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IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v. UNITED STATES DEPARTMENT OF INTERIOR SECRETARY SARAH "SALLY' JEWELL; UNITED STATES BUREAU OF INDIAN AFFAIRS; JOCKO VALLEY IRRIGATION DISTRICT; MISION IRRIGATION	)	Case No. CV-14-44-M-DLC **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

DISTRICT; FLATHEAD IRRIGATION DISTRICT; DISTRICT COURT FOR THE TWENTIETH JUDICIAL DISTRICT OF MONTANA; MONTANA WATER COURT; MICHAEL G. MCLATCHY, BLANCHE CREPEAU, and ALEX CREPEAU; JUDY HARMS and ROBERT HARMS; BETTY A. STICKEL and WAYNE D. STICKEL; and AN UNKNOWN NUMBER OF JOHN DOE DEFENDANTS CLAIMING FIIP IRRIGATION WATER AS A PERSONAL WATER RIGHT, Defendants.	)	

Plaintiff Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (hereafter "Tribes"), brings this complaint for injunctive and declaratory relief and allege as follows:

PARTIES

1. The Plaintiff Confederated Salish and Kootenai Tribes ("Tribes") are a federally-recognized confederation of Indian tribes with a government operating in accordance with the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. The Tribes reserved from their aboriginal territory the Flathead Indian Reservation ("FIR") as their exclusive and permanent homeland pursuant to the Hellgate Treaty of July 16, 1855 (12 Stat. 975).

2. Defendant Bureau of Indian Affairs ("BIA") is a component of the United States Department of Interior, and is the owner of Flathead Indian Irrigation Project (hereafter "FIIP"), an Indian irrigation project created for the benefit of the Indians of the Flathead Indian Reservation pursuant to the 1904 Flathead Allotment Act, discussed below.

3. Defendant Secretary of Interior Sarah "Sally" Jewell, ("SOI") is the federal official responsible for the proper administration of the BIA, including the FIIP, and is the principal officer of the United States responsible for upholding the federal fiduciary relationship over tribal and Indian resources.

4. The Defendant Jocko Valley Irrigation District is an irrigation district located on the Flathead Indian Reservation, is organized under the laws of Montana and was created pursuant to Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

5. The Defendant Mission Irrigation District is an irrigation district located on the Flathead Indian Reservation, organized under the laws of Montana and was created pursuant to Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

6. The Defendant Flathead Irrigation District is an irrigation district located on the Flathead Indian Reservation, organized under the laws of Montana pursuant to

the Congressional mandate contained in the Congressional Act of May 10, 1926 (infra).

7. All three Defendant irrigation districts are located within FIIP boundaries and entirely within the FIR.

8. The Defendant irrigation districts do not operate, manage or maintain FIIP nor do they employ any equipment, people or entity to do so.

9. The Defendant BIA, owner of FIIP, is presently reassuming its federal responsibility to operate and maintain FIIP from a recently defunct cooperative management entity comprised of BIA, the Tribes and the now-defunct Flathead Joint Board of Control. The FJBC was formerly a state-based representational entity that acted on behalf of the three Defendant irrigation districts.

10. Defendant District Court for the Twentieth Judicial District of Montana is currently exercising jurisdiction over the exclusively federal subject matter raised in this Complaint, ownership of irrigation water received from FIIP, in a case called Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control, Cause No. DV-12-327. Neither the Tribes nor the United States are party to that piecemeal water right adjudication.

11. The Defendant District Court for the Twentieth Judicial District is also exercising jurisdiction over a case nearly identical to Western Water Users

Association, LLC in a case entitled Ingraham v. Flathead Joint Board of Control, Cause No. DV 13-102. Neither the Tribes nor the United States are party to that suit and the Flathead Joint Board of Control, an entity created under Montana law, has since dissolved and ceases to exist.

12. Defendant Montana Water Court is currently exercising jurisdiction over the exclusively federal subject matter of this Complaint, ownership of irrigation water received from FIIP, in In Re Adjudication of Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground of the Federal Flathead Indian Reservation, Basin 76L, Case No WC-2013-05. The primary litigants in this Water Court case are the same as in the Western Water Users Association, LLC case and are raising the same questions of ownership of water rights under FIIP. The Tribes have not waived their sovereign immunity to this piecemeal water right adjudication.

13. Defendants Michael G. McLatchy, Blanche Crepeau and Alex Crepeau are co-owners of water right claim number 76l-142449 00, claiming the FIIP Jocko K Canal as their source of irrigation water.

14. Defendants Judy M. Harms and Robert E. Harms are co-owners of water right claim number 76L 153879 00, claiming the FIIP Upper Dry Fork Reservoir as their source of irrigation water.

15. Defendants Betty A. Stickel and Wayne D. Stickel are co-owners of water right claim number 76L 143757 00, claiming the FIIP Camas Canal as their source of irrigation water.

16. The Tribes believe there are other persons who claim as a personal water right water diverted from FIIP irrigation facilities and therefore should be named Defendants, but Montana Department of Natural Resources and Conservation water rights records do not clearly disclose that information.

JURISDICTION AND VENUE

17. This is a suit for declaratory and injunctive relief. Jurisdiction is proper under the Declaratory Judgment Act, 28 U.S.C. § 2201. Federal question jurisdiction exists under 28 U.S.C. § 1331. Jurisdiction also arises under 28 U.S.C. § 1362, as this is a civil action brought by an Indian tribe and the matter in controversy arises under the Constitution, laws and treaties of the United States.

18. Venue is proper in Missoula Federal District Court pursuant 28 U.S.C. § 1391 (b) and 28 U.S.C. § 1362. Venue is also proper under Rule 3.2 of the Local Rules of Procedure of the United States District Court for the District of Montana.

FACTS

A. BACKGROUND.

19. The Tribes seek a declaration of the ownership of irrigation water that is collected, stored, diverted, and delivered by the Flathead Indian Irrigation Project of the Bureau of Indian Affairs, United States Department of Interior.

