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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES,

Plaintiff,

v.

UNITED STATES DEPARTEMENT 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 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.

Cause No. CV-14-44-M-DLC

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The Twentieth Judicial District of Montana and the Montana Water Court filed their Motion To Dismiss on May 15, 2014. (Doc. 28.) The Tribes filed their First Amended Complaint the same day. (Doc. 27.) The Tribes' amended pleading dropped the Montana Courts as Defendants but raised official capacity claims against Judges James E. Manley, Russell McElyea and Douglas Ritter (collectively, "Judges"). (Doc. 27.) With this reply, the Judges incorporate the arguments presented by the Montana Courts.

This Court should reject what is, in effect, a preemptive appeal by the Tribes of a ruling that may or may not occur. This preemptive appeal not only undermines the statewide process enacted pursuant to the McCarran Amendment, but it fundamentally challenges basic principles of federalism and the Judges' solemn obligation to follow federal law. The Judges' Motion To Dismiss should be granted.

I. THE ELEVENTH AMENDMENT BARS SUIT AGAINST THE JUDGES.

As duly conceded by the Tribes, this action is barred by sovereign immunity unless the Tribes can satisfy the narrow *Ex Parte Young* exception. *Ex parte Young* allows an official capacity suit against a state official seeking prospective equitable relief from an ongoing violation of federal law. *Ex parte Young,* 209 U.S. 123, 167 (1908). With their First Amended Complaint, the Tribes have satisfied the first requirement of *Ex parte Young* – the individual judges, rather

than the courts, are now named as defendants. However, the Tribes have failed to cure the more fundamental problem: They have failed to state a plausible claim the Judges are committing an "ongoing violation of federal law." *Id*.; *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635, 645 (2002).

At most, the Tribes state a claim the Judges might issue rulings that could be inconsistent with federal precedent, or could be unenforceable against the Tribes and the United States. Because the Tribes do not assert the Judges lack jurisdiction over the pending cases, or that the Judges have issued rulings that violate federal law, there is no basis to invoke *Ex parte Young*. The doctrine has no application and the Eleventh Amendment bars suit. *See, e.g., Verizon*, 535 U.S. at 645.

Far from demonstrating an ongoing violation of federal law, the Tribes argue the plaintiffs in the state cases assert claims that are defeated by applicable federal precedent – *U.S. v. McIntire*, 101 F.2d 650 (9th Cir. 1939) and *U.S. v. Alexander*, 131 F.2d 359 (9th Cir. 1942) in particular. This may or may not be true, but the only question today is whether the Judges are entitled to consider and rule upon the issues brought to them, or whether this Court should step in, halt the state proceedings, and instruct the Judges on how to interpret and apply federal precedent in advance. This latter option appears to contradict, in a very direct way, principles of federalism and the policies underlying the McCarran Amendment, because it is based on an assumption the Judges will flout their "solemn obligation

to follow federal law." *State ex. rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 766 (Mont. 1985) (quoting *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983)).

The Tribes acknowledge, as they must, that adjudication of Indian reserved water rights is not exclusively federal, and that state and federal courts have concurrent jurisdiction over such matters. (Doc. 62 at 15.) The Tribes further concede the Montana Water Use Act "satisfies the federal McCaran requirements on its face," though they speculate the Judges might issue rulings that violate the McCarran Amendment "as applied." (Doc. 62 at 15.) Thus, by insisting this Court put an end to the state proceedings before the Judges have even had an opportunity to consider the issues, the Tribes advocate a result that, at its core, is based on a perceived inadequacy of state forums that "run[s] counter to basic principles of federalism." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997). The Tribes ignore the U.S. Supreme Court's "emphatic reaffirmation ... of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so." *Id*.

In summary, the Tribes' do not, and cannot, challenge the Judges' jurisdiction over the pending state court cases, or point to any rulings by the Judges

that violate federal law. Hypothetical violations are insufficient to defeat Eleventh Amendment immunity.[1]

II. *YOUNGER* REQUIRES DIMISSAL.

The Tribes assert abstention under *Younger v. Harris*, 401 U.S. 37, 49-53 (1971) is discretionary. (Doc. 62 at 20.) Not true. When the required factors are established, dismissal under *Younger* is mandatory. *Partington v. Gedan*, 880 F.2d 116, 120 (9th Cir.1989), *rev'd and vacated in part on other grounds*, 923 F.2d 686 (9th Cir.1991) ("[W]here *Younger* abstention is applicable, a district court must dismiss the action."); *see also Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 n.22 (1976). The Ninth Circuit has specifically addressed this issue as follows:

> In the *Younger* context, these factors are static. A district court's perception of the appropriateness of abstaining will not be affected by the progress of the state court proceeding. When abstention under *Younger* is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires dismissal of the federal action.

