No. 10095

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, FLATHEAD IRRIGATION DISTRICT, A CORPORATION, AND DENNIS A. DELLWO, APPELLANTS

v.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE KNUTSON AND EDNA I. KNUTSON, HIS WIFE, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT MYERS NELSON, JOHN ELLIS, J. A. MCKEEVER, AXEL ERICKSON, JOHN MINESINGER AND ADA B. MINESINGER, HIS WIFE, AND THOMAS WALD, APPELLEES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The district court wrote no opinion; its findings of fact and conclusions of law are to be found at pages 126–191 of the record.

JURISDICTION

These are appeals from a judgment of the district court entered August 28, 1941, dismissing plaintiff's

and interveners' complaints without prejudice (R. 192–193). Notices of appeal were filed November 25 and 26, 1941 (R. 638, 639). The jurisdiction of the district court was invoked by the United States under section 24 (1) of the Judicial Code, 28 U. S. C. sec. 41 (1), and by the interveners under Rule 24 of the Federal Rules of Civil Procedure. The jurisdiction of this Court to review a judgment dismissing the complaints without prejudice rests on section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a). *Wilson* v. *Republic Iron Co.,* 257 U. S. 92, 96 (1921); *The Three Friends,* 166 U. S. 1, 49 (1897); *Iowa-Nebraska Light & Power Co.* v. *Daniels,* 63 F. 2d 322, 324 (C. C. A. 8, 1933).

QUESTIONS PRESENTED

1. Whether the water rights of Indian allottees and their successors in interest are in fact superior to those possessed by the owners of other irrigable lands on the Flathead Indian Reservation.

2. Whether the facts disclosed by the present record entitle the Government and/or the interveners to injunctive relief.

TREATY AND STATUTES INVOLVED

Relevant provisions of the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation; pertinent sections of the Act of April 23, 1904, c. 1495, 33 Stat. 302, providing for the allotment of the reservation in severalty; section 19 of the Act of April 23, 1904, as added by the Act of June 21, 1906, c. 3504, 34 Stat. 325, 355, continuing water rights in

statu quo; the paragraph of the Act of April 30, 1908, c. 153, 35 Stat. 70, 83, appropriating $50,000 for the commencement of the irrigation project; pertinent sections of the Act of May 29, 1908, c. 216, 35 Stat. 444, 448, providing for the disposal of unallotted irrigable lands and the payment of construction charges; relevant paragraphs of the Indian Appropriation Act of May 18, 1916, c. 125, 39 Stat. 123, 139; and pertinent provisos of the Appropriation Act of May 10, 1926, c. 277, 44 Stat. 453, 465, are printed in the chronological order in the appendix, *infra,* pp. 20–37.

STATEMENT*

This suit was begun by the United States in 1936 to enjoin the owners of certain Indian allotments on the Flathead Indian Reservation from diverting water through their privately constructed ditches in excess of amounts allocated to them and their predecessors by the Secretary of the Interior in 1921.

It was the Government's theory in the court below, as evidenced by its complaint, that the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation, had impliedly reserved the available waters on the reservation for the use of the Indians, *Winters* v. *United States,* 207 U. S. 564 (1908) (R. 4–6); that Congress in 1904 and 1908 had directed the Secretary of the Interior to cause the reservation to be surveyed and partially allotted in severalty to members of the tribe, with directions to appraise and dis-

*For a fuller statement of the facts, including a detailed description of the Flathead Irrigation Project, see brief filed by the interveners.

pose of the surplus lands and to use such portions of the proceeds therefrom as he might deem necessary for the construction of systems "for the irrigation of the irrigable lands [both white and Indian] embraced within the limits of said reservation" (R. 6);[1] that expensive canal and reservoir systems had in fact been constructed by the Government for the irrigation of said lands (R. 6–7);[2] that the cost thereof had been apportioned among Indian and surplus landowners on an irrigable acreage basis (R. 6–7, 20–21);[3] that the Secretary of the Interior in 1921 had accorded to the defendants (and to a number of other owners of Indian allotments who likewise irrigate their lands through privately constructed ditches) two acre-feet of water for each acre cultivated by them or their predecessors in 1909 (R. 8–17); and that the defendants were diverting water in excess of the amount allowed by the so-called "secretarial decrees" of 1921, to the damage of other lands within the Flathead Irrigation Project (R. 20–21).

