

DANIEL J. DECKER
Managing Attorney
MELISSA SCHLICHTING
CHRISTINA M. COURVILLE
ZACH ZIPFEL
Staff Attorneys
Confederated Salish and Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855
406-675-2700
daniel.decker@cstk.org
melissa.schlichting@cstk.org
christina.courville@cstk.org
zachary.zipfel@cstk.org

RYAN C. RUSCHE
Sonosky, Chambers, Sachse, Endreson &
perry LLP
P.O. Box 2930
Columbia Falls, MT 59912
rusche@sonosky.com

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

**CONFEDERATED SALISH & KOOTENAI TRIBES’ ADDITIONAL BRIEF IN SUPPORT
OF MOTION FOR EXTENSION OF STAY**

The Confederated Salish & Kootenai Tribes (the Tribes) join with the United States and the State of Montana in the simultaneously filed Motion for Extension of Stay of Preliminary Decrees in Basins 76L and 76LJ, however, the Tribes hereby separately report to the Court the unique circumstances that the Tribes face should the current stay not be extended, all of which subject the Tribes to unique burdens and prejudices.

First, the Tribes hereby incorporate their previous Report to the Court filed on September 5, 2023, in both BASIN 0002-76LJ-1985 as Dkt. No. 22, and BASIN 0001-76L-1985 as Dkt. No. 21, including the Declaration of Pamela McDonald, attached thereto as Exhibit 1.

Second, from the Tribes' perspective it is important to remember how and why we are all here. All the surface water in Basins 76LJ and 76L arise on or upstream of the Tribes' permanent homeland on the Flathead Indian Reservation ("the Reservation"), secured and promised to the Tribes under the 1855 Treaty of Hellgate ("the Treaty"). Water via the rivers and streams specifically named in the Treaty were of utmost importance to the Tribes and are referenced multiple times, noting specifically their import to the native fish and wildlife. *See*, 1855 Treaty of Hellgate, Articles I, II, and III.

Starting in 1904 with the Flathead Indian Allotment Act (58 Cong. Ch. 1495, 33 Stat. 302, as amended by 59 Cong. Ch. 3504, 34 Stat. 325) the Tribes have had to contend with not only the taking of more than a majority of their land base, but the construction and imposition of an irrigation system magnitudes larger than on any other Indian reservation in Montana. That irrigation system diverted water from nearly every stream on the Reservation, completely dewatering some, and forever altering the Reservation's ecosystem which prior to allotment the U.S. Court of Claims stated was "a natural paradise for hunting and fishing." *Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458, 478 (Ct. Cl. 1971).

In order for the Tribes to protect their interests in water, the Tribes have been forced to participate in complex and uncertain processes entirely designed by the Federal Government and the State of Montana without the Tribes' input or consent. In 1952, Congress passed the McCarran Amendment (43 U.S.C. § 666) waiving the United States' sovereign immunity for state-wide water adjudications, despite the fact that neither Congress or the Tribes have ever waived the Tribes' immunity. Nevertheless, the Tribes' water rights are now being adjudicated in the Montana Water Court.

Wanting to exercise jurisdiction over federal reserved water rights under the McCarran Amendment, the State of Montana passed the Montana Water Use Act, created the Water Court, and established the Reserved Water Rights Compact Commission, all without input or the consent of the Tribes. *See*, Stephen R. Brown, Michelle L. Bryan & Russ McElyea, *Montana Water Law*, 264 (2021) (discussion of federal water law, the McCarran Amendment, and the Montana Water Use Act); *see also*, *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76 .

The Montana Legislature has further proscribed and modified deadlines and benchmarks for water adjudication without the consent of the Tribes. The Tribes have complied with all

deadlines and have had to engage in litigation at considerable expense, in order to protect one of the Tribes' most valuable resources – its water. *See e.g. Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnner (1996), 278 Mont. 50, 923 P.2d 1073, as amended on denial of reh'g (Sept. 24, 1996); Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 Mont. 448, 992 P.2d 244; Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093; and Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 Mont. 302, 158 P.3d 377.*

Shortly after the Reserved Water Rights Compact Commission (“the Commission”) was established the Tribes voluntarily offered to participate in negotiations, but the Commission chose to adopt an agenda that put the Tribes' water rights as the last to be resolved/negotiated. Despite the Tribes' offer to engage in early negotiations, the Commission refused, favoring negotiations with other Indian tribes and federal agencies. As a result, the Tribes were the last of the Indian tribes and federal agencies to finally have access to the negotiation table and the last to conclude negotiations for a water compact.

The Tribes have engaged in good faith negotiations with the Commission, and participated in the State's general stream adjudication. The Tribes recognize that the Court must be responsive to the Montana Legislature's desire to achieve benchmarks and complete the State's general stream adjudication, however, the Court should balance such expectations with the prejudice that the Tribes face in the pendency of an adjudication designed by the State without regard to the interests of the Tribes. Therefore, we implore the Court to consider the framework by which the Tribes are before the Court in both the adjudication of Basins 76LJ and 76L, and the Compact proceedings when considering an appropriate timeframe for the issuance of a Preliminary Decree in Basin 76LJ and 76L.

Third, the Tribes have approximately 556 state-based water rights in Basins 76L and 76LJ that are either held by the Tribes alone, a Tribal entity, or co-owned by the Tribes. *See Declaration of Pamela McDonald*, attached to Dkt. No. 22 as Exhibit 1, at paragraphs 3, 4, and 5. That alone will be a daunting task for Tribal staff to review and determine whether to object to the Tribes' own state-based water rights or their neighbors, or both. Add to that review, any state-based water rights that may interfere with the Tribes' filed rights or Compact rights, the preparation of any related objections, and Tribal staff participation in the on-going litigation of the Compact case that will

likely include discovery and depositions, and it is easy to see how overwhelming it will be for the Tribes and Tribal staff.

