

DISTRICT COURT

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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:

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FINDINGS OF FACT

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

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

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

10 4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court
11 issued on December 14, 2012 an Alternate Writ of Mandamus commanding
12 Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final
13 proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first
14 submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-
15 1957 OR that Defendants file an Answer within 30 days of the Alternate Writ.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 **CONCLUSIONS OF LAW**

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

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

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

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

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

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

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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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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

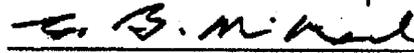
The Montana statutes which provided for creation of the Defendants' Irrigation Districts and Joint Board of Control specified as their purpose to operate irrigation districts which have no ownership interest in any water rights which belong exclusively to the individual Irrigators as appurtenances to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

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

6 DATED this 15th day of February, 2013.

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10 C.B. McNeil, District Judge

CERTIFICATE OF SERVICE

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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:

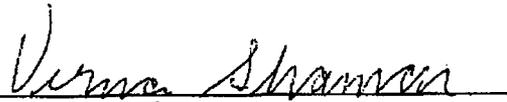
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