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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

INTRODUCTION

Defendants Judy Harms, Robert Harms, Betty Stickel, and Wayne Stickel's (collectively, "Landowners") Motion to Dismiss should be granted. In an effort to avoid this result, Plaintiffs argue that Landowners' *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976) and *Younger v. Harris*, 401 U.S. 37 (1971) abstention doctrine arguments are inapplicable or, alternatively, do not favor abstention. Doc. 64 at 11–19. Plaintiffs focus on various state court proceedings, but not the general stream adjudication of Basin 76L which is the focus of Landowners' arguments. *Compare* Doc. 64 at 11–19 *with* Doc. 56 at 12–26. Because Landowners are not parties to those state court proceedings, Plaintiffs' injunctive relief request should be dismissed as against them. Doc. 27 ("FAC") ¶¶ 10–12; Count Two ¶¶ 1–16. Plaintiffs also fail to rebut Landowners' issue preclusion and failure to state a claim arguments. *See* Doc. 64 at 19–22. For the reasons previously demonstrated and the reasons discussed herein, Landowners respectfully request this Court dismiss Plaintiffs' First Amended Complaint ("FAC") in its entirety.

ARGUMENT

I. PLAINTIFFS' *RES JUDICATA* ARGUMENT DOES NOT RENDER EITHER THE *COLORADO RIVER* OR *YOUNGER* ABSTENTION DOCTRINES IRRELEVANT.

Plaintiffs attempt to use the affirmative defense of *res judicata* to argue that *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939) and *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942) somehow entitle them to a declaratory judgment that they own "all" the water within the Reservation, including waters delivered by the Flathead Irrigation Project ("Project").[1] FAC Prayer for Relief § A, ¶¶ 2, 5; Fed. R. Civ. P. 8(c)(1) (listing affirmative defenses). Plaintiffs then make the illogical leap that the *Colorado River* and *Younger* abstention doctrines are inapplicable based on their ill-conceived attempt to use *res judicata* offensively. Doc. 64 at 11–12, 17–19.

Rather than cite any legal authority for the proposition that *res judicata* requires this Court to ignore Landowners' *Colorado River* and *Younger* abstention arguments relating to the declaratory relief claim, Plaintiffs merely cite to their

[1] *Res judicata* is the collective moniker for claim preclusion and issue preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Landowners submit that Plaintiffs are really arguing offensive issue preclusion, not claim preclusion, by relying on *McIntire* and *Alexander*. Doc. 64 at 9–11, 17–18; *see Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) (listing issue preclusion elements). Further, offensive issue preclusion is disfavored, whereas defensive use is preferred. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330–31 (1979). Nothing prevents Plaintiffs from raising their *McIntire* and *Alexander* arguments defensively in the state court proceedings. Nonetheless, Plaintiffs fail to establish elements for both.

argument regarding *injunctive* relief in Plaintiffs' Response to Judges (Doc. 62). Doc. 64 at 11–12. Regardless, Plaintiffs' *res judicata* argument is unconvincing for several reasons.

First, Plaintiffs fail to prove Landowners are in privity with a party in *McIntire* or *Alexander*. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081–82 (9th Cir. 2003) (discussing privity); *Kendall*, 518 F.3d at 1050. Rather, Plaintiffs postulate that the Landowners are in privity with the Flathead Irrigation District ("FID") by citing bare legal authority with no supporting facts. Doc. 62 at 17–18; *see* FAC ¶¶ 14–15. Lack of privity is clear when looking at *McIntire* and *Alexander* in context—neither determines water rights to surplus lands. *McIntire*, 101 F.2d at 651, 654; *Alexander*, 131 F.2d at 360–61. Moreover, Plaintiffs' assertion that Landowners are in privity with the FID raises serious due process concerns, especially when Plaintiffs have not demonstrated that Landowners' interests were adequately represented in *McIntire* or *Alexander*. *See Tahoe-Sierra*, 322 F.3d at 1082.[2]

[2] Plaintiffs also argue that Landowners "are parties by privity to the state cases." Doc. 64 at 12 n.3. However, that Landowners' irrigable lands are within the FID is hardly an admission that they are represented by the FID.

