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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CONFEDERATED SALISH AND
KOOTENAI TRIBES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
INTERIOR SECRETARY SARAH
"SALLY" JEWELL; UNITED STATES
BUREAU OF INDIAN AFFAIRS; JOCKO
VALLEY IRRIGATION DISTRICT;
MISSION IRRIGATION DISTRICT;
FLATHEAD IRRIGATION DISTRICT;
DISTRICT COURT FOR THE
TWENTIETH JUDICIAL DISTRICT OF
MONTANA; MONTANA WATER
COURT; MICHAEL G. MCLATCHY,
BLANCHE CREPEAU, and ALEX
CREPEAU; JUDY HARMS and ROBERT
HARMS; BETTY A. STICKEL; and AN
UNKNOWN NUMBER OF JOHN DOE
DEFENDANTS CLAIMING FIIP
IRRIGATION WATER AS A PERSONAL
WATER RIGHT,

Defendants.

Case No. 9:14-cv-00044-DLC

**MONTANA ATTORNEY
GENERAL'S MOTION FOR
LEAVE TO INTERVENE**

The Montana Attorney General (“the Attorney General”) moves for leave to intervene, pursuant to Fed. R. Civ. P. 24 (a) and 24(b), for the limited purpose of moving for 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) (a federal court has authority to entertain a motion to intervene for the limited purpose of seeking dismissal). In filing this motion to intervene and memorandum in support, the Attorney General does not waive the State of Montana’s sovereign immunity from suit or consent 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.

This motion is supported by Intervenor-Defendant Montana Attorney General’s Memorandum in Support of Motion to Intervene. Pursuant to LR 24.1(b)(3)(B), the proposed motion to dismiss and proposed memorandum in support are attached as Exhibits 1 and 2 respectively.

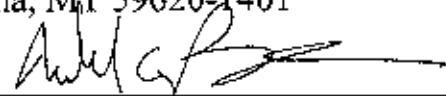
Pursuant to Local Rule 7.1(c)(1), the other parties who have appeared in this action have been contacted. Plaintiff objects to this motion. Defendants Montana Water Court, Twentieth Judicial District Court, Harms, and Stickels consent to the

motion. The remaining Defendants either take no position or have not returned phone messages regarding their position.

Respectfully submitted this 22nd day of May, 2014.

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Defendants.

Case No. 9:14-cv-00044-DLC

**INTERVENOR-DEFENDANT
MONTANA ATTORNEY
GENERAL'S MOTION TO
DISMISS**

(PROPOSED)

EXHIBIT

1

MOTION TO DISMISS
PAGE 1

The Montana State Attorney General ("the Attorney General") hereby moves to dismiss the action for lack of subject matter jurisdiction under Fed R. Civ. P. 12(b)(1), and based upon the *Brillhart, Younger, and Colorado River* absence doctrines. This motion is supported by the Attorney General's Memorandum in Support of Motion to Dismiss. Pursuant to Local Rule 7.1(c)(1), other parties have been contacted and _____ objects to this motion.

Respectfully submitted this _____ day of May, 2014.

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By: /s/ Michael G. Black
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, Missoula Division, by using cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: _____ /s/ Michael G. Black
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
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CONFEDERATED SALISH AND
KOOTENAI TRIBES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
INTERIOR SECRETARY SARAH "SALLY"
JEWELL; UNITED STATES BUREAU OF
INDIAN AFFAIRS; JOCKO VALLEY
IRRIGATION DISTRICT; MISSION
IRRIGATION DISTRICT; FLATHEAD
IRRIGATION DISTRICT; DISTRICT
COURT FOR THE TWENTIETH JUDICIAL
DISTRICT OF MONTANA; MONTANA
WATER COURT; MICHAEL G.
MCLATCHY, BLANCHE CREPEAU, and
ALEX CREPEAU; JUDY HARMS and
ROBERT HARMS; BETTY A. STICKEL;
and AN UNKNOWN NUMBER OF JOHN
DOE DEFENDANTS CLAIMING FIIP
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WATER RIGHT,

Defendants.

