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

ENROLLED MEMBERS OF THE BLACKFEET TRIBE, et al, **Plaintiffs,** **vs.** **THEDUS CROWE, et al,** **Defendants.**	**CV 15-92-GF-BMM-JTJ** **BRIEF IN SUPPORT OF UNITED STATES' MOTION TO DISMISS**

Defendant, United States of America, moves to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. This court lacks jurisdiction to review Plaintiffs' claims because the United States has not waived its sovereign immunity from suit. Plaintiffs'

have demonstrated neither a basis for jurisdiction nor an applicable waiver of the United States' sovereign immunity. Because of this, Plaintiffs also fail to state a claim upon which this Court may grant relief.

I. This Court Lacks Subject Matter Jurisdiction to hear Plaintiffs' Claims.

It is axiomatic that the United States is immune from suit except as it consents to be sued. The terms of any such consent define the court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Waivers of the government's sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). Such waivers must be strictly construed, and may not be enlarged. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983). This rule of strict construction directs the analysis both with regard to the question of whether the United States has consented to be sued and in determining the scope of any consent that that is given. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33, (1992); *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Plaintiffs here are *pro se*. It is well established that "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007). Nonetheless, while a *pro se* plaintiff "may be entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995). Here, the United States has attempted to construe Plaintiffs' complaint and associated pleadings to discover any possible basis for a waiver of the United States' sovereign immunity and a grant of jurisdiction that would allow this court to review Plaintiffs' claims, and has addressed all possible bases for such jurisdiction below.

While Plaintiffs' complaint here neither states a statutory basis for jurisdiction nor for a waiver of the United States' sovereign immunity, Plaintiffs claim that they "are seeking legal title to all natural resources on or related to the Blackfeet Indian Reservation." Dkt. 1 at 1. They state that they are attempting to stop "illegal dispositions of the Blackfeet tribal property." *Id.* Plaintiffs also challenge the ability of the state of Montana to exercise "adjudicatory jurisdiction over the Blackfeet Indian Reservation and Blackfeet tribal Water Right(s)." *Id.* Plaintiffs additionally seek "a Federal Court Decreed Water Rights Certificate/Title to all water ways originating or passing through the Blackfeet Indian reservation,"

and "compensatory (money) damages for the illegal capture and utilization of the Tribal Water Right." *Id.*

Referencing the letters and other documents filed subsequent to their complaint, it appears that Plaintiffs are in part challenging the Tribes' negotiation and ratification of the Blackfeet Water Compact and Blackfeet Water Rights Settlement Act between the Tribe, the State of Montana, and The Federal Government. In addition, Plaintiffs appear to challenge various aspects of the composition and operation of the Blackfeet Tribal Business Counsel, and to have a number of grievances regarding tribal lands and assets. Dkts. 11-15.

Construing Plaintiffs' pleadings in the most liberal manner possible, it appears that there may be three possible bases under which Plaintiffs could attempt to invoke this court's jurisdiction through waiver of the United States' sovereign immunity. First, because Plaintiffs appear to be challenging the negotiated settlement of the Tribe's water rights, they may be attempting to invoke the United States limited waiver of sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666. Second, Plaintiffs' assertion "that they are attempting to stop "illegal dispositions of the Blackfeet tribal property," and are seeking damages for such dispositions appears to be a takings claim, which would be cognizable under the Tucker Act or Little Tucker Act. *See* 28 U.S.C. § 1491 and 1346. Finally,

Plaintiffs characterize themselves as "Enrolled Members of the Blackfeet Tribe aka Treaty Status Indians" and invoke the United States' responsibilities to the tribe as trustee. As such, Plaintiffs may be attempting to claim jurisdiction pursuant to 28 U.S.C. § 1362. For the reasons set forth below, none of these waivers of the United States' sovereign immunity and concurrent grants of jurisdiction apply to Plaintiffs or their claims, and Plaintiffs' complaint should be dismissed for these and other reasons, explained below.

A. The Blackfeet Water Compact and McCarran Amendment do not provide a Waiver of Sovereign Immunity for Plaintiffs' Claims.

