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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER- FROM HOLTER DAM TO SUN RIVER - BASIN 41 QJ

CLAIMANTS: Linda M. Johns; W. Steve)		
Johns; Betty L. Bicknell; Gene E. Bicknell;)		
Diana L. Nelson; Sue A. Weingartner;	)	Case 41QJ-19	
Russell W. Weingartner; Elizabeth; C.)		
Dagnall; Robert G. Dagnall	)	41QJ 5581-00	41QJ 97570-00
	)	41 QJ 34410-00	41QJ 97571-00
	)	41QJ 41568-00	41QJ 97572-00
OBJECTOR: United States of America	)	41QJ 41569-00	41QJ 143007-00
Department of Interior-Bureau of Indian)		
Affairs)		
)		

**ASSINIBOINE AND GROS VENTRE TRIBES' MOTION TO APPEAR
AS AMICUS CURIAE AND TO SUBMIT AMICUS MEMORANDUM IN SUPPORT
OF UNITED STATES' MOTION TO REVISE THE ORDER OF SEPTEMBER 24, 2012;
REQUEST FOR LEAVE TO SUBMIT SUPPLEMENTAL FILING;
AND REQUEST FOR AND TO PARTICIPATE IN ORAL ARGUMENT**

Applicant, the Assiniboine and Gros Ventre Tribes, now known as the Fort Belknap Indian Community ("FBIC" or "Tribes"), by its attorneys, Fredericks Peebles & Morgan LLP, and Law Offices of James L. Vogel, hereby move the court for leave to appear as *amicus curiae*, to file an *amicus* Memorandum, and to join the United States of America in its Motion to Revise the Order of September 24, 2012, in the above-captioned case. Additionally, the FBIC requests that the court grant it leave to make a supplemental filing to this brief, as necessary, after it has had the opportunity to review the United States' Memorandum in support of its motion, to be filed today. We also join the United States in requesting that the court set this issue for oral argument and allow the FBIC to participate for the reasons set forth herein.

Applicant was not notified by the parties or the Court of the pending issue in this case addressing the P490 issue remark. *See* Provencio Aff. Ex. 1. In fact, the United States notified applicant on October 19, 2012, of this Court's *Order Addressing P490 Issue Remark* and does not object to Applicant's Motion to Appear and Join. Due to the timing of notice to Applicant and the deadline for filing, Applicant has not been able to seek permission from Claimants.

This Court's *Order* concerns the interpretation of the Blackfeet Treaty of 1855. The Treaty of 1855 included the Gros Ventre Indian Tribe. In addition to the Gros Ventre Tribe's participation in the execution of the Treaty of 1855, the Tribes, with recognized *Winters* Indian reserved water rights, have an interest in this Court's disposition of tribal *Winters* reserved water rights in the ongoing water rights adjudication in the state.

In its Memorandum attached hereto, the Tribes set out why the Applicant's *amicus curiae* is desirable. In short, it appears that neither the Blackfeet Tribe nor any other Indian tribe with *Winters* reserved water rights in Montana have been involved in the resolution of the P490 issue remark. Further, this Court's *Order* does not appear to limit its ruling only to the adjudication

and priority date of the Blackfoot Tribe's reserved water rights, but has implications for the interpretation and settling of the FBIC Indian reserved water rights. All reservations in Montana have the same set of facts, whereby large reservations were reduced time after time by treaty and/or executive order to make way for non-Indian settlement of the west. Thus, the Applicant offers its position with regard to the implication of this Court's *Order* on the adjudication of Indian reserved rights and, in particular, the impact that this Order will have on the Applicant's *Winters* reserved water rights.

Furthermore, it is desirable for this Court to allow Applicant to appear *amicus curiae* since this Court's Order also appears to alter Mont. Code Ann. § 85-2-217 (2011), which suspends all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies that are negotiating. Again, this Court's Order does not appear to be limited to just the effect of this adjudication on the Blackfoot Tribe's reserved water rights. Therefore, the Applicant desires to be heard on this matter to protect its *Winters* reserved water rights.

