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MONT. DEPT. OF NATURAL RESOURCES & CONSERVATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, Montana, et al.,

Plaintiffs

v.

THE STATE OF MONTANA, et al.,

Defendants.

NO. 81-[illegible]

DEFENDANTS' BRIEF IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

This memorandum in opposition to the plaintiffs' application for preliminary injunction is submitted by all of the defendants named in the above-captioned action.

INTRODUCTION

The plaintiffs, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, (hereinafter called "Tribes"), and various individual members of the Tribes have applied to this Court for a preliminary injunction prohibiting the State of Montana and all named defendants from any acts applying or enforcing, directly or indirectly, any provision of the Montana Water Use Act, as amended, MCA Sections 85-2-101 through 85-2-704 and Sections 3-7-101 through 3-7-502 (1979) on the Flathead Indian Reservation or with respect to any and all waters within or appurtenant to the Flathead Indian Reservation. The Tribes base their claims upon the

premise that the existence of the Montana Water Use Act, together with any enforcement of the Act on the Reservation would violate numerous rights of the Tribes, guaranteed to them by the United States Constitution, the Treaty of Hell Gate, and various cases interpreting those documents.

On or before November 11, 1981, the defendants will file an answer to the complaint. That answer will contain specific responses to the allegations contained in the complaint. The defendants believe, however, that it is important that this Court be aware of certain areas of agreement between the Tribes and the State of Montana. Those areas of agreement, in the defendants' opinion, eliminate the heart of plaintiffs' complaint and vitiate any possible need for injunctive relief.

The defendants admit that the Treaty of Hell Gate of June 16, 1855, impliedly reserved to the plaintiff Tribes the right to use water for uses reasonably related to the purposes for which the Reservation was established. Winters v. United States, 207 U.S. 564 (1908), Cappaert v. United States, 426 U.S. 128 (1976). The defendants refer to this water right as a "reserved water right." The defendants acknowledge that the priority date for this right is 1855. The defendants further acknowledge that by virtue of this priority date, the Tribes have the first right to the use of waters on the Reservation for uses reasonably related to the purposes for which the Reservation was established. Rights subsequent in time, whether by reservation or appropiration, have a later priority date.

The defendants do not in any way assert jurisdiction over the Tribes, or over the property of individual members of the Tribes owned by them or their Reservation. The defendants acknowledge that, without a waiver of sovereign immunity, such

jurisdiction may not be obtained.

The defendants do however assert jurisdiction pursuant to the Montana Water Use Act over the surplus waters flowing through and touching upon the Reservation. Furthermore, the defendants assert jurisdiction over the United States, as trustee for the Tribes. As will be discussed below, that jurisdiction is asserted by means of the on-going state-wide water adjudication commenced in 1973, and implemented by an Act of the Montana Legislature, effective May 11, 1979, commonly known as SB76. That Act is codified at Chapter 2 of Title 85, Montana Codes Annotated, and, in part in Part 7, Chapter 3 of the Montana Codes Annotated (1979).

The Montana Water Use Act provides that the United States be named as a party defendant in the adjudication since it was the legislature's intent to adjudicate the federal reserved water rights, reserved both by the United States in its own behalf and on behalf of Indian tribes. MCA Section 85-2-213(5). Defendants contend that by virtue of the McCarren Amendment, Act of July 10, 1952, c.651, Title II, Section 208 (a)-(c), 66 Stat. 560, codified at 43 U.S.C. §666, the United States may be joined as a defendant in any suit for adjudication of water rights within any river system.

It is clear that 43 U.S.C. §666 reaches all water rights held by the United States, including reserved rights owned by the United States for the use of Indian tribes. Colorado River Water Conservation District, et al. v. United States, 424 U.S. 800, 812 (1976), (hereinafter called "Colorado River"). That case followed United States District Court for Eagle County, 401 U.S. 520 (1971) and United States v. District Court for Water Division No. 5, 401 U.S. 527 (1971), in which the United States unsuccessfully tried to limit the McCarren Amendment's

waiver of sovereign immunity.

