John B. Carter
Ranald McDonald
Rhonda Swaney
Daniel Decker
Tribal Legal Department
CONFEDERATED SALISH AND KOOTENAI TRIBES
P. O. Box 278
Highway 93 North
Pablo, MT 59855
Ph: (406) 675-2700, ext. 1164
E-mail: jccskt@yahoo.com

James H. Goetz
GOETZ, BALDWIN & GEDDES, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: jim@goetzlawfirm.com

Attorneys for Plaintiff

IN THE 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; MISION IRRIGATION	)	Case No. CV-14-44-M-DLC **BRIEF IN RESPONSE TO JUDGES' MOTION TO DISMISS**

DISTRICT; FLATHEAD IRRIGATION DISTRICT; DISTRICT COURT FOR THE TWENTIETH JUDICIAL DISTRICT OF MONTANA PRESIDING JUDGE HON. JAMES E. MANLEY; MONTANA WATER COURT CHIEF JUDGE RUSSELL McELYEA and ASSOCIATE WATER JUDGE DOUGLAS RITTER; MICHAEL G. MCLATCHY, BLANCHE CREPEAU, and ALEX CREPEAU; JUDY HARMS and ROBERT HARMS; BETTY A. STICKEL and WAYNE D. STICKEL; and AN UNKNOWN NUMBER OF JOHN DOE DEFENDANTS CLAIMING FIIP IRRIGATION WATER AS A PERSONAL WATER RIGHT, Defendants.	)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Federal Statutes/Acts:

Montana Statutes:

EXHIBIT INDEX:

I. PROCEDURAL POSTURE OF THE CASE

The Federal Defendants have received an extension of time in which to respond. All named Defendants except Michael G. McLatchy have timely responded. The State Court Judges, the Montana Attorney General and Defendants Harms and Stickles have each filed separate Motions to Dismiss. Each Motion raises variations on abstention and judicial discretion, as well as defenses unique to each Motion. The remainder of the responding Defendants have filed Answers.

In line with this Court's Order of June 3, 2014 and because there are common defenses raised in all Motions, the Tribes are filing individual Response Briefs to each Motion to Dismiss. The Tribes' Response Briefs build on each other in a successional path starting with the Tribes' Response to the State Court Judges Brief (Judges Brief), then the Montana Attorney General's Brief (AG Brief); and third, the Harms and Stickles Brief (Harms Brief). In the interests of judicial and litigant economy, the Tribes will not repeat a legal argument in detail once it has been addressed in the first instance in a prior Tribal Brief on the same subject matter. Rather, as necessary, the Tribes will summarize, incorporate by reference and cite to their brief containing the prior argument. Additionally, the Tribes will address in detail in each Brief in Support of Dismissal those arguments unique to that Defendants' legal rational for dismissal.

Finally, the Amended Complaint and the Brief of the State Courts were filed on the same day. The Court Brief addresses the original Complaint, which named the State Courts, but not the Judges, as Defendants. The Amended Complaint dropped the State Courts as Defendants and named the State Court Judges as Defendants. Only minor substantive changes to the allegations in the Complaint were made to accommodate naming the Judges as Defendants. The Tribes will address the State Court Brief as if it responds to the Amended Complaint rather than the obsolete original Complaint. The Tribes have been informed by their legal counsel that the Judges will make an appearance as defendants but that has not occurred as of the date of this brief.

II. INTRODUCTION

This case demonstrates the rationale behind and need for a direct application of res judicata and claim preclusion to uphold the jurisdiction and integrity of the federal courts. The very narrow question of ownership of irrigation water delivered by the Federal Flathead Indian Irrigation Project (FIIP), the issue before the Defendant Judges, was answered decades ago by the Ninth Circuit in United States v. McIntire, et al. and the Flathead Irrigation District, 101 F.2d 650 (9th Cir. 1939) (McIntire). The Court found that Flathead Indian Reservation (FIR) waters, including, "[t]he waters of Mud Creek were impliedly reserved by the treaty to the Indians." Furthermore, "[t]he United States became a trustee, holding the legal

title to the land and waters for the benefit of the Indians." Id. at 653, citing Winters v. United States, 207 U.S. 564 (1908) and United States v. Powers, 94 F.2d 783 (9th Cir 1938), aff'd, 305 U.S. 527 (1939). In reaching that holding, the Ninth Circuit reversed a federal court trial on the merits that erroneously found individual irrigators were private owners of FIIP irrigation water. See, McIntire v. United States et al., 22 F.Supp. 316 (D. Mont. 1937). The Flathead Irrigation District and members of the Tribes were parties to that trial. Id. at 318.

Dissatisfied, the irrigators under FIIP sought to negate McIntire in a subsequent judicial challenge. Once again the Ninth Circuit upheld the federal reserved water rights doctrine of Winters and reaffirmed that the "treaty impliedly reserved all waters of the [Flathead] reservation to the Indians." United States v. Alexander et al. and the Flathead Irrigation District, 131 F.2d 359, 360 (9th Cir. 1942) (Alexander).[1]

Today, albeit now in the state judiciary, the Flathead Irrigation District, its successors and its privies, seek to relitigate the federal law that repeatedly held that they do not have private ownership rights in irrigation water delivered by the FIIP. In their Brief in Support of Motion to Dismiss (Judges Brief), the Defendant Judges barely acknowledge that the federal law has already been declared in the

[1] See also, Big Four Inc. v. Bisson, 314 P.2d 863, 864 (1957), where the Montana Supreme Court cited favorably to McIntire and Alexander while addressing a procedural aspect of water litigation on the Flathead Indian Reservation.

cases they are presiding over. Instead, they raise numerous technical defenses based upon a subtle misrepresentation of the scope of this case.

