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IN THE WATER COURT OF THE STATE OF MONTANA  
 YELLOWSTONE DIVISION  
 TONGUE RIVER BELOW HANGING WOMAN CREEK - BASIN 42C

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United States of America	)	
General Objections to Basin 42B and 42C	)	
Preliminary Decrees	)	<b>CASE 42B-1</b>

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**MOTION FOR LEAVE TO APPEAR *AMICUS CURIAE* AND TO SUBMIT AN *AMICUS* MEMORANDUM IN SUPPORT OF THE UNITED STATES' *MOTION FOR ORDER REQUIRING DNRC TO EXAMINE FOR POST-JUNE 30, 1973 NONUSE AND MOTION FOR WATER COURT TO ADJUDICATE POST-JUNE 30, 1973 ABANDONMENT IN THE MONTANA ADJUDICATION AND BRIEF IN SUPPORT***

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Applicant, the Assiniboine and Gros Ventre Tribes, now known as the Fort Belknap Indian Community ("FBIC" or "Tribes"), by and through its attorneys, Fredericks Peebles & Morgan LLP, and the Law Offices of James L. Vogel, and pursuant to its October 31, 2013 Scheduling Order, hereby move the court for leave to appear *amicus curiae*, to submit an *amicus*

Memorandum supporting the United States of America in its *Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication and Brief in Support* (hereinafter, the “Motion”), in the above-captioned case. FBIC also joins the United States in requesting that the court set this issue for oral argument and allow the FBIC to participate for the reasons set forth herein.

The FBIC concurs with and joins the United States’ position that this Court’s direction of the Department of Natural Resources and Conservation (DNRC) to examine post-June 30, 1973 abandonment issues is required under Montana state law. Moreover, the FBIC concurs with the United States that the Water Court is bound by law to adjudicate post-June 30, 1973 abandonment prior to issuing final decrees on existing water rights.

The FBIC seeks to appear *amicus curiae* to submit additional information for the Court to consider regarding the implication and effect of this Court’s inaction on post-June 30, 1973 abandonment issues, including its effect on the FBIC’s compacting efforts. As noted below, the FBIC’s compacting efforts have already been met with challenges unique to issues associated with the Milk River. The FBIC believes that this Court’s inaction on abandonment issues will compromise the FBIC’s ability to realize the full measure of its federally reserved water right.

**Failure to Adjudicate Post-June 30, 1973 Abandonment Adversely Affects the FBIC’s Rights Under the Fort Belknap Water Compact**

The Fort Belknap–Montana Water Rights Compact (“Compact”) was entered into by and among the State of Montana, the FBIC, and the United States for the purpose of settling all existing water rights claims of the FBIC.<sup>1</sup> This Compact arose from the FBIC’s claim of reserved water rights to fulfill the purposes of the Treaty, the Acts of Congress, and *Winters v. United States*, 207 U.S. 564 (1908). In *Winters v. United States*, the United States Supreme

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<sup>1</sup> Ratified as § 85-20-1001 of the Montana Code Annotated (“MCA”) on April 16, 2001, pursuant to the provisions of MCA § 85-2-702.

Court ruled that the FBIC had reserved water rights sufficient to fulfill the purpose of encouraging Indians to pursue agricultural practices on the Reservation at the time of its creation pursuant to the Treaty of 1855.<sup>2</sup>

A subsequent Court decision, *Arizona v. California*, 373 U.S. 546, 600 (1964), held that the quantity of water reserved by an Indian tribe under *Winters* was enough to develop a viable agricultural economy, or water sufficient to irrigate the practicably irrigable acreage (“PIA”) of the reservation. Under the *Winters* Doctrine, the priority date for the Fort Belknap water right is October 17, 1855, much earlier than most other water rights priority dates claimed by non-Indians using water from the Milk River, and the FBIC is entitled to enough water to irrigate the PIA. Because the FBIC’s unquantified senior water right poses problems for non-Indian water users and the State of Montana, the United States brought suit in 1979 seeking to quantify the FBIC’s water rights. *United States v. Aageson*, No. CV-79-21 (D. Mont., filed April 5, 1979). The case was postponed in 1983 to allow the parties to negotiate a settlement. After intense negotiation, the State and the FBIC signed the Compact in 2001. It is currently pending federal approval before the United States Congress.

This Compact was intended to satisfy all of the water rights claims of the FBIC, tribal members, and Allottees, and of the United States on behalf of the FBIC and its members and Allottees within the State of Montana. Additionally, the Compact specifically ensures that the Milk River is operated and administered using measures necessary to ensure satisfaction of the FBIC’s water rights. Generally, the Compact allows the FBIC to divert water from any point on the water source that lies within the boundaries of the Reservation and use that water any place within the Reservation. However, it also sets forth a detailed and complex accounting of the sources from which the tribal right can be taken, the amount of water the FBIC is entitled to, and

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<sup>2</sup> Pursuant to its ruling, the Supreme Court reserved to the Gros Ventre and Assiniboine Tribes rights to 125 cubic feet per second of water to irrigate approximately 10,425 acres of land.

provisions for storage, development and administration of the tribal water right.