Defendants' demurrer to the complaint having been overruled (R. 23–27), they filed an answer in September of 1936 in which they denied the validity of the "secretarial decrees," affirmatively alleging that in 1905 and 1906 certain Indians had constructed the McDonald-Deschamps and Magee-Minesinger Ditches with sufficient carrying capacity to irrigate adjacent

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[1] Act of April 23, 1904, 33 Stat. 302; Act of April 30, 1908, 35 Stat. 70, 83; Act of May 29, 1908, 35 Stat. 444, 448, 450.

[2] Total cost of the Flathead Irrigation Project from 1910 to 1935 was $7,238,189.19.

[3] Act of May 18, 1916, 39 Stat. 123, 139–142.

lands, that the waters of Post Creek had been diverted through these ditches for the irrigation of said lands, that the defendants had succeeded to the rights of these early appropriators, that they were accordingly entitled to a sufficient quantity of water to beneficially irrigate the allotments adjacent to these privately constructed ditches and that their diversions were not in excess of that amount (R. 27–41).

The case remained in this posture during the next two and a half years pending the decisions of this Court and the Supreme Court in *United States* v. *Powers,* 94 F. 2d 783 (C. C. A. 9, 1938), affirmed 305 U. S. 527 (January 9, 1939), and *United States* v. *McIntire,* 101 F. 2d 650 (C. C. A. 9, January 31, 1939). This Court's decision in the latter case holding that section 19 of the Act of June 21, 1906, 34 Stat. 354, 355, was a mere saving clause and not a grant cast considerable doubt on the validity of the "secretarial decrees" pleaded by the Government and it completely exploded defendants' contention that the Indians who constructed private ditches and diverted water prior to the allotment of the reservation in severalty thereby acquired valid water rights.

In order that additional issues might be raised and that the pleadings might be made to conform to the *Powers* and *McIntire* cases, the Government requested the Flathead Irrigation District [4] and Dennis A. Dellwo, the owner of an Indian allotment within the district, to file a petition in intervention. In their

[4] The Flathead Irrigation District is one of three state corporations which have agreed to repay construction costs assessed against irrigable lands on the Flathead Indian Reservation.

complaint filed in May of 1939 they alleged (1) that Congress had dedicated all waters of the reservation for the use of the Flathead Irrigation Project, that defendants' lands served by privately constructed ditches have not been brought within the project, that the secretarial decrees were void, and that defendants were not entitled to any water whatever; and alternatively (2) that all irrigable lands within the reservation, both allotted and surplus, were entitled to equal rights, that defendants were therefore merely entitled to a pro rata share of the natural flow waters, and that their diversions were in excess thereof (R. 46–80).

The case came on for trial in May of 1940 (R. 199–637). After hearing testimony and examining briefs of the parties (R. 637), the court found that the defendants were diverting water in the amounts complained of by the Government and the interveners, but that in doing so they had not acted "wrongfully or unlawfully" (Fdgs. 66 and 67, R. 167–168); that the defendants had failed to comply with the project engineer's request to install headgates and measuring devices (Fdg. 68, R. 168–169); that the defendants have deprived the Flathead Irrigation Project of water needed for the irrigation of the *unallotted* surplus lands on the reservation (Fdg. 69, R. 169); that the natural flow waters are insufficient to irrigate the allotted lands, but are sufficient, when supplemented by storage waters, "to raise good crops" on the irrigable *allotted* lands (Fdgs. 98 and 100, R. 185–186).

From these facts the court concluded that all waters flowing on the reservation had been impliedly reserved