20. The reason the Tribes seek to enjoin the several State Court proceedings is that the parties to those multiple suits appear in each case to be attempting to relitigate issues already settled by the Federal Courts; that the Hellgate Treaty impliedly reserved all waters on the FIR to the Tribes, that such waters, being reserved, water rights could be obtained only as specified by Congress, and that the waters collected and distributed by the FIIP are subject to federal law. They also appear to be attempting to circumvent the McCarran Amendment requirement for a general *inter sese* water rights adjudication in the absence of necessary and indispensable parties, the Tribes and the United States. The litigants in each case seek rulings that either individual irrigators own private water rights delivered by FIIP, that the defunct Flathead Joint Board of Control owns water rights to the water delivered by FIIP or that the three Defendant irrigation districts own water rights for the irrigation water delivered by the FIIP.

21. The Tribes do not seek in this case to quantify the volume of any water rights of the Tribes or of any person or legal entity who may assert a claim to water rights on or off of the Flathead Indian Reservation (hereafter "FIR").

22. The United States Supreme Court has concluded that state courts have a "solemn obligation to follow federal law" when adjudicating the pervasive aboriginal and reserved water rights of the Petitioner Tribes. San Carlos Apache Tribe v. Arizona, 463 U.S. 545, 571 (1983).

23. The Montana Supreme Court has declared that state courts have a solemn obligation to follow federal law when adjudicating Indian aboriginal and reserved water rights. State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 Mont. 754, 768 (1985).

24. The Tribes seek this declaration of ownership to frame the federal law under which water for irrigation on the FIR will be adjudicated and quantified in a proper general *inter sese* water rights adjudication under the Montana Water Use Act that satisfies the McCarran Amendment, 43 U.S.C. § 666.

25. The Tribes reserve the right to challenge the adequacy of the Montana Water Use Act adjudication as applied to their water rights, a right acknowledged in Greely, supra at 768.

B. ABORGINAL HOMELAND.

26. Prior to July 16, 1855, the Tribes held aboriginal title to much of present day Montana and all it contained, including what is now called the Flathead Indian Reservation. Confederated Salish and Kootenai Tribes v. United States, 193 Ct.Cl. 801, 437 F.2d 458 (1971).

27. From time immemorial the Tribes exercised all aspects of ownership to waters throughout their aboriginal territory to perpetuate their lifestyle, including, but not limited to, fishing, hunting, trapping, gathering riparian plants, personal consumption, cultural and religious practices and travel.

28. As a result of expansion of the United States into the North American continent west of the Mississippi River, the United States determined the need to extinguish tribal aboriginal land title throughout the West to allow legally defensible acquisition of land by non-Indians throughout Indian country.

C. THE 1855 HELLGATE TREATY.

29. The United States determined that it needed to extinguish that portion of the Tribes' aboriginal land title to lands in what is today Montana west of the Continental Divide and initiated negotiations with the Tribes, resulting in the Hellgate Treaty of July 16, 1855 (12 Stat. 975).

30. The Treaty caused no break in the chain of Tribal title to Reservation lands. The FIR land was "reserved" for the Tribes and title went directly from Tribal aboriginal title to trust title held by the United States for its beneficiary, the Tribes.

31. Under Article 1 of the Hellgate Treaty the Tribes agreed to cede their aboriginal land title to land west of the Continental Divide in what is now Montana.

32. Under Article 2 of the Hellgate Treaty of July 16, 1855 (12 Stat. 975) the Tribes reserved from their cession the present FIR for their "exclusive use and benefit" in perpetuity, including all water necessary to maintain and develop the Reservation as their permanent and exclusive homeland and to satisfy all of the purposes for which the FIR was created, past, present and future.

33. In Article 3 of the Treaty the Tribes expressly reserved and retained their uninterrupted use and occupancy to continue their hunting, fishing and gathering practices on and off the FIR. The Tribes reserved to themselves and the United States guaranteed to protect,

> [t]he exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

34. Tribal members, pursuant to Article 3 and subsequent Tribal, Montana and federal law, have since time immemorial and to the present, hunted, fished and

gathered flora and fauna on the FIR as well as off the FIR throughout the Tribes' aboriginal territory east and west of the Continental Divide.

35. In Article 4 of Hellgate Treaty, in order to assist the Tribes and its members to expand their agrarian practices, the President of the United States committed to provide the funding and expertise to implement the federal goals of "breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary" for "the use and benefit of the said Indians."

36. The United States had many purposes for entering the Treaty beyond simply quieting aboriginal land title. For example, in Article 5 of the Treaty, the United States further committed to establish,

> an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said Indians, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop,; one wagon and plough-maker's shop; and to keep the same in repair , and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician.

37. Article 6 of the Hellgate Treaty anticipated that Tribal lands could be allotted to individual Indians.

38. Every purpose, past, present and future, for which the Tribes and the United States agreed to reserve the FIR is inextricably tied to water for either consumptive or non-consumptive uses by or on behalf of the Indians.

39. Under the federal reserved water rights doctrine enunciated in Winters v. United States, 207 U.S. 564 (1908), the Tribes reserved all water on, under and flowing through the FIR. See United States v. Alexander and Flathead Irrigation District, 131 F.2d 359, 361 (9th Cir. 1942), where the Court, citing Winters, found that "[t]he treaty impliedly reserved all waters on the reservation to the Indians".

D. FIR EVENTS BETWEEN THE 1855 TREATY AND 1904.

40. The Flathead Indian "Reservation was a natural paradise for hunting and fishing." Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F.2d 458, 478 (1971).

41. During the period from July 16, 1855 to April of 1904, Tribal members expanded the agricultural and livestock-based component of their society on the FIR while continuing their hunting, fishing and gathering activities on and off the FIR.

42. By the mid 1800's, Tribal members were constructing ditches to bring irrigation water to their farms and, the United States initiated construction of irrigation ditches in the Jocko River Valley on the FIR to assist Tribal members in their agricultural pursuits.

