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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FLATHEAD JOINT BOARD OF CONTROL; FLATHEAD IRRIGATION DISTRICT, Plaintiffs, vs. SARAH "SALLY" JEWELL, Secretary of the Department of Interior, STANLEY SPEAKS, Portland Area Direct, Bureau of Indian Affairs, JOSEPH "BUD" MORAN, Superintendent, Flathead Agency,	)	Cause No. CV-14-88-M-DLC **AMENDED COMPLAINT**

Bureau of Indian Affairs, DEPARTMENT OF INTERIOR, and BUREAU OF INDIAN AFFAIRS, Defendants.	))))))	

Plaintiffs Flathead Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts and Flathead Irrigation District respectfully request declaratory judgment, prospective equitable relief, and permanent injunctive relief, an accounting of tax funds improperly controlled and expended by Defendants, equitable relief controlling such expenditures, and other appropriate relief.

PARTIES

1. Plaintiff Flathead Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts (FJBC) is a local governmental entity under Montana law that serves as the central control agency of the named irrigation districts. § 85-7-1605, MCA. The districts are designated as FID, MID, and JID. Collectively, they are referred to as "the Districts." FJBC is the operating agent of the Districts and possesses the powers and duties of the Districts, including but not limited to the authority to institute any action or proceeding necessary or proper to carry out the provisions of Chapter 7, Title 85, MCA and to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by that Chapter. §

85-7-1612, MCA. It was formed May 27, 2014, by the Districts, and its statutory authorities are to be given a broad reading.

2. FID and the other Districts are elected local governments under Montana law, which empowers irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters, including relations with the United States, and irrigation project operation. *See generally* Title 85, Chapter 7, Parts 1 through 22, MCA. This includes the authority to own water rights, and own, finance, construct, manage, operate and maintain the irrigation infrastructure comprising the project that serves its lands. It also includes the authority and responsibility to levy taxes, collected twice-yearly as property taxes, to pay for the operation and maintenance (O&M) of the relevant irrigation project. *See* Title 85, Chapter 7, Part 19, MCA. These statutory powers are to be understood broadly.

3. Congress specifically empowered the Districts to be created and to operate under Montana law in the Act of May 10, 1926, 44 Stat. 453, 464 (1926 Act)[1], which continues Congress' application of General Allotment Act policies on the Flathead reservation. Congress not only mandated the creation and operation

[1] For the convenience of the Court, the pertinent uncodified acts of Congress are attached as exhibits, with the important language indicated. They are introduced in the Facts section, beginning with paragraph fifteen, to provide them in the chronological order of their enactment.

of those Districts under state law, but it also required and empowered them to embrace all the irrigable lands under the Flathead Irrigation and Power Project (Project or Flathead Project) "except trust patent Indian lands," until "the issuance of fee patent therefore," when such lands "shall . . . be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts." The FID contains approximately 87,088 acres of fee-owned land. The MID, contains approximately 15,089 acres, and the JID, contains approximately 7,031 acres. The fee land within FID's jurisdiction lies within Lake and Sanders Counties. MID's fee land jurisdiction is in Lake County; and JVID's extends to land within Missoula, Sanders, and Lake Counties. Therefore, the FJBC has within its scope approximately 109, 208 acres of taxable irrigated land, making the Flathead Project the largest irrigation project in Montana.

4. Defendant Sarah "Sally" Jewell is the Secretary of the Department of Interior (DOI). She is the federal official responsible for the proper administration of the DOI and its agency, the Bureau of Indian Affairs (BIA). She is the principal officer of the United States responsible for implementing the laws and policies of Congress enacted in the General Allotment Act, 25 U.S.C. §§ 331-358, as amended, and the Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302, as amended.

5. Defendant Stanley Speaks is the Portland Area Director of the BIA. He is the principal regional federal official of the BIA responsible for implementing the laws and policies of Congress in the General Allotment Act, 25 U.S.C. §§ 331-358, as amended, and the Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302, as amended.

6. Defendant Ernest T. "Bud" Moran is the Superintendant of the BIA, Flathead Agency. He is the principal local officer of the BIA responsible for implementing the laws and policies of Congress in the General Allotment Act, 25 U.S.C. §§ 331-358, as amended, and the Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302, as amended.

7. Defendant Department of Interior (DOI) is an executive agency of the United States Government. It is the Department principally responsible for implementing the laws and policies of Congress in the General Allotment Act, 25 U.S.C. §§ 331-358, as amended, and the Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302, as amended and supplemented.

8. Defendant BIA is an agency of the Department of Interior. It is at this time the owner of the title to the Project. BIA is the agency within DOI principally responsible, through its officials, for implementing the laws and policies of Congress in the General Allotment Act, 25 U.S.C. §§ 331-358, as amended, and the Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302, as amended.

