No. 8797

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

Parker Printing Company, 545 Sansome Street, San Francisco 60-4-19-38

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. ELMER E. HERSHEY
of Missoula, Montana,
Attorney for Plaintiff and Appellee.

Mr. JOHN P. SWEE
of Ronan, Montana,
Attorney for Defendants Alex Pablo and A. M. Sterling, Defendants and Appellees.

Mr. JOHN B. TANSIL,
United States District Attorney,
Billings, Montana, and

Mr. KENNETH R. L. SIMMONS,
District Counsel,
United States Indian Irrigation Service,
Billings, Montana,
Attorneys for United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of Flathead Reclamation Project, and Nineteen members of the Flathead Tribe of Indians, Defendants and Appellants.

Messrs. POPE & SMITH,
of Missoula, Montana,
Attorneys for Defendant Flathead Irrigation District, Defendant and Appellant.

[1*]

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In the District Court of the United States in and for the District of Montana

No. 1496

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

Be it remembered, that on February 13, 1934, a Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [2]

COMPLAINT

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [3]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October

8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned. [4]

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now

the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L p 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "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 of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress

in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims [5] an interest in the waters flowing in said Mud Creek and has *damed* up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L p 416, for the purpose of completely adjudi-

cating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independ- [6] ent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interferring with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem [7] meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY,
Attorney for Plaintiff.

State of Montana
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

MRS. AGNES McINTIRE.

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE,
Notary Public for the State of Montana. Residing at Polson, Montana.

My Commission expires August 1, 1934.

[Endorsed]: Filed Feb. 13, 1934. [8]

Thereafter, on March 21, 1934, a Return of Service of the Bill of Complaint was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

AFFIDAVIT.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being first duly sworn according to law, deposes and says:

That he caused a copy of the Bill of Complaint, filed in the above case, to be served upon the United

States District Attorney for the District of Montana, on the 13th day of February, 1934, by depositing in the United States postoffice at Missoula, Montana, a full, true and correct copy of said Bill of Complaint securely sealed, postage prepaid and registered, and addressed to said United States Attorney at Helena, Montana, and the same was received by him on February 14, 1934, as evidenced by his return receipt showing such service, attached hereto and made a part of this affidavit.

That on February 13, 1934, he mailed a copy of said Bill of Complaint by registered letter to the Attorney General of the United States at Washington, D. C., and the same was received by him on February 16, 1934, as evidenced by the return receipt, which is attached hereto and made a part of this affidavit. [9]

That on February 13, 1934, he addressed a letter to the Secretary of the Interior inclosing a copy of said Bill of Complaint by registered mail, a copy of which letter is attached hereto and made a part hereof. That the same was received by the Secretary of the Interior on February 17, 1934, as is evidenced by his return receipt which is attached hereto and made a part hereof.

ELMER E. HERSHEY.

Subscribed and sworn to before me this 20th day of March, 1934.

[Seal] RALPH L. ARNOLD,

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires December 18, 1934.

Tuesday,
February thirteenth,
Nineteen Thirty-four.

Mr. Harold L. Ickes,
Secretary of the Interior,
Washington, D. C.

Dear Sir:

I inclose, herewith, copy of Complaint in the case of Agnes McIntire vs. The United States of America, et al., this day filed in the U. S. District Court at Helena, Montana.

Will you voluntarily appear thereto, or shall I proceed and obtain an Order under the provisions of Sec. 57 of the Judicial Code of the United States, (36 Stat. L., 1102).

Very respectfully,
ELMER E. HERSHEY.

Post Office Department
Official Business
Registered Article
No. 4272
Insured Parcel.

Penalty for private use to avoid payment of postage, $300.

Post mark of delivering office.
(Helena, Mont. Feb. 14, 1934. Registered)

Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

JAMES H. BALDWIN,
U. S. Atty. for District of Montana.
(signature or name of addressee)

Date of delivery 2/14/1934.

J. C. KEENAN,
Agent. [10]

Post Office Department
Official Business
Registered Article
No. 4274.
Insured Parcel.

Penalty for private use to avoid
payment of postage, $300.
Post mark of delivering office.
(Washington, D. C. 9, Feb. 17, 10AM., 1934)

Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

Department of Justice
(Signature or name of addressee)
W. E. FEENEY
(Signature of addressee's agent)
Date of delivery Feb. 16, 1934.

Post Office Department
Official Business
Registered Article
No. 4273.
Insured Parcel.

Penalty for private use to avoid payment of postage, $300.
Post mark of delivering office.
(Washington, D. C. 3, Feb. 17, 10PM., 1934)

Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

Interior Department
Secretary's Office
(Signature or name of addressee)
per IRVING JOHNSON, Authorized Agent.
(Signature of addressee's agent)

Date of delivery Feb. 17, 1934.

[Endorsed]: Filed March 21, 1934. [11]

Thereafter, on March 23, 1934, a Motion for an Order directing defendant Harold L. Ickes, Secretary of the Interior to appear, etc., herein, was duly filed herein, being in the words and figures following, to-wit: [12]

[Title of District Court and Cause.]

MOTION

Now comes the above named plaintiff and moves the Court that an order be made directing defendant, Harold L. Ickes, Secretary of the Interior, to appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28, U. S. C. A. Sec. 118), and that a copy of the complaint filed herein together with a copy of said order be forthwith served upon said defendant.

Said defendant Harold L. Ickes, Secretary of the Interior, is not an inhabitant of the District of Montana, and has failed to voluntarily appear in said action, although requested to do so in a letter addressed to said defendant on February 13, 1934, inclosing a copy of said complaint, which letter was registered and the return card shows that the same was received on February 17, 1934.

Dated March 22, 1934.

(Signed) ELMER E. HERSHEY

Attorney for Plaintiff

[Endorsed]: Filed Mar. 23, 1934. [13]

Thereafter, on March 23, 1934, an Order directing Harold L. Ickes, Secretary of the Interior, to appear, etc., was duly filed and entered herein, being in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

ORDER

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case,

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L., 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23 day of March, 1934.

BOURQUIN

Judge

[Endorsed]: Filed and entered March 23, 1934. [15]

Thereafter, on March 29, 1934, a Subpoena in Equity was duly filed herein, being in the words and figures following, to-wit: [16]

[Title of District Court.]

SUBPOENA IN EQUITY

The President of the United States of America
To The United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting:

You are hereby commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. GARLOW
Clerk
By H. H. WALKER
Deputy Clerk

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY
Missoula, Montana,
Attorney for Plaintiff [17]

RETURN ON SERVICE OF WRIT

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Henry Gerharz, Project Manager, Flathead Reclamation Project by handing to and leaving a true and correct copy thereof with him personally at St. Ignatius Mission in said District on the 21st day of March, A. D. 1934.

ROLLA DUNCAN
U. S. Marshal
By NED S. GOZA
Deputy

Marshal's	Fee	$2.00
"	Expense	2.48
	Total	$4.48

[Indorsed on back]: Original. No. 1496. United States District Court, District of Montana. Agnes McIntire vs. The United States of America, et al. Subpoena in Equity. Filed on the 29th day of Mar. 1934. C. R. Garlow, Clerk. By G. Dean Kranich, Deputy. [18]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by the United States, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant the United States of America, appearing specially and not voluntarily herein and for the sole purpose only of objecting to the jurisdiction of the above entitled court in the above entitled suit over it and says:

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued.

Wherefore, the United States of America prays that the complaint in this action be dismissed and held for naught as against it.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
ROY F. ALLAN
Assistant U. S. Attorney.
DONALD J. STOCKING
Assistant U. S. Attorney.

[Endorsed]: Filed April 9, 1934. [19]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by Deft. Harold L. Ickes, Secretary of the Interior, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now Harold L. Ickes, Secretary of the Interior, appearing specially and not voluntarily herein, and for the sole purpose only of objecting to the jurisdiction of the above-entitled court in the above-entitled suit over him says:

1. That said Court does not have any jurisdiction over him as a party defendant in said suit for the reason that the same is brought against him in

a district court other than that of the district whereof he is an inhabitant.

2. That this suit is essentially and substantially, despite the alleged joinder of the Secretary of the Interior, a suit against the United States of America and is therefore beyond the jurisdiction of this Court, for the reason that the United States without its consent cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

[Endorsed]: Filed April 9, 1934. [20]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by Deft. Henry Gerharz, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant Henry Gerharz, as denominated in the Bill of Complaint, Project Man-

ager of the Flathead Reclamation Project, and appearing specially and not voluntarily herein and for the purpose of objecting to the jurisdiction of the above entitled court in the above entitled suit over him, says:

1. That the Bill of Complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against Henry Gerharz in his denominated capacity in said Bill of Complaint as Project Manager of Flathead Irrigation Project or otherwise, and does not state facts sufficient to entitle the plaintiff to any relief as against Henry Gerharz as Project Manager or otherwise.

2. That this suit is essentially and substantially, despite the alleged joinder of Henry Gerharz in his denominated capacity in the said Bill of Complaint, as Project Manager of Flathead Irrigation Project, a suit against the United States of America and is therefore beyond the jurisdiction of this court for the reason that the United States, without its consent, cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

[Endorsed]: Filed April 9, 1934. [21]

Thereafter, on April 16, 1934, Motions to Dismiss were denied, the minute entry thereof being in the words and figures following, to-wit:

[Title of District Court and Cause.]

Counsel for respective parties present in court, Mr. E. E. Hershey appearing for plaintiff and Mr. James H. Baldwin, U. S. Attorney, appearing for defendants. Thereupon the defendants' motions to dismiss the bill of complaint herein were submitted to the court without argument, whereupon court ordered that said motions be and are denied.

Entered in open court April 16, 1934.

C. R. GARLOW,
Clerk. [22]

Thereafter, on April 25, 1934, Answer of the United States was duly filed herein, being in the words and figures following, to-wit: [23]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, one of the defendants in the above entitled action, and for its answer to the complaint in equity on file herein, alleges:

I.

For a first affirmative defense that this action is not one in which the United States of America has consented to be sued.

II.

For a second affirmative defense, that the action was not one brought for the partition of lands.

III.

For a third affirmative defense, that this action is in fact and legal effect one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana.

IV.

For a fourth affirmative defense, that the facts stated therein are insufficient to constitute a valid cause of action in equity against this answering defendant.

Wherefore, having fully answered, the United States of America prays:

1. That plaintiff take nothing by her action;

2. That the United States of America have judgment against plaintiff for its costs and disbursements herein necessarily expended.

3. For such other and further relief as may be fit and proper in the premises.

JAMES H. BALDWIN

United States Attorney for the District of Montana. [24]

United States of America,
District of Montana,
County of Silver Bow—ss.

James H. Baldwin, being duly sworn on oath, deposes and says:

That he is the United States Attorney for the District of Montana, and as such makes this verification to the foregoing answer:

That he has read the same and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JAMES H. BALDWIN

Subscribed and sworn to before me this 25th day of April, 1934.

[Seal] HAROLD L. ALLEN
Deputy Clerk U. S. District Court
District of Montana.

[Endorsed]: Filed April 25, 1934. [25]

Thereafter, on April 25, 1934, Answer of Deft. Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [26]

[Title of District Court and Cause.]

ANSWER

Comes now Henry Gerharz, Project Engineer of Flathead Irrigation Project, incorrectly designated in the title of the bill of complaint as Project Man-

ager of Flathead Reclamation Project and for answer to the complaint in equity herein alleges:

I.

Defendant admits the allegations contained in Paragraph I of plaintiff's complaint save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendant states that he is without knowledge.

Defendant alleges that the said Flathead Irrigation Project is incorrectly designated in the title of this action and in certain paragraphs of the complaint herein as Flathead Reclamation Project, and alleges that the said Project is subject, not to the Reclamation Laws, but to the Indian Irrigation Project Laws of the United States.

Defendant alleges by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation. [27]

II.

Defendant admits that Michel Pablo and Agatha Pablo are Flathead Indians of the Flathead tribe

or nation of Indians and states that except as hereinbefore expressly admitted he is without knowledge as to any allegation contained in Paragraph II thereof and in this connection alleges that the lands described in said complaint in equity are situated within the Flathead Indian Reservation in Lake County, Montana.

III.

States that he is without knowledge as to any allegation contained in Paragraph III thereof.

IV.

States that he is without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Admits the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L 355) and except as hereinbefore specifically admitted, states that he is without knowledge as to any allegation contained in Paragraph V thereof.

VI.

Admits that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, states that he is without knowledge as to any allegation contained in Paragraph VI thereof.

VII.

Denies that there are no other parties using the waters of Mud Creek except plaintiff and the United States of America, and in this connection alleges that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, and except as hereinbefore specifically denied or qualified states that he is without knowledge as to any allegation contained in Paragraph VII thereof. [28]

VIII.

Alleges that all acts done by this answering defendant in regard to lands and waters mentioned in said complaint in equity were and are and will continue to be proper and lawful acts done in pursuance of the orders, rules and regulations of the Secretary of the Interior of the United States of America, made and promulgated by said Secretary under and by virtue of the authority vested in him by the laws and statutes of the United States of America to carry the same into effect.

IX.

Denies that he has ever wrongfully or without right claimed that plaintiff has no water right on

Mud Creek independent of the Flathead Irrigation Project and denies that he has unlawfully claimed the right to shut out plaintiff's headgate or to prevent waters from flowing into plaintiff's ditch or to deprive plaintiff of the use of said waters upon said lands, except by paying to said Flathead Irrigation Project fees and charges.

Defendant, however, admits and avers that in the course of his employment as Project Engineer of the Flathead Irrigation Project, acting under the direction and authority of the Secretary of the Interior, pursuant to laws and statutes of the United States, he assessed against a portion of said lands claimed by plaintiff, certain charges for construction, operation and maintenance of the Flathead Irrigation system and further alleges that said charges and each thereof were and are lawful and proper;

Defendant further alleges that on August 26, 1926, an order was duly given, made and entered of record in the District Court of the Fourth Judicial District of the State of Montana in and for the counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West half (W½) of Northeast quarter (NE¼) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

That subsequently said Flathead Irrigation District entered into a repayment contract with the United States of America and the above described lands became and are now subject to the terms and conditions of such repayment contract. **[29]**

X.

States that he is without knowledge of the value of the water mentioned in the complaint in equity herein.

XI.

Denies that this action is necessary to prevent a multiplicity of *of* suits.

XII.

Denies that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Denies each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

1. First affirmative defense.

For a further answer and by way of a first affirmative defense this answering defendant says:

That this action is not one for the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water.

2. Second affirmative defense.

For a further and second affirmative defense, defendant says:

That the facts stated in the complaint in equity herein are insufficient to constitute a valid cause

of action in equity as against this answering defendant.

3. Third affirmative defense.

For a further and third affirmative defense, defendant says:

That the above entitled court is without jurisdiction or authority to proceed further in this action for want of necessary parties, for this, that there are numerous users of the waters of Mud Creek whose lands are situate thereon and adjacent thereto and both above and below the lands described in the complaint in equity herein, whose rights to the use of the waters of said creek may be injuriously affected by any decree that the above entitled court may render or enter in the above entitled cause and whose presence either as parties plaintiff or defendant in this action is necessary and proper to a complete determination of this cause and of the issues of the right to and the amount or duty of water involved in this cause. [30]

4. Fourth affirmative defense.

For a further and fourth affirmative defense, defendant says:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Wherefore this answering defendant prays that plaintiff's complaint in equity herein be dismissed

and that this answering defendant do have and recover of and from said plaintiff his costs and disbursements herein necessarily expended.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, United States Indian Irrigation Service.
Attorneys for Defendant Henry Gerharz

[31]

United States of America,
District of Montana,
County of Silver Bow—ss.

James H. Baldwin, being duly sworn on behalf of the defendant in the above-entitled action, says that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendant is absent from the County of Silver Bow, where his attorney has his office, and that the affiant is one of the defendant's attorneys and therefore makes this affidavit.

JAMES H. BALDWIN

Subscribed and sworn to before me this 25th day of April, 1934.

[Seal] HAROLD L. ALLEN
Deputy Clerk U. S. District Court, District of Montana.

[Endorsed]: Filed April 25, 1934. [32]

Thereafter, on April 30, 1934, Reply to Answer of the United States was duly filed herein, being in the words and figures following, to-wit: [33]

[Title of District Court and Cause.]

REPLY TO ANSWER OF THE UNITED STATES OF AMERICA

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of The United States of America filed herein, denies each and every allegation therein made, as set forth in said answer, and in the First, Second, Third and Fourth affirmative defense as alleged therein and the whole thereof, except as set forth and alleged in her complaint filed herein.

Wherefore, plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 27th day of April, 1934.

[Seal] RALPH L. ARNOLD

Notary Public for the State of Montana.

Residing at Missoula, Montana.

My Commission expires December 18, 1934.

[Endorsed]: Filed April 30, 1934. [34]

Thereafter, on April 30, 1934, Reply to Answer of Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [35]

[Title of District Court and Cause.]

REPLY TO ANSWER OF HENRY GERHARZ

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Henry Gerharz filed herein, denies each and every allegation therein made, as set forth in said answer, and in the First, Second, Third and Fourth affirmative defense as alleged therein and the whole thereof, except as set forth and alleged in her complaint filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY

Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that

he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 27th day of April, 1934.

[Seal] RALPH L. ARNOLD

Notary Public for the State of Montana.

Residing at Missoula, Montana.

My Commission expires December 18, 1934.

[Endorsed]: Filed April 30, 1934. [36]

Thereafter, on May 7, 1934, Amended Bill of Exceptions of the United States was duly filed herein, being in the words and figures following, to-wit: [37]

[Title of District Court and Cause.]

AMENDED BILL OF EXCEPTIONS OF THE UNITED STATES OF AMERICA

To Order of the Court of April 16th, 1934, denying its objection to jurisdiction:

Be it remembered, that

1. The above-named plaintiff filed her Complaint in Equity in the above-entitled court and action on February 13th, 1934. Said Complaint in Equity

after the title of court and cause is as follows, to-wit:

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation. [38]

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and

have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October 8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same [39] was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators

of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "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 of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriations and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit [40] of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United

States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L p. 418), for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined. [41]

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to de-

prive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to

sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug [42] and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff.

State of Montana,
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

AGNES McINTIRE

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE
Notary Public for the State of Montana. Residing at Polson, Montana.

My commission expires August 1, 1934.

2. That thereafter, and on that day, a subpoena in equity issued out of the above-entitled court, in the above-entitled cause. Said Subpoena in Equity is in words and figures as follows, to-wit:

United States District Court
Missoula Division—District of Montana.

The President of the United States of America to the United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting: [43]

You Are Hereby Commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. CARLOW,
Clerk.

By H. H. WALKER,
Deputy Clerk.

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff.

3. That thereafter and on March 20, 1934, the plaintiff above-named caused to be filed in the above-entitled court and cause the affidavit of Elmer E. Hershey which affidavit, after the title of court and cause is as follows:

State of Montana
County of Missoula—ss:

Elmer E. Hershey, being first duly sworn according to law, deposes and says:

That he caused a copy of the Bill of Complaint, filed in the above case, to be served upon the United States District Attorney for the District of Montana, on the 13th day of February, 1934, by depositing in the United States postoffice at Missoula, Montana, a full, true and correct copy of said Bill of Complaint securely sealed, postage prepaid and registered, and addressed to said United States Attorney at Helena, Montana, and the same was received by him on February 14, 1934, as evidenced by his return [44] receipt showing such service, attached hereto and made a part of this affidavit.

That on February 13, 1934, he mailed a copy of said Bill of Complaint by registered letter to the Attorney General of the United States at Washington, D. C., and the same was received by him on February 16, 1934, as evidenced by the return receipt, which is attached hereto and made a part of this affidavit.

That on February 13, 1934, he addressed a letter to the Secretary of the Interior inclosing a copy of said Bill of Complaint by registered mail, a copy of which letter is attached hereto and made a part hereof. That the same was received by the Secretary of the Interior on February 17, 1934, as is evidenced by his return receipt which is attached hereto and made a part hereof.

ELMER E. HERSHEY.

Subscribed and sworn to before me this 20th day of March, 1934.

[Seal] RALPH L. ARNOLD

Notary Public for the State of Montana, Residing at Missoula, Montana.

My Commission expires December 18, 1934.

4. That on April 9th, 1934, said United States of America; served and filed in the above-entitled Court and cause its Special Appearance and Objection to Jurisdiction which after the title of court and cause is in words and figures as follows:

Comes now the defendant the United States of America, appearing specially and not voluntarily

herein and for the sole purpose only of objecting to the jurisdiction of the above entitled court in the above entitled suit over it and says:

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued. [45]

Wherefore, the United States of America prays that the complaint in this action be dismissed and held for naught as against it.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
ROY F. ALLAN
Assistant U. S. Attorney.
DONALD J. STOCKING
Assistant U. S. Attorney.

5. That said Special Appearance and Objection to Jurisdiction came duly and regularly on for hearing before the above-entitled court, the Honorable George M. Bourquin, Judge presiding, at the court room thereof, at Missoula, Montana, on April 16th, 1934, and thereafter and on that day said Objection to Jurisdiction was by the Court denied;

And now the defendant The United States of America, asks that this be settled, approved, signed,

order filed, and filed as its Amended Bill of Exceptions on said ruling of the Court.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

Approved and settled.
BOURQUIN, J.

[Endorsed]: Filed May 7, 1934. [46]

Thereafter, on May 7, 1934, Amended Bill of Exceptions of Harold L. Ickes, Secretary of the Interior, was duly filed herein, being in the words and figures following, to-wit: [47]

[Title of District Court and Cause.]

AMENDED BILL OF EXCEPTIONS OF HAROLD L. ICKES, SECRETARY OF THE INTERIOR

To Order of the Court of April 16th, 1934, denying his objection to jurisdiction:

Be it remembered, that

1. The above-named plaintiff filed her Complaint in Equity in the above-entitled court and action on February 13th, 1934. Said complaint in Equity after the title of court and cause is as follows, to-wit:

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation. [48]

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial

irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October 8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same [49] was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred

sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "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 of

any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriations and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit [50] of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation

Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 418, for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined. [51]

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her

said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one

hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug [52] and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

AGNES McINTIRE

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE
Notary Public for the State of Montana.
Residing at Polson, Montana.

My Commission expires August 1, 1934.

2. That thereafter, and on that day, a subpoena in equity issued out of the above-entitled court, in the above-entitled cause. Said Subpoena in Equity is in words and figures as follows, to-wit:

United States District Court
Missoula Division—District of Montana

The President of the United States of America

To the United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting: [53]

You are hereby commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER,
Deputy Clerk.

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after

service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff.

3. That thereafter, and on March 22nd, 1934, the above-named plaintiff filed in the above-entitled court and cause her Motion which, after the title of court and cause is as follows:

Now comes the above-named plaintiff and moves the Court that an order be made directing defendant, Harold L. Ickes, Secretary of the Interior, to appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of the complaint filed herein together with a copy of said order be forthwith served upon said defendant.

Said defendant Harold L. Ickes, Secretary of the Interior, is not an inhabitant of the District of Montana, and has failed to voluntarily appear in said action, although requested to do so in a letter addressed to said defendant on February 13, 1934, inclosing a copy of said complaint, which letter was registered and the [54] return card shows that the same was received on February 17, 1934.

Dated March 22, 1934.

ELMER E. HERSHEY
Attorney for Plaintiff.

The Court thereupon made an order which after the title of court and cause is as follows:

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case.

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23rd day of March, 1934.

BOURQUIN

Judge

[Endorsed]: Filed and entered March 23, 1934. C. R. Garlow, Clerk.

That said order, together with a copy of the bill of complaint, was served upon said defendant by the United States Marshal at Washington, D. C. on March 30, 1934.

4. That on April 9th, 1934, said Harold L. Ickes, Secretary of the Interior, served and filed in the above-entitled court and cause his Special Appearance and Objection to Jurisdiction which after the title of court and cause is in words and figures as follows: [55]

Comes now Harold L. Ickes, Secretary of the Interior, appearing specially and not voluntarily

herein, and for the sole purpose only of objecting to the jurisdiction of the above-entitled court in the above-entitled suit over him says:

1. That said Court does not have any jurisdiction over him as a party defendant in said suit for the reason that the same is brought against him in a district court other than that of the district whereof he is an inhabitant.

2. That this suit is essentially and substantially, despite the alleged joinder of the Secretary of the Interior, a suit against the United States of America and is therefore beyond the jurisdiction of this Court, for the reason that the United States without its consent cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN,
United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

5. That said Special Appearance and Objection to Jurisdiction came duly and regularly on for hearing before the above-entitled court, the Honorable George M. Bourquin, Judge presiding, at the court room thereof, at Missoula, Montana, on April 16th,

1934, and thereafter and on that day said Objection to Jurisdiction was by the Court denied;

And now the defendant Harold L. Ickes, Secretary of the Interior, asks that this be settled, approved, allowed, signed, order filed, and filed as his Amended Bill of Exceptions on said ruling of the Court.

JAMES H. BALDWIN
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

Approved and settled.
BOURQUIN, J.

[Endorsed]: Filed May 7, 1934. [56]

Thereafter, on July 25, 1934, an Order granting Plaintiff leave to file an Amended Complaint and time for Defts. to appear in response thereto was duly entered herein, the minute entry thereof being in the words and figures following, to-wit: [57]

[Title of District Court and Cause.]

Counsel for the respective parties present in court, Mr. Elmer E. Hershey appearing for the plaintiff and Mr. James H. Baldwin, U. S. District Attorney, appearing for the defendants the United States and Henry Gerharz.

Thereupon, on the motion of Mr. Hershey, and there being no objection by the District Attorney, the plaintiff was granted leave to file an amended complaint herein, it being agreed and ordered that the defendants the United States and Henry Gerharz shall have thirty days in which to appear in response to the amended complaint, and that if they do not so appear the answers heretofore filed shall stand and be considered as answers to the amended complaint.

Entered in open court July 25, 1934.

C. R. GARLOW,
Clerk. [58]

Thereafter, on July 25, 1934, an Amended Complaint in Equity was duly filed herein, being in the words and figures following, to-wit: [59]

[Title of District Court and Cause.]

AMENDED COMPLAINT IN EQUITY

Now comes the above named plaintiff and by leave of court first had and obtained files this her amended complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March

8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. P. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [60]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michael Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the North-east Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Mountain Meridian, and

Lizette Barnaby, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian.

III.

That on or about the 15th day of April, 1900 said Indian allottee, Michel Pablo who was then in the possession of said described land dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigation their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned. [61]

IV.

That on January 25, 1918 a fee patent was issued to Agathy Pablo, wife of Michael Pablo, for the lands allotted to him, and on October 5, 1918 a fee patent was issued to Agatha Pablo, for said lands allotted to Lizette Barnaby, and thereafter said lands were sold and transferred to Plaintiff, and Plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "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 of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, Defendant herein, claims [62] an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from Plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of

said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416), for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right [63] to shut down plaintiff's headgate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

XIII.

That Alex Pablo and A. M. Sterling are each claiming that the appropriation of Michael Pablo as herein alleged was also made for additional lands now owned by them, and for this reason they are each made a defendant herein, in order that all rights, if any other than plaintiff's herein in said appropriation may be enquired into and the several rights in said ditch and the waters carried therein be fixed, partitioned, separated and established.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior

right to the use of said waters of one hundred sixty [64] inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 18th day of July, 1934.

[Seal] FRED D. WHISLER

Notary Public for the State of Montana, Residing at Missoula, Montana.

My Commission Expires July 8, 1935.

[Endorsed]: Filed July 25, 1934. [65]

Thereafter, on August 21, 1934, Motion to Dismiss the Amended Complaint by Defendants Alex Pablo and A. M. Sterling was duly filed herein, being in the words and figures following, to-wit: [66]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT IN EQUITY

Now come the defendants, Alex Pablo and A. M. Sterling, two of the defendants in the above entitled action, and separately move the Court to dismiss the amended complaint in equity filed in the above entitled cause upon grounds and reasons therefor as follows:

I.

That there is insufficiency of fact alleged in said Amended Complaint in Equity to constitute a valid cause of action in equity against the said defendants, or either of them.

JOHN P. SWEE

Ronan, Montana.

Solicitor for said defendants.

Service of the foregoing Motion to Dismiss Amended complaint in Equity accepted and receipt of copy acknowledged this 20th day of August, 1934.

ELMER E. HERSHEY
Attorney for Plaintiff.

[Endorsed]: Filed August 21, 1934. [67]

Thereafter, on March 20, 1935, Motion for Judgment on the Pleadings by the United States was duly filed herein, being in the words and figures following, to-wit: [68]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the defendant and moves the Court that judgment be rendered for the defendant herein on the pleadings and as grounds for said motion, states:

I.

This Court is without jurisdiction of this case for the reason that this action is not one in which the United States of America has consented to be sued.

II.

That the facts stated in the amended bill of complaint in equity are insufficient to constitute a valid cause of action in equity against the United States of America.

III.

That the above entitled Court is without jurisdiction or authority to proceed further in this ac-

tion for want of necessary parties, for this, that there are numerous users of the waters of Mud Creek, whose lands are situate thereon and adjacent thereto and both above and below the lands described in the complaint in equity herein, whose rights to the use of the waters of said creek may be injuriously affected by any decree that the above entitled court may render or enter in the above entitled cause and whose presence either as parties plaintiff or defendant in this action is necessary and proper to a complete determination of this [69] cause and of the issues of the right to and the amount or duty of water involved in this action.

IV.

That by reason of the execution of the repayment contract, entered into between the United States of America and the Flathead Irrigation District, in which district the lands of plaintiff are included, subjecting plaintiff to the terms and conditions of said repayment contract, plaintiff is estopped from obtaining a determination of her rights as against the United States, one of the parties to said repayment contract.

Dated this 20th day of March, 1935,

JAMES H. BALDWIN
United States Attorney for District of Montana.

KENNETH R. L. SIMMONS
District Counsel, Interior Department, Indian Irrigation Service.
Attorneys for Defendant, United States of America

[Endorsed]: Filed March 20, 1935. [70]

Thereafter, on May 7, 1936, Return of Service of Order on Secretary of the Interior was duly filed herein, being in the words and figures following, to-wit: [71]

[Title of District Court and Cause.]

ORDER

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case,

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L., 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23 day of March, 1934.

BOURQUIN,
Judge

[Endorsed]: Filed and entered March 23, 1934. C. R. Garlow, Clerk.

Attest a true copy.

[Seal] C. R. GARLOW,
Clerk.

By H. H. WALKER,
Deputy.

U. S. Marshal's Office
Washington, D. C.

March 31, 1934.

Served copy of the within Order together with a copy of the bill of complaint in said case on Harold L. Ickes, Secretary of the Interior, by personal service of the same on Harry Slattery, Assistant to the Secretary of the Interior, March 30, 1934.

EDGAR C. SNYDER
U. S. Marshal, District of Columbia
By THOMAS R. EAST,
Deputy U. S. Marshal.

[Endorsed]: Filed May 7, 1936. [72]

Thereafter, on May 16, 1936, Amended Complaint in Equity was duly filed herein, being in the words and figures following, to-wit: [73]

In the District Court of the United States, for the District of Montana.

No. 1496.

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of Interior, HENRY GERHARZ, Project Manager of Flathead Reclamation Project, ALEX PABLO, A. M. STERLING, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, a corporation, ALICE CLAIRMONT COWAN, VICTOR LEONARD CLAIRMONT, HENRY CLAIRMONT, JAMES C. & ELIZABETH TVARUZEK, FLORENCE CLAIRMONT, ERNEST CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, Administrator of

Estate of R. W. JAMISON, deceased, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. D. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY and W. A. DUPUIS,

Defendants.

AMENDED COMPLAINT IN EQUITY.

Now comes the above named plaintiff and by leave of court first had and obtained files this her amended complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and upper Pend d' Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation, which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United [74] States, April 18, 1859, (12 Stat. L. P. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent

homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and with out artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Lizette Barnaby, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian.

III.

That on or about the 15th day of April, 1900, said [75] Indian allotee, Michel Pablo who was then in the possession of said described land dug and constructed an irrigation ditch from Mud Creek, in

Lake County, Montana, carrying one hundred sixty inches, or four cubic feet of water per second of the waters from said creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918, a fee patent was issued to Agatha Pablo, wife of Michael Pablo, for the lands allotted to him, and on October 5, 1918, a fee patent was issued to Agatha Pablo for said lands allotted to Lizette Barnaby, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. P. 354) there was added [76] by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "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 of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906, and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in

said Mud Creek and has dammed up said creek and carries part of the waters away from plaintiff, and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands. [77]

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416) for the purpose of completing adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project

Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's headgate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss. [78]

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That the plaintiff has no plain, speedy or adequate remedy at law.

XIII.

That Alex Pablo and A. M. Sterling are each claiming that the appropriation of Michael Pablo as herein alleged was also made for additional lands

now owned by them, and for this reason they are each made a defendant herein, in order that all rights, if any other than plaintiff's herein in said appropriation may be enquired into and the several rights in said ditch and the waters carried therein be fixed, partitioned, separated and established.

XIV.

That the Flathead Irrigation District is a corporation, duly incorporated under the laws of the State of Montana.

XV.

That defendants Lou Bigelow Krout, Alphonse Clairmont, Flathead Irrigation District, a corporation, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, James C. & Elizabeth Tvaruzek, Florence Clairmont, Ernest Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. [79] Remiers, Administrator of the Estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. D. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, W. A. Dupuis, Gertrude E. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley at one time claimed some rights to the waters flowing in Mud Creek, or some interest therein, and are made defendants herein in order that they may have an opportunity to set forth their rights or interests, if any they have, in order that the entire

controversy over the waters in Mud Creek may be settled and disposed of.

Wherefore, plaintiff prays that the defendant, the United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY,

Attorney for Plaintiff. [80]

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above entitled action, says that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula, where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 13th day of May, 1936.

[Seal] JAS. A. WALSH

Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed May 16, 1936. [81]

Thereafter, on June 5, 1936, Special Appearance and Objection to Jurisdiction by the United States, was duly filed herein, being in the words and figures following, to-wit: [82]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant, The United States of America, appearing specially and not voluntarily

herein and for the sole purpose only of objecting to the jurisdiction of the above entitled Court in the above entitled suit over it and says:

I.

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued.

Wherefore, The United States of America prays that the Amended Complaint in this action be dismissed and held for naught [83] as against it.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department Interior, United States Indian Irrigation Service.

[Endorsed]: Filed June 5, 1936. [84]

Thereafter, on June 5, 1936, Special Appearance and Objection to Jurisdiction by Deft. Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [85]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant, Henry Gerharz, as denominated in the Amended Bill of Complaint, Project Manager of Flathead Reclamation Project, and appearing specially and not voluntarily herein and for the purpose of objecting to the jurisdiction of the above entitled Court in the above entitled suit over him says:

I.

That the Amended Bill of Complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against Henry Gerharz in his denominated capacity in said Amended Bill of Complaint as Project Manager of Flathead Reclamation Project or otherwise, and does not state facts sufficient [86] to entitle the plaintiff to any relief as against Henry Gerharz as Project Manager or otherwise.

II.

That this suit is essentially and substantially, despite the alleged joinder of Henry Gerharz in his denominated capacity in the said Amended Bill of Complaint, as Project Manager of Flathead Reclamation Project, a suit against the United States of America and is therefore beyond the jurisdiction of this Court for the reason that the United States, without its consent, cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Amended Complaint in this suit be dismissed and held for naught as against him.

JOHN B. TANSIL,
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS,
District Counsel, Department of Interior, United States Indian Irrigation Service.

[Endorsed]: Filed June 5, 1936. [87]

Thereafter, on June 9, 1936, Motion to Dismiss by Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [88]

[Title of District Court and Cause.]

MOTION TO DISMISS.

Comes now Flathead Irrigation District, one of the defendants in the above entitled action, and moves the Court to dismiss the bill of complaint filed in the above entitled cause for the reason and on the ground that there is insufficiency of facts therein to constitute a valid cause of action in equity against this defendant.

WALTER L. POPE,
RUSSELL E. SMITH,
Solicitors for Defendant,
Flathead Irrigation District. [89]

Service of the foregoing Motion to Dismiss accepted and receipt of copy acknowledged this 8th day of June, 1936.

ELMER E. HERSHEY,
Attorney for Plaintiff.

[Endorsed]: Filed June 9, 1936. [90]

Thereafter, on June 10, 1936, Motion to Dismiss by Defendants, members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [91]

[Title of District Court and Cause.]

MOTION TO DISMISS.

Come now the defendants, Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, Mary Pablo, Alex Sloan, George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead tribe of Indians and wards of the United States of America, by and through the United States Attorney for the District of Montana, move the above entitled Court to dismiss said action as against them and as grounds for their motion allege: [92]

I.

That the alleged amended complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against these defendants, and does not state facts sufficient to entitle plaintiff to any relief against said defendants.

Wherefore, these defendants pray that the alleged amended complaint in this suit be dismissed and held for naught as against them.

JOHN B. TANSIL,
United States District Attorney.
KENNETH R. L. SIMMONS,
District Counsel, Department of the Interior, U. S. I. I. S.,
Attorneys for above defendants.

[Endorsed]: Filed June 10, 1936. [93]

Thereafter, on November 23, 1936, Answer of the United States to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [94]

[Title of District Court and Cause.]

ANSWER.

Comes now the United States of America, one of the defendants in the above entitled action, and for its answer to the amended bill of complaint in equity on file herein, alleges:

I.

For a first affirmative defense that this action is not one in which the United States of America has consented to be sued.

II.

For a second affirmative defense, that the action was not one brought for the partition of lands. [95]

III.

For a third affirmative defense, that this action is in fact and legal effect one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana.

IV.

For a fourth affirmative defense, that the facts stated therein are insufficient to constitute a valid cause of action in equity against the answering defendant.

Wherefore, having fully answered, the United States of America prays:

1. That Plaintiff take nothing by her action;

2. That the United States of America have judgment against plaintiff for its costs and disbursements herein necessarily expended.

3. For such other and further relief as may be fit and proper in the premises.

ROY F. ALLAN

Asst. United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, Department of Interior, United States Indian Irrigation Service. [96]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allan, being duly sworn on oath, deposes and says:

That he is the Asst. United States Attorney for the District of Montana, and as such makes this verification to the foregoing answer;

That he has read the same and knows the contents thereof and the same is true to the best of his knowledge, information and belief.

ROY F. ALLAN

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN
Deputy Clerk, U. S. District Court
District of Montana

[Endorsed]: Filed Nov. 23, 1936. [97]

Thereafter, on November 23, 1936, Answer of Henry Gerharz to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [98]

[Title of District Court and Cause.]

ANSWER

Comes now Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of Flathead Reclamation

Project and for answer to the amended bill of complaint in equity herein alleges:

I.

Defendant admits the allegations contained in Paragraph I of plaintiff's amended bill of complaint save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendant states that he is without knowledge. [99]

Defendant alleges that the Flathead Indian Irrigation Project is incorrectly designated in the title of this action and in certain paragraphs of the amended bill of complaint herein as Flathead Reclamation Project, and alleges that the said Project is subject, not to the Reclamation Laws, but to the Indian Irrigation Project Laws of the United States.

Defendant alleges by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's amended bill of complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

II.

Defendant admits that Michel Pablo and Lizett Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendant states that he is without knowledge as to any allegation contained in Paragraph III thereof.

IV.

Defendant states that he is without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Defendant admits the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L. 355) and except as hereinbefore specifically admitted, states that he is without knowledge as to [100] any allegation contained in Paragraph V thereof.

VI.

Defendant admits that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, states that he is without knowledge as to any other allegation contained in Paragraph VI thereof.

VII.

Defendant denies that there are no other parties using the waters of Mud Creek except plaintiff and

the United States of America, and in this connection alleges that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the amended bill of complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause; and except as hereinbefore specifically denied or qualified states that he is without knowledge as to any allegation contained in Paragraph VII thereof.

VIII.

Defendant alleges that all acts done by this answering defendant in regard to lands and waters mentioned in said amended complaint in equity were and are and will continue to be proper and lawful acts done in pursuance of the orders, rules and regulations of the Secretary of the Interior of the United States of America, made and promulgated by said Secretary under and by virtue of the authority vested in him by the laws and statutes of the United States of America to carry the same into effect.

IV.

Defendant denies that he has ever wrongfully or [101] without right claimed that plaintiff has no water right on Mud Creek independent of the Flathead Indian Irrigation Project and denies that he has unlawfully claimed the right to shut out plain-

tiff's headgate or to prevent waters from flowing into plaintiff's ditch or to deprive plaintiff of the use of said waters upon said lands, except by paying to said Flathead Irrigation Project fees and charges.

Defendant, however, admits and avers that in the course of his employment as Project Engineer of the Flathead Indian Irrigation Project, acting under the direction and authority of the Secretary of the Interior, pursuant to laws and statutes of the United States, he assessed against a portion of said lands claimed by plaintiff, certain charges for construction, operation and maintenance of the Flathead Irrigation System and further alleges that said charges and each thereof were and are lawful and proper;

Defendant further alleges that on August 26, 1926, an order was duly given, made and entered of record in the District Court of the Fourth Judicial District of the State of Montana in and for the counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West Half ($W\frac{1}{2}$) of Northeast Quarter ($NE\frac{1}{4}$) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

That subsequently said Flathead Irrigation District entered into a repayment contract, and First,

Second and Third supplemental contracts with the United States of America and the above described lands became and are now subject to the terms and conditions of such repayment contract and said supplemental contracts. [102]

X.

Defendant states that he is without knowledge of the value of the water mentioned in the amended bill of complaint in equity herein.

XI.

Defendant denies that this action is necessary to prevent a multiplicity of suits.

XII.

Defendant denies that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Defendant states that he is without knowledge as to any allegation contained in Paragraph XIII thereof.

XIV.

Defendant admits the allegations contained in Paragraph XIV thereof.

XV.

Defendant states he is without knowledge as to any allegation contained in Paragraph XV thereof. Defendant alleges that whatever rights, if any, these defendants have to the use of the waters of Mud

Creek are subservient to the rights of the United States of America, defendant herein, and whatever rights, if any, they have were granted them by the United States of America pursuant to Federal statutes.

XVI.

Defendant denies each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

First Affirmative Defense.

For a further answer and by way of a first affirmative defense this answering defendant says: [103]

That this action is not one of the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water.

Second Affirmative Defense.

For a further and second affirmative defense, defendant says:

That the facts stated in the amended bill of complaint in equity herein are insufficient to constitute a valid cause of action in equity as against this answering defendant.

Third Affirmative Defense.

For a further and third affirmative defense, defendant says:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic

purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Fourth Affirmative Defense.

For a further and fourth affirmative defense, defendant says:

That by a treaty between the United States and the Confederated tribes of Flathead, Kootenai and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stats. 975) ratified March 8, 1859 and proclaimed April 15, 1859, the Confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them being in what is now the northwestern part of the State of Montana; and the United States set aside and there reserved for the exclusive use, benefit and occupancy of the said Confederated tribes and as a [104] general Indian Reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the lands so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation. The purpose and effect of this treaty was, in keeping with the general Indian policy of the United States, to enable these Indians to abandon their habits as a nomadic and uncivilized people and to become a self-supporting agricultural and civilized people with perma-

nent homes on lands thereafterwards to be allotted to them in severalty. The lands of said reservation are arid and without artificial irrigation are valueless for farming and the growing of agricultural crops thereon; and said reservation was and is too small in area to enable these Indians to support themselves as a nomadic and uncivilized people as they had theretofore lived and supported themselves upon the much larger area occupied and claimed by them. Upon the making of said treaty the said Confederated bands of Indians removed to settled upon and have thereafter remained upon and occupied said Indian reservation and began and have continued to support themselves by farming and the growing of agricultural crops upon the lands of said reservation by means of artificial irrigation with the waters flowing upon said reservation. By the establishment of this reservation the United States, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted from appropriation under territorial and state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

That pursuant to the Acts of Congress of April 23, 1904 (33 Stat. L. 305), June 21, 1906 (34 Stat. L. 354), and April 30, 1908 (35 Stat. L. 70 83), the United States commenced the construction of the Flathead Irrigation Project to irrigate the [105]

irrigable lands on the Flathead Indian Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908, the sum of $50,000 was appropriated from public monies for preliminary surveys, plans and estimates of irrigating systems to irrigate the lands allotted by the Act of Congress of April 23, 1904, and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936, the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Indian Irrigation Project in Montana; and that the United States now owns, operates and is in control of the Flathead Indian Irrigation Project.

That pursuant to Section VII of the General Allotment Act of Congress of February 8, 1887 (24 Stat. L., 388), and of the Acts of Congress aforesaid of April 23, 1904, June 21, 1906 and April 30, 1908, the Secretary of the Interior, as the Agent of the United States, designated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project system. That all of said lands are classified as irrigable lands, subject to their pro rata share of the waters distributed by the Flathead

Indian Irrigation Project system. That a portion of the lands of the defendant described herein have been classified as irrigable by the Secretary of the Interior and lie under said irrigation system and are subject to water deliveries therefrom.

That all of the waters of streams bordering upon and flowing through the Flathead Indian Reservation, including the waters of Mud Creek, are used by the Flathead Indian Irrigation Project system and are necessary for the proper irrigation of [106] lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

That the only right plaintiff, or her predecessors in interest, ever had to use said waters or any part thereof, was and is the right to use for irrigation and other beneficial purposes, the amount of said waters apportioned and distributed to them, or to her, under the laws of the United States and the rules and regulations of the Secretary of the Interior of the United States Government, subject to lawful charges for operation, maintenance and construction of said project thereunder; and that neither the said water, nor any part thereof, on said Indian Reservation, was or could be appropriated, or title thereto acquired by plaintiff, or by his alleged predecessors, or by any person.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all

early water right developments of Indians and white settlers on the Flathead Indian Reservation in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Mud Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report [107] of said committee and its recommendations were approved by said Secretary on November 25, 1921.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Mud Creek to the lands of Michel Pablo, being allotment No. 1148, comprising the West Half (W½) of the Northeast Quarter (NE¼) of Section Fourteen (14), Township Twenty-one (21) North, Range Twenty (20) West, Montana Principal Meridian, to the extent of one thousand (1000) gallons per day

for domestic and stock uses. That pursuant to said Acts of Congress, the Secretary of the Interior, on November 25, 1921, further declared that no other water right of any kind is appurtenant to this allotment.

That save and except the rights plaintiff acquired under the Flathead repayment contract and said supplemental contracts to water deliveries from the Flathead Indian Irrigation Project system, subject to assessments and charges made under said contracts with the United States, this right to the use of one thousand (1000) gallons of water per day for domestic and stock use is the only right ever granted said allotment by the United States.

Fifth Affirmative Defense

For a further and fifth affirmative defense, defendant says:

That as a further notice to all landowners and settlers along Mud Creek that the United States was the sole owner of the waters flowing therein and of the right to the use of the same, pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and under and by virtue of an Act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams of the State of Montana * * *" approved February 27, 1905 (Revised Codes of Montana, 1921, Section 7099), [108] the United States through H. N. Savage, Supervising Engineer, U. S. Reclamation Service, thereunto duly

authorized by the Secretary of the Interior of the United States in that behalf, did make the following appropriations of the waters of Mud Creek and its tributaries:

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Montana Flathead County	Vol. & Page Recorded in Book of Water Rights
Dec. 27, 1909	20 cubic feet of water per second of time.	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	20 " " " "	Jan. 28, 1910	Vol. 90, p. 511
Dec. 27, 1909	20 " " " "	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	50 " " " "	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	200 " " " "	Jan. 28, 1910	Vol. 90, p. 512
April 4, 1912	200 " " " "	April 4, 1913	Vol. 71, p. 471
		Missoula County	
April 4, 1912	100 " " " "	April 7, 1913	Vol. J, p. 11

That the United States applied these waters to beneficial use within the time specified by the laws of the State of Montana and for the purposes as set out in the aforesaid Notices of Appropriation; that the United States has continuously used and is now using all of the waters of Mud Creek in its Flathead Irrigation Project system.

That the United States, long prior to and since the aforesaid dates of appropriation of the waters of Mud Creek and its tributaries, has continuously applied to beneficial use through the Flathead Irrigation Project system all of the waters of said streams.

Sixth Affirmative Defense.

For a further and sixth affirmative defense, defendant says:

That the United States has continuously and at all times since about the year 1855 and for a period greatly exceeding ten years prior to the filing of this action, had asserted and exercised the actual, visible, open, notorious and exclusive ownership, possession and control of all the waters of said Mud Creek, under claim of title in the United States as [109] aforesaid and hostile to the claims of all other persons whomsoever; that for a period of more than ten years immediately preceding the filing of this action the United States has by means of reservoirs, dams, ditches, flumes, headgates and other works under the Flathead Indian Irrigation Project, taken actual physical possession and control of all of said waters and has at all times during said period exercised entire dominion over and ownership of the said waters and water-rights, and has delivered such waters to actual users thereof only under the statutes and laws of the United States and the rules and regulations of the Secretary of the Interior relative to said Flathead Indian Irrigation Project, and not otherwise; that at all times during said period of more than ten years immediately preceding the filing of this action, the plaintiff and his predecessors have been permitted by the United States to use only such waters as have been delivered to them by it under said project and pursuant to the grant of the United States through the Secretary of the Interior to one thousand gallons of water per day for domestic and stock use; that during the whole of said period the plaintiff and his predecessors have used said waters only with the permission and consent of the United States and

subject to its asserted title thereto, and not under claim of title in themselves or adverse to the title of said United States.

That by reason of the premises the United States has title by adverse possession in and to all the waters mentioned in plaintiff's complaint, and in and to all the waters of Mud Creek as against any possible claim of title in plaintiff.

That by reason of the premises the plaintiff is barred by the provisions of Sections 9015, 9016, 9018 and 9041 of the Revised Codes of the State of Montana 1935, from asserting any right, title or interest in or to said waters or water-rights adverse to the United States or to this defendant.

That by reason of the premises the plaintiff has been guilty of laches and should not now be heard in equity to set up [110] or assert any right, title or interest in or to said waters or water-rights adverse to the United States or to this defendant.

Wherefore this answering defendant prays that plaintiff's amended complaint in equity herein be dismissed and that this answering defendant do have and recover of and from said plaintiff his costs and disbursements herein necessarily expended.

ROY F. ALLAN
Asst. United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department of the Interior, United States Indian Irrigation Service.
Attorneys for Defendant Henry Gerharz

[111]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allan, being duly sworn on behalf of the defendant in the above-entitled action, says that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendant is absent from the County of Silver Bow, where his attorney has his offices, and that the affiant is one of the defendant's attorneys and therefore makes this affidavit.

ROY F. ALLAN

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN
Deputy Clerk, U. S. District Court,
District of Montana

Due and legal service of the within Answer and receipt of a true copy thereof is hereby acknowledged this 23rd day of November, 1936.

ELMER E. HERSHEY
Attorney for Plaintiff

[Endorsed]: Filed Nov. 23, 1936. [112]

Thereafter, on November 23, 1936, Answer of Defts., members of the Flathead Tribe of Indians, to Amended Bill of Complaint, was duly filed herein, being in the words and figures following, to-wit: [113]

[Title of District Court and Cause.]

ANSWER.

Comes now the defendants, Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, May Pablo, Alex Sloan, George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead tribe of Indians and wards of the United States of America, by and through the United States District Attorney for the District of Montana, and for answer to the amended bill of complaint in equity herein allege: [114]

I.

Defendants admit the allegations contained in Paragraph I of plaintiff's amended bill of complaint, save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendants state that they are without knowledge.

Defendants allege by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's amended bill of complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the

waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

II.

Defendants admit that Michel Pablo and Lizette Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendants state that they are without knowledge as to any allegation contained in Paragraph III thereof.

IV.

