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

INTRODUCTION

Plaintiff, the Confederated Salish & Kootenai Tribes (the Tribes) filed their Response to the Montana Attorney General's Motion to Dismiss (Tribes' Response), clarifying that the purpose of their suit is "to end the numerous conflicting claims . . . in multiple state forums." (Doc. 63 at 6.) While this is indeed a goal that the Attorney General and the Tribes share, the Attorney General disagrees that now is the time for this Court to weigh in on the matter. Rather, the Attorney General submits that this Court should refrain from entertaining this suit to enjoin Judge Manley, Chief Water Judge McElyea and Associate Water Judge Ritter ("the State Court Judges"), by exercising its absolute discretion and dismiss this case.

In an effort not to duplicate arguments, the Attorney General will not address the Tribes' *res judicata* and Anti-Injunction Act arguments because the State Court Judges are in a better position to do so. That being said, the Attorney General joins with the State Court Judges in the arguments made in their reply. (Doc. 72.)

ARGUMENT

I. THE TRIBES' REQUEST FOR INJUNCTIVE RELIEF FAILS TO SATISFY PRUDENTIAL RIPENESS.

The Tribes correctly restate this District's most recent pronouncement of the test for the first element of prudential ripeness (fitness of issues for judicial

decision) as: "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 *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003) (citation omitted). However, the Tribes fail to correctly apply the facts to the test.

The Tribes' Response states that the issue of ownership of the FIIP irrigation water has been settled law for over 70 years. (Doc. 63 at 8.) While it may be true that the law on the ownership of the FIIP irrigation water is final, the "challenged actions" that they seek injunctive relief for are the *potential* inconsistent decisions of State Court Judges that *may* be contrary to established federal law, which has not yet occurred and may never occur. Thus, while the law on the matter may be final, the "challenged action" is not. The Tribes have the opportunity to raise claim preclusion in the appropriate state venue.

This was exactly the situation in *United States v. Braren*, where the Klammath Tribes sought to have the Oregon District Court "construe and clarify the nature and scope of tribal water rights" as previously established by federal law[1] so that the State of Oregon would correctly apply the established federal law during the

[1] *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*) and *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (*Adair II*).

Oregon comprehensive water adjudication process. *Braren*, 338 F.3d at 974. In *Braren*, the Oregon District Court not only issued a declaration of tribal water rights, it went on to hold that "individual defendants were precluded from arguing that the [Klammath] Tribes had lost their treaty rights to hunt, fish, and gather because this issue was conclusively resolved in *Adair I* and *II*." *Id.* at 974 (citations omitted).

The Ninth Circuit overturned the Oregon District Court's decision having found that the action failed the fitness aspect of the prudential ripeness test, stating:

> The United States and the [Klammath] Tribes sought a declaration of their water rights because the Adjudication allegedly embraced a standard contrary to those rights. But the Adjudication has not yet embraced *anything*. At most, the Adjudication announced a starting point in analyzing the federal claims.

Id. at 976.

Here, like *Braren*, the Tribes fear how the State Court Judges may misinterpret, or misapply, or reject established federal law. However, the Tribes fail to establish that the State Court Judges have done so.[2] Indeed the State Court Judges have yet to determine if the pending state cases are properly before them. As such, this case is not ripe.

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[2] In the Tribes' Brief in Response to Judges' Motion to Dismiss (Doc. 62), the Tribes claim that "Montana district courts have a demonstrated inability to accept and adhere to federal judicial decisions." (Doc. 62 at 19, n.6.) In support of this remarkable statement, the Tribes cite to three cases in which the Montana Supreme Court has overruled the lower court's misapplication of federal law, but the Tribes fail to cite to any instance in which the State Court Judges have done so. As noted by the Judges in their reply brief, these cases "confirm the State process works." (Doc. 72 at 10, n.6.)

II. THE CIRCUMSTANCES IN THIS CASE WEIGH IN FAVOR OF THE COURT EXERCISING ITS DISCRETION TO DISMISS THE TRIBES' REQUEST FOR DECLARATORY JUDGMENT.

The Tribes agree that this Court has the absolute discretion to decline to exercise jurisdiction in this case. (Doc. 63 at 9.) The Tribes, however, go on to misstate and misapply the applicable law to the facts. The Tribes incorrectly refer to the factors set forth in *Brillhart v. Excess Ins. Co. of America* as a "three-part test." (Doc. 63 at 9.)