In the introduction of the Judges Brief the Judges assert that the Tribes seek a "declaration of the law governing reserved Indian water rights in Montana." Brief at p. 1; see also p. 17. Not true. The Complaint clearly states that the geographic scope is limited to the question of reserved water rights within the Flathead Indian Reservation and more particularly, within the FIIP. "The Tribes seek a declaration of the ownership of irrigation water that is collected, stored, diverted and delivered by the Flathead Indian Irrigation Project of the Bureau of Indian Affairs, United States Department of Indian Affairs." Amended Complaint (hereafter Complaint) at ¶ 19.

The Tribes expressly disclaim any intent to quantify any water rights in this case. AC ¶ 21. Rather, the Tribes seek to avoid relitigating, in a piecemeal fashion, previously settled questions of federal law.

III. THE FOUR STATE COURT PROCEDINGS ALL SEEK DECLARATIONS OF PRIVATE OWNERSHIP RIGHTS TO IRRIGATION WATER SERVED BY FIIP

All four State court cases cited in the Complaint arise out of a negotiated water rights compact presented to the 2013 Montana Legislature by the Tribes, the State of Montana and the United States. See Mont. Code Ann. § 85-2-701, et seq. The use of federally-delivered irrigation water through the FIIP comprised a

significant portion of the Compact. The recipients of FIIP irrigation water who were opposed to the Compact initiated what eventually morphed into the State court suits discussed below. In each case individuals and Districts are claiming various forms of private ownership of FIIP irrigation water.

1. F.L. INGRAHAM v. FLATHEAD JOINT BOARD OF CONTROL, Cause No. DV-13-102, (20th Judicial District, MT)

This case is presently on stay. However, the Petitioner asserts that he "[o]wns fee land with appurtenant water to irrigate within the irrigation district and the lands are located in and served water delivered by. . .(FIP)" (sic). Amended Complaint in DV-13-102, ¶ 1. Similar assertions of private ownership of water rights to irrigation water served by FIIP pervade the Amended Complaint in that case. For example, Petitioner identifies FIIP irrigation water as "[s]tate water right" (¶ 15 b), in direct conflict with McIntire and Alexander. Neither the Tribes nor the United States are party to that suit.

2. WESTERN MONTANA WATER USERS ASSOCIATION, LLC v. MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, and FLATHEAD JOINT BOARD OF CONTROL, Cause No. DV-12-327 (20th Judicial District, MT)

All parties claim various private possessory rights to irrigation water delivered by FIIP. The Flathead Joint Board of Control (FJBC) asserts that "its members' property rights, namely the [FIIP] water appurtenant to their fee land in the three irrigation districts that comprise the FJBC, would be injured" if a water

rights compact with the Tribes was approved by the Montana Legislature. Answer to Second Amended Petition in DV-12-327 ¶ 47. See also ¶¶ 2, 38, 44, 45, 47-50, 58, 59, 119, 120,134,155-156, and 163. Defendants seek monetary damages for threatened loss of those alleged private water rights "to compensate them for the loss of part or all of their appurtenant water." Defendants' Answer to Second Amended Petition ¶ 43.

Similarly, Plaintiffs assert that they are entitled to compensation "for the loss of part or all of their appurtenant water" if a compact was approved. First Amended Petition in DV-12-327 ¶ 134. See also ¶¶ 38, 43-44, 47-50, 53, 59, 119-129, 137, 154-156, 163.

Neither the Tribes nor the United States are party to this suit. In fact the former presiding judge, in his second Conclusion of Law, declared that "the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over them." Order of February 15, 2013, attached as **EXHIBIT A.**

3. 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 VALLEY IRRIGATION DISTRICTS. Water Court Case No. 2013-05.

The FJBC and the three irrigation districts seek a declaratory judgment on their alleged ownership of FIIP irrigation water in the FJBC and Districts. For

example, in its Combined Motion to Interplead, For Declaratory Judgment, and to Deposit Property in the Court and Supporting Brief, dated December 6, 2013, "[t]he FJBC asserts it owns the nominal title to these claims and rights as a fiduciary for the irrigators in the districts." Id. at p 5. The Western Water Users respond that "irrigators own the [FIIP] water rights pursuant to State and federal law." See Water Users' Combined Response to the above pleading, dated December 23, 2013 at p. 6. The Tribes are not a party to that suit.

In every case, the irrigation water at issue is delivered by the FIIP within the boundaries of the FIR. The question of ownership of irrigation water delivered by FIIP was answered by the Ninth Circuit in McIntire (1939) after a trial on the merits in Federal District Court and subsequently ratified in Alexander in 1942. The parties to the four state cases are simply trying to improperly relitigate settled federal law.[2]

4. FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD INDIAN RESERVATION AND JOCKO VALLEY IRRIGATION DISTRICTS, AND FLATHEAD IRRIGATION DISTRICT V. UNITED STATES BUREAU OF INDIAN AFFAIRS. Twentieth Judicial District, CAUSE NO. DV-13-313.

This case is nearly identical to the Water Court case identified above. Same parties, same attorneys. Neither the Tribes nor the U.S. are party to this suit.

