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UNITED STATES OF AMERICA

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' AMENDED MOTION TO DISMISS**

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INTRODUCTION AND PROCEDURAL HISTORY

Federal Defendants move this Court to dismiss Plaintiffs' amended complaint in the above-captioned matter. Plaintiffs have not separately filed an amended complaint in this matter, but a brief recap of the procedural history reveals that *pro se* Plaintiffs may have intended their Motion for Leave to File Amended Complaint (Doc. 29) to include their amended claims. Plaintiffs filed their initial complaint (Doc. 1) in October of 2015. The United States was not properly served until July 18, 2017. (Doc. 17). The United States filed its Motion to Dismiss Plaintiffs' initial complaint on September 18, 2017. (Doc. 19).

At the scheduled hearing on the United States' Motion to Dismiss, Plaintiffs submitted a letter to the Court, which the Court construed as a motion for continuance. (Doc. 27). The United States did not oppose Plaintiffs' motion and this Court granted a 120 day continuance, rescheduling the hearing on the United States' Motion to Dismiss for March 13, 2018. (Doc. 28). A predicate for Plaintiffs' requested continuance was that Plaintiffs wished to retain counsel. The Court ordered that counsel for Plaintiffs should file a notice of appearance, and that Plaintiffs had until February 21, 2018 to file any response brief opposing dismissal. (*Id.*).

Plaintiffs did not file a response and did not file a notice of appearance. Instead, on February 14, 2018, Plaintiffs, still *pro se*, filed a Motion for Leave to File an Amended Complaint. (Doc. 29). Again, the United States did not oppose Plaintiffs' motion, but moved to vacate the hearing scheduled for March 13, 2018. (Doc. 30). The Court granted Plaintiffs leave to amend their complaint and ordered that the United States should have "21 days from the date the Amended Complaint is filed to file their answer." (Doc. 31). Plaintiffs have not filed an amended complaint in response to the Court's Order, which was entered March 6, 2018, more than two months ago. Because Plaintiffs are *pro se*, their pleadings must 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). Plaintiffs' motion for leave to amend states that a copy of their amended complaint is attached to the motion. (Doc. 29 at 1). Despite the fact that no document purporting to be a complaint or amended complaint was attached to Plaintiffs' motion, the United States concludes that Plaintiffs intended their motion to also constitute their amended complaint.

Proceeding on this assumption, the foregoing constitutes the United States' Amended Motion to Dismiss. The United States respectfully requests

this Court to issue a ruling on its motion. The integrity of the Blackfeet Tribal Business Council and the Blackfeet Compact and Water Rights Settlement Act—two components of a tripartite negotiated agreement between three sovereign governments—hangs in the balance and Plaintiffs' claims impugn a historic negotiated settlement between the Tribe, the United States Government, and the State of Montana that was approved by the United States Congress.

Plaintiffs assert that "the new complaint maintains the counts and allegations . . . from the original complaint but accounts for significant factual and procedural developments that have occurred since the original complaint was filed in October 2015. (Doc. 29 at 1). While the balance of Plaintiffs' amended assertions go to the tribal referendum on the Compact and associated education and outreach efforts, which Plaintiffs characterize as fraudulent, the amended complaint does not appear to raise any distinct or novel legal claims, but rather attempts to provide additional background and subsequent history pertaining to the claims articulated in Plaintiffs' initial Complaint. More importantly, the amended complaint does not address any of the legal deficiencies identified by the United States in its initial Motion to Dismiss.

Defendant, United States of America, moves to dismiss Plaintiffs' amended 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 and because Plaintiffs lack standing. 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.

ARGUMENT

I. Plaintiffs' Complaint Should be Dismissed Because Plaintiffs Lack Standing

Plaintiffs designate themselves "Enrolled Members of the Blackfeet Tribe." Plaintiffs have failed to demonstrate, however, that they have any legal authority to speak for the Tribe as an organizational entity or that they have individual standing to pursue their claims.