Finally, the Tribes are uniquely prejudiced in that they are also actively engaged in Compact implementation which cannot wait until after adjudication. In accordance with the Compact, the Compact Implementation Technical Team was formed and has been meeting since 2016. *See*, Art. IV.G.(2) and (3) of the Compact, codified at 85-20-1901, MCA. Likewise, the Flathead Reservation Water Management Board was also formed following the Effective Date (September 17, 2021) and has been meeting since February 2022. *See, Id.* at Art. II(34). Additionally, registration of the Tribal Water Right is required to be completed within 5 years of the Effective Date, and the Tribes have set up an office to review and prepare registrations of both the Tribes' use of the Tribal Water Right as well as to assist Tribal members and Allottees. *See, Id.* at Art. III.C.1(b), and Sec. 2-1-102(1) of the UAMO, codified at 85-20-1902, MCA. The same Tribal staff are engaged in all of these implementation activities.

For the foregoing reasons, the Tribes respectfully request the Court continue the stay of adjudication in Basins 76LJ and 76L until after the conclusion of any factual hearing scheduled in the Compact case (Case No. WC-2021-01). The Tribes also respectfully request the Court reinstate the staggered timeframe for issuance of preliminary decrees in Basins 76LJ and 76L. *Order Extending Stays*, September 8, 2023, at 3-4.

Respectfully submitted this 29th day of March, 2024.

By: /s/ Melissa Schlichting
Melissa Schlichting
*Counsel for the Confederated Salish and
Kootenai Tribes*

By: /s/ Ryan C. Rusche
Ryan C. Rusche
*Counsel for the Confederated Salish and
Kootenai Tribes*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following persons by electronic mail or U.S. mail on this 29th day of March 2024.

Service by E-Mail:

Daniel J. Decker
Melissa Schlichting
Christina M. Courville
Confederated Salish & Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
406-675-2700
Daniel.decker@cskt.org
Melissa.schlichting@cskt.org
Christina.courville@cskt.org

Terisa Oomens
Agency Legal Counsel
Agency Legal Services Bureau Montana
Dept. of Justice
P.O. Box 201401
Helena, MT 59620-1401
406-444-7375
Terisa.Oomens@mt.gov

Duane Mecham
U.S. Department of Interior
Bureau of Indian Affairs
601 SW 2d Street, Suite 1950
Portland, OR 97204
503-231-6299
duane.mecham@sol.doi.gov

Arne Wick
Compact Program Manager
Compact Implementation Bureau Montana
DNRC
P.O. Box 201601
Helena, MT 59620-1601
awick@mt.gov

Jim Ferch
Kalispell Regional Office, DNRC
Water Resources
655 Timberwolf Parkway, Ste 4
Kalispell, MT 59901-1215
406-752-2288
jferch@mt.gov

Nathaniel Ward
Adjudication Bureau Chief
Montana DNRC
P.O. Box 201602
Helena, MT 59620-1602
406-444-0560
nward@mt.gov

Anna Pakenham Stevenson, Administrator
Water Resources Division
Trevor Watson
Deputy Division Administrator
Water Resources
Montana DNRC
1424 9th Avenue
P.O. Box 201602
Helena, MT 59620-1602
Anna.pakenhamstevenson@mt.gov
Trevor.watson2@mt.gov

Colleen Coyle
Coyle Law Firm
P.O. Box 1326
Bozeman, MT 59771
406-551-4868
406-570-2740 (Cell)
colleen@coylelawmt.com

Renee L. Coppock
Justin Harkins
Selena Z. Sauer
Crowley Fleck PLLP
PO Box 2529
Billings, MT 59103-2529
406-252-3441
rcoppock@crowleyfleck.com
acowen@crowleyfleck.com
jharkins@crowleyfleck.com
creynolds@crowleyfleck.com
ssauer@crowleyfleck.com
lculver@crowleyfleck.com

Service by U.S. Mail:

Flathead Irrigation District
Paul Guenzler
PO Box 639
St. Ignatius, MT 59865

Mission Irrigation District
Ray Swenson
PO Box 639
St. Ignatius, MT 59865

Jocko Irrigation District
Boone Cole
PO Box 639
St. Ignatius, MT 59865

/s/ Melissa Schlichting
Melissa Schlichting
*Counsel for the Confederated Salish and
Kootenai Tribes*

CERTIFICATE OF SERVICE

I, Melissa A. Schlichting, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion to the following on 03-29-2024:

Renee Lynne Coppock (Attorney)
490 N 31st St., Ste 500
PO Box 2529
Billings MT 59103
Representing: Avista Corporation
Service Method: eService

John William Harkins (Attorney)
P.O. Box 2529
Billings MT 59103
Representing: Avista Corporation
Service Method: eService

Chad R. Vanisko (Attorney)
215 N Sanders St.
Helena 59601
Representing: State of Montana Attorney General
Service Method: Email

Todd Kim (Attorney)
999 19th St, South Terrace, Ste 370
Denver 80202
Representing: United States DOJ Indian Resource Section ENRD
Service Method: Email

David Harder (Attorney)
950 Pennsylvania Avenue, NW
Washington 20530-0001
Representing: United States DOJ Indian Resource Section ENRD
Service Method: Email

Daniel Frederick Decker (Attorney)
Confederated Salish & Kootenai Tribes, Tribal Legal Department, PO Box 278
Pablo 59855
Representing: Confederated Salish and Kootenai Tribes
Service Method: Email

Electronically Signed By: Melissa A. Schlichting
Dated: 03-29-2024