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

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, MONTANA;

THOMAS E. PABLO, Chairman of the Tribal
Council, on his own behalf and as a
representative of the members of the
Confederated Salish and Kootenai Tribes;

KEITH ALLAN BLOOD, PETER BLOOD,
JACK LEWIS HARRISON, WILLIAM ALLEN BLOOD,
LOUIS EUGENE BLOOD, KIMBERLY A. ROULLIER MORTON,
and AGNES GENEVIEVE BLOOD HARRISON,
on their own behalf and as representatives
of similarly situated members of the
Confederated Salish and Kootenai Tribes;

GEORGE THOMAS BLOOD, on his own behalf and
as a representative of similarly situated
members of the Confederated Salish and
Kootenai Tribes;

JOSEPH ENEAS, on his own behalf and
as a representative of similarly situated
members of the Confederated Salish and
Kootenai Tribes; and

JUNE EVELYN MCLEOD MAHLER, on her own
behalf and as a representative of similarly
situated members of the Confederated Salish
and Kootenai Tribes,

Plaintiffs,

v.

THE STATE OF MONTANA;

MICHAEL T. GREELY, Attorney General of the State
of Montana;

LEO BARRY, JR., Director, Montana Department of
Natural Resources and Conservation;

No. 81-147¹⁴⁹

ROBERT M. HOLTER, Water Judge, Clark Fork River)
Basin Water Division; and)
FRANK I. HASWELL, GENE B. DALY,)
JOHN CONWAY HARRISON, DANIEL J. SHEA,)
JOHN C. SHEEHY, FRANK B. MORRISON,)
and FRED WEBER, Justices, Supreme Court)
of the State of Montana,)
Defendants.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, and certain of their members, by their attorneys, bring this action against the above-named defendants, and allege as follows:

JURISDICTION

1. This is a civil action for preliminary and permanent injunctive relief and for a declaratory judgment. It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975; under the Act of April 23, 1904, 33 Stat. 302, as amended by the Act of June 21, 1906, 34 Stat. 325, the Act of May 29, 1908, 35 Stat. 444, and the Act of March 3, 1909, 35 Stat. 781; under the Act of February 25, 1920, 41 Stat. 452; under the Act of March 7, 1928, 45 Stat. 200, 212-13; under the Act of August 15, 1953, 67 Stat. 588; under the Enabling Act of February 22, 1889, 25 Stat. 676; under Amendment XIV to the Constitution of the United States; and under 42 U.S.C. § 1983 (1976). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (1976), as amended by the Act of December 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369; pursuant to 28 U.S.C. § 1362 (1976); pursuant to 28 U.S.C. § 1343

(1976); and pursuant to 28 U.S.C. § 2201 (1976). Venue is established under 28 U.S.C. § 1391(b) (1976).

PARTIES

2. Plaintiff CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA (hereinafter referred to as the "Tribes"), is a confederation of American Indian Tribes, organized pursuant to the provisions of the Act of June 18, 1934, 25 U.S.C. §§ 461 et seq. (1976), with a governing body duly recognized by the United States Secretary of the Interior. The United States continues to maintain its trust relationship with the Tribes. The Tribes hold beneficial title to large areas of land on the Flathead Indian Reservation in Montana. [The Tribes bring this action on their own behalf and on behalf of each of their members.] *See No. 100-100007*

3. Plaintiff THOMAS E. PABLO is an enrolled member of the Tribes, a resident of the Flathead Indian Reservation, and Chairman of the Tribal Council, the governing body of the Tribes. He brings this action on his own behalf, on behalf of the Tribal Council, and on behalf of other members of the Tribes.

4. Plaintiffs KEITH ALLAN BLOOD, PETER BLOOD, JACK LEWIS HARRISON, WILLIAM ALLEN BLOOD, LOUIS EUGENE BLOOD, KIMBERLY A. ROULLIER MORTON, and AGNES GENEVIEVE BLOOD HARRISON are enrolled members of the Tribes and residents of the Flathead Indian Reservation. They own beneficial interests in Allotments Nos. 548, 549 and 550, on the Flathead Indian Reservation, which allotments were made pursuant to the Act of April 23, 1904, as amended, and are held in trust by the United States. Each plaintiff brings this action on his or her own behalf and on behalf of other, similarly situated members of the Tribes.

5. Plaintiff GEORGE THOMAS BLOOD is an enrolled member of the Tribes, a resident of the Flathead Indian Reservation, and

the owner of a beneficial interest, by heirship, in Allotment No. 348, on the Flathead Indian Reservation, which allotment was made to Basil Matt, pursuant to the Act of April 23, 1904, as amended, and which is held in trust by the United States. He brings this action on his own behalf and on behalf of other, similarly situated members of the Tribes.

6. Plaintiff JOSEPH ENEAS is an enrolled member of the Tribes and a resident of the Flathead Indian Reservation. He owns a beneficial interest in Allotment No. 434, on the Flathead Indian Reservation, which allotment was made pursuant to the Act of April 23, 1904, as amended, and is held in trust by the United States. He brings this action on his own behalf and on behalf of other, similarly situated members of the Tribes.

7. Plaintiff JUNE EVELYN MCLEOD MAHLER is an enrolled member of the Tribes, a resident of the Flathead Indian Reservation and the owner of a beneficial interest in Allotment No. 1575, on the Flathead Indian Reservation, which allotment was made pursuant to the Act of April 23, 1904, as amended, and is held in trust by the United States. She brings this action on her own behalf and on behalf of other, similarly situated members of the Tribes.

