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

TOWN OF BROWNING, a Montana municipal corporation,

Plaintiff,

-vs-

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; TYSON RUNNING WOLF; JOE McKAY, EARL OLD PERSON; and NELSE ST. GODDARD.

Defendants.

CAUSE NO.
CV-14-24-GF-BMM-RKS

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

INTRODUCTION

In yet another attempt to bleed the Town of Browning (hereinafter the "Town") financially dry, the day after this Court's Order (Dkt. 123) denying the Defendants' Motion to Dismiss (Dkt. 70), the Defendants, through their agent Two Medicine Water Company ("TMWC"), began shutting off water to utility customers who continued to pay the Town for utility services. As a result, the Town has lost a substantial number of its customers and a substantial amount of utility revenue.

The Defendants do not deny the recent utility shut-offs, Dkt. 129, p. 9. Instead, the Defendants contend that the recent utility shut offs are allowable because the Town has somehow failed to demonstrate ownership over its utility pipes, systems, and infrastructure (hereinafter "utility system"). The Defendants' contention lacks merit, however, as the Town's ownership over its utility system has been established and recognized since at least 1934. Dkt. 127-1, ¶ 4; *see also* Dkt. 127-1, Exhibit A. Most recently, by virtue of a Memorandum of Agreement ("MOA"), the Blackfeet Tribal Business Council ("BTBC") contractually recognized and agreed that the Town does in fact ***own*** the utility system at issue in this case. *See* Dkt. 127-1, Exhibit B, p. 2, Section 3.02b & c.

Since October 1, 2013, the status quo of the parties has eroded as the Defendants and their agents have syphoned the Town's utility revenue and utility

customers – most recently, by shutting off water to the Town's customers who refuse to pay TMWC for the utility services provided by the Town. Without injunctive relief, the Town will be left without any utility customers, utility revenue, or the means by which to remedy its losses.

FACTS

From August 1, 1995, to October 1, 2013, the Town and the Blackfeet Tribe provided utility services to customers in the Browning community pursuant to the terms of a MOA. Affidavit of William S. Morris, Jr., ¶ 4; *see also* Dkt. 127-1, Exhibit B. The MOA and amendments recognized and confirmed that the Town owns all facilities and equipment utilized in the production, transmission, and delivery of water from the Flatiron and Willow Creek water sources. Dkt. 127-1, Exhibit B, p. 2, Section 3.02 b. Likewise, the MOA and amendments recognized that the Town of Browning owns all the facilities and equipment connected to the Hodson sewage lagoon. *Id*. at Section 3.02 c.

The Town no longer utilizes the Willow Creek water source, yet it still owns the pipes, facilities and infrastructure connected to the Willow Creek water source. Morris Affidavit, ¶ 5. The Town continues to utilizes the Flatiron water source – which is located west of the Parsons Connection. *Id*. Just as the MOA and amendments had acknowledged, *see* Dkt. 127-1, Exhibit B, Section 3.02 b, the Town owns the water utility system connected to the Flatiron water source –

which includes the water utility system located east of the Parsons Connection. Morris Affidavit, ¶ 5. The Town has never disclaimed, transferred, or conveyed the water and sewer utility system located east of the Parsons Connection. Dkt. 127-1, ¶ 9.

The Town has maintained, repaired, and improved its water utility system. *See* Morris Affidavit, Vendor Detail Query, Exhibit 1. By way of example, in 1999, the Town replaced the water mains located at 2nd and 3rd Avenues southeast in Browning. *Id.* at p. 2, CL 2845, 2888, and 2896. In 2003, the Town replaced a water line running outside of the municipal limits. *Id.* at p. 3, CL 5940 and 5941. In 2005, the Town repaired and replaced twenty-five fire hydrants on the water system located both inside and outside the Town's geographical boundaries. *Id.* at p. 1, CL 8542, 8637, 8719, 8775, 8793, 8800, 8880, and 9421. To date, the Town continues to maintain, repair, and improve its water utility system. Morris Affidavit, ¶ 7.