for the Indians by the treaty of 1855 (Concl. 1 and 12, R. 187, 190–191); that so long as the United States held these lands and waters in trust for the Indians no title thereto could be acquired by anyone except as specified by Congress (Concl. 2 and 3, R. 187–188); that the Act of May 29, 1908, 35 Stat. 448, 449, allocated to each *allotment* such waters "as may be required to irrigate such land," but if the supply were insufficient, then a "just and equal" share (Concl. 4, 5, and 12, R. 188, 191); that successors in interest to Indian allottees enjoyed similar water rights of which they could not be deprived by the Secretary (Concl. 8 and 9, R. 188–189); and that the complaints should be dismissed without prejudice (R. 191). It seems to have been the trial court's theory, in denying the *Government* any relief whatever, that Indian allotments have water rights superior to those accorded the surplus lands; that if the latter were excluded from the project, the available supply (natural and storage) would be sufficient to furnish all Indian allotments with enough water "to raise good crops" (2 plus acre-feet per acre); that the diversions by defendants, though somewhat in excess of that amount, did not therefore injure the owners of other Indian allotments nor the United States. Having concluded that the water rights of surplus lands were subordinate to the rights of allotted lands, the court also dismissed the *interveners'* complaint, on the theory that the differing rights of Indian and surplus landowners could not be determined without the joinder of all persons

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within the Mission Division of the Flathead Irrigation Project.[5]

SPECIFICATIONS OF ERROR

The errors assigned by the Government in its statement of points (R. 642–645, 650–651), and relied upon on this appeal, may be summarized as follows:

1. The district court erred in holding that the water rights of Indian allottees and their successors in interest are superior to those possessed by the owners of other irrigable lands on the Flathead Indian Reservation.

2. The district court erred in holding that the Government and the interveners are not entitled to injunctive relief.

ARGUMENT

The Government on this appeal does not rely upon the "secretarial decrees" and makes no attempt to sustain their validity. It contends, on the contrary, that all irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights, and that all diversions, whether from Government or private ditches, are to be administered by the project engineer. The Government further contends that the diversions made by the defendants are in ex-

[5] The Flathead Irrigation Project is composed of three divisions—the Jocko Division, the Camas Division, and the Mission Division—each with a separate water supply (Fdgs. 88–94, R. 183–184). The Mission Division of the project is that area shown in green on Government Exhibit 1, original. All lands involved in this litigation are located in the Mission Division of the project (Fdg. 90, R. 183).

cess of their pro rata share—from which it follows that the Government and the interveners are entitled to injunctive relief.

I

All irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights

The treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation, impliedly reserved the available irrigation waters on the reservation for the Flathead Indians, inasmuch as the lands were arid or semiarid in character (Fdg. 25, R. 145; Concl. 1, R. 187). *Winters* v. *United States,* 207 U. S. 564 (1908); *United States* v. *McIntire,* 101 F. 2d 650, 653 (C. C. A. 9, 1939). So long as the reservation was held in communal ownership, the legal title to such waters was in the United States and the equitable title in the Tribe. *Gritts* v. *Fisher,* 224 U. S. 640, 642 (1912); *Montana Power Co.* v. *Rochester,* 127 F. 2d 189, 191, 192 (C. C. A. 9, 1942). Being thus reserved, no individual rights in the lands and waters of the reservation could be acquired by anyone until Congress otherwise directed. *United States* v. *McIntire,* 101 F. 2d 650, 653 (C. C. A. 9, 1939).

No provision for the acquisition of individual rights in the waters of this reservation is to be found in any statute enacted prior to 1904. In that year Congress directed the Secretary of the Interior to cause the reservation to be surveyed and allotted to individual Indians, the surplus lands to be appraised and sold, one-half of the proceeds therefrom to be paid directly to the Indians and the balance expended for their

benefit. Act of April 23, 1904, 33 Stat. 302. But before any lands were actually allotted or sold under the 1904 Act, a reconnaissance survey made in 1907 had disclosed the irrigation and power potentialities of the reservation (R. 199–207; Plaintiff's Exhibit 2, original). Congress thereupon passed two amendatory acts providing for the disposal and utilization of the resources of the reservation in a somewhat different manner: (1) The Act of April 30, 1908, 35 Stat. 70, 83,[6] appropriated $50,000.00 for preliminary plans and surveys and beginning construction of "irrigating systems to irrigate the allotted lands of the Indians * * * and the unallotted irrigable lands * * *, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation."[7] (2) The Act of May 29, 1908, 35 Stat.

[6] Cf. Act of March 3, 1909, 35 Stat. 781, 795; Act of April 4, 1910, 36 Stat. 269, 277; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of August 24, 1912, 37 Stat. 518, 526; Act of June 30, 1913, 38 Stat. 77, 90; Act of August 1, 1914, 38 Stat. 582, 593.

