IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 20-0083

STATE OF MONTANA, by and through the DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, for and on behalf of the BOARD OF LAND COMMISSIONERS, and THE OFFICE OF THE ATTORNEY GENERAL,

Plaintiffs/Appellees/Cross-Appellants,

vs.

GREENFIELDS IRRIGATION DISTRICT, BOARD OF COMMISSIONERS OF GREENFIELDS IRRIGATION DISTRICT,

Defendants/Appellants/Cross-Appellees.

On Appeal from the First Judicial District, Lewis and Clark County
The Honorable Michael F. McMahon, Presiding

APPELLEES/CROSS-APPELLANTS' COMBINED RESPONSE BRIEF AND PRINCIPAL CROSS-APPEAL BRIEF

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STATEMENT OF THE ISSUES

Issue 1: Whether the undisputed facts establish the Full-Service Trust Land has a vested right to Greenfields Irrigation District water as a matter of law.

Issue 2: Whether the undisputed facts establish that Greenfields Irrigation District's conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA, as a matter of law.

Issue 3: Whether the District Court properly denied Greenfields Irrigation District's converted motion for summary judgment.

STATEMENT OF THE CASE

This dispute began on October 22, 2014, when the Greenfields Irrigation District ("GID") sent a letter and invoice demanding that the Department of Natural Resources and Conservation ("DNRC") pay a $500.00 per acre "conversion fee" or GID would terminate water delivery to irrigated school trust land located within the boundaries of the district.

GID denied the DNRC's requests for a hearing to contest the conversion fee and termination of water delivery. Accordingly, on December 2, 2016, the State of Montana, by and through the DNRC, on behalf of the Board of Land Commissioners ("Land Board"), and the Montana Attorney General (collectively "the State") filed this action in the First Judicial District Court seeking a declaration of the legal status and entitlements of the school trust land pursuant to

Montana law and a declaration that the conversion fee and threatened termination of water delivery was arbitrary, capricious, and unlawful. R-1_Complaint; R-57_Amended-Complaint.[1]

The State filed a Motion for Partial Summary Judgment on May 18, 2019, and GID filed a Motion to Dismiss on June 7, 2019, that was converted to a motion for summary judgment by the District Court. R-61_State-Motion-Partial-Summary-Judgment; R-74_GID-Motion-Dismiss.

The State's Motion maintained that the undisputed evidence and applicable law establish that 604 acres of the school trust land have a vested right to delivery and beneficial use of GID water with the same entitlements and protections as privately owned classified irrigable acres assessed through taxation. Moreover, the undisputed evidence and applicable law established that the "conversion fee" is an unlawful and arbitrary attempt to collect past assessments that GID alleged – without evidence – were not paid prior to 1986, and an assessment for future operation and maintenance costs in excess of the amount charged to other entitled land in violation of §§ 85-7-2103, -2104, and -2106, MCA. R-57; R-61; R-62(State-Brief-in-Support-Motion-Partial-Summary-Judgment).

[1] Citations to documents in the District Court record on appeal: Record-Docket-Number_Description.

On August 22, 2019, the District Court issued its Order on Pending Motions, in which it granted the State's Motion and denied GID's Motion. The District Court declared that the conversion fee could not be imposed on the school trust land so long as it remained school trust land and that GID was required to deliver water to 604 acres of school trust land so long as Montana, by and through its lessees, continues to pay the annual water use assessments charged by GID. The District Court did not declare that the conversion fee violated §§ 85-7-2103, -2104, and -2106, MCA, as requested by the State. R-95_Order-on-Pending-Motions-for-Summary-Judgment.

On January 8, 2020, GID and the State stipulated that the Order applied to an additional 62.5 acres of school trust land and constituted final judgment by the District Court on 666.5 acres of school trust land, hereinafter referred to as the "Full-Service Trust Land." R-96_Stipulation-for-Entry-of-Judgment.

An Amended Judgment was entered on February 3, 2020. R-102_Amended-Judgment. GID appealed on February 7, 2020. The State cross-appealed on April 3, 2020.

STATEMENT OF THE FACTS

GID was formed in 1925 pursuant to state law to distribute Sun River Project water to irrigable land in its boundaries, enhancing the productivity and value of those lands through irrigation. R-63_Attachment 3(Order-Matter-of-

Formation-Greenfields-Irrigation-District)[2]; R-63_Brunner19:15-20:15.[3] At the time GID formed, Montana law authorized the Land Board to petition for inclusion of State land in irrigation districts. Chap. 90, § 1, 1925 Session Laws of Montana.

To satisfy the minimum-acreage requirement for formation of an irrigation district, the Land Board approved and signed the petition for the inclusion of 11,000 acres of school trust land in formation of GID. The school trust land was identified as susceptible to irrigation and included in the boundaries of the newly formed GID on May 29, 1925. R-63_Attachments 1-3.

Much of the original 11,000 acres of school trust land was sold to private parties. The State retained ownership of the 666.5 acres of Full-Service Trust Land. Those acres are irrigated within the decreed place of use for Water Right 41K 40870-00, and use water delivered by GID pursuant to Water Right 41K 40870-00. Water Right 41K 40870-00 is co-owned by GID and the Bureau of Reclamation (BOR) and authorizes irrigation of 83,231.72 acres within the district boundaries/service area, including the Full-Service Trust Land. R-63_Attachment 9 (Affidavit-of-Dennis-Myer)*. The elements of the water right are not at issue in this dispute.

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[2] Documents and deposition transcripts are included with the Appendix to State's Brief in Support of Motion for Partial Summary Judgment (R-63) and Reply Brief in Support of Motion for Partial Summary Judgment(R-84). Documents from the record included with Appendix to this Brief for the Court's convenience are identified with an asterisk *.

[3] Tim Brunner is the president of the GID Board of Commissioners. Citation to deposition testimony: Record-Docket Number_Deponent Last Name-page#:line#-page#:line#.

The Full-Service Trust Land acres are classified as "principally valuable for the production of crops" pursuant to § 77-1-401, MCA, and leased to private individuals to generate revenue for the school trust through a share of crop revenues. R-63_Attachment 9. These acres are subject to eleven different leases. R-96_Stipulation-for-Entry-of-Judgment, p 2.[4] The 666.5 acres of Full-Service Trust Land only makes up a portion of the school trust land in each lease. R-63_Attachment 9, pp 2-5. The GID water beneficially used to irrigate the Full-Service Trust Land adds significant value. R-91_Eneboe 45:21-49:8.[5]

ANNUAL ASSESSMENTS AND FULL-SERVICE TRUST LAND

GID uses annual assessments to charge water users for the repayment of construction loans and operation and maintenance ("O&M") costs. R-63_Attachment 5(GID-Total-Annual-Assessment-Table); R-63_Whitmore 31:21-15[6]; R-63_Brunner 28:11-23; R-63_Juel 120:13-121:10.[7] Annual assessments for private land are collected through county taxes.

[4] 604 of the Full-Service Trust Land acres are subject to the nine leases that were addressed by State's Motion for Partial Summary Judgment and the District Court's Order. The parties stipulated that the remaining 62.5 of the Full-Service Trust Land which are subject to two additional leases are subject to the Order and Amended Judgment.

