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Montana Water Court

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IN THE WATER COURT OF THE STATE OF MONTANA

MONTANA WATER COURT, CLARKFORK)
DIVISION AND JOCKCO RIVER)
HYDROLOGIC SUB-BASIN (BASIN 76L))
AND FLATHEAD RIVER TO AND INCLUDING)
FLATHEAD LAKE (BASIN 76LJ) ✓)

**MEMORANDUM OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
CONCERNING ORDER RESCHEDULING STATUS REPORT AND HEARING**

The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (Tribes) submit this Memorandum in accordance with this Court’s Order dated June 1, 2015, as amended by the Orders of June 19 and June 29, 2015, concerning the procedures relative to claims in the above-referenced basins. The Tribes appreciate and share the Court’s desire to swiftly and efficiently resolve water rights in western Montana in accordance with applicable law. In this regard, the Tribes have worked for over a decade to reach a negotiated settlement with the State of Montana and the United States of America. As the Court noted in its Orders, this settlement was recently ratified by the State of Montana. Nevertheless, federal and Tribal approvals are still needed. In this Memorandum we explain why in order for the Compact to have any hope of final

approval, the Court should permit DNRC examine claims in Basins 76L and 76LJ but hold all other activities referred to in the Orders in abeyance.

A. Introduction.

The unchanged substance of the Order of June 1, 2015 states that the Court proposes to undertake the following activities for Basins 76L and 76LJ:

1. Direct the Montana Department of Natural Resources and Conservation (DNRC) to complete claims examination in those Basins;
2. Upon completion of claims examination, to order DNRC to issue a Summary Report for each Basin;
3. Upon receipt and analysis of the Summary Reports, to issue a preliminary decree for each Basin; and
4. To vacate all prior Orders pertaining to limited claim examination, summary reports or decrees in conflict with the actions identified above.

We understand that the first proposed action applies to the approximately 455 State-based claims left unexamined in the two Basins. Those are claims that the Tribes, individual Indians or the Tribes and individuals in joint ownership have acquired over the years. They are presently under a 'Do Not Examine' status pursuant to a series of Orders of this Court, the most recent dated November 19, 2009 for Basin 76LJ. This Court's June 1 Order proposes to lift the stay, examine those claims, issue a summary report and then issue a preliminary decree for Basins 76L and 76LJ. Doing so will initiate the objections process for all State-based claims in both basins. As discussed below, the practical effect of initiating adjudications in 76L and 76LJ before the Compact becomes final will generate catastrophic negative impact on the political, legal and social support of the Compact and may well sound its death knell. In doing so it will result in

extensive litigation of the complex State, Tribal and federal questions of law the Compact has settled. As discussed below that adjudication will impact 54 of the 85 adjudication basins in Montana, thereby increasing this Court's caseload by orders of magnitude.

The reason the Tribes filed 2,814 reserved and aboriginal water right claims with DNRC on June 25, 2015 is to protect the ability of the Tribes to assert their aboriginal and reserved water rights in the event the Compact ultimately fails to receive the Congressional, Tribal and judicial approvals necessary to cause it to be permanently binding on all parties.¹ The claims the Tribes have filed are significantly greater in volume (numerically as well in quantity of water) and in geographic location than the water rights the Tribes have accepted in the Compact. The United States, in its capacity as trustee for the Tribes, has filed 7,312 claims analogous to those of the Tribes.²

B. Implementation of the Court Order Will Cause Severe Political Impediment to Final Approval of the Compact.

Governor Bullock signed the Compact into State law on April 24, 2015. The Compact is the result of many years of negotiation and ultimate agreement to compromise the State-wide water rights claims of the Tribes. The Compact focuses primarily on consumptive and non-consumptive water use on the Flathead Indian Reservation. It resolves the very contentious question of ownership of irrigation water delivered by the federal Flathead Indian Irrigation

¹ See Exhibit A, a map showing the adjudication basins impacted by the Tribal claims.

² The Tribes assume that the Court's proposed actions are not intended to apply to the 2,814 aboriginal and reserved water rights claims filed by the Tribes and the 7,312 claims filed by the United States with DNRC on June 25, 26 and 29, 2015. This is so because the water rights Compact between the Tribes, Montana and the United States establishes a different process for staying any action on those claims. See Compact, Article VII.D.2. As directed by the Compact the Tribes filed a request for stay on those claims identified in Compact Article VII.D.2 with this Court on June 29, 2015.

Project (FIIP). FIIP water use comprises approximately 90% of all surface water use on the Reservation. As part of the Tribal compromise, the Compact contains less-than-optimum instream flows for fish on the Reservation. It also recognizes limited Tribal non-consumptive instream flow water rights off of the Reservation and west of the Continental Divide only.³

The Compact was hotly contested in the 2015 Legislature. An earlier version failed to pass the 2013 Session. Passage of the Compact came about because a coalition of irrigation water users on and off of the Reservation, off-Reservation irrigation districts, members of the Tribes, conservation groups, local business persons, bankers, realtors, legislators from both parties, the Governor and the Attorney General, city and county governments and private individuals supported it. The logic of their support is based in large part upon the extensive scientific, historical and anthropological evidence justifying the results and upon the certainty the Compact brings to irrigated agriculture and real estate values both on and off of the Reservation, east and west of the Continental Divide. Additionally, the Compact forestalls the debilitating political, economic and social toll on all water users on and off the Reservation that would occur should the Compact fail and decades of litigation ensue.

The Tribes have been monitoring the DNRC claim examination process for Basins 76L and 76LJ since its inception. The Tribes did this for the purpose of developing Tribal objections to those claims, should that need arise. The Tribes have solid grounds to object to the majority of the irrigation claims for greater than 5 acres examined by DNRC.⁴ If the Court initiates litigation in Basins 76L and 76LJ the Tribes will be forced to object to claims of people who, and entities that, have actively supported the Compact, thereby incurring significant expense and

³ See Exhibit B, a map showing basins impacted by the Compact.

⁴ See Exhibit C, the Affidavit of Daniel Decker, Tribal Attorney in charge of the Tribal objection process.

animosity. The parties to the Compact need these same people and entities to support the Compact before Congress. Litigating against them is not likely to encourage that support.

A uniquely Tribal legal impediment to a successful Compact will arise if the Tribal government finds itself with proper objections to State-based claims now owned by Tribal members. The basis for a Tribal objection in all probability arose out of the original claim and has nothing to do with any action by the Tribal member who now owns the claim. Nevertheless, the Tribes would be forced to object to their own member's claim; the same people the Tribes needs for support of the Compact. Once again, that situation is not likely to engender Tribal member support for the Compact.

C. Implementation of the Court Order Will Cause Massive Legal Impediments to Passage of the Compact.

The single most complex legal issue the Compact settles on the Reservation is the ownership of irrigation water supplied by FIIP, the largest Bureau of Indian Affairs Indian irrigation project in the United States. There has been extensive litigation over that irrigation water from the 1930s to the present. The federal courts have consistently found that as a result of the Hellgate Treaty and the reserved water rights doctrine first enunciated in Winters v. United States, 207 U.S. 564 (1908), that all Reservation water was reserved to the Tribes. United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939); United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942). Since then, the Flathead Joint Board of Control and its constituent Mission, Flathead and Camas irrigation districts have filed numerous unsuccessful suits seeking control and management of FIIP water and the associated federal facilities. See for example Flathead Joint Board of Control v. United States and the Confederated Salish and Kootenai Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) (JBC), which recognized a Tribal aboriginal water right claim to instream flows to protect fisheries, regardless of the equities to

junior irrigation uses. A WESTLAW search will reveal the numerous other FJBC efforts against Tribal interests in FIIP within the State and Federal courts and the Interior Board of Indian Appeals. That list provides a window into the level of strife to expect should this Court not stay the adjudication process pending final approval of the Compact.

The contentious nature of FIIP water is most recently reflected in several law suits filed by the Flathead Joint Board of Control, which represents some of the irrigators under FIIP. The FJBC seek to abolish the Compact in Flathead Joint Board of Control v. Montana, DV-15-73 (20th Judicial District, Montana). In Flathead Joint Board of Control v. Jewell et. al, CV-14-88-M-CLC (D. Montana) the FJBC seeks, *inter alia*, to replace the Bureau of Indian Affairs as manager of FIIP. Most recently, on June 15, 2015 the Flathead Joint Board of Control has filed a Notice of Appearance of Counsel, Notice of Pending Litigation and Objection in this matter.