[2] The Tribes ask the Court to take judicial notice of these state court cases pursuant to Rule 201 of the Federal Rules of Evidence. Inclusion of select state court documents is for the convenience of the Court and is not intended to convert this into a summary judgment proceeding.

IV. THE DOCTRINE OF RES JUDICATA OR CLAIM PRECLUSION REQUIRES THAT THE STATE COURT JUDGES BE ENJOINED FROM PROCEEDING ON THE CASES IDENTIFIED IN THE AMENDED COMPLAINT

The doctrine of res judicata or claim preclusion is premised on issues of judicial and litigant economy, as well as respect for the rule of law, "vital public interests beyond any individual judge's ad hoc determination of equities in a particular case." Federated Department Stores v. Moitie, 452 U.S. 394, 401 (1981). It avoids multiple and vexatious suits. Americana Fabrics, Inc. v. L&L Textiles, Inc., 754 F.2d 1524, 1528-29 (9th Cir. 1985). Those considerations direct the application of the doctrine to this case because:

> judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to other admissible matter which might have been offered for that purpose.

Cromwell v. Sac. County, 94 U.S. 351, 352 (1876). The highest need for res judicata arises in cases involving real property. Nevada v. United States, 463 U.S. 110, 129, n. 10 (1983). There the Court made clear that, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith involving cases concerning real property, land and **water**." [Emphasis added].[3] As the Judges

[3] Ironically, Nevada is essentially the flip side of the present case. It involved a preexisting federal decree on Indian water rights that the tribes sought to relitigate but were barred from doing so under res judicata. Nevada at 121-145.

noted, "actions concerning water rights are generally found to be in the nature of in rem proceedings." Judges Brief at p. 16. As such, judgments in rem transfer "property rights, and property rights are rights good against the world, not just against parties to a judgment or persons with notice of the proceedings." Matter of re Met-L-Wood Corp, 861 F.2d 1012, 1017 (7th Cir. 1988), cert. denied sub nom., Gekas v. Pipin, 490 U.S. 1006 (1989).

The Ninth Circuit identified the four elements of res judicata in In re International Nutronics, 28 F.3d 965, 969 (9th Cir 1994), cert. denied sub nom., Robertson v. Isomedix Inc., 513 U.S. 1016 (1994). First, there must be a final judgment on the merits. As discussed infra, the Ninth Circuit decision in McIntire was based upon a trial in federal district court where witnesses were called, evidence presented and a judgment rendered on the contested issue at hand, only to be reversed by the Ninth Circuit.

Second, the prior action must involve the same parties or persons in privity with a prior party. The Defendant Flathead Irrigation District was a party in both McIntire and Alexander. "A successor to an interest in property is in privity", such as irrigators who have acquired land to which FIIP delivers irrigation water. Guerrero v. Katzen, 774 F.2d 506, 509 (D.C. Cir. 1985). Privity also applies to a non-party who is represented by a party, again, such as irrigators who are not specifically named but are represented by the Defendant irrigation districts.

Restatement (Second) of Judgments, § 41 (1982). Put another way, a person whose representative was defeated in a prior action cannot pursue another action on the same issue. Corcoran v. Chesapeake and Ohio Canal Co., 94 U.S. 741, 745 (1876). Beneficiaries of trusts are bound by a judgment on the corpus of the trust from a prior litigation. Kersh Lake Drainage District v. Johnson, 309 U.S. 485, 491 (1940). Clearly, with the exception of the Judges, all named Defendants, including the John Does, fall within the privity requirement.

The third element of res judicata is that the prior action must have involved the same claims. Here multiple parties are claiming various types of ownership of FIIP irrigation water, the very claim settled in McIntire and Alexander decades ago. FIIP irrigation water is derived from a federal reserved water right. It is not owned by state-based irrigation districts nor by private individuals. It is owned by the United States in trust. McIntire at 654; Alexander at 361.

The fourth and last element of res judicata is also satisfied. The prior judgment(s) at issue must have been rendered by a court of competent jurisdiction. McIntire and Alexander were both decided by the Ninth Circuit Court of Appeals.

Defendant Judges, again seeking to avoid McIntire and Alexander, cite to Sandpiper Village Condominium Association, Inc. v. Louisiana-Pacific, 428 F.3d 831 (9th Cir. 2005), cert. denied sub nom., Louisiana-Pacific Corp v. Lester Bldg. Systems, 548 U.S. 905 (2006), and imply that there is no similarity in transactions

as in the original federal action. Judges Brief at pp. 13-14. As discussed infra, the Judges are being asked to rule on the very issue the federal Court decided decades ago; ownership of FIIP irrigation water. As also discussed, the parties to the State court proceedings are successors to the original McIntire and Alexander litigants and are represented by direct successors such as the Flathead Irrigation District, thereby satisfying the privity issue that Judges allege does not exist. The depth of their efforts to ignore the significance of res judicata is best represented by the following statement; "to the extent Indian reserved water rights are even at issue in those [state court] cases" the state courts should be allowed to proceed. Judges Brief at p. 15. Indian reserved water rights are the core, the basis and the corpus of the state court cases. The bare holding in McIntire is that the waters of the Reservation were "impliedly reserved by treaty to the Indians." That said, "The United States became trustee, holding the legal title to the land and waters for the benefit of the Indians." McIntire at 653.[4]

V. THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION

The Supreme Court recognizes that a plaintiff can sue individual state officers in their official capacities in federal court to obtain prospective