a. No Individual Standing

Standing to sue is a doctrine rooted in the traditional understanding of federal courts' Article III powers. "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) *citing Warth v. Seldin* 422 U.S. 490, 498 (1975). The Supreme Court has established, and the Ninth Circuit has confirmed, that standing requires plaintiff to demonstrate at least three basic elements. The plaintiff must have suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant,

and that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *United States v. Van Dyck*, 866 F.3d 1130 (9th Cir. 2017) (finding a party must have an "actual or imminent invasion of a legally protected, concrete, and particularized interest," "a causal connection between the injury and the conduct complained of," and the likelihood "that the injury will be redressable by a favorable decision"). The Supreme Court has held that "at an irreducible minimum, Art. III requires plaintiffs to establish that they personally have suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the conduct can be fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

Plaintiffs bear the burden of clearly alleging facts demonstrating each element of standing. *Spokeo*, 136 S. Ct. *at* 1547; *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 645 (9th Cir. 2016) (plaintiff has burden of showing injury, causation, and redressability to establish standing). In this case, Plaintiffs have failed to adequately plead any element of standing. At the outset, they have failed to demonstrate they have personally suffered a particular injury created by the United States. Perhaps more importantly,

Plaintiffs neither demonstrated nor even argued that the Court has the ability to grant the relief they claim—i.e. that title to all the natural resources held by the Blackfeet Tribe could be transferred to their possession. Neither this Court nor the Federal Defendants can take land held by a sovereign Indian nation and transfer it to a group of private individuals. To do so would violate the United States Constitution and would be contrary to the United States' trust responsibilities to the Blackfeet Tribe.

b. Plaintiffs Lack Organizational Standing

In addition to lacking individual standing, Plaintiffs also fail to demonstrate organizational standing to speak on behalf of the Blackfeet Tribe or any other entity. Plaintiffs are prevented from arguing their case as an organizational entity because they are not represented by a licensed attorney. Plaintiffs contend they are members of a group called "Enrolled Members of the Blackfeet Tribe (or aka Blackfeet Treaty Status Indians)," yet have commenced this action in federal court as *pro se* litigants. This combination of facts prevents a federal court from exercising jurisdiction over this matter. With very limited exceptions, parties in federal court "may plead or conduct their own cases personally or be represented by counsel. 28 U.S.C. § 1654. In addition, the Local Rules require that:

> (a) [a]ny individual acting without an attorney must appear personally and may not delegate that duty to any other person who is not a member of the bar of this court…; (b) [a]ny entity other than an individual, including but not limited to a corporation, an unincorporated association, a partnership, or a union, may appear only by an attorney." L.R. 83.8.

Even if Plaintiffs retained a licensed attorney, however, their self-styled organization would lack standing. An entity may have standing to sue in federal court based on either an injury to the organization in its own right (associational standing) or its status as the representative of its members who have been injured (representational standing). *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 556 (1996).

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). A plaintiff has the burden to demonstrate standing for each claim that it asserts. *Wild Earth Guardians v. United States EPA*, 759 F.3d 1064, 1070 (9th Cir. 2014); *citing DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Plaintiffs fail to plead any facts about their organization that would allow it to represent their interests. Plaintiffs have, moreover, failed to demonstrate that they have individual standing to bring their claims, a prerequisite to associational standing. *Friends of the Earth*, 528 U.S. at 181. Plaintiffs also lack associational standing because the trine underlying associational standing does not operate in reverse. Membership in an organization does not confer standing to sue on the entity's behalf. The premise behind associational standing that permits organizations to sue on behalf of their members is that an individual member implicitly authorizes the group to sue on his or her behalf. But in accepting the individual's membership, the association gives no reciprocating signal that the member represents *its* interests. *Glanton v. Advance PCS, Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006). For this reason, Plaintiffs may not sue on behalf of the Blackfeet Tribe simply by virtue of their status as enrolled members.

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

In addition to Plaintiffs' lack of standing, the Court lacks subject matter jurisdiction over 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 dictates the analysis of whether the United States has consented to be sued, and in determining the scope of any such consent. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33, (1992); *Lane v. Pena*, 518 U.S. 187, 192 (1996).

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, amended 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.