[5] Eric Eneboe is DNRC's Trust Land Management Division Conrad Unit Manager.

[6] Trudy Whitmore was the GID office manager and secretary for the Board of Commissioners from 1993 until 2019.

[7] Erling Juel is the current manager of GID. He was not employed by GID in 2014 but conducted research on the Full-Service Trust Lands between 2015 and 2017. His deposition was taken on April 3 (Volume I) and April 4 (Volume II), 2019. All citations are to Volume II of Juel's deposition.

The Full-Service Trust Land is tax-exempt. Therefore, GID administratively charges annual assessments for water service to those lands. Like assessments collected through taxes, assessments charged administratively by GID for the Full-Service Trust Land include a component for construction costs along with O&M. R-63_Whitmore 24:20-27:21 and 38:15-40:6.

Most of the Full-Service Trust Land acres were being irrigated using GID water by 1961, some as early as 1936. R-63_Attachment 9 pp 2-5. Although the exact billing method used by GID prior to 1986 was not clear, it is undisputed that GID charged, and the State lessees paid, for water delivered and used to irrigate the Full-Service Trust Land prior to 1986. R-63_Brunner 56:3-11, 71:7-13, and 73:18-74:24; R-63_Juel 167:11-168:10 and 175:23-178:22; R-63_Whitmore 40:18-42:1. GID could not produce water delivery records or financial ledgers for Full-Service Trust Land prior to 2001 and 1997 respectively. Had GID produced either, assessment payments for the Full-Service Trust Land before1986 could be calculated. R-63_Whitmore 12:10-25 and 130:9-131:9; R-63_Juel 201:11-203:5.

On December 10, 1985, GID's Board of Commissioners ("1985 GID Board") converted water service contracts for the Full-Service Trust Land to "full-charge":

> Discussion was held on State Land WSC Contracts. *These are being changed to full charge for those lands that are classified as irrigable as they have the same water right as other water users within the District*. Some will reflect full charge plus the ordinary WSC charge

> as some are irrigating non-classified land. Motion by Grossman and seconded by Krause to implement the WSC on State Land to full charge if the land being irrigated is classified as irrigable. Motion carried.

R-63_Attachment 6(emphasis added)*. The "Full Service" water service contracts entered between GID and State lessees from 1986 through 2014, included the following language:

> WHEREAS, the undersigned WATERUSER has possession of land owned by the State of Montana, hereinafter referred to as State Land, such land containing classified irrigable acres,
>
> WHEREAS, the WATERUSER desires to irrigate State Land and there are no provisions for the collection of fees to cover the cost of providing service to classified irrigable State Land,
> . . . .
> CLASSIFIED IRRIGABLE ACRES: Classified Irrigable Acres are defined as acres which have been classified as irrigable by the Bureau of Reclamation as documented on the DISTRICT'S irrigable acreage "Section Plat" on file in the DISTRICT office, such acres eligible to receive full water service under the DISTRICT'S vested water right.

R-63_Whitmore 35:9-42:1 and 50:13-51:8; R-63_Attachment 8(Greenfields-Irrigation-District-Water-Service-Contract-On-State-Land-Full-Service WSC09F)*.

Jerry Nypen was GID's manager from 1983 through 1997. On January 17, 2017, shortly after GID was served with the State's Complaint, Juel emailed Nypen several questions about Full-Service Trust Land. R-7; R-63_Attachment 20. Inexplicably, Nypen's January 26, 2017, response was not disclosed until Juel's April 4, 2019, deposition – nearly two years after it should have been

produced in response to written discovery. R-63_Attachments 20-21*; R-63_Juel 227:10-232:16.

Nypen submitted an affidavit in support of the State's Reply in Support of Motion for Partial Summary Judgment. R-84_Attachment 23(Affidavit-of-Jerry-Nypen)*. Nypen participated in advising the 1985 GID Board related to its December 10, 1985, decision regarding Full-Service Trust Land. He is the only witness in this matter with first-hand knowledge of the 1985 GID Board's vote and the origins of the "Full Service" contracts used to charge the Full-Service Trust Land annual assessments, which were initially issued during his tenure. R-84_Attachment 23 pp 1-2.

The following undisputed facts about the entitlements, liabilities and history of the Full-Service Trust Land are confirmed by GID board minutes, testimony of current and former GID staff and board members, the contents of the water service contracts, and Nypen's email response and affidavit. The Full-Service Trust Land acres were classified as irrigable for purposes of formation and development of GID and, therefore, are entitled to water appropriated by GID as part of the Sun River Project. The 1985 GID Board determined the Full-Service Trust Land acres are permanently entitled to water delivery pursuant to GID's water right. R-63_Attachments 6, 8 and 21; R-84_Attachment 23 pp 2-3. "Full Service" water service contracts were used from 1986 through 2014 to

charge the tax-exempt Full-Service Trust Land acres annual assessments at the same rate as private land assessed through taxes. All charges for the Full-Service Trust Land acres were paid during that period regardless of the amount of water used. R-63_Attachments 6, 8 and 21; R-63_Juel 180:19-181:17; R-63_Whitmore 35:9-36:14, 38:15-42:1 and 50:13-51:9; R-84_Attachment 23.

SURPLUS WATER CONTRACTS

Contrary to GID's arguments before this Court, the water delivered to the Full-Service Trust Land was not "surplus water." GID-Principal-Brief pp 1, 8-11 and 19-22. GID used a different class of water service contracts to charge for surplus water delivered to "non-assessed" private land that was not classified as irrigable. R-63_Attachment 10(Greenfields-Irrigation-District-Water-Service-Contract-For-Nonassessable-Land-Contract-WSC63)*. The contracts for surplus water were significantly different from the Full-Service Trust Land contracts. Each expressly stated that it only authorized delivery of surplus water when available on a priority basis, that it applied to non-assessed acres (acres not classified irrigable), that it did not constitute a water right, and only charged a per-acre-foot rate for water used. If no water was used, no water service charges were paid. R-63_Whitmore 55:17-56:23 and 57:8-59:9; R-63_Attachment 10.

The large distinction in amount paid pursuant to surplus water contracts versus Full-Service Trust Land contracts and private taxed acres is illustrated by

comparing the amounts paid over time. For example, from 1997 through 2014, private water service contract WSC63 paid a total of $729.86 for 88.93 ac/ft of water used on 31.11 acres. R-63_Whitmore 59:24-68:23 and 135:13-136:17. This translates to a total payment of $23.46 per acre ($729.86÷31.11 acres) and an average annual payment of $1.30 per acre (($729.86÷31.11)÷18yrs). During that same time-period, Full-Service Trust Land and private taxed land paid $282.41 per acre (total annual assessment for 1997-2014) and an average annual assessment of $15.69 per acre ($282.41÷(1 acre x 18 yrs.)). R-63_Attachment 5.