43. By 1904, there were approximately 470 individual Indian farms involving irrigation practices on parcels of Tribal land on the FIR. These historic irrigation practices by members of the Tribes were recorded by the SOI in the 1920's and have become known as "Secretarial water rights" (hereafter "SWRs").

44. There is no Congressional authorization for the SOI to issue SWRs. Many of the SWRs are now claimed by non-Indian successors to the original Indian users of SWRs.

45. Pursuant to the terms of Article 2 of the Treaty, with several limited enumerated exceptions therein, no non-Indian could own land or claim water rights on the FIR at the time these historic Indian irrigation uses were initiated.

E. THE 1904 FLATHEAD ALLOTMENT ACT AND THE CREATION OF FIIP.

46. Indian tribal governments are subject to the plenary powers of Congress.

47. The Act of Congress dated April 23, 1904 (33 Stat. 302), commonly called the Flathead Allotment Act (hereafter the FAA), was enacted in spite of decades of express Tribal opposition to allotting their Reservation. The FAA has been amended numerous times since then. It is an allotment Act specific to the FIR.

48. The FAA has been judicially determined to have been an unlawful breach of the Hellgate Treaty. Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F.2d 458, 469 (1971).

49. The FAA, as amended, is the preemptive federal law on land title and irrigation water use on the FIR.

50. The FAA forced the allotment of Reservation lands to individual Indians of the Tribes and announced that pursuant to a future Presidential Proclamation, certain unallotted Tribal lands would be opened to non-Indian entry under unspecified "general provisions of the homestead, mineral, and town-site laws of the United States." Act at Sec. 8. The required future Presidential Proclamation was not issued until May 22, 1909 and, thus, there was no non-Indian entry until after that date.

51. Section 9 of the 1904 FAA set the rules for how non-Indian entry-men could attempt to acquire unallotted Tribal lands; once the anticipated future Presidential Proclamation allowed such entry. These rules included payment of one-third of the SOI appraised value of the land at the time of entry and paid the remainder in five equal and successive annual installments.

52. If an entry-men failed to make any of the payments identified in Section 9 of the 1904 FAA, Congress declared that "all rights in and to the land covered by his or her entry shall at once cease and any payments theretofore made shall be forfeited and the entry shall be forfeited and cancelled."

53. Section 14 of the FAA directed the SOI to act as trustee for the Tribes when selling the unallotted Tribal lands left over after allotment and directed the SOI to expend the funds he received from the sales as follows:

> one-half shall be expended from time to time by the Secretary of the Interior as he shall deem advisable for **the benefit of the said Indians** and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time of this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and the education and civilization of said Indians, and the remaining half to be paid to the said Indians…, or be expended on their account, as they may elect. (Emphasis added).

54. The legislative history of the FAA demonstrates that early drafts of the Act referred to Tribal lands to be opened to non-Indian entry as "ceded" lands. Secretary of Interior E. A. Hitchcock advised against including "ceded" or "cession" language, as the Tribes had never agreed to such action, and the Congress, taking that advice, deleted any reference to homestead entry lands as having been ceded by the Tribes. See, Committee on Indian Affairs, House of Representatives, January 23, 1904, 58th Congress, 2nd Session, March 17, 1904, H. Rpt. 1678.

55. Significantly, Section 16 of the FAA specified two things:

(1) "nothing in this Act contained shall in any manner bind the United States to purchase any portion of the [Tribal] land herein described," and

(2) "it being the intention of this Act that the United States shall act as **trustee for said Indians to dispose of said lands** and to expend and pay over the proceeds received from the sale thereof only as received." (Emphasis added).

56. All lands within the FIR were reserved by the Hellgate Treaty of 1855 for the exclusive use of the Tribes. As a consequence, no lands within the FIR were ever "public lands" or "public domain." Such lands were never subject to the general public land laws of the United States. No lands on the FIR were ever withdrawn from Tribal ownership under the 1902 Reclamation Act. The 1904 FAA, as amended, is the only Congressional enactment that ever allowed non-Indian entry within the FIR. Section 16 of the FAA makes clear that under a 'chain of title' analysis, the "surplus" unallotted Tribal lands that were opened for non-Indian entry went directly from Tribal title to non-Indian entry under the fiduciary management of the United States and therefore never carried a title status of "public lands" or "public domain".

57. The FIIP originated with the 1904 FAA which authorized the creation of irrigation project ditches for the benefit of the Indians.

58. Any federal use of water for irrigation purposes under FIIP derives from the senior pervasive Reservation-wide Tribal consumptive use water rights confirmed under the Winters decision.

59. The FAA contains an implied right to irrigation water to satisfy the federal purpose of developing and operating FIIP so long as water is being beneficially used for federal irrigation purposes under the FAA. The FAA granted the United States a secondary implied reservation of water to be derived from the larger senior pervasive Tribal Reservation-wide reserved water right. The secondary federal reserved irrigation water right has a priority date of the date of the 1904 FAA, April 23, 1904, a right junior to the Tribal reserved right.

60. The majority of the water delivered by FIIP arises on Tribal lands of the FIR and returns to Tribal lands and water bodies on the FIR.

61. FIIP diverts, stores and delivers irrigation water to approximately 127,000 acres of land, all within the boundaries of the FIR.