On July 16, 2014, under the direction of the Environmental Protection Agency, the Town turned on its wells at the Flatiron water source to supplement the water supply to customers in the Browning community. Morris Affidavit, ¶ 8. The Town's water wells are still running. *Id.* The Town continues to supply the Browning community with water from its own wells, which is pumped through the Town-owned water utility system to customers in the Browning community. *Id.*

The Town has eight utility department employees, including the Mayor and Town Manager William S. Morris Jr., who perform maintenance, repair, and service work to the Town's water and sewer utility system. Morris Affidavit, ¶ 9; Affidavit of Dan Madden, ¶ 3; Affidavit of Roger Kicking Woman, ¶ 3; Affidavit of Jerry McNeely, ¶ 3; Affidavit of Victor Running Crane, ¶ 3; Affidavit of Jeri Lee Latray, ¶ 3; Affidavit of Melanie Heavy Runner, ¶ 3.

ARGUMENT

I. The Court has jurisdiction to grant the relief requested by the Town.

Relying on distinguishable authority, the Defendants mistakenly contend that the Town's Motion is the functional equivalent of a quiet title action which would "diminish, even extinguish, the Tribe's control over the Tribe's Two Medicine Reservoir" and tribally owned utility systems. Dkt. 129, pp. 13-15; *citing Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 26 (1997); *Lacano Investments, LLC v. Balash*, 765 F.3d 1068 (9th Cir. 2014). The Defendants' reliance on *Coeur d'Alene* and *Lacano* is misplaced. The Town does not seek to divest the Defendants or the Tribe of any property interest; nor does the Town seek to eliminate the ability of the Defendants or the Tribe to regulate utility operations on the Blackfeet Reservation within the confines of federal law. Put simply, the ownership and control over tribal resources and tribal property is not at issue. Rather, the issue is whether federal law authorizes the Defendants to

exercise control over Town-owned utility system – the very same utility system that the Defendants and the Tribe recognized as Town-owned until October 1, 2013. *See* Dkt. 127-1, Exhibit B, Section 3.02 b.

In *Coeur d'Alene*, the Coeur d'Alene Tribe ("Tribe") sued the State of Idaho and state officials alleging an interest in lands submerged under navigable waterways within the original boundaries of the Coeur d'Alene Reservation. *Coeur d'Alene* at 264-65, 117 S. Ct. 2028. Pursuant to *Ex Parte Young*, the Tribe sought a declaratory judgment to establish its right to use and occupy the lands, and sought an injunction prohibiting Idaho from infringing upon its right to the land. *Id.* at 265. The Court examined the "realities of the relief the Tribe demand[ed]," and found that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id*. at 282. Accordingly, the Court concluded that the Tribe could not maintain the functional equivalent of a quiet title suit. *Id*. at 281-82.

As discussed in *Lacano*, Justice O'Connor's partially concurring opinion in *Coeur d'Alene* further explained the distinction between a typical *Ex Parte Young* action and the quasi-quiet title action brought by the Coeur d'Alene Tribe:

> In her concurrence, Justice O'Connor agreed that "[t]his case is unlike a typical *Young* action," and thus barred by the Eleventh Amendment, for two reasons. First, the Tribe's action was "the functional equivalent of an action to quiet [the Tribe's] title to the bed

> of Lake Coeur d'Alene," which was not acceptable under the Eleventh Amendment because "[a] federal court cannot summon a State before it in a private action *seeking to divest the State of a property interest*." Second, "the Tribe does not merely seek to possess [the] land . . . [but] *seeks to eliminate altogether the State's regulatory power* over the submerged lands at issue." Justice O'Connor concluded that these distinctions from the "typical *Young* action" meant that "the Tribe's suit must be dismissed."

Lacano at 1073 (internal citations omitted) (emphasis supplied).

The distinctions drawn by the *Coeur d'Alene* and *Lacano* courts are not applicable in this case. First, the Town is not attempting to divest the Defendants or the Tribe of a property interest. The proposed injunction relief would not "shift" ownership of the utility system from the Tribe to the Town. Dkt. 129, p. 14. The Town has owned, operated, maintained, and improved the utility system at issue since at least 1934. Dkt. 127-1, ¶ 3; Dkt. 127-1, Exhibit A. Moreover, from August 1, 1995, to October 1, 2013, the BTBC – the governing body of the Tribe – recognized that the Town owns the utility system connected to the Flatiron and Willow Creek water sources – which includes the water utility system located east of the Parsons Connection. Morris Affidavit, ¶¶ 4-5; Dkt. 127-1, Exhibit B, p. 2, Section 3.02 b. Injunctive relief will not divest the Defendants or the Tribe of any property interest. Rather, injunctive relief will prevent the Defendants and their agents from exercising control over the Town's property.