GID'S DEMAND FOR CONVERSION FEE OR TERMINATION OF WATER SERVICE

On October 22, 2014, GID notified the State that it was terminating water service contracts with the State's lessees, but the Full-Service Trust Land could "remain under full service assessment…the difference being the assessment will be billed through either Teton or Cascade County…" if the State paid a $500.00 per-acre conversion fee.[8] If the State did not pay the conversion fee the Full-Service Trust Land would be considered "dry land" and water delivery to those acres would be terminated. R-63_Attachment 11*; R-63_Whitmore 107:8-110:9. Essentially, GID demanded that the State pay up, or dry up.

[8] The initial demand was for $311,966.00 for 604 acres. It subsequently increased to $322,000.00 for 644 acres. The conversion fee for the 666.5 acres Full-Service Trust Land acres the fee would be $333,250.00.

The State objected and requested an explanation for the conversion fee. GID maintained the $500.00 per-acre figure approximated historic costs it asserted – without evidence – were not paid for the Full-Service Trust Land. GID contended that it was authorized to charge a conversion fee, for which "the value can be totally arbitrary," because no contrary authority existed. R-63_Juel 204:12-205:7; R-63_Attachments 14 and 15.

Dissatisfied with GID's justification, the State requested a hearing before GID's Board to contest the conversion fee and proposed termination of water delivery on two occasions. Both requests were denied by GID. R-63_Attachment 15; R-63_Juel 179:5-180:15.[9]

On November 28, 2016, GID sent a final demand letter. It acknowledged that because the Full-Service Trust Land was tax-exempt, if the State paid the conversion fee, GID would grant permanent entitlement to Full-Service Trust Land and continue to deliver water and collect annual assessments administratively, as it has done all along. R-63_Juel 180:18-181:7, 219:3-223:12; R-63_Brunner 76:2-80:13; R-63_Whitmore 35:9-38:22 and 108:11-109:11; R-63_Attachments 12 and 13.

GID'S BASIS FOR THE CONVERSION FEE OR TERMINATION OF WATER SERVICE

[9] The State maintained it was entitled to a hearing before the Board pursuant to the Collections and Delinquency provisions of the GID Policy. R-63_Attachment 7, pp 24-27.

The conversion fee is an attempt to recover historic construction costs and O&M costs that GID maintains – without supporting evidence – were not paid for the Full–Service Trust Land. R-63_Brunner 38:23-39:5, 47:6-12 and 55:9-56:11, 59:8-19; R-63_Juel 157:23-159:20; R-63_Whitmore 99:3-15 and 103:21-24; R-63_ Attachment 17 pp 3-4; R-63_Attachment 18 p 2; R-63_Attachment 19 pp 2-3; R-76_Exhibit D. Proceeds from the conversion fee were earmarked for future infrastructure improvements and construction, which would normally be collected through annual assessments. R-63_Juel 159:21-161:16; R-63_Brunner 85:19-21 and 86:14-17.

The $500.00 per-acre conversion fee was derived arbitrarily without the use of a formula or accounting for historic payments made for the Full-Service Trust Land. R-63_Brunner 58:19-59:7; R-63_Whitmore 103:7-20; R-63_Attachment 12 and 19 pp. 2-3. The 2014 GID Board was not aware of, and did not consider, the 1985 GID Board decision or the legal nature and entitlements of the Full-Service Trust Land prior to its August 25, 2014, decision. It did not account for the fact that the Full-Service Trust Land acres paid full charge assessments after the 1985 GID Board determined those lands were classified as irrigable and permanently entitled to GID water. Nor did the 2014 GID Board consider the legal nature and entitlements of the Full-Service Trust Land. R-63_Brunner 93:16-23; R-63_Norris

22:22-25:4, 28:17-29:22, 32:20-33:20, 53:13-55:11, 63:1-8 and 65:10-69:11[10]; R-63_D.Gulick 22:21-24:12[11].

The record belies GID's revisionary effort to characterize its actions as the adoption and repeal of policy. The 2014 GID Board's August 25, 2014, decision to terminate Full-Service Trust Land contracts and charge a conversion fee does not reference repealing or "enactment of a law or declaration of public policy" R-63_Attachments 11-15 and 17-19; R-76_Exhibits D, E and F.[12] Rather, "GID's action was to cancel Water Service Contracts …[, t]he letters sent in 2014 to the WSC water users with whom GID contracted effectuated this termination." R-63_Attachment 15.

STANDARD OF REVIEW

A district court's ruling on a motion for summary judgment is subject to de novo review pursuant to which this Court applies the same criteria of M.R.Civ.P. 56 as the district court. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Williams v. Missoula County*, 2013 MT 243, ¶ 22, 371 Mont.

[10] Bill Norris is Vice President of GID's Board of Commissioners.
[11] David Gulick is a member of GID's Board of Commissioners.
[12] Jenny Gullick submitted an affidavit in support of GID's Motion to Dismiss and Response to the State's Motion for Partial Summary Judgment. She only became office manager and board secretary in December of 2018.

356, 308 P.3d 88. Once a moving party meets its initial burden, the burden shifts to the nonmoving party to establish with substantial evidence setting forth specific facts that a genuine issue of material fact exists, rather than relying upon mere denials, unsupported speculation, or conclusory and fanciful assertions. M.R.Civ.P. 56(e)(2); *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶¶ 17-18, 342 Mont. 530, 182 P.3d 741; *Baumgart v. State*, 2014 MT 194, ¶ 14, 376 Mont. 1, 332 P.3d 225.

Denial of a motion to dismiss asserting the absence of an indispensable party is reviewed for an abuse of discretion. *Williams*, ¶ 21.

This Court will affirm a district court where it reached the right result for the wrong reason. *Hinebauch v. McRae*, 2011 MT 270, 362 Mont. 358, 264 P.3d 1098.

SUMMARY OF THE ARGUMENT

The undisputed evidence set forth above was primarily established by the State through GID's current and former employees, GID's board minutes, GID documents related to the Full-Service Trust Land, and provided compelling support for the relief requested by the State. In contrast GID's "Statement of Facts" consists mostly of conclusory statements and arguments of counsel, which is insufficient to grant or defeat summary judgment. GID-Principal-Brief pp 4-12.

The State is not asking for special treatment of its lands as suggested by GID and Amici. Instead, it seeks a declaration that the Full-Service Trust Land has the same vested right to delivery and beneficial use of GID water as private irrigated lands in the district based upon the undisputed evidence and applicable laws. This right was established by: statutory authorization and Land Board approval and petition for inclusion of the Full-Service Trust Land in formation of GID; the district court order forming GID to deliver irrigation water to irrigable lands including the Full-Service Trust Land; the designation of the Full-Service Trust Land as "classified irrigable" acres and classification of those acres as principally valuable for the production of crops by the State; the decades of beneficial use of GID water on those lands for the production of crops by the State's lessees; and, the payment of all water assessments levied by GID for delivery and beneficial use of GID water on the Full-Service Trust Land.

The undisputed evidence further establishes that the "conversion fee" is an unlawful and arbitrary attempt to collect back assessments GID alleges were not paid prior to 1986 and an assessment for future operation and maintenance costs in excess of the amount charged other "irrigable land" in violation of §§ 85-7-2103, -2104, and -2106, MCA.

