David W. Harder, Trial Attorney
J. Nathanael Watson, Trial Attorney
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Div.
999 18th St.
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1372
(303) 844-1348
Attorneys for the United States

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)

THE UNITED STATES'S MOTION FOR EXTENSION OF STAY OF PROCEEDINGS AND MEMORANDUM IN SUPPORT

The United States of America respectfully requests that this Court continue the stay of all proceedings to adjudicate water rights claims in Basins 76L and 76LJ until such time as the Confederated Salish and Kootenai–Montana Water Compact ("Compact") is approved by this Court. The Confederated Salish and Kootenai Tribes ("Tribes") have already so petitioned this Court. The United States supports that motion but submits this motion and memorandum in support to provide additional reasons to not start litigation in these basins. Continuing the stay will avoid substantial harm against the United States, as well as the two other sovereigns, the Tribes and the State of Montana, who negotiated the water rights compact, which settles claims that would otherwise lead to lengthy and expensive litigation, that became state law in April, 2015. MCA §§ 85-20-1901 (2015).

I. Developments Since July of 2015[1]

On July 27, 2015, this Court continued the stay of adjudication of all claims to water in Basins 76L and 76LJ until January 31, 2017. At that time the Compact was already enacted by the 2015 Montana legislative session, but it had yet to begin the legislative process at the federal level. Since then, significant events on the path to approval have occurred. On May 26, 2016, Senator John Tester introduced a bill in the United States Senate (S. 3013) to approve the Compact and settle all of the Tribes' water-related claims against the United States. Tribes' Petition for Extension, Exhibit B. That milestone was followed by a second: the Senate Indian Affairs Committee held a hearing on the Compact Bill on June 29, 2016 and supportive statements were given by several Senators on the legislation and testimony on behalf of the United States was provided by Letty Belin, Senior counselor to the Deputy Secretary of the Interior.

At that hearing Senator Tester stated that "pursuing water rights settlements is the best policy . . . and saves everybody time and money by not forcing folks to the courtroom." Tribes' Petition for Extension, Exhibit C at 2. Letty Belin stated that the "Administration strongly supports the resolution of Indian water rights claims through negotiated settlement," and recognized the "excellent work . . .done in furtherance of the Compact and an overall settlement of the Tribes['] water rights claims." Id. at 7. Ms. Belin stated at the hearing: "we support all the aspects that have already been negotiated in relation to [the Compact] . . . ." Id. at 18. She noted that "[l]itigation does not solve" the problems resolved in the compact, noting that she could not "even count how many law suits there have been over decades; and the problems are

[1] The United States does not believe it is necessary to repeat all of the facts and arguments laid out in its Response to the Court's June 1, 2015 Order, submitted July 8, 2015, regarding the history of Montana adjudication proceedings and the Compact. That response is, however, attached as Exhibit A.

not solved," id. at 19, but that "the compact that has already been negotiated sets an excellent framework." Id. at 20. However, she explained that "the department has significant concerns about the Federal costs of the settlement" and that "we have not yet completed a full and robust analysis and discussion of all aspects and ramifications of this substantial settlement." Id. at 7. Senator Tester asked Ms. Belin to provide a timeframe for working out an "agreement with the CSKT" regarding Federal contributions and whether it could be done in "three years, two years, one year?" Ms. Letty replied "barring unforeseen developments, I don't see why we couldn't do it in that timeframe." Id. at 20.

Since this Court's last order continuing the stay, the United States has devoted substantial time and resources to resolving these claims. This is consistent with the decades long process that went into negotiating the Compact, across administrations.

II. Continuing the Stay Supports Settlement, Compromise, and Efficient Use of the Resources for All Interested Parties

Continuing the stay of adjudication for all claims will preserve the substantial progress made towards federal approval of the Compact over the last year while preserving the benefit of the bargain reached by three sovereigns after over a decade of work. The three sovereigns—the Tribes, the State of Montana, and the United States—have devoted substantial resources to pursuing settlement and compromise. Those efforts have not ceased. A bill to approve the Compact and settle claims against the United States has been introduced in the United States Senate. At the bill's hearing, the Administration emphasized its support for the negotiated solutions in the Compact and described its next focus being to settle claims the Tribes' claims. A continuance of the stay will allow the Administration and the Tribes to negotiate a settlement of the Tribes' claims against the United States and will allow Congress time to consider the legislation. A continuance of the existing stay will advance the Montana policy that

"[c]ompromises are favored by the Court." State Highway Comm'n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (Mont. 1974).

This Court acknowledged that "[t]he Montana Legislature has recognized the benefits of settling claims to federal and Indian reserved rights" and that the Compact is a "product of that process." Order of July 27, 2015 at 1. Yet, the Court has also noted that the deadline for it issuing decrees by the Water Court is 2020. Id. at 2. As this Court noted, "[a]pproval of the Compact, provided it occurs in a timely manner, may avoid protracted litigation over Tribal claims, thereby serving the Legislature's goal of expediting the adjudication." Id. The same rationale still applies. Without approval of the Compact, this Court will need to adjudicate over ten thousand claims filed by the United States and the Tribes and the objections to all of those claims. Resolving those thousands and thousands of claims and objections will require voluminous discovery, resolution of discovery disputes, extensive briefing of innumerable legal issues and disputes, and require many written opinions and possible appeals. It is no exaggeration to state that these disputes will be contentious, resource intensive, and potentially interminable. See, e.g., United States v. Washington, 573 F.3d 701, 704-709 (9th Cir. 2009) (discussing the continuation of litigation that directly began in 1970 and noting that "this case has become a Jarndyce and Jarndyce, with judges dying out of it . . . ." and that "the district court accurately stated fifteen years ago that 'the court has become a regulatory agency perpetually to manage fishing.'") Settlement avoids all of that. Continuance of the stay allows the Tribes, the State of Montana, the federal administration, and the United States Congress to consider the delicately balanced Compact and to preserve the agreement so carefully negotiated by the three sovereigns.

