

**COPY**

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(406) 883-7231  
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CLERK OF THE  
DISTRICT COURT  
LYN FRICKER

2016 JUL 25 PM 4 03

FILED BY \_\_\_\_\_  
CLERK/DEPUTY

**MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY**

LAKE COUNTY, a Political Subdivision of the  
State of Montana

Plaintiff,

vs.

MISSION VALLEY IRRIGATORS UNITED,  
INC., JACK LAKE, SUSAN LAKE, JACK  
HORNER, RALPH SALOMON, JANICE  
TUSICK, FLATHEAD JOINT BOARD OF  
CONTROL, MISSION IRRIGATION  
DISTRICT, FLATHEAD IRRIGATION  
DISTRICT, and JOCKO IRRIGATION  
DISTRICT

Defendants.

CAUSE NO. DV-16-162

COMPLAINT FOR  
DECLARATORY  
JUDGMENT

**JAMES A. MANLEY**

COMES NOW, Lake County, a political subdivision of the State of Montana, of 106 4<sup>th</sup> Ave.  
E. Polson, MT., by and through its attorney's, STEVEN N. ESCHENBACHER, and WALTER E.  
CONGDON, who seeks a Declaratory Judgment in respect to an election in Lake County, Montana.

In respect to this request for relief, Plaintiff alleges as follows:

1. Plaintiff as a political subdivision of Montana, conducts elections for various governmental entities each election year.

1           2.     In 2016, Plaintiff conducted an election for numerous Irrigation Districts in the County,  
2           including:

3                 a.   Mission Irrigation District

4                 b.   Flathead Irrigation District

5           3.     Pursuant to statute MCA 13-1-304, the Spring 2016 election was “cancelled for any  
6           reason specified in law”, by the Joint Board of Control, as noted in the Exhibit “A” letters  
7           attached hereto.

8           4.     The Joint Board of Control, consisting of the Districts, alleged it cancelled the elections  
9           due to mailing dates, bulk mail requirements, and election notice and qualifications.

10          5.     The Districts via the Joint Board of Control have requested Lake County hold another  
11          election by the end of September, 2016. Lake County is uncertain if the original election was  
12          legally cancelled, and is not clear as to if the election that was cancelled but run and counted  
13          anyway is valid or not valid.

14          6.     This election also impacted irrigators in the districts in Missoula and Sanders Counties.

15          7.     Lake County seeks a Declaratory Judgment as to if the election was or was not properly  
16          cancelled per MCA 13-1-304. Lake County also believes if the election was properly  
17          cancelled, the next election should be run, and winners seated. Lake County also believes if the  
18          election was not properly cancelled, the winner of the election shall be seated and the districts  
19          should move ahead without any additional election.

20          8.     Numerous persons and irrigators are impacted by this issue, and Lake County desires a  
21          ruling of the Court to determine the validity or invalidity of the election arising from the  
22          question of if the cancellation of the election was effective based on “cancellation for any  
23          reason specified in law”.

24





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Kristin L. Omvig

Marshall Murray  
(Retired)

All Lawyers Licensed in Montana  
\*Also Licensed in Idaho  
\*\*Also Licensed in North Dakota

April 22, 2016

Via: E-Mail and U.S. Mail

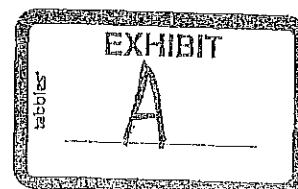
Kathy Newgard  
Lake County Election Administrator  
106 Fourth Avenue East  
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[knewgard@lakemt.gov](mailto:knewgard@lakemt.gov)

Steven Eschenbacher, Esq.  
Walter E. Congdon, Esq.  
County Attorney  
106-4<sup>th</sup> Ave. E.  
Polson, MT 59860-2125  
[seschenbacher@lakemt.gov](mailto:seschenbacher@lakemt.gov)

Re: Flathead, Mission and Jocko Irrigation Districts, and Flathead Joint Board  
of Control—Notice of Cancellation of Elections

