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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

Town of Browning, a Montana Municipal Corporation Plaintiff, v.s. Willie A. Sharp, Jr.; Forrestina Calf Boss Ribs; Paul McEvers; William Old Chief; Cheryl Little Dog; Shawn Lahr; Alvin Yellow Owl; Derek Kline; Harry Barnes; Iliff Kipp; Joe McKay; Earl Old Person; Tyson Running Wolf; and Nelse St. Goddard, Defendants.	CAUSE NO.: CV-14-24-6F-BMM-RKS Defendants' Reply Brief in Support of Motion to Dismiss Amended Complaint Under Rule 12(b)(7)

INTRODUCTION

The defendants established under the two-part Rule 19(a) analysis that the

Blackfeet Tribe is a necessary party to this action. (ECF 75, pp. 1-5). The defendants also showed under the four-part Rule 19(b) analysis that the Blackfeet Tribe is a required party that cannot be joined due to its sovereign immunity. (ECF 75, pp. 5-8). The Town of Browning utterly fails to respond to the Tribe's arguments or engage in the required analysis under Rule 19(a) and Rule 19(b).

Instead, the Town focuses entirely on the self-serving affidavit of Town Mayor Willie Morris, (see ECF 97, pp. 3-5; Morris Affidavit (ECF 95-11)), and his assertion that the Town owns the community water and sewer systems in Browning and that it can run the systems without the Tribe's water and property. (Id.) However, the Mayor's assertions do not reference any conveyance instruments establishing the Town's title to any property, they contradict earlier statements he made about the old water supply, and they ignore the defendants' exhibits proving tribal ownership of the community water and sewer utility systems in Browning. (See ECF 71-1, Exhibits 8-20). The Town's claim that it can run the community water and sewer systems without the water and property of the Blackfeet Tribe lacks any basis in fact or law.

I. The Tribe is a required party under Rule 19(a).

The Court cannot accord complete relief among the existing parties as the Blackfeet Tribe is a necessary party to this action. See F.R. Civ. P. 19(a)(1)(A). As shown in the defendants previous filings, the Blackfeet Tribe holds title to the

water supply, (ECF 75, p.3), and it owns the water treatment facility and the 12-mile water distribution line that delivers the Tribe's treated water to Browning. (ECF 71-1, Exhibit 11).

At the "Parsons connection," which is located approximately five (5) miles west of the Town municipal limits, the Tribe's 12-mile water distribution line from East Glacier meets the chlorinator booster station serving Browning. The Blackfeet Tribe owns the new chlorinator building. (See ECF 71-1, Exhibit 16).

"East of the Parson's connection" is where the Tribe's water is then delivered to the Browning community. The Tribe owns the water main and delivery facilities running east, (see ECF 71-1, Exhibit 12), including the water storage tanks, (ECF 71-1 Exhibits 13, 14, and 15); all of the sewer pipes, (ECF 71-1 Exhibit 17); one entire sewer lagoon, (ECF 71-1 Exhibit 18), and a large majority of another lagoon, which includes the sewer treatment building that discharges treated wastewater into the Tribe's surface waters. (ECF 71-1 Exhibit 19 and 20). Therefore, the Blackfeet Tribe owns the critical water and sewer delivery and transmission system serving Browning and is a necessary party to this action.

The Town's assertion that they own all the water and sewer facilities "east of the Parsons connection" is based entirely on the Mayor's affidavit. The Mayor's affidavit shreds the statute of frauds. (See ECF 97, pp. 3-5). Under the statute of frauds, any sale or transfer in real property must be in writing. BLACKFEET LAW

AND ORDER CODE, Ch. 2, Section 2 (1967) *citing* MCA 28-2-903, 30-11-111, and 70-20-101. If a grant of real property does not comply with the statute of frauds, it is invalid. *Luloff v. Blackburn*, 274 Mont. 64, 68 (1995) *citing Isaak v. Smith,* 257 Mont. 176 (1992); *Quirin v. Weinberg*, 253 Mont. 386 (1992).

Water and sewer utility infrastructure is an interest in real property. See *Clark County v. Sioux Equip. Corp.*, 753 N.W. 2d 406 (S.D. 2008); see *Delgadillo v. City of Socorro*, 723 P.2d 245, 247 (N.M. 1986). *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972); *Yakama Fruit and Cold Storage Co. v. Cent. Heating & Plumbing Co.,* 503 P.2d 108 (1972); *Pinneo v. Stevens Pass, Inc.,* 545 P.2d 108 (1972). Since the Town uses the Mayor's affidavit to establish that all utility infrastructure is "legally owned by the Town," (see ECF 97, p. 4), the Town's claim to ownership is invalid.[1] MCA 28-2-903, 30-11-111, and 70-20-101, MCA; *Luloff, supra*.