62. The FIIP service area is approximately equally divided between allotted and homesteaded lands.

F. THE 1908 LEGISLATION ESTABLISHED THE PROCESS TO OBTAIN A WATER RIGHT.

63. The Act of May 29, 1908, 35 Stat. 444, 448, amended Section 9 of the FAA in the following significant ways:

(1) reaffirmed that the FAA was enacted for the "benefit of said Indians" of the FIR;

(2) authorized the construction of a much more expansive irrigation system than initially addressed in the FAA, the Indian irrigation project now called "FIIP";

(3) directed that a system of application for water rights be established by the Secretary of Interior for homestead entry lands to be irrigated by FIIP requiring "the entryman or owner of any land irrigatable by any system hereunder constructed" to "pay for a water right," in addition to all other payments required by Section 9;

(4) directed that "failure to make any two payments when due shall render the entry and water right application subject to cancellation, with forfeiture of all rights under this Act";

(5) directed that "no such [water] right shall permanently attach until all payments therefore are made";

(6) directed that if any water-right application was cancelled, such lands and waters may be disposed of by the SOI;

(7) required "[non-Indian] entry-men or owner[s] of any land" to be served **by the FIIP to pay for a water right the proportionate cost of construction of the FIIP** bears to the land to be irrigated (emphasis added); and

(8) made clear that Indian-owned lands (ie, allotments and Tribally-owned lands) "shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction" of the irrigation works.

64. The above-addressed 1908 amendments to the FAA set forth a detailed and comprehensive means by which non-Indian entry-men could attain FIIP water rights. There was no governmental representation, explicit or implicit, that such non-Indian entry-men could obtain legal and binding water rights by any other means. Moreover, because Winters v. United States was decided in 1908, before the Presidential proclamation of May 22, 1909, reported at 3 Kapp. 655, opening up certain non- allotted Tribal lands of the FIR for non-Indian entry, all non-Indian entry-men on the FIR staked their claims with actual or constructive knowledge of the pervasive water claims of the Tribes throughout the FIR.

65. The 1908 Act further amended Section 9 of the FAA by providing that,

> [w]hen the payments required by this Act have been made for the major part of the **unallotted lands** irrigable under any system and subject to the charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. (Emphasis added).

66. The legislative history of the 1908 Act demonstrates the Congress anticipated that "in all probability three-fourths of the irrigable lands would be allotted to Indians." See 60th Congress, 1st Session, March 7, 1908, H. Rpt. 1189

67. The 1908 Act also amended Section 14 of the FAA in the following ways:

(1) reformed how the SOI was to expend proceeds from the sale of unallotted Tribal lands so that the SOI would utilize and expend an unspecified amount Tribal funds derived from the sale of homestead lands for the construction of FIIP;

(2) provided that the SOI would spend whatever the remainder of the proceeds from the sale of Tribal lands "for the benefit of said Indians" for farming, livestock and to aid the civilization of said Indians; and

(3) The 1908 Act did not amend or diminish Congress's stated intent in Section 16 of the FAA that required the SOI "to act as trustee for said Indians" as he sold unallotted Tribal land for non-Indian entry and expended such funds as directed under the FAA, as amended.

68. The FAA, as amended, is the exclusive Congressional authorization for the construction, operation and maintenance of FIIP. As such, the FAA preempts the field of law on that topic.

69. In the early part of the twentieth century the BIA contracted some of the construction of FIIP to the Bureau of Reclamation (BOR), but never conveyed title for FIIP to the BOR.

70. The BIA contractual relationship with the BOR was terminated by order of the Secretary of Interior in 1924.

G. NON-INDIAN ENTRY AND SUBSEQUENT DEVELOPMENTS.

71. On May 22, 1909, reported at 3 Kapp. 655, President Taft issued a Proclamation by the President of the United States opening certain unallotted Tribal lands of the FIR for non-Indian entry. President Taft stated that such lands,

> within the Flathead Indian Reservation in the State of Montana under the Act of Congress approved April 23, 1904 (33 Stat. L. 302) [the FAA], which have not been withdrawn under the Act of Congress approved June 17, 1902 (32 Stat. L. 388) [the 1902 Reclamation Act] …. Shall be disposed of under the provisions of the homestead laws of the United States.

72. No lands on the FIR have ever been withdrawn from Tribal ownership under the 1902 Reclamation Act because there was no Congressional authorization for such withdrawal.

73. With two discrete Congressional exceptions, FIIP is not an irrigation project subject to the provisions of the 1902 Reclamation Act. Accordingly, the 1902 Reclamation Act does not apply to this BIA Indian irrigation project to any extent beyond that explicitly authorized by Congress. See Flathead Lands, October 22,

1921, Decisions of the Department of Interior in cases relating to the Public lands, Vol. 48, pp. 468, 470, 475, 477.

74. When Congress passed the Act of July 17, 1914 (38 Stat. 510) it expressly incorporated two discrete provisions of the 1902 Reclamation Act into the FAA. The first, the Act of June 25, 1910 (36 Stat. 592) allowed homestead entry-men to assign their entries. The second, the Act of August 9, 1912 (37 Stat. 265) provided that "purchasers of water rights certificates on reclamation projects shall be entitled to a final water-right certificate" once all sums due the United States are paid in full.

75. The Act of July 17, 1914 made clear that other than those two provisions of the 1902 Reclamation Act, "such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four (thirty-third Statutes at Large, page three hundred and two)", the FAA, as amended.

76. The FIR has never been "public land" or public domain" for purposes recognized under federal public land. See Decisions of the Department of Interior in Cases Relating to The Public Lands, Vol. 48, February 1-April 30, 1922, pp. 476, 470. United States v. McIntire, 101 F.2d 650, 656 (9th Cir. 1939).

77. By 1916, it became clear to the SOI and Congress that the entry-men of unallotted Tribal lands had not made the required repayments for the cost of

construction to date of the FIIP. Accordingly, the Act of May 18, 1916, 39 Stat. 123, 139, a BIA appropriations bill, directed the following steps:

(1) directed the SOI to return to the Tribes "for the benefit of the tribe" those Tribal proceeds from the sale of unallotted Tribal lands that Congress had improperly assigned to cover the cost of construction of FIIP under the 1908 amendment to the FAA; and

(2) expanded the timeframe from five to fifteen annual installments for repayment by individual homestead entry-men to repay the cost of construction of FIIP.

