

PUBLIC-REDACTED

I. THE ASSERTIONS OF MISCONDUCT CONTAINED IN THE SUPPLEMENT ARE UNSUPPORTED AND WITHOUT MERIT AND DEMONSTRATE AN INTENT TO DISRUPT THESE PROCEEDINGS AND THE DAY-TO-DAY WORKINGS OF THE FJBC/DISTRICTS.

The Supplement claims inappropriate behavior by the FJBC, through its Chairman and the FJBC's retained Montana and Washington DC counsels:

In particular, the FJBC's Montana and D.C. counsels have intentionally contacted and/or communicated with, in a hostile, harassing and/or intimidating manner, directly and through others, a number of undersigned counsel's clients about the subject of the settlement conference proceedings now before this Agency, These contacts and communications took place during the past month preceding, during and following regularly and specially convened FJBC meetings at which Montana and D.C. counsel were present in person and via telephone, including FJBC Executive Committee meetings. At such meetings, the FJBC's Montana and D.C. counsels especially singled out for harassment one of the undersigned counsel's clients (Mr. Hein).

Supplement at 1-2. According to the Supplement, counsels' objectionable behaviors arguably violate or contravene the letter and spirit of a number of the D.C. Rules of Professional Responsibility. *Id.* at 2 and Exhibit 1 thereto.

The FJBC/Districts and their counsels strongly deny that their actions in any way constituted misconduct or violations of applicable Rules of Professional Responsibility. In fact, counsels have obligations to keep their client, the FJBC/Districts, reasonably informed about the state of the FERC proceedings and to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *See*, Attachment 1 hereto at 3, D.C. Rules of Professional Conduct Rule 1.4. Fulfilling those obligations is not improper; it is required by the Rules of Professional Conduct.

PUBLIC-REDACTED

The only assertion in the Supplement made with adequate specificity which would allow response² relate to counsels' interactions with Movant Hein. Supplement at 2. As the Motion explains, Movant Hein is "a member of the Executive Committee of the FJBC." Motion at P 9. Therefore, Movant Hein has the right to attend and participate in the regularly and specially convened FJBC meetings which are the basis of the misconduct assertions. The only contact D.C. counsel has had with Movant Hein is responding to questions posed by Movant Hein in his capacity as a member of the Executive Committee of the FJBC at regularly and specially convened FJBC meetings, including FJBC Executive Committee meetings. Counsels' responses consisted entirely of analysis of the issues related to the subject matter of the representation, *i.e.*, the ongoing hearing in Project No. 5-100. Under the D.C. Rules of Professional Responsibility, counsels are obligated to fulfill reasonable client expectations for information and the client is entitled to whatever information it wishes about all aspects of the subject matter of the representation.³

It is not harassment or otherwise improper for counsel to respond to questions, and provide legal advice to the FJBC/Districts by responding to questions posed by members of the Executive Committee (including Mr. Hein) during regularly and specially convened FJBC meetings. In fact, if counsels refused to respond to any Executive Committee members' request for legal advice, it could be argued that they were in violation of the obligation to keep the client reasonably informed and represent the client

² While the Supplement makes accusations regarding purported communications with "a number of the undersigned counsel's clients" that supposedly took place "during the past month" (Supplement at 1, 2) the Supplement is devoid of any specificity regarding any communications except those with Movant Hein. The Supplement also lacks support for any the accusations contained therein, via affidavit or otherwise.

³ *See*, Attachment 1 hereto at 4, D.C. Rules of Professional Conduct Rule 1.4, comments 2 and 3.

PUBLIC-REDACTED

zealously and diligently.⁴ When Movant Hein’s position as a member of the Executive Committee of the FJBC is taken into account (as it must be), it is clear that it is baseless to assert that it is improper to communicate with him regarding the FERC proceeding in which the FJBC is involved. The Supplement’s accusations of violations of applicable ethics rules are baseless and provide no support for the Motion.

Exhibit 2 to the Supplement contains a letter from Movants’ Counsel to the FJBC/Districts’ D.C. counsel re: “Demand for Cessation of Board Intimidation of My Clients.” While the Supplement at 2 cites that document as evidence of “objectionable behaviors” by counsels, the letter contains no assertions of any inappropriate behavior by counsels. Instead, all of the accusations in that letter are directed to the Chairman of the FJBC who supposedly “harassed” unnamed Movants by seeking to resolve the issues raised in the Motion.⁵ Again, those assertions are baseless. As the Chairman of the FJBC, Mr. Cole has an obligation to conduct the business of the FJBC, including issues related to the FERC proceeding. It is telling that the Supplement cites D.C. Rule of Professional Responsibility Rule 4.2 in support of its accusations, but fails to provide the comment most relevant to those assertions. Comment 2 to D.C. Rule of Professional Responsibility Rule 4.2 provides, in part, that “parties to a matter may communicate directly with each other.”⁶ Thus, the rules are clear that there is nothing improper about Mr. Cole discussing FJBC business, including the FERC litigation, with members of the Executive Committee (including Mr. Hein) or any of the other Movants. Assertions of

⁴ *Id.*, and D.C. Rules of Professional Conduct Rule 1.3 Attachment 1 hereto at 1-3.

⁵ Supplement, Exhibit 2, at 1. That letter also claims that the Board inadequately represents Movants’ interests due to a lack of transparency. It is difficult to understand how the claim of a lack of transparency is consistent with the claim in the Supplement that it is inappropriate for Movant Hein to be included in FJBC Board discussions regarding the ongoing FERC litigation.

⁶ Attachment 1 hereto at 5.

PUBLIC-REDACTED

improper behavior by Mr. Cole are baseless and provide no support for granting the Motion.

Exhibit 3 to the Supplement asserts that a communication between Montana counsel for the FJBC/Districts and Mr. Tim Orr (another member of the FJBC Executive Committee) “would be subject to disciplinary action by counsel subject to the District of Columbia and New York Rules of Professional Responsibility”⁷ because counsel supposedly “indirectly” communicated with Movants. That assertion is baseless. Comment 2 to D.C. Rule of Professional Responsibility Rule 4.2 is explicit that “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.”⁸ Montana counsel was simply responding to the request of Mr. Orr that he be provided advice as to how to interact with Movants. Since, as explained above, “parties to a matter may communicate directly with each other,” Mr. Orr is legally entitled to communicate with Movants and Montana counsel is not prohibited from advising a client concerning that communication. Accordingly, any and all assertions of impropriety based on the matters discussed in Exhibit 3 are baseless.

In sum, the accusations in the Supplement are baseless and nothing more than an attempt to further disrupt this proceeding and prejudice and burden the FJBC/Districts. Given the lack of legal or factual basis for those accusations, they provide nothing which would support granting the Motion.

⁷ Supplement, Exhibit 3, at 1.