There is good cause to continue the stay. "[T]he 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) ("exercise of judgment [ ] must weigh competing interests and maintain an even balance"). In Henry v. Dist. Ct. of the Seventeenth Jud. Dist., 198 Mont. 8, 13, 645 P.2d 1350, 1353 (Mont. 1982), the Montana Supreme Court cited and echoed Landis, holding that a stay of proceedings is appropriate when "balancing the competing interests" favors the movant and the movant "make[s] out a clear case of hardship or inequity . . . ." Id. The United States has explained why failure to extend the stay would amount to a clear case of hardship and inequity. Response to Order of July 1, 2015 Rescheduling Status Report and Hearing, attached as Exhibit A, at 3-9. But the hardship and inequity would be even worse today than in July of 2015, because a bill has been introduced to the Congress and at the Senate committee hearing on that bill, the administration emphasized its support for the compact and its investment of resources in resolving the Tribes' claims against the United States. Moreover, to the extent that the Court is concerned that it faces two mandates — the desire for settlement as expressed by the Montana legislature and the need to issue preliminary decrees by 2020 — continuing the stay provides a far more expeditious route to resolving all of potential disputes settled by the compact than litigating thousands of claims and adjudicating innumerable legal issues that have already generated numerous published opinions in the United States Court of Appeals for the Ninth Circuit. See, e.g., Joint Bd. of Control of Flathead, Mission and Jocko Irr. Dists. v. United States, 832 F.2d 1127 (9th Cir. 1987); Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982); United States v. Alexander, 131 F.2d 359, 360-61 (9th Cir. 1942); and United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939).

III. Conclusion

The United States requests that in the interest of the parties' limited resources, judicial economy, and the efforts already expended by the State of Montana, the Tribes, and the United States in negotiating a compromise which is now being considered by the Congress, that the Court continue the stay of adjudication of all water rights in Basins 76L and 76LJ.

Dated this 19th day of September, 2016.

/s/ David W. Harder

David W. Harder,
Assistant Section Chief
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Division.
999 18th St.
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1372
david.harder@usdoj.gov

/s/ J. Nathanael Watson
J. Nathanael Watson, Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
999 18th Street
South Terrace – Suite 370
Denver, CO 80202
joseph.watson@usdoj.gov

Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following persons by first class mail on this 19th day of September, 2016.

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

John Peterson
Adjudication Bureau Chief
Montana DNRC
PO Box 201601
Helena, MT 59620-1602

John B. Carter
Daniel Decker
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855

Bruce A. Fredrickson
Kristin L. Omvig
Rocky Mountain Law Partners, PLLP
1830 3rd Avenue East, Suite 301
PO Box 1758
Kalispell, MT 59903

Eileen Rutherford
Paralegal

David W. Harder, Assistant Section Chief
J. Nathanael Watson, Trial Attorney
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Div.
999 18th St.
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1372
(303) 844-1348
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Response of the United States to the Court's Order Rescheduling Status Report and Hearing

In accordance with the Court's Order dated June 1, 2015, as amended by the Orders of June 19 and June 29, 2015, concerning the procedures to be followed in basins 76L and 76LJ, the United States respectfully submits this response and requests that this Court stay all claims made in basins 76L and 76LJ. If a preliminary decree is issued, it will work a substantial harm against the United States, as well as the two other sovereigns who negotiated the water rights Compact that became state law in April 2015. If adjudication begins in these basins, issues settled by the Compact will be litigated before two sovereigns, the United States and the Confederated Salish and Kootenai Tribes (the "Tribes"), have had the opportunity to review the Compact and offer their assent. The Compact gives the United States four years, and the Tribes five years, to assent, before allowing parties to lawfully withdraw their support for the Compact. A stay will not harm anyone, because the adjudication process for the claims in basins 76L/76LJ have not

yet begun. The Court should issue a stay that allows our federal legislature and executive and the Tribes to consider what the legislature and executive of Montana have already done.[1]

A stay will ultimately allow for long term progress on the Court's docket. If a preliminary decree is issued in basins 76L and 76LJ there may be short term progress, but at the cost of legal battles that could undermine the Compact and would require substantial litigation stretching far into the future. Waiting a few years to give the Compact ratification process a fair chance will allow for long-term judicial efficiency, judicial deference to the Montana legislature's passage of the Compact, and deference to the United States Congress and the Tribes as they consider whether to ratify the Compact.

I. Background

With respect to claims for "federal non-Indian and Indian reserved rights," § 85-2-217, MCA suspended the Montana adjudication proceedings, including the obligation to file claims for such rights "[w]hile negotiations for the conclusion of a compact . . . are being pursued . . . ." Subsequent legislative amendments extended this suspension of the adjudication to July 1, 2013. Because the negotiations did not result in a Compact approved by both the affected tribes and the Montana legislature by that date, § 85-2-702(3), MCA, required that "all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the [DNRC] within 24 months," i.e., by July 1, 2015. The United States complied and filed its claims before this deadline. Exhibit A (letters to DNRC which were included in the claim filing and summarize the claims made by the United States, 7,312 claims in its capacity as trustee for the

[1] The Tribes have also filed a response to the Court's June orders. The United States generally agrees with their response. The United States provides additional rationales for the continuation of the stay but, for the sake of brevity, strives to not repeat the Tribes' arguments.

Tribes.) Exhibit A. The claims filed by the United States include claims for the Flathead Indian Irrigation Project.[2] This is in addition to the 2,814 claims filed by the Tribes and the claims filed by all other parties.

Fortunately, after July 1, 2013, and before July 1, 2015, 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 Compact was the result of considerable effort on the part of all three sovereigns and is by its very nature a settlement and compromise.

The Court's June 1, 2015 Order was issued before the United States or the Tribes filed their claims. That June 1 Order, on its face, would lift the stay and proceed to adjudicate all the claims in basins 76L and 76LJ, including the over 10,000 claims filed by the United States and Tribes. This response addresses the issues raised by the Court's June 1 Order in the context of the recent federal and tribal claim filings that would be affected by the Court's June 1 Order.