H. FORMATION OF LOCAL IRRIGATION DISTRICTS AND THEIR FAILURE TO MAKE PAYMENTS TO THE UNITED STATES.

78. As of 1925, entry-men had paid approximately 1% of the $5,140,000.00 cost of construction. Accordingly, in a BIA appropriations Act dated May 10, 1926, 44 Stat. 453, 464, Congress directed that:

(1) funding for FIIP construction be withheld by Congress until the claimants of non-trust land formed irrigation districts under the laws of Montana for the purpose of entering into binding repayment contracts with the SOI under the FAA for the cost of FIIP construction;

(2) provided that "trust patent Indian lands shall not be subject to the provisions of the law of any district" as long as the trust title remained;

(3) directed that a portion of net power revenues generated by the yet –to-become-productive hydroelectric facility proposed to be built on Tribal lands on the FIR be assigned to, *inter alia*, pay for those responsible irrigators their costs of FIIP construction, thereby creating a subsidy to irrigators out of potential Tribal power site revenues; and

(4) prohibited the SOI from "granting of a water right to or the use of water by any individual for more than one hundred and sixty acres" served by FIIP.

79. Certain non-Indian water users filed a Petition in the Fourth Judicial District of the State of Montana, in and for the Counties of Lake and Sanders (now the Twentieth Judicial District) under the caption "IN THE MATTER OF THE FORMATION OF THE FLATHEAD IRRIGATION DISTRICT to the Honorable Judge of the District Court, State of Montana" seeking an Order creating the Flathead Irrigation District.

80. In the third numbered paragraph of the Petition to form the Flathead Irrigation District, the petitioners acknowledged that,

> [a]ppropriations of the waters having been made for such purposes by the agents of the Secretary of Interior, pursuant to Federal Law, as aforesaid, and for the purpose of conveying and distributing the water to its place of use, the irrigation works have been constructed by the United States.

81. Subsequently, a State District Court issued three orders creating the three irrigation districts named as Defendants in this Complaint. All three Defendant

irrigation districts filed similar petitions and all were similarly decreed. For purposes of simplicity in the Complaint, the Tribes will use the record on the Flathead Irrigation District as an example to represent all three irrigation districts named in this Complaint.

82. The State District Court Order establishing the Flathead Irrigation District, dated August 26, 1926, acknowledged the Petition addressed above as the basis for the Order and made the following conclusions:

(1) confirmed the District's assertion in its Petition that the FIIP was built by the United States (Petition p. 4);

(2) confirmed the District's assertion, contained in its Petition, that "appropriation of the water having been made for such purpose by the agents of the Secretary of Interior, pursuant to federal law as aforesaid, and for the purpose of conveying and distributing the water to its place of use (Petition at p. 5); and

(3) provided numerous pages of legal land descriptions as those lands to be included within the Flathead Irrigation District.

83. The State District Court Order creating the districts did not grant water rights to the irrigation districts or any individual or other entity.

84. The August 26, 1926 State District Court Order establishing the Defendant Flathead Irrigation District specified at page 5 that,

> **appropriation of water having been made for such purpose by the agents of the Secretary of Interior, pursuant to federal law as aforesaid**, and for the purpose of conveying and distributing the water to its place of use, the irrigation works having been partially constructed by the United States. (Emphasis added).

85. The August 26, 1926 State District Court Order establishing the Defendant Flathead Irrigation District, reiterated that the United States built FIIP and appropriated water for it under federal law. That Order also specified that the district was created within the pre-existing FIIP system for the purpose of assumption of the debt for construction which individual irrigators have never paid.

86. The State District Court Orders establishing the three Defendant irrigation districts all demonstrate the following points:

(1) that the new districts have been formed within the pre-existing federal FIIP system years after FIIP had been established and been delivering irrigation water to lands now identified as district lands;

(2) that the United States had previously appropriated water for use under FIIP under federal law;

(3) that state irrigation law does not apply on trust land whether Tribally owned or owned by individual Indians; and

(4) that the Districts were formed to create legal entities that the United States could hold accountable for the individual irrigator's ongoing failure to pay their costs attributable to irrigation.

I. REPAYMENT CONTRACTS CREATE A SUBSIDY FOR IRRIGATION.

87. Those three districts each entered into repayment contracts with the SOI, as required by the 1926 Act, to repay the cost of construction of FIIP in fifty years.

88. Each District repayment contract has been subjected to fully-executed "Supplemental Contracts" and to one or more amendments, all similar in form and content.

89. The original Flathead District repayment contact, executed by the Flathead Irrigation District on May 12, 1928, and by the Secretary of Interior on November 24, 1928 contains:

(1) a recitation of the several amendments to the FAA, and in particular the 1926 Act which required the formation of the districts and obligation to contract with the SOI to repay the cost of FIIP construction as well as annual operation and maintenance charges necessary to maintain FIIP facilities and Services (Contract #1);

(2) established a priority system for the net power revenues from an envisioned electric power generation and distribution system, also to be

owned and operated by the BIA, in which the cost of construction to be reimbursed to the U S would be the third priority out of four and the cost of FIIP operation and maintenance would be last (Contract #1);

(3) prohibited the grant of a water right for more than 160 acres in one non-Indian ownership (Contract #1 and 13);

(4) Acknowledged that "the United States have [has] not been paid for as yet by the owners of the lands to be benefitted, and also certain charges for operation and maintenance of said works remain unpaid" (Contract #4);

(5) specified that the repayment contracts were for the express purpose of obligating the owners of non-trust land under the FIIP to pay "all charges of every nature in connection with said project in so far as the said project lands are included within the said districts", which includes the cost of construction and the cost for a water right (Contract #4);

(6) that the SOI shall have exclusive control and management of the FIIP "and all of the works and rights thereof." (Contract #5);

(7) the district "promises and agrees that it will levy annual assessments against the lands within its borders…, in such amounts that the total thereof shall not be less than the aggregate amount of the obligations due or estimated by the Secretary of the Interior or his agents to become due the United States…in order to procure and insure in each year the due

assessment, levy and collection of an amount sufficient to discharge all obligations of this contract," (Contract #17); and

(8) made clear that "Title to all works and rights in connection with said project now existing in the United States shall so remain unless and until otherwise provided by law." (Contract #21).

