

May 31, 2019

Senator Steve Daines
838 Hart Senate Office Building
Washington, D.C. 20510

Subject: Transmittal of Mission and Jocko Valley Irrigation District Request for the Audit of the Flathead Irrigation and Power Project

Dear Senator Daines:

We, the undersigned commissioners of the Mission and Jocko Valley Irrigation Districts hereby unanimously request that you initiate, through the General Accounting Office, a full and comprehensive audit and investigation of the federal Flathead Irrigation and Power Project. Please find attached our letter report transmitting and describing our audit/investigation request along with supporting documentation.

We understand that the contracts between the irrigation districts and the United States secured to repay the construction costs of the irrigation and power project are binding, and Congress' historic and codified efforts to develop a self-sufficient integrated irrigation and power project form the basis of this request.

While this audit/investigation request is independent of the proposed CSKT Compact, we wish to advise you that the CSKT Compact contemplates the complete turnover of the federal irrigation and power project infrastructure, water rights, and power revenues—which we paid for and to which we are legally entitled—to the CSKT. Should the CSKT Compact pass, the investments of thousands of irrigators and the United States in the FIPP will be rendered meaningless. The consequence of failure to protect these investments will in turn generate a huge financial liability to the United States as it will be forced to compensate for the Fifth Amendment takings resulting from the CSKT Compact. We also believe that the passage of the CSKT Compact is antithetical to the policies of the President in protecting private property rights, agriculture, and our western heritage.

We recommend that this audit/investigation be completed before advancing any movement on the CSKT Compact in Congress. Once this audit/investigation is completed, we expect that the contours of the CSKT Compact can be adjusted to achieve a fair outcome, rather than the complete destruction of the United States' and our investment over more than 100 years.

We look forward to working with you in solving the vexing water problems of western Montana and in securing our livelihood and future agricultural sustainability.

Sincerely yours,

Jocko Valley Irrigation District:



D. Boone Cole, Chairman



Tracy Gardner



Patty Hahn

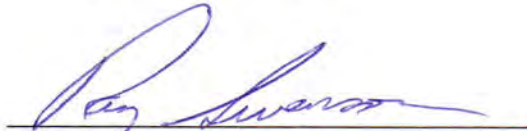
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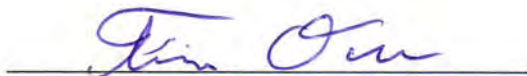
Bruce White

Attachments

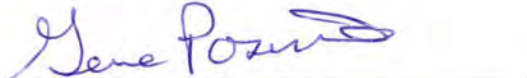
Mission Valley District:



Ray Swenson, Chairman



Tim Orr



Gene Posivio

May 31, 2019

Dear Senator Daines,

We, the undersigned commissioners of the Mission and Jocko Valley Irrigation Districts hereby unanimously request that Senator Daines initiate, through the General Accounting Office, a full and comprehensive audit and investigation of the federal Flathead Irrigation and Power Project.

We represent the irrigators who paid for both the Irrigation and Power divisions of the Project and who continue to pay for its operation and maintenance, while being allowed no input on the management of the project, the distribution of the power revenue for irrigation purposes, or how our annual operation and maintenance money is being spent.

In 2019, the Bureau of Indian Affairs (BIA) imposed another rate increase of \$4.50/acre from the irrigators, on top of an increase of \$3/acre the year before, even though the FIPP had a carryover of around \$450,000-\$600,000 that was unspent from last year.¹ The carry-over amount more than covers this year's increased assessment, which calls into question the BIA's rationale for the rate increase. Importantly, the FIP is still operating on a partial staff, though we are paying for a full staff which was the purpose of the last rate increase. To our knowledge, the FIPP will continue to be carelessly and unlawfully operated by the BIA to the detriment of project irrigators.²

The General Accounting Office (GAO) has demonstrated that federal Irrigation projects managed by the BIA have the highest operation and maintenance costs (O&M) costs per acre (GAO-06-314, 2006). Despite that circumstance, the GAO found that BIA projects have deteriorated to the point that costs to rehabilitate them have escalated to unsustainable levels. The FIPP is no exception as the costs of rehabilitating the FIPP in 1980 were estimated to be \$20 million dollars, but in 2019 the costs of rehabilitation have mushroomed to more than \$189 million dollars.³ We would argue that the mission of the BIA in representing only Tribal government interests and neglecting its federal responsibilities to Indian and non-Indian project irrigators resulting in complete BIA / tribal government control over a federal irrigation project in which non-Indians own 90% of project lands, are factors responsible for bringing its finances and operations to the breaking point. The BIA's action also negatively impacts tribal member irrigators who may have to relinquish their leases because they cannot afford the O&M increase⁴.

In the pages that follow, we provide information on the background and need for such an investigation and audit, including information that suggests that both the power revenues and the irrigator annual O&M fees associated with the FIPP are being misspent. The use and disposition of these funds is the subject of our requested audit and investigation.

Background

A discussion of the full historical background of the development of the FIPP is beyond the scope of this

¹ The per acre cost has risen from \$19.95 per acre in 2002 to \$33.50 in 2019, with no corresponding improvement in the irrigation infrastructure system, water delivery, or management. The *Flathead Indian Irrigation Project 2018 Budget Approved and Actuals* shows a \$450,000 net surplus from actual revenues less actual expenses.

² The BIA has been pre-implementing the proposed water compact of the Confederated Salish and Kootenai Tribes although Congress has not ratified it. The pre-implementation involves the redistribution of water from irrigation to instream flow, storage reservoir manipulation, and violates the 2008 BIA Operating Plan for the project.

³ Flathead Resource Organization 1984; BIA 2015, *Project Modernization Plan*, Cal Poly University.

⁴ CSKT Tribal Council Minutes; Volume 19 Number 53; May 7, 2019

paper, however, a timeline of the major activities of note, including important and specific language of the statutes is attached to this letter (Table 1). This section describes portions of the FIPP project history most relevant to and prescribing the audit request. Our request is further anchored in the fact of historic Congressional intent to enable the development of a combined irrigation and power project to serve all the landowners within the exterior boundaries of the Flathead Indian reservation regardless of land ownership, the issuance of land patents in furtherance of this goal, and the Acts of Congress ensuring the productive development of the region.