Ms. Newgard, Mr. Eschenbacher and Mr. Congdon:

Our office represents the Flathead, Mission and Jocko Valley Irrigation Districts along with the Flathead Joint Board of Control (hereafter, collectively "FJBC"). Pursuant to MCA § 13-1-304 the FJBC has determined that it is necessary to cancel the respective 2016 district office elections due to violations by Lake County. More particularly, we understand and have confirmed that Lake County failed to mail out nearly 800 elector ballots in a timely and/or legal manner resulting in a violation of Montana law including but not limited to MCA § 13-1-503 and § 13-19-207. By virtue of this letter, the Lake County Elections Administrator and County Attorneys' Office are being provided timely notice of the cancellation pursuant to MCA § 13-1-304.

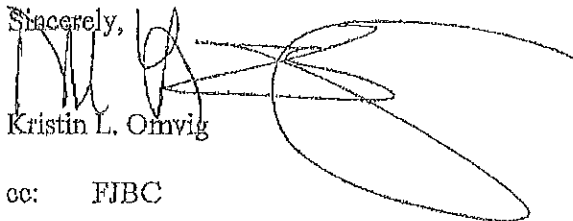


Kathy Newgard.  
Steven Bschenbacher, Esq.  
Walter E. Congdon, Esq.  
April 22, 2016  
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Our office has consulted with Assistant Lake County Attorney Walter Congdon who concurred that given the existing violations, cancellation remained the viable option under Montana law. The FJBC reserves, preserves and does not waive any of its rights, remedies, causes of action or the like herein. Thank you for your timely attention to this matter.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kristin L. Omvig', is written over the word 'Sincerely,'. The signature is stylized and extends to the right with several loops.

Kristin L. Omvig

cc: FJBC



# Mail Ballot Written Plan, Timetable and Instructions

MUST BE RECEIVED BY SECRETARY OF STATE NO LATER THAN 60 DAYS BEFORE ELECTION DAY. COMPLETE, SAVE AND EMAIL THIS FORM TO [SOSELECTIONS@MT.GOV](mailto:SOSELECTIONS@MT.GOV). THIS DOCUMENT MAY BE AMENDED UNTIL THE 35<sup>TH</sup> DAY BEFORE THE ELECTION. ELECTION CAN BE CANCELLED AT ANY TIME PERMITTED BY LAW. A SEPARATE PLAN MUST BE SUBMITTED FOR EACH TYPE OF ELECTION.

Written Plan	Response
1 Legal Name of Jurisdiction	Flathead Irrigation
2 Name of County or Counties Involved	Lake/Sanders
3 Estimated # of Electors (including Active, Inactive, and Provisional in Jurisdiction; Inactive voters are only provided ballots by request but should be included in estimate)	2300
4 Type of Election (e.g., trustee/director/governing body, levy, bond, creation, etc.)	Trustee/Director/Governing Body
5 Postage to return ballot paid by: elector or election office (& if insufficient, who pays)	Elector; jurisdiction covers insufficient postage.
6 Describe procedures you will use to ensure security and transport of ballots	Ballots will be deposited in locked ballot box and secured in locked area. Any transportation of ballots will be conducted by at least two officials.
7 Ballots will be printed based on: precinct, ward, or district	District
8 For school elections, specify signature verification procedures:	Signatures are verified by county election office
Timetable	Date
1 Date applicable documents sent to the governing body <i>No date set by law, but should be no later than 60 days before election. Documents include: 1) written plan; 2) statement of decision to conduct election by mail; 3) list of reasons for decision; and 4) statement regarding right of governing body to object under 13-19-204.</i>	February 26, 2016
2 Actual date of submission of plan, timetable, and instructions to Secretary of State <i>(Must be received by Secretary of State at least 60 days before election.)</i>	February 26, 2016
3 Last day for governing body to opt out of mail ballot (no later than 55 days before election – if the election is on a Tuesday, the last day to opt out is a Wednesday)	March 9, 2016
4 Secretary of State approves, disapproves or recommends changes to plan	Within 5 days of SOS receipt of plan
5 Publish notice specifying close of voter registration and availability of late registration <i>(For non-school elections, published at least 3 times in the 4 weeks preceding the close of registration, once per week. For school elections, provide close of registration annual election notice or special election notice at least once between 40<sup>th</sup> and 30<sup>th</sup> day before election)</i>	March 15, 2016 March 23, 2016 March 30, 2016
6 Publish notice of election <i>(All non-school elections: 13-1-108, MCA; school elections: 20-20-204, MCA. For school elections, notice must be published at least once between 40 and 10 days before the election in a newspaper (if there is one in the district) and in 3 public places in the district, and for 10 days prior to the election, on the district's website, if the district has an active website)</i>	April 6, 2016 April 13, 2016 April 20, 2016
7 Close of regular voter registration <i>(30 days before election; move to 29 days before election when 30th day falls on a Sunday)</i>	April 4, 2016
8 Beginning of late voter registration (applicable to all elections) <i>(Late registration opens for all elections the day after the close of regular registration)</i>	April 5, 2016
9 Specific date on which ballots will be mailed <i>(No sooner than 20 days or later than 15 days before election)</i>	April 15, 2016
10 Election Day	May 3, 2016