As Trustee to the FBIC, the United States' position as set forth in its Motion is aligned with Applicant's position. The Tribes' supporting memorandum in support of the motion and above requests is set forth below.

Memorandum in Support of Motion

This court's decision to remove issue remark P490 from the claims in this case, and the reasoning supporting it, could have a significant negative impact on the interpretation and determination of the FBIC Indian Reserved Water Rights claims and the senior priority date attached to such water rights.

The FBIC now occupies the Fort Belknap Indian Reservation in north-central Montana by Agreement of May 1, 1888, 25 Stat. 8. However, the region encompassing the present Fort Belknap Indian Reservation has been the ancestral home of both the Gros Ventre and Assiniboine Indians for centuries. *See* Historical Research Associates, Historical Analysis of Water Development on the Fort Belknap Indian Reservation, Blaine County, Montana (Draft Report) at i (Jan. 17, 1989) (hereinafter HRA Historical Analysis). The 1855 Treaty, 11 Stat. 657, included the Gros Ventre Indians.

The FBIC joins the United States in requesting that the court modify its decision in this matter where the court concluded that "unreserved water rights . . . could be appropriated under state law" consistent with the purpose of the Treaty of 1855. It is the FBIC's position that the Court's Order is wrong as a matter of law. The Tribes ask the court to direct the Department of Natural Resources and Conservation ("DNRC") to continue to append the P490 issue remark to Claimants' claims and any other claims on which it has been placed by the DNRC in any other Basin when the claimed priority date overlaps with the existence of an Indian reservation.

The Tribes, in joining the United States, incorporate by reference herein its Response to Motion and Memorandum in Support of Declaratory Judgment and Opening Memorandum Re: Questions Posed by the Water Court Re: Article 7 of the 1855 Treaty, dated May 21, 2012, and add the following.

I. BECAUSE THE FBIC IS IN THE PROCESS OF NEGOTIATING AND SETTLING ITS RESERVED INDIAN WATER RIGHTS WITH MONTANA AND THE UNITED STATES, PROCEEDINGS THAT ADJUDICATE THESE RIGHTS MUST BE STAYED UNDER MONTANA CODE ANN. § 85-2-217

The FBIC is currently in negotiations with the Montana and the United States to settle its reserved Indian Water Rights, and "all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights" are "suspended," until July 1, 2013 (with additional time

in which the FBIC may file its claims). Mont. Code Ann. § 85-2-217. On May 21, 2012, a bill was introduced in the Committee on Indian Affairs of the United States Senate, S. 3209, proposing "[t]o provide for the settlement of the water rights claims of the Fort Belknap Indian Community, and for other purposes." In introducing the bill, Senator Tester stated that "[s]ince the Supreme Court's 1908 decision in *Winters*, the United States has had a responsibility to provide water to the land it reserves for specific purposes, such as reservations for American Indian homelands." In fact, it was the reserved water rights of the Fort Belknap Reservation Tribes that were at issue in the Supreme Court's landmark *Winters* case, leading to the now well-known *Winters* doctrine. 207 U.S. 564 (1908).

Here, the court makes findings of fact and conclusions of law that could impact the future adjudication of the Tribes' rights, and, yet, they have not had the benefit of due process through discovery and development of facts that will support their Indian Reserved Water Rights claims, as may be necessary to defend against objectors to such claims. As noted above, the FBIC was not notified of this court's intent to interpret the purpose of the 1855 Treaty, as it has done in its decision, and it believes that the court's interpretation could negatively impact its own claims. In developing its rationale, the Court confuses public land law with Indian law to reach a rather egregious interpretation of the law to the benefit of non-Indians.

II. THE STATE OF MONTANA RECOGNIZES THE TREATY OF 1855 AS THE DATE A RESERVATION WAS ESTABLISHED IN MONTANA FOR THE GROS VENTRE AND ASSINIBOINE TRIBES CREATING A RESERVED WATER RIGHT WITH A PRIORITY DATE OF 1855

By statute, Mont. Ann. 85-20-1001, the State of Montana ratified the Fort Belknap-Montana Compact, which was agreed to between the parties and filed under the provisions of 85-2-702, MCA, on April 16, 2001. In the Fort Belknap-Montana Compact, the State of Montana recognizes that a Reservation was established in Montana for the Gros Ventre and Assiniboine

Tribes under the Treaty of 1855, and the Acts of Congress of 1874, 18 Stat. 28, and 1888, 25 Stat. 113. A senior priority date of the reserved water rights recognized in this Compact is October 17, 1855.