Second, Plaintiffs fail to prove the claims in the three state court proceedings[3] "arise from the same transactional nucleus of facts" as *McIntire* and *Alexander*. *See Tahoe-Sierra*, 322 F.3d at 1078 (discussing identity of claims). Plaintiffs mistakenly rely on *McIntire* and *Alexander* as settling all water rights claims within the Reservation, specifically water distributed by the Project. Doc. 62 at 10–12, 18. Both *McIntire* and *Alexander*, however, focused on water rights to allotted lands, not surplus lands. *McIntire*, 101 F.2d at 651, 654; *Alexander*, 131 F.2d at 360, 361 (refusing to decide the priority of water rights to surplus lands). More importantly, neither case purported to undertake a comprehensive adjudication of all water rights within the Reservation. Doc. 62 at 18. Further, the court's statement in *Alexander* that "[t]he treaty impliedly reserved all waters on the reservation to the [Plaintiffs]" is dictum. 131 F.2d at 360; *see United States v. Johnson*, 256 F.3d 895, 915–16 (9th Cir. 2001) (discussing dictum). Therefore, Plaintiffs' *res judicata* argument to stave off dismissal of their injunctive claims against the state court judges does not apply to their declaratory relief request.

[3] The FAC alleges Landowners own water rights claims in Basin 76L. FAC ¶¶ 14–15. Landowners are not parties to Case Nos. DV-12-327 and DV-13-105, and Landowners' water rights claims are not listed in Case No. WC-2013-05.

II. THIS CASE SHOULD BE DISMISSED IN FAVOR OF THE ONGOING GENERAL STREAM ADJUDICATION OF BASIN 76L.

A. Plaintiffs Fail To Address The Basis Of Landowners' Abstention Arguments, The Ongoing General Stream Adjudication Of Basin 76L.

Plaintiffs attempt to fault Landowners for failing to address the three state court cases that Plaintiffs seek to enjoin and to which Landowners are not parties.[4] Doc. 64 at 14–17. Plaintiffs fail to explain why those cases are relevant to Landowners' *Colorado River* and *Younger* abstention arguments regarding the Basin 76L stream adjudication, or rebut Landowners' *Colorado River* and *Younger* abstention arguments favoring the Basin 76L stream adjudication. Doc. 64 at 11–17.[5] As previously demonstrated, Plaintiffs' filing of this suit exacerbates the risk of piecemeal adjudication. Doc. 56 at 17–20.

Plaintiffs "seek [a] declaration of ownership to frame the federal law under which water for irrigation on the [Reservation] will be adjudicated and quantified in a proper general *inter sese* water rights adjudication . . . ." FAC ¶ 24; *see also*

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[4] Plaintiffs seek to enjoin Case Nos. DV-12-327; DV 13-102; and WC-2013-05. FAC ¶¶ 10–12. Plaintiffs' attempt to implicate a fourth state court proceeding (*see* Doc. 62 at 15), must fail because this state court proceeding was not mentioned in Plaintiffs' FAC. FAC ¶¶ 10–12; Count Two ¶¶ 1–16.

[5] Plaintiffs confuse the general stream adjudication referenced in Landowners' Brief (Doc. 56). *See* Doc. 64 at 11–19. To clarify, Landowners are not parties to the other proceeding in Montana Water Court, Case No. WC-2013-05. Landowners referenced the "general stream adjudication" wherein the Montana Water Court has assumed jurisdiction to adjudicate all water rights claims in Basin 76L. Doc. 56 at 10–11, 14–26. It is based on that adjudication that Landowners argue abstention under *Colorado River* and *Younger* is appropriate.