Again, citing the Mayor's affidavit, the Town claims that it does not need to obtain water from any tribally-owned source and that the Town's old well system is still operable and can adequately supply the community with water. (See ECF

[1] The Town has only provided proof of an easement for water and sewer infrastructure serving the Teacher Trailer Court, (ECF 95, Exhibit F), which is a small area serving 10 trailer houses, located outside the Town's municipal limits. Under the Town's own water and sewer ordinance, it cannot provide water and sewer services outside its incorporated limits unless it has a contract or MOA. Title IV, Town of Browning Ordinances, Section 4.02.70, (Anderson Affidavit, Exhibit 1, attached hereto). The other writings the Town provides do not prove ownership to *any* water and sewer pipes. (See ECF 95, Exhibits A-H). In fact, the Town attempts to provide proof of ownership of water facilities formerly owned by the Great Northern Railway by attaching a deed from 1956, (ECF 95, Exhibit F), but fails to provide the exhibit to the deed that shows where the purported water facilities are located. Id. Needless to say, this too fails the statute of frauds to own the system, MCA 28-2-903, 30-11-111, and 70-20-101. Finally, it also must be noted that the Blackfeet Tribe has a future interest in the Town's deed to a small portion of the Hodson sewer lagoon. (ECF 95, Exhibit E; ECF 71-1, Exhibits 19 and 20).

97, p.3). This contradicts earlier statements made by the Mayor.

While operating and managing the community water system under the 1995 MOA, (ECF 71-1 Exhibit 1), the Mayor declared a "moratorium" on connections to the old water system, stopping the construction of vital housing developments, since the "water supply suffers from an inadequate supply and does not meet some of the secondary standards under the Safe Drinking Water Act." See Anderson Affidavit, Exhibit 2, attached hereto. The Mayor also stated that the old well system does not produce enough water to serve all the community's needs, See Anderson Affidavit, Exhibit 3, attached hereto, and that the old wells actually produce "dirty water." Id.

Based on the Mayor's prior statements regarding the old water supply, see Anderson Affidavit, Exhibit 2 and 3, attached hereto, his new statements made under oath for purposes of this case – that the old well system actually produces a sufficient supply of water for the growing Browning community, and that the Town owns the water and sewer infrastructure – lack any credibility.

At least since the 1980's, numerous studies have shown the severe inadequacies of the Browning water system and the Flatirons/Willow Creek water supply. See Anderson Affidavit, Exhibit 4 and 5, attached hereto. These studies show the inadequacy and unreliability of the water system, the inadequacy of the system to meet future growth, and the systems' failure to meet basic drinking water

standards. Obviously, neither the Tribe nor any of the funding agencies would have spent over $19 million for a new system, if the old system was capable of serving the community in any respect.

The Court simply cannot grant an injunction that would provide the relief that is apparently requested by the Town – that it run the old system – without endangering the water supply to the entire Community. An adequate and safe drinking water supply cannot be provided to the Community without the Tribe's water supply, treatment plant, transmission line, and other infrastructure.[2] And, since the Town does not have any licensed water and sewer operators on staff, it is incapable of running any system. All of the Town's former licensed water and sewer operators currently work for the Tribe. See Anderson Affidavit, Exhibit 6 (Bechel Affidavit), attached hereto.

These facilities and personnel are absolutely essential to adequately supply and serve the community with safe drinking water and water for vital fire protection. The Tribe's property interests, as well as its government interest in ensuring that its members and the community, as a whole, have adequate drinking water to which they are entitled, clearly establish that the Tribe is a necessary party to this proceeding. *American Greyhound Racing, Inc. v.* Hull, 305 F.3d 1015, 1023 (9th Cir. 2002). The absence of the Tribe will substantially "impair or

[2] Seventy-five new housing units have been built since the new system went on line and the moratorium on new housing was lifted. The old system, which was inadequate to serve existing housing, would not be capable of serving any of the new housing units.

impede" its ability to protect that interest. See F.R. Civ. P. 19(a)(1)(A). Therefore, the Tribe is a required party under Rule 19(a).

II. The Tribe is Required to Be Joined Under Rule 19(b).

The Town also fails to address the defendants' four-part Rule 19(b) analysis. Instead, the Town asserts, without any legal authority, that since the Tribe is not an indispensable party under Rule 19(a), an analysis of Rule 19(b) is "unnecessary and irrelevant." (ECF 97, p.6).

A Rule 19(b) analysis is essential to determine whether, in equity or good conscience, the action should proceed among the existing parties or should be dismissed. F.R. Civ. P. Rule 19(b). In other words, it further determines if a party is indispensable. See id. The Town's failure to even engage in this analysis further suggests the validity of the defendants' argument that the Blackfeet Tribe is indispensable and is the real, substantial party in interest.

III. Conclusion

The Blackfeet Tribe is an indispensable party to this action and is the real, substantial party in interest. Due to the Tribe's ownership of the water and sewer facilities and its title to the water supply, any injunctive relief would allow the unconsented use of tribal trust property and resources, including tribal trust assets, thereby impairing and impeding the Tribe's ability to protect its property interest and water resources. Further, the water supply for the entire Town would be

endangered if the Town attempted to run the old system. It would also interfere with the Tribe's sovereign governmental interests in managing and administering its property and water to ensure an adequate drinking water supply for Reservation residents.

The Town's Amended Complaint should, therefore, be dismissed for failure to join an indispensable party.

DATED this 2nd day of October 2014.

/s/ Lawrence A. Anderson
Lawrence A. Anderson

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that Defendants' Reply Brief in Support of Motion to Dismiss Amended Complaint Under Rule 12(b)(7) is double spaced, proportionately spaced, typed in Times New Roman, has a typeface of 14 points, and contains less than 1709 words.

/s/ Lawrence A. Anderson
Lawrence A. Anderson