The first treaty made with Indian tribes in the Montana area, including the Gros Ventre and Assiniboine Indians, was the 1851 Fort Laramie Treaty, 11 Stat. 749. It was the first governmental attempt to extend the reservation policy to the western plains Indians. The Treaty acknowledged separate, defined tribal territories for several tribes, including areas for the Assiniboines and for the Gros Ventre Indians. Government policy at the time reflects that the tribes were expected to be confined to and to settle permanently within their territorial boundaries where they were strongly encouraged to pursue agriculture and stock raising. See HRA Historical Analysis, *supra* at II 1-6. The policy was to effectuate a change in Indian life from nomadic to a smaller, confined pastoral lifestyle.

The Treaty October 17, 1855, 11 Stat. 657 (Treaty of Laramie) with the Blackfeet, Piegan, Blood, Gros Ventre, Flathead and Nez Percé Indians provided that these Tribes would "remain within their own respective countries" as established by the 1851 Treaty, except in coming and going to a common hunting ground to be used by all the Tribes. (Article 6.) The 1855 Treaty of Laramie differs from many treaties of peace and amity because, besides setting aside an area to be used in common by many tribes as a hunting ground, it specifically designated a large tract of land for the exclusive use and control of the "Blackfoot nation." (Article 4). The second paragraph of the Treaty defines the Blackfoot nation as "consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians."¹ (Prior to 1868, government

¹ The unratified treaty of 1868 with the Gros Ventre negotiated by W.J. Cullen acknowledged that the Treaty of 1855 established a reservation for the Gros Ventre and Blackfeet and the agreement of the Gros Ventre to the cession included in the 1868 treaty was required. *Id.* at II 35.

officials considered the Gros Ventre to be part of the Blackfeet Nation). Article 4 also provided that the Assiniboine Indians had the right to hunt in common with the other tribes in a portion of their exclusive territory.

A major purpose of the 1855 treaty was to create a self-supporting, agrarian homeland for the Gros Ventre and Blackfeet Indians by means of the reservation system. This was evidenced by the instructions of Commissioner of Indian Affairs George Manypenny to Isaac Stevens and the other commissioners who held the 1855 treaty council with the tribes of the Upper Missouri River. Manypenny instructed the commissioners to make arrangements between the tribes and the federal government "as shall gradually reclaim the Indians from a nomadic life and tend to encourage them to settle in permanent houses, and obtain their sustenance by agricultural, and other pursuits of civilized life." (Manypenny to Cummings, Stevens and Palmer, May 3, 1855, at 356-359, OIA, LS, Feb. 21-June 12, 1855, M-21, Roll 51, RG75, NA.) Thus, as shown by these and other statements in the historical record, the 1855 treaty had a federal purpose to create an agricultural homeland for the tribes for whom the exclusive territory was set out.² Partoll, "Blackfoot Indian Peace Council, 1855," at 201.

² Isaac Stevens wrote to Commissioner Cummings of the 1855 treaty council concerning the exclusive reservation area: "It is, in the main an exceedingly fine grazing country, of great salubrity of climate, [and] much arable land of great quality." Although he believed that part of the country was "scantily watered," Stevens considered it excellent grazing country and "the greater portion of the land is adapted to all cereals and most of the vegetables of the Temperate Zone." Ratified Treaties, 1854-1855, "Official Proceedings of the Commission Appointed to hold a Council with the Blackfeet and other Indian tribes on the Headwaters of the Missouri River in the year 1855."

At the 1855 treaty council, Stevens told the Gros Ventre and Blackfeet Indians:

We want to establish you in your country on farms. We want you to have cattle and raise crops. We want your children to be taught, and we want to send word to your Great Father through us where you want your farms to be, and what schools and mills and shops you want.

