Maegan Woita, Esq. (*pro hac vice*)
Steven J. Lechner, Esq. (*pro hac vice*)
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Fax: (303) 292-1980
mwoita@mountainstateslegal.com
lechner@mountainstateslegal.com

Duncan Scott
Scott & Kienzle, P.C.
1001 South Main Street
Kalispell, MT 59901
(406) 752-1250; Fax: (406) 752-6001
Duncan@Dscottlaw.com

Attorneys for Defendants,
Judy and Robert Harms, &
Betty and Wayne Stickel

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

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR SECRETARY SARAH "SALLY" JEWELL, *et al.*, Defendants.	Case No. CV 14-44-M-DLC **DEFENDANTS HARMS AND STICKELS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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INTRODUCTION

Defendants Judy Harms, Robert Harms, Betty Stickel, and Wayne Stickel (collectively, "Landowners") are owners of water rights claims filed with Montana's Department of Natural Resources and Conservation ("DNRC") pursuant to the Montana Water Use Act ("MWUA") for the general stream adjudication of Basin 76L in Montana Water Court. Landowners irrigate their lands located within the boundaries of the Flathead Reservation ("Reservation") with water distributed by the Flathead Irrigation Project ("Project").[1]

Plaintiffs seek a declaration of ownership of all water within the Reservation, including all water distributed by the Project, and seek to enjoin various ongoing proceedings in Montana state courts. First Am. Compl., Doc. 27 ("Compl."). Plaintiffs also assert claims that, if successful, would cloud Landowners' title granted by way of federal land patents under the general public land laws. Compl. ¶ 56, Count One ¶ 8, Prayer for Relief ¶ 3.

Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b). Specifically, this suit should be dismissed due to the comprehensive

[1] The Project was created under federal law to provide an irrigation system for all of "the irrigable lands within the limits" of the Reservation. 35 Stat. 444, 450 (May 29, 1908); Plaintiffs allege the Project "diverts, stores and delivers irrigation water to approximately127,000 acres of land[,]" including Landowners' lands. Compl. ¶ 61.

general stream adjudication of Basin 76L currently ongoing in Montana Water Court. *Id*. ¶¶ 111–19. Abstention in this case is appropriate under either *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976) or *Younger v. Harris*, 401 U.S. 37 (1971). Additionally, *res judicata* bars Plaintiffs from seeking declaratory relief challenging the disposal of surplus lands within the Reservation to settlers under the general public land laws. Alternatively, Plaintiffs' allegations, taken as true, do not support their claim of title to Landowners' lands. For the reasons set forth herein, Landowners' Motion to Dismiss should be granted.

STANDARD OF REVIEW

Under Rule 12(b)(1), a party may move to dismiss an action based on lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).[2] The party invoking the court's jurisdiction has the burden to prove subject matter jurisdiction exists. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) (internal citation omitted). For purposes of this Motion, Plaintiffs' well-pled factual allegations must be accepted as true. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

A motion to dismiss under Rule 12(b)(6) avers that the plaintiff's complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

[2] The Ninth Circuit has "not squarely held whether abstention is properly raised under Rule 12(b)(6), Rule 12(b)(1), both, or neither," but has emphasized that abstention is properly raised in a motion to dismiss. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.2 (9th Cir. 2014).

"A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984) (internal citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). However, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Res judicata is normally an affirmative defense, but may be raised in a Rule 12(b)(6) motion if the defense is apparent from the face of the complaint. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). The party asserting the defense bears the burden of proof. *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980).

ARGUMENT

I. THIS COURT SHOULD ABSTAIN BASED ON THE *COLORADO RIVER* DOCTRINE.

Plaintiffs seek declaratory relief that they own implied reserved water rights under the Hellgate Treaty, 12 Stat. 975 (1855) and *Winters v. United States*, 207 U.S. 564 (1908). Compl. Prayer for Relief ¶¶ 1–2, 4–10. Plaintiffs also seek declaratory relief that such implied reserved water rights encompass "*all* waters on,

under and flowing through the Reservation." *Id*. ¶ 2 (emphasis added). Put simply, Plaintiffs ask this Court for a declaration of ownership and a quantification of all waters within the Reservation, including all waters distributed by the Project. Such a request for relief is inappropriate in light of the comprehensive general stream adjudication currently underway in Montana Water Court, and this Court should dismiss Plaintiffs' Complaint pursuant to *Colorado River*.

