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Question:
v.220928.2
Is the Montana statutory framework surrounding the state process to collect irrigation district fees and assessments applicable on Federally owned irrigation projects within the state?

Factual Background:

The County of Lake is a political subdivision of the State of Montana. Eighty percent of the county lies within the boundaries of the Flathead Reservation of the Confederated Salish & Kootenai Tribes (hereinafter CSKT). The Flathead Indian Irrigation Project, (hereinafter FIIP), is located on the Reservation and within Lake, Sanders, Missoula, and Flathead counties. Since the establishment of Lake County in 1923, the state process set out in Title 85 of the Montana Codes has served as the basis for collection of irrigation district assessments, included on each respective irrigator's county tax bill, and subject to Montana state enforcement procedures.

However, the passage of the Confederated Salish and Kootenai Water Rights Compact and of the Montana Water Rights Protection Act, (hereinafter MWRPA), has fundamentally altered the pre-existing framework, placing Lake County in an ambiguous position with respect to enforcement by the county using state monies and process to collect a debt owed the Secretary of the Interior for water owned by the United States in trust for the Confederated Salish & Kootenai Tribes.

In other words, as presently comprehended, Lake County, otherwise a stranger to the bargain, is the uncompensated collection agent for a Federal Indian Irrigation Project it neither owns nor controls, that delivers a commodity it likewise neither owns nor controls, to three irrigation districts shriven of state process to address any of it.

Under the Montana Water Rights Protection Act, at Pub. L. 116-260 div. DD, §1, Dec. 27, 2020, 134 Stat. 3008, AKA S. 3019, the Flathead Indian Irrigation Project "means the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), (a complete review of the several Federal enactments creating and sustaining the FIIP can be found at *Flathead Joint Board of Control of Flathead v. U.S.,* 30 Fed. Cl. 287 (1993) and includes, but is not limited to, all lands, reservoirs, easements, rights-of-way, canals, ditches, laterals, or any other FIIP facilities (whether situated on or off the Reservation), head gates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the FIIP." (Parenthetical anent *FJBC* supplied.) *See*, Section 85-20-1902, 1-1-104.24, MCA.

The Department of the Interior, Bureau of Indian Affairs, (hereinafter BIA), operates and manages the FIIP. Details describing how the project is to be operated can be found in the "Indian Affairs Manual, Irrigation Overview, Part 50, Chapter 1".

The 1908 Act reserved to the Secretary the authority to protect federal assets and fulfill trust responsibilities owed to the Confederated Tribes. The 1908 Act authorized the Secretary to "perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying the provision of [the 1908 Act] into full force and effect." 35 Stat. at 448. Plaintiffs rely entirely on the 1908 Act in seeking to declare the Secretary's reassumption of operation and management illegal, but as set forth above, the 1908 Act vests the Secretary with significant discretion and *reserves to the Secretary the authority to operate and manage the Project* until such time as the Secretary of the Interior establishes an organization for that purpose acceptable to it. *Flathead Irrigation Dist. v. Jewell*, 121 F.Supp.3d 1008 (D. Mont. 2015) (Italics added.)

Irrigation district(s) board of commissioners exercise no authority over Project Funds. *See*, Section 12 of the MWRPA, S. 3019 , (a) AMENDMENTS . . . (B) by adding at the end the following: "(k) MISSION VALLEY DIVISION.— "(1) IN GENERAL.—The Secretary of the Interior (referred to in this section as the 'Secretary'), or the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana acting on behalf of the Secretary, *as the entity with the legal authority and responsibility to operate the Mission Valley division of the project* (referred to in this subsection as the 'project operator'), may allocate revenues derived from the Mission Valley division in accordance with paragraph (2) for the purposes described in subsection (h)(6)." (Parentheticals in original; other emphasis added.)