This country is your home. It will remain your home. And as I told the Western Indians we hoped through the long winters, bye and bye, the Blackfeet would not be obliged to

On July 5, 1873, the President issued an executive order reducing the boundaries of the Reservation. This was followed by the Act of April 15, 1874, 18 Stat. 28, which further reduced the boundaries of the Reservation "set apart for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate thereon" These Tribes held the Reservation in common, although they were assigned to one of three agencies on the Reservation. In 1878 the Fort Belknap Agency was established for the Gros Ventre and Upper Assiniboine Tribes. See HRA Historical Analysis, *supra*, at II 39-42.

Finally, the present Fort Belknap Indian Reservation was reserved as a homeland for the Assiniboine and Gros Ventre Tribes by the Agreement of May 1, 1888, 25 Stat. 8. The 1888 Agreement created three separate reservations from the larger reservation set aside by Congress in the 1855 Treaty of Laramie, for the Blackfeet, Piegan, Blood, Gros Ventre, Flathead and Nez Percé Indians. Consistent with federal law, the FBIC has been assigned the senior priority date for their Reserved Water Rights at 1855.

III. BECAUSE THE INDIAN NON-INTERCOURSE ACT INVALIDATES LAND CONVEYANCES WITHOUT FEDERAL CONSENT, THE NON-INDIAN CLAIMANTS CANNOT CLAIM WATER RIGHTS AS APPURTENANT TO LAND THEY DID NOT OWN BECAUSE CONGRESS DID NOT AUTHORIZE OR CONSENT TO THE CONVEYANCE OF RIGHTS TO INDIAN LAND UNDER THE 1855 TREATY

Here, the court concluded that a reservation was created for the Blackfeet Nation by the 1855 Treaty. Decision at 6. Likewise, because government officials considered the Gros Ventre Indians to be part of the Blackfeet Nation at the time of the 1855 treaty, the 1855 Treaty created a Reservation that included the Gros Ventre Indians. *Id.* The court identified the key issues in

live on poor buffalo meat but would have domestic cattle for food. We want them to have cattle. You know the buffalo will not continue forever. Get farms and cattle in time.

the present case as "*how much water* was reserved through creation of the Blackfeet Reservation [in the 1855 Treaty], and whether *unreserved water rights thereon could be appropriated under state law*." Decision at 8. It, then, proceeded to analyze the *Winters* case, 207 U.S. 564 (1908), concluding that the *Winters* doctrine took "an expansive view" of Indian reserved rights, assuming that if a reservation occurred, all available water was withheld from other uses[.]" *citing United States v. McIntire et al.*, 101 F.2d 650, 653-54 (9th Cir. 1939). The court rejected this "expansive view" and proceeded to conduct its own analysis of the purpose of the Reservation established by the 1855 Treaty, concluding that its purpose was to support a nomadic lifestyle, and "did not reserve all the waters in Basin 41QJ for the exclusive use of the Blackfeet Tribe." Therefore, the court concluded that "*McIntire* does not prohibit appropriation of unreserved water," *citing United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939), and ordered that the issue mark be removed from the claims in this case. The Court's Order is contrary to the United States' obligation under the Treaty granting the Blackfeet Nation exclusive use and control of the Reservation.

Further, the court's conclusion cannot be sustained where Indian Reserved Water Rights are involved, given the requirements of the Indian Trade and Intercourse Act (also known as the Indian Non-Intercourse Act). The Claimants here could not have been "early settlers" upon these lands, part of the reservation created by the Treaty of 1855, Decision at 18, because at this time, Congress forbade the conveyance of Indian lands without the consent of the United States, 25 U.S.C. § 177, and such consent had not been given. The requirements under the Indian Non-Intercourse Act is directly contrary to the court's creation of an implied right of non-Indians "to appropriate water" under the 1855 Treaty, Decision at 11.

The Nonintercourse Acts, passed between 1790 and 1834, are now codified at 25 U.S.C.