Defendants state that they are without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Defendants admit the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L. 355) and except as hereinbefore specifically admitted, state that they are without knowledge as to any allegation contained in Paragraph V thereof. [115]

VI.

Defendants admit that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, state

that they are without knowledge as to any allegation contained in Paragraph VI thereof.

VII.

Defendants deny that there are no other parties using the waters of Mud Creek except plaintiff and the United States of America, and in this connection allege that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the amended bill of complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water, and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, and except as hereinbefore specifically denied or qualified state that they are without knowledge as to any allegation contained in Paragraph VII thereof.

VIII.

Defendants state that they are without knowledge as to any allegation contained in Paragraph VIII thereof.

IX.

Defendants deny that they have ever wrongfully or without right claimed that plaintiff has no water right on Mud Creek independent of the Flathead Indian Irrigation Project. Defendants state that they are without knowledge of any other allegation contained in Paragraph IX thereof.

X.

Defendants state that they are without knowledge of the value of the water mentioned in the amended bill of complaint in equity herein. [116]

XI.

Defendants deny that this action in equity is necessary to prevent a multiplicity of suits.

XII.

Defendants deny that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Defendants state that they are without knowledge as to any allegation contained in Paragraph XIII thereof.

XIV.

Defendants admit the allegations contained in Paragraph XIV thereof.

XV.

Defendants admit that they have some interest in the waters flowing in Mud Creek independent of the Flathead Indian Irrigation Project. Defendants allege, however, that whatever rights they have to the use of the waters of Mud Creek and its tributaries are subservient to the rights of the United States of America, defendant herein, and whatever rights they have were granted them by the United States of America pursuant to Federal Statutes.

XVI.

Defendants deny each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

First Affirmative Defense.

For a further answer and by way of a first affirmative defense these answering defendants say:

That this action is not one for the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water. **[117]**

Second Affirmative Defense.

For a further and second affirmative defense, defendants say:

That the facts stated in the amended complaint in equity herein are insufficient to constitute a valid cause of action in equity as against these answering defendants.

Third Affirmative Defense.

For a further and third affirmative defense, defendants say:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Fourth Affirmative Defense.

For a further and fourth affirmative defense, defendants say:

That by a treaty between the United States and the Confederated tribes of Flathead, Kootenai and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stat. 975) ratified March 8, 1859 and proclaimed April 15, 1859, the Confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them being in what is now the northwestern part of the State of Montana; and the United States set aside and there reserved for the exclusive use, benefit and occupancy of the said Confederated tribes and as a general Indian Reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the lands so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation. The purpose [118] and effect of this treaty was, in keeping with the general Indian policy of the United States, to enable these Indians to abandon their habits as a nomadic and uncivilized people and to become a self-supporting agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty. The lands of said reservation are arid and without artificial irrigation are valueless for farming and the growing of agricultural crops

thereon; and said reservation was and is too small in area to enable these Indians to support themselves as a nomadic and uncivilized people as they had theretofore lived and supported themselves upon the much larger area occupied and claimed by them. Upon the making of said treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian reservation and began and have continued to support themselves by farming and the growing of agricultural crops upon the lands of said reservation by means of artificial irrigation with the waters flowing upon said reservation. By the establishment of this reservation the United States, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

That pursuant to the Act of Congress of April 23, 1904 (33 Stat. L. 305), June 21, 1906 (34 Stat. L. 354), and April 30, 1908 (35 Stat. L., 70, 83), the United States commenced the construction of the Flathead Indian Irrigation Project to irrigate the irrigable lands on the Flathead Indian Irrigation Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908, the sum of $50,000 was appropriated from public monies for preliminary surveys, plans and estimates of irrigating [119] sys-

tems to irrigate the lands allotted by the Act of Congress of April 23, 1904, and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936, the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Indian Irrigation Project in Montana; and that the United States now owns, operates and is in control of the Flathead Indian Irrigation Project.

That pursuant to Section VII of the General Allotment Act of Congress of February 8, 1887 (24 Stat. L., 388), and in pursuance to other and subsequent Acts of Congress, the Secretary of the Interior, as the Agent of the United States, designated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project system. That all of said lands are classified as irrigable lands, subject to their pro rata share of the waters distributed by said Flathead Indian Irrigation Project system. That a portion of the lands of the defendant described herein have been classified as irrigable by the Secretary of the Interior and lie under said irrigation system and are subject to water deliveries therefrom.

That all of the waters of streams bordering upon and flowing through the Flathead Indian Reserva-

tion, including the waters of Mud Creek, are used by the Flathead Indian Irrigation Project system and are necessary for the proper irrigation of lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

That the only right plaintiff, or her predecessors [120] in interest, ever had to use said waters or any part thereof, was and is the right to use for irrigation and other beneficial purposes, the amount of said waters apportioned and distributed to them, or to her, under the laws of the United States and the rules and regulations of the Secretary of the Interior of the United States Government, subject to lawful charges for operation, maintenance and construction of said project thereunder; and that neither the said water, nor any part thereof, on said Indian Reservation, was or could be appropriated, or title thereto acquired by plaintiff, or by her alleged predecessors, or by any person.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all early water right developments of Indians and white settlers on the Flathead Indian Reservation in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian

Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Mud Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report of said committee and its recommendations were approved by said Secretary on November 25, 1921.

That pursuant to the aforesaid Acts of Congress [121] of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted the following valid and subsisting water rights from Mud Creek and its tributaries to the lands of the following defendants:

Name	Allotment No.	Land Description	Water Right
Alex Pablo	1152	N½NW¼ Sec. 14, T. 21 N., R. 20 W.	1000 gallons per day for domestic and stock uses.
Alphonse Clairmont	942	W½NW¼ Sec. 8, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 65 acres.
Alice Clairmont	944	SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 19.6 acres.
Victor Clairmont	945	NW¼NE¼ & NE¼NW¼ Sec. 18, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 33.3 acres.
Henry Clairmont	946	SE¼NE¼ Sec. 7; SW¼SW¼ Sec. 5, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 13.8 acres.
Florence Clairmont	948	W½SE¼ Sec. 7, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 13.7 acres.
Lillian Clairmont	971	SE¼NW¼ & SW¼NE¼ Sec. 8, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 60 acres.
Rose Ashley	1076	N½NE¼ Sec. 32, T. 22 N., R. 19 W.	1000 gallons per day for domestic and stock purposes.
Henry Ashley	1029	SE½SE¼ Sec. 29, T. 22 N., R. 19 W.	1000 gallons per day for domestic and stock purposes.
Alexander Sloane	1186	NE¼SW¼, W¾NW¼SE¼ & E¼NW¼SW¼ Sec. 34, T. 21 N., R. 20 W.	None.
Hattie Rose Sloane	1182	NE¼NW¼, W¼NE¼NW¼ & E¼NW¼NW¼ Sec. 34, T. 21 N., R. 20 W.	None.

That pursuant to said Acts of Congress, the Secretary of the Interior, on November 25, 1921, further declared that no other water rights of any kind were appurtenant to the above listed allotments. [122]

That save and except the rights these defendants acquired by the aforesaid grants of the Secretary of the Interior, acting in pursuance to Federal Statutes, these defendants admit they have no other rights except in some cases where water deliveries are or may be made to their lands by the Flathead Indian Irrigation Project system.

Fifth Affirmative Defense.

For a further and fifth affirmative defense, defendants say:

That all of the waters of Mud Creek and its tributaries are now and have been continuously since 1910 applied to beneficial use upon the lands of these defendants and upon other lands located on the Flathead Indian Reservation in Montana, subject to water deliveries from the Flathead Indian Irrigation Project system.

Defendants further allege that the lands of this plaintiff are included within the Flathead Irrigation District and are subject to the terms of a repayment contract and First, Second and Third supplemental contracts entered into between the Flathead Irrigation District and the United States of America; that on August 26, 1926, an order was duly given, made and entered of record in the District

Court of the Fourth Judicial District of the State of Montana in and for the Counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West Half (W½) of Northeast Quarter (NE¼) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

Wherefore these answering defendants pray that plaintiff's amended complaint in equity herein be dismissed and [123] that these answering defendants do have and recover of and from said plaintiff their costs and disbursements herein necessarily expended.

ROY F. ALLEN
Asst. United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of the Interior, United States Indian Irrigation Service. [124]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allen being duly sworn on behalf of the defendants in the above entitled action, says that he has read the foregoing answer and knows the

contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendants are absent from the County of Silver Bow, where their attorney has his office, and that the affiant is one of the defendants' attorneys and therefore makes this affidavit.

ROY F. ALLEN.

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN,
Deputy Clerk U. S. District Court, District of Montana.

Due and legal service of the within Answer and receipt of a true copy thereof is hereby acknowledged this 23rd day of November, 1936.

ELMER E. HERSHEY,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 23, 1936. [125]

Thereafter, on November 23, 1936, Answer of Flathead Irrigation District to Amended Bill of Complaint, was duly filed herein, being in the words and figures following, to-wit: [126]

[Title of District Court and Cause.]

ANSWER OF FLATHEAD IRRIGATION DISTRICT.

Comes now the defendant, Flathead Irrigation District, and for answer to the plaintiff's amended complaint:

I.

Admits that on July 16, 1855 a treaty was entered into between the United States of America and the tribes of Indians referred to in Paragraph I of said amended complaint. Admits the lands of said reservation are arid and require water for irrigation. Denies that one inch of water per acre is necessary for the proper irrigation of said lands, and admits that pursuant to said treaty [127] said Indians settled upon and occupied said Indian reservation; but denies that said Indians farmed said lands by means of irrigation, otherwise than as hereinafter alleged in this answer, pursuant to the establishment of the Flathead Irrigation Project, hereinafter mentioned. In this connection this defendant alleges that a copy of said treaty is attached hereto, marked "Exhibit A," and expressly made a part of this answer.

II.

This defendant alleges that it is without knowledge as to whether Michel Pablo or Lizette Barnaby or either of them made allotment for or acquired any interest in the lands described in Paragraph II of said amended complaint, or any part of said lands.

III.

This defendant denies that on or about the 15th day of April, 1900, or at any other time, Michel Pablo, or any other person, constructed an irrigation ditch from Mud Creek, referred to in said amended complaint, and denies that Michel Pablo, or any other person, or any Indian allottee, on April

15, 1900, or at any other time, appropriated or became the appropriator or appropriators of any of the waters of Mud Creek, and specifically denies that any of said waters thereby or otherwise or at all became appurtenant to any of the lands described in said amended complaint. In this connection this defendant alleges the fact to be that none of the lands of said Indian Reservation and none of the lands described in the amended complaint were allotted in severalty or ceased to be tribal Indian lands prior to the year 1910, and defendant alleges the fact to be that all of said lands remained unallotted tribal Indian lands, without ownership in severalty, until the year 1910.

IV.

Admits that on the dates mentioned in Paragraph IV of said amended complaint fee patents were issued to Agatha Pablo for [128] certain of the lands described in the amended complaint, and admits that plaintiff is now the owner in fee of the lands described in the complaint, but specifically denies that the plaintiff is the owner of any water right or of any of the waters of Mud Creek, and specifically denies that there was then or ever or at all, any of the waters of Mud Creek appurtenant to said lands.

V.

Admits that on June 21, 1906, Congress made the enactment referred to in Paragraph V of the amended complaint, but denies that at the times mentioned in said paragraph, or at any other time

prior to the commencement of this action, any ditch or ditches was or were used for the conducting of water from Mud Creek to the lands described in the amended complaint, or any of them.

VI.

Admits that the United States claims an interest in the waters of said Mud Creek, but denies that the United States has deprived the plaintiff of any use of said waters to which plaintiff is entitled, and denies that the plaintiff has any right, title or interest in or to said waters of Mud Creek, or any of them.

VII.

Denies that the plaintiff and the United States are tenants in common, or joint tenants, in the use of the waters of Mud Creek, and denies that the plaintiff has any interest whatsoever therein.

VIII.

Admits that Harold L. Ickes is Secretary of the Interior, and is in charge of the Flathead Indian Irrigation Project, and admits that Henry Gerharz is the Project Manager of said project. [129]

IX.

Admits that the defendants last named are claiming that the plaintiff has no water rights on Mud Creek, independent of said Indian Irrigation Project.

X.

Admits that the interest in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand ($3000.00) Dollars.

XI.

Admits that the defendants Alex Pablo and A. M. Sterling are each claiming rights in the waters of Mud Creek.

XII.

Admits that this defendant is a public corporation duly incorporated under the laws of the State of Montana.

XIII.

Defendant alleges that it is without knowledge as to whether the other defendants named in said amended complaint, but not heretofore specifically mentioned, claim some interest in or to the said waters of Mud Creek.

Further answering said amended complaint this defendant alleges that heretofore and on the 26 day of August, 1926, this defendant was, by an order and decree of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake, which was duly given, made and entered on said date, duly created and established as an irrigation district, under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects, and this district was duly organized and created pur-

suant to the Acts of Congress of May 10, 1926 (44 Stat., 464-466), January 12, 1927 [130] (44 Stat., 945), March 7, 1928 (45 Stat., 212-213), March 4, 1929 (45 Stat., 1574), March 4, 1929 (45 Stat., 1639-1640), and May 14, 1930 (46 Stat., 291), and other Acts amendatory thereof and supplemental thereto. That all of the lands within this defendant district are lands within said Flathead Indian Reservation, and were and are lands within the Flathead Indian Irrigation Project, mentioned in the said amended complaint. That subsequently and on or about the 12 day of May, 1928, this defendant district entered into a certain repayment contract between said district and the United States of America, which said repayment contract contained terms and provisions required to be incorporated therein by the aforesaid Acts of Congress, and subsequently and on the 12 day of July, 1926, said repayment contract was, by a judgment and decree of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake, duly given, made and entered on said date, duly confirmed, approved and ratified, and all proceedings in relation thereto duly confirmed, which decree became final, and that ever since the date aforesaid the said repayment contract has been in full force and effect, and this defendant has been under the obligations, and is now under the obligations created thereby.

That under and by virtue of the treaty with the Indian tribes, copy of which is attached hereto marked "Exhibit A," all of the waters upon said

Flathead Indian Reservation, including the waters of said Mud Creek, were reserved by the United States, and exempted from appropriation under state laws or any other laws, and reserved for the use and benefit of said Indian tribes. That thereafter and immediately upon the enactment of the Act of Congress of April 23, 1904 (33 Stat., 302-306), the United States, and the Secretary of the Interior, pursuant to the authorities contained in said Act, established, set up [131] and created, for the benefit of said Indian tribes, the Flathead Irrigation Project, for the irrigation of lands thereafter to be allotted under said Act to individual Indians, and for the irrigation of the surplus unallotted lands mentioned in said Act, and that thereafter the United States has, without interruption, continued the construction of said Flathead Indian Irrigation Project and is still continuing the construction thereof, all of which has been done pursuant to the said Act of April 23, 1904, and Acts amendatory thereof and supplemental thereto; and this defendant alleges that by the initiation and establishment of the said Irrigation Project the United States appropriated and segregated all of the waters lying upon said Indian Reservation and which might in any manner be utilized in conjunction with the construction of said Indian Irrigation Project, for the use and benefit of said Indian tribes, through the irrigation of the said allotted and surplus unallotted lands. That said Project was thus established and commenced prior to the date of any allotments in severalty of lands upon said reserva-

tion, and prior to the sale or disposition of any surplus unallotted lands, and that the lands within this defendant district are composed in part of allotted lands and in part of surplus unallotted lands which were sold pursuant to the aforesaid Acts of Congress, and that the owners of said lands within said irrigation district, by virtue of their right to receive water under said project, are, together with this defendant district, the successors in interest and title of the said Indian tribes, in and to the waters of said reservation, including all of the waters of said Mud Creek; that any attempted diversion or appropriation of the waters of Mud Creek for the purpose of acquiring a private water right therein, would be in violation of the said Acts of Congress, and in derogation of the rights established thereby and by the creation of said Indian Irrigation Project, and [132] wholly void, illegal and of no effect.

That the lands within this district are arid and require irrigation for the successful cultivation thereof, and that the sources of supply for said irrigation project and for said lands which are served thereby, are insufficient to supply all of the needs and requirements of the lands within said district, even elthough all of the waters of Mud Creek be taken, used and diverted into the irrigation system of said irrigation project, and if the plaintiff is permitted to take or use any of the waters of Mud Creek for irrigation or other purposes, the lands within this defendant district will be deprived of a portion of the waters required and needed by them

and to which they are entitled under the said irrigation project and under the contract between this defendant and the United States.

That under and pursuant to its contract with the United States this defendant has levied taxes and assessments upon private lands and has assumed obligations to the United States for the payment of construction charges and other charges against said land in an amount in excess of Five Million Dollars, and that if this plaintiff be permitted to divert said waters the lands of said district will suffer material detriment in loss of needed waters, and be unable to make payment of the assessments so levied and required for the payment of said obligations to the United States.

Wherefore, this defendant prays that plaintiff take nothing by her said action, and that the same be dismissed upon the merits.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for Flathead
Irrigation District [133]

"EXHIBIT A"

TREATY WITH THE FLATHEADS, ETC., 1855

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, Head-Men, 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, Head-Men, and Delegates, Whose Names Are Signed to This Treaty, Do Hereby in Behalf of their Respective Tribes, Recognize Victor as Said Head Chief.

Article 1. The said confederated tribe 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, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork, thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Riv-

ers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head-waters of the Koos-koos-kee River and of the southwestern form of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

Article 2. 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 [134] 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. And the said confederated tribes agree to remove and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner and claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improve-

ments of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The 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.

Article 4. 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, in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, break-

ing up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years four thousand dollars each year; and for the next five years, three thousand dollars each year.

All of which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the *wises* of the Indians in relation thereto. [135]

Article 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, 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 tribes, 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 ploughmaker'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 ploughmaker, 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; and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the same houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed

by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President 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 themselves 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 7. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. Nor will they make war [136] on any other tribe except in self-defense, but will submit all matters of difference

between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article 10. The United States further agrees to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading-post on the Pru-in River by the servants of that company.

Article 11. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall

prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.

Article 12. 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.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens [L.S.]
Governor and Superintendent Indian Affairs W. T.

Big Canoe, his x mark [L.S.]
Kootel Chah, his x mark [L.S.]
Paul, his x mark [L.S.]
Michelle, his x mark [L.S.]
Nattiste, his x mark [L.S.]
Kootenays

Gun Flint, his x mark [L.S.]
Little Michelle, his x mark [L.S.]
Paul See, his x mark [L.S.]
Moses, his x mark [L.S.]
Henry R. Crosire
Gustavus Sohon,
Flathead Interpreter
A. J. Hoecken,
sp. mis.
William Craig
Victor, head chief of the Flathead
Nation, his x mark [L.S.]
Alexander, chief of the
Upper Pend d'Oreilles,
his x mark [L.S.]
Michelles, chief of the
Kootenays, his x mark [L.S.]
Ambrose, his x mark [L.S.]
Pah-soh, his x mark [L.S.]
Bear Track, his x mark [L.S.]
Adolphe, his x mark [L.S.]
Thunder, his x mark [L.S.]
James Doty,
secretary
R. H. Lansdale,
Indian Agent
W. H. Tappan,
sub Indian Agent

[Endorsed]: Filed Nov. 23, 1936. [137]

Thereafter, on November 23, 1936, Answer of A. M. Sterling and Alex Pablo to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [138]

[Title of District Court and Cause.]

ANSWER

Comes now A. M. Sterling and Alex Pablo, two of the above named defendants, and for answer to the amended bill of complaint in equity herein allege:

I.

Defendants admit the allegations contained in paragraph one of plaintiff's amended bill of complaint, save and except the allegation that one inch of water is necessary for the proper irrigation of said land. As to this allegation, the defendants, state that they are without knowledge. [139]

II.

Defendants admit that Michel Pablo and Lizette Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendants admit that on or about the 15th day of April, 1900, said Indian allottee, Michel Pablo, was in the possession of, and the owner of the following described land, situated in the County of Lake, State of Montana, to-wit:

The West half (W½) of the Northeast quarter (NE¼) of Section Fourteen (14) in Town-

ship Twenty-one 21) North, of Range Twenty 20) West, Montana Principal Meridian, Montana.

and that he dug and constructed an irrigation ditch on Mud Creek, in Lake County, Montana, carrying eighty inches or two cubic feet of water per second of the waters from the said creek to his allotment above described for the purpose of irrigating his land above described; that said ditch was taken out on the right bank of Mud Creek, about the quarter corner common to Sections Twelve, Thirteen, Township Twenty-one (21) North, Range Twenty (20) West, long prior to the survey thereof, and while the same was unoccupied and unclaimed; and that said ditch was of sufficient size to carry said water; and that the said Michel Pablo thereby became the appropriator of eighty inches of water for the above described land from the waters of Mud Creek on or about the 15th day of April, 1900, and that the same has become appurtenant to said land, and at no time since the appropriation thereof has the same been abandoned. Further answering said paragraph three, the defendants deny each and every allegation not hereinbefore admitted.

IV.

Answering paragraph four the defendants state that they are without knowledge of any allegation contained in said paragraph four of said complaint. [140]

V.

Defendants admit the enactment into Laws of the United States the provisions of Section nineteen of the act of Congress of June 21, 1906 (34 Stat. L. P. 354), and that Michel Pablo was in the possession of the land hereinabove described; and admits all of the other allegations in said paragraph four except that said water was used by Michel Pablo for domestic use in irrigation upon the land hereinbefore described of which he was in possession and of which he was the owner, but deny that the water was used for domestic purposes or to irrigate the land of Lizette Barnaby as alleged and described in the plaintiff's complaint.

VI.

Answering paragraph six of said amended complaint, defendant admits that the United States of America claims some right and interest in the water flowing in Mud Creek, but as to all the other allegations contained in said paragraph six of plaintiff's complaint the defendant allege that they have not sufficient knowledge or information to form a belief and therefore deny the same.

VII.

Answering paragraph seven of said complaint, defendants deny that there are no other parties using the water of Mud Creek except the plaintiff and the United States of America, and in this connection allege that there are numerous users of the water of Mud Creek whose lands are situated both

above and below and adjacent to the lands described in the amended complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, except as hereinabove specifically specified, denied, or qualified states that the said defendants are without knowledge as to any allegation contained in said paragraph seven thereof. [141]

VIII.

Defendants admit paragraph eight of said amended bill of complaint in equity.

IX.

Answering paragraph nine of said amended complaint, defendants allege that they have not sufficient knowledge or information to form a belief as to the matters and statements therein stated, and therefore deny same.

X.

Defendants admit paragraphs ten, eleven, twelve, thirteen, fourteen, and fifteen.

Further answering said complaint, and by way of cross complaint herein the defendants allege:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation, which Treaty was duly ratified March 8,

1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [142]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Fathead Indian of the Flathead tribe or nation of Indians, made an allotment for the West half of the Northeast quarter (W½ NE¼) of Section Fourteen (14) in Township Twenty-one North (21N) of Range Twenty (20) West, Montana Principal Meridian, Montana.

III.

That on or about the 15th day of April, 1900, said Indian allottee, Michel Pablo, who was then in possession of said described land, dug and constructed an irrigation ditch from Mud Creek in Lake County, Montana, carrying 560 inches of water from Mud Creek to his allotment and the allotments of his wife and children, for the purpose of irrigating said lands above described and for domestic purposes; that said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one (21) North, of Range Twenty (20) West, long prior to the survey thereof, and while the same was unoccupied and unclaimed land; that said ditch was of sufficient size to carry said water, and said Indian allottee thereby became the appropriator of 560 inches of the waters of Mud Creek on or about the 15th day of April, 1900, and the same has become appurtenant to his land hereinbefore described, and the lands of his wife and children, and at no time since the appropriation thereof has the same been abandoned. [143]

IV.

That the defendant, Alex Pablo, is the son of said Michel Pablo, and is the owner of the following described land, situated in the County of Lake, State of Montana, to-wit:

The North half (N½) of the Northwest quarter (NW¼) of Section Fourteen (14) in

> Township Twenty-one (21) North, of Range Twenty (20), West, Montana Principal Meridian, Montana.

said land being his own personal allotment, the title to said land being held in trust for said defendant by the United States of America.

V.

That said Alex Pablo is a member of the Flathead tribe of Indians and a ward of the United States of America.

VI.

That the defendant A. M. Sterling is the owner of the legal title to the following described land, situated in the County of Lake, State of Montana, to-wit:

> The South half (S½) of the Northwest quarter (NW¼) of Section Fourteen (14), in Township Twenty-one (21) North, of Range Twenty (20) West, Montana Principal Meridian, Montana.

said land formerly was owned by Agatha Pablo, the wife of Michel Pablo, deceased. Said land was, prior to the sale to the said defendant, allotted to said Agatha Pablo, and after receiving a patent in fee for said land, the said Agatha Pablo sold said land to the defendant A. M. Sterling.

VII.

That on or about the 14th day of November, 1907, Michel Pablo made and executed a Notice of Appro-

priation of 560 inches of the waters of Mud Creek, and the purpose for which said water was claimed and the place of intended use was for domestic and irrigation purposes for use upon the lands described in the said Notice of Appropriation hereto attached, marked "Exhibit A" and made a part of this answer as though set forth at length at [144] this place.

VIII.

That ever since the construction of the ditch from Mud Creek by Michel Pablo, and since the filing of his Notice of Appropriation with the Clerk and Recorder of Missoula County, Montana, the waters from said ditch have been continuously used up to the present time upon the land of the defendant Alex Pablo, and the land now owned by the defendant A. M. Sterling; that under said Notice of Appropriation there was appropriated for the defendant, Alex Pablo, for irrigation and domestic purposes, eighty inches of water, or two cubic feet of the waters of Mud Creek, for use upon his land, and under and by virtue of said appropriation, there was appropriated for use upon the lands of the defendant, A. M. Sterling, eighty inches or two cubic feet of the waters of Mud Creek; and that said ditch was constructed, and the waters appropriated and used by Michel Pablo and Alex Pablo and Agatha Pablo, and since the sale of the land to A. M. Sterling, by A. M. Sterling, his tenants and successors; and that the filing of the notice marked "Exhibit A" was made long prior to the acquiring of any rights whatsoever of the waters of Mud

Creek, by the United States of America or any other person or corporation whatsoever.

IX.

That on June 21, 1906, there was added by Congress of the United States, to the provisions of an act approved April 3, 1904, providing for the allotment of the lands on said Flathead Indian reservation and the opening of the same for sale and disposal Sections 17, 18, 19, and 20. Section 19 being as follows:

> "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 of any ditches, dams flumes, reservoirs, constructed and used by them in the appropriation and use of said water." [145]

That from April 15, 1900 continuous up to and including June 21, 1906, and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands belonging to the defendants, Alex Pablo and A. M. Sterling, herein described in conveying the water from said Mud Creek to said land, and these defendants claim the benefit of said act of Congress in the use and possession of eighty inches or two cubic feet of water per second upon each of their respective tracts of land, from the waters carried in said ditch, and without any pref-

erence, and that the right to said water for irrigation and domestic purposes upon the respective land of these defendants. Their rights are superior and prior to the rights of any other person or persons or corporation, save and except the plaintiff, who, under the appropriation made by Michel Pablo is entitled to eighty inches of water or two cubic feet of water per second of the waters carried in said ditch, but that the plaintiff is not entitled to a prior right to the use of said water, but that her rights to the use of said water is equal with the rights of these defendants, without priority.

X.

That the United States of America, one of the defendants herein, claims an interest in the waters flowing in said Mud Creek, and has dammed up said creek and carries part of the waters away from these defendants, and has deprived said defendants of the full use of the water to which they are entitled; that the defendant, Alex Pablo, and the defendant, A. M. Sterling's right to the use of said water became vested in them or their predecessors long prior to the claim of the United States, and that the United States, under the provisions of said act of June 21, 1906, has no right to deprive these defendants of any water originally appropriated, and required by them and necessary for domestic use and irrigation of their lands, not exceeding, however, eighty inches of the waters flowing in said ditch from Mud Creek. [146]

XI.

That there are no other parties using the waters flowing in the ditch known as the Pablo ditch, from Mud Creek, except the defendants, Alex Pablo, and A. M. Sterling, and the plaintiff; and that the waters flowing in said ditch from Mud Creek can be divided, partitioned, and separated so that the amount of water that these defendants and the plaintiff are entitled to. can be fixed and determined, and also the rights of the United States as to the balance of the water flowing in said Mud Creek.

Wherefore: The defendants, A. M. Sterling and Alex Pablo, pray that the United States of America be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States, to said water, the waters therein may be adjudicated between the United States and these defendants; and that the defendants right as herein set forth may be partitioned, separated, fixed, and established, and that said defendants, and each of them, be given a prior right to the use of said waters, of eighty inches or two cubic feet of water per second of the waters flowing in said ditch from Mud Creek; and that the defendants rights to the waters in said ditch be fixed and determined by the court, and that all other defendants named in this action be restrained from interfering with the rights of the defendants as so found; and that the defendants be given sufficient water for domestic use and for

the purpose of irrigation of their land, and for other beneficial use thereon, to the extent of eighty inches for each of the said defendants of the waters of Mud Creek and flowing through the irrigation ditch dug and constructed as herein set forth; and that these defendants have such other and further relief in the premises as may to the court seem meet and in accordance with equity and good conscience; and for costs of suit.

JOHN P. SWEE
Attorney for Plaintiff.
Ronan, Montana. [147]

State of Montana,
County of Lake—ss.

A. M. Sterling, being first duly sworn upon his oath deposes and says: That he is one of the defendants named in the above entitled action, that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated therein on information and belief and as to those matters he believes them to be true.

A. M. STERLING

Subscribed and sworn to before me this 23rd day of November, 1937.

[Seal] JOHN P. SWEE
Notary Public for the State of Montana
Residing at Ronan, Montana.

My Commission expires July 27, 1937.

EXHIBIT "A"

NOTICE OF APPROPRIATION

State of Montana,
County of Missoula,
Flathead Indian Reservation—ss.

To All Whom These Presents May Concern:

Be It Known, That Michel Pablo (No. 605) and his wife, Agate children, Joseph, Mary and Alex, and grand nieves, Mary and Philomene of Flathead Indian Reservation in said County and State do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That they have a legal right to the use, possession and control of and claim Five Hundred and Sixty (560) inches of the waters of Mud Creek in said County and State for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for domestic and irrigation purposes on W/2 NW/4, SE/4 NW/4 and NE/ SW/4, Sec. 13, Twp. 21 N. R. 20 W. M. M.—W/2 NE/4, E½ SW/4 and NW/4 Sec. 14, Twp. 21 N. R. 20 W. M. M. and S/2 SW/4 Sec. 11 Twp. 21 N., R. 20 W., M. M.

III. That the means of diversion with size of flume, ditch pipe, or acqueduct, by which he intends to divert the said water is as follows: A ditch 48 inches by 18 inches in size, which carries and conducts 560 inches of water from said creek; which said ditch diverts the water from said stream at a point upon its North bank, and runs thence in a

westerly direction—The head of said ditch being about 150 yards above the land hereinbefore described, and being on land claimed by Marie Louise Pablo, thence over and upon said land (or mining claim).

IV. That they appropriated and took said water on the 15th day of April A. D. 1900, by means of said ditch. [148]

V. That the names of the appropriators of said water, Michel Pablo, Agate Pablo, Joseph Pablo, Mary Pablo, Alex Pablo, and Mary and Philomene Pablo.

VI. That they also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands, of any dams, flumes, reservoirs, constructed or to be constructed, by them in appropriating and in using said water.

VII. That they also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of the said right, water, ditch or said appurtenances in part or whole at any time.

Claiming the same all and singular, under any and all laws, National and State, and local rulings and decisions thereunder, in the matter of water rights.

Together with all and singular, the hereditaments and appurtenances thereunto belonging and appertaining, or to acc*ur*e to the same.

Witness our hand at Ronan, Montana, this 12th day of November, 1907.

M. PABLO

Witness:

D. D. HULL

State of Montana,
County of Missoula—ss.

M. Pablo, having first been duly sworn, deposes and says that he is of lawful age and is one of the appropriators and claimants of the water and water right mentioned in the foregoing notice of appropriation and claim, and the persons whose name is subscribed thereto as the appropriator and claimant, that he knows the contents of said foregoing notice and that the matters and things therein stated are true.

M. PABLO

Subscribed and sworn to before me, this 14th day of November A. D. 1937.

[Seal] A. J. VIOLETTE
Notary Public in and for Missoula County, Montana.

Received for record Nov. 14th, 1907 at 2:10 p. m.

W. H. SMITH
County Recorder

Filed for record Nov. 14th A. D. 1907, at 2:10 o'clock p. m., and recorded in Book F of Water Rights, on page 277 Records of Missoula County, Montana.

W. H. SMITH
County Recorder

[Endorsed]: Answer filed Nov. 23, 1936. [149]

Thereafter, on December 9, 1936, Reply to Answer of United States was duly filed herein, being in the words and figures following, to-wit: [150]

[Title of District Court and Cause.]

REPLY TO ANSWER OF UNITED STATES OF AMERICA

Now comes Agnes McIntire, Plaintiff herein, and for her reply to the separate answer of The United States of America, filed herein, denies each and every allegation therein made, as set forth in its answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH

Notary Public for the State of Montana.

Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [151]

Thereafter, on December 9, 1936, Reply to Answer of Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [152]

[Title of District Court and Cause.]

REPLY TO ANSWER OF HENRY GERHARZ

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Henry Gerharz filed herein, denies each and every allegation therein made, as set forth in his answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY

Attorney for Plaintiff

State of Montana,

County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that

he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH

Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [153]

Thereafter, on December 9, 1936, Reply to Answer of Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [154]

[Title of District Court and Cause.]

REPLY TO ANSWER OF FLATHEAD IRRIGATION DISTRICT

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Flathead Irrigation District filed herein, denies each and every allegation therein made, as set forth in its answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY

Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH

Notary Public for the State of Montana,
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [155]

Thereafter, on December 9, 1936, Reply to Answer of Defts., members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [156]

[Title of District Court and Cause.]

REPLY TO ANSWER OF ALEX PABLO, ET AL.

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, May Pablo, Alex Sloan,

George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley, W. A. Dupuis, filed herein, denies each and every allegation therein made, as set forth in their answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [157]

Thereafter, on December 9, 1936, Reply to Answer of A. M. Sterling and Alex Pablo was duly filed

herein, being in the words and figures following, to-wit: [158]

[Title of District Court and Cause.]

REPLY TO ANSWER OF A. M. STERLING AND ALEX PABLO

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of A. M. Sterling and Alex Pablo filed herein, denies each and every allegation therein made, as set forth in their answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [159]

Thereafter, on September 15, 1937, the

DECISION OF THE COURT

was duly filed herein, being in the words and figures following, to-wit: [160]

[Title of District Court and Cause.]

The above entitled suit was instituted by the plaintiff for the purpose of establishing water rights to the use of the waters of Mud Creek on the Flathead Indian Reservation in Montana and to the extent of 160 inches thereof, with priority date as of April 15, 1900. An injunction is also sought against the United States of America, Harold L. Ickes, Secretary of Interior, and Henry Gerharz, project manager of the Flathead Reclamation Project, the defendants named in the complaint, for the purpose of restraining them from interfering in any manner with the alleged rights of plaintiff; and it is further provided therein that if the court should ultimately find the United States has any interest in said waters in connection with that claimed by plaintiff, that such waters be partitioned, separated, and established by decree of this court.

The material matters alleged are that the said reservation was established by treaty July 16, 1855, (Stat. L. 975) and also that the Indians of that locality were encouraged to abandon their habits of a nomadic people and become self-supporting. It is also alleged that the lands of the reservation are arid and without aid of irrigation are useless, and

that one inch of water per acre is necessary for said land. [161]

That Indian predecessors in interest on said date became the appropriators of 160 inches of the waters of Mud Creek, and that said waters have become appurtenant to the lands now owned by this plaintiff and that such water rights have never been abandoned and that continuous use of the water on the lands of plaintiff from the date of original appropriation down to the present time is also alleged. Plaintiff relies upon Section 19 of the act of June 21, 1906 (34 Stat. L. 354) as a basis of her claim to the right to the use of said waters and particularly the following provision of said Secticn:

> "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 of any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water."

The bill also contains allegations to the effect that the United States claims an interest in the waters of Mud Creek and has in effect dammed up the waters and has thereby prevented plaintiff from using the same to the full extent of her alleged rights; she also claims that no other persons are using the waters of Mud Creek except plaintiff and the United States. Plaintiff prays that the waters

of said creek be divided, partitioned, and separated between plaintiff and the United States according to the provisions of Title 28 Section 41, subdivision 25 of the U. S. C. A. Plaintiff also alleges that the Secretary of Interior above named claims to be in charge of said irrigation project and that Henry Gerharz claims to be the project manager and in direct charge thereof, and "that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined." Plaintiff further alleges that the defendants are wrongfully and without [162] right denying her claim of right to the use of the waters of Mud Creek, independent of the Flathead Irrigation Project, and that defendants claim the right to deprive the plaintiff of the use of the waters of said creek and the right to withhold from flowing into and through the plaintiff's ditch any of the water thereof, and that she has no right whatever to the use of the waters thereof without paying the fees and charges prescribed by the aforesaid project.

On March 23, 1934, Judge George M. Bourquin, a judge of the above named court and then presiding in the above titled cause entered the following order: "Upon application of Elmer E. Hershey, attorney for plaintiff, and upon the records and files in said case.

> "It is ordered that said Harold L. Ickes, Secretary of Interior, defendant herein appear, plead, answer, or demur, by the 14th day of

April 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102) (Title 28 U. S. C. A. 118), and that a copy of this order together with a copy of the complaint be served upon said defendant forthwith dated this 23rd day of March 1934.

(Signed) BOURQUIN,
Judge."

On February 13, 1934, plaintiff caused to be mailed to the Secretary of Interior a copy of the bill of complaint which was received by him on February 17, 1934. On March 31, 1934 plaintiff caused to be served by the United States Marshal for the District of Columbia a copy of the bill of complaint and a copy of the order of the court of March 23, 1934 upon the Secretary of the Interior. It is claimed by the defendants this is the only attempt made by the plaintiff to serve process upon the defendant, Secretary of the Interior. The United States, was served with process under the provisions of Title 28, Section 41 subdivision 25, U. S. C. A. The original bill of complaint was filed subsequent to the decision of the Circuit Court of Appeals, 9th Circuit. [163] in the case of Moody v. Johnston, 66 Fed.(2) 999 and before the decision of the said court in the mandamus opinion in Moody, project manager v. Johnston, et al. and other cases, Nos. 6782, 6784, 6785, 70 Fed.(2) 835. The defendants claim that the facts relied upon in the present bill of complaint are identical with the basic facts of the original 9 amended bills of complaint considered by the above named court of appeals in its mandamus opinion. Defendants claim

that it is quite evident that this complaint was drafted with the intention of conforming to the pertinent language of the Court of Appeals in Moody v. Johnston, 66 Fed.(2) 999, 1003.

The first amended bill appears to be like the original except the matter relating to Pablo and Sterling and the appropriation of Michael Pablo claimed by the former for lands now owned by them. The motions of Pablo and Sterling to dismiss were denied. The appearances of the defendants, the United States and Henry Gerharz were allowed to stand as to the amended bill. The motion for judgment on the pleadings was denied May 5, 1936.

It appearing that all parties interested in Mud Creek had not been joined as parties defendant, plaintiff applied for permission to include others, which was granted, and about thirty-five new defendants were added. The second amended bill is like the first except in paragraphs XIV and XV. It is alleged that the defendants added claim some interest in the waters of Mud Creek, and that the Flathead Irrigation District is a corporation. In behalf of the United States and Henry Gerharz there were special appearances and objections to jurisdiction. The second or final amended complaint was never served upon Harold L. Ickes, Secretary of the Interior, no order was ever made by the court directing the Secretary of the Interior to appear by a day certain respecting the second amended complaint, and no appearance was made by the Secretary. Motions to dismiss were filed by defendants, Hendricks, Billie, and nineteen members of the

Flathead Tribe, also by the Flathead Irrigation District; answers were filed by the foregoing defendants on November [164] 23, 1936, and by A. M. Sterling and Alex Pablo. The separate answer of the District corporation was filed on November 24, 1936, to the cross complaint of defendants Sterling and Pablo.

The United States answered that it had not consented to be sued; that the suit was not one brought for the partition of lands, that it is in fact and legal effect one brought to determine the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek, and that the facts fail to state a cause of action in equity against the United States.

In his answer defendant Gerharz raises certain pertinent issues. He has no knowledge as to the date of construction of the ditch in paragraph III of plaintiff's amended complaint, or the size of the ditch or that the waters therein alleged to have been appropriated were appurtenant to the lands described therein; as to the issuance of patent in fee to plaintiff's Indian predecessors in interest, or as to the claim of continuous use of the waters aforesaid down to the present time. It is admitted that the United States claimed an interest in the waters of Mud Creek and that it dammed up such waters. It is denied that plaintiff's right to use these waters became vested prior to the claim of the United States, and that under the act of June 21, 1906, no right existed on the part of the United States to deprive plaintiff of the use of said waters. Defend-

ant claims that all of the acts here complained of were proper and lawful acts done pursuant to the orders, rules and regulations of the Secretary of the Interior and according to federal law, and that whatever rights plaintiff may have to the use of the waters of Mud Creek are subservient to the rights of the United States, and that such rights, if any, were granted by the United States under federal statutes.

Then follows a defense like that of the United States and the District Corporation. It is alleged in defense that the United States, [165] through the Secretary of the Interior recognized all early water right development of Indians and white settlers on the Flathead Indian Reservation prior to the year 1909, and granted a right to a portion of the lands to the extent of 1000 gallons of water per day for domestic and stock use, and that this particular right is the only one ever granted the Michael Pablo allotment by the United States. Again it is alleged that the United States had a quiet title by adverse possession to the waters claimed in plaintiff's second amended bill, and that "Since the date of giving further notice to all settlers along Mud Creek and its tributaries that the United States had appropriated all of the waters of this stream for beneficial use upon the lands of the Reservation, it had continuously and was now using all of said waters, and had done so for a period of more than ten years, adverse to the alleged rights of plaintiff."

Practically the same issues and defenses are raised by the nineteen members of the Flathead Tribe as

in the answer of defendant Gerharz. The defendants Sterling and Pablo claim rights to 560 miners' inches of the waters of Mud Creek with a date of priority as of April 15, 1900; they also rely upon a notice of appropriation pursuant to Montana law, and upon Section 19 of the Act of June 21, 1906, claiming thereunder that the United States recognized their irrigation development. It was ordered during the trial that all new matter raised in any of the answers would be deemed denied.

The record shows that the Secretary of the Interior made a special appearance denying the jurisdiction of the court and asking for dismissal of the suit. No answer was ever filed by him and no general appearance ever made by the Secretary of the Interior, although he was served with process and a copy of the original complaint. Thereafter the suit progressed and first and second amended complaints were filed; these amended complaints were not served upon the Secretary for obvious reasons. By his actions he had declined to enter the suit upon the claim asserted, based upon the statute referred to, that he could be [166] sued only in the District of Columbia.

The preliminary steps herein were taken by Judge Bourquin, before his retirement from the bench, and the law of the case established by him in his orders; he was a judge of co-ordinate jurisdiction with the present presiding Judge, acting in the same case and upon the same questions and record, and therefore the present presiding Judge will continue upon

the theory and orders adopted and entered by him, irrespective of his own views as *the* the questions presented and heretofore decided by Judge Bourquin. Having adopted the theory and law upon which Judge Bourquin rested the case, it now becomes important to ascertain whether the allegations of the complaint have been sustained by evidence that is clear and convincing.

It appears from the evidence in the case that on or about the 15th of April 1900, and for nine years prior thereto, Michael Pablo, an Indian allottee, was in possession of the land hereinbefore described, and dug an irrigation ditch from Mud Creek carrying 160 inches or four cubic feet of water per second of the waters of said creek to his allotment for irrigation purposes and said waters were used to irrigate his allotment; that such appropriation was made long prior to the survey thereof and while the lands were unoccupied and unclaimed. It appears from the evidence that the ditch was of sufficient size to carry the waters appropriated and that the said Michael Pablo thereby became the appropriator of 160 inches of Mud Creek on or about the date mentioned, and that the same has become appurtenant to the land above described and the appropriation thereof has not been abandoned.

It further appears from the proof that on January 25, 1918 a patent in fee was issued Agatha Pablo, wife of Michael Pablo, for the lands allotted to him and on October 5, 1918 a fee patent was issued to Agatha Pablo for said Lands allotted

Lizette Barnaby, and that afterwards said lands were sold and transferred to the plaintiff in this case and that plaintiff is now the owner in fee of said lands which [167] were thus allotted and patented to both of the said Indians, and that the waters so appropriated are appurtenant thereto.

The plaintiff herein places special emphasis upon the act of June 21, 1906, as well as upon the treaty entered into by the government both of which were heretofore referred to.

It appears that no other parties are using the waters of Mud Creek except this plaintiff, Alex Pablo, and A. M. Sterling, and the United States acting through the Flathead Reclamation Project, and that the four are tenants in common or joint tenants in the use of said waters. That it appears from the proof that the waters of Mud Creek can be divided, partitioned, and separated so that the amount of water this plaintiff has a right to use can be determined.

The defendants Alex Pablo and A. M. Sterling each claim that the appropriation of Michael Pablo as alleged in plaintiff's complaint was also made for additional lands now owned by them, and that they were made defendants in order that their rights might be determined. The other defendants mentioned in the complaint were named in order that they might have an opportunity to set forth any rights or interests, if any, claimed by them.

The patent for the lands embraced in the allotment of Michael Pablo and the patent for the lands

embraced in the allotment of Lizzie Barnaby, both of which were issued to Agatha Pablo, were received in evidence; one of these patents was for the west-half of the north-east quarter and the other for the east-half of the north-east quarter of section 14 township 21 north, range 21 west. Subsequent conveyances were introduced in evidence showing that plaintiff is the owner of the land described in her complaint. There seems to be no question so far as the proof is concerned that prior to 1891 a ditch was dug conveying water to these lands for irrigation purposes and for watering the stock for Michael Pablo. The water from this ditch was sufficient to cover all the 160 acres [168] now owned by the plaintiff.

The evidence further discloses that at an early day what was known as the Pablo ranch including the two eighties above mentioned was one of the best known places on the reservation and produced large crops of grain. Plaintiff asks for decree allowing her 160 inches of the waters of Mud Creek, and the evidence shows that this amount of water would be sufficient for irrigation of crops grown thereon; in other words, that one inch per acre would be sufficient.

Nothing in the act of June 21, 1910 should be construed to deprive any of said Indians of the use of the water appropriated and used by them for the necessary irrigation of their lands. It conclusively appears that the water right claimed by plaintiff was appurtenant to her lands. The leading

authorities to sustain the right of appropriation under the foregoing state of facts are to the effect that the government in its dealing with the Indians, may create property rights which once vested even it cannot alter. Morrow v. U. S. 243 Fed. 854, 856; Williams v. Johnson, 239 U. S. 414, 420; Sisemore v. Brady, 236, U. S. 441, 449; Choate v. Trapp, 224 U. S. 665; English v. Richardson, 224 U. S. 680; Jones v. Meehan, 175 U. S. 1; Chase v. U. S., 222 Fed. 593, 596; Sheer v. Moody, 48 Fed.(2) 327; Ickes v. Fox, et al. 57 Sup. ct. rep. 412; Winters v. U. S. 143 Fed. 740, 749; Skeen v. U. S. 273 Fed. 93, 95; U. S. v. Hibner, 27 Fed.(2) 909, 911.

A. M. Sterling and Alex Pablo, defendants, herein presented claims showing appropriations made of the waters of Mud Creek for the land described. It appears that A. M. Sterling is the owner of land situated in Lake County, in the state of Montana described as follows: the south-half of the north-west quarter of section 14 in township 21, north of range 20, west M. P. M. The proof shows that prior to 1891 Michael Pablo constructed a ditch conveying water from [169] Mud Creek to lands now owned by A. M. Sterling and Alex Pablo hereinbefore described and other lands, and that water had been used for irrigation purposes and for watering stock by Michael Pablo and also by Alex Pablo his successor, and by the tenants of A. M. Sterling. The defendants Alex Pablo and A. M. Sterling claim 80 inches of water from said ditch conveying water from Mud Creek to their

lands. From the evidence it appears that the ditch was constructed and a notice of appropriation was made prior to the opening of the Flathead Indian Reservation for settlement in 1910, and that the waters have been used continuously for the irrigation of lands and watering stock by Alex Pablo and A. M. Sterling down to the present time.

From the testimony of Alex Pablo it appears that he had irrigated on an average each year from fifteen to twenty acres of land, and also in respect to the land owned by A. M. Sterling the testimony was to the effect that twenty acres of his land had been irrigated and that the water had been used for domestic purposes and watering of live stock by his tenants; and that eighty inches of water would be necessary for the beneficial use of such lands. Both Pablo and Sterling claim the same rights under the act of June 21, 1906, as the plaintiff herein, and likewise rely upon the same authorities as are hereinbefore set forth.

From the law of the case and the evidence submitted in the opinion of the court these defendants are entitled to the use of eighty inches of water from the ditch constructed by Michael Pablo. Under the evidence there seems to be no question that the construction of the ditch and the appropriation of the water was made by Michael Pablo long prior to the time of appropriation by the United States, and therefore the rights of these defendants, his successors in interest, appear to be prior to any of the rights of the United States or any other person or

corporation, and that assertion will also hold true in respect to the plaintiff herein. [170]

To advert briefly to the testimony. The witness John Ashley, 76 years old, testified that he lived on the reservation all his life; knew Michael Pablo, who lived at foot of lake about eight miles from Pablo; all his lands were fenced; he raised wheat and oats and irrigated them from Mud Creek, through a ditch about a mile long, three feet wide on bottom and two feet deep; at the cut it was fifteen feet deep and extended 200 yards; the ditch had to be dammed on lower side in one place by use of logs extending about 150 yards; Michael Pablo used the water from the ditch on the Lizette Barnaby land, on that of Alex Pablo and Joe Pablo and on his ranch. When the water was turned in it filled the ditch "plumb full." Michael Pablo at one time had a large number of cattle; he raised hay and oats, witness had seen the latter six feet high; it was known as a "show place." Three eighties were irrigated and "that was Alex's and the old lady's and Joe's, and this other, the old man's, part of it right along side the fence."

Elmer E. Hershey, as a witness, said he drove by the ditch in 1891 and saw quite a large quantity of water flowing in it; ditch was in same place that it is today, and "road was fenced on both sides, and strung along the ditch, then on the east side and west side both, just as it is today, at the north-end of the Barnaby land and Michael Pablo land."

Jean McIntire in 1907, saw large crops growing on the land. Impossible to raise hay, grain, oats, or barley, or anything of that sort without irrigation.

Mr. Moody, the project engineer, told him he had no right to use of the water for irrigation, only to use for domestic purposes and watering stock.

The sheriff's deed was issued in 1924. They have used the water some every year since. The water was used on both the east and west eighties. They irrigated 40 acres of the east eighty which is a [171] meadow, and 20 acres on the west eighty. They cleaned out the ditch and took willows and brush out of it.

Bert Lish knew about irrigation—had been irrigating lands for fifty-three years. Knows the Pablo and Barnaby lands; he said that to do a good job of irrigating would require two inches to the acre, because the subsoil is gravel and rock; the top soil is black loam five or six or seven inches deep, and the balance rock and sand and gravel with no soil in it.

Mr. Stockton said one and one-half to two acre feet per acre, or one to two inches on the land, would be required for proper irrigation.