⁸ See Attachment 1 hereto at 5, Rule 4.2, Comment 2.

II. THE MOTION TO INTEVENE SHOULD BE DENIED.

As will be demonstrated herein, in addition to being based on a number of errors of fact and law, the Motion should be denied for: 1) failure to demonstrate any independent interests not already represented in the proceeding, and 2) seeking to have addressed issues that are beyond the scope of the Order Establishing Hearing and Settlement Judge Proceedings issued September 17, 2015 herein, and therefore would both disrupt these proceedings, and prejudice and place additional burdens on other parties in contravention of Rule 214(d)(1).

Rule 214(b)(3) requires that motions for late intervention show good cause why the time limitation for filing such motions should be waived. Rule 214(d)(1) requires the decisional authority acting on such a motion to consider whether:

- (i) The movant had good cause to for failing to file the motion within the time prescribed;
- (ii) Permitting the intervention might disrupt the proceeding;
- (iii) The movant's interest is adequately represented by other parties to the proceeding;
- (iv) Permitting the intervention might prejudice or place additional burdens on other parties; and
- (v) The motion conforms to the requirements of paragraph (b) of Rule 214.

As will be demonstrated herein, when the misstatements of fact and law contained in the Motion are corrected, and the requirements of the Rule 214(b)(3) are analyzed, the Motion should be denied.

A. The FJBC/Districts Clearly Represent The Interests Movants Claim to Represent; Movants Have Not Demonstrated that Their Interest is Not Already Adequately Represented By Other Parties to the Proceeding.

Movants' primary claim is that they should be allowed intervenor status because "the FJBC/Districts proposed negotiating position does not adequately represent

PUBLIC-REDACTED

Movants’ or the public’s interest in these proceedings.” Motion at P 11. The FJBC/Districts strongly contest that assertion. It is unfortunate that Movants took their concerns with the internal workings of the FJBC/Districts to FERC, rather than having them addressed via appropriate channels. The Districts are entities created under Montana law to perform certain obligations and exercise certain authority on behalf of the owners of irrigable lands served by the Flathead Irrigation Project (“FIP”). The FJBC is a local governmental entity under Montana law that serves as the central control agency of the Districts.⁹ FJBC and the Districts are elected local governments under Montana law, which empowers irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters, including relations with the United States, and irrigation project operation. *See generally* MONT. CODE ANN. Title 85, Chapter 7, Parts 1-22. As Montana governmental entities, the FJBC/Districts are not subject to FERC’s jurisdiction.

The Districts have approximately 2400 members. The Districts are represented on the FJBC via 12 elected Board Members. While the FJBC/Districts strive to reach consensus, given the 2400 Members and 12 Board Members, that goal is not always attainable. In accordance with the requirements of its Charter and organizational documents, the Districts/FJBC operates on a majority rule basis. Attachment 2 at 2, FJBC Bylaws Art V, Section 4. Contrary to the assertions in the Motion, the fact a few members disagree with a given FJBC/Districts action does not mean that the FJBC/Districts are not properly representing their members and the public interest.

⁹ *See* MONT. CODE ANN. § 85-7-1601. The FJBC’s Bylaws are Attachment 2 hereto.

PUBLIC-REDACTED

Rather, that is simply the result of the lack of unanimity that often occurs within large organizations.

In regards to their claims regarding lack of notice, the Motion admits that Movant Hein, a member of the Executive Committee of the FJBC had actual notice of the settlement process by October 11, 2015 [sic] and participated in a FJBC Executive Committee telephone conference call regarding the proposed negotiating position on October 15, 2015.¹⁰ Because Movants had notice of the settlement process, it appears that the “disagreement” giving rise to the Motion centers on “whether [the FJBC/Districts’] negotiating position should include reference to water rights.” Motion at P 13. That argument should be rejected because FERC does not adjudicate water rights.¹¹

The assertion that the FJBC/Districts should have revised their settlement position based on a legal opinion circulated at 3 am the day settlement positions were required to be exchanged¹² ignores the fact that the FJBC bylaws only permit the calling of special meetings by the Chair and at least one other Commissioner together with the posting of an agenda 48 hours in advance of any such meeting. Attachment 2 at 4-5, FJBC Bylaws Art. VII, Sections 2, 3 and 5. Therefore, if the FJBC/Districts had revised the settlement

¹⁰ Motion at P 13. It also appears that the Motion is claiming lack of notice for the other Movants of the Commission’s and Settlement ALJ’s September 17, 24, and 25 and October 1 Orders prior to October 14, 2015 “at the earliest.” *Id.* Even if that claim were substantiated, it ignores the fact that all Commission orders are noticed and published in the Federal Register. That process provides notice to the entire public. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that Federal Register publication provides constructive notice to all affected parties); *PPL Great Works, LLC*, 131 FERC ¶ 61,035, at P 13 (2010) (explaining the same). Claims regarding lack of notice should be summarily dismissed on that basis alone.

¹¹ *Marseilles Hydro Power, LLC*, 107 FERC ¶ 61,066, at P 10 (2004) (“The Commission does not adjudicate water rights: that is a State function”); *Conway Ranch P’ship*, 50 FERC ¶ 61,406, at p. 62,254 (1990) (same).

¹² Motion at P 15.

PUBLIC-REDACTED

offer based on a 3 am email, it would be open to challenges from other Board members that they were not provided adequate notice of the proposed revisions. Rather than acting in contravention of the Bylaws, the FJBC acted properly, and exchanged the settlement offer approved by its Board.¹³

The FJBC/Districts agree that some of the Movants have demonstrated an interest that may be affected by the outcome of the proceeding, *i.e.*, are members of the Districts.¹⁴ However, contrary to the assertions in the Motion (*id.* at P 10), Movants have not demonstrated that they will be **directly** affected by the outcome of the proceeding. Nor have they demonstrated that the interest they assert is not already adequately represented by other parties to the proceeding, namely, the FJBC/Districts.

Each of the Districts was a party to the 1985 Settlement, the provisions of which were approved and incorporated into the 1985 Kerr Hydroelectric Project License. Each of the Districts currently receive low-cost power from the Kerr Hydroelectric Project (as detailed in Article 40(c) of the Kerr Hydroelectric Project License). As part of the 1985 Settlement and Article 40(c) of the Kerr Hydroelectric Project License, each of the Districts had the right to have a hearing to resolve the question of their rights once the Kerr Hydroelectric Project is conveyed to the Confederated Salish and Kootenai Tribes (“CSKT” or “Tribes”) and Energy Keepers Inc. (“EKI”). That conveyance occurred on September 5, 2015.

