

John B. Carter
Confederated Salish and Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
(406) 675-2700
FAX: (406) 675-4665

and

James H. Goetz
Goetz, Gallik & Baldwin, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
(406)587-0618
FAX:(406)587-5144

IN THE WATER COURT OF THE STATE OF MONTANA

PETITION OF THE CONFEDERATED SALISH)
AND KOOTENAI TRIBES OF THE FLATHEAD) Cause No. _____
INDIAN RESERVATION FOR AN ORDER TO)
TAKE THE DEPOSITION OF PROFESSOR)
DEWARD E. WALKER, JR., Ph.D., FOR THE)
PURPOSE OF PRESERVING TESTIMONY)
_____)

Comes Now the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (hereafter Tribes) by their undersigned attorney and petition this Court for an Order authorizing the Tribes to take the audio-visual deposition on oral examination of Professor Deward E. Walker, Jr., Ph D. for the purpose of preserving his testimony for use in the Montana general state-wide water rights adjudication proceedings. This verified petition is filed pursuant to Rule 27(a) of the Montana Rules of Civil Procedure, as modified by Rule 28 of the Montana Water Right Adjudication Rules.

The undersigned attorney for the Tribes swears to and certifies the veracity of the following facts, as identified in Rule 27(a), M.R.Civ.P.:

1. The Tribes are a party to an action cognizable in the Montana Water Court, involving the general adjudication of all aboriginal, federally reserved and State-law based water rights of the Tribes to waters throughout the State of Montana. That adjudication, as applied to the Tribes, is presently stayed under the provisions of 85-2-217, M.C.A. (2009). The stay shall remain in

effect to the later of (1) the expiration of the statutory stay (85-2-217, MCA) coupled with the subsequent two-year statutory period of time for the Tribes to file all their water rights claims (85-2-702, MCA), presently June 30, 2015, or (2) two years after the date of the early termination of negotiations, an indeterminable date. Accordingly, should negotiations continue to the sunset date, under the operation of the Montana Water Use Act, the initiation of the adjudication of the Tribes' water rights, may not commence until July 1, 2015. The date for Dr. Walker's testimony would be some undetermined additional time into the future.

2. The action will consist of an adjudication and quantification of the aboriginal, federal reserved and state-based water rights of the Tribes. If the effort to settle the Tribes' water rights claims by negotiation with the RWRCC fails, the Tribes will file, prosecute and defend water rights claims both within and outside of the Flathead Indian Reservation in the State of Montana. The Tribes' claims would include consumptive and non-consumptive claims in both the Columbia River Basin and the Missouri River Basin.

3. The Tribes propose to take the deposition of Dr. Deward E. Walker, Jr., Ph.D. Dr. Walker is an anthropologist who has undertaken anthropological studies of the Tribes for over forty years. He is a professor of Anthropology at the University of Colorado, Boulder, Colorado and a vice-president of the Walker Research Group, Ltd, a Colorado corporation. His mailing address is P.O. Box 4147, Boulder, Colorado 80306. Dr. Walker is seventy four years old. His years of professional experience and accumulated knowledge constitute a critical and essential foundation of the substantiation of Tribes' reserved and aboriginal water rights claims. Preserving his testimony at this time is the responsible thing to do in light of the distant date for the initiation of a litigation of those Tribal claims.

Dr. Walker will testify about the nature of the Tribes' traditional, historic and contemporary reliance upon water and water-related natural and cultural resources in the Tribes' aboriginal territory as well as on the Flathead Indian Reservation. His testimony will include the information and documentation he has studied, developed and used to support the following expert opinions he has developed concerning Tribal reliance on water and water-related resources.

(1). The Salish, Pend d'Oreille, and Kootenai are the three constituent tribes of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (CSKT).

(2). The Salish, Pend d'Oreille, and Kootenai have occupied western Montana and surrounding regions since time immemorial as their homeland.