JURISDICTION AND VENUE

9. Plaintiffs incorporate by reference the other allegations herein.

10. FJBC and FID ask the Court to issue a declaration and corresponding prospective injunctive relief having the effect of requiring federal officials to obey a 1908 Act of Congress that mandates the transfer of the management and operation of the Flathead Project to the "owners of the lands irrigated thereby." *See* Act of May 29, 1908, 35 Stat. 448, and the Act of May 10, 1926, 44 Stat. 453, 464.

11. Jurisdiction is proper under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* because an actual controversy exists between the parties. That controversy is outlined below. Federal question jurisdiction exists under 28 U.S.C. § 1331. Jurisdiction is also appropriately exercised under §§ 702 and 706 of the Administrative Procedure Act and the officer suit exception to sovereign immunity. *Ex Parte Young*, 209 U.S. 123 (1908). Defendants unlawfully refuse to obey Congress' mandate in the laws at issue in a variety of ways. Defendants have adopted and have been pursuing a policy and practice regarding this issue that is contrary to law, willfully refusing to obey mandates of Congress, acting or failing to act with recalcitrance in the face of their clear statutory duties or in abdication of their substantive statutory responsibilities and mandates. This Court has the authority to order Defendants to discharge the duties Congress required

them to perform and, in light of their recalcitrance, to declare the terms of how they must do so. Plaintiffs seek prospective equitable relief prohibiting the continuation of ongoing violations of 25 U.S.C. § 463(a), as well as other congressionally-enacted federal mandates, in particular the provisions, as amended, of the Act of May 25, 1948, 62 Stat. 269, and P.L, 93-638, 25 U.S.C. § 450, et seq.

12. Venue is proper in Missoula Federal District Court pursuant to 28 U.S.C. § 1391. Venue is also proper under Rule 3.2 of the Local Rules of Procedure of the United States District Court for the District of Montana.

FACTS

13. Plaintiffs incorporate by reference the other allegations herein.

A. Background of Controversy

14. This matter concerns the Flathead Irrigation Project (the Project). The Project consists of two divisions, the Irrigation Division and the Power Division. The Irrigation Division yields nearly $100 million in economic activity from Project lands each year. The efficiency with which this water can be delivered, both in terms of cost and operational decision-making, significantly impacts irrigators' livelihood.

Historically, the Irrigation Districts were the de facto operators of both divisions of the Project. In the early 1980's, the previous FJBC was formed, at the urging of BIA, to formally take operational and management control of the Project

in its entirety. In 1991, however, BIA split the Irrigation and Power Divisions administratively and entered a contract with the CSKT under the terms of P.L. 638 allowing them to operate the Power Division. This contract was in contravention of the federal law, as BIA later recognized by analogy. *See* Exhibit 1.

15. The costs of construction of the Project, approximately $12.5 million, were fully repaid in 2004. Irrigators served by the Project, all but a small percentage of whom are represented by the FJBC, pay approximately $2.8 million each year for its operation and maintenance (O&M).

16. For the past four irrigation seasons, the Cooperative Management Entity (CME), an entity of which BIA approved, was the project operator. The CME was comprised of an equal number of appointees made by the irrigation districts, and the Confederated Salish and Kootenai Tribes (CSKT), which is a landowner under the project. The only parties to the agreement authorizing the CME to operate the Project were the BIA, the CSKT, and the FJBC.

17. The CME did not comply with Congress' mandate to turn over the Project because the CSKT was grossly overrepresented and because the Districts, through the FJBC, were not represented in proportion to the acreage within each of them that is owned by their landowner-constituents.

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18. Prior to the filing of this suit, the previous FJBC was involuntarily dissolved by the decision of four dissident commissioners of the two smaller Districts. No plan was made for reconstituting, replacing, or continuing the CME.

19. The dissolution of the CME, which had been formed pursuant to a Transfer Agreement signed by the BIA, the former FJBC, and the CSKT voided that Transfer Agreement and rendered the CME defunct.

20. After the dissolution of the CME, the parties to the now-void agreement attempted from December to mid-March, 2014 to form an entity to operate and manage the Irrigation Division that is representative of the landowners served by the Project. These talks focused solely on operation and management of the Irrigation Division. They failed because the BIA insisted that the CSKT must have 50% of the control of the entity operating the Project notwithstanding its much smaller land ownership compared with the amount of irrigated land served by the Project and owned by individuals represented by the Districts and now the FJBC. The FID insisted that the entity must comply with Congress' mandate of proportional representation of all landowners. BIA refused.

21. BIA took over the operation and management of the Irrigation Division of the Project in March without legal authority to do so. This violated the plain language of the FAA, and it will increase the cost of operating the Project and harm the irrigators in the Project. Among other negative impacts, it will

decrease the efficiency of operations, as more money will go to salaries and benefits leaving less available to pay for necessary operation and maintenance. The BIA is also operating the Irrigation Division contrary to its own manual, guidelines, or regulations.

