TIMOTHY C. FOX
Attorney General
CORY J. SWANSON
Deputy Attorney General
CoSwanson@mt.gov
JEREMIAH D. WEINER
Assistant Attorney General
JWeiner2@mt.gov
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401
(406) 444-2026

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

* * * * * * * *

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,

Plaintiffs,

VS.

U.S. Bureau of Indian Affairs,

Defendant.

Cause No. DV-13-313

STATE OF MONTANA ATTORNEY GENERAL'S PROPOSED AMICUS CURIAE BRIEF

INTRODUCTION

Montana has an historic opportunity to settle the final remaining reserved water rights claims of the several Indian Tribes in Montana, rather than endure years of protracted adjudication, uncertainty over the litigation of complex legal and historical issues, and the attendant strain upon community relations that will come with such a process. The Confederated Salish & Kootenai Tribes (CSKT) are involved in negotiations with the State of Montana through the Reserved Water Rights Compact Commission (RWRCC), *see* Montana Dept. of Natural Resources & Conservation, RWRCC, http://dnrc.mt.gov/rwrcc/Default.asp (last accessed May 19, 2014), to settle the CSKT's federal reserved water rights claims within the State of Montana.

The RWRCC has successfully negotiated the reserved water rights claims of the other six federally-recognized Indian Tribes in Montana, as well as all of the United States' federal reserved water rights claims, resulting in a total of 17 Compacts that have been ratified by the Montana Legislature.[1] The CSKT is the final remaining Compact to be approved. The 2013 Montana Legislature did not pass that Compact, and the Governor of Montana and the CSKT Tribal Chairman have recently exchanged letters indicating a resumption of negotiations on one particular portion of the Compact that remains hotly disputed.

In February of 2014, the CSKT filed a Complaint in the United States District Court for the District of Montana seeking relief which in part affects the matters subject to the Compact negotiations and, in the event of a failure of the negotiating process, implicated in a comprehensive water rights adjudication in the Montana Water Court. The CSKT has cited the existence of two suits in this Court as one of the factors

[1] For a list of completed Compacts see: http://dnrc.mt.gov/rwrcc/Compacts/Compacts.asp. The Compacts are all codified in the Montana Code Annotated beginning with the Fort Peck Indian Reservation Compact at Mont. Code Ann. § 85-20-201, et. seq.

necessitating its suit in federal court;[2] the existence of a similar suit in the Montana Water Court is the other cited factor. *See* CSKT First Am. Compl. ¶¶ 10-12, U.S. Dist. Court for Dist. Of Montana, CV-14-44-M-DLC, Doc. No. 27 (May 5, 2014) (attached hereto as Exhibit 1).

Contemporaneous with this filing, the Attorney General has sought leave to file an *amicus* brief in the Montana Water Court case referenced above, and intends forthwith to seek leave to intervene in the CSKT federal district court case, in order to accomplish a single purpose: to ensure that no court undertakes an improper piecemeal adjudication of water rights in and around the Flathead Indian Reservation. Instead, the Attorney General strongly urges the parties to take advantage of one more opportunity to successfully reach a comprehensive CSKT Compact for the benefit of all Montanans and avoid lengthy, costly and divisive litigation.

ARGUMENT

THE DISTRICT COURT SHOULD REJECT THE FJBC'S REQUEST TO DETERMINE THE "CHARACTERISTICS" OF ITS WATER RIGHT CLAIMS, BUT MAY ENTERTAIN THE MATTER OF POST-FJBC OWNERSHIP OF THOSE CLAIMS

The now-defunct Flathead Joint Board of Control (FJBC) has requested the Court to grant an interpleader motion pursuant to Mont. R. Civ. P. 22, and to require / permit a deposit of its water rights claims with the Court pursuant to Rule 67. Neither of these procedural motions is necessary, and the Rule 67 motion is improper. But more importantly, the FJBC's effort to determine the ownership and characteristics of its water right claims should be carefully divided in order to determine the relief within the province of this Court – the ownership of the claims after the dissolution of the FJBC –

[2] These cases are *Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control*, Cause No. DV-12-327; and *Ingraham v. Flathead Joint Board of Control*, Cause No. DV-13-102.

and to deny the relief not properly sought from the Court – the request to determine the "characteristics" of the FJBC's water right claims.

I. The Court Is Without Jurisdiction to Entertain the FJBC's Request To Determine its Water Right Claims' "Characteristics"

The FJBC requests this Court to determine the "characteristics" of its water rights claims, by which it means "whether they are owned in trust" or by various claimants or entities such as individual irrigator land owners, irrigation districts, the Federal Bureau of Indian Affairs, some combination of the above, or some other person(s) or entity. FJBC Compl. ¶ 6 (Dec. 11, 2013). It also requests certification of this matter to the Chief Water Judge of the Montana Water Court pursuant to Mont. Code Ann. § 85-2-406.

Certification of this case is unnecessary, since the FJBC has filed a virtually identical complaint with the Water Court already. See *In Re Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground of the Federal Flathead Indian Reservation, Basin 76L*, Montana Water Court Case No. WC-2013-05 (attached hereto as Exhibit 2). Further, the issuance of such a declaratory judgment by this Court would impermissibly intrude into the exclusive jurisdiction of the Montana Water Court.

In dissolving an injunction and alternative writ of mandate issued by Judge C.B. McNeil on February 15, 2013, in *Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control*, Cause No. DV-12-327, involving a dispute over the possible disposition of water rights associated with the Flathead Indian Irrigation Project, the Montana Supreme Court affirmed that it was not within the jurisdiction of a district court to make determinations regarding the elements of water rights. *Western Mont. Water Users Ass'n, LLC v. Mission Irrigation Dist.*, 2013 MT 92, ¶ 24, 369 Mont. 457,

299 P.3d 346. Instead, the resolution of those questions lies within the exclusive jurisdiction of the Water Court. *See State ex rel. Jones v. District Court of the Fourth Judicial Dist.*, 283 Mont. 1, 7-8, 938 P.2d 1312, 1316-17 (1997); Mont. Code Ann. §§ 3-7-501 and 85-2-234(6). This Court should continue to abide by the Supreme Court's clear direction and decline to rule on the characteristics of the former-FJBC's water rights claims.

II. The District Court May Determine the Post-FJBC Ownership of Its Water Right Claims, As Distinct From Water Rights Adjudication

The FJBC seeks a declaratory judgment from this Court to determine who owns the various water right claims it filed in 1982, since it has now been dissolved into its three constituent irrigation districts. Compl. at ¶¶ 5, 11-15. The question of who owns the claims of the FJBC upon its dissolution – as distinct from the question of the ultimate validity of those claims – is in fact a property distribution issue that incidentally involves water rights rather than an adjudication matter. Such issues belong to district courts. *See State ex rel. Jones v. District Court of the Fourth Judicial Dist.*, 283 Mont. 1, 7-8, 938 P.2d 1312, 1316-17 (1997); *Kreur v. Three Creeks Ranch of Wyoming, L.L.C.*, 2008 MT 315, ¶ 24, 346 Mont. 66, 194 P.3d 634. It is essential to both the proper disposition of the case at hand and to the orderly operation of the Montana General Stream Adjudication that this Court not allow these two distinct matters to be conflated in this action.[3]

III. The Rule 67 Motion Is Improper and Unnecessary

Rule 67 provides, in relevant part, that "[i]f any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party -- on notice to every other party and by leave of court -- may deposit with the court

[3] Similar concerns are raised by various of the pleadings and motions that have been filed two other suits before this Court: *Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control*, Cause No. DV-12-327; and *Ingraham v. Flathead Joint Board of Control*, Cause No. DV-13-102. Although the Attorney General is not seeking leave to appear as an amicus in either of these cases at this time, he does encourage the Court to bear these jurisdictional issues squarely in mind in those cases as well.

all or part of the money or thing, whether or not that party claims any of it." Mont. R. Civ. P. 67(a).

A water right is not money, a bearer bond, a work of art or some other tangible piece of personal property that is capable of being physically delivered from person A to person B. Rather, it is "a usufructory [sic] right, which does not confer any actual physical ownership." *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 32, 361 Mont. 77, 255 P.3d 179. *See also Brennan v. Jones*, 101 Mont. 550, 567, 55 P.2d 697, 702 (1936). As a use right, it conveys a right to use water as against other would-be appropriators but does not bring with it ownership of the physical corpus of the water. *Trout Unlimited,*¶ 32. It is thus akin to an easement, which is similarly not capable of being physically deposited with a court, and consequently falls outside the ambit of Rule 67. *See Park County Rod & Gun Club v. Department of Highways*, 163 Mont. 372, 376-77, 517 P.2d 352, 354 (1973).

Even if water rights claims could be deposited pursuant to Rule 67, in this case such a deposit is unnecessary. As the FJBC points out, the water right claims in question have all been filed in the Montana General Stream Adjudication. Compl. at ¶¶ 11-15. There is no allegation these paper filings are in jeopardy, or that if they somehow went missing the water rights they claim would be lost. Accordingly, the purpose of Rule 67, to safeguard property, is not needed in this case. 12 Wright, Miller & Marcus, *Federal Practice and Procedure* civil 2d § 2991, 59,[4] *see John v. Sotheby's*, 141 F.R.D. 29, 34 (S.D.N.Y. 1992).

