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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 DISTRICT; FLATHEAD IRRIGATION DISTRICT; DISTRICT COURT FOR	)	Case No. CV-14-44-M-DLC **TRIBES' RESPONSE TO DEFENDANTS STICKEL AND HARMS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

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.	)	

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I. PROCEDURAL POSTURE OF THE CASE

The Federal Defendants have received an extension of time in which to respond. All other named Defendants except Michael G. McLatchy have timely responded. The State Court Judges, the Montana Attorney General and Defendants Harms and Stickles have each filed separate Motions to Dismiss. Each Motion raises variations on abstention and judicial discretion, as well as defenses unique to each Motion. The remainder of the responding Defendants have filed Answers.

In line with this Court's Order of June 3, 2014 and because there are common defenses raised in all Motions, the Tribes are filing individual Response Briefs to each Motion to Dismiss. The Tribes' Response Briefs build on each other in a successional path starting with the Tribes' Response to the State Court Judges Brief (Judges Brief), then the Montana Attorney General's Brief (AG Brief); and third, the Harms and Stickles Brief (Harms Brief). In the interests of judicial and litigant economy, the Tribes will not repeat a legal argument in detail once it has been addressed in the first instance in a prior Tribal Brief on the same subject matter. Rather, as necessary, the Tribes will summarize, incorporate by reference and cite to their brief containing the prior argument. Additionally, the Tribes will address in detail in each Brief in Support of Dismissal those arguments unique to that Defendants' legal rational for dismissal.

Finally, the Amended Complaint and the Brief of the State Courts were filed on the same day. The Court Brief addresses the original Complaint, which named the State Courts, but not the Judges, as Defendants. The Amended Complaint dropped the State Courts as Defendants and named the State Court Judges as Defendants. Only minor substantive changes to the allegations in the Complaint were made to accommodate naming the Judges as Defendants. The Tribes will address the State Court Brief as if it responds to the Amended Complaint rather than the obsolete original Complaint.

II. INTRODUCTION

The reason the Tribes filed this Complaint, much like the reason they expressed in the AG Brief, is to avoid piecemeal water rights adjudication in violation of the McCarran Amendment, 43 U.S.C. § 666. As noted in the Amended Complaint (hereafter Complaint), there are three cases in the Twentieth Judicial District and one in the Water Court, brought by the same individuals, irrigation districts, special interest groups, and attorneys, all asking each state court to declare that either individual irrigators or irrigation districts own the right to irrigation water delivered by the FIIP.[1] FIIP is the federal Flathead Indian

[1] In a fifth and related case in the Twentieth Judicial District, entitled Harley Hettick et al. v. Roger Christopher, et al., Cause No. DV-14-9, a motion to disqualify has been brought against one of the attorneys of record in the state cases, alleging the ethical impropriety of representing both plaintiffs and defendants in the Hettick case.

Irrigation Project, built, owned and operated by the Bureau of Indian Affairs within the boundaries of the Flathead Indian Reservation (FIR). As discussed in detail at pp. 3-6 of the Tribes' Brief in Response to the Judges Brief, the specific question of who owns FIIP irrigation water is the issue in each current state court case the Tribes and Attorney General take issue with. The Tribes are not concerned with ancillary matters in those cases, nor are they addressed in the Amended Complaint (Complaint).

The Tribes and Attorney General simply provide different avenues to achieve that same goal of avoiding piecemeal water rights adjudication under the Montana Water Use Act. The Attorney General, in his capacity as amicus, asks the Water Court and District Court to voluntarily dismiss the cases in front of them. The Tribes argue that the doctrine of res judicata requires the state courts to dismiss the same cases because that question was answered by the federal judiciary over seventy years ago. See Tribes' Response to Judges Brief at pp. 1-2, 6-10. The Tribes also argue that the Tribes and the United States are necessary and indispensable parties to a proper McCarran Act water rights adjudication involving FIR waters and that the Tribes are not parties to any of the state cases. The United States is party to the Water Court case only. The absence of the Tribes and U.S. necessitates dismissal of the state cases for lack of necessary and indispensable parties.