Case No. 9:14-cv-00044-DLC

**MEMORANDUM IN
SUPPORT OF MONTANA
STATE ATTORNEY
GENERAL'S MOTION TO
DISMISS**

(PROPOSED)

EXHIBIT

2

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INTRODUCTION

For the reasons stated in the Montana Attorney General's (the Attorney General's) memorandum in support of his motion for leave to intervene, the Attorney General sought intervention in this case for the limited purpose of moving for dismissal of this case, and 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). In filing the motion to dismiss 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.

In seeking to intervene in this case, the Attorney General does not represent the interests of any other party, any particular water right claimant or objector, or any other stakeholder in the Montana General Stream Adjudication (the Adjudication). This is true of the Attorney General's participation in other cases in

the Adjudication as well. See, e.g., Appellant's Opening Brief in *Heavirland v. State*, DA 12-0759 (filed with the Montana Supreme Court March 15, 2013) at 4.¹

The Confederated Salish and Kootenai Tribes (the Tribes), the United States, the State of Montana, the Flathead, Mission and Jocko Irrigation Districts, as well as many individual irrigators and landowners have spent decades trying to reach agreement regarding water rights on the Flathead Indian Reservation (the FIR). The inability of the parties to reach a negotiated agreement has spurred the filing of several lawsuits in both federal and state courts concerning water rights on the FIR. This action is the fifth of six pending lawsuits specifically concerning ownership of water rights related to the Flathead Indian Irrigation Project (the FIIP).²

The present action was filed by the Tribes in direct response to three lawsuits filed in Montana's Twentieth Judicial District Court and Water Court

¹ Available on the Montana Supreme Court's website at: <http://supremecourtdocket.mt.gov/view/DA%2012-0759%20Appellant%20--%20Brief?id={F44177C4-72A9-4529-BD79-399414A11581}>

² Three of the six other lawsuits are pending before the Twentieth Judicial District (*Western Montana Water Users Association v. Mission Irrigation District, et al.*, Case No. DV-12-327; and, *Ingraham v. Flathead Joint Board of Control*, Case No. DV-13-105; *In Re: Water Right Owner, Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States Bureau of Indian Affairs*, Case No. DV-13-313); one lawsuit is pending before the Montana Water Court (*In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Federal Flathead Indian Reservation, Basin 76L, In Re: Water Right Owner, Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts*, Case No. WC-2013-05); and the other lawsuit is pending before this Court (*Flathead Irrigation District v. United States*, Case No. 14-cv-00088-DLC).

(collectively "State Courts"). Specifically, the Tribes seek declaratory and injunctive relief against the plaintiffs in the pending state court lawsuits and against the State Courts and their judges.

The Attorney General seeks dismissal based on lack of subject matter jurisdiction under the ripeness doctrine pursuant to Fed. R. Civ. P. 12(b)(1). The Attorney General also requests this Court to abstain from exercising jurisdiction over the Tribes' declaratory relief claim in favor of the Adjudication.

The State Courts have also filed a motion to dismiss (Doc. 29), but have limited their motion to the case against them. The Attorney General fully supports the State Courts' motion to dismiss and brief in support. However, in order to avoid duplicating much of the State Courts' motion to dismiss, the Attorney General limits his arguments to those requiring dismissal or stay of the entire lawsuit and those in which additional information may aid the Court.

BACKGROUND

Several events precede the present lawsuit. First, a water compact was not approved by the Montana State Legislature, the Tribes and the United States prior to July 1, 2013--the sunset date of the suspension of the general adjudication of reserved Indian water rights and federal reserved water rights as prescribed by Montana Law. *See* Mont. Code Ann. § 85-2-217. Second, the Flathead Joint Board of Control (FJBC) comprised of the Flathead, Mission and Jocko Irrigation

Districts, dissolved on December 12, 2013. Third, the dissolved FJBC filed a complaint in the Twentieth Judicial District Court seeking not only to have ownership of the dissolved FJBC's assets--the water rights claims filed by the dissolved FJBC on behalf of its members and individual irrigators--determined, but also to declare the nature and attributes of the water rights claims. Lastly, the dissolved FJBC filed a motion in Water Court (Case No. WC-2013-05) making the same arguments and requesting the same relief contained in its complaint filed in Montana's Twentieth Judicial District Court.