¹³ During this process, the FJBC/Districts’ Counsels properly assisted the FJBC in exchanging the settlement offer approved by its Board. Such action was consistent with Rules 1.2 and 1.13 of the D.C. Rules of Professional Conduct, which require counsel to “abide by a client’s decisions concerning the objectives of representation” and require counsel to represent the entire FJBC as its client, respectively. *See*, Attachment 1 hereto, D.C. Rules of Professional Conduct Rules 1.2 and 1.13.

¹⁴ *See*, Motion at PP 9-10. Other Movants claim an interest as “residents of the Flathead Reservation entitled to low-cost power.” *Id.* at P 9. Nowhere does the Motion explain how non-District members’ interests are affected by the outcome of a proceeding addressing the Districts’ right to low cost power.

PUBLIC-REDACTED

Specifically, Article 40(c) of the Kerr Hydroelectric Project License states:

This joint license does not cover or resolve the questions of whether, from the time the project is conveyed by [the licensee] to the Tribes until the expiration of the joint license, (i) the Tribes must make any part of the output from the project available to the United States, for and on behalf of FIP or the Districts, or if so on what terms and conditions, or (ii) the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation. . . . Upon request of . . . the Tribes, [Interior], or the Districts . . . the Commission shall set such matters for hearing within twelve months of the date of the request

Pursuant to Article 40(c) of the Kerr Hydroelectric Project License, and consistent with direction provided by the FJBC, on May 28, 2015, the FJBC/Districts requested a hearing on “whether CSKT and EKI Tribes must make any part of the output from the Kerr Hydroelectric Project available to the United States, for and *on behalf of FIP [Flathead Irrigation Project] or the Districts*, and, if so, on what terms and conditions.” *See Confederated Salish and Kootenai Tribes*, 152 FERC ¶ 61,207, at P 1 and Ordering Paragraph (A) (2015) (“September 17 Order”) (emphasis supplied). Movants are neither the FIP, nor the Districts. Rather, they seek intervention as individual members of the Districts or local landowners. Motion at PP 9-10. Since the issue set for hearing relates to the Districts’ rights, not any irrigators’ individual rights, contrary to their assertions, Movants have not demonstrated any interest that may be **directly** affected by the outcome of the proceedings.

Movants also claim that the “FJBC/Districts’ proposed negotiating position does not adequately represent Movants’ or the public’s interest in these proceedings.” Motion at P 11. Unfortunately, those claims are based on an unauthorized release of a confidential draft settlement position. The implications of that, and other, improper releases of confidential materials is addressed in the discussion of prejudice and burden,

PUBLIC-REDACTED

infra. That document was clearly labeled DRAFT via watermark. Therefore, it is difficult to understand why Movants' counsel thought it appropriate to rely on that draft, or, more importantly, to divulge the contents of those materials prepared in anticipation of litigation in its pleading, though on a privileged and confidential basis. Reliance on the draft settlement document resulted in numerous misstatements of fact in the Motion, which fatally undermine the claims that the FJBC/Districts do not properly represent Movants' interests.

BEGINNING OF PRIVILEGED AND CONFIDENTIAL INFORMATION

DO NOT DISCLOSE

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

-
- [REDACTED]
 - [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC-REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

END OF PRIVILEGED AND CONFIDENTIAL INFORMATION

Prejudice to and additional burden on other parties is also clearly demonstrated by Movant's reliance on, and disclosure of the contents of, the FJBC/Districts' confidential draft settlement position. Motion at PP 16-17 (public) and 18-23 (privileged).

Moreover, the Supplement, which was filed publically, discusses confidential settlement positions of the FJBC/Districts. Supplement Exhibit 4, at 1; Exhibit 5, at 3. Movants public disclosure of this privileged information demonstrates a fundamental disregard for the Commission's policies and practices, severely prejudices the FJBC/Districts' settlement positions, and are vivid evidence of Movants' attempt to disrupt this proceeding and burden the participants thereto. These actions alone warrant denial of the Motion.

WHEREFORE, the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts respectfully request that the October 22, 2015 Motion to Intervene be rejected.

PUBLIC-REDACTED

Respectfully Submitted,

The Flathead, Mission and Jocko Valley Irrigation
Districts and the Flathead Joint Board of Control of
the Flathead, Mission and Jocko Irrigation Districts

/s/ Kathleen L. Mazure

Kathleen L. Mazure

Tyler E. Mansholt

Duncan, Weinberg, Genzer & Pembroke, P.C.

1615 M Street, NW Suite 800

Washington, D.C. 20036

(202) 467-6370

Date: November 6, 2015

Its Attorneys

PUBLIC-REDACTED

Attachment 1

PUBLIC-REDACTED

Rules of Professional Conduct: Rule 1.2--Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the objective of the representation if the client gives informed consent.

(d) A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c).

(e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

(f) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within these limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Rules of Professional Conduct: Rule 1.3--Diligence and Zeal

(a) A lawyer shall represent a client zealously and diligently within the bounds of the law.

(b) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or

(2) Prejudice or damage a client during the course of the professional relationship.

(c) A lawyer shall act with reasonable promptness in representing a client.

Comment

[1] The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, including the Rules of Professional Conduct and other enforceable professional regulations, such as agency regulations applicable to lawyers practicing before the agency. This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

[2] This duty derives from the lawyer's membership in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of individuals, each member of our society is entitled to have such member's conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

[3] The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, ambiguous statutes, or judicial opinions, and changing public and judicial attitudes.

[4] Where the bounds of law are uncertain, the action of a lawyer may depend on whether the lawyer is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as the advocate finds them. By contrast, a lawyer serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a lawyer may not institute or defend a proceeding unless the positions taken are not frivolous. *See* Rule 3.1. In serving a client as adviser, a lawyer, in appropriate circumstances, should give a lawyer's professional opinion as to what the ultimate decision of the courts would likely be as to the applicable law.

[5] To prevent neglect of client matters in the event that a sole practitioner ceases to practice law, each sole practitioner should prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client that the lawyer is no longer engaged in the practice of law, and determine whether there is a need for immediate protective action. *See* D.C. App. R. XI, § 15(a) (appointment of counsel by District of Columbia Court of Appeals, on motion of Board on Professional Responsibility, where an attorney dies, disappears, or is suspended for incapacity or disability and no partner, associate or other responsible attorney is capable of conducting the attorney's affairs).

[6] In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client. However, when an action in the best interests of the client seems to be unjust, a lawyer may ask the client for permission to forgo such action. If the lawyer knows that the client expects assistance that is not in accord with the Rules of Professional

PUBLIC-REDACTED

Conduct or other law, the lawyer must inform the client of the pertinent limitations on the lawyer's conduct. See Rule 1.2(e) and (f). Similarly, the lawyer's obligation not to prejudice the interests of the client is subject to the duty of candor toward the tribunal under Rule 3.3 and the duty to expedite litigation under Rule 3.2.

[7] The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration.

[8] Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence.