In Colorado River, the United States argued that the application of the Amendment did not include federal reserved rights held on behalf of Indians. The Supreme Court responded:

> We conclude that the state court had jurisdiction over Indian water rights under the Amendment. * * * Though Eagle County and Water Div. 5 did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. * * *
> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. * * * [I]t is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective. 17
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> Finally, legislative history demonstrates that the McCarren Amendment is to be constructed as reaching federal water rights reserved on behalf of Indians. . . .
> [T]he Senate report on the Amendment took note of a recommendation in a Department of the Interior report that no consent to suit be given as to Indian rights and rejected the recommendation.
>
> Colorado River, supra, 424 U.S. at 809-812 (1976).[1]

Pursuant to the requirements of the Montana Water Use Act, M.C.A. §85-2-212, on June 8, 1979 the Montana Supreme Court entered an order commencing the procedures for adjudication under SB76. A copy of the order is attached to plaintiffs' complaint. The United States attorney for the District of Montana and the Attorney General for the United States were served with a copy of the order. The United States was thus

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1/ Footnote 17, included in the quotation from the Colorado River opinion, reads as follows: "Indeed, if exclusion of Indian rights were the conclusion, conflicts between Indian and non-Indian rights, as well as practical matters of adjudication, might have the effect of requiring district court adjudication of non-Indian along with Indian rights, thereby effectively vitiating our construction of the Amendment in Eagle Country and Water Div. 5."

named a defendant in the on-going state-wide adjudication. The United States has never petitioned to remove this matter from the state water courts to the federal court. Presumably, the United States will comply with the requirements of SB76 in protecting the United States' right to its reserved waters.

The Montana Water Use Act requires that any person claiming a right to use water, which right would have been protected under the laws of the State of Montana as it existed on July 1, 1973, must file a claim to the right by the deadline set by the Supreme Court of the State of Montana, or that right will be presumed to have been abandoned. The Montana Water Use Act defines "existing rights" as rights "to the use of water which would be protected under the law as it existed prior to July 1, 1973." Thus existing rights under the Act by definition include reserved water rights, which were protected by the law at least since Winters v. United States, 207 U.S. 564 (1908).

The current deadline for the filing of those claims to existing rights is January 1, 1982. The Attorney General for the State of Montana has recently filed a petition for extension of that deadline for a period to be set by the Court, to end no later than June 30,1983. The Supreme Court of the State of Montana has issued an order soliciting comments of all interested parties to be filed by November 30, 1981, with oral comments to be heard on December 7, 1981. The Montana Supreme Court, presumably, will enter an order either denying any extension of the filing deadline or granting an extension for a period of time ending not later than June 30, 1983.

All prudent Montana water users, who claim water rights, either appropriative or reserved, are striving to meet the deadline set by the Supreme Court of the State of Montana.

Now, only two months from the long-set deadline, the plaintiffs seek to disrupt the status quo by asking for injunctive relief against the defendants. For reasons discussed below, the defendants submit that the harm to the State of Montana and its citizens which would be caused by the granting of any preliminary injunctive relief to the plaintiffs would far outweigh any conceivable benefit to the Tribes.

THE REQUISITE LEGAL STANDARDS FOR A PRELIMINARY INJUNCTION DO NOT EXIST

Plaintiffs argue that defendants lack jurisdiction to regulate or adjudicate both reserved and surplus water rights, with respect to plaintiffs or the Flathead Indian Reservation. Plaintiffs, contrary to the holding in Colorado River, supra, argue that the McCarren Amendment does not allow defendants to include the reserved waters owned by the United States on behalf of the Tribes in Montana's water adjudication or regulation scheme, regardless of whether the Act constitutes a "general stream adjudication" as required for McCarren Amendment jurisdiction over the United States. Likewise, plaintiffs insist that under the holding Colville Confederated Tribes v. Walton, 647 F. 2d 42 (9th Cir. 1981), petition for certiorari filed, docket No. 81-32 (1981), the State of Montana lacks jurisdiction over any of the non-reserved water rights in question. Plaintiffs also allege that the required $40.00 fee for filing a water claim is overly burdensome, and amounts to a tax against plaintiffs of the type that has been held impermissible in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) and in Dillon v. Montana, 451 F. Supp. 163 (D. Mont. 1978), rev'd, 634 F.2d 463 (9th Cir. 1980).

Plaintiffs' claim that a preliminary injunction is

necessary in order to preserve the status quo, as perceived by the plaintiffs, the disturbance of which would allegedly cause plaintiffs immediate irreparable harm. The first alleged harm is that illiteracy and poverty of an unidentified number of members of the Tribes make the documentation and fee requirements of the Act excessively burdensome. Second, plaintiffs argue they face irreparable harm from a future loss of water that is absolutely essential to plaintiffs. That harm seems not to be an "immediate" one. Plaintiffs conclude that these alleged harms tip the balance of hardships toward the plaintiffs so that equity demands the requested relief. Finally, plaintiffs argue that their compliance with the Act would so obviously contravene federal laws and treaties, that there is no need for the Court to apply the standards usually required before issuing a preliminary injunction.[2]

The Ninth Circuit Court of Appeals has often recited the standards which must be met in order for a preliminary injunction to issue. The moving party must either show a probable likelihood of success on the merits of the case combined with the possibility of irreparable injury; or, serious questions must be raised and the balance of hardships must tip sharply in the movant's favor.[3] In different cases, different emphasis has

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2/ Plaintiffs rely on United States v. San Francisco, 310 U.S. 16 (1940), reh. denied, __U.S.__(194_)and Libby Rod and Gun Club v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978), rev'd. in part and aff'd. in part, 594 F. 2d 742 (9th Cir. 1979). In both cases, there existed specific and clear congressional directives that were violated by the enjoined parties.