8. Defendant STATE OF MONTANA (hereinafter "State") is a sovereign State of the Union, having been admitted to the Union pursuant to the Enabling Act of February 22, 1889, 25 Stat. 676.

9. Defendant MICHAEL T. GREELY is the Attorney General of the State of Montana. He is charged by state law with the responsibility of administering and taking certain actions pursuant to various provisions of the Montana Water Use Act, as amended. His official address is The State Capitol, Room 208, Helena, Montana 59601.

10. Defendant LEO BARRY, JR., is the Director of the Montana Department of Natural Resources and Conservation. He is

charged by state law with the responsibility of administering and taking certain actions pursuant to various provisions of the Montana Water Use Act, as amended. His official address is 32 South Ewing, Helena, Montana 59601.

11. Defendant ROBERT M. HOLTER is the Water Judge of the Clark Fork River Water Division, Montana. He is charged by state law with the responsibility of administering and taking certain actions pursuant to various provisions of the Montana Water Use Act, as amended. His official address is Lincoln County Court House, Libby, Montana 59601. The Clark Fork River Water Division includes within its boundaries the Flathead Indian Reservation.

12. Defendants FRANK I. HASWELL, GENE ^B DALY, JOHN CONWAY HARRISON, DANIEL J. SHEA, JOHN C. SHEEHY, FRANK B. MORRISON, and FRED WEBER are the Justices of the Supreme Court of the State of Montana. They are charged by state law with the responsibility of administering and taking certain actions pursuant to various provisions of the Montana Water Use Act, as amended. Their official address is The State Capitol, Room 306, Helena, Montana 59620.

STATEMENT OF THE CLAIMS

13. By the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, the plaintiff Tribes agreed to convey certain of their aboriginal homelands to the United States. They reserved to themselves an area of land within the boundaries of what is now the State of Montana. By the same treaty, the United States guaranteed that the land so reserved would remain as the Tribes' permanent home; that reserved area of land is known today as the Flathead Indian Reservation. Also reserved to the Tribes by the Treaty was the exclusive and paramount right to all water necessary and convenient to any and all existing and future uses reasonably related to the purposes for which the Reservation was

established. A priority beneficial use to all of the surface and ground waters arising upon, flowing through or under, bordering, or otherwise occurring on the Reservation was thereby vested in the Tribes, with those waters reserved for the present and future needs and uses of the Tribes and their members.

14. By the Act of April 23, 1904, 33 Stat. 302, Congress provided for the allotment of land on the Flathead Indian Reservation to individual members of the Tribes and authorized the opening of the Reservation to settlement and entry by non-Indians through the sale of surplus lands by the United States, acting as trustee for the Tribes. That Act was subsequently amended by the Act of June 21, 1906, 34 Stat. 325, and by the Act of May 29, 1908, 35 Stat. 444, both of which expressly guaranteed to all Indians who received allotments under the 1904 Act such amounts of the waters of the Flathead Indian Reservation as then were or in the future would be needed to make beneficial use of their allotments and other lands of the Reservation acquired by them. The reserved water rights guaranteed by these statutes have a priority date of 1855 and are superior to all water uses permitted non-Indians by the Act of April 23, 1904, as amended.

15. There are currently 1,953 tracts of land within the Flathead Reservation that were allotted to tribal members and which have been held in trust by the United States since the time of allotment and continue today to be held in trust by the United States. Those tracts total approximately 48,156 acres and are scattered throughout the Reservation. Each is entitled to all of the water that now or in the future can be beneficially used on it, with a priority date of 1855.

16. There are approximately 570,752 acres of Reservation land held in trust by the United States for the plaintiff Tribes. These lands have been in that status since ratification of the 1855 Treaty of Hell Gate. Each acre of this land has a

right to the use of as much water now or in the future as can be beneficially applied to it or is necessary to achieve the purposes for which the Reservation was established, with a priority date of 1855.

17. Pursuant to the Act of April 23, 1904, as amended, the Secretary of the Interior has determined the existence of certain "water rights." These rights are known popularly as "Secretarial Water Rights". There are 449 "Secretarial Water Rights" within the Reservation, utilizing water from approximately 48 creeks and streams and one river. The plaintiff Tribes and their members do not agree with the limitations imposed by the Secretary in his determination of Secretarial Water Rights. The defendant State seeks to exercise jurisdiction over those rights, even though erroneously restricted by the Secretary, by subjecting them to the provisions of the Montana Water Use Act, as amended.

18. The Tribes provide permanent homesites to tribal members residing on the Flathead Indian Reservation by leases of tribal lands held in trust by the United States. At the present time, there are approximately seven hundred sixty-seven (767) homesites on the Reservation. Most of the homesites receive their domestic water supply from wells, springs, creeks, streams and self-developed domestic systems. Some receive water from other systems, such as the Public Health system at St. Ignatius, Montana. The water used for domestic purposes by tribal members on many of the tribal homesites will be affected adversely by non-Indian appropriations made pursuant to the Montana Water Use Act, as amended, since the ground and surface waters of the Reservation are interrelated and finite.

19. The United States, as trustee for the Tribes, acting through the United States Public Health Service, maintains and supplies, through a deep-water well, the sewer and water system for the Indians residing on trust land in St. Ignatius,

Montana, within the Flathead Indian Reservation. The defendant State, through the Montana Water Use Act, as amended, purports to authorize non-Indians on the Reservation to drill wells and appropriate ground water. The water supply for the Public Health Service's sewer and water system for St. Ignatius is and will be adversely affected by non-Indian appropriations made pursuant to that Act, since the ground and surface waters of the Reservation are interrelated and finite.