The complex legal issue the Compact settles off of the Reservation is the right of the Tribes to non-consumptive instream flows for fish. Such federally protected rights are aboriginal in origin and carry the most senior priority date possible; "time immemorial". State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 764 (1985); see also JBC at 1132. Under the Compact, the Tribes have greatly compromised the breadth of such claims, limiting them to select waters west of the Continental Divide. Furthermore, for most of the instream flow rights contained in the Compact, the Tribes have accepted state-based junior priority dates.

If the Compact fails, the geographic scope of the Tribes' instream flow claims covers much of the State. See Exhibit A. Furthermore, in all instances east and west of the Continental Divide the Tribes claim a time immemorial priority date. The United States has filed similar

instream flow claims with time immemorial dates. As the Klamath experience demonstrates, those claims will be hotly contested by many of the people who presently support the Compact and the conflict will take decades to resolve.⁵ Loosing public support for the Compact will severely lessen the chance of Congressional approval. That threat can be avoided if this Court does not begin the adjudication process in Basins 76L and 76LJ.

D. Judicial and Litigant Efficiency and Economy Will Best Be Served By Not Initiating Adjudications in Basins 76L and 76LJ Prior to Completion of the Compact Approval Process.

The Supreme Court has set out the elements upon which the discretionary grant or denial of a stay of adjudication may be ordered. In *Nken v. Holder*, 556 U.S. 418, 426 (2009), the Court looks first to “whether the stay applicant has made a strong showing that he is likely to succeed on the merits.” This element is not particularly applicable to this situation, as the merits of the Compact have already been determined by the Montana Legislature to be sound and proper and no adjudications have been initiated.

The second element the *Nken* Court set out is “whether the applicant will be irreparably injured absent a stay.” *Id.* As discussed herein, initiation of adjudication of State-based water rights claims within the Flathead Indian Reservation will irreparably injure, if not destroy, the State-wide support necessary for Congressional approval of the Compact. It is worth noting that this support has been years in the making and represents a great deal of effort by all parties to the Compact.

⁵ See In the Matter of the Claims of the KLAMATH TRIBES AND THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES; CORRECTED PARTIAL ORDER OF DETERMINATION; Water Rights Claims 625-640 (Williamson River and its tributaries); KLAMATH BASIN GENERAL ADJUDICATION, BEFORE THE DIRECTOR OF THE WATER RESOURCES DEPARTMENT OF THE STATE OF OREGON (February 28, 2014).

The third Nken element, “whether issuance of the stay will substantially injure other parties interested in the proceedings” is inapplicable, as no adjudications of State water rights has been initiated. Id. No summary reports have been issued, no preliminary decrees have been issued and no objections have been filed. In short, there have been no proceedings in which any claimant could be injured.

The fourth Nken element looks to “where the public interest lies.” Id. The Montana Legislature enacted the Reserved Water Rights Compact Commission because it saw the State-wide public interest in negotiating, rather than litigating, Indian aboriginal and reserved water rights. The Montana Legislature recently enacted the Compact in the public interest. If the Compact is approved by Congress, the Tribes and the Water Court, the public interest will be further served by saving the State and thousands of water rights claimants, including the Tribes and Tribal members, as well as the United States in its Tribal trustee capacity, from years of expensive, protracted and divisive litigation.

The Tribes have reviewed this Court’s June 24, 2015 Order Granting Request for Stay in Part and Denying Request For Stay In Part in WC-1991-01, involving the Blackfeet Tribe. There the Court directed adjudication of all State-based claims within the Blackfeet Reservation even though the Blackfeet Compact is presently pending in Congress. The Tribes do not think that approach is appropriate for basins 76L and 76LJ for the following factual reasons.

First, here, unlike Blackfeet, there is no question of multiple stays of adjudication in the two basins, as DNRC has not finished examining all State-based claims and has not issued any summary reports, nor has this Court issued any decrees in the basins. Consequently, there is no existing adjudication. There have been no stays of adjudication, let alone multiple stays on the Reservation. No individual will be injured by a disruption of the adjudication of his or her

claims. Issues of notice of a stay to all claimants is unnecessary, as no adjudication has been commenced. Finally, because no adjudication of claims in Basin 76L and 76LJ has been commenced, the grant of a stay is not untimely nor is it prejudicial to anyone.

The Tribes are aware that the Montana Legislature has placed benchmarks on the State-wide general stream adjudication in an effort to complete the process in a timely manner. Mont. Code Ann. § 87-2-271 and § 85-2-280. The Tribes are also aware that there are a large number of adjudication basins that were evaluated under the discredited verification process. Those Basins may be reopened and subjected to claim examination, summary reports and preliminary and final decrees. Mont. Code Ann. § 85-2-282. That process in itself could take years to complete.

If the Compact is finally approved it could short circuit decades of litigation over the Tribes' claims on and off the Reservation. As the 30-plus years of the adjudication of the water rights on the reservation of the Shoshone and Arapaho Tribes of the Wind River Reservation amply demonstrate, those litigations would likely far exceed the mandated deadline for completion of the State-wide adjudication. See In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), as well as its precursor and successor litigations.

Many of these claims in Basin 76L and 76LJ raise questions of State, Tribal and federal law that are either contentious or not settled in Montana; off-Reservation instream flows and minimum reservoir pool levels, wetlands, historic and future Indian irrigation and groundwater to name a few. The experience of the Gila River Indian water rights litigation establishes a sound roadmap for how litigation of the Tribes' claims would logically proceed. See generally In re General Adjudication of the Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (Ariz.

2001) and related cases. Such an adjudication would start with initial motions to declare the applicable law to the various classes of Tribal claims, followed by a claim-by-claim adjudication of all State, Tribal and federal. Should the Compact fail, the CSKT adjudications would involve 54 of the 85 adjudication basins in the State, disrupting the progress this Court has already achieved State-wide.⁶ In short, there is plenty of work to be done to meet the Legislature's mandated completion of adjudication without initiating the adjudication of claims in Basin 76L and 76LJ now.

Given the complexity of the Compact, and the State-wide impact should it not achieve final approval, it would make sense for the Water Court to first complete the adjudication, and if necessary, reexamination, for the many basins that will not be impacted should the Compact become the law of the land. That appears to be a substantial burden in itself, given the statutory benchmarks. The Compact provides a unique situation not anticipated in the benchmarks. It appears inescapable to the Tribes that should the Court initiate adjudication in Basins 76L and 76LJ, any benchmarks would be left in the dust of litigation.

E. Request for Personal Appearance.

The Tribes have consulted with the attorneys for the United States Department of Justice assigned to this matter. Both the Tribes and United States request the opportunity to personally appear before the Court at the hearing scheduled for July 16, 2015 at 9:00 a.m.

F. Conclusion.

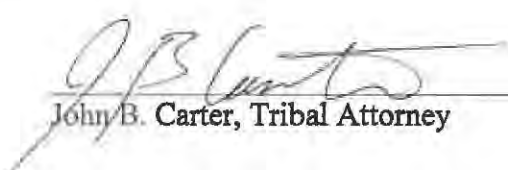
For the reasons stated above, the Tribes urge the Court to proceed as follows:

⁶ This complexity is further compounded by the fact that the Montana Supreme Court has not promulgated rules for examining Indian aboriginal and reserved water right claims. Development of those rules could in itself be a timely and expensive process.

First, order DNRC to complete the examination of all State-based claims in Basins 76L and 76LJ but also order DNRC not to issue any summary reports. This will afford substantial compliance with the mandate to examine all claims by June 30, 2015.

Second, decline to undertake the balance of the steps outlined in the June 1, 2015 Order, stay all proceedings to adjudicate Basin 76L and 76LJ and allow the Compact to proceed through Congress without the burden of ongoing litigation of the complex issues resolved in the Compact and signed into Montana law in April of this year.

Respectfully submitted this 1st day of July, 2015.