B. Federal statute requires turnover of the project.

22. Congress specifically extended its policies under the General Allotment Act[2] to the Flathead Reservation in the Flathead Allotment Act of 1904 (FAA), Act of April 23, 1904, 33 Stat. 302. *See* Exhibit 2.

23. Congress deepened its Dawes Act policy on the Flathead Reservation in 1908 when it amended the FAA authorize the creation of the Project. *See* Exhibit 2. The 1908 FAA amendment required delivery of irrigation water to all irrigable land, both allotted and unallotted, on the reservation for the benefit of individuals, both tribal member allottees and homesteaders, and their successors in interest. Act of May 29, 1908, 35 Stat. 448. (Referred to here as "the 1908 FAA Amendment.") *See* Exhibit 3.

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[2] The General Allotment Act is codified at 25 U.S.C. §§ 331 to 358.

24. In the 1908 FAA Amendment, Congress mandated that the "management and operation" of the Project "shall pass to the owners of the lands irrigated thereby" when the charges for the construction of the Project had been paid. Ex. 3, § 15. The full provision reads:

> "When the payments required by this act have been made for the major part of the unallotted lands irrigable under any systems and subject to charges for such construction thereof, **the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby,** to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior."

This congressional mandate is referred to here as the "FAA Turnover provision." Quoting very similar language from the 1902 Reclamation Act, the United State Supreme Court characterized it as providing that the "Project was later to be turned over as a going concern to the landowners." *Swigart v. Baker*, 229 U.S. 187, 196-197 (1913); *see also United States v. McIntire*, 101 F.d 650, 652 (1939), stating, based on the Flathead Turnover provision: "Flathead Irrigation District, a Montana corporation, hereinafter called the district, will upon repayment to the United States of the project's cost, become the owner of it."

25. In the 1908 FAA Amendment and later enactments, Congress used language very similar to the language that it used in the 1902 Reclamation Act, 43 U.S.C. §§ 371 to 616, as amended. As such, interpretation of the Reclamation

Act's interpretation and implementation sheds light on Congress's intent in passing the 1908 FAA Amendment. Most pertinent to this suit, in the 1902 Reclamation Act, Congress mandated that "the management and operation of" the irrigation projects built pursuant to its provisions "shall pass to the owners of the lands irrigated thereby," with a proviso, the absence of which in the FAA Turnover provision, is significant. 43 U.S.C. § 498 reads in full:

> "When the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior; Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

26. The DOI has consistently transferred the operation and management of irrigation projects to local irrigation districts when implementing the Reclamation Act's similar language. In the Act of July 17, 1914, 38 Stat. 510, Congress made two statutes applicable to Reclamation Act project lands also applicable to the Flathead Project. Ex. 4[3]. The first of those two provisions provided that homestead entrymen could assign their entries or a part of them to another and the assignee could receive a patent for it. Act of June 23, 1910, 36

[3] Exhibit 4 consists of the 1914 Act of Congress making two previous acts applicable to the Flathead Project and a copy of each of those two acts.

Stat. 592. More important for this case is the Act of August 9, 1912, 37 Stat. 265. There, Congress provided not only for the entrymen, including on Indian lands, to receive a water right certificate, but imposed "a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights." Ex. 4, p. 2. Emphasis added.

27. In 1926, Congress required the creation of irrigation districts "organized under State law embracing the lands irrigable under the project, except trust patent Indian lands" to enter a contract with the United States "which contract, among other things, shall require repayment of all construction costs heretofore…"[4] *See* Exhibit 5. In that act, Congress also specified "[t]hat trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefore, be accorded the same rights and privileges and be subject to the same obligations as other lands within each such district or districts. . ." *Id.* In that act, Congress again provided "[t]hat all construction, operation, and maintenance costs (except

[4] Act of May 10, 1926, 44 Stat. 934, 945.

deferred obligations) on this project shall be, and are hereby, made a first lien against all lands within the project. . . ."[5] *Id.* (parenthetical added).

28. In response to the 1926 Act, the Districts were formed and executed repayment contracts with the United States.

29. In 1948, Congress enacted a major revision of its laws, beginning with its 1908 amendment of the FAA in which it authorized the Project, to establish a sound financial footing for both divisions of the Project. *See* Act of May 25, 1948, 62 Stat. 269 (hereinafter, "The 1948 Act"). *See* Exhibit 6. The 1948 Act was the congressional response to a number of developments since the 1926 Act, including the development of Kerr dam as a power site and its licensing by the Federal Power Commission, predecessor of the Federal Energy Regulator Commission. Other developments were less sanguine. The Great Depression, which struck agriculture earlier than industry and urban areas, resulted in the inability of many irrigators to pay O&M charges let alone repayment costs. By the mid-1940's, the potential of the Power Division was becoming apparent just as the desperate need of the irrigators under the Irrigation Division for relief from the financial burdens of the construction cost of the Project became acute. Thus, in the 1948 Act,

[5] Congress had previously made the cost of construction of the Project a first lien on "every patent and water-right certificate issued" when it made the Act of August 9, 1912, 37 Stat. 265, which imposed the lien on the lands of entrymen

Congress systematically prescribed means for addressing the operation of the Power Division of the Project and the distribution of its revenues while repealing all previous acts or parts of acts "inconsistent with the provisions of this Act." § 8, Act of May 25, 1948, 62 Stat. 269.