[4] Defendants also urge this Court not to "issue advisory opinions nor to declare rights in hypothetical cases." Brief at p. 18. The issues they deem advisory or declaratory are, in fact, long settled federal law. As to Defendants' argument that there is no case or controversy over which the Federal Court may exercise jurisdiction, exception three to the Anti-Injunction Act and the four pending state court cases certainly present multiple cases and controversies.

nonmonetary injunctive relief for violations of federal law. Ex Parte Young, 209 U.S. 123, 167 (1908). Ex Parte Young constitutes a waiver of state sovereign immunity. Importantly, Defendants concede this fact. They state that:

> in order to defeat sovereign immunity, the Tribes must avail themselves of the narrow *Ex Parte Young* exception. *Ex Parte Young* allows a plaintiff to circumvent the Eleventh Amendment and to file suit against a state official in his or her official capacity seeking prospective equitable relief from an ongoing violation of federal law. *ExParte Young*, 209 U.S. 123, 167 (1908).

Brief at pp. 4-5. That is why the Tribes amended the original Complaint to name the Judges in their official capacity, dropped the Courts as defendants, and seek only prospective equitable relief against the Judges. The Tribes seek no monetary relief from the Judges nor do they seek any relief from the State.

Also, contrary to suggestions in their Judges Brief at pp. 1 and 17, this is not an action against the state of Montana nor one impacting all of Montana. Therefore, the Eleventh Amendment to the U.S. Constitution does not pose a bar to this action. [5]

The Judges argue that they are clothed in state sovereign immunity from this suit by operation of the Eleventh Amendment of the U.S. Constitution. Judges

[5] In fairness, the Defendant Judges filed a motion to dismiss based upon the original Complaint, which named the Water Court and the 20th Judicial District Court and not the Judges in their official capacities. The Amended Complaint and Prayer for Relief only seek to enjoin the Judges in their official capacity and does not name the Courts nor the State of Montana as defendants. The Tribes wrote this Brief as if Defendant is responding to the Amended Complaint in an effort to comply with this Court's Order dated June 3, 2014.

Brief at pp. 3-8. The cases they cite for that proposition consistently reaffirm the Ex Parte Young doctrine, but found the doctrine did not apply under the facts of the particular cases. In Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 282 (1997), the Court found that the relief the tribe sought was not prospective nonmonetary injunctive relief but was in the nature of a quiet title action with retroactive effect. Therefore it reasoned that the relief sought was inconsistent with Ex Parte Young. In Seminole Tribe v. Florida, 517 U.S. 44, 75-76 (1996), the Court found that since Congress provided an extensive procedural remedy in the Indian Gaming Regulatory Act, it was the exclusive remedy. They determined on the facts of that case that the tribe failed to meet the statutory elements and therefore Ex Parte Young was inapplicable.

Though many Ex Parte Young challenges address violations of federal statutes, the federal law being violated need not be statutory**.** It may also include ongoing violations of federal common law. Crowe and Dunlevy, PC v. Stidham, 640 F.3d 1140, 1156 (10th Cir. 2011).

> More recently, the Supreme Court reaffirmed Ex Parte Young, finding that:
>
> [i]n determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'

Verizon Maryland Inc. v. Public Service Commission, 535 U.S. 635, 645 (2002). The Amended Complaint satisfies this analysis. Additionally, the Ninth Circuit

subsequently analyzed and distinguished the Couer d'Alene case in Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041 (9th Cir. 2000). It found that Ex Parte Young is alive and well and that the Coeur d'Alene decision addressed a narrow exception because that tribe did not seek nonmonetary prospective injunctive or declaratory relief**.** Agua Caliente at 1046. The Tribes meet the Ex Parte Young criteria, thus obviating an Eleventh Amendment defense.

VI. JUDICIAL IMMUNITY DOES NOT BAR THIS SUIT

Defendants also assert that even if the Tribes satisfy Ex Parte Young, the Judges are shielded by judicial immunity. Judges Brief at p. 5, n. 3. Not so in Montana. Mont. Code Ann. at § 2-9-112, entitled "Immunity from suit for judicial acts and omissions." Section (2) provides that:

> [a] member, officer, or agent of the judiciary is immune from **suit for damages** arising from the lawful discharge of an official duty associated with judicial actions of the court. [Emphasis added].

The Montana Federal District Court has recognized this limited statutory waiver of judicial immunity in a case entitled Leachman v. Hernandez, ___ F.Supp.2d ___ 2011 WL 2559837, *3 (D. Mont. 2011). The Federal Court:

> makes clear that state officials enjoy judicial or quasi-judicial immunity from damages only (citation omitted). Accordingly, although judicial immunity prevents any claim for damages, it is not grounds for dismissing the suit in its entirety.

The Tribes do not seek monetary (or any) damages from the Judges, only prospective equitable relief. Therefore the Judges are not vested with judicial immunity from this suit.

The federal law the 20th Judicial District Judge Manley is confronted with is the McCarran Amendment, 43 U.S.C. § 666. McCarran case law has concluded that a state general comprehensive *inter sese* water rights adjudication may adjudicate Indian reserved water rights under certain circumstances. Colorado River Conservation District v. United States, 424 U.S. 800 (1976) ("Colorado"). Critically important to a proper McCarran-qualifying water rights adjudication is that all claimants be joined. While the State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754 (Mont. 1985) Court has concluded that the Montana Water Use Act satisfies the federal McCarran requirements on its face, it expressly left open the question of adequacy as applied. Id. at 768. Judge Manley's predecessor issued an Order dated February 15, 2013, discussed infra, stating that, "[t]he Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either."

