

IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 13-0154

WESTERN MONTANA WATER USERS ASSOCIATION, LLC, et al.,

Plaintiffs and Appellees,

v.

MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION
DISTRICT, FLATHEAD IRRIGATION DISTRICT, AND FLATHEAD JOINT
BOARD OF CONTROL,

Defendants and Appellants.

**BRIEF OF AMICUS CURIAE CONFEDERATED SALISH
AND KOOTENAI TRIBES**

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I. INTRODUCTION

The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation ("Tribes") were granted leave to participate in this direct appeal by Order of this Court dated March 15, 2013. The Tribes have a strong interest in the subject matter of this case; the adjudication or negotiation of the competing claims to water on the Flathead Indian Reservation. The District Court improperly determined water rights ownership on the Reservation in a piecemeal fashion and in violation of Montana and Federal law.

The Tribes' interest is manifest in their Application for Writ of Supervisory Control, Other Appropriate Writ or Original Jurisdiction (hereafter "Writ") arising out of the same District Court proceedings, docketed with this Court at OP 13-0156. The Tribes request this Court take judicial notice of that docket and briefing, as it involves the same parties, amici and subject matter as this Direct Appeal. The request for judicial notice is based upon Rule 202 (6) of the Montana Rules of Evidence. The Tribes make this request because the Appellee here, the Western Montana Water User's Association, LLC ("LLC"), has filed a Response Brief dated March 14, 2013, to the Tribes' Writ. That Response Brief demonstrates the need to present the Federal and State law applicable to a proper water right adjudication on the Reservation.

The Tribes expressly do not seek to adjudicate their claims to water, or the rights of any other claimant, in this appeal or in the District Court below and strenuously object to any effort to do so. That is best left to the negotiation or properly applied adjudication provisions of the Montana Water Use Act.

II. STATEMENT OF ISSUES

1. Did the District Court erroneously determine ownership of some, but not all, water rights under the federal Flathead Indian Irrigation Project in violation of the Montana Water Use Act general *inter sese* adjudication and in violation of State and Federal laws unique to the Tribes' federal reserved and aboriginal rights reserved to them in the Hellgate Treaty of July 16, 1855?
2. Did the District Court erroneously determine that the Tribes are or would become owners of undefined components of the federal Flathead Indian Irrigation Project works under one component of the pending water rights Compact negotiated pursuant to Mont. Code Ann. § 85-2-701, et seq. (2011)?

III. STATEMENT OF CASE

The Tribes, the United States, the Montana Reserved Water Rights Compact Commission ("Commission") and the Appellants (hereafter collectively called "JBC") have for years been engaged in a public negotiation process to reach a water rights compact to quantify the Tribes' federal reserved and aboriginal water rights. Due to the complex interplay of the Hellgate Treaty of July 16, 1855 (12

Stat. 975), the federal Flathead Allotment Act of April 23, 1904 (33 Stat. 302), as amended ("FAA"), and numerous State and Federal judicial decisions specific to competing claims to water on the Reservation, the Compact is voluminous, complicated and comprehensive.

The Compact consists of three parts. All three parts must be complete for the Compact to become effective. The first component is the Compact itself, which quantifies the Tribes' water rights on and off the Reservation. The second component is a body of law designed to regulate and permit new uses and enforce all water rights on the Reservation in a unified and comprehensive manner. The third component is a water use agreement between the Tribes, the JBC and the United States that apportions Reservation water between the Tribes and the federal Flathead Indian Irrigation Project ("FIIP"). That agreement is titled Proposed Agreement Between The Confederated Salish And Kootenai Tribes Of The Flathead Indian Reservation, The United States Acting Through The Bureau of Indian Affairs Of The United States Department Of Interior, And The Flathead Joint Board of Control Of The Flathead, Mission And Jocko Valley Irrigation Districts, dated January 17, 2013 (Agreement).¹ The District Court erroneously determined that the "irrigation districts and the FJBC have no ownership interest in

¹ The District Court based its decision on an early draft of the Agreement dated May 18, 2012. The agreement finalized by the Tribes, JBC and United States is dated January 17, 2013 and was publicly available on the Commission website before the District Court issued the decision on appeal.

any water rights which are individually owned by the Irrigator members of the Districts.” Decision, p. 6-8. Based on that determination, the Court concluded that the JBC could not lawfully execute the (outdated) Agreement, thereby rendering the entire Compact incomplete.