Project Construction and Repayment

In 1908, the 1904 Flathead Allotment Act (33 Stat. 802) was amended as to the sale and allotment of surplus unallotted lands and to authorize the construction of the Flathead Irrigation and Power Project (35 Stat. 444). Congress statutorily authorized the FIPP to serve both the Indians on allotted lands and the settlers who purchased the surplus, unallotted lands (35 Stat. 444, 448-50). From 1909 through 1911, the United States appropriated under state law the waters of the Flathead River and its tributaries to serve the irrigation and power project.

In 1909, the President of the United States officially opened the Flathead Indian Reservation to settlement. Entry men who purchased the unallotted lands to be irrigated by the Project were required to purchase a water right whose cost would be reflected by the construction costs of the FIPP. Irrigation Districts formed in the 1920's entered into repayment contracts for construction costs with the United States. To ensure construction cost repayment, the United States placed a lien on the properties of the irrigators until the construction costs of the irrigation and power system were repaid. In accordance with the statutory language in the 1908 Act, when the construction costs of the project were repaid, the liens would be released, and the operation and management of the project would be turned over to the landowners therein (35 Stat. at 449-50). The construction costs of the power and irrigation divisions were paid in full in early January 2004, but the liens on these lands have never been released. In a detailed letter describing the lands subject to the agricultural lien, all three irrigation districts petitioned Interior Secretary Zinke in May 2018 to release the liens. No acknowledgement of the receipt of the letter or response was received.⁵

Water Rights and Power Generation

By the Act of May 10, 1926 (44 Stat. 464), Congress appropriated funds for the construction of a power plant to generate power for operation of a large pumping station to serve the irrigation project. It was anticipated that power generated in excess of the pumping plant needs would be sold and this act specified how the revenues from such sales would be used. In 1928, the Federal Power Commission (FPC)—now the Federal Energy Regulatory Commission (FERC)—issued a license to develop the power sites on the Flathead Indian Reservation. The license provided for a reservation of a specified amount of power for use by the irrigation project (45 Stat. 200-212).

To enable the United States to develop the hydropower component of the FIPP, the Secretary of the Interior entered into contracts with the three irrigation districts to use the water rights appropriated for irrigation to generate power at Kerr Dam.⁶ In exchange for the use of the irrigation water rights to perfect the hydropower resource, the irrigation project was allocated a specified amount of power at

⁵ A copy of the document sent to Secretary Zinke, without attachments, is attached to this report. The process requires the irrigators to submit such a letter with the legal descriptions of the lien-assessed property.

⁶ Scattergood, 1930, Flathead Power Development, Senate Document 153, 71st Congress, 2nd Session

the cost of production, known as the low cost block of power (LCB) to operate the pumping plant, with the provision that revenues in excess of the LCB would be made available for the FIPP to sell.

Allocation of Power Revenues in Excess of the Low Cost Block of Power

In 1948, Congress enacted a law (62 Stat. 270, 271) that allocated the net power revenue from the low cost block of power to the liquidation of costs associated with the construction of the irrigation and power system and to assist with the annual operation and maintenance costs of the Project:

"All net revenues hereafter accumulated from the power system shall be applied annually to six purposes, in the following order of priority:

- (1) To liquidate all matured installments of the schedule of repayments for construction costs of the power system;
- (2) To liquidate all matured installments of the schedule of repayments for construction costs of the irrigation system of each division, on an equal per acre basis for all irrigable lands within the division;
- (3) To liquidate unmatured installments of the schedule of repayments for construction costs of the power system which will mature at a date not later than the maturity of any unliquidated installment of irrigation system construction costs;
- (4) To liquidate unmatured installments of the schedule of repayments for construction costs of the irrigation system of each division which will mature at a date prior to the maturity of any unliquidated installment of power system construction costs, on an equal per acre basis for all irrigable lands within the division;
- (5) To liquidate construction costs chargeable against Indian owned lands the collection of which is deferred under the Act of July 1, 1932 (47 Stat. 564; 25 U. S. C., Sec. 386a); and
- (6) To liquidate the annual operation and maintenance costs of the irrigation system."

Congressional Intent

As is demonstrated by this brief history, through the construction of the FIPP, Congress intended to make the opened Flathead Indian Reservation productive for all citizens regardless of land ownership status. Further, Congress did all that it could to ensure the FIPP was self-sufficient, which it was throughout most of its history until about 1980. Congress had the foresight to provide for an integrated irrigation and power project such that where the gravity fed structures were unable to provide water, a power system using the abundant waters of the Flathead River would provide for pumping costs to get water to a portion of the project's irrigated lands, and the excess revenues from that power would be directed toward repayment of project construction costs and ultimately to the reduction of annual operation and maintenance costs.

None of the Acts of Congress which produced this system have been modified or repealed.⁷ Thus, the guiding principles for the Flathead Irrigation and Power Project are still "the law of the land".

⁷ Modification of the FERC license for Kerr Dam in 2017 did not change, revise, or alter the existing statutes for the FIPP. Similarly, the Tribes' purchase of Kerr Dam in 2015 did not negate the existing law and responsibilities for the delivery of the low cost block of power or net power revenue.

Management and Operation of the FIPP by the Bureau of Indian Affairs

While the Bureau of Reclamation (BOR) was the primary agency responsible for the design, construction and management of the FIPP until project construction stopped in 1960 at the request of the Tribes, the Bureau of Indian Affairs (BIA) took over daily project management and operations sometime after 1960. At that time, the BIA became responsible for the operation of the integrated irrigation and power project and with that, the distribution of power revenues in accordance with the statutes creating the FIPP.

Rather than continue to operate the FIPP as a combined irrigation and power project, however, the BIA has acted to disintegrate the FIPP system as envisioned and codified by Congress. The primary actions of the BIA to this end include:

- Failure to develop an irrigation emergency surplus fund from the power revenues for the irrigation project as required by the 1948 Act
- Spending the annual operation and maintenance funds provided by the irrigators on irrelevant, off-reservation actions, such as the 1980 GAO-investigated use of \$500,000 on evaluation of a hydropower facility off the reservation at Kootenai Falls
- Failure to perform routine operations and maintenance on the irrigation project, resulting in its deterioration and increasing the costs of project rehabilitation from \$20 million in 1980 to over \$189 million in 2019
- De-coupling the integrated irrigation and power functions by awarding a contract to the Tribes for the operation of the power component on behalf of the BIA
- Failure to allocate the power revenues to liquidate annual operation and maintenance fees as directed in the 1948 Act
- Failure to fully staff the irrigation division with appropriate expertise to manage and deliver water to lands irrigated by the project

Because of these actions of the BIA, the federal FIPP has failed to live up to the intent of Congress in developing an integrated water and power system to serve all reservation residents. We therefore believe that an audit of both the power and irrigation divisions is necessary to protect our investment in the FIPP as well as the considerable investment of the United States.

