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**United States of America**

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

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| **ENROLLED MEMBERS OF THE BLACKFEET TRIBE, et al,**<br><br>**Plaintiffs,**<br><br>**vs.**<br><br>**THEDUS CROWE, et al,**<br><br>**Defendants.** | **CV 15-92-GF-BMM-JTJ**<br><br>**UNITED STATES' RESPONSE TO PLAINTIFFS' OBJECTIONS TO FINDINGS AND RECOMMENDATIONS** |

Following briefing and oral argument on the United States' Amended Motion to Dismiss, Doc. 32, Magistrate Johnston entered Findings and Recommendations on September 5, 2018. Doc. 43. Magistrate Johnston found that "the claims asserted by Plaintiffs have their genesis in an intra-tribal dispute."

Doc. 43 at 5. As such, these claims are grounded in tribal law and "[r]esolution of Plaintiffs' claims would necessarily require the Court to interpret Blackfeet tribal law and the Blackfeet Constitution. Federal courts lack jurisdiction to resolve intra-tribal disputes that require the court to interpret tribal law or a tribal constitution." *Id.* at 5-6. Plaintiffs Duane Many Hides and Roy Ingram separately filed objections to the Findings and Recommendations on September 24, 2018. These Objections are untimely, as both 28 U.S.C. §636(b)(1) and the Local Rules allow 14 days from the entry of a Magistrate's findings and recommendations for any objections to be filed. L.R. 27.3(b). While failure to timely object to a magistrate judge's findings and recommendations may not automatically waive the right to appeal the district court's conclusions of law, it does waive the right to challenge those findings. *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015). Moreover, failure to timely file objections may bar de novo review of Plaintiffs' objections by the district judge. Doc. 43 at 9. Even had Plaintiffs' Objections been timely filed, they do not identify any specific portion of the Findings or Recommendations as required by L.R. 27.3(a). Thus, Plaintiffs' objections should not be entitled to de novo review.

Plaintiffs raise no new issues in their objections that would undermine the rationale behind Judge Johnston's Findings and Recommendations. Plaintiff Roy

Ingram asserts again that the election in which the Tribal membership voted to adopt the Blackfeet Water Compact was conducted fraudulently. Plaintiff acknowledges that "[t]he manner of our review is our enforcement of rules regulations and laws pertaining to our constitution." Doc. 48. He asks the Court to force the BIA to enforce a trust responsibility Plaintiffs allege has been violated. Similarly, Plaintiff Duane Many Hides objected to the adoption of the Water Compact, the allegedly illegal election by which the Blackfeet Tribal Membership voted to adopt the Compact, and the alleged contents of the Compact itself. Both Objections raise issues Plaintiffs raised multiple times in their prior pleadings. Neither responds to Magistrate Johnston's Findings and Recommendations in the manner required by L.R. 72.3 by itemizing each factual finding to which they object, identifying evidence in the record they believe contradicts the finding, and identifying each recommendation to which they object and setting forth the authority they believe contradicts that recommendation. In fact, Plaintiffs Objections do not appear to take issue with the findings themselves, other than insofar as they lead to the recommended dismissal of Plaintiffs' claims.

Notwithstanding the fact that Plaintiffs' allegations of fraud are unsupported and that their assertions about the Compact are factually incorrect, the central issue Plaintiffs seek to relitigate through their Objections is the very basis for Magistrate

Johnston's Findings and Recommendations: namely, a purely intra-tribal matter over which this court lacks jurisdiction. Doc. 43 at 6, citing *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *U.S. Bancorp v. Ike*, 171 F. Supp.2d 1122, 1125 (D. Nev. 2001). In particular, both Plaintiffs Ingram and Many Hides appear primarily to challenge the tribal referendum election by which the Compact was adopted by the Tribal Membership.

Thus, because Plaintiffs raise no new issues in their Objections, and the issues they do raise were either conclusively addressed by Magistrate Johnston, as well as by the United States in previous briefing, or were outside the scope of the Court's jurisdictional reach, the United States respectfully requests the Court to adopt Magistrate Johnston's Findings and Recommendations in their entirety. Judge Johnston appropriately limited his analysis to a single controlling issue, that of the Court's lack of jurisdiction over purely intra-tribal disputes: "the proper forum for Plaintiffs to challenge the validity of the Blackfeet Water Compact and the related tribal referendum election is the Blackfeet Tribal Court." Doc. 43 at 7, *citing Sac & Fox Tribe of the Mississippi in Iowa, Election Bd.*, 439 F.3d at 835. Nonetheless, it is important to reiterate the additional reasons that dismissal is appropriate in this case, as they further bolster Judge Johnston's recommendation that Plaintiffs' case be dismissed with prejudice.

**1. Plaintiffs Lack Standing**

Plaintiffs bear the burden of clearly alleging facts demonstrating each element of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *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 cannot show 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 have the ability to 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.