In *Colorado River*, the Supreme Court examined the McCarran Amendment, 43 U.S.C. § 666, which provides concurrent jurisdiction to state courts to undertake comprehensive stream adjudications by waiving federal sovereign immunity, including immunity regarding tribal water rights. *Colorado River*, 424 U.S. at 809–13; *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569–70 (1983). In the interest of judicial efficiency, and to avoid any duplication or potential for inconsistent judgments, *Colorado River* set forth a list of factors for federal courts to consider in deciding whether to abstain from adjudicating federal or tribal water rights. 424 U.S. at 818–19. The Supreme Court added two more factors in *Moses H. Cone Memorial Hosp. v. Mercury Const. Group*, 460 U.S. 1, 23–27 (1983) . In the Ninth Circuit, there are now eight factors "for assessing the appropriateness of a *Colorado River* stay or dismissal:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained

> jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co. Inc. v. Transp. Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011) (citing *Holder v. Holder*, 305 F.3d 854, 870 (9th Cir. 2002)). Each of the factors applicable here counsels in favor of dismissal.[3]

A. Montana Water Court Assumed Jurisdiction Over The Water In Basin 76L Before Plaintiffs Filed This Case.

The first *Colorado River* factor is which court first assumed jurisdiction over any property at stake. *Colorado River*, 424 U.S. at 818. Actions seeking the allocation of water "essentially involve the disposition of property and are best conducted in unified proceedings." *Id*. at 819. Where a state court has "established a single continuous proceeding for water rights adjudication" that antedates the suit in federal court, the first *Colorado River* factor counsels against concurrent federal proceedings. *Id.* at 819–20.

[3] Although either a stay or dismissal is permissible under *Colorado River*, a dismissal is preferable where, as here, the general stream adjudication involves thousands of claims, and "will take years to complete." *United States v. Bluewater-Tolec Irr. Dist.*, 580 F. Supp. 1434, 1447 (D.N.M. 1984), *aff'd sub nom.*, *United States ex rel. Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irrigation Dist.*, 806 F.2d 986 (10th Cir. 1986); *see* DNRC Water Resources Division, Water Adjudication Bureau: Montana General Adjudication Basin Status (hereinafter "DNRC Status Report"), *available at* http://www.dnrc.mt.gov/wrd/water_rts/adjudication/adjstatus_report.pdf.

Here, Montana Water Court (with the assistance of the DNRC) has undertaken significant efforts to collect and review water rights claims in Basin 76L, including claims to Reservation waters and the Project, since 1979. Compl. ¶¶ 111–119; Mont. Code Ann. §§ 85-2-212, 214, 221 (2013). As Plaintiffs admit, negotiations regarding a possible compact have significantly slowed down this process by suspending adjudication of tribal water rights. Compl. ¶¶ 118–19; Mont. Code Ann. § 85-2-217. The Montana Legislature's refusal to ratify an unlawful compact allowed the adjudication to proceed, and Plaintiffs now have until June 30, 2015, to file all their asserted water rights claims in Montana Water Court.[4] Compl. ¶ 119; Mont. Code Ann. § 85-2-702(3). In the meantime, Montana Water Court and the DNRC have collected and reviewed 3,068 separate claims, and the DNRC is drafting a Summary Report of all such claims.[5] *See*

[4] Compact negotiations were authorized by the Montana Legislature, which created a water rights compact commission to negotiate water rights with Plaintiffs. Mont. Code Ann. §§ 85-2-701, 702. However, the statute also expressed the legislature's intent "to conduct unified proceedings for the general adjudication of existing water rights under the [MWUA,]" regardless of the success of compact negotiations. *Id.* § 701(1). Plaintiffs' filing of this case directly conflicts with the Montana Legislature's express intent regarding comprehensive stream adjudications. *Id*. §§ 85-2-201 *et seq*.

[5] The substantial work performed by the DNRC, standing alone, qualifies as an ongoing stream adjudication. *See United States v. Oregon*, 44 F.3d 758, 766–67 (9th Cir. 1994) ("[T]he active participation of administrative agencies is at the core of most of the 'comprehensive state systems for adjudication of water rights' contemplated by the McCarran Amendment . . . whether the case is initiated in court and then referred to an agency for administrative proceedings, or is initiated

DNRC Status Report; DNRC Water Resources Division, Water Adjudication Bureau: Adjudication Status Map (hereinafter "DNRC Status Map"), *available at* http://dnrc.mt.gov/wrd/water_rts/adjudication/images/adjudication_map.pdf.[6] In short, Montana Water Court and the DNRC are complying with the procedures outlined in the MWUA, Mont. Code Ann. §§ 85-2-231, 243.