Count One ¶¶ 1–11; Prayer for Relief § A, ¶¶ 1–11. As Landowners established (Doc. 56 at 15–16, 24–25) and Plaintiffs have not refuted, DNRC's examination of claims in Basin 76L constitutes an ongoing general stream adjudication. *See United States v. Oregon*, 44 F.3d 758, 766–67 (9th Cir. 1994) (finding administrative proceedings qualify as ongoing stream adjudications). Indeed, Plaintiffs' Exhibit A (Doc. 64-1), supports the ongoing nature of DNRC's claims examination, albeit in Basin 76LJ.[6] Doc. 64-1 at 2 ("DNRC shall examine all existing water rights claims on file with DNRC that lie in whole or in part with Basin 76LJ" excepting Plaintiffs' water rights claims.).[7]

While Landowners are not parties to the three state court proceedings Plaintiffs wish to enjoin, Landowners own water rights claims that are part of the ongoing general stream adjudication of Basin 76L. *See* FAC ¶¶ 14–15; Mont. Code Ann. § 85-2-214. Thus, Landowners have an interest in having their water rights claims examined with all other claims in the Basin 76L general stream adjudication, rather than in piecemeal fashion as Plaintiffs wish in their declaratory relief request.

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[6] Exhibit A pertains to Basin 76LJ, but Landowners' claims are in Basin 76L. FAC ¶¶ 14–15.

[7] Plaintiffs attach Exhibit A to support its allegation that the DNRC temporarily suspended review of tribal water rights. Doc. 64 at 18. Since the proposed compact was not ratified by July 1, 2013, the suspension on adjudication of Indian reserved water rights expired. FAC ¶¶ 118–19; Mont. Code Ann. § 85-2-217. Therefore, the DNRC may now file a Summary Report for Basin 76LJ (and 76L). Doc. 64-1 at 5.

B. In Claiming "Ownership" Of All Waters Within The Reservation, Plaintiffs Seek Quantification Of All Water Rights In Their Favor.

The most important *Colorado River* factor is "avoidance of piecemeal adjudication of water rights in a river system." 424 U.S. at 819. Plaintiffs purport to disclaim "any desire or intent to quantify anyone's claims to water." Doc. 64 at 15; FAC ¶ 21. Yet, Plaintiffs' own pleading directly contradicts this "disclaimer." *See* FAC Prayer for Relief § A, ¶ 2 (". . . the United States reserved *all* waters on, under and flowing through the Reservation for the Tribes") (emphasis added); ¶ 5 ("all waters of the [Reservation] for consumptive use were reserved by the Tribes pursuant to the [*Winters*] Doctrine").

A determination of Indian reserved water rights necessarily includes the scope and quantification of such rights, which is properly made in a comprehensive adjudication.[8] *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 565–70 (1983) (answering affirmatively that *Colorado River* applies to suits brought by Indian tribes "seeking adjudication only of Indian water rights"); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764–65 (Mont.

[8] In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the court, not abstaining, recognized the interrelation between ownership of water rights and actual quantification of those rights by leaving quantification for the general stream adjudication in state court. *Id*. at 1406. Here, Plaintiffs request a declaration of ownership to "all" water within the Reservation, not just that Indian reserved water rights may exist. FAC Prayer for Relief § A, ¶¶ 2, 5. Further, *Adair* is distinguishable from Plaintiffs' suit, because the general stream adjudication was just beginning. 723 F.2d at 1405.

1985) (discussing quantification standards); *Adair*, 723 F.2d at 1408–11 (discussing scope of implied reserved rights). Therefore, a declaration of Plaintiffs' claimed rights by this Court would side-step the quantification standards for Indian reserved rights and the *Winters* doctrine by declaring *all* waters within the Reservation were reserved by or for Plaintiffs without addressing the scope of such rights.[9] *See* FAC Prayer for Relief § A, ¶¶ 2, 5.

C. Under *Colorado River*, This Court Should Abstain From Determining Water Rights Within The Reservation.

Plaintiffs attempt to explain away the *Colorado River* doctrine by glossing over the ongoing general stream adjudication of Basin 76L. As such, Plaintiffs fault Landowners for not arguing the applicability of *Colorado River* to the three state court proceedings Plaintiffs seek to enjoin and then attacking the straw men of those state court proceedings. Doc. 64 at 11–17. Yet, Landowners' water rights are not at issue in those proceedings and Landowners are not parties. *See* Footnote 4, *supra*. In short, Plaintiffs are confused. Regardless, Plaintiffs' arguments are unavailing because *Colorado River* clearly counsels toward abstention in favor of the comprehensive stream adjudication of Basin 76L.