The Court should deny the Rule 67 motion as being improper, or in the alternative, the Court should exercise its sound discretion and deny the motion as being unnecessary. *See Cajun Electric Power Cooperative, Inc. v. Riley Stoker Electric Corp.*, 901 F.2d 441,

[4] Fed. R. Civ. P. 67 is materially identical to Mont. R. Civ. P. 67.

445 (5th Cir. 1990) (the granting of relief under Rule 67 lies within the "sound discretion" of the Court).

CONCLUSION

As evidenced by the many lawsuits now before this Court, the Montana Water Court and the federal district court, the matter of the water rights on and around the Flathead Indian Reservation is complex and the potential subject of protracted, divisive and costly litigation. The interests of the parties and non-parties, this Court and the State of Montana are best served by strictly respecting the role of the Montana Water Court as the appropriate forum for the determination of the validity and elements of claimed water rights. This is true not only because the CSKT's reserved water rights are currently the subject of negotiations that will hopefully lead to a successful Compact, but also because a comprehensive adjudication of these rights in the Water Court – should negotiations fail – is necessary to comply with the federal McCarran Amendment, 43 U.S.C. § 666, and to preserve the integrity of Montana's adjudication.

For these reasons, the Attorney General requests the Court to rule consistently with this *amicus* brief.

Respectfully submitted this 20th day of May, 2014.

TIMOTHY C. FOX
Montana Attorney General
CORY J. SWANSON
Deputy Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

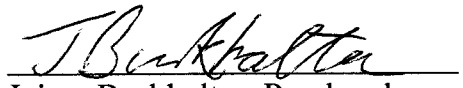
By: _____
JEREMIAH D. WEINER
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing STATE OF MONTANA ATTORNEY GENERAL'S PROPOSED AMICUS CURIAE BRIEF was served by U.S. mail on the following:

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

Dated: May 20, 2014



Jaime Burkhalter, Paralegal

John B. Carter
Ranald McDonald
Rhonda Swaney
Daniel Decker
Tribal Legal Department
CONFEDERATED SALISH AND KOOTENAI TRIBES
P. O. Box 278
Highway 93 North
Pablo, MT 59855
Ph: (406) 675-2700, ext. 1164
E-mail: jccskt@yahoo.com

James H. Goetz
GOETZ, BALDWIN & GEDDES, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: jim@goetzlawfirm.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v. UNITED STATES DEPARTMENT OF INTERIOR SECRETARY SARAH "SALLY' JEWELL; UNITED STATES BUREAU OF INDIAN AFFAIRS; JOCKO VALLEY IRRIGATION DISTRICT; MISION IRRIGATION	)	Case No. CV-14-44-M-DLC **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

DISTRICT; FLATHEAD IRRIGATION DISTRICT; DISTRICT COURT FOR THE TWENTIETH JUDICIAL DISTRICT OF MONTANA PRESIDING JUDGE HON. JAMES E. MANLEY; MONTANA WATER COURT CHIEF JUDGE RUSSELL McELYEA and ASSOCIATE WATER JUDGE DOUGLAS RITTER; MICHAEL G. MCLATCHY, BLANCHE CREPEAU, and ALEX CREPEAU; JUDY HARMS and ROBERT HARMS; BETTY A. STICKEL and WAYNE D. STICKEL; and AN UNKNOWN NUMBER OF JOHN DOE DEFENDANTS CLAIMING FIIP IRRIGATION WATER AS A PERSONAL WATER RIGHT, Defendants.	)	

Plaintiff Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (hereafter "Tribes"), brings this complaint for injunctive and declaratory relief and allege as follows:

PARTIES

1. The Plaintiff Confederated Salish and Kootenai Tribes ("Tribes") are a federally-recognized confederation of Indian tribes with a government operating in accordance with the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. The Tribes reserved from their aboriginal territory the Flathead Indian Reservation

("FIR") as their exclusive and permanent homeland pursuant to the Hellgate Treaty of July 16, 1855 (12 Stat. 975).

2. Defendant Bureau of Indian Affairs ("BIA") is a component of the United States Department of Interior, and is the owner of Flathead Indian Irrigation Project (hereafter "FIIP"), an Indian irrigation project created for the benefit of the Indians of the Flathead Indian Reservation pursuant to the 1904 Flathead Allotment Act, discussed below.

3. Defendant Secretary of Interior Sarah "Sally" Jewell, ("SOI") is the federal official responsible for the proper administration of the BIA, including the FIIP, and is the principal officer of the United States responsible for upholding the federal fiduciary relationship over tribal and Indian resources.

4. The Defendant Jocko Valley Irrigation District is an irrigation district located on the Flathead Indian Reservation, is organized under the laws of Montana and was created pursuant to Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

5. The Defendant Mission Irrigation District is an irrigation district located on the Flathead Indian Reservation, organized under the laws of Montana and was created pursuant to Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

6. The Defendant Flathead Irrigation District is an irrigation district located on the Flathead Indian Reservation, organized under the laws of Montana pursuant to the Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

7. All three Defendant irrigation districts are located within FIIP boundaries and entirely within the FIR.

8. The Defendant irrigation districts do not operate, manage or maintain FIIP nor do they employ any equipment, people or entity to do so.

9. The Defendant BIA, owner of FIIP, is presently reassuming its federal responsibility to operate and maintain FIIP from a recently defunct cooperative management entity comprised of BIA, the Tribes and the now-defunct Flathead Joint Board of Control. The FJBC was formerly a state-based representational entity that acted on behalf of the three Defendant irrigation districts.

10. The Hon. James E. Manley is currently exercising jurisdiction over the exclusively federal subject matter raised in this Complaint, ownership of irrigation water received from FIIP, in a case called Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control, Cause No. DV-12-327. Neither the Tribes nor the United States are party to that piecemeal water right adjudication.

11. Hon. James E. Manley of the District Court for the Twentieth Judicial District is also exercising jurisdiction over a case nearly identical to Western Water Users Association, LLC in a case entitled Ingraham v. Flathead Joint Board of Control, Cause No. DV 13-102. Neither the Tribes nor the United States are party to that suit and the Flathead Joint Board of Control, an entity created under Montana law, has since dissolved and ceases to exist.

12. Defendant Montana Water Court Chief Judge Russell McElyea or Associate Water Court Judge Douglas Ritter of the Montana Water Court are currently exercising jurisdiction over the exclusively federal subject matter of this Complaint, ownership of irrigation water received from FIIP, in In Re Adjudication of Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground of the Federal Flathead Indian Reservation, Basin 76L, Case No WC-2013-05. The primary litigants in this Water Court case are the same as in the Western Water Users Association, LLC case and are raising the same questions of ownership of water rights under FIIP. The Tribes have not waived their sovereign immunity to this piecemeal water right adjudication.

13. Defendants Michael G. McLatchy, Blanche Crepeau and Alex Crepeau are co-owners of water right claim number 76l-142449 00, claiming the FIIP Jocko K Canal as their source of irrigation water.

14. Defendants Judy M. Harms and Robert E. Harms are co-owners of water right claim number 76L 153879 00, claiming the FIIP Upper Dry Fork Reservoir as their source of irrigation water.

15. Defendants Betty A. Stickel and Wayne D. Stickel are co-owners of water right claim number 76L 143757 00, claiming the FIIP Camas Canal as their source of irrigation water.

16. The Tribes believe there are other persons who claim as a personal water right water diverted from FIIP irrigation facilities and therefore should be named Defendants, but Montana Department of Natural Resources and Conservation water rights records do not clearly disclose that information.

JURISDICTION AND VENUE

17. This is a suit for declaratory and injunctive relief. Jurisdiction is proper under the Declaratory Judgment Act, 28 U.S.C. § 2201. Federal question jurisdiction exists under 28 U.S.C. § 1331. Jurisdiction also arises under 28 U.S.C. § 1362, as this is a civil action brought by an Indian tribe and the matter in controversy arises under the Constitution, laws and treaties of the United States.

18. Venue is proper in Missoula Federal District Court pursuant 28 U.S.C. § 1391 (b) and 28 U.S.C. § 1362. Venue is also proper under Rule 3.2 of the Local Rules of Procedure of the United States District Court for the District of Montana.

FACTS

A. BACKGROUND.

19. The Tribes seek a declaration of the ownership of irrigation water that is collected, stored, diverted, and delivered by the Flathead Indian Irrigation Project of the Bureau of Indian Affairs, United States Department of Interior.

20. The reason the Tribes seek to enjoin the several State Court proceedings is that the parties to those multiple suits appear in each case to be attempting to relitigate issues already settled by the Federal Courts; that the Hellgate Treaty impliedly reserved all waters on the FIR to the Tribes, that such waters, being reserved, water rights could be obtained only as specified by Congress, and that the waters collected and distributed by the FIIP are subject to federal law. They also appear to be attempting to circumvent the McCarran Amendment requirement for a general *inter sese* water rights adjudication in the absence of necessary and indispensable parties, the Tribes and the United States. The litigants in each case seek rulings that either individual irrigators own private water rights delivered by FIIP, that the defunct Flathead Joint Board of Control owns water rights to the water delivered by FIIP or that the three Defendant irrigation districts own water rights for the irrigation water delivered by the FIIP.

21. The Tribes do not seek in this case to quantify the volume of any water rights of the Tribes or of any person or legal entity who may assert a claim to water rights on or off of the Flathead Indian Reservation (hereafter "FIR").