The Audit/Investigation Request

Due to the BIA's arbitrary and careless separation of the irrigation and power divisions of the project, we believe that in order to understand the finances of the project as a whole, and as Congress intended, it is necessary to request two separate but simultaneous audits of the project, one for each division, covering the same time period of 2009-2018. To audit the irrigation side and not the power side, or vice versa, will not give a complete picture of the funding disposition of the FIPP.

The audits must assess the problems associated with the separation of the divisions and recommendations made as to pathway forward, including checks and balances necessary to reintegrate project finances in order to return the FIPP to self-sufficiency as Congress intended. Importantly, none of the acts or laws of Congress that produced this integrated system and provided for the allocation of revenues have been changed or repealed.

Flathead Agency Power Division:

As the 1908 and 1948 Acts make clear, the FIPP was designed to serve everyone regardless of land ownership status and its purpose was to make the reservation productive, and the project as self-sufficient as possible. Importantly the power revenues were to be used “hereinafter” for the six purposes outlined in the 1948 Act.

We request that this investigation and audit include the Power Division of the Project, now known as Mission Valley Power, in order to account for the Net Power Revenues (NPR) which belong to the Irrigation Division to “...liquidate annual O&M charges” as per the Repayment Contracts with the Districts as well as the Act of 1948. We need to know how these funds have been spent and what if any amounts are owed to the Irrigation Division.

When the project was managed by the Bureau of Reclamation, office staff kept track of the Net Power Revenues from 1950 through 1984, shortly before the management of the power division was taken over by the Tribes. The record shows the BOR carefully tracked net power revenues by year and the payments made from them toward each of the provisions mandated in the 1948 act. Below is a summary of the net power revenues taken from that log, prior to any payments being applied out of them:

FIP Power Division Net Power Revenue		
Years	Total	Annual Avg
1950-1959	\$2,267,605	\$226,761
1960-1969	\$2,923,204	\$292,320
1970-1979	\$7,183,930	\$718,393
1980-1984	\$1,480,999	\$296,200
Annual Avg (over 35 years)		\$395,878

Once the first five categories were paid off, net power revenues were to be applied to the sixth classification: “To liquidate the annual operation and maintenance costs of the irrigation system.”

The BOR data tells us that after the project was paid off in early 2004, a minimum of \$400,000, and possibly as much as \$1,000,000⁸ per year should have been applied to help liquidate the O&M costs of the irrigation system. However the increasing O&M assessments on irrigators confirm it is highly unlikely that this has ever happened.

Of concern to this audit/investigation request is the improper separation of the power and irrigation components of the FIPP. Despite Congressional intent for the FIPP, the BIA separated the project components by arbitrarily awarding a contract to the Tribes for the management of the power system separately from the irrigation system, including its revenues as described below.

In 1986, the BIA inappropriately awarded the Tribes a P.L. 93-638 contract to operate and manage the power side of the FIPP on behalf of the BIA. We maintain that contract was not appropriate because the Project was established for the benefit of *both* the tribes and non-Indian settlers. However, the Indian Self Determination and Education Assistance Act (ISDEAA), known as Public Law 93-638, authorizes the Secretary of the Interior (Secretary) to enter into self-determination contracts for specific types of government programs that were created “for the benefit of Indians because of their status as Indians”

⁸ Table 2: Excerpts from CSKT Minutes, Volume 18, Number 76; July 3, 2018

25 USC Sec 450f(a)(1)(E). No part of the FIPP is a project designed specifically for the Tribes.⁹

Now managed under the shield of a “638 contract”, the operations and finances of the FIPP Power Division, now called Mission Valley Power, lack the visibility and accountability necessary for what once was a well-functioning Federal Irrigation Project.

Additionally, the BIA failed to ensure that the provision for the power revenue from the LCB was directed to the purposes outlined in the 1948 Act, resulting in a net drain to the irrigation side of the project and directly contributing to the physical deterioration of the system. The ultra - modern facilities of the power division located in Pablo are a stark contrast to the deteriorated infrastructure of the Irrigation Division, while O&M costs per acre have increased drastically over the years.

One of the important sideboards on the Tribes’ use of the NPR is that 25 U.S.C § 458 cc (b)(4)(C) of the Indian Self Determination and Education Assistance Act prohibits inclusion of Flathead Project funds in contract funding agreements:

“(b) Each funding agreement shall (4) prohibit the inclusion of funds provided (C) the Flathead Agency Irrigation Division or the Flathead Agency Power Division, except that nothing in this section shall affect the contract authority of such divisions under section 450f of this title.”

The CSKT are aware that this prohibition exists and have unsuccessfully tried to amend this language of the ISDEAA several times over the years. In 2014, Chairman Ron Trahan testified in Congress requesting an amendment to this provision of the bill, stating:

In 1986, we signed a contract to take over control and management of the electrical utility on our reservation, then known as the Electrical Division of the Flathead Indian Irrigation Project. We renamed it Mission Valley Power (MVP). This utility serves every home and business on the reservation, Indians and non-Indians alike. It also provides power to the National Bison Range. It is considered one of the best-run utilities in the state of Montana. Since the Tribes took over, MVP has replaced and updated much of the utility’s infrastructure yet managed to retain some of the lowest rates in the region. MVP has been 638-contracted and has not been included in subsequent Self-Governance agreements due to the prohibition found in 25 U.S.C. § 458cc(b)(4)(C). CSKT supports S. 919’s deletion of this prohibition.(Emphasis Added)

We maintain that since project construction costs were paid off in early 2004, net power revenues have been depressed to ensure that little if any funds are available to be applied to Irrigation Operations and Maintenance as required by the 1948 Act. If the power division net revenues were directed to their lawful purpose, it is more than likely that there would not have been a need for the BIA to raise the per acre charge to the irrigated lands for operation and maintenance.