[9] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be eliminated by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[10] Rule 1.3 is a rule of general applicability, and it is not meant to enlarge or restrict any specific rule. In particular, Rule 1.3 is not meant to govern conflicts of interest, which are addressed by Rules 1.7, 1.8, and 1.9.

Rules of Professional Conduct: Rule 1.4—Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

Comment

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a

PUBLIC-REDACTED

client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case is required to inform the client promptly of its substance. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete.

[3] Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of representation.

[4] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation. When the lawyer is conducting a trial, it is often not possible for the lawyer to consult with the client and obtain the client's acquiescence in tactical matters arising during the course of trial. It is sufficient if the lawyer consults with the client in advance of trial on significant issues that can be anticipated as arising during the course of the trial, and consults during trial to the extent practical, given the nature of the trial process.

Rules of Professional Conduct: Rule 1.13--Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the

PUBLIC-REDACTED

organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rules of Professional Conduct: Rule 4.2--Communication Between Lawyer and Person Represented by Counsel

(a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Comment

[1] This rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[2] This rule does not prohibit communication with a person or party, or an employee or agent of an organization, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. In addition, a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.

[3] In the case of an organization, and other than as noted in Comment [5], this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having the power to bind the organization as to the particular representation to which the

PUBLIC-REDACTED

communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this rule.

[4] The rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. *See* D.C. Bar Legal Ethics Committee Opinion No. 129. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

[5] Because this rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization. If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.

[6] Consent of the organization's lawyer is not required where a lawyer seeks to communicate with a former constituent of an organization. In making such contact, however, the lawyer may not seek to obtain information that is otherwise protected.

[7] This rule also does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

[8] This rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[9] This rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this rule require.

[10] Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer

PUBLIC-REDACTED

representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.

[11] Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

[12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

PUBLIC-REDACTED

Attachment 2

PUBLIC-REDACTED

OPERATING BYLAWS OF THE FLATHEAD JOINT BOARD OF CONTROL

Missoula, Sanders and Lake County, Montana

ARTICLE 1. OFFICE

The principal office of the FLATHEAD JOINT BOARD OF CONTROL (the "FJBC") in the State of Montana shall be located at 524 Main Street, Saint Ignatius, Montana 59865. The Board of Commissioners (the "Board" or "Commissioners") may change the principal office of the FJBC within the State of Montana as it may determine from time to time in its sole discretion. For purposes of controlling and limiting costs, both administrative and operation and maintenance, for administrative efficiency, for other Board related purposes, and in the best interests of the Board as determined by the Board, the Board may enter into a contract with other Districts to share the office space and administrative capacities and coordinate the fulfillment of the responsibilities of the Boards, including, as allowed under state law, Title 85, Chapter 7, Part 16, Montana Code Annotated, to conduct joint operations by creating a joint board of control.

ARTICLE II. BOARD POWERS AND DUTIES; COMMISSIONER OBLIGATIONS

Section 1. Nature of Board. The Board exists for the benefit of its irrigator-constituents. The Board is, and holds itself to the standards of, a local government under Montana law. It exercises its powers and authorities under law and fulfills its duties to irrigators through its Commissioners, who are responsible directly to irrigators to make decisions and take actions for the general benefit of all irrigators and without pursuing their self-interest. The Board owns property, disposes of property, and makes decisions regarding its property only for the benefit of irrigators. The Board may own some property only as to its legal title and as a fiduciary, for the benefit of irrigators, who may own the beneficial title. In any case, the Board's powers and authorities, including owning and protecting property, exist only to fulfill its duties to irrigators.

Section 2. Legal Powers and Responsibilities of Board. The Board possesses all the powers and authorities and all the responsibilities established in the law of the state of Montana and applicable federal law. These may be supplemented in accordance with law, through these bylaws, and they may be directed or limited, in accordance with law, through these bylaws only where that intention is clear.

Section 3. Commissioners Obligated to Act Without Self-Interest or Conflict of Interest. As democratically-elected officers of local governments, Board Commissioners are obligated under these bylaws and Montana law, Title 2, Chapter 2, Part 1, Code of Ethics, Part 2, Proscribed Acts Related to Contracts and Claims, and Part 3, Nepotism, to make decisions and take actions for the best interest of irrigators, not in their own self-interest, and without any conflict of interest. All Board Commissioners, by taking the oath of office, agree to fulfill their public duties without regard to their private interests, and assert and promise their strict compliance with these and all other applicable legal standards of conduct regarding the execution of their duties; and they agree that any ruling of a tribunal, authority, or court of competent jurisdiction to the effect that they are in violation of such duties, even if they are not specifically named and identified as a violator, will result in their promptly taking action to either come into compliance with such ruling or resign as a District and Board Commissioner.

ARTICLE III. ELECTORS

Section 1. Electors. Electors of the District are determined by state statute, specifically 85-7-1710, Montana Code Annotated (2013), and generally include every person 18 years of age or older, whether a resident of the District or State or not, who is an owner or a purchaser under a recorded contract of purchase or other instrument of fee title to irrigable land situated within the *District and subject to the charges or assessments of the District.*

Section 2. Voting Rights of Electors.

(1) Multiple Ownerships. If ownership is in estates by the entirety, tenants in common, or in other cases of multiple ownership, only one vote shall be allowed on behalf of all the owners. Representatives of the owners are entitled to

PUBLIC-REDACTED

vote on behalf of all the owners, as determined by those owners. The Elections Administrator may require proof of this determination by the owners before allowing one to cast the votes.

(2) Corporate Ownerships. Any corporation may vote as a single owner of land through any officer or agent when the officer or agent is authorized to vote by the corporation and the written authorization is filed with the Secretary of the District and/or the County Elections Office.

(3) General Partnership, etc. Any general partnership, limited partnership or limited liability company may vote as a single owner of land through any general partner, member or agent when the general partner, member or agent is authorized to vote by the entity and written evidence of the authority of the general partner, member or agent is filed with the Secretary of the District.

(4) Representative Ownerships. Any trustee of a trust, guardian, administrator or executor authorized to act as such of a person or estate owning land with the District shall be considered an owner of land for the purposes of the Irrigation District Law, when the owner in fee is not otherwise entitled to vote.

(5) Weighted Voting on a per-acre basis. In accordance with state statute, 85-7-1710, MCA, which in general entitles an owner of land or elector to cast as many votes as equal the number of irrigable acres or major fractions of an acre he or she owns within the District that is subject to the charges or assessments of the District on that basis.

Section 3. Termination as Elector. One ceases to be an elector if one is no longer an owner of land within the District subject to the charges or assessments of the District.