§ 177 (codifying the Act of June 30, 1834, 4 Stat. 730), which provides as follows:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

The purpose of the Nonintercourse Acts was to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers. 4 Stat. 730. With limited exception, in 1834 all that part of the United States west of the Mississippi was taken and deemed to be Indian country. *Id.* A non-Indian could not acquire land within an Indian reservation unless it was approved by treaty or Congress. 25 U.S.C. § 177. Because there is no evidence that any Reservation land was conveyed to the Claimants as required under Section 177, the Claimants did not possess lands from which a water right could be appurtenant thereto under state law.

Applying the Nonintercourse Act, courts find that conveyances of land interest violate the Nonintercourse Act if they are not approved by Congress or fail to be issued pursuant to a procedure required by statute. *See, e.g., Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035-36 (Fed Cir. 2012). The United States Supreme Court explained how the Nonintercourse Act controls ownership of lands on Indian reservations in *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974) (concluding federal jurisdiction over the case). "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law. Indian

title, recognized to be only a right of occupancy, was extinguishable only by the United States." *Id.* at 667. The primacy of federal law, articulated in the first Nonintercourse Act passed in 1790, 1 Stat. 137, remains the policy of the United States today. *Id.* at 668, *citing* 25 U.S.C. § 177. The *Oneida* Court stated that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." (internal citations omitted). Relying on *Mitchel v. United States*, 34 U.S. 711 (1835), the Court explained that Indian "right of occupancy is considered as sacred as the fee simple of the whites." *Id.* at 668-669. The power of Congress is supreme. *Id.* at 669, *quoting* *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941). Since *Johnson v. M'Intosh*, 8 Wheat. 543 (1823), the Court has refused to recognize land titles originating in grants by Indians to private parties because Indian title could only be extinguished by or with the consent of the federal government. *Id.* at 669.

It is axiomatic the "the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, with their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States." *Id.* at 670-71, *quoting* *Worcester v. Georgia*, 6 Pet. 515 (1832).

Further, in *The New York Indians*, 5 Wall. 76 (1867), the court, voiding a state tax on reservation lands, referred to the Indian right of occupancy as creating "an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption . . . and [New York] possessed no power to deal with Indian rights or title." *Id.* at 671. The

protection afforded under the Nonintercourse Act, 25 U.S.C. § 177, has been interpreted as memorializing "Indian real property rights," *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538 (1st Cir. 1997), and to extend to Indian Reserved Water Rights. *See, e.g., Pyramid Lake Paiute Tribe of Indian v. Morton*, 354 F. Supp. 252 (D.D.C.) (mem.) (finding a Secretarial duty to protect Indian water rights by the most exacting fiduciary standards), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

The Court of Appeals for the Second Circuit has "held that the Indian rights were federal and that 'state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.'" *Oneida* at 673, *quoting United States v. Forness*, 125 F.2d 928 (2nd Cir.), *cert. denied, sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942) (emphasis added).

The rather oblique reference at Article 7 of the 1855 Treaty providing that "citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by [the Tribes]," and to "white men residing in and passing through [Indian] country," Decision at 11, emphasized by the court, is insufficient to infer and conclude extinguishment of Indian land title and the conferring of individual land ownership on non-Indians—given the supremacy of the Nonintercourse Act, and it cannot support a right to appropriate water "by implication," thereof, *id.*, that is, on lands that the non-Indian claimants could not have owned as a matter of law.

In fact, the court misunderstands the purpose or intent of allowing non-Indians to "reside" on the Reservation. The Act of June 30, 1834, Section 2, provided that non-Indians could enter

upon and trade with the Indians on the Reservation, but would require the permission of the superintendent of Indian affairs to do so. At Section 3 of the 1834 Act, Congress provided "That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country. . . ." Section 9 provided "[t]hat if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock." When the 1855 Treaty is read with the 1834 Nonintercourse Act, it is much more reasonable to infer that the reference in the 1855 Treaty to "white men residing in and passing through [Indian] country" was intended to refer to employees of the United States, who would reside on the Reservation, as necessary to carry out the United States' obligations under Article 8 of the Treaty and to regulate trade and intercourse with Indians under the Nonintercourse Act, and to Indian traders, who were regulated under the Nonintercourse Act. In fact, Section 22 provides that the burden of proof with regard to any right of property on an Indian reservation "shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Here, the court concluded, and it is undisputed, that it was not until July 5, 1873, that a new Blackfeet Reservation was created by Executive Order, with Congress amending the boundaries of the Blackfeet Reservation in April 1874, and "the restoring to the public domain all lands within the boundaries of the 1855 Treaty, excepting those lands which created a new Blackfeet Reservation via the July 5, 1873[,] Executive Order. Decision at 7. The Tribes of the FBIC were included in this reduction of the Reservation boundaries. It must be concluded, therefore, that Indian title to the reservation created in 1855 had not been extinguished at the