20. By Article III of the Treaty of Hell Gate, the plaintiff Tribes reserved, and the United States guaranteed to them, exclusive fishing rights on the Flathead Indian Reservation. The protection and exercise of the Tribes' treaty fishing rights are dependent upon the maintenance of adequate in-stream flows of waters in the various creeks, streams and rivers on the Reservation. The defendant State, by the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the in-stream flows of waters in the creeks, streams and rivers of the Reservation, by purporting to make those waters subject to appropriation and depletion pursuant to the various provisions of the Act. Thus, the defendant State, by that Act, seeks to exercise jurisdiction over the Tribes' treaty fishing rights, and threatens to impair, diminish and extinguish the ability of the Tribes and their members to exercise those treaty rights.

21. Pursuant to the Montana Water Use Act, as amended, only past water uses are recognized as having any priority; any new use of water will have a priority date as of the time water permits are granted pursuant to the Act. There are currently many acres of tribal and individual trust lands which are not irrigated but could be irrigated. These lands have a priority date of 1855 for all of the water that now or in the future can be beneficially applied to them. The defendant State, by the terms of the Montana Water Use Act, as amended, (i) denies the existence of that priority

date for current and future beneficial uses of water for tribal and individual trust lands and (ii) makes the present and future use of waters for those lands contingent upon (a) the filing of a state application, (b) the payment, to the defendant State, of the requisite fee or fees, and (c) the availability of water not subject to a prior use approved by the State, even if that prior use is by a non-member, is applied to fee lands and has a priority date of 1981.

22. Pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended by the Act of May 29, 1908, 35 Stat. 444, there was established, on the Flathead Reservation, the Flathead Irrigation Project. The Flathead Irrigation Project is administered by the Bureau of Indian Affairs, Department of the Interior, and supplies water for irrigation to tribal and allotted lands held in trust by the United States for the Tribes and individual allottees, or the heirs of allottees, and to lands held in fee by Indians and non-Indians. The irrigation project supplies water to irrigate approximately 126,262 acres, approximately 11,970 of which are held in trust by the United States, either for the plaintiff Tribes or members of the Tribes. The lands held in trust and irrigated by the Project consist of approximately 355 separate tracts. In some instances, through heirship, non-members hold interests in various parcels of land held in trust by the United States. The Flathead Irrigation Project receives its water from snow pack, the waters of approximately 30 creeks and streams, three rivers, one lake and nine reservoirs.

23. The water rights exercised by the Tribes and members of the Tribes, whether in conjunction with tribal land, an allotment, or otherwise, and whether exercised at the time of the Act of April 23, 1904, as amended, or subsequent to that Act and its amendments, or in the future, have a priority in time and amount over any other water uses permitted non-members who entered the

Reservation pursuant to the Act of April 23, 1904, as amended, and who receive water from the Flathead Irrigation Project.

24. The water rights of the Tribes and their members, for lands within or without the Flathead Irrigation Project, have a priority in time and in quantity, whether exercised now or in the future, over all uses of water provided to non-members by the Flathead Irrigation Project. The Flathead Irrigation Project, although administered by the Bureau of Indian Affairs, which exercises the trust obligations of the United States toward the Tribes and their members, does not recognize the superiority of the reserved Indian water rights of the Tribes and their members in the administration of the Flathead Irrigation Project. Therefore, there exists a conflict of interests between the Tribes, their members and their trustee over reserved Indian water rights on the Reservation.

25. The plaintiff Tribes and their members have their paramount right to the use of waters of the Flathead Reservation pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended. The only other uses of water permitted on the Reservation are those permitted by the Act of April 23, 1904, as amended. The Congress of the United States has not authorized, either directly or indirectly, the defendant State to use or appropriate the waters of the Flathead Indian Reservation for itself or for anyone else.

26. In 1979, the defendant State enacted into law a statute, popularly referred to as "SB 76," by which it significantly amended the Montana Water Use Act. The Montana Water Use Act, as amended in 1979, is codified at Sections 85-2-101 through 85-2-704 and at Sections 3-7-101 through 3-7-502 of the Montana Code Annotated; it shall be referred to hereinafter as "the Act."

27. Plaintiffs bring this action to enjoin and have declared unlawful and invalid the application or enforcement of the Act on the Flathead Indian Reservation and to any and all waters arising upon, flowing through or under, bordering, or otherwise occurring on the Flathead Indian Reservation.

28. Pursuant to the Act, the state has been divided into four water divisions; each water division is presided over by a water judge. Under the Act, the water judge for each division is directed to appoint a water master, who is said to have the same general powers granted to masters by Rule 53(c) of the Montana Rules of Civil Procedure. The water judge for each division has been granted jurisdiction over all matters concerning the determination and interpretation of existing water rights that are considered filed in or transferred to a judicial district wholly or partly within his division. (M.C.A. §§ 3-7-101, 3-7-301, 3-7-311, 3-7-501).

29. The Act declares that any use of water is a public use and that all of the waters within the state are the property of the state for the use of its people and are therefore subject to appropriation for beneficial uses as provided by the Act. (M.C.A. § 85-2-101). Thus, by the Act, the defendant State purports to claim sovereign ownership of tribal and individual Indian treaty and federal statutory water rights and to exercise jurisdiction over all of the waters on, beneath, flowing through or under, or appurtenant to the Flathead Indian Reservation.