Where joinder of a necessary party is not feasible, the court must decide whether the absent party is "indispensable" and therefore required for the case to proceed. Bank of America National Trust and Savings Association v. Hotel Ritterhouse Associates, 844 F.2d 1050, 1054 (3rd Cir. 1988). Here the Tribes have

been adjudicated to be beneficial owners of FIIP irrigation water in McIntire and Alexander. By definition, any subsequent adjudication of that subject matter requires the Tribes so that they may protect their property interests. The State District Court (3 cases) has already held it lacks jurisdiction over the Tribes. As discussed infra, the Water Court proceedings, to which the Tribes are not a party, are at best statutorily premature under the Water Use Act.

To proceed with any aspect of water rights in the cases in front of Judge Manley will result in a *per se* piecemeal water rights adjudication with the absence of necessary, indispensable and unjoinable parties; the Tribes and the United States. To do so is in direct conflict with the McCarran Amendment and may well render the Montana Water Use Act, § 85-2-201 et seq., MCA, inadequate as a matter of federal law.

The Water Court Judges have much the same problem as Judge Manley. They are being asked to make a determination of the ownership of FIIP irrigation water rights outside of the scope of a comprehensive general *inter sese* adjudication, as required under the Montana Water Use Act. That may be viewed as a piecemeal adjudication in violation of the McCarran Amendment-one of the primary judicially established proscriptions applicable to the McCarran Amendment. See RR Street and Company v. Transportation Co., 656 F.3d 966, 980 (9th Cir. 2011).

VII. THIS CASE FALLS SQUARELY IN THE THIRD AND SECOND EXCEPTIONS TO THE ANTI-INJUNCTION STATUTE

This case is a text-book manifestation of exception three to the Anti-Injunction Act. This Court should enjoin the state court cases "to protect or effectuate its judgments." 28 U.S.C. § 2283. This Court should enjoin the Judges because they threaten to conflict with the settled federal judgments in McIntire and Alexander. Those cases determined that neither irrigation districts nor individual irrigators have any ownership in FIIP irrigation water. That is the question the State Judges are being asked to rule on now, decades after ownership was ruled on by the Federal Court.

The Act is discretionary. The federal courts must consider issues of equity, comity and the comparative magnitudes of the competing state and national issues. Mitchum v. Foster, 407 U.S. 225, 229-230 (1972). The Act applies when national goals of the highest order are at issue and are clearly a "superior federal interest" for purposes of this Act. U.S. v. Washington, 459 F.Supp. 1020, 1028 n. 3 (D.C. Wash. 1978), appeal dismissed, 573 F.2d 1117 (9th Cir. 1978), aff'd, 645 F.2d. 749 (9th Cir. 1981). At issue in Washington was the age-old set of competing state and treaty-based claims of tribes to fish for salmon free of state law. The Court found that the Federal Court had authority to enjoin state court actions to effectuate prior Federal judgments on that issue. Similarly, in Alonzo v. U.S., 249 F.2d 189, 197,

cert. denied, 355 U.S. 940 (1958), the Court recognized that a state-based claim adverse to Indian land ownership was subject to Federal Court injunction under the Act.

On p. 1 of their Brief, the Judges concede that for purposes of a motion to dismiss, all allegations should be deemed true and accurate. Later they concede that, "[a]n injunction may properly be issued under the relitigation exception if 'there **could** be an actual conflict between the subsequent state court judgment and the prior federal judgment.'" Judges Brief at p. 13 [emphasis added], yet conclude that this case is not ripe for injunctive relief. In doing so, they seemingly ignore McIntire and Alexander, which definitively answered the questions the State judges are now being asked to decide. The holdings in those cases are not mere Tribal allegations. They are prior federal judgments entitled to res judicata. As the Judges point out regarding the third exception to the Act:

> [t]his exception is grounded in 'the well-recognized concepts of res judicata and collateral estoppel,' *Chick Kam Choo*, 486 U.S. at 147, and is intended to 'prevent the harassment of successful federal litigants through repetitious state litigation.' *Amwest Mortg. Corp v. Grady*, 925 F.2d 1162, 1164 (9th Cir. 1991).

Judges Brief at p. 13. The Tribes agree with this analysis, and ask the Court to apply it here. There certainly "could" be a conflict in state and federal rulings if the state cases were allowed to proceed.[6]

Defendants' sole argument for avoiding the second exception to the Anti-Injunction Act, that injunctions should lie only "where necessary in aid of its jurisdiction," is that this case is not necessary or "convenient". Judges Brief at pp. 13 and 15. Importantly, the Judges define when the second exception should apply.

> Courts have applied this second exception in only two scenarios: where the case is removed from state court, and where the federal court acquires in rem or quasi in rem jurisdiction over a case involving real property before the state court does. *Martingale LLC v. City of Louisville*, 361 F.3d 297, 302-303 (6th Cir. 2004).