Plaintiffs also lack standing to bring this suit on behalf of the Tribe. An entity 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). Plaintiffs contend they are members of a group called "Enrolled Members of the Blackfeet Tribe (or aka Blackfeet Treaty Status Indians)," yet they do not possess any imprimatur from the Tribe itself to represent collective Tribal interests or the interests of any other individual Tribal members.

**2. No Subject Matter Jurisdiction Because no Waiver of Sovereign Immunity**

In addition to lacking jurisdiction to adjudicate purely intra-tribal disputes, the Court lacks jurisdiction because the United States has not waived its sovereign immunity from suit, and the Court therefore lacks subject matter jurisdiction to adjudicate Plaintiffs' claims against the United States. *See 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, in both its initial and amended motions, 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 again addressed any 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.* 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 four 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 terms of the Compact itself and/or 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 might be cognizable under the Tucker Act or Little Tucker Act. *See* 28 U.S.C. § 1491 and 1346. Third, 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. Lastly, it is possible that Plaintiffs' claims sound in tort, in which case their sole jurisdictional avenue for

relief would reside in the Federal Tort Claims Act, 28 U.S.C. § 1346(b). For the reasons set forth below, and explained at greater length in the United States' Brief in support of its Amended Motion to Dismiss (Doc. 33) none of these waivers of the United States' sovereign immunity and concurrent grants of jurisdiction apply to Plaintiffs or their claims.

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

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. 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 a takings claim and/or a claim for monetary damages. Plaintiffs also allege that the allegedly 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. These include the Treaty of October 17, 1855, the Act of April 15, 1874, the Act of May 1, 1888 (25 stat 113), the Act of June 12, 1896, and the Executive Orders of July 5, 1873, August 19, 1874, and April 13, 1875. Plaintiffs cite these documents for the proposition that Plainiffs are the real proprietary owners of the Blackfeet Reservation. These treaties, acts and executive orders respectively constitute agreements 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 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).

The two remaining possible additional sources of jurisdiction are equally inapplicable to Plaintiffs' claims. First, only tribes, not individual tribal members, may invoke federal jurisdiction under 28 U.S.C. § 1362, which provides for original jurisdiction over civil actions brought by tribes. *See 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). Second, to the extent Plaintiffs' claims sound in tort, the Federal Tort Claims Act would constitute Plaintiffs' only potential avenue for relief. Suit may only be brought under the FTCA, however, when a plaintiff has properly filed an administrative tort claim pursuant to 28 U.S.C. § 2675(a). 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.

**3. Plaintiffs Fail To State a Claim for Relief**

Plaintiffs failed to state a claim on which relief may be granted. Neither Plaintiffs' Complaint nor their Amended Complaint articulated any cognizable legal theory, much less allege specific facts to support one. 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). Even though greater latitude is given to *pro se* litigants at the pleading stage, federal courts will nonetheless dismiss a plaintiff's 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). Plaintiffs failed to meet this threshold requirement in either their Complaint or Amended Complaint.

(Doc. 1).

**4. Plaintiffs Failed to Join a Necessary and Indispensable Party**

Finally, Plaintiffs have failed to join a necessary and indispensable party in the Blackfeet Tribe itself. While Plaintiffs term themselves "Enrolled Members of the Blackfeet Tribe" they do not represent the Tribe and have not given the Tribal Business Counsel, or any other entity entitled to represent the Tribe's interests, an opportunity to respond to their allegations. Plaintiffs are a small group of

individual Tribal members disaffected for various reasons with a decision that was the culmination of years of hard fought negotiation between three sovereign entities and was supported by a substantial majority of the Tribal members who participated in the referendum election. 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, negotiated a Compact with the United States and the State of Montana to adjudicate all claims regarding water on and appurtenant to tribal lands. During the course of this negotiation, the Tribal negotiators extracted substantial concessions from both the state and federal governments on behalf of the Tribe and individual Tribal members. The negotiations were conducted openly and with dozens of opportunities for public comment and involvement. If these Plaintiffs take issue with the way the Compact was negotiated or adopted, the most appropriate entity to address those concerns to is the Blackfeet Tribe, as represented by the Tribal Business Counsel. 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).

The United States urges the Court to adopt Judge Johnston's Findings and Conclusions in their entirety. He appropriately concluded that this Court lacks jurisdiction to adjudicate Plaintiffs' claims, and that tribal court is their only venue for such adjudication. While it is true that Plaintiffs' only avenue for relief *vis a vis* the Tribe is tribal court, Plaintiffs also have the ability to object to the Compact through the avenue of the Montana Statewide General Stream Adjudication via the Montana Water Court. This is the forum created to hear disputes over water rights codified under state law. Thus, the negotiated settlement process to which Plaintiffs object provides them with an additional forum in which to challenge the Compact. They do not have that forum in federal district court, and their claims should be dismissed for the reasons articulated by Judge Johnston, as well as those enumerated here and in the United States' Amended Motion to Dismiss.

**DATED** this 9th day of October, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2018, a copy of the foregoing document was served on the following person by the following means**.**

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