*Additional information (to access the sections of law below, visit [http://leg.mt.gov/bills/mca\\_toc](http://leg.mt.gov/bills/mca_toc)): Irrigation (85-7-1710). Each elector is permitted to cast one vote for each acre of irrigable land or major fraction of an acre of irrigable land owned by the elector within the district. Any elector owning any less than 1 acre of irrigable land within the district is entitled to one vote. 85-7-1710(1)(b) and (c) must be guardian, executors, administrator and trustees; domestic corporations, by their duly authorized agents.*

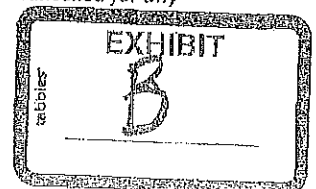
### Affirmation:

*By entering my name on the line below, I affirm that I will conduct the election according to the written plan and timetable for conducting the election. I understand that any undeliverable ballots must be filed securely, retained and available for electors to vote and that I must attempt to contact electors whose ballots are undeliverable. If such electors cannot be contacted otherwise, electors in odd-year elections will be mailed a notice and the guidelines in 13-19-313, MCA and ARM 44.3.2710 will be followed. (For school trustee elections: If a school trustee election is cancelled for any reason, I understand I must follow the deadlines and process in 20-3-313 MCA.)*

Kathie Newgard

Name(s) of Election Administrator(s) Conducting Election

Complete the above plan and timetable and the instructions below, and save and email this form to [soselections@mt.gov](mailto:soselections@mt.gov).





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(Retired)

All Lawyers Licensed in Montana  
\*Also Licensed in Idaho  
\*\*Also Licensed in North Dakota

April 26, 2016

Via: E-Mail and U.S. Mail

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seschenbacher@lakemt.gov  
wcongdon@lakemt.gov

Re: Flathead, Mission and Jocko Irrigation Districts, and Flathead Joint Board  
of Control— Cancellation of Elections

Mr. Eschenbacher and Mr. Congdon:

Our office represents the Flathead, Mission and Jocko Valley Irrigation Districts along with the Flathead Joint Board of Control (hereafter, collectively "FJBC"). On April 22, 2016, our office notified the Lake County Elections Administrator and County Attorney of the FJBC's decision to cancel the 2016 district elections due to incurable legal violations committed by Lake County. Exhibit A. This decision impacts voters in Lake, Flathead, Missoula and Sanders counties. In follow up to my conversation with Mr. Eschenbacher yesterday, we understand that Lake County does not intend to honor the FJBC's decision to cancel the 2016 district office elections. The FJBC objects and submits that Lake County lacks authority to override that decision. More specifically, Lake County failed to mail out, and intentionally withheld, nearly 800 elector ballots in a timely and/or legal manner resulting in several violations under Montana law. We understand the County's decision arose for the first time during the 2016 elections because Lake County changed its interpretation of MCA § 85-7-1717 regarding qualifications of electors. While that statute has been in place since 2013, Lake County unilaterally determined NOT to mail out ballots in 2016 unless and until lands owned by entity forms (*i.e.* corporations, trusts, limited liability companies, partnerships *etc.*) executed, notarized and returned affidavits attesting to an agent's authority to vote the land's voting rights.