John B. Carter, Tribal Attorney

CERTIFICATE OF SERVICE

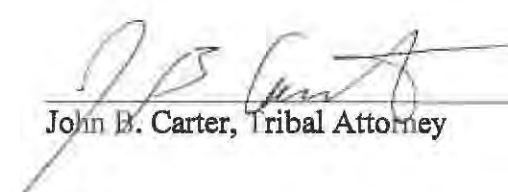
I certify that the foregoing “**Memorandum of the Confederated Salish and Kootenai Tribes Concerning Order Rescheduling Status Report and Hearing**” was mailed on the 1st day of July, 2015, via United States mail, postage prepaid, to the following:

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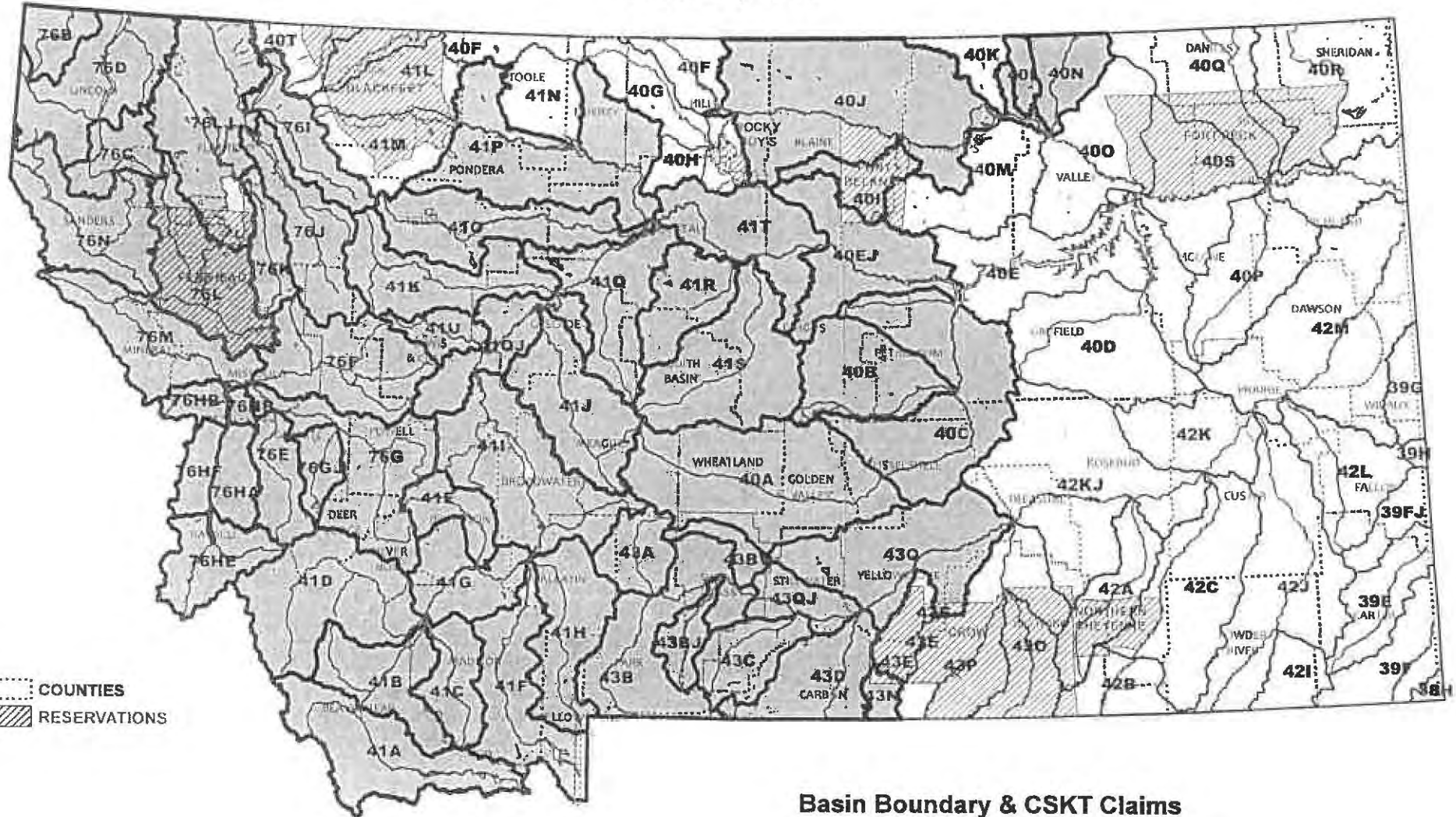
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John B. Carter, Tribal Attorney

Basins in which the Confederated Salish and Kootenai Tribes have filed water rights claims

June 25, 2015



 COUNTIES
 RESERVATIONS

Basin Boundary & CSKT Claims



-  Basins included in CSKT claim filing
-  Basins not included in CSKT claim filing

Exhibit A

**Memorandum of the CSKT Concerning Order
Rescheduling Status Report and Hearing**

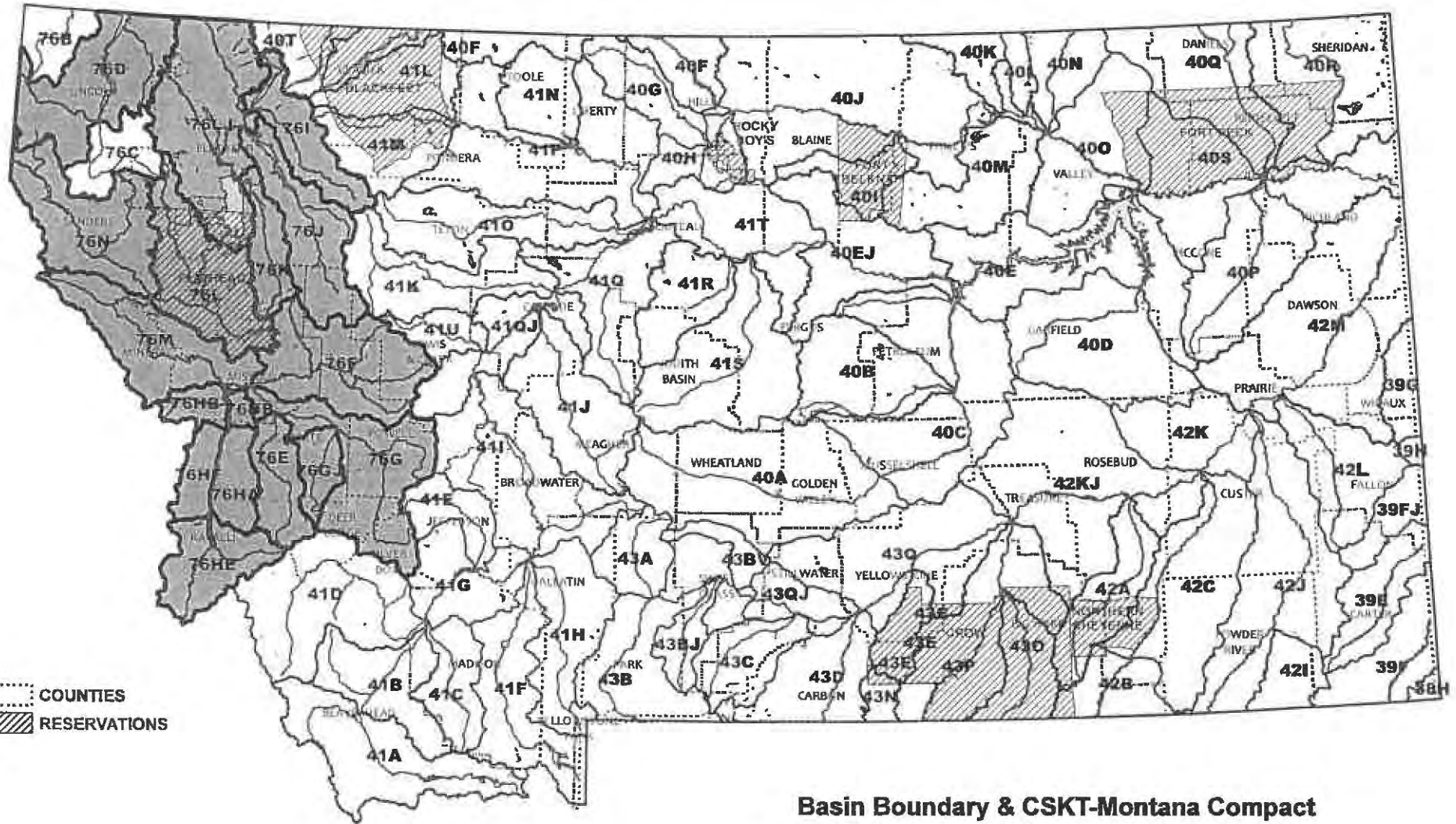


CSKT Legal Department
June 2015
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Basins in the Confederated Salish and Kootenai Tribes - Montana Compact

July 1, 2015



 COUNTIES
 RESERVATIONS

Basin Boundary & CSKT-Montana Compact

 Basins included in CSKT-Montana Compact
 Basins not included in CSKT-Montana Compact



CSKT Legal Department
 July 2015
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 created by DOWL
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Exhibit B
Memorandum of the CSKT Concerning Order Rescheduling Status Report and Hearing

Adjudication of Basins 76L and 76LJ.