22. The United States Supreme Court has concluded that state courts have a "solemn obligation to follow federal law" when adjudicating the pervasive aboriginal and reserved water rights of the Petitioner Tribes. San Carlos Apache Tribe v. Arizona, 463 U.S. 545, 571 (1983).

23. The Montana Supreme Court has declared that state courts have a solemn obligation to follow federal law when adjudicating Indian aboriginal and reserved water rights. State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 Mont. 754, 768 (1985).

24. The Tribes seek this declaration of ownership to frame the federal law under which water for irrigation on the FIR will be adjudicated and quantified in a proper general *inter sese* water rights adjudication under the Montana Water Use Act that satisfies the McCarran Amendment, 43 U.S.C. § 666.

25. The Tribes reserve the right to challenge the adequacy of the Montana Water Use Act adjudication as applied to their water rights, a right acknowledged in Greely, supra at 768.

B. ABORGINAL HOMELAND.

26. Prior to July 16, 1855, the Tribes held aboriginal title to much of present day Montana and all it contained, including what is now called the Flathead Indian Reservation. Confederated Salish and Kootenai Tribes v. United States, 193 Ct.Cl. 801, 437 F.2d 458 (1971).

27. From time immemorial the Tribes exercised all aspects of ownership to waters throughout their aboriginal territory to perpetuate their lifestyle, including, but not limited to, fishing, hunting, trapping, gathering riparian plants, personal consumption, cultural and religious practices and travel.

28. As a result of expansion of the United States into the North American continent west of the Mississippi River, the United States determined the need to extinguish tribal aboriginal land title throughout the West to allow legally defensible acquisition of land by non-Indians throughout Indian country.

C. THE 1855 HELLGATE TREATY.

29. The United States determined that it needed to extinguish that portion of the Tribes' aboriginal land title to lands in what is today Montana west of the Continental Divide and initiated negotiations with the Tribes, resulting in the Hellgate Treaty of July 16, 1855 (12 Stat. 975).

30. The Treaty caused no break in the chain of Tribal title to Reservation lands. The FIR land was "reserved" for the Tribes and title went directly from Tribal aboriginal title to trust title held by the United States for its beneficiary, the Tribes.

31. Under Article 1 of the Hellgate Treaty the Tribes agreed to cede their aboriginal land title to land west of the Continental Divide in what is now Montana.

32. Under Article 2 of the Hellgate Treaty of July 16, 1855 (12 Stat. 975) the Tribes reserved from their cession the present FIR for their "exclusive use and benefit" in perpetuity, including all water necessary to maintain and develop the Reservation as their permanent and exclusive homeland and to satisfy all of the purposes for which the FIR was created, past, present and future.

33. In Article 3 of the Treaty the Tribes expressly reserved and retained their uninterrupted use and occupancy to continue their hunting, fishing and gathering practices on and off the FIR. The Tribes reserved to themselves and the United States guaranteed to protect,

> [t]he exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

34. Tribal members, pursuant to Article 3 and subsequent Tribal, Montana and federal law, have since time immemorial and to the present, hunted, fished and gathered flora and fauna on the FIR as well as off the FIR throughout the Tribes' aboriginal territory east and west of the Continental Divide.

35. In Article 4 of Hellgate Treaty, in order to assist the Tribes and its members to expand their agrarian practices, the President of the United States committed to provide the funding and expertise to implement the federal goals of "breaking up

and fencing farms, building houses for them, and for such other objects as he may deem necessary" for "the use and benefit of the said Indians."

36. The United States had many purposes for entering the Treaty beyond simply quieting aboriginal land title. For example, in Article 5 of the Treaty, the United States further committed to establish,

> an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said Indians, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop,; one wagon and plough-maker's shop; and to keep the same in repair , and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician.

37. Article 6 of the Hellgate Treaty anticipated that Tribal lands could be allotted to individual Indians.

38. Every purpose, past, present and future, for which the Tribes and the United States agreed to reserve the FIR is inextricably tied to water for either consumptive or non-consumptive uses by or on behalf of the Indians.

39. Under the federal reserved water rights doctrine enunciated in Winters v. United States, 207 U.S. 564 (1908), the Tribes reserved all water on, under and flowing through the FIR. See United States v. Alexander and Flathead Irrigation

District, 131 F.2d 359, 361 (9th Cir. 1942), where the Court, citing Winters, found that "[t]he treaty impliedly reserved all waters on the reservation to the Indians".

D. FIR EVENTS BETWEEN THE 1855 TREATY AND 1904.

40. The Flathead Indian "Reservation was a natural paradise for hunting and fishing." Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F.2d 458, 478 (1971).

41. During the period from July 16, 1855 to April of 1904, Tribal members expanded the agricultural and livestock-based component of their society on the FIR while continuing their hunting, fishing and gathering activities on and off the FIR.

42. By the mid 1800's, Tribal members were constructing ditches to bring irrigation water to their farms and, the United States initiated construction of irrigation ditches in the Jocko River Valley on the FIR to assist Tribal members in their agricultural pursuits.

43. By 1904, there were approximately 470 individual Indian farms involving irrigation practices on parcels of Tribal land on the FIR. These historic irrigation practices by members of the Tribes were recorded by the SOI in the 1920's and have become known as "Secretarial water rights" (hereafter "SWRs").

44. There is no Congressional authorization for the SOI to issue SWRs. Many of the SWRs are now claimed by non-Indian successors to the original Indian users of SWRs.

45. Pursuant to the terms of Article 2 of the Treaty, with several limited enumerated exceptions therein, no non-Indian could own land or claim water rights on the FIR at the time these historic Indian irrigation uses were initiated.

E. THE 1904 FLATHEAD ALLOTMENT ACT AND THE CREATION OF FIIP.

46. Indian tribal governments are subject to the plenary powers of Congress.

47. The Act of Congress dated April 23, 1904 (33 Stat. 302), commonly called the Flathead Allotment Act (hereafter the FAA), was enacted in spite of decades of express Tribal opposition to allotting their Reservation. The FAA has been amended numerous times since then. It is an allotment Act specific to the FIR.

48. The FAA has been judicially determined to have been an unlawful breach of the Hellgate Treaty. Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F.2d 458, 469 (1971).

49. The FAA, as amended, is the preemptive federal law on land title and irrigation water use on the FIR.

50. The FAA forced the allotment of Reservation lands to individual Indians of the Tribes and announced that pursuant to a future Presidential Proclamation,

certain unallotted Tribal lands would be opened to non-Indian entry under unspecified "general provisions of the homestead, mineral, and town-site laws of the United States." Act at Sec. 8. The required future Presidential Proclamation was not issued until May 22, 1909 and, thus, there was no non-Indian entry until after that date.

51. Section 9 of the 1904 FAA set the rules for how non-Indian entry-men could attempt to acquire unallotted Tribal lands; once the anticipated future Presidential Proclamation allowed such entry. These rules included payment of one-third of the SOI appraised value of the land at the time of entry and paid the remainder in five equal and successive annual installments.

52. If an entry-men failed to make any of the payments identified in Section 9 of the 1904 FAA, Congress declared that "all rights in and to the land covered by his or her entry shall at once cease and any payments theretofore made shall be forfeited and the entry shall be forfeited and cancelled."

53. Section 14 of the FAA directed the SOI to act as trustee for the Tribes when selling the unallotted Tribal lands left over after allotment and directed the SOI to expend the funds he received from the sales as follows:

> one-half shall be expended from time to time by the Secretary of the Interior as he shall deem advisable for **the benefit of the said Indians** and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time of this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and

> stock raising, and the education and civilization of said Indians, and the remaining half to be paid to the said Indians..., or be expended on their account, as they may elect. (Emphasis added).

54. The legislative history of the FAA demonstrates that early drafts of the Act referred to Tribal lands to be opened to non-Indian entry as "ceded" lands. Secretary of Interior E. A. Hitchcock advised against including "ceded" or "cession" language, as the Tribes had never agreed to such action, and the Congress, taking that advice, deleted any reference to homestead entry lands as having been ceded by the Tribes. See, Committee on Indian Affairs, House of Representatives, January 23, 1904, 58th Congress, 2nd Session, March 17, 1904, H. Rpt. 1678.

55. Significantly, Section 16 of the FAA specified two things:

> (1) "nothing in this Act contained shall in any manner bind the United States to purchase any portion of the [Tribal] land herein described," and
>
> (2) "it being the intention of this Act that the United States shall act as **trustee for said Indians to dispose of said lands** and to expend and pay over the proceeds received from the sale thereof only as received." (Emphasis added).

56. All lands within the FIR were reserved by the Hellgate Treaty of 1855 for the exclusive use of the Tribes. As a consequence, no lands within the FIR were ever "public lands" or "public domain." Such lands were never subject to the

general public land laws of the United States. No lands on the FIR were ever withdrawn from Tribal ownership under the 1902 Reclamation Act. The 1904 FAA, as amended, is the only Congressional enactment that ever allowed non-Indian entry within the FIR. Section 16 of the FAA makes clear that under a 'chain of title' analysis, the "surplus" unallotted Tribal lands that were opened for non-Indian entry went directly from Tribal title to non-Indian entry under the fiduciary management of the United States and therefore never carried a title status of "public lands" or "public domain".