Confederated Salish v. Simonich, 29 F.3d 1398, 1402-03 (9th Cir. 1994) (emphasis added) (internal citations omitted).[2]

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[1] Judicial immunity would not apply if the Tribes' action otherwise satisfied *Ex parte Young*.

[2] The Tribes cite *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007) to argue dismissal is "not a mandate," but *AmerisourceBergen* was a case for money damages, and the Ninth Circuit actually confirmed in its opinion that dismissal is the appropriate remedy in cases such as this: "[W]hen a federal plaintiff seeks monetary damages (rather than injunctive or

Presumably, the Tribes argue against the mandatory nature of *Younger* abstention because they cannot effectively challenge the four *Younger* elements. *See Younger*, 401 U.S. at 49-53. As to the first element, the Tribes concede "the state cases were ongoing before the Tribes filed this suit" and the Tribes, in fact, list and describe the ongoing state proceedings in their brief. (Doc. 62 at 5-7, 20).[3] Similarly, the Tribes do not challenge the third element by claiming they are "barred from litigating federal constitutional issues in the state proceeding." *See Younger*, 401 U.S. at 49-53; (Doc. 62 at 22). To the contrary, the Tribes admit they are "preparing to file claims to water under the provisions of § 85-2-702, MCA should negotiations [with the Montana Reserved Water Rights Compact Commission] fail." (Doc. 62 at 21.) Nor do the Tribes challenge the fourth *Younger* factor – that the Court's action would enjoin or have the effect of enjoining the state proceedings – because that is the precise relief the Tribes have requested. (Doc. 62 at 20-22.)

The only *Younger* factor the Tribes take issue with is the second, which asks whether the state proceeding "implicates important state interests." *Younger*, 401

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declaratory relief) in a case requiring abstention under *Younger*, dismissal is not the appropriate procedural remedy." (Emphasis added).

[3] The Tribes, correctly, do not take issue with the fact that the proceedings are not technically "state-initiated." As Judge Lovell held in *Montanans for Community Development v. Motl*, 2014 WL 977999, *4, fn. 1, "[t]he requirement that the ongoing state proceedings be state-initiated has been diminished as to the first-element, because even a state proceeding between two private parties may provide the basis for a *Younger* abstention."

U.S. at 49-53. Although it would seem axiomatic that it does, and although the Tribes concede "a properly-executed McCarran –qualifying *inter sese* water rights adjudication is in the states' [sic] interest," the Tribes go on to suggest the State's interest should be disregarded in favor of the Tribes' interest. (Doc. 62 at 21.)

Montana has an important state interest in regulating the use of water within its borders, including waters within the Flathead Indian Reservation. *See Simonich*, 29 F.3d at 1405. In a case where the Tribes challenged Montana's right to regulate water use on the Flathead Reservation, the Ninth Circuit specifically determined "the ongoing judicial proceeding in Montana state court implicates important state interests" for purposes of the second *Younger* requirement. *Id.* (emphasis added)[4]; *see also United States v. Anderson*, 736 F.2d 1358 (9th Cir.1984)) (recognizing the important state interest in comprehensive water resource regulation); *see also State ex rel. Greely*, 712 P.2d at 757-58.

In addition, in enacting the McCarran Amendment – which waived federal immunity from suit for the adjudication of federal reserved water rights, including those of Indian tribes, *e.g., Colorado River*, 424 U.S. 800 – Congress explicitly recognized the importance of state law in the area of water rights. *See, e.g., United States v. Idaho*, 113 S. Ct. 1893, 1897 (1993) ("[T]he McCarran Amendment

[4] In *Simonich*, *Younger* was ultimately found not to apply, but only because the fourth factor was not met: Unlike here, where the Tribes specifically ask the Court to enjoin the state proceedings, in *Simonich* "[t]he Tribes d[id] not seek by their federal court action to restrain any ongoing state proceeding." *Id*. at 1400.

submits the United States generally to state adjective law, as well as state substantive law of water rights").