In *Brillhart*, the United States Supreme Court listed three *factors* to be considered when a court is deciding whether to exercise jurisdiction over a declaratory judgment action. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942). The Ninth Circuit has added four additional considerations to the *Brillhart* factors. *See Government Employees Ins. v. Dizol*, 133 F.3d 1220, 1225, n.5, (quoting *American State Ins. v. Kearns*, 15 F.3d 142,145 (9th Cir. 1994). In applying these factors, it is not necessary that all factors weigh in favor of abstention for the Court to find that abstention is appropriate. *Huth v. Hartford Ins.*, 298 F.3d 800, 802-03 (9th Cir. 2002) (the district court did not abuse its discretion by determining one of the three *Brillhart* factors was a "wash"). The Court must simply balance the factors keeping the basic principles of "judicial administration, comity and fairness to the litigants" in mind. *Kearns*, 15 F.3d at 144 (quoting *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1367 (9th Cir. 1991)).

Here, a balancing of the factors weighs in favor of abstention. First, it is a well-established principle of federalism that litigants may assert their federal defenses in state court because state courts are capable of adjudicating those defenses, subject always to final review by the United States Supreme Court. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*¸ 398 U.S. 281, 287 (1970). This is especially true in this case because both the United States Supreme Court and the Montana Supreme Court have instructed the State Court Judges to follow federal law. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 9183) ("State courts, as much as federal courts, have a solemn obligation to follow federal law."); *see also State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 21 Mont. 76, 712 P.2d 754, 759-62 (1985) (state courts must follow federal law to determine tribal reserved water rights).

Here, the Tribes emphasize that they are not parties to the pending State cases, but that is their choice. They could, much like the Attorney General has done in this case, intervene in the pending State cases. Furthermore, even if the State Court Judges were to issue decisions that conflict or contradict established federal law, the Tribes can appeal those decisions to the Montana Supreme Court and ultimately the United States Supreme Court.

Additionally, the Tribes clearly filed this lawsuit in reaction to the arguments made by plaintiffs in the State cases. The Ninth Circuit has instructed

that "courts should generally decline to entertain reactive declaratory actions." *Dizol*, 133 F.3d at 1226; *see also Continental Casualty v. Robsac Indus.*, 947 F.2d 1367, 1371-73 (9th Cir. 1991).

On balance the factors weigh in favor of abstention and this Court should decline to entertain the Tribes' declaratory relief claim and dismiss this case.

III. ALTERNATIVELY, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DISMISS THE TRIBES' LAWSUIT ON ABSTENTION GROUNDS.

Rather than respond separately to the Attorney General's grounds for abstention under *Younger v. Harris*, 401 U.S. 37 (1971) and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Tribes chose to incorporate the arguments made in their Response to the State Court Judges' Motion to Dismiss (Doc. 62). However, the Tribes' Response to the State Court Judges' Motion to Dismiss only addressed the *Younger* abstention doctrine. (Doc. 62 at 20-22). Also, the Tribes' Response to the Attorney General (Doc. 63) lumps their discussion of both the *Younger* and *Colorado River* abstention doctrines together.

Since the Attorney General adopts the reasoning of the arguments the State Court Judges' Reply (Doc. 72), the Tribes' specific arguments against application of the *Younger* abstention doctrine will not be repeated here. However, since the Tribes' Response repeatedly refers to both the *Younger* and *Colorado River*

abstention doctrines together in an uncharacteristically general way, the arguments for abstention may similarly apply to both.

The Tribes' Response states that the avoidance of piecemeal adjudication is the "single biggest factor" weighing against abstention. (Doc. 63 at 13.) In doing so, the Tribes ignore the fact that this lawsuit itself presents piecemeal adjudication of the issues. In *Colorado River*, the federal court, recognizing the piecemeal adjudication that would result from exercising jurisdiction, rightfully abstained in favor of an on-going comprehensive (*inter sese*) adjudication which is exactly the case here. *Colorado River*, 424 U.S. at 817-20.

The Tribes' deadline to file its competing water rights claims is June 30, 2015--less than 11 months from now. *See* Mont. Code Ann. §§ 85-2-217, -702(3). To proceed with this lawsuit prior to the filing of the Tribes' claims or the expiration of the deadline to do so runs a very great risk of creating the sort of piecemeal adjudication that was disfavored by the United States Supreme Court in *ColoradoRiver*, and cautioned against by the Montana Supreme Court in *Salish and Kootenai Tribes v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093 (2002).

Furthermore, despite the clear applicability of the *Colorado River* abstention doctrine to this case, the Tribes raise *res judicata* as the answer to every argument for abstention. (Doc. 63 at 13.) This ignores the fact that even if this Court were

to grant the all of the Tribes' requested relief it would not definitively resolve all of the issues between the parties. Only a full and final adjudication of all of the parties' interests will settle the issues between the parties. Such an adjudication can only take place in the Montana Water Court as part of the Montana General Stream Adjudication process. The Tribes may certainly raise any *res judicata* argument during the Adjudication.

CONCLUSION

For the foregoing reasons, as well as the points and authorities set forth in the Attorney General's opening brief, this Court should dismiss this action.

Respectfully submitted this 15th day of August, 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.

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

Dated: August 15, 2014 */s/ Michael G. Black*
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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 1,831 words, excluding certificate of service and certificate of compliance.

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