The doctrine of res judicata should be applied to bar the current efforts in state court to relitigate the ownership question. It was resolved over seventy years ago in a series of federal cases. The first, United States v. McIntire and the Flathead Irrigation District, 101 F.2d 650, 653 (9th Cir. 1939) overturned a trial on the merits, reported at 22 F.Supp. 316 (D. Mont. 1937) and concluded that when the Tribes reserved the FIR from its aboriginal territory, "[t]he United States became a trustee, holding bare legal title to the lands and waters for the benefit of the Indians." That Court also made clear that "[b]eing reserved, no title to waters could be acquired by anyone except as specified by Congress." McIntire, 101 F.2d at 654.

Dissatisfied with those results, the individual irrigators and current Defendant Flathead Irrigation District sought unsuccessfully to relitigate the same question. Once again the Ninth Circuit upheld the federal reserved water rights doctrine first enunciated in Winters v. United States, 207 U.S. 564 (1908), confirming that the United States owned irrigation water under FIIP, not individual irrigators or irrigation districts. See Alexander et al. v. Flathead Irrigation District, 131 F.2d 359, 360 (9th Cir. 1942).

Every Dismissal Brief fails to address this body of dispositive federal law laid out in the Complaint. Seventy-plus years ago the federal judiciary declared that ownership of irrigation water delivered by FIIP is vested in the hands of the

United States in its capacity as trustee to the Tribes. The Flathead Allotment Act ("FAA"), April 23, 1904 (33 Stat. 302), as amended, specifies exactly how an individual may obtain a water right to use irrigation water delivered by FIIP. See Complaint at ¶¶ 63-104. As alleged in the Complaint, ¶¶ 94-109, no person has met those Congressionally-imposed steps and accordingly, no one other than the United States has a "water right" to FIIP irrigation water, a right derived from the larger Tribal reserved water right identified in Winters, McIntire, and Alexander, and more recently in State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985) (Greely).

The Harms Brief raises four defenses to the Complaint; abstention under Colorado River Conservation District v. United States, 424 U.S. 800 (1976) (Colorado), and abstention under Younger v. Harris, 401 U.S. 37 (1971). It also creates out of thin air an argument that the Tribes seek to discredit non-Indian title to lands open to homesteading and allotment under the terms of the Flathead Allotment Act and then refutes that straw man argument. See Harms Brief at pp. 17-27. Finally, based upon their erroneous land grab theory, Harms asserts the alleged Tribal land grab is unsupported by factual allegations in the Complaint. That, of course, is true because the Tribes make no such allegations or request for relief. The Tribes will respond in order presented by Harms.

III. ABSTENTION UNDER COLORADO RIVER DOES NOT APPLY

A. Since the Question of Who Owns FIIP Irrigation Water Was Decided Over Seventy Years Ago, Abstention Under Colorado River, or Any Other Abstention Doctrine, is Not Relevant.

One of the fundamental forces driving Colorado is to promotion of "wise judicial administration" when there are concurrent state and federal cases on the same issue filed contemporaneously. 424 U.S. at 817. That is not the case here, as the federal courts have ruled on FIIP water ownership approximately seventy years before any of the state court cases at issue were filed.

Colorado also sought to avoid piecemeal adjudication of water rights in several different courts. See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20-21 (1983). That is what's happening now and that is what the Tribes and the Attorney General seek to obviate, though in different manners. The Ninth Circuit Court of Appeals decided the issue raised in all of the underlying State District Court and Water Court cases over seventy years ago. As discussed in detail in the Tribes' Brief in Response to the Judges, the federal judiciary held that the United States owns FIIP irrigation water in trust for the Tribes under the Winters doctrine.[2] The purpose of the Tribes' Complaint is to enjoin the state court judges from issuing any conflicting state court judgments, from issuing

[2] This trustee ownership relationship is confirmed in Greely at 767, "the United States is not the owner of Indian reserved rights. It is trustee for the benefit of the Indians."

decisions in the absence of necessary and indispensable parties and from conducting improper piecemeal water rights adjudications in contravention of the McCarran Amendment, 43 U.S.C. § 666. Also discussed in that Tribes' Brief to the Judges is the fact that all named individual defendants and irrigation districts here were in a position of privity to the parties in McIntire and Alexander, and therefore the principle of res judicata bars them from attempting to relitigate the question now in any state court.[3]