ARTICLE IV. ELECTIONS

Section 1. Special Elections—Binding and non-binding. Pursuant to 85-7-1712, MCA, a special election may be called at any time by resolution of the Commissioners an election is required or, in the judgment of the Board is proper to be submitted to popular vote. If the outcome of a special election is intended to be binding on the Board, such election shall be conducted as required by Title 13, MCA. If the Board intends a special election to be non-binding, it must declare that intention in the resolution calling the election, stating the reasons for that intention. It may then conduct the election either in accordance with Title 13, MCA or as nearly as practicable and in reasonable accordance with electoral fairness and due process.

Section 2. Absentee Voting. Electors of the District shall be entitled to vote by absentee ballot in compliance with state law.

ARTICLE V. COMMISSIONERS

Section 1. Board of Commissioners. The affairs of the Board shall be managed by the Board of Commissioners. Commissioners must be residents of the State of Montana and an owner, or shareholder of a corporate owner, of land within the district, and otherwise qualify for election as a Commissioner under the laws of Montana.

Section 2. Number and Term of Office. The number of Commissioners constituting the Board of Commissioners will be twelve (12) to include a Member at Large. The term of office of Commissioners is three (3) years. A Commissioner shall hold office from the first Tuesday in May to the first Tuesday in May following the next election for that position when a qualified successor is seated. The member-at-large shall be selected annually by a majority vote of the elected commissioners.

Section 3. Quorum. A majority of the members of the Board of Commissioners (FJBC) shall constitute a quorum for the conduct of business by the Board, except, as provided in section 4 below, taking official action of the Board

Section 4. Action of Board. The Board (FJBC) may take official action only upon a majority vote of its Commissioners.

PUBLIC-REDACTED

Section 5. Public Meetings and Records. All meetings of the Commissioners (FJBC) shall be public and all records of the Board of Commissioners (FJBC) shall be open to public inspection during business hours.

Section 6. Vacancies. Any vacancy within the Board shall be filled for the unexpired portion of the term by appointment of a qualified individual from the same District as the vacancy and agreed to by a majority vote of the remaining Commissioners, at any regular monthly meeting or special meeting called for such purpose. A vacancy shall be filled as provided by law.

Section 7. Election to Fill Vacancy. If a vacancy within the Board occurs less than 25 days before a regular annual Commissioners election, the vacancy shall be filled by appointment at the next regular annual Commissioners election.

Section 8. Recall of Commissioners. (1) Any person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office.

(2) A public officer holding an elective office may be recalled by the qualified electors entitled to vote for the elective officer's successor. A public officer holding an appointive office may be recalled by the qualified electors entitled to vote for the successor or successors of the elective officer or officers who have the authority to appoint a person to that position.

(3) Physical or mental lack of fitness, incompetence, and violation of the oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45 are the only grounds for recall. A person may not be recalled for performing a mandatory duty of the office that the person holds or for not performing any act that, if performed, would subject the person to prosecution for official misconduct. (MCA 2-16-603)

Section 9. Compensation and Expenses of Commissioners. (1) The commissioners, when sitting as a board or when engaged in the business of the Board, are entitled to compensation at an amount determined by a majority vote of the board for each day that they are actually and necessarily engaged in the performance of irrigation Board duties. The amount of compensation determined by the board may be no greater than \$100.

(2) The commissioners are also entitled to reimbursement for travel expenses, as provided in MCA 2-18-501 through MCA 2-18-503, and for their necessary expenses when otherwise engaged in Board business. (MCA 85-7-1505)

ARTICLE VI. OFFICERS

Section 1. Officers. The FJBC shall have the following officers: a Chairman; two Vice-chairman (as determined by the Board of Commissioners); a Secretary; Member at Large; and such other officers as may be elected by the Board of Commissioners in accordance with these Bylaws and law. Such officers who are elected or appointed by the Board shall have such authority and perform such duties as are designated from time to time by the Board. The same person may not hold more than one office.

Section 2. Election and Term of Office. The officers of FJBC shall consist of a Chair, Two Vice- Chairs, designated First Vice-Chair and Second Vice Chair, and a Secretary-Treasurer. The Chair and Vice Chairs shall be the chair of each of the Districts. The initial Chair of the FJBC shall be elected from among the current District Chairs by a majority of all the FJBC Commissioners. Thereafter, the Chair of the FJBC shall rotate every four month among the Chairs each of each District. The Secretary-Treasurer shall be elected be a majority of all the FJBC Commissioners.

Section 3. Vacancies. Any office of the Board which becomes vacant prior to expiration of the normal term thereof for any reason, including resignation, removal, disqualification or death, may be filled by the Board for the unexpired portion of such normal term or until the next regular election, whichever comes first.

Section 4. Removal of Officers. The Board of Commissioners (FJBC) may remove any officer of the Board at any time, provided they determine that such removal is in the best interests of the Board.

PUBLIC-REDACTED

Section 5. Chairman. The Chairman of the Board shall preside at all meetings of the Board of Commissioners (FJBC) of the Board. The Chairman may sign, together with the Secretary-Treasurer, or any other officer designated by the Board, any contract, deed, mortgage, evidence of indebtedness or other document authorized to be executed by the Board of Commissioners, except where the Board of Commissioners, these Bylaws or applicable law has authorized execution by other parties. To the extent permitted by applicable law and these Bylaws, the Chairman shall have all powers and perform all duties incident to the Office of Chairman, or as otherwise designated by the Board. (MCA 85-7-1502)

Section 6. Vice-Chairman. In the absence of the Chairman, the Vice-Chairman shall act in place of the Chairman and possess all the authority, powers and duties of the Chairman during such time. To the extent permitted by applicable law and these Bylaws, the Vice-Chairman shall have all powers and perform all duties incident to the Office of Vice-Chairman, or as otherwise designated by the Board.

Section 7. Secretary. The Secretary shall keep the minutes of all meetings of the Board and provide appropriate individuals with notice of such meetings; act as custodian of the corporate records and corporate seal; execute documents on behalf of the Board as provided by these Bylaws, by authority of the Board or applicable law.

The Secretary shall collect all charges and assessments of the Board; shall be responsible for preservation and maintenance of all funds, securities and related items of the Board, and shall maintain full and complete books of account with respect thereto. The Secretary shall deposit funds of the Board in such banks or other depositories and in such manner as is provided in these Bylaws, as directed by the Board, or as required by law.

The Secretary shall perform all duties and functions of Secretary in the conduct of Board Elections as provided by law.

To the extent permitted or required by applicable law and these Bylaws, the Secretary shall have all powers and perform all duties incident to the Office of Secretary, or as otherwise designated by the Board.

Section 8. Bond Requirements. Before handling or receiving any funds or collecting any charges or assessments, the Secretary of the Board shall obtain a good and sufficient surety bond by an authorized surety company, in an amount that the Board may determine. The cost of the bond shall be paid by the Board.

ARTICLE VII. MEETINGS

Section 1. Regular Monthly Meetings. The FJBC Board shall meet in a regular monthly meeting on the second Monday of each month unless at a previous meeting it is determined by majority vote of the Commissioners attending that the next regular meeting is unnecessary.