In apparent response to these events, the Tribes have filed this lawsuit seeking declaratory and injunctive relief, alleging that the pending actions in the State Courts (as discussed above) threaten to violate 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--the Tribes and the United States. (Doc. 27, ¶ 9, pp. 40-41.) Consequently, 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, ¶¶ 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.)

The Attorney General has a significant interest, as both the chief legal officer of the State of Montana and as a result of his statutory role (*see, e.g.*, Mont. Code Ann. §§ 85-2-212, -248), in protecting and preserving the integrity and orderly conduct of the Adjudication so as to vindicate the State's role under Mont. Const. Art. IX, § 3. *See also* Mem. In Supp. Of Att'y Gen.'s Mot. to Intervene (AG Intervention Brief) at 9-11. This interest is particularly great 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 the Montana Water Court 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*, 212 Mont. 76, 712 P.2d 754, 759-62 (1985).

In furtherance of these interests, the Attorney General also moved for leave to file *amicus curiae* briefs in two of the lawsuits pending before the

State Courts. *See Amicus Curiae* Brief (Proposed) filed in Montana Water Court Case No. WC-2013-05, attached as Ex. D (without exhibits) to AG Intervention Brief; *see also Amicus Curiae* Brief (Proposed) filed in Montana's Twentieth Judicial District Court Case No. DV-13-105, attached as Ex. C (without exhibits) to AG Intervention Brief.

In his *amicus curiae* brief lodged with Twentieth Judicial District Court, the Attorney General urges the court to dismiss the dissolved FJBC's request for a declaratory judgment as to the validity of certain water rights claims and their elements and characteristics because such determinations are within the exclusive jurisdiction of the Water Court. Ex. C, AG Intervention Brief at 4-5. The Attorney General also asks that the district court bear the jurisdictional issues in mind when considering similar requests in related litigation. *Id.* at 5, n.3.

With respect to the similar lawsuit pending before the Water Court, the Attorney General's proposed *amicus curiae* brief asks the court to either dismiss the dissolved FJBC's declaratory judgment motion, or in the alternative, hold it in abeyance pending the Tribes' filing of its claims or other developments--such as a negotiated settlement--that might ameliorate or eliminate the need for adversarial litigation of the dissolved FJBC's and Tribes' claims. Ex. D, AG Intervention Brief at 6-8.

Should the Montana State Courts follow the suggestions of the Attorney General, the lawsuits pending before them no longer pose the potential for inconsistent rulings, piecemeal adjudication or violation of the McCarran Amendment. Regardless of any subsequent action that may or may not be taken by the State Courts with regard to the pending lawsuits, the Attorney General asks this Court to dismiss the Tribes' claim for injunctive relief for lack of a justiciable controversy, and abstain from exercising jurisdiction over the Tribes' declaratory relief claim in light of the ongoing Adjudication.

ARGUMENT

I. THE TRIBES' CLAIM FOR INJUNCTIVE RELIEF IS NOT RIPE AND SHOULD BE DISMISSED.

The Tribes' claim for injunctive relief is not ripe for adjudication and should be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Article III of the Constitution limits federal judicial power to deciding "cases" and "controversies." U.S. Const. Art. III, § 2. The case-or-controversy requirement mandates that asserted claims be ripe before a federal court exercises jurisdiction over them. *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 807-08 (2003). Ripeness is comprised of two components: constitutional ripeness and prudential ripeness. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (*en banc*).

“The constitutional ripeness of a declaratory judgment action depends upon ‘whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’ This position indicates a ‘substantial controversy’ between the parties that is immediate.” *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003) (quoting *Maryland Casualty v. Pacific Coal & Oil*, 312 U.S. 270, 273; accord *Central Montana Electric Power Co-Op. v. Bonneville Power Admin.*, 840 F.2d 1472, 1474 (9th Cir. 1988)).

Prudential ripeness “requires more thorough consideration. ‘In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: [1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.’” *Braren*, 338 F.3d at 975 (quoting *Thomas*, 220 F.3d at 1141 (internal quotation marks omitted)).

