



## INTRODUCTION

The Montana Attorney General (“the Attorney General”) moves to intervene for the limited purpose of seeking dismissal of this case. There is no express or implied waiver of sovereign immunity by virtue of this limited intervention. *See Southwest Ctr. For Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 519-20 (9th Cir. 1998) (recognizing state interest in intervening for purpose of seeking dismissal); *see also Zych v. Wrecked Vessel Believed to be Lady Elgin*, 960 F.2d 665, 667-68 (7th Cir. 1991) (finding that a federal court has authority to entertain a motion to intervene for the limited purpose of seeking dismissal). In filing the motion to intervene and this memorandum in support, the Attorney General does not waive the State of Montana’s sovereign immunity from suit nor consents to be sued with regard to any issue or claim now or hereafter presented in this case or otherwise, and expressly reserves its sovereign immunity from suit.

The Confederated Salish and Kootenai Tribes (the Tribes) filed this action seeking declaratory and injunctive relief, alleging that pending actions in Montana’s Twentieth Judicial District and the Montana Water Court (collectively “the State Courts”) threaten to violate the general adjudication requirements of the McCarran Amendment, 43 U.S.C. § 666, by allowing piecemeal adjudication in the absence of necessary and indispensable parties. (Doc. 27, ¶¶ 120, 121.)

The Tribes seek to enjoin the State Courts, and now their judges, from proceeding with the pending actions because they fear the State Courts may issue inconsistent or conflicting rulings, and in doing so may waste judicial resources by ultimately issuing a judgment that is unenforceable against the Tribes and the United States. (Doc. 27 at 40, ¶ 7; and at 41, ¶ 14.)

The Attorney General has a significant interest in protecting and preserving the integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2, and ensuring its on-going compliance with the McCarran Amendment, 42 U.S.C. § 666. The Attorney General's interest has constitutional underpinnings. *See* Mont. Const. Art. IX, § 3. The Attorney General's interest may be impaired if the Court grants the Tribes' requested relief; therefore, he seeks leave of the Court to intervene under Fed. R. Civ. P. 24 for the limited purpose of seeking dismissal.

### **BACKGROUND**

On the eve of its dissolution, the Flathead Joint Board of Control (dissolved FJBC)<sup>1</sup> filed a motion (the FJBC Motion) in the Water Court seeking a declaratory judgment as to the "characteristics" of ownership of certain water rights ostensibly secured by claims filed by the dissolved FJBC on behalf of its irrigator-landowners within the Flathead, Mission and Jocko Valley

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<sup>1</sup> The Flathead Joint Board of Control dissolved on December 12, 2013.

Irrigation Districts. *See In the Matter of the Adjudication of Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground of the Federal Flathead Indian Reservation Basin 76L; In Re: Flathead Joint Board of the Flathead, Mission, and Jocko Valley Irrigation Districts*, Case No. WC-2013-Basin 76L, Montana Water Court, Combined Motion to Interplead, for Declaratory Judgment and for Permission to Deposit Property in the Court, filed Dec. 6, 2013, attached as Ex. A.

The FJBC dissolved on December 11, 2013. The following day, the dissolved FJBC, along with one of its member districts, the Flathead Irrigation District (FID), filed a complaint (the FJBC Complaint) in the Montana Twentieth Judicial District Court that is nearly identical to the FJBC Motion in the Montana Water Court. *See Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts, and Flathead Irrigations District v. United States Bureau of Indian Affairs*, Case No. DV-13-313, Twentieth Judicial District (Lake County), Compl. filed Dec. 11, 2013, attached as Ex. B.

Both the FJBC Complaint and the FJBC Motion state that the “character” of the ownership of the water rights asserted in the claims is uncertain because the Bureau of Indian Affairs has filed “almost identical” water rights claims and the Tribes also asserts ownership of “all or part of” these same water rights but have not yet filed their claims. *See Ex. A at 7; Ex. B at 6.* Under the guise of protecting

the dissolved FJBC from liability and litigation over ownership of the water right claims, the FJBC Complaint and the FJBC Motion also ask that it be allowed to deposit them with both Montana State Courts under Mont R. Civ. P. 67. See Ex. A at 9; Ex. B at 9. On May 20, 2014, the Attorney General moved for leave to file amicus curiae briefs in both State Courts.<sup>2</sup>

Two other cases concerning the ownership of water rights claims related to the Flathead Indian Irrigation Project (“the FIIP”) and the dissolved FJBC are also pending before the Twentieth Judicial District Court. See Ex. C at 5, n.3 (*discussing Western Montana Water Users Ass’n v. Mission Irrigation Dist., Jocko Valley Irrigation Dist., Flathead Irrigation Dist., and Flathead Joint Board of Control*, Cause No. DV 12-327, and *Ingraham v. Flathead Joint Board of Control*, Cause No. DV 13-102.) As noted in the Attorney General’s proposed amicus brief lodged in the Twentieth Judicial District Court, the validity of water rights claims should be determined in the Adjudication.