Section 2. Special Meetings. The FJBC Board may hold special meetings at the call of the Chair and at least one other Commissioner or at the call of a majority of the Board Commissioners.

Section 3. Emergency Meetings. Emergency meetings of the Board of Commissioners (FJBC) may be called by the Chairman or any board member when an actual emergency exists.

Section 4. Annual Meetings. An annual meeting of the FJBC Board shall be held on the second Monday of January of each year.

Section 5. Agendas. An agenda shall be posted at least 48 hours in advance of any FJBC Board meeting, including special meetings, unless an actual emergency to which the Chair and one Commissioner or a majority of the Commissioners will attest, in which case a Special Meeting may be held on shorter notice, but an agenda must be posted. The agenda shall provide notice of the intended subjects of the meeting. It shall be posted prominently, which requirement is fulfilled if it is posted on the outside of the FJBC Board office, sent electronically to those individuals who have provided the information necessary to do so and requested such notice, and posted on the

PUBLIC-REDACTED

FJBC Boards' website. All Commissioners shall also receive a hard copy of the agenda delivered either by mail or in person. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the Commissioners at the Commissioners address as it appears on the records of the Board, with postage prepaid thereon.

Section 6. Conduct of Meetings—Public Right to Know and Participate—Civility—Timely Conduct of Business. As local governmental entities, the FJBC Board shall conduct all Regular, Special, and Emergency meetings and its affairs generally, in accordance with state law and, in particular, in compliance with the public's right to know, observe deliberations, and participate in the governmental process. The Chair and the Board are authorized, and have the responsibility, to conduct the meetings in a manner that respects the rights of the public and of other individuals, including the right to privacy, and civility in public discourse. The Chair and Board are authorized, and have the responsibility, therefore to ensure civility in the meetings and that they attend to the business of the Board in a reasonable, timely manner. The Chair shall conduct meetings in an orderly fashion, generally conforming to Roberts Rules of Order.

Section 7. Executive Sessions. The Commissioners are authorized to meet in executive, or closed session, only when authorized under Montana law, and they may be conducted only as allowed by law.

Section 8. Location and time of Meetings. All meetings shall be held at 11:00 a.m. at the FJBC Board's office in unless otherwise noted on the agenda. Any other time and place of a meeting shall be prominently indicated on the agenda.

Section 9. Telephonic/Electronic Meeting. Subject to compliance with Montana's Public Meetings Law, any meeting of the FJBC Board may be accomplished in whole or in part by telephonic conference call or other legally allowable electronic communication.

ARTICLE VIII. EXECUTIVE MANAGER

Section 1. Employment of Manager. The FJBC Board may employ a full time Executive Manager of the Board who shall serve at the pleasure of the Board.

Section 2. Duties of Manager. The Manager shall perform such duties and have such powers and authority as shall be provided by the FJBC Board and state law. Except as provided in these Bylaws, or by law, or otherwise by the Board, the Manager shall supervise the business and affairs of the Board and all employees of the Board.

Section 3. Compensation. Rate of compensation shall be determined by the Board of Commissioners (FJBC) and Manager performance reviewed at a minimum of once per fiscal year in Executive Session at a noticed meeting. The Manager is also entitled to reimbursement for travel expenses and for their necessary expenses when otherwise engaged in FJBC Board business.

ARTICLE IX. CONTRACTS, CHECKS, DEPOSITS AND FUNDS

Section 1. Contracts. The FJBC Board may authorize any officer or officers, manager agent or agents of the Board, in addition to the officers so authorized by these Bylaws, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Board, and such authority may be general or confined to specific instances.

Section 2. Warrants, Other Instruments. All warrants, drafts, or orders for the payment of money, notes or other evidences of indebtedness issued in the name of the FJBC Board, shall be signed by such officer, officers, manager agent or agents and in such manner as shall be designated by the Board from time to time. In the absence of such designation, such instruments shall be signed by the Chairman, Vice-Chairman and/or the Secretary of the Board. Authorized signature stamp of individual FJBC Board commissioners may be utilized by any officer or officers, manager agent or agents of the Board to implement necessary actions of the board. Thirty six hour (36) notice is

PUBLIC-REDACTED

required to be given to Lake County Treasurers Office prior to processing of warrants to allow appropriate funds transfer. (MCA 20-3-325 Section 2)

Section 3. Deposits. All funds of the FJBC Board shall be deposited from time to time to the credit of the FJBC Board in such banks, trust companies or other depositories as the Board may select. Where required by law, as with payments for bonded or contractual indebtedness, deposits shall be made to designated accounts.

Section 4. Transfer of Funds. The board of commissioners shall have power to transfer money from any one administrative fund to any other administrative fund, except that no money shall be drawn from the Operating and Maintenance fund held in trust by the county, except for those payments for expenses incurred for the delivery and maintenance of irrigation services within the Board(s). (MCA 85-7-2139)

Section 5. Increase of Tax Assessment. The board of commissioners (FJBC) shall have the authority to increase current tax assessments at a rate of 100% per fiscal year and submit to the Lake County Treasurers Office, Montana Department of Revenue, no later than the 1st Monday of August of each fiscal year. (MCA 85-7-2104) For an increase of more than 100%, although not required by state statute, a binding referendum of the irrigators shall be performed prior to any action.

ARTICLE X. BOOKS AND RECORDS

Section 1. Public Records. The FJBC Board shall keep and maintain books and records of account, minutes of all meetings of the Board, and shall keep at its principal office a record giving the names of the owners of lands subject to the charges and assessments of the Board. In addition, the Board shall keep and maintain, and make available for inspection, such records as may be required by federal and state law. Any books and records of the Board, not subject to exclusion under Montana's Public Records law, shall be open to public inspection during business hours. All requests for copies of public records must be submitted in writing to the Board Manager. The Board will charge research time and material fees for public information requests. Officers, manager agent or agents of the Board shall have a minimum of 30 days to process any and all public requests upon approval of release.

Section 2. County, Federal, and State Reporting/Audit. All required annual reports shall be completed and submitted to required agencies at per state statutes prior to the 1st Monday of August of each fiscal year. (MCA 85-7-2107 to MCA 85-7-2109) The FJBC Board shall keep or cause to be kept, in the form prescribed by the department of administration, a full and complete book and record of the accounts, records, contracts, securities, minutes of meetings, and other matters of every kind pertaining to or belonging to the operation of the irrigation Board. The accounting records of all FJBC Boards must be audited in accordance with MCA 2-7-503.

Section 3. Public Record Search Requirements and Associated Fees. All public requests for records maintained by the board of commissioners (FJBC) that the Board is obligated to respond to must be submitted in writing and signed by the requesting party. A fee of .10 cents per page will be assessed to requestor. Digital files of past meetings will be available for a fee of \$10.00 per individual meeting requested. All charges will be due to the Board upon receipt of request.