The right to any water available to the FIIP system is administered by the CSKT, which may lease Flathead System Compact Water to FIIP irrigators. Art. III, Section C.1.c.x, Water Rights Compact, CSKT and Montana. (Hereinafter 'Compact.') Under the Compact, the right to these waters is owned not by the Project but by the CSKT, which can lease some of that right to FIIP.

Subsection (e) of the Montana Water Rights Protection Act specifies that "the Tribes shall have the authority to allocate, distribute, and lease the Tribal Water Right for any use on the

Reservation in accordance with— (A)the Compact; (B)the Law of Administration; (C)this Act; and D) applicable Federal law."

In short: the water in FIIP is owned by the United States in trust for the CSKT; the system is owned by the United States and operated and maintained by the BIA; and the irrigators do not now, and after the 2015 passage of the CSKT Water Compact and the 2020 passage of the MWRPA, never will own the Project or any part of it. All three of these statements are consequences of Federal and Montana enactments. The only nexus that the FIIP seems to share with the state is its location within the geographical boundaries of Montana – and the FIIP's now antiquated collection mechanism. FIIP is otherwise an entirely BIA and/or CSKT concern.

Against that background, Lake County has faithfully performed what appears to be its Title 85 statutory obligation to collect irrigation district fees. Yet, continuing to act as the BIA's collection agent, considering the fundamentally changed circumstances, and particularly considering the many issues that arise in the attempts to do what is, at best, an ambiguous duty, covered *infra*, has become an increasingly absurd proposition.

The ambiguities of both process and substance are plain in the statutory guidance irreconcilable with the present, post-Compact, post-MWRPA irrigation project shows up initially at Section 85-7-2136, MCA.

> **85-7-2136. Collection of taxes or assessment.** (1) On or before the third Monday in August of each year, the (irrigation) board of commissioners shall furnish to the department of revenue a correct list of all the district lands in the county, together with the amount of the total taxes or assessments against the lands for district purposes. The department of revenue shall immediately upon receipt of the list enter the assessment roll in the property tax record of the county subject to taxation or assessment under 85-7-2104 for each year. (Clarity added.)

The process contemplated by subsection (1) is the kingpin around which the statutory duties in question revolves. The problems are the "correct list" and "assessments" as meant and intended in the statute. The irrigation district(s) board of commissioners *cannot* furnish either Montana Department of Revenue, (hereinafter DOR), or Lake County a correct list of all the district lands in the county. Under the Compact and Montana's adoption legislation at Title 85, Chapter 20, that list can only come from the BIA, which owns all "records or copies of records and all other physical, tangible objects" of the FIIP.

DOR refuses to "enter the assessment roll in the property tax record of the county subject to taxation or assessment." Instead, DOR has effectively shifted the cost of preparing the assessment roll to the County Treasurer's office in Lake County, contrary to other Montana statutory mandate at Section 1-2-116, MCA.

That entry listing of assessable irrigation district parcels is provided by BIA and, given ongoing subdivision and sales, is increasingly inaccurate, despite the statutory admonition that such assessments be "apportioned" as in Section 85-7-2104, MCA. Many parcels that cannot

physically receive water from the FIIP remain on the list, whereas parcels that ought to be are not on the list.

No state process is available to ensure that errors in irrigation assessments can be addressed; the BIA affords the only route for correction. These innumerable defects, increasing annually, are brought to the county treasurer by irritated owners within the Project boundaries. Montana law, at Section 85-7-2111, MCA, offers appeal to the district court, not the BIA. This statutory defect affords that taxpayers have no state-based means, or manner, to correct any assessments from the assessment list provided by BIA.

The Flathead, Jocko and Mission District Irrigation Boards do set yearly operation and maintenance fees by resolution as mandated by MCA 85-7-2104, but the amount of those fees is established by the BIA. The Indian Irrigation Project Managers are responsible for "developing the Indian Irrigation Project's annual O & M assessment rate and submitting the rate to the Regional Irrigation Engineer and Regional Director for review," (Indian Affairs Manual, Irrigation Overview, Part 50, Chapter 1). Failure of the irrigation districts to levy and submit payment to the BIA for the established fees will result in the irrigators being denied water.