The JBC represents all irrigators of fee title land who receive irrigation water from the FIIP, whether a member of the Tribes or not. The LLC represents a group of about 100 persons claiming to be irrigators who assert receipt of irrigation water from the FIIP but who oppose the FIIP Agreement.² The LLC filed suit in the Twentieth Judicial District seeking to enjoin the JBC from executing the Agreement. Neither the Tribes nor the United States are parties to that suit. In fact, the Court acknowledged that it “has no jurisdiction over either.” Decision, p. 6.

The District Court issued an *ex parte* writ on December 14, 2012, enjoining the JBC from executing the Agreement as a matter of state law. The Court issued the decision on appeal on February 15, 2013, rescinding and superseding its December writ. Decision, p. 8. That decision is based upon three errors of law. First, the Court erroneously determined that the JBC lacked the authority to execute the Agreement as a matter of State law. The Tribes will not address the

² The number of participants in the LLC is derived from the unverified Exhibit B to the LLC Petition For Writ of Mandate and Complaint for Injunctive and Declaratory Relief in the case on appeal.

first finding in detail, as the Appellant JBC is quite able to do so. Second, the Court decided, that as a matter of State law, the JBC did not possess any water rights on the Reservation and that individual irrigators under the FIIP owned water rights to water delivered by FIIP. Decision pp. 6-8. Third, the Court determined that somehow as a result of the Agreement, the Tribes would acquire ownership of federal FIIP facilities. Decision, p. 7.

The second and third issues were never subjected to evidentiary hearings, briefing or argument and without the any input from the United States, the actual owner of FIIP, or the Tribes. The Tribes will discuss the last two erroneous rulings in this brief.

IV. FACTS RELEVANT TO THIS APPEAL

Rule 12 (1) (d) of the Montana Rules of Appellate Procedure directs that relevant facts from the lower court record be identified. The District Court produced no evidentiary record and neither sought nor recorded any briefing on the issue of water right ownership or of ownership of FIIP facilities. Accordingly, the facts relevant to the Tribes' brief are extrinsic to the record and will be provided in the Argument portion of this brief. In every instance, the facts relied upon are contained in the FAA, its legislative history, texts and decisions of this Court and Federal Courts specific to the Tribes and State water rights records for the Flathead Indian Reservation.

V. STANDARD OF REVIEW

The District Court conducted no evidentiary exposition of any single claim to water on the Flathead Indian Reservation. Rather, it ruled on matters of law only. Accordingly, this Court should review the District Court conclusions of law for correctness. Hidden Hollow Ranch v. Fields, 2004, 321 Mont. 505, 92 P.3d 1185.

VI. SUMMARY OF ARGUMENT OF AMICUS CURIAE TRIBES

1. The Tribes possess senior unquantified federal reserved and aboriginal water rights. State ex rel. Greely v Confederated Salish and Kootenai Tribes (1985), 219 Mont. 76, 712 P.2d 754. The Tribes' water rights derive from Winters v. United States, 207 U.S. 564 (1908), which enunciated the Indian reserved water rights doctrine that guided the outcome in Greely. "State courts, as much as federal courts, have a solemn obligation to follow federal law. The Water Court like any other court must follow federal law when federal law conflicts with state law." Greely, 219 Mont. at 99, 712 P.2d at 768.

Ownership and other attributes of water rights on the Reservation are defined in the FAA, as amended, and in numerous state and federal decisions specific to the Flathead Indian Reservation. The 1902 Reclamation Act does not apply to water rights on the Tribes' Reservation.

Section 85-2-701, et seq., of the Montana Water Use Act provides for a negotiated quantification of the Tribes' water rights as an alternative to participation in the State-wide general water right adjudication process established in the Water Use Act. Should negotiations fail, the Tribes and its trustee the United States will quantify the Tribes' federally-derived water rights in the Montana Water Court while preserving their right to challenge that adjudication process if it fails to satisfy the "adequate as applied" standard noted in Greely, 219 Mont. at 768, 712 P.2d at 99.

The Water Court, not the District Court is the proper jurisdiction for adjudication of water rights in the first instance. Accordingly, the District Court erred as a matter of law when it undertook a piecemeal adjudication of water right ownership on the Reservation absent the necessary and indispensable Tribes and United States. Decision, pp. 6-8. Neither the District Court nor this Court is the proper forum for determination in the first instance of who does, and who does not own a right to water on the Reservation.

2. The District Court erred in law when it determined that the Tribes are or will become the owner of unidentified facilities of the FIIP if the JBC executes the Agreement and the Compact is approved by the Montana Legislature.