time the Claimants, here, assert a priority date for the appropriation of water and that Indian title was guaranteed as protected by both treaty and statute.

Without Congressional approval of the conveyance of land that was part of the land reserved for the Blackfeet Nation prior to 1874, the Claimants were, indeed, trespassers and illegally residing on Indian land and appropriating Indian Reserved Water. *Cf* Decision at 18-19. Where a conveyance violates the Nonintercourse Act, the conveyance is void and, therefore, any party using the conveyed property is a trespasser, even if such party is acting in good faith. *See, e.g., Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035-36 (Fed Cir. 2012); *United States v. So. Pac. Transp. Co.*, 543 F.2d 676, 699 (9th Cir. 1976). Accordingly, tribes can assert claims to recover damages for trespass and unlawful possession against the trespasser. *See, e.g., Shoshone Indian Tribe*, 672 F.3d at 1036; *Cf. Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) (finding that conveyances of land violated the Nonintercourse Act and acknowledging the tribe's Nonintercourse Act claims for, *inter alia*, trespass and unlawful possession, but concluding that damages are subject to equitable defenses); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (same); *United States v. So. Pac. Transp. Co.*, 543 F.2d 676, 699 (9th Cir. 1976).

Therefore, the Court's attempt to grant the Claimants' state water right claims with a priority date of appropriation from 1859-1872 fails. Under state law, water rights claims are appurtenant to the land owned by a Claimant. "It is settled law that one may not acquire a water right on the land of another without acquiring an easement in the land." *Scott v. Jardine Gold Mining & Milling Co.*, 257 P. 406, 410 (Mont. 1927). But once water is properly appropriated by a landowner to his own land, the appropriated water right becomes appurtenant

to the land for the benefit of which the water is applied. *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 954 (Mont. 1985). The Montana Code Annotated reflects this general principle of water law: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air or heat from or across the land of another." Mont. Code Ann. § 70-5-105. As a result, an owner conveying land also conveys the appurtenant water right, unless the right is expressly reserved. *Yellowstone Valley Co. v. Associated Mortg. Investors*, 290 P. 255 (Mont. 1930). Thus, it is fundamental under Montana law that a properly appropriated water right used for beneficial purposes in connection with a given tract of land is appurtenant to the tract. *Castillo v. Kunnemann*, 642 P.2d 1019, 1024 (Mont. 1982). As discussed above, no right in land could have been obtained by Claimants under 25 U.S.C. § 177.

Additionally, the Court's reliance upon the Mining Act of 1866, the Desert Lands Act of 1877, and supporting case law regarding the same, Decision at 14-17, is inapposite with regard to determining non-Indian claims for the appropriation of water rights on Indian reservation land. The federal public lands, which are subject to the Mining Act and Desert Lands Act, are not reservation lands held in trust for Indian tribes, but publicly held lands subject to an entirely different body of law than the law governing the establishment and protection of Indian reservations.

The Mining Act of 1866, 43 U.S.C. § 661, addresses the appropriation of water on public lands, not Indian reservation land. This distinction is spelled out clearly in *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939). As noted in Objector's *Response to Motion and Memorandum* and this Court's *Order*, *McIntire* addressed issues of Indian reserved water rights on an Indian Reservation. The *McIntire* Court, however, distinguished between federal Indian

reservation land and other federal lands in the appropriation of water under the Mining Act. "Appellees seem to contend that [the original appropriator of water on reservation land] acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U.S.C.A. § 661, requires recognition of those rights. That statute, however, applies only to 'public' lands." *McIntire*, 101 F.2d at 654 (citing *Winters v. United States*, 143 F. 740, 747 (9th Cir. 1906), *affirmed* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340). "The statute mentioned, therefore, does not, we think, apply here." *Id.*³