3/ See, e.g., Miss Universe, Inc. v. Flesher, 605 F. 2d 1130 (9th Cir. 1979); Benda v. Grand Lodge of the International Ass'n. of Machinists and Aerospace Workers, 584 F. 2d 308 (9th Cir. 1978); Motor Vessels Theresa Ann v. Kreps, 548 F. 2d 1382 (9th Cir. 1977); Richter v. Dept. of Alcoholic Beverage Control, 599 F. 2d 1168 (9th Cir. 1977 ); Jones v. Pacific Intermountain Express, 536 F. 2d 817 (9th Cir. 1976); and William Inglis and Sons Baking Co. v. ITT Continental Baking Co., 526 F. 2d 86 (9th Cir. 1975).

been given to different parts of these standards. Other considerations are sometimes added to these established standards, as appropriate. See, e.g., Kelly v. Gilbert, 437 F. Supp. 201, 204 (D. Mont. 1977).

The Ninth Circuit Court of Appeals is consistent, however, in viewing these basic alternative standards for a preliminary injunction as "extremes of the same continuity." The critical element is that the movant presents a question so serious that it requires litigation and that the movant will sustain greater injury in the absence of injunctive relief than the opposing party will sustain if injunctive relief is granted. Benda, supra, 544 F. 2d at 315. If the necessary legal standards are met, then a preliminary injunction may be granted to preserve the status quo pending trial on the merits. Burton v. Matanuska Valley Lines, 244 F. 2d 647, 650 (9th Cir. 1957); Miss Universe, Inc., supra, 605 F. 2d at 1133. In extraordinary cases, where it is found that a federal statute has been violated by the party sought to be enjoined, then courts, including the Ninth Circuit will not inquire further into the requirements for equitable relief.[4]

In the instant case, none of the standards necessary for the granting of a preliminary injunction exists. There is not a serious question or a likelihood of success on the merits sufficient to require litigation in this Court, and the balance of injury and hardships tips in defendants' favor, not in favor of the plaintiffs. Defendants have not violated any federal statute so as to trigger an exception to the normal standards for injunctive relief. This Court should refuse to grant the request for a preliminary injunction.

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4/ See, e.g., T.V.A. v. Hill, 437 U.S. 153, 195 (1978); United States v. San Francisco, supra, 310 U.S. at 30; Libby Rod and Gun Club v. Poteat, supra, 457 F. Supp. at 1185.

A. Injunctive relief should not be granted in the absence of indispensible parties.

The defendants submit that there are indispensible parties to this action, in whose absence the injunctive relief should not be considered by this Court.

Plaintiffs acknowledge that the United States holds the title to the Tribal and trust lands, as well as the reserved water rights for those lands. The United States is not a party to this action. Defendants contend that the United States is a party needed for just adjudication which should be joined pursuant to Fed. R.Civ. P. 19. As owner of the Tribal reserved water rights, the United States has the power and the responsibility to make claims on behalf of the Tribes pursuant to the Montana Water Use Act, and without an injunction against the United States prohibiting the United States from making such claims, it is entirely likely that the United States will in fact file the claims as required by the Act and will thus take action which will forever bind the plaintiff Tribes.

It must be noted that the plaintiffs do not make any allegations in their complaint about whether or not the United States will in fact file the requisite claims.

In addition, the plaintiffs seek specific injunctive relief against the thousands of individuals and other entities who claim the right to use waters which flow through or touch upon the Flathead Indian Reservation. As is apparent from the prayer in the complaint, paragraph 4, page 31, plaintiffs seek declaration

> that any and all water use permits previously issued by the defendant State of Montana or any of the individual defendants herein, or any of their employees, subordinates, attorneys or agents with respect to the waters arising upon, flowing through or under, bordering or otherwise occurring on the Flathead Indian Reservation are null and void, and enjoining the exercise by any permittees of any rights porportedly conferred by those unlawful permits.