Unable to overcome the undisputed evidence, GID attempts to shelter its conduct from judicial scrutiny through strawman arguments and baseless claims of

immunity. GID's argument that the Full-Service Trust Land was not included in the district and entitled to water because it is tax-exempt is contrary to the law, the undisputed facts, GID's past actions, and GID's final demand. Indeed, the1985 GID Board recognized that the Full-Service Trust Land acres are entitled to GID water on the same terms as private acres assessed through taxation and those lands were charged the full annual assessment rate from 1986 to the present. That the Full-Service Trust Land will enjoy permanent status and entitlements if the conversion fee is paid, yet annual assessments will be collected administratively rather than through taxes, further demonstrates why GID's taxation argument must be rejected.

The District Court correctly concluded that GID is required to deliver water to the Full-Service Trust Land so long as annual assessments continue to be paid and that GID's arguments and actions unlawfully infringe upon the State's management prerogatives and devalue the Full-Service Trust Land in violation of *Dep't of State Lands v. Pettibone*. Likewise, it properly denied GID's converted motion to dismiss. The State requests that the Court affirm the District Court in both regards.

However, the Order fails to properly construe the nature of the Full-Service Trust Land's vested right, incorrectly infers that this entitlement only applies while the acres are "school trust land," and fails to declare the conversion fee violates §§

85-7-2103, 2104, and 2106, MCA. To this extent, the State requests that this Court reverse in part and remand to the District Court with instructions for a declaration that the vested right to GID irrigation water is appurtenant to the Full-Service Trust Land and includes the statutory entitlements and protections enjoyed by all entitled land in GID. Additionally, the State requests that this Court remand to the District Court with instructions for a declaration that the conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA.

ARGUMENT

Issue 1: The undisputed evidence establishes that the Full-Service Trust Land has a vested right to GID water as a matter of law

The undisputed evidence establishes the Full-Service Trust Land has a vested right to GID water with the same entitlements and protections as private land assessed through taxes. While *Dep't of State Lands v. Pettibone* informs construction of the applicable statutes, actions of the Land Board and undisputed evidence, the District Court did not correctly define the legal nature of the vested right and its protections. Thus, while significant portions of the Order are correct, the District Court's emphasis on *Pettibone* as controlling erroneously overlooks key aspects of the irrigation district statutes and case law that define the nature of the Full-Service Trust Land's vested right to GID water.

The vested right was established pursuant to Land Board authorization for inclusion of those lands in formation of GID pursuant to Chap. 90, § 1, 1925

Session Laws of Montana the district court order including the Full-Service Trust Land in the formation of GID, § 85-7-1911, MCA, and decades of administrative assessments and beneficial use of GID water thereupon. The right claimed by the State, is the same as the right provided to entitled private land within the district pursuant to §§ 85-7-1911, -2103, and -2104, MCA. The District Court failed to recognize that the right to GID water is appurtenant to the Full-Service Trust Land and subject to the same entitlements, liabilities and protections as entitled privately owned land regardless of its status.

A. The Full-Service Trust Land's vested right to GID water is derived from statutory and Land Board authorization for inclusion of those lands in GID and the beneficial use of GID water thereupon.

GID's confusion over the nature of the State's vested right reflects its ignorance of the law by which it is governed. Contrary to the arguments made by GID and Amici, the trust principles and appurtenance analysis set forth in *Pettibone* provides compelling support for the establishment and existence of the entitlements of the Full-Service Trust Land in this matter, if not controlling.

The Full-Service Trust Land acres represent endowments by the United States to Montana for the benefit of common schools. Subject to the fiduciary obligation of undivided loyalty to the school trust beneficiaries, the Land Board must manage school trust lands to: (1) secure the largest measure of legitimate and reasonable advantage to the State; and (2) provide for the long-term financial

support of education. Mont. Const. Art. X, § 11; *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 366, 702 P.2d 948, 951 (1985); *Mont. Trust v. State*, 1999 MT 263, ¶¶ 13-23, 296 Mont. 402, 989 P.2d 800.

GID was formed to manage and deliver water from the Sun River Project to cultivate lands classified as irrigable that would otherwise be of little value. *See*, *Dodson Irr. Dist. v. United States of America*, 2018 WL 7574161, at p. 3 (Mont. Water Ct. 2018). The undisputed evidence establishes that the Full-Service Trust Land acres were included in formation of the district pursuant to Montana statute, Land Board approval, and the district court order forming GID in order to aid in and benefit from its development. Moreover, the Full-Service Trust Land is classified as irrigable land in the BOR irrigable acre section plat and constitutes "irrigable land" as defined by § 85-7-2205(1), MCA ("land that can receive irrigation water and is classified as irrigable by the district or United States government"). *Supra* pp 3-9.

Contrary to the arguments of GID counsel, not all land in GID's boundaries is classified as irrigable. R-63_Bruner 19:15-20:15; R-84_Attachment 23 p 3; *compare* R-63_Attachment 8 *to* Attachment 10; R-76_Exhibit C. For example, of the 2,120 acres of school trust land subject to the nine leases addressed in the State's Motion for Partial Summary Judgment, only 604 were classified as

irrigable and entitled to GID irrigation water. R-63_Attachment 9.[13] The original classified irrigable designation identified those lands capable of flood irrigation with water delivered by the district. Importantly, the classification of the Full-Service Trust Land as irrigable land designates that they were included in the acres for which the district was constructed to serve. § 85-7-2205(1), MCA; R-70_GID-Second-Amended-Answer p 3(alleging at the time GID formed "irrigable acres" referred to land capable of gravity fed flood irrigation); R-63_Bruner 19:15-20:15; R-84_Attachment 23, p. 3. The 1985 GID Board confirmed the importance of this classification as a component of the genesis of the right to GID water. R-63_Attachment 6.

Consistent with the purpose for which the Land Board included the Full-Service Trust Land in GID, those acres are managed and primarily valued for crop production pursuant to § 77-1-401, MCA. *See Pettibone*, 216 Mont. at 372, 702 P.2d at 944-45. To this end, GID water has been beneficially used to irrigate crops and generate revenue for the trust for the past 50 to 80 years. R-63_Attachment 9. Although the water was paid for and applied by the lessee, the State is the beneficial user and owner of the interest in appurtenant rights to the use of water that is developed or used by a lessee – such as the vested right to GID irrigation

[13] This does not include the acres associated with Lease 2123 and Lease 2124 which pursuant to the Stipulation for Entry of Judgment include 62.5 acres of Full-Service Trust Land subject to the Order and Amended Judgment. R-96.

water for the Full-Service Trust Land. *Pettibone*, 216 Mont. at 368, 702 P.2d at 952.

It is well settled that water beneficially used on land within an irrigation district is appurtenant even though the associated water right is owned by the district. § 85-7-1911(1), MCA ("The amount of water is appurtenant to the land and inseparable from it…"); 43 USCA § 372 ("The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right"). The U.S. Supreme Court explained:

> Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners. . . it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by expressed provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

Ickes v. Fox, 300 US 82, 94-96, 57 S.Ct 412, 416-17 (1937). Although an irrigation district may be the "owner" of a water right "the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Nevada v. US*, 463 US 110, 126,103 S.Ct 2906, 2917 (1983).

