

ATTACHMENTS

LETTERS AND MEMORANDA CITED IN CONCERNED CITIZENS REPORT TO THE WPIC

1. FN 3. (a) Letter from Gene and Vonda Schock to the Montana Reserved Water Rights Compact Commission, January 23, 2002 (b) Flathead Joint Board Newsletter article 2003; (c) Letter from Bill , Alan, and Grace Slack April 30 2008 (d) November 10 2002, "Liquid Assets"
2. FN 4. Letter from Compact Commission Chairman Chris Tweeten to Bud Moran, Tribal Chair, and Duane Mecham, Interior Department, January 19, 2010
3. FN 6. John Tubbs letter to Susan Cottingham and Jay Weiner, February 21, 2008.
4. FN 9. Briefing Paper, Water Rights Settlement Proposal, July 27, 2010
5. FN 13. Memorandum from Bill Schultz, RWRCC Staff Director to Clayton Matt, October 25, 2010
6. FN 15. (a)Memorandum from Lynda Saul to Marcia Rundle, March 24, 1988; (b)Memorandum from Larry Fasbender to Susan Cottingham, May 20, 1988
7. FN 51. (a) Comparative Alternative Proposed CSKT Compact Quantification Table (b) Table: Comparison of Alternative and Existing CSKT Quantifications

February 23, 2002
St. Ignatius, Mt. 59865

Montana Reserved Water Rights
Compact Commission
P.O. Box 201601
Helena, Mt. 59620-1601

Dear Sirs:

"THE GUARANTEE OF EQUAL PROTECTION
CANNOT MEAN ONE THING WHEN APPLIED TO ONE
INDIVIDUAL AND SOMETHING ELSE WHEN APPLIED
TO A PERSON OF ANOTHER COLOR."

JUSTICE POWELL, 1978

I have before me a copy of the Confederated Salish & Kootenai Tribes proposal for a settlement of water rights. My comment is, I AM AGAINST making any kind of agreement with the Tribes to ADMINISTER any water rights of any kind.

I am opposed because:

1. Water is necessary for the survival and prosperity of all mankind and living creations, should not be under the control of any special interest group.
2. The State is to be in charge of all of the water within its boundaries and its distribution and use.
3. Homestead rights and Indian Patents gave all rights, including water rights to the owners of the land and their assignees.
4. Tribal leaders are elected by Tribal members only, to put someone that does not represent me, that I cannot vote for, in charge of my water rights is unconstitutional, it is taxation without representation.
5. Laws were written and put in place by our elected leaders or by the people, one of the reasons among many others was so that we would have a guideline to follow, and not be led astray from fairness when pressure is put on by special interest groups.
6. Tribal jurisdiction in the past and at present has not been only very unfair to non-tribal members, but also illegal.
7. The Supreme Court of the United States has ruled several times that Tribal authority does not apply to non-tribal persons.

Attachment FN 3 (a)

INTRODUCTION

The Tribe says "their origins reach back to the beginning of human time." My origins also go back to the beginning of human time. I am a descendent of Adam & Eve, the first human beings that ever existed. This is according to documented history, not legends. Recent Geological diggings suggest that the "Kenwick" man lived in this geographical area 50,000 years ago, and that he was of European descent and was Caucasian. This documentation dates a lot further back than any Indian skeletal remains do.

Like the Tribes, my way of life is also based on the harvest of the seasonal abundance of animals and plants. To this day, I also seek and need help from the natural environment in order to subsist.

As it is with the tribes, the beauty and sacredness of water is of the highest value to my family's livelihood, we also use it for medicinal purposes. Without our water we couldn't exist. We share it among animals, plants and other human beings. As Irrigators on the Flathead Irrigation Project we share the water with thousands of acres and billions more plants than the Tribes ever did. Since the irrigation dams and canals have been put on the reservation, plants, fish and wildlife have prospered and thrived more than they ever did in ancient days. Now the water can be controlled year around, for the fish and wildlife, thanks to the irrigation project which is being paid for by the land owners using irrigation water.

My ranch is also sacred. Many, many, years ago a pastor came out and blessed our place and the water that runs through it, and prayed that it would prosper. To this day we get much higher production per acre than any one else in the area. We do not take more than we need, and under the present system on the reservation there is plenty of water for every one, if there isn't we all share the shortage equally. Which is as it should be, if there is a shortage of water, the Tribe is not entitled to the available water at our expense.

For the Indians to claim that they are special and are entitled to something that other races are not entitled to, for historic reasons or any other reason is absolutely ridiculous. We all have history and culture. The United States is a "melting pot" of all cultures, and every one working together for one common goal.

Page 1

1. M C A 85-1-101-(3, 7, 9, 10) "The state, in the exercise of its sovereign power, acting through the department of natural resources and conservation, SHALL coordinate the development and use of THE water resources of the state so as to effect full utilization, conservation, and protection of its water resources.

(7) It is necessary to coordinate local, state, and federal water resource development and utilization plans and projects through a SINGLE agency of STATE government, the department of natural resources and conservation.

(9) Any attempt to gain control of or speculate on large quantities of ground water of the state of Montana is not in the interest of the people and is to be restricted.

(10) To achieve these objectives and to protect the waters of Montana from diversion to other areas of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be progressively formulated, to be known as the "STATE WATER PLAN".

Water was here long before Indians or any one else was here. One group has no more right to it than any other group, it is the State's duty to co-ordinate the use of the water, not to give it to a special interest group.

Page 2

2. The Tribe states, "all water on and under the Flathead Indian Reservation is owned by the United States in trust for the Confederated Salish & Kootenai Tribes"

This is not so. This reservation was opened up to Homesteading by the United States Government. Along with the homesteads went not only the physical ground, or the surface of the earth, but also all rights and privileges of whatever nature including all water and mineral rights.

I have also a "Patent" from The United States of America to a Flathead Indian. This document says the same thing. " that the United States of America does give and grant unto said claimant the land described above: to Have and to Hold the same, together with ALL THE RIGHTS, PRIVILEGES AND IMMUNITIES AND APPURTENANCES. OF WHATEVER NATURE, and to the heirs and ASSIGNS of said claimant FOREVER."

An appurtenance according to Black's Law Dictionary is: 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 water-course, or of a passage for light air or heat from or across the land of another." This water right was to stay with the land forever.

Page 3

In the Tribes supporting authority they quote the Hellgate Treaty. I don't see anything in there that says anything about water rights, only hunting and fishing rights from the streams of the reservation.

As far as the rest of the supporting authority, I don't put much credence in it. It is based on someone else's opinion, not the actual treaty. A Judge's responsibility is to interpret law, not to legislate law. The Judge's opinions, almost all of the time are based on who's attorney was the "best salesman", (not on who's right or who's wrong, or the facts of the law), the Judge's own political leanings, and who had the most money to present their case. Then when you base the next case on that opinion, you get still further away from the actual law. After a few opinions away from the actual law, there is no resemblance of the original law. You cannot interpret law by basing your interpretation on someone else's opinion.

The Tribes have unlimited money to present their case, they use taxpayer money, any one who opposes them has to come up with their own money. As we saw in the O. J. Simpson case our justice system is not based on justice, it is based on whose attorneys were the best salesmen, who has the most money available to hire that salesman.

Page 4

On the bottom of page 5 of their proposal the Tribe states they want:

(6) all water use on the Reservation subject to the Tribal water administration.

The Montana Constitution says that the State of Montana is in charge of all waters within its boundaries. A very small percentage of the resident's and land owners on the reservation are tribal. If you are not a member of the Tribe you cannot vote in their elections. A very small minority of the reservations residents would be electing Tribal councilmen to administer the water rights. We, as the majority would have no input or power over our water rights. We will have been deprived of our rights under the United States Constitution. Our livelihood and our existence depend on water. Remember, (page 2) that the Homestead rights and the Indian Patents both say that the water rights are to stay with the land forever. The Tribes have been compensated for the land within the boundaries of the reservation, twice. Once in 1855 and again in 1972 when they got six million dollars plus interest for it. The Tribes have NO right to claim any water rights on the reservation, other than on the land they own, and no right to any more allotted water per acre or per household than non-members get.

The tribes were appeased when the United States Government (we the taxpayers) paid them for the reservation, twice already. How many more times do we have to appease them or buy the reservation again. Its time to be color blind, just because someone has dark colored skin doesn't mean they are entitled to special or favored treatment.

I am tired of certain groups being called African-Americans, Chinese-Americans, Hispanic-Americans, Indian-Americans, Native-Americans. If we were born in the United States we are all native Americans, if we are naturalized citizens we are naturalized Americans. Anything else is discrimination, and should not be tolerated.

By patronizing people and telling them how badly their ancestors (or even themselves) were treated is just as hurtful and degrading as being discriminated against. We completely destroy their expectations of themselves, their desires, their dreams and what they could be. We all work side by side, we all have opportunities for the same education, have the same job opportunities, and we should all be treated the same, NO special favors for any one group of people.

Page 5

If the Tribe were in charge of the waters rights they could and would put such exorbitant prices on water that we couldn't afford to stay here. Water is necessary for us to survive and prosper.

This whole water rights thing is about one of two things and maybe both. Money! or forcing all non-tribal members off the reservation. Since the Tribe has taken over management of the Irrigation Project, the water prices have approximately tripled, the system is in the worst shape it has ever been in, and we are being allotted a lot less water than we used to get. Do we want more of the same only on a larger scale?

Page 6

Despite what the tribes want you to believe there is much controversy in the areas where they have Reservation wide jurisdiction.

One of the controversies is right next door to me. Two years ago a guy from Missoula, Mr. A, bought a piece of ground to put a large lake on. Of course Mr. A had to apply for permits for building, water etc. All of the neighbors opposed this project for various reasons. The Tribes Shoreline Protection Board held hearings on the purpose of, water availability for, construction, and other things relating to the lake.

Despite the fact that:

1. All of the neighbors protested to the Shoreline Protection Board, D N R C, and anyone else who would listen, including Bud Morin, Superintendent of Tribal water.
2. Mr. A was caught by the Shoreline Board, several times lying to them, they knew it and were made aware of it.
3. The D N R C served a court order on Mr. A telling him not to fill the lake until he had a permit from them to do so.

In spite of all of these concerns Mr. A was issued a "revocable permit" from the Tribe to fill his lake. This shows the Tribes attitude and concerns when it comes to respecting and protecting water users under State law. It also shows their disdain and lack of concern for, the concerns of non-tribal members.

There is just as much dis-satisfaction in the area about the Fish & Game management & regulations, and the water quality program.

For the Tribes to say that they "regularly exercise Reservation-wide jurisdiction and authority over Indians and non Indians on the Flathead Reservation in a manner that has been fair to all .", is not the truth.

For more evidence that this is not so, please see Exhibit A.

The truth is, tribal jurisdiction discriminates against non-tribal members on the basis of ancestry. To deny fair and equal representation to any citizen affected by government jurisdiction, whether Federal, State, or Tribal, IS NOT JUSTICE, IT IS DISCRIMINATION! When you live within the boundaries of an Indian reservation, non-members cannot elect representatives, and do not have a voice in the laws that govern them on the reservation. This is equivalent to taxation without representation, and deprives me of my constitutional rights which are guaranteed to me under the United States Constitution.

Page 8

In the Hell Gate treaty of 1855 (Article 8) the "Indians acknowledge their dependence on the United States Government . . ."

From, Dying in Indian Country - Supreme Court cases:

"Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interest of the overriding sovereignty. Their rights of complete sovereignty, as independent nations are necessarily diminished."

Oliphant v. Suquamish Indian Tribe 435 US 191 (1978)

The Supreme Court has described tribal government as a "quasi-sovereign", or "domestic, dependent-sovereign". The Court explained that a tribe retains some aspects of a sovereign, but only as it relates to a tribes people, property and internal affairs. The Court has repeatedly stated that, when the tribes executed treaties, they were divested of governmental authority over non-tribal people and their property. The Supreme Court explained that tribal authority over non-Indians or their property would be inconsistent with the most basic principles of democracy,, and constitutional protections.

On Feb. 23, 1994, the United States Supreme Court Case #92-6281, Hagen v. Utah, ruled that large portions of the U & O Reservation had been diminished when the reservation was open to non-Indian settlement, and that opened lands were no longer located within the reservation. The court ruled "jurisdiction within the exterior boundaries of said Reservation apply only to tribal members and tribal or trust lands."

CONCLUSION

Page 8 of the Tribal proposal says, " Tribal rights would be quantified first. Then we would consider (not enforce and honor) 'existing rights.' Permits and certificates would not be considered 'existing rights' ". This is completely unacceptable. The Montana Constitution says that the State of Montana is in charge of all waters within its boundaries.