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<sup>2</sup> The first motion and proposed brief were filed in the Montana Twentieth Judicial District Court, Lake County, Cause No. DV-13-313. A true and correct copy of the motion and proposed amicus brief (without exhibits) is attached as Ex. C. The Attorney General also filed a motion for leave to file an amicus curiae brief in Water Court of the State of Montana, Cause No. WC-2013-05. A true and correct copy of the motion and proposed amicus brief (without exhibits) is attached as Ex. D.

Here, the Tribes are seeking declaratory and injunctive relief, alleging that the pending actions in the State Courts threaten to violate the terms of the waiver of federal and tribal sovereign immunity contained in the McCarran Amendment, 43 U.S.C. § 666. More specifically, the Tribes assert that the McCarran Amendment requires comprehensive ("*inter sese*") adjudication while the pending actions constitute piecemeal adjudication in the absence of necessary and indispensable parties--Tribes and the United States. (Doc. 27, ¶ 9, pp. 40-41.) Consequently, the Tribes seek to enjoin the State Courts from proceeding with the pending actions because they allegedly fear the State Courts may issue inconsistent or conflicting rulings, and in doing so may waste judicial resources by ultimately issuing a judgment that is unenforceable against Tribes and the United States. (Doc. 27, ¶¶ 7, 11, 14, pp. 40-41.)

The Tribes also seek a declaratory ruling that the water rights for the FIIP belong to the United States--as opposed to, among other possibilities, the dissolved FJBC, the Flathead, Jocko and Mission irrigation districts or individual irrigators served by the FIIP--and that the United States' rights for water used on the FIIP derive from the Tribes' own water rights established pursuant to the Hellgate Treaty of 1855. (Doc. 27, ¶¶ 2, 5, pp. 42-43.)

**I. THE ATTORNEY GENERAL MEETS THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT PURSUANT TO FED. R. CIV. P. 24(a)**

Rule 24(a)(2), Fed. R. Civ. P., authorizes anyone to intervene in an action as of right when the applicant demonstrates: (1) the application is timely; (2) the applicant has a “significant protectable interest” in the action; (3) “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest;” and (4) “the existing parties may not adequately represent the applicant’s interest.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011). The Ninth Circuit upholds a liberal policy in favor of intervention. *Wilderness Soc’y v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). Such a policy allows for “both efficient resolution of issues and broadened access to the courts.” *Id.* (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). It follows that if Fed. R. Civ. P. 24(a) is to be “construed broadly in favor of intervention, the four part test should also be construed broadly.” *Wildlands CPR v. United States Forest Service*, CV 10-104-M-DWM, 2011 U.S. Dist. LEXIS 12813, at \*3-\*4 (D. Mont. Feb. 9, 2011).

In evaluating whether the requirements are met, courts are “guided primarily by practical considerations, not technical distinctions.” *Southwest Ctr. for*

*Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). As the Ninth Circuit has explained:

A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [courts] often prevent or simplify future litigation involving related issues; at the same time, [they] allow an additional interested party to express its views before the court.

*United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002).

The State meets all four parts of the test and is entitled to intervene as of right.

**A. The Attorney General's Application is Timely.**

Whether a motion to intervene--permissive or otherwise--is considered timely is ultimately up to the discretion of the court. *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."). In the Ninth Circuit "[t]imeliness is measured by reference to '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay.'"

*United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002), citing *County of Orange v. Air Calif.*, 799 F.2d 535, 537 (9th Cir. 1986).

The Attorney General has filed its Motion less than a week after the Tribes filed their amended complaint (Doc. 27). A motion to intervene at such an early stage of the proceedings is timely. *Citizens for Balanced Use*, 647 F.3d. at 897 (motion to intervene was timely when filed less than three months after the complaint and less than two weeks after an answer).