II. Argument

A. A Stay Supports Settlement and Compromise. Denying a Stay Ignores the Montana Legislature and Diminishes the Benefits the Tribes, State of Montana, and United States Sought When the Three Sovereigns Invested Substantial Resources in Achieving a Compromise

Issuing a preliminary decree in basins 76L/76LJ will deprive the three sovereigns of the benefit of their bargain, and will contradict the expressed intentions of the State of Montana which adopted a settlement and set forth a time frame for other sovereigns to review and assent to the Compact. This Court should not cut short the United States Congress's review of the Compact, nor the Tribes' review. A stay will allow the United States and Tribes time to consider

[2] The United States' claim number ranges for FIIP are claim numbers 30079254-30080522 and 30082502-30082518.

ratifying the Compact and is consistent with the timeframe set forth in the Compact and passed by the Montana legislature.

Adjudicating claims on the Flathead Indian Reservation would amount to judicial interference with the actions of the Montana legislature: a settlement passed by the legislature and signed by the executive and then submitted to the Tribes and the United States for ratification would have key questions litigated at the outset by this Court, despite the fact that the Compact settles the claims at issue. That is not judicial review, but instead a competition between multiple branches of government to see whose judgment will determine various water rights issues on the Flathead Indian Reservation. Any claimants whose claims are stayed but who might disagree with the Compact will still be heard by this Court, either by objecting to the Compact after federal and tribal approval or having their claims adjudicated after a stay is lifted because the Compact fails. Lifting the stay now, though, would mean that the litigation within the reservation would resolve disputed issues before knowing if the settlement was "final." The State of Montana's approval of the Compact should suffice to allow the United States and Tribes time to approve or reject the compromise, and should not require the United States to expend its resources litigating the very issues that the Compact settles.

Adjudicating state-based claims in basins 76L/76LJ will require the United States to litigate issues settled by the Compact. For example, the Flathead Joint Board of Control has indicated its intent to defend claims for individual irrigators to the water used to operate the Flathead Indian Irrigation Project ("FIIP") owned by the Bureau of Indian Affairs. Exhibit B at 4 (various Flathead Joint Board of Control's Filings in Montana Water Court). The United States, at the proper time, will object to these claims (as well as many others). On the Flathead Indian Reservation "[t]he treaty impliedly reserved all waters on the reservation to the Indians,"

and "[b]eing reserved, water rights could be obtained only as specified by Congress." United States v. Alexander, 131 F.2d 359, 360-61 (9th Cir. 1942). The United States has claimed the waters for the FIIP as part of the water right of the Tribes. See note 2, supra. The Compact treats the water used by the FIIP as part of the Tribal Water Right. Compact, Article III C.1.a. Without a stay, the United States will have to litigate this issue (and many others) despite having already invested substantial efforts in achieving a settlement and waiting for approval of the settlement.

"Compromises are favored by the Court." State Highway Comm'n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (Mont. 1974). Furthermore, "the declared public policy of this State [is] to encourage settlement and avoid unnecessary litigation." Augustine v. Simonson, 283 Mont. 259, 266, 940 P.2d 116, 120 (Mont. 1997) (citations omitted). A stay preserves the compromise achieved in the Compact. If litigated, the Court and the parties will need to litigate questions of federal law and issues of fact in 54 of the 85 adjudication basins in Montana. Montana's declared public policy favoring settlements, the three sovereigns' investment in compromise, and the potential to avoid complex and expensive litigation all compel a continued stay until the Compact can be ratified.

B. Equity Favors a Stay

There is good cause to continue the stay. "[T]he 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) ("exercise of judgment [ ] must weigh competing interests and maintain an even balance"). In Henry v. Dist. Ct. of the Seventeenth Jud. Dist., 198 Mont. 8, 13, 645 P.2d 1350, 1353 (Mont. 1982), the Montana Supreme Court cited and echoed Landis, holding that a

stay of proceedings is appropriate when "balancing the competing interests" favors the movant and the movant "make[s] out a clear case of hardship or inequity . . . ." Id.

The Montana Supreme Court recognized several reasons to issue a stay: "[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 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, 645 P.2d at 1353 (quoting Landis, 299 U.S. at 255-256). This is a case of extraordinary public moment and the balance of harms favors a stay.

First, the conclusion of Compact negotiations followed by adoption of the Compact by the State of Montana is an extraordinary public moment. In this instance, delay of all tribal water rights and all claims on the reservation serves the public welfare and convenience. This extraordinary public moment will continue until the Compact is adopted by the United States and the Tribes, or until a party withdraws from the Compact pursuant to the Compact's explicit terms regarding withdrawal. The stay should continue 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 five years or the time when a party withdraws under the terms of the agreement, Compact, Article A.2, 4, whichever is earlier.

In short, this comprehensive settlement is an extraordinary public moment because, if passed by the United States Congress and Tribes, the Compact will settle the federal and tribal claims. Henry, 198 Mont. at 13.

Second, it would work a substantial hardship and inequity on the United States to litigate its objections to claims filed in basins 76L and 76LJ. Resolving its objections to those claims would undermine the Compact. Litigating the objections filed by the United States will involve resolution of legal questions which were part of the litigation risk analyzed when crafting the Compact. Most likely, the largest dispute will involve ownership of the irrigation water supplied by the FIIP. The Compact provides that FIIP water is part of the Tribal Water Right. Compact, Article III C.1.a. But claims supported by groups like the Flathead Joint Board of Control and individual irrigators are contradictory to the Compact's resolution of the Tribes' and United States' claims to the irrigation project water. Compare id. and Exhibit A with Exhibit B at 4, 6. Those irrigation claimants will still have the opportunity to have their claims adjudicated after the stay is lifted. But if those claims are litigated before the Congress and Tribes have considered adopting the Compact, it would alter the legal landscape which produced a settlement. If the United States prevails, and the binding rulings in United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939), and Alexander, 131 F.2d at 360-61, are correctly applied,

would the United States still be justified in supporting a compromise of its claims, when it might gain more through litigation? Likewise, if the United States does not prevail, might Montana find that the Compact gives too much? The whole purpose of a settlement is that it is a compromise of positions when the outcome is uncertain.