The same is true of the Desert Lands Act of 1877, 43 U.S.C. § 321. A distinction is drawn between "public lands", which are subject to the Desert Lands Act, and Federal Indian reservations, which are not. The *Winters* court makes it clear that the doctrine of appropriation of waters under 43 USCS §§ 321 *et seq.*, applies only to public lands and waters of United States. *See Winters*, 143 F at 747. "The term 'public lands' only embodies such lands as are subject to the sale or other disposition by the United States under general laws. It is a well-settled principle that land once reserved by the government or appropriated for any special purpose cases [sic] to be a part of the public lands. . . ." *Id.* at 748.⁴

The court's reliance on *United States v. New Mexico*, 438 U.S. 696 (1978), as support for its holding, also fails to recognize the distinction of federally reserved lands, such as forest and national park lands, versus federally created Indian reservations. The Supreme Court in *New*

³ The court's reliance upon *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274, 25 L.Ed. 790 (1879) suffers the same flaw in logic that the Court employed with the Mining Act of 1866. *Broder* addressed claims upon "public property of the United States", not Federal Indian reservations. *Broder*, 101 U.S. at 274, 275. The *Broder* court states that the Congress enacted the Mining Act "to deal with the rights of miners who had, therefore without objection, and with tacit encouragement of the United States, discovered, developed, and mined *the public lands*." (emphasis added). *Id.* at 275.

⁴ This distinction between rights associated with Federal Indian reservations and reserved federal public lands is seen in other cases as well. *See e.g. Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 575; 103 S. Ct. 3201, 3218 (1983) (J. Stevens, dissenting) ("Although in some respects Indian tribes' water claims are similar to other reserved federal water rights, different treatment is justified.")

Mexico identified the enabling legislation that served as the original backbone for the reservation of federal forest lands. "It was in answer to these fears that in 1891 Congress authorized the President to 'set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations.'" *Id.* at 705 (citing Creative Act of Mar. 3, 1891, § 24, 26 Stat. 1103, as amended, 16 U. S. C. § 471 (repealed 1976)).

The Supreme Court noted that subsequent laws addressing reservation of forest lands were enacted in response to national expansion and other emerging issues in timber and water conservancy. "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; . . . *Id.* at 707 (citing 30 Stat. 35, as codified, 16 U.S.C. § 475 (1976 ed.) (emphasis added)).

By its own language, the Court recognizes that reserved forest lands are "public lands" intended to supply timber and water resources for the "use and necessities of U.S. citizens."⁵ This characterization of federal reservation land is distinct from federal Indian reservation land. Unlike the forest lands and national park lands discussed in *New Mexico*, Congress's establishment of Indian reservation land is not for benefit and enjoyment of U.S. citizens.⁶ To the contrary, it provides the Tribes the right to limit access to lands reserved for federally recognized Indian tribes and enjoy unimpaired rights pursuant to its Treaty

⁵ In addressing the federal reservation of lands, the Supreme Court noted that, as with forest lands, Congress has also been authorized, by statute, to pursue acquisition of lands and appurtenant rights "necessary or beneficial in the administration and public use of the national parks and monuments." *New Mexico*, 438 U.S. at 702, 703. The Court's reference to the reservation of National Park and National Monument lands is instructive in that the Supreme Court recognizes Congress's intent to establish federal reservations in the form of forest lands and national parks for the benefit and enjoyment of the nation's citizens.

⁶ In fact, until Congress passed the Indian Citizenship Act of 1924, well after the Creative Act of March 1891 and the National Park Services Act of 1916, the Indians were not recognized as citizens of the United States.

agreement. For Montana Indian tribes, this right is affirmed in the Montana Organic Act of 1864, which created the territory of Montana. The Organic Act states that “nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory *so long as such rights remain unextinguished by treaty between the United States and such Indians. . . .*” (emphasis added). *Act of May 26, 1864*, ch. 95, 13 Stat. 85, 86.