Abstention also fails for lack of necessary and indispensable parties in the underlying state court cases. The Tribes are not parties to any of the District Court cases. In fact, as Exhibit A to the Tribes' Brief in Response to the Judges makes clear, the District Court expressly disclaims all jurisdiction over the Tribes and the United States, even though it is moving forward with a trial on the question of who owns FIIP irrigation water. The Tribes are not party to the Water Court case because that case is premature. The Tribes and its trustee the United State have until June 30, 2015 to file their water rights claims to be adjudicated by the Water Court in a proper McCarran general inter sese adjudication. See § 85-2-702,

[3] Accordingly, while doing a good job of manifesting the piecemeal nature of the four state cases, Harms' admission that they are represented by the Flathead Irrigation District, a defendant in this case as well as a party in McIntire and Alexander, is an admission that they also are parties by privity to the state cases in which their district is a party. Harms Brief at p. 9 n. 8.

MCA. For the Water Court to rule only on ownership, in the absence of indispensable parties, is the definition of piecemeal adjudication.

Alternatively, should the Montana Legislature pass a water rights Compact in the 2015 Legislative session, this case and the state cases may well become moot.[4] There are no Tribal or Federal water right claims for the Water Court to adjudicate. The only question before the Water Court relevant to this litigation is who owns FIIP irrigation water. Neither the Tribes nor the U.S. have filed substantive claims to that water yet. What does exist, however, are the holdings in McIntire and Alexander.

B. Harms Responds To A Case The Tribes Did Not File

Abstention is not applicable to this case. Nevertheless, the Tribes will address some of the more egregious misstatements Harms relies upon to try and make applicable the abstention doctrine addressed in Colorado.

1. Harms argues that the first issue in addressing the discretionary application of Colorado abstention is what court was filed in first. As discussed above, the numerous recent state court cases were initiated by persons and irrigation districts who today are in privity with those early dispositive federal decisions. So, the timing factor fails to meet the first Colorado factor.

[4] Harms refers to the negotiated Compact between the Tribes, the United States and the State of Montana that was entered into the 2013 Legislative session as an "unlawful compact." Harms Brief at p. 6. The Harms have reached a somewhat inflammatory conclusion that no court has ever ruled on.

Additionally, and importantly, Harms never argues that Colorado abstention applies to the three Twentieth Judicial District Court cases. Accordingly, under Harms' rationale, we could confront abstention in this Court to the Water Court, but not to three District Court cases. This omission runs throughout Harms Brief, which will by definition result in the type of vexatious piecemeal adjudication that Colorado abstention seeks to avoid.

2. Harms argues that the second Colorado factor, geographic location of the courts, is not a significant factor. Harms Brief at p. 8. However, this Court is in fact several hundred miles closer to the subject matter than is the Water Court.

3. The third Colorado factor is avoidance of piecemeal litigation. Harms Brief at p. 9. The facts of this situation manifest piecemeal adjudication in three different courts, one of which has expressly disclaimed all jurisdiction over the Tribes and the United States and the other which, if it undertakes the question, is at best statutorily premature, as the Tribes have until June 30, 2015 to file any water right claims to FIIP irrigation water. Further, any litigation would be conducted without a necessary and indispensable party, the Tribes. Such an action raises the question of the adequacy of the Montana Water Use Act as applied. See Greely at 765.

Harms reaches the conclusion that it is fine for the Water Court to proceed, relying on that portion of the decision in Greely that held the Montana Water Use

Act adequate on its face. Greely did hold that Act is facially adequate to adjudicate the Tribes' reserved and aboriginal water rights (Greely at 766) but expressly left open the question of adequacy as applied. Greely at 786. For the judges from either Water Court or the District Court to rule on the cases before them will bring the "adequacy as applied" question to the forefront. Once again, Harms fails to address the efforts of District Court cases, rendering his argument hollow.

Harms also grossly misrepresents the Tribes' position in this case. For example, he asserts that contrary to Complaint ¶ 21, in which the Tribes expressly disclaim any desire or intent to quantify anyone's claims to water, "Quantification is exactly the relief sought by Plaintiffs---specifically, quantification of 100% of the water in their favor." Harms Brief at p. 10. That is pure inflammatory fabrication. The Prayer for Relief seeks no quantification. Nowhere in the Complaint do the Tribes even hint at seeking any quantification. There are no Tribal requests for quantification. Those will come when the Tribes file their claims in accordance with the Montana Water Use Act.