Plaintiffs' claim that they are seeking to enjoin "illegal dispositions of the Blackfeet Tribal Property," appears to be a reference to the negotiated settlement of the Tribes' water rights claims. The negotiation between the three parties culminated with the passage of the Blackfeet Water Compact by the Montana legislature in 2009. Mont. Code Ann. § 85-20-1501. The Compact quantifies the tribes federal reserved water rights; sets forth the terms under which the Tribe may use, lease, contract, or exchange portions of the tribal water right; provides for development of water resources and associated infrastructure to promote economic development; and protects the rights of non-Indian water users, most of whose rights are junior in priority to those of the Tribe. The federal legislation providing

for funding and federal ratification of the compact was passed by Congress and signed into law by President Obama in December of 2016. P.L. 114-322, 130 Stat. 1841, § 3701 et. seq. The Blackfeet Tribe voted to approve both the Compact (the state legislation) and the Blackfeet Water Rights Settlement Act (the federal legislation) in April of 2017, by a vote of 1,894 in favor to 631 against. Blackfeet Tribal Resolution No. 152-2017.

The Compact, which is codified under state law, recognizes that "only Congress can waive the immunity of the United States." Mont. Code Ann. § 85-20-1501, Art. IV(J)(8). In the Blackfeet Water Rights Settlement Act, Congress declined to expand the waiver of the United States' sovereign immunity beyond that already established by the McCarran Amendment. P.L. 114-322, 130 Stat. 1841, at § 3722(a). The McCarran Amendment was enacted in 1952 and waived federal sovereign immunity for the joinder of the United States as a defendant in state general Stream adjudications:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments,

> orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666.

Consistent with the principle that any waiver of the United States' sovereign immunity must be narrowly construed, the Supreme Court has determined that the waiver embodied by the McCarran Amendment provides only a limited waiver of sovereign immunity for purposes of joinder to comprehensive general stream adjudications to which the rights of *all* competing claimants are adjudicated. *See*, *Dugan v. Rank*, 372 U.S. 609, 618-19 (1963); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). It is now well established that the waiver cannot be invoked to subject the United States to private suit to decide priorities between the United States and a particular claimant. *Id.* *See* also *United States v. District Court for Eagle County*, 401 U.S. 520, 525 (1971).

It is clear that the suit brought by Plaintiffs does not invoke the waiver of sovereign immunity embodied by the McCarran Amendment because it does not implicate a general stream adjudication in which the rights of all claimants are adjudicated. In fact, the Complaint denies that such an adjudication can decide the water rights of the Tribe, an assertion that has been explicitly refuted by the Supreme Court. *Colorado River Water Conservation Dist.* 424 U.S. at 810; *see*

also *Orff v. United States*, 358 F.3d 1137, 1143 (9th Cir. 2004), aff'd, 545 U.S. 596 (2005) (a private lawsuit for damages . . . is not the type of suit contemplated by the McCarran Amendment). Plaintiffs therefore may not invoke the limited waiver of sovereign immunity embodied by the McCarran Amendment in order to bring their claims within the jurisdiction of this Court.

B. The Tucker Act and Little Tucker Act do not provide jurisdiction for this Court to review Plaintiffs' Claims.

Plaintiffs' claims for cessation of "illegal dispositions of the Blackfeet tribal property," and for "compensatory (money) damages for the illegal capture and utilization of the Tribal Water Right," suggest something in the nature of a takings claim and/or a claim for monetary damages. Plaintiffs also allege that the illegal uses of Tribal resources are violations of various treaties, executive orders, and tribal enabling documents. Given the nature of these claims, the Tucker Act or the Little Tucker Act present the most reasonable avenues for a waiver of the United States' sovereign immunity. The Tucker Act, 28 U.S.C. § 1491, and Little Tucker Act, 28 U.S.C. § 1346 do not in and of themselves create substantive rights, but serve as jurisdictional provisions that operate to waive the United States' sovereign immunity for claims premised on other sources of law. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). The alternative source of law need not explicitly mandate a suit for damages but must at least be interpretable as requiring

compensation from the federal government. *Id.* To invoke the waivers of sovereign immunity and federal jurisdiction under either Act, a claimant must first identify a source of law that establishes a specific fiduciary or other duty, and second must allege that the government has failed to perform such duty. *Id.* at 290-291.

Even if Plaintiffs argued that the Little Tucker Act waived sovereign immunity, they failed to set forth a statute or constitutional provision that could be considered money mandating. While Plaintiffs allege that they seek to stop "illegal disposition of the Blackfeet tribal property," they neither invoke a constitutional provision nor do they advance any arguments or set of facts that alleges wrongdoing by the government based on the sources of law listed in their complaint:

1. The Treaty of October 17, 1855

The October 17, 1855 treaty (Exhibit A) establishes an agreement for a relationship between the Tribe and the United States, such as establishing hunting grounds, expectations of peaceful relations and establishment of the Blackfeet Reservation.

2. The Act of April 15, 1874

The Act of April 15, 1874 (18 stat 28), in pertinent part, merely establishes boundaries of the Blackfeet Reservation in Montana. It is not plausible that a federal court would deem this statute "money-mandating" for purpose of justifying jurisdiction in a federal district court.