Although irrigators are important stakeholders in the project, BIA management has thwarted every effort made by irrigators to seek oversight and understanding of project operations and expenditures. Their files are full of requests by the districts for information that is necessary to understand many various aspects of project operations from financial activity, and up to and including project maintenance and water deliveries.

Earlier, this year, Commissioners of the Mission and Jocko districts requested an appointment to visit the project building to review daily worksheet logs, irrigation dam books, purchase orders, an equipment inventory, and employee compensation and staffing information. Rather than allowing

⁹ December 21, 2007. Letter from the Associate Solicitor to James Steele denying the Tribe a 638 contract for the irrigation division of the FIPP

the commissioners to set up a time to go to the office to look at the information requested, Commissioners were told they needed to do a FOIA Request. Upon compliance with that request, the districts received a form letter explaining all of the charges and delays associated with meeting such a request, because they were classified as a “commercial use” requester.¹⁰ **These are elected representatives of irrigators who paid for the FIPP, not “commercial use requesters.”** This example is not an exception, it is the way business is done by the BIA.

The 1950-1984 BOR net power revenue data records, coupled with the lack of transparency, the current state of irrigation infrastructure and unreasonable increases to irrigator O&M fees are all strong indicators that something is very wrong with the management of the project. There are very few sources of information available to understand what is going on, however references in the CSKT tribal council minutes show a pattern of financial behavior that raises serious questions about non-irrigation uses of project money and assets, through a variety of means. These questions require answers that only an audit and investigation can uncover. To note:

- Have any land, building or other assets belonging to the project been inappropriately transferred to tribal ownership and / or other uses?
- Have net power revenues from the power division been spent on non-irrigation uses?
- Are the payroll and benefits of Mission Valley Power inflated to cover the cost of working on tribal buildings and other non-irrigation projects throughout the community?
- Another area of concern is the MVP “OPERATING RESERVE FUND” of nearly \$2.4 million at the end of 2017 which was increased \$262,000 out of “*funds received in excess of expenditures in the fiscal year 2017...*”. This fund appears to be funded by net power revenues, and a forensic review of all funds flowing in and out of this account is urgently needed.
- Is there any inappropriate co-mingling of tribal and project money?
- What was the annual Net Power Revenue between 1985 through 2018, and how were those funds distributed to each of the six mandated categories in the 1948 act?

Excerpts from the Tribal Council minutes that have raised some of these concerns can be found in Table 2 attached to this letter.

Power Division Audit Request Specifics

Timeframe Covered: 2009-2018.

Note: If it is determined that funds have been inappropriately used during this period, we request that the audit period be extended back to the year which the CSKT took over management of the Power Division.

Areas of Concern:

- A review of the internal controls and operations and decision making processes to ensure that net power revenues are maximized for the benefit of the Irrigation Division project operations as required by the 1948 Act.
- A complete review of the annual allocation of the Low Cost Block of Power (LCB), and the Net Power Revenues derived from them, to determine if revenues and expenditures to and from

¹⁰ USDOJ / BIA Letter to Ray Swenson dated April 29, 2019 from the Northwest Regional Director.

them are in full compliance with the 1948 act and to ensure that the prohibition in 25 U.S.C § 458 cc (b)(4)(C) of the Indian Self Determination and Education Assistance Act has not been violated

- Analysis and review of the Mission Valley Power Operating Reserve account, including all sources of its funding, the appropriateness of all expenditures from this account, and whether this “reserve account” should be located and reserved for the Irrigation project as required by the 1948 Act
- Review of ALL donations made by Mission Valley Power, whether they be monetary, supplies, or labor and other resources of Mission Valley Power, to discern what if any expenditures were made for non-Irrigation purposes using the NPR and what if any of it was used to financially benefit the tribe, tribal assets, or the tribal membership.
- A full review of activity in the MVP balance sheet accounts to determine whether assets belonging to the project have been inappropriately transferred to other uses and / or non-project ownership. Detailed balance sheet account reconciliations should be provided in the audit report.
- A review of FTE levels to ensure they are not inflated, and that staff are not providing services that benefit and / or enrich public entities, tribal government, tribal assets, or individual tribal members to the detriment of the irrigation project.
- A review of the legality and appropriateness of a tribal 638 contract for management of Mission Valley Power, considering the FIPP was constructed for all landowners and the 2007 DOI Denial Letter attached to this letter.
- A review of internal controls with respect to financial checks and balances, to reconcile irrigators need for financial and operational transparency.
- Because the project is integrated, Irrigators have the right to look at basic operational data of Mission Valley Power, and to know that their valuable investments in the project are protected. We request the audit review the processes related to transparency, and to recommend corrective action to assist irrigators with informational requests in the future.

Flathead Agency Irrigation Division Audit

The Irrigation and Power Divisions of the project fall under separate accounting systems, but in order to achieve Congressional intent, it is necessary that they work in concert to ensure that once the project was paid off, the excess funds from the Power Division of the project be used to defray the cost of operation and maintenance of the project.

There simply is no reason for the deteriorated state of the project infrastructure, the lack of transparency with respect to operations, and the BIA’s failure to deal with problems of great concern that arise in the course of operations, especially during the irrigation season and given the NPR earmarked for the irrigation division by the 1948 Act.

Importantly, in July of 1990, the Senate Select Committee on Indian Affairs (SCIA) held oversight hearings on BIA management and operation of Indian Irrigation Projects. Many of the issues associated with BIA management of the Flathead project were discussed during those hearings, but no resolution

ever resulted.¹¹

In the decades since those hearings, the Mission, Flathead and Jocko Irrigation districts have continued to work within a BIA framework that is responsible to advocate for only the tribal interests in the project. This has made its management more political, hostile and less transparent with each irrigation season, and irrigators and project infrastructure have suffered because of it.

Irrigation Division Audit Request Specifics

Timeframe Covered: 2009-2018

If it is determined that funds have been inappropriately used during this period, we request that the audit period be extended to go back to 1986, when the CSKT took over management of the Power Division.