Page 9 of the Tribes proposal they state, " This is a framework. A framework implies that there are many spaces which will need to be filled." I would hope that none of us are dumb enough to sign a contract without knowing ALL of the details before we sign it!

The only rights the Tribes have to water on the reservation, are those rights that are a part of the land the tribes own. The Tribe does not even have a right to water on the land the Indian people own, those waters are under the jurisdiction of the State of Montana. The Montana State Constitution Guarantees those rights to individuals. Constitutional guarantees cannot be compromised, by any governmental department, they have to be changed by a vote of 2/3 of the people of the State of Montana.

Laws were written and put in place by our elected leaders or by the people, one of the reasons among many others was so that we would have a guideline to follow, and not be led astray from fairness when pressure is put on by special interest groups. The law is the law, it can only be changed by changing the constitution. The law was put in place long before you or I got in the position we are currently in at this time. It is not our duty or responsibility, to change it, or to put a "spin" on it to satisfy a "special interest group". Public input is good, but public input is not to be used to justify changing the law to make it say something it doesn't. Your duty is to enforce the law and to abide by it.

There is no legal basis, moral basis, or any other reason to give the Tribes authority and the right to administer water rights on the Flathead Reservation. To do so would be a violation of my Constitutional rights. To do so would be to jeopardize the very right of survival and prosperity of our grand children for generations to come.

Within the last few days the Department of Interior released a preliminary water management strategy for the Kalamath Falls Basin stating that, farmers irrigation water had the highest priority, that anyone who wants to use water for purposes other than irrigation, including protection of endangered fish, should buy the water from farmers. That is quite a change from the "spin" the environmentalists and government bureaucrats were putting on the law this summer when they denied the farmers their irrigation water. There is going to be a lot of lawsuits over that.

Please also find some other pertinent enclosures.

Thank you very much for allowing me to comment and express my feelings on this matter.

Sincerely

Gene Schock

Vonda Schock

THE IRRIGATOR'S SOURCE OF NEWS AND INFORMATION

The Watermaster

Published by the Joint Boards of the Flathead, Mission and Jocko Irrigation Districts, Vol. 10, No. 1 / Feb. 2003

A NOTE FROM THE CHAIRMAN - Walt Schock

The FJBC has been quietly active throughout the past year. For the sixth year, assessments for O&M are at the same level (19.95 per acre since 1998).

With urging from FJBC the old Moiese flume is being replaced. A pipe contract has been bid and placement will start in May.

The Flathead River pumps ran last year, newly automated. They supply needed water for the whole valley in dry years.

We have had meetings here, in Washington D.C, in Portland Oregon and in Pablo to transfer project management to local water users.

MONT. SUP. CT. STOPS WATER PERMITS

A Court order stopped the state from issuing new water use permits on the Flathead until the Indians reserved rights are quantified. The state hopes that the Tribes will assist them in deciding what quantity of water is needed. Both parties seemed ready to do that.

INTERIM AGREEMENT

The State team is doing everything possible to allow permitting to resume. They are trying to get an interim agm't. With the Tribes while reserved rights are being quantified.

RESERVED WATER RIGHTS, QUANTIFICATION:

In November 2001 the CS&KT presented to the State a proposal for quantifying their water. They asked the State to grant that the Tribes own ALL the water on and around the reservation. They also want the right to administer the use of all the water (to be able to say who can use it).

This is in direct conflict with Montana Law, its Constitution and all federal law. The U. S. Supreme Court has clearly given the states the responsibility to determine how much water was reserved for Indians on the reservations within their borders.

The Tribes have refused to drop their proposal and allow negotiations to continue. They claim the State just needs to recognize that the Tribes actually own all the water, then it can have a deal. If the State will do so the Tribes will allow needy applicants to obtain water use licenses that the Tribes can revoke whenever they want to. These are revocable permits. When the State couldn't do that at the December 2002 session, the Tribes declared that they alone will quantify the water rights on the reservation. They said it may take them two years to do it.

THE FEDERAL TEAM'S DUBIOUS LEGAL POSITION

Contrary to all existing law the federal negotiators support the Tribes proposal. In Wyoming, the state's responsibility to adjudicate and administer the water rights of its Wind River Reservation has been upheld repeatedly by the US Supreme Court. The water belongs to the States. That's the law of the land.

FJBC WINS FOIA SUIT, SEARCHES FOR NEW WAY

We brought suit under the Freedom Of Information Act (FOIA) to make public information the government has that will show that there is plenty of water for everyone. The Courts agreed but the federal team continues to resist.

Searching for a new way, the FJBC is encouraging three new laws: HB683 will change permitting so that Polson and Charlo can drill replacement wells; SB416 proposes to allow new uses of water while the state is adjudicating the Indians' reserved rights; SB417 sets basic principles that an interim agreement must have to protect State constitutional authority and so that local water users can take part in negotiation. The message of all three bills: **the Tribes do not own the water**. If you would assist in getting them passed, contact us: sti2090@blackfoot.net, or 745-2090.

LEGISLATIVE ACTIONS:

Three Senate bills and one in the House have cleared their committee hearings. They are intended to resolve the impasse here on water development under state law. HB683 & SB416 stand alone and will allow the cities to go ahead with wells. SB194 & SB417 need to be blended together to give state negotiators firm guidelines and make clear that Tribes can not control the state's water. They now go to debate and possible amendment by the full legislature.

PROJECT MANAGEMENT TRANSFER

A lot of work has been done to get the Irrigation Division of the Project transferred to a local Management Board. In 1985 when it was decided that the Tribes should manage the power division, government investigators agreed that water users should manage the irrigation division. The district contracts provide that when project construction costs are repaid to the government transfer will occur.

Construction costs are repaid.

When federal solicitors finally agreed that over \$1.25 million of Jobs Bill and SEED costs had been improperly accounted as construction costs, the total bill was reduced to where it will be paid off this year (2003). The BIA Regional office is waiting for word to credit the schedules of all three valleys so this will happen.

Jobs Bill costs, rejected

Money spent by the project to create jobs for the Federal Jobs Bill under Pres. Carter was incorrectly accounted by BIA as a part of project construction. The FJBC pointed out the error in 1996. Word was finally received last September that those costs were to be stricken.

SEED costs, rejected

Like the Jobs Bill costs, the FJBC pointed out the error of making the costs of the Safety Evaluation of Existing Dams (SEED) a project construction cost. Federal Solicitors agreed with us on this and Jobs Bill at the same time.

Indian Share, is without cost to Indians

When the project was started Congress made clear that the costs apportioned to Indian owned lands would be without costs to Indians. We are still waiting for the Solicitors to have the BIA make that final notation in its accounting.

Although, transfer does not depend upon it, when that is done the Flathead Project books will be cleared. Only O&M costs will continue.

MEETINGS with BIA

We went to Portland and met with BIA Regional Director, Stanley Speaks, to get started with transfer. He came to the Flathead in July to meet with us and the Tribes. In September he was here again when Aurene Martin came from the Secretary of Interior's office in Washington, D. C.

REPRESENTING TRUST LANDS

In 1926, when the U.S. demanded that irrigation districts be formed so that project management could be transferred, all the trust land was expected to be patented in fee and to be in the districts. Now, the trust period has been extended and the FJBC is working to find an acceptable way to provide representation for the part of project lands that are still in trust.

When talks were started on this with the Tribes, it was agreed that neither party would use them for litigation or political purposes.

CONGRESSIONAL SUPPORT

We are working with the Montana congressional delegation for support and to be certain that all the federal concerns are secure.

ANNUAL MEETINGS

We will hold a series of local community meetings across the project this year to explain in more detail what we are doing.

PABLO RESERVOIR RESTRICTED, AGAIN!

Repair of the outlet conduit of Pablo Dam is scheduled for this fall. In the meantime storage will be limited to 22,000 of the 28,000 acre feet capacity. The work plan requires that when the irrigation season ends on September 15, flow through for stock water will have to be cut off. Ranchers will have to find new ways to water livestock while harvesting fall pastures

PROJECT O&M:

Superintendent Moran's 2003 O&M budget virtually depletes all project reserves, but it also provides for a lot of accomplishment.

A full season (\$270,000 worth) of pumping is planned to help offset the loss of storage in Pablo reservoir and to allow the mountain runoff to be held for use in the south end of the valley.

A large (6 ft. diameter) reinforced concrete pipe is being ordered to replace the old Moiese Flume. The contract bid was \$100,000 less than estimated. Placement is scheduled to start in May. It should be in service the following year (2004). Replacing the half mile long flume has been a long time dream of Moiese irrigators.

The old flume is to be photographed and catalogued for history. A section may even be archived if a suitable place can be found. It was first built in 1914 and replaced in the 1950's.

WATER OUTLOOK, IMPROVED?

The snow courses in the Mission and Jocko Mountains improved a little, from 62% of normal at January first to 74% by February. The precipitation in January was still less than average. No word yet from the Camas courses.

REMINDER: Project phones - St. Ignatius: 745-2661; Lonepine: 741-2945; Arlee: 726-3251; Charlo/Moiese: 644-2716; Round Butte: 676-2121; Polson/Pablo/Ronan: 676-3243.

William L., Grace B., and Alan W. Slack
(Secretarial Water Rights Holders and Flathead Project Water Users)
32930 East Post Creek Road
St, Ignatius, Montana 59865
April 30, 2008

Reserved Water Rights Compact Commission
Confederated Salish and Kootenai Tribes
United States

Subject: Tribes' Unitary Management Proposal - Response

The proposed Unitary Management of State filed water rights is a transparent attempt by a small representation of reserved water rights holders, the Confederated Tribes, to gain control of the resource contrary to established law and order. It would impose a new order of authority over the use of water and land, putting it in the hands of a few people who also have competing rights to use these limited resources. Doing it ignores the responsibilities of all three compacting participants to quantify and prioritize the various claims, both reserved and filed.

The use of water in Montana is recognized by the United States as the responsibility of the State. Uses of State waters have been established that now only require quantification of remaining reserved rights. The Tribes endeavor to secure a fair amount of the resource should not extend to control over any rights that have been conveyed to others in the course of legitimate commerce.

We would remind you that the Secretary of the Interior issued a Decree establishing Secretarial Water Rights (SWR) shortly after the reservation was opened to non-Tribal settlement and the construction of an irrigation project was started. It was in response to a request by a Tribal member to recognize, protect and preserve the enterprise and diligence of individuals in developing their lands independent of any government. It recognized that when title was given to reservation lands by the United States it carried an implication of the right to sufficient domestic water, water for livestock and for irrigation wherever that was practical. It also recognized that certain parts of the surplus lands opened for sale to non-members could be irrigated under the Federal project. Guide lines were set out for the exchange of the earlier rights for project rights, but they did not require it.

The Secretary further required that all rights be filed with the State setting out the place of use, purposes, and the sources of the water so that quantification could take place and priorities be established

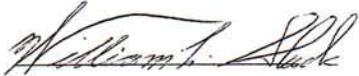
Early efforts to quantify and establish priorities for these uses were futile because remaining reserved rights are difficult to quantify and determine sources for them. That is now the sole purpose of all three compacting parties. The Tribes, in this proposal, profess a commitment to protect present uses while securing other reserved rights; the Legislature has

authorized the Commission to do that; and, Congress is in process of doing it throughout the West with the Department of the Interior.

We urge that you not be distracted by any effort to change the order of water rights administration. Our investments of our own resources, toil and effort were based on our governments' encouragement that they, too, would be recognized, protected and preserved.

Sincerely

William L. Slack



Grace B. Slack



Alan W. Slack



Liquid assets: The question of 'who owns the water' continues

"Water is a unitary resource, all connected," says Clayton Matt, a water manager for the Salish and Kootenai Tribes. "It makes sense for the owners of that resource to manage it, and the tribe has a pretty good history of managing its resources effectively."

By MICHAEL MOORE of the Missoulian

Montana - 11/10/02 - Salish and Kootenai tribes are seeking to manage the water that flows through the Flathead Reservation, water they say they are entitled to by treaty and a century of law

FLATHEAD RESERVATION - Clayton Matt carries history around like others carry a wallet.

Spirit, family and culture, always close at hand. Although his people, the Salish and Kootenai, have lived in this country for generations, this history cannot be circumscribed by lines on a map. It exists both in and out of time, and is rooted in a sense of place that defies boundary.

"When you look at a map of the Flathead Reservation, it has a nice, neat boundary," Matt, water resources division manager for the tribes, said recently. "But that is not our homeland, because when we talk about the homeland we are talking about the land we lived on before the treaty. We moved with the seasons, for food, for trade, for relations with other tribes. The reservation is important, but it's also just lines on the map, and just a small part of our aboriginal existence."