Losing the benefit of a settlement is a serious harm. "Most cases in our judicial system never make it to trial," because "litigants often find it advantageous to secure a resolution more quickly by settling the case and negotiating a result that the parties can tolerate, even though neither side can call it a total win." Dennis v. Kellogg Co., 697 F.3d 858, 861 (9th Cir. 2012) (Trott, J.). In the end, "the parties walk away — not entirely happy, but not entirely unhappy either." Id. Ending this stay and proceeding to litigation on any type of claim that addresses an issue determined by the Compact will leave someone entirely unhappy, much like the poker player who folded a hand with two pair thinking that his opponent might have something better and, when his adversary reveals her hand discovers that his own hand was superior. Settlements, like poker hands, are not negotiated with the benefit of hindsight. Here, all three sovereigns got something they can live with— resolving the unresolved questions that led to the Compact. Litigating those same issues and getting decisions would likely compel them to act differently if the Compact was not yet adopted.

Third, the continuation of the stay is consistent with Montana policy favoring settlements. See Simonson, 283 Mont. at 265, 940 P.2d at 119 ("Obviously, settlement avoids litigation with its attendant expenses and resultant burden upon the legal system.") (Citations omitted). The Compact, which was enacted by the Montana legislature, also emphasizes the need for a stay. Compact, Article VII D.2. To the extent that anyone 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. The stay anticipated by the Compact applies to all other claims on the Flathead Indian Reservation given their close interrelationship with the underlying legal issues associated with the federal and tribal claims as well as the Compact.

Finally, no individual will be injured by a stay because no adjudication has, as of yet, commenced. The United States respects that the Court is attempting to comply with demanding benchmarks related to completing a State-wide general stream adjudication. But a stay will serve that interest over the long term. Adjudicating these claims undermines the Compact, therefore, without a stay this Court may need to contend with the thousands of claims filed by the Tribes and the United States. This will require a substantial commitment of resources spanning decades from the Court, as well as the Tribes, Montana, and the United States.

III. Conclusion

For all of the above reasons, the United States respectfully requests that this Court order DNRC to complete the examination of all State-based claims in Basins 76L and 76LJ. The United States also requests that the Court order DNRC not to issue any summary reports. Fundamentally, the United States requests that the Court not issue any preliminary decree in these two basins.

The United States also asks that this Court decline to undertake the remaining steps suggested in the June 1, 2015 Order, and to allow the Compact to be considered by Congress and the Tribes without the burden of ongoing litigation that will raise issues that have been resolved in the Compact and become Montana law.

Dated this 8th day of July, 2015.

/s/ David W. Harder

David W. Harder,
Assistant Section Chief
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources
Division.
999 18th St.
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1372
david.harder@usdoj.gov

/s/ J. Nathanael Watson
J. Nathanael Watson, Trial Attorney
United States Department of Justice
Environment & Natural Resources
Division
Indian Resources Section
999 18th Street
South Terrace – Suite 370
Denver, CO 80202
joseph.watson@usdoj.gov

Attorney for United States of America

CERTIFICATE OF SERVICE

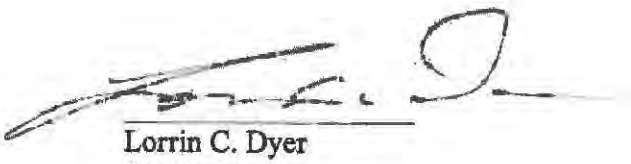
I certify that a copy of the foregoing **Response of the United States to the Court's Order Rescheduling Status Report and Hearing** was served upon the following persons by first class mail on this 8th day of July, 2015.

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

John Peterson
Adjudication Bureau Chief
Montana DNRC
PO Box 201602
Helena, MT 59620-1602

John B. Carter
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855

Bruce A. Fredrickson
Kristin L. Omvig
Rocky Mountain Law Partners, PLLP
1830 3rd Avenue East, Suite 301
PO Box 1758
Kalispell, MT 59903



Lorrin C. Dyer
Secretary

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DH

FILE

RECEIVED
JUN 26 2015
DNRC: [redacted]

U.S. Department of Justice

Environment and Natural Resources Division

DWH:lcd
90-6-2-93

REPLY TO:
David W. Harder
U.S. Department of Justice
999 Eighteenth Street
South Terrace, Suite 370
Denver, CO 80202

Telephone: (303) 844-1372
Fax: (303) 844-1350

June 25, 2015

By Federal Express For Delivery on June 26, 2015

John Peterson
Montana Dept. of Natural Resources and Conservation
ATTN: Tim Davis
P.O. Box 201601
1424 9th Avenue
Helena, Montana 59620

Dear Mr. Peterson:

The United States, the Confederated Salish and Kootenai Tribes ("Tribes"), and the Reserved Water Rights Compact Commission worked cooperatively for many years and with hard work and compromises on all sides were able to negotiate a compact. This year the Montana Legislature approved the compact and the Governor signed the ratification bill (SB 264) in late April. The United States strongly supports the government parties using the settlement path to resolve differences over water rights. We look forward to working with the Tribes and the State to seek ratification of the compact, but as the compact has not yet been ratified by the United States Congress or by the Tribes, the United States is today submitting water right claims in accordance with the state statutory process.

With the expiration of the stay of tribal water rights litigation on July 1, 2013, the United States is required to file its federal Indian reserved water right claims on behalf of the Tribes. 85-2-217, 85-2-702(3), MCA. Pursuant to that statutory dictate, please find attached a portion of the claims the United States files on behalf of the Tribes.[1] Specifically, we attach for filing the following claims on the enclosed DVD: 1,094 off-Reservation instream flow and lake claims, within claim numbers 30074702 – 30076226; 145 on-Reservation instream flow claims, within claim numbers 30076069 – 30076214; and 52 on-Reservation reservoir minimum pool claims, within claim numbers 30076227 – 30076278. The claim forms, and associated map books, are

[1] Additional claims for Reservation consumptive uses will be submitted under separate cover tomorrow.

EXHIBIT A

Exhibit A to Motion for Extension of Stay

provided in PDF Portfolio format on the enclosed DVD-ROM disk. (We enclose two identical copies of the disk.)

In off-Reservation instream flow and lake claims, one or more claims are being filed in 54 basins, totaling 1,094 claims. These claims are organized by DNRC drainage basin. Within the folder "OffReservation.zip," there is one claim pdf for each basin that contains all the claims for that basin, and one basin exhibit pdf, containing the associated maps. As an example, for Basin 40A, there are 31 claims contained in the "Basin40A.pdf," and "Basin40A_Exhibits.pdf" contains all the associated maps for the Basin 40A claims.