"Vested right" is a term used by this Court to describe the appurtenant legal entitlement to irrigation district water supplied and beneficially used on land in an irrigation district. That appurtenance prohibits the district and third parties from depriving those lands of water. *Maclay v. Missoula Irr. Dist. et al.,* 90 Mont. 344, 292, 3 P.2d 286, 292 (1931); *Koch v. Colvin*, 110 Mont. 594, 105 P.2d 334, 336-37 (1940); *Dodson Irr. Dist.,* 2018 WL 7574161, at p. 3.

Contrary to GID's and Amici's arguments, appurtenance of water "owned" by an irrigation district to land upon which it is beneficially used does not depend upon unity of title, who applies the water, or who pays for the water. Amici-Brief, pp 7-10; GID-Principal-Brief pp 31-33. Indeed, statutory appurtenance of irrigation district water serves to protect the value and irrigation of the land from infringement because the water right itself is owned by the irrigation district rather than the owner of the land upon which the water is beneficially used. Full-Service Trust Land has the same vested right, entitlement and protections as private land with a vested right to GID water.

B. <u>The tax-exempt status of the Full-Service Trust Land does not preclude its vested right.</u>

GID's narrow interpretation of entitled lands as limited to those lands assessed through taxation is contrary to the law and the undisputed evidence in this case.

In *Toole County Irr. Dist. v. State*, this Court explained that the entitlements and liabilities of State land in an irrigation district depend upon the law at the time the district was formed, and actions taken by the Land Board to include those lands. 104 Mont 420, 434, 67 P.2d 989, 992 (1937). The Court further concluded that the Land Board was expressly authorized by statute to include state land for participation in irrigation districts formed from 1921 through 1927. *Id*.

At the time GID was formed Montana law empowered the Land Board to include school trust land in irrigation districts such as GID, which the Land Board authorized when it signed the petition to form GID:

> The State Land Board for, and on behalf of the State of Montana, is hereby empowered to sign a petition for the inclusion of any lands belonging to the State, in any irrigation district created under the provisions of section 7166 to 7264, Revised Codes of Montana 1921 . . . but when such lands are included in an irrigation district, they shall not be taxed for any purpose by the district until title thereto has passed from the State, or until a contract for the sale thereof has been made by the State.

Chap. 90, § 1, 1925 Session Laws of Montana. While the 1925 law prohibited "taxation" of the Full-Service Trust Land, it did not prohibit "assessment" of those lands. *Montana Vending, Inc. v. Coca-Cola Bottling Co. of Montana*, 2003 MT 282, ¶21, 318 Mont. 1, 78 P.3d 499(statutory interpretation is to be determined on its plain language). It was not until 1929 that Montana law was amended to

preclude "assessment or taxation" of the State's interest in its land in an irrigation district. Chap. 58, § 93, 1929 Session Laws of Montana.

This distinction is important because irrigation district assessments are not a tax. Rather, they are special assessments for local improvements that may be levied against tax-exempt State land under certain circumstances. *Toole County Irr. Dist.*, 104 Mont at 434, 67 P.2d at 992-993; *Kalispell v. School Dist. No. 5 of Flathead County*, 45 Mont. 221, 122 P. 742, 743 (1912). Whether the Full-Service Trust Land is entitled to the benefits and liabilities of being included in GID does not depend upon the availability of a tax lien for enforcement as suggested by GID. GID-Principal-Brief, pp. 6-7. Montana law provides a means to discharge irrigation district assessments, including remedies for non-payment, in lieu of taxes or tax liens. *Toole County Irr. Dist.*, 104 Mont at 434, 67 P.2d at 993; *Kalispell*, 122 P. at 744.

As contemplated by this Court's jurisprudence, the 1985 GID Board confirmed that the tax-exempt Full-Service Trust Land was entitled to GID water and devised an administrative mechanism to collect annual assessments. GID concedes that annual assessments can, have, and will be levied administratively rather than through taxation. *Supra* pp 5-9. If the State pays the conversion fee, GID intends to include the Full-Service Trust Land as permanent entitled lands. Nonetheless, it will continue to charge assessments for the Full-Service Trust Land

administratively as it always has. *Supra* p 11. Clearly, whether GID presently considers taxation a prerequisite to the privileges and entitlements of being "included" in the district is dictated by whether the State pays its arbitrary conversion fee, not by the law.[14]

GID's suggestion that the Full-Service Trust Land did not contribute equally to the financial soundness of the district because it is tax-exempt is likewise unfounded. GID-Principal-Brief pp 6-7. The evidence establishes that all administrative assessments charged for the Full-Service Trust Land were paid and continue to be paid even though water service contracts were terminated in 2014. *Supra* pp 6-9. That the State lessees paid the assessments rather that the State is legally and factually irrelevant.

The Full-Service Trust Land will always be tax-exempt. Thus, GID's interpretation of the law permanently infringes on the value ability to manage those lands for crop production, the purpose for which they are principally valued. Considering the plain language of law in place when GID was formed, the Land Board's actions, and the undisputed history of irrigation and payments for Full-Service Trust Land, the law is properly construed in a manner to avoid the absurd and constitutionally infirm results urged by GID. §§ 85-7-1911(1), -2103 and -

[14] The alternative is that GID is knowingly attempting to defraud the State of $333,250.00 for an empty promise of permanence.

2104, MCA. *Pettibone*, 216 Mont. at 373-75, 702 P.2d at 955-56 (when two possible interpretations of law are possible, a constitutional interpretation is favored); *City of Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 380, 450 P.3d 898 (statutory interpretation should not lead to absurd results where a reasonable interpretation will avoid it). Thus, Chap. 90, § 1, 1925 Session Laws of Montana is properly interpreted as limiting only the taxation of the Full-Service Trust Land, not as a limit to assessment and entitlement of those lands.

C. Appurtenance of the vested right is not dependent upon the land remaining school trust land.

The District Court erred in part when it concluded that GID could not charge a conversion fee and was only required to deliver water "at any time [the Full-Service Trust Land acres] are Montana school trust land" inferring that the vested right is not appurtenant. R-95_Order p 7.

As explained above, GID's obligation to deliver water to entitled private land applies equally to the Full-Service Trust Land. § 85-7-1911(1), MCA; GID-Principal-Brief p 6. While there are limited circumstances pursuant to which the subject acres could be sold or exchanged, the vested right to GID water remains appurtenant to the land unless it is severed. *McClay*, 3 P.2d at 290. Similar to private land, the appurtenant permanent nature of the vested right to GID water is critical to the value and long-term management of the irrigated Full-Service Trust

Land. It is also vital to obtaining full market value for the Full-Service Trust Land as irrigated acreage if the Land Board offered the land for sale or exchange.

Accordingly, the State requests that this Court reverse or modify the District Court's conclusion to the extent it incorrectly concluded that the vested right to GID water and GID's obligation to deliver the same, is dependent upon the land remaining school trust land.

Issue 2: <u>The undisputed evidence establishes that the conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA, as a matter of law.</u>

The District Court erred when it failed to declare that the undisputed evidence establishes GID's conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA. Moreover, the Order incorrectly infers that the conversion fee or a similar fee could be imposed by GID at some future date if the subject land is no longer school trust land.