3. The Act of May 1, 1888

The Act of May 1, 1888 (25 stat 113) merely recites and encompasses all previous agreements between the United States government and the Blackfeet Tribe up until that point.

4. The Act of June 12, 1896[1], and the Executive Orders of July 5, 1873, August 19, 1874, and April 13, 1875[2].

Plaintiffs cite these documents for the proposition that they are the real proprietary owners of the Blackfeet Reservation. This Act and executive orders respectively constitute an agreement as to boundaries, set aside land for the Tribe, restore land previously set aside to the public domain, and outline the boundaries of the Blackfeet Reservation.

While some of these treaties, statutes, and executive orders could be considered money mandating under certain circumstances, Plaintiffs have alleged

[1] (29 stat 321).
[2] *See* Exhibit B for the Executive Orders of July 5, 1873, August 19, 1874, and April 13, 1875.

no facts under any of these laws alleging specific money damages or a violation by the United States that would entitle them to such damages. Thus, Plaintiffs have alleged no authority to invoke the jurisdiction of either the Tucker Act or the Little Tucker Act. Even had they done so, only the latter would provide this Court with jurisdiction to review their claims, as Little Tucker Act claims are only provide the district court with concurrent jurisdiction if damages do not exceed $10,000. *United States v. White Mountain Apache*, 537 U.S. 465, 472 (2003). If claims are valued over $10,000, the Court of Federal Claims retains sole jurisdiction. 28 U.S.C. § 1346(a)(2).

Plaintiffs here do not allege a specific amount of monetary damages. They do, however, request "compensatory (money) damages for the illegal capture and utilization of the Tribal Water Right" and "legal title to all natural resources on or related to the Blackfeet Indian Reservation." Dkt. 1 at 1. It is reasonable to assume, therefore, that such assets would be valued in excess of $10,000. This alone is sufficient to divest this Court of jurisdiction. Further, Plaintiffs appear to be requesting, in addition to damages, various forms of equitable relief. Under the Little Tucker Act, federal courts do not have the power to grant equitable relief. *Richardson v. Morris*, 409 U.S. 464, 466 (1973).

C. Only Tribes, not Individual Members, can invoke this Court's Jurisdiction under 28 U.S.C. §1362.

The only remaining alternative source of jurisdiction that might be contemplated by Plaintiffs is that embodied by 28 U.S.C. § 1362. This statute provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." It is well established that this provision applies only to the tribe or representative entity of the tribe, not to individual tribal members. *Dillon v. State of Mont.*, 634 F.2d 463, 469 (9th Cir. 1980); *Quinault Tribe of Indians of Quinault Reservation in State of Wash. v. Gallagher*, 368 F.2d 648, 656 (9th Cir. 1966). The section also does not apply to allow suits by individual tribal members against the tribe. *Solomon v. LaRose*, 335 F. Supp. 715, 717 (D. Neb. 1971).

Plaintiffs are individual tribal members, as is clear from the complaint. While they allege that they are the "proprietor [sic] owners of the Tribal Estate aka Blackfeet Indian Reservation," and purport to bring their suit on behalf of the tribe, it is clear from their filings that they are seeking to challenge actions of the Blackfeet Tribal Business Council. The Council serves as the nine-member governing body of the tribe, and therefore represents the tribe itself. Thus, 28

U.S.C. § 1362 does not provide a waiver of the United States' Sovereign Immunity or a source of jurisdiction for this Court to hear the Plaintiffs' claims.

D. To the extent Plaintiffs' claims sound in tort, their sole avenue for relief would be the Federal Tort Claims Act.

Plaintiffs' claim for damages resulting from "the illegal capture and utilization of the Tribal Water Right." (Dkt. 1 at 2). This could be considered as a claim for the tort of conversion. To the extent this is the case, the Federal Tort Claims Act would constitute Plaintiffs' only potential avenue for relief, as the Act provides a limited waiver of the United States' sovereign immunity from suit by allowing claims for damages for certain torts sounding under state law. 28 U.S.C. § 1346(b).

However, a suit may be brought under the FTCA only after the plaintiff has properly filed an administrative tort claim pursuant to 28 U.S.C. § 2675(a) with the federal agency whose acts give rise to the claim. Because the United States is immune from suit except insofar as it consents to be sued, *United States v. Mitchell*, 463 U.S. 206, 2012 (1983), the statutory requirement that a potential litigant must first submit a claim to the agency is a jurisdictional limitation. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). In this case, Plaintiffs have not filed an administrative claim as required by the statute and cannot avail

themselves of the United States' waiver of its sovereign immunity or this Court's jurisdiction under the FTCA.