90. The First Supplemental Contract for the Flathead District, dated February 27, 1929:

(1) incorporated subsequent amendments to the FAA as additional authority (#1 & 2);

(2) confirmed that the "Intent of the respective parties to said contract was to "comply fully with the several acts of Congress that were or may be enacted affecting the rights of the parties thereto" (#3); and

(3) acknowledged that the required payment under the original repayment contract have not been satisfied and granted an extension of time, with interest, for the District to pay up by June 30, 1934 (#6).

91. Because the districts continued to fail to pay the costs required by Congress, the Second Supplemental Contract for the Flathead Irrigation District, dated March 28, 1934, further extended the time for the District to repay its accumulated construction and operation and maintenance assessments in "seventy (70) semi-annual installments with interest" starting on February 1, 1935. (#4)

92. The Third Supplemental Contract with the Flathead Irrigation District, dated July 13, 1936, extended the date for repayment of delinquent assessments for FIIP construction and interest thereon to commence on December 31, 1938. (#5)

93. The Defendant Districts still did not pay their contractual debt obligations to the SOI.

J. REPEATED CONGRESSIONAL REPRIEVES FOLLOWED BY REPEATED BREACHES OF THE IRRIGATOR'S OBLIGATION TO PAY FOR THE COST OF CONSTRUCTION AND FOR WATER RIGHT.

94. In 1948, for the third time Congress confronted the fact that the Defendant irrigation districts, just as their predecessor individual non-Indian irrigators, were not repaying the costs of construction of FIIP or the costs imposed by Congress to obtain a water right.

95. Congress amended the FAA again with the Act of May 25, 1948, (62 Stat. 269) to expand the federal subsidy to non-Indian irrigators under FIIP by once again addressing the failure of the Defendant irrigation districts to repay the cost of construction of FIIP. That Act rescinded all prior Congressional efforts to obtain repayment costs for FIIP construction for owners of non-Indian land "notwithstanding any provision of law to the contrary." In so doing, among other things, Congress:

(1) reconfigured the calculation of net power revenues identified in the 1926 Act to cause net power revenues to liquidate the cost of construction of FIIP in fifty annual installments commencing on January 1, 1950;

(2) authorized additional costs of construction as "reimbursable costs", thereby adding to the unpaid costs of construction; and

(3) did not eliminate the prior Congressional obligation to pay for a water right.

96. The Amendatory Repayment Contract for the Flathead Irrigation District, dated April 4, 1950, addressing "certain portions of the lands, costs, charges and benefits of the Flathead Indian Irrigation Project", as supplemented and now amended, was entered into in part to effectuate the new repayment provisions contained in the 1948 Act.

97. The Amendatory Repayment Contract modified the repayment obligation of the District to include as a cost to the District some of the preexisting delinquent matured installments for the cost of construction of the power and irrigation divisions of FIIP (#2, quoting Sec. 2 h 1 of the 1948 Act), and also simply cancelled some of the District's unpaid debt, thereby expanding even further the Congressional subsidy to irrigators on the FIR (#2, quoting Sec. 4 of the 1948 Act)

98. Section 6 of the Amendatory Contract states that the FIIP owns the "property or water rights held by the project for present or future use in connection" with power generation and distribution.

99. Section 6 c of the Amendatory Repayment Contract amended the District Repayment Contract to incorporate the net power revenues subsidy to the non-Indian water users and further amends the original repayment obligation to a 25 year schedule.

100. Section 11 of the Amendatory Repayment Contract rescinded and cancelled all prior Supplemental Contracts.

101. The practical effect of the 1926 and 1948 Acts was to excuse the duty of irrigators to pay their debts to the United States and to expand the subsidy to irrigators by requiring all electric power consumers on the FIR to pay the irrigator's delinquencies with an add-on to their monthly power bills until the irrigator's debts be paid.

102. Not one iteration of the repayment contracts imposed any contractual duty on the United States to deliver any specific volume of irrigation water to any tract of FIR land served by FIIP.

103. The repayment contracts did not change or divest the BIA of title to FIIP then or prospectively nor did they divest the BIA of its federal duty to operate and maintain the FIIP.

104. Just as with the individual irrigators, the irrigation districts failed to pay the cost of construction of FIIP even under the Congressionally-mandated repayment contracts executed with the SOI.

K. NO NON-INDIAN OWNS A PRIVATE WATER RIGHT ON THE FIIP.

105. The Federal Courts have determined that the water on, under and flowing through the FIR was reserved by the United States for the Tribes, and "[b]eing reserved no title to the waters could be acquired by anyone except as specified by Congress." United States v. McIntire and Flathead Irrigation District, 101 F.2d 650, 654 (9th Cir. 1939).

106. The Acts of 1908, 1912, and 1926 (supra) specify how Congress directed the acquisition of water rights on the FIR by non-Indians. The only way to acquire a water right from the SOI under FIIP is pursuant to an application process and regulations issued by the SOI. Once the required payments have been made, a person may receive a "final certificate of water right."

107. The Acts of 1908, 1912 and 1926 also specify that only persons who own 160 acres or less of irrigated land may acquire a water right under FIIP.

108. To the best information and belief of the Tribes, no person seeking a water right on the FIR has perfected the steps Congress has mandated as necessary to acquire a water right on the FIIP.

109. In response to a Freedom of Information Act request made by the Tribes inquiring whether any person has ever applied for and received a "final water right certificate" for water under FIIP, the Northwest Regional Director of the Bureau of Indian Affairs, the BIA Regional Office with responsibility for FIIP, responded in writing dated October 28, 2009, that,

> I have been informed by our subject matter expert, Mr. Julian Courville, Superintendent, Flathead Agency, there are no responsive documents to this request.

L. MONTANA'S GENERAL STATE ADJUDICATION OF WATER RIGHTS.

110. In 1973 the Montana Legislature passed the Water Use Act to administer, control, and regulate all water rights within the state of Montana and to establish a system of centralized records of all such rights. Section 85-2-101(1), MCA.