[7] Representative Sherman, in explaining the purpose of this $50,000 appropriation, said: "The land [of the Flathead Indian Reservation] is largely arid land. Now, it is proposed to provide an irrigation project by which it will make the land productive and to reimburse the Treasury for the cost of providing this irrigation project *from the lands when sold*, it being believed that the irrigation project will not only make the lands much more valuable for the Indian allotments, but it will make land that is practically of no value now to the Indian allottees valuable, and make it possible for them to maintain themselves on it, and *the surplus disposed of to settlers will make those lands enough more valuable so that the Treasury will be reimbursed for the expenditure in providing the irrigation project.*" 42 Cong. Rec., pt. 2, p. 1784 (1908). See also 42 Cong. Rec., pt. 3, p. 2650 (1908), where Senator McCumber, in discussing the Truckee-Carson irrigation project, said: "That [arid] land is worthless, so far as raising anything

444, 448, directed the Secretary to expend so much of the proceeds from the sales of surplus lands as he deemed advisable "for the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits" of the Flathead Indian Reservation. This Act also required entrymen on lands irrigable under these systems "to reclaim at least one half of the total irrigable areas of his entry," and to pay construction charges apportioned against such tract, as well as its appraised value, before receiving a patent or a water right thereto. The Act further provided that "the land irrigable under the systems herein provided, which has been allotted to Indians in severalty, 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 such systems,*" it being contemplated that the proportionate cost of irrigating Indian allotments would be paid out of the proceeds from the sale of surplus land, timber, etc.[8] Persons purchasing such allot-

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on it, without irrigation. How are we going to get it irrigated and get the pay for the irrigation unless the Government does it wholly at its own expense? * * * The Indian, of course, has no money. The Indian can not pay for that irrigation. As I understand the scheme, it is for the Indian to surrender a certain portion of his land, and the Government at its own expense, in lieu of that, will then put in the irrigation works, at no expense whatever to him; and *the balance of the land will be sold to white people who will use it and irrigate and really pay for the entire irrigation, and thereby make all the land valuable.*" Cf. Act of March 1, 1907, 34 Stat. 1015, 1024 (Fort Hall Reservation).

[8] This method of apportioning construction costs was further modified by the Act of May 18, 1916, 39 Stat. 123, 139–142, an Act ordering these proceeds restored to the tribe, and requiring each acre of land irrigable by the irrigation systems on the reservation

ments prior to the expiration of the trust period were exempted from construction costs theretofore incurred. But all irrigable lands, whether allotted or surplus, were to bear their pro rata share of operation and maintenance costs.

It seems reasonably clear from these statutes, when read in the light of the physical facts, that Congress intended all irrigable lands on the reservation, whether allotted or surplus, to have equal water rights, and to bear a pro rata share of the construction costs. The available waters were reserved for the entire project, Congress well knowing that such a disposition of the waters would redound to the advantage of the Indians as well as the whites. This was so because most of the water for the project is obtained from small mountain streams located for the most part in the southeastern portion of the reservation. Unless fully and carefully utilized and distributed by a costly system of reservoirs and canals the supply would be inadequate to irrigate more than a few hundred acres of land close to the streams. But if the waters of these streams were impounded during flood periods and off-seasons and if all irrigable lands were made to pay a pro rata share of the construction costs on an acreage basis rather than an actual cost basis, the water supply could be made to serve thousands of acres of land far removed from these flash streams. Since the Indians were not re-

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(including private as well as Government ditches) to bear directly its pro rata share of the construction costs. This amendment was passed because it was believed unfair to use tribal funds to pay for improvements specially benefiting individual allottees. Cf. Act of February 14, 1920, 41 Stat. 408, 409.

quired to select their allotments in a given locality, it was not possible to irrigate their lands scattered over the entire reservation [9] unless surplus lands were also given a water right and thus encouraged to bear a part of the construction costs. The requirement in the 1908 Act that a purchaser of surplus lands *reclaim* at least one-half of the total irrigable area of his entry and pay a pro rata share of the construction costs, before receiving a patent, and that the Secretary use the proceeds therefrom to construct an irrigation project for Indian as well as white lands is a clear indication by Congress that it wanted all waters to be reserved for the entire project and all irrigable lands treated alike. In short, lands advantageously located close to the streams and irrigable at a small cost were to be made to pay pro rata assessments in order that other lands further removed from the source of supply could also be irrigated. Those persons near the streams were not to be allowed, merely because of the fortuitous location of their lands, to stay out of the project to the detriment of other persons farther away.

