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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

WAYNE PERANK, MONICA NEBEKER,
and the UTE INDIAN TRIBE OF THE
UINTAH & OURAY RESERVATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

**COMPLAINT FOR DAMAGES UNDER
THE FEDERAL TORT CLAIMS ACT**

Civil Case No. 2:20-cv-00712-DBP

Magistrate Judge Dustin B. Pead

Plaintiffs WAYNE PERANK (“PERANK”), MONICA NEBEKER (“NEBEKER”), and the UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION (“TRIBE”), for damages pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (“FTCA”), allege as follows:

I. GENERAL NATURE OF THE ACTION

1. This is an action pursuant to the FTCA to recover damages that Plaintiffs incurred as a result of the negligence of the United States, Bureau of Indian Affairs (“BIA”), in modifying, removing, and constructing certain features of the Uintah Indian Irrigation Project (“UIIP”) infrastructure that distributes tribally owned water to lands on

the Uintah & Ouray Reservation of the Ute Indian Tribe within the State of Utah, and that the United States holds in trust for the Tribe and its members. Plaintiffs Perank and Nebeker (“Tribal Member Plaintiffs”) utilize tribal lands for agricultural purposes that are to receive such tribally owned water under an assignment from the Tribe pursuant to tribal law. The acts of Defendant United States constitute negligence under the law of the place where the acts occurred.

II. PARTIES

2. Plaintiff Wayne Perank is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation and an assignee of five Tribal land assignments on Tribally-owned trust land within the Uintah and Ouray Reservation and within the area serviced by the UIIP. The United States, through the BIA, is obligated to deliver the Tribe’s Indian Reserved Water Rights to Perank’s Tribal land assignments for irrigation purposes as discussed in section IV, *infra*. Perank resides on the Uintah and Ouray Reservation in Utah.

3. Plaintiff Monica Nebeker is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation and an assignee of a Tribal land assignment on Tribally-owned trust land within the Uintah and Ouray Reservation and within the area serviced by the UIIP. The United States, through the BIA, is obligated to deliver the Ute Indian Tribe’s Indian Reserved Water Rights to Nebeker’s Tribal land assignment for irrigation purposes. Nebeker resides on the Uintah and Ouray Reservation in Utah.

4. Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation is a federally recognized, sovereign Indian tribe, 85 Fed. Reg. 5466 (Jan. 30, 2020), organized under

a Constitution approved by the Secretary of the Interior under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5144. In 1937, pursuant to the Indian Reorganization Act, the Uintah, White River, and Uncompahgre bands of the Ute formed the Ute Indian Tribe of the Uintah and Ouray Reservation. The Tribe and the Uintah and Ouray Reservation are located in Utah.

5. Defendant United States holds title to the UIIP as a trust asset of the Tribe pursuant to the Act of June 21, 1906, 34 Stat. 325 (“1906 Act”).

III. JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter because it is a civil action for money damages accruing on or after January 1, 1945, for injury or loss of property caused by the negligent or wrongful act or omission of an employee of the United States, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimants. 28 U.S.C. § 1346.

7. This Court has jurisdiction over this matter separately and distinctly pursuant to 28 U.S.C. § 1362 because this is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, and treaties of the United States.

8. Venue lies in the District of Utah, the judicial district in which Plaintiffs reside and in which the act or omission complained of occurred. 28 U.S.C. § 1402.

IV. STATEMENT OF FACTS

A. History of the UIIP

9. The Uintah Valley Reservation was established by executive order on October 3, 1861, and confirmed by Congress in 1864. Executive Order No. 38-1, reprinted in 1 C. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904); Act of May 5, 1864, ch. 77, 13 Stat. 63.

10. In 1906, the United States Congress authorized construction of an irrigation project to irrigate “the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah.”¹ Act of 1906, 34 Stat. 325. The Congressional authorization stated:

[t]hat such irrigation systems shall be constructed and completed and held and operated ... and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto[.]²

11. The Indian irrigation project authorized by the Act of 1906 is now known as the Uintah Indian Irrigation Project (“UIIP”).