57. The FIIP originated with the 1904 FAA which authorized the creation of irrigation project ditches for the benefit of the Indians.

58. Any federal use of water for irrigation purposes under FIIP derives from the senior pervasive Reservation-wide Tribal consumptive use water rights confirmed under the Winters decision.

59. The FAA contains an implied right to irrigation water to satisfy the federal purpose of developing and operating FIIP so long as water is being beneficially used for federal irrigation purposes under the FAA. The FAA granted the United States a secondary implied reservation of water to be derived from the larger senior pervasive Tribal Reservation-wide reserved water right. The secondary federal reserved irrigation water right has a priority date of the date of the 1904 FAA, April 23, 1904, a right junior to the Tribal reserved right.

60. The majority of the water delivered by FIIP arises on Tribal lands of the FIR and returns to Tribal lands and water bodies on the FIR.

61. FIIP diverts, stores and delivers irrigation water to approximately 127,000 acres of land, all within the boundaries of the FIR.

62. The FIIP service area is approximately equally divided between allotted and homesteaded lands.

F. THE 1908 LEGISLATION ESTABLISHED THE PROCESS TO OBTAIN A WATER RIGHT.

63. The Act of May 29, 1908, 35 Stat. 444, 448, amended Section 9 of the FAA in the following significant ways:

(1) reaffirmed that the FAA was enacted for the "benefit of said Indians" of the FIR;

(2) authorized the construction of a much more expansive irrigation system than initially addressed in the FAA, the Indian irrigation project now called "FIIP";

(3) directed that a system of application for water rights be established by the Secretary of Interior for homestead entry lands to be irrigated by FIIP requiring "the entryman or owner of any land irrigatable by any system hereunder constructed" to "pay for a water right," in addition to all other payments required by Section 9;

(4) directed that "failure to make any two payments when due shall render the entry and water right application subject to cancellation, with forfeiture of all rights under this Act";

(5) directed that "no such [water] right shall permanently attach until all payments therefore are made";

(6) directed that if any water-right application was cancelled, such lands and waters may be disposed of by the SOI;

(7) required "[non-Indian] entry-men or owner[s] of any land" to be served **by the FIIP to pay for a water right the proportionate cost of construction of the FIIP** bears to the land to be irrigated (emphasis added); and

(8) made clear that Indian-owned lands (ie, allotments and Tribally-owned lands) "shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction" of the irrigation works.

64. The above-addressed 1908 amendments to the FAA set forth a detailed and comprehensive means by which non-Indian entry-men could attain FIIP water rights. There was no governmental representation, explicit or implicit, that such non-Indian entry-men could obtain legal and binding water rights by any other means. Moreover, because Winters v. United States was decided in 1908, before

the Presidential proclamation of May 22, 1909, reported at 3 Kapp. 655, opening up certain non- allotted Tribal lands of the FIR for non-Indian entry, all non-Indian entry-men on the FIR staked their claims with actual or constructive knowledge of the pervasive water claims of the Tribes throughout the FIR.

65. The 1908 Act further amended Section 9 of the FAA by providing that,

> [w]hen the payments required by this Act have been made for the major part of the **unallotted lands** irrigable under any system and subject to the charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. (Emphasis added).

66. The legislative history of the 1908 Act demonstrates the Congress anticipated that "in all probability three-fourths of the irrigable lands would be allotted to Indians." See 60th Congress, 1st Session, March 7, 1908, H. Rpt. 1189

67. The 1908 Act also amended Section 14 of the FAA in the following ways:

(1) reformed how the SOI was to expend proceeds from the sale of unallotted Tribal lands so that the SOI would utilize and expend an unspecified amount Tribal funds derived from the sale of homestead lands for the construction of FIIP;

(2) provided that the SOI would spend whatever the remainder of the proceeds from the sale of Tribal lands "for the benefit of said Indians" for farming, livestock and to aid the civilization of said Indians; and

EX 1

(3) The 1908 Act did not amend or diminish Congress's stated intent in Section 16 of the FAA that required the SOI "to act as trustee for said Indians" as he sold unallotted Tribal land for non-Indian entry and expended such funds as directed under the FAA, as amended.

68. The FAA, as amended, is the exclusive Congressional authorization for the construction, operation and maintenance of FIIP. As such, the FAA preempts the field of law on that topic.

69. In the early part of the twentieth century the BIA contracted some of the construction of FIIP to the Bureau of Reclamation (BOR), but never conveyed title for FIIP to the BOR.

70. The BIA contractual relationship with the BOR was terminated by order of the Secretary of Interior in 1924.

G. <u>NON-INDIAN ENTRY AND SUBSEQUENT DEVELOPMENTS</u>.

71. On May 22, 1909, reported at 3 Kapp. 655, President Taft issued a Proclamation by the President of the United States opening certain unallotted Tribal lands of the FIR for non-Indian entry. President Taft stated that such lands,

> within the Flathead Indian Reservation in the State of Montana under the Act of Congress approved April 23, 1904 (33 Stat. L. 302) [the FAA], which have not been withdrawn under the Act of Congress approved June 17, 1902 (32 Stat. L. 388) [the 1902 Reclamation Act] .... Shall be disposed of under the provisions of the homestead laws of the United States.

EX 1

72. No lands on the FIR have ever been withdrawn from Tribal ownership under the 1902 Reclamation Act because there was no Congressional authorization for such withdrawal.

73. With two discrete Congressional exceptions, FIIP is not an irrigation project subject to the provisions of the 1902 Reclamation Act. Accordingly, the 1902 Reclamation Act does not apply to this BIA Indian irrigation project to any extent beyond that explicitly authorized by Congress. See Flathead Lands, October 22, 1921, Decisions of the Department of Interior in cases relating to the Public lands, Vol. 48, pp. 468, 470, 475, 477.

74. When Congress passed the Act of July 17, 1914 (38 Stat. 510) it expressly incorporated two discrete provisions of the 1902 Reclamation Act into the FAA. The first, the Act of June 25, 1910 (36 Stat. 592) allowed homestead entry-men to assign their entries. The second, the Act of August 9, 1912 (37 Stat. 265) provided that "purchasers of water rights certificates on reclamation projects shall be entitled to a final water-right certificate" once all sums due the United States are paid in full.

75. The Act of July 17, 1914 made clear that other than those two provisions of the 1902 Reclamation Act, "such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four

(thirty-third Statutes at Large, page three hundred and two)", the FAA, as amended.

76. The FIR has never been "public land" or public domain" for purposes recognized under federal public land. See Decisions of the Department of Interior in Cases Relating to The Public Lands, Vol. 48, February 1-April 30, 1922, pp. 476, 470. United States v. McIntire, 101 F.2d 650, 656 (9th Cir. 1939).

77. By 1916, it became clear to the SOI and Congress that the entry-men of unallotted Tribal lands had not made the required repayments for the cost of construction to date of the FIIP. Accordingly, the Act of May 18, 1916, 39 Stat. 123, 139, a BIA appropriations bill, directed the following steps:

(1) directed the SOI to return to the Tribes "for the benefit of the tribe" those Tribal proceeds from the sale of unallotted Tribal lands that Congress had improperly assigned to cover the cost of construction of FIIP under the 1908 amendment to the FAA; and

(2) expanded the timeframe from five to fifteen annual installments for repayment by individual homestead entry-men to repay the cost of construction of FIIP.

H. FORMATION OF LOCAL IRRIGATION DISTRICTS AND THEIR FAILURE TO MAKE PAYMENTS TO THE UNITED STATES.

EX 1

78. As of 1925, entry-men had paid approximately 1% of the $5,140,000.00 cost of construction. Accordingly, in a BIA appropriations Act dated May 10, 1926, 44 Stat. 453, 464, Congress directed that:

(1) funding for FIIP construction be withheld by Congress until the claimants of non-trust land formed irrigation districts under the laws of Montana for the purpose of entering into binding repayment contracts with the SOI under the FAA for the cost of FIIP construction;

(2) provided that "trust patent Indian lands shall not be subject to the provisions of the law of any district" as long as the trust title remained;

(3) directed that a portion of net power revenues generated by the yet –to-become-productive hydroelectric facility proposed to be built on Tribal lands on the FIR be assigned to, *inter alia*, pay for those responsible irrigators their costs of FIIP construction, thereby creating a subsidy to irrigators out of potential Tribal power site revenues; and

(4) prohibited the SOI from "granting of a water right to or the use of water by any individual for more than one hundred and sixty acres" served by FIIP.

79. Certain non-Indian water users filed a Petition in the Fourth Judicial District of the State of Montana, in and for the Counties of Lake and Sanders (now the Twentieth Judicial District) under the caption "IN THE MATTER OF THE

FORMATION OF THE FLATHEAD IRRIGATION DISTRICT to the Honorable Judge of the District Court, State of Montana" seeking an Order creating the Flathead Irrigation District.

80. In the third numbered paragraph of the Petition to form the Flathead Irrigation District, the petitioners acknowledged that,

> [a]ppropriations of the waters having been made for such purposes by the agents of the Secretary of Interior, pursuant to Federal Law, as aforesaid, and for the purpose of conveying and distributing the water to its place of use, the irrigation works have been constructed by the United States.

81. Subsequently, a State District Court issued three orders creating the three irrigation districts named as Defendants in this Complaint. All three Defendant irrigation districts filed similar petitions and all were similarly decreed. For purposes of simplicity in the Complaint, the Tribes will use the record on the Flathead Irrigation District as an example to represent all three irrigation districts named in this Complaint.