All individuals who either claim rights existing as of July 1, 1973, pursuant to the Montana Water Use Act, or claim water rights through permits granted by the Montana Department of Natural Resources and Conservation as provided by Montana law have valuable property rights. None of the named defendants can adequately protect those rights, which will inevitably be affected by the outcome of this litigation. Moreover, the issuance of an injunction against the named defendants will adversely affect those property rights, in the absence of those to whom they are most valuable. Thus, it would be ill-advised for this Court to grant a preliminary injunction which would in essence declare the Montana Water Use Act invalid, and which would thereby destroy the property rights of permittees and other water users without their presence in this litigation.

B. The complaint does not raise questions of the type to require injunctive relief.

In order for plaintiffs to be entitled to the preliminary injunction which they seek they must

> raise questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair basis for litigation . . . (and) must make a clear showing of sufficiently serious questions going to the merits to make them a fair ground for litigation . . . Kelly v. Gilbert, supra, 437 F. Supp. at 204. Accord, Alameda v. Weinberger, 520 F. 2d 344, 349. (9th Cir. 1975).

Here, there are no such questions. First the defendants do not question that plaintiffs are entitled to reserved water rights pursuant to Winters v. United States, 207 U.S. 564 (1908). The only type of jurisdiction asserted with regard to reserved water rights by defendants is of the very type contemplated by the McCarren Amendment. Colorado River, supra.

Most, if not all, of the questions raised by the Tribes'

complaint are the subject of pending litigation, whose outcome should be awaited by this Court rather than litigated here. In the meantime, this Court should do nothing to change the status quo, but should instead either dismiss this case or stay further proceedings in this case.

1. The federal water suits

There are now pending in the Ninth Circuit Court of Appeals seven cases in which the United States and several Tribes seek to have federal reserved rights, including those reserved for Tribes, adjudicated in federal court. The Northern Cheyenne Indian Tribe filed the first case on January 30, 1975, seeking to have the United States District Court adjudicate the water rights in the vicinity of the Norther Cheyenne Indian Reservation. Northern Cheyenne Indian Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Association, et al., No. CV-75-6-BLG, CA-79-4887. A similar complaint was filed by the United States on its own behalf and as trustee for the Northern Cheyenne Indian Tribe, on March 7, 1975. United States v. Tongue River Waters Users Association, et al., No. CV-75-20-BLG, CA-80-3040, 80-3041, 80-3042. On April 17, 1975, the United States filed a third suit, United States v. Big Horn Low Line Canal, et al., No CV-75-34-B.G, CA-80-3062, 80-3063, on its own behalf and as trustee for the Crow Tribe of Indians. Amended Complaints were filed by the United States in the two cases it brought on August 1, 1975, and August 29, 1975, respectively. The Northern Cheyenne Tribe moved to consolidate its case, No. CV-75-6-BLG, with the United States' case, No. CV-75-20-BLG. An Order consolidating the actions was issued on September 4, 1975. The Northern Cheyenne Tribe filed its Amended Complaint on September 4, 1975.

The district court stayed the proceedings, pursuant to stipulation of the parties, pending the United States Supreme Court decision in Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976).

During the time when the Montana Legislature was passing SB76, the United States filed four additional suits in federal court on April 5, 1979: United States v. Aasheim, et al., No. CV-79-40-BLG, CA-80-3028, 80-3061; United States v. Aageson, et al., No. CV-79-21-GF, CA-80-3032, 80-3044; United States v. AMS Ranch, Inc., et al., No. CV-79-22-GF, CA-80-3045; and, United States v. Abell, et al., No. CV-79-33-M, CA-80-3038. The Abell case involved the Flathead Indian Reservation. A copy of the Complaint is attached to this memorandum.

On November 26, 1979, District Judges Battin and Hatfield issued a joint Memorandum and Order dismissing all seven suits on the basis of "wise judicial administration." A copy of that Order is attached hereto. The United States and some Indian tribes appealed the Order to the Ninth Circuit Court of Appeals, which consolidated the appeals for review.

On May 23, 1980, the Plaintiff Tribes moved to intervene in the appeal of Abell, approximately four months after the date for filing a notice of appeal. All of the federal cases were argued before the Court of Appeals on July 15, 1981. The Court has not ruled on the appeals.

In order to demonstrate that these federal suits involve most of the same issues (and parties) as the Tribes' Complaint, defendants submit to this Court copies of the following documents which have been filed in the Ninth Circuit Court of Appeals:

Brief of the Appellants, the Crow Tribe of the Crow Reservation, Montana, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (served June 24, 1980)

Reply Brief of Appellants: The Crow Tribe of the Crow Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, The Northern Cheyenne Tribe of the Northern Cheyenne Reservation (served September 2, 1980)

Brief for Appellants United States (June 1980)

Brief of Appellees the State of Montana (dated July 24, 1980)

Because the Tribes, represented by the same counsel as in this case, wrote or were served with copies of all of these documents, defendants have not provided them with additional copies of the briefs.