12. Construction of the UIIP canals, ditches, and other facilities was substantially completed by 1922. See generally *Hackford v. Babbitt*, 14 F.3d 1457, 1461 n.2 (10th Cir. 1994).

13. From the construction of the UIIP to the present, the BIA has been the federal agency responsible for the operation, maintenance, and rehabilitation of the UIIP.

14. Specific and comprehensive Federal regulations to govern the BIA’s operation and maintenance of the UIIP were promulgated prior to 1957 as Part 121 of

¹ “Allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian (“trust” allotment) or a parcel of land owned by an Indian subject to a restriction on alienation in the United States or its officials (“restricted” allotment). Cohen’s Handbook §16.03[1], p. 1071.

² Pub. L. 59-258, Stat. 325, 375.

the Code of Federal Regulations, and subsequently renumbered as Part 199 on December 24, 1957, 22 Fed. Reg. 10479, 10637-38 (Dec. 24, 1957) (“1957 regulations”). These regulations applied specifically to the UIIP and vested the BIA with pervasive and comprehensive control of the UIIP.

15. The 1957 regulations continued a system for the assessment of operation and maintenance fees payable by landowners within the UIIP. The regulations provided that “Bills for the yearly assessment of construction and operation and maintenance charges will be issued each year for the record owner of land within the project,” with an “annual per-acre charge for operation and maintenance...levied against the entire irrigable area of each farm unit or allotment to which irrigation water can be delivered from present constructed works.”

16. In addition to establishing a system for assessing operation and maintenance fees, the federal regulations reinforced Defendant’s pervasive and comprehensive control over the UIIP. Section 199.20 of the regulations stated that “[n]o persons other than those specifically designated by the project engineer are authorized to regulate project structures or to interfere in any way with project-operated canals or any works appurtenance thereto or to the water flowing therein.” The term “project engineer” was in reference to the BIA engineer charged with implementing the regulations.

17. The federal regulations also required the BIA to deliver water to “one point on the upper boundary of each farm unit on the project,” and to “maintain the lateral system to said delivery point.” These requirements confirmed that the United States’

pervasive, comprehensive, and exclusive control over UIIP operations extended up to the property boundaries of individual irrigators.

18. In 2008, the United States promulgated regulations governing the operation and maintenance of all irrigation projects administered by the BIA, including the UIIP. The United States' exclusive responsibilities relating to the operation of the UIIP, as reinforced by the prior federal regulations, remain in full force and effect in the 2008 regulations.

19. The United States' exclusive responsibilities relating to the operation of the UIIP, as reinforced by the prior federal regulations, remain in full force and effect in the 2008 regulations.

20. For the UIIP, the Agency Superintendent is the Officer-in-Charge and is authorized to administer, carry out, and enforce the regulations contained in 25 C.F.R. Part 171.

21. The UIIP consists of an off-stream reservoir (Midview Reservoir) and 23 individual canal systems comprised of canals, laterals, and sub-laterals.

22. The UIIP, which was supposed to serve about 88,000 acres of allotted lands for the benefit of the Tribe and its members, only delivered Tribal irrigation water to approximately 61,000 acres of project lands as well as approximately 24,700 acres of non-project lands.

23. On October 1, 2000, the United States and a private company known as the Uintah Indian Irrigation Project Operation and Maintenance Company ("O&M Company")

entered into a Cooperative Agreement in which the O&M Company assumed responsibility over the day-to-day operation and maintenance of the UIIP.

24. The O&M Company is not owned or in any way controlled by the Tribe. It is a private company functioning as an agent of the Federal Government by assuming some of the responsibilities normally delegated to the BIA.

25. Further, the Cooperative Agreement provides the BIA continued and substantial oversight authority over the O&M Company's activities. For instance, under the Cooperative Agreement, the O&M Company is required to produce an Annual Operating Plan each year containing a comprehensive work and budgeting plan for the year. This Annual Operating Plan must be approved by the BIA.

