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IN THE UNITED STATES DISTRICT COURT, FOR THE

DISTRICT OF MONTANA, MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v.	))))))	Case No. CV-14-44-M-DLC **PLAINTIFF'S RESPONSE TO ATTORNEY GENERAL'S MOTION TO DISMISS**

UNITED STATES DEPARTMENT OF INTERIOR SECRETARY SARAH "SALLY' JEWELL; UNITED STATES BUREAU OF INDIAN AFFAIRS; JOCKO VALLEY IRRIGATION DISTRICT; MISION IRRIGATION 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.	)	

I. PROCEDURAL POSTURE OF THE CASE

The Federal Defendants have received an extension of time in which to respond. All other 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.

II. INTRODUCTION

The interests that the Attorney General (AG) seeks to protect are remarkably similar to those the Confederated Salish and Kootenai Tribes (Tribes) seek to protect. Both desire to have water rights disputes on and off the Flathead Indian Reservation (FIR) identified and quantified in a negotiated compact rather than through protracted water adjudication. Attorney General's Brief in Support of Motion to Dismiss (AG Brief) at p. 18. A negotiated settlement was reached in 2013 but the Legislature failed to enact it. AG Brief at p. 3. Neither the Tribes nor the AG want to see this suit adversely impact the proper exercise of the Montana Water Use Act. AG Brief at p 3. Complaint at ¶¶ 21, 25. Both are concerned about the application of res judicata as a result of all the current State Court litigation involving previously adjudicated FIR water. AG Brief at p. 11, Tribes'

Brief in Opposition to Motion to Dismiss by the State Court (Tribes' Judge's Brief) at pp. 6-10.[1] Both seek to avoid a piecemeal litigation of water rights. AG Brief at pp. 13-17; Complaint at Count Two, pp. 39-42.

Where the Tribes and AG differ is in how to achieve those common goals. There are presently four state court cases in which the same litigants and attorneys are seeking declarations that either irrigation districts represented by the Flathead Joint Board of Control or individual irrigation districts or individual irrigators own irrigation water collected, stored, transported and delivered to them by the Federal Flathead Indian Irrigation Project (FIIP). See, AG Brief p. 2, n. p. 2. See also, the Tribes' Judges Brief at pp. 3-6. In fact, the AG notes that all those State cases are "specifically concerning ownership of water rights related to the Flathead Indian Irrigation Project (FIIP)." AG Brief at p. 2. Neither the Tribes nor the U.S. are party to any of those cases.[2] The United States is a party in the Water Court case only.

The AG Brief touches on many of the arguments fleshed out in the Tribes' Judges' Brief. It is important to note, however, that the AG asserts that the Tribes seek to enjoin both the state court and the state court judges. See AG Brief at p.

[1] The Tribes' Judges' Brief is filed contemporaneously with this brief. In the interest of judicial and litigant economy, the Tribes incorporate by reference relevant portions of that brief into this one.

[2] Please see Exhibit A to the Tribes' Judge's Brief, the State District Court Order expressly finding that that Court had no jurisdiction over either the Tribes or the United States.

15. That is not correct. The Tribes amended their Complaint to drop the courts and add the judges as defendants. Accordingly, in the interest of avoiding duplicative briefing, the Tribes will touch briefly on the overlapping issues and incorporate by reference the germane portions of its Tribes' Judges' Brief and focus this brief on the arguments unique to the AG Brief.

III. RES JUDICATA BARS RELITIGATING THE QUESTION OF WHO OWNS FIIP IRRIGATION WATER

The reason the Tribes filed this case was to end the numerous conflicting claims of private ownership of FIIP irrigation water in multiple state forums, thereby satisfying the shared goal of the Tribes and AG; to avoid piecemeal litigation that will threaten the integrity of the Montana Water Use Act general water rights adjudication. Where the AG has erred is in his failure to acknowledge that the issue of ownership of FIIP irrigation water on the Reservation was settled decades ago in United States v. McIntire et al. and the Flathead Irrigation District, 101 F.2d 650 (9th Cir. 1939) and reaffirmed in United States v. Alexander et al. and the Flathead Irrigation District, 131 F2d 359, 360 (9th Cir. 1942). Both cases confirm that the United States, not irrigation districts or individual irrigators, owns water delivered by FIIP in trust under the Indian reserved water rights doctrine first enunciated in Winters v. United States, 207 U.S. 564 (1908), a case originating in Montana. Pages 1-2 and 6-10 of the Tribes' Judge's Brief expands greatly upon this point and demonstrates the applicability of res judicata to all the State court

cases. The nature of this case is not based on a need for a declaration of the law on ownership, but rather to ask this Court to declare to the state judges that has already been judicially settled.

The AG himself recognizes that dismissal of the State cases would satisfy his goals as well as those of the Tribes. He has filed amicus briefs in the District Court and the Water Court urging dismissal. AG Brief at pp. 6-7. He notes that, "[s]hould 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." AG Brief at p. 7.