The first *Colorado River* factor is which court first assumed jurisdiction over any property at stake. 424 U.S. at 818. Montana Water Court and the DNRC have

[9] Plaintiffs do not even attempt to explain how a declaration that they own "all water" would not be a quantification of 100 percent of the water in their favor. Doc. 64 at 15.

been collecting and reviewing water rights claims since 1979. Mont. Code Ann. §§ 85-2-212, 214, 221 (2013). Review of tribal water rights was temporarily stayed, but is now underway again. *Id.* § 85-2-217. Plaintiffs believe this factor weighs against abstention because of *McIntire* and *Alexander*. Doc. 64 at 13. However, the first *Colorado River* factor considers only "existing state proceedings" and the "exercise of concurrent jurisdiction." 424 U.S. at 818. *McIntire* and *Alexander* are not concurrent proceedings.

The second *Colorado River* factor considers the "geological inconvenience of the federal forum[.]" *Id*. at 805. It does not, as Plaintiffs assert, consider the relative convenience of the two fora. *Compare* Doc. 64 at 14 *with Health Care and Ret. Corp. of Am. v. Heartland Home Care, Inc.*, 324 F. Supp. 2d 1202, 1206 n.5 (D. Kan. 2004).

The third *Colorado River* factor is avoidance of piecemeal adjudication. 424 U.S. at 819. Plaintiffs assert that the state cases it seeks to enjoin manifest piecemeal adjudication. Doc. 64 at 14. Landowners are not parties to those cases. Moreover, any determination of water rights concerning Basin 76L by this Court, rather than in the general stream adjudication of Basin 76L, would result in piecemeal adjudication and, potentially, conflicting judgments. Doc. 56 at 17–20; *San Carlos Apache*, 463 U.S. at 567.

The fourth *Colorado River* factor is which court—this Court or the Montana Water Court—first obtained subject-matter jurisdiction. 424 U.S. at 818. Plaintiffs do not address the applicability of this factor to the Basin 76L adjudication, but again argue that the courts in *McIntire* and *Alexander* first asserted jurisdiction. Doc. 64 at 15–16. This *Colorado River* factor clearly considers only a present conflict between courts with concurrent jurisdiction. 424 U.S. at 818.

The fifth factor is whether federal or state law controls. *Moses H. Cone Memorial Hosp. v. Mercury Const. Group*, 460 U.S. 1, 25 (1983). Plaintiffs fail to correctly describe or address this factor. Doc. 64 at 16.

The sixth factor is whether the state court proceedings are adequate to protect federal litigants' rights. *Moses H. Cone*, 460 U.S. at 26–27. This factor weighs heavily in favor of abstention, as Plaintiffs' only basis for declaratory relief is the assumption that the Montana Water Court is unable to determine the relevance, if any, of *McIntire* and *Alexander*. Doc. 64 at 14–18. Even if this Court accepts as true Plaintiffs' allegations that *McIntire* and *Alexander* stand for the incredible proposition that Plaintiffs own all water within the Reservation, Plaintiffs fail to allege that Montana Water Court is unwilling or unable to satisfy its "solemn obligation to follow federal law." *San Carlos Apache*, 463 U.S. at 571.

The seventh factor is the "desire to avoid forum shopping[.]" *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011). Again, Plaintiffs fault Landowners for the actions of other parties in bringing the three state court cases, but fail to explain how their FAC solves that issue, rather than exacerbates it. Doc. 64 at 16–17. As demonstrated, Plaintiffs improperly attempt to leap-frog the Basin 76L general stream adjudication by forum-shopping. Doc. 56 at 23.

The final factor is "whether the state court proceedings will resolve all issues before the federal court." *R.R. St.*, 656 F.3d at 979. Plaintiffs incorrectly fault Landowners for not explaining how the general stream adjudication, being a unified proceeding for all water rights in a basin, will resolve Plaintiffs' declaratory relief request.[10] Doc. 64 at 17. Landowners submit that conclusion is self-evident when Plaintiffs' request for declaratory relief that they own "all" water rights, FAC Prayer for Relief § A, ¶¶ 2, 5, is considered alongside the Montana Water Use Act's ("MWUA") quantification requirements. Mont. Code Ann. § 85-2-234(6)(b). Thus, Plaintiffs' declaratory relief claim should be dismissed under *Colorado River*.