26. The O&M Company only performs proposed O&M work if the BIA has approved the Annual Operating Plan and funds are available.

27. The BIA also remains responsible for UIIP recordkeeping, billing, and collections of the annual O&M fees from UIIP water users, and for negotiating and executing carriage agreements with private irrigators using state-based water rights. 25 C.F.R. §§ 171.515, 171.600, 171.605.

28. The Cooperative Agreement expressly states that the BIA's trust responsibility toward the UIIP remains fully intact despite the O&M Company assuming day-to-day operation and maintenance tasks, and that the United States retains its legal ownership of the UIIP.

29. Likewise, Article IV of the Articles of Incorporation for the O&M Company expressly states that the Secretary retains any and all trust responsibilities to the UIIP, Plaintiff Tribe, and individual Indian landowners within the UIIP Project Area.

30. Defendant United States, therefore, owes a duty to Plaintiffs to provide the Tribe's water right to the Tribal Trust Land Assignments as defined and discussed in section IV(B), *infra*. As trustee, Defendant United States further has a duty not to destroy Tribal or Tribal members' property in performance of its trust duties.

31. The O&M Company and the BIA prepare an Annual Operating Plan which includes a description of work to be performed by the O&M Company each year.

32. The BIA is responsible for reviewing and approving the Annual Operating Plan for the UIIP.

B. Tribal Trust Land Assignments

33. The Tribe owns Tribal trust land located east and southeast of Midview Reservoir, in Section 31, Township 3 South, Range 2 West, Uintah Special Meridian, which encompasses six Tribal land assignments held by Tribal Member Plaintiffs.

34. The legal descriptions for Perank's five Tribal trust land assignments are:

Lot 14, NWSW Section 31, T3S R2W
Lot 15, SWSW Section 31, T3S R2W
NESW Section 31, T3S R2W
SESW Section 31, T3S R2W
NWSE Section 31, T3S R2W
Uintah Special Meridian

35. The legal description for Nebeker's Tribal trust land assignment is:

SWNE Section 31, T3S R2W
Uintah Special Meridian

36. The Tribe's water right is delivered to these lands through the UIIP pursuant to federal laws including the Act of March 1, 1899, 30 Stat. 941 ("...and it shall be the duty of the Secretary of Interior to prescribe such rules and regulations as he may deem necessary to secure to the [Ute] Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the [Ute] Indians..."); the 1906 Act, 34 Stat. 325 (authorizing construction of irrigation systems to irrigate the allotted lands of the Uintah, Uncompahgre, and White River Utes in Utah); and 25 C.F.R. Part 171 ("Irrigation Operation and Maintenance").

37. Perank's five Tribal trust land assignments include 85.65 acres of "Class 1" or "presently assessable" land with Indian water rights under the UIIP which are assessed O&M fees by the BIA. "Presently assessable" lands are lands "to which water can be delivered upon request and in a reasonable time frame from an existing project by virtue of their physiographic and topographic conditions." BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, NAT'L INDIAN IRRIGATION HANDBOOK (2008) at 10-10.

38. Nebeker's Tribal trust land assignment includes 12 acres of "Class 1" or "presently assessable" land with water rights under the UIIP which are assessed O&M fees by the BIA.

39. The total Class 1 assessable acreage for the delivery of Tribal water under the UIIP for Tribal Member Plaintiffs' Tribal trust land assignments ("Tribal Trust Land Assignments") is 97.65 acres.

40. During all relevant times, O&M fees have been paid for the Tribal Trust Land Assignments.

41. Tribal Member Plaintiffs make agricultural use of their respective land assignments, and both pay for the costs and labor necessary for their respective land assignments to remain commercially productive.