**B. The Attorney General Has a Protectable Interest Relating to the Subject of the Action.**

Whether an applicant has a “significantly protectable” interest necessary for intervention depends on: (i) whether the interest is protectable under some law; and (ii) whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc’y*, 630 F.3d at 1179. The two prongs of the “significantly protectable” interest test are closely related because an applicant “has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). “Although an applicant cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation.” *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States v. Union Elec.*, 64 F.3d 1152, 1162 (8th Cir. 1995)); see also *United States v. Aerojet General*, 606 F.3d 1142, 1150 (9th Cir. 2010).

Here, the Attorney General has a significant interest in protecting and preserving the integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2. This interest is particularly significant as it pertains to assuring the compliance of the Adjudication with the waiver of federal and tribal sovereign immunity embodied in the McCarran Amendment, 43 U.S.C. § 666, which allows Montana state courts to exercise jurisdiction over the water rights claims of the United States and Indian tribes within Montana's borders. *See State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 762 (Mont. 1985). The Montana General Stream Adjudication proceeds according to a specific statutory process. As the Montana Supreme Court has explained:

Persons who claim water rights that existed prior to July 1, 1973, were required to file statements of their claims, which are then compiled and examined by the Department of Natural Resources and Conservation under the direction of the Water Court. The Water Court then issues an interlocutory, temporary preliminary, or preliminary decree of water rights based on the claims, on data from the DNRC, on other information obtained by the water judge, and on water compacts where applicable. Public notice of the decree provides opportunity for interested persons to review and object to the decree for good cause. The Water Court holds hearings on the issues raised by the objections and issues a final decree.

*Montana Trout Unlimited v. Beaverhead Water*, 361 Mont. 77, 255 P.3d 179, 181 (Mont. 2011) (internal citations omitted).

Mont. Code Ann, § 85-2-248(7)(a) requires the Water Court to join the State of Montana, through the Attorney General, to each Water Court case in which:

(1) a Department of Natural Resources and Conservation (DNRC) issue remark placed on a water rights claim during the examination phase gives rise to a question of nonperfection or abandonment; and (2) that issue remark has not been resolved through the claimant's informal consultation with the DNRC or during the regular course of the objection process. The State's role in such cases is to ensure the accuracy of the Adjudication so as to vindicate the State's constitutionally assigned role as owner of all the water in Montana. *See* Mont. Const. Art. IX, §3.

In these cases, the Attorney General does not represent the interests of any particular water rights claimant or objector, or other stakeholder in the Adjudication. *See* Mont. Code Ann. § 85-2-248(7).

Given the Attorney General's statutory role in ensuring the integrity of the state-wide adjudication process, the Tribes' claims that the proceedings before the State Courts threaten to violate that process and its on-going compliance with the McCarran Amendment directly implicate the Attorney General's interests. Moreover, the Tribes' requested relief--to enjoin the State Courts--could impair or impede the Attorney General's ability to protect and preserve the state-wide adjudication process through the State Courts which also makes the Attorney General's interest a "significantly protectable interest."

**C. The Attorney General's Interests Would Be Impaired or Impeded by the Outcome of the Litigation.**

A proposed intervenor need only demonstrate that the outcome of litigation “may” “impair or impede” its legally protectable interests, not that impairment is certain to occur. Fed. R. Civ. P. 24(a)(2); *United States v. City of Los Angeles*, Cal., 288 F.3d 391, 397-98 (9th Cir. 2002). As described above, the Tribes’ requested injunctive relief, if granted, could impede the Attorney General’s ability to protect and preserve the state-wide adjudication process through the State Courts and ensure its continued compliance with the requirements of the McCarran Amendment.

**D. The Montana State Courts Cannot Adequately Represent the Attorney General's Interests.**

Lastly, the fourth requirement of Fed. R. Civ. P. 24(a)(2)--that the Attorney General’s interests are not adequately represented by an existing party--is satisfied if he can demonstrate that the representation of its interests “may be” inadequate. *See Citizens for Balanced Use*, 647 F.3d at 898 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). In determining the adequacy of representation the Court examines three factors: “(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary

elements to the proceeding that other parties would neglect.” *Id.* quoting *Arakaki*, 324 F.3d at 1086.