By undertaking a general stream adjudication of Basin 76L, Montana Water Court "assumed jurisdiction" over the waters administered by the Project and other Basin 76L waters claimed by Plaintiffs in this case. *R.R. St. & Co.*, 656 F.3d at 978. Compared to the extensive review undertaken by Montana Water Court and the DNRC, the "absence of any proceedings" in this case, other than initial pleadings, demonstrates the inappropriateness of this Court conducting concurrent proceedings. *Colorado River*, 424 U.S. at 820. Because Montana Water Court

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through an administrative procedure before being reviewed by a court is not a material difference for purposes of the McCarran Amendment.").

[6] Landowners request this Court take judicial notice of the DNRC Status Report and Map, as well as other publicly available DNRC materials cited in this brief. This Court may take judicial notice of the status of these administrative proceedings because they are part of the general stream adjudication of Basin 76L. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'") (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir.1979)).

assumed jurisdiction over Basin 76L prior to this Court, the first *Colorado River* factor counsels in favor of abstention.

B. The Location Of The Federal Forum Weighs Neither For Nor Against Abstention.

The second *Colorado River* factor considers only the "geological inconvenience of the federal forum," not the respective inconveniences of the federal and state forums. *Id*. at 805; *Health Care and Retirement Corp. of America v. Heartland Home Care, Inc.*, 324 F. Supp. 2d 1202, 1206 n.5 (D. Kan. 2004). Because this Court is located in Missoula, 70 miles from the Reservation, this factor is neutral.

C. Abstention Will Avoid Piecemeal Adjudication Of Water Rights In Basin 76L.

"By far the most important factor" in *Colorado River* is the "'clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system.'" *Moses H. Cone*, 460 U.S. at 16 (quoting *Colorado River*, 424 U.S. at 819). This federal policy is unambiguously set forth in the McCarran Amendment, 43 U.S.C. § 666, which Plaintiffs misinterpret in their Complaint.[7] Compl. ¶¶ 20,

[7] Plaintiffs contend they are "indispensable parties" to any general water rights adjudication pursuant to the McCarran Amendment, and that the parties to those alleged "piecemeal" actions are somehow violating this statute. Compl. ¶¶ 111, 121. But Plaintiffs then admit that the BIA and themselves both filed claims on behalf of tribal members and Plaintiffs in Montana Water Court in 1982, and the deadline to file new claims for Indian water rights has been extended to June 30,

24, 111, 120. The McCarran Amendment "represents Congress's judgment that the field of water rights is one peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting under the state courts." *Moses H. Cone*, 460 U.S. at 16. This is exactly the type of statutory scheme dictated by the MWUA and currently being implemented by Montana Water Court and the DNRC. *See* DNRC Status Report; Mont. Code Ann. §§ 85-2-201 *et seq*.

Interestingly, Plaintiffs assert that two suits filed in state court and one in Montana Water Court will result in "piecemeal adjudication" of water rights to the Project.[8] Compl. ¶¶ 10–12, 121. However, Plaintiffs' filing of this case exacerbates that concern; it does not solve it. In effect, Plaintiffs seek to do in federal court what they allege the state court plaintiffs seek to do in those suits: leap-frog ahead of the ongoing general water adjudication in Montana Water Court by asking this Court to "declare" their rights to "all" Reservation waters, including waters delivered by the Project. Compl. Prayer for Relief ¶¶ 1–2, 5. Plaintiffs' suit

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2015. *Id*. ¶¶ 113–19. Plaintiffs thus fail to explain how the general stream adjudication somehow excludes them in violation of the McCarran Amendment.

[8] Landowners are not parties to these three state court suits. Landowners are not members of the Western Montana Water Users Association, who filed suit against the named defendant irrigation districts and the Flathead Joint Board of Control in Case No. DV-12-327. Compl. ¶ 10. Landowners' irrigable lands fall within the Flathead Irrigation District, but Landowners are not individual parties to Case No. WC-2013-05. *Id*. ¶ 12. Similarly, Landowners are not parties to Case No. DV-13-102. *Id*. ¶ 11.

is inappropriate for the same reasons they allege the state court suits are inappropriate.

Although Plaintiffs claim they are not asking this Court for a quantification of water rights, Plaintiffs seek a declaration that their reserved water rights include "all water on, under and flowing through" the Reservation. *Compare* Compl. ¶ 21 *with* ¶¶ 19, 39. Quantification is exactly the relief sought by Plaintiffs—specifically, quantification of 100% of the water in their favor. Plaintiffs' purported distinction between water ownership and water rights is unavailing.[9] *See Hage v. United States*, 51 Fed. Cl. 570, 577 n.8 (Fed. Cl. 2002) ("[W]ater is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate.") (internal quotations omitted). Quantification of Plaintiffs' water rights in this Court while other water users' claims to the same basin are quantified in Montana Water Court would unquestionably result in piecemeal adjudication. *Colorado River*, 424 U.S. at 819.