Second, the Town does not seek to eliminate the ability of the Defendants or the Tribe to regulate utility operations on the Blackfeet Reservation within the

confines of federal law. *See Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992). However, Tribal regulatory *authority* is not equivalent to *ownership*. In other words, assuming *arguendo* that the Defendants and the Tribe are federally authorized to regulate the Town's utility operations (an issue which the Town does not concede), the Defendants and the Tribe would not then *own* the utility system simply because they regulate its operation.

As shown above, the Town's Motion is not equivalent to a quiet title action. The issue in this case is whether federal law authorizes the Defendants to exercise control over Town-owned utility system. Federal law expressly prohibits an Indian tribe from "tak[ing] any private property ... without just compensation." 25 U.S.C. § 1302(a)(5).[1] Likewise, the Defendants and their agents may not act beyond the Tribe's federally prescribed authority. *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2012). This is precisely the conduct from which the Town seeks relief. The Defendants and their agents, including TMWC, should be enjoined from further interfering with the ownership, operation, and control of the Town's utility system.

[1]The Town concedes that only habeas corpus relief may be granted under the Indian Civil Rights Act. Thus, citation to 25 U.S.C. § 1302(a)(5) is meant purely to demonstrate that the Defendants and their agents are not authorized by federal law to commandeer the Town's property without just compensation.

II. The Town has met the requirements entitling it to a preliminary injunction and temporary restraining order.

As shown below, the Town's Motion meets the requirements for a preliminary injunction and temporary restraining order.

1. Likelihood of success on the merits.

The Ninth Circuit has recognized that a party may bring an *Ex Parte Young* action against tribal members or officials for prospective injunctive relief. *Burlington Northern R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991); *see also Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002). In order to maintain an *Ex Parte Young* action; 1) the officer sued must have a duty to enforce the challenged law; 2) the action of the officer must constitute an alleged violation of federal law; and 3) the federal law allegedly violated must be the supreme law of the land. *See* Wright & Miller, Federal Practice & Procedure, § 3524.3.

Here, the Defendants have asserted that Blackfeet Ordinance 98 purportedly authorized them "tak[e] over all operations of the . . . water and sewer" utility systems in the Browning community. *See* Dkt. 127-1, Exhibit D, pp. 1-3. However, as the Defendants point out, "Ordinance 98 merely prescribes a rate setting structure and engineering standards for the utility system." Dkt. 129, p. 17. Thus, while the Defendants – as officers and employees of the Tribe – may have

an interest in enforcing the regulatory standards set forth in Ordinance 98, there is no provision within Ordinance 98 which would permit a tribal officer or employee to exercise control over the Town's utility property.

Nor is the Defendants' conduct permitted under federal law. Just as federal law defines the limitations of tribal ordinance enforcement against non-Indian, non-members such as the Town, *see Chilkat, supra*; *Tyonek, supra*, federal law also prohibits an Indian tribe from "tak[ing] any private property . . . without just compensation." 25 U.S.C. § 1302(a)(5); *see also* U.S. Const., amend. V ("nor shall private property be taken for public use, without just compensation"). The Defendants' conduct in interfering with and exercising unauthorized control over the Town's utility system is a clear violation of federal law.

Contrary to the Defendants' assertions, the Town is likely to prevail on the merits of this case. However, a decision on the merits of the case will be worthless to the Town if the Defendants are not enjoined from shutting off water to those customers who continue to pay the Town, or enjoined from threatening the Town's customers with bills and shut off notices. Without relief, the Town will be left without any utility customers, any utility revenue, and any means by which to remedy its losses.

2. The Town is suffering irreparable harm.

The Defendants readily admit that they have disseminated notices and

threats to the Town's utility customers, and have in fact recently shut off water to customers who have failed to pay TMWC. However, the Defendants erroneously contend that such conduct merely demonstrates the *possibility*, rather than *likelihood*, of irreparable harm to the Town. This is patently false. The harm suffered by the Town is more than possible or likely – the harm is a ***fact***. Dkt. 127-1, ¶ 17. The Defendants and their agents have continued to siphon utility revenue and utility customers from the Town. This has been accomplished through threats, disinformation, and utility shut offs designed to force the Town's customers to switch utility providers.