30. The Act states that its purpose is to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose. (M.C.A. § 85-2-101).

31. The Act defines "persons" to include any individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity. (M.C.A. § 85-2-102). The defendant State, by

the Act, specifically intends to "include all claimants of reserved Indian water rights as necessary and indispensable parties" in any proceeding instituted under the Act. (M.C.A. § 85-2-701). The plaintiff Tribes, the individual plaintiffs herein, and other members of the Tribes claim "reserved Indian water rights." Thus, by the Act, the defendant State purports to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flat-head Indian Reservation.

The Act provides that no person may appropriate water except as provided in Chapter 2 of Title 85 of the Montana Code Annotated. Under the Act, a person may appropriate water only for a beneficial use, and a right to appropriate water may not be acquired by any other method. While the Act purports to recognize existing water rights, and purports to permit confirmation of those rights if the burdensome provisions of the Act are followed, including the payment of fees, the Act in fact does not recognize the existing water rights of the plaintiff Tribes and their members, because the reserved Indian water rights of the plaintiff Tribes and their members are open-ended. That is, to the extent necessary, additional water not used yesterday or today may be used tomorrow, for tribal and individual trust land, with a priority date of 1855. The Act, however, specifically permits confirmation of prior uses only in use as of July 1, 1973, and it provides that any use thereafter must be pursuant to the provisions of the Act. These provisions have the effect, among others, of cutting off any future expansion of reserved Indian water rights, under the Treaty of Hell Gate and applicable federal statutes, by the plaintiff Tribes and their members, thus making any use by them instituted after July 1, 1973, subject to state law and the priority dates and uses established under the Act. (M.C.A. § 85-2-301).

33. Pursuant to the Act, the Supreme Court of the State of Montana has issued an order which purports to require all persons claiming a water right within a water division to file a claim of that right in the manner prescribed by the Act.

34. The Act purports to establish the law of prior appropriation for all water within the state, including ground and surface water within and appurtenant to the Flathead Indian Reservation. In addition, the Act purports to prohibit the appropriation of water without full compliance with the Act's requirements for receiving a permit from the Montana Department of Natural Resources and Conservation. It is on the basis of these provisions that the defendant State seeks to exercise jurisdiction over the Tribes and their members residing on the Flathead Indian Reservation and to regulate in a detailed manner the appropriation and use of all ground and surface waters within the state, including the reserved Indian water rights of the plaintiff Tribes and their members. (M.C.A. §§ 85-2-301, 85-2-302, 85-2-305, 85-2-312, 85-2-402, 85-2-406).

35. By the Act, the defendant State purports to exercise jurisdiction over past, present and future appropriation and use of all water within and appurtenant to the Flathead Indian Reservation, by granting to the Montana Department of Natural Resources and Conservation the sole power to administer the Act and to prescribe procedures, forms, and requirements for applications, permits, certifications, declarations, claims of existing rights and present and future uses, and proceedings under the Act. (M.C.A. § 85-2-112).

36. By the Act, the defendant State seeks to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flathead Indian Reservation by requiring the affirmative action of filing with the State all claims of existing water rights, regardless of origin or nature, and all future uses of

waters pursuant to such rights. Failure to file a claim of an existing right is decreed by the Act to establish a conclusive presumption of abandonment of that right. The State also requires by the Act that each such claim be accompanied by a 40-dollar (\$40.00) filing fee; and the forms prepared by the defendant State and its Department of Natural Resources and Conservation, which must be used under the Act, do not provide for or recognize the existence of reserved Indian water rights. Thus, by the Act, the defendant State purports to make even the opportunity to assert the existence of plaintiffs' reserved Indian water rights and all other water rights on the Flathead Indian Reservation conditional upon payment of a filing fee and the filing of a detailed claim on forms which do not even provide for or recognize the reserved water rights of Indians. (M.C.A. §§ 85-2-221, 85-2-225, 85-2-226).

37. The defendant State, through the Act's requirement that claims of water rights be accompanied by a filing fee, seeks to impose a tax upon the reserved Indian water rights of the plaintiff Tribes and their members.

38. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members by authorizing the Montana Department of Natural Resources and Conservation to determine what uses of water are lawful within the State, including reserved Indian water rights. (M.C.A. § 85-2-114).

39. The defendant State, by the Act, purports to allow agents of the Montana Department of Natural Resources and Conservation to enter upon trust lands within the Flathead Indian Reservation without the permission of the plaintiff Tribes, individual members of the Tribes, or the United States. (M.C.A. § 85-2-115).

40. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members residing

on the Flathead Indian Reservation by purporting to make each of the following acts a misdemeanor: (a) Any appropriation of water, except as provided in the Act; (b) any change of the place of diversion, place of use, purpose of use, or place of storage of water, except as permitted by the Act and approved by the Montana Department of Natural Resources and Conservation; (c) severance of all or any part of an appropriation right from the appurtenant land, sale of the appropriation right for other purposes, or making the appropriation right appurtenant to other lands. (M.C.A. §§ 85-2-122, 85-2-301, 85-2-402(1), 85-2-403(3)). Thus, by the Act, the defendant State seeks to exercise criminal jurisdiction over the plaintiff Tribes and their members residing within the Flathead Indian Reservation.

41. The defendant State, by the Act, seeks also to exercise jurisdiction over the United States and its agencies, by purporting to require the United States and its agencies to apply to the Montana Board of Natural Resources and Conservation in order to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water. (M.C.A. § 85-2-316).

42. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flathead Indian Reservation by providing that any appropriator of water who ceases to use all or a part of his appropriation right with the intention of abandoning the right, or who ceases to use an appropriation right according to its terms and conditions, shall be deemed to have abandoned the right. (M.C.A. § 85-2-404). Reserved Indian water rights, as trust property rights, cannot be abandoned either intentionally or by non-use, just as an allotment cannot, by "intentional abandonment" or "non-use" be transformed into fee land and subjected to state jurisdiction.

43. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flathead Indian Reservation by purporting to grant jurisdiction to the state district courts to settle controversies between appropriators from a water source which has been the subject of a general determination of existing rights. (M.C.A. § 85-2-406).

44. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flathead Indian Reservation by purporting to regulate the use of all groundwater in the state. The Act permits the Montana Department of Natural Resources and Conservation to prevent the waste and the contamination or pollution of groundwater and to hold hearings to determine compliance with these provisions. (M.C.A. § 85-2-505). The Montana Board of Natural Resources and Conservation is authorized by the Act to designate or modify controlled groundwater areas. An order may be issued by the Board, closing any such controlled area to further appropriation, or regulating the withdrawal of groundwater in the controlled area. Such an order may be enforced by the Montana Department of Natural Resources and Conservation, which may bring an action for an injunction in a state district court. (M.C.A. §§ 85-2-506, 85-2-507).

45. The defendant State, by the Act, seeks to exercise jurisdiction over the plaintiff Tribes and their members residing on the Flathead Indian Reservation by directing defendant Greely, in his capacity as Attorney General of the State of Montana, to petition the Supreme Court of the State of Montana to commence a state administrative proceeding by which every person claiming a right to use water within the state is required to file a detailed claim of right, together with the required filing fee, with the

Montana Department of Natural Resources and Conservation. Defendant Greely filed the required petition in 1979.

46. The Supreme Court of the State of Montana, on June 8, 1979, issued an order commencing the claim-filing registration procedure. That order contained the following statement: "FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED." Pursuant to that order, the State seeks to exercise jurisdiction over all water users within the state -- including the reserved Indian water rights of the plaintiff Tribes and their members -- by requiring every such water user to file a detailed claim of existing right, together with a 40-dollar (\$40.00) filing fee, by December 31, 1981, or lose their rights to the use of water.

47. The State of Montana, pursuant to the Act, has, since 1975, issued water permits for irrigation, water wells, and other uses on the Reservation, over the repeated objections of the Tribes that the State lacks jurisdiction over waters within or appurtenant to the Flathead Indian Reservation.

48. Plaintiffs Keith Allan Blood, Peter Blood, Jack Lewis Harrison, William Allen Blood, Louis Eugene Blood, Kimberly A. Roullier Morton, and Agnes Genevieve Blood Harrison have interests in Allotments Nos. 548, 549 and 550, on the Flathead Indian Reservation, which allotments are held in trust by the United States and which have reserved Indian water rights pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended. The values of Allotments Nos. 548, 549 and 550 are directly related to the treaty and federal statutory reserved Indian water right each possesses. If plaintiffs Keith Allan Blood, Peter Blood, Jack Lewis Harrison, William Allen Blood, Louis Eugene Blood, Kimberly A. Roullier Morton, and Agnes Genevieve Blood Harrison do not submit to state jurisdiction by

filing the required forms, paying the requisite filing fees, and submitting their treaty and federal statutory reserved Indian water rights to state regulation and the procedures required by the Montana Water Use Act, as amended, those rights will be conclusively presumed abandoned and lost to them forever, if that Act is enforced on the Reservation.

49. Plaintiff George Thomas Blood has an interest through descent and distribution (heirship) in Allotment No. 348, which Allotment was made to Basil Matt, pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, 33 Stat. 302, as amended. Allotment No. 348 has a reserved Indian water right pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended. There are 48 individual heirship interests in Allotment No. 348, as well as a tribal interest. Legal title to Allotment No. 348 is held in trust for the 49 beneficial owners thereof, including plaintiff George Thomas Blood. The value of Allotment No. 348 is directly related to the treaty and federal statutory reserved Indian water rights it possesses. If George Thomas Blood does not submit to state jurisdiction by filing the required forms, paying the requisite filing fees, and submitting the reserved Indian water rights of Allotment No. 348 to state regulation and the procedures required by the Montana Water Use Act, as amended, those rights will be conclusively presumed abandoned and lost forever, if that Act is enforced on the Reservation.

50. Plaintiff Joseph Eneas received Allotment No. 434 pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended. Legal title to Allotment No. 434 is held in trust by the United States for Joseph Eneas. Allotment No. 434 has a reserved Indian water right pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended, and also receives water from the Flathead Irrigation Project. The value of Allotment No. 434 is directly related to the water rights it possesses. If

plaintiff Joseph Eneas does not submit to state jurisdiction by filing the necessary forms, paying the requisite filing fees, and submitting his treaty, statutory and administrative water rights to state regulation and the procedures required by the Montana Water Use Act, as amended, those water rights will be conclusively presumed abandoned and lost forever, if that Act is enforced on the Reservation.

51. Plaintiff June Evelyn McLeod received Allotment No. 1575 pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended. Legal title to Allotment No. 1575 is held in trust by the United States for June Evelyn McLeod. Allotment No. 1575 has reserved Indian water rights pursuant to the Treaty of Hell Gate and the Act of April 23, 1904, as amended, which water rights were assigned by plaintiff June Evelyn McLeod to the Flat-head Irrigation Project in return for receipt of water from that Project. The value of Allotment No. 1575 is directly related to its appurtenant water rights. If plaintiff June Evelyn McLeod does not submit to state jurisdiction by filing the required forms, paying the requisite fees, and submitting her water rights to state regulation and the procedures required by the Montana Water Use Act, as amended, those rights will be conclusively presumed abandoned and lost forever, if that Act is enforced on the Reservation.