Areas of Concern:

- We request that the liens on irrigator lands be located and released.
- A thorough review of all revenues and expenses of the project for appropriateness and to ensure that established internal controls and fiscal responsibility goals are being adhered to.
- A full review of activity in the balance sheet accounts of the Irrigation Division to determine whether assets belonging to the project have been inappropriately transferred to other uses and / or non-project ownership. Detailed balance sheet account reconciliations should be provided to the irrigators along with the audit report.
- A review of FTE levels to ensure they are not inflated, and that staff are not providing services that benefit and / or enrich public entities, tribal government, tribal assets, or individual tribal members to the detriment of the irrigation project.
- A complete review of the Irrigation Division's Reserve fund is also requested, giving detailed attention to the sources of all revenues that fund it, and any expenditures of funds taken from it, to ensure all activity affecting this account is proper and legal.
- A review of all irrigation division bank accounts, reserve accounts and assets totaling \$5.7 million at the time of the transfer of project operations back to the BIA when the Cooperative Management Entity disbanded in 2014.¹² To note, irrigators want to know how and where those funds were transferred to and who handled those transactions, and any tribal use of funds accounted for.
- Irrigators have the right to look at basic irrigation division operational data such as water deliveries, irrigation finances, staffing, water deliveries and other pertinent data. We request the audit review the processes that contributed to this frustrating and obstructive lack of transparency, and to recommend corrective action to assist irrigators with information requests in the future.

¹¹ BIA management and operation of Indian irrigation projects : *Hearing before the Select Committee on Indian Affairs, United States Senate, One Hundred First Congress, Second session ... July 12, 1990, Washington, DC.*

¹² CME Balance Sheet Document 00410 dated July 29, 2014: Cooperative Management Entity of the FIIP Balance Sheet as of July 1, 2014

Conclusion

Because of the BIA's failure to inform project irrigators annually of the operational components, the allocation of irrigator O&M funds, and the allocation of net power revenues, we request that this audit be undertaken by the GAO. The BIA simply cannot be entrusted to audit itself, including the contracts it has issued to the Tribes.

Further, inasmuch as the subject of these audit requests involve a federal irrigation project and the potential malfeasance of the BIA not only with the project irrigator's money but with federal funds generated from the Low Cost Block of power, the costs of these audits should be borne entirely by the federal government.

Finally, considering the hostility of the BIA and Tribes to the project irrigators, we request that for the duration of the audit, the Secretary of the Interior be charged with the management of the FIPP.

Respectfully Submitted:

Jocko Valley Irrigation District:



D. Boone Cole, Chairman



Tracy Gardner



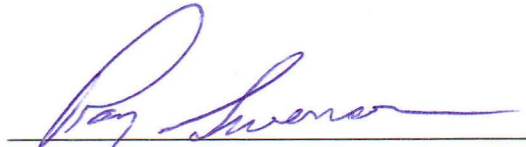
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Flathead Irrigation District:



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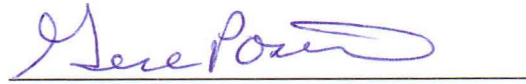
Mission Valley District:



Ray Swenson, Chairman



Tim Orr



Gene Posivio

List of Attachments to Senator Daines Audit Request Letter:

Item	Description	Audit Letter Reference
Table 1: History and Background of Flathead Irrigation Project	This document is a timeline of federal legislation and other activity that relates to Congressional Intent related the finances of both the Irrigation and Power Divisions of the Flathead Irrigation Project	Page 1 of 10
2018 Lien Release Letter to Secretary of the Interior Ryan Zinke	This letter documents a request by the irrigators for the Department of Interior to release the construction liens on irrigator properties. It is included for Senator Daines' reference without attachments	Page 2 of 10
Table 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets	Excerpts taken from CSKT Tribal Council Minutes from 2009-2018 that provide examples of what could be questionable financial activities related to the project particularly Mission Valley Power and the depression of Net Power Revenues that are supposed to reduce O&M Costs for irrigators	Page 7 of 10
2007 Department of the Interior 638 Contract Denial Letter to the CSKT	<p>In advance of turnover of project management to the irrigators as per the provisions of the 1909 act, the CSKT attempted to take over management of the irrigation project by requesting they be awarded a 638 contract.</p> <p>The denial lays out why a 638 contract would violate Congressional intent related to the project because Congress intended that the project serve all lands, regardless of ownership status</p>	Page 8 of 10

TABLE 1: History and Background of Flathead Irrigation and Power Project (FIPP)

Date	What	Explanatory Language
1908	35 Statute 83,84 Amendment to 1904 Flathead Allotment Act	“For preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the Act of April twenty-third, nineteen hundred and four, entitled “An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment,” and to begin the construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation.”
1908	35 Statute 450 Turnover Provision	“When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works shall pass to the owners, of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.”
1926	44 Statute 465 Formation of Irrigation Districts Pursuant to this act, three irrigation districts were formed in accordance with Montana State law. These districts were the Flathead, Mission and Jocko, who executed repayment contracts with the U.S. on March 2, 1928, April 21, 1931 and November 13, 1934, respectively	“Provided further, that no part of this appropriation, except the \$15,000 herein made immediately available, shall be expended on construction work an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order : First, to liquidate the cost of the power development ; second, to liquidate payment of the deferred obligation on the Camas Division ; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project ; and fourth, to liquidate operation and maintenance costs within the entire project.”
1928	45 Statute 200-212 Federal Power Commission authorized to issue a permit for the development of power sites on the Flathead Reservation Subsequent to 1926 the Rocky Mountain Power Co., a subsidiary of Montana Power Company entered into negotiations with the U.S. concerning the building of a large dam for the purpose of generating power, the site of this dam being the same as the one selected for the irrigation Project	“Flathead irrigation project, Montana : The unexpended balance of the appropriation for continuing construction of the irrigation systems on the Flathead Indian Reservation, Montana, contained in the Act of May 10, 1926 (Forty-fourth Statutes at Large, pages 464 4 66), as continued available in the Act of January 12, 1927 (Forty-fourth Statutes at Large, page 945), shall remain available for the fiscal year 1929, subject to the conditions and provisions of said Acts : Provided, That the unexpended balance of the \$395,000 may be used for power available for continuation of construction of a power plant may be distributing system . used, in the discretion of the Secretary of the Interior, for the construction and operation of a power distributing system and for purchase of power for said project but shall be available for that purpose only upon execution of an appropriate repayment contract as provided for in said Acts : Provided further, That the net revenues derived from the operation of such distributing system shall be used to reimburse the United States in the order provided for in said Acts : Provided further, That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects.”