As was the case in *Braren*, prudential ripeness is not met in this case because the Tribes’ injunctive relief claim is not yet fit for decision. “Whether an issue is ‘fit for decision [depends on whether] the issues raised are primarily legal, do not require further factual development, and the challenged action is final.’” *Montanan’s for Community Dev. v. Motl*, 2014 U.S. Dist. LEXIS 32896, *7 (D. Mont. March 12, 2014) (quoting *Braren*, 338 F.2d at 975 (citation omitted)).

Here, the Montana State Courts have yet to determine whether they even have the jurisdiction to entertain the complained of lawsuits. The Water Court, recognizing jurisdiction is an issue, has ordered the parties in that case to brief the jurisdictional issues. To date, in the lawsuits pending before the Twentieth Judicial District, the Court has not ruled on the jurisdictional issues. Clearly further factual development is necessary in the State Court's regarding jurisdiction. There is currently no issue as to whether the State Courts are presently improperly exercising jurisdiction.

Further, in bringing this action to enjoin the State Courts and their judges, the Tribes assume the State Courts and judges will act contrary to federal law rather than follow it even though they have been instructed to do so by both the U.S. Supreme Court and the Montana Supreme Court. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law."); *see also State ex rel. Greely*, 712 P.2d at 765-66 (state courts must follow federal law to determine tribal reserved water rights). Because the Tribes' claim for injunctive relief is premature, this Court should dismiss it for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

II. IF THIS COURT DISMISSES THE TRIBES' INJUNCTIVE RELIEF CLAIM DUE TO RIPENESS, THIS COURT SHOULD EXERCISE ITS DISCRETION AND ALSO DECLINE THE TRIBES' CLAIMS FOR DECLARATORY RELIEF.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), makes a “textual commitment to discretion” by specifying that a court *may* declare litigants’ rights that “confers a discretion on the courts rather than an absolute right upon the litigant.” *Wilton v. Seven Falls*, 515 U.S. 287-88 (1995) (citations omitted). A district court has discretion not to entertain a declaratory judgment action “even when the suit otherwise satisfies subject matter jurisdictional prerequisites.” *Wilton*, 515 U.S. at 282 (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942)).

A. The Brillhart Standard Supports Dismissal.

In *Wilton*, the Supreme Court held that the discretionary standard of *Brillhart*, and not the “exceptional circumstances” test developed in *Colorado River*, controls a district court’s decision to stay a purely declaratory judgment action. *Wilton*, 515 U.S. at 289-90. Here, because the Tribes’ claim for injunctive relief is not ripe (see discussion in Section III(A) above), and no other claims exist, the *Brillhart* standard applies.

In *Brillhart*, the Supreme Court articulated three factors that courts should consider when deciding whether to entertain a declaratory judgment action: (1) avoiding “needless determination of state law issues”; (2) discouraging “forum

shopping”; and, (3) avoiding “duplicative litigation.” *Government Employees Ins. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (*en banc*) (citing *Continental Casualty v. Robsac Indus.*, 947 F.2d 1367, 1371-73 (9th Cir. 1991)).

In addition to the *Brillhart* factors, the Ninth Circuit has also looked at other considerations such as whether the declaratory action will: (1) “settle all aspects of the controversy”; (2) “serve a useful purpose in clarifying the legal relations at issue”; (3) result in one party obtaining “a res judicata advantage”; or (4) “result in entanglement between the federal and state court systems.” *Dizol*, 133 F.3d 1225, n.5, (quoting *American States Ins. v. Kearns*, 15 F.3d 142, 145 (9th Cir. 1994)). Regardless, in applying the *Brillhart* factors, the district court “must balance concerns of judicial administration, comity, and fairness to the litigants.” *Kearns*, 15 F.3d at 144 (quoting *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1367 (9th Cir. 1991)).

Though the presence of a federal law issue normally weighs in favor of exercising jurisdiction, the circumstances of this case dictate otherwise. Here, the Tribes seek a “declaration of ownership to frame the federal law under which water for irrigation on the FIR will be adjudicated and quantified in a proper general *inter sese* water rights adjudication.” (Doc. 27 at 8, ¶ 24). The issuance of a “declaration of ownership” as a matter of federal law necessarily implicates the

parties' state water rights claims, if any, and infringes on an important state administrative process--the Montana General Stream Adjudication.