[10] Plaintiffs also fault Landowners for not addressing Plaintiffs' injunctive relief claims. Doc. 64 at 17. Again, Landowners are not the state court judges or parties to those cases.

D. Under *Younger*, This Court Should Abstain From Determining Water Rights Within The Reservation.

Plaintiffs' argument against *Younger* abstention is similarly unavailing. The first *Younger* factor is the ongoing nature of the state proceeding. *Gilbertson v. Albright*, 381 F.3d 965, 976 n.10 (9th Cir. 2004) (en banc) (internal citation omitted). As previously indicated, the Basin 76L general stream adjudication is ongoing. Doc. 56 at 15–16, 24.[11]

The second factor is the implication of important state interests. *Gilbertson*, 381 F.3d at 976 n. 10. Plaintiffs do not argue that Montana lacks an important state interest, or that their tribal interests override Montana's interest or the McCarran Amendment, 43 U.S.C. § 666. Doc. 62 at 29–30.

The third factor is whether Plaintiffs have an adequate opportunity to litigate federal claims. *Gilbertson*, 381 F.3d at 976 n. 10. Plaintiffs argue there is no definitive answer to this factor, because the MWUA has not been found adequate "as applied." Doc. 62 at 30. The MWUA is facially adequate to determine Indian reserved water rights, *Greely*, 712 P.2d at 768, which affords Plaintiffs an adequate opportunity to litigate such claimed rights. Therefore, Plaintiffs' declaratory relief request should be dismissed under *Younger*.

[11] Plaintiffs allege that Landowners' reference to 3,068 water right claims is unclear. Doc. 64 at 18 n.5. The DNRC Status Report clearly shows in yellow that 3,068 claims have been reviewed by the DNRC for Basin 76L.

III. PLAINTIFFS CONCEDE THAT THEIR REQUEST FOR DECLARATORY RELIEF REGARDING CHAIN OF TITLE WAS INARTFULLY PLEADED AND SHOULD BE DISMISSED.

Plaintiffs admit that "[t]he Prayer for Relief in the Complaint is what [Plaintiffs] argue for in the Complaint." Doc. 64 at 19. In the Prayer for Relief, Plaintiffs request this Court to declare "the 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 or subject to general public land laws." FAC Prayer for Relief § A, ¶ 3; *see also* ¶ 56; Count One ¶ 8; 36 Stat. 2494, 2494–95 (May 22, 1909) (proclaiming that the surplus lands "shall be disposed of under the provisions of the homestead laws . . . and be opened to settlement and entry . . . .").

Plaintiffs fault Landowners' reading of their FAC as "nonsense," but concede that a reading of their allegations, if accepted as true, would place a cloud on Landowners' title. Doc. 64 at 19–20. Then, Plaintiffs attempt to clarify by claiming that the chain of title claim was included to: (1) make apparent the 1902 Reclamation Act did not apply, except as specified by Congress; and (2) that the 1908 Act imposed certain requirements to obtain water rights. *Id*. at 21. However, Plaintiffs devote separate claims to both allegations. *See* FAC Prayer for Relief § A, ¶¶ 6–7, 11. Moreover, Plaintiffs cannot fault Landowners for their own inartful pleading.

Plaintiffs' agreement with Landowners that they were compensated for surplus lands in *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (Ct. Cl. 1971) renders their allegations that the lands were never subject to the public land laws and their request for declaratory relief that the chain of title was never broken specious. FAC Prayer for Relief § A, ¶ 3. Accordingly, this Court should dismiss Plaintiffs' chain of title claim.

CONCLUSION

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

DATED this 6th day of August 2014.

Respectfully submitted,

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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 3,250 words, excluding parts of the brief exempted by D. Mont. L.R. 7.1(d)(2)(E).

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