TABLE 1: History and Background of Flathead Irrigation and Power Project (FIPP)

Date	What	Explanatory Language
1930	Flathead Power Development Report p6 pages 42-43 discuss LCBP in exchange for use of irrigation projects valuable water right.	“In the case of a power development upon Indian lands, the title to the site also remains vested in the United States Government but in trust for the Indian tribe, and the site is rented for the 50 year period of the lease to the licensee. Thus the licensee is here also saved the necessity of using any capital in the acquiring of the site, and in lieu thereof pays and annual rental to the government for the benefit of the Indians. Thus in an ordinary Indian case there are three interests to be adjusted, viz, the successful licensee, the United States for the Indian Tribe, and the general consuming public. In the particular case of the Flathead there is a fourth interest, viz., a special part of the consuming public consisting of (1) individual Indian land holders and (2) white settlers who have bought Indian lands, which two groups together comprise the Flathead irrigation project. It is this irrigation project hat is referred to in the legislation already referred to. This in the case of the Flathead, the Federal Power commission and the Secretary of the Interior are called upon to make an adjustment between four interests, viz, (a) the successful licensee, which is, of course, entitled to the usual return of 8 per cent under the practice of the Montana Public Service Commission; b) the Indian tribe, which is entitles to a fair rental for the use of power sites; (c) the particular part of the public forming the irrigation project, and to which certain low rates for power up to 15,000 horsepower have been promised by one applicant as further explained below; (d) the general consuming public.”
1930-1935	Federal Power Commission License for Kerr Dam (From 1930 Flathead Power Development Report)	“Article 26: Coincident with the beginning of commercial operations of the project works and thereafter throughout the remainder of the term of the license, licensee shall make available, at the project boundary at or near the licensee’s generating station, and the United States, for and on behalf of the Flathead Irrigation Project or the Flathead Irrigation District, may take and having taken, shall pay for, at the price of 1 mill per kilowatt-hour: (1) Electrical Energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale. Such deliveries shall be made at standard voltage as my be selected by the commission. The licensee shall also make available, at the voltage of the line from which service is taken, either at the project boundary at or near the licensee’s generating station or at some more convenient place on the project to be agreed upon, and the United States, for and on behalf of the Flathead Irrigation Project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of 2 ½ mills per kilowatt-hour, additional electrical energy in an amount no exceeding 5,000 horsepower of demand for all project and farm uses and for resale.”
1948	62 Statute 269 Act to provide for adjustment of irrigation charges on the Flathead Irrigation Project	Low Cost Block of Power Provisions (62 Stat. 270, 271): “Electric energy available for sale through the power system shall be sold at the lowest rates which, in the judgment of the Secretary of the Interior, will produce net revenues sufficient to liquidate the annual installments of the power system construction costs established pursuant to subsection (f) of this section, and (for the purpose of reducing the irrigation system construction costs chargeable against the lands embraced within the project and of insuring the carrying out .of the intent and purpose of legislation and repayment contracts applicable to the project) to yield a reasonable return on the unliquidated portion of the power system construction costs, and (for the same purpose) to yield such additional sums as will cover the amount by which the wholesale value of the electric energy sold exceeds the cost thereof where such excess is the result of the electric energy having been obtained on a special basis in return for water rights or other grants.”

TABLE 1: History and Background of Flathead Irrigation and Power Project (FIPP)

Date	What	Explanatory Language
		<p>Net Revenues of the Power System (62 Stat. 271): “All net revenues hereafter accumulated from the power system shall be applied annually to the following purposes, in the following order of priority (1) To liquidate all matured installments of the schedule of repayments for construction costs of the power system; (2) To liquidate all matured installments of the schedule of repayments for construction costs of the irrigation system of each division, on an equal per acre basis for all irrigable lands within the division; (3) To liquidate unmatured installments of the schedule of repayments for construction costs of the power system which will mature at a date not later than the maturity of any unliquidated installment of irrigation system construction costs; (4) To liquidate unmatured installments of the schedule of repayments for construction costs of the irrigation system of each division which will mature at a date prior to the maturity of any unliquidated installment of power system construction costs, on an equal per acre basis for all irrigable lands within the division; (5) To liquidate construction costs chargeable against Indian owned lands the collection of which is deferred under the Act of July 1,1932 (47 Stat . 564 ; 25 U . S. C., see. 386a); and (6) To liquidate the annual operation and maintenance costs of the irrigation system”</p>
1984	GAO report to Senator Max Baucus on Bureau of Indian Affairs’ Participation in a Proposed Hydroelectric Facility at Kootenai Falls, Montana	<p>“This report discusses how the BIA improperly spent Flathead Indian Reservation Irrigation and Power Project revenues and did not report to congressional appropriations committees its reprogramming of irrigation and power system construction funds to pay a portion of its share of Kootenai Falls participation expenses. Also, the Flathead project’s financial system was not in compliance with two of the Comptroller Generals internal control standards.”</p> <p>The BIA was required to reimburse the Flathead project power revenues from an available appropriation account or seek a deficiency appropriation from the Congress for that purpose (p.13)</p>
1986	Indian Self Determination Act Contract for Management of the Flathead Irrigation Project Power Division was awarded to the CSKT by the BIA	<p>The last 4 pages of Volume 2 of the “ 1985 Comprehensive Review Report of the Flathead Indian Irrigation Project” prepared by the BIA at the direction of the Secretary of the Interior discussed different options for Operation and Management of the Power Division: 1) Transfer of the Power Division to the supervision and control of the irrigation water users 2) Transfer the Power Division to the CSKT to operate and maintain and 3) Transfer of operation and maintenance of the power system to some entirely separate organization such as an REA cooperative, selling the power to an electric utility.</p> <p>In 1986, the BIA arbitrarily chose to award a 638 management contract to the CSKT and it has been in effect ever since.</p>
2006	Federal Register /Vol. 71, No. 196	<p>“Repayment of Project construction conditions were fulfilled in early January 2004.” p. 59809</p> <p>In preparation for project turnover, an audit was done of the construction cost repayments and completion of repayment was reported in the federal register, but liens on the irrigator properties were never released.</p>
2007	Flathead Project638 Contract Denial Letter written by Edith Blackwell, Deputy Associate Solicitor, Division of Indian Affairs	<p>In 2006-2007, the CSKT attempted to work around the turnover provisions in the 1908 act by requesting the award of a 638 contract to operate and manage the irrigation division of the project. That request was soundly rejected when it was concluded:</p> <p><i>The transfer provision of the 1908 Act has been triggered, and the Department is committed to facilitating the transfer of the operation and management of the Project to the owners of the lands irrigated thereby. Although the Department recognizes the potential advantages that could come from issuing the Tribes a self-determination contact for the operation and management of the Project, the ISDEAA cannot be read in a vacuum and must be</i></p>