Furthermore, the Supreme Court has already rejected an Indian tribe's contention that "because Indian water claims are based on the doctrine of 'reserved rights,' . . . they need not as a practical matter be adjudicated *inter sese* with other water rights . . . ." *San Carlos Apache*, 463 U.S. at 567; *see also United States v.*

[9] Similarly, Plaintiffs' allegations regarding ownership and management of the Project facilities are irrelevant to the adjudication of Plaintiffs' and Landowners' respective water rights. Compl. ¶¶ 78–104.

District Court ex rel. Eagle County, Colo., 401 U.S. 520, 524 (1971) (McCarran Amendment's waiver of sovereign immunity is an "all-inclusive" provision including appropriated rights, riparian rights, and reserved rights.). Thus, the "piecemeal adjudication" factor weighs heavily in favor of abstention.

D. The State Water Court First Assumed Jurisdiction.

The fourth *Colorado River* factor, the order in which the court assumed subject matter jurisdiction, *Colorado River*, 424 U.S. at 818, also weighs in favor of abstention. Pursuant to the MWUA, Montana Water Court assumed jurisdiction when it undertook to collect and review all water rights claims beginning in 1979, when the Montana Supreme Court ordered water users to file claims on all existing water rights. *See* Mont. Code Ann. §§ 85-2-212, 214; DNRC Water Resources Division, Water Adjudication Bureau, *available at* http://dnrc.mt.gov/wrd/water_rts/adjudication/default.asp; *Oregon*, 44 F.3d at 766–67. Plaintiffs filed their original complaint in this case on February 27, 2014. *See* Doc. 1. Thus, this factor weighs heavily in favor of abstention.

E. The State Water Court Is Competent To Adjudicate Issues Of Federal Law, And The MWUA Controls The Water Rights Adjudication Process.

The fifth factor, whether federal law or state law provides the rule of decision on the merits, weighs in favor of abstention. *See Moses H. Cone*, 460 U.S. at 25. While the quantity of water reserved to Plaintiffs may be determined

by federal law under the *Winters* doctrine, *see United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983), the involvement of state water law is a factor that counsels in favor of abstention. *Colorado River*, 424 U.S. at 820. The MWUA prescribes the water rights adjudication process for the State of Montana. Mont. Code Ann. §§ 85-2-201 *et seq*. Indeed, the Montana Supreme Court has already held that the adjudication process outlined in the MWUA "is adequate to adjudicate Indian reserved water rights" with regards to the Reservation. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 766 (Mont. 1985).

Thus, although there are some issues of federal law to be adjudicated, the Montana Water Court is competent to apply federal law within the framework of the MWUA.[10] *Greely*, 712 P.2d at 763; *San Carlos Apache*, 463 U.S. at 564. This factor weighs in favor of abstention.

[10] For this reason, Plaintiffs' request that this Court "frame the federal law" for the benefit of Montana Water Court is inappropriate. Compl. ¶ 24. An advisory opinion is not necessary for Montana Water Court to apply federal law regarding reserved water rights, *San Carlos Apache*, 463 U.S. at 564, nor is issuing an advisory opinion within this Court's powers. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (federal courts "do not render advisory opinions").

F. The State Water Court Proceedings Are Adequate To Protect Plaintiffs' Interests.

The sixth factor is whether the state court proceedings can adequately protect the rights of the federal litigants. *Moses H. Cone*, 460 U.S. at 26–27. Plaintiffs have not alleged any facts indicating that Montana Water Court is unable or unwilling to apply federal law. Indeed, the McCarran Amendment rests on the premise that state courts "have a solemn obligation to follow federal law." *San Carlos Apache*, 463 U.S. at 569, 571 ("The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications."). As the Supreme Court has recognized, "Although adjudication of [Indian water] rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights." *Id.* at 569. Additionally, the Montana Supreme Court has stated that state court adjudications of Indian reserved water rights are subject to "'particularized and exacting scrutiny'" upon appeal. *Greely*, 712 P.2d at 766 (quoting *San Carlos Apache*, 463 U.S. at 571). Thus, this factor weighs in favor of abstention.