Alex Pablo, a defendant claims prior right to use of waters of Mud Creek. His allotment joins Michael Pablo land on the north-west. His eighty runs east and west and joins the north forty of the Michael Pablo land. He has lived there all his life; was born in 1889 and is a son of Michael Pablo. There was a ditch from Mud Creek running to his land and

Alex Pablo's, and water has flowed in that ditch ever since he was old enough to remember, and is still flowing in it. Michael Pablo used the water for stock purposes, domestic and some for irrigation; he was engaged in the stock business. He used the water on his own allotment and on Alex Pablo's allotment and on his wife's allotment for irrigation purposes. Michael Pablo irrigated twenty acres of Alex Pablo's allotment for hay and pasture land.

Michael Pablo flooded or irrigated about twenty-five acres of his wife's land now owned by the defendant, A. M. Sterling. He says water is necessary to raise crops and has been used most of the time. The ditch runs across his father's allotment now owned by the plaintiff. Alex testified that the irrigation of his land and his mother's had been almost continuous since he was old enough to do farming.

Thomas C. Moore has irrigated some of the land in question; he stated that he had not done much during the past two or three years as there was not enough water coming down, and he did not intend to make many repairs while the water question remained unsettled. [172]

The foregoing is the substance of the testimony of witnesses who resided on the lands in question or came in close contact with them. Certain affidavits and other proof have been submitted by defendants but in the court's opinion are not sufficient to cast discredit upon the claims of priority of right to the use of water from Mud Creek by the plaintiff,

Pablo and Sterling; and much of the proof is entirely irrelevant in view of the theory of the case adopted herein. The evidence shows that long prior to the commencement of the Flathead Irrigation Project the waters were appropriatd in the manner and to the extent herein above set forth. To quote the language of Judge Bourquin in Sheer v. Moody, 48 Fed.(2) 327-333: "It would seem that the ditches would carry more water, but the extent of the use is the measure of the right, when dilatory application has been interrupted by the government's intervening appropriation as here."

It seems possible that the Circuit Court of Appeals in Moody v. Johnston, 70 Fed.(2) 835, 840, may have meant, when it said: "We think the interests of the parties will best be litigated in a separate suit brought for that purpose", that the government ought to commence a suit against all of these defendants and all other interested parties and finally dispose of all material issues at one time; such a course would do away with most of the questions raised by government counsel in this and other suits of a like character which may remain pending for an indefinite period before the rights of the parties including the government are finally determined. It is apparent that the Secretary of the Interior is an indispensable party; counsel evidently believe that he can be sued only in the District of Columbia, and if that is the law governing in this suit then what has been done herein would seem to be of no avail and these important questions

no nearer settlement than they were in the beginning. Relief will be awarded as above indicated, and counsel will present findings of ultimate facts.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Sep. 15, 1937. [173]

Thereafter, on October 18, 1937, Petition for Rehearing by Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [174]

[Title of District Court and Cause.]

PETITION FOR REHEARING

Defendant Flathead Irrigation District, pursuant to Equity Rule 69, prays for a rehearing herein, and as special matter or cause for such rehearing says:

1. The court undertook to make no examination of the law here applicable upon the theory that "the law of the case" was established by Judge Bourquin. In so holding this court,

(a) Proceeds upon a misapprehension in that Judge Bourquin did not establish the law of this case; (Judge Bourquin retired May 31, 1934, and the motion to dismiss was not heard until November, 1936.)

(b) Makes a rule applicable to Indian reservation water rights utterly inconsistent and at variance with the rules heretofore established

by this court in the case of United States v. Powers et al, (Equity No. 2962—Billings Division) which latter decision is consistent with the theory of Judge Bourquin in Scheer v. Moody, 48 F.(2d) 327.

(c) Denies to this defendant its right to present to this court for consideration the points made by it in its briefs herein. Having been [175] necessarily made a party by amendment pursuant to the rule in Moody v. Johnston, 66 F.(2d) 999, defendant is by the court's ruling denied its day in court.

(d) Reaches not only a wrong result, but in addition lays down a precedent throwing into complete confusion the law applicable to thousands of acres of land in the Flathead area. Neither this defendant nor the persons with whom it deals can possibly know whether the rule of this case or the rule of United States v. Powers, or such rule as the Circuit Court of Appeals may establish on review thereof, will be applicable to all users on the Flathead reservation, (all because it is assumed that Judge Bourquin established the law of this case.)

2. The brief heretofore filed by this defendant (and which the court for the reasons stated in the opinion apparently has not considered) for the first time in the history of litigation concerning Flathead water rights, points out the history, reason and proper interpretation of Section 19 of the Act of June 21, 1906 (34 Stat. L. 354) upon which this

action is predicated. It demonstrates that whatever is a sound decision in United States v. Powers must necessarily be a sound decision in this case concerning the Flathead.

ARGUMENT

Even if action on a motion to dismiss, usually perfunctory, could be construed as a determination of the law of a case, yet here since Judge Bourquin retired May 31, 1934, and with but one exception has refrained from judicial action thereafter, it is obvious that since motions to dismiss were passed upon in November, 1936, Judge Bourquin did not determine the law of this case. [176]

Now, while defendant's position here is not that of the decision in U. S. v. Powers, it is obvious that the decision in that case was reached after long trial and argument and careful consideration. It presents a logical and reasonable theory, one of equality, fully consistent with Section 7 of the General Allotment Act (24 Stat. L. 388). It was there decreed that "each irrigable acre is entitled to the same amount of water as any other acre * * * whether such land is under a government ditch or not", all rights being dated 1868. In Moody v. Scheer, 48 Fed.(2d) 327, Judge Bourquin said nothing indicating any priority in private water rights. He said (p. 330, Col. 1)

> "In either case, any such right is limited to water *in equity with all other like users* and to the extent reasonably necessary." [Emphasis is by the Court.]

Here, most unfortunately, and to the confusion of all interested parties, it is found "the rights of these defendants (Pablo and Sterling) appear to be prior to any of the rights of the United States, or any other person or corporation, and that assertion will also hold true in respect to the plaintiff herein."

How can the rule relating to water rights on Indian reservations be different in the Missoula division from that in the Billings division? Section 19 of the Act of June 21, 1906 (34 Stat. L. 354), as pointed out in our original brief, and under the rule of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 162, relating to such saving clauses, creates no new or different rule on the Flathead reservation. And it does seem hard on this defendant, representing as it does thousands of farmers, whose water is already short, to give it no chance to argue the law applicable.

It is respectfully submitted that this Court should determine for itself the law applicable in this case, and that if [177] the position taken by defendant in its brief and by us deemed unanswerable is not to be adopted that at least no rule more drastic than that stated in the Powers case should be applied here.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for defendant,
Flathead Irrigation District.

Service of the foregoing Petition for Rehearing acknowledged this 15th day of October, 1937.

ELMER E. HERSHEY
Attorney for Plaintiff.

I certify that I have mailed in the usual manner a copy of the foregoing Petition to each of the following named persons:

John P. Swee, Attorney for certain defendants, at Ronan, Montana.

John B. Tansil, United States District Attorney, Butte, Montana.

Kenneth R. L. Simmons, Indian Irrigation Attorney, Billings, Montana.

WALTER L. POPE.

[Endorsed]: Filed October 18, 1937. [178]

Thereafter, on October 22, 1937, Proposed Findings of Fact and Conclusions of Law by the United States, Henry Gerharz, and members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [179]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED STATES OF AMERICA, HENRY GERHARZ, PROJECT MANAGER AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Comes Now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian

Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and proposes the following findings of fact and conclusions of law in behalf of all of the foregoing defendants:— [180]

Findings of Fact

I

That this action is one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana, and is not an action in partition which would fall under the provisions of Title 28, Section 41, Subdivision 25 U. S. C. A.

II

That the consent of the United States to be sued in this action has not been given.

III

That no valid and legal service of process in this action has ever been made upon Harold L. Ickes,

Secretary of the Interior, who is an indispensable party defendant.

IV

That by virtue of a treaty between the United States of America and the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stat. L. 975), ratified March 8, 1859 by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, the United States as sole owner of the lands and waters of the Flathead Indian Reservation, Montana, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted from appropriation under territorial or State law or otherwise all of the waters upon said reservation, including all of the waters of Mud Creek and its tributaries, which has its source and flows wholly within the boundaries of said reservation.

V

That pursuant to the Acts of Congress of April 23, 1904, (33 Stat. L. 305), June 21, 1906, (34 Stat. L. 354), and April 30, 1908, (35 Stat. L. 70 and 83); the United States commenced the construction of the Flathead Irrigation Project to irrigate the irri- [181] gable lands on the Flathead Indian Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908 the sum of $50,000 was appropriated from public moneys for preliminary surveys, plans and estimates of

irrigation systems to irrigate the lands allotted by the Act of Congress of April 23, 1904, as well as the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

VI

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936 the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Irrigation Project in Montana; and that the United States owns, operates, and is in control of the Flathead Indian Irrigation Project.

VII

That pursuant to Section 7 of the General Allotment Act of Congress of February 8, 1887 (24 Stats. L. 388), and in pursuance to other and subsequent Acts of Congress, the Secretary of the Interior, as the designated agent of the United States, allocated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project.

VIII

That the only right plaintiff or her predecessors in interest have to the use of the waters of Mud Creek is the right to her pro rata share of the

waters apportioned and distributed through the Flathead Irrigation Project system under the laws of the United States and under the rules and regulations of the Secretary of the Interior and the right granted to a portion of her said lands by the Secretary of the Interior in pursuance to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, in the amount of 1,000 gallons of water per day from Mud Creek for domestic and stock uses. [182]

IX

That all of the waters of Mud Creek and its tributaries are used by the Flathead Irrigation Project system and are necessary for the successful irrigation of lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

X

That the only rights the nineteen members of the Flathead Tribe of Indians, defendants herein, have in and to the use of the waters of Mud Creek and its tributaries are rights granted them by the Secretary of the Interior in pursuance to the Acts of Congress aforesaid of February 8, 1887, June 21, 1906, and May 29, 1908.

XI

That the Secretary of the Interior in allocating the waters of the streams of the Flathead Indian Reservation, including the waters of Mud Creek

and its tributaries has acted strictly in pursuance to authority vested in him by all of the acts of Congress herein set out and under said acts of Congress has absolute control over the distribution of the waters of Mud Creek and its tributaries.

XII

That the United States has continuously and at all times since about the year 1855 and for a period greatly exceeding ten years prior to the filing of this action, asserted and exercised the actual, visible, open, notorious, and exclusive ownership, possession, and control of all of the waters of Mud Creek, under claim of title in the United States as aforesaid and hostile to the claims of all other persons whomsoever; that at all times during said period of more than ten years immediately preceding the filing of this action, plaintiff and her predecessors have been permitted by the United States to use only such waters as have been granted by the Secretary of the Interior to the lands of plaintiff limited to the amount of 1,000 gallons of water per day for domestic and stock use. [183]

Conclusions of Law

I

That this action is not one in which the United States of America has consented to be sued and is not an action brought for the partition of lands, and a decree of dismissal should issue in favor of the

United States in accordance with this prayer set forth in its answer on file herein.

II

That no valid and legal service of process has ever been made upon the Secretary of the Interior in this action and a decree of dismissal should issue as to him.

III

That the United States of America through the Secretary of the Interior has the right to completely control the use of the waters of streams flowing through or within the Flathead Indian Reservation in Montana.

IV

That the United States District Court for Montana has no jurisdiction over the Secretary of the Interior. He can only be sued in a district of which he is an inhabitant, not the District of Montana, but the District of Columbia.

V

That the Secretary of the Interior is an indispensable party defendant herein.

VI

That the plaintiff has failed to state a valid cause of action in equity against any of the defendants herein and all are entitled to decrees of dismissal in

accordance with the prayers contained in their respective answers.

....

Judge.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff;

Pope & Smith, Missoula, Mont.
Attorneys for defendant;

Flathead Irrigation District;

John P. Swee, Ronan, Mont.
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 22, 1937. [184]

Thereafter, on October 27, 1937, the Plaintiff, Agnes McIntire, filed herein her objections to the proposed findings of the United States, et al., which objections are in the words and figures following, to-wit: [185]

[Title of District Court and Cause.]

OBJECTIONS TO THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE UNITED STATES OF AMERICA, HENRY GERHARZ, PROJECT MANAGER, AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Now comes the plaintiff, Agnes McIntire, and files and enters the following Objections and Exceptions

to the Proposed Findings of Fact and Conclusions of Law of the United States of America, Henry Gerharz, Project Manager and 19 members of the Flathead Tribe of Indians.

I.

Plaintiff objects and excepts to Paragraph I of Proposed Findings of Fact for the reason that it is not sustained by the complaint filed, or the evidence given, and particularly objects to that part of said paragraph stating that it is not an Action in Partition, that would [186] fall on the provisions of Title 28, Section 41, Sub-Division 25, U. S. C. A., for the reason that it is such an Action, so alleged in the complaint, and sustained by the evidence.

II.

Plaintiff objects and excepts to proposed Findings No. II and III for the reason that it is a misstatement of fact, as shown by written exceptions heretofore filed in this case, showing services upon both the United States, and on Harold L. Ickes, Secretary of the Interior.

III.

Plaintiff objects and excepts to Proposed Findings of Fact No. IV for the reason that it is a mere conclusion, and not sustained by the evidence given at the trial, or the treaty referred to.

IV.

Plaintiff objects and excepts to Proposed Finding No. V for the reason that under the provisions of

the Acts of Congress mentioned and described, and under the evidence given, this case, it was expressly provided that, "nothing in said Acts shall be construed to deprive any of said Indians * * * of the use of water appropriated and used by them for the necessary irrigation of their lands" and that said provision was binding upon all parties connected with the reclamation and irrigation of the lands on the Flathead Indian Reservation and the amount of money spent, or the conclusions reached as to what lands are best adapted to irrigation and farming would not warrant those in charge of said irrigation system of violating the plain and express will of Congress, and by so doing, deprive plaintiff of her property rights. [187]

V.

Plaintiff objects and excepts to paragraph VI for the same reason, and in addition objects to the statement, "and that United States owns, operates, and is in control of the Flathead Irrigation Project," for the reason that it is not a correct statement.

VI.

Plaintiff objects and excepts to Proposed Findings No. VII for the reason that no authority was given the Secretary of the Interior at any time to take away from plaintiff, and her predecessors in interest, her prior rights and if an injury threatened by the illegal action in depriving plaintiff of her property, the officer cannot claim immunity from injunction process as alleged in plaintiff's complaint, and sustained by the evidence offered.

VII.

Plaintiff objects and excepts to Finding No. VIII for the reason that it is not sustained by the pleading or the evidence given in this case.

VIII.

Plaintiff objects and excepts to Findings No. IX, X, and XI for the reason that the same are not sustained by the evidence and are not made an issue in this case.

IX.

Plaintiff objects and excepts to Finding No. XII for the reason that it is a mis-statement of the facts, and Congress, under the Act of April 25, 1904, (33rd Stat. L. p. 302) expressly disclaimed any interest in, or ownership of any portion of the lands except 16 and 36, or the equivalent in each Township, or to dispose of said lands, except as [188] provided in said Act, or to guarantee to find purchasers for said lands, or any portion thereof, it being expressly stated that it was the intention of the Act that the United States should 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.

X.

Plaintiff objects and excepts to the Conclusions of Law Nos. I to VI, for the reason that such Conclusions are not warranted under the law applicable

to this case, and the evidence introduced at the trial thereof.

ELMER E. HERSHEY,
Attorney for Plaintiff.

Dated this 26th day of October, 1937.

Copies to:
Kenneth R. L. Simmons, Billings, Montana.
Pope & Smith, Missoula, Montana.
John P. Swee, Ronan, Montana.
John B. Tansil, United States Attorney, Butte, Montana.

[Endorsed]: Filed Oct. 27, 1937. [189]

Thereafter, on October 27, 1937, the Defendant, Flathead Irrigation District, filed its proposed findings of fact and conclusions of law, in the words and figures following, to-wit: [190]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant, Flathead Irrigation District, and proposes the following Findings of Fact and Conclusions of Law, and requests the Court to adopt the same as the Findings of Fact and Conclusions of Law of the Court.

Findings of Fact

I.

That heretofore and on the 26th day of August, 1926, the defendant, Flathead Irrigation District,

was, by an order and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, which was duly given, made and entered on said date, duly created and established as an irrigation district, under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects. That all of the lands within the said defendant Flathead Irrigation district are lands within Flathead Indian Reservation, and the Flathead Indian Irrigation Project, mentioned in [191] the said amended complaint. That subsequently and on or about the 12th day of May, 1928, the said defendant district entered into a certain repayment contract between said defendant district and the United States of America, in the manner required by law, and that ever since the date aforesaid the said repayment contract has been in full force and effect, and the defendant Flathead Irrigation District has been under the obligations, and is now under the obligations created thereby.

II.

That the United States entered into a treaty with the Confederated Tribe of Flathead Kootenai and Upper Pend d-Oreille Indians, which said treaty was ratified March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859. That under and by virtue of said treaty, a copy of which

is attached to this defendant's answer herein, the United States reserved to itself as trustee for the Flathead tribe of Indians the lands within the said Flathead Indian Reservation, and all of the waters thereof, including the waters of Mud Creek. [192]

III.

That thereafter Congress enacted the Act of April 23, 1904 (33 Stat. 302-306), providing for the allotment of lands in severalty to members of the Flathead tribe of Indians, and for the sale of surplus unallotted lands mentioned in the said Act, and that thereafter and immediately upon the enactment of the Act of Congress of April 23, 1904 (33 Stat. 302-306), the United States, and the Secretary of the Interior, pursuant to the authorities contained in said Act, established, set up and created, for the benefit of said Indian tribes, the Flathead Irrigation Project, for the irrigation of lands thereafter to be allotted under said Act to individual Indians, and for the irrigation of the surplus unallotted lands mentioned in said Act, and that thereafter the United States has, without interruption, continued the construction of said Flathead Indian Irrigation Project and is still continuing the construction thereof, all of which has been done pursuant to the said Act of April 23, 1904, and Acts amendatory thereof and supplemental thereto; and that by the initiation and establishment of the said Irrigation Project the United States reserved and segregated unto itself as trustee all of the waters

lying upon said Indian Reservation and which might in any manner be utilized in conjunction with the construction of said Indian Irrigation Project, including the waters of Mud Creek for the use and benefit of said Indian tribes, through the irrigation of the said allotted and surplus unallotted lands.

IV.

That said Project was thus established and actual field operations commenced prior to the date of the allotment in severalty of any lands to the plaintiff herein or her predecessors in interest or to the defendants Pablo and Sterling or their predecssors in interest or any allotments in [193] severalty of lands upon said reservation, and prior to the sale or disposition of any surplus unallotted lands, and that the lands within this defendant district are composed in part of allotted lands and in part of surplus unallotted lands which were sold pursuant to the aforesaid Acts of Congress, and that the owners of said lands within said irrigation district, by virtue of their right to receive water under said project, are, together with this defendant district, the successors in interest and title of the said Indian tribes, in and to the waters of said reservation, including all of the waters of said Mud Creek.

V.

That the United States has never authorized the appropriation of water on the Flathead Indian Reservation by any individuals, and has never made the provisions or laws of the State of Montana

applicable to the lands and waters within the said Flathead Indian Reservation. That at the time the attempted appropriations by the plaintiff and by the defendants Pablo and Sterling were claimed to have been made, there was no law in existence authorizing the appropriations so claimed, and that said claimed appropriations were wholly void, invalid and of no effect.

VI.

That the United States has never authorized the Secretary of the Interior to adjudicate or decree private rights to any individuals on the Flathead Indian Reservation, and that any and all acts of the Secretary of the Interior purporting to decree or adjudicate any private appropriations of water on the Flathead Indian Reservation are wholly void, invalid and of no effect. [194]

Conclusions of Law

I.

That the plaintiff and the defendants, Pablo and Sterling have no rights to any of the waters flowing in Mud Creek, or any of its tributaries, or to any of the other waters on the Flathead Indian Reservation except such rights as they may have to receive water proportionately distributed through the Flathead Irrigation Project under the laws of the United States and under the rules and regulations of the Secretary of the Interior upon the payment of the proper charges therefor.

II.

That the plaintiff and the defendants, Pablo and Sterling, have failed to state a valid cause of action in equity against any of the remaining defendants, and that the plaintiff's cause of action should be dismissed upon the merits.

Let judgment be entered accordingly.

....

Judge. [195]

Service of the foregoing Proposed Findings of Fact and Conclusions of Law of defendant, Flathead Irrigation District acknowledged this 27th day of October, 1937.

ELMER E. HERSHEY
Attorney for Plaintiff.
JOHN B. TANSIL
KENNETH R. L. SIMMONS
United States District Attorney, District Counsel U. S. I. I. S. Dept. Interior.

State of Montana,
County of Missoula—ss.

Russell E. Smith, being first duly sworn, deposes and says: That he is one of the attorneys for defendant Flathead Irrigation District in the above entitled action; that he did on the 26th day of October, 1937, mail a copy of the foregoing Proposed Findings and Conclusions to John P. Swee, Ronan, Montana, attorney for defendants Pablo and Swee.

RUSSELL E. SMITH

Subscribed and sworn to before me this 26th day of October, 1937.

[Seal] MARTHA ALSTEENS

Notary Public for the State of Montana, residing at Missoula, Montana.

My Commission expires May 28, 1939.

[Endorsed]: Filed Oct. 27, 1937. [196]

Thereafter, on October 27, 1937, the Defendants, the United States of America, et al., filed herein their objections to the proposed findings of the Flathead Irrigation District, which objections are in the words and figures following, to-wit: [197]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE DEFENDANT, FLATHEAD IRRIGATION DISTRICT.

Comes now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States

District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the proposed findings of fact and conclusions of law of the defendant, Flathead Irrigation District: [198]

I.

Defendants have no objections or exceptions to paragraphs I, II, III, IV, and V of the Proposed Findings of Fact and to paragraphs I and II of the proposed Conclusions of Law of the defendant, Flathead Irrigation District.

II.

Defendants object and except to defendant's Proposed Finding of Fact contained in paragraph VI for the reason that the Secretary of the Interior was duly authorized by the United States under the provisions of the Acts of February 8, 1887 (24 Stat. L. 388) and June 21, 1906 (34 Stat. L. 354), to grant private water rights on the Flathead Indian Reservation under conditions prescribed by him.

Respectfully submitted,

JOHN B. TANSIL

United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, U. S. I. I. S., Department of the Interior.

Copies to:
E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff,
Pope & Smith, Missoula, Mont.
Attorneys for Defendant,
Flathead Irrigation District;
John P. Swee, Ronan, Mont.,
Attorney for Defendants,
Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 27, 1937. [199]

Thereafter, on October 22, 1937, the Defendants, the United States of America, et al., filed herein their objections to the proposed findings of the Plaintiff, Agnes McIntire, and the proposed findings of the Defendants Pablo and Sterling, which objections are in the words and figures following, to-wit: [200]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF AGNES McINTIRE AND THE DEFENDANTS ALEX PABLO AND A. M. STERLING.

Comes now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the

answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the proposed findings of fact and conclusions of law of the plaintiff, Agnes McIntire and of the defendants, Alex Pablo and A. M. Sterling: [201]

I.

Defendants object and except to paragraph I of said proposed findings of fact, in particular to the statement "certain lands were ceded to the United States * * *" Under the Treaty of July 16, 1855 (12 Stat. L. 975) the Flathead, Kootenai and Upper Pend d'Oreilles tribes of Indians ceded their right to occupy a larger tract of territory and reserved their right of occupancy in and to the present Flathead Indian Reservation. The fee title in and to the larger as well as the smaller tract of land was before, at the time of and after the Treaty of 1855 in the United States and never in any of said tribes of Indians.

Defendants further object to the following statement contained in paragraph I: "The Indians dug large ditches from the running streams on said reservations, and carried the waters to their several tracts, for the purpose of irrigating the same" for the reason that such statement of fact is not sub-

stantiated by the evidence in said cause before the court.

II.

Defendants have no objections or exceptions to paragraph II of said proposed findings of fact.

III.

Defendants object and except to that portion of paragraph III of said proposed findings of fact wherein it is stated: "Said water became appurtenant to the lands so farmed, and the appropriations so made have never been abandoned", and "during his lifetime Michel Pablo used the waters conveyed by said ditch from Mud Creek, to the lands above described for the purpose of irrigation of said lands and for domestic use, and that after his death the said water has been continually used by his heirs, successors and assigns each year, and by the defendants Alex Pablo, A. M. Sterling and Agnes McIntire, to irrigate their respective lands hereinbefore described, and for domestic use," for the reason [202] that the waters of Mud Creek, save and except that amount granted the lands of plaintiff by the Secretary of the Interior in pursuance to the report of the private water rights committee on December 10, 1919 and approved by the Secretary of the Interior November 25, 1921, have never become appurtenant to the lands of plaintiff, either by act of the United States of America or the Secretary of the Interior, or by operation of law.

Defendants further object to said statements of fact for the reason that the evidence clearly shows

in this case that only a very small amount of the waters of Mud Creek has at any time been used on the lands of plaintiff and the defendants, Pablo and Sterling for stock and domestic purposes and for the irrigation of a small garden tract.

Defendants further object and except to the statements of fact contained in paragraph III of plaintiff's and defendants' Pablo and Sterling, proposed findings of fact for the reason that the evidence in the case clearly shows that the ditch constructed by Michel Pablo was not of sufficient size to carry 160 inches or 4 cubic feet of water per second of time from Mud Creek to the lands of plaintiff let alone of sufficient size to convey an additional 160 inches of water to the lands of Alex Pablo and A. M. Sterling, defendants herein.

Defendants further object and except to the statement of fact that the duty of water on said lands is one inch per acre for the reason that there is no limitation as to the period of the year within which said water is to be used and for the further reason that the evidence in this case does not support such a finding of fact.

IV

Defendants object and except to paragraph IV of said proposed findings of fact in its entirety. The evidence in the case clearly shows that there are numerous defendants using the waters of Mud Creek and its tributaries, under grants made by the Secretary [203] of the Interior, who are parties to this action, who have appeared and have been

represented at the trial of said cause, namely, the nineteen members of the Flathead tribe of Indians.

Defendants object and except to the following statement of fact that "the four are tenants in common, or joint tenants in the use of said waters of Mud Creek" for the reason that a tenancy in common or a joint tenancy cannot exist in this action.

Defendants object and except to the statement of fact that the waters of Mud Creek "can be divided, partitioned and separated" for the reason that an action in partition cannot lie where no joint tenancy or co-tenancy exists; that this is not an action in partition, but is, if anything, an action to quiet title to or to adjudicate the waters of Mud Creek.

V

Defendants object and except to the statement of fact contained in paragraph V of said proposed findings of fact to the effect that the waters of Mud Creek so appropriated were appurtenant to lands owned by said parties for the reason that no appropriation of waters under State law *of* otherwise can be validly made upon an Indian reservation and the waters of such streams can never become an appurtenance to the lands they irrigate except by express act of the United States or of the designated agent of the United States, the Secretary of the Interior.

VI

Defendants object and except to paragraph I of the proposed Conclusions of Law for the reason

that the ditch referred to never became an appurtenance to the lands now owned by plaintiff save and except as a means of conveyance for the water right granted said lands by the Secretary of the Interior as hereinbefore set out.

VII

Defendants object and except to paragraph II of said proposed Conclusions of Law for the following reasons: [204]

(1) That the only rights plaintiff or her predecessors in interest could acquire to the use of the waters of Mud Creek were rights granted the lands of plaintiff by the United States of America through the Secretary of the Interior, its designated agent, in accordance with Federal statutes:

(2) That no rights were ever granted the lands of plaintiff by the United States of America or the Secretary of the Interior to the use of 160 inches of the waters of Mud Creek or to the lands of the defendant, Alex Pablo to the use of 80 inches of the waters of Mud Creek or to the lands of A. M. Sterling to the use of 80 inches of the waters of Mud Creek;

(3) That the evidence in this case clearly shows that no such amounts of water were ever used upon said lands of the plaintiff or of the defendants, Pablo and Sterling;

(4) That the evidence in the case clearly shows that no use of the waters of Mud Creek save for stock and garden purposes was made for a period

of over more than ten years immediately preceding the filing of the bill of complaint in this action;

(5) That the right to use said amounts of water, if any right ever existed, has been abandoned by plaintiff and the defendants, Pablo and Sterling, by non-use for a period of more than ten years in pursuance to the Statutes of the State of Montana.

VIII

Defendants object and except to paragraph III of said proposed Conclusions of Law in its entirety for the reason that all acts done by the Project Engineer of the Flathead Irrigation Project and other employees of the Flathead Irrigation Project in maintaining a dam in Mud Creek and in diverting the waters of Mud Creek for use in the Flathead Irrigation Project System have been done in pursuance to Acts of Congress and in pursuance to instructions of the Secretary of the Interior made thereunder.

Respectfully submitted,

JOHN B. TANSIL

United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, U. S. I. I. S., Department of the Interior.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff;

Pope & Smith, Missoula, Mont.
Attorneys for Defendant, Flathead Irrigation District;

John P. Swee, Ronan, Mont.,
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 22, 1937. [205]

Thereafter, on October 27, 1937, Court entered an

ORDER DENYING THE PETITION OF FLATHEAD IRRIGATION DISTRICT FOR A RE-HEARING

herein, the minute entry of said order being in the words and figures following, to-wit: [206]

[Title of District Court and Cause.]

This cause came on regularly for hearing this day on the Petition for re-hearing, and on the applications for adoption of Findings of Fact and Conclusions of Law, Mr. Elmer E. Hershey appearing for the plaintiff, Mr. Russell Smith appearing for the Flathead Irrigation District, and Mr. John B. Tansil U. S. Attorney and Mr. Kenneth R. L. Simmons, District Counsel U. S. Indian Irrigation Service, appearing for the United States and the several defendants represented by them.

Thereupon the Petition for re-hearing was argued by Mr. Smith and Mr. Hershey, submitted to the court, and by the court denied.

Thereupon the application for the adoption of proposed Findings of Fact and Conclusions of Law, and the objections thereto, were heard and submitted and by the court taken under advisement.

Thereupon, on motion of Mr. Simmons, court signed and ordered entered the following written order:

"Title of Court and Cause.

Order.

Upon application of the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians, defendants herein, it appearing to the court a proper case therefor,—

It is Ordered that the time for preparing and lodging in the office of the Clerk of the above entitled court their statement of the evidence in the above entitled cause, be and the same is hereby extended to and including the twenty-fifth day of December, 1937."

Entered in open court October 27, 1937.

C. R. GARLOW,

Clerk. [207]

Thereafter, on October 27, 1937, an order was duly entered herein granting the United States of America, et al., to and including December 25, 1937, in which to prepare and lodge in the Clerk's office

their proposed Statement of Evidence, which order is in the words and figures following, to-wit: [208]

[Title of District Court and Cause.]

ORDER

Upon application of the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians, defendants herein, it appearing to the Court a proper case therefor;—

It Is Ordered that the time for preparing and lodging in the office of the Clerk of the above entitled court their statement of the evidence in the above entitled cause, be and the same is hereby extended to and including the twenty-fifth day of December, 1937.

Dated this 27th day of December, 1937.

CHARLES N. PRAY
United States District Judge
for the District of Montana.

[Endorsed]: Filed October 27, 1937. C. R. Garlow, Clerk. [209]

Thereafter, on November 6, 1937, Findings of Fact and Conclusions of Law, proposed by Plaintiff, were adopted and signed by the Court, and were filed herein, in the words and figures following, to-wit: [210]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

On July 16, 1855, (12th Stat. L. 975) what is known as the Stevens Treaty was made by the United States and the Flathead, Kootenay, and Upper Pend d-Oreilles Indians, as a Confederated Tribe. Certain lands were ceded to the United States, and a large tract of certain other lands were reserved for the exclusive use and occupation of said Indians, which were thereafter known as the Flathead Indian Reservation.

The Indians fenced up large tracts of land in severalty, and farmed the same, and in every way said Indians were encouraged to abandon their habits as a nomadic peoples, and become self-supporting.

That the lands on said reservation were arid, and, without aid of irrigation, were useless, and the Indians dug large ditches from the running streams on said reservation, and carried the waters to their several tracts, for the purpose of irrigating the same.

II

Congress of the United States, by an Act approved April 23, 1904, (33rd Stat. L. P. 302) opened said Flathead Indian [211] Reservation for allotment and sale, and thereafter, on June 21, 1906 (34th Stat. L. P. 354) amended said Act by adding certain sections, Section 19 reading as follows:

"Section 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."

III

That sometime prior to 1891, Michael Pablo, who was then in possession of a large tract of land, dug and constructed a ditch from Mud Creek to the lands so farmed by him, and used the water upon said lands in raising crops and said water became appurtenant to the lands so farmed, and the appropriations so made has never been abandoned.

That on January 25, 1918, patent in fee was issued to Agatha Pablo, wife of Michael Pablo, for the lands allotted to him and on October 5, 1918, a fee patent was issued to Agatha Pablo for certain lands allotted to Lizette Barnaby, which lands were a part of the lands so fenced by said Michael Pablo, and farmed by him, and for which said appropriation was made, as aforesaid.

Said lands are described in said patents as the West Half of the Northeast Quarter, and the East Half of the Northeast Quarter of Section Fourteen, Township Twenty-one, North, Range Twenty, West, Montana Meridian, and are now owned by plaintiff

herein, Agnes McIntire, together with the water rights appurtenant to said lands.

That Alix Pablo, defendant herein, a son of Michael Pablo, was allotted the North Half of the Northwest Quarter of [212] Section Fourteen, Township Twenty-one, North, Range Twenty-West, and A. M. Sterling is the owner of the South Half of the Northwest Quarter of Section Fourteen, Township Twenty-one, North, Range Twenty West, allotted to Agatha Pablo, wife of said Michael Pablo, together with the water appurtenant thereto. Said lands were patented to said allottee, who thereafter sold said lands to said defendant A. M. Sterling.

That the original ditch dug by said Michael Pablo, prior to 1891, was of sufficient size and carrying capacity to carry said water, and said ditch carried said water to the lands above described, and was used for the proper irrigation of said lands.

That said lands require one inch to the acre for the proper irrigation thereof.

IV

That no other parties are using the waters of said Mud Creek except this plaintiff Agnes McIntire, and defendants Alix Pablo, A. M. Sterling, and the United States, acting through the Flathead Reclamation Project, and that the four are tenants in common, or joint tenants in the use of said waters of Mud Creek.

That the waters of said Mud Creek can be divided, partitioned and separated so that the amount

of water this plaintiff has a right to use can be determined. It can also be determined the amount of water that Alix Pablo and A. M. Sterling are entitled to use, who were made defendants in this case in order that their rights might be determined, and who are now claiming rights to said waters.

The other defendants mentioned in the complaint were named in order that they might have an opportunity to set forth any rights or interests claimed by them, but no rights are claimed, [213] except through the Flathead Reclamation Project, by those who filed similar answers to that filed by the United States. A great many of the other defendants have made default, and their default has been duly entered herein.

V

That defendant Henry Gerharz is the Engineer and Project Manager of the Flathead Indian Reclamation Project in the State of Montana, and as such Engineer and Project Manager, has charge of the construction, operation, management and control of said irrigation project, and as a part of the work done by him operates and maintains ditches and dams upon said reservation.

That as such Engineer and Project Manager, said defendant is in direct charge of what is known as the Pablo Feeder Canal, which crosses Mud Creek, and, at said point, a dam is maintained by said Project Manager, turning all of the waters of Mud Creek into said Canal, and depriving this plaintiff, Agnes McIntire, and defendants Alix Pablo and

A. M. Sterling of the waters so appropriated, prior to 1891, and appurtenant to the lands owned by said parties.

CONCLUSIONS OF LAW

I

That the ditch originally built prior to 1891 was appurtenant to the lands herein described, and the same recognized and confirmed by said Act of June 21, 1906, and as the private property of said Indian allottees, was by them conveyed to plaintiff's predecessors, and plaintiff is now the owner thereof, and likewise to defendants' predecessors and said defendants are now the owners thereof. [214]

II

That the lands herein described as privately owned, are entitled in the case of plaintiff, to 160 inches, or four cubic feet of water per second from Mud Creek, and lands of Alix Pablo are entitled to 80 inches, or two cubic feet of water per second of the waters of Mud Creek, and the lands of A. M. Sterling are entitled to 80 inches of water, or two cubic feet per second of the waters of Mud Creek, and as such owners are entitled to non-molestation to the full extent of their necessities.

III

That the maintaining of said dam in Mud Creek, and depriving these parties of the waters, the use of which is owned by these defendants, is wrongful and unlawful, and in violation of the Act of Congress, allotting the lands on said reservation, and

such interference with said private ditch and water right is mere trespass, for which said Project Manager must personally account, and for which his employment is no defense.

Opinion incorporated.

Dated this 6th day of November, 1937.

CHARLES N. PRAY
Judge.

Copies to:

Kenneth R. L. Simmons, Billings, Montana.
Pope & Smith, Missoula, Montana.
John P. Swee, Ronan, Montana.
John B. Tansil, U. S. District Atty. Butte, Montana.

[Endorsed]: Adopted by the Court and Filed Nov. 6, 1937. [215]

Thereafter, on November 6, 1937, Findings of Fact and Conclusions of Law, proposed by Defendants Pablo and Sterling, were adopted and signed by the Court, and were filed herein, in the words and figures following, to-wit: [216]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DEFENDANTS, ALEX PABLO AND A. M. STERLING.

I

On July 16, 1855, (12th Stat. L. 975) what is known as the Stevens Treaty was made by the

United States and the Flathead, Kootenay, and Upper Pend d-Oreilles Indians, as a Confederated Tribe. Certain lands were ceded to the United States, and a large tract of certain other lands were reserved for the exclusive use and occupation of said Indians, which were thereafter known as the Flathead Indian Reservation.

The Indians fenced up large tracts of land in severalty, and farmed the same, and in every way said Indians were encouraged to abandon their habits as a nomadic people, and become self-supporting.

That the lands on said reservation were arid, and, without aid of irrigation, were useless, and the Indians dug large ditches from the running streams on said reservation, and carried the waters to their several tracts, for the purpose of irrigating the same.

II

Congress of the United States, by an Act approved April 23, 1904, (33rd Stat. L. P. 302) opened said Flathead Indian [217] Reservation for allotment and sale, and thereafter, on June 21, 1906 (34th Stat. L. P. 354) amended said Act by adding certain sections, Section 19 reading as follows:

> "Section 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 domes-

tic use, or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

II

That sometime prior to 1891, Michel Pablo, who was then in possession of a large tract of land, dug and constructed a ditch from Mud Creek to the lands farmed by him and the lands of his wife and children, and used the water upon said lands in raising crops and said water became appurtenant to the lands so farmed, and the appropriations so made has never been abandoned.

That the defendant Alex Pablo, was alloted by the United States of America upon the North half of the Northwest Quarter (N½NW¼) of Section Fourteen (14) In Township Twenty One (21) North of Range Twenty West (20W), Montana Meridian, Montana, and that he has never received a patent covering said land and that the same is held in trust by the United States Government, for said Alex Pablo, who is a Member of the Flathead Tribe of Indians, together with the water rights appurtenant thereto.

That the defendant A. M. Sterling is the owner of the land that formerly belonged to Agath Pablo, wife of Michel Pablo, having acquired the same by deed from said Agatha Pablo, on or about the 25th day of November 1925, said land being located in the County of Lake, State of Montana, to-wit: The South-half of the Northwest Quarter (S½NW¼) of Section Fourteen (14) In Township Twenty One

(21) North of Range Twenty (20) West of the Montana Meridian, Montana, together with the water rights appurtenant to sa*o*d lands.

That the plaintiff is the owner of certain lands that formerly was owned by [218] Agatha Pablo the wife of Michel Pablo, said lands having formerly been alloted to Michel Pablo, and to Lizette Barnaby, and which later were patented and acquired by Agatha Pablo, and are now owned by the plaintiff Agnes McIntire the plaintiff, said lands being located in the County of Lake State of Montana to-wit: The West-half of the Northeast Quarter (*W¼NE*) and the East-Half of the Northeast Quarter (*E½NE*) of Section Fourteen (14) In Township Twenty One (21) North of Range Twenty (20) West of the Montana Meridian, to-Twenty (20) West of the Montana Meridian, Montana, together with the water rights appurtenant to said lands.

That the original ditch dug by Michel Pablo, prior to 1891, was of sufficient size and carrying capacity to carry said water to the lands above described, and was used for the proper irrigation of said lands and that all of said lands was included in the Notice of Appropriation, execution and *file* by Michel Pablo, in the office of the Clerk and Recorder of Missoula County, Montana, on the 14th day of November 1907, in which Notice the said Michel Pablo, claimed a legal right to the use, possession and control of 80 inches of water for the lands of Alex Pablo, 80 inches for the lands of A. M. Sterling and 80 inches for each of the eighty acre tracts

now owned by the plaintiff, of the waters of Mud Creek, and that during his life time Michel Pablo used the waters conveyed by said ditch from Mud Creek, to the lands above described for the purpose of Irrigation of said lands and for domestic use, and that after his death the said water has been continually used by his heirs, successors and assigns each year, and by the defendants Alex Pablo, A. M. Sterling and Agnes McIntire, to irrigate their respective lands hereinbefore described, and for domestic use.

That said lands require an inch to the acre for the proper irrigation thereof.

IV

That no other parties are using the waters of Mud Creek except Alex Pablo, A. M. Sterling, defendants herein and Agnes McIntire the plaintiff and *and* the United States, acting through the Flathead Reclamation Project, and that the four are tenants in common, or joint tenants in the use of the waters of said Mud Creek. [219]

That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff has a right to use can be determined. It can also be determined the amount of water that Alex Pablo and A. M. Sterling are entitled to use, who were made defendants in this case in order that their rights may be determined, and who are now claiming rights to said water.

The other defendants who are mentioned in the

complaint were named in order that they might have an opportunity to set forth any rights or interests claimed by them, but no rights are claimed except through the Flathead Reclamation Project, by those who filed similar answers to that filed by the United States. A great many of the other defendants have made default, and their default has been duly entered herein.

V

The defendant Henry Gerharz is the engineer and Project Manager of the Flathead Reclamation Project in the State of Montana, and as such Engineer and Project Manager, has charge of the construction, management and control of said irrigation project, and as a part of the work done by him operates and maintains ditches and dams upon said reservation, that as such Engineer and Project Manager, said defendant is in direct charge of what is known as the Pablo Feeder Canal, which crosses Mud Creek, and, at said point, a dam is maintained by said Project Engineer and Manager, turning all of the waters of Mud Creek into said canal, and depriving the plaintiff, Agnes McIntire, and the defendants Alex Pablo and A. M. Sterling of the waters so appropriated, prior to 1891, and appurtenant to the lands owned by the said parties.

CONCLUSIONS OF LAW

I

That the ditch built prior to 1891 was appurtenant to the lands herein described, and the same

recognized and confirmed by the Act of June 21, 1906, and as the private property of said Indian Allottees, was by them conveyed to plaintiffs predecessors, and the predecessors of the defendants Alex Pablo and A. M. Sterling, and that they are now the owners thereof.

II

That the lands herein described are privately owned, and are entitled in the case of the plaintiff, to 160 inches, or four cubic feet of water [220] per second from Mud Creek, and lands of Alex Pablo are entitled to 80 inches, or two cubic feet of water per second of the waters of Mud Creek, and the lands of A. M. Sterling are entitled to 80 inches of water or two cubic feet per second of the waters of Mud Creek, and as such owners are entitled to non-molestation to the full extent of their necessities.

III

That the maintaining of said dam in Mud Creek, and depriving these parties of the waters, the use of which is owned by the plaintiff and the defendants Alex Pablo and A. M. Sterling, is wrongful and unlawful, and in violation of the Act of Congress, allotting the lands on said reservation, and such interference with said private ditch and water right is mere trespass, and for which said Project Manager must personally account, and for which his employment is no defense.

Dated this 6th day of November 1937.

CHARLES N. PRAY
Judge.

Copies to

Kenneth R. L. Simmons, Billings, Montana,
Elmer E. Hershey, Missoula, Montana,
Pope and Smith, Missoula, Montana,
John B. Tansil, U. S. Dist. Attorney, Butte, Montana.

[Endorsed]: Adopted by the Court and Filed Nov. 6, 1937. [221]

Thereafter, on November 8, 1937, the United States of America, et al., filed herein their Objections and Exceptions to the Findings and Conclusions of the Court, in the words and figures following, to-wit: [222]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PLAINTIFF, AGNES McINTIRE AND THE DEFENDANTS ALEX PABLO AND A. M. STERLING ADOPTED BY THE COURT.

Comes Now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and

nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the findings of fact and conclusions of law submitted by the plaintiff and by the defendants Alex Pablo and A. M. Sterling, and adopted by the above entitled Court on the sixth day of November, 1937. [223]

(1) Defendants object and except to each and every adopted finding of fact and conclusion of law for the reasons heretofore stated in defendant's objections and exceptions to the findings of fact and conclusions of law proposed by plaintiff Agnes McIntire and the defendants Alex Pablo and A. M. Sterling on file in said action.

Respectfully submitted,

JOHN B. TANSIL

United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, U. S. I. I. S., Department of the Interior.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff,

Pope & Smith, Missoula, Mont.
Attorneys for Defendant, Flathead Irrigation District;

John P. Swee, Ronan, Mont.,
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Nov. 8, 1937. [224]

Thereafter, on November 17, 1937, the Decree of the Court was duly signed, filed and entered herein, in the words and figures following, to-wit: [225]

In the District Court of the United States for the District of Montana, Missoula Division.

Equity No. 1496.

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of Interior, HENRY GERHARZ, Project Manager of Flathead Reclamation Project, ALEX PABLO, A. M. STERLING, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, a corporation, ALICE CLAIRMONT, HENRY CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, Administrator of the estate of R. W. Jamison, deceased, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. D. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY and W. A. DUPUIS,

Defendants.

DECREE.

This cause came on to be heard at this term, and testimony was taken, and was argued by counsel, and an opinion was given; and thereupon, upon the consideration thereto, it was ordered, adjudged and decreed as follows, viz.:

That plaintiff, Agnes McIntire, and the defendants A. M. Sterling and Alex Pablo, are entitled to the full extent of their necessities, to sufficient waters to irrigate their said lands, which in no event will exceed one inch per acre, of the waters of Mud Creek, a natural stream of flowing water in Lake County, Montana, for use upon the West half of the Northeast Quarter, and the East half of the Northeast Quarter of Section Fourteen, Township Twenty-one North, Range Twenty West, Montana [226] Meridian, containing 160 acres, and the South half of the Northwest Quarter of Section Fourteen in Township Twenty One North of Range Twenty West, Montana Meridian, containing 80 acres and the North half of the Northwest Quarter of Section Fourteen in Township Twenty-one North of Range Twenty West, Montana Meridian, containing 80 acres, without interference or molestation on the part of defendants, and the Project Engineer of the Flathead Indian Irrigation Project, or the Project Manager of the Flathead Reclamation Project, Henry Gerharz, and those acting with him, his agents and attorneys, in charge of the construction, operation, management and control of said Irrigation Project, and that they be enjoined and re-

strained from interfering with the rights of the plaintiff, Agnes McIntire, and defendants A. M. Sterling and Alex Pablo, as aforesaid, and from damming up, or maintaining any dam on Mud Creek, whereby said waters will be diverted or turned from the main channel of Mud Creek in any way so that this plaintiff Agnes McIntire and the defendants A. M. Sterling and Alex Pablo would be deprived of the waters herein described, the use of which water, is the private property of said plaintiff Agnes McIntire and defendants A. M. Sterling and Alex Pablo, and appurtenant to their lands.

Opinion and findings incorporated herein.

Dated this 17th day of November, 1937.

CHARLES N. PRAY,
Judge.

Copies to

Kenneth R. L. Simmons, Billings, Montana;
E. E. Hershey, Missoula, Mont.;
Pope & Smith, Missoula, Mont.;
John P. Swee, Ronan, Montana;
John B. Tansil, United States Attorney, Butte, Montana.

[Endorsed]: Filed Nov. 17, 1937. [227]

Thereafter, on November 30, 1937, the Statement of Evidence, which was lodged herein on November 18, 1937, was approved by the Court and filed herein, in the words and figures following, to-wit: [228]

[Title of District Court and Cause.]

PROPOSED STATEMENT OF EVIDENCE OF DEFENDANTS UNITED STATES OF AMERICA HENRY GERHARZ PROJECT ENGINEER AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Be it Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, at ten o'clock a. m. on Monday the 23rd day of November, 1936, before the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, sitting without a jury.

Plaintiff was represented at the trial of said cause by Elmer E. Hershey, Esquire, Attorney at law, Missoula, Montana. The United States of America, defendant, and all other defendants except Alex Pablo, A. M. Sterling and Flathead Irrigation District, a corporation, were represented by John B. Tansil, United States District Attorney for Montana, Roy F. Allen, Assistant United States District Attorney for Montana, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, U. S. I. I. S. Defendants Alex Pablo and A. M. Sterling were represented by John P. Swee, Esquire, attorney at law of Ronan, Montana. Defendant Flathead Irrigation District, a corporation,

was represented by the law firm of Pope and Smith, Missoula, Montana, solicitors for said District. [229]

Thereupon the following proceedings were had and taken and the following evidence and none other was introduced.

The Court: Gentlemen, we have one case set for today, I believe there are some motions pending, to be overruled and denied, and answers filed; are you ready for that step? We will proceed with the case on the calendar. Those motions may be overruled and denied, and you are ready to file your answers now, I understand.

(And thereupon answers were handed to the clerk and filed.)

The Court: Have you received copies of these answers?

Mr. Hershey: They were just handed me about a minute ago.

The Court: I suppose you know about the line of defense?

Mr. Hershey: Yes; and we will file written replies to them a little later on. For the present, during the trial, if it may be considered that all the affirmative defenses are deemed denied, except as set forth in the plaintiff's complaint?

The Court: Yes; I think the equity rule will cover that anyhow; they will be deemed denied, under the rule, anyhow. They will be filed, and there may be some new matters you will wish to specifically answer. You may give a brief outline of what you propose to do, of what your proof is and what you do, under the pleadings; just a brief statement.

Opening statement on behalf of plaintiff was then made by Mr. Hershey.

Mr. Hershey: I desire, before I start in on that proposition to call your Honor's attention to certain sections of the Codes of Montana as to water rights. I desire to call your Honor's attention to Section 7105, rights settled in one action, the Codes of 1935. I also desire to call your attention to Section 7099 of the Codes, the right of the United States to make appropriation of water in this state; and I also desire to call your Honor's attention to 7107, how water is measured in this state, cubic foot of water. [230]

Mr. Simmons: May we make our opening statement?

The Court: Yes you may make a brief statement, Mr. Simmons.

Opening statement was then made by Mr. Simmons.

Mr. Hershey: In view of the statement possibly I had better start at the beginning and introduce the pleadings. I have here a copy of the treaty.

Mr. Pope: If your Honor please.

The Court: Yes, and there are others here. Whom do you represent?

Mr. Pope: Mr. Smith and I represent the Flathead Irrigation District.

Opening statement was then made by Mr. Pope.

Mr. Swee: I appear for Alex Pablo, son of old Michel Pablo, and A. M. Sterling. Mr. Sterling is the purchaser of the Agatha Pablo allotment which is the allotment of Michel Pablo's wife, both of them being now dead.

Opening statement was then made by Mr. Swee.

The Court: Anything further? If not we will proceed.

And thereupon the following evidence was offered by the plaintiff in behalf of her case in chief.

Mr. Hershey: In view of what has been said I think I had better start with the treaty itself.

The Court: Very well.

Mr. Hershey: This treaty was made on July 16, 1855, and it describes a large area of land.

The Court: That is the Stevens Treaty?

Mr. Hershey: This is known as the Stevens Treaty.

The Court: Yes.