If this Court would apply res judicata to the State court cases the Tribes' and AG's shared goals would be satisfied and render this case moot.

IV. THE TRIBES' CASE IS RIPE

The AG's assertion that this case is not ripe (AG Brief at pp. 7-9) is refuted by the facts. If it isn't ripe, then none of the disparate ongoing State cases can be either, as they raise the same question of law as do the Tribes; ownership of FIIP irrigation water.

a. Constitutional Ripeness.

The AG asserts that to satisfy the constitutional component of ripeness there must be a "'substantial controversy' between the parties that is immediate." AG

Brief at p. 8. There are now six different cases and controversies in three different courts (State District Court, State Water Court and this Federal District Court) dealing with the same subject matter; ownership of FIIP irrigation water. AG Brief at p. 2, n. 2; see also, Tribes' Judge's Brief at pp. 3-6. That represents a very substantial and immediate controversy with party overlap and therefore, factually, the requirements for constitutional ripeness laid out by the AG have been met.

b. Prudential Ripeness.

The AG lays out two elements necessary to satisfy prudential ripeness. He cites Montanans for Community Development v. Motl, 2014 U.S. Dist. LEXIS 32896 (D. Mont. March 12, 2014) as the test for the first element, "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."

Here the issue of ownership of FIIP irrigation water is exclusively a question of settled federal law. See McIntire and Alexander, supra. Being settled federal law, no more factual development is necessary. As to finality, those federal cases were final over seventy years ago.

This case also satisfies the second element of prudential ripeness. The AG cites to United States v. Braren, 338 F.3d 971, 975 (9th Cir. 2003) for the second element, "hardship to the parties of withholding court consideration." AG Brief at p. 8. The hardship this case seeks to avoid is the need of all parties to

contemporaneously litigate numerous different cases on the same subject matter in three different courts. That would impose tremendous burdens upon the parties, promote vexatious litigations that have the likelihood of producing conflicting judicial decisions, constitutes the piecemeal litigation both the AG and Tribes seek to avoid and runs afoul of the doctrine of res judicata. For more on these specific points, please refer to the Tribes' Judges' Brief on res judicata and the judicial and litigant economy that doctrine promotes. This case is ripe for determination.

V. TO THE EXTENT THE EXERCISE OF JUDICIAL DISCRETION IS WARRANTED IN THIS MATTER, IT SHOULD BE APPLIED TO ENJOIN THE STATE JUDGES FROM RULING ON THE OWNERSHIP ISSUE

The AG is correct when he notes that the Declaratory Judgment Act does not impose a mandate on the Court to declare anything. He argues that the three-part test set forth in Brillhart v. Excess Insurance Co. of America, 316 U.S. 491 (1942) supports a discretionary dismissal of the declaratory portion of the Tribes' Complaint. AG Brief at pp. 10-11.

Applying the facts of this case to the Brillhart test demonstrates clearly why this Court should grant the declaratory relief the Tribes seek. First, if dismissal of a federal declaratory action results in "avoiding 'needless determination of state law issues'" it may be granted. AG Brief at p. 10. Here, the law issue raised in both State courts, ownership of FIIP water, is in direct conflict with federal precedent and should be barred by res judicata. Furthermore, not all necessary and

indispensable parties are present in all the State Court cases. The District Order attached to the Tribes' Judges Brief affirms that fact. Consequently, any State court ruling will cause further confusion in state law, rather than less. This case should proceed for the express reason that it will avoid needless, fundamentally flawed, determinations of state law issues.

The second Brillhart concern is in "discouraging 'forum shopping'". AG Brief at pp. 10-11. It is hard to imaging more forum shopping than the State Court litigants have engaged in already. See AG Brief at p. 2, n. 2. The Tribes' intent in this case is to focus the federal question of ownership of FIIP irrigation water in one forum, the federal forum that has previously ruled decisively on the matter raised by the State Court litigants and those in privity with them.

The third Brillhart element, "avoiding 'duplicative litigation'", AG Brief at p. 11, is much like the second. The State Court litigants have mastered the art of engaging in duplicative litigation, one of the goals the AG and Tribes seek to avoid.

In addition to the Brillhart factors, the AG identifies other factors that may influence judicial discretion in a declaratory action in this Circuit on p. 11 of his brief. First, will the declaratory action settle all aspects of the controversy? The single question of law in this case is who owns FIIP water. That is also the central question in all the State cases. The Ninth Circuit settled that question twice in

McIntire and Alexander. It's res judicata.[3] The United States owns it in trust. U.S. v. McIntire, 101 F.2d 650, 653 (9th Cir. 1939); U.S. v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942). Second, will the action serve a useful purpose in clarifying the legal relations at issue? Again the legal issue has already been settled. Third, will it result in one party obtaining a res judicata advantage? Given the self-proclaimed lack of jurisdiction over the Tribes and United States, a state district court ruling can have no res judicata effect on them. For more on how res judicata acts to bar the State court proceedings, please refer to the Tribes' Judge's Brief at pp. 6-10. Fourth and last, will the federal action result in entanglement between the state and federal courts? AG Brief at p 11. Once again, as with the AG, the Tribes seek to avoid that entanglement. The entanglement here is that several State Courts are proceeding to litigate the question of ownership of FIIP irrigation water seventy years after the Ninth Circuit definitively ruled that the United States owned it in trust. The AG has suggested dismissal of the State cases to avoid entanglement. Not being party to any of those State cases, the only way the Tribes can seek to avoid entanglement is to seek to enjoin the Judges from ruling on them, rather than move to dismiss the State cases.