3. For the Court's information, as of July of 2011, there were 8,443 unique water rights records of State-based water rights filings, based on point of diversion, within the exterior boundaries of the Flathead Indian Reservation. These water rights records were quantified in a GIS database prepared by the Montana Reserved Water Rights Compact Commission.

4. At the present time, the Tribes are focusing its objections preparation on irrigation claims for parcels of land 5 acres in size and larger. There are approximately 1,000 claims that satisfy the aforementioned criteria that the Tribes will be objecting to.

5. Of the approximate 1,000 objections, roughly 95% of the objection files have at least 3 or more grounds for Tribal objection.

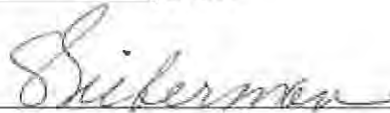
6. Of the approximate 1,000 objections, the typical objection file has an average of 6 to 7 grounds for Tribal objection.

I swear and affirm that the above statements are true and correct under penalty of perjury of law.

Dated this 11th day of June, 2015.


Daniel J. Decker

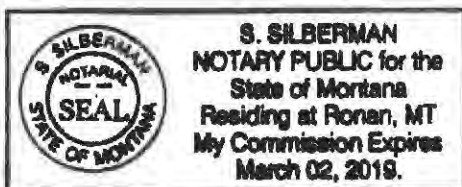
SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, on this 11 day of June, 2015.



Notary Public for the State of Montana

Residing at: Ronan

My Commission Expires: 3/2/19



E-MAIL FILED

JUL 01 2015

Montana Water Court

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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
JOCKO RIVER HYDROGLOGIC SUB-BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ) ✓

Motion to Stay Proceedings to Adjudicate Aboriginal and Reserved Water Rights Claims

The United States respectfully asks this Court to stay proceedings to adjudicate the aboriginal and reserved water rights claims that it filed on behalf of the Confederated Salish and Kootenai Tribes ("Tribes"), in its capacity as trustee. The claims were filed with the Montana Department of Natural Resources and Conservation in June of 2015. The United States requests that the Court enter a stay that will not be dissolved until each of the following events occur:

- 1) Passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary settlement to the Tribes;
- 2) Approval by the Tribes of the Compact and Act as described in Article VII D. 2 of the Compact;
- 3) The Montana Water Court issues a final water right decree or decrees imposing the water rights quantified pursuant to this Compact; and

- 4) All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

The parties to the Compact will promptly inform the Court when these events have occurred. See Compact, Article VII D.2. If, however, the above events do not occur, the stay should dissolve in no later than five years, or if the conditions for a party to withdraw under the terms of the agreement, Compact, Article VII A 2, 4, are met and a party withdraws pursuant to the Compact, whichever is earlier.

Memorandum in Support of Stay

There is good cause to grant the stay requested by the Tribes and the United States.¹

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936). When considering whether to issue a stay, the Court’s “exercise of judgment [] must weigh competing interests and maintain an even balance.” Id. (Citations omitted). As the Montana Supreme Court has stated, a stay of proceedings is appropriate when the “balancing the competing interests” favors the movant and the movant “make[s] out a clear case of hardship or inequity” Henry v. Dist. Ct. of the Seventeenth Jud. Dist., 198 Mont. 8, 13, 645 P.2d 1350, 1353 (Mont. 1982) (citing Landis, 299 U.S. at 254-55).

The Montana Supreme Court noted several reasons a stay might be utilized: “[a] court has inherent power to stay proceedings in control of its docket-after balancing the competing interests;” “the suppliant for a stay must make out a clear case of hardship or inequity in being

¹ The Tribes have also filed a motion to stay their claims for aboriginal and reserved water rights claims.

required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else” and “in cases of extraordinary public moment, the individual may be required to submit to delay and not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” Henry, 198 Mont. at 13-14 (quoting Landis, 299 U.S. at 256). All three bases for a stay are present here.

First, this is an extraordinary public moment and delay serves the public welfare and convenience. As a matter of Montana law, the Tribes and the United States were required to file by July 1, 2015 all aboriginal and reserved water rights claims with the Montana Department of Natural Resources and Conservation. §§ 85-2-217, 702 MCA. Those claims are now filed. Fortunately, the Montana legislature passed a compact between the Tribes, Montana, and the United States. It was signed into law on April 24, 2015. SB 262, 64th Leg., (MT 2015). This comprehensive settlement, if passed by the United States Congress and Tribes, will settle the federal and tribal claims. The Compact, which was enacted by the Montana legislature, also emphasizes the need for a stay. Article VII D.2 of the Compact requires the Tribes and United States to file a motion for a stay. To wit, “[u]pon filing [claims], the Tribes and the United States will request that the Montana Department of Natural Resources and Conservation stay any action on such claims” Compact, Article VII D.2. This language was enacted by the Montana legislature. To the extent that any Court questions whether the public interest and welfare are served by a stay, the Court should first defer to the legislature’s judgment that the Tribes and United States should seek a stay in order to serve the public welfare and convenience in this extraordinary moment.

Refusing to grant a stay on these claims would, in effect, allow the subject of a settlement entered into by the legislature of Montana to be litigated while the other settling sovereigns

obtain their own form of consent. The settlement and these claims concern a matter of significant public interest and involve claims filed in basins both east and west of the continental divide. The consideration of the settlement agreement, already passed by the Montana legislature and signed by Montana's Governor, is now pending before the United States Congress and the Tribes. In short, a stay is warranted because a settlement before three sovereigns to resolve water rights issues is an extraordinary public moment.

Second, it would work a substantial hardship and inequity on the United States to litigate thousands of claims when it has already invested substantial efforts in reaching a settlement. The United States filed 7,312 water claims prior to July 1, 2015. These claims were filed in the event that the Compact may not become final and fully enforceable. The public welfare and convenience are served by a stay because going forward with litigation of the thousands of tribal and federal claims will require expenditures by the Tribes, State of Montana, and United States, as well as those filing their own objections to those claims. See Augustine v. Simonson, 283 Mont. 259, 265, 940 P.2d 116, 119 (Mont. 1997) ("Obviously, settlement avoids litigation with its attendant expenses and resultant burden upon the legal system.") (citations omitted).

Third, to the extent that the Court wishes to maintain control over its own docket, it may reasonably find that staying these 7,312 claims will aid that effort. In particular, if this Compact is ratified and decreed, then it would be unnecessary to litigate these claims. "[P]ublic policy considerations, apart from the contract of the parties, generally favor settlements." Id. at 120; see also Miller v. State Farm Mut. Auto Ins. Co., 2007 MT 85, ¶ 14, 337 Mont. 67, ¶ 14, 155 P.3d 1278, ¶ 14 (Mont. 2007); Holmberg v. Strong, 272 Mont. 101, 106, 899 Mont. P.2d 1097, 1100 (Mont. 1995).

The United States respectfully requests that all proceedings to adjudicate its claims made on behalf of the Tribes and the very similar claims of the Tribes be stayed until the Compact has received final approval and survived final judicial challenge. Should the Compact succeed, the United States will file a motion to lift the stay and dismiss its 7,312 claims. Alternatively, the stay should be lifted in five years, or the stay should be lifted if the Tribes withdraw from the Compact after conditions allowing them to withdraw are met, Compact, Article VII A. 2, or if Montana withdraws from the Compact after the conditions allowing it to withdraw are met, Article VII A. 4, whichever is sooner.

Dated this 1st day of July, 2015.

/s/ David W. Harder

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/s/ J. Nathanael Watson

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Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Motion to Stay Proceedings to Adjudicate Aboriginal and Reserved Water Rights Claims** was served upon the following persons by first class mail on this 1st day of July, 2015.