30. The government of irrigation districts in 1926 and now rests on an acreage basis. This means that an irrigator who owns 100 irrigated acres has more votes in district elections than one who owns 40 acres. In Montana, an irrigator has one vote per acre owned. § 85-7-1710(2), MCA. It also means that larger districts, in terms of acreage, may have larger numbers of elected commissioners.

31. Thus, the FID, with 87,000 acres has five (5) elected commissioners, and had five members of the former FJBC; MID, with 15,000 acres has three (3) elected commissioners, and had three members of the former FJBC; and JVID, with 7,000 acres has three (3) elected commissioners, and had three members of the former FJBC. The twelfth former FJBC member was an at-large member appointed by the majority of the elected FJBC commissioners. § 85-7-1611 (1), Mont. Code Ann. These proportions have been applied to the current FJBC.

32. Under Montana law, the public, including tax-paying irrigators, has fundamental constitutional rights under Montana's 1972 Constitution to participate

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under the Reclamation Act, applicable to the Flathead Project in the Act of July 17, 1914. Ex. 4.

in government prior to decision-making, to know what government is doing, including through observing deliberations and examining public documents. Individual members of the public also have the right to have these rights balanced by their privacy interests. Mont. Const. Art. II, §§ 8, 9, 10. These and other rights, and responsibilities, under state law were intended by Congress in the FAA Turnover provision and the 1926 Act to be available to irrigators in their dealings with the Project as it delivers irrigation water.

33. The Court in *McIntire* found the cost of construction up to June 30, 1936, was $7,499,105.85. Since that time, additional construction occurred and they were more recently totaled, in 2002, at $12,463,486.57. The costs of construction of the Flathead Project were completely paid off in 2004.

34. The total reimbursable cost of the Project was approximately $10,969,842.17. Of this amount, 69% was incurred prior to 1924 and, therefore, had been a lien on the land for nearly 80 years when ultimately paid off.

35. The 1908 Amendment to the FAA authorizing the Project and mandating its Turnover to irrigators also required landowners to pay the cost of managing and operating the Project. The FID now pays approximately $2.3 million each year for that purpose; the MID, $400,000; and the JVID, $185,000. This total of approximately $2.885 million paid annually is collected from

irrigators in property taxes each year and paid by the Districts, through the FJBC, to the operator of the Project.

C. Congress's intent in passing the foregoing laws was to protect the rights of entrymen and to provide for landowner control of the Project pursuant to the proportional representation doctrine.

36. Congress' policy in enacting the FAA was the eventual assimilation of the Indian population of the Flathead Reservation, the reservation's gradual dissolution, and the elimination of tribal relations through their dissolution as well. *See Montana v. United States*, 450 U.S. 544, 559, n. 9 (1981); and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n. 1 (2001). As the Supreme Court noted in regard to the General Allotment Act

> Throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, *e. g., id.*, at 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.

37. As the Supreme Court also noted, while "[t]he policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act (IRA) …, what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and

occupation of reservation land." *Montana*, 450 U.S. at 559, n. 9 (internal citations omitted). Congress in the IRA made it unmistakably clear that in halting the policy of the allotment era, it did not undermine the rights acquired by individuals, tribal members and nonmembers, and other entities, such as irrigation districts, prior to 1934. For example, in 25 U.S.C. § 463, while providing for the reacquisition of land on behalf of tribes Congress provided:

> (a) Protection of existing rights
>
> The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation."

38. The consequence of these policies nationwide was "that nearly 90 million acres of non-Indian fee land had been acquired as part of the Indian General Allotment Act, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, which authorized the issuance of patents in fee to individual Indian allottees who, after holding the patent for 25 years, could then transfer the land to non-Indians." *Atkinson*, 532 U.S. at 650, n. 1.

39. Congress' intention and goal in enacting the FAA was to eventually fully integrate the reservation land and people into Montana society. That goal has

been largely accomplished. Numerous cities and towns are scattered throughout the reservation boundaries, including Dayton, Polson, Pablo, Ronan, St. Ignatius, Arlee, Charlo, Hot Springs, Lone Pine, Dixon, and Ravalli. State and interstate highways run onto, through, and beyond the reservation, including Highway 93, Highway 200, Highway 212, and Highway 28. Many miles of county roads lace the area. Parts of four counties encompass areas of the reservation, Flathead, Lake, Missoula, and Sanders. The Twentieth Judicial District Court (Polson), the Fourth Judicial District Court (Missoula), and the Eleventh Judicial District Court (Kalispell) exercise jurisdiction there. Eleven State of Montana School Districts provide K-12 educational services there to thousands of Montana children.