A review of these briefs makes clear that the following issues raised by plaintiffs are being actively litigated in the Ninth Circuit Court of Appeals by the Plaintiff Tribes:

1. The question of whether the State of Montana may name the United States as a defendant in the on-going state water adjudication pursuant to the McCarren Amendment, and thereby subject the United States as trustee for the tribal reserved water rights to the provisions of the Montana Water Use Act.

2. The question of whether application or enforcement of the Montana Water Use Act with respect to the tribal reserved water right through the United States as trustee would violate the State of Montana's Enabling Act and Constitution.

3. The question of whether the Montana Water Use Act is void on its face insofar as it applies to reserved Indian water rights.

4. The question of whether the on-going state-wide adjudication is a general stream adjudication which meets the requirements of the McCarren Amendment. See United States v. District Court for Water Division No. 5, 401 U. S. 527, 529 (1971).

Plaintiffs, in effect, seek a stay of all State Court water adjudication proceedings. When considering the relevant factors

for and against dismissing the federal suits, Judges Battin and Hatfield specifically considered the question of whether they should stay the state adjudication in order to avoid the possibility of piecemeal and conflicting adjudications if both federal and state adjudications continued. They stated:

> The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication . . .
> Memorandum & Order, page 7.

The defendants submit that the core issues of this case are identical to those in the cases being litigated in the Ninth Circuit Court of Appeals. Under even the most liberal construction of the Ninth Circuit cases on injunctive relief discussed above, it is clear that Plaintiffs do not raise a sufficiently "serious question" or have sufficient "probability of success" to entitle Plaintiffs to a preliminary injunction.

2. Colville Confederated Tribes v. Walton

While the questions discussed above relate to reserved water rights of the Tribes, Plaintiffs suggest that a sufficiently serious question also is raised as to their rights with regard to surplus water and that they are likely to succeed on the merits of that issue. Plaintiffs base these assumptions on their reading of Colville Confederated Tribes v. Walton, supra. In relying on that case, Plaintiffs disregard two facts. The first is that the Walton holding that Washington State's water regulatory system was preempted by tribal and federal law was an extremely narrow one. The holding was based on the very unusual fact that the water in issue in Walton, No Name Creek, arises and terminates entirely within the Colville Reservation. It is a completely closed watershed with no hydrologic impact outside of the Reservation boundaries. The tribal interest in regulating the use of No Name Creek was totally unrelated to off-reservation use.

To Defendants' knowledge, there are no such closed watersheds within the boundaries of the Flathead Indian Reservation. Plaintiffs' reliance on this narrow holding is misplaced.

The second significant fact in Walton is that a Petition for certiorari was filed by the State of Washington. (Docket No. 81-321). The issues of that case are pending before the U. S. Supreme Court. Therefore, this Court should not rely upon Walton in determining whether to grant injunctive relief to Plaintiffs.

C. A preliminary injunction should not be granted because Plaintiffs do not face irreparable harm and the balance of hardship tips toward the state if an injunction is granted.

1. Plaintiffs are not being denied use of water

There are no allegations in the Complaint that the streams running through the Flathead Indian Reservation are in danger of running dry, or that the State of Montana or individuals who are not members of the Tribes are embarked upon a series of actions which will irreparably harm the Tribes by actually depriving them of water. The Plaintiffs are not facing the irreparable harm which would warrant a preliminary injunction. See Winters v. United States, supra, for the type of immediate irreparable harm warranting injunctive relief. Plaintiffs merely allege that if they fail to file the claims to existing water rights, they will irretrievably submit to state jurisdiction and they will in the future lose the right to their reserved waters. Not only is that harm not immediate, but it is within Plaintiffs' power to prevent any perceived harm by simply seeing to it that the proper claims are filed by the United States. Plaintiffs may file protective claims under SB76.

If the Tribes are correct in their argument that by filing any forms under SB76 the Tribes and their property are subjected

to jurisdiction of the State of Montana which would not otherwise exist, then defendants submit that United States may be about to compromise the Tribes' rights to correctly filing forms under SB76 on the Tribes' behalf.