Mr. Hershey: And it describes a large area of land on which the Indians were then living. And then Article 2 provides that "There is however reserved from the lands above described for the use and benefit of said confederated tribes, and as a general Indian Reservation on which may be placed other confederated tribes and bands of Indians under the common designation The Flathead Nation, with Victor head chief of the Flathead Indians * * * the tract of land described within the following boundaries, to-wit:"—I will skip that—"All of which tracts will be set apart and as far as necessary surveyed * * * for the benefit of said confederated tribes, as an Indian Reservation." Now there is more to that: "No white man shall go on the Reservation without their consent to enter thereon," and various exclusive rights as to hunting and fishing and so on, reserved to the Indians. I have a

copy taken from one of the two original copies of the treaty. The chief of the Reservation has one of those copies and this is taken directly from that. I have compared it also with the published accounts of it and it is correct, word for word, as it was written. I am merely offering this simply to save bringing up the treaty itself.

The Court: Of course if counsel has seen that copy it can go in and be among the files of the case, if you are satisfied with its accuracy.

Mr. Pope: We have never seen it.

Mr. Hershey: I will state that I compared that myself, with an employe, and it is as nearly perfect as I could make it. It was written in longhand, one of the originals—that was claimed to be one of the originals—that was signed by Stevens at that time.

Mr. Hershey: Then on the 25th day of January, 1918, a patent was issued to the allotment of Michel Pablo, to Agatha Pablo, for the W½ NE¼ of Section 14, Township 21 N. R. 20 W. We offer that.

Mr. Simmons: You are not offering the treaty?

Mr. Hershey: Well, all right.

The Court: Well he referred to the treaty."

ELMER E. HERSHEY

Attorney for the plaintiff, Agnes McIntire, offered in evidence certain exhibits in behalf of plaintiff.

PLAINTIFF'S EXHIBIT ONE.

Admitted

(Certified by the clerk and recorder of Lake County, Montana, on November 20, 1936, as a true, full and correct copy of said instrument filed in his office for record on April 19, 1930, at 11:39 o'clock a. m., and recorded in Book "C" of Deeds at page 304, records of Lake County.)

Transcribed from Missoula County Records, Deed Book 90, page 566.

90-566 Compared Compared

[231]

751391 -36247-
50837-17. I. O. 4-1061
1148

The United States of America to all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant Agatha Pablo, purchaser of land included in the allotment of Michel Pablo, and described as the West half of the northeast quarter of Section fourteen in Township twenty-one North of Range twenty west of the Montana Meridian, Montana, containing eighty acres.

Now Know Ye, that the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of the said claimant the lands above described: To have

and to hold the same together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. The lands hereby conveyed are subject to a lien, prior and superior to all other liens, for the amount costs and charges due to the United States for and on account of construction of the irrigation system or acquisition of water rights by which said lands have been or are to be reclaimed, as provided and prescribed by the Act of Congress of May 18, 1916, (39 Stat., 123), and the lien so created is hereby expressly reserved.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. [232]

Given under my hand, at the City of Washington, the twenty-fifth day of January in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

By the President:

[Seal] WOODROW WILSON

By M. P. LeROY,

Secretary

L. Q. C. LAMAR,

Recorder of the General Land Office

Recorded: Patent Number 615136. Entered on Tract Book 11 A P 181 R. 2-6-18.

Filed for Record on the 19th day of April, 1920 at 11:39 o'clock a. m. W. J. Babington, County Clerk, by R. J. Cyr, Deputy.

PLAINTIFF'S EXHIBIT TWO

Admitted

(Certified by clerk and recorder Lake County, Montana, as a true, full and correct copy of said patent, filed for record April 19, 1920, at 11:38 o'clock a. m., recorded in Book "C" of Deeds, page 303, records of Lake County, Montana.)

Transcribed from Missoula County Records, Deed Book 90, page 565.

90-565 Compared Compared
648499 -36246-
83815-16 I. O. 4-1061
1429

The United States of America to all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant Agatha Pablo, purchaser of land included in the allotment of Lizette Barnaby, and described as the East half of the northeast quarter of Section fourteen in Township twenty-one North of Range twenty west of the Montana Meridian, Montana, containing eighty acres;

Now Know Ye, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of [233] the said claimant the land above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifth day of October in the year of our Lord one thousand nine hundred sixteen and of the Independence of the United States the one hundred and forty-first.

By the President:
WOODROW WILSON
By M. P. LEROY,
Secretary

L. Q. C. Lamar, Recorder of the General Land Office. Recorded Patent Number 548935. Entered on Tract Book mms. Filed for Record on the 19th day of April, 1920, at 11:38 o'clock a. m. W. J. Babington, County Clerk. By R. J. Cyr, Deputy.

PLAINTIFF'S EXHIBIT THREE

Admitted

DEED ON ORDER OF SALE

This Indenture made the 25th day of September in the year of our Lord, one thousand nine hundred and twenty-four (1924), between W. R. Kelly, Sheriff of the County of Lake, State of Montana, the party of the first part, and J. L. McIntire, the party of the second part, witnesseth:

Whereas, in and by a certain judgment or decree made and entered by the District Court in and for Lake County, State of Montana, on the 25th day of July A. D. 1923, in a certain action [234] then pending in said court, wherein J. L. McIntire was plaintiff and Agatha Pablo was defendants and of which said judgment or decree a certified copy with an order of sale from said court was delivered to said party of the first part, as such Sheriff, for execution, it was among other things ordered, adjudged and decreed that all and singular the mortgaged premises described in the complaint in said action, specifically described in said judgment or decree, should be sold at public auction by the Sheriff of the said County of Lake, in the manner required by law and according to the course and practice of said court; that any of the parties to said action might become the purchaser at such sale, and that such Sheriff should execute the usual certificate and deed to the purchaser or purchasers, as required by law;

And Whereas, the said Sheriff did at the hour of 2 o'clock p. m. on the 24th day of September, A. D. 1923, after due public notice had been given as required by the laws of this State and the course and practice of said Court, duly sell at public auction in the said county of Lake agreeably to said judgment or decree and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereafter described, were fairly struck off to the said J. L. McIntire, the said party hereto of the second part, for the sum of Thirty-eight hundred ninety-eight 23/100 Dollars, J. L. McIntire being the highest bidder and that being the highest sum bid for the same;

And Whereas, the said J. L. McIntire thereupon paid to the said Sheriff the sum of money so bid by him;

And Whereas, the said Sheriff thereupon made and issued the usual certificate in duplicate of the said sale in due form of law and delivered one thereof to the said purchaser, J. L. McIntire, and caused the other to be filed in the office of the County Recorder of said County of Lake; [235]

And Whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid by or on behalf of the said judgment debtor, the said Agatha Pablo, Great Western Land Co., *Roan* State Bank, and Louise J. Smith, or by or on behalf of any other person.

Now this Indenture Witnesseth, that the said party of the first part, the said Sheriff, in order to

carry into effect the sale so made by him as aforesaid in pursuance of said judgment or decree and in conformity to the statute in such cases made and provided, and also in consideration of the premises and of the sum of Thirty-eight hundred ninety-eight 23/100 Dollars so bid and paid to him by the said purchaser J. L. McIntire, the said W. R. Kelly, Sheriff, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, all that certain lot, piece or parcel of said land, situate, lying and being in the said County of Lake, State of Montana, and bounded and particularly described as follows, to-wit:

> The East half of the Northeast quarter (E½ NE¼) and the West half of the Northeast quarter (W½NE¼) Section Fourteen (14) in Township Twenty-one (21) North of Range Twenty (20) West of the Montana Meridian, Montana, containing 160 acres more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as the said Sheriff can, may or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same. [236]

In Witness Whereof, the said Sheriff, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

....

[Seal] W. R. KELLY,

Sheriff of the County of Lake, State of Montana.

Signed, Sealed and Delivered in the presence of (\$4.00 Internal Revenue Stamps attached and canceled)

(Acknowledged September 25, 1924, before Stella M. Upham, Notary Public)

(Received for record September 26, 1924, at 9:55 o'clock a. m., and recorded in Volume 2, Deed Records of Lake County, Montana, page 249)

PLAINTIFF'S EXHIBIT FOUR

Admitted

(Plaintiff's Exhibit 4 is a warranty deed from J. L. McIntire to the plaintiff, Agnes McIntire to the property described in plaintiff's Exhibit 3).

JOHN ASHLEY

was called as a witness on behalf of the plaintiff and having been first duly sworn upon direct examination testified as follows:

Direct Examination

By Mr. Hershey:

I live at Pablo, Montana on the Flathead Indian Reservation. I have lived there all my life. I am 77

(Testimony of John Ashley.)
years old. I am an Indian allottee. Knew Michel Pablo when he lived on his allotment. Pablo had his lands fenced. He had cattle on his lands and farmed them to some extent. He raised wheat and oats and used water for the irrigation of the same from Mud Creek, which he carried through a ditch. This ditch was over a mile long, three feet wide at the bottom and about two feet deep. It was about fifteen feet deep as it went through a cut of about 200 yards. About 150 yards of the ditch was made out of logs. The land had to be dammed.

The Lizette Barnaby allotment was owned by Michel Pablo when the ditch was built. Pablo just used this allotment for pasture. [237] He had water on the allotment. This ditch was dug prior to the opening of the Flathead Indian Reservation. Michel Pablo used this ditch on his land, and on Alex Pablo and on Joe Pablo's lands. When water was turned in the ditch it filled it.

I worked on the ditch up at the head and changed it for about 300 yards at the request of Michel Pablo. The ditch was placed so that you could use water on the Lizette Barnaby and the Michel Pablo land. After the ditch was changed Pablo was raising hay and oats and once in a while wheat. The oats was as high as six feet. Pablo had from six to nine thousand cattle upon this land which he was raising feed for while he was living. He also had

(Testimony of John Ashley.)
five or six hundred head of buffalo there. This condition existed before and after I changed the ditch.

Cross Examination

By Mr. Simmons:

I do not know the year Michel Pablo died. After the ditch went dry, at Pablo's request I dug it over. This was before the reservation was opened. I do not know the year the reservation was opened. The grade of the ditch was about a quarter of an inch to a rod. Three 80 acre tracts were irrigated of the Michel Pablo lands through this ditch. Pretty near all of the land on these three eighties was irrigated. These eighties were Alex Pablo's, Agatha Pablo's (Michel Pablo's wife) and Joe's, part of the old man's right alongside of the fence. The Lizette Barnaby tract was used for pasture. The entire eighty was used as pasture, the brush and everything. No crop was grown on this land only a small garden. It took old man Frank Busquet, who is now dead, and me, about a month and a half to build this ditch.

Redirect Examination

By Mr. Hershey:

The garden on the Barnaby land was quite a large garden. He had a large force there to feed and was raising vegetables to supply his own needs. [238]

ELMER E. HERSHEY

was called as a witness on behalf of the plaintiff and having been first duly sworn upon

Direct Examination

testified as follows:

I will state that I was admitted to practice in this state June 2, 1891, and with then Lieutenant McAlexander—afterwards Brigadier General McAlexander—the "Rock of the Marne," we entered a partnership, and we filed what is known as the Williams Addition to Demersville; and the boats were running up there and landing on Williams' land, and I went up to settle the troubles we were having; and on June 20, 1891,—evidently I had returned—I made a charge for the trip; if you gentlemen want to see it here it is down at the bottom. And I will state that I passed by this place and there was water coming through there in quite a large quantity. My recollection is now that the road was fenced up on both sides; and strung along the ditch, then, on the east side and west side both, just as it is today, at the north end of the Barnaby land and the Michel Pablo land; there was quite a large head of cattle there strung along the ditch clear out of sight to the east in the brush and trees; and quite a quantity of water was coming down at that time. The ditch was the same place where it is now, and I have seen it many times since.

Cross Examination

By Mr. Simmons:

I was making this trip on the stage. I did not get out of the stage and go along the ditch to exam-

ine it. I do not know how long the ditch was. The stage crossed it. It was a large ditch coming down there full of water. That was in 1891.

JEAN McINTIRE

then was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Hershey:

Plaintiff is my mother. I am acquainted with the two eighties, the 160 acres which she now owns, in controversy here. I have known that land since 1907 when I was 14 years of age. [239] At that time I went down to that land with my father who had been asked to advance some money on this land by a man named Hitchcock who desired to purchase it. We saw Mr. Pablo to find out whether or not he wanted to sell the land. There was an irrigation ditch on the land. It was a show place on the reservation. There was a wonderful crop on the land of alsike and timothy. The crops were so high that I could not see the buckboard of the wagon.

The majority of this land will not raise crops without irrigation. Ordinary crops, such as hay and grain, oats or barley, or anything of that nature cannot be raised on this land without irrigation. It has a gravelly sub-soil.

After my father acquired this tract of land we saw Mr. Moody, the project engineer of the Flat-

(Testimony of Jean McIntire.)
head Irrigation Project and he advised my father in my presence that we had no right to irrigate the land. He said the only right the Government acknowledged was water for stock and domestic purposes only and that we could not irrigate the land without the Government's permission; it was against the law and we would be subject to prosecution, if we irrigated the land. This occurred as soon as my father got the Sheriff's deed in 1924.

We have used water on the land and irrigated it to some extent every year. There is water coming down the ditch on the east eighty and we have also used some in the west 80. The east 80 was the Barnaby land and the west 80 the Michel Pablo land. There has been water there ever since 1907.

Cross Examination

By Mr. Simmons:

I don't know the number of acres irrigated in 1907 when I went on the two eighties in question with my father. I think the crops raised at that time were alsike and timothy. I don't know how much water was used. About 1500 head of cattle were getting their water from the ditch. When my mother acquired this land Mr. Moody told us we could not irrigate. Since we have had the place we have irrigated the meadow and turned out [240] some water. About half of the Lizette Barnaby place, approximately 40 acres, that is the E½ of the NE¼ has had water from the ditch since 1924. The irrigation has only been for grazing purposes

(Testimony of Jean McIntire.)
for the meadow on those 40 acres. No crops have been raised upon the east eighty whatsoever. On the west eighty, the old Michel Pablo allotment, I would say that we have used water on possibly 20 acres. On this acreage we raised some alsike and timothy. We have a good garden there and some alfalfa.

The ditch is comparatively level. In some places it is filled with silt and is only eighteen inches to two feet wide; in other places it is probably four feet wide. The length of the ditch is approximately a mile. The ditch has been cleaned out on several occasions. We have never attempted to limit the amount of water diverted to a thousand gallons a day, which the Project Engineer told us we were entitled to divert.

BERT LISH

was called as a witness on behalf of the plaintiff and having been first duly sworn upon direct examination testified as follows:

Direct Examination

By Mr. Hershey:

I am sixty four years old. I have been irrigating lands ever since I was eleven years old. I started irrigating in the Gallatin Valley and I have irrigated lands in the Blackfoot and pretty much in the Bitter Root and on the Flathead Indian Reserva-

(Testimony of Bert Lish.)

tion. I live on a farm on the Flathead now near Post Creek. It is about 12 to 14 miles south of the lands in controversy. I am familiar with the Michel Pablo and Barnaby lands and have been out on both of those places. To properly irrigate those lands you would have to have quite a head of water, two inches to the acre, for the reason that there is just a little skim of good land on the top and the rest is mostly gravel and rocks. There is a gravel pit up there in one place, about twelve feet deep and it is rocks from the top to the bottom. [241]

Cross Examination

By Mr. Simmons:

By two inches to the acre I mean as near as I can get it around two second feet. I think I mean two second feet to the acre, eighty miner's inches. You want all the water you can get. I don't know what a miner's inch of water to the acre is. I have seen water all over this State measured and helped to measure it and I know that a certain sized weir —will carry so much. An acre foot of water isn't hardly anything. I would say that the duty of water on the McIntire land is two inches of water at the point of delivery on the land. I don't mean continuous flow during the entire year, but just the irrigation season. The irrigation season would be from about the 15th of April to about the 15th of October. The various times I have examined this land I made no examination to determine the number of acres being irrigated on either of these tracts.

(Testimony of Bert Lish.)
I only observed the lands as I was going up and down the road at the time they were building the highway.

Redirect Examination

By Mr. Hershey:

In the last two or three weeks I have been present when a demonstration was being made in measuring water. I have assisted in the placing of the weir and at that time there was measured out accurately by a weir 40 inches of water into a ditch.

ELMER E. HERSHEY

a witness on behalf of the plaintiff, was recalled and testified as follows:

I will state that taking the rules of the Agricultural College at Bozeman—I haven't got the rules here but I can produce them—I built a weir, rectangular weir, and it was a two foot weir, and I put over that two foot weir the actual amount of water for 40 inches and let it flow down a ditch that this witness and others had been using for irrigation purposes, just even 40 inches, so they could see what 40 inches was. And that is what I am trying to have this witness answer, with his experience as an irrigator. He has seen, actually seen 40 inches of water measured out in the ditch. [242]

(Testimony of Bert Lish.)

BERT LISH

a witness on behalf of the plaintiff was again recalled and testified as follows:

Redirect Examination

By Mr. Hershey:

I recall the incident related by Mr. Hershey and I observed the quantity of water flowing in the ditch. From my experience in using water in the last fifty odd years and from my observation of the quantity of water in this ditch on this place I will state from my observation as an irrigator and from what I saw demonstrated there would be required to irrigate an acre of land upon the land in question, the Pablo land, two inches at least.

Recross Examination

By Mr. Simmons:

Q. You mean two inches for the irrigation season or for the entire year?

Mr. Hershey: I object to that because that isn't the way we measure water. Beneficial use is the measure of the right and we have a right to sufficient water to irrigate that land as long as we need it.

The Court: Yes, I think so.

The two miner's inches will just run during the irrigation or crop season.

Plaintiff rests.

Thereupon the following evidence was introduced by the defendants upon their case in chief.

HENRY GERHARZ

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Simmons:

I am the Project Engineer of the Flathead Indian Irrigation Project and have been such since November 14, 1933. I have general charge of all the Operation and Maintenance activities of the project and I have charge of the construction work that is carried on and among my duties is that of being Water Commissioner to settle any controversies between the different users of both private and project rights.

DEFENDANTS' EXHIBIT FIVE

Admitted

(Exhibit 5 is a certified copy of an official Government map, part of the Flathead Irrigation Project records, of Private Canals and Irrigated lands in part of Township 21 North, Range 20 West, Montana Principal Meridian, showing that portion of the lands and waters in controversy as well as the course of the ditches, Government and [243] private in that area. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Testimony of Henry Gerharz.)

Defendants offered Exhibit 6, is a photostatic copy of several official record maps showing the grants of water made by the Secretary of the Interior to private claimants, as well as the lands to be irrigated by said waters. We have the original maps here in court. The photostat enlargements were made so that they could be readily seen. I have compared the original maps with these enlargements and they are identical. The entire course of Mud Creek as is affected by the water rights in controversy can be seen on this map. The green color is put on to show lands to which the Secretary of the Interior granted water rights. All of these tracings from which this map was made are part of the official files in the Government Irrigation Office at St. Ignatius, Montana. (The witness designated by red pencil mark on this offered exhibit north, south, west and east. The course and source of Mud Creek was traced by the witness in red pencil. The witness designated with a red pencil by the figure "1" the Lizette Barnaby allotment and by the figure "2" the Michel Pablo allotment.)

DEFENDANTS' EXHIBIT SIX

Admitted

(Defendants' Exhibit 6, being a photostatic copy of several official Government record maps as described above, has been certified to the Circuit Court of Appeals as a portion of the record in this case).

(Testimony of Henry Gerharz.)

The Lizette Barnaby allotment is described as the E½ of the NE¼ of Section 14 marked in red pencil on the map as No. 1 and the Michel Pablo allotment is described as the W½ of the NE¼ of Section 14, marked in red pencil as No. 2 on the map. Mud Creek flows through the SE corner of the Lizette Barnaby allotment. Defendants' Exhibit 6 shows the course of the Pablo ditch running out of [244] Mud Creek and running down to the Michel Pablo and other tracts in that territory.

(The witness marked the course of the Pablo Ditch on defendants' exhibit 6 with a blue pencil.)

On defendants' exhibit 6 is shown the irrigable acreage of the Michel Pablo and the Lizette Barnaby tracts. The irrigable acreage as determined by the Government classification committee on the Michel Pablo tract is 60.8 acres; none on the Lizette Barnaby tract.

Cross Examination

By Elmer E. Hershey:

Referring to defendants' Exhibit 6 the 60.8 acres designated thereon as being irrigable acreage on the Michel Pablo tract was placed on the map several days ago. It was taken from our records of the irrigable acreage for each 40 acre tract in the Flathead Irrigation District. These records were made up many years ago. We have them here. They were made up since Michel Pablo settled on the land and it was allotted to him. No irrigable acreage is shown on the Lizette Barnaby land. I have been on the

(Testimony of Henry Gerharz.)
Lizette Barnaby land and I have never seen a ditch across that land nor have I observed that the land has been plowed. The classification records undoubtedly show that they were made since the lands were allotted to these Indians and since patents were issued to them.

ROBERT S. STOCKTON

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

During the year 1907 I was employed by the Government as Project Engineer in the construction of the Huntley Project near Billings, Montana. During the summer of that year I was ordered by my superior, H. N. Savage, Supervising Engineer, to make a reconnaissance and preliminary survey on the Flathead Indian Reservation to outline the possible development for irrigation, power, and other conservation of natural resources of the Flathead Reservation. In July, 1907 I shipped an outfit to Ravalli, Montana, organized two field parties and during the summer and up to the [245] middle of September of that year we made plane table, level, and stadia surveys covering the lands in the Mission and Jocko Valleys and some investigation on

(Testimony of Robert S. Stockton.)
the Little Bitter Root and took all the information in the field that we thought necessary in order to prepare a report to show the best possible distribution of use that could be made of the natural resources of the lands on the Reservation. I have a copy here of the report that was submitted to the Secretary of the Interior in Washington.

"Mr. Hersey: The same objection that I made heretofore. At the present time they cannot have any evidentiary value to the appropriation of water made in 1891 or prior thereto, being too late a date, the rights had attached to this land and the government itself couldn't take away any of those rights or destroy them in any way.

The Court: Well we will admit them under your theory of the case.

Mr. Hershey: Now that objection I think ought to go to all of these exhibits so I won't have to repeat it.

The Court: Yes, the other exhibits that are admitted; they may be admitted, and these two.

DEFENDANTS' EXHIBIT SEVEN

Admitted

(Defendants' Exhibit Seven is a letter addressed to Mr. Robert S. Stockton, Irrigation Manager, United States Reclamation Service, Glendive, Mon-

(Testimony of Robert S. Stockton.)

tana, dated December 28, 1908, and signed by Charles P. Williams, an engineer in the United States Reclamation Service. This exhibit has been certified to the Circuit Court of Appeals as a part of the original record in this case.)

DEFENDANTS' EXHIBIT EIGHT

Admitted

(Defendants' Exhibit Eight is a report of Mr. R. S. Stockton, dated November 12, 1907 to H. N. Savage, Supervising Engineer, U. S. Reclamation Service covering the subjects testified to by Mr. Stockton. This exhibit has been certified to the Circuit Court of Appeals as a part of the original record in this case.)

DEFENDANTS' EXHIBIT EIGHT (a)

Admitted

(Folded and placed in the back of defendants' Exhibit 8, but not fastened thereto is a large blueprint map which bears the title "Flathead Project, Montana. Map of Lands and Surveys," dated November 12, 1907 with the names Robert S. Stockton, Project Engineer and H. N. Savage, Supervising Engineer. This exhibit, the blueprint map re-

(Testimony of Robert S. Stockton.)
ferred to, has been certified to the Circuit Court of Appeals as a part of the original record in this case.) [246]

In my investigations and work on the Flathead Indian Reservation in 1907 I laid out the plans of the Flathead Irrigation Project System in a general way. I laid out a system of canals and laterals, estimated the irrigable acreage that could probably be obtained, made a rough estimate of costs for the construction of the main canals of the irrigation system proposed, but not of the distributing system to the individual farmers. Our idea was that the water in the various small streams and the water in the Flathead River would be available for the irrigation of the land and for the development of power; that the water and the land was in the hands of the Government and after my instructions from Mr. Savage and after talks with Senator Dixon and in considering the act opening the reservation our purpose was to conserve in a permanent way the very large natural resources of this region.

The Washington Office had decided to have the Reclamation Service construct the project and the Indian Service and Reclamation Service were co-operating at that time.

I remember the water across the road at the Pablo Ranch, but I have no personal knowledge of this particular right. I did notice a large number

(Testimony of Robert S. Stockton.)

of buffalo grazing there. I made a study of Mud Creek and of the waters flowing thereon for use in the project system. It was carefully surveyed and we had a lateral system planned taking water out of Mud Creek as well as out of Mission Creek and Post Creeks. The idea was to take up all the water available and provide as much storage as possible so as to get the greatest possible useful development of the lands of the Flathead Reservation.

I was back on the reservation in October, 1908 and I was advised by the engineers in charge that my original plan of taking water out of these different little streams had been modified by running a main feeder canal designated as the Pablo Feeder Canal parallel to the Mission Mountains and picking up all of this water [247] into one main feeder canal. The Pablo Feeder Canal is correctly designated on defendants' exhibit 6.

(The witness marked the course of the Pablo Feeder Canal in red pencil on defendants' exhibit 6 along the dashed line on the map which designates said canal.)

The Reclamation Service subsequently turned over the operation, management and construction of the Flathead Irrigation Project to the United States Indian Irrigation Service.

The work done by me as a Reclamation Service engineer was in cooperation with the Indian Service.

(Testimony of Robert S. Stockton.)

Cross Examination

By Mr. Hershey:

The Pablo Feeder Canal designated on defendants' Exhibit 6 was above the Pablo land. I had no instructions not to interfere with private water rights. My instructions were to find the best way to use all of the water available on that project without regard to any other rights that might have existed.

GUY L. SPERRY

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am an assistant engineer in the Indian Irrigation Service. Have been such since 1924. Prior to that time I was with the Reclamation Service from 1909 to 1917. I was surveying in 1909, junior engineer in 1910, and was on the engineering force until 1917.

DEFENDANTS' EXHIBIT NINE

Admitted

(Defendants' Exhibit 9 is a lithographed map of the Flathead Irrigation Project, Montana, showing

(Testimony of Guy L. Sperry.)
the source and course of Mud Creek, the Pablo Feeder Canal, and the major portion of the Flathead Irrigation Project System. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.) [248]

In 1910 I located the Pablo Feeder Canal on the north end of the project, that is, the part of the feeder canal that crossed Mud Creek and that lay in the northeast of Pablo. The construction of the canal was begun on the north end and worked back south, in other words, work was begun at the lower end of the feeder canal and continued upstream so that we could use the lower end of it before the entire canal was completed. In other words, the branches of Crow Creek and Mud Creek and Post Creek could be picked up as the canal crossed these creeks.

(The witness designated the places on the map crossed by Mud Creek with X's in pencil.)

The Pablo Feeder Canal was built for the purpose of picking up all of the waters along the base of the Mission Range. It runs pretty much parallel to the Mission Range Mountains. The water is carried north by the canal and may be used on the Pablo Division and put in the Pablo Reservoir and used from there to water lands lying in south and west of the Pablo Reservoir in the Pablo Division and in the Round Butte Division. There are ample lands to use all of the water that can be picked up and even then there is a shortage of water. All of

(Testimony of Guy L. Sperry.)
the available water is used. Since 1913 all of the available waters of Mud Creek have been used on land lying under the Flathead Irrigation Project system. All of the waters of Mud Creek are being used up to this time, except that which we have to let go by in order to supply certain private rights that are recognized by the United States.

Defendants' Exhibit 5, which shows the McIntire lands involved in this case, is a print from the original map made from survey by me in 1910. It covers the Lizette Barnaby and the Michel Pablo allotments now owned by the plaintiff, Agnes McIntire. This map shows that in 1910 there was no irrigation done on the Lizette Barnaby unit. It also shows that on the Michel Pablo unit in the northwest quarter of the NE¼ of Section 14, that is, the north half of the [249] eighty there were 13 acres irrigated poorly; in the SW¼ of the NE¼ there were five acres poorly irrigated. By poorly irrigated I mean that it was just partially irrigated. It was not irrigated sufficiently to produce a good crop. It did have some evidence of irrigation. My notes show that the timothy was poor. The data for the preparation of this map and the drafting of the same was secured by means of a transit and stadia survey made in 1910 by myself and one F. E. White, Rodman. The ditch was located by means of the transit and the stadia reading distances and angles, and tied in to a General Land Office corner, that is, a Land Office corner. On the same day that the sur-

(Testimony of Guy L. Sperry.)
vey was made I also gauged the amount of water in the ditch. I found there was .95 of a second foot flowing on that day. That was June 28, 1910. That will be thirty-eight miner's inches in the State of Montana. The ditch on that day was approximately half full. It would have a capacity of a two second foot ditch or 80 miner's inches.

In 1929 or 1930 I was on these lands, looking over them, and classifying the lands and classifying the irrigable areas. I never saw any evidence of irrigation on the Lizette Barnaby tract. A part of the Michel Pablo tract in the south forty near the north edge of the south forty is sub-irrigated.

The soil on the Barnaby eighty is very gravelly along the road. It lies along the main highway and the State highway have a gravel pit there. It has a shallow top soil, which is probably pretty fair soil. There is quite a little sand in some places in the eighty and quite a lot of gravel. The west eighty, that is, the Michel Pablo eighty, is a better eighty and is not so gravelly.

The duty of water would be the amount of water that would be required per acre to raise a good crop. The duty of water on the Lizette Barnaby land would take probably five or six acre feet per acre, parts of it probably not so much. The Michel Pablo land between two and three acre feet per acre, that is, on the gravelly portion, other parts of it possibly a foot and a half. The sub- [250] irrigated portions of the Michel Pablo allotment would not require any water.

(Testimony of Guy L. Sperry.)

Cross Examination

By Mr. Hershey:

The Pablo Feeder Canal carries water toward the Pablo Reservoir to irrigated lands that never had any water on them before the canal was built or before the project was being built. In 1913 these lands began to be irrigated, possibly before that. Water was taken from Mud Creek through the feeder canal for the irrigation of these new lands in about 1913. Reducing the acre feet required to irrigate the Barnaby tract to second feet would be three second feet. The Michel Pablo land would require about half that much.

In June, 1910 Michel Pablo was occupying the land at the time I made the survey. The ditch was in fair repair to such an extent that it was carrying a foot of water and was, however, full on that day.

Redirect Examination

By Mr. Pope:

The Pablo Feeder Canal is a very significant factor in the Flathead Irrigation Project system, inasmuch as any creeks or streams crossed by this canal can be picked up and carried to a storage reservoir and there stored and distributed from this reservoir for thousands of acres of land that lie in the project; or can either be stored there and run down the distributary canals and put on the land within the project has proposed to and is irrigating; and for

(Testimony of Guy L. Sperry.)

this reason it is a very significant factor; otherwise these waters would go on in the streams and be lost and could not be recovered. The loss of the waters from Mud Creek would affect all the lands in the Mission Valley Project, which includes something over a hundred thousand acres of irrigable lands; and the waters of Mud Creek can be picked up and carried and stored in the Pablo Reservoir, and this, of course, obviates the necessity of running other waters farther south. [251]

Recross Examination

By Mr. Hershey:

The water from the Pablo Reservoir can be used to irrigate the Pablo and Barnaby Tracts. There is a ditch at the northwest corner of the Michel Pablo eighty, the culvert across the road has been destroyed and water could not be placed upon the allotment until this is done. This work, however, would require not to exceed 48 hours to put water on this allotment and possibly not more than 24. No water has ever been used from that source on these lands. About sixty or sixty-one acres is irrigable on the Michel Pablo allotment, that is, land considered as irrigable by our land classification. This water which would be delivered through this ditch and culvert is not private water.

(Testimony of Guy L. Sperry.)

Redirect Examination

By Mr. Simmons:

These lands I spoke of, which were classified as irrigable, were classified by Land Classification Board appointed by the authority of the Commissioner of Indian Affairs to make a survey and go over the lands of the entire project, such as were within the district, and classify these lands with regard to whether they were irrigable or non-irrigable, or whether they had lands in them that could never be irrigated. This Board inspected the Michel Pablo allotment. They found 60.77 acres of irrigable lands there. No classification of the Lizette Barnaby tract was made for the reason that the land on this allotment was considered by the Board as being quite gravelly and too gravelly and sandy to irrigate, and in the second place, it is not in the District. If the plaintiff desired to secure water from the Flathead Irrigation Project System for the irrigation of the irrigable portions of her lands she could put in a request for water for this particular tract, allowing a short time to put the road culvert across the road, and make what little ditch would be necessary to put the water down on the land. No demand has ever been made of me and to my knowledge of any project officials for the waters of the project system by the plaintiff for the irrigation of this land. [252]

(Testimony of Guy L. Sperry.)

Recross Examination

By Mr. Hershey:

This land classification was made in the fall of 1929 and the spring of 1930. The land was patented many years before that. You could get water on the Michel Pablo land from the Flathead Irrigation Project System by making application for it and paying for it. The east 80, that is, the Barnaby tract, is not in the irrigation district.

W. S. HANNA

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am the Supervising Engineer of the United States Indian Irrigation Service and have supervision over the Flathead Irrigation Project. I have made repeated trips to the Flathead Irrigation Project since 1914. In 1924 the project was turned over from the control of the Reclamation Service to the Indian Service. Since that date it has been directly under the jurisdiction of my office. The Pablo Feeder Canal was completed after 1914. The bulk of the lands benefitted by the waters of Mud Creek lie under the Flathead Irrigation District. However, the waters of Mud Creek are a benefit to the whole Mission Valley Division.

(Testimony of W. S. Hanna.)

DEFENDANTS' EXHIBIT TEN
Admitted

(Defendants' Exhibit 10 is a portion of the annual costs statement and general irrigation data statement that is prepared annually for submission to Congress by the Chief Engineer's Office in Washington. It shows the cost of construction of the Flathead Irrigation Project to June 30, 1936. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

The cost to June 30, 1936 of the Flathead Irrigation Project as shown on the exhibit is $7,499,105.85. This is arrived at by adding the column which shows preliminary surveys and construction and another column which shows administration expense. [253]

Direct Examination

By Mr. Pope:

The Flathead Project was originally made in three divisions, the Mission Valley Division, the Jocko Division, and the Camas Division. What we refer to as the Mission Valley Division includes the greater portion of the Flathead Irrigation District and all of the Mission Irrigation District. The greater portion of this division is composed of lands which are in the Flathead Irrigation District, one of the defendants in this case. There are in the

(Testimony of Henry Gerharz.)
neighborhood of 80,000 acres of irrigable land within the Mission Valley Division and also within the Flathead Irrigation Districts. The waters of Mud Creek affect approximately 80,000 acres of land within the Flathead Irrigation District.

HENRY GERHARZ,

a witness for the defendants was recalled and testified as follows:

Redirect Examination

By Mr. Simmons:

DEFENDANTS' EXHIBIT ELEVEN
Admitted

(This is a certified copy of the official file copy of the instrument referred to, as appears in the records of the Office of Indian Affairs, Washington, D. C.)

Irrigation
23254-34
50537-18 Copy
WHF Jun 8 1934

Mr. Henry Gerharz,
Project Engineer.

Dear Mr. Gerharz:

Responding to your letter of May 8 referring to the appointment of a Water Commissioner to supervise the distribution of water flowing within the

(Testimony of Henry Gerharz.)
boundaries of the Flathead Reservation in Montana—

The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision: [254]

> "The Secretary of the Interior shall appoint the engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch."

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date of August 10, 1922 by the Department to act as Water Commissioner on this reservation.

As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission.

In view of the fact that the Water Commissioner must effect the division of the waters of the reserva-

(Testimony of Henry Gerharz.)

tion between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report.

These private water right matters were involved in the so-called "Moody Cases." The Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and remanded the cases with directions to dismiss them for want of necessary parties, unless the plaintiffs, within a reasonable time amended their complaint so as to bring in such necessary parties. Subsequently, in mandamus proceedings the Circuit Court granted our petition for a writ of mandamus against the District Court from proceedings inconsistent with the order of the Circuit Court. Owing to the need to protect the several private water users and the Flathead Project in the use of water, it is necessary that some one perform this work, and the Project [255] Engineer is the logical person to perform these services.

In case of interference by the water users with the distribution of the water, you will present the facts to District Counsel Simmons for his consideration and action.

Sincerely yours,

(Sgd) WILLIAM ZIMMERMAN, JR.

Assistant Commissioner.

(Testimony of Henry Gerharz.)

Approved: Jun 12 1934.

(Sgd) OSCAR L. CHAPMAN
Assistant Secretary.

Copy to Supervising Engineer Hanna.

Copy to District Counsel Simmons.

DEFENDANTS' EXHIBIT TWELVE
Admitted

(Defendant's Exhibit Twelve is a photostat copy of the original repayment contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT THIRTEEN
Admitted

(Defendants' Exhibit Thirteen is a photostat copy of the first supplemental contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT FOURTEEN
Admitted

(Defendants' Exhibit Fourteen is a photostat copy of the second supplemental contract between the Flathead Irrigation District and the United

(Testimony of Henry Gerharz.)
States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.) [256]

DEFENDANTS' EXHIBIT FIFTEEN
Admitted

(Defendants' Exhibit Fifteen is a photostat copy of the third supplemental contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT SIXTEEN
Admitted

(Defendants' Exhibit Sixteen is a certified copy of the order of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake in the matter of the formation of the Flathead Irrigation District. In this order there appears the following description of lands included in the Flathead Irrigation District: The W½ of the NE¼ of Section 14. The township and range being the same as the Michel Pablo Tract involved in this case, which shows eighty acres of the lands involved here as being all included in the Flathead Irrigation District and subject to the terms of the Flathead Repayment Contract entered

(Testimony of Henry Gerharz.)
into between the District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT SEVENTEEN
Admitted

(This is a certified copy of the original instrument on file in the Office of Indian Affairs, Washington, D. C.)

Department of the Interior
United States Indian Service
Flathead Agency

Dixon, Montana.
December 10, 1919.

The Commissioner of Indian Affairs,
Washington, D. C.

Sir: [257]

The first findings on water rights on the Flathead Indian Reservation were submitted by a committee appointed by the Commissioner of Indian Affairs, consisting of Fred C. Morgan, Superintendent of Flathead Indian School, Foster Towle, Assistant Engineer, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe. This committee made a report on the water rights of the Jocko Drainage Basin which was submitted on January 15, 1914.

(Testimony of Henry Gerharz.)

On July 21, 1917, a committee composed of Fred C. Morgan, Superintendent of the Flathead Indian School, F. T. Crowe, Project Manager, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe, made a report on the water rights of Garden Creek.

Under date of September 17, 1918, Theodore Sharp was appointed to succeed Fred C. Morgan on this Committee and on March 26, 1919, the appointment of A. P. Smyth, Assistant Engineer, U. S. Reclamation Service, to succeed Foster Towle was approved by your office.

The following are the principles observed in making the findings of the Committee last mentioned above, together with recommendation with regard to the taking over of old ditches.

The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the

(Testimony of Henry Gerharz.)
course of said streams, the location of the ditch or canal diverting water therefrom, and [258] the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost.

A previous report has been submitted by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the al-

(Testimony of Henry Gerharz.)
lotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904. [259]

A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon

(Testimony of Henry Gerharz.)

and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch. [260]

The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in

(Testimony of Henry Gerharz.)
interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right.

Michel Pablo
Allotment No. 1148
W½ NE¼ Sec. 14, T. 21 N., R. 20 W.

The Committee, on June 3, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Michel Pablo, being allotment No. 1148, comprising the W½ NE¼ Sec. 14, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913, and June 3, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1109,

(Testimony of Henry Gerharz.)
made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia, it is determined that Michel Pablo in 1891 constructed a ditch diverting water from Mud Creek at a point on the right bank in the NE¼ NE¼ NW¼ Sec. 13, T. 21 N., R. 20 W., for the purpose of conveying water upon portions of this allotment; that this ditch has not been used for irrigation for the past ten years but has been [261] used continuously for domestic and stock purposes; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day for domestic and stock use and that no other water right of any kind is appurtenant to this allotment.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Jocko Valleys, and includes the following streams and their tributaries:

Sabine Creek.
Dry Creek near St. Ignatius.
Mission Creek.
Ashley Creek.
South Fork of Ashley or Dry Creek.
Poison Oak Creek.
Post Creek.
Marsh Creek.
Crow Creek.
Spring Creek near Ronan.
Mud Creek.
Ashley Creek near Bisson Creek.
Dubay Creek.

(Testimony of Henry Gerharz.)

Minesinger Creek.
Bisson Creek.
Meadow Creek.
Moss Creek.
Big Creek at Polson.
Dayton Creek.
Big Creek at Eudora.
Sullivan Creek.
Little Bitter Root River.
Dry Fork Creek.
Warm Springs Creek.
Markle Creek.
Cottonwood Creek.
Sweetwater Creek.
Michel Creek.
Camas Creek.
Revais Creek.
Selow Creek.
Jocko Creek.
Ashley Creek near Mud Creek.
Courville Creek.

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted [262] lands and the unallotted irrigable lands as approved by the Secretary

of the Interior and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,

(Sgd) THEODORE SHARP,
Chairman, Supt. & S. D. A.
Flathead Agency

(Sgd) ALPHONSE CLAIRMONT
Representative elected by the Indian Council and member of the Flathead Tribe.

(Sgd) A. P. SMYTH
Assistant Engineer, U. S. Reclamation Service.

DEFENDANTS' EXHIBIT EIGHTEEN
Admitted

(This is a certified copy from the files and records of the Office of Indian Affairs, Washington, D. C.)

Department of the Interior
United States Indian Service
Flathead Agency
Dixon, Montana.

December 10, 1919.

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

(The contents of this letter or report, down to the description of the individual rights, are exactly

(Testimony of Henry Gerharz.)
the same as the contents of the report contained in Defendants' Exhibit 17, immediately preceding this page, and are not therefore again copied in full at this point, but in lieu thereof reference is made to line 1, page 30 of this statement of the evidence and from there to and including line 17 on page 33 of the record, for the exact contents of this part of this exhibit 18.)

Alexander Sloane
Allotment No. 1186
NE¼SW¼, W¾ NW¼SE¼ & E¼NW¼ SW¼ Sec. 34, T. 21 N., R. 20 W. [263]

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Alexander Sloane, being Allotment No. 1186, comprising the NE¼SW¼, W¾ NW¼SE¼ and E¼NW¼ SW¼ Sec. 34, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1122, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that the predecessor in interest of the allottee in 1901 constructed a ditch diverting water from a branch of Mud Creek in Sec. 27, T. 21 N., R. 20 W., but that said ditch has not been used for ten years and therefore is to be considered as

abandoned; that said allotment is determined to have no water right from any source.

Office of Indian Affairs
Received Jul 27 1936—9090

Hattie Rose Sloane
Allotment No. 1182
NE¼NW¼, W¼NE¼NW¼ & E¼NW¼ NW¼ Sec. 34, T. 21 N., R. 20 W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Hattie Rose Sloane, being Allotment No. 1182, comprising the NE¼NW¼, W¼NE¼NW¼ & E¼NW¼ NW¼ Sec. 34, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913.

From personal investigation on the ground, testimony taken, from facts shown on Plat F-1122, made by engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that the predecessor in interest of the allottee in 1901 constructed a ditch diverting water from a branch of Mud Creek in Sec. 27, T. 21 N., R. 20 W., but that said ditch has not been used for ten years and therefore is to be considered as abandoned; that said allotment is determined to have no water right from any source.

Alex Pablo
Allotment No. 1152
N½NW¼ Sec. 14, T. 21 N., R. 20 W. [264]

The Committee, on June 3, 1919, made an ex-

(Testimony of Henry Gerharz.)
amination in the field of the irrigation system and water rights appurtenant to the lands of Alex Pablo, being Allotment No. 1152, comprising the N½NW¼ Sec. 14, T. 21 N., R. 20 W.; and testimony was taken on November 19, 1913, and June 3, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1109, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Michel Pablo in 1891 constructed a ditch diverting water from Mud Creek at a point on the right bank in the NE¼NE¼NW¼ Sec. 13, T. 21 N., R. 20 W., for the purpose of conveying water upon portions of this allotment; that said ditch has been used continuously since said date for domestic and stock purposes but has been abandoned as regards irrigation for the past ten years; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day; that no other water right of any kind is appurtenant to this allotment.

Victor Clairmont
Allotment No. 945.
NW¼NE¼ & NE¼NW¼ Sec. 18, 21, N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Victor

(Testimony of Henry Gerharz.)
Clairmont, being Allotment No. 945, comprising the NW¼NE¼ & NE¼NW¼ Sec. 18, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 26, made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia it is determined that Alphonse Clairmont, the father of the allottee, in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon [265] portions of this allotment; that since said date there have been irrigated 60 acres of said allotment; that said 60 acres hereinbefore described are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 120 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)
Henry Clairmont
Allotment No. 946
SE¼NE¼ Sec. 7, T. N., R. W.
SW¼SW¼ Sec. 6, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Henry Clairmont being Allotment No. 946, comprising the

(Testimony of Henry Gerharz.)
SE¼NE¼ Sec. 7, T...... N., R...... W., and SW¼ SW¼ Sec. 5, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud and Ashley Creeks and diverting on the left bank of Mud Creek in SE¼NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1906 and prior to 1915 the only area irrigated has been 13.8 acres in SE¼NE¼ Sec. 7, T. 21 N., R. 19 W.; that said 13.8 acres hereinbefore described are determined to have a valid and subsisting water right from Mud and Ashley Creeks to the extent of 2 acre feet per acre per annum or a total of 27.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)
Florence Clairmont
Allotment No. 948
W½SE¼ Sec. 7, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to [266] the lands of Florence Clairmont being Allotment No. 948, com-

(Testimony of Henry Gerharz.)
prising the W½SE¼ Sec. 7, T. 21 N., R. 19 W., and Sec......, T. .....N., R...... W., and testimony was taken on November 18, 1913 and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud and Ashley Creeks and heading on the left bank of Mud Creek in SE¼NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 and prior to 1915 the only land irrigated in this allotment has been 13.7 acres in SW¼SE¼ Sec. 7, T. 21 N., R. 19 W.; that said 13.7 acres hereinbefore described are determined to have a valid and subsisting water right from Mud & Ashley Creeks to the extent of 2 acre feet per acre per annum or a total of 27.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Alphonse Clairmont
Allotment No. 942
W½NW¼ Sec. 8, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Alphonse Clairmont being Allotment No. 942, comprising the W½NW¼ Sec. 8, T. 21 N., R. 19 W., and Sec.

(Testimony of Henry Gerharz.)

T. N., R. W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that portions of this allotment were prior to 1906 irrigated from the Joseph Clairmont ditch from Mud Creek and that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, [267] T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since said date there have been irrigated 65 acres of said allotment; that said 65 acres hereinbefore described are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 130 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)

Alice Clairmont

Allotment No. 944

SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W.

The Commitee, on June 6, 1919, made an examination in the field of the water rights and irrigation system appurtenant to the lands of Alice Clairmont, being Allotment No. 944, comprising the

(Testimony of Henry Gerharz.)
SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 26, made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 19.6 acres in SW¼NE¼ Sec. 18, T. 21 N., R. 19 W.; that said 19.6 acres are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 39.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)
Rose Ashley
Allotment No. 1076
N½NE¼ Sec. 32, T. 22 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant of the lands of Rose Ashley, being Allotment No. 1076, comprising the [268] N½NE¼ Sec. 32, T. 22 N., R. 19 W., and testimony was taken on November 20, 1913.

(Testimony of Henry Gerharz.)

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 29, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that water from a small stream in SW¼SE¼NE¼ Sec. 28, T. 22 N., R. 19 W., has since 1895 been used for domestic and stock purposes on this allotment and that said allotment is determined to have a valid and subsisting water right from unnamed stream in Sec. 28, T. 22 N., R. 19 W., to the extent of 1,000 gallons per day for domestic and stock purposes.

Henry Ashley
Allotment No. 1029
S½ SE¼ Sec. 29, T. 22 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Henry Ashley, being Allotment No. 1979, comprising the S½ SE¼ Sec. 29, T. 22 N., R. 19 W., and testimony was taken on November 20, 1913.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 29, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that water from an unnamed stream in SW¼SE¼NE¼ Sec. 28, T. 22 N., R. 19 W., has, since, 1895, been used for domestic and stock purposes on this allotment; that said allotment is determined to have a valid and subsisting

(Testimony of Henry Gerharz.)

water right from unnamed stream in Sec. 28, T. 22 N., R. 19 W., to the extent of 1,000 gallons per day for domestic and stock purposes; that no other water right from any source is appurtenant to this allotment.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Jocko Valleys, and includes the following streams and their tributaries: [269]

Sabine Creek.
Dry Creek near St. Ignatius.
Mission Creek.
Ashley Creek.
South Fork of Ashley or Dry Creek.
Poison Oak Creek.
Post Creek.
Marsh Creek.
Crow Creek.
Spring Creek near Ronan.
Mud Creek.
Ashley Creek near Mud Creek.
Courville Creek.
Big Creek near Bisson Creek.
Dubay Creek.
Minesinger Creek.
Bisson Creek.
Meadow Creek.
Moss Creek.
Big Creek at Polson.
Dayton Creek.
Big Creek at Fudora.

(Testimony of Henry Gerharz.)

Sullivan Creek.
Little Bitter Root River.
Dry Fork Creek.
Warm Springs Creek.
Markle Creek.
Cottonwood Creek.
Sweetwater Creek.
Michel Creek.
Camas Creek.
Revais Creek.
Selow Creek.
Jocko River.

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,
(Sgd) THEODORE SHARP,
Chairman, Supt. & S. D. A.,
Flathead Agency.

(Testimony of Henry Gerharz.)

(Sgd) ALPHONSE CLAIRMONT
Representative elected by the Indian Council and Member of the Flathead Tribe.

(Sgd) A. P. SMYTH
Assistant Engineer, U. S. Reclamation Service. [270]

DEFENDANTS EXHIBIT NINETEEN
Admitted

(This is a certified copy taken from the files and records of the Office of Indian Affairs, Washington, D. C., and certified as such.)

29928-21

United States
Department of the Interior
Office of Indian Affairs
Washington

Copy
May 24 1921

The Honorable
The Secretary of the Interior
(Through Director, Reclamation Service).

My dear Mr. Secretary:

The Commission, comprising the Superintendent of the Flathead Reservation, the Reclamation Service Project Manager, and an Indian selected by the Flathead Tribe, appointed for the purpose of deter-

(Testimony of Henry Gerharz.)
mining old water rights on the Flathead Indian Reservation, Montana, has reported with respect to existing rights of all persons owning or occupying land upon streams within the Flathead Indian Reservation. This report also covers those lands held by eleemosynary societies at St. Ignatius and white owners who have been adopted into the tribes. After having conducted surveys and investigations on the ground and considered testimony brought out at a hearing called for the purpose, the Commission submits its report, consisting of four volumes, as follows:

(Here follows a quotation, word for word, of the report of the Committee referred to, which is included in Defendants' Exhibit 17, herein, beginning on line 1 of page 30 of this statement and to and including line 17 on page 33 of this statement, where the quotation ends, and for this reason it is not again copied in full at this point but reference is made to said Exhibit 17 and to line 17, page 33 of this statement.)

It will be noted that the Commission recommends that in those cases where it is deemed advisable for the United States to destroy private ditches and construct a new ditch, the owner or owners of said old ditch shall be entitled to a paid-up water right to the extent of 100% of the cost of construction, with no charges for [271] operation and maintenance, for that part of his allotment which is determined to have a valid water right. While it is believed to be equitable and just in such cases to grant

(Testimony of Henry Gerharz.)
the Indian what is known as a paid-up water right, nevertheless it is believed that such land should not be granted paid-up operation and maintenance in perpetuity. Such charges are paid annually as a general rule and to concur in this respect with the Commission's report might in the future cause considerable dissatisfaction among various land owners.