According to the 2010 United States census, the reservation population was 28,359. Of this amount, approximately 4,000 to 5,000 are tribal members. Approximately 90% of the irrigated land under the Flathead Project is owned in fee. A similar percentage of all the arable land within reservation boundaries, nearly 500, 000 acres, is owned in fee. Approximately 50% of the total reservation acreage of 1.3 million acres is owned in fee.

40. Congress' intention in authorizing the construction of the Project in the 1908 FAA Amendment was to render nearly sterile rangeland productive through irrigation. Without irrigation water provided by the Project, most perhaps all the now productive agricultural land would be nearly valueless. The water

delivered by the Project increases the productivity of the land exponentially, which justifies the investment of hundreds of millions of dollars landowners and their predecessors have made in the 100+ year history of the Project.

41. As a result of Congress' Reclamation Act policies and the 1908 FAA Amendment authorizing the Project, the Flathead Irrigation Project is now the largest irrigation project in Montana, delivering water to approximately 127,000 acres of irrigated land, most of it owned by approximately 2,000 Montana family farms and ranches. The Project irrigation season generally runs from April 15 of each year until September 15 and occasionally beyond. As noted, the work these families do irrigating this land with water delivered by the Project results in approximately $100 million of annual economic activity.

42. Congress repudiated but did not legally reverse the General Allotment Act and FAA policies, and their results, in 1934 when it enacted the Indian Reorganization Act. *Montana*, 450 U.S. at 559, n. 9. The proper implementation of and adherence to the GAA and FAA therefore remains defendants' duty and is essential to the respect for and maintenance of the legal and equitable rights of individuals and entities, including property rights in land and water, obtained under the provisions and policies Congress enacted in those laws and under state law as a consequence of those laws and policies.

43. Congress' exercise of its plenary power leading to the imposition of General Allotment Act policies by way of the FAA, as amended, which imported Reclamation Act policies, not only violated the Hellgate Treaty but created vested legal and equitable rights in tens of thousands of people, many of them landowners, who, heeding Congress' call, moved to the reservation and acquired rights, including property rights, in land and water.

44. In the FAA Turnover Provision, Congress mandated the transfer of title and the management and operation of the Flathead Project, including of the reservoirs and related works, to the landowners served by the Project. In the 1926 Act, Congress specified that the fee landowners must be represented by the Irrigation Districts formed in response to that act. This requires the entity formed to operate and manage the Project to represent landowners on a proportional representation basis, based on an acreage-owned basis.

45. Congress' intention for the FAA Turnover Provision was to strengthen local institutions—the irrigation districts—and control, allowing them and their constituents, both tribal members and nonmembers, to reap the legal and practical benefits of local control, including more economical and efficient operation of the Project and operation pursuant to and with respect for the law under which irrigation districts operate.

46. While Congress' policies in the FAA, as amended, and related enactments were meant to benefit individuals, both tribal members and nonmembers, by authorizing and facilitating individual private ownership of property, and, in fact, have, their impact both on the Flathead Tribes, which was intended to be adverse, and on the federal commitments made in the Hellgate Treaty, was in many specific respects negative.

47. Congress has provided the Flathead Tribes a number of opportunities to sue the United States for its actions in violation of the Hellgate Treaty, including opening the reservation to allotment and settlement and the authorization, construction, and operation of the Flathead Project, and the Tribes, in fact, have done so.

D. The BIA's recent takeover of operation of the Project in violation of the plain language of the FAA harms the landowners in the Project.

48. Over the last ten years, from 2004 to 2014, the three Irrigation Districts have paid more than $20 million for the O&M of the Project. The irrigator-members of the districts and represented by the FJBC rely on the legal and professional operation of the project for their livelihood.

49. Under BIA Project operation, which it took over in March 2014, the O&M amount is expected to increase dramatically.

50. The operation of the Project requires between 35 and 45 employees, most of them seasonally. Prior to the BIA's takeover, there was a good, fairly stable workforce of experienced employees for the Project available for many years, including since 2010. Most of the employees have more than ten years' experience directly on the Flathead Project. Prior to 2010 the employees by and large were federal, on a federal pay scale, and eligible to be enrolled in a federal retirement program.

51. Since 2010, the CME had been eligible to enroll employees in the State of Montana Public Employees Retirement System (MPERS) and had done so. The employees under CME operation, therefore, were on a local-government pay scale and eligible to be enrolled in MPERS. This means the costs of operation, even if no efficiency improvement was gained through local operation, was lower than under federal operation. In fact, the efficiency of Project operation was improved under local control.