In the most fundamental way, that existence was shaped by water, which yielded the fish, nourished the elk and deer and bear, floated the boats. Water was a partner; when settlers came, water became a tool, a way to find precious metals and convert semi-arid land into farms and cattle country.

The water comes down from the high mountains, rushes down in streams and creeks, bubbles from the ground in springs, runs to the lake, the big river. In their simplistic way, maps show water: blue lines, solitary strands finally winding together as thicker blue lines.

In this thicket of lines, maps find one of their truest meanings, as a way to diagram conflict. Water comes and goes from the Flathead Reservation. It finds its headwaters in reservation land, flows through land owned by non-Indians, then courses again onto tribal land. Finally, it flows off tribal land altogether.

Through its journey, water creates a question that Matt's ancestors would never have thought to ask - who owns it?

That question, and the subsequent questions that flow from it, are now the subject of a complex negotiation taking place between the Confederated Salish and Kootenai Tribes, the state of Montana and the federal government. The negotiation, which will parse the delicate relationship between state and Indian water rights, will go a long way toward determining how water is used on the reservation, now and in the future.

The law, in both treaties and court cases, has been relatively forthright about water ownership on Indian reservations. Predictably, of course, that forthrightness has come to be interpreted to support both state and tribal ownership of reservation waters.

When the tribes signed the Hellgate Treaty in 1855, they reserved the exclusive right to hunt and fish on the reservation, while the federal government agreed in perpetuity to protect the tribes' treaty-reserved natural

resources. Those resources included water, which was reserved in an undefined quantity sufficient to satisfy the purposes for which the reservation was created and the habitat upon which treaty-reserved fisheries depend, both on and off the reservation.

When Montana became a state in 1889, the new constitution recognized the ability of the citizenry to put water to work for beneficial uses. Water was a first-come, first-served commodity, and had been that way since settlers first came into the territory.

"It all started with miners - that's why we measure the amount of water that gets diverted in 'miner's inches,' " said Bruce Loble, who is the chief judge of the Montana Water Court. "They were mainly following the custom of California. In fact, quite a few of them had been to California before they came up here."

Although most of the West is a desert, water was used rather cavalierly in Montana's territorial days. Miners simply used it where they found it, washing away whole hillsides in the search for gold.

Back then, it hardly mattered. So few people lived in the territory, and there was water enough for all. Miners would usually set up mining districts, decide how to dole out the water, then get to work. The concept of waste was unheard of.

The change began when agriculture moved in. The first settlers moved into the rich valley bottoms, where water was plentiful. They had it good until more settlers came, moving into the higher valleys.

"This is where you got the saying, 'It's better to be upstream with a sharp shovel than downstream with an early priority date,' " Loble said.

Conflict was inevitable; the state's first murder was a water fight in Stevensville.

"Most of the conflict got worked out on the ground," Loble said. "They just beat each other up. That's how we distributed water. When we got a little more civilized, we took the fight to court."

Indeed, one of the very first Supreme Court cases was a water case. As the Montana frontier got a bit more civilized, "we started into a series of water adjudications," Loble said.

"We'd have an area with a problem and we'd get the people together and work something out," Loble said. "The problem was that we didn't get everybody into one case, so as soon as another problem cropped up, we'd have to start over again. It was highly inefficient and, quite frankly, continued that way for quite some time."

Montana water law developed through what's called the doctrine of prior appropriation; that is, first in time is first in right. According to water master Doug Ritter, who adjudicates water rights cases for the state Water Court, prior appropriation produced a maze of water rights that was often incomprehensible and, because they were filed in courthouses around the state and in some cases not filed at all, nearly undiscoverable.

"What we wound up with was a situation where it was nearly impossible to find out how many claims there were on water and how much those claims were for," Ritter said. "It wasn't really the best way to go about things, but nonetheless, that's what we did. So we were stuck with trying to figure it out."

The depth and width of the confusion became apparent after the state adopted its new constitution in 1972. The next year, the Legislature passed the Montana Water Use Act, which was "intended to address the uncertainty caused by the tangle of water rights based on state law as well as the perceived threat from

(Indian) reserved rights and out-of-state water users," Ritter wrote in a short history of state water rights.

The act called for a general adjudication of all existing water rights in the state. The effort was and is the largest judicial undertaking in state history. The adjudication has moved ahead like a forked river - state rights are handled through the Montana Water Court, while reserved rights on Indian reservations are handled through the Montana Reserved Water Rights Compact Commission.

It has been anything but simple.

"I do believe that the Legislature envisioned that this would happen in some definable number of years, and maybe it will," water judge Loble said. "It has been a tremendously complex undertaking and in many ways has become more complex as we've moved ahead."

For instance, when Montana was a more agricultural state, many of the state water rights were owned by large ranches. Even in the western half of the state, where agriculture is less dominant, much of the water was tied up by ranches. For good or ill, the domination at least kept things somewhat manageable.

But when ranches starting being subdivided, an elaborate maze of rights got decidedly more entangled.

"What happened was this: You'd have a ranch that had a right to let's say 100 inches of water," Loble said. "Then, when the subdivision went through, you had a new group of people divvying up this larger right. The problem arises when all the smaller claims suddenly add up to more inches than the original right. I can't tell you how often that's happened."

Those are the sorts of cases that wind up in the hands of water masters like Doug Ritter.

"What you have to do is sort of go back to the water and say, 'Here's the water we have, now how do we get there from here,' " Ritter said. "This often comes as real big news to people in a subdivision. The good news is that a lot of time people are able to work these problems out on their own. If they can't work it out, then we work it out for them."

While water court is still an essentially adversarial system, it doesn't necessarily have the cutthroat air of criminal and civil courts.

"We try to work patiently with people," Loble said. "We are not a heavily lawyered court. People are mostly pro se. If we had to have a lawyer for everyone in water court, there wouldn't be enough lawyers in the state. And that's saying something."

Of Montana's Indian reservations, only the Flathead and the Blackfeet have not yet reached negotiated water-rights compacts with the state and federal governments.

An effort to reach an agreement on the Flathead first started in the 1980s, broke down, then restarted in the '90s. The most recent round of proposals and negotiations have come in the past two years, since the tribes presented another plan for resolving water rights on the reservation.

The proposal reflects what the tribes view as an undeniable fact: that they hold the position of power in the negotiation, with the treaty and a century of law on their side.

"We want to negotiate an agreement that recognizes our aboriginal and reserved rights, but we don't want to

deny the fact that there have historically been other water uses on the reservation," Matt said. "We understand that we have a responsibility to both Indian and non-Indian residents of this land, and we want people to understand our willingness to share."

However, that willingness to share is not to be confused with an inclination to grant the state authority over tribal waters.

"We are saying that we own the water and that is what the law says," Matt said. "What we are saying is that if the state will recognize that this is a tribal resource, then we will recognize that there are legitimate uses. Negotiation is the way to do this, not an adversarial proceeding."

The state agrees that negotiation is the best channel to a water rights solution on the reservation, but it does not buy the tribes' ownership argument.

"Back in February, we told the tribes that their proposal couldn't form the basis for a compact," said Anne Yates, an attorney for the water rights compact commission. "They claimed all the water above and below the reservation and that won't work for us."

The state wants to maintain the status quo, Yates said, which would sustain water users with state claims.

"If the people of the area can't get behind a proposal, then the Legislature's not going to get behind it," Yates said. "We recognize the sovereignty of the tribe, and we've considered the proposal. The thing to remember here is this is a long-term process."

The murkiest waters in the Flathead negotiation are those that flow to nontribal irrigators.

John Metropolis, a Helena attorney who represents irrigators through the Flathead Joint Board of Control, said irrigators support a compact settlement, but cannot and will not support any agreement that concedes that the tribes own the reservation's waters.

"Our contention, which I believe is supported by the law, is that the state of Montana owns the water," Metropolis said. "The claim that they own the water conflicts with water law and we expect that it will be resolved in the state's favor. Since they don't own it, they don't hold the right to manage it."

The state claims ownership as part of the state Constitution, but the tribe disagrees, pointing to what they feel is contradictory state law and to previous court decisions.

"What is clear is that the United States owns the water on and under the reservation in trust for the tribes," said John Carter, an attorney for the tribes. "But because of the nature of this, the level of complexity, the way to resolve this is through negotiation. To solve it by drip-by-drip adjudication - and I do mean drip-by-drip, because that's the way it goes - won't make anyone happy."

Most people come to court or the negotiation table armed with their best legal weaponry and minds, and the negotiation of a Flathead water compact is no different. A typical negotiation session has enough lawyers to field a football team.

But the tribes have also brought another sensibility and value to the table. It's evident on the first page of the proposal:

"To the tribes, the beauty and sacredness of water are of the highest value. The intrinsic cultural and spiritual value of water is pervasive with our people. Water has long been considered a medicinal substance, which is one reason it is considered sacred. We believe, however, that water is to be shared among animals, plants and humankind for the mutual benefit of all. To take more than is needed risks the loss of environmental balance, which is necessary for all to survive and prosper."

Said Matt: "The very nature of negotiation suggests that there are reasons to talk. Yes, we have positions to take, and the state has its position, but once you set that out, then you can start working toward a solution. What is very important is that people understand that, regardless of ownership, the tribe sees water as the incredibly important resource that it is and wants to make sure it is managed for the good of all."

Where the Flathead negotiation has veered from other previous negotiations of Indian water rights is in the tribes' proposal to administer the water itself (see Michael Jamison's story today about the Rocky Boy's Reservation settlement).

"... in prior Indian water rights settlements in Montana, the parties agreed to a dual governmental ownership scheme that resulted in parallel and redundant administrative functions for state and tribal governments, predicated on ever-changing land ownership patterns," the Flathead proposal states.

Matt, who acts as a spokesman for the tribes' negotiating team, said management is extremely important part of the tribes' proposal.

"Water is a unitary resource, all connected," he said. "It makes sense for the owners of that resource to manage it, and the tribe has a pretty good history of managing its resources effectively. This entire water system is a very complicated organism, and it only makes it more complicated to have multi-jurisdictional management."

There is a phrase that shows up in the legal terminology surrounding Indian water rights - time immemorial. It refers to Indians' historic use and habitation of their vast aboriginal territory, both in Montana and beyond. In water law terms, these aboriginal rights are given a priority date of "time immemorial." In a system that refers to rights as senior and junior, they are the most senior of rights.

But it's the phrase itself that Clayton Matt likes. It provides him a sort of chronological tableau upon which the state's water battles can play out. Time immemorial put words like "negotiation" and "rights" and "beneficial uses" in proper perspective.

"For me, the way I think about this is that I am just one person," Matt said. "I am honored to play this role, at this time. But it's just a small thing in time. What has made this work for us, what brings us here today, is not me. We stand on the shoulders of our ancestors. There is a really strong sense of water flowing through time here. Tribal membership includes young and old. It's like my parents, they told me they had the opportunity to give this place away. But they didn't do that, because it's their job to pass it on to me. And that's where we are with this water today. It's my little job right now to pass it down. But in the larger picture, it's our job to keep the water moving through time, from the ancestors to the young."

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Montana's Response to the CSKT Unitary Management Discussion Paper of December 29, 2009

1. Introduction.

The State of Montana ("State") has expressed its willingness to explore the unitary management proposal put forth by the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes"), while consistently making clear that many of the proposal's implications still needed to be explored by all the parties, and that many difficult issues need to be overcome before the State could finally agree that a "unitary management" approach could form the basis of a successful negotiated settlement. The State appreciates the thought and effort that went into the Tribes' December 29, 2009 Discussion Paper ("Discussion Paper"), as it has highlighted some critical issues that must be addressed in order for us to progress further down a unitary management path in these negotiations. The following reflects the State's initial effort to analyze the complexities presented by the Tribes' approach, as articulated in that Discussion Paper. At this point, there are some areas of agreement, some of disagreement, and some in which we can neither agree nor disagree with the approach presented in the Discussion Paper. The discussion below highlights the issues that need to be addressed and gives you the State's position on many of them. As the Tribes also noted, this response is not intended to commit, compromise or waive and litigation strategy the State might undertake in the unfortunate event that Compact negotiations are ultimately unsuccessful.