The position of the U. S. Dept. of Interior indicates how illusory is the Plaintiffs' claim that they will sustain irreparable harm if a preliminary injunction is not granted. As is shown by the opinion of the Field Solicitor of the Department of Interior issued to the Bureau of Indian Affairs, a copy of which is attached hereto, the official position of the United States Department of Interior is that Indian tribes should be filing protective claims if they see fit to do so. These plaintiff Tribes could easily file protective claims in the format suggested by the Field Solicitor and avoid the threat of having their water rights deemed to be abandoned. In the event that the Ninth Circuit Court of Appeals overrules Colorado River and holds that the McCarren Amendment does not allow states to sue the United States and to obtain jurisdiction over the United States as an owner of the tribal reserved water rights, then the plaintiff Tribes would have lost nothing. However, in the event that the Ninth Circuit Court of Appeals does not rule in the Tribes' favor and the Tribes' water rights, as owned by the United States, are subject to adjudication in state court, then the Tribes would have met all requirements of the Montana Water Use Act.

In the alternative, the Tribes could enter into negotiations with the State of Montana to enter into a compact regarding the Tribes' reserved water rights. M.C.A. § 85-2-702. The Tribes did negotiate for a period of time, but then summarily terminated the negotiations sometime in 1981. By resuming negotiations, even in a superficial fashion, the Tribes would by virtue of M.C.A.

§ 85-2-217, be granted until July 1, 1985, within which to file their claims to existing water rights pursuant to the Montana Water Use Act.

2. The filing fee is not burdensome.[5]

Plaintiffs have made a mountain out of a molehill in their characterization of the amounts of money which must be paid by the Tribes and their members in order to file claims to existing water rights pursuant to the Montana Water Use Act. As is apparent from the affidavit of The Honorable W. W. Lessley, Chief Water Judge, to be filed in this case in support of defendants' opposition to the application for preliminary injunction, the Montana statutes require that the owner of the water right file a claim, and pay the $40 filing fee for each claim in a certain basin, up to a maximum of $480 for any single owner. Because the United States is clearly the owner of the reserved water rights held in trust for the Tribes or for their members, it is the United States which should not only file the forms claiming those rights, but should also pay the fee. The Department of Natural Resources and Conservation would require the payment of a maximum of $480 by the agency filing those claims on behalf of the Tribes and their members.

If the Tribes choose to file claims to their reserved Indian water rights, (instead of or in addition to the claims which should be filed by the United States), it is true that the Tribes would have to pay a $40 filing fee for each claim, not to exceed a total of $480. Surely that sum is within their means.

The Tribes argue that each tribal member with a reserved water right must file claims on their own behalf. This ignores

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5/ See Paragraph D for a discussion of whether or not the fee is a tax and, if so, the limits on this Court's jurisdiction for enjoining such a tax.

the fact that the owner of the right should be filing the claim to the reserved Indian water right. Clearly, if the owner of the right has the responsibility to do the filing, any action on the part of the individual tribal members is voluntary and avoidable. Thus those individual members of the Tribe are not in danger of being irreparably harmed.

The argument at page 44, subparagraph (3) of the Tribes' brief in support of their application for preliminary injunction that claims must be filed for the 767 tribal homesites which utilize reservation waters reserved for the Tribes is also specious. If, in fact, those homesites rely upon tribal reserved waters for their water rights, then the filing by the United States, or the Tribe, will adequately protect those claims to reserved water rights. Obviously, those claims will be included in the maximum $480 total fee.

3. The illiteracy of tribal members does not justify a preliminary injunction.

The Tribes contend that at least some of their members are illiterate or incapable of comprehending the Montana Water Use Act and completing the required documentation. The Tribes, however, ignore the publications of the State of Montana attached as Appendix B in which assistance is offered to anyone who has any problem or question about the filing procedure. Furthermore, the Tribes ignore the fact that the United States, the owner of the reserved water right has the responsibility of filing any forms required by SB76. Thus, there is no immediate irreparable harm to the Plaintiffs or to illiterate members of the Tribes.

4. A preliminary injunction will destroy the status quo and irreparably harm the State of Montana and its citizens.

The purpose of a preliminary injunction is to preserve the status quo when the requisite standards previously discussed exist,

pending litigation on the merits of the case. Miss Universe, Inc. supra, 605 F. 2d at 1133; Burton v. Matanuska Valley Lines, 244 F. 2d at 650. Plaintiffs suggest that their failure and refusal to file water rights forms under the Montana Water Use Act constitutes the status quo which must be preserved. In fact, the status quo includes the existence of an elaborate and well-orchestrated legislative scheme both to adjudicate pre-1973 water rights and to facilitate and regulate the use of Montana's waters after 1973. Since 1973 water users have been complying with the Act and since 1979 water users have been complying with the Act as amended by SB76. Maintenance of the status quo requires that the Montana Water Use Act and the state-wide adjudication with its initial filing requirements continue to proceed in an orderly, timely fashion. As discussed earlier, there is no immediate danger of Plaintiffs' water use being curtailed. Speculating at distant and indirect possible hardships, and seeking to disrupt the on-going state-wide adjudication in a fashion already rejected by Judges Battin and Hatfield is in violation of the normal requirement that the status quo be maintained by a preliminary injunction.