Judges Brief at p. 16 [emphasis added]. Once again, the Tribes agree with that point of law. The Judges have acknowledged that water rights litigation is in rem or quasi-in rem. Brief at pp. 16-17. But more importantly, in an Indian reserved water rights case, the Supreme Court has also agreed. Nevada at 129, n. 10. As to the timing issue, the Federal Courts first exercised jurisdiction over the same

[6] The Montana district courts have a demonstrated inability to accept and adhere to federal judicial decisions, including McCarran prohibitions on piecemeal adjudication of Indian reserved water rights, when attempting to apply State water law on the Reservation. In the Matter of the Application for Beneficial User Permit Nos. 66459-76L, Ciotti; 64988-G76L, 278 Mont. 50, 923 P.2d 1073 (1996); Confederated Salish and Kootenai Tribes v. Clinch, et al., 297 Mont. 448, 992 P.2d 244 (1999); Confederated Salish and Kootenai Tribes v. Stults et al., 312 Mont. 420, 59 P.3d 1093 (2002).

subject matter and parties or persons in privity with those early defendants in 1937 at the trial level in McIntire. This case is not barred by the Anti-Injunction Act.

VIII. YOUNGER ABSTENTION IS NOT APPROPRIATE IN THIS CASE

Federal Courts have an "unflagging obligation" to exercise their jurisdiction. Colorado at 817. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." Id. at 813. Accordingly, Defendants' assertion that Younger v. Harris, 401 U.S. 37 (1971) "mandates" this Court to dismiss this action is incorrect. Judges Brief at p. 8. The application of abstention is a discretionary function. Colorado at 817.

To be sure, Younger, does establish a test to determine if dismissal is warranted in a criminal law context, but it is not a mandate. The test in civil cases in the Ninth Circuit is laid out in Amerisourcebergen Corp. v. Roden, 495 F.3d 1143, 1149 (9th Cir. 2007). Younger abstention may be applied if all three of the following of the elements are met:

(1) the presence of an ongoing state proceeding, and

(2) the state proceedings implicate important state interests, and

(3) do the state proceedings afford an adequate opportunity to raise a federal constitutional challenge.

As to the first element, while the state cases were ongoing before the Tribes filed this suit, McIntire and Alexander had already decided the ownership question

those state suits seek to relitigate. As to the second, while a properly executed McCarran-qualifying general *inter sese* water rights adjudication is in the states' interest, the presence of the disparate, contemporaneous and piecemeal state adjudications identified in the Complaint is not. Furthermore, if "there is an overwhelming federal interest", no state interest can be nearly as strong as to warrant Younger abstention. Harper v. Public Services Commission of West Virginia, 396 F.3d 348, 356 (4th Cir. 2005). Two overwhelming federal interests are found in the second and third exceptions to the Anti-Injunction Act.

Not only are there state and federal interests at issue, there are significant Tribal interests at stake. The Tribes are complying with the negotiation provisions of the Montana Water Use Act (Mont. Code Ann. § 85-2-701, et seq.) and are in good-faith negotiations with the Montana Reserved Water Rights Compact Commission, with the mutual goal of submitting a comprehensive water rights Compact to the 2015 Montana Legislature. The second State Court case, DV-12-327, was filed with the express purpose of disrupting that process. The others have the same effect. If they are allowed to proceed, negotiations will be at best difficult and at cross purposes with the Water Use Act and McCarran Amendment. Additionally, contemporaneous with the negotiation process, the Tribes are preparing to file claims to water under the provisions of the § 85-2-702, MCA should negotiations fail. Those claims are due by statute on or before June 30,

2015. The Tribes have not yet filed them, but are complying with the Montana Water Use Act and therefore any effort in the state courts to adjudicate any aspect of FIIP water rights is of tremendous interest and impact to the Tribes and to the United States, already adjudged to own that water right.

As to the third element necessary for the discretionary application of Younger abstention, the ability of the Tribes to meaningfully raise federal constitutional questions in state courts, there is no definitive answer. The element can only be satisfied in an "as applied" setting. See Greely at 768.

IX. CONCLUSION

For the reasons discussed, the Defendant Judges should be enjoined from ruling on ownership of FIIP irrigation water.

Respectfully submitted this 23rd day of July, 2014.

/s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND KOOTENAI TRIBES
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 points, is double-spaced, and contains approximately 5,418 words, excluding the parts of the brief exempted by L.R. 7.1(d)(2)(E).

Dated this 23rd day of July, 2014.

/s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND KOOTENAI TRIBES
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2014, 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.

I further certify that a copy of the foregoing document was mailed by U.S. Mail, first-class, postage pre-paid, to the following:

Blanche Crepeau
103 Imperial Way
Missoula, MT 59803

Alex Crepeau
103 Imperial Way
Missoula, MT 59803

Michael G. McLatchy
1575 Council Way
Missoula, MT 59808

/s/ John B. Carter
John B. Carter
CONFEDERATED SALISH AND KOOTENAI TRIBES
Attorney for Plaintiff

Hon. C.B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860
(406) 883-7250

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

WESTERN MONTANA WATER USERS ASSOCIATION, LLC, on behalf of its members, who own irrigated lands with appurtenant water and other water rights within the Mission, Jocko Valley, and Flathead Irrigation Districts,

Plaintiff,

vs.

MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, AND FLATHEAD JOINT BOARD OF CONTROL,

Defendants.