The Legislature, not GID, defines the parameters of fees that may be charged by an irrigation district. GID may not circumvent the plain language of the statutory limitations provided for by the Legislature and invent conversion or permanence fees. § 1-2-101, MCA. Although GID concedes it is a "creature of Montana statute" it cites no statute authorizing the conversion fee because there is none. GID-Principal-Brief p. 8; R-63_Attachment 14; R-63_Brunner 42:6-14; 45:4-20; 64:3-67:11; R-63_Juel 204:3-205:22.

GID's general authority to carry out the purposes of Title 85, Chapter 7, MCA, as set forth in § 85-7-1902, MCA, is restricted by the plain statutory language. See *Core-Mark Intern., Inc. v. Montana Board of Livestock*, 2014 MT 197, ¶¶ 45, 376 Mont, 25, 329 P.3d 1278; *Abshire v. School Dist. No. 1 Silver Bow County*, 124 Mont. 244, 246, 220 P.2d 1058, 1060 (1950)(a public corporation only has those limited powers conferred by the law). The plain language of Title 85, Chapter 7, MCA, provides that GID is required to apportion and distribute water equally to, and charge, all "irrigable land"[15] within the district alike. §§ 85-7-1911(1), -2103, and -2205(1) MCA.

GID may charge an annual assessment for interest and principal on district debts and O&M and may charge each farm unit an administrative fee as set forth in §§ 85-7-2103 and -2104, MCA. In limited circumstances, which do not apply here, the rate for a subdistrict may be greater than the assessment rate for "original" lands to account for new debts incurred to construct new infrastructure for the subdistrict in addition to any remaining indebtedness for the original project infrastructure. § 85-7-2102, MCA.

GID is also authorized to sell surplus water. § 85-7-1911(3), MCA. However, even GID's discretion related to surplus water is expressly limited by

[15] The undisputed evidence establishes that the Full-Service Trust Land is "irrigable land." It can receive irrigation water and is classified as irrigable.

statute: it must deliver surplus water when available if the user tenders the customary assessment rate. §§ 85-2-415, -417, MCA. Finally, GID is prohibited from collecting unpaid assessments more than three years after the land escaped assessment for any reason. § 85-7-2106, MCA.

A. GID's conversion fee violates § 85-7-2106, MCA.

The undisputed evidence establishes that GID intended to use the conversion to recover what it asserted – without evidence - the Full-Service Trust Land did not pay for historic construction and O&M costs collected via annual assessments prior to 1986. *Supra* pp 11-13. GID's attempt to collect back assessments it alleges were not paid more than three years prior violates § 85-7-2106, MCA.

In *Vail v. Custer County*, the Tongue River Irrigation District attempted, in 1949, to collect unpaid back assessments from 1921–1926. Like GID's conversion fee, the district asserted that if the back assessments were not paid, the land "in question should be considered as out of the district and the water it provides not available to these lots." 132 Mont. 205, 218, 315 P.2d 993, 1001 (1957). This Court concluded that the district's attempt to collect past due assessments was barred by RCM 1947 § 89-1804 (now § 85-7-2106, MCA). So long as prospective assessments for O&M were paid, the district was obligated to deliver water to the land even though the land may have escaped assessment in prior years. *Id*.

To the extent any pre-1986 assessments went unpaid, GID was required to collect those back-assessments when the 1985 GID Board converted the payment mechanism for the Full-Service Trust Land to full annual assessment charges over 30 years ago. Both common sense and the plain language § 85-7-2106, MCA, bar GID from collecting past assessments that it can only speculate were not made prior to 1986.

B. GID's conversion fee violates §§ 85-7-2103 and -2104, MCA.

The undisputed evidence further establishes that GID intends to use the conversion fee for future O&M costs that would otherwise be collected through future annual assessments. *Supra* pp 11-13. Charging the Full-Service Trust Land a greater assessment for O&M costs than other classified irrigable acres in the district violates the statutory requirement that all irrigable lands within the district must be charged alike for costs such as O&M, as a matter of law. §§ 85-7-2103 and -2104, MCA.

C. GID's April 20, 2020, administrative surcharge fee violates §§ 85-7-2103 and -2104, MCA.

It is unclear why the District Court did not provide the requested declaratory relief regarding §§ 85-7-2103, -2104, and -2106, MCA. However, the necessity of such a declaration regarding GID's authority and the protection of the Full-Service Trust Land from disparate treatment became evident before the ink on the Amended Judgment had time to dry.

On April 20, 2020, after these appellate proceedings commenced, GID sent an "Invoice for 2020 Water" to each lessee of the Full-Service Trust Land.[16] It notified each State lessee they were required to pay a $100.00 administrative surcharge fee in addition to the 2020 annual assessment, or water would not be delivered to the Full-Service Trust Land.

Although relatively nominal, the 2020 fee reflects a similar attempt by GID charge the Full-Service Trust Land in excess of those charges levied for privately owned entitled lands in violation of the same statutory provisions the State requested the District Court declare the conversion fee violated. § 85-7-2103, MCA (all irrigable lands must be charged alike for assessments and administrative fees). As a matter of judicial economy, the State requests that this Court include in its opinion a declaration that GID may not charge the Full-Service Trust Land administrative fees in excess of those charged private land assessed through taxation. *See Dahl v. Uninsured Employer's Fund*, 1999 MT 168, 295 Mont. 173, 983 P.2d 363, n. 1 (If the standard of review is the same between the district court and the Supreme Court, the Court may review arguments not reviewed by the district court in the interests of judicial economy.).

In summary, the State requests that this Court reverse the Order to the extent it infers that the conversion fee could be imposed by GID at some future date if the

[16] This Court took the State's Unopposed Motion for Judicial Notice under advisement.

subject land is no longer school trust land. Further, the State requests that this Court declare that the undisputed facts establish the conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA, as a matter of law because it attempts to collect back assessments GID alleges were not paid prior to 2011, and attempts to collect future assessments at a rate exceeding that charged for other entitled lands. Finally, as a matter of judicial economy, the State requests that this Court declare the 2020 fee invalid pursuant to § 85-7-2103, MCA, because, similar to the conversion fee, it charges the Full-Service Trust Land a fee in excess of that charged other entitled lands.

Issue 3: <u>The district court properly denied GID's converted motion for summary judgment.</u>

As explained below, GID's motion and appeal are premised on fallacious arguments contrived by GID to side-step the undisputed facts and law that compel the relief requested by the State. Nothing required the District Court to itemization of the reasons for denial of GID's motion beyond that offered considering the State's motion was granted.

A. <u>Sovereign immunity does not apply to GID's actions.</u>

GID's assertion that its decision to terminate water delivery to the Full-Service Trust Land if the conversion fee was not paid constitutes a legislative act for which it enjoys absolute immunity pursuant to § 2-9-111, MCA, is contrary to the evidence and law. GID-Principal-Br., pp. 15-16.