52. To attempt to address the void left by the dissolution of the FJBC and the CME, the Irrigation Districts, BIA, and CSKT communicated a number of times in the past four months, by email, telephone conference, and at two meetings, December 4, 2013, and January 24, 2014. For its part, the FID engaged in these discussions in an attempt to reach agreement on the features of an entity that could

legally operate the Flathead Project in accordance with the FAA Turnover provision. Those efforts failed to produce agreement.

53. After the January 24 meeting, on February 3, defendant Moran sent an ultimatum demanding that the FID, MID, and JVID indicate their agreement to an "Agreement in Principle" of that same date for the operation of the Project. *See* Exhibit 7. Mr. Moran's ultimatum required the Districts to indicate acquiescence in the "Agreement in Principle" by February 7th and completion of executed documents effectuating its provisions by February 21st. This scheme would have perpetuated the flawed CME organization that did not comply with Congress' FAA Turnover provision.

54. FID did not agree to that proposal, because it violated the FAA Turnover provision. FID communicated this to federal representatives on February 6, three days after receiving the ultimatum. *See* Exhibit 8[8].

55. The FID made it clear, however, that it wanted to continue local control of the Project but that the entity must comply with Congress' FAA Turnover provision, as later refined by Congress' Act of 1926. Ex. 8. Specifically, FID stated that the entity must represent landowners in compliance with the 1908 Turnover provision, on a proportional basis, meaning that trust land would have a

[8] In the email that is Ex. 8, dated February 6, the date of the BIA ultimatum is mistakenly given as January 3rd, rather than February 3rd.

representative on the body operating the Project, but not 50%. The FID also indicated it would, notwithstanding the drop-dead dates in BIA's ultimatum, develop a counter-proposal. Ex. 8.

56. On February 19, two days before the final drop-dead date in BIA's ultimatum, the FID relayed a counter-proposal to the BIA that would have, at least defensibly, comported with the legal mandate for Turnover to landowners as a temporary, stop-gap measure. *See* Exhibit 9. This counter-proposal was intended to get the Project operations up and running only for the 2014 season, allowing interested stakeholders some time to negotiate a permanent solution. Ex. 9.

57. Receiving no official response to its counterproposal, on March 5th FID proposed to hire all the employees from the previous season, so they could at least maintain their status and benefits under Montana PERS, and so that work on Project operations for the 2014 season could begin, implementing the same operations as the parties to the CME had agreed to, while a more permanent solution was negotiated during this year. *See* Exhibit 10. This proposal was promptly conveyed to federal representatives on March 5, even though information had been received that BIA had decided it would operate the Project.

58. In a letter dated March 11th, 2014, defendant Speaks of the BIA, dismissing both FID proposals, announced that the BIA would completely take over operation of the Flathead Project. Mr. Speaks made no provision for

resumption of management and operation by the landowners served by the Project, no provision for retention of the former employees of the defunct CME, no provision for immediate or even eventual compliance with the mandate of Congress in the FAA Turnover provision. *See* Exhibit 11.

59. Immediate compliance with the requirement of Congress in the FAA Turnover provision is possible. The criteria for a legally-compliant entity, at least for this season, to operate the Project are contained in FID's counterproposal, delivered to federal representatives February 19th. Ex. 9.

60. In that proposal, FID suggested the entity be named the "New Management Entity," that it have thirteen members: eight appointed by FID, two by MID, one by JVID, and two by the CKST. This roughly approximates the amount of acreage each represents, with the assumption that the CSKT represent trust land. FID also proposed that while the Irrigation District members would be active irrigators of land within their boundaries and appointed for 2014, they would be elected thereafter; but the CSKT appointees could not only be selected however the CSKT want but one of them would not need to be an irrigator but could be a fisheries expert.

61. BIA has indicated it will not hire many and perhaps any of the employees of the CME, who will lose some or all of the benefits to which they are

entitled in the Montana PERS. It is anticipated that BIA will have to increase the O&M fee, just to pay the employees on the higher federal pay scale.

62. Less work on maintaining the Project will be possible because more of the O&M fee will go to salaries than in the past, reducing funds available for materials necessary to perform maintenance work.

63. BIA takeover of operation of the Flathead Project will immediately and directly cause or threaten imminent, irreparable harm to FJBC and FID, their irrigator constituents, and the employees of the CME.

64. The FID paid its first O&M check for the 2014 season, without penalty, in the amount of approximately $1.15 million in late January, 2014. The second installment is due in June of 2014.

E. Injuries Certain or Likely to Result from BIA Takeover of Project Operations in Violation of FAA Turnover Provision.

65. First, federal operation of the Project will result in the termination of employment of many if not all of the employees that ran the Project in recent years. As employees of the CME, which was an employer enrolled in the state of MPERS they accrued at most four years of service and benefits in that system. They were paid according to a state pay scale. Federal operation of the Project operation will result in employees being paid on a federal pay scale, which is significantly higher than the state pay scale. In addition, it will result in their

losing some or all of their benefits, including years of service in MPERS, as full vesting occurs after five years. And it may result in their loss of some portion, the employer match, of their funds now in MPERS because they are not now fully vested. Only some future and very uncertain employment by another MPERS-qualified employer, likely within a finite number of years, will allow them possibly to recoup this loss.