It is therefore respectfully recommended that the report submitted herewith be approved with a slight modification relative to the matter of paid-up operation and maintenance charges referred to above, to the effect that the Secretary of the Interior in all such cases shall determine whether or not such persons shall in addition to being granted a full paid-up water right, also be granted free operation and maintenance charges.

Cordially yours,
(Sgd.) CHAS. H. BURKE
Commissioner

I concur: May 24, 1921.
(Sgd.) MORRIS BIEN
Acting Director
Reclamation Service

Approved: Nov. 25, 1921.
(Sgd.) F. M. GOODWIN
Assistant Secretary

(Testimony of Henry Gerharz.)

DEFENDANTS' EXHIBITS 20, 21, 22, 23, 24, 25 AND 26 ADMITTED

(Defendants' Exhibits are certified copies of records taken from the Department of Reclamation in Washington showing notices of appropriation of the waters of Mud Creek by the United States of America, made in pursuance to the Reclamation Act and in pursuance to the laws of the State of Montana applicable thereto. It is charged in the Bill of Complaint that these filings were made as formal notice to all landowners and settlers along Mud Creek; that these [272] waters had been reserved by the United States for beneficial uses upon the lands of the reservation. They are not relied upon to establish any date of priority. These exhibits have been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Testimony of Henry Gerharz Continued.)

As to that portion of the Michel Pablo allotment which is classed as irrigable and other irrigable lands in the Flathead Irrigation District we as a yearly matter make an estimate of the amount of money that is going to be required to operate the project for a year, which estimate is sent to Washington for approval, and when approved, we notify the Flathead Irrigation District that it will require so much money to operate the project for the next year; then the Flathead Project adds to our esti-

(Testimony of Henry Gerharz.)
mate the amount they figure they will need for administration and then prorates the entire cost of the irrigable acreage and certifies it to the County Treasurer that they have raised so much taxes against these irrigable lands in the District and the County Treasurer collects it the same as he does any other taxes.

Recross Examination

By Mr. Hershey:

Our charge is just a service charge. The Flathead Irrigation District is our collection agency. I am not supposed to deliver any private water. I heard the testimony that Michel Pablo is entitled to 1,000 gallons a day. This water has been delivered to him. I have seen more than a thousand gallons on the Michel Pablo place many times. We only recognized the fact that this is 1,000 gallons that he is entitled to.

Redirect Examination

By Mr. Simmons:

No complaint has ever been made to me that Agnes McIntire, the plaintiff, was not receiving 1,000 gallons of water per day.

Redirect Examination

By Mr. Pope:

The thousand gallons referred to in the document I have identified is to be used for domestic and stock purposes. As a representative of the Indian

(Testimony of Henry Gerharz.)
Service I would not interfere with the [273] utilization of 1,000 gallons for any purpose the plaintiff might want it for. We consider that this land is entitled to 1,000 gallons.

(Amend said statement on pages 46, 47 and 48 by striking out all of the purported testimony of Alfonse Clairmont, written in narrative form, and insert therein the testimony of this witness as given by questions and answers.)

ALPHONSE CLAIRMONT,

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Mr. Clairmont, during the year 1919 were you appointed as a member of a private water rights committee by the Commissioner of Indian Affairs?

A. Yes, sir.

Q. I hand you herewith defendants' Exhibit 18, which is a report of a committee composed of Theodore Sharp, Alphonse Clairmont and A. P. Smyth, dated December 10, 1919, to the Commissioner of Indian Affairs, Washington, D. C., and I will ask you to examine that report briefly. Is that the report, Mr. Clairmont, that was made by this committee of which you were a member?

A. Yes, sir.

(Testimony of Alphonse Clairmont.)

Q. Do you recall, Mr. Clairmont, the different proceedings had by this committee, that is, what was done by the committee in a general way as to the obtaining of data on these early irrigation developments? [274]

A. Why you mean going around?

Q. Yes, what did you do in getting your facts together so that you could make these findings?

A. Well we posted up notices and went around and examined the ditches and the grounds.

Q. Did you as a member of that committee examine the Mitchel Pablo and the Lizette Barnaby tracts of land?

A. Yes.

Q. Did this committee hold hearings at Ronan, Montana, on November 19, 1913?

A. Yes.

Q. Was testimony taken of witnesses at that hearing?

A. Yes.

Q. Do you recall hearing the testimony of Michel Pablo at Ronan, Montana, as a member of this committee, on November 19, 1913?

A. Yes.

Q. I hand you herewith Defendants' offered exhibit number 27, and I will ask you to examine the same and read it. You read this testimony over before this time, that is, in the office of the United States Attorney?

A. Yes.

(Testimony of Alphonse Clairmont.)

Q. And did you hear Michel Pablo's testimony before this committee of which you were a member, on November 19, 1913?

A. Yes.

Q. And did you hear Mrs. Pablo's testimony before this committee of which you were a member, at Pablo, Montana, on June 3, 1919?

A. Yes. [275]

Q. Was the testimony given at this hearing at Ronan, Montana, on November 19, 1913, and at this hearing given at Pablo, Montana, on June 3, 1919, by Michel Pablo and Mrs. Pablo, identical with the testimony contained in question and answer form in defendants' offered exhibit number 27?

A. Yes.

Mr. Simmons: We now offer in evidence Defendants' offered exhibit 27.

Mr. Hershey: I would like to examine the witness concerning it.

The Court: Very well, you may do so.

Examination

By Mr. Hershey:

Q. When were you appointed commissioner?

A. 1913, wasn't it?

Q. No, you are answering?

A. What is that?

Q. When were you appointed on this commission?

A. 1913 or 1914.

Q. When was this testimony taken?

(Testimony of Alphonse Clairmont.)

A. Well it was taken right after, in 1914 I believe.

Q. In 1914. When was Mrs. Pablo's testimony taken—at the same time?

A. Well no.

Q. When was it taken?

A. Later on.

Q. You think this testimony was taken for Mr. Pablo in 1914?

A. As near as I can remember, yes.

Q. Where was it taken?

A. Ronan.

Q. In whose office? [276]

A. Well I don't know as I remember now; I think it was taken in one of the government houses there.

Q. Do you know who was present?

A. Well there were a whole lot of them in there, different cases.

Q. What official was present?

A. Well there were—what do you mean, on the commission?

Q. Yes, or who swore—was Pablo sworn?

A. Yes.

Q. In 1919?

A. In 1919.

Q. Yes.

A. Well I don't remember the year.

Q. Was Agate Pablo sworn?

A. Yes they were all sworn.

Q. Did Mrs. Pablo speak through an interpreter?

A. Yes.

(Testimony of Alphonse Clairmont.)

Q. She spoke through an interpreter?

A. Yes.

Q. Who was the interpreter?

A. Well I don't know, I don't remember that.

Q. What member of the commission was present?

A. Well it was either Morgan or Sharp, I don't know which one, now.

Q. You don't remember which?

A. No.

Q. You are not able to tell what they said are you?

A. Well he didn't say very much.

Q. But you can't tell whether he testified to these answers, to these questions and these answers that are written down here, [277] you couldn't tell now at this late time?

A. Well I can remember now that he said he didn't use much water.

Q. You remember that he didn't use much water. How often have you talked to his counsel with reference to this?

A. Which?

Q. This gentleman sitting here?

A. Oh just today.

Q. It hasn't been shown to you heretofore?

A. No.

Q. You didn't read it over in the attorney's office, this testimony?

Mr. Simmons: Well he testified that he had read it over.

(Testimony of Alphonse Clairmont.)

Mr. Hershey: Yes and I'm trying to bring out the facts and I have a right to examine him without any objection or suggestions on your part.

Q. (continued) Now you did read it over in their office?

A. Yes.

Q. It was read to you very carefully?

A. Yes.

Q. Once?

A. Yes.

Q. When was that?

A. This morning.

Q. Where was it, in this room out here?

A. Yes.

Q. And that's the only time you saw it?

A. That's all; well I read it over down to the office when they first put in the testimony.

Q. Where was that?

A. St. Ignatius.

Q. When was that? [278]

A. Well that was directly after we took the evidence.

Q. You read it over when they took it?

A. Yes.

Q. Where was that?

A. Well at St. Ignatius.

Q. Where are the papers that you read over?

A. Well it is in the form here somewhere.

Q. Was it taken down in long hand or written in typewriting?

(Testimony of Alphonse Clairmont.)

A. It was in typewriting, after it was in typewriting.

Q. Who was the stenographer?

A. Well there was a big fat fellow, I don't recall his name.

Q. Could Agate Pablo write?

A. No.

Q. Could Michel Pablo write?

A. No.

Q. Neither one of them wrote. Mark with a thumb, or was it a cross?

A. Yes, Michel Pablo could write his own name.

Q. He could write his own name?

A. Yes, and that's about all, I think.

Q. And that's about all you think he could do?

A. Yes.

Q. Did Agate sign with a cross?

A. I guess she did yes.

Q. You guess so?

A. She did sign it with her thumb.

Q. Isn't it a matter of fact that this is all guess work?

A. No it isn't.

Q. And you remember testimony taken in 1913 or 1914?

A. How is that? [279]

Q. You remember testimony taken in 1913 or 1914?

A. Yes.

Q. Which year was it?

(Testimony of Alphonse Clairmont.)

A. Which year?

Q. Yes, was it 1913 or 1914?

A. I think it was 1913 or 1914, I don't know which now.

Q. It might have been 1914?

A. Well it might have been.

Q. Might have been 1915?

A. Well I don't know as to that, I don't think so.

Q. Who else was present at that time?

Mr. Simmons: Objected to as repetition.

A. (No answer.)

Q. What other witness' testimony was taken at that hearing, anybody?

A. Well there were several others.

Q. Who were they?

A. Several cases.

Q. Who were they?

A. Well they were people right around the neighborhood there.

Q. Do you know their names?

A. Well there was Sullivan there and Alex McLeod, and different ones that had private water rights up there.

Q. Was Alex Pablo there?

A. I don't recall him being there.

Q. He is present in court?

A. Yes.

Q. Now as a matter of fact Pablo was dead in 1914 wasn't he?

A. Well he died that year some time.

(Testimony of Alphonse Clairmont.)

Q. He died that year, 1914, some time? [280]

A. (No answer.)

Mr. Hershey: We object to it; it is too far fetched. There may have been some proceedings had there.

The Court: Find out how it was taken; does he know whether it was written in long hand?

Q. Was it written in long hand or in typewriting and transcribed?

A. It was written in shorthand and then transcribed, I guess.

Q. You guess?

A. Well that is the way it was generally taken, in shorthand.

Q. And you can't tell who it was that took it in shorthand?

A. Well there were several different fellows with us.

Q. And was it signed that day—was it transcribed that day or was it signed later?

A. No.

Q. It wasn't signed that day?

A. It was transcribed after it got down to the office here at the Mission; they took it in shorthand.

Q. And then did Pablo follow it there and sign his name?

A. I don't know.

Q. You don't know that Pablo ever signed it?

A. No I don't.

Mr. Hershey: We object to it.

Mr. Simmons: If the court please, I may call the Court's attention to the map that is designated in that report, which was introduced as one of the ex-

(Testimony of Alphonse Clairmont.)
hibits in this case; the testimony refers to Map S-4050, which we have before the Court as one of the exhibits, and that of course is an official copy of a government record; the official books are kept with the Project and we have an official copy here which is kept in the Flathead Project, which contains the identical testimony; that copy was prepared in the Washington Office; we have the book [281] here of the testimony that was taken.

The Court: You have?

Mr. Simmons: Yes.

The Court: Well of course this is the form. I think I will admit it, and it may be considered, of course, in connection with the cross examination; as to what weight we will give it is another thing.

Mr. Hershey: I want to ask another question of this witness if I may.

The Court: All right.

Q. (By Mr. Hershey) Do you know whether it was ever read to Michel Pablo after it was written down by the stenographer?

A. No I don't.

Mr. Hershey: Now as a matter of fact in 1919 when this Agate Pablo is purported to give this testimony she wasn't the owner of the land and had sold it, and the deed shows that it had been transferred prior to the giving of that testimony.

The Court: Well that is a matter you can present of course in your proof, together with your cross examination. I will admit it. It is properly

(Testimony of Alphonse Clairmont.)

authenticated as a public document. And what weight will be given it and how the Court will regard it——

Mr. Hershey: —Just a minute—a suggestion made here.

Q. (By Mr. Hershey) As a matter of fact you know Michel Pablo couldn't read, don't you?

A. Couldn't read?

Q. (Mr. Hershey) Yes sir?

A. I don't think so.

Q. (By Mr. Simmons) Was there an interpreter present at these hearings who translated the English language into the Indian language? [282]

A. Yes, sir.

Q. (Mr. Simmons) Do you speak the Indian language?

A. Well, I don't speak it very plain, but I can understand pretty nearly every word.

The Court: Well, I will receive that, subject to your objection. What I will receive that, subject to your objection. What I will do with it later will depend on how I regard it at that time. [283]

Thereupon was received in evidence the instrument referred to, identified as Defendants' Exhibit 27, and being as follows:

DEFENDANTS' EXHIBIT 27

Admitted

(This is a certified copy from the records and files of the Office of Indian Affairs, Washington, D. C., so certified as of date June 3, 1936.)

MICHEL PABLO
Ronan, Montana
November 19, 1913.

Witness being first sworn, testified as follows:

Q. What is your full name and where do you live?

A. Michel Pablo; live 5 miles north of Ronan.

Q. Do you live on your own allotment?

A. Yes.

Q. How long have you lived there, Mr. Pablo?

A. I don't hardly recall, but must have been there over 30 years.

Q. Do you irrigate any of the land on your allotment?

A. Very little.

Q. Where do you obtain your water supply?

A. From Mud Creek.

Q. When was the ditch constructed to carry water for the irrigation of your allotment?

A. I believe that was made in 1891.

Q. And you have used water for irrigation ever since?

A. For my stock to drink out of and used it on some trees and switched into some gravelly places but not much.

Q. Is there some land irrigated on the Alex Pablo allotment, which is adjacent to your place?

A. Yes, it runs through his place.

Q. And some irrigated on Agate Pablo's land?

A. Yes.

Q. I will show you the map, S-4050, and ask if that fairly represents the location of the ditches and irrigated area on your allot- [284] ment and that of your children Alex and Agate Pablo?

A. Yes.

Q. Have you kept the ditch in repair ever since it was constructed?

A. Well, until here in the last three or four years. I never paid much attention to the head of it where it comes into the ditch and it is kind of washing out a little. I had water enough running in the ditch anyway.

Q. Is there a sufficient supply of water in Mud Creek to fill your ditch usually?

A. Yes.

Q. Mud Creek rises in the mountains to the east of you?

A. Yes.

Q. And the land is more or less springy around there?

A. Yes, all above the ditch.

Q. And on your allotment and on the two allotments of your children, Alex and Agate; how many acres do you estimate you irrigate?

A. I never took trouble to irrigate much of that, but about 4 or 5 acres where it is gravelly.

Q. The most of the soil there doesn't require much irrigation?

A. No.

Q. As a matter of fact you have built a drainage ditch, have you?

A. Yes.

MRS. PABLO

Pablo, Mont.

June 3, 1919.

Witness being first duly sworn, testified as follows:

Q. What is your name?

A. Mrs. Pablo.

Q. Has any water been used for irrigation on your land here the last six or seven years?

A. I don't use it for irrigation. Let it run for stock and house use. [285]

Q. How many years have you used it for that purpose?

A. Over 20 years.

Q. Who built the ditch?

A. My husband.

Q. Does anybody else use the water through your ditch except for these lands?

A. Only ones are the people that haul it.

Q. No land above or below that takes the water?

A. No sir. I don't think so.

FRANK C. MAYER

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am at present watermaster of the Pablo Division of the Flathead Irrigation Project. I have held this position since February 9, 1922. I cover the Pablo Division, Ronan Division, Pleasant Valley View and Round Butte Divisions on the Flathead Irrigation Project. I am familiar with the lands involved in this case. The land described is the Lizette Barnaby allotment and the Michel Pablo allotment owned by the plaintiff includes the McIntire. Since 1922 I have visited these lands a great many times. I have gone across the Pablo Ditch during the irrigation season sometimes two and three times a day and as a rule not less than several times a week. This statement holds for each year since 1922 up to and including the present time. I have recently made an examination of the Pablo Ditch; the last examination I made was on November 21, 1936. There has been very little irrigation done on this land since 1922. Three years ago there were a few little furrows plowed [286] out from the ditch on the Pablo eighty where the old house stands; and run down in the field a little ways, but I don't know whether there was water put into these ditches. We did not go out to examine. Two years ago there was another ditch

(Testimony of Frank C. Mayer.)
took out along the fence towards the house and water was run in that ditch. It was not run out on the ground that time. It was in the ditch. The use of this water from 1922 to the present time was more for stock purposes than anything else. I have noticed twenty acres on the Michel Pablo place being in crop, but it was never irrigated. I never saw any acres in crop on the Lizette Barnaby tract. In 1922 when I first examined the ditch I would say it had a capacity of perhaps a foot and a half of water, approximately 60 miner's inches. In 1922 the upper portion of the ditch was well growed up to willows and brush and pretty well filled up. The head of the ditch was about 18 inches wide and in depth, and after it comes out in the timber it hits rather sandy soil and is close to gravel so that the ditch there was widened out to about four or five feet. It was built shallow on account of the gravel being so close to the surface. When I examined the ditch a few days ago the only change in the ditch from that in 1922 was that it was in worse shape. The willows and brush had grown so much larger in the ditch. At no time that I examined the Pablo ditch was there any physical evidence in the ditch or on the ditch banks that would indicate that it had at any time a carrying capacity of four cubic feet of water per second of time or 160 miner's inches. There was no evidence from my observation that would indicate that it might have had a larger capacity in 1891. In all of the time that I have been over this land since

(Testimony of Frank C. Mayer.)

1922 and I have taken several trips a [287] week during that period over that land I have never seen any crops irrigated with the waters of Mud Creek through the Pablo Ditch on either the Michel Pablo or the Lizette Barnaby tracts.

I would say that the duty of water on these tracts to raise a decent crop would be about three acre feet per acre.

Cross Examination

By Mr. Hershey:

I am not accustomed to measuring water in cubic feet of water per second of time or miner's inches. One hundred miner's inches over a given period is a good irrigation head of water to irrigate land with. I stated in direct examination that no crops had been raised on either the Lizette Barnaby or the Michel Pablo tracts that have been irrigated. These tracts were not cropped this last year. A very poor crop was raised the year before.

Redirect Examination

By Mr. Simmons:

In my direct examination yesterday I made the statement that 2½ second feet or 100 miner's inches of water is needed to irrigate lands similar to the Pablo lands or the lands owned by Agnes McIntire on the Pablo allotment. I meant by that statement that a large head of water was required to go over this land quickly; that 2½ feet of water flowing for 24 hours, making 5 acre feet of water; I didn't

(Testimony of Frank C. Mayer.)
mean that continuous, all summer, or for the entire irrigation season, as they don't irrigate that way, they turn the water in for from four to ten days, something like that; then the water is taken off for two weeks; then it is turned back on again for a few days for the second or third irrigation, whatever it may be. The frequency of irrigation depends on the nature of crops being irrigated.

(Before the Government rested on behalf of the defendants it represented, at the request of the defendant Flathead Irrigation District and with the consent of the court Robert S. Stockton was called and testified as a witness in behalf of said defendant, Flathead Irrigation District.) [288]

ROBERT S. STOCKTON

was called as a witness on behalf of said defendant and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Pope:

I acted in the capacity of Project Engineer in charge of construction on the Huntley Project near Billings, Montana from the spring of 1905 until the completion of the project, which took up to the fall of 1909 and I was then transferred to the Lower Yellowstone Project. From the summer of 1903 I was connected with the Reclamation Bureau and appointed in that year as an engineer. I served

(Testimony of Robert S. Stockton.)
with the Reclamation Bureau until March 1, 1911. For a period of nearly twenty-five years I have been Superintendent of Operation and Maintenance for the Canadian Pacific Railroad, Department of Natural Resources of a large irrigation project taking over 200,000 acres of land and with a large mileage of canals and laterals to maintain and operate. I have been retired by the Canadian Pacific and now reside on my ranch near Thompson Falls, Montana. I have had practical experience in irrigating my own land. I have heard most of the testimony during the progress of this trial with relation to the character of the land known as the Michel Pablo and Lizette Barnaby allotments. I have had occasion during my experience as irrigation engineer to study the problem of the duty of water. After listening to the testimony of witnesses as to the character of the Barnaby and Pablo lands and upon my knowledge gained from my survey in 1907 of lands generally on the Flathead and upon my general experience as an irrigation engineer I have formed an opinion as to the amount of water required for successful irrigation of lands of the character of the Pablo and Barnaby tracts. The proper duty of water for the Flathead lands would not be greater than one and a half to two acre feet per acre.

Defendants' Exhibit 8a shows a definite diversion of water from Mud Creek with the proposed canal line, which is on the map marked "C" line and which covers a considerable area of lands proposed to be irrigated. [289]

(Testimony of Robert S. Stockton.)

Direct Examination

By Mr. Simmons:

The flow of half a miner's inch to the acre for 120 days delivery on the land would amount to three acre feet. One hundred fifty days would be approximately the average duration of an irrigation season in the Flathead District.

And thereupon the following evidence was offered for the defendants Alex Pablo and A. M. Sterling, in behalf of their case in chief.

(By oral stipulation it was agreed by all the counsel that A. M. Sterling is the owner of the south half of the *NE* quarter of Section 14, Township 21 North, Range 20 West.)

Thereupon

ALEX PABLO,

one of the defendants last named was duly sworn and testified in behalf of said defendants as follows:

Direct Examination

By Mr. Swee:

I am a ward of the United States Government and live on my allotment which joins the Michel Pablo allotment on the northwest. My eighty runs east and west. The Michel Pablo allotment runs north and south. I have lived there practically all of my life. I am 47 years old and am a son of

(Testimony of Alex Pablo.)

Michel Pablo. When I was old enough to observe the conditions of my father's ranch my father had his allotment and my allotment and other lands there. We were allotted about the year 1908. When I was old enough to observe the conditions of his ranch my father had a ditch of water running to his land and to my land. Waters flowed in that ditch ever since I have been old enough to observe. There is water in it now. My father used that water for stock and domestic purposes and he used some for irrigation. Up to the time of my father's death in 1914 my father ran on the average about 1500 head of cattle on the Flathead, about 100 head of horses, and about 400 or 500 head of buffalo. I think he sold his buffalo in 1909. This ditch was used for drinking purposes for the stock. It was also used in the winter during the feeding season. This water was also used on his own allotment and my allotment and the land that belonged to my mother for irrigation purposes. Up to the time my father died in 1914 he irrigated about 20 acres on my allotment, raised hay mostly, some pasture. On my [290] mother's allotment now owned by Mr. Sterling he irrigated about 25 acres. The water was not used on that land every year. Whenever he had hay on it there he used it, but whenever he had other crops in he did not use it. Since I have started farming I have used the water for irrigating hay. I have farmed it and also leased my land. I now have it leased to Tom Moore. I have only raised hay and grain on my land. The

(Testimony of Alex Pablo.)
East 40 of my land needs water to raise a good crop.

DEFENDANTS' EXHIBIT 28

Admitted

(Defendants' Exhibit 28 represents a photograph taken in 1909 and 1910. It was taken toward the Mission Range and is an actual photograph of a portion of the Michel Pablo Allotment and the Pablo Ditch where the ditch runs over his allotment. It shows a picture of Michel Pablo on his horse. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Continuation of the Testimony of Alex Pablo.)

The irrigation of my mother's and my land has been almost continuous since I was old enough to farm.

Mr. Swee: If it please the Court, I have here a certified copy of the notice of appropriation filed by Mr. Pablo in this county in 1907, certified by the clerk and recorder of Missoula County.

Mr. Simmons: We object to the introduction of the Defendants' offered exhibit 29 in evidence for the reason that it is incompetent, irrelevant and immaterial and has bearing on any issue involved in this case. It is our position, substantiated by many recent cases, that no water right can be acquired on Indian Reservations under state appropriation—state filing.

The Court: Yes we have heard that a good many times.

(Testimony of Alex Pablo.)

Mr. Swee: May it please the Court this is——

Mr. Pope: May the record show a like objection is made on behalf of the defendant Irrigation District.

Mr. Hershey: This goes deeper than just the appropriation; it is a [291] sworn statement that he took out this water for the irrigation of certain lands; Pablo swears to this, that the purpose of taking it out was to irrigate certain lands, and as an affidavit made at that time it would have some evidentiary value of his intention.

The Court: Yes, aside from the appropriation, it might; but of course you have other evidence, of the actual digging of the ditches and the taking of the waters; you have now carried it way back to some time in the past. Perhaps for that purpose it would be admissible—unless you have some other objection that will exclude it, outside of the appropriation under the state statute.

Mr. Allen: We have the further objection that it is a self serving declaration.

The Court: Well I will overrule that. I think it might be very material; I will receive it at this time, subject to your objection, and make some future disposition of it.

Mr. Pope: If we may have an exception to the ruling?

The Court: Certainly.

Defendant Flathead Irrigation District's exception noted.

(Testimony of Alex Pablo.)

And thereupon, over the objections, was received in evidence the instrument referred to, the same being identified as and marked Defendant Pablo's Exhibit 29, and in words and figures as follows to wit:

DEFENDANTS EXHIBIT 29

(Admitted over the foregoing objections)

(This is a certified copy of an original Notice of Water Right, filed in the office of the clerk and recorder of Missoula County, Montana, and so certified)

L 1877 Compared

NOTICE OF APPROPRIATION

State of Montana,
County of Missoula,
Flathead Reservation—ss.

To All Whom These Presents May Concern: [292]

Be It Known, That Michel Pablo (No. 605) and his wife, Agate, Children Joseph, Mary and Alex, and grand-nieces, Mary and Philomene Pablo, of Flathead Indian Reservation in said County and State do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That they have a legal right to the use, possession and control of and claim Five Hundred and Sixty (560) inches of the waters of Mud Creek in said County and State for irrigating and other purposes.

(Testimony of Alex Pablo.)

II. That the purpose for which said water is claimed, and the place of intended use is for domestic and irrigating purposes on the W½NW¼, SE¼NW¼ and NE¼SW¼ Sec. 13, Twp. 21, N., R. 20 W., M. M., W½NE¼, E¼SW¼ and NW¼ Sec. 14, Twp. 21 N., R. 20 W., M. M. and S½SW¼ Sec. 11, Twp. 21, N., R. 20 W., M. M.

III. That the means of diversion with size of flume, ditch, pipe, or acqueduct, by which *he* intends to divert the said water is as follows: A ditch 48 inches by 18 inches in size, which carries and conducts 560 inches of water from said Creek; which said ditch diverts the water from said stream at a point upon its North bank, and runs thence in a Westerly direction. The head of said ditch being about 150 yds. above the lands hereinbefore described, and being on land claimed by Marie Louise Pablo, thence over and upon said land (or mining claim).

IV. That they appropriated and took said water on the 15th day of April A. D. 1900 by means of said ditch.

V. That the names of the appropriators of said water Michel Pablo, Agate Pablo, Joseph Pablo, Mary Pablo, Alex Pablo, Mary Pablo and Philomene Pablo.

VI. That they also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final dis-

(Testimony of Alex Pablo.)

charge, and also the right of location upon any lands, of any dams, reservoirs, constructed or to be constructed, by them [293] conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands, of any dams, reservoirs, constructed or to be constructed, by them in appropriating and in using said water.

VII. That they also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of the said right, water, ditch or said appurtenance in part or whole at any time.

Claiming the Same All and Singular, Under any and all laws, National and State, and Local rulings and decisions thereunder, in the matter of water rights.

Together with All and Singular, The hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

Witness our hand at Ronan Montana, this 12th day of November, 1937.

M. PABLO,
AGATE PABLO,
JOSEPH PABLO,
MARY PABLO,
ALEX PABLO,
MARY PABLO,
PHILOMENE PABLO

Witness:

D. D. HULL

(Testimony of Alex Pablo.)

State of Montana,
County of Missoula—ss.

Michel Pablo having first been duly sworn, deposes and says that he is of lawful age and is one of the *appropriator* and *claimant* of the water and water right mentioned in the foregoing notice of appropriation and claim, and the person whose name is subscribed thereto as the appropriator and claimant, that he *know* the contents of said foregoing notice and that the matters and things therein stated are true.

M. PABLO

Subscribed and sworn to before me this 14th day of November A. D. 1907.

A. J. VIOLETTE

[Seal] Notary Public in and for Missoula County, Montana.

1877 Notice of Water Right. Filed for record Nov. 14th, A. D. 1907 at 2:10 o'clock p. m. and Recorded in Book F of Water Rights, on Page 277 Records of Missoula County, Montana. W. H. Smith County Recorder by Deputy Recorder. [294]

Cross Examination

By Mr. Allen:

In the years 1909 and 1910 my father ran on the average about 1500 head of cattle. He had about 100 head of horses and about 500 head of buffalo.

(Testimony of Alex Pablo.)

My father was chiefly a livestock man. He raised wheat and oats and hay. It was all used for the feed of his livestock. I don't recall the Commission that met on the Flathead Indian Reservation to take into consideration the claims of the various Indian wards as to the amount of water that they had been using on the Flathead Indian Reservation.

My mother's land was sub-irrigated on the west side, about twenty acres. The picture, identified as defendants' exhibit 28, was taken in the month of May during the spring run-off.

Cross Examination

By Mr. Hershey:

The sub-irrigation on a part of my land is caused by water in the Government ditches. Before the Government ditches were built there was no sub-irrigation.

Redirect Examination

By Mr. Swee:

The west end of my mother's land was sub-irrigated. My father irrigated the east end which is not sub-irrigated. The west end was sub-irrigated by water in the Government ditches which has ruined a part of my west 40.

THOMAS C. MOORE

being called as a witness on behalf of the defendants Alex Pablo and A. M. Sterling, after having first been duly sworn, testified as follows:

Direct Examination

By Mr. Swee:

I have lived on the Joe Pablo allotment since February, 1925. Am purchasing the Agatha Pablo land on contract for deed from the A. M. Sterling Company. I have farmed this land since 1925. I farmed the Michel Pablo land for a period of seven years commencing with 1925. I have also farmed the land belonging to Alex Pablo. I have used water from the Pablo Ditch for irrigation and for stock purposes. During the years I have irrigated the Agatha Pablo land I have irrigated approximately twenty or twenty- [295] five acres. I have raised beets, hay, and all kinds of grain. The Pablo ditch runs on this land.

When I had the Alex Pablo land leased I irrigated to some extent, but not a great deal. I may have irrigated about 10 acres, possibly a little more. I did not run very much water on the Alex Pablo land. It was pretty hard to get it over the land. I think every foot of the 80 can be irrigated. All but three acres of the land I am purchasing from A. M. Sterling can be irrigated.

I have made some repairs on the ditch. The ditch is not in very good condition. The dam is poor. The ditch could be enlarged. I have had seventeen years of irrigation experience both in the

(Testimony of Thomas C. Moore.)

Flathead and Bitter Root Valleys. The east half of the land that I am purchasing would take a lot more water than the west half. It takes a head of at least a cubic foot to get over the land. The same amount of water would be required to irrigate the Alex Pablo land.

While I was farming the Michel Pablo land I did not irrigate very much of it. I have watered about seventy five head of cattle and horses on an average.

Cross Examination

By Mr. Hershey:

There is not very much water going down the ditch at the present time. We utilized all that came down. It means a lot of work to fix the ditch up so that we could get a good head of water and none of us are able to fix it up at the present time.

Cross Examination

By Mr. Allen:

The capacity of the ditch at the head is a foot at the present time. Down where I live it might be a half a foot. There is no headgate in this ditch.

ANDREW STINGER

was called as a witness on behalf of the defendants Alex Pablo and A. M. Sterling, and being first duly sworn testified as follows:

Direct Examination

By Mr. Swee:

I have been living on the Flathead Indian Reservation since 1888. I was a partner at one time of Michel Pablo in the cattle [296] business. The partnership was formed in 1907 or 1908. I continued in partnership with Mr. Pablo until his death in 1914. I am familiar with the Pablo Ditch, have seen it many times, in fact, was on the land when the ditch was dug. Mr. Pablo told me he was getting a ditch for irrigation and stock water. Mr. Pablo and I ran about 3500 head of cattle and about 100 head of horses. That was about the yearly average during the time I knew Mr. Pablo. Mr. Pablo had about 450 head of buffalo. The livestock was all kept on the Pablo Ranch and my place adjoining his. The ditch was used for the watering of this stock. I never saw him irrigate out of the ditch.

Cross Examination

By Mr. Simmons:

Michel Pablo died in 1914. After his death the cattle were sold.

Cross Examination

By Mr. Hershey:

Whatever hay was raised on the Pablo Ranch was used as feed for livestock.

And thereupon Counsel for defendants Pablo and Sterling announced said defendants rest.

D. A. DELLWO

was called as a witness on behalf of the defendant, Flathead Irrigation District and having been first duly sworn testified as follows:

Direct Examination

By Mr. Pope:

I live in the vicinity of Charlo, Montana. I am one of the Commissioners of the Flathead Irrigation District as well as being Secretary of the Board of Commissioners. I have held these positions since 1926 when the District was organized. I have resided on the Flathead Reservation about twenty-two years. I homesteaded there in 1912 and later on sold the homestead and bought other land which I now live on. The land which I own is within the Flathead Irrigation Project. My land was at one time allotted. [297]

In the Flathead Irrigation District there are approximately 68,000 acres within the boundaries of the district. In addition to that there are numerous tracts of non-patented Indian lands which would make the total area of the project within that district of about 80,000 acres. This is all irrigated land. The irrigated area in the Mission Valley Division is in excess of 55,000 acres.

In 1912 the unallotted lands had practically all been homesteaded and of course, the allotted lands had all been taken or rather given to the allottee at that time. The lands had all been taken up in either one way or the other.

(Testimony of D. A. Dellwo.)

In 1926 through the repayment contract, which has been received in evidence, the Flathead Irrigation District assumed an obligation to the United States for the payment of the costs of the construction of the system. The main object of organizing the District was to assure the United States that the cost of construction would be repaid in return for which we had considerable assurance from the United States that our project would be completed. Upon the completion of the contract the ultimate per acre charge to the land owners is limited under the repayment contract to $65.00 per acre. There is no doubt that the cost will reach that figure. There are probably about 1300 or 1400 land owners in that district subject to that charge. In 1934 there were slightly over 1300 farms irrigated in the Mission Valley.

I am generally familiar with the system of irrigation works by which water is diverted for the lands of the district. The waters of Mud Creek form a portion of the supply for the district. The supply of water which can be brought to the lands by gravity is not sufficient. We are at present going beyond our natural watershed into what is known as the Placid Lake to get additional gravity water and then when all our sources have been exhausted and every possible diversion has been made we will be obliged to pump water from Flathead Lake to have anything like an adequate water supply. Pumping will involve extraordinary expense. Every

(Testimony of D. A. Dellwo.)

[298] acre foot of water lifted from Flathead Lake to the lands of the project will mean an additional per acre charge each year for operation and maintenance.

There has been an insufficient supply of water for lands within the District since perhaps the early twenties. Previous to that time there was not as strong an inclination to irrigate the wheat farming as possible, and the country was settled up with a lot of dry land farmers who were hesitant about irrigating, but since we have employed the irrigation type of farming I think without exception we have been short of water; in the last couple of years we have been very very short of water; during the present season, over a good part of the project we have only been able to allow about twelve inches of water to the irrigable farms with the clay types of soil and a little more in the gravelly type of soil. By twelve inches I mean an acre foot. The maximum amount of water used on land within that district on the best type of soil, I mean the soil underlaid with clay, we allowed, I believe, a foot and 15/100ths, possibly 20/100ths in one section of the project where we had an additional supply during the late months of the season through a pumping plant which was constructed this summer, and of course, in the Moiese Valley, where they have a supply of water that cannot be used anywhere else on the project and where they have an abundance of water for use as high as four feet; and there

(Testimony of D. A. Dellwo.)
are gravelly types of soil in the Moiese Valley part of the project.

The waters of Mud Creek have been diverted into the government project system ever since the construction of the Pablo Feeder Canal and then later on a diversion was installed farther down the creek to pick up additional water that circulated through farther down the creek.

I am familiar with the lands owned by the plaintiffs in this action. I am familiar with irrigating practices and I irrigate my own farm. The duty of water for plaintiff's land would be from [299] three to perhaps five acre feet depending largely on two factors, the amount of rainfall and the kind of irrigator or the type of an irrigation system that might be used on the farm. By three to five acre feet I mean a depth of water that deep over the irrigable area of the farm.

Cross Examination

By Mr. Simmons:

I have never observed any extensive irrigation on either of these eighties.

Cross Examination

By Mr. Hershey:

The waters of Mud Creek are carried away by the Government system in the Pablo Feeder Canal and are used upon lands that had no water prior to the construction of the system. To a very large extent lands are now being irrigated that had no

(Testimony of D. A. Dellwo.)

water prior to the building of the Pablo Feeder Canal.

Cross Examination

By Mr. Swee:

The water that goes by the feeder canal and runs into Mud Creek out of which this Pablo Ditch was taken is picked up in the Crow Reservoir, which is farther down the creek. Spring Creek and Crow Creek also feed the Crow reservoir. The Lower Crow Creek Reservoir supplies the Moiese Valley. Water cannot be taken out of the Crow Creek Reservoir for use on any other portion of the project. In the past all of the water in the Crow Creek Reservoir has not been necessary for use in the Moiese Valley. During the last three years probably sixty five per cent of the water that passed through Crow Reservoir was used in the Moiese Valley, the balance of it went to waste. We now have a means of saving water that previously has been going to waste in the Crow Reservoir. A pumping plant has been installed which will lift around 18,000 feet of water each year into Nine Pipes Reservoir, making water available in what is known as the Big Flat or Post Division, which is water out of Crow Creek and Spring Creek. It affects the water in Mud Creek in this way, that if there should be no further water wasted out of Crow Reservoir, the waters of Mud Creek will be used [300] principally to supply the Moiese Valley and the waters of Spring Creek will be almost entirely diverted to the

(Testimony of D. A. Dellwo.)
Nine Pipe Division of the Project. The plant is capable of pumping all of the water that is gathered out of Crow Creek and Spring Creek into Nine Pipe except during times of high flood. Crow Creek is, of course, diverted not only by the Pablo Feeder Canal, but also by the Kicking Horse Feeder Canal which is lower down the creek.

Redirect Examination

By Mr. Pope:

The Crow Reservoir is a reservoir far down Crow Creek. It drains an area of about 65,000 acres and handles all of the spring run-off from that 65,000 acres. It takes very little water from the normal flow of Crow Creek at the present time. Today I would say roughly that there is not more than three second feet of water coming down Crow Creek. The Pablo Feeder Canal which runs into the Pablo Reservoir picks up the waters of Mud Creek much farther up. There is a very acute shortage of water over the entire area served by the Pablo Reservoir. This shortage has existed ever since irrigation has been taken up. In the area north of Mud Creek and Crow Creek, which is the area served through Pablo Reservoir, if all of the available gravity water that could possibly be diverted could be taken there, it would not have more than a fifty per cent supply of water.

Mr. Pope: If the Court please, for the purpose of completing the record in this matter, counsel have kindly indicated they would stipulate that the

(Testimony of D. A. Dellwo.)

allotments here in question, that is, those of the claim of the plaintiff and those of the defendants Sterling and Alex Pablo, were made by trust patent dated October 8, 1908. May the record so show?

Mr. Swee: This is agreeable to us.

Mr. Pope: And we desire to call to the Court's attention for the purpose of judicial notice—and for convenience we will ask to offer the documents themselves—that portion of the official report of the Reclamation Service, marked "7th Report, 1908, relating to the [301] Flathead Project; and we desire in this connection to have the Court take judicial notice of the letters of transmittal, giving the dates, in the first page of the book, and that portion relating to the Flathead Project found on pages 100 and 101; and if it is agreeable to the Court and counsel, these being library books, might we have this designated as an exhibit and have the stenographer, at our expense, make a copy for the convenience of the Court? Would that be agreeable?

Mr. Hershey: That is satisfactory except of course that it would go in under our general objection.

The Court: Oh yes.

Mr. Hershey: That it is an attempt to modify vested rights.

The Court: Yes it will go in under your objection. You may mark off the parts so as not to encumber the record with any unnecessary parts. Mark the parts that you think the Court should consider.

(Testimony of D. A. Dellwo.)

And thereupon was received in evidence the references referred to, identified as and marked Defendant Flathead Irrigation District's Exhibit 31, taken from the Seventh Annual Report of the Reclamation Service, 1907-1908, and being as follows:

DEFENDANT FLATHEAD IRRIGATION DISTRICT'S EXHIBIT 31

Admitted

(Defendant Flathead Irrigation District's Exhibit 31 represents excerpts taken from the 7th Annual Report of the Reclamation Service, 1907-1908. This exhibit has been certified to the Circuit Court of Appeals as a portion of the records in this case.)

DEFENDANT FLATHEAD IRRIGATION DISTRICT'S EXHIBIT 32

Admitted

(Defendant Flathead Irrigation District's Exhibit 32 represents excerpts of the official report of the Reclamation Service contained in the 8th Report, 1909, including letters of transmittal. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.) [302]

The defendant Flathead Irrigation District rests.

(Testimony of D. A. Dellwo.)

The defendant, the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians represented by Government Counsel rest.

By agreement between all Counsel all new matters raised in the answers of all parties was deemed denied without need of a written reply.

MR. DELLWO

being recalled with the permission of the Court and all Counsel as a witness for the defendant, Flathead Irrigation District, testified as follows:

Redirect Examination

By Mr. Pope:

In 1910 the lands on the Flathead Indian Reservation had all been taken up either through allotment to the Indians or through having been homesteaded, except a few scattered tracts, just an odd 80 acre tract here and there and in the month of November, 1910 they were thrown open to general homestead entry and I filed on one of those. The Irrigation District lands consist of lands that had been taken by homestead and lands that had at one time been allotted lands, but had become patented and had become transferred over to white people, or are still being held under fee patent by the original allottees.

Thereupon the defendant Flathead Irrigation District rested.

Whereupon the following evidence was introduced by plaintiff in rebuttal.

JEAN McINTIRE

was called as a witness in rebuttal and testified as follows:

Direct Examination

By Mr. Hershey:

On this map the two tracts, eighty acres each, marked 1 and 2 in red are the lands my mother owns. All of those lands are fenced. The ditch is not properly placed on the map. It shows that this ditch on the Lizette Barnaby tract does not touch this particular eighty. Well, that is not correct. There is a fence between these two eighties. This Mary Louise Pablo eighty and the [303] Lizette Barnaby eighty and this ditch comes straight through here. It comes to this fence and then turns to the north and then goes out as is shown on the map. The Pablo and the Barnaby eighties slope to the south. The ditch would run through the highest point on the farming land. Mud Creek runs through the southeast corner of the Barnaby land. All of the Barnaby land can be irrigated from the ditch. About half of it is irrigated, the east half of the eighty. That is the land a witness talked about as being swampy. Water has been turned out of the ditch. It dries up the irrigated land in the southeast which demonstrated that all the water came from the ditch.

During the times that I have been up there during the irrigation season the only water that flows down below the Pablo Feeder Canal where it crosses

(Testimony of Jean McIntire.)

Mud Creek is some springs and what seeps out of the canal or underneath the canal. There is a gate on the Government ditch, but the gate as always closed. It is impossible under present conditions to farm the land properly. It is impossible to raise a good crop without irrigation and it has been impossible for us to get sufficient water for it is not available.

We have not repaired the ditch and it is in poor repair now because there has been this water dispute on as to whether the Government was entitled to control the waters of Mud Creek or whether we were entitled to sufficient water to irrigate our lands.

I received a letter from the present project engineer, Mr. Gerharz this fall. There was a dispute that we were taking more water out of the ditch than we had a right to. Mr. Gerharz enclosed a letter from the United States Attorney telling us to discontinue taking out of Mud Creek only the water that we were allowed and if we did not do that, Mr. Gerharz was to notify him and he was to start action against us. His order was to remove the dam. The map referred to is defendant's exhibit 6. [304]

Cross Examination

By Mr. Allen:

I have had the course of the ditch surveyed, but do not have the report with me. The fence corners are on the line. There is also a tangent which makes it impossible, as this map shows, for the ditch to run as shown here on the map, in other words you

(Testimony of Jean McIntire.)

couldn't run the water as shown. These fences have been tied in by survey to a Government corner. This was done just after we got the land. We have iron stakes in there to show where these corners are. All the irrigation that we have done on these two eighties was done from the waters below the ditch. There was no water available to irrigate these two eighties from the Pablo ditch.

The west eighty is under the Flathead Indian Irrigation Project. The project officials told us we had a private water right only for stock and domestic purposes. When this land was in Flathead County—the water charges came with our taxes—we saw Mr. Moody and told him as long as we were paying for this water we would like to have it delivered, if we had no private right, and we had a controversy—I can't show you here on the map—it was peculiar—the Government ditch comes in just the opposite corner from where our private water right comes in, and it did not look reasonable to me; for instance, if you had water coming in that corner of this room to irrigate this room, and water coming in over here, then one must be wrong, so I told Mr. Moody about that and he said: "Well, you have Mayer check that up" so I went out and saw Mr. Mayer and Mr. Mayer told me that there was no culvert under the railroad, if I recall correctly, and that the ditch at that time, the Government ditch, was not completed down on to this land and it was necessary to do some work; and Mr. Mayer advised it was not practical to irrigate this land

(Testimony of Jean McIntire.)
with Government water on account of taking so much; Mr. Moody agreed to withdraw the land from the project; he said he could not do it legally and he said he would just simply withdraw the charges and he did that. We went on for a [305] year or two and was taken out of our taxes. Then when Mr. Gerharz came in as Project Manager he put the land back in and claimed that he had no right to take it out without a court order. We have been paying these water charges. We were advised by the County Treasurer that we would have to start suit within sixty days if we did not pay them. They were never paid under protest. We haven't demanded that the Flathead Indian Irrigation Project furnish us water for the 60.8 acres in the west eighty which is held to be irrigable land under the project for the reason that this litigation has been pending for about four years. When I say there was not sufficient water available I mean from the Pablo Ditch. The east eighty is not under the Flathead Irrigation Project.

Redirect Examination

By Mr. Hershey:

We have been paying for water from the Reclamation Service which has never been furnished and we were compelled to do so in order to pay our property taxes in the county and state. There was not any water in the ditch because the government takes all the water, with the exception of that which comes out of the springs.

(Testimony of Jean McIntire.)

Mr. Hershey: I have been making a motion and objection to the exhibits that they have been offering, and I was just wondering, for the record, whether it wouldn't be wise to make a motion at this time to strike all those exhibits out, and with your permission I would like to make such a motion.

The Court: Yes you may make such a motion. You have already objected, and I have allowed them to go in under your objection. I may sustain your objection later on. This is an equity suit.

Mr. Hershey: Well the only point that I could make is that possibly to some of them the record may not show there was an objection made, and I believe it is from exhibit 6 to the close, [306] are all exhibits relating to matters and proceedings subsequent to the initiation of the rights to this water, and so I now move to strike them out and not consider them for the reason that the government of the United States cannot take away or annul or destroy any vested rights to the waters appropriated for the irrigation of these lands; a patent having issued to the lands, by relation the rights would relate back to the day when the rights were first initiated, or at least prior to 1891, and for that reason they are all immaterial and are an attempt to modify and destroy vested rights.

The Court: Very well, the matter will be taken under advisement, of course.

FRANK C. MAYER

was called as a witness in sur rebuttal and having been first duly sworn testified as follows:

Direct Examination

By Mr. Allen:

I never made the statement to my knowledge that the west eighty of the McIntire land was not accessible to water from the Government ditches. The 60.8 acres of the west eighty is in fact irrigable from the Government ditch.

Cross Examination

By Mr. Hershey:

The water in the Pablo ditch as irrigated on the map runs in a westerly direction and runs within 400 feet of the northwest corner of the eighty acres. Water could not be turned into the ditch and run just the opposite direction to what it is now. The ditch coming in at the northwest corner would be closer and there would be less land missed by coming in at that point than where the ditch comes in at the present time. It would follow through and reach a few hundred feet south of the northeast corner of the eighty. The Government ditch is built down to within sixty feet of the McIntire land. There is a railroad grade between and no provision made for a culvert. A portion of the land is on the west side of the railroad which could be easily reached as well as the land on the east. There would have to be a culvert placed under the railroad. [307]

(Testimony of Frank C. Mayer.)

Redirect Examination

By Mr. Allen:

Water could be delivered within 48 hours to the McIntire land.

The Court: Well now what do you mean by the McIntire land?

Q. What part of the land do you mean by the 48 hours you could put a culvert in there in that time? What portion of it could be irrigated? Now you speak of the railroad track running through there; how much of it could be irrigated, as the ditch stands now? You say it is within 60 feet of the land?

A. Yes it is just across the road.

Q. How much land could be irrigated?

A. Why I couldn't say off hand; there is a little strip in here of perhaps six or eight or ten acres, along in there on the west side of the road.

The Court: That is, that the ditch could now irrigate?

A. Yes sir, until a culvert is put under the railroad.

Whereupon the testimony was closed.

And now within the time allowed by law and order of court herein the defendant, the United States of America, Henry Gerharz, Project Manager of Flathead Reclamation Project, and the

nineteen members of the Flathead Tribe of Indians, appellants herein, lodge the foregoing proposed statement of the evidence and ask the same be signed, settled, and approvd.

JOHN B. TANSIL

United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, Department of Interior, United States Indian Irrigation Service, Counsel for above named defendants.

[Endorsed]: Lodged this 18th day of November, 1937 with the Clerk of the above entitled court.

....

Clerk, United States District Court.

By..

Deputy Clerk. [308]

CERTIFICATE OF JUDGE

I, Charles N. Pray, Judge of the above entitled Court and the Judge before whom said cause was tried hereby certify that the foregoing is a true and correct narrative statement of the evidence in the above entitled cause and that the same is now by me duly settled, allowed, and approved within the judg-

ment term as the Statement of Evidence in said cause.

Dated this 30th day of November, 1937.

CHARLES N. PRAY
Judge.

[Endorsed]: Lodged in Clerk's Office November 18, 1937. Filed Nov. 30, 1937. [309]

Thereafter, on January 24, 1938, Assignment of Errors of the United States was filed herein, in the words and figures following, to-wit: [310]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, the United States of America, and files the following Assignment of Errors upon which it relies in prosecution of its appeal from the decree in said suit made and entered by the above entitled court on November 14, 1937, viz.:

I.

The Court erred in overruling the motions of the defendant, the United States of America, to dismiss the original and the amended Bills of Complaint.

II.

The Court erred in overruling the motion of the defendant, the United States of America, for judgment upon the pleadings.

III.

The Court erred in holding that the defendant, the United States of America, has consented to be sued in this action. [311]

IV.

The Court erred in entering judgment against the defendant, the United States of America.

V.

The Court erred in holding in effect that the plaintiff, Agnes McIntire and the defendants, the United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

VI.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

VII.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

VIII.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned.

IX.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful. [312]

Now, therefore, defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [313]

Thereafter, on January 24, 1938, Assignment of Errors of the Secretary of the Interior was filed herein, in the words and figures following, to-wit: [314]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, the Secretary of the Interior, in the above entitled cause, and files the following Assignment of Errors upon which he relies in prosecution of his appeal from the decree in said suit made and entered by the above entitled Court on November 14, 1937, viz.:

I.

The Court erred in overruling the motion of the defendant, the Secretary of the Interior, to dismiss the original Bill of Complaint.

II.