2. Response to the Tribes' articulation of premises.

- A. The State appreciates the Tribes' recognition of the importance of protecting existing verified water uses on the Flathead Indian Reservation ("Reservation"). We of course agree that this objective must be accomplished in any Compact.
- B. The State agrees that the Tribes have claims to federal reserved water rights under state and federal law, and recognizes that the Tribes subdivide those claims into the three categories described in page 2 of the Discussion Paper at 2.B.(1), (2), and (3).
- C. The State recognizes that the Tribes have not agreed to waive, subordinate or otherwise relinquish rights to which they might be entitled. How "deferral" of the exercise of those rights, as they may ultimately be established, ensures protection of existing verified uses is an important issue for the State in these negotiations. The Discussion Paper provides no detailed discussion of the mechanism through which a deferral will occur. We look forward to fleshing out the details of the deferral approach.
- D. The role and position of the United States in these negotiations is up to the Federal Team to describe. The State does not know the full extent of the federal position, but is willing to accept the Tribes' description of it for purposes of the discussion of unitary management, subject to correction or modification by the Federal Team.
- E. The State agrees that the issues of surface- and ground-water connectivity and the potential conjunctive management of those resources must be addressed in our negotiations.
- F. The State does not agree that the land ownership and water supply patterns on the Reservation are qualitatively different than the complexities faced in other water compact negotiations that the State has successfully concluded. Consequently, the State does not agree that the dual sovereign management system adopted in all of our prior tribal-state compacts (where the tribe, through its water resources department and pursuant to its own water code, administers tribal water resources and the State, through DNRC and pursuant to Montana law, administers state law-based water rights, disputes between the two systems to be resolved by reference to a Compact Board) is unworkable on the Reservation. The State has expressed its willingness to explore the Tribes' stated preference for a unitary administration system in these negotiations, and remains willing to do so unless and until we hit an insurmountable roadblock. As will be discussed below, however, some features of the Tribes' Discussion Paper appear to the State to describe a dual rather than a unitary management system.

3. Response to the Tribes' identification of issues.

A. The interplay between future tribal uses and unitary management

The State understands the Tribes' desire to categorize their block of water for future consumptive uses as an existing use, and believes that Winters and its progeny make no particular distinction between reserved water rights for current or future uses. The approach the Tribes describe, however, appears to us to conflict with the Level 1/Level 2 hydrograph approach that the Joint Technical Team has been pursuing. The Level 1 hydrographs account for *all* of the water currently available on the Reservation. A presently undeveloped use of water is not and cannot be accounted for in the Level 1 hydrographs – and thus the State has difficulty in understanding the Tribes' statement in the Discussion Paper that quantification of a block of water for future tribal consumptive uses “is consistent with the Tribes' commitment to protect all existing verified uses....”

The Tribes appear to recognize this problem in their identification of possible sources for the satisfaction of future tribal consumptive uses. The State agrees that improved efficiencies, retirement of existing uses, abandonment of existing uses, purchase or transfer of existing rights and supplemental water supplies are all potentially viable avenues for identifying sources of water to satisfy future tribal uses, either non-consumptive (in the Level 2 hydrographs) or possibly consumptive.

The State agrees that it is not certain that these sources will provide sufficient water to satisfy the entirety of the Tribes' quantified rights, and is not opposed to building a compensation structure into federal legislation ratifying a Compact. The State views this as a tribal-federal issue.

The Tribes' Discussion Paper also sets out for the first time the possibility of the Tribes having the discretion to allocate water to either non-consumptive or consumptive uses without resort to the state-tribal unitary management board (“UMB”). As discussed below, the State does not in principle oppose the idea of the Tribes retaining discretion to allocate portions of the tribal water right recognized in a Compact to consumptive or non-consumptive uses, provided existing users are not injured. But the concept described by the Discussion Paper presents problems in the context of a unitary management system as the State has understood it.

In our prior compacts with the other tribes in Montana, we have addressed this situation by agreeing with our negotiating partners that each tribe would develop its own water code to administer uses of its tribal water right, but that such code would have provisions to ensure that tribal development authorized (including private or third-party development of a portion of the tribal water right under license/permit from the tribe) would be reviewed by the tribal water resources authority to ensure that such development does not harm existing water users. The State is generally empowered through these compacts to conduct a technical review of the proposed new use as well. If there is a conflict between the answer arrived at by the tribal water resources department and the State (i.e. if the tribe finds no harm and the State finds harm), then such disputes are to be resolved by the compact board created in each of our prior compacts.

The State had understood from the Tribes' stated goal of a unitary system that under such an approach new developments of water (whether by tribal or non-tribal interests) would need to be permitted by the UMB. This was an important point to the State in

terms of ensuring the goal of a system that is "unitary" as to both tribal and non-tribal interests. The State believes that a system that does not regulate both tribal and non-tribal uses is neither "unitary" nor workable. In addition, as noted above, protection of existing uses is a critical goal of the State in these negotiations, and a vigorous administrative role for a UMB seems a necessary and vital aspect of such protections. But the Tribes' approach to future tribal development suggested in the Discussion Paper seems to deny a UMB this role.

Placing those who wish to develop water uses in the future, whether tribal or non-tribal, in a position of parity before a UMB would allow us to simplify in these negotiations the significant issue of how we will provide for the future development of water on the Reservation. For example, suppose the City of Polson needs a new well to serve its users. Under the State's understanding of unitary management, the city could identify a source of supply (and mitigation if necessary) and apply to the UMB for a permit to develop that water. Under the vision expressed in the Tribes' Discussion Paper, the State is unclear about whether or how the city could go about developing a new water use. The State would like to better understand how the Tribes view such future development occurring on the Reservation.

B. Attaining Level 1 and Level 2 hydrographs

The Discussion Paper states that "diminishment [of flows] from the natural hydrograph down to a Level 2 or a Level 1 hydrograph represents a loss for which compensation is required." As noted above, issues of compensation for tribal claims can be dealt with between the Tribes and the United States in the federal legislation.

C. A single priority date for the Flathead Indian Irrigation Project

The State agrees that a single priority date for the Flathead Indian Irrigation Project ("FIIP") would simplify the task of administering the FIIP's water rights. The State supports the Tribes' efforts to work with the Flathead Joint Board of Control to find a mutually beneficial approach to the definition and decree of the particulars of the FIIP water rights. The State also agrees that any agreement concerning the FIIP does not address non-FIIP rights. The State assumes that by "unresolved" the Tribes mean that the treatment of these rights in the Compact remains to be negotiated.

D. Dispute resolution

The State does not agree that federal court is the optimal venue for resolution of disputes arising under a unitary management system. The State continues to believe that the "court of competent jurisdiction" approach utilized in prior tribal-state compacts is an appropriate way of recognizing the parties' differing views of the jurisdictional landscape.

4. Conclusion

The State reiterates its appreciation for the effort the Tribes put into their Discussion Paper, as well as the ongoing commitment to achieve a negotiated settlement of the Tribes' water rights. The State believes that an equitable settlement is achievable and looks forward to continuing discussions to this end.

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Memorandum

To: Susan Cottingham, Staff Director
Reserved Water Rights Compact Commission

CC: Jay Weiner, Attorney RWRCC

From: John Tubbs, Administrator
DNRC, Water Resources Division

Date: 2/21/2008

Re: CSKT Negotiations: Decision Points

In an effort to facilitate coordination for the negotiations of the water rights compact with the Confederated Salish and Kootenai Tribe (CSKT), the Department of Natural Resources and Conservation, Water Resources Division (DNRC) has developed a list of what it believes to be important decision points or sideboards for the State negotiators. The list is not intended to be an absolute prohibition but rather a list of points at which time the Reserved Water Rights Compact Commission (RWRCC) staff should consult with the DNRC before moving forward to commit to a State position. The list is preliminary and general. The list may continue to evolve as the negotiations progress. Also included are preliminary goals that the Department supports and believes the State negotiators should pursue. The side boards are generally as follows:

- 1) DNRC is bound by the Montana Constitution's open government requirement. Any discussion of potential unitary management method must also provide for open government and access to information.
- 2) DNRC is bound by the Water Use Act. The compact should mirror as existing law, procedures and exceptions for new permit and change applications. Issues that must be discussed in particular are, but are not limited to, deviations from the current burdens of proof, determination of "adverse effect," and any procedure other than a change authorization under Mont. Code Ann. §85-2-402 for use of reserved water rights outside the exterior boundaries of the Reservation.

Attachment FN 6

- a. Holders of state law based rights need to be able to come to DNRC to address their concerns.
- b. Administration cannot be exclusively by tribal ordinance
- 3) Reserved rights should be within the Reservation boundaries.
- 4) The goal should be to protect all existing state law based rights, including permits and exempt rights.
 - a. Consider subordination of reserved rights.
 - b. Address the status of existing non-compliant exempt wells, i.e. drilled and in-use, but no filing with DNRC due to the moratorium.
- 5) A goal is to provide for a single-family domestic well exemption for a water right.
- 6) Reserved rights should be defined as to total volume, i.e. a "no call" provision is problematic.
- 7) Encourage the progress of the on-reservation claims examination order.
- 8) Technical data should be developed and analyzed jointly by the team as a whole.
- 9) The issue of expanded acreage of the Flathead Irrigation Project should be addressed. If it is not, there is a potential change issue for the DNRC after the Compact is final, which could very controversial.
- 10) Discuss with DNRC any agreement on off-reservation water marketing before agreeing to it.
- 11) DNRC needs to review any proposed storage before any agreement is made.
- 12) Ground water is a unitary source. Do not differentiate between hydrologically connected ground water and non-hydrologically connected ground water
- 13) Any controlled ground water area issue needs to be discussed with DNRC.

We look forward to working with the RWRCC on this complicated and challenging negotiation. Please don't hesitate to give me a call if you have any questions or concerns.

BRIEFING PAPER
WATER RIGHTS SETTLEMENT PROPOSAL
PRESENTED BY THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE
FLATHEAD INDIAN RESERVATION

July 27, 2010

1. INTRODUCTION

The Confederated Salish and Kootenai Tribes (Tribes) of the Flathead Indian Reservation, located in Western Montana, are pleased to present this overview of the water rights settlement we anticipate achieving in the next two years. The Tribes, the Montana Reserved Water Rights Compact Commission and the United States are aggressively negotiating a settlement of the Tribes' extensive reserved and aboriginally-based claims to water on and off of the Flathead Reservation. If settlement is to occur, it must happen prior to June, 2013, which is the statutory deadline for all Indian water rights compacts to be completed under Montana State law. If no Compact is approved by the Montana Legislature by that date, the Tribes and the United States will be required to file water rights claims for the Tribes in the ongoing Montana general water rights adjudication proceedings. The Tribes are prepared to make those filings for aboriginal and Winters reserved water rights on and off of the Reservation.

The Tribes propose a settlement approach unique in many aspects. While our final settlement package is not yet complete, we anticipate that the main components of that settlement will: protect both Indian and non-Indian verified existing water uses; manage Reservation surface and ground water as a unitary natural resource by a joint State/Tribal management entity under a single body of law; foster rehabilitation of the degraded habitat for Tribal fisheries and wildlife on and off of the Reservation; and provide for Tribal economic and educational development. This settlement will also provide redress to the Tribes for injuries to Tribal natural resources arising out of or resulting from the acts, errors and omissions of the United States and the State of Montana pertaining to water management and related issues since the Reservation was reserved by the United States in trust for the Tribes. It is assumed that the State of Montana will contribute materially to the final settlement.

2. THE FLATHEAD INDIAN RESERVATION AND THE HELLGATE TREATY

The Tribes have occupied central and western Montana, as well as portions of Idaho and Canada, as their homeland for thousands of years. The Smithsonian Institute's Handbook of North American Indians, Vol. 12 (1998), entitled Plateau Indians, describes in detail the aboriginal reliance of the Tribes on the panoply of natural resources this region has to offer. They practiced their cyclic way of life based upon the harvest of seasonally available fish, game, and plants for food, medicinal purposes and cultural needs.

Water has been central to the Tribes' existence since time immemorial. It is a source of travel and trade as well as an essential component of the habitat for the fish, wildlife and plants necessary to support our physical and cultural existence. In August of 1805, the Tribes greeted Lewis and Clark in the Bitterroot River Valley and showed them the way over the Lolo Creek Trail towards the Pacific Coast. In 1841 the Jesuits built Saint Mary's Mission in the Bitterroot Valley to satisfy the resident Salish Tribes' request for education and assistance. The Church joined with the Tribes to create the first irrigation canals in Montana. Prior to 1854 the Jesuits developed irrigation facilities near the Catholic Mission of St. Ignatius for the benefit of the Tribes in what became the Flathead Indian Reservation with the signing of the Hellgate Treaty.

The Flathead Indian Reservation was reserved by the Tribes as their permanent and exclusive homeland in the Hellgate Treaty of July 16, 1855 (12 Stat. 975). The Hellgate Treaty is one of a series of similar Indian treaties entered between the United States, represented by Issac Stevens, and numerous tribes of the Columbia River system. In Article One of the Hellgate Treaty the Tribes ceded to the United States a significant portion of their aboriginal territory. In Article Two the Tribes reserved to themselves from their aboriginal territory the Flathead Indian Reservation.