G. Plaintiffs' Attempt At Forum Shopping Counsels In Favor Of Abstention.

The seventh factor is "the desire to avoid forum shopping[.]" *R.R. St. & Co.*, 656 F.3d at 979. The Ninth Circuit has explained that "forum shopping weighs in favor of [abstention] when the party opposing the stay seeks to avoid adverse rulings made by the state court[.]" *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1370 (9th Cir. 1990). Here, Plaintiffs seek to avoid any adjudication by the Montana Water Court that would award Plaintiffs less than 100% of the waters on, under, and flowing through the Reservation by asking this Court for "declaratory relief" that Plaintiffs own all such water. Compl. ¶¶ 39, 117. The "vexatious or reactive nature" of Plaintiffs' suit is apparent from Plaintiffs' acknowledgement that the McCarran Amendment requires a "general *inter sese* water rights adjudication," while at the same time claiming that their water rights are somehow exempt from such adjudication. *Id.* ¶¶ 20, 24; *Moses H. Cone*, 460 U.S. at 17 n.20. Again, Plaintiffs' attempt to leap-frog the general stream adjudication by forum-shopping is improper, and this factor weighs in favor of abstention.

H. The State Water Court Proceedings Will Resolve All Issues Before This Court.

The final factor is "whether the state court proceedings will resolve all issues before the federal court." *R.R. St.& Co.*, 656 F.3d at 979. Because quantification is a necessary component of a general stream adjudication, *see* Mont. Code Ann. §

85-2-234(6)(b), the Montana Water Court proceeding will resolve Plaintiffs' requests for declaratory relief. *See* Compl. Prayer for Relief ¶¶ 1–11. Thus, this factor weighs in favor of abstention.

II. ALTERNATIVELY, THIS COURT SHOULD ABSTAIN BASED ON THE *YOUNGER* DOCTRINE.

Even if this Court chooses not to abstain under the *Colorado River* doctrine, this court should abstain pursuant to the "strong federal policy against federal-court interference with pending state judicial proceedings" espoused in *Younger*. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 430 (1982). *Younger* abstention "'is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims.'" *Gilbertson v. Albright*, 381 F.3d 965, 976 n.10 (9th Cir. 2004) (en banc) (quoting *Hirsh v. Justices of the Supreme Court of the State of Cal*., 67 F.3d 708, 712 (9th Cir. 1995)). All three elements are present here.

First, the Montana Water Court proceedings are ongoing. Although Plaintiffs' water rights claims are not due until June 30, 2015, *see* Mont. Code Ann. § 85-2-702(3), the DNRC is in the process of issuing a Summary Report for Montana Water Court to adjudicate all claims. *See* DNRC Status Map. Furthermore, over 3,068 separate water rights claims—including claims by

Plaintiffs—have been filed and reviewed for conflicts. *See* DNRC Status Report. There is simply no doubt that the Basin 76L adjudication is well underway.

Second, Plaintiffs' claims implicate important state interests. Plaintiffs seek to deprive Montana Water Court of its jurisdiction to quantify water rights claims filed pursuant to the MWUA. *See* Mont. Code Ann. §§ 85-2-224, 231–234. Plaintiffs' requested relief is intended to truncate the water court proceedings and, in doing so, disregards the McCarran Amendment's recognition of comprehensive state systems as the preferable means for conducting unified water rights proceedings. *San Carlos Apache*, 463 U.S. at 566 n.16. Plaintiffs' stated desire for certainty and security, Compl. Count One ¶ 2, does not override the important state interest in conducting a comprehensive water rights adjudication.

Third, the general stream adjudication in Montana Water Court provides Plaintiffs an adequate opportunity to litigate their alleged claim to "all water on, under and flowing through the [Reservation]." Compl. ¶ 39. The Supreme Court has recognized that the McCarran Amendment "allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications." *San Carlos Apache*, 463 U.S. at 569. Indeed, the Ninth Circuit has—after determining the priority date of an Indian tribe's reserved water rights—expressly left the quantification of tribal rights under

the *Winters* doctrine to the purview of the state water court.[11] *See Adair*, 723 F.2d at 1399, 1406 n.11 (affirming the district court's declaration that "actual quantification of the rights to the use of waters . . . will be left for judicial determination . . . by the State of Oregon under the [McCarran Amendment]."). Here, adjudication of Plaintiffs' claims is not only available in Montana Water Court, it is necessary for purposes of quantifying other water users' claims. Thus, *Younger* abstention is appropriate.

III. *RES JUDICATA* BARS PLAINTIFFS FROM CLOUDING TITLE TO LANDS PATENTED TO LANDOWNERS' PREDECESSORS.

Res judicata is the collective moniker for claim preclusion and issue preclusion (also known as collateral estoppel). *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Issue preclusion bars "'successive litigation of an issue of fact or law actually litigated or resolved in a valid court determination essential to a prior judgment,' even if the issue recurs in the context of a different claim." *Id*. (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). Issue preclusion bars an issue from being relitigated if four requirements are met:

> (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4)

[11] To the extent Plaintiffs ask this Court to declare the priority dates of their water rights, *see* Compl. Prayer for Relief ¶¶ 2, 5, such a determination is unnecessary, given Montana Water Court's obligation to follow federal law. *Greely*, 712 P.2d at 766 (citing *San Carlos Apache*, 463 U.S. at 571).