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1830 3rd Avenue East, Suite 301
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Kalispell, MT 59903



Lorrin C. Dyer
Secretary

FILED

JUL 01 2015

Montana Water Court

76LJ

John B. Carter
Rhonda R Swaney
Daniel J. Decker
Tribal Legal Department
Confederated Salish and Kootenai Tribes
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IN THE WATER COURT OF THE STATE OF MONTANA

IN RE THE ABORIGINAL AND RESERVED)
WATER RIGHTS CLAIMS OF THE)
CONFEDERATED SALISH AND KOOTENAI)
TRIBES, EAST AND WEST OF THE)
CONTINENTAL DIVIDE)
)

MOTION TO STAY PROCEEDINGS TO ADJUDICATE THE ABORIGINAL AND RESERVED WATER RIGHTS CLAIMS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES AND MEMORNDUM IN SUPPORT OF MOTION

1. MOTION TO STAY

Comes now the Confederated Salish and Kootenai Tribes (Tribes) and asks this Court to stay all proceedings to adjudicate the aboriginal and reserved water rights claims filed with the Montana Department of Natural Resources and Conservation by the Tribes on June 25, 2015.

The Tribes ask this Court to stay any action on such claims pending the occurrence of the following events:

- a. The passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary settlement to the Tribes;

- b. Approval by the Tribes of the Compact and Act described in [Compact] Article VII.D.2;
- c. Issuance by the Montana Water Court of a final water right decree or decrees incorporating the water rights quantified pursuant to this Compact; and
- d. All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

The Tribes respectfully ask this Court to issue such a stay for the reasons stated below.

2. MEMORANDUM IN SUPPORT OF STAY

Whether or not the Tribes were successful in obtaining a water rights Compact with the State and the United States, Montana law establishes July 1, 2015 as the final date for the Tribes to file all their aboriginal and reserved water rights claims with the Montana Department of Natural Resources and Conservation (DNRC). See, § 85-2-217 and § 85-2-702, M.C.A. Fortunately, the Legislature did pass the Tribes' water Compact and Governor Bullock signed it into law on April 24, 2015. As of that date, the specific terms of the Compact govern the actions of the parties relative to the water rights claims filed by the Tribes.

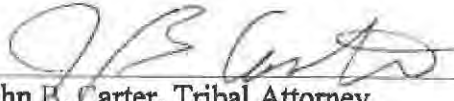
Article VII.D.2 of the Water Rights Compact between the Tribes, Montana and the United States, directs the Tribes, and the United States in its trustee capacity for the Tribes, to file their aboriginal and reserved water rights claims prior to July 1, 2015. It also requires the Tribes to file a motion to stay all proceedings on those claims. The Motion to Stay quotes verbatim the terms of the stay the Montana Legislature approved.

The Tribes filed 2,814 water rights claims with DNRC on June 25, 2015. They include consumptive and non-consumptive claims on the Flathead Indian Reservation, as well as non-consumptive claims east and west of the Continental Divide. A copy of the categories of claims,

numbers of claims and affected adjudication basins in each category is attached as Exhibit A to this motion and memorandum. The Tribes filed those claims as a protective measure in the event that the Compact not become final and fully enforceable. Should the Compact succeed, the Tribes will move to lift the stay and to dismiss their claims.

The Tribes submit a motion, memorandum and proposed Order staying all proceedings to adjudicate the Tribes' aboriginal and reserved water rights claims until the Compact has received final approval and survived final judicial challenge.

Respectfully submitted this 29th day of June, 2015.


John B. Carter, Tribal Attorney


CERTIFICATE OF SERVICE

I certify that the foregoing "**Motion to Stay Proceedings to Adjudicate the Aboriginal and Reserved Water Rights Claims of the Confederated Salish and Kootenai Tribes and Memorandum in Support of Motion**" was mailed on the 29th day of June, 2015, via United States mail, postage prepaid, to the following:

Jeremiah D Weiner, Esq.
Assistant Attorney General
State of Montana
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

John Peterson
Adjudication Chief
Montana DNRC
P.O. Box 201602
Helena, MT 59620-1602

David Harder, Trial Attorney
U.S. Department of Justice
ENRD/IRS
999 18th Street, South Terrace, Suite 370
Denver, CO 80202


John B. Carter, Tribal Attorney

Summary of Confederated Salish & Kootenai Tribes' Water Rights Claims

Claim Category	Purpose	Priority Date	Number of Claims	Magnitude	Basins	Assigned Water Right Numbers
Irrigation Historic FIIP Water Use	Irrigation	Treaty Date July 16, 1855	202	143,816 Acres	76L, 76LJ, 76F & 76N	30031816 to 30032014, 30032430 to 30032431, 30032434
Irrigation Historic Tribal Private Water Use	Irrigation	Treaty Date July 16, 1855	254	12.123 Acres	76L & 76LJ	30032164 to 30032432
Irrigation Future Tribal Water Use	Irrigation	Treaty Date July 16, 1855	249	44,851 Acres	76L, 76LJ, 76F & 76N	30032436 to 30032684
Stock Water Stock Ponds	Stock	Treaty Date July 16, 1855	194	632 Acre-Feet	76L, 76LJ, 76F & 76N	30031517 to 30031709, 30032433
Stock Water Other Stock Uses	Stock	Treaty Date July 16, 1855	4	168 Acre-Feet	76L & 76LJ	30031710 to 30031713
Domestic	Domestic	Treaty Date July 16, 1855	4	2,124 Acre-Feet	76L & 76LJ	30031501 to 30031504
Commercial	Commercial	Treaty Date July 16, 1855	4	318 Acre-Feet	76L & 76LJ	3003105 to 30031508

Summary of Confederated Salish & Kootenai Tribes' Water Rights Claims

Claim Category	Purpose	Priority Date	Number of Claims	Magnitude	Basins	Assigned Water Right Numbers
Municipal	Municipal	Treaty Date July 16, 1855	4	3,693 Acre-Feet	76L & 76LJ	30031509 to 30031512
Industrial	Industrial	Treaty Date July 16, 1855	4	11,403 Acre-Feet	76L & 76LJ	30031513 to 30031516
Power Generation	Power Generation	Treaty Date July 16, 1855	37	10,984,174 Acre-Feet	76L & 76LJ	30031732 to 30031767, 30032435
FIIP Reservoir Minimum Pool	Fish & Wildlife	Time Immemorial	52	30,848 Acre-Feet	76L, 76LJ, 76F & 76N	30031768 to 30031815, 30032427 to 30032429, 30032686
Flathead Lake	Fish & Wildlife	Time Immemorial	1	122,537 Acres (Surface Area)	76LJ	30031714
Instream Flow On-Reservation	Fish & Wildlife	Time Immemorial	145	4,289,529 Acre-Feet	76L & 76LJ	30032015 to 30032163

Summary of Confederated Salish & Kootenai Tribes' Water Rights Claims

Claim Category	Purpose	Priority Date	Number of Claims	Magnitude	Basins	Assigned Water Right Numbers
Instream Flow Off-Reservation	Fish & Wildlife	Time Immemorial	1,094	Complexity of claim precludes quantification of the magnitude	40A, 40B, 40C, 40EJ, 40I, 40J, 40L, 40N, 41A, 41B, 41C, 41D, 41E, 41F, 41G, 41H, 41I, 41J, 41K, 41O, 41P, 41Q, 41QJ, 41R, 41S, 41T, 41U, 41U, 43A, 43B, 43BJ, 43BV, 43C, 43D, 43N, 43Q, 43QJ, 76B, 76C, 76D, 76E, 76F, 76G, 76GJ, 76HA, 76HB, 76HE, 76HF, 76I, 76J, 76K, 76L, 76LJ, 76M, & 76N	30032687 to 30033789
High Mountain Lakes	Fish & Wildlife	Time Immemorial	36	2,448 Acres (Surface Area)	76L & 76LJ	30039001 to 30039034, 30039049, 30039050, 30039051
Springs	Fish & Wildlife	Time Immemorial	500	100% Natural Flow & Volume	76L & 76LJ	to 30039550

Summary of Confederated Salish & Kootenai Tribes' Water Rights Claims

Claim Category	Purpose	Priority Date	Number of Claims	Magnitude	Basins	Assigned Water Right Numbers
Wetlands	Fish & Wildlife	Time Immemorial	14	71,479 Acre-Feet	76L & 76LJ	30039035 to 30039048
Groundwater	Other	Time Immemorial	16	35,263,256 Acre-Feet	76L & 76LJ	30031715 to 30031731

Montana Water Court
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Fax: (406) 523-4131

IN THE WATER COURT OF THE STATE OF MONTANA

IN RE THE ABORIGINAL AND RESERVED)
WATER RIGHTS CLAIMS OF THE)
CONFEDERATED SALISH AND KOOTENAI)
TRIBES, EAST AND WEST OF THE)
CONTINENTAL DIVIDE)
)

**ORDER STAYING ALL PROCEEDINGS TO ADJUDICATE THE ABORIGINAL AND
RESERVED WATER RIGHT CLAIMS OF THE CONFEDERATED SALISH AND
KOOTENAI TRIBES, EAST AND WEST OF THE CONTINENTAL DIVIDE**

Having reviewed the provisions of Article VII. D.2 of the water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, the State of Montana, and the United States, which was signed into Montana Law on April 24, 2015, this Court hereby ORDERS that The Montana Department of Natural Resources and Conservation stay any action on such claims pending occurrence of the following events:

- a. The passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary settlement to the Tribes;
- b. Approval by the Tribes of the Compact and the Act of Congress identified above;
- c. Issuance by the Montana Water Court of a final water right decree or decrees incorporating the water rights quantified pursuant to the Compact; and

d. All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

The parties to the Compact shall promptly inform this Court when all of the conditions of this stay have been satisfied.