Cause No. DV-12-327

FINDINGS OF FACT, CONCLUSIONS OF LAW AND WRIT OF MANDATE

The above cause came before the Court February 14, 2013 pursuant to Mont. Code Ann. § 27-26-301 for a return and hearing upon the Alternate Writ of Mandate issued by this Court December 14, 2012;

Plaintiff appeared by its counsel, Brian C. Shuck and Bob Fain; Defendants appeared by their counsel Jon Metropoulos;

Good cause appearing therefore, the Court makes the following:

29

CSKT Brief in Response to Judges' Motion to Dismiss
Exhibit A

FINDINGS OF FACT

1. That on December 12, 2012, Plaintiff filed a Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief.

2. That Mont. Code Ann., § 27-26-102 provides for a Writ of Mandamus to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station.

3. That Plaintiff's first claim for relief relies upon Mont. Code Ann., § 27-8-101, *et seq.*, the Uniform Declaratory Judgment Act and upon Mont. Code Ann, § 27-19-101 *et seq.* for injunctive relief.

4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court issued on December 14, 2012 an Alternate Writ of Mandamus commanding Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-1957 OR that Defendants file an Answer within 30 days of the Alternate Writ.

5. That Defendants did file an Answer January 16, 2013. That ¶ 15 of Defendants' Answer admits that approval of the FIP Agreement by the Flathead Joint Board of Control (hereinafter "FJBC") would be illegal for several reasons.

6. That Plaintiff is an LLC organized under the laws of the State of Montana and its members (hereinafter "Irrigators") all own fee simple lands with appurtenant water rights within the Defendants' Irrigation District and all are physically located within the exterior boundaries of the Flathead Indian Reservation.

7. The Defendants Mission, Jocko Valley and Flathead Irrigation Districts were all formed under the laws of the State of Montana for the purpose of providing effective public agencies for the improvement, development, operation, maintenance and administration of irrigation systems.

8. That the creation of said districts under Mont. Code Ann., § 85-7-101, *et seq.* expressly states that said law does not contemplate the acquisition by the districts of the existing water, water rights or systems or works owned by the Irrigators who are respective water rights owners within the districts.

9. That the Defendant Flathead Joint Board of Control was created under Montana Law under Mont. Code Ann., § 85-7-1601 *et seq.* when the Board of Commissioners of the three irrigation districts deemed it advisable for the best interest of their district to operate, manage, supervise and maintain the operation of their district jointly with other districts. That said FJBC has no ownership interest in any water rights.

10. That Article IX, Section 3 of the Montana Constitution recognizes and confirms all existing rights to the use of any waters for beneficial purposes, provides that all waters within the boundaries of the State are the property of the State subject to appropriation for beneficial uses as provided by law.

11. That Article II, Section 16 of the Montana Constitution provides that courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or character.

12. That Article II, Section 17 of the Montana Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

13. That Article II, Section 29 prohibits the taking of private property without just compensation.

14. That Title 3, Chapter 7 of the Montana Code Annotated established water courts to adjudicate water rights in the State of Montana.

15. That Title 2, Chapter 15, Part 33 RCM established the Montana Department of Natural Resources and Title 85 Chapter 2, Mont. Code Ann., § 101, *et seq.* provided for the administration, control and regulation of water rights and established a system of centralized records of all water rights.

16. That Plaintiff has alleged that its members' fee lands would have less or little value without their water rights. This Court accepts as a truism requiring no further proof that irrigated fee lands with a water right are more valuable than irrigable fee lands with no water rights.

17. That the statutory procedure for dissolution of an irrigation district is Mont. Code Ann., § 85-7-1001, *et seq.* and requires a petition signed by an equal number of holders of title as were required to sign the original petition for creation of the district.

18. That in the draft agreement found on the 34th page of Exhibit "A" to Plaintiff's Complaint, numbered page 16, contractually provides that Plaintiff-Irrigators transfer or assign their water rights to the Salish and Kootenai Tribes of the Flathead Nation (Tribes) in order to join the Flathead Indian Irrigation Project (FIIP).

19. That the draft agreement contains no provision for any compensation to any individual irrigator for the transfer of his water rights to the Tribes.

20. That said draft agreement contains no contractual obligation on the part of the Tribes to issue any FIIP Tribes-owned water right to any of the Irrigators.

21. That ¶ 18, page 12 of said agreement sets a maximum quantum water right of 1.4 acre feet per acre of water per year, which may be substantially less than the individual Irrigator's water right assigned to the Tribes, but there is no minimum requirement in the agreement for any "reallocated" water right to be provided to said Irrigators.

22. That said draft agreement is incomplete with ¶12, page 11 containing a highlighted phrase "review after completing compact language".

23. That the 16th through and including 33rd pages of Exhibit "A", each of which contain non-sequential numbers, contain an extensive list of rehabilitation and betterment improvement projects which will be owned by the Tribes, but said draft agreement at ¶ 26, page 14 contractually would require that this Montana District

Court designate the Irrigators' fee simple land as Irrigation District lands pursuant to Mont. Code Ann., § 85-7-107, which would subject said lands to tax assessments to pay for said projects without said lands having any water rights.

24. That ¶ 26, page 14 of said agreement contractually obligates the Defendant FJBC to defend the Tribes' claim before the Montana Water Court to all water rights on the reservation even though that is a direct conflict with individual water rights' claims of the Irrigators before the Montana Water Court.

25. That ¶ 78, the last page of said agreement, numbered page 26 on the 44th page of said draft agreement, contains a provision that the forum for disputes between the parties shall be federal court. Such a provision would be contractually binding upon the parties but would not be binding upon the U.S. District Court which has its own statutes and court rules for determining its jurisdiction. The two parties to the draft agreement who are not parties to this litigation, the United States and the Tribes, undoubtedly could invoke federal court jurisdiction because they are federally recognized legal entities. However, the third party to the agreement, the FJBC is not.