ARTICLE XI. FISCAL YEAR

The fiscal year of the FJBC Board shall be from January 1st to December 31th.

ARTICLE XII. BOARD SEAL

The FJBC Board shall provide a Board Seal, which seal shall be in the form of a circle, and contain the name of the Board and reference to the Board as being a Board in the State of Montana residing in Lake County.

PUBLIC-REDACTED

ARTICLE XIII. AMENDMENT TO BYLAWS

These Bylaws may be amended or repealed and new Bylaws adopted, by a majority of the FJBC Board at any regular meeting thereof, or at any duly noticed and constituted meeting thereof.

ARTICLE XIV. JOINT OPERATIONS

Section 1. Authority for Joint Operations of Irrigation Districts. Whenever the board of commissioners of one or more irrigation districts, established and organized by virtue of the provisions of MCA 85-7-101 through MCA 85-7-103 shall, in their discretion, deem it advisable for the best interests of their district to operate, manage, supervise, and maintain the operation of their district jointly with another irrigation district, the said commissioners are hereby authorized and empowered to enter into written contracts for the creation of a joint board of control, if such action is taken in accordance with the statutory requirements and their bylaws.

Section 2. Condition on entry of agreement for Joint Operations. The District shall not enter any contract, agreement, or other legal arrangement for joint operations with another District as provided in Title 85, Chapter 7, Part 16, MCA, that requires it to accept any debt or legal liability of another district existing at the time the contract for joint operations is entered or thereafter incurred as a result of decisions of another district's board that are not the decision of the joint board or ratified by it.

Section 3. Withdrawal from Joint Operation. As agreed in paragraph 8 of the contract executed by the districts creating the Joint Board of Control, any district having entered into that written contract, may withdraw from such contract upon submitting to the board of control and each other district, in writing, a 90-day Notice of Withdrawal, as provided in 85-7-1603, MCA. Such notice shall also be posted in accordance with the requirements for posting an Agenda for a District meeting. Although not mandated by state law, a special election as allowed by state law and herein provided of the Irrigators shall be conducted at the expense of the district that provided the Notice of Withdrawal, the results shall be binding on the district(s), and the withdrawal by a district must be approved by a two thirds majority vote conducted pursuant to 85-7-1710 and 1712, MCA. If a 2/3 vote in favor of the proposed withdrawal is not attained, the district board shall immediately rescind its decision to withdraw. As provided in paragraph 8 of the contract created the Joint Board of Control, the judicial remedy for any attempted breach of this article and section is a specific performance by any person or entity with standing.

IN WITNESS WHEREOF, the undersigned hereby certify that these Bylaws of the FLATHEAD JOINT BOARD OF CONTROL were adopted at a duly constituted meeting of the Board of Commissioners held on Monday, May _____, 2014.

Wayne E Blewett
Chairman, Commissioner

Daniel Boone Cole
Vice-Chairman, Commissioner

Consulting Attorney for District

Attachment 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

SENATE BILL NO. 262
INTRODUCED BY C. VINCENT

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A WATER RIGHTS COMPACT ENTERED INTO BY THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, THE STATE OF MONTANA, AND THE UNITED STATES OF AMERICA; CREATING A UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE TO GOVERN WATER RIGHTS ON THE FLATHEAD RESERVATION; PROVIDING EXCEPTIONS FROM CERTAIN STATE WATER LAWS RELATED TO DEPARTMENT POWERS, JUDICIAL ENFORCEMENT, AND WATER RIGHTS PERMITTING; AMENDING SECTIONS 3-7-211, 85-2-111, 85-2-114, 85-2-301, 85-2-302, 85-2-306, 85-2-427, 85-2-506, AND 85-5-110, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States ratified.** This Compact is entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United State of America to settle all existing claims to water of or on behalf of the Confederated Salish and Kootenai Tribes within the State of Montana.

ARTICLE I - RECITALS

WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation; and

WHEREAS, the Confederated Salish and Kootenai Tribes claim aboriginal water rights and, pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation; and

WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Confederated Salish and Kootenai Tribes, their members and Allottees brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribes' water rights claims, see *United States v. Abell*, No. CIV-79-33-M (filed April 5, 1979); and

WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights

1 d. A majority vote of the CMC may be appealed using the following procedures:

2 i. Disputes arising out of any act, failure to act, error or omission of the BIA or Project Operator involving
3 Operational Improvements or Rehabilitation and Betterment or otherwise affecting real property owned by the
4 United States may be appealed under Title 25, Part 2, Code of Federal Regulations.

5 ii. For disputes raising questions of Compact interpretation, the CMC shall immediately seek a
6 determination of those questions from the Water Management Board, which determination will be provided in
7 writing within 30 days.

8 iii. All other disputes may be appealed to a Court of Competent Jurisdiction. In considering a petition for
9 relief, a Court of Competent Jurisdiction will review the CMC's legal conclusions for correctness and its factual
10 findings for abuse of discretion.

11 H. Power Provisions

12 1. Low-Cost Block of Power

13 The Parties recognize that Article 40 of the Kerr Project License, as amended, jointly issued to the
14 Montana Power Company and the Tribes for the Kerr Project, Project No. 5, requires Montana Power Company,
15 through its successor-in-interest, NorthWestern Energy, to make available the capacity and energy up to 3.734
16 megawatts at up to 100 percent load factor during the months of April through October to the United States, for
17 and on behalf of the FIIP, at the rates set forth in and adjusted in accordance with such Article.

18 The Parties agree that the Kerr Project License Article 40 Low Cost Block of Power is equivalent to the
19 delivery of 19,178,000 kilowatt hours of electricity per year, and generally supplies electricity necessary to pump
20 approximately 46,000 Acre-feet of water per year to the FIIP. If the operation and maintenance, and all other
21 rights and responsibilities for the Kerr Project are assumed by the Tribes or their wholly-owned corporation, the
22 Tribes agree, to the extent permitted under applicable license(s) and Federal law, to make the Low Cost Block
23 of Power available in the same manner and at the same rates, as adjusted, as NorthWestern Energy. If the
24 Tribes seek a new license for the Kerr Project, the Tribes or their wholly-owned corporation, agree that their
25 license application will request authority from FERC to make the Low Cost Block of Power available in the same
26 manner and at the same rates, as adjusted, as NorthWestern Energy.

27 2. Net Power in Excess of Low Cost Block

28 For purposes of Article IV.E, power required to run the Flathead Pumping Station in excess of the Low
29 Cost Block of Power identified in Article IV.H.1 shall be purchased at the price at which Mission Valley Power sells
30 power for irrigation purposes.