TABLE 1: History and Background of Flathead Irrigation and Power Project (FIPP)

Date	What	Explanatory Language
		<p><i>considered in light of the language of the 1904 and 1908 Acts.</i></p> <p><i>The 1904 legislation authorizing the construction of irrigation ditches for the benefit of Indians on the Reservation was subsequently amended to require the construction of and irrigation system that would benefit both Indian allottees and non-Indian purchasers of lands on the Reservation. Since its inception, the Project has been operated to benefit both Indian and non-Indian irrigators, and all of those irrigators contribute to the costs of operating and maintaining this system. Applying the standard set forth in Navajo and Hoopa Valley, the operation and management of the Project is not "specifically targeted" to the Tribes, but instead benefits both Indians and non-Indians alike. (5) Accordingly, we cannot conclude that the Project is "for the benefit of Indians because of their status as Indians" such that the Tribes would be entitled to a self-determination contact under the ISDEEA.</i></p>
2010-2013	Establishment and Operation of the Cooperative Management Entity Agreement	Cooperative management entity agreement established in an attempt to fulfill federal provisions to turn management of the project over to the owners of the lands served by it. The entity gave a disproportionate share of representation to the tribes (a minimum of 50%, although more than 90% of the lands served by the project are privately owned by non Indians.
2014	Collapse of the Cooperative Management Entity	Cooperative management entity collapses as the result of CSKT Water Compact politics related to the collapse of the Flathead Joint Board of Control in late 2013. The Bureau of Indian Affairs resumed takeover of project management, and under the protest of irrigators.
2019	Federal Register/Vol. 84, No. 26	2019 O&M rate increase from \$29.00 per acre to \$33.50

March 19, 2018

Honorable Ryan Zinke, Secretary
U.S. Department of the Interior
1849 C Street NW MS 7229
Washington, D.C. 20240

Subject: Release of Flathead Irrigation Project Construction Liens for the Jocko, Mission, and Flathead Irrigation Districts

Dear Secretary Zinke:

The Jocko, Mission, and Flathead Irrigation Districts of the Flathead Irrigation Project (FIP)¹ represent over 2,000 irrigators on 115,764 acres of private land served by the FIP. The FIP was authorized by the Act of May 29, 1908 to serve both Indian and non-Indian lands within the exterior boundaries of the Flathead Indian Reservation.

We write to formally request the Department of the Interior's release of the liens on property within the Districts of the Flathead Irrigation Project pursuant to our repayment of construction costs in 2004. This letter transmits the necessary documentation of our contracts with the United States, repayment, and descriptive information of lands to which the construction liens apply.

These Districts entered into repayment contracts with the Secretary of the Interior for the repayment of the construction costs of the Flathead Irrigation Project in 1928, 1931, and 1934, respectively, and all were amended to include both repayment for associated construction of the power system and use of revenue generated by the FIP to assist with payment of construction costs of the project. Language from the Jocko Irrigation District Contract describes the construction lien:

All construction costs heretofore or hereafter incurred by the United States on account of the irrigation system of the project (after deduction of the amounts discharged through the application of the net power revenues accumulated on May 25,1946, as provided in section 18 of this contract) and all uncanceled operation and maintenance costs heretofore or hereafter incurred by the United States on account of the irrigation system of the project shall be, and are hereby made, a first lien under the Act of May 10, 1926 (44 Stat. 453,464-466), against all lands within the project, including those not yet designated as irrigable, and the existence of such lien is hereby recognized and acknowledged by the District.

¹ Authorized by the 1908 Amendment to the Flathead Allotment Act of 1904 35 Stat. 441

Each of the other District's contracts contain the same language and are attached for your reference.

As a condition of the contracts, construction liens were placed on all lands served by the project. When the construction costs were repaid, the Secretary of the Interior is required to release the construction liens and to transfer the operations and management of the project to the landowners.² The language memorializing this agreement for the release of the liens in the Jocko District is shown below:

After the total amount covered by such lien which is chargeable against any particular farm unit or other separately bounded landholding has been paid, and all rights of the United States to incur costs, impose assessments, enforce charges or collect repayments with respect to the lands included in such farm unit or landholding have terminated, the lien against such parcel of lands shall be released by the Secretary of the Interior, and a recital of the existence of the lien shall be made in any patent or other instrument of title issued by said Secretary prior to such release.

The construction costs of the FIP were repaid in January 2004 as reported by Federal Register Notice 59808 on Wednesday, October 11, 2006³:

Repayment of Project construction conditions were fulfilled in early January 2004.

Importantly, this same Federal Register Notice cites the Secretary's obligation, upon the payoff of project construction costs, to turn the management and operation of the project over to the landowners therein.

Included on the attached disk are the relevant documents for your use and reference:

- Flathead, Jocko, and Mission Repayment contracts with the United States
- 1948 Repayment Contract
- Federal Register Notice announcing FIP construction costs paid
- Land identification data separated by irrigation district and county

We are also requesting release of liens for all privately-owned lands including those irrigators not represented by the districts who pay the BIA directly for their water each year. While the records on the enclosed disk do not include those lands, they most likely can be located at the BIA's offices in Lakewood, Colorado.

We would appreciate your attention to this matter as the project has been paid off now for fourteen (14) years. At your earliest convenience we would appreciate the designation of a point person for this project, so we may communicate progress and provide any additional information they may need.