The 145 on-Reservation instream flow claims are found in the folder "OnReservation.zip." Unlike the off-Reservation instream flow and lake claims, the on-reservation claims have a single portfolio pdf for each individual claim. Each pdf contains the claim and the associated map/exhibit. As an example, the first claim has two pdfs entitled: "76L_30076086.pdf" and "76L_30076086.Exhibits.pdf."

Finally, the 52 irrigation project reservoir minimum pool level claims are found in the folder "OnRes_FIIP_ReservoirMinPool.zip." Similar to the on-Reservation instream flow claims, there is a single portfolio pdf for each claim, but with each claim there are three pdfs. One pdf of each claim group is the claim form and the other two pdfs are the associated tribal claim form and tribal claim exhibits. As an example, the first claim has three pdfs that are entitled: "76F_30076235.pdf," "CSKT_30031776.pdf", and "CSKT_30031776_Exhibits.pdf".

We reiterate the pledge made several months ago to provide DNRC with claim information and attributes that are compatible with its electronic filing system, later this year. Please do not hesitate to contact us with information or database related questions.

In addition to providing an overview of what is being submitted for filing, this cover letter also fulfills the statutory requirement of affirmation by the claimants' representatives that the claims submitted on the attached disc entitled "United States' Instream and Lake Claims" and dated June 25, 2015, are true and correct to the best of their knowledge and belief.

Finally, we have enclosed a copy of this submission letter and a self-addressed, postage pre-paid envelope. We ask that you return the copy of this submission letter after stamping it with the *date of the receipt* of this group of claims.

If you have any questions, please do not hesitate to contact us at the numbers listed below.

Michael Dammarell
Water Rights Specialist
Northwest Region
Bureau of Indian Affairs
911 N.E. 11th Avenue
Portland, OR 97232-4169
Phone: (503) 231-2269

David W. Harder
Assistant Section Chief
U.S. Department of Justice
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
Phone: (303) 844-1372

cc:
Duane Mecham
Jennifer Frozena
John Carter

NOTARY SEALS:

for Michael Dammarell only.

OFFICIAL SEAL
VALERIE H BAXTER
NOTARY PUBLIC-OREGON
COMMISSION NO. 467323
MY COMMISSION EXPIRES MAY 17, 2016

Valerie Baxter 6/25/15
Multnomah County, OR

for David W. Harder

KARMEN T MILLER
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID: 20054012105
MY COMMISSION EXPIRES MARCH 28, 2017

Karmen T. Miller 6/25/15
Denver County, CO.

U.S. Department of Justice

Environment and Natural Resources Division

2015 JUL -2

DWH:lcd
90-6-2-93

REPLY TO:
David W. Harder
U.S. Department of Justice
999 Eighteenth Street
South Terrace, Suite 370
Denver, CO 80202

Telephone: (303) 844-1372
Fax: (303) 844-1350

June 26, 2015

RECEIVED
JUN 29 2015
DNRC-[redacted]

By Federal Express For Delivery on June 29, 2015

John Peterson
Montana Dept. of Natural Resources and Conservation
ATTN: Tim Davis
P.O. Box 201601
1424 9th Avenue
Helena, Montana 59620

Dear Mr. Peterson:

The United States, the Confederated Salish and Kootenai Tribes ("Tribes"), and the Reserved Water Rights Compact Commission worked cooperatively for many years, and as a result of hard work and compromises by all sides, were able to negotiate a compact. This year the Montana Legislature approved the compact and the Governor signed the ratification bill (SB 264) in late April. The United States strongly supports the government parties using the settlement path to resolve differences over water rights. We look forward to working with the Tribes and the State to seek ratification of the compact, but as the compact has not yet been ratified by the United States Congress or by the Tribes, the United States is today submitting water right claims in accordance with the state statutory process.

With the expiration of the stay of tribal water rights litigation on July 1, 2013, the United States is required to file its federal Indian reserved water right claims on behalf of the Tribes. 85-2-217, 85-2-702(3), MCA. Pursuant to that statutory requirement, please find attached a portion of the claims the United States files on behalf of the Tribes. These claims are for actual uses and future uses on tribal and trust land on the Flathead Reservation. They are in addition to the on-Reservation and off-Reservation instream flow and lake claims submitted on June 25.

The claim forms, and associated map books, are provided in PDF format on the enclosed DVD-ROM. (We enclose two identical copies of the disk.) The location, format, and specific content of the various claim types on the DVD is provided in the attached table.

Exhibit A to Motion for Extension of Stay

We reiterate the pledge made several months ago to provide DNRC with claim information and attributes that are compatible with its electronic filing system, later this year. Please do not hesitate to contact us with information or database related questions.

In addition to providing an overview of what is being submitted for filing, this cover letter also fulfills the statutory requirement of affirmation by the claimants' representatives that the claims submitted on the attached disc entitled "United States' Commercial, Domestic, Industrial, Irrigation, Lake, Municipal, Power, Springs, Stockwater, Wells, and Wetlands Claims" and dated June 26, 2015, are true and correct to the best of their knowledge and belief.

Finally, we have enclosed a copy of this submission letter and a self-addressed, postage pre-paid envelope. We ask that you return the copy of this submission letter after stamping it with the *date of the receipt* of this group of claims.

If you have any questions, please do not hesitate to contact us at the numbers listed below.