VII. ARGUMENT

THE FLATHEAD ALLOTMENT ACT, NOT THE RECLAMATION ACT OF 1902, CONTROLS THE ACQUISITION AND OWNERSHIP OF WATER RIGHTS UNDER THE FIIP

A. The Flathead Allotment Act Authorized Construction of FIIP and Specified How Water Rights May Be Obtained For Water Delivered By FIIP

The Tribes reserved the Flathead Indian Reservation as their permanent and exclusive homeland under the terms of the Hellgate Treaty of July 16, 1855 (12 Stat. 975). They reserved all water necessary to satisfy the numerous purposes for which the Reservation was set aside. Greely, 219 Mont. 76, 712 P.2d 754. They also expressly reserved their hunting, fishing and gathering rights off of the Reservation throughout their aboriginal territory. See Article III of the Treaty; see also, United States of America v. Atlantic Richfield Company and Northwestern Corporation, CV 89-039-BU-SHE, United States District Court for the Butte Division (Tribes were granted intervention as a CERCLA “natural resource trustee” on the strength of the Article III of the Treaty); State v. Stasso (1977), 172 Mont. 242, 245, 563 P.2d 562, 564.

Prior to Congressional passage of the FAA the Reservation was a “hunting and fishing paradise”. Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458, 470 (Ct. Cl. 1971). Prior to the FAA, the Reservation supported a strong Indian agricultural community that engaged in irrigated agriculture as well

as raising thousands of cattle and horses. The Flathead Indians by John Fahey, University of Oklahoma Press (1975), p. 205.

In spite of Tribal objection, Congress enacted the FAA, an allotment Act specific to the Flathead Reservation. That Act of April 23, 1904, 33 Stat. 302, directed the Secretary of Interior to allot individual tracts of land to the Indians and to open “surplus” lands for non-Indian homestead entry at a future date. Section 14 of the 1904 Act directed the Secretary to undertake the “construction of irrigation ditches, the purchase of stock cattle, farming implements,...to aid the Indians in farming and stock raising.” The FIIP was built by the United States Department of Interior, Bureau of Indian Affairs (BIA), is entirely owned by the BIA and until recently, exclusively operated and managed by the BIA.³ The U.S. filed notices of appropriation for all FIIP water in the early 1900’s.

Congress amended the FAA again in the Act of May 29, 1908, 35 Stat 444, 448 to authorize the construction of the FIIP. Congress clearly defined how any person could obtain a water right under the FIIP in Section 15, which amended Section 14 of the FAA to provide that:

The entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section 14 of this Act shall in addition to

³ In its Complaint to the District Court, the LLC also challenges the validity of the Cooperative Management Entity (CME), the federally sanctioned operator of the FIIP, which is comprised of Tribal and JBC elected officials. The BIA has approved the creation of the CME and it, rather than the BIA, has been operating FIIP for approximately four years.

the payment required by section nine of said Act be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments.

Congress continued in that amendment to the FAA to specify that, “[a] failure to make any two payments when due shall render the entry and water right application subject to cancellation, with forfeiture of all rights under this Act” and that “no such right shall permanently attach until all payments therefore are made.”

To end any doubt that Congress set out the exclusive manner in which the JBC, the LLC or others could lawfully obtain a water right under the FIIP, Congress again amended the FAA with the Act of August 9, 1912, 37 Stat 265, regarding a discreet portion of the 1902 Reclamation Act specific to homestead entry lands. This amendment does not address lands allotted to Indians under the FAA. Rather, it provides that owners of homestead land would be entitled to a “final water-right certificate” upon satisfaction of “all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid. [sic]”⁴

One of the many amendments to the FAA relevant to the subject matter of this appeal is the Act of May 25, 1948, 62 Stat. 269. There Congress, aware that

⁴ Congress was clear that FIIP is not a Reclamation Act project and not subject to Reclamation Act of 1902. Page 2 of House Report 730, Assistant Secretary of Interior A.A. Jones states that the Act of August 9, 1912 “does not apply to the Flathead project for the reason that the project is not being constructed under the reclamation act.” In fact, Jones referenced the Act of April 23, 1904 (the FAA) as the relevant legislation under which FIIP “is being constructed.”

the irrigators were not making the required payments for the cost of construction of FIIP, directed that the cost of construction would be shifted to revenues derived from an electrical energy distribution project also authorized under the FAA.⁵

The significance of the Congressional directive on how a person could acquire a water right under FIIP is two-fold. First, as noted in a FIIP-specific case, because the Reservation was created by the Hellgate Treaty:

The treaty impliedly reserved all waters on the reservation to the Indians. Winters v. United States, United States v. Powers [citations omitted]. Being reserved, water rights could only be obtained only as specified by Congress.