66. It appears certain also that many if not most of the former employees of the CME will not be employed by the BIA if it takes over operation of the Project. This will not only harm them, but the FID and the other districts, who should under the FAA Turnover provision be primarily operating and managing the Project, because this loss of employment will cause harm to the workforce available to them when they are finally allowed to operate the Project. Some of these employees will find other employment and some will leave the area.

67. In practice the BIA in fact has hired very few of the former employees, claiming many are unqualified, and at least ten of these individuals have lost or are in the process of losing the four years of retirement savings they accrued as state employees under the CME.

68. BIA operation of the Project will also, with certainty, either increase the cost of running the Project in the more efficient manner it has been run since

2010 or result in less efficiency, which in this enterprise means less water delivered to irrigators and less agricultural productivity.

69. BIA operation of the Project, depending on who it hires and the experience they have, may imminently threaten public safety, because the Project captures, directs, and delivers, spring run-off of hundreds of thousands, perhaps millions, of acre feet of water in its reservoirs and canals. To do so safely requires expertise that the prior workforce possessed.

70. In addition, the United States, primarily through the BIA, has been implementing the IRA in violation of 25 U.S.C. § 463(a), in particular its provisos. The U.S. has been taking land irrigated by the Project out of fee status and moving it into trust status, rendering it untaxable by the Districts, in violation of the proviso that land within a reclamation project, which the Flathead Project is, shall not be taken into trust. This action in violation of federal law harms the long-term financial viability of the FJBC, the Districts, and the irrigators they represent.

71. The Power Division of the Project is now operated by the CSKT under a contract with the Defendant BIA, in violation of P.L. 638, since the Power Division serves not only tribal members. BIA is well aware this federal operation does not qualify for P.L. 638 contracting.

72. The Project has been operated in violation of applicable manuals, guidelines or regulations since its unauthorized March takeover.

73. Under the BIA operation of the Irrigation Division of the Project, the operator has failed to communicate crucial information necessary for the business of irrigated agriculture to the Districts and FJBC, and through them, irrigators, as required by BIA guidelines, manual, or regulations.

74. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator has failed to consult with irrigators, through the Districts and the FJBC, as required by BIA guidelines, manual, or regulations.

75. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator has failed to make irrigation water deliveries as required by BIA guidelines, manual, or regulations.

76. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator has expended irrigator O&M tax monies collected previously by the FJBC and transferred to the CME on unauthorized expenditures for which an accounting is due.

77. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator has effectuated or allowed unauthorized persons or entities to have access to and expend irrigator O&M tax monies collected previously by the FJBC and transferred to the CME on unauthorized expenditures and purposes for which an accounting is due.

78. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator been unaccountable to the Districts and FJBC, and through them, irrigators, for the expenditure of O&M tax monies collected in previous seasons and the 2014 season, for which an accounting is due.

79. Under the BIA operation of the Irrigation Division of the Project since its unauthorized March takeover, the operator has expended or allowed to be expended irrigator tax monies collected previously by the FJBC and transferred to the CME on unauthorized expenditures by unauthorized persons and for non-O&M purposes, for which an accounting is due;

COUNT ONE—DECLARATORY JUDGMENT—TURNOVER

80. Plaintiffs incorporate by reference the other allegations herein.

81. This case presents an actual controversy within this Court's jurisdiction and under the FAA Turnover provision in which Congress gave the landowners whose land is irrigated by the Flathead Project the right to operate and manage the Project. Defendants have been refusing and continue to refuse and to unlawfully withhold or improperly delay obeying Congress' mandate therein. This controversy is within this Court's jurisdiction to determine and declare the rights and other legal relations of the parties in regard to this issue pursuant to 28 U.S.C. § 2201.

82. The Project construction costs having been repaid a decade ago, the landowners have the right based on federal statute to operate and manage the Project by way of an organization comprised of representatives of the Irrigation Districts, in numbers proportional to the acres within their jurisdiction, and of trust land irrigated by the Project, in numbers proportional to the number of irrigated acres in that status.

83. This Court has the jurisdiction to order (or issue a declaration having the same or a similar effect), and should order, formation of such an entity and to declare what its permanent features must be, including:

- proportional representation of all landowners served by the Project based on the number of acres;
- fee landowners to be represented by individual active irrigators irrigating land within a particular Irrigation District and elected in accordance with state law controlling irrigation district elections by the irrigators of that district;
- trust landowners to be represented by individual active irrigators irrigating land held in trust for them and elected or appointed as they and their trustee decide;
- only active irrigators eligible to serve on the Project operations entity;
- project operations entity meetings and documents to be open to the public and subject to provisions of state law regarding open meetings and public documents.
- that the Turnover Provision includes operation and management of the entire Project, both the Irrigation and Power Divisions.