A common attribute of Stevens treaties is express perpetuation of tribal aboriginal hunting fishing and gathering rights on and off of Reservations. Hunting, fishing, trapping and gathering throughout their aboriginal territory were essential to the Tribes' existence before and after non-Indian contact. That reliance is expressly ratified in Article Three of the Treaty, when the Tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Flathead Indian Reservation. They also expressly reserved the right to continue their hunting, fishing and gathering needs off of the Reservation in their aboriginal territory. This Treaty language is indistinguishable from the treaty language that has secured to other tribes the right to a federally-protected salmonid allocation both on and off of their Reservations.

Articles Four and Five of the Treaty demonstrate the commitment of the United States to provide the necessary materials, equipment, facilities, educational facilities, instruction and monetary support to convert the Tribes to an agrarian society. These promises and more are what underpin the continuing existence of the Tribes. We have worked hard to protect our rights and resources for future generations at considerable cost and fair success.

3. HYDROLOGIC SETTING

Streams and rivers on the Reservation, with the exception of the Flathead and Little Bitterroot Rivers, arise in mountainous terrain that is predominantly in Tribal ownership. Extensive valley-floor wetland and groundwater resources also originate from Reservation watersheds. Stresses on Tribal water resources began with the allotment-era opening of the Reservation, followed by construction and operation of the approximately 130,000 acre federal Flathead Indian Irrigation Project (Project), and ongoing water development under the State of Montana appropriation system. Development has culminated in the current pattern of surface

and ground water use, which substantially diminishes Reservation riparian and aquatic habitats and the ability of the Tribes to utilize their resources in a manner consistent with the 1855 Treaty of Hellgate.

The Flathead River originates in southern British Columbia and the Bob Marshall Wilderness and flows through portions of the Tribes' aboriginal territory. Once on the Reservation it flows for over 70 miles and drains the entire Reservation. The Flathead River is a large headwater tributary to the Columbia River, with a mean annual runoff exceeding eight million acre-feet of water. Two hydropower facilities, Kerr Dam and the Hungry Horse project, respectively have storage capacities of approximately 1.8 and 3.5 million acre-feet. Water management of both facilities is fully integrated with operations for the Federal Columbia River Power System including system-wide flood control, power generation, and reservoir maintenance and release patterns to enhance both anadromous and inland fisheries. **Figure 1** depicts the regional nature of the waters at issue.

Kerr Dam, located on the Reservation at the outlet of Flathead Lake and completed in 1938, is currently operated by PPL Montana. Following FERC relicensing, the Tribes were designated co-licensees with the option to operate the facility starting in 2015. Kerr Dam regulates the top ten feet of Flathead Lake, a natural waterbody, of which the south half is located within the Reservation. While there are clear power and recreational benefits attributable to the facility, these were generally achieved at the expense of Tribal natural resources. The facility was operated as a load following power plant until implementation of ramping rate and daily flow schedules in the late 1990's. Prior to this, dramatic flow fluctuations substantially degraded Flathead River riparian and aquatic habitats and lead to the lowest trout densities of any large Montana river. Maintenance of the full pool elevation of Flathead Lake resulted in widespread shoreline erosion, including the complete loss of the unique 800 acre delta where the Flathead River enters the lake.] irrigation purposes

Hungry Horse Dam, located on the lower South Fork Flathead River, was completed in 1958 and is operated by the Bureau of Reclamation. The dam inundated 80 miles of the South Fork Flathead River and tributaries, irreversibly influencing the physical and cultural landscape in this portion of the Tribes' aboriginal territory. Due to the reservoir's large storage capacity and flood control mandate, peak streamflows have been measurably reduced throughout the lower Flathead system. Again, there are clear economic benefits that can be attributed to the facility, but the reduction in peak flows has diminished the formation and maintenance of riparian habitat along large stretches of the Flathead River within the Flathead Reservation. 26. interference by Kerr for utility

The ecology of streams and rivers on the Reservation is linked to seasonal mountain snowmelt with spring and early summer streamflows that typically account for 60 to 80 percent of the annual runoff. During this critical water management period the 17 federal Project irrigation reservoirs are filled, state-based appropriations are met, wetland and groundwater resources are recharged and, to the extent not diverted for irrigation, elevated streamflows form and maintain the riparian and aquatic habitat upon which native and introduced species depend.

However, in all but the wettest years, there is insufficient natural runoff to meet competing demands for water use. Tribal natural resources bear the brunt of water shortages, with the Little Bitterroot River exhibiting some of the most severe water shortages. This river flows for over 50 miles on the Reservation. However, below the primary Project irrigation diversions in upper reaches of the river over 60% of the total annual runoff is depleted, and by the mouth the river is either dry or at very low flows during the summer irrigation period. **Figure 2** shows the inextricably intertwined nature of Flathead Indian Irrigation Project facilities and water bodies on the Reservation.

Streams and rivers that support higher summer flows are often maintained by surface water and ground water interactions. In some watersheds the exchange is very substantial, and it becomes a somewhat artificial distinction to physically separate surface and ground water resources.

With the above as context, two of the primary tenets of the Tribal proposal to settle water rights - unitary management and protection of existing verified uses - come into focus. Land use patterns that have developed over the last century, including over 155,000 combined Project and private irrigated acres, development of over 7,000 domestic wells and numerous municipal and community wells, lead the Tribes to recognize that verified existing uses would need some level of protection through the settlement process. Concurrent with this, the Tribes perceive: (a) a complex physical environment where surface and ground water as well as natural and irrigation-influenced flows are co-mingled; and (b) a legal and institutional pattern of appropriations and water use that is highly complex. Logically, the Tribes consider that unitary management, a legal and administrative framework that sees surface and ground water as a single resource to manage, and does not bifurcate administration between State of Montana and Tribal codes, as an appropriate path to implement a compact. **Figure 3**, demonstrating the checkerboard land ownership pattern on the Reservation, casts light on the illogic of the traditional bifurcated system of water administration perpetuated in most Indian water rights settlements.

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4. THE FLATHEAD ALLOTMENT ACT AND THE FLATHEAD INDIAN IRRIGATION PROJECT

A. The Flathead Allotment Act.

The Flathead Indian Reservation remained in communal Tribal ownership until Congress, over the objection of the Tribes, passed the Flathead Allotment Act of April 23, 1904 (33 Stat. 302). That Act, as amended, set the stage for the Tribes' efforts to achieve a water rights settlement. The three primary components of the Act consist of (1) allotment of Tribal land to individual Indians, (2) opening "surplus" unallotted Tribal lands to non-Indian homestead entry, and (3) authorization of the development of the Flathead Indian Irrigation Project (Project) "for the benefit of the Indians" of the Flathead Reservation contained in Section 14 of the Act. The Act contains additional considerations that play into a settlement, such as the grant to the State of Montana of sections 16 and 36 of each township on the Reservation.

(1) Allotment.

Members of the Tribes received individual allotments of Tribal land consisting of 80 or 160 acres covering approximately 220,000 acres of the 1.2 million acre Reservation. As the Reservation land status map (Figure 3) demonstrates, most of the allotments are no longer in Indian ownership and in fact, most were lost from Indian ownership by the late 1920's. *lost by Tribes.*

(2) Homesteading.

Tribal lands the Secretary of Interior deemed "surplus" to allotments were opened to non-Indian entry in 1910. Approximately 410,600 acres of Tribal land were taken as homesteads in the early 1900's. The Secretary of Interior sold these lands in his capacity as trustee to the Tribes. *+ Title*

(3) Flathead Indian Irrigation Project.

The Project, the single largest impact on the history of the Flathead Indian Reservation, is discussed in detail in the next portion of this briefing paper.

The Court of Claims has determined that the Flathead Allotment Act constituted an unlawful breach of the Hellgate Treaty and resulted in compensable takings of Tribal lands. The Tribal government has received compensation from the United States for taking Tribal land for State sections and homestead lands and other federal purposes. The 1948 amendments to the Act provided the Tribal government *de minimis* compensation for undefined and perpetual easements over Tribal land for Project facilities. Owners of allotted and homesteaded lands have received no compensation for Project rights-of-way over their lands. The Tribes have received no compensation for taking Tribal aboriginal or reserved water rights.

B. The Flathead Indian Irrigation Project.

(1) Purpose of the Project.

The Act and its 1908 amendments directed the United States to build an irrigation project for the benefit of the Indians of the Reservation. The Act also provided for the homestead entrymen to be served. That project is called the Flathead Indian Irrigation Project (Project). *FIP.* The Project serves approximately 130,000 acres of land on the Reservation.

Prior to initiating construction of the Project, the Secretary acknowledged the existence of extensive irrigation by members of the Tribes and directed the survey of those Indian uses of water. This federal undertaking recorded approximately 470 cases of Indian irrigation that predated construction of the Project. Congress provided no statutory authority or guidance to the Secretary for this federal endeavor. These early Indian irrigation uses have come to be known locally as "Secretarial water rights." As with the allotments those Secretarial water rights became attached to, most are now in non-Indian ownership. Secretarial water rights provide one basis for non-Indian claims to water on the Reservation.

(2) The Project is a BIA Project.

The irrigation project is a Bureau of Indian Affairs (BIA) project authorized under the Flathead Allotment Act. It is not a Bureau of Reclamation (BOR) authorized under the 1902

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Reclamation Act. The Flathead Allotment Act incorporated only limited portions of the Reclamation Act of 1902 for application on the Reservation. For example, the Act did not invoke the application of state water law. Consequently the Project does not operate under water delivery contracts or other commitments common to BOR projects.

The BIA was solely responsible for operation and maintenance of the Project in accordance with 25 U.S.C. 281, et seq., Title 25 of the Code of Federal Regulation, the BIA irrigation manual and federal judicial guidance prior to April 7, 2010. Since that date, management and operation has been conducted jointly by the Tribes and the Flathead Joint Board of Control, the representational entity for the three state-based irrigation districts authorized to exist within the project boundaries pursuant to a 1928 amendment to the Flathead Allotment Act. The United States has retained ownership of the project under the BIA-approved Project operating agreement between the Tribes, the Joint Board and the United States. The Project is now operated and maintained by the Cooperative Management Entity (CME), a cooperative undertaking between the Tribes and the Joint Board of Control.

(3) Project Construction, Operation and Maintenance Has Severely Degraded Tribal Natural Resources.

Federal construction and operation of the Project began in 1908 and was essentially complete in 1964. The Project consists of 16 reservoirs on the Reservation and one upstream and north of the Reservation on the Little Bitterroot River. Most of the reservoirs are natural water bodies modified by the United States to enhance storage capacity. There are approximately 1,100 miles of canals and laterals and approximately 10,000 irrigation structures within the Project. Many canals divert some to all of the flow of natural streams. In many cases, natural streams were and continue to be totally obliterated. With the exception of one off-Reservation diversion on Placid Creek (discussed below), not one of these Project structures was designed and built to provide any instream flow, screening or fish passage. It was not until 1985, after the Tribes successfully sued to enjoin the United States from dewatering Reservation streams, that the Project made any effort to maintain minimum instream flows to protect the Tribes' aboriginal and Treaty-reserved fishery habitat impacted by the Project on the Reservation. Subsequent efforts by the Tribes, including securing funding and materials, finally prodded the BIA to initiate a fish screening effort for Project diversions on the Reservation.

To supplement the water supply for the Project the United States constructed numerous trans-basin diversions within the Reservation and four trans-boundary diversions that bring water onto the Reservation from off-Reservation watersheds. One trans-boundary diversion, from Placid Creek off of the Reservation, has had a BIA fish screen and ladder in place since the 1930's at the request of non-Indian land owners seeking to protect their portion of the off-Reservation aquatic environment. This was 50 years before the federal court mandated the BIA to undertake similar protections for Tribal resources on the Reservation. The construction of these watershed diversions has resulted in well-documented massive and ongoing erosional features and numerous lesser but cumulatively significant injuries to Tribal lands and waters within the Reservation, including but not limited to uncontrolled irrigation return flows, canal

breaks, dam failures, flooding and unregulated stream diversions.

In the 1948 amendments to the Act Congress directed that a portion of the electrical power generated by the FERC-licensed Kerr hydroelectric facility be dedicated to paying for a portion of Project costs and operational expenses, including eventual coverage of operation and maintenance assessments normally chargeable to the irrigators. The Tribes are co-licensee of the Kerr facility and have the option to assume full ownership in 2015. Unless amended, the Tribes will be bound by the provisions of the 1948 Act that require Kerr to provide a "low cost" block of power to supplement Project operating expenses. In effect, the Tribes will subsidize the operation of the Project, yet as owner of only 10% of the lands served, will receive only 10% of the water delivered by the Project.

(4) The Project Can Not Deliver Water on a Priority Date Basis.