(3). Home territory boundaries are largely defined by river drainages such as the Kootenay River for the Kootenai; the Pend d'Oreille river for the Pend d'Oreille; and the Bitterroot, Clark Fork, and Flathead Rivers for the Salish, although their homelands are much larger.

(4). Traditional Salish, Pend d'Oreille, and Kootenai culture is based on riverine and lake settlement patterns with a direct reliance on the diverse subsistence base provided in such areas,

including flora, fauna, and fish.

(5). Trade partnerships as well as hunting took the tribes well beyond their homeland east into the Plains to bison hunting areas and west to salmon-fishing areas.

(6). Precontact Euroamerican influences such as the horse and epidemic disease began affecting the tribes from at least the 17th century. Disease resulted in severe depletion of their population. Acquisition of the horse increased the tribes' range, affecting their political, economic, and subsistence patterns. The horse was also instrumental in spreading disease. The fur trade offered the tribes their first continuing contact with non-Indians.

(7). The 1855 Hellgate Treaty provided for cession of tribal lands to the U.S. government in exchange for continued rights to fish, hunt, gather, and pasture on unoccupied (by non-Indians) lands and usual and accustomed places, exclusive use of a reservation (without trespass by non-Indians), and various annuities, goods, and services, all to be provided by the federal government.

(8). It was the understanding of both Governor Stevens and the tribal leaders who signed the 1855 Treaty of Hellgate that the rights of the Flathead, Pend d'Oreille, and Kootenai to gather, hunt, and fish were reserved and protected by this Treaty, including exclusive rights to do so on the Reservation.

(9). Article 3 of the 1855 Treaty of Hellgate reserves to the Flathead, Pend d'Oreille, and Kootenai the privilege within their homeland of hunting, fishing, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

(10). Both Governor Stevens and the tribal leaders who signed the 1855 Treaty of Hellgate understood that the confederated status of the three tribes was to be preserved and that their leaders would continue to exercise authority in the administration of the affairs of the CSKT and their reservation.

(11). The Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation is a direct successor to the Confederated Tribal government recognized in the Hellgate Treaty of 1855.

(12). The tribes claimed various rights and privileges that were reserved in the 1855 Hellgate Treaty, but some confusion is evident in the record of the 1855 Treaty negotiations.

(13). Despite culture and language barriers, the tribes understood Article III of the 1855 Hellgate Treaty, which preserved their rights to gather, hunt, and fish in usual and accustomed sites and locations.

(14). Problems on and off the reservation, including lack of supplies, incompetent agents, non-Indian trespass, and bans (by federal policy and missionaries) on traditional practices, made reservation life difficult for the tribes after the treaty was ratified.