The Court erred in entering judgment against the defendant, the Secretary of the Interior. [315]

Now, therefore, the defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [316]

Thereafter, on January 24, 1938, Assignment of Errors of Henry Gerharz was filed herein, in the words and figures following, to-wit: [317]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, Henry Gerharz, Engineer and Project Manager of the Flathead Indian Reservation, and files the following Assignment of Errors upon which he relies in prosecution of his appeal from the decree in said suit made and entered by the above entitled court on November 14, 1937, viz.:

I.

The Court erred in overruling the motions of the defendant, Henry Gerharz, to dismiss the original and the amended Bills of Complaint.

II.

The Court erred in entering judgment against the defendant, Henry Gerharz. [318]

III.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

IV.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

V.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned.

VI.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

VII.

The Court erred in holding that the above mentioned maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, is a trespass for which the defendant, Henry Gerharz, must personally account and for which his employment is no defense. [319]

Now, therefore, defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [320]

Thereafter, on January 24, 1938, Assignment of Errors of the members of the Flathead Tribe of Indians was filed herein, in the words and figures following, to-wit: [321]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants, Lou Goodale Bigelow Krout, Alphonse Clairmont, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Remiers, Administrator of the estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. B. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Gertrude A. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead Tribe of Indians, in the above entitled cause, and file the following Assignment of Errors upon which they rely in prosecution of their appeal from the decree in said suit made and entered by the above entitled Court on November 14, 1937, viz.: [322]

I.

The Court erred in entering judgment against the defendants, members of the Flathead Tribe of Indians.

II.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

III.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

IV.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendant, Alex Pablo and A. M. Sterling, has never been abandoned.

V.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

Now, therefore, defendants pray that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [323]

Thereafter, on January 24, 1938, Petition for Allowance of Appeal of the United States of America, et al., was filed herein, in the words and figures following, to-wit: [324]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project and the nineteen members of the Flathead Tribe of Indians, defendants in this action, feeling themselves aggrieved by the decree made and entered in this cause on the 17th day of November, 1937, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendants pray that their appeal be allowed and that citation issue as provided by law, and that the transcript of record, proceedings and papers upon which said decree was based, duly

authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California. [325]

Dated this 20th day of January, 1938.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Dept. of Interior
U. S. Indian Irrigation Service,
Counsel for Defendants.

[Endorsed]: Filed Jan. 24, 1938. [326]

Thereafter, on January 24, 1938, Prayer for Reversal of the United States of America, et al., was filed herein, in the words and figures following, to-wit: [327]

[Title of District Court and Cause.]

PRAYER FOR REVERSAL

Come now the defendants, the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and the nineteen members of the Flathead Tribe of Indians and pray that the decree entered herein in the District Court of the United States in and for the District of Montana on the 17th day of November, 1937, be reversed by the United States Circuit Court of

Appeals for the Ninth Circuit, and that such other and further orders as may be fit and proper in the premises be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 20th day of January, 1938.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Dept. of Interior, U. S. Indian Irrigation Service.

[Endorsed]: Filed Jan. 24, 1938. [328]

Thereafter, on January 24, 1938, Order Allowing Appeal of the United States of America, et al., was filed herein, and was duly entered herein on January 25, 1938, being in the words and figures following, to-wit: [329]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading and considering the petition for appeal on file herein, together with the assignment of errors on file herein:

It is hereby ordered that the appeal of the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and the nineteen members of the Flathead Tribe of Indians, defendants and appellants, to the United States Circuit

Court of Appeals for the Ninth Circuit, be and the same is hereby allowed.

Dated this 24th day of January, 1938.

CHARLES N. PRAY
Judge

[Endorsed]: Filed Jan. 24, 1938. [330]

Thereafter, on January 29, 1938, Citation on Appeal, issued by the Court on January 24, 1938, was duly filed herein, the original Citation being hereto annexed and being in the words and figures following, to-wit: [331]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America: To Agnes McIntire, plaintiff in the above entitled action, and Elmer E. Hershey, her attorney:

You are hereby notified that in the above entitled cause in equity in the United States District Court in and for the District of Montana an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals on or before 30 days from the date of signing this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 24th day of January, 1938.

CHARLES N. PRAY
Judge. [332]

Service of a copy of the above citation is hereby acknowledged this 27th day of January, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff
POPE & SMITH
By RUSSELL E. SMITH
Attorneys for Flathead Irrigation District.
JOHN P. SWEE
Attorney for Alex Pablo and A. M. Sterling [333]

[Endorsed]: Filed Jan. 29, 1938. [334]

Thereafter, on February 2, 1938, Petition for Allowance of Appeal of the Flathead Irrigation District was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To the Hon. Charles N. Pray, District Judge:

The Flathead Irrigation District, a corporation, defendant in this action, feeling aggrieved by the decree made and entered in this cause on the 17th

day of November, 1937, and for the purpose of joining in the appeal of the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and nineteen members of the Flathead Tribe of Indians, heretofore taken and perfected in this cause, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendant prays that its appeal be allowed and that citation issue as provided by law, and that the transcript of record, proceedings and papers upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of *Montana*.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

Dated this 31st day of January, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Missoula, Montana.
Solicitors for defendant, Flathead Irrigation District, a Corporation.

[Endorsed]: Filed February 2, 1938. [335]

Thereafter, on February 2, 1938, Assignment of Errors of the Flathead Irrigation District was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, Flathead Irrigation District, a Corporation, and makes and files the following assignment of errors, upon which it relies in the prosecution of its appeal from the decree in the above entitled cause made and entered by the above entitled Court on November 14, 1937, viz:

I.

The Court erred in overruling the motion of the defendant, Flathead Irrigation District, to dismiss the last Amended Bill of Complaint.

II.

The Court erred in entering judgment against the defendant, Flathead Irrigation District.

III.

The Court erred in holding in effect that the plaintiff, Agnes McIntire, and the defendants, The United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

IV.

The Court erred in holding that the waters of Mud Creek are now, or ever have been, subject to

private appropriation by the plaintiff, Agnes McIntire, or by the defendants, Alex Pablo and A. M. Sterling.

V.

The Court erred in holding that the rights of the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, to the use of the waters of Mud Creek are prior to the rights of the United States and the defendant, Flathead Irrigation District. [336]

VI.

The Court erred in holding and finding that the lands of the plaintiff and the defendants, Alex Pablo and A. M. Sterling, required one inch to the acre for the proper irrigation thereof.

VII.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to the lands now owned by plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, by reason of an appropriation of said waters by the predecessors in interest of the plaintiff and of said defendants.

VIII.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, are entitled to the use of one inch per acre of the waters of Mud Creek to irrigate the described lands belonging to the plaintiff and said defendants.

IX.

The Court erred in holding that the maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

X.

The Court erred in finding that the above-mentioned appropriations of the waters of Mud Creek by the predecessors in interest of the plaintiff and the defendants, Alex Pablo and A. M. Sterling, have never been abandoned.

Wherefore, this defendant prays that the decree herein be reversed.

Dated this 31st day of January, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Attorneys for Defendant,
Flathead Irrigation District

[Endorsed]: Filed February 2, 1938. [337]

Thereafter, on February 14, 1938, Order Allowing Appeal of Flathead Irrigation District was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading and considering the petition for appeal on file herein, together with the assignment of errors on file herein;

It Is Hereby Ordered that the appeal of Flathead Irrigation District, a corporation, defendant and appellant, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed upon the defendant giving bond as required by law in the sum of $500.00.

Dated this 5th day of February, 1938.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed February 14, 1938. [338]

Thereafter, on February 14, 1938, Undertaking on Appeal of Flathead Irrigation District was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, the defendant, Flathead Irrigation District, in the above entitled action has petitioned the above named court for an order allowing its appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from that certain judgment entered in the above entitled action on the

17th day of November, 1937, in favor of the plaintiff and the defendants, Sterling and Pablo, and against the defendant, Flathead Irrigation District; and

Whereas, the above named court has by its order duly given, made and entered, allowed the said appeal of the defendant upon its furnishing good and sufficient security in the sum of $500.00 that it, as said appellant, shall prosecute its appeal to effect, and if it fail to make its plea good, shall answer all costs;

Now, Therefore, the undersigned, United States Fidelity and Guaranty Company, a corporation, allowed to become surety under and by virtue of the laws of the United States and of the State of Montana upon bonds and undertakings, in consideration of the premises and of the aforesaid appeal, does hereby jointly and severally undertake in the sum of $500.00, and promise to the effect that said defendant as said appellant will prosecute its appeal in the above entitled action to effect, and, if it fail to make its plea good, shall answer all costs only, not exceeding the said sum of $500.00.

The undersigned hereby expressly agrees that in case of any breach of any condition of this undertaking the above named court may upon notice to the undersigned of not less than ten (10) days, proceed summarily in the above entitled action in which this undertaking is given, to ascertain the amount which the undersigned as surety upon this

undertaking is bound to pay on account of such breach thereof by the defendant, and render judgment therefor against the undersigned and award execution therefor. [339]

In Witness Whereof, said corporation has hereunto caused its name to be subscribed and its seal to be affixed by its agent thereunto duly authorized, this 11th day of February, 1938.

UNITED STATES FIDELITY
[Seal] & GUARANTY COMPANY
Baltimore, Maryland
By ARTHUR E. DREW
Its Attorney in Fact

The foregoing undertaking is approved this 14th day of February, 1938.

CHARLES N. PRAY
District Judge.

[Endorsed]: Filed February 14, 1938. [340]

Thereafter, on February 19, 1938, Citation on Appeal, issued by the Court on February 5, 1938, was duly filed herein, the original Citation being hereto annexed and being in the words and figures following, to-wit: [341]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America,—
ss. to Agnes McIntire, plaintiff in the above entitled action, and to Elmer E. Hershey, her attorney; Alex Pablo and A. M. Sterling, defendants in the above entitled action, and to John P. Swee, their attorney:

You, and Each of You, Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the [342] District of Montana, Missoula Division, in a suit wherein United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of the Flathead Reclamation Project, Lou Goodale Bigelow Krout, Alphonse Clairmont, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Ramiers, Administrator of the estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. D. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Ger-

trude A. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley, W. A. Dupuis, and Flathead Irrigation District, a Corporation, are appellants, and you, the said Agnes McIntire, A. M. Sterling and Alex Pablo are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Hon. Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 5th day of February, 1938.

CHARLES N. PRAY
Judge. [343]

Service of the foregoing Citation on Appeal acknowledged this 9th day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff, Agnes McIntire.

JOHN P. SWEE
Attorney for Defendants, A. M. Sterling and Alex Pablo. [344]

[Endorsed]: Filed Feb. 19. 1938. [345]

Thereafter, on February 19, 1938, Amended Citation on Appeal, issued by the Court on February 11, 1938, was duly filed herein, which original Amended Citation on Appeal is hereto annexed and is in the words and figures following, to-wit: [346]

[Title of District Court and Cause.]

AMENDED CITATION ON APPEAL

The President of the United States of America; To Agnes McIntire, plaintiff in the above entitled action, and Elmer E. Hershey, Esq., her attorney; Flathead Irrigation District, a corporation, defendant in the above entitled action, and Messrs. Pope and Smith, defendant's attorneys; and to Alex Pablo and A. M. Sterling, defendants in the above entitled action and John P. Swee, Esq., their attorney:

You are hereby notified that in the above entitled cause in equity in the United States District Court in and for the District of Montana an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals on or before 30 days from the date of signing this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf. [347]

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 11th day of February, 1938.

CHARLES N. PRAY

Judge.

Service of a copy of the above citation is hereby acknowledged this 14th day of February, 1938.

ELMER E. HERSHEY

Attorney for Plaintiff, Agnes McIntire

POPE AND SMITH

By RUSSELL E. SMITH

Attorneys for Defendant, Flathead Irrigation District.

Service of a copy of the above citation is hereby acknowledged this .... day of February, 1938.

JOHN P. SWEE

Attorney for Defendants, Alex Pablo and A. M. Sterling

[Endorsed]: Filed February 19, 1938. [348]

Thereafter, on February 19, 1938, Praecipe of the United States of America, et al., for transcript of record on appeal was duly filed herein, in the words and figures following, to-wit: [350]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and incorporate in such transcript of record the following papers or exhibits.

I.

Original bill of complaint, and subpoena in equity filed and issued February 13, 1934, Affidavit of Return of Service upon the United States of E. E. Hershey, Esq. filed March 20, 1934, motion (ex parte) to direct the defendant, Harold L. Ickes, Secretary of the Interior to appear, filed March 22, 1934, order of court of March 23, 1934, directing defendant Ickes, to appear, return of service of order of March 23, 1934 and original bill of complaint on defendant, Ickes, by United States Marshal at Washington, D. C., on March 30, 1934, [351] Special Appearance and Objection to Jurisdiction of defendants, Ickes, the United States of America and Henry Gerharz, Project Manager, filed April 9, 1934; order of court of April 16, 1934 denying Objections to Jurisdiction of said defendants; answers of defendants, the United States of America and Henry Gerharz, Project Engineer to the original bill of complaint; replies to the above answers by the plaintiff, Agnes McIntire; first amended bill of complaint; motions to dismiss of defendants Alex Pablo and A. M. Sterling to the first amended bill of complaint; order of Court allowing appearances of the defendants, United States, Harold L. Ickes, Secretary of the Interior, and Henry Gerharz, Project Engineer made to the original bill of complaint to stand; second amended bill of complaint; special appearances of the defendants, the United States of America and Henry Gerharz, Project Engineer to the second amended bill of complaint; motion to dismiss of the defendants, the United States of America, the nineteen members of the

Flathead Tribe of Indians, and Alex Pablo and A. M. Sterling; motion to dismiss of the defendant, the Flathead Irrigation District; motion for judgment on the pleadings of the defendant, the United States of America; answers to second amended bill of complaint of the defendants, the United States of America, Henry Gerharz, Project Engineer, Flathead Irrigation Project, and nineteen members of the Flathead Tribe of Indians; answers of defendant, Flathead Irrigation District, and of defendants, Alex Pablo and A. M. Sterling; replies of plaintiff, to said answers of defendants.

II.

Service, if any, upon Harold L. Ickes, Secretary of the Interior, of either the first or second amended bills of complaint.

III.

The opinion of the Court after trial of the issues.

IV.

Order dated October 27, 1937 granting extension to lodge statement of evidence, petition for rehearing dated October 27, 1937 [352] of defendant, Flathead Irrigation District, and minute order of the Court denying such petition.

V.

Proposed findings of fact and conclusions of law, and objections thereto of all parties; adopted findings of fact and conclusions of law; decree.

VI.

The statement of the evidence signed and approved herein.

VII.

Petition for allowance of appeal; order allowing appeal; prayer for reversal; assignments of errors; and amended citation on appeal.

VIII.

The praecipe with acknowledgment of service thereon.

Said transcript to be prepared and fully certified by you, as required by law and the rules of the above entitled Court, *and the rules of the above entitled Court,* and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 10th day of February, 1938.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

Service of the foregoing Praecipe is hereby acknowledged this 14 day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff, Agnes McIntire
POPE & SMITH
By RUSSELL E. SMITH
Attorneys for Flathead Irrigation District, a corporation

Service of the foregoing Praecipe is hereby acknowledged this   day of February, 1938.

JOHN P. SWEE
Attorney for defendants Alex Pablo and A. M. Sterling

[Endorsed]: Filed Feb. 19, 1938. [353]

Thereafter, on February 19, 1938, Praecipe of Flathead Irrigation District to incorporate in transcript of record certain additional papers was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed the defendant, Flathead Irrigation District, a corporation, in the above entitled cause, and incorporate in such transcript of record, in addition to the matters incorporated therein pursuant to the praecipe of the United States Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, the following:

Defendant Flathead Irrigation District's Petition for Appeal;

Defendant Flathead Irrigation District's Assignment of Errors;

Order Allowing Appeal of defendant, Flathead Irrigation District;

Bond on Appeal;

Original Citation on Appeal;

This Praecipe;

Your Certificate to this Transcript.

Dated this 14th day of February, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for Defendant,
Flathead Irrigation District

Service of the foregoing Praecipe accepted and receipt of a copy acknowledged this 15th day of February, 1938.

ELMER E. HERSHEY
Solicitor for Plaintiff
JOHN P. SWEE
Solicitor for Defendants, Alex Pablo and A. M. Sterling

[Endorsed]: Filed February 19, 1938. [354]

Thereafter, on February 21, 1938,

PRAECIPE

of Plaintiff to incorporate in transcript of record additional papers was duly filed herein, being in the words and figures following, to-wit: [355]

[Title of District Court and Cause.]

To the Clerk of the above entitled Court:

On February 10, 1938, I was served by appellants in the above case a copy of a Praecipe which is incomplete.

You will please add to said Praecipe on behalf of appellees the Amended Bill of Exceptions of the United States filed May 7, 1934, and the Amended Bill of Exceptions of Harold L. Ickes, Secretary

of the Interior, filed May 7, 1934, and the Return of Service on the United States, and Request of Harold L. Ickes, Secretary of the Interior, to appear, filed March 21, 1934.

Dated this 14th day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff

Copies to:

Kenneth R. L. Simmons, District Counsel, Billings, Montana,

John B. Tansil, United States Attorney, Butte, Montana.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being first duly sworn according to law, deposes and says: That on the 4th day of February, 1938, he served the foregoing upon Kenneth R. L. Simmons, at Billings, Montana, by depositing in the United States post office a full, true and correct copy thereof, secure of seal, postage prepaid, and addressed to Kenneth R. L. Simmons, District Counsel, United States Indian Irrigation Service, Billings, Montana.

ELMER E. HERSHEY

Subscribed and sworn to before me this 14 day of February, 1938.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires October 21, 1938.

[Endorsed]: Filed Feb. 21, 1938. [356]

Thereafter, on March 9, 1938, Order enlarging time for filing record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit was duly made and entered herein, in the words and figures following, to-wit: [357]

[Title of District Court and Cause.]

ORDER

For good cause appearing it is hereby ordered that the return day of the Amended Citation issued herein on February 11, 1938, and the time for filing the record on appeal in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be enlarged and extended to and including the 11th day of April, 1938.

Dated March 9th, 1938.

CHARLES N. PRAY

United States District Judge for the District of Montana. [358]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 359

pages, numbered consecutively from 1 to 359 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 1496, Agnes McIntire vs. United States of America, et al., which have by praecipes been designated to be incorporated into said transcript, (except "Service upon Harold L. Ickes, Secretary of the Interior, of either the first *of* second Amended Bill of Complaint", and except "Motion to Dismiss of Defendant the United States of America", of which there is no record) as appears from the original records and files of said Court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citations issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $52.60; that $8.00 of said amount has been paid by the Appellant Flathead Irrigation District, and the balance of said costs has been made a charge against the United States.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following exhibits introduced and received in evidence at the trial of said cause, to-wit: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 8-a, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

Witness my hand and the seal of said court at Helena, Montana, this March 18th, A. D. 1938.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER
Deputy. [359]

[Endorsed]: No. 8797. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al., Appellants, vs. Agnes McIntire, Flathead Irrigation District, a corporation, Alex Pablo, and A. M. Sterling, Appellees. Flathead Irrigation District, a corporation, Appellant, vs. Agnes McIntire, Alex Pablo, and A. M. Sterling, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed March 21, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8797

United States Circuit Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant

FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed ....

Clerk ....

FILED

No. 8797

United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant

FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION.

This is an appeal from a decree, rendered in a suit in equity brought by the plaintiff, Agnes McIntire, against the defendants, United States of America, Harold Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of the Flathead Reclamation Project, Alex Pablo and A. M. Sterling (the two defendants last named are appellees in this court), Flathead Irrigation District, a corporation, and certain defendants designated as nineteen members of the Flathead Tribe of Indians. The suit was brought for the dual purpose, according to the prayer of the complaint, of (1) partitioning the waters of Mud Creek and quieting plaintiff's title to 160 inches of said water as partitioned, and (2) restraining the defendants from interfering with plaintiff's water right as partitioned and quieted. (R. 81)

An original and one amended complaint was filed prior to the time that the Flathead Irrigation District was made a party. (R. 2 and 60). On May 1, 1936, the amended complaint which made the Flathead Irrigation District a party defendant and which framed the issues upon which the case was tried, was filed, evidently for the purpose of complying with the decision of this court in the case of Moody v. Johnston, 66

Fed. (2d) 999, to the effect that all interested parties must be joined in such a suit. (R. 73)

This complaint alleges the execution and ratification of the Flathead Treaty of July 16, 1855 (12 Stat. L. p. 975), which was proclaimed April 18, 1895, creating the Flathead Reservation; that the Indians were encouraged to abandon their nomadic ways and become civilized people on lands afterward allotted; that the land on the reservation is arid and requires one inch of water per acre for proper irrigation; that the Indians settled on the reservation and are farming the same by use of artificial irrigation. (Comp. Par. I, R. p. 74-75).

That Michel Pablo and Lizette Barnaby, both members of the Flathead tribe, "made allotment" for certain described lands. (Comp. Par. II, R. 75)

That on April 15, 1900, Michel Pablo, by means of a ditch with a capacity of 160 inches, carried water from Mud Creek to the allotments described in Paragraph II of the complaint, and thereby appropriated the 160 inches of water which became appurtenant to the lands. (Comp. Par. III, R. 75-76).

That on January 25, 1918, a fee patent issued to Agatha Pablo, wife of Michel Pablo, covering the Michel Pablo allotment, and that on October 5, 1918, a a fee patent issued to Agatha Pablo covering the Barnaby allotment and that plaintiff subsequently became the owner in fee of the lands and the 160 inches of water appurtenant. (Comp. Par. IV, R. 76).

That Congress passed the Act of June 21, 1906 (34 Stat. L. p. 354) amending the Act of April 23, 1904

(33 Stat. L. p. 302), providing for the allotment of Indian lands and the opening of the same for sale. That from April 15, 1900, to the present date the water from Mud Creek has been used on the lands and that plaintiff claims 160 inches thereof. (Comp. Par. V. R. p. 76)

That no parties other than plaintiff and defendant, United States, are using water; that said parties are joint tenants and that the water can be partitioned. (Comp. Par. VI, R. 77-78)

That defendant Ickes, Secretary of the Interior, claims to be in charge of the Flathead Irrigation Project and that defendant Gerharz claims to be project manager. (Comp. Par. VIII, R. 79).

That defendants are claiming that plaintiff has no right to the waters of Mud Creek and are preventing water from flowing in plaintiff's ditch to plaintiff's damage. (Comp. Par. IX, R. 79)

That the value of the water exceeds the sum of $3,000.00; that this action is necessary to prevent a multiplicity of suits; that plaintiff has no plain, speedy and adequate remedy at law. (Comp. Pars. X, XI XII, R. 79)

That the defendant, Flathead Irrigation District, is a corporation and that all of the defendants make some claim to the waters. (Comp. Pars. XIII, XIV, and XV, R. 79-80).

The prayer asks that the United States be required to set up its interest; that the right of plaintiff be partitioned; that plaintiff be given a prior right of 160

inches and that the defendants be restrained from interfering with plaintiff's water.

The answers filed by the defendants Alex Pablo and A. M. Sterling contain cross-complaints based on substantially the same facts as set forth in the amended complaint and claim an appropriation for both Alex Pablo and A. M. Sterling as successors to portions of the Michel Pablo appropriation. (R. p. 138)

The defendant, Flathead Irrigation District, filed an answer which put in issue the rights of the plaintiff to appropriate water on an Indian Reservation (R. 121), and the plaintiff's ownership of any interest in the water of Mud Creek (R. 122) and which set up the incorporation of defendant district (R. 123), the contracts of the defendant district with the United States (R. 124), and claim of defendant that there is not and never has been a right to take water upon the Flathead Reservation other than through the Flathead Irrigation Project. (R. 125-127).

By stipulation all new matter contained in the answers of all parties was deemed denied without need of a written reply. (R. 335).

The jurisdiction of the district court in this suit is based upon the provisions of the Judicial Code, paragraph 25 (30 Stat. L. 416, 30 Stat. L. 1094, 28 U. S. C. A., section 41, par. 25),providing for partition of lands held in joint tenancy by the United States.

STATEMENT OF THE CASE

As is seen from the plaintiff's complaint herein, the

plaintiff claims by virtue of an appropriation thereof a right to the waters of Mud Creek prior to that of the United States and the remaining defendants. The defendants, Sterling and Pablo likewise claim rights to the waters of Mud Creek by virtue of private appropriations. (Answer of Pablo and Sterling, Tr. 138). The only question which this appellant seeks to review is whether the plaintiff and the defendants Pablo and Sterling are entitled to water from Mud Creek aside from their rights under the Flathead Irrigation Project and if so the nature of those rights.

A. Creation and Purpose of Defendant. Flathead Irrigation District.

The appellant, Flathead Irrigation District, is a public corporation organized under the laws of Montana (Sections 7166 to 7194.8 R.C.M. 1935) for the purpose of cooperating with the United States in the construction of irrigation works and projects and pursuant to the Acts of Congress of May 10, 1926 (44 Stat. 464-466), January 12, 1927 (44 Stat. 945), March 7, 1928 (45 Stat. 212-213), March 4, 1929 (45 Stat. 1574), March 4, 1929 (45 Stat. 1639-1640), and May 14, 1930 (46 Stat. 291) (Tr. p. 270, Def's. Ex. 16) The Flathead Irrigation District, after its creation, entered into contracts with the United States (T. 269-270-328), whereby the said district will upon repayment to the United States become the owner of the Flathead Irrigation Project. Since the appellant irrigation district is under contract to pay for the project, it is vitally interested in the rights of the United States as the present own-

er of the project to the waters of Mud Creek.

B. Creation of Reservation.

The Flathead Indian Reservation was created by the Flathead Treaty executed July 16, 1855 and proclaimed April 18, 1859 (12 Stat. 975) Under the treaty the Flathead Nation ceded to the United States a large tract of land and there was reserved for the "exclusive use and benefit of said tribes as an Indian Reservation" a smaller tract. Section VI of the treaty provided:

> "The President 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 themselves 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."

C. Origin of Rights Claimed by Plaintiff and Defendants Pablo and Sterling.

The record shows that by the year 1891 Michel Pablo, a Flathead Indian was living on what was known as the "Pablo Place" and had dug a ditch taking water from Mud Creek for the land. (R. p. 242) From this ditch the tracts later alloted to Alex Pablo, Agatha Pablo and Michel Pablo and Joe Pablo were irrigated. (R. P. 241) The ditch was so dug that the water could be used on what was later the Barnaby allotment. (R. p. 240). A notice of appropriation dated Nov. 12, 1937,

(apparently an error) claiming 560 inches of water as of April 15, 1900, was admitted over objection. (R. p. 319 Defs. Ex 19).

At the time of the claimed appropriation the reservation had not been opened to settlement and no allotments in severalty had been made. In 1904, Congress by its act of April 23rd, 1904 (24 Stat. L. 302) provided for the survey of the reservation, the allotment of lands in severalty and the sale of surplus unalloted lands. It was stipulated at the trial that no trust patents issued for lands in the Flathead Reservation prior to October 8, 1908 (R. p. 333).

The plaintiff claims as the successor of Agatha Pablo who on January 25, 1918 received a fee patent for the land which had been alloted to Michel Pablo (R. p. 232, Pfs. Ex. 1) and who on October 5th, 1916 received a fee patent for land which had been alloted to Lizette Barnaby (R. p. 234, Pfs. Ex. 2). Plaintiff secured title to these lands on September 25th, 1924 by virtue of a sheriff's deed which issued after the foreclosure of a mortgage. (R. p. 235, Pfs. Ex. 3) The record does not show the chain of title to the lands of Sterling and Alex Pablo except that Alex Pablo testified that he was a ward of the government and owned an allotment (R. pp 315) and it was stipulated that A. M. Sterling is the owner of the South half of the Northeast quarter of Section fourteen, Township twenty-one North, Range twenty West. (This stipulation is apparently incorrect because Sterling in his answer claims the Northwest not the Northeast quarter. This

appellant does not however make any point of this error.) All of the appellees are thus claiming through the appropriation alleged to have been made by Michel Pablo.

D. History of Flathead Irrigation Project.

The Act of Congress, April 23, 1904 (33 Stat. L. 302) which provided for the allotment of lands in severalty to the Flathead Indians, and provided for the sale of surplus unalloted lands, provided in Section 14, for the use of the proceeds of the sale of surplus unallotted lands, in part, 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 implements, 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." (Italics supplied)

The report of the Commissioner of Indians Affairs for the year 1907 shows:

> "On April 26, 1907, the Director of the Reclamation Service was asked to make a preliminary investigation on the Flathead Reservation in Montana to enable me to recommend the legislation needed for an adequate system of irrigation for

the Indians to be allotted and for the lands to be disposed of under act of April 23, 1904. (33 Stat. L. 302) No report has yet been received from him."

(Annual Reports of Department of Interior—Administrative 1907 Volume 2, p. 52). We ask the court to take judicial notice of this report as a public document. The Bureau of Reclamation for the purpose of providing waters for the Indian lands to be allotted and the surplus unalloted lands made a survey in the Flathead area in 1907 and 1908 as shown by the report of the Bureau of Reclamation for that year. (7th Annual Report Reclamation Service p. 100-101, Defendant Flathead Irrigation Dist. Ex. 31, R. 334). The funds for this work were provided by Act April 30, 1908 (35 Stat. L. p. 83) which is as follows:

> "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."

Engineer Stockton testified that as a representative of the Reclamation Service he went to the Flathead Reservation in 1907 and made a survey for the purpose of determining the best possible distribution to be made of the natural resources of the reservation (Record p.

253 and Defendants Ex. 8 R. 254). Stockton laid out a system of irrigation and estimated the irrigable acreage (R. p. 255). At that time it was planned to use the waters of Mud Creek, the idea being to take up all the water available and provide as much storage as possible to get the greatest possible useful development of the lands on the reservation. (R. 256) Later the Pablo feeder canal was designed and constructed to conserve the waters of Mud Creek and other small streams. (R. p. 256 and 258).

The Act of Congress of May 29, 1908 (35 Stat. L. 488), amending Section 9 of the Act of April 23, 1904 (33 Stat. L. 302) provided generally for the sale of unallotted lands and the price thereof and also provided for the manner in which purchasers should pay for water rights; the act then provided in Section 9, relative to Indian allotees, as follows:

> "The lands 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." (Italics supplied.)*

and further provided in Section 14 for the disposal of the proceeds of the sale of surplus lands as follows:

"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 live stock, 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 persons holding tribal rights on said reservation, semi-annually 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." (Italics supplied)*

Thereafter and from year to year various measures were passed appropriating money for the construction of the project and the cost to June 30, 1936, was $7,-499,105.85 (R. p. 265).

The waters of Mud Creek affect approximately 80,-000 acres in the Mission Valley Division, which includes the greater portion of the Flathead Irrigation District. (R. 262, 265-266) These waters are used upon lands which had no water prior to the construction of the

system (R. 330) and even with the waters of Mud Creek there is a shortage of water for the lands under the project. (R. p. 259, 329, 332).

E. The Recognition by the United States of Private Rights

The record shows certain acts of the Secretary of the Interior recognizing private water rights on the reservation. (R. 271 to 293, and 295 to 296, also R. 296 to 310.) This appellant raises no question with respect to these rights and any extended discussion of them would simply reiterate matters contained in the brief of the United States and other appealing defendant. The defendants claim apart from the rights adjudicated by the Secretary of the Interior and it is with the rights claimed in excess of those granted by the department that this appellant is concerned.

F. Duty of Water and Abandonment.

There is considerable evidence in the record with respect to the duty of water and the bandonment of the rights of plaintiff and defendants Sterling and Pablo. However, since these matters are urged by the United States and since this appellant is concerned only with the broader question of law involved we assign no error in this court with respect to the findings of the court on duty of water and abandonment and will refrain from setting forth the facts relative thereto.

G. Rights of the Plaintiff and Defendants Within the Irrigation System.

The record shows that the lands of appellees are classified as irrigable and lie within the Flathead Irriga-

tion District and have been assessed with operation and maintenance charged by the United States (R. 294, 295). However, no demand has been made by plaintiff for water from the system (R. 264) though plantiff's lands could be supplied within a short time (R. 262, 263).

The questions raised by this appeal are

1. Whether the plaintiff or the defendants Pablo and Sterling have any private rights on the Flathead Reservation *prior to the rights of the United States,* and other than those decreed by the Secretary of the Interior, and
2. Whether the plaintiff and the defendants Pablo and Sterling have any rights to take water from Mud Creek (other than those adjudicated by the Secretary of the Interior) except through the Flathead Irrigation Project.

SPECIFICATIONS OF ERROR

The assigned errors which are to be relied upon are:

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ARGUMENT

SUMMARY OF ARGUMENT.

(Note: When in this arguement appellant refers to

private rights, it refers only to those which are claimed apart from the adjudication of the Secretary of the Interior).

I. That it has never been possible to create water rights, with a date of priority, on the Flathead Indian Reservation, under the doctrine of prior appropriation for:

A. The Flathead Treaty reserved the lands and waters of the reservation for the Indians.

1. The reservation of lands and waters was for the Indians as a tribe, not as individuals.

B. The United States thereupon became the trustee of said lands and waters for the benefit of the Indians as a tribe.

C. There has never been a law under which water rights could be created on the Flathead Reservation by appropriation.

1. The State Law of appropriation did not apply.
2. There is no law of the United States creating such rights, Section 19 of the Act of June 21, 1906 (34 Stat. L. 354) being a mere saving clause and inoperative to create rights.
3. The idea of prior appropriation is repugnant to any theory of equitable treatment of the Indians on a reservation.

II. There is no right in plaintiff or appellee defendants to take any water from the streams on the reservation except as such parties would be entitled to water from the Flathead Irrigation Project. (We contend that the doctrine of U. S. vs. Powers

et al (16 Fed. Supp. 155, affirmed 94 Fed. (2) 783) cannot be applied to the Flathead Reservation.)

A. The record here shows that the appellees could get water from the project system.

B. The United States, which sustained to the Indians the guardian and ward relationship, had plenary power to provide for the distribution of the waters of the reservation so as to provide the greatest good for the greatest number, and the method designated by the United States is the exclusive method.

C. The United States has indicated that rights to water be obtained only through the project system.

D. This did not disturb any vested rights because the lands were made subject to the system before any private rights attached to the lands.

E. The system provided is the most equitable which could be devised.

I. IT HAS NEVER BEEN POSSIBLE TO CREATE WATER RIGHTS WITH A DATE OF PRIORITY UPON THE FLATHEAD INDIAN RESERVATION, UNDER THE DOCTRINE OF PRIOR APPROPRIATION.

Assignment Error No. II (R. p. 358)—The court erred in entering judgment against the defendant, Flathead Irrigation District.

Assignment Error No. IV (R. p. 358)—The Court erred in holding that the waters of Mud Creek are now, or ever have been, subject to private appropriation

by the plaintiff, Agnes McIntire, or by the defendants, Alex Pablo and A. M. Sterling.

Assignment of Error No. V (R. p. 359)—The Court erred in holding that the rights of the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, to the use of the waters of Mud Creek are prior to the rights of the United States and the defendant, Flathead Irrigation District.

Assignment of Error No. VII (R. p. 359)—The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to the lands now owned by plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, by reason of an appropriation of said waters by the predecessors in interest of the plaintiffs and of said defendants.

Assignment of Error No. IV (R. p. 360)—The court erred in holding that the maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

If it be established that there can be no rights created on the Flathead Reservation by prior appropriation, then it is clear that the court erred in entering judgment against the Flathead Irrigation District, (R. 225) in holding that the waters of Mud Creek were sub-

ject to appropriation by plaintiff and defendants Pablo and Sterling (R. 175, 210, 216, 218) in holding the rights of respondents to be prior to the rights of the United States (R. 171), in holding the waters of Mud Creek to be appurtenant to the lands of respondents (R. 210, 216, 218), and in holding that the maintenance of a dam by the United States is unlawful. (R. 225).

A. THE FLATHEAD TREATY RESERVED THE LANDS AND WATERS OF THE RESERVATION FOR THE BENEFIT OF THE INDIANS.

By Section 1 of the treaty of July 18, 1855 (12 Stat. p. 975, 2 Kappler 542), the Flathead nation ceded to the United States a large section of territory, and by Section 2 of the treaty reserved for the use and occupation of the Indians a smaller area, for the "exclusive use and benefit of said confederated tribes as an Indian Reservation." It is clear from all the authority on this subject that the waters as well as the lands were impliedly reserved for the benefit of the Indians.

Winter v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340.

It is not questioned but that the waters were reserved for the Indians, but there is confusion as to the meaning of the term "Indians." Does the word refer to the tribe or does it refer to the individual members of the tribe?

1. THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS.

In U. S. v. Powers et al (16 F. Supp. 155), the Dis-

trict Court held that under the Crow Treaty the reservation was for the benefit of the Indians as individuals. Whether the proposition was there correctly decided is not necessary to a decision here for it is clear that under the Flathead Treaty a different result must obtain.

The Flathead people were not living upon the present reservation at the time of this treaty. They were living in the general area of the Bitter Root Valley in Montana. This is shown by the terms of the treaty itself. In Article 2 of the treaty the Indians agree to move to the reservation within one year after the ratification of the treaty. The treaty further provided for the appraisal of the improvements of the Indians who, on moving, had to abandon the same. It also contains a provision for the payment of certain money to compensate the Indians for moving to the reserved land. The treaty of 1855 did not definitely fix the reservation at least so far as the Flatheads were concerned. Article II of the treaty provided that if upon a survey it should be decided that the Bitterroot Valley was better suited to the needs of the tribe than the general reservation then portions of the Bitterroot should be set aside as a reservation. The question was not settled until the proclamation of President Grant in 1871.

Northern Pac. R. Co. v. Maclay, 61 Fed. 554.

Northern Pac. R. Co. v. Hinchman, 53 Fed. 523.

It is indeed difficult to see how the Indians who were not living on the lands now in question could have had any rights in severalty to either the lands or waters.

At the time of the Treaty the lands here involved were not even occupied by the Flatheads. Even if we assume that the waters were appurtenant to the lands no right to water could vest in an individual prior to the time that the individual secured some rights in the land.

Article 6 of the treaty, the provisions of which are as follows:

> "The President 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 themselves 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."

clearly shows that the reservation was for the tribe. Any ownership in severalty was expressly deferred subject to the discretion of the President. Not until after a survey and allotment could an individual right accrue. The survey and allotment was not provided for until the Act of April 23, 1904 (33 Stat. L. 302.) It is clear therefore from the provisions of the treaty that at the time of the treaty the waters were reserved for the tribe. Apart from ownership in lands in severalty there could be no right to water in severalty and since the treaty created a common ownership of the land there was necessarily created a common ownership of the water. At this point we call the court's attention to Article 6 of the Treaty with the Omahas (10 Stat. L.

1043, 2 Kappler 453), referred to in Article 6 of the Flathead Treaty. Article 6 of the Omaha Treaty does not change the situation so far as the question of severalty or common ownership is concerned.

B. THE UNITED STATES BECAME TRUSTEE OF THE LANDS AND WATERS FOR THE BENEFIT OF THE INDIANS AS A TRIBE.

Since the case of Johnson v. McIntosh (8 Wheat. 543, 5 U. S. (L. Ed.) 681), it has been unifromly held that the fee title to all of the lands in the Louisiana Purchase is in the United States, subject only to the right of occupancy in the Indians. (25 R. C. L. 123) However, upon the ratification of the Flathead Treaty, the United States became a trustee for the Indians of the lands and waters in the reserevd area. Whatever may have been the obligation of the United States with respect to the title held for the Indians, it is clear that the title to the land and water was in the United States. In saying this we do not disagree with the language in the case of U. S. v. Powers et al, (94 Fed. (2) 783, at page 785,) where the court said:

> "There was in the treaty no express reservation of water for irrigation or other purposes. There was, however, an implied reservation. Winters v. United States, 207 U. S. 564, 575, 28 S. Ct. 207, 52 L. Ed. 340. The implied reservation was to the Indians, not to appellant. Skeem v. United States, 9 Cir. 273 Fed. 93, 95; Conrad Investment Co. v. United States, 9 Cir., 161 F. 829, 831; Winters v. United States, 9 Cir., 143 F. 740, 745, affirmed in 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340."

But we do insist that the reservation to the Indians

vested in the United States as trustee for the Indians. We do not contend that the United States, as a sovereign, held unto itself this title, but we do claim that the United States as guardian of the Indians, held this title after the execution of the treaty.

In the case of Minnesota v. Hitchcock, (185 U. S. 373, 46 L. Ed. 954, 22 S. C. 650) the Supreme Court considered the question of the title of the United States to lands in an Indian Reservation, and said:

> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.
>
> But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone up the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility."

In the case of Cherokee Nation v. Hitchcock, (187 U. S. 294, 47 L. Ed. 183, 23 S. C. 115) it was held that the United States as guardian of the property of the Cherokee Nation might make leases of the unallotted lands of the Cherokees for oil and gas. The court said:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.
>
> The holding that Congress had power to provide

a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. The Cherokee Trust Funds, 117 U. S. 288, 308. The manner in which this land is held is described in Cherokee Nation v. Journeycake, 155 U. S. 196, 207, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.'

There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States v. Richert, (188 U. S. 432, 47 L. Ed. 532, 23 S. C. 478) the Supreme Court, held that the State of South Dakota had no power to tax lands to which trust patents had issued, and in so holding said:

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have

> not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficient objects with reference to a race of which this court has said that 'from their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' "

We cite this case for the limited purpose of showing that the United States hold as trustee for the Indians.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. Ed. 299, 23 S. C. 216) the Supreme Court held that the United States had power to sell surplus lands contrary to the provisions of a treaty.

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . .
>
> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in Cherokee Nation v. United States, 119 U. S. 1, 27, and Stephens v. Cherokee Nation, 174 U. S. 445, 483."

The entire history of Indian litigation and legislation assumes the title to be in the United States. The very manner in which the trust and fee patents are issued precludes any other theory. And it must follow, as the night the day, that if the Government held the title to the reserved land it likewise held title to the reserved waters.

We stress this seemingly obvious point because upon a proper consideration of it depends the entire question of Indian reservation waters.

C. THERE HAS NEVER BEEN A LAW BY WHICH A WATER RIGHT COULD BE CREATED BY APPROPRIATION ON THE FLATHEAD RESERVATION.

Since the title to the waters remained in the United States, a right to water could necessarily be secured only from the United States under some law authorizing such a right. There has never been enacted such a law.

1. The state laws do not apply.

The case of Winters v. U. S. (207 U. S. 564, 52 L. Ed. 340, 28 S. C. 207) is authority for the proposition that the United States had the power to reserve the waters from private appropriation. And that decision determines that waters needed for the reservation cannot be appropriated for use outside the reservation.

A right in persons within the reservation to appropriate water under State Law was never recognized by Congress. The enabling act of the State of Montana expressly provides:

"That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States."

Act of Congress, Feb. 22, 1889 (25 Stat. 676, Vol. 1 R. C. M. 1935, p. 60)

The Act of Congress of July 26, 1866, C 262, Sec. 9 (14 Stat. 243, 43 U.S.C.A. 661) which recognized the doctrine of prior appropriation, where the same existed by local custom applied only to the *public* lands and waters of the United States.

Winters v. U. S., 143 Fed. 740, at page 747;

Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761;

Smith v. Deniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408;

Cruse v. McCauley (C C) 96 Fed. 369.

Lands reserved for an Indian Reservation were not public lands.

In Northern Pac. R. Co. v. Maclay, (61 Fed. 554,) it was held that the lands in the Bitterroot Valley mentioned in Section 11 of the Flathead Treaty of 1855 were not public land. The court said:

"From the agreed statement of facts, it affirmatively appears that the lands in question, in the

> Bitter Root valley, above the Lolo Fork, in the state of Montana, were not public lands of the United States at the date of the passage of the 'Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Pugent Sound on the Pacific coast by the northern route, approved July 2, 1854.' "

The United States Supreme Court held that lands reserved to the use and benefit of the Indians were not public lands in the case of Leavenworth, etc. R. R. Co. v. U. S., (92 U. S. 733, 23 L. Ed. 634,) saying:

> "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it. It may be urged that it was not necessary in deciding that case to pass upon the question; but, however, this may be, the principle asserted is sound and reasonable, and w eaccept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. State v. Delesdenier, 7 Tex. 76; Spaulding v. Martin, 11 Wis. 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the government."

Our point here is simply this: In order that the state laws apply to water on an Indian Reservation, it is necessary that there be some authority from the United States recognizing the applicability of such laws and as we have seen there is no such Federal law.

This was settled in U. S. v. Rio Grande Irrigation

Company, (174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136) where the court said:

> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belong to each state, yet two limitations must be recognized: First. That, in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property. Second. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

2. There is no law of the United States under which rights could be created by private appropriation.

The Federal Government did not authorize the creation of rights under state law nor did the federal government ever by its own enactment create or recognize the doctrine of appropriation independently of state law.

Section 19 of the Act of Congress of June 21, 1906 (34 Stat. 354) has been consistently relied upon as authority for the appropriation of the waters of the Flathead. The respondents all reply upon it. (R. 77 and 146) And Judge Pray relied upon it in rendering his decision in this cause (R. 160) The Act in question reads:

> "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 of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

It is apparent that Section 19 is a saving clause and nothing more.

See Shutt v. State, (173 Ind. 689 at 692, 89 N. E. 6,) where it is said:

> "There is no particular rule for its location, or its verbal form; but it is generally near or at the end, commencing, 'Nothing in this act shall,' "

Its purpose was to save such rights as existed and not to create any rights. The clause operates only in restrospect and did not purport to create or provide a method for creating rights in future.

As a saving clause it could not operate to create rights. The rule with respect to a saving clause is well stated in Knickerbocker Ice. Co. v. Stewart, (253 U. S. 149 at page 162, 64 L. Ed. 834, 40 S. C. 438) in these words:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlick, Interpretation of Statutes, Sec. 372."

See also 59 C. J. 1093, as follows:

> "A saving clause is an exception of special things out of the general things mentioned in the statute; something smaller than the thing itself, and yet not nullifying it. Its usual function is

> not to create anything, but to preserve something from immediate interference***"

A reference to the proceedings in Congress with respect to Section 19 discloses that it was not the intent of Congress to create a right to appropriate water. After the bill H. R. 15331 of the 59th Congress, First Session, had passed the House, the sections relating to townsites were added to the Act by amendment on the floor of the Senate (Cong. Rec. Vol. 40, p. 6036). The matter was the subject of some debate which discloses no evidence of any intent to create any water right or to extend the laws of the State relating to appropriation to Flathead lands.

At the time of the enactment of Section 19, neither the Winters case nor the Conrad case had been decided. It would be quite natural for Congress to insert a saving clause that would say no more than that the legislation was not intended to alter or change the rights of parties who were using water from the streams on Indian Reservations. That is the usual purpose of a saving clause, as pointed out in the Knickerbocker case heretofore cited.

As a matter of fact, reference to the Congressional Record will show that during the debate on the Act in which this section is included there was some discussion of the Conrad case and one amendment offered was designed to compel a dismissal of that action. Reference may be had to that debate and to the amendment which was not adopted (and which would also have made Montana appropriation laws apply to the Black-

feet Reservation) by an examination of Volume 40, Congressional Record, pp. 5811-5813.

Reference to that proposed amendment, never adopted, shows clearly that it was understood by the members of Congress, first, that without special enactment Montana laws relating to appropriation would not apply and, second, that the final outcome of the Winters and Conrad cases was unknown, which would explain the insertion of a saving clause in the pending legislation.

Since Section 19 was a saving clause, the question then arises, what, if anything, did it save? The answer is nothing. Since at the time of the enactment of Section 19, which was in 1906, there were no rights in severalty either in trust or fee on the reservation, how could it be said that any person could have appropriated water for his land? How could water have become appurtenant to private land when there was as yet no private ownership of land? Until after the trust patents issued which was not prior to October 8, 1908, no Indian had a vested right to any particular land, the whole being in the United States for the benefit of all. We therefore urge that Section 19 did not and could not save any prior rights because there were none to save.

Even if there had been private rights to land at the time of the passage of Section 19, the result would be no different for the reason there was no law prior to that time, as we have pointed out, under which rights to water by prior appropriation could be initiated. In the absence of the consent of the United States no

individual could obtain a right hostile to its ownership of the waters, as trustee of the entire tribe. In order to find that Section 19 saved any rights, it is first necessary to find the rights, and in order to find such rights it is necessary to hold that Indians who had no private ownership of lands were able, without the consent of the United States to divest the United States of its title as trustee, to water, and then in some way affix that divested title as a private appurtenance to land still owned by the United States as trustee.

The Acts of Congress which governed the lands on reservations prior to the Act of June 21, 1906, not only did not recognize prior appropriation as the law of the reservation, but indicated that prior appropriation was not to be the rule.

The General Allotment Act of 1887 (24 Stat. L. 388) provided in Section 7:

> "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

It is clear from this act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality the Secretary was authorized to make rules and regulations. Wheth-

er such rules and regulations were provided is not important here for we are concerned only with the intent of Congress to make equality the rule. The act then goes on to say that *no other appropriation or grant of water by a riparian appropriater shall be authorized or permitted to the damage of any other riparian proprietor.* The words *"no other appropriation"* must refer back to *"just and equal distribution"* and consequently any appropriation which gave an Indian a greater quantity of water or an earlier priority than others was clearly unlawful. It is true that the statute uses the word "riparian," but since all the land was in one ownership on the Flathead until 1908, the land was all riparian. Further it could not have been the intent of Congress to provide a *"just and equal distribution"* among riparian owners and to allow non-riparian owners to go without, particuarly in view of the fact that Congress said *"just* and *equal* distribution", which must necessarily comprehend *all* the Indians living on the reservation. The whole theory of prior appropriation is contrary to the theory of just and equal distribution and is therefore contrary to Section 7 of the General Allottment Act.

3. The idea of a prior appropriation on an Indian reservation is repugnant to any theory of equitable treatment of the Indians.

We believe that the court should lean away from any construction of the acts of Congress which could possibly lead to a right of prior appropriation on an In-

dian reservation. It is to be presumed that the United States intended to treat the Indians equally, insofar as possible. The Indians are a nomadic, not an agricultural people. At the time of the creation of the reservation few, if any, of the Indians could have known of irrigation and most probably none were interested in it.

If the United States adopted the rule of prior appropriation for the Flathead Indian Reservation, then the intent of the United States was to:

1. Prefer those Indians who through their white blood, association with whites or superior intelligence were smart enough to get lands and put water on them to the exclusion of their less advanced fellows and,
2. Allow those Indians fortunate enough to locate on or near a stream to acquire rights to the exclusion of those having irrigable lands a few miles from a water source.

As a trustee for all, it was the obligation of the United States to see that an Indian acquired no more of the common property than another. If the United States permitted private appropriation by an Indian as against another, then it was guilty of a gross injustice to the less advanced Indian and to the Indian who lived away from the water and could not possibly for economic reasons build the necessary ditches to convey the water. The United States did not intend to throw these untutored and uncivilized people into competition with each other for valuable water rights and every presumption should avail against any language used

by Congress (we still assert there is none) which would tend to permit the doctrine of prior appropriation. All of this is particularly obvious when it is considered that the Acts here referred to contemplated that Indian allottees might receive fee patents and dispose of their lands to white purchasers. Inevitably these purchasers would acquire the lands first irrigated, with the result that white purchasers would soon have all the water and the neighboring Indian owners would have none. Is it not significant here that three of the four private water rights claimed are in white ownership?

II. THERE IS NO RIGHT IN PLAINTIFF OR APPELLEE DEFENDANTS TO TAKE ANY WATER FROM THE STREAMS ON THE RESERVATION EXCEPT AS SUCH PARTIES ARE ENTITLED TO WATER FROM THE FLATHEAD IRRIGATION PROJECT.