COUNT I

52. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 51 of this Complaint.

53. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States exclusive jurisdiction to regulate the property and affairs of Indian Tribes. That exclusive jurisdiction includes the power to confer, define, foster and regulate all water rights on an Indian

reservation, and only Congress can confer jurisdiction on a state or state-delegated body or official to exercise any portion of that jurisdiction.

54. Congress has never conferred upon the defendant State jurisdiction to define, regulate, impair, diminish, or extinguish water rights on the Flathead Indian Reservation.

55. The defendant State, through the Montana Water Use Act, as amended, seeks to preempt federal jurisdiction over the plaintiff Tribes and their members and their water rights by assuming total jurisdiction over all waters within and appurtenant to the Flathead Indian Reservation, which exercise of jurisdiction includes (but is not limited to) defining water rights on the Flathead Indian Reservation on the basis of state law; regulating such water rights on the basis of state law; conditioning the preservation of such water rights upon the payment of fees and compliance with burdensome administrative procedures; and providing for the loss of such rights.

56. The defendant State, through the Montana Water Use Act, as amended, asserts that Congress, by the Act of July 10, 1952, Pub. L. No. 82-495, 43 U.S.C. § 666 (1976), conferred jurisdiction upon the defendant State to regulate totally the use of water on the Flathead Indian Reservation. (M.C.A. § 85-2-701.) The Act of July 10, 1952, however, does not confer jurisdiction on the defendant State to regulate the use of water on the Flathead Indian Reservation. That Act merely and only waives the sovereign immunity of the United States (i) to any suit for the adjudication of rights to the use of water, or (ii) to any suit for the administration of rights to the use of water, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, exchange or otherwise, and the United States is a necessary party to such suit. The limited waiver of sovereign

immunity of the United States, as provided in the Act of July 10, 1952, is not a grant of jurisdiction to the defendant State to regulate the waters of the Flathead Indian Reservation.

57. Because the defendant State, through the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the Flathead Indian Reservation, over the plaintiff Tribes, and over the Tribes' members residing on the Flathead Indian Reservation, without congressional authorization, by assuming state court jurisdiction over them and by defining and regulating water rights on the Flathead Indian Reservation, and because it thereby threatens to impair, diminish and extinguish such rights held by the plaintiff Tribes and their members pursuant to federal treaty and statutes, the Montana Water Use Act, as amended, is unconstitutional, unlawful and invalid insofar as it purports to relate to or affect such water and water rights within the Flathead Indian Reservation.

COUNT II

58. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 57 of this Complaint.

59. The defendant State seeks to exercise jurisdiction over the use of water on the Flathead Indian Reservation by asserting, through the Montana Water Use Act, as amended, that that Act, in effect, commences "procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water." (M.C.A. § 85-2-212). To the extent that certain provisions of the Montana Water Use Act, as amended, involve adjudications of the specified variety covered by the Act of July 10, 1952, which plaintiffs deny, the Montana Water Use Act, as amended, far exceeds in intent, purpose and scope the adjudication of water

rights covered by the Act of July 10, 1952. Rather, it is a comprehensive law designed to confer on the defendant State total jurisdiction over any and all aspects of the use of water in the State, including such use by the plaintiff Tribes and their members on the Flathead Indian Reservation.

60. Because the Congress of the United States has not conferred jurisdiction on the defendant State to regulate and control the use of water on the Flathead Indian Reservation, over the plaintiff Tribes, and over the Tribes' members residing on the Reservation, the Montana Water Use Act, as amended, is unconstitutional, unlawful and invalid insofar as it purports to relate to affect the use of water within the Flathead Indian Reservation.

COUNT III

61. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 60 of this Complaint.

62. By the Treaty of Hell Gate of July 16, 1855, the United States secured to the plaintiff Tribes the exclusive and paramount right to all waters necessary and convenient to any and all existing and future uses reasonably related to the purposes for which the Flathead Indian Reservation was established.

63. Because the defendant State, by the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the waters of the Flathead Indian Reservation, without federal consent, by defining and regulating water rights on the Reservation, and because it threatens to impair, diminish and extinguish such rights, application or enforcement of that Act on the Flathead Indian Reservation would unlawfully deprive the plaintiff Tribes and their members of rights guaranteed to them by federal treaty. Such application or enforcement would therefore be unlawful and invalid.

COUNT IV

64. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 63 of this Complaint.

65. Water rights on the Flathead Indian Reservation are conferred, defined, governed, fostered, protected and regulated by federal treaty, federal common law and federal statutes.

66. Because the defendant State, by the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the waters of the Flathead Indian Reservation, without federal consent, by defining and regulating water rights on the Reservation, and because it threatens to impair, diminish and extinguish such rights, application or enforcement of that Act on the Flathead Indian Reservation would frustrate, impede and be inconsistent with federal law, and is preempted by federal law. Such application or enforcement would therefore be unlawful and invalid.

COUNT V

67. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 66 of this Complaint.

68. The plaintiff Tribes are a sovereign political entity, organized pursuant to the provisions of the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 et seq. (1976), with all the powers of a sovereign government (except where limited by treaty or federal law) over the lands, waters, resources and people of the Flathead Indian Reservation.