The Court's failure to distinguish between federally reserved forest lands like those in *U.S. v. New Mexico* and federally reserved Indian reservation lands is a fundamental problem with the Court's logic. First, the Supreme Court notes that the purposes for establishing federal reservation forest land are clearly enumerated and narrow in scope. More importantly, establishment of federally reserved forest lands was for the “use and necessities of citizens of the United States.”

For the Court to employ a uniform analysis upon the establishment of federally reserved forest lands and federal Indian reservations fails to not only consider precedent contrary to case law, but it also fails to consider the fundamental distinction between the purpose of forest lands reserved by the federal government of the use and enjoyment of U.S. citizens and lands reserved for Indian tribes *in exchange for* relinquishment of lands, diminishment of resources, and what amounted to a fundamental change in the existence of Indian tribes. Thus, this Court's attempt equate Indian reservation land with reserved forest land is nothing more than equating apples with oranges.

CONCLUSION

As the *Oneida* court acknowledged, there are recurring tensions between federal and state law; “state authorities have not easily accepted the notion that federal law and federal courts

must be deemed the controlling considerations in dealing with the Indians." *Oneida* at 678 (internal citations omitted). For the reasons identified above, the FBIC, respectfully requests that the court revise its Order of September 24, 2012, in the above-captioned case, and retain the issue mark in question until such time as the FBIC and Blackfoot Tribe have completed negotiations and settlement of their Indian Reserved Water Rights and submit such settled rights to the Montana Water Court for the issuance of a final decree.

The Tribes, also, respectfully request that leave be granted to file a supplemental memorandum, as necessary, after receipt and review of the United States' Memorandum filed this date, and request that the court set this issue for oral argument, allowing the FBIC to participate.

Dated this 22nd day of October 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **ASSINIBOINE AND GROS VENTRE TRIBES' MOTION TO APPEAR AS AMICUS CURIAE AND TO SUBMIT AMICUS MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO REVISE THE ORDER OF SEPTEMBER 24, 2012; REQUEST FOR LEAVE TO SUBMIT SUPPLEMENTAL FILING; AND REQUEST FOR ORAL ARGUMENT** in this matter was served on the Montana Water Court via email to Swithin J. Shearer, Deputy Clerk of Court at sshearer@mt.gov. Also on this day, the original of the foregoing was placed in a U.S. Post Office Box with a copy served via U.S. Mail, postage pre-paid to:

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Kelly H. Basinger
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IN THE WATER COURT OF THE STATE OF MONTANA
 UPPER MISSOURI DIVISION
 MISSOURI RIVER- FROM HOLTER DAM TO SUN RIVER - BASIN 41 QJ

CLAIMANTS: Linda M. Johns; W. Steve)				
Johns; Betty L. Bicknell; Gene E. Bicknell;)				
Diana L. Nelson; Sue A. Weingartner;	)	Case 41QJ-19			
Russell W. Weingartner; Elizabeth; C.)				
Dagnall; Robert G. Dagnall	)	41QJ 5581-00		41QJ 97570-00	
	)	41 QJ 34410-00		41QJ 97571-00	
	)	41QJ 41568-00		41QJ 97572-00	
OBJECTOR: United States of America	)	41QJ 41569-00		41QJ 143007-00	
Department of Interior-Bureau of Indian)				
Affairs)				
)				

AFFIDAVIT OF EDUARDO A. PROVENCIO

I, **Eduardo A. Provencio**, being of lawful age and upon my oath do swear I have personal knowledge and am competent to testify as to the matters stated herein:

1. I am an attorney at Fredericks Peebles and Morgan LLP in Louisville, Colorado and reside in Superior, Colorado.
2. I was admitted *pro hac vice* in the Montana Water Court on August 20, 2012 to represent the Fort Belknap Indian Community in the state's adjudication of water rights.
3. As counsel for the Fort Belknap Indian Community, I did not receive notice from parties or the Court to the above-numbered and described matter regarding the issues the Court addresses in its footnote 2 of its *Order*; namely, "the interpretation of Treaties concluded between the United States and Indian Tribes in 1851 and 1855" which "potentially affect the rights and interests of [a] number of Indian tribes. . . ."