111. In 1979 the Water Use Act was amended to specify the federal and Indian reserved water rights included in the proceedings for the general adjudication of existing water rights, either as claims or by compact. Section 83-2-701, MCA. That amendment directed the Montana Attorney General to petition the Montana Supreme Court to require all persons claiming a right to file a claim of the right as provided in § 85-2-221 and required the Montana Attorney General to include all claimants of reserved Indian water rights as necessary and indispensable parties

under authority granted by the state by the McCarran Amendment, 43 U.S.C. § 666. See § 85-2-221, MCA.

112. Pursuant to that statute, the Montana Attorney General petitioned the Montana Supreme Court.

113. In 1982 the United States Department of Interior, BIA, filed water rights claims in its own name with the State of Montana for water necessary to serve the irrigation purpose of the FIIP.

114. In 1982 the United States Department of Interior, Bureau of Indian Affairs, acting in its official capacity as federal trustee for the Tribes, filed water rights claims with the Montana Department of Natural Resources an Conservation ("DNRC") for the Tribes for the entire FIR and identified itself as "Owner of the Water Right" and identified the Tribes as Co-Owner.

115. BIA identified the use of the water it claimed "on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation" to satisfy the broad spectrum of uses necessary to satisfy the homeland purposes for which the FIR was created.

116. The BIA also filed water rights claims on behalf of "Allottees of the Confederated Salish and Kootenai Tribes" to satisfy the purposes for which the Reservation was created and to fulfill the homeland purposes of the FIR for individual Indians.

117. The Tribes in their own right also filed "protective" water right claims with DNRC in 1982. The Tribes identified themselves as sole owner of the water right and attached a text treatment to explain the uses for which the water would be put. Those uses claim all water on, under and flowing through the FIR to satisfy the purposes for which FIR created.

118. The Montana Use Act provides for negotiations between the Montana Reserved Water Rights Compact Commission, the United States, and Indian Tribes. See §§ 85-2-701, 702, MCA. That Act provides that if negotiations for the conclusion of a compact are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of Tribes and federal agencies are suspended. Section 85-2-217, MCA. In the 1980s the Tribes commenced compact negotiations with the Montana Compact Commissions and the suspension statute was repeatedly amended by the Montana Legislature to extend its application. Most recently the statute was amended to extend its effective date until July 1, 2013. By that date the Tribes had negotiated and reached a proposed compact among the United States, the Tribes, and the state of Montana. That negotiated compact, however, was not ratified by the 2013 Montana Legislature.

119. As a result of the failure to ratify, the suspension has expired and the statute requires that the Tribes are now subject to the special filing requirements of § 85-

2-702(3), MCA, which require that new filings for Indian water rights must be made by June 30, 2015.

120. This statutory procedure for general adjudication is Montana's sole procedure calculated to comply with the general adjudication requirements of the McCarran Amendment, 43 U.S.C. § 666.

121. The current actions pending in Montana's Twentieth Judicial District Court and the Montana Water Court violate this exclusive statutory procedure for general adjudication and threaten to proceed with improper piecemeal adjudication in the absence of necessary and indispensable parties.

COUNT ONE

Declaratory Judgment

1. The Tribes reallege and incorporate all prior allegations.

2. This case presents an actual controversy within this Court's jurisdiction and there is an important need for this Court to declare the rights and other legal relations among the parties interested in the matters herein. The Uniform Declaratory Judgment Act accords courts the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The Act is remedial and it is to be liberally construed and administered to permit courts to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.

3. All waters on the FIR for consumptive use were reserved by the Tribes pursuant to the Winters Doctrine. The priority date for Tribal and individual Indian consumptive water use is July 16, 1855. McIntire, supra.

4. The usufructory right to irrigation water collected, stored and delivered by the Flathead Indian Irrigation Project is a right impliedly reserved for the United States to satisfy the irrigation purposes expressed in the Flathead Allotment Act and is a part of the senior, pervasive, tribal water rights reserved to the Tribes under the Winters Doctrine to satisfy the purposes of the Flathead Indian Reservation.

5. The 1904 FAA implicitly reserved to the United States out of their senior pervasive Tribal Winters rights a volume of irrigation water to serve the federal irrigation purpose of the FIIP, with a priority date of April 23, 1904.

6. The substantive law governing ownership and use of all waters collected, transported, and diverted through the FIIP, including extent and nature of use and all associated usufructory rights is federal.

7. Because of the pervasive ownership by the Tribes and the pervasive trust ownership by the United States for the Tribes of the waters collected, diverted through the FIIP, any attempt to apply state water rights law is preempted, subject only to the provisions of the federal McCarran Amendment.

8. The chain of title to land on the FIR has never been broken and for that reason no lands within the borders of the FIR have ever been part of the public domain subject to the general public land laws.

9. The SOI has issued no person a "final certificate of water right" under the FAA.

10. As a matter of federal law the BIA is entitled to a volume of irrigation water adequate to maintain beneficial irrigation in the FIIP service area when such volumes of irrigation water are physically available within the FIR.

11. FIIP has always been a BIA Indian irrigation project and has never been a Bureau of Reclamation irrigation project.

COUNT TWO

Injunction

1. The Tribes reallege and incorporate all prior allegations.

2. An injunction of the complained-of lawsuits pending in the Montana Water Court, and in the District Court of the State of Montana, Twentieth Judicial District, is necessary to protect and effectuate long-standing federal judgments that the Hellgate Treaty impliedly reserved all waters on the FIR to the Tribes, that such waters, being reserved, water rights could be obtained only as specified by Congress, and that the waters collected and distributed by the FIIP are subject to federal law and such rules and regulations as may be adopted by the U. S.