C. Modifications to UIIP and BIA's Failure to Fulfill its Legal Obligation to Deliver Water

1. Installation of UIIP Pahcease Pipeline – No delivery of Tribal water to Tribal Trust Land Assignments

42. Water has historically been delivered to the Tribal Trust Land Assignments by the Pahcease Canal, a BIA canal within the UIIP infrastructure which relied on water diverted from the Duchesne Feeder Canal of the UIIP into the Midview Reservoir and subsequently into the Pahcease Canal.

43. In 2015-16, at the urging of non-Indian UIIP water users, the BIA/UIIP replaced the Pahcease Canal with a pipeline that is now referred to as the "Pahcease Pipeline." The BIA/UIIP replaced the Canal with the Pipeline without the consent of the Ute Tribal Business Committee ("UTBC"), acting on behalf of the Tribe and its members-the beneficial owners of the UIIP, and the Indian Reserved waters that formerly were distributed through the Pahcease Canal, and are now distributed through the "Pahcease Pipeline."

44. Designs for the Pahcease Pipeline were developed in 2015, providing ample time for the BIA/UIIP to seek input from the Tribe and Tribal Member Plaintiffs

regarding the potential ramifications to Tribal trust property and agricultural operations from the UIIP modifications, yet the BIA/UIIP made no effort to do so.

45. The BIA approved the construction of the Pahcease Pipeline, and the BIA undertook such construction during the winter of 2015-16.

46. However, appropriate facilities and infrastructure to deliver the assigned water from the UIIP to the Tribal Trust Land Assignments from the main pipeline were not designed until the winter of 2016-17 and not constructed until May 2017, despite the fact that the Pahcease Pipeline replaced the Pahcease Canal Plaintiffs relied on, and that Plaintiffs had historically relied on, for delivery of Tribal water from the UIIP to irrigate the Tribal Trust Land Assignments.

47. The BIA's negligent modification of the UIIP, including construction of the new Pahcease Pipeline, caused the UIIP's failure to deliver the total Indian water right assigned to the Tribal Trust Land Assignments which was necessary for agricultural irrigation purposes.

48. This negligent failure of Defendant United States to provide delivery of Tribal water directly and proximately caused significant damage to Plaintiff Perank's agricultural operation.

49. The negligent construction of the Pahcease Pipeline directly and proximately caused significant damage to and destruction of on-farm infrastructure on the Tribal Trust Land Assignments.

50. Plaintiff Perank lost the majority of his 2016 alfalfa harvest due to the new Pahcease Pipeline construction and implementation – he was only able to harvest one

cutting, whereas fields with adequate water produce three or four cuttings - and the condition of the remaining alfalfa stands deteriorated to a degree that field rehabilitation became necessary and alfalfa stands had to be reestablished.

51. The UTBC asked the Tribe's expert Tribal Water Engineer, Natural Resources Consulting Engineers, Inc. ("NRCE"), to conduct an evaluation and assessment of the damages Plaintiffs suffered as a result of the 2016 UIIP infrastructure modifications that replaced the Pahcease Canal with the Pahcease Pipeline.

52. NRCE personnel conducted numerous site visits to the Tribal Trust Land Assignments to assess the UIIP infrastructure modifications and resulting damage to Tribal trust and Tribal member property.

53. At an April 19, 2016 site visit, NRCE observed that no infrastructure was available to deliver water to the Tribal Trust Land Assignments where the historical infrastructure from the Pahcease Canal had been removed and/or abandoned when the UIIP replaced it with the Pahcease Pipeline, despite the fact that adjacent non-tribal water users had already begun irrigating.

54. The UIIP typically begins distribution of the Tribal water for the irrigation season by April 15.

55. According to BIA officials, a lateral pipe was planned to deliver water to the Tribal Trust Land Assignments, but it had not yet begun Tribal water delivery on April 19, 2016.

56. While non-Indian irrigators had full access to the Tribal water right delivery from the UIIP for their lands, the Tribal members, including Tribal Member Plaintiffs,

cultivating Tribal trust lands, for whom the UIIP was built, had no access to the Tribal water.