> the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008) (quoting *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000)).

In *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (Ct. Cl. 1971), Plaintiffs brought a Fifth Amendment takings claim against the United States regarding surplus lands within the Reservation that had been patented to settlers. Plaintiffs were awarded just compensation for the value of those lands, including "all homestead and cash entries[.]" *Id.* at 469, 471; Compl. ¶ 48 (citing *Confederated Salish*, 437 F.2d at 458) ("The [Flathead Allotment Act] has been judicially determined to have been an unlawful breach of the Hellgate Treaty."). Interestingly, Plaintiffs now claim continuing title to those same lands, including those patented to Landowners' predecessors, for which they received just compensation in *Confederated Salish*. *See* Compl. ¶ 56, Count One ¶ 8, Prayer for Relief ¶ 3 ("[T]he chain of title to land on the [Reservation] has never been broken and for that reason no lands within the borders of the [Reservation] have ever been part of the public domain subject to the general public land laws."). Because of the

preclusive effect of *Confederated Salish*, Plaintiffs' claim of continuing title to the lands patented to settlers is barred by *res judicata*.[12]

A. Plaintiffs Had A Full And Fair Opportunity To Litigate The Issue Of Title To Lands Patented To Settlers In *Confederated Salish*.

The first requirement of issue preclusion is that there was a full and fair opportunity to litigate the claim in a previous action. *Kendall*, 518 F.3d at 1050. In 1946, Congress passed a special jurisdictional act ("Act of 1946"), which conferred jurisdiction upon the United States Court of Claims "to hear, examine, adjudicate, and render judgment in *any and all legal and equitable claims of whatsoever nature*" that Plaintiffs may have against the United States. 60 Stat. 715 (July 30, 1946) (emphasis added).

Plaintiffs timely filed a claim pursuant to the Act of 1946, "contend[ing] that . . . their lands disposed of to white settlers were taken." *Confederated Salish*, 437 F.2d at 466. By alleging a takings claim, Plaintiffs averred that title was in the United States, but just compensation was not paid. *See Arizona v. California*, 530

[12] Additionally, Plaintiffs' claim necessarily questions the validity of federal patents issued under the general public land laws, which have been considered the "highest evidence of title" against all other claims, *United States v. Stone*, 69 U.S. 525, 535 (1864), and are afforded presumptions that "are not open to rebuttal in an action at law." *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 641 (1881); *United States v. Creek Nation*, 295 U.S. 103, 111 (1935) ("[Disposals of surplus lands] were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law.").

U.S. 392, 417 (2000) ("Had the case proceeded to final judgment upon trial, the Tribe might have won damages for a taking, indicating title was in the United States. Alternatively, however, the Tribe might have obtained damages for trespass, indicating that title remained in the Tribe."). In seeking damages for a taking pursuant to the Act of 1946, Plaintiffs demonstrated that they had a full and fair opportunity to litigate title to surplus lands before the Court of Claims.[13]

B. Plaintiffs Actually Litigated Title To Lands Patented To Settlers In *Confederated Salish*.

The second requirement of issue preclusion is that the issue has actually been litigated. *Kendall*, 518 F.3d at 1050. Plaintiffs actually litigated title vis-à-vis their takings claim in *Confederated Salish*. 437 F.2d at 459. The Court of Claims has fashioned a two-part test to determine whether a taking without just compensation occurred under the Fifth Amendment. *Norman v. United States*, 63 Fed. Cl. 231, 243 (2004). The first prong is "whether the claimant has a 'property interest' that was affected by the government action[,]" while the second prong is "whether a taking occurred." *Id*. at 243–44.

Under the first prong, Plaintiffs were required to demonstrate a compensable property interest in surplus lands patented to settlers, as determined in

[13] Plaintiffs are also time-barred from claiming title to Landowners' lands. 60 Stat. at 715 ("[S]uit or suits under this Act may be instituted by [Plaintiffs] . . . by filing within five years after the approval of this Act [,]" meaning July 30, 1951.).

Confederated Salish. 437 F.2d at 460 (quoting 12 Stat. 975) ("[The] [t]reaty reserved . . . some 1,245,000 acres . . . for the 'exclusive use and benefit (of plaintiffs) as an Indian reservation.'"); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277–78 (1955) ("Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.").