4. The fourth Colorado factor is which court first assumed jurisdiction over the subject matter. Harms Brief at p. 11. He asserts that the Water Court did. He makes no assertion regarding the three District Court cases. He fails to recognize

that the Ninth Circuit assumed jurisdiction over the subject matter and definitively ruled on it thirty years before the Montana Water Court first came into existence.

5. The fifth Colorado factor addresses the ability of a state court to apply federal law to the case. Harms Brief at p. 12. Given the applicability of res judicata to this case, The Tribes merely reiterate the points made in subsection 3 above.

6. The sixth Colorado factor is whether the state courts are capable of protecting the rights of federal litigants. Harms Brief at p. 13. While asserting that to be true, Harms provides no authority to support his conclusion. Furthermore, he only concludes that the Water Court has that capacity. He offers no opinion about, nor any support for, the competency of the state District Court, the court that has expressly disclaimed jurisdiction over the Tribes and the U.S. This begs the piecemeal adjudication Colorado seeks to avoid.

7. Seventh on the Colorado list is an effort to avoid forum shopping. Harms Brief at p. 14. Harms claims that the Tribes are forum shopping by filing this case. If ever there was an example of forum shopping, it lies in the four state court cases in two different courts and in which most of the parties are essentially the same and are represented by the same legal counsel. That is forum shopping *per se* and *per se* piecemeal adjudication that the Tribes and the Attorney General seek to bring an end to.

Somehow Harms has concluded that the Tribes are "claiming that their water rights are somehow exempt from" the Water Court Adjudication. Id. That too is false. The Tribes have followed the rules of the Montana Water Use Act; first, by continuing to try and reach a water rights compact acceptable to the Montana Legislature, and second, by spending millions of dollars to develop a comprehensive set of water rights claims both on and off of the FIR to be filed at the Legislatively established date in 2015.

8. The last Colorado factor requires analysis of whether or not the state court can resolve all the issues before the federal court. Harms simply says "the Montana Water Court proceedings will resolve Plaintiff's requests for declaratory relief." Harms Brief at p. 15. Leaving aside the fact that the Tribes also seek injunctive relief against the State Court judges, he provides no authority for his conclusion. He simply does not address the abilities or the role of the District Court at all.

Even if res judicata were not dispositive of the issues actually raised by the Tribal Complaint, Harms has failed to meet the requirements for Colorado abstention.

IV. ABSTENTION UNDER YOUNGER DOES NOT APPLY

For the reasons addressed above, primarily the application of res judicata, Younger abstention does not apply in this case. The Tribes discuss in more detail

why McIntire and Alexander defeat the discretionary standards for application of Younger abstention at pp. 17-19 of the Tribes' Response to the Judges Brief.

There is one puzzlingly unclear statement on p. 15 of Harms Brief. It is asserted that,

> DNRC is in the process of issuing a Summary Report for the Montana Water Court to adjudicate all claims. …Furthermore, over 3,068 separate water rights claims–including claims by Plaintiffs-have been filed and reviewed for conflicts.

If in fact the Montana Department of Natural Resources and Conservation (DNRC) has reviewed any Tribal water rights claims and if in fact DNRC is issuing a Summary Report for water rights claim examinations on the FIR, it is doing so in direct violation of ¶¶ 1 and 9, a Water Court Order dated November 19, 2009 and attached as Exhibit A to this Brief, specifically barring those two DNRC actions.[5] A copy of that Water Court Order is attached as **Exhibit A** to this brief.

The Tribes have until June 30, 2015 to file their water rights claims on and off of the FIR. See 85-2-702 (3), Montana Code Annotated. Until that date, any

[5] The Tribes have acquired lands with existing DNRC claims, and those claims may have been examined by DNRC. The Order pertains to any claims filed by the Tribes and the United States. The number of water rights claims on file with DNRC exceeds two hundred thousand individual claims state-wide. It is unclear what Harms' reference to 3,068 claims means, since it is not tied to any specific Water Court adjudication basin and does not accurately reflect the number of water rights claims filed with DNRC for the FIR on Basin 76L and 76LJ, within which the FIR exists.