26. If the FJBC were to seek to invoke the jurisdiction of the U.S. District Court for the resolution of a dispute arising under the agreement, the federal court could very well determine that the legal residency of the Tribes is Pablo, Montana within the Flathead Reservation; that all of the Irrigators' fee property is within the exterior boundaries of said reservation and therefore there is no diversity of citizenship and decline jurisdiction. Such a result would deprive Plaintiff of any legal forum for the resolution of any dispute arising under the agreement contrary to the State of Montana Constitution.

///

///

///

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That Plaintiff's Petition and Complaint is based upon an Exhibit "A", Public Review Draft Agreement between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the the U.S. Department of Interior, and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts.

2. That the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either.

3. That the Flathead Joint Board of Control and all the irrigation districts were all created under Montana law and are subject to the jurisdiction of this Court.

4. That the statutory purpose for which the three irrigation districts and the Flathead Joint Board of Control were created is to operate irrigation districts. That the irrigation districts and FJBC have no ownership interest in any water rights which are individually owned by the Irrigator members of the Districts. The statutes authorizing the creation of said districts and Joint Board of Control for such purpose are void of any authority for the FJBC to enter into any agreement which provides for the assignment of the water rights privately owned by the Irrigators to the Tribes.

5. That there also is a void of any authority for the FJBC to enter into an agreement which provides for the assignment of the Irrigators' water rights to the Tribes without just compensation for their valuable water rights in violation of the Montana Constitution.

6. That there also is no authority for the FJBC to enter into any agreement which provides for an assignment of the Irrigators' water rights to the Tribes as a pre-condition to becoming members of the FIIP when such agreement contains no contractual agreement by the Tribes to issue any water right to any Irrigator whether designated "reallocated right" or otherwise.

7. That there also is a void of any authority for the FJBC to enter into an agreement which provides for an agreement to a forum for disputes which deprives the Irrigators of their Montana Constitutional right to access to the state courts of justice, including the State District Courts, State Water Court and the Montana Supreme Court and further deprives the Irrigators of the protection of their water rights by the Constitution of the State of Montana.

8. That there also is no authority for the FJBC to enter into an agreement which provides that the Irrigators are contractually obligated to defend the Tribes' application to the Montana Water Court for all water rights on the reservation, which claim is in direct conflict with the Irrigators' own rights to apply to the Montana Water Court to have their water rights adjudicated by the Water Court under Montana law.

9. That there is also no authority for the FJBC to enter into an agreement requesting the Montana District Court to designate lands held in fee simple status as Irrigation District land. This would result in such lands being assessed and taxed to pay for the 17 pages of projects set forth in the draft agreement and which projects would be owned by the Tribes and which fee lands would no longer have any appurtenant water rights.

10. That there also is no authority for the FJBC to effectively dissolve the FIP by providing for the assignment of the Irrigators' water rights to the Tribes in ¶ 30, page 16 of said agreement and then applying to join the FIIP without complying with the Montana statutory procedure for the dissolution of water districts.

That based upon the foregoing Findings of Fact and Conclusions of Law, the Court issues the following;

///

///

///

WRIT OF MANDATE

The Defendants Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District and Flathead Joint Board of Control are hereby enjoined from entering into the Draft agreement between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the United States Department of the Interior, and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts, as set forth at Exhibit "A" to Plaintiff's Complaint.

Said Defendants are further enjoined from entering into any other agreement which contains any of the provisions over which they have no authority to act as set forth in the Conclusions of Law above which exceeds their statutory authority to operate irrigation districts.

That the Alternative Writ of Mandate issued December 14, 2012 is rescinded and superseded by this Writ of Mandate.

Rationale

The Montana statutes which provided for creation of the Defendants' Irrigation Districts and Joint Board of Control specified as their purpose to operate irrigation districts which have no ownership interest in any water rights which belong exclusively to the individual Irrigators as appurtenances to their fee lands.

Said statutes contain no authority and this Court finds that the Defendants have no authority to enter into any agreement which provides for the Irrigators to assign their valuable water rights to the Tribes or to anyone else without any compensation and without any contractual agreement by the Tribes to issue any water rights back to the Irrigators.

The Court also holds that Defendants have no authority to enter into any agreement which contains any of the provisions found in the Draft Agreement attached

as Exhibit "A" to Plaintiff's Complaint and for which specific conclusions of law are hereinabove set forth. Said conclusions may not be exhaustive and all inclusive, but each of which individually supports the issuance of a Writ of Mandate to enjoin Defendants from entering into the Draft Agreement or any other agreement with similar provisions.

DATED this 15th day of February, 2013.

C.B. McNeil, District Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 15th day of February, 2013, I served a true and correct copy of the foregoing *Findings of Fact, Conclusions of Law and WRIT OF MANDATE* by U. S. Mail, first class, postage prepaid thereon, to the following:

Brian C. Shuck
Law Office of Brian C. Shuck, P.C.
P.O. Box 3029
Cheyenne, WY 82003

Bob Fain
Attorney at Law
P.O. Box 80886
Billings, MT 59108-0886

Attorneys for Plaintiff

Jon Metropoulos
Metropoulos Law Firm, PLLC
50 South Last Chance Gulch, Suite 4
Helena, MT 59601

Attorney for Defendants

Verna Shannon
Judicial Assistant