Such a construction of these statutes will not deprive the Indians of rights assured them by the 1855 treaty. It will in fact augment their rights, because (as the present record shows) the waters of the reservation are not even sufficient to irrigate the Indian allotments unless implemented by an elaborate stor-

[9] "Allotments have been made to the Indians in many widely separated parts of the [Flathead] reservation." *Seventh Annual Report of the Reclamation Service* (1908), p. 101 (Intervener's Exhibit 13, original).

age and canal system, all of which would not be economically feasible but for the contributions to the construction and operation costs made by the owners of surplus lands. And it is to be remembered that this legislation, reserving all waters of the reservation for a unified project, was enacted in May of 1908, some months before the issuance of trust patents to Indian allottees, and over a year before the surplus lands were opened to entry.[10]

Contrary to the belief of the court below, the Act of May 29, 1908, 35 Stat. 444, 448, did not give to Indian allotments a superior water right. It merely provided that such allotments should "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 such irrigation systems." In other words, the Indian allottees were to get water rights without cost to themselves, rights which surplus landowners were to acquire only upon payment of their pro rata share of the construction charges.[11]

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[10] Most of the Indian allotments have since passed into white ownership. In fact, Indians irrigated only 452 acres, or 1.3 per cent of the 34,441 acres irrigated on the Flathead Reservation in 1927. *Survey of Conditions of the Indians of the United States*, Hearings of Senate Subcommittee on Indian Affairs (1930), pt. 6, p. 2217. Therefore, as a practical matter, if Indian allotments are given a priority over surplus lands, it will merely mean that one group of white users will be benefited at the expense of other white users on a project which could not have been constructed except as a common enterprise.

[11] That this is the proper construction of the 1908 Act is further borne out by its legislative history and by subsequent statutes *in pari materia*—discussed at length in the brief filed by the interveners.

Nor did the fact that defendants' predecessors constructed private ditches in 1905 and 1907 with which to irrigate lands then occupied by them but not yet allotted in severalty give them any additional or different water rights. This Court has already held that these private attempts to appropriate water prior to 1908 conferred no rights on the individual Indians or their successors in interest. *United States* v. *McIntire,* 101 F. 2d 650, 653 (C. C. A. 9, 1939). Congress, it is true, could have respected these attempts, and did in fact direct the Secretary "to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted lands." Act of May 18, 1916, 39 Stat. 123, 142. But this Act did not accord to these private appropriators any greater water rights; it merely provided that the ditches constructed by them might be accepted in payment or part payment of construction charges otherwise assessable against all irrigable lands on the Flathead Indian Reservation.

It therefore follows that all irrigable lands on the Flathead Indian Reservation, whether served by private ditches or by government constructed canals and reservoirs, are part of the Flathead Irrigation Project (see Fdg. 90, R. 183) and have the same water rights and are liable for their pro rata share of the construction, operation, and maintenance costs (except that those lands served by privately built ditches may be relieved of all or a part of the construction charges).

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II

The facts disclosed by the present record entitle the Government and the interveners to injunctive relief

The court below found as a fact that during the years from 1935 to 1938, inclusive, the defendants who own the eight allotments irrigated by the McDonald-Deschamps ditch made an average annual diversion of 2.29 acre-feet and that the defendants who own the four allotments irrigated by the Magee-Minesinger ditch made an average annual diversion of 7.39 acre-feet for each irrigable acre served by those ditches (Fdgs. 63, 66, 67, R. 165–167)—at a time when the supply was insufficient to furnish more than 1.14 acre-feet to the other irrigable lands in the Mission Division of the Flathead Project (Interveners' Exhibit 19, R. 401). And even if the entire available supply had been used exclusively on Indian allotments, the latter would have received only 1.34 acre-feet in natural flow and 0.82 acre-foot in storage water, a total of 2.16 acre-feet per irrigable acre (Interveners' Exhibit 19, R. 401). Despite these findings the court refused to grant the Government any injunctive relief, apparently on the erroneous theory that Indian allotments had first claim to all waters on the reservation, and that the supply was sufficient to furnish Indian allotments with enough water "to raise good crops" (2 plus acre-feet per acre), and hence that the Government, as trustee of the Indians, was in no way injured. But, as we have seen, all irrigable lands on the reservation,