DATED this ___ day of _____, 2015.

Russ McElyea
Chief Water Court Judge

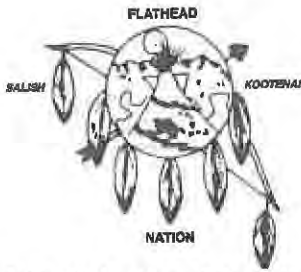
Copies sent to:

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OF THE FLATHEAD NATION

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A People of Vision

A Confederation of the Salish,
Pend d' Oreille
and Kootenai Tribes

June 29, 2015

Clerk of Court
Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

TRIBAL COUNCIL MEMBERS:

Vernon S. Finley - Chairman
Carole Lankford - Vice Chair
James V. Matt - Secretary
Len Twoteeth - Treasurer
Ronald Trahan
Shelly R. Fyant
Lenonard W. Gray
Lloyd D. Irvine
Terry L. Pitts
Patty Stevens

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JUL 01 2015

Dear Clerk of Court:

Montana Water Court

Enclosed for filing please find a motion and memorandum in support in a cause of action required under Article VII.D.2 the water rights Compact between the Confederated Salish and Kootenai Tribes, the State of Montana and the United States. I have also enclosed a draft Proposed Order for the convenience of the Court.

Please confirm the copy of the first page of the pleading and return it to me in the enclosed stamped and addressed envelope.

Thank you for your consideration.

Sincerely,

John B. Carter
Tribal Attorney

FILED

JUN 29 2015

Montana Water Court

**MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)**

ORDER REGARDING UPCOMING HEARING

Previous Orders of this Court limited examination of certain water rights in Basins 76L and 76LJ. The Orders also directed that the Water Court was not to receive a summary report of claims examination from the DNRC without notice to the parties and an opportunity for a hearing.

On June 1, 2015, the Court provided notice to the parties that it intended to direct the DNRC to complete claims examination in Basins 76L and 76LJ and issue preliminary decrees for those Basins. The parties were given the opportunity to request a hearing pursuant to the Court's previous Orders.

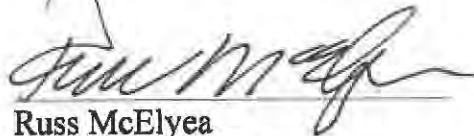
The Confederated Salish and Kootenai Tribes (CSKT), the State of Montana, and the United States jointly requested a hearing. A telephonic hearing is set for July 16, 2015 at 9:00 AM.

The Court received a Notice of Pending Litigation and Objection from the Flathead Joint Board of Control (FJBC). The FJBC objects to any actions taken towards implementing, approving, and/or processing the 2015 CSKT Compact and requests a stay pending the outcome of their suit in Lake County District Court concerning the validity of the Compact.

The Court will hear FJBC's objection and motion for stay during the July 16, 2015 hearing on the recommencement of claims examination in Basins 76L and 76LJ. The

hearing is currently scheduled to take place telephonically. If any party requests an in-person hearing, the hearing will be held at the Montana Water Court in Bozeman.

DATED this 29th day of June, 2015.



Russ McElyea
Chief Water Judge

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**MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)**

**ORDER RESCHEDULING STATUS CONFERENCE AND HEARING AND
ORDER UPDATING SERVICE LIST**

Pursuant to the Water Court's June 1, 2015 Order Setting Status Conference and Hearing, a telephonic status conference was scheduled for July 1, 2015 to discuss Basins 76L and 76LJ. The Order stated that the parties could request a hearing on the Court's stated intention to proceed with adjudication of water rights in these basins. On June 11, 2015, the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States filed a Joint Hearing Request. The parties stated they wished to have a hearing, and also requested that the July 1, 2015 hearing date be rescheduled.

On June 15, 2015, Kristin Omvig and Bruce Fredrickson filed a Notice of Appearance on behalf of the Flathead Joint Board of Control, as well as a Notice of Pending Litigation and Objection. Ms. Omvig and Mr. Fredrickson will be added to the service list.

IT IS ORDERED that the telephonic hearing set for July 1, 2015 is VACATED and RESCHEDULED for **July 16, 2015 at 9:00 AM**. The instructions for accessing the call are as follows:


1. At the designated conference time dial the toll free telephone number:
1-877-526-1243
2. At the prompt, enter the participant pin code followed by the pound (#) key:
7685196#.
3. At the prompt state your name followed by the pound (#) key.

If you have any questions or if you experience problems placing this call, you may contact the Water Court at 1-800-624-3270 (in state) or (406) 586-4364.

ORDERED that the parties shall file prehearing briefs by **July 8, 2015**. The prehearing briefs shall specify whether the parties wish to conduct the July 16, 2015 hearing via telephonic conference call as currently scheduled, or in-person at the Montana Water Court.

ORDERED that the service list is updated to add Kristin Omgig and Bruce Fredrickson.

DATED this ~~19th~~ day of ~~JUNE~~, 20~~14~~¹⁵.


Russ McElyea
Chief Water Judge

Jeremiah D. Weiner, Esq.
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Note: Service List Updated 6/19/2015

FILED

JUN 18 2015

Montana Water Court

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kristin@rmtlawp.com
6

Attorneys for Flathead Joint Board of Control

7
8 **IN THE WATER COURT OF THE STATE OF MONTANA**
CLARK FORK DIVISION
9 **FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)**

10 IN THE MATTER OF THE WATER RIGHTS
OF FLATHEAD RIVER TO AND INCLUDING
11 FLATHEAD LAKE (BASIN 76LJ)

**NOTICE OF PENDING
LITIGATION AND OBJECTION**

12 COMES NOW, the Flathead Joint Board of Control ("FJBC") by and through its
13 counsel of record Rocky Mountain Laws Partners, PLLP and provides the following:

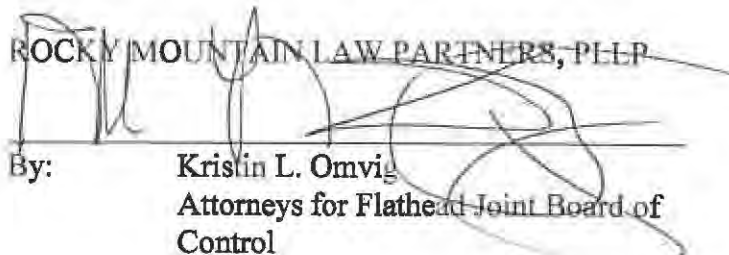
- 14 1. This Court recently issued its Order Setting Status Conference and Hearing dated
15 June 1, 2015 regarding Basins 76L and 76LJ, indicating that the CSKT was recently
16 approved by the Montana Legislature and setting dates pertinent to the 2015 CSKT Compact.
17
- 18 2. On or about April 20, 2015, the Flathead Joint Board of Control, along with
19 individual members of the Flathead Joint Board of Control, filed Lake County Cause No.
20 DV-15-73 entitled *Flathead Joint Board of Control et al v. Members of the Montana 64th*
21 *Legislature et al*, Montana Twentieth Judicial District Court, Lake County, Montana,
22 challenging the validity of the legislative vote approving Senate Bill 262 which is more
23
24

1 commonly referred to as the 2015 Confederated Salish and Kootenai Tribes Water Compact.
2 A copy of the Verified Complaint, without exhibits, is attached hereto as Exhibit "A".

3 The FJBC hereby objects to any actions taken towards implementing, approving
4 and/or processing the 2015 CKST Compact until such time as the Court renders a
5 determination on the merits in Cause No. DV-15-73. Rather, a stay prohibiting further action
6 on the water rights and 2015 CSKT Compact may be appropriate until such time as a
7 determination is made as to the validity of the vote on SB 262.