69. The waters of the Flathead Indian Reservation are a vitally important natural resource of the Reservation, and they are absolutely essential to the maintenance and continued existence of the Reservation as a tribal homeland, to the ability of the

members of the Tribes to exercise and enjoy rights guaranteed by treaty and, indeed, to the continued existence of the plaintiff Tribes themselves.

70. Authority to regulate and control the appropriation and use of the waters of the Flathead Indian Reservation (except where limited by treaty or federal law) is vested in the plaintiff Tribes.

71. Because the defendant State, by the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the waters of the Flathead Indian Reservation, without federal consent, by defining and regulating water rights on the Reservation, and because it threatens to impair, diminish and extinguish such rights, (i) application or enforcement of the Montana Water Use Act, as amended, with respect to any of the waters within or appurtenant to the Flathead Indian Reservation would infringe upon, frustrate, be inconsistent with and impair the right and ability of the plaintiff Tribes to regulate and control the appropriation and use of the waters of the Reservation, and (ii) application or enforcement of that Act on the Flathead Indian Reservation would infringe upon, frustrate, be inconsistent with and impair the right and ability of the sovereign plaintiff Tribes to govern themselves, their lands, their water and their resources. Such application or enforcement would therefore be unlawful and invalid.

COUNT VI

72. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 71 of this Complaint.

73. The Enabling Act of February 22, 1889, pursuant to which the defendant State was admitted to the Union, expressly conditioned Montana's admission to the Union upon the future State's disclaimer of any and all jurisdiction over Indian lands

within the State's boundaries. The Constitution adopted and ratified by the people of Montana in 1889 recognized and accepted this limitation upon the State's power, and the same disclaimer is expressly reaffirmed and incorporated in Article I of the Constitution adopted and ratified by the people of Montana in 1972.

74. Water is an integral part of the Flathead Indian Reservation and an absolutely necessary element of many forms of land use on the Reservation; it is necessary also to many of the activities of the plaintiff Tribes and their members on the Reservation.

75. Because the defendant State, by the Montana Water Use Act, as amended, purports to define and regulate water rights on the Flathead Indian Reservation, and because it threatens to impair, diminish and extinguish such rights, application or enforcement of that Act on the Flathead Indian Reservation would constitute the exercise of state jurisdiction over Indian lands, in violation of the Enabling Act of February 22, 1889, 25 Stat. 676, and of the defendant State's Constitution. Such application or enforcement would therefore be unlawful and invalid.

COUNT VII

76. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 75 of this Complaint.

77. Because the defendant State, through the Montana Water Use Act, as amended, threatens unlawfully to impair, diminish and extinguish valuable water rights of the plaintiff Tribes and their members residing on the Flathead Indian Reservation, application or enforcement of that Act on the Reservation would (i) deprive the plaintiff Tribes and their members of valuable property rights without due process of law, (ii) impose an unlawful tax upon the plaintiff Tribes and their members, and (iii) impair the

ability of the plaintiff Tribes and their members to realize the full benefit and use of their Reservation lands, thereby denying them of liberty and property without due process of law. Such application or enforcement would therefore be unconstitutional, unlawful and invalid.

COUNT VIII

78. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 77 of this Complaint.

79. The defendant State, through the Montana Water Use Act, as amended, recognizes that "water and water rights" within each water division established by the Act are "interrelated" and states that: "It . . . is the intent of the legislature [i.e., of the defendant State] to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature [i.e., of the defendant State] that the attorney general's petition required in 85-2-211 [allegedly instituting general stream adjudications of the nature that would make the United States amenable to state court proceedings pursuant to the Act of July 10, 1952, 43 U.S.C. § 666] include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the State by 43 U.S.C. 666." (M.C.A. § 85-2-701.)

80. The plaintiff Tribes and their members are claimants of "reserved Indian water rights."

81. Indians Tribes cannot be sued either in state or federal courts, under the doctrine of sovereign immunity, unless the jurisdiction to sue tribes is expressly authorized by the Congress of the United States. As a corollary to the doctrine of tribal sovereign immunity, federal treaty and statutory rights, within an Indian reservation, including property rights, such as

water rights, of individual tribal members cannot be the subject of suit either in state or federal court by suing the individual members or by judicial proceedings in the nature of quiet title, without express authority by the Congress of the United States.

82. The defendant State seeks, by the Montana State Water Use Act, as amended, to join the plaintiff Tribes, the plaintiff tribal members and all other tribal members similarly situated, in a state court adjudication. The defendant State recognizes it cannot do this without express authority from the Congress of the United States, and attempts to invoke the Act of July 10, 1952, 43 U.S.C. § 666, as such authority.

83. The Act of July 10, 1952, 43 U.S.C. § 666, however, is not express authority from the Congress of the United States conferring jurisdiction on the defendant State to sue the plaintiff Tribes or their members to adjudicate their federal treaty and statutory water rights in any court. That Act waives only the sovereign immunity of the United States. It does not even mention Indians or Indian Tribes. It therefore does not confer jurisdiction on the defendant State to join as indispensable parties the plaintiff Tribes or any of its members in any adjudication or to adjudicate the water rights of the plaintiff Tribes or its members through proceedings instituted pursuant to the Montana Water Use Act, as amended.