The Tribes cite *Harper v. Pub. Serv. Commn. of W.VA.*, 396 F.3d 348, 355-56 (4th Cir. 2005) to suggest *Younger* abstention is subject to a balancing of the relative importance of state and federal interests. (Doc. 62 at 21.) *Harper* does not support this interpretation. *Harper* involved a state's transparent attempt to restrict market entry in violation of the dormant Commerce Clause. *Id*. at 350-51. An out-of-state waste disposal service was barred from competing in West Virginia with waste removers the state had effectively licensed with an exclusive franchise. *Id*. The service instituted a federal action to enjoin the state from enforcing a cease-and-desist order. *Id*. In preface to its discussion of the second *Younger* factor, the Fourth Circuit observed:

> [T]he state interest at stake here is its interest in limiting interstate access to the waste removal market. While neutral health, safety, and environmental regulations are one thing, limitation on market access to maintain exclusive franchises for existing enterprises is another. . . .
>
> The commerce power plays a role in abstention analysis quite different from many of the other provisions of the Constitution. The dormant Commerce Clause demonstrates a difference of kind, not merely of degree. . . . No state's dignity could be offended by acknowledging the obvious point that the Framers consciously withdrew interstate commerce from the vast collection of interests that remain the primary responsibility of the states.

Id. at 355–56 (emphasis added).

Unlike *Harper*, this case does not involve a state-erected trade barrier implicating the commerce power of the U.S. Congress. Even assuming the *Harper* analysis is beyond reproach, it was based on the "quite different" abstention analysis under dormant Commerce Clause, and does not apply here.[5]

In summary, because important state interests are implicated by the ongoing state proceedings, all four *Younger* factors are met and the Tribes' action should be dismissed. *Simonich*, 29 F.3d at 1402-03.

III. THE ANTI-INJUNCTION ACT BARS SUIT AGAINST THE MONTANA COURTS.

The Anti–Injunction Act "is designed to prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances." *Sandpiper Village Condo. Ass'n., Inc. v. Louisiana-P. Corp.*, 428 F.3d 831, 842 (9th Cir. 2005). Accordingly, "the limited exceptions to the Anti–Injunction Act will not be enlarged by loose statutory construction." *Id.* "Any doubts . . . [will] be resolved in favor of permitting the state courts to proceed." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970).

The Tribes advocate an enlargement of the Anti–Injunction Act's exceptions that would ultimately swallow the Act's general mandate. The Tribes' main

[5] *Harper* has been called into question in subsequent decisions. *See e.g., Marathon Petroleum Co. LLC v. Stumbo*, 528 F. Supp. 2d 639, 646-50 (E.D. Ky. 2007).

argument is that the issue of water rights on the Flathead Indian Reservation has already been resolved; that any dispute relating to these rights is a simple matter of applying the doctrine of *res judicata*. If that is true, then the Tribes should have no concern with presenting the issue to the Judges who, following their "solemn obligation" to apply federal law, should then easily conclude the law is as the Tribes say. The Tribes' hesitancy, apparently, lies in concerns stated in footnote 6 of their brief, wherein they express the view that "[t]he Montana district courts have a demonstrated inability to accept and adhere to federal judicial decisions. . . ." (Doc. 62 at 19, fn. 6.)[6] Setting aside the gratuitous slap at Montana district courts, the Tribes fail to point to any legal authority that permits an end-run around state court jurisdiction simply because of a perceived "inability" to apply federal law. This is nothing more than forum shopping by the Tribes.

Moreover, for *McIntire* and *Alexander* to have preclusive effect under *res judicata* (in addition to binding effect under *stare decisis*), the Tribes must show "an identity of claims," as well as a "final judgment on the merits." *E.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). In this regard, the Tribes

[6] It should be noted that the cases cited by the Tribes in footnote 6 actually confirm the state process works. *See In the Matter of the Application for Beneficial User Permit Nos. 66459-76L, Ciotti; 64988-G76L*, 923 P.2d 1073 (Mont. 2996); *Confederated Salish & Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999); *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093 (Mont. 2002). Each of these cases involved the Tribes' current counsel, Mr. Goetz, and each resolved in the Tribes' favor. In each case, the Montana Supreme Court held the Montana DNRC could not issue water use permits on the Flathead Reservation until the Tribes' federally reserved water rights had been defined and quantified (in one case reversing a district court that had found otherwise). In all of these cases, the Montana courts ultimately rendered decisions that both accepted and adhered to federal judicial decisions.

overstate the breadth of *McIntire* and *Alexander*. Those cases did confirm the 1855 Hellgate Treaty "impliedly reserved all waters on the reservation to the Indians," *McIntire*, 101 F.2d at 653, but they did not resolve, forevermore, all water use disputes on the Flathead Indian Reservation. The so-called "relitigation exception" does not apply because the current Montana actions do not involve the same claims or arise out of the same transaction as a prior federal action, or threaten to overturn a prior judgment entitled to *res judicata* effect. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). Moreover, even if they did, the Tribes could easily submit these issues to the Judges, rather than file a preemptive appeal of the Judges' potential interpretation of federal law.