The statutory infirmities surrounding county collection of FIIP assessments initiated by the failures inherent in subsection (1), themselves creations of the now-existing legal paradigm, only worsen downstream when Lake County's now-impossible statutory duty arises. This statutory subsection is the very heart of the issue presented:

> (2) The county treasurer of each county in which any irrigation district is located, in whole or in part, shall collect and receipt for all taxes and assessments levied by the district, in the same manner and at the same time as is required in the collection of taxes upon real estate for county purposes as provided in **15-16-102**.

Titles 15 and 85 of the Montana Code both contemplate county treasurers having care of the details of preparing and collecting taxes and assessments surrounding irrigation districts. County treasurer's prepare the tax bill that goes out to each property owner. The bill includes the applicable fees assessed by each special district in the county; water and sewer, fire districts, and so forth, that each has set in the manner provided by law – except that of FIIP.

In the specific case of the FIIP, Lake County must undertake a process other than that contemplated by Montana statutes in order to include FIIP assessments in the county tax billing.

The irony is that none of the state-statute based processes of FIIP district assessments is necessary. Every irrigator may pay their assessments to the BIA directly through the pay.gov website, bypassing the state process entirely.

Pursuant to Section 85-7-2104, MCA, the irrigation district(s) board of commissioners may by resolution set assessments and an administrative fee. Those measures, if any, mean nothing: the irrigation district(s) board of commissioners doesn't own, operate, or maintain the Project. The United States owns the project, which is operated by the BIA, and it is the only authority that may set the fees and assessments for the FIIP. The result is that while the county treasurer is,

under this subsection, enjoined by the Legislature to "collect and receipt for all taxes and assessments levied by the district," the county treasurer cannot do so, but can only prepare a tax bill, often incorrect or wrong, ignoring Montana statutory law, and reflecting the taxes and assessments set by BIA.

As yet, this specific issue has not arisen but may well do so. Section 85-7-2151 provides that if assessments are delinquent, not distinguishing assessments appearing on a property tax bill arising from and ultimately payable to BIA, the county may then sell the same "in the same manner as for state and county taxes in the respective counties where such lands are situated." Deprivation of title will be a further use of Montana tax lien collection systems and money to satisfy a debt owed to the BIA.

Argument:

On the one hand we have Title 85, Chapter 7 and on the other, Title 85, Chapter 20 and the Federal Montana Water Rights Protection Act, as set forth in the Consolidated Appropriations Act of 2020 AKA S. 3019.

Chapter 7 sets forth the Montana county treasurer's duty with respect to irrigation districts in their respective counties formed under State laws with State protections.

Chapter 20, Montana's codification of the Compact, and the Federal MWRPA, either or both, undermine the meaning and applicability of then-existing Montana statutes to such extent the same no longer have any meaning and:

1. are impliedly repealed, or,
2. that the Federal government has pre-empted the entire area of FIIP administration, leaving Montana instrumentalities, specifically county treasurers whose territories contain Federally owned and operated irrigation systems using state collection, without any duty to collect such district assessments.

A. Implied repeal of Sections 85-7-2104, 85-7-2109, 85-7-2134, and 85-7-2136, Montana Code Annotated.

These sections deal with, -2104, the setting of proportionate assessments by the irrigation district(s) board of commissioners; -2109 preparation by the irrigation district(s) board of commissioners of a 'list of all lands in the district'; -2134, the obligation of the board of county commissioners to levy taxes in the irrigation district(s) if it's board of commissioners fails or refuses; and -2136, specifying details of the county treasurer's office in collecting a debt owed the BIA.

These code Sections were all impliedly repealed when Montana passed the Compact and codified it at Title 85, Chapter 20.