- (15). Allotment of the Flathead Indian Reservation ultimately resulted in extensive lands being lost to tribal uses, the diminishment of habitats necessary for many species, and loss of access to various traditional tribal hunting, fishing, and gathering areas.
- (16). The Flathead Irrigation Project construction was begun about the time the reservation was opened to non-Indian settlement and has resulted in mostly non-Indian owned land being irrigated. It has not benefitted the tribe to the extent that was ostensibly intended. In fact, many tribal uses of lands and waters have been lost because of the project as well as streamflows being interrupted and pollutants contaminating water courses.
- (17). The Flathead Indian Reservation adopted the Indian Reorganization Act of 1934, which ended the allotments and allowed the tribes to begin regaining their lost territory, a process that is continuing.
- (18). Although termination threatened the reservation's existence, it was strongly and successfully opposed by tribal members.
- (19). The Flathead, Pend d'Oreille, and Kootenai Tribes have continued from pre-Hellgate Treaty times to conduct hunting, fishing, and gathering activities. Most traditional species continue to be found on various parts of the reservation and larger traditional homeland of the CSKT. My research into the nature and extent of tribal reliance on these resources reveals that they have always been and continue to be an important resource for the tribes.
- (20). The contemporary meaning of hunting and fishing to members of the Flathead, Salish, and Kootenai Tribes is both rich and complex. Hunting and fishing present one of the greatest opportunities for tribal members to learn about their culture, traditions, and history. These rights and associated practices are among the few opportunities available for elders to teach younger members of the tribes many important lessons of life. Perhaps the most fundamental lesson young tribal members learn is a reverential respect for all aspects of nature. The next most fundamental lesson is that human beings, fish, game, and other natural resources are part of a single, inseparable system that is both spiritually and practically interconnected. Other fundamental lessons are the planning, spiritual preparation, techniques of regulation, patience, and deep understanding of animal behavior that are necessary for success. Yet another set of important lessons taught by elders to tribal young people through hunting, fishing, and gathering concerns sharing the mutual support throughout the community. It is taught from the start that all needful members of the community must share in the catch. In some cases one hunter may regularly hunt for a half-dozen or more families who have no hunter to support them. Overall, the exercise of the rights reserved in Article 3 of the Treaty concern more than just protection of tribal subsistence resources. Instead, it is concerned with protecting a way of life or culture that is closely identified and intertwined with the exercise of these rights and activities throughout the CSKT homeland.
- (21). Continuing contemporary reliance on hunting and fishing incorporates most traditional beliefs and practices. The contemporary game chosen, such as deer, elk and moose, have been

used historically in both pre- and post-Treaty times. Families continue to share the catch with other less fortunate families. Virtually all parts of the animal are used by many traditional families, including the hide, horn, hooves, and various organs and other animal parts to make domestic implements, clothing, handicrafts, and special foods whose preparation is understood only by the tribes. Respect and reverence for traditional subsistence resources has always been true and remains so to this day, including special rituals followed after the animal is killed. Families traditionally hunted together in family hunting territories and continue to do this at this time.

(22). Throughout the traditional as well as modified CSKT economy, the central importance of water and water-related resources remains fundamental to tribal survival. The CSKT gathering, hunting, and fishing activities augment modern reservation economic activities in fundamental ways linked to the cultural survival of the Salish, the Pend d'Oreille, and Kootenai. CSKT future well being is directly linked to successful management of water and water-related resources.

(23). Continuation of the tribes' fishing and hunting activities as currently practiced requires tribal control of these vital resources. Without tribal control many aspects of the culture of the Flathead, Pend d'Oreille, and Kootenai would be jeopardized, including their sovereignty, religion, economy, and other beliefs and practices dating from before the Hellgate Treaty of 1855. Contemporary hunting and fishing regulations of the Confederated Salish and Kootenai Tribes of the Flathead Reservation are based in various principles of regulation. As such they are a continuing exercise of the spirit and letter of the various provisions of the Hellgate treaty of 1855 and Governor Stevens' assurances that the authority of the tribes' leadership would be recognized.

(24). The CSKT government has power over their natural and cultural resources and is managing them with an eye to both preservation and restoration. The tribes are also committed to restoring their habitats (and therefore the species) that have been lost or damaged due to allotment and subsequent non-Indian settlement, irrigation, and land use practices of the late 19th and 20th centuries.

4. Rule 27(a) (2), M.R.Civ.P. establishes the Notice and Service requirements for this petition, which requires notice to "each person named in the petition as an expected adverse party." (Emphasis added). The Tribes can not with any degree of accuracy determine each person they expect may become an adverse party in the adjudication, an adjudication that may not commence for years. There are several reasons for this uncertainty. First, the Tribes have not yet been required to file their water rights claims and therefore no one has actual notice of possible injury or adverse effect they may experience. Second, given that State-law based water rights claims are transferable under Montana law, it is not possible to identify today persons who may, or may not, possess claims to water at the time the Tribes may be required to file their water right claims. Third, even if the Tribes were to personally serve all persons identified on the water rights records of the Montana Department of Natural Resources and Conservation, as directed under Water Court Rule 28, experience gained under this Court's July 3, 2003 Order entitled IN RE EXAMINATION OF CLAIMS PERFORMED BY THE MONTANA DEPARTMENT OF