It should be noted that the Tribes have waited until virtually the last moment within which to file their complaint and seek injunctive relief. The packet of documents submitted by the Tribes in support of their petition for injunctive relief shows that the Tribes' counsel have spent a great deal of time working on their complaint and the supporting documents, but have waited until approximately sixty days before the January 1, 1982 deadline within which to file that complaint and seek extraordinary relief against the State of Montana. The Tribes have done everything within their power to disrupt Montana's water rights adjudication. They should not be permitted to succeed in this fashion at this late date.

The State of Montana and other defendants contend that to grant the Tribes' preliminary injunction will irreparably harm the State and its citizens. The Montana Water Use Act provides the backbone and skeleton to the water users of Montana - a means by which water rights may be made more certain, and, if necessary, enforced, one against another. The injunctive relief sought by Plaintiffs would remove entirely that old skeleton, and would not replace it with anything. This litigation and other related cases may go on for years, and, until resolved the preliminary injunction would remain in force. This would leave Montana and its citizens completely bereft of a statutory scheme to control the creation and existence of water rights or to give any guidance to water users.

Montana's surplus (non-reserved) waters cannot be protected or regulated by the Tribes. The issuance of a preliminary injunction prohibiting the use of these waters by anyone but the Tribes (and their members) would leave these waters vulnerable to appropriation by downstream users pending the outcome of this litigation.

Finally, as discussed above, the issuance of the preliminary injunction sought by the Tribes would deprive those who claim the right to use water under Montana law of valuable property rights. Although the Tribes would be incapable of actually using or consuming these surplus waters, non-members would be required to allow their crops to wither and their livestock to die, merely because a federal Court accepted as true the Tribes' baseless allegations.

D. Even if the filing fee is a tax to Plaintiffs, its imposition does not justify the granting of a preliminary injunction.

Plaintiffs submit in their Brief, p. 34, that the $40 filing fee is, in fact, a tax imposed illegally by the State upon the

the water rights of the Plaintiffs. As Plaintiffs allege, the filing fees are not refundable once paid. Instead, those fees are placed in the water right adjudication account as set forth in M.C.A. § 85-2-241. All fees collected under this section shall be deposited to pay the expenses incurred by the State for administering the Montana Water Use Act and the on-going state-wide water adjudication. For that reason, the filing fees are commensurate to the services granted by the State. In fact, the evidence will show that the fees collected defray only a part of the total expenses incurred by the State of Montana in the water rights adjudication. The filing fees can, therefore, hardly be characterized as a tax, and the fees are clearly valid. The fees are similar to the license plates fees which were upheld in Moe v. Confederated Salish and Kootenai Tribes, 425 U. S. 463 (1975).

In the event this Court determines that these fees are a tax, then this Court is clearly barred by 28 U. S. C. § 1341[6] from exercising jurisdiction over all but the Tribes' claim for injunctive relief. The jurisdictional prohibition of Section 1341 has consistently been recognized as a strong public policy of federal non-interference with State taxation schemes, Mandel v. Hutchinson, 336 F. Supp. 772 (1971), aff'd, 494 F. 2d 364, 366 (9th Cir. 1974), and has always been applied to requests for injunctive relief. See, e.g., Rosewell v. LaSalle National Bank, ___U.S.___, 67 L. Ed. 2d 464 (1981); Housing Authority of the City of Seattle v. Washington, 629 F. 2d 1307 (9th Cir. 1980); Dillon v. Montana, 634 F. 2d 463, 466 (9th Cir. 1980). The claims of the individual

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6/ 28 U.S.C. § 1341 provides: "The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the Court of such State."

Plaintiffs run directly into the jurisdictional prohibitions of Section 1341 if the filing fee is deemed a tax. Consequently, this Court could not consider the individual Plaintiffs' claims and must dismiss them for lack of jurisdiction if the fee is held to be a tax.

There exists a single exception to the otherwise absolute bar to federal jurisdiction over state tax cases. This exception is for Indian Tribe or band Plaintiffs only, and is expressed in 28 U.S.C. § 1362.[7] Section 1362 would allow Plaintiff Tribes to seek in this Court to enjoin the filing fee if it were held to be a tax. It would not, however, allow any of the other Plaintiffs to seek an injunction. Quinault Tribe of Indians v. Gallagher, 368 F. 2d 648 (9th Cir. 1966); Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F. 2d 1228, 1233-34 (9th Cir. 1979); Dillon v. Montana, supra.