2. Installation of UIIP Lateral 1 (Perank Lateral Pipeline) and Lateral 2 Pipelines – Insufficient and ineffective delivery of Tribal water

57. After irrigation began for the 2016 season, the BIA installed a pipe lateral, “Lateral 1” or “Perank Lateral,” as part of the UIIP which was supposed to enable delivery of Tribal water to the Perank Trust Land Assignments.

58. At a July 21, 2016 site visit, NRCE observed that the BIA had installed a 15-inch pipeline lateral at the first main pipeline offtake below Midview Reservoir to provide irrigation water to the Perank Trust Land Assignments at the SW corner of Lot 14, NWSW Section 31, T3S R2W and the NW corner of Lot 15, SWSW Section 31, T3S R2W.

59. However, the lateral would deliver water for only a very short period of time at the pressure and flow rate required for sufficient Tribal water distribution at this location.

60. After about 15 minutes of being turned on, the pipeline pressure and flow became considerably reduced and a large amount of entrained air was observed in the small stream of water delivered at the lateral outlet.

61. The reduced pressure and flow prevented Perank from being able to use his traditional gravity flow irrigation methods, directly and proximately causing severely limited harvest and significantly damaged crops.

62. The BIA/UIIP's construction of the lateral pipelines directly and proximately caused further damage or destruction to the on-farm infrastructure on the Tribal Trust Land Assignments.

63. Over the course of the UIIP modifications from 2015 through 2017, the BIA negligently removed, damaged, or destroyed thousands of feet of Plaintiffs' on-farm ditches and at least 20 of Plaintiffs' irrigation boxes on the Tribal Trust Land Assignments, and did not replace them. The destruction of Plaintiffs' on-farm infrastructure has prevented and continues to prevent Plaintiffs from being able to use their full allocation of water to irrigate their lands.

V. COUNT I

NEGLIGENCE

64. Paragraphs 1-63 are incorporated by reference as if fully stated herein.

65. As described above, Defendant negligently made or approved alterations consisting of removal of then-existing UIIP infrastructure and construction of new UIIP infrastructure that resulted in significant damage to Plaintiffs' land interests in Tribal trust land, significant damage to Plaintiff Perank's crops and alfalfa stands, and significant damage to on-farm infrastructure located on the Tribal Trust Land Assignments.

66. As a result, Plaintiffs suffered damages of not less than \$197,422.00.

67. Under the circumstances, the person responsible for maintaining the UIIP infrastructure, if he was a private person, would be liable to Plaintiffs for Plaintiffs' damages resulting from the above-described construction modifications to the UIIP.

68. The BIA official responsible for the tortious conduct was an employee of the United States government acting in the scope of his office and employment on behalf of the BIA.

69. Tribal Member Plaintiffs timely presented their claims in writing to the BIA for damages covering their injuries caused by the government employee's negligence.

70. Tribal Member Plaintiffs later amended their claims, seeking \$183,572.00 and \$13,850.00, respectively.

71. Tribal Member Plaintiffs' claims were denied by the Solicitor of the BIA by letter dated April 3, 2019

72. Tribal Member Plaintiffs timely filed Requests for Reconsideration.

73. The Solicitor denied the Requests for Reconsideration on April 13, 2020.

74. Since the submission of the claims to the BIA, Plaintiffs have continued to incur damages due to lost crops as a result of Defendant's negligence described above and remain unable to irrigate the Tribal Trust Land Assignments using traditional gravity flow methods and unable to use their full allocation of water to irrigate their lands.

WHEREFORE, Plaintiffs ask this Court for the following relief:

Damages in an amount of not less than \$197,422.00 for injuries resulting from the United States' negligence and damages in an amount to be determined for Plaintiffs' ongoing injuries which continue to accrue due to Defendant's refusal to remediate the harm to Plaintiffs; and

Such other and further relief as the Court shall deem just and proper.

Dated this 13th day of October, 2020.

J. PRESTON STIEFF LAW OFFICES, LLC

/s/ J. Preston Stieff

J. Preston Stieff
Attorney for Plaintiffs