whether allotted or surplus, have equal water rights. The Indian allotments do not have a priority over surplus lands, nor do the Indian allotments owned by the defendants and served by privately constructed ditches have any priority over other Indian allotments on the reservation. *United States* v. *McIntire,* 101 F. 2d 650 (C. C. A. 9, 1939). Since the supply (natural flow and storage combined) is inadequate to furnish Indian and surplus lands with more than 1.14 acre-feet per acre, a diversion by the McDonald-Deschamps defendants of approximately twice that amount and by the Magee-Minesinger defendants of six times that amount[12] is obviously injurious to other water users on the reservation, including the Indian allottees and the United States as their trustee and as the present owner of the Flathead Irrigation Project. The court should, therefore, have ordered the defendants to install headgates and measuring devices, and to refrain from taking water in excess of the amount allotted by the project engineer to other lands of a similar character.[13]

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[12] If natural flow water alone is considered (defendants having contributed nothing to the storage system which provides the project with 40% of its water supply), their diversions are, respectively, three and ten times greater.

[13] In the court below the Government asked for an injunction against taking water in excess of that allowed by the "Secretarial decrees" of 1921, an amount generally less than that suggested above. It is believed that a court of equity under the new federal rules could and should have given the above relief even though not expressly requested by the Government, especially in view of the fact that such relief was requested by the interveners.

The adjudicated cases indicate that such a determination—namely, that defendants are entitled to only an equal share of the waters of the reservation—could have been made without the joinder of any additional parties. For example, in *United States* v. *Powers,* 305 U. S. 527 (1939), the Supreme Court decided that persons allegedly outside a reclamation project had *some* water rights, even though that determination affected other users within the project who were not parties to the suit. In that case, the determination was detrimental to such users, because it required a wider distribution of the available water. In this case a determination that defendants are only entitled to their pro rata share would be beneficial to all other users on the project. Other persons served by private ditches need not be joined because they would not be bound by an injunction against the defendants.

CONCLUSION

It has been shown that all lands on the Flathead Indian Reservation, whether allotted or surplus and whether supplied by government or private ditches, have equal water rights and that the defendants are diverting water in excess of their pro rata share. It is accordingly submitted that the judgment below should be reversed and that a decree should be entered requiring defendants to comply with the lawful orders of the project engineer and to refrain from taking

more than their pro rata share of the waters of the Flathead Indian Reservation.

Respectfully,

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JULY 1942.

APPENDIX

Relevant provisions of the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation:

> Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief.
>
> ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them * * *.
>
> ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may

agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. * * *

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars * * *

ARTICLE VI. The Presdent may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail them-

selves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

* * * * *

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Pertinent sections of the Act of April 23, 1904, c. 1495, 33 Stat. 302, providing for the allotment of the Flathead Indian Reservation in severalty:

* * * the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the

reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, * * *

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and townsite laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and

such selections shall be made prior to the opening of such lands to settlement: *Provided,* That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent

for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, 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 canceled: *And provided,* That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may 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 that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming im-

plements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

Section 19 of the Act of April 23, 1904, as added by the Act of June 21, 1906, c. 3504, 34 Stat. 325, 355, continuing water rights in *statu quo:*

> SEC. 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

Paragraph of the Act of April 30, 1908, c. 153, 35 Stat. 70, 83, appropriating $50,000 for the commencement of the Flathead Irrigation Project:

> For preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the Act of April twenty-third, nineteen hundred and four, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the

construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation.

Pertinent sections of the Act of May 29, 1908, c. 216, 35 Stat. 444, 448, providing for the disposal of unallotted irrigable lands and the payment of construction charges:

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows:

"SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish Wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said Commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for

the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of computation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, 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 canceled: *And provided,* That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the the price fixed by said Commission, receiving credit for payments previously made: *Provided, however,* That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this Act shall in addition to the payment required by section nine of said Act be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall in addition to compliance with

the homestead laws reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

"A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

"All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.

"The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be dis-

posed of under the terms of this Act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.

"The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, 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 such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

"When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to 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.