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Assistant Section Chief
U.S. Department of Justice
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
Phone: (303) 844-1372

cc:
Duane Mecham
Jennifer Frozena
John Carter

NOTARY SEALS:

for Michael Dammarell only

OFFICIAL SEAL
VALERIE H BAXTER
NOTARY PUBLIC-OREGON
COMMISSION NO. 467323
MY COMMISSION EXPIRES MAY 17, 2018

Valerie Baxter 10/20/2015
Multnomah County, OR

for David W. Harder

KARMEN T MILLER
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID: 20064012105
MY COMMISSION EXPIRES MARCH 26, 2017

Karmen T. Miller 10/20/15
Denver County, CO

DVD Content Table for the United States' Commercial, Domestic, Industrial, Irrigation, Lake, Municipal, Power, Springs, Stockwater, Wells, and Wetlands Claims					
Basins	Folder/ClaimType	No. of Claims	Claim No. Range	USE	PDF Format on DVD
76L, 76LJ	DCMI	4	30082519 - 30082522	actual	One PDF per claim form and single exhibit PDF for all claims
76L, 76LJ	Future Use - DCMI	4	30082458 - 30082461	future	One PDF per claim form
76L, 76LJ	Future Use-IRRIGATION	4	30082454 - 30082457	future	One PDF per claim form
76L, 76LJ	Future Use-IRRIGATION RESERVOIR	14	30082462 - 30082475	future	Single PDF containing all claim forms
76L, 76LJ	Future Use- LARGE INDUSTRIAL	4	30082450 - 30082453	future	One PDF per claim form
76L, 76LJ	Future Use - POWER GENERATION	26	30082476 - 30082501	future	Single PDF per Basin containing all claim forms
76L, 76LJ	HIGH MOUNTAIN LAKES	180	30079070 - 30079249	actual	Single PDF containing all claim forms and three exhibit PDFs: Map Index Figure, NAIP Mapbook, and TOPO Mapbook
76L, 76LJ	IRRIGATION (FIIP)	1269	30079254 - 30080522	actual	Single PDF containing all claim forms and three exhibit PDFs: Map Index Figure, NAIP Mapbook, and TOPO Mapbook
76L, 76LJ	IRRIGATION (HIA)	835	30076502 - 30077336	actual	Single PDF containing all claim forms and three exhibit PDFs: Map Index Figure, NAIP Mapbook, and TOPO Mapbook
76L, 76LJ	IRRIGATION RESERVOIRS	19	30077337 - 30077355	actual	Two PDFs containing all Irrigation Reservoir and all FIIP Irrigation Reservoir Claim forms and three exhibit PDFs: Map Index Figure, NAIP Mapbook, and TOPO Mapbook
76L, 76LJ	POWER GENERATION	4	30079250 - 30079253	actual	One PDF per claim form and three exhibit PDFs: Map Index Figure, NAIP Mapbook, and TOPO Mapbook
76L, 76LJ	SPRINGS	238	30078832 - 30079069	actual	Single PDF per Basin containing all claim forms and five exhibit PDFs: (1) Map Index Figure for both Basins 76L and 76LJ, (2) NAIP Mapbooks for Basins 76L and 76LJ, and (2) TOPO Mapbooks for Basins 76L and 76LJ
76L, 76LJ	STOCKWATER	388	30077356 - 30077743	actual	Single PDF per Basin containing all claim forms and five exhibit PDFs: (1) Map Index Figure for both Basins 76L and 76LJ, (2) NAIP Mapbooks for Basins 76L and 76LJ, and (2) TOPO Mapbooks for Basins 76L and 76LJ
76L, 76LJ	WELLS	1927	30080523 - 30082449	actual	One PDF per claim form and five exhibit PDFs: (1) Map Index Figure for both Basins 76L and 76LJ, (2) NAIP Mapbooks for Basins 76L and 76LJ, and (2) TOPO Mapbooks for Basins 76L and 76LJ
76L, 76LJ	WETLANDS	1088	30077744 - 30078831	actual	One PDF per claim form and five exhibit PDFs: (1) Map Index Figure for both Basins 76L and 76LJ, (2) NAIP Mapbooks for Basins 76L and 76LJ, and (2) TOPO Mapbooks for Basins 76L and 76LJ
	Total	6004			

Attachment to the United States' June 26, 2015
Claim Filing Letter

Exhibit A to Motion for Extension of Stay

Jon Metropoulos
Metropoulos Law Firm, PLLC
50 S. Last Chance Gulch, Suite 4
Helena, Montana 59601
406-442-0285 Tele.
406-449-2256 Fax
jon@metropouloslaw.com

Attorneys for *Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts*

IN THE WATER COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND OF THE FEDERAL FLATHEAD INDIAN RESERVATION, BASIN 76L, IN RE: Water Right Owner FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS	Case No. WC-2013- Basin and Water Right Claim Nos. BASIN 76L 76F 166696 00 76L 166596 00 76L 166597 00 76L 166598 00 76L 166599 00 76L 166600 00 76L 166601 00 76L 166602 00 76L 166603 00 76L 166604 00 76L 166605 00 76L 166606 00 76L 166607 00 76L 166608 00 76L 166609 00 76L 166610 00 76L 166611 00 76L 166612 00 76L 166613 00 76L 166614 00 76L 166615 00 76L 166616 00 76L 166617 00 76L 166618 00 76L 166619 00 76L 166620 00 76L 166621 00 76L 166622 00 76L 166623 00 76L 166624 00 76L 166625 00 76L 166626 00 76L 166627 00 76L 166628 00 76L 166629 00 76L 166630 00 76L 166631 00 76L 166632 00 76L 166633 00 76L 166634 00 76L 166635 00 76L 166636 00 76L 166637 00 76L 166638 00 76L 166639 00 76L 166640 00 76L 166641 00 76L 166642 00 76L 166643 00 76L 166644 00 76L 166645 00 76L 166646 00 76L 166647 00 76L 166648 00 76L 166649 00 76L 166650 00 76L 166651 00 76L 166652 00 76L 166653 00 76L 166654 00 76L 166655 00 76L 166656 00 76L 166657 00 76L 166658 00 76L 166659 00 76L 166660 00 76L 166661 00 76L 166662 00 76L 166663 00 76L 166664 00 76L 166665 00 76L 166666 00 76L 166667 00 76L 166668 00