Assuming, arguendo, that the filing fee is a tax, and acknowledging that this Court would have jurisdiction over the Tribes' request to enjoin payment of the money, there still cannot be said to be anything amounting to irreparable harm to the Tribes from the collection of this money. As previously discussed, the total filing fee the Tribes may be subject to for their reserved water rights is $480.

The Tribes' argument that by paying that fee they will be irreparably harmed is proposterous in light of the expenses which the Tribes have clearly incurred in having four attorneys and a Washington, D.C. law firm represent them in filing the volumous complaint and supporting documents. Air fare alone

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7/ 28 U.S.C. § 1362 states: "The District Court shall have original jurisdiction of all civil actions, brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter is controversy arises under the Constitution, laws, or treaties of the United States."

for the attorneys to attend the requested hearing on the preliminary injunction far exceeds the $480 filing fee. There is no harm to the Tribes by requiring this fee, and no justification can be imagined for granting a preliminary injunction as to this fee.

E. Defendants have not clearly violated a federal statute thereby triggering an exception to the normal requirements for injunctive relief.

As a general principle, courts do not inquire into or insist upon the usual requirements for equitable relief in those few cases where the party sought to be enjoined is in clear violation of a specific Federal Statute. Thus, in T.V.A. v. Hill, supra, 437 U.S. at 195, the U. S. Supreme Court upheld the validity of curtailing the normally required judicial analysis of the standards necessary for granting a preliminary injunction, when there was found to be a clear violation by T.V.A. of the Endangered Species Act. Likewise, an injunction was granted against the U. S. Army Corps of Engineers in Libby Rod and Gun Club v. Poteat, supra, without Court inquiry into the standards usually necessary for granting a preliminary injunction. There, the main Federal Statute found to be violated by the Corps was 33 U.S.C. § 401 which stated clearly that it was not lawful to construct any dam over a navigable river until Congress authorized such construction.

In the above cases, the Courts merely discerned the meaning of the Federal Statute in question and the nature of the violation before enjoining the unauthorized action. Said the Ninth Circuit in Libby Rod and Gun Club, "Because the . . . dam has not been authorized by Congress as required by Section 401, this Court need not look further at the equities employed by the

district Court to support the injunction." 594 F. 2d at 747. In that case, because the Court found a violation of a specific federal statute, the Court limited its inquiry to that violation for granting the injunction rather than requiring the Plaintiff to meet the normal standards for a preliminary injunction. Accord, United States v. San Francisco, supra, where by Congressional Act the United States granted to the City and County of San Francisco the use of power. One of the conditions of this grant was that the power not be transferred to a private utility. Yet, there the City was found to persist "in violating the very conditions upon which those benefits were granted" by selling this power, 310 U.S. at 30, and was therefore enjoined.

The exception to the normal requirements for a preliminary injunction is a very narrow one, and absent this exception, it is a clear abuse of a court's discretion to fail to apply the standards for a preliminary injunction. Benda, supra at 313. Significantly, Libby Rod and Gun Club was reversed in part by the Ninth Circuit, 594 F. 2d 742. The reversal pertained to the injunction against the Corps constructing and installing turbines for the main, and previously authorized Libby Dam. There did not exist the same kind of clear violation of a Federal Statute in the construction of the turbines that existed in construction of the reregulating dams absent congressional authority.

Plaintiffs cannot invoke this narrow exception by a mere allegation of perceived federal rights that are vague, not specific, not generally recognized, and which are being considered by the Ninth Circuit. Here, there is no specific Federal Statute such as existed in the above cases, nor is there the clear violation of the type which can justify a Court's limiting its inquiries to the normal requirements for preliminary

injunctive relief. Thus, Plaintiffs are not excepted from meeting the standard requirements for the granting of a preliminary injunction.

CONCLUSION

Plaintiffs have failed to name parties indispensible to their case and the requested injunctive relief should not be considered by this Court without those parties. Furthermore, even if the Plaintiffs' requests are considered, they should be denied. The Plaintiffs have not satisfied any of the requisites for the granting of a preliminary injunction, and they do not fall into the narrow exception to those requirements. There is no justification for granting Plaintiffs' request for equitable relief.

RESPECTFULLY SUBMITTED this 5th day of November, 1981.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify, that on this 5th day of November, 1981, I mailed, postage prepaid, a true copy of the foregoing Defendants' Brief in Opposition to Application for Preliminary Injunction, to:

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