As a result of the historical shortage of water in the Milk River basin, the FBIC's water rights were defined in the Compact to create certainty for Indian and non-Indian users alike. The FBIC's Milk River water right recognized and affirmed in the FBIC's Compact constitutes Fort Belknap's major water supply and is an integral part of the Tribe's irrigation project and development of its water resources. However, the Milk River does not currently have sufficient water to satisfy the reserved water rights of both the Blackfeet Tribe and the FBIC. As a result, both tribes have begun negotiations to attempt to resolve the contested water supply.<sup>3</sup> Failure to examine post-June 30, 1973 claims for abandonment in the Montana Adjudication will further strain the already insufficient water supply and compromise the FBIC's ability to make full use of its water rights to improve and make beneficial use of its land and resources. This will adversely impact the FBIC's water rights and compromise current and future water use on the Reservation pursuant to the Fort Belknap Indian Irrigation Project.

**Canada's Right to Develop Its Share of Milk River Water Under the Boundary Waters Treaty Could Further Limit Milk River Water in Montana**

In 1909, Great Britain and United States consummated an agreement to address emerging and ongoing issues associated with watercourses that either meander through or border both Canada and the United States. The Boundary Waters Treaty of 1909 was signed by the United States and Great Britain<sup>4</sup> to resolve disputes over any waters bordering the two countries, including the Milk River and St. Mary River in Montana. *See generally*, Treaty Relating to Boundary Waters ("Boundary Waters Treaty"), U.S.-Gr. Brit., Jan. 11, 1909.

Article VI of the Treaty specifically addresses the apportionment of waters from the St. Mary River and Milk River. Article VI states, in part:

The High Contracting Parties agree that the St. Mary and Milk Rivers and their

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<sup>3</sup> Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2013.

<sup>4</sup>Canada was a Dominion of Great Britain and under the British throne at the time of the Treaty signing.

tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

Boundary Waters Treaty, art. VI.

The apportionment of waters on the Milk River and St. Mary River is premised upon the treaty's guiding principle to provide equal and similar rights in the use of border waters for the United States and Canada. Mary Ellen Wolf,<sup>5</sup> *The Milk River: Deferred Water Policy Transitions in an International Waterway*, 32 Nat. Res. J. 55, 56 (Winter 1992). Despite the treaty's intent, the Milk River is already stretched to capacity, with more demand on the horizon from both sides of the border. *Id.* For this reason, future development by Canadian or U.S. water users will invariably affect both current and future users due to the limited and erratic supply of Milk River water. With the respective shares of Milk River water allocated to each nation already near capacity, the state of Montana and the Canadian province of Alberta have been meeting to explore potential options for both nations to better utilize their respective shares of both the Milk River and the St. Mary River. Bureau of Reclamation, *St. Mary River- Milk River Basin Study Draft Report*, 2 (Jan. 2012).

As part of Canada's plan to maximize its respective share of Milk River water, Canada has been contemplating construction of a reservoir on the Milk River in Alberta to help expand irrigation opportunities in the Canadian province. *Id.* at 2-3. Currently, Canada's inability to fully utilize its share of Milk River water results in approximately 20,000 acre feet of Canadian

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<sup>5</sup> At the time of its publication, the author, Mary Ellen Wolf, worked for the State of Montana in its Department of Natural Resources and Education.

water that flows into the United States. *Id.* at 30. Pursuant to the Treaty, the United States' share of Milk River water returning from Canada between March and October has, on average, stood at 63,900 acre feet. *Id.* Thus, the U.S. is receiving approximately 83,900 acre feet of water crossing into Montana. If Canada pursues development of a reservoir to capture its losses, the United States stands to lose almost one quarter of the water it currently relies upon to meet the needs of downstream Milk River water users. This would likely have a devastating effect on those water users who already rely upon the Canadian share of water that flows into Montana.

The demand for Milk River water will be further affected by the FBIC's compacting efforts to quantify its federally reserved rights. Fort Belknap sits downstream from the Milk River's re-entrance into Montana from Canada. Pursuant to the Compact, Fort Belknap's priority date for its claims to Milk River water is October 17, 1855, predating virtually all non-Indian Milk River water users in the state. Once Fort Belknap's Compact is ratified by the United States Congress, the Fort Belknap Indian Community will look to develop its Compact water right, making appropriation by subordinate water users more difficult, especially in times of low flow or drought.

### **Conclusion**

The issues described above magnify the importance for a complete and accurate adjudication of water rights for all of Montana's citizens. By failing to adjudicate post-June 30, 1973 abandonment, this Court has essentially made an already scarce resource even more susceptible to depletion for those with valid water right claims. The volatility of Milk River flow, coupled with the emerging issues of Canadian and tribal water development, make review of post-June 30, 1973 abandonment even more of a priority. As the United States noted in its January 24, 2012 *Motion*, this Court has the exclusive obligation under the Montana Water Use Act to fairly and accurately adjudicate all water rights claims within the state's boundaries.

Establishing a precedent where the DNRC does not investigate abandonment claims will

cause problems in other basins within the State of Montana. The Water Court is obligated to address post-1973 abandonment and the failure to direct the DNRC to investigate post-June 30, 1973 abandonment claims will adversely impact the FBIC's water rights in the Milk River Basin by forestalling finality and generating future litigation to remedy this very issue. Such problems will increase costs in both time and money for Indian and non-Indian users. Moreover, it will constrain an already limited water supply in the Milk River Basin and have a significant effect on the FBIC's water rights. Therefore, it is crucial that this Court direct the DNRC to examine these abandonment issues and that the Water Court adjudicate post-June 30, 1973 abandonment prior to issuing final decrees on existing water rights.

For the reasons set forth above, we respectfully ask this Court to grant the relief sought by the United States in its *Motion*.

Respectfully submitted this 19th day of December, 2013.

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I certify that a copy of the foregoing was served by first class mail on each of the parties set forth below this 19th day of December, 2013.

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