EXHIBIT B

Exhibit A to Motion for Extension of Stay

	76L 166669 00 76L 166670 00 76L 166671 00 76L 166672 00 76L 166673 00 76L 166674 00 76L 166675 00 76L 166676 00 76L 166677 00 76L 166678 00 76L 166679 00 76L 166685 00 76L 166686 00 76L 166687 00 76L 166688 00 76L 166689 00 76L 166690 00 76L 166691 00 76L 166692 00 76L 166693 00 76L 166694 00 76L 166697 00 76L 166698 00 76L 166699 00 76L 166700 00 76L 166701 00 76L 166702 00 76L 166703 00 76L 166704 00 76L 166705 00 76L 166706 00 76L 166707 00 76L 166708 00 76L 166709 00 76L 166710 00 76L 166711 00 76L 166712 00 76L 166713 00 76L 166714 00 76L 166715 00 76L 166716 00 76L 166717 00 76L 166718 00 76L 166719 00 76L 166720 00 76L 166721 00 76L 166722 00 76L 166723 00 76L 166724 00 76L 166725 00 76L 166726 00 76L 166727 00 76L 166728 00 76L 166729 00 76L 166731 00 76L 166732 00 76L 166733 00 76L 166734 00 76L 166738 00 76L 166739 00 76L 166740 00 76L 166741 00 76L 166742 00 76L 166743 00 76L 166744 00 76L 166745 00 76LJ 166680 00 76LJ 166681 00 76LJ 166682 00 76LJ 166683 00 76LJ 166684 00 76LJ 166695 00

COMBINED MOTION TO INTERPLEAD, FOR DECLARATORY JUDGMENT, AND FOR PERMISSION TO DEPOSIT PROPERTY IN THE COURT AND SUPPORTING BRIEF

MOTION

Movant Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts (FJBC) respectfully files this motion for Interpleader under Rule 22, M. R. Civ. P., for Declaratory Judgment under rule 57, M. R. Civ. P., and Title 27, Ch. 8, MCA, and for an Order under Rule 67, M. R. Civ. P., and Title 25, Ch. 8, MCA, permitting it to deposit its existing water right claims, listed in the caption, in this Court. The purpose of this motion is to secure possession of and control over the captioned water rights claims, made and owned by the FJBC, and the existing water rights to which they accord prima facie status, §85-2-227, MCA, by this Court pending its determination of the rightful legal and beneficial ownership of the water

rights and the characteristics of that ownership in a declaratory judgment.

It is imperative for the FJBC to lodge these claims in the Court at this time for two, interrelated reasons: First, there are unresolved conflicting claims to their ownership and concerning the characteristics of their ownership which protracted negotiations among all claimants and potential claimants have failed to resolve. These conflicts include a demand made, this day, December 6, 2013, to sign over these claims to other entities. Second, the FJBC, as explained more fully below, is involuntarily dissolving as a local government entity, casting uncertainty on and imperiling the ownership and the characteristics thereof of these claims and water rights, which are vital to the existence of hundreds of irrigators of approximately 109,000 acres.

Since, the FJBC is the only one of the claimants and potential claimants that legally represents all the affected irrigators and that filed its water rights claims in a timely manner, to protect the irrigators who are the beneficial users and owners of these water rights, it is necessary to secure these valuable property interests by depositing them in this Court.

The "characteristics" of the ownership of these claims and water rights, for the purposes of this motion, references whether they are owned in trust, with fiduciary obligations owing to the owners of the land irrigated by putting the water rights to beneficial use, as the FJBC asserts; or are they owned in toto by the individual land owners, as some land owners assert; or are they owned by some other entity, for example the federal Bureau of Indian Affairs (BIA), which has also made claims to these water rights, without the obligations and standards applicable to a fiduciary owner; or are they owned by the individual Districts, two of which now demand to receive a deed to the claims without, apparently any conditions as to the characteristics of their ownership.

Thus, the FJBC respectfully requests this Court grant its motions to not only fulfill its fiduciary duty to Land Owners in regard to these water rights but to protect the Land Owners themselves from adverse effects to them that would result from the loss of these rights or their compromise in a manner other than keeping with a fiduciary standard.

SUPPORTING BRIEF
Background

1. These claims are to the irrigation water rights appurtenant to fee land served by the federal Flathead Irrigation Project (Project) in Basin 76L. The land to which these claims secure appurtenant water rights is owned in fee. It was acquired by the current owners' predecessors in interest and it is owned pursuant to the provisions of the Flathead Allotment Act (FAA), 33 Stat. 302, Act of April 23, 1904, as amended, in particular by the Act of May 29, 1908, 35 Stat. 448, in which Congress authorized the construction of the Project. The reimbursable costs of constructing the Project were, for about eight (8) decades, a lien on these lands, which Congress specifically required. *See* §9, FAA, as amended by Act of May 29, 1908, 33 Stat. 448; *and see* Act of May 10, 1926, 44 Stat. 453, 464, requiring formation and operation of irrigation districts under state law to execute repayment contracts guaranteeing these liens and representing all such land. Those liens have been fully repaid.

2. The land to which these claims secure appurtenant water rights is within the boundaries of the federal Flathead Indian Reservation and is owned in fee.

3. The suspension of all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights pending compact negotiations terminated July 1, 2013. §85-2-217, MCA (2013). No legal obstacle exists to any party to this litigation, including the FJBC, invoking this Court's jurisdiction to protect its claims and rights implicated in such adjudication, equally with every and any other litigant and water rights claimant. The State of Montana Water

Court has jurisdiction over all these claims. *State ex. rel. Greeley, v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985).

4. The FJBC is a political subdivision of the state of Montana. §85-7-1612, (3) and (5) MCA; *Love v. Harlem Irr. Dist.* 802 P.2d 611, (1991). It serves as the "central control agency," §85-7-1605, MCA, of the three irrigation districts (Districts), which are also political subdivisions of the State. §85-7-109, MCA. The decision-making body of the FJBC consists of the elected commissioners of the three Districts plus one at-large appointed commissioner. There are twelve commissioners, five from the Flathead Irrigation district (FID), three each from the Mission (MID) and Jocko Valley (JVID) districts, and the at-large commissioner. The FID has approximately 87, 088 acres within its jurisdiction, the MID approximately 15, 089 acres, and the JVID approximately 7,031, for a total of 109, 208 acres.

5. These three Districts were established and have been operated under Montana law pursuant to specific congressional direction and authorization. Act of May 10, 1926, 44 Stat. 453, 464.