82. The State District Court Order establishing the Flathead Irrigation District, dated August 26, 1926, acknowledged the Petition addressed above as the basis for the Order and made the following conclusions:

(1) confirmed the District's assertion in its Petition that the FIIP was built by the United States (Petition p. 4);

(2) confirmed the District's assertion, contained in its Petition, that "appropriation of the water having been made for such purpose by the agents

of the Secretary of Interior, pursuant to federal law as aforesaid, and for the purpose of conveying and distributing the water to its place of use (Petition at p. 5); and

(3) provided numerous pages of legal land descriptions as those lands to be included within the Flathead Irrigation District.

83. The State District Court Order creating the districts did not grant water rights to the irrigation districts or any individual or other entity.

84. The August 26, 1926 State District Court Order establishing the Defendant Flathead Irrigation District specified at page 5 that,

> **appropriation of water having been made for such purpose by the agents of the Secretary of Interior, pursuant to federal law as aforesaid,** and for the purpose of conveying and distributing the water to its place of use, the irrigation works having been partially constructed by the United States. (Emphasis added).

85. The August 26, 1926 State District Court Order establishing the Defendant Flathead Irrigation District, reiterated that the United States built FIIP and appropriated water for it under federal law. That Order also specified that the district was created within the pre-existing FIIP system for the purpose of assumption of the debt for construction which individual irrigators have never paid.

86. The State District Court Orders establishing the three Defendant irrigation districts all demonstrate the following points:

(1) that the new districts have been formed within the pre-existing federal FIIP system years after FIIP had been established and been delivering irrigation water to lands now identified as district lands;

(2) that the United States had previously appropriated water for use under FIIP under federal law;

(3) that state irrigation law does not apply on trust land whether Tribally owned or owned by individual Indians; and

(4) that the Districts were formed to create legal entities that the United States could hold accountable for the individual irrigator's ongoing failure to pay their costs attributable to irrigation.

I. REPAYMENT CONTRACTS CREATE A SUBSIDY FOR IRRIGATION.

87. Those three districts each entered into repayment contracts with the SOI, as required by the 1926 Act, to repay the cost of construction of FIIP in fifty years.

88. Each District repayment contract has been subjected to fully-executed "Supplemental Contracts" and to one or more amendments, all similar in form and content.

89. The original Flathead District repayment contact, executed by the Flathead Irrigation District on May 12, 1928, and by the Secretary of Interior on November 24, 1928 contains:

EX 1

(1) a recitation of the several amendments to the FAA, and in particular the 1926 Act which required the formation of the districts and obligation to contract with the SOI to repay the cost of FIIP construction as well as annual operation and maintenance charges necessary to maintain FIIP facilities and Services (Contract #1);

(2) established a priority system for the net power revenues from an envisioned electric power generation and distribution system, also to be owned and operated by the BIA, in which the cost of construction to be reimbursed to the U S would be the third priority out of four and the cost of FIIP operation and maintenance would be last (Contract #1);

(3) prohibited the grant of a water right for more than 160 acres in one non-Indian ownership (Contract #1 and 13);

(4) Acknowledged that "the United States have [has] not been paid for as yet by the owners of the lands to be benefitted, and also certain charges for operation and maintenance of said works remain unpaid" (Contract #4);

(5) specified that the repayment contracts were for the express purpose of obligating the owners of non-trust land under the FIIP to pay "all charges of every nature in connection with said project in so far as the said project lands are included within the said districts", which includes the cost of construction and the cost for a water right (Contract #4);

(6) that the SOI shall have exclusive control and management of the FIIP "and all of the works and rights thereof." (Contract #5);

(7) the district "promises and agrees that it will levy annual assessments against the lands within its borders..., in such amounts that the total thereof shall not be less than the aggregate amount of the obligations due or estimated by the Secretary of the Interior or his agents to become due the United States...in order to procure and insure in each year the due assessment, levy and collection of an amount sufficient to discharge all obligations of this contract," (Contract #17); and

(8) made clear that "Title to all works and rights in connection with said project now existing in the United States shall so remain unless and until otherwise provided by law." (Contract #21).

90. The First Supplemental Contract for the Flathead District, dated February 27, 1929:

(1) incorporated subsequent amendments to the FAA as additional authority (#1 & 2);

(2) confirmed that the "Intent of the respective parties to said contract was to "comply fully with the several acts of Congress that were or may be enacted affecting the rights of the parties thereto" (#3); and

EX 1

(3) acknowledged that the required payment under the original repayment contract have not been satisfied and granted an extension of time, with interest, for the District to pay up by June 30, 1934 (#6).

91. Because the districts continued to fail to pay the costs required by Congress, the Second Supplemental Contract for the Flathead Irrigation District, dated March 28, 1934, further extended the time for the District to repay its accumulated construction and operation and maintenance assessments in "seventy (70) semi-annual installments with interest" starting on February 1, 1935. (#4)

92. The Third Supplemental Contract with the Flathead Irrigation District, dated July 13, 1936, extended the date for repayment of delinquent assessments for FIIP construction and interest thereon to commence on December 31, 1938. (#5)

93. The Defendant Districts still did not pay their contractual debt obligations to the SOI.

J. REPEATED CONGRESSIONAL REPRIEVES FOLLOWED BY REPEATED BREACHES OF THE IRRIGATOR'S OBLIGATION TO PAY FOR THE COST OF CONSTRUCTION AND FOR WATER RIGHT.

94. In 1948, for the third time Congress confronted the fact that the Defendant irrigation districts, just as their predecessor individual non-Indian irrigators, were

EX 1

not repaying the costs of construction of FIIP or the costs imposed by Congress to obtain a water right.

95. Congress amended the FAA again with the Act of May 25, 1948, (62 Stat. 269) to expand the federal subsidy to non-Indian irrigators under FIIP by once again addressing the failure of the Defendant irrigation districts to repay the cost of construction of FIIP. That Act rescinded all prior Congressional efforts to obtain repayment costs for FIIP construction for owners of non-Indian land "notwithstanding any provision of law to the contrary." In so doing, among other things, Congress:

(1) reconfigured the calculation of net power revenues identified in the 1926 Act to cause net power revenues to liquidate the cost of construction of FIIP in fifty annual installments commencing on January 1, 1950;

(2) authorized additional costs of construction as "reimbursable costs", thereby adding to the unpaid costs of construction; and

(3) did not eliminate the prior Congressional obligation to pay for a water right.

96. The Amendatory Repayment Contract for the Flathead Irrigation District, dated April 4, 1950, addressing "certain portions of the lands, costs, charges and benefits of the Flathead Indian Irrigation Project", as supplemented and now

EX 1

amended, was entered into in part to effectuate the new repayment provisions contained in the 1948 Act.

97. The Amendatory Repayment Contract modified the repayment obligation of the District to include as a cost to the District some of the preexisting delinquent matured installments for the cost of construction of the power and irrigation divisions of FIIP (#2, quoting Sec. 2 h 1 of the 1948 Act), and also simply cancelled some of the District's unpaid debt, thereby expanding even further the Congressional subsidy to irrigators on the FIR (#2, quoting Sec. 4 of the 1948 Act)

98. Section 6 of the Amendatory Contract states that the FIIP owns the "property or water rights held by the project for present or future use in connection" with power generation and distribution.

99. Section 6 c of the Amendatory Repayment Contract amended the District Repayment Contract to incorporate the net power revenues subsidy to the non-Indian water users and further amends the original repayment obligation to a 25 year schedule.

100. Section 11 of the Amendatory Repayment Contract rescinded and cancelled all prior Supplemental Contracts.

101. The practical effect of the 1926 and 1948 Acts was to excuse the duty of irrigators to pay their debts to the United States and to expand the subsidy to irrigators by requiring all electric power consumers on the FIR to pay the

irrigator's delinquencies with an add-on to their monthly power bills until the irrigator's debts be paid.

102. Not one iteration of the repayment contracts imposed any contractual duty on the United States to deliver any specific volume of irrigation water to any tract of FIR land served by FIIP.

103. The repayment contracts did not change or divest the BIA of title to FIIP then or prospectively nor did they divest the BIA of its federal duty to operate and maintain the FIIP.

104. Just as with the individual irrigators, the irrigation districts failed to pay the cost of construction of FIIP even under the Congressionally-mandated repayment contracts executed with the SOI.

K. NO NON-INDIAN OWNS A PRIVATE WATER RIGHT ON THE FIIP.

105. The Federal Courts have determined that the water on, under and flowing through the FIR was reserved by the United States for the Tribes, and "[b]eing reserved no title to the waters could be acquired by anyone except as specified by Congress." United States v. McIntire and Flathead Irrigation District, 101 F.2d 650, 654 (9th Cir. 1939).

106. The Acts of 1908, 1912, and 1926 (supra) specify how Congress directed the acquisition of water rights on the FIR by non-Indians. The only way to acquire a

water right from the SOI under FIIP is pursuant to an application process and regulations issued by the SOI. Once the required payments have been made, a person may receive a "final certificate of water right."

107. The Acts of 1908, 1912 and 1926 also specify that only persons who own 160 acres or less of irrigated land may acquire a water right under FIIP.