Moreover, the issuance of a "declaration of ownership" will not settle all aspects of the controversy between the parties. This Court's declaratory judgment would provide no relief to the parties' ultimate controversy--the quantification of the parties' water rights through the Adjudication process. The comprehensive nature of the Adjudication also weighs in favor of abstention because all of the questions in controversy can best be settled if done all together in one action.

Further, the Ninth Circuit has instructed that "courts should generally decline to entertain reactive declaratory actions." *Dizol*, 133 F.3d at 1226; *see also Robsac*, 947 F.2d at 1371-72 (dismissal warranted due to "defensive or reactive" nature of the action and where plaintiff merely sought to obtain "a tactical advantage from litigating in a federal forum."). The reactive nature of this lawsuit is self-evident from the Tribes' request to enjoin the State Courts and judges. But for the pending state court proceedings, the Tribes would not be seeking relief in federal court.

Therefore, this Court should decline to entertain the Tribes' declaratory relief claim and dismiss this case.

III. ALTERNATIVELY, THIS COURT SHOULD DISMISS THE TRIBES' LAWSUIT ON ABSTENTION GROUNDS.

Generally, where a federal court has subject matter jurisdiction, it also has a “virtually unflagging obligation” to exercise that jurisdiction, even if an action concerning the same matter is pending in state court. *Colorado River Water Conservation Dist. v. United States* 424 U.S. 800, 817 (1976). “Only in rare cases will ‘the presence of a concurrent state proceeding’ permit the district court to dismiss a concurrent federal suit ‘for reasons of wise judicial administration.’” *R.R. Street & Co. v. Transport Ins.*, 656 F.3d 966, 977-78 (9th Cir. 2011) (quoting *Colorado River*, 424 U.S. at 817). This case presents rare and extraordinary circumstances warranting this Court’s abstention from the exercise of jurisdiction.

A. The Younger Doctrine Governs this Court’s Abstention Analysis.

Generally, the Supreme Court’s decision in *Younger* and its progeny direct federal courts to abstain from granting declaratory or injunctive relief that would interfere with pending state judicial proceedings. *Younger v. Harris*, 401 U.S. 37, 40-41 (1971); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (holding that “where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well”). This is true even if a federal plaintiff is not a party to an ongoing state proceeding where, as is the case here, the federal plaintiff’s interests are “so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable.” *Green v. City of*

Tucson, 255 F.3d 1086, 1100 (9th Cir. 2001) (*en banc*), overruled on other grounds, *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004).

“The *Younger* abstention is based upon four elements: 1) state-initiated proceedings are ongoing, (2) the state proceedings implicate important state interests, (3) federal claims can be raised in the state proceedings, and (4) the court’s action would enjoin or have the practical effect of enjoining, ongoing state proceedings.” *Montanans for Community Dev. v. Moll*, 2014 U.S. Dist. LEXIS 32896, *10-11 (citing *AmerisourceBergen v. Roden*, 495 F.3d 1143 (9th Cir. 2007) (citing the first three factors from *Middlesex County Ethics Committee v. Garden State Bar Ass’n*, 457 U.S. 423, 431-34 (1982), and the fourth factor from *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004) (*en banc*)). Here, all four *Younger* elements are satisfied.

Regarding the first and second elements, “whether or not the underlying action is state-initiated is more properly considered in relation to the second element (whether the state proceedings implicate important state interests), not the first element.” *Montanans for Community Dev.*, at *12, n.1, citing *Potrero Hills Landfill v. County of Solano*, 657 F.3d 876, 883, n.7 (9th Cir. 2011). Here, while the ongoing state proceedings were not state-initiated, there can be no doubt that they all implicate an important state interest--the Adjudication. *State ex rel. Greely*, 712 P.2d at 757-58.

As to the third element, upon filing of the Tribes' water rights claims, the Tribes, as well as the other parties, will have the full opportunity to raise their federal claims in the Adjudication and in which the Montana Water Court is required to apply and follow federal case law. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law."); *see also State ex rel. Greely*, 712 P.2d at 765-66 (state courts must follow federal law to determine tribal reserved water rights).