NATURAL RESOURCES AND CONSERVATION IN THE JOCKO RIVER HYDROLOGIC SUB-BASIN IN BASIN 76L WHOLLY OR PARTIALLY WITHIN THE FLATHEAD INDIAN RESERVATION, (as amended), demonstrates that those agency records have been inaccurate and incomplete as of the date of this filing. Additionally, changes in claim ownership prior to the commencement of litigation, even if accurately reflected in the agency record, would not afford notice to future claimants. Fourth, the Tribes' water rights claims will include waters in the Columbia River drainage, which may impact potentially unknown and unknowable adverse parties in the States of Idaho and Washington as well as Montana. Fifth the Tribes' water right claims will include waters tributary to the Missouri River, rendering the number of potential adverse parties unknowable.

The RWRCC has been designated by the Montana Legislature to attempt to negotiate, rather than litigate the Tribes' water rights claims throughout the State of Montana. 85-2-702, M.C.A. (2009). The practical effect of a successful RWRCC negotiated settlement of Tribal water rights is to obviate the need for all claimants who ultimately would be adverse to the Tribes to undertake the cost of individually litigating their interests against the Tribes. In effect, the RWRCC acts as *parens patriae* for all potential adverse parties within the State of Montana. In this unique situation, notice to the Compact Commission should be viewed as notice to all state-based water rights claimants.

Finally, the Tribes assert that they can not determine if an unidentified potential future adverse party will be a minor or deemed incompetent within the meaning of Rule 17 (c) of the Montana Rules of Civil Procedure. Accordingly, the Tribes request the Court to take notice of that portion of Rule 27(a)(2) that provides that:

for persons not personally served in the manner provided in Rule 4D who do not appear, an attorney shall be appointed who shall represent them and cross-examine the deponent. If an adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

With this guidance, the Tribes respectfully request the Court include in its Order the appointment of an attorney for those unknown potential adverse parties not otherwise represented by, or whose interests are aligned with, the RWRCC or the other governmental persons and agencies noticed up under this Petition.

For these reasons, resulting from the unique federal nature of a comprehensive *inter sese* general adjudication of Indian water rights within a State-based system, the Tribes assert that it is not presently possible to identify with certainty most, if not every "expected adverse party," as Rule 27(a)(2) anticipates. Accordingly, in a good faith effort to identify the most likely adverse parties, the Tribes have personally served the governmental entities identified in the Certificate of Service and have published notice of this Petition in newspapers of general circulation in close proximity to the Flathead Indian Reservation, as well as larger newspapers within the Columbia River Basin and the Missouri River Basin.

5. The Tribes respectfully request the Court to issue an Order authorizing the Tribes to take the audio-visual deposition of Professor Deward E. Walker, Jr., for the purpose of preserving his testimony in the general adjudication of the Tribes' claims to water in the State of Montana. The Tribes will stipulate to waiving the seven hour limit on depositions contained in Rule 30(d)(2), M.R.Civ.P. and instead request a schedule of three consecutive five-hour days commencing on May 17, 2010, to be held in Missoula, Montana. The Tribes also request that the Court include in its Order the appointment of an attorney to represent those potential adverse parties who do not appear and those potential adverse parties who would qualify for protections under Rule 17(c), M.R.Civ.P.

The Tribes further request the Court to Order a pre-deposition conference of attorneys who desire to participate for the purpose of settling issues of timing, limits on and order of cross-examination, evidentiary matters, stipulations on exhibits, a method to seek judicial supervision prior to and during the course of the deposition if necessary, and other issues that may arise.

Respectfully submitted this 4th day of February, 2010.

/s/

John B. Carter, Tribal Attorney