108. To the best information and belief of the Tribes, no person seeking a water right on the FIR has perfected the steps Congress has mandated as necessary to acquire a water right on the FIIP.

109. In response to a Freedom of Information Act request made by the Tribes inquiring whether any person has ever applied for and received a "final water right certificate" for water under FIIP, the Northwest Regional Director of the Bureau of Indian Affairs, the BIA Regional Office with responsibility for FIIP, responded in writing dated October 28, 2009, that,

> I have been informed by our subject matter expert, Mr. Julian Courville, Superintendent, Flathead Agency, there are no responsive documents to this request.

L. MONTANA'S GENERAL STATE ADJUDICATION OF WATER RIGHTS.

110. In 1973 the Montana Legislature passed the Water Use Act to administer, control, and regulate all water rights within the state of Montana and to establish a system of centralized records of all such rights. Section 85-2-101(1), MCA.

EX 1

111. In 1979 the Water Use Act was amended to specify the federal and Indian reserved water rights included in the proceedings for the general adjudication of existing water rights, either as claims or by compact. Section 83-2-701, MCA. That amendment directed the Montana Attorney General to petition the Montana Supreme Court to require all persons claiming a right to file a claim of the right as provided in § 85-2-221 and required the Montana Attorney General to include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted by the state by the McCarran Amendment, 43 U.S.C. § 666. See § 85-2-221, MCA.

112. Pursuant to that statute, the Montana Attorney General petitioned the Montana Supreme Court.

113. In 1982 the United States Department of Interior, BIA, filed water rights claims in its own name with the State of Montana for water necessary to serve the irrigation purpose of the FIIP.

114. In 1982 the United States Department of Interior, Bureau of Indian Affairs, acting in its official capacity as federal trustee for the Tribes, filed water rights claims with the Montana Department of Natural Resources an Conservation ("DNRC") for the Tribes for the entire FIR and identified itself as "Owner of the Water Right" and identified the Tribes as Co-Owner.

115. BIA identified the use of the water it claimed "on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation" to satisfy the broad spectrum of uses necessary to satisfy the homeland purposes for which the FIR was created.

116. The BIA also filed water rights claims on behalf of "Allottees of the Confederated Salish and Kootenai Tribes" to satisfy the purposes for which the Reservation was created and to fulfill the homeland purposes of the FIR for individual Indians.

117. The Tribes in their own right also filed "protective" water right claims with DNRC in 1982. The Tribes identified themselves as sole owner of the water right and attached a text treatment to explain the uses for which the water would be put. Those uses claim all water on, under and flowing through the FIR to satisfy the purposes for which FIR created.

118. The Montana Use Act provides for negotiations between the Montana Reserved Water Rights Compact Commission, the United States, and Indian Tribes. See §§ 85-2-701, 702, MCA. That Act provides that if negotiations for the conclusion of a compact are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of Tribes and federal agencies are suspended. Section 85-2-217, MCA. In the 1980s the Tribes commenced compact negotiations with the Montana Compact Commissions and

the suspension statute was repeatedly amended by the Montana Legislature to extend its application. Most recently the statute was amended to extend its effective date until July 1, 2013. By that date the Tribes had negotiated and reached a proposed compact among the United States, the Tribes, and the state of Montana. That negotiated compact, however, was not ratified by the 2013 Montana Legislature.

119. As a result of the failure to ratify, the suspension has expired and the statute requires that the Tribes are now subject to the special filing requirements of § 85-2-702(3), MCA, which require that new filings for Indian water rights must be made by June 30, 2015.

120. This statutory procedure for general adjudication is Montana's sole procedure calculated to comply with the general adjudication requirements of the McCarran Amendment, 43 U.S.C. § 666.

121. The current actions pending in Montana's Twentieth Judicial District Court and the Montana Water Court violate this exclusive statutory procedure for general adjudication and threaten to proceed with improper piecemeal adjudication in the absence of necessary and indispensable parties.

COUNT ONE

Declaratory Judgment

1. The Tribes reallege and incorporate all prior allegations.

EX 1

2. This case presents an actual controversy within this Court's jurisdiction and there is an important need for this Court to declare the rights and other legal relations among the parties interested in the matters herein. The Uniform Declaratory Judgment Act accords courts the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The Act is remedial and it is to be liberally construed and administered to permit courts to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.

3. All waters on the FIR for consumptive use were reserved by the Tribes pursuant to the Winters Doctrine. The priority date for Tribal and individual Indian consumptive water use is July 16, 1855. McIntire, supra.

4. The usufructory right to irrigation water collected, stored and delivered by the Flathead Indian Irrigation Project is a right impliedly reserved for the United States to satisfy the irrigation purposes expressed in the Flathead Allotment Act and is a part of the senior, pervasive, tribal water rights reserved to the Tribes under the Winters Doctrine to satisfy the purposes of the Flathead Indian Reservation.

5. The 1904 FAA implicitly reserved to the United States out of their senior pervasive Tribal Winters rights a volume of irrigation water to serve the federal irrigation purpose of the FIIP, with a priority date of April 23, 1904.

6. The substantive law governing ownership and use of all waters collected, transported, and diverted through the FIIP, including extent and nature of use and all associated usufructory rights is federal.

7. Because of the pervasive ownership by the Tribes and the pervasive trust ownership by the United States for the Tribes of the waters collected, diverted through the FIIP, any attempt to apply state water rights law is preempted, subject only to the provisions of the federal McCarran Amendment.

8. The chain of title to land on the FIR has never been broken and for that reason no lands within the borders of the FIR have ever been part of the public domain subject to the general public land laws.

9. The SOI has issued no person a "final certificate of water right" under the FAA.

10. As a matter of federal law the BIA is entitled to a volume of irrigation water adequate to maintain beneficial irrigation in the FIIP service area when such volumes of irrigation water are physically available within the FIR.

11. FIIP has always been a BIA Indian irrigation project and has never been a Bureau of Reclamation irrigation project.

COUNT TWO

Injunction

1. The Tribes reallege and incorporate all prior allegations.

EX 1

2. An injunction of the complained-of lawsuits pending in the Montana Water Court, and in the District Court of the State of Montana, Twentieth Judicial District, is necessary to protect and effectuate long-standing federal judgments that the Hellgate Treaty impliedly reserved all waters on the FIR to the Tribes, that such waters, being reserved, water rights could be obtained only as specified by Congress, and that the waters collected and distributed by the FIIP are subject to federal law and such rules and regulations as may be adopted by the U. S. Secretary of Interior. U. S. v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939); U. S. v. Alexander, 131 F.2d 359 (9th Cir. 1942). Because these state court actions are attempting to relitigate these settled federal issues, the anti-injunction statute, 28 U.S.C. § 2283, does not bar injunctive relief against the Defendant State Courts. Enforcement of Indian treaty rights is a national goal of the highest order and is a superior federal interest for purposes of the statute. An injunction of the state proceedings is necessary in aid of this federal Court's jurisdiction, and enjoining state proceedings is necessary to prevent state courts from so interfering with this federal Court's consideration or disposition of this case as to seriously impair the federal Court's flexibility and authority to decide the case.

3. The Defendant District Court for the Twentieth Judicial District of Montana is currently exercising jurisdiction in the two cases identified in the "Parties"

section of this Complaint that address the federal questions raised in this Complaint.

4. The Montana Water Court is currently exercising jurisdiction over the case identified in the "Parties" section of this Complaint.

5. In each court, non-Indians are asserting competing and exclusive claims of water rights for Indian Reservation water delivered by the BIA through FIIP.

6. The Twentieth Judicial District Court has expressly stated in an earlier decision in Western Water Users Association, LLC, dated February 15, 2013, Conclusions of Law, Number 2, that "the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either."

7. The Tribe and United States are necessary and indispensable parties to that determination and to move forward in their absence is a profound waste of judicial resources and will result in a judgment that is unenforceable against the Tribes and United States.

8. Nevertheless, the Twentieth Judicial District Court is proceeding with a trial on the question of ownership of water rights on the federal FIIP in the middle of the Tribes' Flathead Indian Reservation.

9. The District Court is engaging in piecemeal water rights adjudication in violation of the McCarran Amendment (43 U.S.C. § 666) requirement that federal and Indian reserved and aboriginal water rights be adjudicated in a general *inter*

sese adjudication, thereby seriously threatening the legal adequacy of the Montana Water Use Act state-wide general adjudication.

10. The Montana Water Court is currently exercising jurisdiction in Cause No. WC-2013-05 over the same dispute between the same litigants. This too runs the risk of violating the McCarran Amendment requirement for a general *inter sese* water rights adjudication between all water rights claimants and circumvents the Legislatively-established methodology to adjudicate aboriginal and reserved Indian water rights contained in Title 85, MCA.

11. As a result of the seemingly collusive litigation having been brought by the same litigants in two separate State courts, there is a potential of inconsistent State court rulings on the same question, regardless of McCarran implications.

12. The Tribes, a necessary and indispensable party in both state courts, have not waived their sovereign immunity to either piecemeal adjudication of water rights in either state court.

13. The Tribes have previously been adjudicated to possess legally protectable interests in quantifying their pervasive water rights on the FIR in a proper *inter sese* water rights adjudication. Greely, supra.

14. The concurrent state court proceedings pose a serious threat of inconsistent rulings on this federal matter, creating significant public confusion and uncertainty among all FIIP water users.