Montana Water Court effort to adjudicate waters on the FIR is statutorily premature.

V. THE ARGUMENT THAT THE TRIBES ARE SEEKING TO RECLAIM PATENTED NON-INDIAN RESERVATION FEE LANDS IS NONSENSE

The Prayer for Relief in the Complaint is what the Tribes argue for in the Complaint. It's all about water. Contrary to the Harms Brief at pp. 17-27, the Tribes seek nothing regarding land title. The Tribes' request for declaratory relief pertains to ownership of irrigation water delivered by FIIP and whether or not owners of fee patented FIR lands served by FIIP have followed the process Congress specified in the FAA to acquire a water right. See Complaint at ¶¶ 42-44. The Tribes' request for injunctive relief only seeks to enjoin the state court judges from ruling on the water ownership question, not land ownership. The Tribes Response Brief to the Judges explains this res judicata argument in detail at pp. 1-2 and 6-10.

Somehow, Harms has gleaned out of a water rights case an argument that the Tribes seek to terminate fee patents on the FIR. One thing the Tribes and Harms can agree on is that FIR land ownership question was settled in Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458 (Ct. Cl. 1971). The Tribes were compensated for an unlawful taking of FIR lands arising out of the FAA and were divested of hundreds of thousands of acres of FIR land under the

FAA. Harms accurately refers to that litigation as "regarding surplus lands within the Reservation." Harms Brief at p. 18 (emphasis added). Harms inaccurately asserts that the Tribes "now claim continuing title to those same lands." Id. (emphasis added). Similar references to "land" appear throughout pp. 17-27 of the Harms Brief. Nowhere in the Complaint do the Tribes allege or even infer such a thing. Harms is right when he asserts any such Tribal claim for lands is barred by res judicata. Harms Brief at pp. 17-23. That's why the Tribes do not make any claim for any land in their Complaint.

It is conceivable that the Tribes' allegations in the Complaint regarding the fact that Reservation lands went directly from aboriginal title to FIR status and therefore never fell into "public land" status has spawned Harm's fears. In Ash Sheep Company v. United States, 252 U.S. 159, 167 (1920), the Court found that Reservation land owned by the Crow Tribe and subsequently patented to non-Indians are not public lands. This is so because Congress directed the Secretary to sell such lands in his capacity of trustee to the Tribes. Furthermore, the Secretary, in his trustee role, deposited the proceeds from the sale for the benefit of the Tribe, not into a general treasury account established for proceeds from the sale of public

lands. That is exactly the legal history of the "surplus" patented lands on the FIR. See Complaint ¶¶ 47-57. [6]

Contrary to Harms' assertion at p. 24, the simple act of a Presidential Proclamation opening Reservation lands to non-Indian ownership does not show "that such lands became part of the public domain." The Proclamation opening the FIR to non-Indian ownership is only one piece of the complex chain of title identified in the Complaint and nowhere in that Proclamation did President Taft proclaim those "surplus" FIR lands to be "public lands." See Complaint at ¶¶ 71-72.

There are two reasons the Tribes present this chain of title argument in the Complaint. First, to make clear that, except as specified in the FAA, "public land" laws, such as the 1902 Reclamation Act of June 17, 1902, P.L. 57-161 (32 Stat. 388), do not apply on the FIR except as specified by Congress in the FAA, as amended. Second, to demonstrate that in the FAA, as amended, Congress imposed very specific requirements upon persons who wished to acquire a water right to irrigation water under the FIIP. See Complaint at ¶¶ 63-104. It is the Tribes' contention that those claims to water have not been perfected.

[6] Harms cites to Hagen v. Utah, 510 U.S. 399, 412 (1994) for the proposition that FIR lands open for non-Indian entry are "public lands" because they were once owned by the United States. As discussed above, the Supreme Court in Ash Sheep addressed that contention on the particular facts of the Crow Indian Reservation and came to the opposite conclusion.