The United States did not design and build the Project to serve land based upon a water right priority date scheme. Rather, all lands are served as if they are of equal priority date. The Project serves approximately 130,000 acres of Reservation land, split equally between allotted and homesteaded lands. As the land status map at **Figure 3** shows, the land base under the Project is a highly checkerboard ownership consisting of Tribal, individual Tribal member, non-Indian, State of Montana and Federal (BIA, Fish and Wildlife Service) lands. If settlement negotiations should fail and an adjudication ensue, the Project simply could not serve land on an adjudicated priority date basis without massive redesign and reconstruction.

25 CFR
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priority

The Tribes and its members own approximately 10% of the homesteaded and allotted land served by the Project. The Tribes are the single biggest land owner under the Project and are entitled to a Winters water right with a priority date of July 16, 1855. Following the current status of federal law, owners of allotted lands, be they Indian or non-Indian, would be entitled to the same Winters priority date. Owners of homestead lands under the Project would be entitled to a priority date of the date of first use, which by definition will be no earlier than 1910. In the event the a settlement fails and litigation ensues, the United States would be faced with a Project that cannot satisfy a priority date litigated outcome to Tribal water rights quantification without massive infusions of cash and restructuring.

Questionable

(5) The Project Is in Deplorable Physical Condition.

A report entitled Comprehensive Review Report, Flathead Indian Irrigation Project was completed for the Project in October 1985 by a study team consisting of personnel from the Bureaus of Reclamation and Indian Affairs. The three-volume report confirmed what the Tribes already knew – the Project is in deplorable physical condition. In the intervening years since the 1985 Comprehensive Review, some of the deficiencies have been remedied, some have deteriorated further, and new deficiencies have developed.

Priority to 1985
then!

In 1985, and continuing to the present, the BIA Flathead Agency Irrigation Division lacked a planned and budgeted maintenance program for the irrigation storage and distribution facilities, forcing repairs to be made on an emergency basis and often relying on immediately

available materials which generally had a short life expectancy. A total of \$35 to \$40 million of deferred maintenance was identified by the Bureau of Indian Affairs in 2005.

Lack of adequate water measurement continues to be a major operational deficiency. Automated gate control at key diversion points is needed for efficient water management throughout the Project. The need also exists for installation of motor gate controls at key diversion facilities. Replacement of existing turnouts and small headgates with a typical precast structure to facilitate the use of flow meters is also needed.

Rights of way generally are not surveyed and are at best poorly documented for much of the Project. Fences, gates and other obstacles encroach on canal and lateral right-of-ways. Lack of maintenance access to the Project is a serious deficiency.

Key canals and laterals require cleaning and reshaping to restore them to their original geometry or an ideal geometry. Damage from unrestricted livestock access to Project facilities has been a major cause of poor canal and lateral condition. Fencing or some other preventative measure to prevent continued livestock damage is needed prior to implementing canal and lateral rehabilitation. To the extent they exist at all, canal liners are in need of replacement. Concrete liners are old and deteriorated. Many have been patched; some have been patched or relined multiple times.

Fish protection structures are seriously lacking on the Project. The Biological Assessment for Project operation and transfer to the CME specifies protective measures for the ESA-listed bull trout that must be implemented within the next five years. Above and beyond that, the Tribes have developed recommendations and cost estimates for additional fish passage facilities to be constructed at the intersection of certain streams and canals as well as at several reservoir outlets.

The above list merely highlights some of the most profound structural, operational and maintenance deficiencies that currently exist. The Tribes' engineering contractors have developed estimates for rehabilitating and repairing many Project facilities, focusing on rehabilitating canals and laterals, structure rehabilitation at key canals and laterals, automated water management and improved fish protection. Those costs, calculated in 2008 dollars approach \$160,000,000.00. And this would only approach the 1910 "as built" condition which has caused extensive injury to Tribal resources. These estimates do not include past and future expenditures under the Tribally-operated Safety of Dams program for Project reservoirs, nor do they include estimates to repair or remediate ongoing damage and injury to Tribal natural resources arising out of or resulting from Project construction, operation and maintenance.

(6) BIA Land Records for the Project are Deficient.

(a) The last official Project land redesignation was conducted by the United States in 1963. Ownership and irrigation usage has changed drastically since that date. As a relic of past politics rather than science, not all Project lands are served equally. Most get approximately

equal per acre allocations; fewer get what is referred to as “double duty” or “triple duty” water. Secretarial water rights are provided the spectrum of zero to full duty allocation and have been assessed by the Secretary anywhere from zero to full cost per acre for operation and maintenance.

(b) With very few exceptions, the canals and ditches of the Project have never been surveyed or platted and the individual Indian and non-Indian owners of land have not been compensated for taking those rights-of-way, which generally appear as easements in gross on Reservation land deeds. *MS returned ROWs.*

5. WATER RIGHTS ON THE RESERVATION

Prior to the Flathead Allotment Act, the Tribes owned all the water in, on and under the Reservation. In the early 1900's, the United States filed appropriations under the laws of Montana for 27,466,984.82 acre feet of water on and off of the Reservation to supply the Project. These filings were done in the name of the United States. Other than a few local state court decrees in the early part of the twentieth century (absolutely incompatible with a McCarran Act adjudication), there are no other primary water right claims to water on the Reservation.

The 1912 amendments to the Act established a federal system whereby Project water users could apply for, pay and subsequently obtain a federal “water right certificate” for Project water from the Secretary of Interior. Historical research and the results of a subsequent federal Freedom of Information Act confirm that this system was never implemented. *Not true*

Under the Montana Water Use Act, all persons asserting a claim to a water use predating 1973 were required to file with the State a “claim” to that water. There are approximately 4,200 such claims to Reservation water under State law, predominantly claimed by non-Indians. Under that same body of Montana law, persons who initiated a use of water after 1973 were authorized to seek a “permit” for that water use from the State. Montana was enjoined from issuing new use permits on the reservation in 1996. There are approximately 320 permits on the Reservation, predominantly claimed by non-Indians. Though not required, the United States filed State-wide “protective” water rights claims for the Tribes and its members for water necessary to satisfy Tribal aboriginal and reserved rights throughout the State. The Tribes made similar protective filings three decades ago.

The obligation of Tribes, and the United States as trustee for the Tribes and Tribal members (be they allottees or not), to file water right claims in the Montana adjudication is stayed by state law during the pendency of compact negotiations. If the Montana Legislature fails to approve a compact by June 30, 2013, the Tribes and the United States will be required to file all their water right claims in the Montana adjudication within two years of that date.

If settlement negotiations fail, the Tribes are prepared to file and vigorously prosecute their claims. The Tribes will file claims for instream flows, springs, wetlands, lakes and reservoirs, historic and present irrigation, practicable irrigable acreage, domestic, commercial and industrial uses, hydroelectric generation, and groundwater. The Tribes will also file claims for

instream flows throughout their aboriginal territory in Montana.

6. **STATE AND FEDERAL COURTS HAVE CONSISTENTLY CONFIRMED THE PERVASIVE NATURE OF THE TRIBES' RESERVED AND ABORIGINAL WATER RIGHTS**

The record of judicial decisions addressing the nature and extent of the Tribes' reserved and aboriginal water rights is extensive. As **Appendix A** to this briefing paper demonstrates, the Tribes have established a judicially sound basis to claim all the water necessary to revitalize the pre-Treaty natural environment of the Reservation and such additional water necessary to satisfy the many purposes for which they reserved Flathead Reservation as their permanent homeland. In addition, the Tribes' aboriginal rights to hunt, fish and gather off of the Reservation have been confirmed in State and Federal courts. The following discussion summarizes the judicially confirmed nature of the Tribes' rights to water. For a listing and brief annotation of relevant case law from which this summary is derived, please refer to Appendix A.

NO

A. Aboriginal Water Rights.

(1) The Tribes have retained their pre-Treaty aboriginal rights to hunt, fish and gather off of the Flathead Reservation. Destruction of those rights, and the attendant habitat, constitutes the basis for monetary compensation to the Tribes.

(2) The Tribes' aboriginal right to take fish in Reservation waters entitles the Tribes to instream flow rights necessary to maintain the fishery. *NO*

(3) The Tribal aboriginal right is entitled to a "time immemorial" priority date.

B. Winters Reserved Water Rights.

(1) Creation of the Reservation reserved to the Tribes all waters of the Reservation.

(2) Tribal reserved water rights are entitled to a July 16, 1855 priority date under the Winters doctrine.

NO - H2O to fulfill purposes

C. Nature of Tribal Water Rights.

(1) Tribal water rights are "pervasive" throughout the Reservation.

(2) They include all water necessary to satisfy the many purposes for which the Reservation was created, including fishing, agriculture, domestic, industrial and future uses. In short, the Tribes' rights include all uses necessary to fulfill the homeland of the Tribes in perpetuity.

purposes

D. Duty of the United States.

(1) The United States is vested with a trust obligation to maintain instream flows impacted by the Project at a protected level regardless of the equity claims of junior water users.

(2) The United States' trust obligation requires it to protect Tribal and allottee water rights from diminishment or takings.

(3) The United States' trust obligation also extends to protection of all other Tribal natural resources.

E. Impact of Tribal Rights on Montana State Law.

(1) The State is enjoined from issuing new water uses and changes of existing use on the Reservation until such time as the Tribes' rights are fully adjudicated or resolved through settlement.

(2) Montana Water Use Act is "adequate on its face" to adjudicate the Tribes' water rights; the question of "adequacy as applied" is yet to be determined.

7. ELEMENTS OF THE TRIBAL WATER RIGHT SETTLEMENT

The story is an old one. Since the arrival of non-Indians in their aboriginal territory the Tribes' gestures of friendship and sharing have resulted in loss of Tribal rights and property interests. Litigation is one way to recoup those losses, but pragmatism suggests the value of a focused effort to resolve water-related claims through negotiation in the first instance. The Tribes have four primary goals in settlement. First, the Tribes will obtain sufficient water to satisfy the homeland needs of the Reservation and aboriginal territory. Second, the Tribes desire to rehabilitate and improve the natural environment of the Reservation. Third, the Tribes seek to maintain flexibility in water management options to provide for future changes in water use and water availability arising out of climate and social change. Fourth, given the uncertainties in the global economy, we desire a settlement that reserves to the Tribes the right to prioritize expenditure of settlement funds to obtain the greatest fiscal benefit from the settlement package. Accordingly, and in response to the information summarized in this briefing paper, the Tribes present the following two-part settlement outline.

A. Primary Components of a Water Rights Settlement.

(1) The Tribes commit to protecting verified existing Indian and non-Indian water uses at least to the level available under current law, thereby avoiding the costs of a McCarran-type general adjudication.

(2) Surface and groundwater will be managed as a unitary natural resource.

(3) All water on the Reservation will be administered by a Tribal/State entity under a consistent body of Reservation water law to be enacted by the Tribal Council and the Montana Legislature.

(a) Management will be based upon scientific forecasting and monitoring of each water year.

(b) Adaptive management will address seasonal and annual variation in the water year.

(c) Instream flows for Reservation streams and rivers will be scientifically formulated and will carry a time immemorial priority date.

(d) The Reservation will be closed to new surface water appropriation.

(e) Groundwater will be managed to avoid mining, stream flow depletion, depletion of existing wells, yet allow scientifically sound new well development.

(4) The Project will have a single priority date, July 16, 1855, and will be a part of the Tribes' Winters right. This component is proposed to be achieved through a stipulation between the Tribes and the Joint Board of Control predicated upon a scientifically-based Project water use per irrigated acre. If achieved, it is anticipated that the Project right would be managed by the

Cooperative Management Entity (Tribes and Joint Board) that recently took over management of the Project, subject to the overarching provisions of the Tribal/State body of law on Reservation water administration.

B. Settlement Projects.

The Tribes will substantially complete their damage assessment in December, 2010. At that time we will share the report with the Federal negotiating team and we will establish a priority for implementing settlement projects. The following list identifies the types of Settlement projects we anticipate including in a final settlement.

(1) Transfer ownership of State sections within the Reservation to the Tribes. These were taken from the Tribes under the Flathead Allotment Act.

(2) Establishment of a Tribal fund to acquire Reservation irrigated lands and water rights.

(3) Establishment of a Tribal education and economic development fund.

(4) Establishment of a Tribal fund to rehabilitate fish and wildlife habitat by restructuring Project works and operations to diminish or eliminate adverse impacts caused by Project construction and operation.

(5) Establishment of a Tribal fund for Reservation water projects, such as new Indian irrigation, regional domestic water supplies and sewer systems.