Plaintiffs' initial Complaint states that they "are seeking legal title to all natural resources on or related to the Blackfeet Indian Reservation" and that they are attempting to stop "illegal dispositions of the Blackfeet tribal

property." (Doc. 1 at 1). 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 Council, and to have a number of grievances regarding tribal lands and assets. (Docs. 11-15, 29). In their motion to amend their complaint, which Defendants here construe as encompassing their amended complaint, Plaintiffs assert that the referendum election through which the Tribal membership adopted the Blackfeet Water Compact violated the voting rights of tribal members living off the reservation and was fraudulent in a number of ways. (Doc. 29 at 2-3). Plaintiffs further assert that the election process was fraudulent in various ways, including

misleading tribal members to believe that they would receive a per-person financial benefit if the Compact passed. (Doc. 29 at 3). In addition, Plaintiffs assert that the Compact removes title to various waterways on the Reservation from tribal ownership, thus injuring the Tribe collectively and Plaintiffs individually. (Doc. 29 at 3).

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' amended complaint should be dismissed for the reasons set forth 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 negotiated settlement process was established by the Montana Legislature in 1979, recognizing that federal and tribal reserved water rights have the potential to create significant conflicts between private, tribal, and federal water users. The Blackfeet Compact quantifies the reserved water rights of the Tribe while seeking to protect the rights of non-tribal water users on and

off the reservation. The Compact includes $49 million in state funding for water related infrastructure projects on the Blackfeet Reservation.

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 Federal Legislation provides $422 million in federal funding for water related infrastructure, as well as ratifying the quantification of the Tribe's reserved water rights agreed to in the Compact. 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.[1]

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.

[1] In their Motion for Leave to File Amended Complaint, which the United States here construes as containing Plaintiffs' amended Complaint, Plaintiffs take issue with the referendum vote tally, claiming it does not meet the requirements of Article IX of the Blackfeet Constitution because 1/3 of the eligible voters did not vote. Article IX requires that "one-third (1/3) of the eligible voters of the Blackfeet Tribe *or* a majority of the members of the tribal council" are required to submit "any enacted or proposed ordinance or resolution of the council" to popular referendum "and the vote of *a majority* of the qualified voters *voting in such referendum* shall be conclusive and binding on the tribal council." Blackfeet Constitution, Article IX (emphasis added). Article IX thus does not require 1/3 of the qualified voters to participate in the election as Plaintiffs allege.

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 in 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); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983).

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 argument 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 establishing 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[2], and the Executive Orders of July 5, 1873, August 19, 1874, and April 13, 1875[3].

[2] (29 stat 321).

[3] *See* Exhibit B for the Executive Orders of July 5, 1873, August 19, 1874, and April 13, 1875.

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 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 provide the district court with concurrent jurisdiction only 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." (Doc. 1 at 1). It is

reasonable to assume, therefore, that such assets would be valued in excess of $10,000. This circumstance alone is sufficient to divest this Court of jurisdiction under the Tucker Act. 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 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 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 damages resulting from "the illegal capture and utilization of the Tribal Water Right" (Dkt. 1 at 2), and "giving away a **Tribal Treaty Right** without **financial** or **legal compensation**." (Dkt 29 at 9)(emphasis in original). This could be considered as a claim for the tort of conversion. The Federal Tort Claims Act would constitute Plaintiffs' only potential avenue for relief for such a claim, 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.

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

Plaintiffs' initial and amended complaints also fail to state a claim upon which relief can be granted. Neither the Complaint nor the amended complaint articulate 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 nonetheless dismiss a plaintiffs' case if the pleadings diverge 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 wrongdoing 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.

IV. 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).

CONCLUSION

This Court lacks subject matter jurisdiction to review Plaintiffs' Complaint. Plaintiffs lack standing to bring this suit and 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. Plaintiffs—a handful of individuals Tribal members—are asking the Court to overturn a negotiated settlement that was ratified by three sovereign governments, quantifies extensive Tribal water rights, infuses nearly $470 million in infrastructure funding to the Blackfeet Reservation, and was ratified by Congress. Plaintiffs lack standing to make this request, much less a valid argument as to why the Court should grant it. For the foregoing reasons, the Court should dismiss Plaintiffs' claims.

DATED this 15th day of May, 2018.

KURT G. ALME
United States Attorney

/s/ MELISSA A. HORNBEIN
Assistant U.S. Attorney
Attorney for Defendant

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 5,577 words, excluding the caption and certificates of service and compliance.

DATED this 15th day of May, 2018.

/s/ MELISSA A. HORNBEIN
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2018, a copy of the foregoing document was served on the following person by the following means**.**

1 CM/ECF
____ Hand Delivery
2-7 U.S. Mail
____ Overnight Delivery Service
____ Fax
____ E-Mail

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