COUNT TWO—DECLARATORY JUDGMENT RELATING TO THE TRANSFER OF LAND FROM FEE TO TRUST IN VIOLATION OF CONGRESSIONAL PROHIBITION

84. Plaintiffs incorporate by reference the other allegations herein.

85. This case presents an actual controversy within this Court's jurisdiction as to whether the United States has been and continues to transfer land that was or is owned in fee within the Project into trust status in violation of 25 U.S.C. § 463(a).

86. The FJBC requests a declaratory judgment that in fact the United States has been violating this law.

COUNT THREE—DECLARATORY JUDGMENT RELATING TO DISTRIBUTION OF REVENUES FROM THE POWER DIVISION OF THE PROJECT

87. Plaintiffs incorporate by reference the other allegations herein.

88. Under the operation of the power division since the CSKT took control ostensibly pursuant to a P.L. 638 contract in the early 1990s, the revenues of the Power Division have been systematically generated and, to some degree, misdirected in violation of the 1948 Act in a variety of ways, but in particular section 2 of that Act.

89. The FJBC requests a declaratory judgment that in fact the United States has since the early 1990's allowed the operation of the Power Division of

the Project in contravention of the 1948 Act in a variety of ways that will be demonstrated through the course of this litigation.

COUNT FOUR—INJUNCTIVE RELIEF RELATING TO TURNOVER

90. Plaintiffs incorporate by reference the other allegations herein.

91. An injunction prohibiting the continuance of the federal takeover of operation of the Project, now and in the future, is appropriate and necessary to ensure continued compliance with Congress' mandate regarding local landowner control of the Project, as defined and declared in this Court's declaratory judgment.

COUNT FIVE—INJUNCTIVE RELIEF RELATING TO TRANSFER OF LAND FROM FEE TO TRUST IN VIOLATION OF CONGRESSIONAL PROHIBITION

92. Plaintiffs incorporate by reference the other allegations herein.

93. An injunction prohibiting the continued and any further transfer of land within the Project from fee to trust status is requested.

COUNT SIX—INJUNCTIVE RELIEF RELATING TO OPERATION OF THE POWER DIVISION IN VIOLATION OF THE 1948 ACT

94. Plaintiffs incorporate by reference the other allegations herein.

95. An injunction prohibiting the continued operation of the Power Division in contravention of the 1948 Act, including but not limited to the improper generation or failure to generated Net Power Revenues and their misdirection in contravention of the 1948 Act is requested.

COUNT SEVEN—EQUAL ACCESS TO JUSTICE ACT

96. Plaintiffs incorporate by reference the other allegations herein.

97. As described herein, Defendants' positions are not substantially justified. Moreover, defense of this suit will lead to additional positions being asserted which will not be substantially justified. As such, after this litigation is resolved in its favor, FJBC will be entitled to all the relied allowed by the Equal Access to Justice Act, 28 U.S.C.A. Sec. 2412, *et seq.*, including attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that the Court enter the following order:

A. A declaratory judgment that:

1. Landowners served by the Project have a right to manage and operate the Flathead Project in its entirety through an entity comprised of active irrigators of land they own in fee or which is held in trust for them, with the Irrigation Districts representing the fee landowners and the trust landowners being represented by whom they decide.

2. The number of the members or votes of such Project operating entity shall be sufficient to allow each district and trust lands their proportional share of representatives or votes based on the acreage within each and its relation to the total of acres under the Project.

3. At this time, that proportion is: FID—8 members/votes; MID—2 members/votes; JVID—1 member/vote; trust land—2 members/votes.

4. The fee-owner representatives shall be elected as provided by applicable state law for irrigation district commissioners from each Irrigation District.

5. The trust land representatives shall be selected as the landowners and their trustee decide, whether by election or appointment.

6. Such other elements of an appropriate declaratory judgment to fully resolve this controversy.

B. An Order permanently enjoining or requiring:

1. Defendants from taking any action to delay, hinder, or prevent landowner assumption of operation and management of the Project;

2. Defendants to promptly take all appropriate steps to transfer the authority to landowners, acting through an entity as declared appropriate under the law by this Court, to operate and manage the Project in its entirety;

3. Defendants to promptly take all appropriate steps to transfer title to all real and personal property to landowners, acting through an entity as declared appropriate under the law by this Court, necessary to operate and manage the Project in its entirety;

4. Defendants to act or refrain from acting as appropriate in such other ways and means to fully effectuate the declaratory judgment of this Court.

C. Granting attorneys' fees pursuant to the Equal Access to Justice Act.

D. Granting all other appropriate relief.

DATED this 28th day of July, 2014.

METROPOULOS LAW FIRM, PLLC

/s/Jon Metropoulos

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