The Ninth Circuit has consistently held that such damage to business and customer base is more than sufficient to demonstrate the *likelihood* of irreparable injury. *See Stuhlbarg Int'l Sales Co. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001); *Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *see also Lillge v. Verity,* 2007 WL 2900568 at *7 (N.D. Cal. Oct. 2, 2007).

3. The balance of hardships favors the Town.

While the Court has the discretion to consider inadmissible evidence when deciding whether to issue a preliminary injunction, *Johnson v. Couturier*, 572, F.3d 1067, 1083 (9th Cir. 2009), it should not go unnoticed that the list of so-called "evidence" relied upon by the Defendants on page 24 of their Response is based

almost entirely on inflammatory rhetoric and unsubstantiated hearsay rampant throughout their supporting affidavits. More importantly, much of this so-called "evidence" is simply not true. The Defendants' "factual" contention that the Town does not own the water utility system at issue in this case is disingenuous, at best. *See* Morris Affidavit, ¶ 4; Dkt. 127-1, Exhibit B, p. 2, Section 3.02 b. The Defendants' contention that the Town does not provide water or sewer service is patently false. *See* Morris Affidavit, ¶ 9; Madden Affidavit, ¶ 3; Kicking Woman Affidavit, ¶ 3; McNeely Affidavit, ¶ 3; Running Crane Affidavit, ¶ 3; Latray Affidavit, ¶ 3; Heavy Runner Affidavit, ¶ 3. The Defendants falsely claim that the Town's Flatiron water well is not running. Morris Affidavit, ¶ 8.

Coupled with the fact that evidentiary support for their argument is clearly lacking, the Defendants' "unclean hands" argument is simply inapplicable to the pending motion. The doctrine of "unclean hands" bars relief to a plaintiff "who has dirtied his hands in acquiring the right presently asserted." *Seller Agency Council, Inc. v. Kennedy Center for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010). The Town is asserting a right of ownership over its utility system – an ownership right that was recognized by the BTBC until the unilateral termination of the MOA on October 1, 2013. Dkt. 127-1, Exhibit B, p. 2, Section 3.02 b. The Defendants have set forth no evidence that the Town's ownership right over its utility system was acquired with "unclean hands." Ironically, the Defendants and

their agents are the parties attempting to acquire the Town's property through inequitable means. In any event, the doctrine of unclean hands is inapplicable to the Town.

Without injunctive relief, the Town will continue to lose utility revenue, utility customers at the hands of the Defendants and their agents. In this regard, the hardship on the Town is evident. The status quo of the parties will not be preserved for a trial on the merits of the Town's claims – or during the pendency of the Defendants' appeal – without a preliminary injunction.

Conversely, the Defendants and their agents, including TMWC, will not be burdened if they are enjoined from interfering with the Town's utility system and operations. Nor have the Defendants claimed or raised any such burden. The balance of hardships clearly favors the Town.

4. An injunction is in the public interest.

The parties agree that the public has an interest in the provision of clean drinking water – a service the Town continues to provide to the Browning community to date. Injunctive relief will not hinder this service. Additionally, since the Town charges its utility customers at the same rates charged by its competitor – TMWC – the public's interest in competitive utility rates is also served.

On the other hand, the public has no interest in any person or entity,

sovereign or not, taking private property without just compensation. Nor is the public interested in tribal officials or tribal companies extinguishing their business competition through threats and coercive messages delivered under the guise of sovereign authority. An injunction is in the public interest.

CONCLUSION

For these reasons, the Town's Motion for preliminary injunction and temporary restraining order should be granted.

DATED this 29th day of December, 2014.

/s/ Derek J. Oestreicher
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CERTIFICATE OF COMPLIANCE

I certify that this brief, excluding the caption, table of contents, table of authorities, and certificate of service, contains less than 3,250 words in compliance with Local Rule 7.1(d)(2)(B).

/s/ Derek J. Oestreicher
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