Despite the change in interpretation, the County failed to provide electors notice of this new "requirement" and failed to advise them that they would not be mailed a ballot unless and until the affidavit was executed and returned. The statute at issue, however, does not allow withholding ballots under the new unilaterally imposed statutory interpretation. Rather, it provides:

85-7-1710. **Qualification of electors and nature of voting rights.** (1) At all elections held under the provisions of this part, except as otherwise expressly provided, the following holders of title or evidence of title to irrigable lands within the district, designated "electors", are entitled to vote:

(a) all individuals having the qualifications of electors under the constitution and general election laws of the state, *except that registration of electors and county residency may not be required;*

(b) guardians, executors, administrators, and trustees;

(c) domestic corporations, by their duly authorized agents.

(2) In all elections held under this part, *each elector* is permitted to cast one vote for each acre of irrigable land or major fraction of an acre owned by the elector within the district, irrespective of the location of the irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes or within congressional subdivisions, platted lots or blocks except as otherwise provided for, election precincts, or district divisions, but any elector owning any less than 1 acre of irrigable land is entitled to one vote. Until the irrigable area under the proposed plan of reclamation is determined, all land included within the boundaries of the district must be considered irrigable land for election purposes.

(3) Whenever land is owned by co-owners, the owners may designate one of their number or an agent to cast the vote for the owners. Whenever the land is owned by a single owner, the owner may designate an agent to cast the vote. Only one vote may be cast for each acre of irrigable land or major fraction of an acre by the voting co-owner or by an agent. Whenever land is under contract of sale to a purchaser residing within the state, the purchaser may vote on behalf of the owner of the land. When voting, the agent of a corporation, of a single owner or co-owners, of the co-owner designated for the purpose of voting, or of the purchaser of land under contract of sale shall file with the secretary of the district or with the election officials a written instrument of the agent's authority, executed and acknowledged by the proper officers of the corporation, by the single owner or co-owners, or by the owner of land under contract of sale, and upon filing, the agent or co-owner or purchaser is an elector within the meaning of this part.

(4) The board of commissioners shall choose one of the following methods of balloting:



Steven Eschenbacher, Esq.  
Walter E. Congdon, Esq.  
April 26, 2016  
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(a) for 10 votes or less, separate ballots must be used, and for more than 10 votes, the elector shall vote in blocks of 10 using one ballot for each 10 votes and separate ballots for odd votes over multiples of 10; or

(b) the elector shall submit a ballot that includes the number of acres owned and the number of votes being cast.

Under Montana law, irrigation district elections are governed by Special District Election laws as set forth in § 13-1-501 *et seq.* District elections are generally conducted via mail in ballot. As such, mail ballots must be mailed between the 20<sup>th</sup> and 15<sup>th</sup> day before election day. MCA § 13-1-503(2) provides:

13-1-503. **Deadlines for absentee and mail ballots.** (1) Pursuant to 13-13-205, ballots for a special purpose district election must be available for absentee voting at least 20 days before election day if the election is not conducted by mail.

(2) Pursuant to 13-19-207, ballots must be mailed *no sooner than the 20<sup>th</sup> day and no later than the 15<sup>th</sup> day before election day* if the election is conducted by mail.

That did not occur as ballots continue to be held by Lake County. Further, as a matter of law, all ballots must be mailed on the same day:

13-19-207. **When materials to be mailed.** (1) Except as provided in 13-13-205(2) and subsection (2) of this section, for any election conducted by mail, ballots must be mailed no sooner than the 20 day and no later than the 15<sup>th</sup> day before election day.