15. The concurrent state court proceedings pose a serious risk of disrupting the BIA obligation to deliver available irrigation water in the 2014 irrigation season and beyond and to impose upon all persons who receive irrigation water from FIIP a serious risk of financial hardship while their fields lay fallow.

16. There is no adequate remedy at law, there is a threat of serious and irreparable harm to all FIIP water users, including the Tribes, and therefore an injunction should be issued to the State District Court and State Water Court to cease all proceedings in the above-identified state court cases.

PRAYER FOR RELIEF

WHEREFORE, the Tribes request that the Court enter the following order:

A. A declaratory judgment reaffirming and declaring that:

1. the Hellgate Treaty did not implicitly diminish aboriginal water rights, Greely, supra;

2. when the FIR was created the United States reserved all waters on, under and flowing through the Reservation for the Tribes;

3. the chain of title to land on the FIR has never been broken and for that reason no lands within the borders of the FIR have ever been part of the public domain or subject to general public land laws;

4. after the FIR was created the Tribes continued their exclusive and uninterrupted use and occupation of Reservation lands and waters for hunting,

fishing and gathering practices. Tribal water rights for nonconsumptive aboriginal uses carry a priority date of "time immemorial." Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, 832 F.2d 1127, 1131 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988);

5. all waters of the FIR for consumptive use were reserved by the Tribes pursuant to the Winters Doctrine. The priority date for Tribal and individual Indian consumptive water use is July 16, 1855. McIntire, supra;

6. water rights on the Flathead Indian Reservation could only be acquired as specified by Congress. McIntire, supra;

7. Congress specified the only manner for any non-Indian to acquire a water right on the FIIP in the Acts of 1908, 1912, 1914 and 1926, addressed above, and that those conditions have not been met by any person;

8. the SOI has issued no person a "final certificate of water right" under the FAA;

9. the 1904 FAA implicitly reserved to the United States out of the senior pervasive Tribal Winters rights a volume of irrigation water to serve the federal purpose of the FIIP, with a priority date of April 23, 1904;

10. as a matter of federal law the BIA is entitled to a volume of irrigation water adequate to maintain beneficial irrigation in the FIIP service area when such

volumes of irrigation water are physically available within the FIR and do not adversely impact the Tribes' "time immemorial" instream flow rights; and

11. FIIP has always been a BIA Indian irrigation project and not a Bureau of Reclamation irrigation project.

B. Enjoining:

1. Judge James E. Manley of the District Court of the Twentieth District of Montana in Cause Nos. DV-12-327 and DV-13-105 from taking any action to determine who owns water rights, or claims to water rights made available through any FIIP irrigation facility, structure, reservoir ditch or other means; and

2. Chief Judge Russell McElyea and Associate Water Court Judge Douglas Ritter of the Water Court of the State of Montana in Cause No.WC-2013-05 from taking any action to determine who owns water rights, or claims to water rights made available through any FIIP irrigation facility, structure, reservoir ditch or other means.

C. Awarding the Tribes' reasonable attorneys fees and costs.

D. Awarding such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 15th day of March, 2014.

/s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND
KOOTENAI TRIBES
Attorney for Plaintiff

EX 1

CERTIFICTE OF SERVICE

I hereby certify that on the 15th day of May, 2014, a copy of the foregoing document was served on the following persons by the following means:

1, 2, 3, 6, 7	CM/ECF
_____	Hand Delivery
4, 5, 8	U.S. Mail
_____	Overnight Delivery Service
_____	Fax
_____	Email

1. Clerk, U.S. District Court

2. Victoria Francis, Assistant U.S. Attorney
U.S. Attorney's Office
260 Second Avenue North, Suite 3200
Billings, MT 59101

3. Jon Metropoulos,
METROPOULOS LAW FIRM, PLLC
50 S. Last Chance Gulch, Suite 4
Helena, MT 59601

4. Blanche Crepeau
103 Imperial Way
Missoula, MT 59803

5. Alex Crepeau
103 Imperial Way
Missoula, MT 59803

6. W. John Tietz
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624

7. Duncan Scott
Scott & Kienzle, P.C.

EX 1

1001 South Main Street
Kalispell, MT 59901

8. Michael G. McLatchy
1575 Council Way
Missoula, MT 59808

/s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND
KOOTENAI TRIBES
Attorney for Plaintiff

EX 1

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

EX 2

	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

EX 2

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

Prohibition, dated April 15, 2013. (Exhibit 4.) These may be dissolved without resolving these ownership issues, however. Thus, the exposure of the FJBC to multiple liability and the vexation of litigations is clear as is the need for the proper court to decide the question of ownership of these water claims and rights and the characteristics of that ownership.

10. Additionally, these water right claims and water rights had been one of the objects of negotiations between the FJBC, the Flathead Tribes, and the United States, to develop a Water Use Agreement (WUA) controlling the operation of the Project, in particular its delivery of water, resolving the conflicting claims to the water rights appurtenant to the Land Owners' real property. The existing, proposed WUA, unexecuted, would have assigned the irrigation water right ownership to the Tribes. As such, it had been envisioned that such an agreement would be an Appendix to any Compact resolving the Flathead Tribes' reserved water rights claims. No such agreement has been concluded, in large part because of the conflicting claims regarding the ownership, and characteristics thereof, of the FJBC's water rights claims. Consequently, negotiations on that Compact have stopped, and the suspension of all proceedings in relation to this adjudication ended on July 1, 2013. §85-2-217, MCA (2013).

11. In light of the possible imminent dissolution of the FJBC, therefore, it is imperative that the ownership and control of these water rights claims, and the water rights they represent, be interpleaded and deposited for security purposes in the Water Court until it can be determined who owns them and what the characteristics of that ownership are; whether, in fact and law, the owner of the bare legal title holds them as a fiduciary for the Land Owners, as the FJBC asserts, whether the Land Owners themselves own so much of those claims and rights as are appurtenant to their land, or whether they are owned by some other person or entity or with some other legal characteristics.

Rule 67 permission to deposit these claims in this Court is appropriate to protect them for the beneficial users until ownership and the characteristics thereof can be determined.

12. The imminent dissolution of the FJBC presents a threat to the security of these claims and the water rights. First, if the FJBC dissolves as a legal entity, it is unknown whether these claims will survive and, if so, under whose ownership and with what ownership characteristics. Second, if the ownership of these claims does, in fact, devolve, at least in part, to another entity, such as the MID and JVID, if the characteristics of that ownership are not determined by this Court, they may compromise these claims in a manner violating the fiduciary duty to Land Owners. As noted above, the commissioners who voted to withdraw the MID and JVID from the FJBC have refused to state what their plans are in this regard. But their decision to with draw, first taken June 14, 2013, was in large part in response to the rejection by the FJBC of the existing Proposed WUA, which would have required the FJBC to dismiss these claims and assigned ownership of the water rights to this water to the Flathead Tribes. Such an agreement would patently violate the FJBC's fiduciary duty to Land Owners.

13. Thus, deposit in this Court is necessary, and appropriate, to prevent disposition of these claims until their ownership and the characteristics of that ownership, which will necessarily affect the terms on which these claims may be either adjudicated or settled through compromise, is determined.

Declaratory judgment is appropriate on this motion, and the FJBC respectfully requests the Court to establish a schedule for discovery and briefing.

14. The issues presented by this motion as to the ownership of the FJBC's water rights claims and water rights and the characteristics of that ownership, are appropriate for a declaratory judgment ruling under Rule 57, M. R. Civ. P., and Title 27, Chapter 8, MCA. The pressing issue at this time, however, concerns the interpleader and deposit in this Court of the FJBC's water

rights claims, as explained above. Consequently, movant FJBC provides notice to the Court that it intends to file a brief supporting its motion for declaratory judgment in due time, as this matter procedurally is settled and a schedule established. The FJBC will therefore ask the Court, in due time, to establish a schedule for processing this motion, including discovery, and ensuring that all appropriate parties are given the opportunity to submit evidence and arguments.

Conclusion

The FJBC, for all the reasons stated above respectfully requests that this Court grant its motions. This motion is made in the interests of justice, to ensure the rights of all parties and claimants, and for no improper purpose.

Dated this 6th day of December, 2013.

Jon M. Metropoulos

CERTIFICATE OF SERVICE

This document has been served on the following attorneys known to represent stakeholders and claimants by U.S. mail and electronically. Movant understands the Water Court will also post notice in accordance with its procedures.

F.L. Ingraham
Ingraham Law Offices, LLC
10 Adams Street, S.E.
Ronan, MT 59864
Attorney for F.L. Ingraham

John Tietz
Steve Wade
Browning, Kaleczyc, Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624

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

Duane Mecham
U.S. BIA
By email only

Ranald MacDonald
By email only

Dated this 6th day of December, 2013.