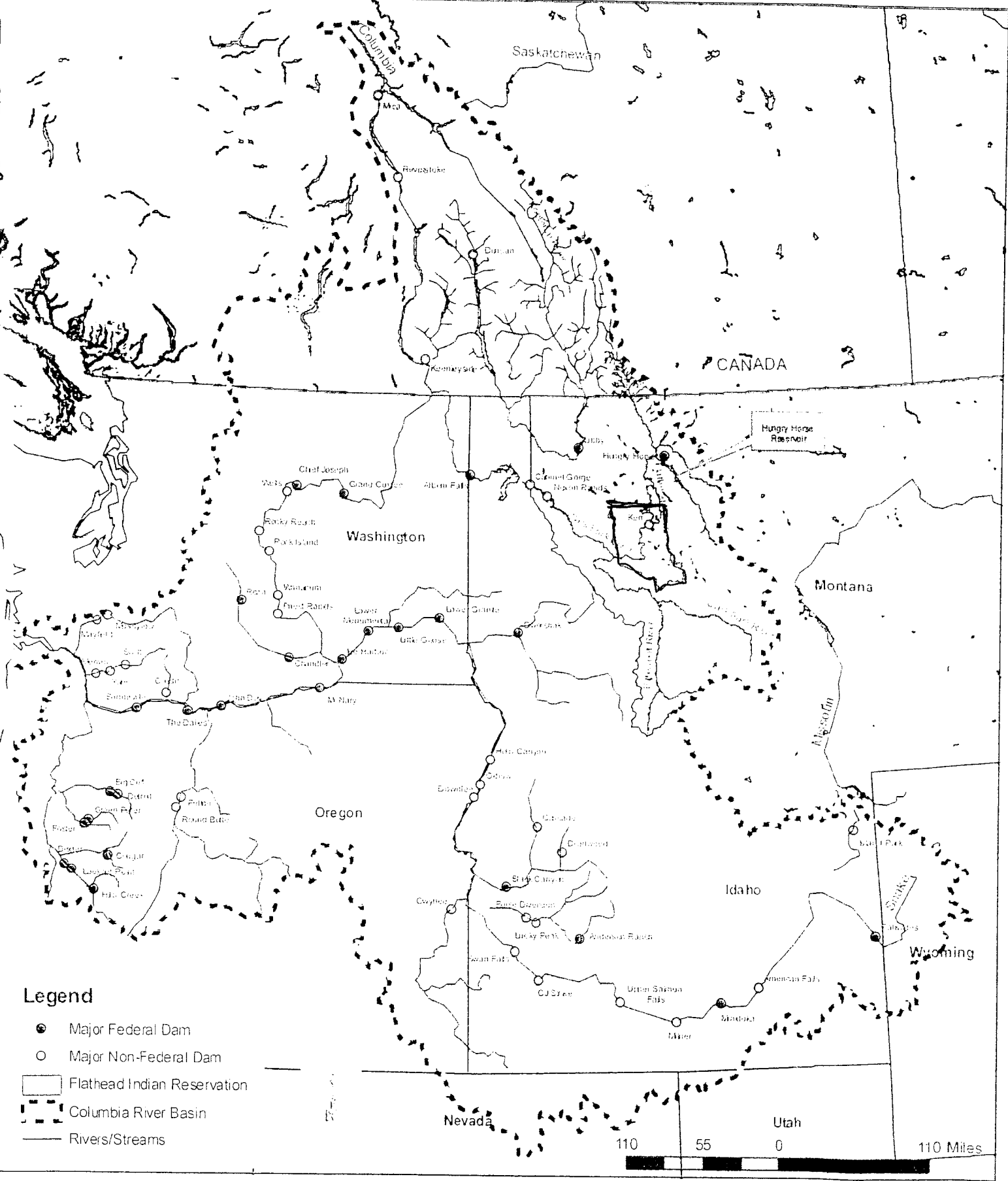
(6) Provide the Tribes with an allocation of water from Hungry Horse reservoir and other sources to off-set the loss of Tribal rights inherent in committing to protect existing verified non-Indian water uses of the Reservation.

(7) Establishment of a Tribal fund to restructure Project works that are structurally unsound or inefficient.

8. CONCLUSION

The Tribes' settlement proposal will relieve the United States from extensive liability that would result from a Reservation-wide general water right adjudication. Those liabilities largely arise out of or result from Project actions, errors, omissions and physical limitations. It will obviate the risks inherent in an off-Reservation aboriginal rights adjudication. If successful, the Tribes' settlement proposal will also save all Reservation residents the expense and anguish of decades of water rights litigation in state and federal court. It will accomplish these goals while affording the Tribes flexibility in water management and in selection of Reservation projects to be implemented with settlement dollars. We request the political and financial support of the United States in achieving these goals.

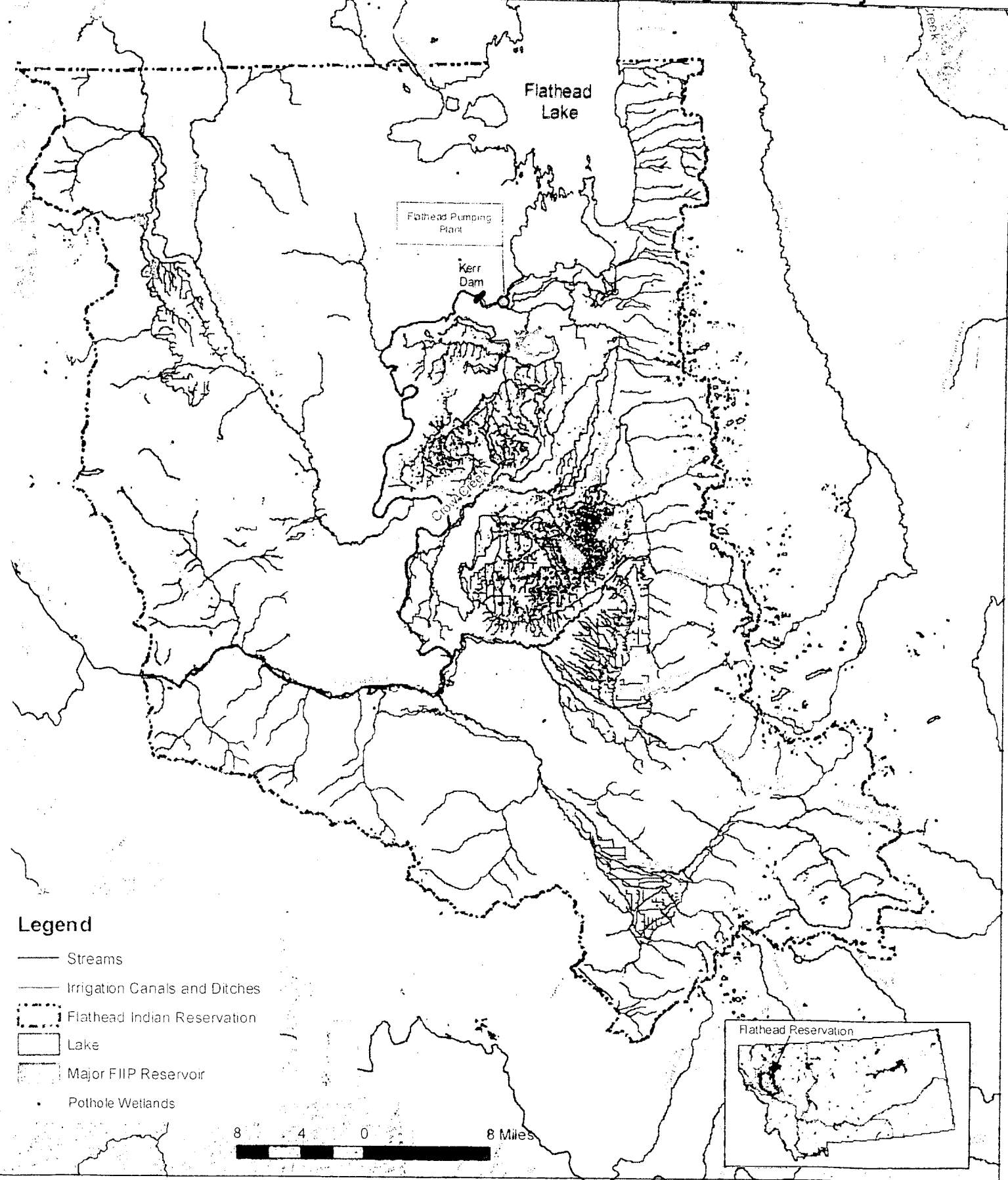
Flathead Reservation in Relation to the Columbia River Basin



Legend

- Major Federal Dam
- Major Non-Federal Dam
- ▭ Flathead Indian Reservation
- - - Columbia River Basin
- Rivers/Streams

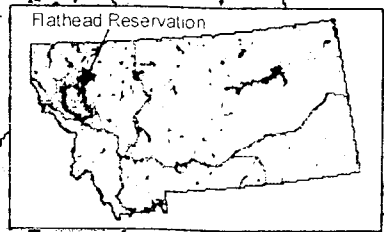
Major Infrastructure - Flathead Indian Irrigation Project



Legend

- Streams
- Irrigation Canals and Ditches
- - - Flathead Indian Reservation
- ▭ Lake
- ▨ Major FIIIP Reservoir
- Polihole Wetlands

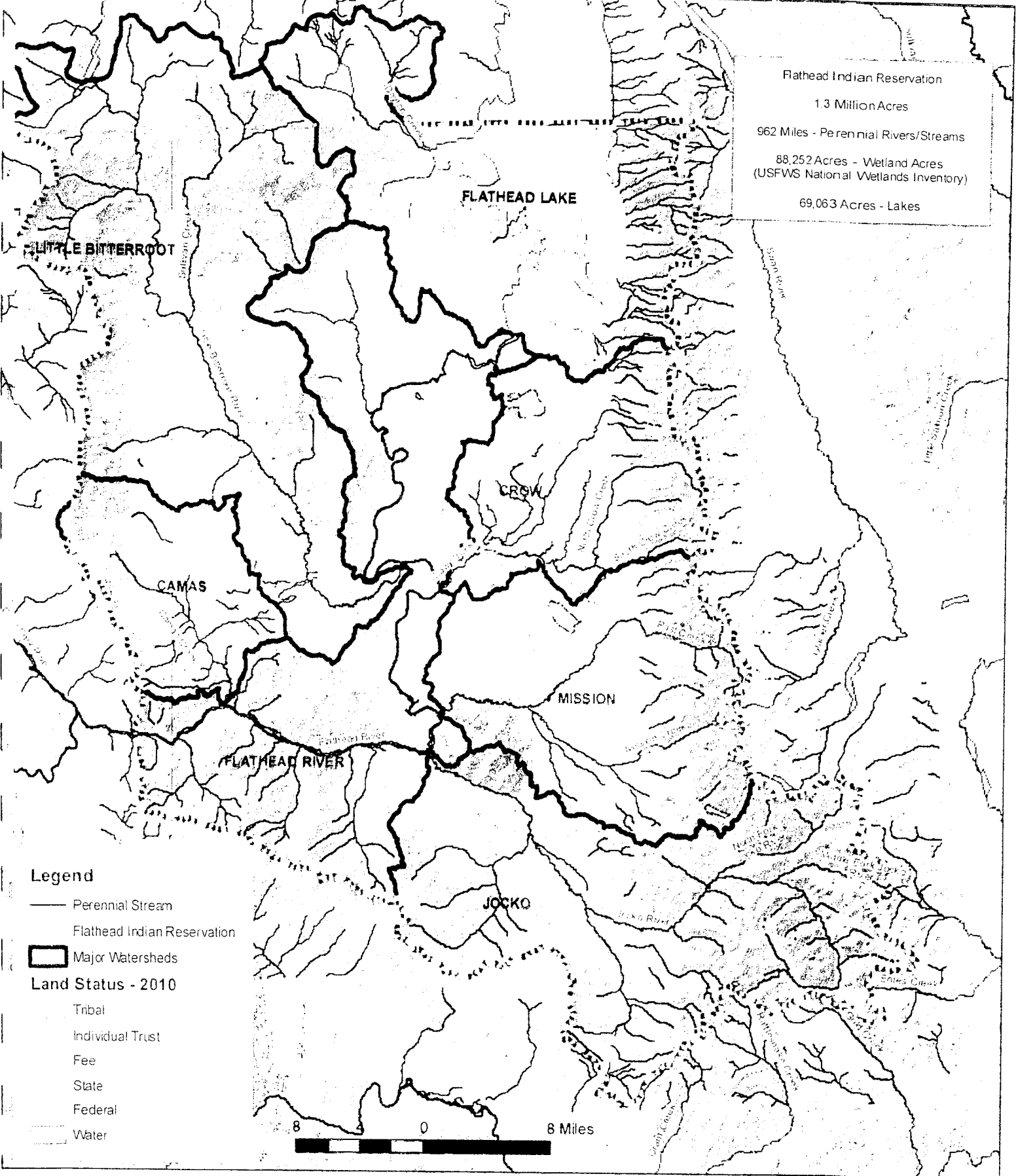
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DATE 7/15/2010

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Major Watersheds on the Flathead Indian Reservation



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RESERVED WATER RIGHTS COMPACT COMMISSION



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October 25, 2010

Clayton Matt
Confederated Salish & Kootenai Tribes
PO Box 278
Pablo, MT 59855

RE: Review of Hydross Model Jocko and Mission Baseline Condition

Dear Mr. Matt:

Thank you for providing the Montana Reserved Water Rights Compact Commission ("Commission") with copies of the Draft Jocko HYDROSS Model Baseline Conditions, August 2010 and the Draft Mission HYDROSS Model Baseline Conditions August 2010. Commission technical staff has carefully reviewed the reports. From their review, I offer the following comments.