Assignment of Error No. III (R. 358)—The Court erred in holding in effect that the plaintiff, Agnes McIntire, and the defendants, The United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

Assignment of Error No. IX (R. 360)—The Court erred in holding that the maintenance of a dam in Mud Creek by the defendants, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are

deprived of the use of the waters of Mud Creek, is unlawful.

If the respondents are entitled to an amount of water equal in time and amount to each other Indian allottee or his successor under the doctrine of the case of United States v. Powers (16 Fed. Supp. 115, affirmed 94 Fed. 2d. 783), then perhaps the lower court was correct in determing that the parties were tenants in common of the water and in enjoining the United States from interfering with a flow to the respondents' lands. That is, even though the court find that the doctrine of appropriation did not apply, still it may have correctly enjoined the United States from interfering with what water respondents were entitled to under the Powers case.

It is our purpose to demonstrate that the Powers case should not apply to the Flathead Reservation.

A. THE RECORD SHOWS THAT THE APPELLEES COULD GET WATER FROM THE PROJECT SYSTEM.

There is no claim made that the respondents here have been prevented from taking water from the project system or that upon payment therefore they could not get water from the system. The record shows that they could get the water within a very short time. (R. 262-263) The question of what the rights of the parties would be if the system were not able to deliver water does not arise. The only question is, can respondents who are able to secure water from the system

take any water apart from the system? We contend that they can not.

B. THE UNITED STATES, WHICH SUSTAINED TO THE INDIANS THE GUARDIAN AND WARD RELATIONSHIP, HAD PLENARY POWER TO PROVIDE FOR THE DISTRIBUTION OF THE WATERS OF THE RESERVATION SO AS TO PROVIDE THE GREATEST GOOD FOR THE GREATEST NUMBER, AND THE METHOD DESIGNATED BY THE UNITED STATES IS THE EXCLUSIVE METHOD.

As we have seen, the United States had title to all the lands and waters as trustee for the Indians. As such trustee the United States had plenary power to provide a method of distributing the waters of the reservation *(at least prior to the time that vested rights in severalty accrued to the Indians.)*

We are not here concerned with the question of what the United States could do with these communal lands as against the Indians, although it might be contended that the government could convey to third persons.

Beecher v. Weatherby, (95 U. S. 517, 24 L. Ed. 440) We are concerned with what the United States could do with these lands in regulating the rights of the Indians *inter sese.* As to the latter the United States had an absolute power to determine the method in which the communal lands were to be handled for the benefit of the tribe.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. E.

299, 23 S. C. 216) the United States was held to have power to sell surplus unalloted lands for the benefit of the tribe contrary to the provisions of a treaty providing that the lands should not be sold without the consent of a certain proportion of the Indians.

The court, in Cherokee Nation v. Hitchcock, (187 U. S. 294 47 L. Ed. 183, 23 S. C. 115)) in addition to the language quoted on page 21 of this brief, said:

> "The decision in Stephens v. Cherokee Nation, 174 U. S. 445, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed."

Certainly the power exercised by the United States in the above case, the exercise of which was sustained by the court, was a plenary power.

In Stephens v. Cherokee Nation, (174 U. S. 445 43 L. Ed. 1041, 19 S. C. 722) the Supreme Court held that the United States had power to determine the membership of a tribe for the purpose of adjusting rights in communal property. Certainly if the United States has power to determine which of the members of a tribe are entitled to share in communal property, it has suf-

ficient power to determine how the communal waters shall be applied to the tribal lands.

In Gritts v. Fisher, (224 U. S. 640, 56 L. Ed. 928, 32 S. C. 580) the Supreme Court sustained an Act of Congress allowing children of the Cherokee tribe to share in the communal property even though a prior act had indicated that such children were not eligible.

> "But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' Cherokee Intermarriage Cases, 203 U. S. 76, 93. *It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.*"

The Supreme Court here held that the United States might diminish, by allowing additional persons to share, the interest of Indians in tribal property and funds. If the United States has power to actually decrease the individual rights to tribal property it cannot be doubted that it may regulate the use of tribal waters and provide a method for the distribution thereof.

The doctrine has been approved and followed.

Tiger v. Western Investment Co., (221 U. S. 286 55 L. Ed. 738, 31 S. C. 578).

Williams v. Johnson, (239 U. S. 414, 60 L. Ed. 358, 36 S. C. 150).

Consequently we say that prior to October 3, 1908, the time when trust patents created some rights in severalty, the power of the United States was full and complete. The question therefore is not, What power did the United States, but *how did it exercise that power?*

C. THE UNITED STATES HAS INDICATED THAT RIGHT TO WATER BE OBTAINED ONLY THROUGH THE PROJECT SYSTEM.

In the Act of Congress of February 8, 1887 (26 Stat. 794, 25 U.S.C.A. 331), Congress indicated that it would provide irrigation projects for Indian lands.

> "And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land***"

The language quoted shows that the amount of an individual allotment was to be governed by the consideration of whether the land was irrigable.

In 1904 Congress by the Allotment Act for the Flathead tribe (33 Stat. L. 302) indicated that communal funds should be used to build an irrigation system. Pursuant to this act the Indian office asked the Bureau of Reclamation to make the preliminary surveys. (See this brief p. .... and R. 252 and 255). Stockton's party made the first survey in 1907 and included the waters of Mud Creek in their plans. (R. 252 and 253). Then on May 29, 1908, by an Act amending the Act of 1904 (35 Stat. L. 488), Congress definitely said that the lands on the reservation should be subject to the system provided. This law is so important that we will at the risk of repetition set it out again:

> "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.*" *(Italics supplied)*

The words "the land irrigable under the systems*** alloted to the Indians in severalty *** shall have a right to so much water *** without cost to the Indians for the construction of such *** systems," shows that Congress intended water rights to be acquired *through* the system. The contention is further strengthened

by the provision that "all lands allotted to Indians shall bear their pro rata share of the cost,etc." The act does not say part of the lands, does not say such lands as are not susceptible to private irrigation, it says *all lands.* The further language "may withhold from *any* Indian a sufficient amount of his pro rata share to pay all charge against land held in trust for him, etc." points to the congressional intention that all should profit by and all bear the expense of the operation and maintenance of the system. If Congress intended that all land should pay for the operation and maintenance of the system it intended that all land should be benefited by the system. Since the Act of 1908 Congress has spent some seven and a half million dollars on this system.

Let us point out again that apart from the acts giving rights under the system, there is no act giving rights. Congress in Section 7 of the General Allotment Act said that the Secretary should make rules to provide for the equal distribution of the water, but it likewise indicated that it was not within the province of the individual to create for himself any rights.

It was not necessary that Congress appropriate this water. The title was in the United States so long as the land remained in communal ownership. Since Congress did indicate the method of distribution of the water and did not in any way provide that there should be any other method, it follows that the method provided by the United States is exclusive. Title was in the United States and before any person can successfully

assert any individual title he must point out the statute under which the United States consented that that title might originate.

United States v. Rio Grande Irrigation Company (174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136).

D. THIS DID NOT DISTURB ANY VESTED RIGHTS BECAUSE THE LANDS WERE MADE SUBJECT TO THE SYSTEM BEFORE ANY PRIVATE RIGHTS ATTACHED TO THE LANDS.

Congress did not impair any vested water rights by the Act of May 29, 1908 (35 Stat. L. 448) above set out. We have argued at length that the United States had plenary power over the communal property prior to the vesting of private rights and since that power was exercised on May 29, 1908, which was about six months prior to the issuance of the trust patents which issued not earlier than October 8, 1908 (R. 333), no vested rights were involved.

We do not quarrel with the rule stated in U. S. vs. Powers, 16 Fed. Supp. 155, at page 162 as follows:

> "In Morrow v. U. S., 243 F. 854, 856, the Circuit Court held: 'There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter.' "

The point is that the United States exercised its power over these waters before any private rights vested. Nor do we quarrel with the rule that a conveyance of lands with appurtenances conveys the water rights used to irrigate the lands (U. S. v. Powers, 16

Fed. Supp. 155 at 162), but we do say that a conveyance of land with appurtenances conveys only such rights as were appurtenant at the time of the conveyance. Hence the question here is not, does the word "appurtenance" pass the water rights, but rather, what waters were appurtenant?

Since at the time Michel Pablo took his trust patent the United States had already limited his right to use waters to a use through the system, the word "appurtenance" passed only such limited right and the United States in now asserting that the successors of Michel Pablo take their water through the system *is not attempting to alter any rights that Pablo ever had* but is simply insisting that his successors be content with the rights which Pablo had.

E. THE SYSTEM PROVIDED IS THE MOST EQUITABLE WHICH COULD BE DEVISED.

The insistance of the United States that water be taken only through the system is in furtherance of the policy that the Indians should be treated alike. In the decisions upon this subject the sympathy of the courts for the Indian is quite evident. That is particularly true of the decisions of Judge Bourquin in the Moody litigation. (Scheer v. Moody, 48 Fed. (2) 327). Whatever we may think of the treatment accorded the Indian in days past, we correct no injustice by establishing a rule of law which creates inequality among the Indians themselves.

The Flathead reservation is arid and big. Streams

course through it at various points. Of the many thousand acres on the reservation very few acres are riparian to the streams, or near enough to make private ditches economically feasible for individual owners of allotments.

Some irrigable lands on the reservation may be irrigated by 100 yards of ditch; other require five miles of ditch. Congress never did say "Lone Wolf, by a fortunate change you got land within 100 yards of water, you take the water, but Black Eagle, the gods did not favor you, your land is five miles from water and if you want it you pay for the operation and maintenance of the ditch that takes it there, without help from the lucky Lone Wolf." Congress said, "You will all take your water from the system and you will all pay your pro rata share." Congress tried to create an equitable system and we believe that the courts should engage in every legitimate presumption to make that system effective. In the absence of a clear congressional intent the courts should not say that rights come into existence which result in a gross inequality.

It is perhaps immaterial that an irrigation project is the only method whereby an equitable distribution of water can be effected. If the court decides that each allottee or successor is entitled to a share of water without regard to the system, and if each allottee starts to take his water, all of the water masters in Western Montana cannot secure a just distribution. The amount of water to which McIntire on Mud Creek is entitled depends on the amount of water not only in Mud Creek

but in every creek in the whole Mission Valley. Only through a central system which collects and distributes all the water can the needs of the land (some 80,000 acres, R. 327) and the available water supply be determined. This factor should be of some weight in determining whether Congress did or did not intend that all Indians should take through the system.

We again call to the court's attention the fact that we are not here concerned with

1. The rights of those for whom the system is not available, or

2. The amount or propriety of various charges for the use of water.

The sole question is, do these parties have rights apart from the system? We humbly submit that they do not.

CONCLUSION

The questions here involved are of major importance to thousands of individuals owning lands on Indian reservations. They involve to some extent the value of irrigation projects costing many millions of dollars. We humbly ask that the whole matter of water rights as between the allottees represented by the systems and those fortunate enough to be located near stream be examined, and that if in the light of fundamentals the dectum U. S. v. Powers, 94 Fed. 2d 783 be found

to be erroneous, that it be withdrawn or in any event be not applied to this litigation.

Respectfully submitted,

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Attorneys for Appellant
Flathead Irrigation District.

No. 8797

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

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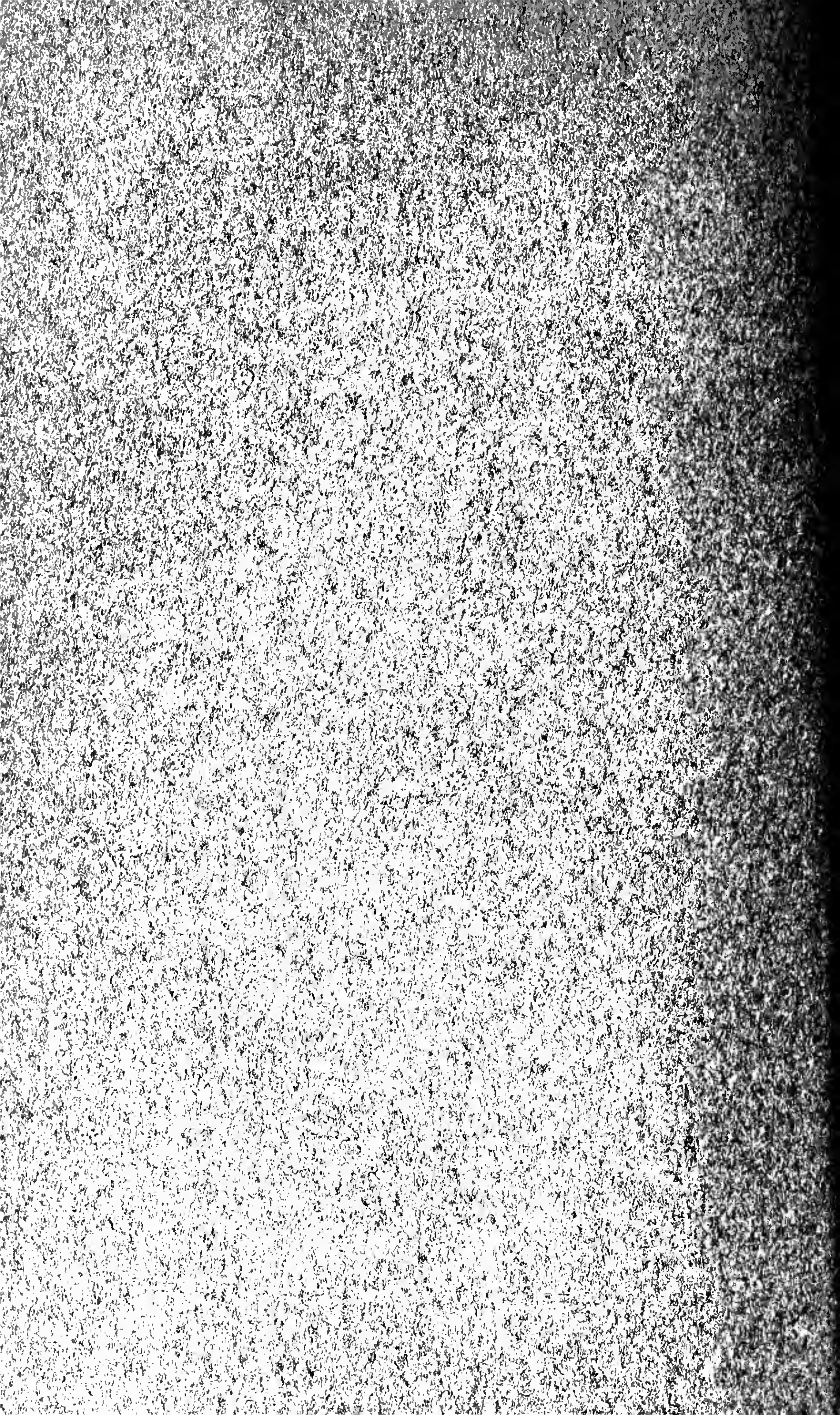
UNITED STATES OF AMERICA, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, A CORPORATION, ALICE CLAIRMONT, HENRY CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, ADMINISTRATOR OF THE ESTATE OF R. W. JAMISON, DECEASED, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. B. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY, AND W. A. DUPUIS, APPELLANTS

v.

AGNES McINTIRE, ALEX PABLO, AND A. M. STERLING, APPELLEES

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

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS



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

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No. 8797

United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Lou Goodale Bigelow Krout, Alphonse Clairmont, Flathead Irrigation District, a Corporation, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Remiers, Administrator of the Estate of R. W. Jamison, Deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. B. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Gertrude E. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley, and W. A. Dupuis, appellants

v.

Agnes McIntire, Alex Pablo, and A. M. Sterling, appellees

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

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION

This action is akin to *Moody* v. *Johnston*, 66 F. (2d) 999, 70 F. (2d) 835, which was recently dismissed by this Court for want of necessary parties. It was brought by the appellee, Agnes McIntire, a white owner of a former Indian allotment on the Flathead Indian Reservation in Montana, to establish a right to the use of certain quantities of the waters of Mud Creek, a stream on the reservation, for the irrigation of her lands, and to enjoin interference with that right. The parties defendant are the United States, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Alex Pablo and A. M. Sterling (who are appellees in this Court), the Flathead Irrigation District, a corporation, and various individuals who are described as members of the Flathead Tribe of Indians.

The second amended complaint, filed May 16, 1936, on which the action was tried, alleges: The Flathead Indian Reservation was set aside for the Flathead Nation by a treaty ratified in 1859 (12 Stat. 975) (R. 74). The Flathead Indians were encouraged to become a self-supporting agricultural people with permanent homes on lands thereafter to be allotted to them in severalty (R. 74–75). The

lands of the reservation can be cultivated only by irrigation, for which one inch of water per acre is necessary (R. 75). Following the treaty, the Indians settled upon the reservation and began to farm by means of irrigation with the waters flowing upon the reservation (R. 75). Michel Pablo and Lizette Barnaby, Flathead Indians, each "made allotment for" described lands (R. 75). In April 1900, Michel Pablo, who was then in possession of both tracts, constructed an irrigation ditch carrying 160 inches of water per second from Mud Creek, of which the allottees thus became the appropriators (R. 75–76). That appropriation has become appurtenant to the described lands and has not been abandoned (R. 76). In 1918 fee patents were issued to Agatha Pablo, wife of Michel Pablo, for the lands allotted to him and to Lizette Barnaby, and thereafter those lands were sold to the plaintiff who now owns them together with 160 inches per second of water appurtenant thereto (R. 76). The Act of April 23, 1904, providing for the allotment of the lands on the Flathead Reservation and the opening of the lands for sale and disposal, as amended by the Act of June 21, 1906 (34 Stat. 355), provides (Section 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. (R. 77.)

From April 1900, continuously up to the present time the ditch has been used in conveying the waters from Mud Creek to the described lands, and the plaintiff claims the benefit of the Act of June 21, 1906, in the use of 160 inches per second of waters carried in the ditch (R. 77). The United States "claims an interest in the waters" of Mud Creek, and has dammed up the Creek and has deprived plaintiff of waters to which she is entitled (R. 78). The plaintiff's right to the use of the waters became fixed prior to the claim of the United States, and the United States, under the Act of June 21, 1906, has no right to deprive plaintiff of them (R. 78). No other parties use the waters of Mud Creek except the plaintiff and the United States acting through the Flathead Irrigation Project, and "this plaintiff and the United States are tenants in common or joint tenants in the use of said water" (R. 78). The waters of Mud Creek "can be divided, partitioned and separated" so that the amount of water to which the plaintiff is entitled can be determined, and the United States is made a party under Title 28, U. S. Code, § 41 (25) "for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant" (R. 78).[1] Harold L.

[1] Title 28, U. S. Code, § 41 (25) (Judicial Code, Section 24, paragraph 25, 30 Stat. 416, 36 Stat. 1094) confers upon the federal district courts jurisdiction of "suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants n common or joint tenants * * *."

Ickes, Secretary of the Interior, is claiming to be in charge, under acts of Congress, of the Flathead Irrigation Project, and Henry Gerharz is claiming to be the Project Engineer in direct charge of the project (R. 78–79). These defendants are claiming that the plaintiff has no water rights on Mud Creek independant of the Flathead Irrigation Project, and are claiming the right to deprive plaintiff of the use of the water except upon the payment to the project of fees and charges (R. 79). The value of the water in controversy exceeds $3,000; this action is necessary to prevent a multiplicity of suits; and the plaintiff has no adequate remedy at law (R. 79). Alex Pablo and A. M. Sterling each claim that the appropriation of Michel Pablo was also made for lands now owned by them (R. 79–80). The Flathead Irrigation District and the individual defendants at one time claimed some rights in the waters of Mud Creek (R. 80).

The plaintiff prayed that the waters of Mud Creek be adjudicated between the United States and the plaintiff; that plaintiff's rights be "partitioned, separated, fixed, and established"; that plaintiff be given a right to the use of 160 inches of water with a priority of April, 1900; and that the defendants be restrained from interfering with the rights of plaintiff as found (R. 81).

After the filing of the original complaint (which was substantially like the amended complaint above summarized), the District Judge ordered the Secretary of the Interior "to appear, plead, answer or

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demur" under Judicial Code, Section 57. That Section (36 Stat. 1102, 28 U. S. C., § 118) authorizes a district court to direct a non-resident defendant to "appear, plead, answer, or demur" in a suit to enforce any claim to real or personal property in the district where the suit is brought. The Secretary of the Interior appeared specially and moved that the complaint be dismissed as against him, on the grounds that the court had no jurisdiction over him because the suit was brought in a district other than that of his residence, and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 20–21). The motion was denied (R. 23), and the Secretary did not appear further in the case (R. 166).

The United States and Henry Gerharz, the Project Engineer of the Flathead Irrigation Project, also appeared specially and moved that the complaint be dismissed as against them, the United States on the ground that it could not be sued without its consent and it had not consented to be sued (R. 19–20), and Gerharz on the grounds that the complaint did not state a cause of action against him and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 21–22). These motions were denied (R. 23). Motions by the United States and by Gerharz to dismiss the second amended complaint (above summarized) were also denied (R. 82–85).

The answer of the United States to the second amended complaint sets up four affirmative defenses: 1. The United States has not consented to be sued. 2. The action was not brought for the partition of lands. 3. This action was brought to settle the relative priorities and rights of the parties to the use of the waters of Mud Creek. 4. The facts alleged do not state a cause of action against the United States (R 87–88).

The answer of Henry Gerharz, the Project Engineer, alleges that by the establishment of the Flathead Reservation the United States reserved all the waters of streams of the reservation, including Mud Creek, for irrigation and other uses upon the reservation, and exempted those waters from appropriation (R. 90); denies any knowledge of the alleged appropriation of waters of Mud Creek by Michel Pablo (R. 91); admits that the United States claims an interest in the waters of Mud Creek and has dammed up the creek (R. 91); alleges that all acts done by him relevant to this suit were done in pursuance of the orders, rules and regulations of the Secretary of the Interior (R. 92); alleges that the west eighty acres of the plaintiff's lands were by court order included in the Flathead Irrigation District, that thereafter the district entered into repayment contracts with the United States and those lands of the plaintiff became subject to those contracts, and that he, as Project Engineer, assessed against the lands of the plaintiff certain charges in

connection with the project (R. 93); and alleges that whatever rights the individual defendants have in the waters of Mud Creek are subservient to the rights of and were granted by the United States (R. 95).

In addition, the answer of Gerharz sets forth six affirmative defenses: 1. This action is not for the partition of lands, but to quiet title to the use of waters (R. 95). 2. The facts alleged do not state a cause of action (R. 95). 3. The Court has no jurisdiction of the subject of the action (R. 96). 4. The United States has constructed the Flathead Irrigation Project to irrigate the irrigable lands on the Flathead Reservation and now owns and operates that project (R. 97–98). All the waters of the streams of the reservation, including Mud Creek, are used by the project and are necessary for the irrigation of lands under it (R. 99). Part of the plaintiff's lands are entitled to water from the project upon payment of lawful charges (R. 99), and that is the only water right the plaintiff has (R. 98–99). No waters of the reservation were or could be appropriated by plaintiff's predecessors or any other person (R. 99). When the irrigation project was undertaken the United States recognized water right developments on the reservation antedating 1909, and the Secretary of the Interior appointed a committee which investigated such rights and made a report thereon (R. 99–100). The Secretary approved the report, granted to the west eighty of the plaintiff's lands a right to 1,000 gallons per day of the waters of Mud Creek for

domestic and stock use, and declared that no other water right was appurtenant to those lands (R. 100–101). 5. Pursuant to federal and Montana law, the United States appropriated the waters of Mud Creek in the years 1909 and 1912. Before that, and since, the United States, through the Flathead Irrigation Project, has continuously used all the waters of Mud Creek (R. 101–102). 6. For more than ten years prior to the filing of this action the United States had exercised open and notorious ownership and control of all of the waters of Mud Creek under claim of title. Accordingly the United States has title to those waters by adverse possession, the plaintiff is barred by the Montana statutes from asserting any right in them, and has been guilty of laches (R. 103–104).

The answer of the individual Indian defendants sets forth substantially the same defenses as that of Gerharz (R. 106–107).

The answer of the Flathead Irrigation District follows the same general theory as does that of Gerharz. It alleges that no rights in the waters of Mud Creek could be acquired by appropriation (R. 126), avers that the Flathead Irrigation Project was initiated before the allotment of reservation lands (R. 125), and that by the initiation of the project all the waters of the reservation were segregated and appropriated for the project (R. 125).

The answer of the defendants A. M. Sterling and Alex Pablo admits that Michel Pablo appropriated 80 inches per second of the waters of Mud Creek for the irrigation of his allotment (now the west eighty

of the plaintiff's lands), and that that appropriation has not been abandoned, but denies that any water was appropriated for or used upon the Lizette Barnaby allotment (plaintiff's east eighty) (R. 139–140). By way of cross complaint it alleges that Alex Pablo is the son of Michel Pablo and the owner by allotment of certain described lands (R. 143–144); that A. M. Sterling is the owner of certain other described lands which were formerly the allotment of Agatha Pablo, the wife of Michel Pablo (R. 144); that in April, 1900, Michel Pablo appropriated 560 inches of the waters of Mud Creek for the irrigation of his allotment and those of his wife and children (R. 143), including 80 inches of water for the lands of Alex Pablo and 80 inches for the lands now owned by Sterling (R. 145); that this appropriation has not been abandoned (R. 143); and that the defendants Alex Pablo and Sterling and the plaintiff are each entitled to 80 inches of the waters of Mud Creek, with priority over the rights of any other person but without priority among themselves (R. 146–147).

By agreement of counsel all new matters in the answers were deemed denied without need of a reply (R. 335).

The jurisdiction of the District Court in this suit rests upon Judicial Code, Section 24, paragraph 1 (36 Stat. 1091, 28 U. S. C., § 41 (1)) which confers upon the federal district courts jurisdiction of civil suits which arise "under the Constitution or laws of the United States, or treaties made * * * under their authority * * *."

The consent of the United States to be sued in this suit rests upon Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)) which confers upon the federal district courts jurisdiction—

> of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants * * *.

STATEMENT OF THE CASE

Appellees each assert rights to the use of sufficient quantities of the waters of Mud Creek to irrigate in their entirety their respective lands (R. 81, 148–149). The duty of water on these lands is said to be one inch per second per acre (R. 75, 142), and the plaintiff's tract of land contains 160 acres and those of Pablo and Sterling 80 acres each (R. 75–76, 143–144). Appellees' claims are based upon an alleged prior appropriation of waters of Mud Creek by Michel Pablo for the irrigation of the lands now owned by them, upon confirmation and recognition of the right of appropriation so acquired by Section 19 of the Act of April 23, 1904, as amended by the Act of June 21, 1906, and upon nonabandonment of that right (R. 74–81, 138–149).

As to the merits of those claims, these appellants contended (1) that no right in any waters of the Flathead Reservation could be acquired by an individual by appropriation; (2) that if a right in waters of the reservation could be so acquired, no such quantities of water as are claimed by the plaintiff,

Pablo and Sterling were ever appropriated for their lands; (3) that if such quantities of water ever were used on those lands their use was thereafter in whole or in part abandoned, and that for more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed those waters adversely to the plaintiff and to Pablo and Sterling.

These appellants contended, however, that the determination of these questions upon their merits is precluded because the United States, an indispensable party, has not consented to be sued.

As detailed in the statement of pleadings, *supra*, the District Court overruled the contention that the United States had not consented to be sued, and a trial on the merits was had. Evidence was introduced as to the original appropriation of waters by Michel Pablo—its extent and the lands on which the waters were used—and as to the extent and continuity of the irrigation of the lands of the appellees since that time (R. 239–342). At the conclusion of the trial the District Court held for the appellees upon all the issues and gave a decree awarding each of them the quantities of water they claimed (R. 225).

QUESTIONS PRESENTED

1. Whether the United States consented to be sued in this action by Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), which provides for—

> suits in equity brought by any tenant in common or joint tenant for the partition of lands

in cases where the United States is one of such tenants in common or joint tenants * * *

2. Whether the United States is an indispensable party to this action.

3. Whether a right to the use of waters of a stream on the Flathead Reservation needed for the irrigation of Indian lands could be acquired by appropriation.

4. Whether, if the preceding question be answered in the affirmative, a right to the use of waters of Mud Creek was acquired by appellees' predecessors, to the extent of 320 inches of water, for use on lands now owned by appellees.

5. Whether, if the two preceding questions be answered in the affirmative, the right to the use of those quantities of waters has been abandoned in whole or in part and has been acquired by the United States through adverse possession.

SPECIFICATION OF ERRORS

The assigned errors which are to be relied upon are: Assignment of Errors of the United States, Numbers 1 through 9, inclusive (R. 344–346); Assignment of Errors of the Secretary of the Interior, Numbers 1 and 2 (R. 347); Assignment of Errors of Henry Gerharz, Project Engineer, Numbers 1 through 7, inclusive (R. 348–349), and Assignment of Errors of the individual defendants, members of the Flathead Tribe, Numbers 1 through 5, inclusive (R. 350–351).

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SUMMARY OF ARGUMENT

I. The United States cannot be sued except when Congress has expressly consented. Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), upon which appellees rely, provides that the United States may be sued in suits "for the partition of lands" of which the United States is one of the "tenants in common or joint tenants." This suit is not within that statute for these reasons:

1. The United States and appellees are not tenants in common or joint tenants of any right in the waters of Mud Creek, and this suit is not for the partition of any such right, but simply to adjudicate the extent and validity of the appellees' water rights. In order for persons to be tenants in common or joint tenants of a water right which is appurtenant to certain land they must be tenants in common or joint tenants of the land to which the water right is appurtenant. The appellees and the United States are not cotenants of the lands—the appellees are the sole owners. The relief actually given by the District Court in no particular resembles partition; its decree merely adjudges that the appellees have certain water rights, and enjoins interference with those rights.

2. The statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters. While a water right partakes of the nature of real estate, and may be appurtenant to land, it is in no sense land.

II. The United States is an indispensable party to this suit. While the United States is not an

indispensable party to a suit to enjoin an official from illegally interfering with rights of property, the United States is an indispensable party to a suit to litigate title to property held or claimed by an official for the United States. And this suit is clearly of the latter type.

III. The claims of the appellees to rights to the use of certain quantities of the waters of Mud Creek fail in their entirety, because their claims are based solely upon an alleged appropriation of those quantities of water for their lands by a predecessor in possession, and it has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation. This argument is not developed in this brief; with respect to it these appellants adopt and rely upon the brief which has been filed for the Flathead Irrigation District.

IV. If rights in the waters of streams of the Flathead Reservation could be acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court. No such amount of water was ever appropriated for the lands now owned by the appellees, by their predecessor in possession upon whose appropriation they base their claims. If such an amount of water was so appropriated, its use was thereafter in whole or in part abandoned, and for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it, adversely to the appellees, and has thereby acquired the right to its use.

ARGUMENT

I

The United States has not consented to be sued in this action.

Assignment of Errors No. 1 of the United States:

> The Court erred in overruling the motions of the defendant, the United States of America, to dismiss the original and the amended Bills of Complaint (R. 344).

Assignment of Errors No. 2 of the United States:

> The Court erred in overruling the motion of the defendant, the United States of America, for judgment upon the pleadings (R. 344).

Assignment of Errors No. 3 of the United States:

> The Court erred in holding that the defendant, the United States of America, has consented to be sued in this action (R. 345).

Assignment of Errors No. 4 of the United States:

> The Court erred in entering judgment against the defendant, the United States of America (R. 345).

Assignment of Errors No. 1 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in overruling the motion of the defendant, the Secretary of the Interior, to dismiss the original Bill of Complaint (R. 347).

Assignment of Errors No. 2 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in entering judgment against the defendant, the Secretary of the Interior (R. 347).

Assignment of Errors No. 1 of Henry Gerharz, Project Engineer:

> The Court erred in overruling the motions of the defendant, Henry Gerharz, to dismiss the original and the amended Bills of Complaint (R. 348).

Assignment of Errors No. 2 of Henry Gerharz, Project Engineer:

> The Court erred in entering judgment against the defendant, Henry Gerharz (R. 348).

Assignment of Errors No. 1 of the individual defendants:

> The Court erred in entering judgment against the defendants, members of the Flathead Tribe of Indians (R. 350).

"* * * no rule is better settled than that the United States cannot be sued except when Congress has so provided * * *." *Ickes* v. *Fox*, 300 U. S. 82, 96.

The District Court found that the appellees and the United States "are tenants in common, or joint tenants in the use of" the waters of Mud Creek, and that those waters "can be divided, partitioned, and separated" so that the rights of the appellees can be determined (R. 211–212, 218), and held that Congress had therefore consented to this suit by Judicial Code, Section 24, paragraph 25, *supra* p. 11.

This statute was originally enacted as Section 1 of the Act of May 17, 1898 (30 Stat. 416). Its legislative history shows that its purpose was to provide a

means whereby persons who were co-owners with the United States of real property could receive their respective interests in severalty. (See 31 Cong. Rec. 3864–3865; House Report No. 959, 55th Cong., 2d Sess.) Moreover, Section 2 of the Act (28 U. S. Code, § 766), which provides that "in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons" makes it clear that no extension of common law principles was intended, but that the purpose of the statute was entirely remedial.

It is the contention of the appellants that this suit is not within this statutory consent to sue the United States because the United States and the plaintiff are not tenants in common or joint tenants of any right in the waters of Mud Creek, and that this suit is not for the partition of any such right, but simply to adjudicate the validity, extent and priority of the plaintiff's water rights. As will be fully shown the appellees' contentions of a tenancy in common or joint tenancy and the findings of the Court below to that effect are wholly inconsistent with appellees' contentions of prior rights and with the relief actually given by the Court. The allegations were inserted merely to give color to the claim that the United States has consented to this suit. Appellants further contend that the statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters.

A. Appellants and appellees are not tenants in common or joint tenants and this not a partition suit, but a suit to adjudicate rights in waters.

The characteristics and incidents of tenancies in common and joint tenancies have long been settled. The fundamental and common feature of both, and of all forms of cotenancy, is unity of possession. Each cotenant is entitled, as against his cotenants, to exclusive possession of any part of the property. In *Russell* v. *Beasley*, 72 Ala. 190, dismissing an action for partition, the court said (p. 190):

> It avails nothing to prove title to a *distinct portion* of the land proposed to be partitioned, for the essence of the estate in common, necessary to be here shown, is that the tenants should "own undivided parts, and occupy promiscuously, because neither knows his own severalty."

In *McConnel* v. *Kibbe*, 43 Ill. 12, 18, the parties owned separate parts of a tract of land covered by one building. Dismissing a suit for partition, the court said:

> The idea of the plaintiff in error that he and the defendant in error hold this property jointly, is not supported by the title deeds. They are neither joint-tenants, tenants in common nor coparceners, but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change.

See also *Hopkins* v. *Noyes*, 4 Mont. 550, 560, 2 Pac. 280, 283; 2 Blackstone, *Commentaries*, pp. 191–192; 2 Minor, *Real Property* (2d Ed.), pp. 1081–1082; 2 Thompson, *Real Property* (1924), pp. 963–964.

While the original application of this principle was to interests in land, it has never been questioned that it is equally applicable to rights in water. There must, accordingly, be unity of possession before there can be a tenancy in common or joint tenancy in a right to the use of water.

It is submitted that the Supreme Court of Montana has reached the correct result in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 64 P. (2d) 845, in which it held that, since rights to the use of water for irrigation are appurtenant to the lands irrigated, a tenancy in common of such rights cannot exist unless the lands irrigated are held in common, and that tenancy in common of an irrigation ditch is not sufficient to create tenancy in common of water rights. The complaint in that case alleged that the husband of the plaintiff had constructed an irrigation ditch and appropriated water thereby for the irrigation of certain land; that subsequently he conveyed part of the land to the defendants and part to the plaintiff; that the plaintiff and the defendants were tenants in common of the ditch and of the right to use the waters, and that the defendants had deprived the plaintiff of her rights in the waters. A demurrer to the complaint was overruled and the defendant appealed. The state Supreme Court held that the complaint did not state a cause of action. And it said (pp. 539–540):

> In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants,

clearly there was not such a unity of possession between the parties as to render the ownership of the right to use the water as that of tenants in common.

Similarly, in *Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059, 1060–1061, the Supreme Court of Montana said:

> To constitute a tenancy in common there must be a right to the unity of possession * * * and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself.

In accord that a tenancy in common of a water right can exist only if the land to which the water right is appurtenant is held in common, see also *Telluride* v. *Davis*, 33 Colo. 355, 357, 358, 80 Pac. 1051; *Snow* v. *Abalos*, 18 N. M. 681, 696, 140 Pac. 1044.[2]

Equally well settled is the nature of a suit for partition. Such a suit is available only between cotenants. *Shepard* v. *Mount Vernon Lumber Co.*, 192 Ala. 322, 325, 68 So. 880; Freeman, *Cotenancy and Partition* (1874), p. 521. Its purpose is to sever and divide the interests of cotenants.

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[2] While it is theoretically possible for a joint tenancy to exist in a water right, no case dealing with such a tenancy has been found. This is perhaps attributable to the tendency to construe cotenancies as tenancies in common rather than as joint tenancies.

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> The object of partition proceedings is to enable those who own property as joint tenants, or co-parceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. *Brown* v. *Cooper*, 98 Iowa 444, 454.

Partition of a right in waters held in common is effected "either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds." *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 21. See also *Smith* v. *Smith*, 10 Paige Ch. (N. Y. 470, 474 ff.[3]

According to the strict common law, the plaintiff in a suit for partition must have a clear legal title. No question of title can be tried in an action for partition, and if any such question arises the suit must be stayed pending its resolution in an action at law. *Clark* v. *Roller*, 199 U. S. 541, 545; *Rich* v. *Bray*, 37 Fed. 273, 277 (C. C. Mo.). This rule has nearly everywhere been relaxed, and questions of title arising incidentally in a suit for partition are now usually tried in the partition proceeding. But even where this more liberal practice prevails the determination of title is incidental to partition as the main purpose of the suit. *Torrence* v. *Shedd*, 144 U. S. 527, 532; *Middelcoff* v. *Cronise*, 155 Calif. 185, 191, 100 Pac. 232.

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[3] Some courts have asserted that, because of the administrative difficulty of apportioning the use of water, a water right can be partitioned only by sale of the right and division of the proceeds. *Brown* v. *Cooper*, 98 Iowa 444, 454–455; *McGillivray* v. *Evans*, 27 Calif. 92, 96–98.

It is apparent from the pleadings and the relief sought that the appellants and the appellees are not tenants in common or joint tenants, and that this is not a partition suit but a suit primarily for the adjudication of water rights. The appellees claimed (R. 75–76, 143–146), and the District Court found (R. 210–211, 216–217) that Michel Pablo appropriated waters of Mud Creek for the irrigation of certain described lands by means of a ditch which he constructed, that the water appropriated by him became appurtenant to the lands, and that appellees now own those lands together with the water rights appurtenant thereto. The conclusions of law of the District Court recite that the ditch built by Michel Pablo became appurtenant to lands now owned by the appellees, and that they now own the ditch (R. 219–220). The appellees claim that they are joint tenants or tenants in common with the United States of the right to use the waters of Mud Creek, and that those waters can be "divided, partitioned, and separated" so that their rights can be determined (R. 78, 148). But they also contend that their "right to the use of said waters became vested long prior to the claim of the United States" (R. 78, 147), a claim wholly inconsistent with the unity of possession essential to a tenancy in common or joint tenancy. Similarly, the relief that they seek is not only that their rights be "partitioned, separated, fixed, and established," but also that they "be given a prior right to the use of said waters" (R. 81, 148). The decree of the District Court adjudges that the appellees are entitled to water sufficient for the irriga-

tion of their lands, without interference on the part of the appellants, and that the use of this water is their private property and appurtenant to their lands (R. 225–226), thus decreeing a prior right inconsistent with tenancy in common of the appellees and the United States of the right to use the waters of Mud Creek. The decree makes no mention of partition, awards no water to the United States, and contains no reference to its rights.

The position taken by the appellees that they and the United States are tenants in common, or joint tenants, in the use of the waters of Mud Creek, and the findings of the District Court to that effect, are thus wholly inconsistent with other allegations in the pleadings and with the findings of fact, conclusions of law and decree of the District Court. The water rights claimed by the appellees are alleged by them and found by the District Court to be appurtenant to lands of which they are the sole owners. The language of the Supreme Court of Montana in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 539–540, 64 P. (2d) 845, discussed *supra* p. 20, with respect to a similar situation is pertinent. It said:

> It is argued that the allegation that the parties owned the water right as tenants in common is a mere conclusion of law and therefore ineffectual. In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants, clearly there was not such a unity of possession between the parties as

> to render the ownership of the right to use the water as that of tenants in common. (*Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059; *Snow* v. *Abalos*, 18 N. M. 681, 140 Pac. 1044; *City of Telluride* v. *Blair*, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101). The conclusion of the pleader was not supported by the facts alleged.
>
> If the parties to this action had owned the land as tenants in common and the water right was appurtenant to the land, then it might be said that they owned the water right in common.

The United States and the appellees are not even cotenants of the Michel Pablo ditch, though that would not make them cotenants of the water rights.

Moreover the relief actually given does not in any particular resemble partition. The appellees are each decreed to be entitled to certain waters (R. 225). No water is allocated to the United States, the alleged cotenant. Instead its Project Engineer is enjoined from interfering with the rights decreed to the appellees (R. 225–226).

It is plain, we submit, that the United States has not consented to be sued in a suit such as this; that this is in no sense a suit for the partition of lands of which the United States is a cotenant; and that the attempt of the plaintiff to label it as such is but a subterfuge to avoid the sovereign immunity of the United States from suit.[4]

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[4] Judge Pray, who presided at the trial of the case, stated in his opinion that he considered himself bound by the earlier ruling of Judge Bourquin upon this question, irrespective of his own views (R. 166–167).

B. The statute applies to lands and not to waters.

What has been thus far said has ignored the fact that the statutory consent is only to a suit for the partition of "lands", while this suit, even if it were a suit for partition, deals solely with waters. "A water right—a right to the use of water—while it partakes of the nature of real estate [citation], is not land in any sense, and, when considered alone and for the purpose of taxation is personal property." *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68. And it is well established that a "* * * suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, 282 U. S. 656, 659. In view of that principle it is submitted that the statute under discussion does not consent to a suit against the United States for the partition of a water right separate and distinct from any partition of lands. As an appurtenance to lands held by the United States in cotenancy with others the waters might be partitioned, but that is not this case.

II

The United States is an indispensable party to this suit.

The District Court held that the United States had consented to be sued and hence did not rule upon the proposition whether the United States is an indispensable party to this suit. It is submitted that the United States is an indispensable party to the suit with respect to all of the appellants, and since the United States has not consented to be sued

the Court below erred in denying the motions to dismiss on that ground.

1. The United States is an indispensable party defendant in this suit under the decisions of this Court in *Moody* v. *Johnston*, 66 F. (2d) 999, and 70 F. (2d) 835. Those suits, like the present, were brought by white owners of former Indian allotments in the Flathead Reservation for the adjudication of water rights alleged to be appurtenant to the allotments. The Project Manager of the Flathead Reclamation Project, who alone had been made a defendant, moved to dismiss on the ground that the United States and the Secretary of the Interior were necessary parties. The District Court denied the motion. At the trial the plaintiffs introduced in evidence a report of the committee which the Secretary of the Interior had appointed to investigate water rights on the reservation antedating the Flathead Irrigation Project, which they claimed showed that water rights were appurtenant to their lands prior to the project. The District Court entered a decree which adjudged that "Plaintiffs are entitled * * * to sufficient water to irrigate their lands," not to exceed a certain quantity of water per acre, without interference by the defendant; and that the defendant be enjoined from levying against the plaintiffs any charges in connection with the reclamation project, from denying the water rights of the plaintiffs, and from in any way clouding the title of the plaintiffs to their water rights. This

Court reversed the decree and remanded the case to the District Court with directions to dismiss for want of necessary parties, unless the plaintiffs within a reasonable time amended their complaints to bring in the necessary parties. As to who were the necessary parties, the Court said (66 F. (2d) at 1003):

> If no greater amount of water is claimed for the allotments in question upon this appeal than as stated in the report of the committee made to the Secretary of the Interior respecting diversions and applications of water for irrigation purposes prior to the initiation of the Flathead Reclamation Project, and such amount of water is recognized as properly apportioned to said lands in the administration of said project, then the Secretary of the Interior would be the only additional necessary party to actions for the determination of questions whether such lands were liable to construction, maintenance, and operation charges imposed on account of the project. Where there has been no recognized determination of the amount or duty of water, even though some indefinite amount may have been diverted and applied to certain allotments or tracts of land prior to the construction of the project works, a determination of the amount of water to which the land may be entitled as well as liability for construction, maintenance, and operation charges may not be determined without not only the Secretary of the Interior being made a party defendant, but the United States or others who may be affected by any change in the use of water available for irrigation.

Thereafter the plaintiffs filed amended bills of complaint, and brought in the United States and the Secretary of the Interior as additional parties defendant, but did not bring in all of the individual water users who would be affected by the decree sought. Upon application of the Secretary and of the Project Engineer this Court thereupon granted a writ of mandamus directing the District Court to dismiss the proceeding on the ground that all the necessary parties had not been joined. In its opinion on the application for mandamus (70 F. (2d) 835, at 839), speaking of its former opinion, the Court said:

> With reference to the United States as a party, we held that, if it was sought by the plaintiffs to litigate a private right in and to the waters as distinguished from the rights asserted by the United States in and to the waters diverted by the United States for the reclamation project and delivered to the defendants, the United States was a necessary party and that the Secretary of the Interior was a necessary party, and that others who would be affected by the change in the use of waters available for irrigation would be necessary parties. . . . It will be observed that we thus called attention to two possible methods of amendment—one requiring only the presence of the Secretary of the Interior; the other requiring all others "affected by any change in the use of water available for irrigation" to be brought in, including the Secretary of the Interior and the United States.

The present case is clearly of the class which this Court thus held could be maintained only if not merely the Secretary but the United States and all other parties claiming an interest in the water were joined. The complaint in this case is devoted solely to the assertion of a water right claimed to exist independently of and anterior to the Flathead Irrigation Project. The plaintiff does not seek a water right under that project, or raise any question as to the charges incident to such a right. The complaint in this case thus closely resembles the amended complaint in *Moody* v. *Johnston*, and in fact was unquestionably modeled after it.[5]

2. The decision of this Court in *Moody* v. *Johnston* that the United States is an indispensable party to a suit like the present is in accord with the precedents. In that case, as has just been shown, this Court drew a distinction between a suit which, like the present, is concerned primarily with the adjudication of a right in waters claimed by the United States and a suit to

[5] The original complaint in this case was filed after the first decision in *Moody* v. *Johnston*, but before the decision on mandamus. The Secretary, the Project Engineer, and the United States were made parties defendant. After the opinion on mandamus in *Moody* v. *Johnston* the complaint in the present case was amended to bring in as additional defendants individuals claiming an interest in the waters. Like the amended complaint in *Moody* v. *Johnston*, the complaint in this case seeks to state a cause of action for partition, and so to bring the suit within Judicial Code, section 24, paragraph 25.

determine the legality of charges assessed by officials of the United States for furnishing to an individual water to which he has a vested right or his right to which is at least not the basic concern of the suit. The Court distinguished, in other words, between a suit to litigate title to property claimed by the United States and a suit to protect property from official action alleged to be illegal. And it held that a suit of the latter type was not a suit to which the United States was an indispensable party, but on the other hand, that a suit of the former type was a suit to which the United States was an indispensable party.

This distinction is precisely that which had been drawn by the Supreme Court in a long line of decisions. That Court has consistently held that a suit against an official of the United States to litigate title to property held by the official for the United States is a suit against the United States—or, what is the same thing, a suit to which the United States is an indispensable party—and so cannot be maintained. *Oregon* v. *Hitchcock,* 202 U. S. 60, 69–70; *Louisiana* v. *Garfield,* 211 U. S. 70, 77–78; *Goldberg* v. *Daniels,* 231 U. S. 218, 221–222; *New Mexico* v. *Lane,* 243 U. S. 52, 58. See *Carr* v. *United States,*

98 U. S. 433, 437-438.[6] It is equally well established that a suit to enjoin illegal interference by officials with rights of property is not a suit against the United States. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *Ickes* v. *Fox,* 300 U. S. 82.

While the distinction between a suit against an official to try title to property held by the official for the Government and a suit to enjoin an official from illegal interference with vested rights of property is sometimes shadowy and productive of considerable difficulty, compare *Ickes* v. *Fox,* 300 U. S. 82, with *Morrison* v. *Work,* 266 U. S. 481, it is clear that the present suit is of the former type. The basic purpose of this suit is avowedly to try the water right of the plaintiff against the United States. The appellees have alleged (R. 77–78, 147):

> That the United States of America, defendant herein, claims an interest in the waters flowing

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[6] This Court and the Circuit Court of Appeals for the Fourth Circuit have further elaborated the doctrine: The United States would not be bound by any decree rendered against its official with respect to title to property held by him for the United States, and since a decree would thus be a nullity, such a suit will not be entertained. *Electric Steel Foundry* v. *Huntley,* 32 F. (2d) 892, 893 (C. C. A. 9); *Wood* v. *Phillips,* 50 F. (2d) 714, 717–718 (C. C. A. 4); *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451, 456–457 (C. C. A. 4). See also *Sanders* v. *Saxton,* 182 N. Y. 477, 75 N. E. 529. An action of ejectment may be brought against officials holding property for the United States, but that is because such a suit does not litigate the title but only the possession of the defendant. See *Carr* v. *United States,* 98 U. S. 433, 437–438; *United States* v. *Lee,* 106 U. S. 196, 216–217; *Wood* v. *Phillips,* 50 F. (2d) 714, 717 (C. C. A. 4).

> in said Mud Creek and has dammed up said creek and carries part of the waters away from plaintiff, and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States * * *.

Again, (R. 78, 148):

> That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416) for the purpose of completing adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

The prayers for relief ask (R. 81, 148):

> * * * that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff * * *.

There is, accordingly, no question but that this is a suit to litigate title to property claimed by the United States, and that the United States is consequently an indispensable party to the suit.

Furthermore, the District Court held that it had jurisdiction over the Secretary of the Interior, a non-resident of the district where this suit was brought, under Judicial Code, Section 57 (36 Stat. 1102, 28 U. S. C., § 118), which provides that in a suit to enforce a claim to property brought in the district where the property is located the court may order a non-resident defendant to appear. This holding shows conclusively that this suit is to litigate title to property, and since that property, as the appellees themselves assert, is claimed by the United States, that the United States is an indispensable party. And in the only decision which has been found dealing with a suit brought under Section 57 against an official acting for the United States, *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, the Circuit Court of Appeals for the Fourth Circuit squarely held that the United States was an indispensable party to the suit, and that the suit could not be maintained against the officials. In that case the Federal Power Commission had ordered the plaintiff not to build a proposed power dam until it accepted a license tendered by the Commission. The plaintiff brought suit, under Judicial Code, Section 57, in the district in which the dam was to be built, against the members of the Commission, non-residents of that district, alleging that certain provisions of the Federal Water Power Act were unconstitutional. The prayer requested that the Commission's orders be declared void and that the defendants be enjoined from enforcing the Act. The District Court dismissed the

bill on the merits. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with directions to dismiss for want of jurisdiction. It said (67 F. (2d) at 456):

> And this brings us to another and conclusive reason why the suit cannot be sustained on any ground as a suit to remove cloud from title, viz., that no one claiming under the alleged cloud has been made a party to the suit and any relief granted would be entirely nugatory. The defendants are asserting no rights under the orders in question and have no personal interest in them. The interest is in the public represented by the government of the United States. The United States has not been made a party and has not consented to be sued in such a case; and yet it is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit. *Wood* v. *Phillips* (C. C. A. 4th) 50 F. (2d) 714, 717; 5 R. C. L. 669, and cases cited. To grant relief against the defendants here would amount to nothing. It would not be binding upon the United States or even upon the Power Commission.