United States v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942).⁶ Put another way in a prior FIIP case, pursuant to the Hellgate Treaty:

The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians [citation omitted]. Being reserved no title to waters could be acquired by anyone except as specified by Congress. The only provision regarding water rights pointed out is found in the Act of May 29, 1908, Sec. 9, 35 Stat. 448, 449.

The District Court erred in law by concluding that the JBC did not own any water rights and that unnamed irrigators did own water rights under the FIIP. It

⁵ The preamble to this amendment provides “the repayment to the United States of all reimbursable costs heretofore or hereafter incurred for the construction of the irrigation and power systems of the Flathead Indian Irrigation Project ...shall be accomplished as prescribed by this Act.”

⁶ This reasoning was followed by this Court in The Big Four v. Bisson, 132 Mont. 87, 87-89, 314 P.2d 863, 863-864 (1957), another case involving Reservation irrigation water rights.

erred because it failed to conduct any evidentiary exposition of any aspect of the Congressionally mandated process for obtaining water rights under FIIP.

The Tribes express no opinion as to the accuracy of the District Court findings regarding ownership of water rights under the FIIP, as such findings are properly to be made by the Water Court. If the Tribal water rights are not quantified in a water rights Compact, these issue of federal law must be thoroughly investigated. They are presented here to demonstrate how deficient the District Court analysis was and to inform this and future Courts of the complexity of the subject matter.

B. The Flathead Indian Irrigation Project Is Not Subject To The Reclamation Act of 1902

The McIntire decision is important for other reasons as well. The McIntire Court found that “public land” laws do not apply on the Reservation because “[l]ands which are reserved are severed from the public domain.” McIntire at 654. This holding is consistent with the rule from Ash Sheep Co. v. United States, 252 U.S. 159 (1920), which reached the same conclusion regarding homestead lands within the Crow Reservation in Montana. The Supreme Court addressed an allegation that since the Crow lands had been opened by a Congressional allotment Act specific to the Crow Reservation, the lands at question were “public lands.” The U.S. Supreme Court disagreed, finding that lands there, like homestead lands

on the Flathead Reservation, were not public lands but in fact are “Indian lands” for federal purposes. Id. at 166.

Acquisition and ownership of water rights under the FIIP is controlled by the FAA, as amended. Reservation lands are not “public lands.” Additionally, although opened to homestead entry, the Flathead Indian Reservation has not been diminished or terminated. Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 955-960, cert. denied, 459 U.S. 977 (1982).⁷ All land on the Flathead Reservation, whether Indian, non-Indian, whether the title is in fee or trust status, is still “Indian country” as defined at 18 U.S.C. §1151.

C. Case Law Interpreting the Reclamation Act Does Not Apply To FIIP

In the introductory portion of this brief, the Tribes asked this Court to take judicial notice of the LLC’s Response to the Tribes’ Writ. In their Response, the LLC spent a considerable amount of time attempting to apply the Reclamation Act and case law interpreting it to the case at hand. The Tribes make this request because it is likely the LLC will make the same effort here. Here’s why that is wrong.

Ickes v. Fox, 300 U.S. 82 (1937) is inapplicable for several reasons. First, it is not an Indian water case. Second, it deals with a Bureau of Reclamation (“BOR”) irrigation project authorized under the 1902 Reclamation Act, not an Act

⁷ The Namen Court also noted that “the Kootenai Indians, one of the Tribes, depended heavily on fishing.” Namen at 962.

specific to the BIA and the Flathead Reservation. Third, the Ickes Court found that individual irrigators owned water rights because under Reclamation law, irrigators had BOR water delivery contracts for specific amounts of water. No such contracts exist on the FIIP.

Nevada v. U.S., 463 U.S. 110 (1983), is inapplicable as well. It dealt with a fully adjudicated set of water rights under a final Federal Court water rights decree for a BOR, not BIA, irrigation project.

Nebraska v. Wyoming, 325 U.S. 589 (1945) is inapplicable also. It was an interstate original proceeding pursuant to Article III, Sec 2 of the United States Constitution. It involves no Indian water law issues and has nothing to do with the FAA or the Hellgate Treaty. Rather, it looks to the 1902 Reclamation Act, the laws of the respective states and the Ickes decision for its law on how to apportion water between states.