For this same reason, the "in aid of jurisdiction" exception does not apply. As noted, jurisdiction over Indian reserved water rights is not exclusively federal. *Colorado River*, 424 U.S. at 809-12. The "in aid of jurisdiction" exception does not arise by virtue of "the mere fact that a state court may reach a conclusion that differs from what a federal court would prefer. . . ." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1101-02 (9th Cir. 2008). Moreover, the Tribes argue an injunction will avoid "piecemeal adjudication," but the opposite is actually true. A declaration in this case, in the absence of a great number of interested parties, will do nothing more than spawn case after case in which the

meaning and effect of this Court's declaration will be litigated in both state and federal courts.

The Tribes' attempt to unjustifiably expand the scope of the Anti–Injunction Act's exceptions is underscored by the authority cited in their brief. In *U.S. v. Washington*, 459 F.Supp. 1020, 2028, fn. 3 (D.C. Wash. 1978), for instance, the federal district court "assumed jurisdiction over the question of what obligations the State of Washington owed to Indian tribes under the fishing rights provision in the federal treaties." It ultimately ordered the State to make reductions in non-Indian fishing, and retained continuing jurisdiction to assure compliance with its judgment. *Id*. When state courts issued injunctions that would directly prevent compliance with the federal judgment, the federal court determined injunctive relief was appropriate. *Id*.; *see also Alonzo v. U.S.*, 249 F.2d 189, 193 (1957) (injunctive relief proper where state action sought to oust the United States and Pueblo Indians from lands to which the Pueblo had title and possession under prior federal order).

Here, by contrast, there is no allegation the Judges have overturned or interfered with the execution of any prior order of this Court. To the contrary, it is the Judges' obligation, as expressed by both the U.S. and Montana Supreme Courts, to follow federal law. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 275; *State ex. rel. Greely*, 712 P.2d at 765-66.

In summary, because no exception applies, this Court should follow the Anti-Injunction Act's mandate and decline to issue an injunction. 28 U.S.C. § 2283.

IV. NO ACTUAL CASE OR CONTROVERSY WARRANTS DECLARATORY RELIEF.

By asking this Court to "frame federal law" for the state proceedings, the Tribes seek an improper advisory opinion. (Doc. 1, ¶ 24.) The Tribes' response to this showing is limited to a single footnote. (Doc. 62 at 11, fn. 4.) The Tribes assert the matters to declare are "long settled federal law" and are not, therefore "advisory or declaratory." (Doc. 62 at 11, fn. 4.) However, if the goal is for this Court to declare long settled law the Judges already have the jurisdiction and the obligation to interpret and apply, then the declaration is, by definition, advisory. *See, e.g., Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir.2000) (en banc).

The Tribes' argument that an actual case or controversy must exist in this case simply because the four state court cases are ongoing is also not persuasive. (Doc. 62 at 11, fn. 4.) The Tribes must prove "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality. . . ." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). The Tribes' requested declaration concerns a hypothetical legal dispute; the Judges have no adverse legal interest to the Tribes and possess no underlying cause of action they

could have brought or threatened to bring against the Tribes. Under Article III, there is no case or controversy presented by the Tribes' complaint.

Finally, by seeking an advisory opinion on their water rights, the Tribes are themselves seeking a piecemeal adjudication that would disenfranchise thousands of other water users who would be impacted by this Court's declaration. This is the opposite of the normal adjudication process, which provides notice and an opportunity to be heard to all water users in the Flathead River basin. This type of comprehensive and inclusive process is why Congress and the federal courts defer to state water rights adjudications – to avoid exactly the outcome the Tribes are seeking in this action. *See, e.g., Colorado River*, 424 U.S. at 809-12.

CONCLUSION

For the reasons stated, the Judges' Motion To Dismiss should be granted.

DATED this 14th day of August, 2014.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox
Attorneys for Defendants Montana Twentieth Judicial District Judge James E. Manley, Montana Water Court Chief Judge Russell McElyea and Associate Water Judge Douglas Ritter

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 3,240 words, excluding the parts of the brief exempted by L.R.7.1(d)(2)(E).

DATED this 14th day of August, 2014.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
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