The models clearly reflect a substantial investment of time and effort by the Tribes and DOWL HKM, which we greatly appreciate, and the results appear to be of very high quality. The baseline model runs appear to be based on reasonable assumptions and contain outputs that line up with the measured data reasonably well. Page 1 states that HYDROSS is a planning model, not a daily operations model. The Commission agrees that the best use of the model is to facilitate planning, and we believe it to be a very useful tool for that purpose.

That said, it is important to bear in mind some of the models' inherent limitations.

Although there is a strong database of existing flow records in the Jocko and Mission valleys, development of the model nevertheless required estimates upon estimates. For example, the model is heavily reliant upon the 2009 canal seepage study. Even though estimates of canal seepage losses are based upon data acquired under careful quality-controlled constraints, the estimates nevertheless carry some statistical uncertainty and apply only to a single irrigation season. To take these somewhat uncertain estimates and extend them to multiple irrigation seasons over the full length of the canals (which themselves have wide variability) leads to even wider uncertainty. Certainly, however, the estimates are the best available information at the time and we believe it is appropriate to use them in the manner applied in the model. In a similar vein, the estimate that 95% of delivery system and on-farm inefficiencies make their way to the next downstream node appears to be appropriate for the Jocko area, but given the vast amount of

wetlands in the Mission area, we expected lower returns on the Mission (or conversely, **higher** returns on the Jocko). These estimates should be revisited at such time that estimates of water use by irrigation-affected wetlands, riparian areas, and groundwater become available (METRIC).

Our concerns about the models' limitations are eased by Wade Irion's assurance that they have been 'stress tested'. By this we assume that they have been subjected to extreme scenarios (for example, lining of all canals, non-use of selected canals, extreme adjustments to the 95% estimate of return flows, or something similar) to see if they produce reasonable results.

It would also be helpful to reorganize table 2.3.8, capacity limits, by canal and sub-canal so that flow amounts can be tracked and tied back to their sources. Organizing outputs by Node ID produces results that appear somewhat scrambled. I recognize, however, that given the complex linkages between canals, this approach might prove unworkable.

None of the foregoing, however, should be read to detract from the Commission's appreciation for the time, resources, and effort the Tribes have invested in developing the HYDROSS models or the Commission's belief that the August 2010 Draft HYDROSS Model Baseline Conditions for Jocko and Mission Valleys are an appropriate basis for moving ahead with Compact negotiations.

Sincerely,



Bill Schultz, Program Manager
Reserved Water Rights Compact Commission

Cc: Wade Irion
Chris Tweeten
Stan Jones
Bill Greiman
Ethan Mace
Jay Weiner
Duane Mecham
Ed Sheets

MEMORANDUM

TO: Marcia Rundle
Counsel/Program Manager
FROM: Lynda Saul *LS*
Hydrologist
DATE: March 24, 1988

RE: Summary of 1986 RFP for an Instream Flow Study on the Flathead Indian Reservation

1. Purpose
 - A. Determine instream flow needs of selected streams flowing within the boundaries of the Flathead Indian Reservation
 - B. Develop technical support for the U.S. in asserting a water right claim for instream flow on behalf of the Confederated Salish and Kootenai Tribes and its members.
2. RFP
 - A. Statement of work was released on January 6, 1986
 - B. CH²M Hill was awarded the contract for \$211,000
 - C. Final Instream Flow Study report was to be completed by April 15, 1987.
3. Scope of Work
 - A. Methodology
 1. Instream Flow Incremental Methodology (IFIM) of U.S. Fish and Wildlife Service.
 2. Personnel need to have at last 3 classes in IFIM including Habitat Modeling.
 - B. Tasks
 1. Instream flow requirements are to be determined for 34 stream segments on the Flathead Indian Reservation
 2. Work is to be done concurrently with IFIM study funded by Bonneville Power Administration on the larger tributary streams
 3. Instream flow and hydraulic modeling is required
 4. Survey techniques will be used to locate transects for each stream segment. Cross-sectional profiles, depth, velocity, substrate and cover will be measured along each transect.
 5. Habitat mapping is not required.
 6. Suitability index curve verification at 4 sites (requires snorkeling)
 7. Fish population estimates at each stream segment, by electrofishing and the catch or mark and recapture method.
 8. Weighted Usable Area for 4 life stages of selected fish species will be performed at each transect for each stream segment.
 - C. Data Presentation
 1. Maps of each study site
 2. Raw data, tabulated data and graphs of all tasks
 3. Photographs of study sites
 4. Explanations of modeling
 5. Available and qualified to testify in court as an "expert witness"

MEMO

TO: Larry Fasbender, Director
FROM: Susan Cottingham, Research Specialist
DATE: May 20, 1988

RE: Confederated Salish and Kootenai Tribes RFPs and Tribal Contracts
Related to Reserved Water Rights

We have copies of the following RFPs:

March 24, 1988	Collect and analyze historical documents into when the Flathead Indian Reservation, Lake County, Montana, was established and for what purpose in order to determine and prove the scope of the water rights claim for the reservation. Due May 3, 1988.
May 16, 1986 revised July 1, 1986	Instream Flow Study which will determine the instream flow needs of selected streams flowing within the Flathead Indian Reservation. Object of contract is to develop technical support for U.S. in asserting a water rights claim for instream flow on behalf of Confederated Salish and Kootenai Tribes. Instream flow needs will be determined using Instream Flow Incremental Methodology (IFIM). Awarded to CH2M Hill - \$211,440
February 24, 1986	Economic study which will determine which lands meet the irrigable standards for reserved water rights litigation purposes on lands held in trust by the U.S. on behalf of the Flathead Indian Reservation. Awarded to Northwest Economic Associates - \$365,855
February 24, 1986	Identify potential irrigable lands held in trust by U.S. for Confederated Salish and Kootenai Tribes within exterior boundaries of Flathead Indian Reservation. Awarded to Stetson Engineering - \$730,501

In addition, we know that the following contracts and 638* monies were awarded on the Flathead Reservation, however, we have not yet requested RFPs for these:

9/5/84	CSKT	638* money to tribal resource program	491,378
5/18/82	CSKT	638* money to tribal resource program	48,000
3/10/82	Donald Chapman	fisheries study	87,356
8/29/80	CSKT	fish population study	63,586
8/80	John A. Glenn	irrigation study	112,601
5/14/79	Morrison-Maierle	"phase" studies	45,822
9/30/76	Clyde, Criddle, Woodward	"evidence" - unspecified	<u>\$ 68,700</u>

Total: RFPs and tribal contracts \$2,225,239

Compiled from Commerce Business Daily and Billings Area Office, BIA.

*PL 93-638 the Indian Self-Determination Act provides for the Secretary of Interior to enter into contracts with tribes to administer tribal programs.

DRAFT--Proposed Alternative CSKT Compact

Component	Description	Source	Water Use	Total Annual Volume (Acre Feet)	Priority Date
Irrigable Acreage(1)	91,000 acres	Flathead River & Tributaries; 12,000 acres served by Flathead Irrigation Project	1.4 acre feet per acre(2)	128,000	1855/1934*
Wetlands	11,500 acres	Flathead River & Tributaries, ground water, irrigation return flow	2.5 feet per year evaporation rate	28,750	Variable
On-reservation instream flow	Miles of stream	Flathead River and tributaries	Stream flow in cfs	270,000	Time immemorial
Existing Uses	Irrigation, domestic, industrial, commercial	Surface water, shallow ground water	Acre feet/yr	6,000	
Future Uses &Development	2,000 AF	Deep Ground water(5))Hungry Horse Reservoir(6)	Acre feet/yr	2,000 50,000	Compact Water
TOTAL				484,750	

(1)Irrigable acreage and water volume reported by CSKT to Clark Fork River Basin organization; (2) an acre foot of water is enough water to cover one acre of land with 1 foot of water, or 325,875 gallons. (3)Generous 'guesstimate' (4) Hungry Horse Reservoir water is known as 'Compact Water" (5) any newly developed deep ground water > 35 gpm is also Compact Water. The amount suggested here is a minimum. (6)The amount of Hungry Horse water would diminish as irrigation rehabilitation efforts make more water available. *Due to lands acquired under1855 Treaty or 1934 Ind. Reorg. Act.

**AN ALTERNATIVE COMPACT PROPOSAL:
COMPARISON WITH EXISTING CSKT PROPOSAL**

There is never just one option for resolving the issue of federal Indian reserved water rights. The CSKT Compact proponents have given the citizens of Montana both on and off reservation a false choice. Below is an easily understood alternative to the existing CSKT Compact that resolves all issues, protects irrigators without having to take away water rights, and most importantly, provides the CSKT will all the water they need to meet current and future demands for growth.

The guidelines for the development of a viable federal reserved rights Compact with the CSKT include the following:

1. Federal Reserved Water Right: The amount of water impliedly reserved for land that the federal government withdraws from the public domain, in this case, the Flathead Indian Reservation. A federal reserved water right applies only on the land so reserved.
2. Quantification of the Federal Reserved Water Right. The volume of water reserved by the federal government is based on the purpose of the reservation. Quantification is the determination of this volume of water.
3. Purpose of Flathead Indian Reservation: Derived from the Treaty of Hellgate, the purposes of the Flathead Indian Reservation are (a) agriculture including stock, and (b) fishing, hunting and gathering. The federal reserved water right is composed of a volume of water to meet these purposes and includes current, existing uses as well as water for future uses.
4. Administration of Water Right: The administration of the federal reserved water right is implemented by the United States, or the Tribe if its program is adequate. Non-Indian, state-based water rights are always administered by the State.

Since the process is about quantifying the federal Indian reserved water right, no one else's water right is determined in this process. In other words, there is no need for a water use agreement involving those who do not hold a federal reserved water right.

Based upon these principles, and using readily available existing information, an alternative quantification of the CSKT federal reserved water right would yield an on-reservation federal reserved water right of approximately 450,000 acre feet.

This compares with the existing CSKT Compact which merely listed the total volume of water claimed by the Tribe without reference to purpose of the reservation of 22 million acre feet on reservation, and 31 million acre feet off the reservation.

The attached Table shows this quantification and compares it with the existing CSKT Compact claimed water volumes.

COMPARISON OF ALTERNATIVE FEDERAL RESERVED WATER RIGHTS QUANTIFICATION PROPOSALS

Component	Description	Source	Water Use	Alternative Total Annual Volume (Acre Feet)	Existing CSKT Compact Annual Volume (acre feet)
Irrigable Acreage(1)	91,000 acres	Flathead River & Tributaries; 12,000 acres served by Flathead Irrigation Project	1.4 acre feet per acre(2)	128,000	No water claimed for agricultural purposes
Wetlands	11,500 acres	Flathead River & Tributaries, ground water, irrigation return flow	2.5 feet per year evaporation rate	28,750	28,750
On-reservation instream flow	Miles of stream	Flathead River and tributaries	Stream flow in cfs	270,000	2,400,000
Existing Uses	Irrigation, domestic, industrial, commercial	Surface water, shallow ground water	Acre feet/yr	6,000	
Future Uses &Development		Deep Ground water(5))Hungry Horse Reservoir(6)	Acre feet/yr	2,000 50,000	90,000
Flathead Lake		Total amount of natural flow into Flathead Lake			18,000,000
Off-Reservation Instream Flow		Streams and Rivers across 11 counties			31,000,000
TOTAL				484,750	51,518,750

(1)Irrigable acreage and water volume reported by CSKT to Clark Fork River Basin organization; (2) an acre foot of water is enough water to cover one acre of land with 1 foot of water, or 325,875 gallons. (3)Generous 'guesstimate' (4) Hungry Horse Reservoir water is known as 'Compact Water" (5) any newly developed deep ground water > 35 gpm is also Compact Water. The amount suggested here is a minimum. (6)The amount of Hungry Horse water would diminish as irrigation rehabilitation efforts make more water available. *Due to lands acquired under1855 Treaty or 1934 Ind. Reorg. Act.