The most recent cogent statement on the doctrine of implied repeal by the Montana Supreme Court appears at *Ross v. City of Great Falls*, 967 P.2d 1103, 291 Mont. 377, 1998 MT 276 (Mont. 1998).

"¶17 A number of well-established principles guide our analysis of whether a statute has been impliedly repealed. First and foremost, the repeal of a statute by implication has never been favored in Montana. See, e.g., *W.R. Grace & Co.*, 238 Mont. at 450, 779 P.2d at 476; *United States v. 196 Buffalo Robes* (1872), 1 Mont. 489, 495. The Montana Legislature is presumed to act with deliberation and with full knowledge of all existing laws on a subject and, as a result, it is further presumed that the Legislature "does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable." *London Guaranty & Accident Co. v. Industrial Acc. Board* (1928), 82 Mont. 304, 310, 266 P. 1103, 1105; see also *Holly v. Preuss* (1977), 172 Mont. 422, 426, 564 P.2d 1303, 1305-06; *Fletcher v. Paige* (1950), 124 Mont. 114, 119, 220 P.2d 484, 486-87."

Having framed the general rule the Court goes on: "¶18 In addition to being plainly and irreconcilably in conflict with each other, the two statutes must relate to the same subject matter and have the same object in view in order for the later statute to impliedly repeal the earlier. *Johnson v. Marias River Elec. Co-op., Inc.* (1984), 211 Mont. 518, 523-24, 687 P.2d 668, 671. In that regard, however, it is well-established that provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal." *Holly,* supra. (Internal cites omitted.) *Ross v. City of Great Falls*, 967 P.2d 1103, 291 Mont. 377, 1998 MT 276 (Mont. 1998)

The general rule is that for a subsequent statute to repeal a former statute by implication, the previous statute must be wholly inconsistent and incompatible with it. . . Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, to the extent of any necessary repugnancy between them the special will prevail over the general statute. *Holly v. Preuss*, 564 P.2d 1303, 172 Mont. 422, 34 St.Rep. 445 (Mont. 1977)

Both exceptions detailed in Holly and Ross to the general rule against implied repeal are present here. That the extant provisions of Title 85, Chapter 7, and specifically with, -2104, the setting of proportionate assessments by the irrigation district(s) board of commissioners; -2109 preparation by the irrigation district(s) board of commissioners of a 'list of all lands in the district'; -2134, the obligation of the board of county commissioners to levy taxes in the irrigation district(s) if it's board of commissioners fails or refuses; and -2136, specifying details of the county treasurer's office in collecting a debt owed the BIA, with minor typo amendments in 2007, Sec. 33, Ch. 67, L. 2017, were all statutes in existence at the time of the adoption of Title 85, Chapter 20, Part 19 – the CSKT Compact – in 2015.

The existing state statutes above-described were presumably intended by the Legislature to address collection by county treasurer's of irrigation districts formed under, or administrable under, provisions of state law. Of statewide utility and application, the statutes represent a general and comprehensive system of irrigation district assessment collection.

However, in later adopting, in 2015, the terms of the CSKT Compact, which provides in no uncertain terms, *supra*, that ownership and management of the FIIP has passed utterly out of state hands and into the hands of the BIA, the Legislature at a stroke rendered the state collection practices on the FIIP functus officio. As detailed above, the Compact, and companion MWRPA Federal legislation, are incompatible with legislatively-mandated state collection mechanisms and practices. The Legislature could only have meant and intended the terms of the later-adopted Compact to control administration of the FIIP, now wholly in the hands of the BIA, and the consequent repeal of any existing statutes "unavoidably implied by the irreconcilability of the continued operation of both," which with respect to FIIP is impossible.

The relevant state statutory sections no longer have any meaning, and the county treasurer in a county with all or part of a Federally administered irrigation district has no remaining duty towards any such or its board of commissioners other than disbursal of whatever funds the treasurer may yet hold as fiduciary to the former FIIP.

