer have any appurtenant water rights.

10. That there also is no authority for the FJBC to effectively dissolve the FIP by providing for the assignment of the Irrigators' water rights to the Tribes in ¶ 30, page 16 of said agreement and then applying to join the FIP without complying with the Montana statutory procedure for the dissolution of water districts.

That based upon the foregoing Findings of Fact and Conclusions of Law, the Court issues the following:

///
///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WRIT OF MANDATE

The Defendants Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District and Flathead Joint Board of Control are hereby enjoined from entering into the Draft agreement between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the United States Department of the Interior, and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts, as set forth at Exhibit "A" to Plaintiff's Complaint.

Said Defendants are further enjoined from entering into any other agreement which contains any of the provisions over which they have no authority to act as set forth in the Conclusions of Law above which exceeds their statutory authority to operate irrigation districts.

That the Alternative Writ of Mandate issued December 14, 2012 is rescinded and superseded by this Writ of Mandate.

Rationale

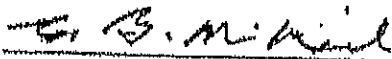
The Montana statutes which provided for creation of the Defendants' Irrigation Districts and Joint Board of Control specified as their purpose to operate irrigation districts which have no ownership interest in any water rights which belong exclusively to the individual irrigators as appurtenances to their fee lands.

Said statutes contain no authority and this Court finds that the Defendants have no authority to enter into any agreement which provides for the irrigators to assign their valuable water rights to the Tribes or to anyone else without any compensation, and without any contractual agreement by the Tribes to issue any water rights back to the irrigators.

The Court also holds that Defendants have no authority to enter into any agreement which contains any of the provisions found in the Draft Agreement attached

1 as Exhibit "A" to Plaintiff's Complaint and for which specific conclusions of law are
2 hereinabove set forth. Said conclusions may not be exhaustive and all inclusive, but
3 each of which individually supports the issuance of a Writ of Mandate to enjoin
4 Defendants from entering into the Draft Agreement or any other agreement with similar
5 provisions.

6 DATED this 15th day of February, 2013.

7
8
9 
10 C.B. McNeil, District Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 15th day of February, 2013, I served a true and correct copy of the foregoing *Findings of Fact, Conclusions of Law and WRIT OF MANDATE* by U. S. Mail, first class, postage prepaid thereon, to the following:

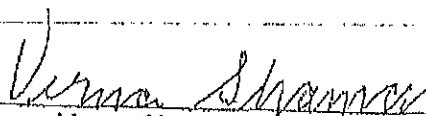
Brian C. Shuck
Law Office of Brian C. Shuck, P.C.
P.O. Box 3029
Cheyenne, WY 82003

Bob Fain
Attorney at Law
P.O. Box 80886
Billings, MT 59108-0886

Attorneys for Plaintiff

Jon Metropoulos
Metropoulos Law Firm, PLLC
50 South Last Chance Gulch, Suite 4
Helena, MT 59601

Attorney for Defendants



Verna Shannon
Judicial Assistant