In *Love v. Harlem Irrigation District*, this Court held that the irrigation district was immune from a lawsuit claiming damages arising from the district board's decision to terminate the plaintiff's water delivery pursuant to § 2-9-111, MCA (1989). 245 Mont. 443, 444, 802 P.2d 611, 612-613 (1990). Shortly after *Love* was decided, § 2-9-111, MCA, was amended limiting immunity to "legislative acts" which are confined to "creation of law or declaration of public policy." § 2-9-111(1)(c)(i)(A), MCA (enacted 1991 Mont. Laws 821). The amendments further provide that "administrative actions undertaken in the execution of law or public policy" are not legislative acts that qualify for immunity. § 2-9-111(1)(c)(ii), MCA.

Subsequent opinions of this Court establish that governmental entities do not enjoy legislative immunity for actions undertaken in the administration or execution of a law or public policy. See, e.g., *Knight v. City of Missoula*, 252 Mont. 232, 245-247, 827 P.2d 1270, 1278 (1992) (immunity only applies to legislative acts, not administrative or executive acts such as road maintenance); *Kiely Const. LLC v. City of Red Lodge*, 2002 MT 241, ¶ 83, 312 Mont. 52, 57 P.3d 836 (execution of policies as set forth in statute are not entitled to immunity). In *Montana Vending, Inc.*, this Court concluded that a school district was immune from suit for its enactment of two policies to enhance non-tax revenue, but

immunity did not extend to administrative action taken to effectuate those policies. ¶¶ 15-18.

GID concedes that it is obligated to deliver water to entitled lands pursuant to § 85-7-1911, MCA. The Montana legislature established the public policy regarding the annual assessments and enacted the law that dictates the fees GID may charge for that delivery. §§ 85-7-2103 and -2104, MCA. GID is not "empowered by the law" to legislate new fees or requirements for inclusion in the district. See, e.g., *Parker v. Yellowstone County*, 140 Mont. 538, 547, 374 P.2d 328, 332-333(1962). Levying fees and assessments are executive acts, not legislative.

Likewise, the 2014 GID Board's August 25, 2014, vote to terminate water service contracts and charge a conversion fee "to come into assessment" and October 22, 2014, letter demanding the same are clearly executive and administrative actions. R-63_Attachments 11 and 19; R-79_Exhibits D, E[17] and F. The 2014 GID Board never characterized its action as the enactment of law or declaration of policy during its deliberations or in its attempt to collect the conversion fee or terminate water delivery. *Supra* p 13. Regardless, to the extent that the Board's August 25, 2014, decision could be construed as a legislative act,

[17] Although Exhibit E is described as the "WSC Current Conversion Fee Policy" it is not a copy of the correspondence sent to the State.

GID's administrative actions to effectuate the Board's policy are not immune from suit. *Montana Vending, Inc*., ¶¶ 17 – 18.

Unlike the damages suits in *Love* and *Pearson v. GID*[18], the State's request for declaratory relief is not precluded by § 2-9-111, MCA. *Hayworth v. School Dist. No. 19, Rosebud County*, 243 Mont. 503, 795 P.2d 470, 471-72 (1990); *Cenex v. Yellowstone County*, 283 Mont. 330, 941 P.2d 330 (1997). Moreover, the *Pearson* court found it was within GID's discretion to award a landowner additional irrigated acreage. R-76_Exhbit-H, pp 5-6. Here, GID admits it has no discretion on whether to deliver water to the Full-Service Trust Land if the lands are entitled. GID-Principal-Brief, p. 6.

B. The State has standing to protect its property interests.

Contrary to GID's strawman argument, the State is not trying to take advantage of a third-party contractual agreement. Rather, the State's standing is derived from its interest in protecting the vested rights that are appurtenant to the Full-Service Trust Land. *Supra* pp 17-27.

A litigant has standing if it is entitled to have the court decide the merits of a dispute or issue. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 27, 312 Mont. 320,

[18] See *Pearsons v. GID*, DV-16-022, Montana Ninth Judicial District Court, Teton County GID-Principal-Brief, pp. 17-18; R-76_Exhibit-H.

59 P.3d 398. An alleged or threatened injury to a litigant's property interests typically suffices. *Id*., ¶ 28.

The State is owner and trustee of the Full-Service Trust Land, manages those lands to generate revenue through cultivation of irrigated crops, and is the source from which GID attempted to extract $322,000.00. Although the State lessee cultivates the Full-Service Trust Land and pays for irrigation water, the State is a beneficiary of that cultivation and owns the vested interest in appurtenant GID water. *Pettibone*, 216 Mont. at 375, 702 P.2d at 952, 956–57; *Geil,* ¶ 28 (the interest need not be exclusive to provide standing). GID's actions threaten the State's vested property interests.

The State unquestionably has standing to seek a declaration of its rights and contest GID's attempt to deprive the Full-Service Trust Lands of irrigation water. Indeed, it was obligated to contest GID's unlawful conversion fee to protect the school trust beneficiaries from injury. R-95_Order p. 6.

C. BOR is not an indispensable party.

GID's meritless attempt to hide behind the United States' immunity belies its argument throughout these proceedings that "it has the sole discretion and authority to determine and agree to the compensation it receives for water it delivers within its district." R-70_Second-Amended-Answer, p. 7; R-75_GID-Brief-in-Support-Motion-to-Dismiss, pp. 7 and 10; R-77_ GID-Brief-in-

Opposition-to-State, pp. 5-6. GID acted alone when threatened to terminate water service to the Full-Service Trust Land if the State did not pay the conversion fee.

A district court has broad discretion to determine whether an absent party is indispensable and if so whether the action will proceed or must be dismissed in the party's absence. *Williams*, ¶ 21. Whether "complete relief" can be awarded turns on the relief between the existing parties, not as between an absent party. Even if certain forms of relief would be unavailable absent BOR, meaningful relief can be and was granted by the District Court. *Id.*; *Mohl v. Johnson*, 275 Mont. 167,171, 911 P.2d 217, 220 (1996).

The State does not seek relief against BOR or challenge any element of Water Right 41K 40870-00, which GID cites as the sole basis for BOR being an indispensable party. The State maintains that *GID's* demand the State pay the conversion fee or *GID* will terminate delivery of water to the Full-Service Trust Land violates *GID's* obligations to, and the entitlements of, the Full-Service Trust Land provided for by *Montana law*. §§ 85-7-1911, -2103 and -2104, MCA; R-57_Amended-Complaint, ¶¶ 11, 12, 18, 27, 28, 30.

In *Ickes v. Fox*, the United States Supreme Court rejected the proposition that the United States' water right ownership interest made it an indispensable party defendant to litigation challenging a Secretary of the Interior's order that reduced the amount of water available to the landowner plaintiffs. 300 U.S. at 87-

88, 92-96. In so holding, the Court explained that the landowner suits to enjoin the Secretary's alleged deprivation of their vested property rights that were "not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. . . may be maintained without the presence of the United States . . ." *Id*. at 96-97; See also *Holguin v. Elephant Butte Irr. Dist.*, 575 P.2d 88, 91-92 (1977 N.M.) (the United States' interest in underlying water right did not make it an indispensable party to a lawsuit). BOR's interest in Water Right 41K 40870-00 is nominal and not a basis for making it an indispensable party to this matter which arises from GID's management actions. *Nevada*, 463 US at 126, 103 S.Ct at 2917.