Under the second prong, whether a taking occurred was actually litigated before the Commissioner and Court of Claims. *Confederated Salish*, 473 F.2d at 459, 461–62. The parties briefed the takings and just compensation issues and presented oral argument before both the Commissioner and the Court of Claims. *Id*. at 459, 461, 480. The Court of Claims "considered the evidence, report of [Commissioner], and the briefs and arguments of counsel . . ." to make its findings of facts and ultimately its conclusion of law. *Id*. at 472, 485. Therefore, the parties actually and extensively litigated the taking of Plaintiffs' property interest in the surplus lands on the Reservation.

C. The Court Of Claims Issued A Final Judgment Awarding Plaintiffs Just Compensation In *Confederated Salish*.

The third requirement of issue preclusion is that the issue was lost as a result of the prior action. *Kendall*, 518 F.3d at 1050. The final judgment in *Confederated Salish* awarded Plaintiffs $6,066,668.78 in just compensation for the

taking of lands by the United States, including all surplus lands patented to settlers. 473 F.2d at 485. Payment of just compensation occurred when Congress appropriated funds in satisfaction of the final judgment in *Confederated Salish* to the credit of Plaintiffs. 25 U.S.C. § 1251. Thus, Plaintiffs have been compensated for any taking that occurred as a direct result of the final judgment in *Confederated Salish*.

The payment of just compensation extinguished any remaining title[14] Plaintiffs had to the lands patented to settlers. As the Supreme Court has repeatedly recognized, "'The exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) (quoting *Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823)). By bringing a takings claim, Plaintiffs acknowledged that the United States had the power to take their lands through eminent domain. *Confederated Salish*, 437 F.2d at 468. Therefore, if title was not

[14] "Title" includes both Indian title and recognized Indian title, because Plaintiffs refer to both. *See* Compl. ¶¶ 26, 28–34, 56. "Indian title" refers to the "right of occupancy" over the lands Indians occupied "before the arrival of white settlers[,]" whereas "recognized Indian title" exists "where Congress by treaty or other agreement has declared that the Indians are to hold the lands permanently." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641–42 n.1 (9th Cir. 1986).

extinguished when the lands were patented to settlers, there is no question that any cloud on settlers' title was extinguished when Congress appropriated money to pay just compensation to Plaintiffs. *See, e.g., United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976) ("[A]ny ambiguity about extinguishment that may have remained . . . has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands."); 25 U.S.C. § 1251. By accepting just compensation, Plaintiffs lost any remaining title to Landowners' lands.

D. Plaintiffs Were A Party To *Confederated Salish*.

The fourth requirement of issue preclusion is that plaintiffs were a party to the previous action. *Kendall*, 518 F.3d at 1050. Plaintiffs were a party in *Confederated Salish*. 437 F.2d at 459. Thus, Plaintiffs' chain of title claim is barred as *res judicata* by the final judgment awarding just compensation in *Confederated Salish*.

IV. PLAINTIFFS' FACTUAL ALLEGATIONS, TAKEN AS TRUE, FAIL TO SUPPORT THEIR CLAIM.

"A complaint must contain sufficient factual matter, accepted as true," to avoid dismissal under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678. "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"

Somers v. Apple, Inc., 729 F.3d 953, 959–60 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

Here, Plaintiffs' factual allegations do not reasonably lead to the relief they seek regarding title of Landowners' lands. Plaintiffs' claim that "no lands within the borders of the [Reservation] have ever been part of the public domain or subject to general public land laws" should be dismissed as speculative. Compl. ¶ 56, Count One ¶ 8, Prayer for Relief ¶ 3; *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). Plaintiffs' allegations, taken as true, fail to support such a claim.

First, Plaintiffs' factual allegation that President Taft's proclamation "open[ed] certain unallotted Tribal lands of the [Reservation] for non-Indian entry" actually undercuts their claim, because it shows that such lands became part of the public domain. *Compare* Compl. ¶ 71 *with* 36 Stat. 2494, 2494–95 (May 22, 1909) (proclaiming that the surplus lands "shall be disposed of under the provisions of the homestead laws of the United States and Acts of Congress and be opened to settlement and entry . . . ."). Lands available for settlement and entry are, by definition, public domain. *See Hagen v. Utah*, 510 U.S. 399, 412 (1994) ("The public domain was the land owned by the Government, mostly in the West, that was 'available for sale, entry, and settlement under the homestead laws, or

other disposition under the general body of land laws.'") (quoting E. Peffer, The Closing of the Public Domain 6 (1951)); *Bardon v. N. Pac. R. Co.*, 145 U.S. 535, 538 (1892) ("[P]ublic lands" means "such land as is open to sale or other disposition under general laws"). In *Solem v. Bartlett*, 465 U.S. 463, 475 n.17 (1984), the Supreme Court noted that "even without diminishment, unallotted opened lands could be conceived as being in the 'public domain' inasmuch as they were available for settlement." Therefore, once the President's proclamation opened certain portions of the Reservation to entry and settlement, such lands—including those settled by Landowners' predecessors—became public domain.