VI. HARMS' ASSERTION THAT THE COMPLAINT IS FACIALLY INADEQUATE IS BASED ON THE FABRICATED LAND GRAB THEORY

Harms asserts the Complaint fails because "Plaintiffs' factual allegations do not reasonably lead to the relief they seek regarding title to Landowners lands." Harms Brief at p. 24 (emphasis added). The entirety of this portion of Harms Brief is predicated on the misconception that the Tribes are seeking any land-based relief; that the Tribes seek to divest lawful owners of non-Indian lands on the FIR of their lands. To be clear, Harms asserts that Complaint fails because they believe that the Complaint merely "supports the inference that Plaintiffs seek a declaration that their title to surplus lands patented to settlers, including Landowners' predecessors was never extinguished." Harms Brief at p. 26 (emphasis added).

Harms never argues that the Tribes' factual allegations in the Complaint regarding ownership of irrigation water delivered by FIIP are insufficient. Harms never argues that the accuracy of the Tribes' factual allegations regarding the several state court cases that gave rise to this water rights Complaint are insufficient. Instead, Harms' creates an argument about land the Tribes never made in the Complaint then asserts that nonexistent Tribal claim fails the well plead complaint rule. This type of sophistry should not be condoned.

VII. CONCLUSION

For the reasons expressed directly in this Brief, as well as those portions of the Tribes' Response Briefs to the Judges and the Attorney General incorporated herein by reference, Harms' Motion to Dismiss should be denied.

Respectfully submitted this 23rd day of July, 2014.

/s/ John B. Carter
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1 (d)(2)(E), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 4,226 words, excluding certificate of service and certificate of compliance.

Dated this 23rd day of July, 2014

s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND KOOTENAI TRIBES
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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2014, I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, Missoula Division, by using cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

I further certify that a copy of the foregoing document was mailed by U.S. Mail, first-class, postage pre-paid, to the following:

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IN THE WATER COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHT TO THE USE OF ALL THE WATER, BOTH SURFACE AND GROUNDWATER.	) BASIN 76LJ

AMENDED CLAIM EXAMINATION ORDER

The Confederated Salish and Kootenai Tribes ("Tribes"), the United States and the State of Montana acting through the Montana Reserved Water Rights Compact Commission ("State") are in active negotiation to resolve the claims of the United States in trust for the Tribes, Tribal members and allottees and the Tribes' claims for reserved and aboriginal water rights under the provisions of the Water Use Act. As such, pursuant to the terms of § 85-2-701, et seq., M.C.A., all proceedings to adjudicate the water rights of the Tribes and the United States in trust for the Tribes, Tribal members and allottees are presently stayed. However, the Tribes, the United States and the State (hereafter the "Parties") believe that a competent examination of certain claims to water on the Flathead Indian Reservation may provide information useful to the negotiation process. Consequently, the Court has issued several orders regarding the examination of claims in Basin 76L, which encompasses much of the Flathead Indian Reservation.

Separately, this Court issued an Order on August 11, 2006 directing examination of selected water rights claims in Basin 76LJ. The DNRC is responsible for conducting the claim examination process pursuant to the terms of that Order. The Order of August 11, 2006, did not provide for an examination of claims in Basin 76LJ within the exterior boundaries of the Flathead Indian Reservation ("Reservation"). To facilitate the negotiation process this Order supersedes the Court's Order of August 11, 2006, and directs an examination regimen for the water right claims in Basin 76LJ that includes claims filed for water use within the exterior boundaries of the Reservation subject to the terms and conditions set forth in this Order.

The Court recognizes that the Tribes claim that a limited waiver of sovereign immunity is necessary for this Order to issue and that the Tribes consent to a limited waiver of sovereign immunity only for the purposes expressly set out in this Order as consented to by all parties as a precondition to its submission to the Court and do not waive immunity for any other purpose. The Court also recognizes that the State does not agree that a waiver of sovereign immunity by the Tribes is necessary to proceed with entry of this Order.

Accordingly, it is ORDERED that the following procedures shall apply to the examination of claims:

1. DNRC shall examine all existing water rights claims on file with DNRC that lie in whole or in part within Basin 76LJ. Provided, however, that no examination shall take place for claims identified pursuant to paragraph 2 that are held in the name of the Tribes, Tribal corporations, agencies of the Tribes or other Tribal organizations or entities or for claims for federal reserved or aboriginal water rights claimed by the Tribes or by the United States on behalf of the Tribes or itself.