Moreover, Montana law expressly authorizes the GID Board to prosecute and defend all lawsuits in the name of the district without joining BOR. § 85-7-1902(3), MCA. BOR is not required to be a party to district court proceedings related to district formation or operation either. §§ 85-7-1821 – 1831, -1845, MCA (compare with §§ 85-7-1801 – 1810, MCA, which provide that petition to add lands to a district need only be signed by landowners of two-thirds of the acreage proposed to be added with no requirement for written consent from the United States.).

Like the plaintiffs in *Ickes*, the State seeks to protect, from GID's unlawful actions, its vested property interests established under the law and previously

confirmed by the 1985 GID Board. Notably, GID water has been delivered and beneficially used on the Full-Service Trust Land for the past 50 to 80 years. If the State prevails, the status quo will be preserved, and nothing will change regarding water delivery or use. Even if the State does not obtain the requested relief, GID would continue to provide water and treat the Full-Service Trust Land as permanent entitled land if the State pays the conversion fee. GID fails to articulate how either outcome implicates BOR's interests.

The District Court had the jurisdiction to provide complete relief and declare the State's rights and entitlements under the statutes and law at issue based upon the undisputed facts without joining BOR.

D. This dispute presents a justiciable controversy under the UDJA.

GID's argument the State failed to make a claim upon which relief could be granted pursuant to the Uniform Declaratory Judgments Act was properly denied by the District Court.

Whether the State's complaint for declaratory relief sufficiently put GID on notice of the claim and relief sought is subject to liberal construction and must construed in a light most favorable to the State. M.R.Civ.P. 8(a); *Kunst v. Pass*, 1998 MT 71, ¶¶ 35-36, 288 Mont. 264, 957 P.2d 1; 26 CJS Declaratory Judgments § 148. The UDJA provides a district court with broad judicial authority to declare rights, status, and other legal relations of parties and to grant relief in a proceeding

where such a judgment or decree will terminate the controversy or uncertainty. See §§ 27-8-102, -201, -202, and -205, MCA; See *Mesa Comm. Group, LLC v. Yellowstone County*, 2001 WL 3630094, *Memorandum and Order* (July 19, 2001).

The availability of relief under the UDJA is not limited to the enumerated provisions of § 27-8-202, MCA, as argued by GID. Rather, the availability of declaratory relief only requires that a justiciable controversy exist for which relief granted by the court will terminate the controversy. § 27-8-205, MCA. A justiciable controversy exists if: 1) the rights or interests at stake are existing and genuine rather than theoretical; 2) the controversy is one upon which the judgment of the court may effectively operate; and 3) judicial resolution of the controversy will have the effect of a final judgment in law or equity upon the rights, status or legal relationships of one or more of the parties. *Northfield Ins. Co. v. MACo*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813.

It must be remembered that judicial relief was necessitated in this case because GID altered the status quo, threatened to devalue the Full-Service Trust Land and denied the State an opportunity to contest its decision administratively. Unlike in *Donaldson v. State*, this controversy does not seek a general declaration that Montana's general statutory structure interferes with a broad class of rights. Nor does the State ask the judiciary to order the legislature to act, or to otherwise "determine speculative matters, to enter anticipatory judgments, to declare social

status, to give advisory opinions or to give abstract opinions" in this matter. 2012 MT 288, ¶¶ 2-5 and 8-10, 367 Mont. 228, 292 P.3d 364.

This matter presents a specific, justiciable controversy regarding the legal status and rights of 666.5 acres of school trust land that constitute the subject Full-Service Trust Land. The legal status of the Full-Service Trust Land is derived from specific statutory authorization and action taken by the Land Board to include the Full-Service Trust Land in GID pursuant to Chap. 90, § 1, 1925 Session Laws of Montana; the district court order including those lands in formation of GID; and GID's obligations to deliver water to the Full-Service Trust Land acres on equal terms pursuant to §§ 85-7-1911, -2103 and -2104, MCA. *Supra* pp 17-27. Moreover, a justiciable controversy exists regarding §§ 85-7-2103, -2104, and -2106, MCA, because the conversion fee is an untimely attempt to collect back assessments and it charges the Full-Service Trust Land at a higher rate for future O&M that would otherwise be collected through annual assessments. R-57_Amended-Complaint; R-62_State-Br.-Partial-Sum.-Judg. 16-18; R-84_State-Reply-Partial-Summary-Judgment pp 13-18.

That this matter is subject to the UDJA is further reflected by GID's competing statutory interpretation that the Full-Service Trust Land's tax-exempt status precludes its assessment and inclusion in the district and, therefore, the

entitlements of §§ 85-7-1911, MCA. GID-Principal-Brief, pp 4-9; R-77_GID-Brief-Opposing-Motion-for-Partial-Summary-Judgment, pp 11-16.

Moreover, GID concedes that it is obligated to deliver water to entitled lands pursuant to § 85-7-1911(1), MCA. GID-Principal-Brief, 6; R-63_Juel 223:1-12. Therefore, declaratory judgment regarding the legal status and entitlements of Full-Service Trust Land based upon the applicable statutory provisions terminates this controversy. A determination that the conversion fee is an unlawful attempt to collect back assessments more than three years in arrears, and/or would charge the Full-Service Trust Land acres at a higher rate for future operation and maintenance costs in violation of §§ 85-7-2103, -2104, and -2106, MCA, likewise resolves the present controversy.

CONCLUSION

The undisputed evidence establishes that the Full-Service Trust Land acres were lawfully included in GID pursuant to Chap. 90, § 1, 1925 Session Laws of Montana and have an appurtenant vested right to GID water with the same entitlements and protections that apply to private land assessed by GID through taxation pursuant to § 85-7-1911(1), -2103, and -2104, MCA. Accordingly, the State requests that this Court affirm the District Court Order to the extent it provides that GID must deliver water so long as annual assessments are paid by the State through its lessees. However, the State requests that this Court reverse the

Order in part and remand to the District Court with instructions to enter summary judgment declaring the Full-Service Trust Land's vested right as set forth above.

The undisputed facts further establish that the conversion fee violates §§ 85-7-2103, -2104, and -2106, MCA, because it attempts to collect time-barred back assessments and charges the Full-Service Trust Land an assessment in excess of that charged privately owned irrigable lands in the district. Accordingly, the State requests that this Court reverse the District Court Order to the extent it suggests that the conversion fee could be levied and collected if the Full-Service Trust Land acres are no longer school trust land, and remand to the District Court with instructions to enter summary judgment that the conversion fee and other fees or assessments in excess of those charged or levied against private irrigable land assessed through taxes are unlawful.

Finally, the State requests that this Court affirm denial of GID's converted motion for summary judgment.

RESPECTFULLY SUBMITTED this 6th day of November 2020.

/s/ Brian C. Bramblett
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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *APPELLEES/CROSS-APPELLANTS' COMBINED RESPONSE BRIEF AND PRINCIPAL CROSS-APPEAL BRIEF* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2016, is 9,906 words, excluding this Certificate of Compliance, the Table of Contents, and the Table of Authorities.

DATED this 6th day of November 2020.

/s/ Brian C. Bramblett
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CERTIFICATE OF SERVICE

I, Brian C. Bramblett, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-06-2020:

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