1 3. Net Power Revenues

2 The State and Tribes agree to seek provisions in the Federal legislation ratifying this Compact for Mission
3 Valley Power to budget annually for an anticipated amount of \$200,000 of Net Power Revenues to be made
4 available in the subsequent year to meet the needs of both the power system and the FIIP with an initial allocation
5 of the Net Power Revenue that provides fifty percent to the Project Operator and fifty percent to the Tribes. These
6 funds shall only be used for work on the FIIP that has significant fisheries, water conservation, or water
7 management benefits. If on an annual basis such work by the Project Operator or the Tribes does not require
8 the full amount of such net revenues the remainder shall be set aside and accumulated for future expenditure
9 for these purposes. This initial allocation may be changed by mutual agreement of the Parties within nine (9)
10 years of the Effective Date, with any subsequent agreement to become effective on the tenth (10th) anniversary
11 of the Effective Date. Any such modification is pursuant to, and shall not be deemed an amendment of, this
12 Compact.

13 I. Administration: Establishment of Flathead Reservation Water Management Board.

14 1. Establishment of Board. There is hereby established the Flathead Reservation Water Management
15 Board. Upon the Effective Date, the Board shall be the exclusive regulatory body on the Reservation for the
16 issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing
17 Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses. The Board shall
18 also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact
19 on the Reservation, and any controversy over the right to the use of water as between the Parties or between
20 or among holders of Appropriation Rights and Existing Uses on the Reservation except as explicitly provided
21 otherwise in Article IV.G.5. The jurisdiction of this Board does not extend to any water rights whose place of use
22 is located outside the exterior boundaries of the Reservation.

23 2. Membership.

24 a. Voting Members. The Board shall consist of five voting members: two members selected by the
25 Governor of the State pursuant to Article IV.I.2.b, after consultation with holders of Water Rights Arising Under
26 State Law located on the Reservation; two members appointed by the Tribal Council; and one member selected
27 by the other four members. All members shall be appointed within six months of the Effective Date.

28 b. Appointment by Governor. Within 90 days of the Effective Date, or 15 days of any vacancy in one or
29 more of the Board positions selected by the Governor, the commissioners of each county whose boundaries
30 include any portion of the Reservation shall nominate individuals for the Governor's consideration for appointment

1 K. Water Rights Database. The Board shall cause all Appropriation Rights and Changes in Use
2 authorized by the Board and all uses of water registered pursuant to the Law of Administration to be entered into
3 the DNRC water rights database in a format agreed to by the Board and the DNRC.

4 ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

5 A. No Effect on Water Rights of Other Tribes or on other Federal Reserved Water Rights.

6 1. Except as otherwise provided herein, the relationship between the Tribal Water Right described herein
7 and any water rights of any other Indian tribe or its members, or of any federally-derived water right of an
8 individual outside the boundaries of the Flathead Indian Reservation, or of the United States in its own right or
9 on behalf of such other tribes or individuals, shall be determined by the rule of priority.

10 2. Nothing in this Compact shall be construed or interpreted as a precedent to establish the nature,
11 extent, or manner of administration of the rights to water of any other Indian tribe, its members or Indian owners
12 of trust land outside of the Flathead Indian Reservation.

13 3. Nothing in this Compact is intended, nor shall it be used, to affect or abrogate a right or claim of an
14 Indian tribe other than the Confederated Salish and Kootenai Tribes.

15 4. Except as provided herein and authorized by Congress, nothing in this Compact shall be construed
16 or interpreted to establish the nature, extent, or manner of administration of rights to water of the United States
17 on Federal lands outside of the Flathead Indian Reservation.

18 B. General Disclaimers. Nothing in this Compact shall be construed or interpreted:

19 1. To preclude the Tribes, Tribal members, and Allottees, or the United States, from applying to the Water
20 Management Board for an Appropriation Right under the Law of Administration on the same basis as any other
21 Person;

22 2. As a precedent for litigation of aboriginal or reserved water rights;

23 3. As precedent for interpretation or administration of future compacts between the United States and
24 the State, or between the United States and any other state, or between the State and any other state;

25 4. As precedent for negotiation, interpretation or administration of any existing or future Compact,
26 negotiated settlement, judicial settlement or other form of accommodation of water rights involving Indian tribes
27 or individual Indians;

28 5. To preclude the possession, acquisition or exercise of Water Rights Arising Under State Law by the
29 Tribes or Allottees or members of the Tribes;

30 6. To limit in any way the right of the Parties or any other Person to litigate any issue or question not

1 resolved by this Compact;

2 7. To authorize the taking of any water right that is vested under State, Tribal or Federal law;

3 8. To affect the ability of tribes or qualified individuals under Title 25, Sections 151.4 and 151.8, Code
4 of Federal Regulations, to purchase land from willing sellers or the Secretary's ability to convert fee land to trust
5 land status;

6 9. To create or deny substantive rights through headings or captions used in this Compact;

7 10. To address or prejudge how the Tribal Water Right may be treated or interpreted in any interstate or
8 international water apportionment proceeding;

9 11. To constitute a waiver of sovereign immunity by the Tribes or the State except as expressly set forth
10 in this Compact;

11 12. To constitute a waiver of sovereign immunity by the United States except as expressly set forth in
12 43 U.S.C. 666 or as otherwise provided by Congress;

13 13. Except as expressly provided herein and as may be required by Congress, to modify the obligations
14 of any agency of the United States;

15 14. To limit or prohibit the Tribes, their members or Allottees, or to limit the United States in any capacity,
16 from objecting in any general stream adjudication in the Montana Water Court to any claims to water rights on
17 or off the Flathead Indian Reservation;

18 15. To prevent the Montana Water Court from adjudicating any properly filed claims or objections to the
19 use of water within the Flathead Indian Reservation;

20 16. To limit or prohibit the Tribes, their members or Allottees, or the United States in any capacity, from
21 filing any necessary action to prevent any Person or Party from interfering with the Tribal Water Right;

22 17. To affect or determine the applicability of any State, Tribal or Federal law not subject to this Compact,
23 including, but not limited to environmental and public safety laws, on activities of the Tribes, their members or
24 Allottees or the United States;

25 18. To prejudice or predetermine any right that Tribal members or Allottees have to obtain the use of a
26 portion of the Tribal Water Right under the provisions of this Compact and the Law of Administration;

27 19. To affect the capacity of any Tribal member or Allottee to lease his or her land;

28 20. To empower the Water Management Board to assess a fee for the use of water;

29 21. To confer any jurisdiction on the Water Management Board over any water right whose place of use
30 is located outside the exterior boundaries of the Reservation;

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Washington, DC, this 6th day of November, 2015.

/s/ Kathleen L. Mazure
Kathleen L. Mazure
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M St., N.W.
Suite 800
Washington, DC 20036
Tel: (202) 467-6370
Fax: (202) 467-6379
klm@dwgp.com