"The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

That section fourteen of said Act be, and the same is hereby, amended to read as follows:

"SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the Commission, of classification and sale of lands,

and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of livestock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semiannually as the same shall become available, share and share alike: *Provided,* That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system."

Relevant paragraphs of the Indian Appropriation Act of May 18, 1916, c. 125, 39 Stat. 123, 139:

For continuing construction of the irrigation systems on the Flathead Indian Reservation, in Montana, $750,000 (reimbursable), which shall be immediately available and remain available until expended: *Provided*, That the payments for the proportionate cost of the construction of said systems required of settlers on the surplus unallotted land by section nine, chapter fourteen hundred ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reser-

vation in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by section fifteen of the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight), shall be made as herein provided: *Provided further*, That nothing contained in the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-four), shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, or to relieve the owners of any or all land allotted to Indians in severalty from payment of the charges herein required to be made against said land on account of construction of the irrigation systems; and in carrying out the provisions of said section the exemption therein authorized from charges incurred against allotments purchased prior to the expiration of the trust period thereon shall be the amount of the charges or installments thereof due under public notice herein provided for up to the time of such purchase.

* * *

That the Secretary of the Interior be, and he is hereby, authorized and directed to announce, at such time as in his opinion seems proper, the charge for construction of irrigation systems on the Blackfeet, Flathead, and Fort Peck Indian Reservations in Montana, which shall be made against each acre of land irrigable by the systems on each of said reservations. Such charges shall be assessed against the land irrigable by the systems on each said reservation in the proportion of the total construction cost which each

acre of such land bears to the whole area of irrigable land thereunder.

On the first day of December after the announcement by the Secretary of the Interior of the construction charge the allottee, entryman, purchaser, or owner of such irrigable land which might have been furnished water for irrigation during the whole of the preceding irrigation season, from ditches actually constructed, shall pay to the superintendent of the reservation where the land is located, for deposit to the credit of the United States as a reimbursement of the appropriations made or to be made for construction of said irrigation systems, five per centum of the construction charge fixed for his land, as an initial installment, and shall pay the balance of the charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum of the construction charge. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: *Provided,* That any allottee, entryman, purchaser, or owner may, if he so elects, pay the whole or any part of the construction charges within any shorter period: *Provided further,* That the Secretary of the Interior may, in his discretion, grant such extension of the time for payments herein required from Indian allottees or their heirs as he may determine proper and necessary, so long as such land remains in Indian title.

That the tribal funds heretofore covered into the Treasury of the United States in partial reimbursement of appropriations made for constructing irrigation systems on said reservations shall be placed to the credit of the tribe and be available for such expenditure for the benefit of the tribe as Congress may hereafter direct.

The cost of constructing the irrigation systems to irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land. Such charges when collected shall be available for expenditure in the maintenance and operation of the systems on the reservation where collected: *Provided,* That delivery of water to any tract of land may be refused on account of nonpayment of any charges herein authorized, and the same may, in the discretion of the Secretary of the Interior, be collected by a suit for money owed: *Provided further,* That the rights of the United States heretofore acquired, to water for Indian lands referred to in the foregoing provision, namely, the Blackfeet, Fort Peck, and Flathead Reservation land, shall be continued in full force and effect until the Indian title to such land is extinguished.

That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and

directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: *Provided,* That if water be available prior to the announcement of the charge herein authorized, the Secretary of the Interior may furnish water to land under the systems on the said reservations, making a reasonable charge therefor, and such charges when collected may be used for construction or maintenance of the systems through which such water shall have been furnished.

Pertinent provisions of the Appropriation Act of May 10, 1926, c. 277, 44 Stat. 453, 464–465:

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, $575,000: *Provided,* That of the total amount herein appropriated not to exceed $15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, $100,000; Moiese Canal enlargement, $15,000; South Side Jocko Canal, $40,000; Hubbard Feed Canal, $7,500; Camas A Canal, $2,500; continuing construction of power plant, $395,000, of which sum $15,000 shall be immediately available for additional surveys and preparation of plans: *Provided further,* That no part of this appropriation, except the $15,000 herein made immediately available, shall

be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123–130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in

fee to the United States free of encumbrance to again become a part of the public domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: *Provided further,* That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: * * *

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