B. Federal preemption.

U.S. Const. art. VI, cl. 2. The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cty. v. Auto. Med. Laboratories, Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.). Congress is empowered by the Supremacy Clause to pass federal acts that supersede state law in three ways: (1) express preemption, (2) field preemption, or (3) conflict preemption, "the latter two being forms of implied preemption." *Mont. Immigrant Justice Alliance*, ¶ 28 (citing *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022-23 (9th Cir. 2013) ). *Dannels v. BNSF Ry. Co.*, 2021 MT 71, 403 Mont. 437, 483 P.3d 495 (Mont. 2021)

Certain statutes within Title 85, Chapter 7, Part 21 have been Federally preempted with respect to the FIIP and are therefore 'invalid.'

The relevant statutory sections deal with, -2104, the setting of proportionate assessments by the irrigation district(s) board of commissioners; -2109 preparation by the irrigation district(s) board of commissioners of a 'list of all lands in the district'; -2134, the obligation of the board of county commissioners to levy taxes in the irrigation district(s) if its board of commissioners fails or refuses; and -2136, specifying details of the county treasurer's office in collecting the irrigation assessments.

Each of these foregoing statutes have been Federally preempted by the enactment of the Montana Water Rights Protection Act, at Pub. L. 116-260 div. DD, §1, Dec. 27, 2020, 134 Stat. 3008, AKA HR 133. That Act confirms the right of control and administration in a Federal agency, the BIA.

"Field preemption occurs when 'the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.' " *Mont. Immigrant Justice Alliance* , ¶ 29 (quoting *Arizona v. United States* , 567 U.S. 387, 399, 132 S. Ct. 2492 2501, 183 L. Ed. 2d 351, 369 (2012) ). Congress' intent to occupy the field of a particular area of law becomes "evident where there is a 'framework of

regulation so pervasive ... that Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Mont. Immigrant Justice Alliance* , ¶ 29 ( *Arizona* , 132 S. Ct. at 2501, 183 L. Ed. 2d at 369 ). See also *Favel* , ¶ 40 ("[C]ongressional intent to preempt state law in a particular area may be implied where the regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to 'occupy the field' and to leave no room for supplementary state regulation."). *Dannels v. BNSF Ry. Co.*, 2021 MT 71, 403 Mont. 437, 483 P.3d 495 (Mont. 2021).

It is self-evident from the MWRPA that Congress intended to assume utterly and thereafter maintain control, via its BIA, of the affairs of the FIIP, having with the Act passed "a framework of regulation so pervasive that . . Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," as held in *Dannels, supra*.

There can be no conclusion but that the Congress has preempted the entire legal area, the field, surrounding administration of the FIIP. Therefore, the above-referenced state statutory terms regarding state process for collection of assessments on a Federally preempted irrigation district no longer have any meaning, and the county treasurer in a county with all or part of a Federally administered irrigation district has no remaining duty towards any such or its board of commissioners other than, again, disbursal of whatever funds the treasurer may yet hold as fiduciary to the former FIIP.

For the foregoing reasons, it is Lake County's position that the Attorney General should HOLD:

1. Sections 85-7-2104, the setting of proportionate assessments by the irrigation district(s) board of commissioners; 85-7-2109, preparation by the irrigation district(s) board of commissioners of a 'list of all lands in the district'; 85-7-2134, the obligation of the board of county commissioners to levy taxes in the irrigation district(s) if it's board of commissioners fails or refuses; and 85-7-2136, specifying details of the county treasurer's office in collecting the irrigation assessments, are of no force or effect in federally-administered irrigation districts within the state, including FIIP.

James Raymond,
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CC: Flathead Irrigation District, Jocko Irrigation District, Mission Irrigation District, Sanders County Commissioners, Flathead County Commissioners, Missoula County Commissioners, Senator Greg Hertz, Senator Dan Salomon, Representative Linda Reksten, Representative Joe Read, CSKT Tribal Council, Dan Lapan, Lawrence Nelson, Winston Taylor