8 DATED this 15th day of June, 2015.

9
10 ~~ROCKY MOUNTAIN LAW PARTNERS, PLLP~~

11 
12 By: Kristin L. Omvig
13 Attorneys for Flathead Joint Board of
14 Control

15 CERTIFICATE OF SERVICE

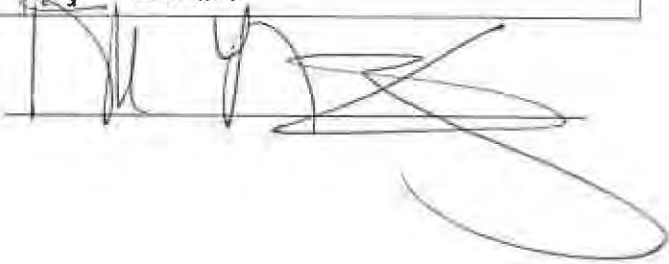
16 I, Kristin L. Omvig, one of the attorneys of the law firm of ROCKY MOUNTAIN
17 LAW PARTNERS, PLLP, do hereby certify that on the 15th day of June, 2015, I served a true
18 and correct copy of the foregoing document upon the person(s) named below, at the address
19 set out below, either by mailing, hand delivery, or Federal Express, in a properly addressed
20 envelope, postage prepaid, or by telecopying a true and correct copy of said document.

21 United States Department of Interior	<input checked="" type="checkbox"/>	U.S. Mail (first class postage)
22 Bureau of Reclamation	<input type="checkbox"/>	Federal Express
23 Montana Area Office	<input type="checkbox"/>	Hand-Delivery
24 P.O. Box 30137	<input type="checkbox"/>	Telefacsimile
Billings, MT 59107-0137	<input type="checkbox"/>	E-Mail:

21 *Objector*

1
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United States Department of Interior Bureau of Reclamation Great Plains Regional Office P.O. Box 36900 Billings, MT 59107-6900	<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"/> E-Mail:
<i>Objector</i>	
Madeleine C. Weisz Water Master Montana Water Court 601 Haggerty Lane, Ste 2 PO Box 1389 Bozeman, MT 59771-1389	<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"/> E-Mail:
<i>Water Master – Basin 76LJ</i>	
Jeremiah D. Weiner, Esq. Assistant Attorney General State of Montana 215 North Sanders PO 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"/> E-Mail:
David Harder, Trial Attorney U.S. Department of Justice ENRD/IRS 999 – 18 th Street, South Terrace, Suite 370 Denver, CO 80202	<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"/> E-Mail:
John B. Carter Confederated Salish & Kootenai Tribes Tribal Legal Department PO Box 278 Pablo, MT 59855	<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"/> E-Mail:
John Peterson Adjudication Bureau Chief Montana DNRC PO Box 201602 Helena, MT 59620-1602	<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"/> E-Mail:



CLERK OF THE
DISTRICT COURT
LYN FRICKER

2015 APR 20 AM 11 51

FILED BY _____
CLERK/DEPUTY

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5 E-mail: bruce@rmtlawp.com
kristin@rmtlawp.com

6 *Attorneys for Plaintiffs*

7 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

8
9 FLATHEAD JOINT BOARD OF
CONTROL and JERRY LASKODY,
10 BOONE COLE, TIM ORR, TED HEINS,
BRUCE WHITE, SHANE ORIEN, WAYNE
11 BLEVINS AND GENE POSIVIO, all
members of the Flathead Joint Board of
Control,

12 Plaintiffs,

13 vs.

14 MEMBERS OF THE MONTANA 64TH
15 LEGISLATURE, a legislative body
comprised of Members of the Senate and
16 House of Representatives; AUSTIN
KNUDSEN, Speaker of the House; DEBBY
17 BARRETT, President of the Senate; STATE
OF MONTANA; STEPHEN C. BULLOCK,
18 Governor, State of Montana; TIMOTHY
FOX, Montana Attorney General;
19 REPRESENTATIVE DANIEL SALOMON,
representing Montana House District 93;
20 REPRESENTATIVE GREG HERTZ,
representing Montana House District 12;
21 REPRESENTATIVE GEORGE KIPP, III,
representing Montana House District 15;
22 SENATOR CLIFF LARSEN, representing
Montana Senate District 47; SENATOR LEA
23 WHITFORD, representing Montana Senate
District 8
24

Cause No. DI-15-73

Judge: JAMES A. MANLEY

**VERIFIED COMPLAINT, PETITION
FOR PRELIMINARY INJUNCTION
AND EX PARTE APPLICATION FOR
EMERGENCY TEMPORARY
RESTRAINING ORDER**

EXHIBIT

A

1 and JOHN DOES 1 - 10.

2 Defendants.

3
4 COME NOW Plaintiffs FLATHEAD JOINT BOARD OF CONTROL, JERRY
5 LASKODY, BOOONE COLE, TIM ORR, TED HEINS, BRUCE WHITE, SHANE ORIEN,
6 WAYNE BLEVINS, and GENE POSIVIO, all as Members of the FLATHEAD JOINT
7 BOARD OF CONTROL with their **VERIFIED COMPLAINT, PETITION FOR**
8 **PRELIMINARY INJUNCTION AND EX PARTE APPLICATION FOR**
9 **EMERGENCY TEMPORARY RESTRAINING ORDER** and complain, allege and aver
10 as follows:

11 **PARTIES**

12 1. Plaintiff, the Flathead Joint Board of Control ("FJBC"), is the joint board of
13 operations for the Flathead Irrigation District (FID), Mission Irrigation District (MID) and
14 Jocko Valley Irrigation District (JVID) (collectively "the Districts"), which are elected local
15 government bodies under Montana law generally empowering irrigation districts with the
16 authority and responsibility to represent landowners within district boundaries as to irrigation
17 matters, including relations with the United States, the State and irrigation project operations.
18 *See generally* Title 85, Chapter 7, Parts 1 through 22, Montana Code Annotated (2013). The
19 FJBC headquarters is located in St. Ignatius, Lake County, Montana. The FJBC is the
20 operating agent of the Districts and possesses the powers and duties of the Districts,
21 including but not limited to, the authority to institute any action or proceeding proper to carry
22 out the provisions of Chapter 7, Title 85, MCA, and to enforce and maintain, protect, or
23 preserve any and all rights, privileges, and immunities created by that Chapter. §85-7-1612,
24 MCA.

1 state sovereign immunity and defenses under the Eleventh Amendment to the United States
2 Constitution, then in the same sentence effectively guts that purported waiver by reclaiming
3 immunity. More particularly the waiver clause states:

4 Waiver of Immunity. The Tribes and the State hereby waive
5 their respective immunities from suit, including any defense
6 the State shall have under the Eleventh Amendment of the
7 Constitution of the United States, in order to permit the
8 resolution of disputes under the Compact by the Board, and the
9 appeal or judicial enforcement of Board decisions as provided
10 herein, except that such waivers of sovereign immunity by
11 the Tribes or the State shall not extend to any action for
12 money damages, costs, or attorneys' fees. The parties
13 recognize that only Congress can waive the immunity of the
14 United States and that the participation of the United States in
15 the proceedings of the Board shall be governed by Federal law,
16 including 43 U.S.C. § 666. (Emphasis added.)

17 See Exhibit 1, pg. 46, ll. 20-24.

18 15. SB 262 further narrows the waiver of immunity doctrine by limiting any
19 alleged waiver to only those waivers expressly stated in SB 262:

20 B. General Disclaimers. Nothing in this Compact shall be construed or
21 interpreted:

22 11. To constitute a waiver of sovereign immunity by the Tribes or the
23 State except as expressly set forth in this Compact.

24 Exhibit 1, pg. 48, ll. 9-10.

18 16. At the same time, SB 262 creates a new governing law of the land coined the
19 "Unitary Management Ordinance" ("UMO"). The UMO is a new law of administration
20 which will be enforced by a newly created Unitary Management Board ("UMB") comprised
21 of political appointees. It further abolishes the dual sovereign water administration system
22 by eliminating applicability of Montana's Water Use Act and by stripping the Montana
23 Water Court's application and jurisdiction. Exhibit 1.