6. The FJBC made these claims in performance of its fiduciary duty to and on behalf of the irrigators-owners (Land Owners) of the fee-owned land on which the water is put to beneficial use. The FJBC asserts it owns the nominal or bare legal title to these claims and rights as a fiduciary for these Land Owners. *See Nevada v. U.S.*, 463 U.S. 110 (1983), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Ickes v. Fox*, 300 U.S. 82 (1937); *In re SRBA Case No. 39576, U.S. v. Pioneer Irrigation District*, 157 P.3d 600 (2007). The FJBC further asserts the Land Owners, who put the water to beneficial use, are the beneficial owners of these claims and rights. *Id.* Therefore, while both the FJBC and the Land Owners own property rights in them, the FJBC's ownership is as a fiduciary for the Land Owners and its actions in relation to them must

meet the high standards of a fiduciary. In any case, the beneficial ownership of the FJBC's claims and the water rights they represent is attached to the land and held by the owner thereof who put the water to beneficial use, perfecting the water right. The FJBC recently reaffirmed this duty in a Resolution, number 2013-7, adopted Wednesday, December 4, 2013. Exhibit 1.

7. The FJBC's ownership of the water rights these water right claims secure and the characteristics of that ownership—i.e. whether as a fiduciary for Land Owners or not--is contested. Some irrigators, many organized as part of an entity named the Western Montana Water Users Association, LLC (WMWUA), assert the Land Owners own the water right appurtenant to their land pursuant to Montana and federal law and, they argue, the FJBC merely filed these claims on their behalf as their authorized representative and holds no ownership interest in the water rights whatsoever. The United States Bureau of Indian Affairs (BIA) filed almost identical claims and also asserts ownership, but, it appears, not as a fiduciary. Additionally, the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT or Flathead Tribes) assert their ownership of all or part of the water rights represented by these claims, though they have not yet filed their claims in this Court and are not required to until July 1, 2015. §85-2-702(3), MCA. In addition, two of the three Districts assert a right to ownership of these rights, but, like the BIA, it appears not as a fiduciary. Exhibit 2.

8. The FJBC's ownership, possession, and control of these claims, and the water rights they represent, may be adversely affected by a change in its status in the near future. Two of the three commissioners from both the MID and JVID voted September 13, 2013, to withdraw their districts from the FJBC. If that is not rescinded or otherwise halted, the FJBC will dissolve after December 12, 2013. On November 22, these same commissioners finally stated publicly, and only in response to a direct question, that they will not rescind their decision to withdraw the

MID and JVID, even though a majority of their irrigator constituents urged them by Referendum to do so. Not until today, Friday, December 6, however, did these breakaway districts state their determination to take these water rights away. Exhibit 2. They provided no information whatsoever as to what they intend to do with them. Thus, these water rights, claimed and owned by the FJBC as a fiduciary for individual Land Owners, are not only contested but imminently threatened.

Argument

The water rights claims and existing water rights they represent are property owned or held by the FJBC that is the subject of multiple conflicting claims, exposing the FJBC to double or multiple vexatious legal actions and liability, and these claims are, therefore, the proper subject of Rule 22 Interpleader.

9. Interpleader and deposit in this Court are necessary both because of the conflicting claims to ownership of all or part of the property right in these water rights and because of the possible imminent dissolution of the FJBC. The FJBC and other claimants, including the WMWUA and the MID and JVID, are and have been engaged in controversies relating to the ownership and final disposition of these water rights, which, could expose the FJBC to double or multiple liability to Land Owners dependent on those water rights, particularly in light of the FJBC's fiduciary duty to them. It could also be exposed to multiple vexatious litigation arising from other claimants to these water rights. For example, the Twentieth Judicial District Court has issued two alternative writs of prohibition still in force preventing the execution of any WUA or other disposition that divests the Land Owners of their ownership interest in these water rights. *See* Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control, DV-12-327, Findings of Fact, Conclusions of Law, and Mandate, dated February 15, 2013. (Exhibit 3.) ; *and see* F. L. Ingraham v. Flathead Joint Board of Control, DV 13-102, Alternative Writ of

76LJ

Montana Water Court
PO Box 1389
Bozeman MT 59771-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

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

* *

ORDER SETTING HEARING ON REQUEST TO EXTEND STAY

On July 16, 2015 the Water Court held a hearing regarding a request to stay adjudication of Basins 76L and 76LJ. On July 27, 2015 the Water Court issued its Court Minutes and Order on Stay, which stayed portions of the adjudication process in Basins 76L and 76LJ until January 31, 2017.

On September 2, 2016 counsel for the Confederated Salish and Kootenai Tribes (CSKT) filed a Petition for Extension of Stay of Proceedings and Memorandum in Support and Request for Hearing. Therefore, it is

ORDERED a hearing on the request to extend the stay in Basins 76L and 76LJ will be held on **Thursday, September 22, 2016 at 2:00 PM.** The hearing will be held by telephone. 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.

If any party wishes to appear in person, they shall file a request no later than **September 16, 2016** and the Court will make its courtroom available at the **Montana Water Court, 1123 Research Drive, Bozeman, Montana.**

DATED this 8 day of September, 2016.

Russ McElyea
Chief Water Judge

Jeremiah D. Weiner, Esq.
Assistant Attorney General
State of Montana
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
(406) 444-2026
jweiner2@mt.gov

David Harder, Assistant Section Chief
J. Nathanael Watson, Trial Attorney
U.S. Department of Justice
ENRD/IRS
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1372 (Harder)
(303) 844-1348 (Watson)
david.harder@usdoj.gov
joseph.watson@usdoj.gov

John B. Carter
Rhonda R. Swaney
Daniel Decker
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855
(406) 675-2700
jccskt@cskt.org
rhonda.swaney@cskt.org
danield@cskt.org

Bruce A. Fredrickson
Kristin L. Omvig
Rocky Mountain Law Partners, PLLP
1830 3rd Avenue East, Suite 301
PO Box 1758
Kalispell, MT 59903
(406) 314-6011
bruce@rmtlawp.com
kristin@rmtlawp.com

John Peterson
Adjudication Bureau Chief
Montana DNRC
PO Box 201602
Helena, MT 59620-1602
(406) 444-6618
johpeterson@mt.gov
(Via Email Only)

Note: Service List Updated 9/2/2016

S:\Share\WC-BASIN FOLDERS\76L\Basin 76L and 76LJ Order Setting Hearing Re Request to Extend Stay 9-2-16 sjs.docx