84. Because the defendant State, through the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the Flathead Indian Reservation, over the plaintiff Tribes and over the Tribes' members residing on the Flathead Indian Reservation, without congressional authorization, by adjudicating their water rights on the Flathead Indian Reservation, and because such action is an unlawful exercise of jurisdiction and in violation of the principle of sovereign immunity as applied to the plaintiff Tribes and the Reservation treaty rights of the Tribes and

their members, the Montana Water Use Act, as amended, is unconstitutional and invalid insofar as it purports to extend any jurisdiction of the defendant State over the rights of the plaintiff Tribes and their members within the Flathead Indian Reservation.

COUNT IX

85. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 85 of this Complaint.

86. The defendant State, through the Montana Water Use Act, as amended, seeks to exercise jurisdiction over the use of waters of the Reservation by non-members of the Tribes by recognizing past uses claimed under inapplicable state law and future uses by granting permits under that Act.

87. The effect upon the Tribes' full equitable title to the waters of the Reservation and on the Tribes' reserved right to the use of those waters by validating past illegal uses and by the granting of new applications, individually and cumulatively, is severe prejudice. Although the State of Montana has no jurisdiction to issue any of these permits with respect to the waters of and appurtenant to the Flathead Reservation, all permittees create certain equities in their favor by the investments they make to exercise their unlawful rights under the permits. As these unlawful equities increase and become established over time, the exercise by the Tribes at a later time of tribal reserved water rights and title will certainly be resisted by the permittees. This resistance will force the Tribes to litigation in each instance. The cost to the Tribes will be enormous.

88. The only relief the Tribes may seek to avoid those enormous future costs is to obtain preliminary and permanent injunctive and declaratory relief in this action, holding unlawful

the practice of the State of Montana in validating prior illegal uses by non-members and in issuing new use permits with respect to the waters of the Reservation to non-members.

COUNT X

89. Plaintiff reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 88 of this Complaint.

90. The Montana Water Use Act, as amended, cannot be applied to the Tribes, its members or the waters of the Reservation. That Act is an integral whole and its provisions are not severable. Therefore, the provisions of that Act, relating to the United States, as trustee of the Tribes, are unconstitutional and invalid insofar as they purport to extend any jurisdiction of defendant State over the rights of the plaintiff Tribes, their members and their reserved Indian water rights by extending jurisdiction over the United States, as trustee for the Tribes and their members and their reserved Indian water rights.

COUNT XI

91. Plaintiffs reallege and incorporate herein each and every one of the allegations set forth in Paragraphs 1 through 90 of this Complaint.

92. Article III of the Treaty of Hell Gate, 12 Stat. 1976, guarantees to the plaintiff Tribes and their members the exclusive right of taking fish in the streams running through or bordering the Reservation. It is essential for the continuation of this treaty fishing right that there be sufficient in-stream water flows in all of the streams, creeks and rivers of the Reservation. The Montana Water Use Act, as amended, M.C.A. 85-2-316, allows the defendant State, any political subdivision or agency thereof or the United States or any agency thereof to

apply to reserve water for existing or future uses. These uses could interfere with necessary in-stream flows for tribal fishing rights. The Act does not permit the Tribes to seek and secure sufficient in-stream flows to protect their treaty fishing rights. The Act therefore denies to the Tribes the equal protection of the laws, and interferes with tribal treaty fishing rights.

93. The Act, therefore, is unconstitutional and invalid (i) insofar as it purports to deny the plaintiff Tribes the authority to receive sufficient in-stream flows and to protect treaty fishing rights, and (ii) insofar as it purports to allow others to affect such in-stream flows and thereby affect plaintiffs' treaty fishing rights. In addition, the Act interferes with the provisions of the Act of March 7, 1928, 45 Stat. 200, 212-213, guaranteeing the Tribes the full exploitable value of their hydroelectric sites.

WHEREFORE, plaintiffs demand judgment:

1. Declaring that the State of Montana has no jurisdiction to apply, administer or enforce the Montana Water Use Act, as amended, directly or indirectly, within the Flathead Indian Reservation, or with respect to waters that arise upon, flow through or under, border, or otherwise occur on that Reservation, or with respect to the plaintiff Tribes or any of their members;

2. Enjoining, preliminarily and permanently, the defendant State of Montana and each of the individual defendants herein, and their employees, subordinates, attorneys or agents from taking any action which would have the effect, directly or indirectly, of applying, administering or enforcing the Montana Water Use Act, as amended, within the Flathead Indian Reservation, or with respect to the waters that arise upon, flow through or under, border, or otherwise occur on that Reservation, or with respect to the plaintiff Tribes or any of their members;


3. Enjoining, preliminarily and permanently, the defendant State of Montana and each of the individual defendants herein, and their employees, subordinates, attorneys or agents, from issuing any permits for any use of waters arising upon, flowing through or under, bordering, or otherwise occurring on the Flathead Indian Reservation;

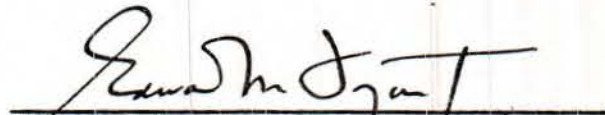
4. Declaring that any and all water use permits previously issued by the defendant State of Montana or any of the individual defendants herein, or any of their employees, subordinates, attorneys or agents with respect to the waters arising upon, flowing through or under, bordering, or otherwise occurring on the Flathead Indian Reservation, are null and void, and enjoining the exercise by any permittees of any rights purportedly conferred by those unlawful permits;

5. Ordering that the defendants pay to the plaintiffs the costs of this litigation, including attorneys' fees; and

6. Awarding to the plaintiffs such other relief as the Court may deem just and proper.

Respectfully submitted,


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