The fourth and final element is easily met by the Tribes' requested relief-to enjoin the State Courts, and now individual judges, from "taking any action to determine who owns water rights, or claims to water rights made available through any FIIP irrigation facility, structure, reservoir ditch or other means." (Doc. 27 at 44.) The Tribes' requested relief clearly interferes with ongoing state proceedings. *See Montanans for Community Dev.* at *13; *see also Green v. City of Tucson*, 255 F.3d at 1094 ("[T]he *Younger* doctrine applies only when . . . the federal relief sought would interfere in some manner in the state court litigation.").

B. Alternatively, the Factors Set Forth in *Colorado River* Weigh in Favor of Abstention.

The U.S. Supreme Court has held that, for reasons of "wise judicial administration," federal courts should generally abstain in favor of state-court general stream adjudications. *Colorado River Water Conservation Dist. v.*

United States 424 U.S. 800, 818 (1976). “[W]here both the state and the federal proceedings are in their infancy at the time of a motion to dismiss the federal proceeding, both *Colorado River* and *San Carlos Apache Tribe* indicate that absent unusual circumstances, the federal court should defer to the state proceeding.”

United States v. Adair, 723 F.2d 1394, 1405 (9th Cir. 1983) (citing *San Carlos Apache Tribe*, 463 U.S. at 571). Such is the case here.

Under the *Colorado River* abstention doctrine, a district court must consider whether a parallel federal court case presents exceptional circumstances in which considerations of wise judicial administration--in particular, the need to conserve judicial resources and promote comprehensive disposition of litigation--counsel against exercising jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 15 (1983); *Colorado River*, 424 U.S. at 817.

Ninth Circuit cases have recognized eight factors for assessing the appropriateness of dismissal or stay under the *Colorado River* doctrine: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and,

(8) whether the state court proceedings will resolve all issues before the federal court. *R. R. Street & Co. v. Transport Ins.*, 656 F.3d 966, 978-79 (9th Cir. 2011).

The *Colorado River* abstention doctrine is not subject to precise rules, but rather should “be applied in a pragmatic, flexible manner with a view to the realities at hand,” taking into account “both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.” *See Moses H. Cone*, 460 U.S. at 16; *Colorado River*, 424 U.S. at 818-19. “The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case.” *Moses H. Cone*, 460 U.S. at 16.

In *Colorado River*, the Supreme Court found the McCarran Amendment’s general policy to avoid piecemeal litigation to be the most important factor. *See Colorado River*, 424 U.S. at 817-20. In bringing this lawsuit the Tribes present the very same potential for piecemeal adjudication that they argue is threatened by the ongoing state court proceedings. Further, as was the case in *Colorado River*, here the comprehensive nature of Montana’s General Stream Adjudication weighs heavily in favor of this Court’s abstention. *Id.*

The Tribes are likely to assert competing claims to water used on the FIIP, and the Tribes’ deadline to file those claims is June 30, 2015--approximately 13 months from now. *See* Mont. Code Ann. §§ 85-2-217 and -702(3). To proceed with a determination of the various water rights claims associated with

the FIIP ahead of the filing of the Tribes' claims or of the expiration of the deadline to do so runs a very great risk of creating the sort of piecemeal adjudication that the Montana Supreme Court cautioned against in *Confederated Salish and Kootenai Tribes v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093 (2002). This would risk the Adjudication's compliance with the McCarran amendment and the State Courts' jurisdiction over the adjudication of federal and tribal water rights claims. *See State ex rel. Greely*, 712 P.2d at 766.

In light of this state of affairs, the Attorney General submits that the Court should either dismiss the Tribes' lawsuit or, in the alternative, hold it in abeyance pending the Tribes' filing of its claims or of other developments that might obviate the need for consideration. It remains possible, for example, that a negotiated settlement of all of the Tribes' water rights claims might be reached prior to the Tribes' deadline to file water rights claims in a manner that would ameliorate or eliminate the need for the adversarial litigation of the Tribes' claims. The Attorney General would welcome such a development.

CONCLUSION

For the foregoing reasons, this Court should dismiss this action.

Respectfully submitted this ____ day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, Helena Division, by using cm/ecf system.

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Dated: _____

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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 4,149 words, excluding certificate of service and certificate of compliance.

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