[3] The Tribes seek a declaratory ruling only on the ownership of FIIP water. While central to all of the State Court proceedings, the litigants there raise numerous other issues of irrigation district and individual irrigator rights and obligations as well. The Tribes assert no position nor seek any relief on those issues ancillary to the ownership question.

At pp. 10-12 of his Brief the AG asserts that that a declaration of ownership sought by the Tribes should not be granted because it "implicates the State Court litigants water rights claims, if any and infringes on an important state administrative process—the Montana General Stream adjudication." The U.S. Supreme Court has been clear on this point. State courts have a "solemn obligation to follow federal law" when adjudicating Indian reserved and aboriginal water rights. San Carlos Apache Tribe v. Arizona, 463 U.S. 545, 571 (1983); see also, Colorado River Conservation District v. United States, 424 U.S. 800, 817 (1976). The Montana Supreme Court has been equally clear. See State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 766 (1985). The controlling federal law was clearly pronounced in McIntire and Alexander**.** No irrigation district or private irrigator has a legal basis to claim a privately owned water right under FIIP.[4] The Tribal suit does implicate the State court claimants and the General Stream Adjudication. It does so by attempting to ensure that the State courts live up to their solemn obligation to follow federal law regarding ownership of irrigation water delivered by FIIP (McIntire and Alexander), by attempting to avoid entanglement of the State and Federal judiciary, to avoid inconsistent rulings, by attempting to avoid conflict between the State Courts, by

[4] To be sure, many irrigators have filed state water right claims for pre-1973 water rights in the Montana General Stream Adjudication, but any final determination on the validity of such claims is years in the future.

attempting to abide by the proscription against piecemeal litigation under the McCarran Amendment, and to capitalize on judicial and litigant economy.

VI. ABSTENTION IN ANY FORM IS INAPPROPRIATE IN THIS CASE

The Judges and the AG both raise Younger and Colorado River abstention as alternative discretionary grounds to dismiss this case. The Tribes' Judge's Brief addresses those issues on pp. 17-19. The Tribes incorporate those arguments into this brief. To the extent the AG raises abstention arguments other than those raised by the Judge's Brief the Tribes will respond.

In noting that Younger and Colorado River abstention are discretionary and not mandatory (AG Brief at pp. 13, 15), the AG also acknowledges that while there are many issues for the Court to consider, none of them definitively requires abstention. In fact, the "weight to be given any one factor may vary greatly from case to case", quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 16. The single biggest factor this Court should evaluate is the application of res judicata. If it is applied to the State cases, the overall goals of the AG and the Tribes will be satisfied and piecemeal adjudications will be avoided.

As discussed in detail in the Tribes' Judge's Brief at pp. 1-3 and 6-12, McIntire and Alexander involved the United States, the current State court litigants and those in privity or in a position of succession to them. The federal Courts first

assumed jurisdiction over the subject matter and definitively ruled on it over seventy years ago. Now, in a piecemeal fashion, the State litigants seek to relitigate that settled federal issue. They should be barred by res judicata.

The relevance of one of the factors raised at p. 16 of the AG Brief as a reason to abstain in this case is "the inconvenience of the federal forum". The actions of one of the primary State court litigants demonstrates that the federal forum is both convenient and the proper forum to resolve this federal issue. The Flathead Irrigation District[5] recently filed a federal suit in this Court seeking various forms of relief they assert arise out of the Flathead Allotment Act of April 23, 1904, 33 Stat. 302, as amended ("FAA")**.**[6] The FIIP was authorized under the FAA. See Complaint at ¶¶ 13-33. The federal questions the Flathead district raises in its federal complaint involve judicial analysis of exactly the same federal statutes the Tribes identified in their Complaint in this case. In fact, it would manifest judicial and litigant economy if that case and this case were consolidated.

VII. CONCLUSION

For the reasons stated in this Brief and in the Tribes' Judges' Brief, the AG's motion to dismiss should be denied and this case should go to trial.

Respectfully submitted this ___ day of July, 2014.

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[5] Since the AG submitted its Proposed Motion and Brief on Dismissal, the FJBC has reunited. See AG Brief at pp. 4, 6.

[6] That case is entitled Flathead Irrigation District v. United States, Case No. 14-CV-00088-DLC.

/s/ John B. Carter
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1 (d)(2)(E), 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 is 3,065 words, excluding certificate of service and certificate of compliance.

Dated this 23rd day of July, 2014.

s/ John B. Carter
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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:

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