II. Plaintiffs Fail to State a Claim Upon Which Relief May be Granted.

Plaintiffs' complaint also fails to state a claim upon which relief can be granted. Plaintiffs' Complaint fails to state any cognizable legal theory, much less allege specific facts to support one. Lacking both legal arguments and supporting facts, the United States is unable to respond to Plaintiffs' arguments without a tortuous attempt to interpret what those arguments might be. Factual allegations must be enough to raise a right to relief "above the speculative level." This "plausibility" standard does not require heightened fact pleading of specifics. Rather, it requires enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (1955). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (internal quotations omitted); *Robertson v. Dean Witter Reynolds, Inc*., 749 F.2d 530, 533-34 (9th Cir. 1984) (Dismissal can be based on lack of a cognizable legal theory or absence of sufficient facts alleged under a cognizable legal theory); *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F3d 1286, 1297 (9th Cir. 2015) (Conclusory allegations of law are

insufficient to defeat a motion to dismiss).

Even though greater latitude is given to *pro se* litigants at the pleading stage, federal courts will still dismiss a plaintiffs' case if their pleadings diverges too markedly from the pleading standard set forth by the Federal Rules of Civil Procedure and the United States Supreme Court. *Brazil v. U.S. Dept. of Navy*, 66 F.3d at 193, 199 (9th. Cir. 1995). A *pro se* plaintiff must still allege facts sufficient to allow a reviewing court to determine that a claim has been stated, and, similarly, a court may not supply essential elements of a claim or facts that were not pleaded. *Ferdik v. Bonzelet*, 963 F.3d 1258, 1261 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

Instead of advancing legal theories with specific factual allegations alleging wrong-doing by the government, Plaintiffs' complaint contains conclusory recitations of laws and treaties devoid of *any* facts that establish they are entitled to receive any of the relief they have requested. (Dkt. 1). The district court should dismiss plaintiffs' cause of action for failure to state a claim for which relief can be granted.

III. Additional Grounds for Dismissal

A. The District Court should dismiss Plaintiffs' Complaint because Plaintiffs failed to join a necessary and indispensable party.

Plaintiffs identify themselves as "the Enrolled Members of the Blackfeet Tribe," and seek "title to all the natural resources on or related to the Blackfeet Indian Reservation." Yet the Blackfeet Tribe is not a party to this action. An absent party is indispensable if "in equity and good conscience," the court cannot allow the action to proceed in its absence. *Makah v. Verity*, 910 F.2d 555, 557 (9th Cir. 1990). The Blackfeet Tribe, through its governing body, the Blackfeet Tribal Business Council, has negotiated a Compact with the United States and the State of Montana to adjudicate all claims regarding water on and appurtenant to tribal lands. This renders the Blackfeet Tribe a necessary and indispensable party to this case. *Pit River Home and Agricultural Coop Assn. v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994).

B. Plaintiffs' treaty-based claims are barred by the Indian Claims Commission Act and 25 U.S.C. § 2501.

Even assuming that Plaintiffs, who self-identify as an entity as something other than the Blackfeet Tribe, can bring treaty based claims, these claims would be barred by the Indian Claims Commission Act ("ICCA"). The ICCA was enacted in 1946 and established the Indian Claims Commission ("ICC") to "hear

and determine … claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States." 60 Stat. 1049. The ICCA granted exclusive jurisdiction to the ICC for: "(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit." ICCA § 2, 60 Stat at 1050. Plaintiffs lack the ability to bring such claims, but even if they possessed it, the claims would be subject to the exclusive jurisdiction of the ICC, and would be defeated in any case by the ICCA's five-year statute of repose. ICCA § 12, 60 Stat. 1052.

IV. Conclusion

This Court lacks subject matter jurisdiction to review Plaintiffs' complaint. Plaintiffs have adduced no argument that would allow the Court to conclude that the United States has waived its sovereign immunity with regard to these Plaintiffs. Plaintiffs moreover fail to state a cognizable legal theory upon which the Court could grant relief, even if it possessed jurisdiction to hear Plaintiffs claims. Finally, other statutory provisions and rules prevent Plaintiffs from adjudicating

their claims before this Court. For the foregoing reasons, the Court should dismiss Plaintiffs' claims against the United States.

DATED this 18th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,757 words, excluding the caption and certificates of service and compliance.

DATED this 18th day of September, 2017.

/s/ MELISSA A. HORNBEIN
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2017, a copy of the foregoing document was served on the following person by the following means.

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