1 17. The newly created UMB is granted unprecedented powers over all water
2 located on the Flathead Indian Reservation ("FIR") whether derived from state, federal or
3 tribal law, including but not limited to:

- 4 • governing authority for allocation and distribution of all water rights,
5 whether derived from tribal, state or federal law within the exterior
6 boundaries of the FIR. (Pg. 56)
- 7 • control over a single system governing the appropriation, allocation and
8 administration of the waters of the FIR. (Pg. 3)
- 9 • Authorization of all change in use. (Pg. 43.)
- 10 • Enforcement of the terms of the Compact along with judicial review
11 powers. (Pg. 43).

12 18. On page 76, SB 262 grants immunity to those authorizing, administering,
13 allocating and enforcing water rights (whether derived from state, federal or tribal law) on
14 the FIR, which includes governmental entities and politically appointed boards:

15 1-2-111. Immunity from Suit. Members of the Board, the
16 Engineer, any Designee, any Water Commissioner appointed
17 pursuant to Section 3-1-114 of this Ordinance, and any Staff
18 shall be immune from suit for damages arising from the lawful
19 discharge of an official duty associated with the carrying out of
20 powers and duties set forth in the Compact or this Ordinance
21 relating to the authorization, administration, or enforcement of
22 water rights on the Reservation.

23 Exhibit 1 pg. 76, ll. 25-29.

24 19. Mont. Const. Art. II, § 18 requires a 2/3 vote of each house of the legislature
in order to give the state or other defined governmental entities immunity from suit:

Section 18. State subject to suit. The state, counties, cities,
towns, and all other local governmental entities shall have no
immunity from suit for injury to a person or property, except as

1 may be specifically provided by law by a two-thirds vote of
2 each house of the legislature.

3 20. No other water compact adopted by the State of Montana vests a politically
4 appointed board with complete control over all water rights whether derived under federal,
5 state or tribal law. Neither does any water compact adopted by the State of Montana abolish
6 dual sovereign water administration. Rather, those water compacts *implement* a dual
7 sovereign water administration system where the Montana Water Use Act regulates state
8 based rights and non-tribal water use while a Tribal Water Code regulates the use of the
9 Tribe and Tribal members. Chapter 20, Title 85, Parts 1-18, MCA. In other words, the State
10 of Montana operates under its own rules and the tribes operate under their rules consistent
11 with federal law.

12 21. All other water compacts adopted by Montana have passed by a 2/3 or greater
13 vote of each house of the legislature.

14 22. On February 26, 2015, the Montana Senate improperly passed SB 262 with a
15 31-19 vote (62%), which is less than the required 2/3 vote mandated by the Montana
16 Constitution. It subsequently, and improperly, transmitted SB 262 to the House of
17 Representatives.

18 23. The House Judiciary Committee took testimony on SB 262 on April 11, 2015,
19 and transmitted the bill to the House floor attaching a number of amendments. On April 14,
20 2015, consistent with the House Rules and the Montana Constitution, the Speaker of the
21 House of Representatives, Austin Knudsen, ruled that SB 262 provided the State of Montana
22 with immunity from suit, thereby requiring a 2/3 vote of each house of the legislature in
23 order to pass the bill into law. Mont. Const. Art. II, §18.

1 24. On April 14, 2015 at 5:41 p.m. the Solicitor General's Office issued its
2 opinion that the provision was essentially boilerplate language, indicating that the Montana
3 Constitutional provision had been "*drained of any significant meaning*"; that despite the
4 state's waiver of its defenses under the Eleventh Amendment (as contained in SB 262) the
5 State of Montana is still immune from all suits for money damages (regardless of the court in
6 which an action may be brought) under the Eleventh Amendment of the United States
7 Constitution, as a matter of law; and that the subject waiver of immunity clause is really a
8 "*limited waiver of sovereign immunity*" as opposed to a "*grant to the state or state entity*" of
9 immunity. *See attached Exhibit 2.*

10 25. On April 15, 2015, the House Rules Committee met and upheld the Speaker's
11 ruling that passage of SB 262 required a 2/3 vote of each house of the legislature because it
12 provided the State of Montana immunity from suit. Mont. Const. Art. II, §18. During the
13 hearing, House Speaker Austin Knudsen provided evidence that every other Tribal water
14 compact in Montana has been approved by at least a 2/3 vote of each house of the legislature.

15 26. The afternoon of April 15, 2015, without mandatory jurisdiction, the House of
16 Representatives then voted, by a simple majority (53-48), to overrule both the Speaker and
17 the Rules Committee's findings that a 2/3 vote was required for SB 262.

18 27. Upon information and belief, both the Governor and Attorney General's
19 Office have been leading proponents of SB 262 and have actively campaigned in favor of its
20 passage. The Solicitor General's Office possessed a conflict of interest when it issued its
21 legal opinion regarding Mont. Const. Art. II, §18. The legal opinion issued was relied upon
22 by the Montana 64th Legislature in its determination to override the House Speaker's and
23 House Rules Committee's findings.

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commission or continuance of the act complained of, either for a limited period or perpetually;

- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; or
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

§ 27-19-201 (1) - (3), MCA. The above cited statutory subsections are disjunctive and findings to satisfy all subsections are not required for the issuance of an injunctive order.

39. It is apparent that Plaintiffs are entitled to the relief sought. Execution, implementation and/or transmittal of SB 262 will cause material and significant damage to the Plaintiffs and those they represent that cannot be compensated for by monetary damages.

40. The Court further has the power to issue a preliminary injunction ordering that the status quo be maintained and that no further action be taken by the Defendants to sign, execute or implement SB 262 into law in the State of Montana.

41. Until such time as this matter may be determined, the Court has the power to issue a temporary restraining order maintaining the status quo.

42. Failure to issue the requested temporary restraining order and preliminary injunction will result in immediate and irreparable damage and harm to the Plaintiffs and those landowners served by the FJBC.

43. Plaintiffs are entitled to a preliminary injunction during the pendency of this action and are ultimately entitled to a permanent injunction precluding the passage of SB 262 into law until such time as this Court has rendered a determination in this case based upon its merits.

1 44. In the interest of justice, Plaintiffs are entitled to a preliminary injunction
2 without posting an undertaking. MCA, § 27-19-306(1)(b)(ii).

3 **COUNT THREE—PRIVATE ATTORNEY GENERAL DOCTRINE**
4 **§ 25-10-711, MCA**

5 45. Plaintiffs incorporate by reference as if fully set forth herein each of the
6 allegations stated in Paragraphs 1 through 44, above.

7 46. SB 262 directly affects the public's rights and impacts matters of significant
8 public interest. The 64th Montana Legislature has expressly violated Mont. Const. Art. II,
9 §18. As such, any defenses are frivolous and/or are pursued in bad faith. Accordingly,
10 Plaintiffs are entitled to an award of their reasonable attorneys' fees and costs.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, the Plaintiffs pray for relief as follows:

13 1. That the Court declare that passage of SB 262 violated Mont. Const. Art. II,
14 §18; that SB 262 did not receive the necessary 2/3 vote of each house of the legislature
15 necessary to become law and therefore, SB 262 is dead;

16 2. An emergency ex-parte order temporarily enjoining the Defendants from
17 violating Mont. Const. Art. II, §18 thereby maintaining the status quo until such time as this
18 Court shall hold a show cause hearing;

19 3. A preliminary injunction enjoining the Defendants from violating Mont.
20 Const. Art. II, §18 thereby maintaining the status quo until such time as this Court has
21 rendered a determination on the merits;

22 4. That at the conclusion of this action, the Court issue an Order permanently
23 enjoining the Defendants from implementing SB 262;

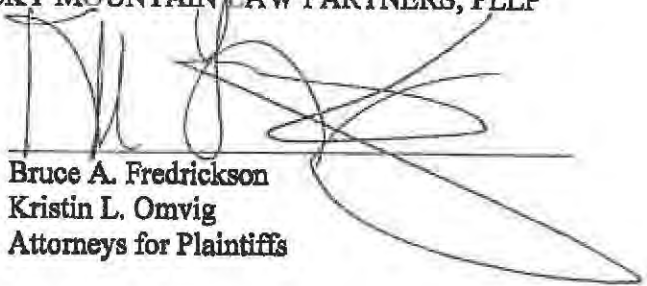
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5. That the Plaintiffs be awarded their reasonable costs, expenses and attorney fees incurred in prosecuting this action as allowed by law or in equity; and

6. That the Plaintiffs be awarded such additional and further relief as might be just and equitable under the circumstances of this action.

DATED this 20th day of April, 2015.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

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