(2) All ballots mailed to electors on the active list and the provisionally registered list *must be mailed on the same day.*

That did not occur either. Undeniably, the irrigation elections are the districts' elections—not Lake County's. The Montana Constitution recognizes a constitutional right to vote and mandates that all elections be free, open and that no power shall interfere to prevent the free exercise of the right of suffrage. Mont. Const. Art. II, 13. As a result of Lake County's unilateral decision to not mail out ballots and its subsequent actions, this election has been compromised and is fraught with incurable legal violations. The FJBC has been threatened with legal repercussions by district property owners if the election is allowed to proceed "as is".

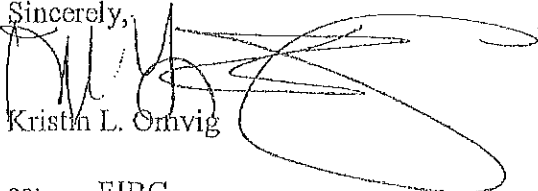
Montana law authorizes the cancellation of an election by the governing body, in this case the FJBC, for any reason specified in law. MCA § 13-1-304. Upon learning of Lake County's violations, our office consulted with Assistant Lake County Attorney Walter Congdon who concurred that given the existing violations, cancellation remained the only viable option under Montana law. The FJBC invited a Lake County representative to attend the FJBC regular board meeting held on April 21, 2016, to discuss the election concerns. No one attended on Lake County's behalf; rather, we understand Lake County officials have been admonished not to

Steven Eschenbacher, Esq.  
Walter E. Condgon, Esq.  
April 26, 2016  
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communicate with the FJBC. That is highly concerning as the two (2) authorities have integral ties. Further, Mr. Eschenbacher reasoned that County's actions were appropriate since ballots were mailed to all registered voters. That is likewise concerning as district voting rights attach to the lands at issue not a specified registered voter. Further, that issue was addressed in a 1979 Attorney General's Opinion, 38 A.G. Op. 47 (1979). There, Attorney General, Mike Greeley opined that a non-resident, corporate property owner is indeed a "registered voter" for purposes of water and sewer district elections. And interestingly, to create even more confusion the County's 2016 Mail Ballot Written Plan, Timetable and Instructions, regular voter registration closes before ballots may be legally mailed out and is thereafter followed by late voter registration. **Exhibit B.** We would request that the County identify any legal authority which may suggest that being a registered voter is a prerequisite to voting in a district election.

Yet another concern remains as Montana law provides that an election for a special purpose district must be held on the same day as the regular school election established as the first Tuesday after the first Monday in May. MCA § 13-1-504(1). The FJBC would prefer to avoid litigation of this matter and simply seeks a fair and equitable election allowing property owners the right and legally sufficient time to vote. The FJBC invites Lake County to cooperate with the FJBC in an effort to amicably resolve this matter and afford voters their legal rights while protecting the integrity of the election process. In any event, the FJBC anticipates taking all steps necessary to preserve and protect the rights of its constituents. Per our discussion of yesterday, we ask that you provide written confirmation of the County's intention to unilaterally proceed with the district elections knowing full well of the FJBC's decision to cancel the election due to inherent and incurable legal violations and further explain its legal position regarding the same. **Finally, please be advised that if Lake County moves forward with the district election process in knowing violation of Montana law, the FJBC will not honor any corresponding election results. Rather, the FJBC will maintain the status quo until such time as a valid election may be held.** Thank you for your time and attention to this matter.

Sincerely,

  
Kristin L. Onvig

cc: FJBC  
Lake County Commissioners via email ([lakecommissioners@lakemt.gov](mailto:lakecommissioners@lakemt.gov))  
Montana Secretary of State via email ([secretary@mt.gov](mailto:secretary@mt.gov))  
Robert Zimmerman, Sanders County Attorney via email  
([rzimmerman@co.sanders.mt.us](mailto:rzimmerman@co.sanders.mt.us))  
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Ed Corrigan, Flathead County Attorney via email ([Corrigan@flathead.mt.gov](mailto:Corrigan@flathead.mt.gov))