Secretary of Interior. U. S. v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939); U. S. v. Alexander, 131 F.2d 359 (9th Cir. 1942). Because these state court actions are attempting to relitigate these settled federal issues, the anti-injunction statute, 28 U.S.C. § 2283, does not bar injunctive relief against the Defendant State Courts. Enforcement of Indian treaty rights is a national goal of the highest order and is a superior federal interest for purposes of the statute. An injunction of the state proceedings is necessary in aid of this federal Court's jurisdiction, and enjoining state proceedings is necessary to prevent state courts from so interfering with this federal Court's consideration or disposition of this case as to seriously impair the federal Court's flexibility and authority to decide the case.

3. The Defendant District Court for the Twentieth Judicial District of Montana is currently exercising jurisdiction in the two cases identified in the "Parties" section of this Complaint that address the federal questions raised in this Complaint.

4. The Montana Water Court is currently exercising jurisdiction over the case identified in the "Parties" section of this Complaint.

5. In each court, non-Indians are asserting competing and exclusive claims of water rights for Indian Reservation water delivered by the BIA through FIIP.

6. The Twentieth Judicial District Court has expressly stated in an earlier decision in Western Water Users Association, LLC, dated February 15, 2013,

Conclusions of Law, Number 2, that "the Tribes and the United States are not parties to this litigation, and this Court has no jurisdiction over either."

7. The Tribe and United States are necessary and indispensable parties to that determination and to move forward in their absence is a profound waste of judicial resources and will result in a judgment that is unenforceable against the Tribes and United States.

8. Nevertheless, the Twentieth Judicial District Court is proceeding with a trial on the question of ownership of water rights on the federal FIIP in the middle of the Tribes' Flathead Indian Reservation.

9. The District Court is engaging in piecemeal water rights adjudication in violation of the McCarran Amendment (43 U.S.C. § 666) requirement that federal and Indian reserved and aboriginal water rights be adjudicated in a general *inter sese* adjudication, thereby seriously threatening the legal adequacy of the Montana Water Use Act state-wide general adjudication.

10. The Montana Water Court is currently exercising jurisdiction in Cause No. WC-2013-05 over the same dispute between the same litigants. This too runs the risk of violating the McCarran Amendment requirement for a general *inter sese* water rights adjudication between all water rights claimants and circumvents the Legislatively-established methodology to adjudicate aboriginal and reserved Indian water rights contained in Title 85, MCA.

11. As a result of the seemingly collusive litigation having been brought by the same litigants in two separate State courts, there is a potential of inconsistent State court rulings on the same question, regardless of McCarran implications.

12. The Tribes, a necessary and indispensable party in both state courts, have not waived their sovereign immunity to either piecemeal adjudication of water rights in either state court.

13. The Tribes have previously been adjudicated to possess legally protectable interests in quantifying their pervasive water rights on the FIR in a proper *inter sese* water rights adjudication. Greely, supra.

14. The concurrent state court proceedings pose a serious threat of inconsistent rulings on this federal matter, creating significant public confusion and uncertainty among all FIIP water users.

15. The concurrent state court proceedings pose a serious risk of disrupting the BIA obligation to deliver available irrigation water in the 2014 irrigation season and beyond and to impose upon all persons who receive irrigation water from FIIP a serious risk of financial hardship while their fields lay fallow.

16. There is no adequate remedy at law, there is a threat of serious and irreparable harm to all FIIP water users, including the Tribes, and therefore an injunction should be issued to the State District Court and State Water Court to cease all proceedings in the above-identified state court cases.

PRAYER FOR RELIEF

WHEREFORE, the Tribes request that the Court enter the following order:

A. A declaratory judgment reaffirming and declaring that:

1. the Hellgate Treaty did not implicitly diminish aboriginal water rights, Greely, supra;

2. when the FIR was created the United States reserved all waters on, under and flowing through the Reservation for the Tribes;

3. the chain of title to land on the FIR has never been broken and for that reason no lands within the borders of the FIR have ever been part of the public domain or subject to general public land laws;

4. after the FIR was created the Tribes continued their exclusive and uninterrupted use and occupation of Reservation lands and waters for hunting, fishing and gathering practices. Tribal water rights for nonconsumptive aboriginal uses carry a priority date of "time immemorial." Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, 832 F.2d 1127, 1131 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988);

5. all waters of the FIR for consumptive use were reserved by the Tribes pursuant to the Winters Doctrine. The priority date for Tribal and individual Indian consumptive water use is July 16, 1855. McIntire, supra;

6. water rights on the Flathead Indian Reservation could only be acquired as specified by Congress. McIntire, supra;

7. Congress specified the only manner for any non-Indian to acquire a water right on the FIIP in the Acts of 1908, 1912, 1914 and 1926, addressed above, and that those conditions have not been met by any person;

8. the SOI has issued no person a "final certificate of water right" under the FAA;

9. the 1904 FAA implicitly reserved to the United States out of the senior pervasive Tribal Winters rights a volume of irrigation water to serve the federal purpose of the FIIP, with a priority date of April 23, 1904;

10. as a matter of federal law the BIA is entitled to a volume of irrigation water adequate to maintain beneficial irrigation in the FIIP service area when such volumes of irrigation water are physically available within the FIR and do not adversely impact the Tribes' "time immemorial" instream flow rights; and

11. FIIP has always been a BIA Indian irrigation project and not a Bureau of Reclamation irrigation project.

B. Enjoining:

1. the District Court of the Twentieth District of Montana in Cause Nos. DV-12-327 and DV-13-105 from taking any action to determine who owns water

rights, or claims to water rights made available through any FIIP irrigation facility, structure, reservoir ditch or other means; and

2. the Water Court of the State of Montana in Cause No.WC-2013-05 from taking any action to determine who owns water rights, or claims to water rights made available through any FIIP irrigation facility, structure, reservoir ditch or other means.

C. Awarding the Tribes' reasonable attorneys fees and costs.

D. Awarding such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 27th day of February, 2014.

John B. Carter
CONFEDERATED SALISH AND KOOTENAI TRIBES
Attorneys for Plaintiff