Second, Plaintiffs' factual allegations regarding the Flathead Allotment Act ("FAA") also undercut Plaintiffs' claim. Compl. ¶¶ 50–51. Plaintiffs allege the FAA "announced that pursuant to a future Presidential Proclamation, certain unallotted Tribal lands would be opened to non-Indian entry under unspecified 'general provisions of the homestead, mineral, and town-site laws of the United States.'" *Id*. ¶ 50 (quoting 33 Stat. 302, 303 (April 23, 1904)). The FAA rebuts Plaintiffs' contention that the surplus lands "were never subject to the general public land laws of the United States." Compl. ¶ 56, Count One ¶ 8, Prayer for Relief ¶ 3. Rather, the FAA, which is the "preemptive federal law on land title,"

provided that surplus lands would be disposed of under the general public land laws. *Id.* ¶¶ 49–51.

Plaintiffs' allegation of an unbroken chain of title to Landowners' lands is unclear. *Compare* Compl. ¶ 56, Count One ¶ 8, Prayer for Relief, ¶ 3 *with* ¶¶ 49–51. Their chain of title claim confuses extinguishment of title to the Indian lands and disestablishment.[15] *See Idaho v. Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983) ("The question of whether title to Indian land has been extinguished is separate from the question of disestablishment."). "While Congress has the authority to disestablish (diminish) a reservation and extinguish title, it may do either without the other." *Id*. There is no indication that the "distinction between 'public domain' and 'reservations' has any bearing on the question of how and when treaty rights of Indians in those lands are extinguished." *Id*. at 1464–65 (quoting *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983)). As such, a reasonable reading of Plaintiffs' speculative claim supports the inference that Plaintiffs seek a declaration that their title to surplus lands patented to settlers, including Landowners' predecessors was never extinguished, despite the final

[15] Extinguishment goes to title of the lands, but disestablishment (also called "diminishment") goes to jurisdiction, *i.e.,* the lands' reservation status. *See Solem*, 465 U.S. at 470 ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

judgment in *Confederated Salish*. Even if Plaintiffs' claims to title were not barred by issue preclusion, their allegations regarding chain of title fail to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Landowners respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety.

DATED this 3rd day of July 2014.

Respectfully submitted,

/s/ Maegan Woita
Maegan Woita, Esq.
Steven J. Lechner, Esq.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Fax: (303) 292-1980
mwoita@mountainstateslegal.com
lechner@mountainstateslegal.com

/s/ Duncan Scott
Duncan Scott
Scott & Kienzle, P.C.
1001 South Main Street
Kalispell, MT 59901
(406) 752-1250; Fax: (406) 752-6001
Duncan@Dscottlaw.com

Attorneys for Defendants Judy and Robert Harms and Betty and Wayne Stickel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E) of the 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 or more, is double-spaced, and contains approximately 6,495 words, excluding parts of the brief exempted by D. Mont. L.R. 7.1(d)(2)(E).

/s/ Maegan Woita
Maegan Woita, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2014, I served a true and accurate copy of the foregoing electronically through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

Michael G. Black
Melissa A. Schlichting
Montana Attorney General
P.O. Box 201401
215 North Sanders
Helena, MT 59620-1401

Victoria L. Francis
U.S. Attorney's Office
2601 Second Avenue North
Box 3200
Billings, MT 59101

Randy J. Cox
Thomas J. Leonard
Boone Karlberg, P.C.
201 West Main St., Suite 300
P.O. Box 9199
Missoula, MT 59807-9199

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

John B. Carter
Daniel J. Decker
Ranald L. McDonald
Rhonda R. Swaney
Confederated Salish & Kootenai Tribes, Legal Department
P.O. Box 278
Pablo, MT 59855-0278

James H. Goetz
Goetz Gallik & Baldwin, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580

David Harder
J.Nathanael Watson
United States Dept. of Justice
999 18th Street
South Terrace – Suite 370
Denver, CO 80202

I also hereby certify that on this 3rd day of July 2014, I served a true and accurate copy of the foregoing through the U.S. mail, postage prepaid, on the following:

Alex Crepeau
103 Imperial Way
Missoula, MT 59803

Blanche Crepeau
103 Imperial Way
Missoula, MT 59803

Michael G. McLatchy
1575 Council Way
Missoula, MT 59808

/s/ Maegan Woita
Maegan Woita, Esq.