While the State Courts, their judges, and the Attorney General share an interest in protecting and preserving the integrity of Montana’s state-wide adjudication process, as well as ensuring its on-going compliance with the McCarran Amendment, their respective roles in the process are different. The Attorney General’s statutory role in the state-wide adjudication process (Mont. Code Ann. § 85-2-248(7)(a) requires Attorney General to be joined as a party to certain claims), as well as his unconditional right to intervene as a party in unresolved claims (Mont. Code Ann. § 85-2-248(7)(b)), and his particular interest in ensuring the compliance of the Adjudication with the McCarran amendment, makes his interest separate and distinct from that of the State Courts.

Further, though both the State Courts and the Attorney General may have the same “ultimate objective” of having the State Courts dismissed from this case, neither the State Courts nor their judges can be expected to make all the arguments that the Attorney General will make because of their differing roles in the adjudication process. The State Courts or the judges in their official capacities defense of their role in the adjudication process will likely take priority for them over the Attorney General’s interest.

## **II. THE ATTORNEY GENERAL MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.**

If this Court denies the Attorney General's request to intervene as of right, the Attorney General respectfully requests, in the alternative, to be allowed to intervene permissively under Fed. R. Civ. P. 24(b). Rule 24(b) provides two avenues for permissive intervention--one specifically for a government officer or agency, and another for any person (including a government officer or agency). Here, the Attorney General may be granted permissive intervention under either Rule 24(b)(1) or (b)(2).

Fed. R. Civ. P. 24(b)(2) provides:

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Here, the Tribes' allegations directly implicate the adequacy and integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2. As discussed above, the Montana Water Use Act assigns the Attorney General certain statutory obligations, as well as affords him certain rights. *See* Mont. Code Ann. §§ 85-2-248(7)(a), (b). The Attorney General also has a long-standing role in ensuring the accuracy of the

Adjudication and its compliance with the McCarran Amendment. See, e.g., *State ex rel. Greely v. Confederated Salish Kootenai Tribes*, 712 P.2d at 762. Thus, the Attorney General has a role in the administration of the Montana Water Use Act and may be granted permissive intervention under Rule 24(b)(2)(B).

This Court may also grant permissive intervention pursuant to Rule 24(b)(1) when an applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely, and (3) the applicant's claim or defense, and the main action have a question of law or fact in common. See Fed. R. Civ. P. 24(b)(1); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109-11 (9th Cir. 2002); see also *Friends of the Wild Swan, et al. v. Jewell, United States Fish and Wildlife Service, et al.*, Case No. CV-13-61-M-DWM (D. Mont. July 1, 2013) (Doc. 16) (granting permissive intervention to State agencies).

First, the Attorney General need not establish independent grounds for jurisdiction because Tribes assert federal-question jurisdiction under 28 U.S.C. § 1331, and the Attorney General raises no new claims in his proposed motion to dismiss. See *Freedom From Religion Found. v. Geithner*, 644 F.3d 836, 843-844 (9th Cir. 2011) ("We therefore clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.").

Second, as explained above, the Attorney General's motion is timely because it was at an early stage of the proceedings--before all defendants filed an answer. *See Fund for Animals v. Norton*, 322 F.3d 728, 735 (9th Cir. 2003) (motion to intervene was timely when filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer.").

Third, the commonality requirement of Rule 24(b)(1)(B) "does not specify any particular interest that will suffice for permissive intervention," and "it plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Kootenai Tribe of Idaho*, 313 F.3d at 1108 (quoting 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1911, 357-63 (2d. ed. 1986)).

Here, the Attorney General's interest in protecting and preserving the integrity of the state-wide adjudication process under the Montana Use Act, as discussed in Section I above, demonstrates a legally protectable interest directly relating to the subject of the action, and thus, easily meets the "common question of law and fact" requirement for permissive intervention.

Finally, in exercising its discretion, a court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(3). Montana's timely application and participation will not unduly delay the case or prejudice the original parties.

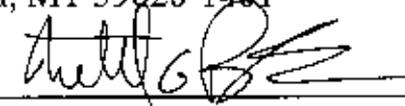
**CONCLUSION**

For the reasons stated herein, the Attorney General requests that the Court grant leave to intervene for the limited purpose of filing a motion to dismiss.

Respectfully submitted this 22nd day of May, 2014.

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,562 words, excluding certificate of service and certificate of compliance.

A handwritten signature in black ink, appearing to read "Michael G. Black", written over a horizontal line.

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