Certiorari was denied, 291 U. S. 674. Compare *Wood* v. *Phillips*, 50 F. (2d) 714 (C. C. A. 4); *Sanders* v. *Saxton*, 182 N. Y. 477, 75 N. E. 529.

III

It has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation.

With reference to the errors assigned upon the holding of the Court below that the appellees are entitled to the usufruct of certain quantities of the waters of Mud Creek solely upon an alleged appropriation of those quantities of waters by Michel Pablo, and upon their succession to the rights to be acquired,[7] it is appellants' contention that it has never been possible to acquire rights in the waters of the streams of the Flathead Reservation under the doctrine of prior appropriation, and that the claims of appellees must therefore fail in their entirety. This contention is also advanced by the other appellant, the Flathead Irrigation District and is fully presented in its brief filed in this Court (pp. 15–34). In order to save the time of this Court, and to avoid needless duplication, these appellants do not reargue that question, but hereby adopt, and rely upon as their own, the argument upon that question in the brief of the Flathead Irrigation District.

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[7] Nos. 2, 4, 6, 7, and 9 of the United States (R. 344–346); No. 2 of the Secretary of the Interior (R. 347); Nos. 1, 2, 3, 4, 6, and 7 of the defendant Gerharz (R. 347–349); and Nos. 1, 2, 3, and 5 of the individual defendants (R. 350–351).

IV

Even if rights in waters of streams of the Flathead Reservation could have been acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court.

The decree of the District Court awards to the appellees waters sufficient to irrigate their respective tracts of land, not to exceed one inch per acre (R. 225). The tract of the plaintiff contains 160 acres and those of Sterling and Pablo contain 80 acres each. Similarly, the conclusions of law of the District Court recite that the plaintiff is entitled to 160 inches of water per second and Pablo and Sterling to 80 inches each (R. 213, 220).

It is the contention of these appellants that, even if this Court holds that rights in streams of the Flathead Reservation, including waters of Mud Creek could be acquired by appropriation, the record does not support the award to the appellees of as much water as was awarded to them by the District Court. No such amount of water was ever appropriated by Michel Pablo for the lands now owned by the appellees and even if such an amount of water had been so appropriated its use was thereafter in whole or in part abandoned. For more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it adversely to the appellees, and the United States has thereby acquired the right to its use.

As shown *infra*, and as brought out in greater detail in the Brief for the Flathead Irrigation District (pp. 39–43), all the waters of the Flathead Reservation were, before the death of Michel Pablo in 1914, reserved for the Flathead Irrigation Project. The appellees, recognizing that any water rights they assert must antedate that reservation, do not claim any greater quantities of water than Michel Pablo appropriated; they allege merely that the water rights which he acquired for the lands they now own have not been abandoned (R. 76, 143).

A. Michel Pablo did not appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court.

Assignment of Errors No. 6 of the United States:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 345).

Assignment of Errors No. 3 of Henry Gerharz, Project Engineer:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 348).

Assignment of Errors No. 2 of the individual defendants:

> The Court erred in holding that the plaintiff, Agnes McIntire and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 351).

Two witnesses testified for the plaintiff as to the amount of water used, that is, the acreage irrigated, by Michel Pablo: John Ashley, a 77-year-old Indian, and Jean McIntire, the plaintiff's son.

Ashley testified that Michel Pablo irrigated "pretty near all" of three 80 acre tracts—the west eighty of the land now owned by the plaintiff and the eighties now owned by Alex Pablo and A. M. Sterling; that Michel Pablo did not irrigate the east eighty of the land now owned by the plaintiff except for a garden (R. 241).

Jean McIntire, the plaintiff's son, testified that he saw the land now owned by plaintiff in 1907 when he was fourteen years of age; that at that time there were good crops on the land; that crops could not be grown on "the majority of" the land without irrigation; that he did not know the number of acres irrigated in 1907 or the amount of water used (R. 243–244).

Two witnesses likewise testified for Pablo and Sterling as to the acreage irrigated by Michel Pablo: Alex Pablo himself, the son of Michel Pablo, and Andrew Stinger, the partner of Michel Pablo in the cattle business from 1907 or 1908 until the latter's death in 1914.

Alex Pablo testified that Michel Pablo, up until his death, irrigated about 20 acres of his (Alex Pablo's) allotment and about 25 acres of the land now owned by Sterling when he raised hay; that when Michel Pablo grew crops other than hay he did not irrigate (R. 316); that the east forty of his (Alex Pablo's) allotment needs water to raise a good crop (R. 317).

Stinger testified that he was thoroughly familiar with the Pablo ditch; that it was used for the watering of Michel Pablo's stock; that he never saw him irrigate out of the ditch (R. 326).

In addition to these two witnesses, Pablo and Sterling introduced in evidence a certified copy of a notice of water right filed in the office of the clerk and recorder of Missoula County, Montana, in November, 1907. This notice, signed by Michel Pablo and his wife and children, asserted that they had a right to the use of 560 inches of water for domestic and irrigating purposes on described lands, which total 560 acres (R. 319-321). All of the lands for which water rights are sought in the present suit are included in the description except the plaintiff's east eighty.

It is plain that this evidence, even if taken at its face value, does not entitle the plaintiff or the defendants Pablo and Sterling to the amounts of water awarded to them by the District Court.

There is no evidence that the plaintiff's east eighty was irrigated at all, aside from Ashley's testimony that a garden plot was irrigated on it. No water

right for that tract was asserted even in the expansive notice of water right. Accepting Ashley's testimony that "pretty near all" of the plaintiff's west eighty was irrigated, the plaintiff is at most entitled to 80 or 90 inches of water—far short of the 160 inches awarded her by the District Court.

Alex Pablo himself claimed only that his father had—when he grew hay—irrigated about 20 acres of his (Alex Pablo's) allotment (R. 316). While his testimony in this respect differs from that of Ashley, it is evident that Alex Pablo was the better informed of the two, and as an interested party certainly he had no reason to understate the extent of his father's irrigation. Alex Pablo should have no more than the 20 inches of water to which his own testimony entitles him, and not the 80 inches awarded to him by the District Court.

Much the same may be said as to the Sterling eighty. Ashley said that "pretty near all" of it was irrigated by Michel Pablo; Alex Pablo said about 25 acres. The District Court awarded water sufficient to irrigate every inch of it.

Thus, even accepting literally the testimony offered by the appellees, it is plain that the water rights awarded to them by the District Court must be radically scaled down. And that is even plainer when the evidence introduced by the appellants is considered.

When the Flathead Irrigation Project was initiated in 1909, and the waters of the reservation were reserved for the project (as shown *infra*), the Secre-

tary of the Interior determined to recognize all existing water right developments on the Flathead Reservation. Accordingly the Secretary designated a committee to report upon the extent of such developments. This committee, composed of the Superintendent of the Flathead Agency, an assistant engineer of the Reclamation Service, and Alphonse Clairmont, a Flathead Indian selected by the tribal council (R. 272), investigated the status of water right developments on all the lands for which water rights are sought in the present case. Both Michel Pablo and his wife, Agatha Pablo, testified before the committee. A certified copy of their testimony was admitted in evidence (R. 306).

Michel Pablo testified that he irrigated "very little" of the land on his allotment (plaintiff's west eighty); that he used his ditch "for my stock to drink out of and used it on some trees and switched into some gravelly places but not much" (R. 308). He further testified that a map which was shown to him fairly represented the location of the ditches and the irrigated area on his allotment, the allotment of Alex Pablo and on that of Agatha Pablo (now owned by Sterling) (R. 308). A copy of this map is before this Court as Defendants' Exhibit No. 5. Michel Pablo estimated the irrigation on the allotments as "4 or 5 acres where it is gravelly" (R. 308). He testified that most of the soil did not require much irrigation (R. 309).

Agatha Pablo, Michel Pablo's wife, testified that no water was used on her land (now owned by

Sterling); that she let the water run for stock and house use (R. 309).

The committee reported that Michel Pablo had constructed a ditch in 1891 for the purpose of conveying water to portions of his allotment (plaintiff's west eighty); that this ditch "has not been used for irrigation for the past ten years but has been used continuously for domestic and stock purposes; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day for domestic and stock use and that no other water right of any kind is appurtenant to this allotment" (R. 277). The committee similarly reported that the Alex Pablo allotment was entitled to 1,000 gallons per day, and that no other water right was appurtenant to it (R. 282). This report was approved by the Department of the Interior (R. 267).

When the Flathead Irrigation Project was undertaken extensive surveys were made of the reservation, including the lands for which water rights are claimed in this case. The map which is Defendants' Exhibit No. 5 was prepared from one of these surveys (R. 259). That is the same map which Michel Pablo said fairly showed the extent and location of his irrigation. This map shows that in 1910, when the survey was made, there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that 18 acres were poorly irrigated on the Michel Pablo eighty (plaintiff's west eighty) (R. 259). Sperry, the engineer who conducted the survey, testified that

"poorly irrigated" meant "partially irrigated" (R. 259); that when he examined the Pablo ditch in 1910 there was a flow of 38 inches; that the ditch had a capacity of 80 inches; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty) (R. 260).

Later the Commissioner of Indian Affairs appointed a board to survey all the lands of the Flathead Irrigation Project to determine which were irrigable (R. 263). The board found that 67.77 acres of the Michel Pablo allotment (plaintiff's west eighty) were irrigable (R. 251, 263). No classification of the Barnaby tract (plaintiff's east eighty) was made because the board considered it too gravelly and sandy to irrigate and because it was not in the irrigation district (R. 263).

Henry Gerharz testified that he had been on the Barnaby tract and had never seen a ditch across the land nor observed that the land had been plowed (R. 252).

Mayer, a watermaster of the Flathead Irrigation Project, testified that he had examined the Pablo ditch in 1922 and frequently since; that in 1922 the ditch had a capacity of 60 inches; that he had never seen any physical evidence that the ditch had at any time a capacity of 160 inches (R. 311).

As has been shown, the evidence introduced on behalf of the appellees, though it be accepted in its entirety, does not at all support the award by the District Court of water for the irrigation of *every single acre* of their lands. But any doubt on that

score is wholly resolved by the evidence just summarized, which is manifestly of a trustworthy character.

That evidence is conclusive that there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty) in 1910, and that there had not been any irrigation on it for many years before that. It is highly doubtful if that tract is even irrigable. As to the Michel Pablo tract (plaintiff's west eighty), and the tracts now owned by Alex Pablo and A. M. Sterling, the testimony of Michel Pablo, of Agatha Pablo, his wife, and of the government surveyors agrees that only a few acres were irrigated, or semi-irrigated, by Michel Pablo. And, it will be recalled, that is about what Alex Pablo testified himself.

B. If Michel Pablo did appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court, the use of that much water upon those lands was thereafter abandoned, and for more than the statutory prescriptive period of ten years the United States has used those waters, or part of them, adversely to the appellees.

Assignment of Errors No. 8 of the United States:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 346).

Assignment of Errors No. 5 of Henry Gerharz, Project Engineer:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 349).

Assignment of Errors No. 4 of the individual defendants:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 351).

We have sought to show that Michel Pablo, through whom the appellees claim, did not use on the lands now owned by them waters even approaching in amount the quantity awarded to the appellees by the District Court. We will now seek to show that even if Michel Pablo did use such quantities of water, that their use on the lands now owned by the appellees was thereafter, in whole or in part, abandoned, and that for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and

claimed those waters, in whole, or in part, adversely to the appellees.[8]

Jean McIntire, the plaintiff's son, testified that Moody, then Project Engineer of the Flathead Irrigation Project, told his father, when the latter first acquired the land in 1924, that the government did not recognize that he had any water right for irrigation, but only for stock and domestic purposes (R. 243–244); that since the McIntires acquired the land they have irrigated, for grazing purposes, "approximately 40 acres" of their east eighty (the Lizette Barnaby allotment), and "possibly 20 acres" of their west eighty (the Michel Pablo allotment) (R. 244–245); that the government, by means of the Pablo Feeder Canal, crossing Mud Creek, had cut off the water of Mud Creek and that the only water in Mud Creek during the irrigation season was water that seeped out of or underneath the Feeder

[8] "There seems to be no question, under the authorities, but that the right to the use of water may be acquired by prescription as against a private person, and that the lapse of time necessary to give such right is the period limited by the statute of limitations for entry upon lands." *State* v. *Quantic*, 37 Mont. 32, 54, 94 Pac. 491. Ten years is the period of limitations for the recovery of lands under the Montana statutes. Revised Codes of Montana (1935), § § 9015–9018.

Revised Codes of Montana (1935), § 7094, provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

Canal and water from springs (R. 336–337); that all the irrigation that had been done on the plaintiff's land was with this seepage and spring water (R. 338); that "There was no water available to irrigate these two eighties from the Pablo Ditch" (R. 338); that "There was no water in the ditch because the Government takes all the water, with the exception of that which comes out of the springs" (R. 341).

Tom Moore, testifying for Alex Pablo and A. M. Sterling, stated that he had farmed all of the tracts for which water rights are sought in this case except the Barnaby tract (plaintiff's east eighty); that he did not irrigate much of the Michel Pablo land (plaintiff's west eighty) when he was farming it; that he irrigated about 10 acres of the Alex Pablo land when he was farming it; that all of that land could be irrigated; that he had farmed the Agatha Pablo (Sterling) land since 1925, and had irrigated approximately twenty to twenty-five acres; that all but three acres of that land could be irrigated (R. 324–325).

Numerous witnesses testified for the appellants that since 1913 all of the waters of Mud Creek have been picked up by the Flathead Irrigation Project by means of the Pablo Feeder Canal and applied to irrigation on the lands of the project, except such quantities of water as were released to satisfy private water rights recognized by the government, such as the 1,000 gallons of water daily which the government concedes to the plaintiff and to Alex Pablo.

Stockton, an engineer, testified that in 1907 he drew up plans for the project for taking up all the

available water in Mud Creek and other streams on the reservation; that in 1908 he was informed that the Pablo Feeder Canal was planned to perform that function (R. 256).

Sperry, also an engineer, testified that in 1910 that part of the Pablo Feeder Canal which picks up the waters of Mud Creek was constructed (R. 258); that since 1913 all of the waters of Mud Creek have been used on land lying under the Flathead Irrigation Project except waters let go by to supply private water rights recognized by the United States (R. 259); that all of the available water is used (R. 259–260); that in 1929 or 1930 he was on these lands classifying the irrigable acreage; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that part of the Michel Pablo allotment was sub-irrigated and would not require any water (R. 260); that irrigation of new lands with the waters of Mud Creek through the Feeder Canal began in 1919 (R. 261).

Henry Gerharz, the Project Engineer, testified that 1,000 gallons of water a day had been delivered to Michel Pablo; that that was all he was recognized as entitled to but that he had seen more water than that on the place many times (R. 295).

Mayer, a watermaster of the Flathead Irrigation District, testified that he has visited the plaintiff's lands many times since 1922; that he has crossed the Pablo ditch several times a week during the irrigation season since 1922; that there has been very little irrigation on the land since 1922; that three years ago

(1933) there were a few little furrows plowed out from the Ditch on the plaintiff's west eighty; that two years ago there was another such ditch; that since 1922 the water in the Pablo Ditch had been used more for stock than anything else; that in 1922 the Ditch had a capacity of about 60 inches; that the Ditch was in worse shape now; that he had never seen any crops irrigated on any of the plaintiff's lands with water from the Ditch (R. 310–312).

Dellevo, one of the Commissioners of the Flathead Irrigation District, testified that the water supply of the district had been insufficient since the early twenties (R. 329); that the waters of Mud Creek have been directed into the government project system ever since the construction of the Pablo Feeder Canal (R. 330); that there is an acute shortage of water in the area in which the waters of Mud Creek are used (R. 332).

The evidence has been stated at this length to show how far short it falls of supporting the Decree of the District Court. If there was ever any substantial amount of irrigation on these lands, in the days of Michel Pablo, which, it is submitted, there was not, it is clear that such irrigation was abandoned almost in toto many years ago. All of the testimony agrees that only slight and spasmodic irrigation has occurred on these lands over the last twenty-five years. Possibly the lands are entitled to some water in excess of the 1,000 gallons daily. But clearly they are not entitled to any such quantities of water as were awarded to them by the District Court.

We wish further to call to the Court's attention the fact that the plaintiff's west eighty (the Michel Pablo tract) was included in the Flathead Irrigation District, upon the creation of the district in 1926, and has been included ever since (R. 270–271; Defendants' Exhibit No. 16, p. 6; R. 338). Although the plaintiff could have objected to the inclusion of her lands on the ground that water rights were already appurtenant thereto (Montana Rev. Code (1935), § 7169), she did not do so, nor has she ever sought by legal proceedings to have her land excluded from the district. The plaintiff has been paying the charges of the irrigation district, and these payments were not paid under protest (R. 339).

The decisions are clear that the plaintiff lost the right to object to the inclusion of her land in the district on the ground that water rights were already appurtenant thereto by her failure to urge that claim in the court proceedings which attended the creation of the district and the inclusion of her land therein. *Tomich* v. *Union Trust Co.*, 31 F. (2d) 515 (C. C. A. 9). See also *Judith Basin Land Co.* v. *Fergus County, Montana*, 50 F. (2d) 792, 793 (C. C. A. 9).

The plaintiff must, therefore, continue to pay all lawful charges assessed by the irrigation district upon her lands which are in the district, and the plaintiff is entitled, as the district has always recognized (R. 263, 339), to be furnished by the district with water for the irrigation of those lands whenever she so requests. The plaintiff thus has a water right, under

the irrigation district, for the irrigable acreage of her west eighty acres. And the decree of the District Court awards to her another and an independent right to water sufficient for the irrigation of her entire tract. In this respect, it is submitted, the decree of the District Court plainly violates the cardinal principle of water law that beneficial use limits the extent of a water right. For obviously the plaintiff cannot put to beneficial use on her west eighty double the quantity of water necessary for its irrigation.

CONCLUSION

The decree below departs from the well settled and applicable rule that the United States may not be sued without its consent. For that and the other foregoing reasons it is submitted that the decree of the trial court should be reversed with directions to dismiss the bill of complaint.

Respectfully submitted.

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No. 8797

United States
Circuit Court of Appeals

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

Brief of Appellee
AGNES McINTIRE

Elmer E. Hershey,
Attorney for Appellee.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed ....

Clerk ....

FILED

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BRIEF FOR AGNES McINTIRE, PLAINTIFF AND APPELLEE

STATEMENT OF THE CASE

July 16, 1855 (12 Stat., 975), a treaty was made by the United States of America, one of the defendants herein, with the chiefs, headmen and delegates of the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians on behalf and acting for said confederated tribes, whereby said confederated tribes ceded, relinquished, and conveyed to the United States all their rights, title, and interest in and to the country occupied or claimed by them, and particularly described.

There was reserved from the lands ceded, for the use and occupation of the confederated tribes entering into said Treaty, certain lands which were thereafter to be known as the Flathead Indian Reservation, with certain exclusive rights reserved to said Indians.

The Indians of said confederated tribes were encouraged to abandon their habits as a nomadic and uncivilized people and become self-supporting, agricultural, and civilized people, with permanent homes on lands thereafterwards allotted to them in severalty.

April 23, 1904 (33 Stat., 302), an Act of Congress provided for the survey and allottment of lands then embraced within the limits of the Flathead Indian Reservation.

On June 21, 1906 (34 Stat., 354), there was added by Congress of the United States to the provisions of the Act approved April 23, 1904, providing for the allott-

ment of said lands and the opening of the same for sale and disposal, Sections 17, 18, 19, and 20, Section 19 being as follows:

> "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."

Michel Pablo, an Indian, took possession of a large tract of land, and prior to 1891 (R 242) dug and constructed a large ditch from Mud Creek, a mile long, three feet wide at the bottom and about two fee deep (R 240), and carried the water to the lands in his possession, which he had fenced, and used the same in irrigating said lands and for domestic purposes.

Eighty (80) acres of this land, covered by said ditch, was allotted to Lizette Barnaby and 80 acres was allotted to Michel Pablo, and trust patents were issued to these parties for the lands so allotted, in 1908.

On October 5, 1916, a fee patent was issued to Agatha Pablo for the lands allotted to Lizette Barnaby (R 234), and on January 25, 1918, a fee patent was issued to Agatha Pablo to the land allotted to Michel Pablo (R 232).

Thereafter, by deeds, duly given, plaintiff became the owner of these lands (R 236-237-238-239).

Michel Pablo died in 1914 (R 316).

These lands are arid lands, and require water for the

proper irrigation of the same, and in order to raise crops.

August 26, 1926, the Flathead Irrigation District was created, under certain Acts of Congress (R 123-124).

About 1914, what is known as the Pablo Feeder Canal was built (R 264).

In building this Canal,

> "instructions were to find the best way to use all the water available on that project without regard to any of the rights that might have existed." (R 257).

The Pablo Feeder Canal crosses Mud Creek above the lands owned by plaintiff (R 257) and carries the waters to irrigate lands that never had any water on them before the Canal was built, and a great portion of these lands were unallotted lands, and were entered by white settlers under the Homestead Law (R 327).

No water from the Flathead Irrigation Project System has been used upon the lands of plaintiff, and no ditches have ever been dug making the water available for the irrigation of these lands (R 263-264).

The United States Reclamation Service was in charge of the Flathead Irrigation Project up to 1924, when the same was turned over to the control of the Indian Service (R 264).

In 1924, plaintiff obtained possession of the lands now owned by her, and the same has been irrigated to some extent each year since (R 244-336-337).

The west eighty is within the irrigation district, but the east or Barnaby eighty is not in the irrigation district (R 264).

Plaintiff, for a time, was not charged with any water from the Reclamation Service, but since the defendant Gerharz came in as Project Manager, plaintiff has been paying the water tax from the Reclamation Service, which water has never been furnished, in order to pay her property tax in the County and State (R 339), under the provisions of Sec. 2172.1, R. C. of Montana.

This action was commenced February 13, 1934 (R 9) and was finally tried on the second Amended Complaint, filed May 16, 1936, with the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others, defendants.

On November 23, 1936, 19 members of the Flathead Tribe of Indians, and wards of the United States of America, defendants above named, through United States District Attorney, for the District of Montana, filed their answer to the Amended Bill of Complaint (R 118), and the other 18 defendants made no appearance.

On September 15, 1937, the decision of the Court was duly filed in said case (R 159 to 176).

Findings of Fact and Conclusions of Law were adopted and signed by the Court on November 6, 1937 (R 209 to 214).

On November 17, 1937, a Decree in this case was given by the Court and filed (R 225-226).

ARGUMENT

It must be remembered that by the treaty of July 16, 1855, the United States granted nothing to the Indians; the Indians reserved what was already theirs.

As said by the Court in Winters vs. United States 143 Fed. 740, 749

> "In conclusion, we are of the opinion that the Court below did not err in holding that 'When the Indians made the treaty to grant rights to the United States, they reserved the rights to use the waters of Milk River at least to an extent necessary to irrigate their lands.' The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees."

And again we find the Court holding in Skeem vs. United States 273 Fed. 93, 95

> "The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians. United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662, 49 L. ed. 1089; Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 350."

Judge Cavanah, District Judge said in United States vs. Hibner 27 Fed. (2d) 909, 911

> "When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one from them to the United States, and all rights not specifically granted were reserved to them. Winters v. U.S. and U.S. v. Winans, supra."

Further, Judge Cavanah said:

> "The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as

> this view is sustained in the case of Skeem v. U.S., supra, and such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians."

In building the Pablo Feeder Canal, the provisions of the Act of Congress under which it was constructed were violated at the beginning.

> "Instructions were to find the best way to use all the water available on that project, without regard to any of the rights that might have existed." (R 257)

Also, in building said Pablo Feeder Canal, Section 19, amending the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, approved April 23, 1904, (33 Stat., 302), was disregarded.

This Amendment was approved June 21, 1906 (34 Stat., 354) and is as follows:

> "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."

Michel Pablo was dead when the Pablo Feeder Canal was constructed.

VESTED RIGHTS ACQUIRED BY PLAINTIFF

The ditch carrying water to the lands of Michel Pablo was dug and the water used on the lands in his pos-

session in the irrigation of the same long prior to 1908 when the Trust Patents were issued to said Indians for the lands now owned by plaintiff.

The Act of July 26, 1866 (14 Stat., 253) provides as follows:

> "Sec. 2339. Whenever priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowleged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same:***

This is Section 2339 of the United States Compiled Statutes, 1901.

Section 2340 following, is as follows:

> "Sec. 2340. All patents granted, pro-emption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."

The fee patents of October 5, 1916 and January 25, 1918, gave and granted the lands,

> "together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said claimant and to the heirs and assigns of said claimant forever." (R 232-234).

When the patents issued in this case, they took effect as of the date when the right to the land was first initiated under the doctrine of relation.

U.S. vs. Hibner, supra, at page 912.

In the case of Hooks, et al, v. Kennard, et al, 114 Pac. on page 746, the Court said:

> "This Court has held in several cases that the selection of and the filing upon an allottment of land was the inception and beginning of the title of the allottees or his heirs, and that, when the patent which is only the evidence of title is issued, it relates back to the inception of the title. De Graffenreid v. Iowa Land & T. Co., 20 Okl. 687, 95 Pac. 624; Godfrey v. Iowa Land & Title Co., 21 Okl. 293, 95 Pac. 792; Irving, et al, v. Diamond, 23 Okl. 325, 100 Pac. 557."

To the same effect is the case of Wood, County Treasurer, et al, v. Gleason, et al, 140 Pac. ~~481~~. 418

Plaintiff became the owner of the right to use the waters of Mud Creek for the irrigation of the 160 acres described in her Complaint. Beneficial use is the basis, the measure, and the limit of the right. This right is a vested property right, and dates from a time prior to 1891.

If there were any other owners to the right to use the waters of Mud Creek for a beneficial purpose, such rights would be a joint right with plaintiff, and the users thereof would be tenants in common, or joint tenants in the use of said water, and the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in order that any rights of said defendants, adverse to the claim of plaintiff, might be established, fixed, and determined.

Alex Pablo and A. M. Sterling were the *only defend-*

ants who set forth and established any claim to the beneficial use of the waters of Mud Creek.

The United States of America must either claim *with* plaintiff as a joint owner or joint tenant in the beneficial use of the waters of Mud Creek or it has no interest in said waters.

> "Federal government's diversion, storage and distribution of water, at Reclamation Project, pursuant to Reclamation Act and contracts with landowners *held* not to have vested in the United States ownership of water rights which remained vested in owners as appurtenant to land wholly distinct from property of government in irrigation work." Ickes, Secretary of Interior, v. Fox et al, 57 Supreme Court Reporter, page 412.

If the United States of America is not the owner, such as would make it a joint tenant or tenant in common, then the United States is not necessarily a party, and as said in said case, Ickes v. Fox, supra, p. 417,

> "the suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of Interior from enforcing an Order, the wrongful effect of which will be to deprive respondents of vested property rights, not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessor in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this Court."

And citing many authorities, and continuing, said:

> "The recognized rule is made clear by what is said in the Simpson case: 'The suit rests upon the charge of abuse of power.' "

It is clearly shown, by the evidence offered, that

long prior to the passage of the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, and long prior to the commencement of any work of the Flathead Irrigation Project, and long prior to the creation of the Flathead Irrigation District, the waters of Mud Creek were being used upon land of plaintiff for irrigation purposes, and in 1908, when the lands were allotted to the Indian claimants, if not before, said water became appurtenant to the lands so allotted.

As was said by the Court in Choate vs. Trapp. Vol. 32, Supreme Court Reporter, at page 568,

> "there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. Reichart v. Felps, 6 Wall. 160 18 L. ed. 849. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the Curtis act which are now protected by the Constitution of the United States."

Also the Court in this case, on page 570, said,

> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States."

It would seem that Congress, in amending the Act providing for the allottment of lands upon the Flathead Indian Reservation, had in mind this provision

when it recognized that some of the Indians might have been using some of the waters on the Flathead Indian Reservation, when it said:

> "Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, *** 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."

This amendment was made in 1906, and Michel Pablo had built his ditch prior to 1891, and had used the water continuously in said ditch when the provisions of this amendment, opening the Reservation for allottment and sale, was passed by Congress.

It is idle now to say that the Indians on the Flathead Indian Reservation did not have the right to the use of water for the irrigation of their lands, and that no Indian had the right to appropriate any water for this purpose.

Plaintiff has upon her lands, a ditch dug by Michel Pablo, an Indian, some time prior to 1891, through which he was carrying water to the lands in his possession, and using the same for irrigation purposes.

The Court found that this use, for a beneficial purpose, should not exceed one inch to the acre, and that plaintiff was the owner of the right to the beneficial use of the water by reason of this appropriation.

Plaintiff should not be deprived of the use of said ditch and the water flowing therein under the provi-

sions of said Act, approved April 23, 1904, as amended by said Sec. 19.

Defendants *claimed* the *ownership of some* right so that these waters could be used by them.

The United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in this action in order that if they had any right to the use of the waters of Mud Creek for a beneficial purpose, such right could be fixed, established and determined, and the waters divided between those entitled thereto.

Two of the defendants, only, showed any rights to the beneficial use of said water.

Defendants other than these two, made no answer, by which any water of Mud Creek could be given to them.

It was said in the North Side Canal Company vs. Twin Falls Canal Company, 12 F. (2d) 311:

> "Suit to establish right to the use of water as prior appropriator, in so far as determination of amount of water each appropriator is entitled to, is one for partition, within Judicial Code, 24 (Comp. St. 991 subd. 25) notwithstanding determination of rights of party to priority is in nature of suit to quiet title."

Title 28, Sec. 118 of U.S.C.A. provides that:

> "When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the District where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found with-

in the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found ***."

Under this Section, said Title 28, in Note 41, on page 157, we find the statement:

> "A suit for partition of land comes within the class of cases specified in this section." Greeley vs. Lowe, 15 Sup. Ct. Rep. 24.
> "A suit for partition is a local action, within this section, and in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined." German Savings Soc. vs. Tull 136 F 1.

RIGHTS SETTLED IN ONE ACTION

Sec. 1705 R. C. of Mont. 1935, provides:

In any action hereafter commenced for the protection of rights acquired to water under the laws of this State, the plaintiff may make any and all persons who have diverted water from the same stream or source, parties to such action, and the Court may in one Judgment settle the relative priorities and rights of all parties to such action.

Turning to the Brief of Appellant's, Flathead Irrigation District, we find the statement on page 5:

> "THE ONLY QUESTION WHICH THIS APPELLANT SEEKS TO REVIEW IS WHETHER THE PLAINTIFF AND DEFENDANTS, PABLO AND STERLING, ARE ENTITLED TO WATER FROM MUD CREEK ASIDE

FROM THE RIGHTS OF THE FLATHEAD IRRIGATION PROJECT AND IF SO, THE NATURE OF THESE RIGHTS."

This statement is made again on page 13 of said Brief.

Said Brief also states that it has never been possible to create water rights with a date of priority on the Flathead Indian Reservation under the doctrine of prior appropriation.

This being true, the allegations made by defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in the fourth affirmative defense (R 100), and the allegations in the answer of nineteen Indians, members of the Flathead Tribe of Indians, in the fourth affirmative defense, are not true (R 116) and the Act of the Secretary of Interior, on November 25, 1921 (R 115) was without authority in granting valid and subsisting water rights from Mud Creek and its tributaries to the lands of the following defendants (R 115-116). Eleven (11) defendants are given water rights (R 116).

Evidently counsel for the Flathead Irrigation District do not agree with the counsel representing the other defendants (except Alex Pablo and A. M. Sterling), and all steps taken by the Secretary of Interior in order to comply with the provisions of the Acts of Congress of June 21, 1906, the saving clause, and of May 29, 1908 (R 115), were void and of no effect, and the order, made on November 25, 1921, where eleven defendants, out of nineteen answering defendants, were

given certain water rights (R 116), has no binding force or effect. (A conclusion with which we hardly agree, in the main.)

The Secretary of Interior could not take away from the Indians any vested rights. The giving of *acre-feet* was not authorized by any law in the State of Montana. *Acre-feet* has nothing to do with the corpus of the water. In Montana, and in the Acts of authorizing the reclamation of lands, "beneficial use is but the basis, the measure and the limit of the right," and in all these cases (R 116) the Indians mentioned would have a right to sufficient water to irrigate their lands, beneficial use being the measure of right. U.S. vs. Hibner, at page 912.

The argument on page 31 of said Brief, states:

> "It is clear from this Act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality, the Secretary was authorized to make rules and regulations."

This being true, the Secretary of Interior, in attempting to fix and determine the private water rights on the Flathead Indian Reservation, wherein it was found that a large number of Indians on many different streams on said reservation were entitled to different amounts of water, was without authority to so hold, and it was contrary to the intent of Congress.

On page 12 of said Brief, the admission is made that the records show certain acts of the Secretary of Interior recognizing private water rights on the reservation.

If there are private water rights on the reservation,

the private water rights of plaintiff and the private water rights of two of the answering defendants are just as sacred as others, and there is no need of pursuing this question further.

The private water rights of others which counsel recognized, is because some rights were obtained, and had become vested prior to the passage of the Act of April 23, 1904, and its amendments, opening said reservation to allotment and sale of the unallotted lands.

Again in said Brief, the statement was made:

> "THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS."

Turning to the Treaty made the 16th day of July, 1855, we find that it recognizes that some of these Indians may have made:

> "substantial improvements heretofore such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this Treaty."

Such improvement shall be valued under the direction of the President of the United States, and

> "payment made therefor in money, or improvements of an equal value be made for said Indians upon the reservation: and no Indian shall be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid."

This is part of Article II.

Article IV of said Treaty provides for the payment of money for certain years,

"To be expended under the direction of the President in providing for their removal to the reservation, plowing up and fencing farms, building houses for them, and for such other objects as he may deem necessary."

Article V provides for the education of the Indian and furnishing them instructors in agricultural pursuits .

The plaintiff's Complaint alleges (R 74):

"The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty."

This allegation was admitted in the Answer of defendant Henry Gerharz (R 26) to the original Complaint filed.

It was also admitted in the Answer to the Amended Complaint filed by this defendant (R 90).

The Answer filed on behalf of the United States of America (R 23-24), admits nothing, and alleges nothing by which it might have any affirmative relief. Its Answer to the Amended Bill of Complaint (R 87-88) is the same.

The Answer of the nineteen Indians *admits* the said allegations contained in said Amended Complaint (R 106).

The Answer of defendant Flathead Irrigation District in effect denies this allegation.

HISTORY OF THE CONFEDERATED TRIBE OF INDIANS.

It must be born in mind that the Flathead Tribe, Kootenay Tribe and Upper Pend d'Oreilles constituted three separate tribes, and by the Treaty was known as the Flathead Nation.

The Flathead Tribe only was occupying the Bitter Root Valley and one of the objections that Chief Victor had was that he did not wish his people to be mixed up with the other tribes, and for this reason the provisions of the Treaty were made as to their remaining in the Bitter Root Valley.

These Indians in the Bitter Root Valley were many of them farmers, and in order to induce them to leave the Bitter Root Valley, and settle upon the Flathead Indian Reservation, Article XI was made a part of the agreement, and if,

> "in the judgment of the President, the Bitter Root Valley shall prove to be better adapted to the wants of the Flathead Tribe, than the General Reservation, then such portions of it as may be necessary shall be set apart as a separate Reservation for the said tribe."

Following this was the Garfield Agreement, found in Report of Commissioner of Indian Affairs, 1872, issued by Department of Interior, and the Act of June 5, 1872 (17 Stat., 226) opening the lands in the Bitter Root Valley for sale.

The Agent of the Flathead Agency on August 5, 1893, made a report which he designates as his Seventeenth Annual Report, and among other things said:

> "Nearly every head of a family on this reservation occupied definite, separate, though unallotted tracts, and their fences and boundary marks are generally respected. They live in houses, and a majority of their homes present a thrifty, farmlike appearance."

This report is plaintiff's Exhibit II in the case of J. C. Moody, etc., Appellant, Harry C. Smith, Appellee, Case No. 6784, (R 218 in said case) and we ask, that, as a Public Document, it be considered in this case.

In this case, prior to 1891, the witness, John Ashley (R 239), testified about the condition of the lands now owned by plaintiff, and in 1907 the witness, Jean McIntire, tells about this land of plaintiff being a show place on the reservation. There was a wonderful crop on the land of alsack and timothy (R 243).

This land was all fenced by Michel Pablo.

Can it now be said that these Indians had no right to occupy the lands fenced and cultivated by them, and water appropriated by them through ditches built at great expense, did not give them any vested rights? Under the doctrine of relations, the rights to the use of this water, the right to the use of these lands fenced and occupied, and the right to the homes built upon this land, would all take effect as of the date when first built.

As to the claims made on behalf of the Flathead Irrigation District, that the United States was the owner of the land and water on the Flathead Indian Reserva-

tion, we most respectfully call attention to the Act of April 23, 1904.

First we find Sec. 2 provides: "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 allottments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenays, Upper Pend d'Oreilles, 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 Kalispell Indians now on the reservation, under the provisions of the allotment laws of the United States."

Then follows the disposal under the general provisions of the Homestead and other laws of the unallotted lands.

Then follows how the land shall be opened to settlement, the allotted lands being only a small part of the Flathead Indian Reservation.

Then follows who shall be entitled to enter these lands, and how the payments shall be made. The right is given to commute entries under the Homestead Law. Much land was given to the various organizations theretofore established on the Reservation.

At the end of five years, should there be any remaining and undisposed lands, they were to be sold at public auction.

Then follows provisions for the payment of lands

reserved, and then follows Section 16, which is as follows:

> "Sec. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts, mentioned in section twelve, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, 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."

Many amendments were thereafter made and as stated June 21, 1906, Sec. 17, 18, 19 and 20 were added, Sec. 19 containing provisions to the effect that nothing in the Act should be construed to deprive any of said Indians of the use of water appropriated and used by them for the necessary irrigation of their lands.

This provision is meaningless and of no effect, according to the Brief of the Flathead Irrigation District.

The lands of plaintiff were settled upon prior to 1891, and an allottment was approved to plaintiff's predecessors in 1908. The ditch was there and water was flowing in it, and had been flowing in it since prior to *1891*.

August 26, *1926,* the Flathead Irrigation District was organized. No ditch was ever dug to the lands of plaintiff and no water ever furnished her by the Flathead Irrigation Dsitrict. In no way were any of her

rights purchased, and yet without the payment of any sum and without the purchase of anything, this defendant now claims to have the right to the use of this water flowing in Mud Creek to the exclusion of plaintiff and claims that the Flathead Irrigation Project has a right to maintain a dam in Mud Creek so that this defendant may store water in the Pablo reservoir at all times, and entirely deprive this plaintiff of any such water, at times when she needs it and can use it for a beneficial purpose.

In the answer of defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in his fifth affirmative defense, the claim is made that the United States, through its Supervising Engineer of the Flathead Reclamation Project, duly authorized by the Secretary of Interior, in that behalf, to make the following appropriation of the waters of Mud Creek and its tributaries.

Then follows seven different appropriations of the waters of Mud Creek, running from 20 cubic feet per second of time to 200 cubic feet of water per second of time, five dated January 28, 1910, one dated April 4, 1913, and one April 7, 1913, and the book and page where recorded is given, in Flathead County and in Missoula County (R 102).

These appropriations made by the United States were made under the statute of 1905 (Laws of 1905, Ch. 44) which provides:

> "When the government of the United States desires to acquire the right to the use of waters flow-

> ing in natural streams in Montana, it must proceed as an individual to make an appropriation in compliance with the laws of the state. See Mettler vs. Ames Realty Co., 61 Mont. 152."

In making these appropriations, the United States does so as an individual, and not as a sovereign, and it can be joined in suits to adjudicate the water appropriated the same as any other party, and the claim made by counsel, in the Brief of Appellant, Flathead Irrigation District on page 21:

> "WE DO NOT CONTEND THAT THE UNITED STATES, AS A SOVEREIGN, HELD UNTO ITSELF THIS TITLE, BUT WE DO CLAIM THAT THE UNITED STATES, AS GUARDIAN OF THE INDIANS, HELD THIS TITLE AFTER THE EXECUTION OF THE TREATY."

may be correct, but in such a case, it is not immune from suit.

As to the Brief filed on behalf of the United States of America and other defendants, we find quite a number of apparent errors.

First, eighteen parties named in the Complaint filed *no* answer, and are *not* represented in this appeal.

It would appear in this regard that nineteen individual Indians are claiming some priorities to the waters of Mud Creek, and that eighteen defendants named are not claiming anything.

As to them, their default was duly entered prior to the trial of this action.

On page 12 and page 13 of said Brief, five questions were presented.

Answering the first question:

Many cases hold with the North Side Canal Company vs. Twin Falls Canal Company, set forth on page 9, supra:

> "Suits to establish right to the use of water as prior appropriators, in so far as determination of amount of water each appropriator is entitled to, is one for partition."

In Frost, et al, vs. Alturas Water Company, 81 Pac. 996, the Court said:

> "It is claimed that these provisions are sufficiently broad to cover a case of joinder such as the one under consideration. It has been frequently held that the appropriators and users of water from the same stream where each owned his separate land and right, could not join in an action against other appropriators and users of water from the same stream for the recovery of damages for an obstruction of their rights or an unlawful diversion of the water to their damage or prejudice; and it has been held by the same authorities that such parties had sufficient common interest that would justify them in uniting as joint plaintiffs in a suit to enjoin a continuation and repetition of such unlawful acts. Churchill v. Lauer (Cal.) 24 Pac. 107; Ronnow v. Delmue (Nev.) 41 Pac. 1074; Foreman v. Boyle (Cal.) 26 Pac. 94; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Miller v. Highland Ditch Co. (Cal.) 25 Pac. 550; Bliss on Code Pleading, 76; Kinney on Irrigation 327. See also Kennedy v. Scovil, 12 Conn. 317; May v. Parker, 12 Pick. (Mass.) 34, 22 Am. Dec. 393. The principle upon which these two distinct holdings is based seems to us clear and obvious. Farnam on Water and Water Rights, vol. 3 687b says: "The relation of prior and subsequent appropriators of the waters of a stream is

> that of *tenants in common,* the respective rights of whom a court of equity has the power to ascertain and determine, and to fix the times at which each may have the use of the water." This text appears to find support in Becker v. Marble Creek Irrigation Company (Utah) 49 Pac. 892; Frey v. Lowden (Cal.) 11 Pac. 838."

In the case of Becker vs. Marble Creek Irrigation Company, supra, at page 893, the Court said:

> "Their relation to each other would be that of tenants in common respecting the waters of the stream, and a Court of Equity has power to ascertain and determine their respective rights as to the waters therein flowing. Irrigation Company vs. Moyle 4 (Utah) 327, 9 Pac. 867; Frey vs. Lowden 70 (Cal.) 55, 11 Pac. 838; Combs vs. Slayton 19 (Or.) 99, 26 Pac. 661."

In the case of Frey et al., vs. Lowden et al., supra, the Court said:

> "Both plaintiffs and defendants derived their rights from appropriation under the statute law of the state, and, under the law, they, in the enjoyment of that right, became and were, tenants in common in the use of the flow of the stream, and entitled to appropriate from it, to the extent of their rights, in the order of time at which they had been acquired."

Section 7105, R. C. of Mont. 1935 provides that water rights be settled in one action, and the making of all persons, who have diverted waters from the same stream or source, parties to such action.

Undoubtedly all of the parties using water out of Mud Creek are joint tenants, and one action such as this can be brought, making all parties in such action. If the United States is claiming rights as a sovereign,

it can be made a defendant under Sec. 24 of the Judicial Code, supra, and if it is claiming as an individual, under certain appropriations made (R 102), then it is a proper party defendant, without reference to said Act of Congress, consenting to be sued, where the United States is a joint tenant.

Answering the second question:

It would appear that the United States is *not* an indispensible party to this action, if it does not claim, under the appropriations made, as set forth on page 102 of the Record.

See Ickes, Secretary of Interior, vs. Fox, et al., set forth on page 7 of this Brief.

Also see United States vs. Power, 94 F (2d) 783.

Answering the third question:

Private water rights have been recognized throughout the Flathead Reservation to various Indians who had acquired vested rights to the use of water prior to the opening of said reservation to allottment and sale.

Answering the fourth question:

Without dispute, the evidence discloses that the ditch by which the appropriation was made was of sufficient carrying capacity to carry the water appropriated and that said water was used for a beneficial purpose.

Answering the fifth question:

Sec. 7094, R. C. of Mont. 1935 states:

"APPROPRIATION MUST BE FOR A USEFUL PURPOSE—ABANDONMENT.

> The appropriation must be for some useful or beneficial purpose, and when the appropriator or

his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

"ESSENTIAL OF ABANDONMENT

Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use—neither alone being sufficient to bring about its abandonment."

Thomas, et al., v. Ball et al., 66 M 161, 166, 213 P. 597.

"NO LAND QUALIFICATIONS NECESSARY FOR APPROPRIATION.

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes.
Toohey vs. Campbell, 24 M 13, 17, 60 P 396.
Smith v. Denniff, 24 M 20, 27, 60 P 398.
Bailey v. Tintinger, 45 M 154, 175, 122 P 575."

In discussing this case, it must be remembered that the Act of May 29, 1908 (35 Stat., 448) was passed for the purpose of giving water to the various homesteaders and purchasers of unallotted land and provisions were made whereby the entryman of lands to be irrigated might pay for the construction, operation and maintenance of ditches used in a system of irrigation, and such water rights were to be *free to Indians,* the Indian to pay only for operation and maintenance.

The waters of Mud Creek were carried in the Pablo Feeder Canal to the Pablo Reservoir and a *large majority* of the lands to be irrigated out of this reservoir

were never allotted to Indians, but were sold under the Act opening said Reservation, and have no water rights except the surplus water after the Indian allottee is fully satisfied (R 328-239-330).

> "The land was settled up with a lot of dry land farmers." (R 329).

The Decree in this case (R 225), enjoins the Project Manager from interfering with the rights of the plaintiff, and from damming up or maintaining any dam on Mud Creek so that said water be diverted or turned from the main channel of Mud Creek in a way that those who have established their water rights would be deprived of the water necessary and required for the proper irrigation of their lands, which water is the private property of said parties, and appurtenant to their lands.

We respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,
ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff and
Appellee, Agnes McIntire.

No. 8797

United States Circuit Court of Appeals

for the Ninth Circuit 10

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gertion Project, et al.,
tion Projec, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

SUPPLEMENTAL

Brief of Appellant

FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allen K. Smith,
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed ....
Clerk ....

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JAN ... 19..
PAUL P. O'BRIEN

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Upon Appeals from the District Court of the United States for the District of Montana.

SUPPLEMENTAL BRIEF OF APPELLANT, FLATHEAD IRRIGATION DISTRICT

Because the decision of the Supreme Court in United States vs. Powers et al, decided January 9, 1939, confirms the position taken by this appellant in the oral argument, because many months have elapsed since the hearing, and because the original brief does not fully disclose that position, counsel wish to reiterate briefly the contentions made on oral argument at the hearing of this cause and to point out the language of the Supreme Court which now gives new support to those contentions.

We therefore ask leave to file this supplemental brief.

The trial court and the respondents both proceeded upon the theory that Section 19 of the Act of Congress of June 21, 1906, (34 Stat. L. 354) authorized the private appropriation of waters. We pointed out on pages 31 to 34 of our original brief that any decree which gives to one Indian a definite amount of water with a definite priority as does the decree in this case, is a nullification of Section 7 of the Act of 1887. Such a decree does not provide for the "just and equal distribution" required by the 1887 Act;—the decree, *ex vi termini* requires an *unequal* distribution.

This section of the Act of 1887 formed the basis of the decision of the Supreme Court in the Powers case.

Throughout the entire opinion the court speaks of "equal rights." Of the 1887 Act the court says:

> "The statute itself clearly indicates Congressional recognition of *equal rights* among resident Indians." (Italics supplied).

And of the Secretary's powers the court said:

> "Certainly he could not affirmatively authorize unjust and unequal distribution."

If the secretary could not authorize an unequal distribution, how can a court decree that these respondents shall have the waters of Mud Creek, "prior to any of the rights of the United States or any other person?" (Opinion, R. 171, incorporated in Decree, R. 224, 226; See Conclusion II, R. 220). It is obvious that the doctrine of prior appropriation is absolutely inconsistent with the doctrine of equal rights.

The Supreme Court also held that the Treaty itself guaranteed that the Indians should have equal rights.

> "Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the *equal benefit* of tribal members (Winters v. United States, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners. The respondents' claim to the extent stated is well founded." (Italics supplied).

And further:

> "Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other

> land from participation in essential water and thereby destroy the *equal interest* guaranteed by the Treaty." (Italics supplied). U. S. v. Powers, supra.

The Crow Treaty goes no further in this respect than does the Flathead treaty, and consequently a construction of Section 19 of the Act of 1906, which permits prior appropriation on an Indian reservation, amounts to a nullification of the Flathead Treaty. Our original brief pointed out that Section 19 was a mere saving clause, and cited authorities which hold that for that reason it cannot be held to create any right of prior appropriation. The Supreme Court has now furnished a further reason why that section should not be so construed. The court says:

> "If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes."

The court will recall that in the oral argument we departed from the original brief with respect to the application of the doctrine of the Powers case to this action. We now wish to outline that argument for the court.

If this court finds that it is necessary to determine the nature and extent of respondents' righs, and if this court should find, as it did in the Powers case, that the respondents have rights equal only to the rights of other allottees on the reservation, then we wish to call to the court's attention the fact that even under a system assuring equal water rights to all of the Indians or

their successors, the United States still has the power to insist that, where that can be done, all water must be taken from the Indian irrigation system, and that charges for operation and maintenance be assessed equally. As was pointed out in our original brief herein, equality of right is not insured by simply saying that each allottee's right to the water is equal in amount to the right of each other allottee. The geographical distribution of the land on the Flathead Reservation and other reservations is such that it would be physically impossible for a majority of the Indians living within the reservation to secure water for their lands in the absence of some central irrigation system. It could not be that the United States intended to prefer those Indians who, by reason of their proximity to a stream, could secure water through a simple gravity system over those Indians living miles away from the stream. Section 7 of the Act of 1887 does not limit the allottees to equality in amount, rather it provides that the Secretary shall make rules and regulations to secure a just and equal *distribution* of the waters. For that reason we now urge, as we urged in our oral argument, that assuming that the allottees have equal rights to the use of water, still the United States as trustee had the power and the right for the purpose of equalizing the burden of distribution and providing for a just distribution, that each Indian should secure his water through the irrigation system provided, and should pay his pro rata share of the operation and

maintenance of that system. Such requirement does not conflict with Section 7 of the Act of 1887, but in reality provides the just and equal distribution required thereby.

The court should recall that in this case it is shown that the lands of the parties are susceptible to irrigation from the irrigation system. Since it is not shown that there has ever been any attempt by the respondents to secure water from that system, we say that the respondents are not entitled to any relief. This case differs from the Powers case in that all the lands here involved are irrigable from the project system (R. 262, 263, 264) whereas in the Powers case, as the Supreme Court said, none of the lands were within the ambit of the government projects. It is to be noted that respondents could quickly secure water from the government system by simply making a request therefor. (R. 262, 263, 264).

If we require that each allotment owner, regardless of his peculiar position with respect to the stream, must bear the burden of carrying the water to his own land, then we are nullifying the intent and purpose of Section 7 of the Act of 1887, for the reason that actually no Indian living more than a mile or so from the stream could possibly secure the water which was rightfully his without the aid of a central irrigation system.

We therefore ask that the court dismiss the bill of complaint in this cause for the reason that there is no

showing that the respondents have ever been denied the right to take water from the system, which under the circumstances in this case, is the only right that they have.

Respectfully submitted,
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