D. The Water Court is the Court Of First Resort For Adjudication of Water Rights Ownership

The Montana Legislature established the Montana Water Court to preside over the state-wide general *inter sese* adjudication of all existing water rights in Montana. See Mont. Code Ann. § 3-7-101, et seq. and § 85-2-216 (2011); see also, Greely generally. The Tribes, United States and the Commission have been in negotiation for decades to quantify Tribal water rights by Compact as provided in Mont. Code Ann. § 85-2-701, et seq. (2011) and are prepared to present it to the

2013 session of the Montana Legislature. As a result of those ongoing negotiations, all proceedings to generally adjudicate the Tribe's water rights are on stay. See Mont. Code Ann. 85-2-217 (2011). Under the ruling in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-77L and Application for Change of Appropriation Water Right No. G15152-S761 (1996), 278 Mont. 50, 923 P.2d 1073, this Court determined that until the Tribes' senior water rights are quantified by negotiated Compact or in a McCarran Amendment-qualifying Water Court adjudication,⁸ it is not legally possible to determine what, if any Reservation water could be attributed to the Tribes and what, if any could be attributed to junior claimants. The real result of the combination of these Legislative and judicial determinations is that the Water Court has conducted no adjudication of water rights on the Reservation.

The ultimate result of a proper water right adjudication is the determination of who does, and who does not, own a water right. Other elements of a water right, such as priority date, type and place of use, volume and flow rate, are secondary. Without that determination of ownership, the rest is irrelevant. The District Court claims to have made that ultimate determination, that "the irrigation districts and the FJBC have no ownership interest in any water rights which are individually

⁸ The McCarran Amendment is codified at 43 U.S.C. § 666.

owned by the Irrigator members of the Districts.” Decision, p. 6.⁹ The District Court exceeded its jurisdiction and usurped the jurisdiction of the Montana Water Court when it undertook a partial adjudication of water rights on the Reservation. It compounded that error by doing so when necessary and indispensable parties, the Tribes and United States, were not parties to its decision. It failed its solemn obligation to follow federal law.

**THE DISTRICT COURT ERRED WHEN IT FOUND THAT THE TRIBES
WOULD ACQUIRE OWNERSHIP OF FEDERAL IRRIGATION
FACILITIES AS A RESULT OF THE AGREEMENT**

FIIP is a federally constructed and owned irrigation project. Nowhere in the Agreement, either the outdated draft the District Court ruled on, or the final version, did federal ownership change hands. The District Court interpreted an Agreement that no one wrote.

As with its water rights ownership determinations, there is no record to support its erroneous conclusion. Importantly, the two entities who could have provided evidence contrary to the District Court findings were not parties to the decision. Most assuredly, the Tribes do not assert any ownership in FIIP facilities

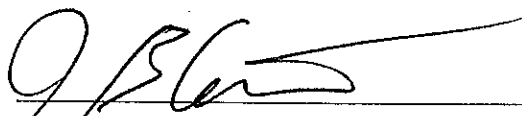
⁹ The District Court didn’t make that erroneous finding just once. Similar judicial statements of ownership of water rights by unnamed individuals and lack of ownership by JBC appear repeatedly. Decision, pp. 6-8.

and the United States did not convey any ownership interest in FIIP to the Tribes.
The District Court decision on this point is clear error of law.

VIII. CONCLUSION

The District Court committed clear errors of law. It did so without necessary and indispensable parties. It did so without eliciting evidence or relevant federal law on the nature of water rights on the Reservation. It did so in spite of the fact that the subject matter it ruled on is committed by statute to the Montana Water Court. The District Court should be reversed and the case should be dismissed with prejudice.

Respectfully submitted this 20th day of March, 2013.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief of Amicus Curiae Confederated Salish and Kootenai Tribes is printed with a proportionately spaced Times New Roman text typeface is 14 points; is double spaced; and the word count calculated is no more than 5,000 words in accordance with Rule 11(4) (a) - (3), excluding certificate of service and certificate of compliance.

Dated this 20th day of March, 2013.


John B. Carter

CERTIFICATE OF SERVICE

I certify that on the 20th day of March, 2013, I mailed a true and correct copy of the foregoing "Brief of Amicus Curiae Confederated Salish and Kootenai Tribes" via U.S. Mail, first-class, postage prepaid, to the following:

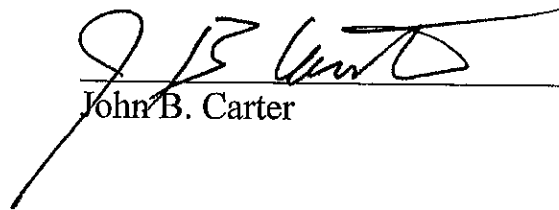
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