2. DNRC shall furnish the Tribes and the United States with an abstract of each claim not yet examined in Basin 76LJ prior to the commencement of any examination of those claims. These abstracts shall be provided to John Carter, Tribal Attorney, or his successor, and to David Harder, United States Department of Justice, or his successor. The Tribes and the United States shall have 120 days following receipt of the abstracts to notify DNRC's Helena Water Resources Office, in writing, of which claims fall within the limitations identified in paragraph 1 of this Order and which therefore should not be examined. If the Tribes and/or the United States do not notify DNRC's Helena office concerning specific claims not to be examined within the 120 day period, DNRC shall proceed to examine all claims identified in the abstracts provided pursuant to this paragraph.

3. For each examined claim making a claim to reserved water rights or to a right with a priority date earlier than April 1, 1910, the following issue remark shall be added:

> NO REVIEW OR DETERMINATION OF THE ORIGIN OF THE CLAIMED TYPE OF HISTORICAL RIGHT OR OF ITS PRIORITY DATE, QUANTITY, VOLUME OR FLOW RATE HAS BEEN MADE. ADDITIONAL EVIDENCE WILL BE REQUIRED BEFORE THE CLAIM CAN BE DECREED.

4. The Tribes and/or the United States, at any time, including during final review of the claims examination, may notify in writing DNRC's Helena Water Resources Office that a claim is of a type that falls within the exclusions identified in paragraph 1 above. Upon receipt of such written notice, DNRC shall cease examination of any such claim(s) so identified and shall remove information relating to any such claim(s) from all reports to the Court.

5. For claims not examined or included in any report to the Court, DNRC shall include the following information remark:

PURSUANT TO WATER COURT ORDER, THIS CLAIM HAS NOT BEEN EXAMINED IN ACCORDANCE WITH MONTANA SUPREME COURT RULES AS THE TRIBES OR THE UNITED STATES HAS DETERMINED THAT THIS CLAIM IS MADE BY THE TRIBES, TRIBAL CORPORATIONS, AGENCIES OF THE TRIBES OR OTHER TRIBAL ORGANIZATIONS OR ENTITIES OR IS MADE FOR FEDERAL RESERVED OR ABORIGINAL WATER RIGHTS CLAIMED BY THE TRIBES OR THE UNITED STATES ON BEHALF OF THE TRIBES.

6. Any field examination of a claim on land within the Flathead Indian Reservation shall be arranged by DNRC. DNRC shall provide the Tribes and the United States with no less than 7 days advance notice of such field examination and the Tribes and the United States shall be entitled to attend any such field examination.

7. For every claim located in whole or in part within the exterior boundaries of the Flathead Indian Reservation, DNRC shall include the following information remark, which shall become a permanent part of the right, if any right should be finally adjudicated:

THIS CLAIM IS LOCATED IN WHOLE OR IN PART WITHIN THE EXTERIOR BOUNDARIES OF THE FLATHEAD INDIAN RESERVATION.

8. Throughout the claims examination process, the United States and the Tribes shall be afforded access to claims examination information which was and is developed, utilized or produced by DNRC or is otherwise in the possession of DNRC pursuant to this Order. Following completion of claims examination pursuant to this Order, DNRC shall furnish the Tribes and the United States with a complete copy of the examination materials for each claim examined. The claim examination materials shall be furnished to the Tribes and the United States through their respective representatives identified above.

9. DNRC shall perform its duties in accordance with the Supreme Court Claims Examination Rules and Orders of the Court, except that DNRC shall not forward to the Court the

Summary Report of results of the claim examination process or other reports or information which may be used by the Court to issue a decree of any nature regarding any claim or claims to water in Basin 76LJ without the consent of the Tribes and the United States; or unless compact negotiations among the Commission, the Tribes, and the United States conclude pursuant to Mont Code Ann § 85-2-702 (2007) or terminate pursuant to the provisions of Mont. Code. Ann. § 85-2-704 (2007); or upon further order of this Court after notice to the parties and an opportunity to be heard.

10. Claim examination work done under the Order of August 11, 2006 will be incorporated with work under this Order rather than being separately provided to the Water Court.

DATED this 19 day of November, 2009.

C. Bruce Loble
Chief Water Judge

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