EX 2

Flathead Joint Board of Control
Resolution 2013-7

Be it resolved by the Flathead Joint Board of Control, that:

Whereas, the majority commissioners of the Mission and Jocko Valley Irrigation Districts, Paul Wadsworth, Jerry Johnson, Kerry Doney, and Roger Christopher, who are a minority of the FJBC, voted twice to withdraw from the FJBC;

Whereas, a Referendum intended to ascertain the will of irrigators regarding these issues returned a vote of a majority of irrigators opposing the withdrawal of the MID and JVID from the FJBC, but, on November 22, those minority commissioners stated they would nevertheless proceed with their determination to withdraw the districts they represent from the FJBC;

Whereas, the FJBC and its commissioners owe a fiduciary duty to the irrigators and the constitutions of the United States and the State of Montana require that they respect irrigators' property rights in land and water rights and not assist in a taking of irrigators' valuable real property rights and water rights without compensation;

Whereas, none of the three irrigation districts filed water right claims in the Water Court, and the majority commissioners of the MID and JVID have refused to state their intentions as to the FJBC's claims, appearing to be willing to dismiss them in favor of another claimant;

Whereas, the legal effect of the involuntary dissolution of the FJBC on its water rights claims is uncertain and may be adverse to the irrigators to whom the FJBC owes a fiduciary duty.

Resolved that the FJBC, by and through its Chairman, is authorized and directed to take all available legal steps to amend its water right claims and to secure, protect, defend, and prevent such real property rights from any relinquishment or compromise in contravention of its fiduciary duty, including, but not limited to, amending those claims in administrative and judicial institutions.

Resolved, that the FJBC Chairman is directed to take all steps necessary to amend all 146 water right claims to accomplish the following purposes. First, the FJBC shall amend the owner name on all 146 water rights claims to identify two alternatives to the ownership of the water rights. Second, this amendment shall seek to ensure that, if the Water Court determines the FJBC owns the water rights, then the claim reflects the fact the FJBC owns them merely as a fiduciary for fee land owners of irrigable land in accordance with the applicable legal foundations, including but not limited to, the individual owners' title to land and water rights obtained pursuant to the Flathead Allotment Act, 33 Stat. 302, Act of April 23, 1904, as amended. *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) supporting both alternative forms of ownership of the water right. This amendment reflects the legal fact that the landowners are either the owners of the water rights appurtenant to their land in toto or, at the least, they are the beneficial owners of the water rights, possessing a legally

Exhibit 1

EX 2

enforceable real property right to receive irrigation water. The irrigated landowners received the water right by virtue of their patents and operation of federal and state law. Further, the irrigated landowners and their predecessors, not the FJBC or any other entity, put the water to beneficial use. The individual landowners' beneficial ownership of these water rights, after adjudication, must result in the issuance of decrees by the Water Court either in the names of the individual landowners or the FJBC, as fiduciary for them. *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). Third, the FJBC shall amend the claimed priority dates back to the claims originally asserted--various dates. In conjunction with the amendment of the name, this clarifies that the legal bases of these water rights is both the water law of the State of Montana and federal common law and case law applicable to Walton water rights. Further, under the doctrine of "relation back" or "tacking," this amendment shall assert that the priority dates in appropriate instances may be earlier than the dates water was put to beneficial use and shall reserve the right to argue for an earlier priority date.

Adopted this day 04 DEC 2013

Approved Christopher Bonner Cole

Attested Jim I. Baker

EX 2

Gmail

Monday FJBC meeting

John Tietz <john@bkbh.com> Fri, Dec 6, 2013 at 8:53 AM
To: Jon Metropoulos <jon@metropouloslaw.com>
Cc: Steve Wade <stevew@bkbh.com>

Jon,

A draft quitclaim deed for the FJBC property is attached for your review.

In addition to the building, it is also going to be necessary for the FJBC to quitclaim the water rights held in its name to each of the individual irrigation districts before the FJBC dissolves on December 12th. If the FJBC does not convey the water rights now, there will be no entity to effectuate the transfer after dissolution. I am working on a draft QTC for each of the districts, and will try to get copies to you for review early this afternoon.

John.

W. John Tietz
Browning, Kaleczyc, Berry & Hoven, PC
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624

(406) 443-6820
(406) 443-6883 (fax)

john@bkbh.com
www.bkbh.com

-----Original Message-----
From: Jon Metropoulos [mailto:jon@metropouloslaw.com]
[Quoted text hidden]

FJBC QTC.pdf
9K

Exhibit 2

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

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

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

Plaintiff,

vs.

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

Defendants.

Cause No. DV-12-327

FINDINGS OF FACT, CONCLUSIONS OF LAW AND WRIT OF MANDATE

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

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

Good cause appearing therefore, the Court makes the following:

Exhibit 3

EX 2

FINDINGS OF FACT

1. That on December 12, 2012, Plaintiff filed a Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief.

2. That Mont. Code Ann., § 27-26-102 provides for a Writ of Mandamus to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station.

3. That Plaintiff's first claim for relief relies upon Mont. Code Ann., § 27-8-101, *et seq.*, the Uniform Declaratory Judgment Act and upon Mont. Code Ann, § 27-19-101 *et seq.* for injunctive relief.

4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court issued on December 14, 2012 an Alternate Writ of Mandamus commanding Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-1957 OR that Defendants file an Answer within 30 days of the Alternate Writ.

5. That Defendants did file an Answer January 16, 2013. That ¶ 15 of Defendants' Answer admits that approval of the FIP Agreement by the Flathead Joint Board of Control (hereinafter "FJBC") would be illegal for several reasons.

6. That Plaintiff is an LLC organized under the laws of the State of Montana and its members (hereinafter "Irrigators") all own fee simple lands with appurtenant water rights within the Defendants' Irrigation District and all are physically located within the exterior boundaries of the Flathead Indian Reservation.

7. The Defendants Mission, Jocko Valley and Flathead Irrigation Districts were all formed under the laws of the State of Montana for the purpose of providing effective public agencies for the improvement, development, operation, maintenance and administration of irrigation systems.

EX 2

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

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

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

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

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

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

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

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

EX 2

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1. That Plaintiff's Petition and Complaint is based upon an Exhibit "A", Public Review Draft Agreement between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the the U.S. Department of Interior, and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts.

2. That the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either.

3. That the Flathead Joint Board of Control and all the irrigation districts were all created under Montana law and are subject to the jurisdiction of this Court.

4. That the statutory purpose for which the three irrigation districts and the Flathead Joint Board of Control were created is to operate irrigation districts. That the irrigation districts and FJBC have no ownership interest in any water rights which are individually owned by the Irrigator members of the Districts. The statutes authorizing the creation of said districts and Joint Board of Control for such purpose are void of any authority for the FJBC to enter into any agreement which provides for the assignment of the water rights privately owned by the Irrigators to the Tribes.

5. That there also is a void of any authority for the FJBC to enter into an agreement which provides for the assignment of the Irrigators' water rights to the Tribes without just compensation for their valuable water rights in violation of the Montana Constitution.

6. That there also is no authority for the FJBC to enter into any agreement which provides for an assignment of the Irrigators' water rights to the Tribes as a pre-condition to becoming members of the FIIP when such agreement contains no contractual agreement by the Tribes to issue any water right to any Irrigator whether designated "reallocated right" or otherwise.

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

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

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

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

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

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EX 2

WRIT OF MANDATE

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

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

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

Rationale

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

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

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

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

DATED this 15th day of February, 2013.

C. B. McNEIL

C.B. McNeil, District Judge

EX 2

CERTIFICATE OF SERVICE

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

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

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

Attorneys for Plaintiff

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

Attorney for Defendants

Verna Shannon
Judicial Assistant

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F.L. Ingraham

Attorney for Plaintiff

MONTANA TWENTIETH JUDICIAL DISTRICT COURT,
LAKE AND SANDERS COUNTIES

F.L. INGRAHAM,	)	**Cause No.** DV-13-102
	)	
	)	**Judge:** C.B. Mc Neil
Plaintiff,	)	
	)	**ALTERNATIVE WRIT OF**
v.	)	**PROHIBITION**
	)	
FLATHEAD JOINT BOARD OF CONTROL,	)	
	)	
Defendant.	)	

TO THE ABOVE NAMED DEFENDANT: FLATHEAD JOINT BOARD OF CONTROL:

THIS MATTER came before the Court upon the Petition of F.L. Ingraham dated April 15th, 2013 and the attached *Affidavit* of F. L. Ingraham, who is beneficially interested in this matter. It appears to the Court by the *Petition for Writ of Prohibition* and the attached affidavit that the Defendant, that the Flathead Joint Board of Control, must not enter into the proposed FIP Agreement because it would be void as illegal and *ultra vires* acts because the proposed FIP Agreement delegates Defendants' powers away to the Cooperative Management Entity in paragraph V on page 8, paragraphs 20 and 21 on page 12, paragraph 29 on page 16, paragraph 30 on page 17, which therefore renders the proposed FIP Agreement void. This is not meant to be an exhaustive list and provisions in other paragraphs are dependent upon the faulty premises set forth in the above paragraphs.

Exhibit 4

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It appears to the Court that there is not a plain, speedy, and adequate remedy in the ordinary course of the law;

By an order of this Court made in the above-entitled action on the 15th day of April, 2013, it was ordered that an *Writ of Prohibition* should issue to you; now therefore,

The Court commands that you either:

1. Refrain from approving the FIP Agreement unless it is revised substantially to ensure that Defendant does not delegate its powers away to other entities by enacting a FIP Agreement with provisions set forth in paragraph 2 on page 2 above; or

2. File an Answer within 30 days of this Order and a hearing shall be ordered so you may show cause before this Court as to why you have not or will not do so on a date to be determined by the Court after a pre-hearing scheduling conference with the parties' counsel.

DONE this 15th day of April, 2013.

T. B. McNeil
District Judge

EX 2