² 35 Stat. 441, P.L. 60-156; Act of May 25, 1948, P.L. 80-554

³ FR Vol. 71, No.196/Wednesday October 11, 2006 Notice 59808

Please direct all correspondence on this matter to Mr. Boone Cole, Chairman, Jocko Irrigation District, P.O. Box Dixon MT, 59860, who will act as the irrigation districts' point person. Mr. Cole's phone number is 406-544-4247.

Sincerely,

Boone Cole
Chairman
Jocko Irrigation District

Ray Swenson
Chairman
Mission Irrigation District

Paul Guenzler
Chairman
Flathead Irrigation District

Attachments

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

NOTES: The information in this table comes from CSKT Tribal Council minutes and raises questions about at least some of the financial activity related to the power division of the Flathead Irrigation Project. It is by no means a complete list. Not enough information is available to know if these transactions violate provisions of the 1948 act, but they do raise concerns.

In 1948 Congress established a pathway to ensure that Net Power Revenues from the power division would pay off the construction costs of the project and ultimately be used to offset irrigation O&M costs for the project. There is concern that under the oversight of the BIA and CSKT, the checks and balances with respect to the proper application of profits from the power division may no longer exist, resulting in the significant deterioration of FIP irrigation infrastructure and exorbitant O&M fees to irrigators. Some of the excerpts include items that could explain why there is little if any net power revenue to be applied to Operations and Maintenance of the Irrigation Project.

When the project was managed by the Bureau of Reclamation, office staff kept track of the Net Power Revenues from 1950 through 1984, shortly before the management of the power division was taken over by the Tribes. The record shows the BOR carefully tracked net power revenues by year and the payments made from them toward each of the provisions mandated in the 1948 act. Below is a summary of the net power revenues taken from that log, prior to any payments being applied out of them:

FIP Power Division Net Power Revenue

Years	Total	Annual Avg
1950-1959	\$2,267,605	\$226,761
1960-1969	\$2,923,204	\$292,320
1970-1979	\$7,183,930	\$718,393
1980-1984	\$1,480,999	\$296,200
Annual Avg (over 35 years)		\$395,878

Once the first five categories were paid off, net power revenues were to be applied to the sixth classification: "To liquidate the annual operation and maintenance costs of the irrigation system."

The BOR data tells us that after the project was paid off in early 2004, a minimum of \$400,000, and possibly as much as \$1,000,000 per year should have been applied to help liquidate the O&M costs of the irrigation system. However the increasing O&M assessments on irrigators confirm it is highly unlikely that this has ever happened.

Once the CSKT took over management of the power division, the financial mechanisms set up by Congress to make the project self-sufficient became muddled under the shield of a 638 contract with no transparency. In 1908, the 1904 Flathead Allotment Act (33 Stat. 802) was amended as to the sale and allotment of surplus unallotted lands and to authorize the construction of the Flathead Irrigation and Power Project (35 Stat. 444). Congress statutorily authorized the FIPP to serve both the Indians on allotted lands and the settlers who purchased the surplus, unallotted lands. Federal Law requires that the project be operated for the benefit of ALL LANDOWNERS, however oversight by the BIA and CSKT has depleted the project to the breaking point.

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

03/05 1993	Vol 93 Num 34	Joe Santos, Super Good Cents, Bill Rauch, Mission Valley Power presented to Council the 1991 action by Council to “direct any future large construction to go through MVP for energy efficient facilities through the energy Smart Design program. Since that date, there have been several Tribal buildings built and remodeled and MVP was not consulted for recommendations on conservation. If conservation was utilized or considered, the product (building) is more energy efficient in the long term and there are potential cash rebates.
05/07/1993	Vol 93 Num 49	Joseph Dupuis, Executive Secretary presented a request for donations, for work conducted by the Mission Valley Power staff. MOTION Louie Adams by to authorize payment of donations for work conducted by MVP staff, seconded by Hank Baylor, carried, unanimous (7 present.)
05/11/1993	Vol 93 Num 50	Greg Dumontier, Administrative Assistant presented to Council a request for donation of supplies and labor from Mission Valley Power. The supplies and donations include: 1. Banner for fiddlers contest. 2. Poles for Polson baseball park. 3. Hot Springs Schools playground. MOTION by Hank Baylor to approve MVP donation of supplies and labor to local organizations, seconded by Tony Incashola, Carried, Unanimous, (9 Present).
06/11/1993	Vol 93 Num 57	Joseph Dupuis, Executive Secretary presented to Council a request from the Dixon Community for donation of time and material from Mission Valley Power. The request is to place two poles, guy wires in downtown area for city banner attachments. Estimated cost: \$750.00. Council has set up a donation fund so they can reimburse Mission Valley Power with cash for the cost of the donation. MOTION by Louie Adams to approve the donation of time and materials from Mission Valley Power to be reimbursed from the donation account set up by Council, seconded by Sonny Morigeau, Carried, Unanimous, (7 Present).
10/19/1993	Vol 94 Num 6	Joseph Dupuis, Executive Secretary, presented a request from Mission Valley Power to make a donation to the St. Ignatius community for Christmas tree lighting. MOTION by Fred Matt to approve request from Mission Valley Power to make a donation to the St. Ignatius community for Christmas tree lighting. Seconded by Lloyd Irvine. Carried, unanimous (8 present).
11/09/1993	Vol 94 Num 12	Ralph Goode and Alan Grenier, Tribal Forestry, presented to Council the Community Forestry Matching Funds Grant Project: SCOPE OF PROJECT: To plant approximately 150 trees (shrubs) at the Arlee Pow Wow grounds to enhance the natural beauty of the site, and to promote the comfort and peace of the Pow Wow participants and visitors. Professional help will be sought in order to ensure visual diversity as to form, height, color, and species - with representation of exotic as well as native trees and/or shrubs. Estimated cost is \$10,000.00 (source: DSL COMMUNITY FORESTER). BENEFITS: A minimum of a two year follow-up educational opportunity will be a part of the in-kind contribution of the Confederated Salish & Kootenai Tribes, Mission Valley Power, Natural Resources, Tribal Forestry, and the Salish Culture Committee. Representatives of these entities pledge to sponsor grade school field trips to promote Community involvement, plant identification, aesthetic appreciation, basic landscape planning, and powerline safety. Right tree in the right place! Estimate 10 mandays. Hopefully, this effort will be seen, appreciated, and replicated, if not outdone by the Elmo Pow Wow grounds; which are scheduled for relocation; and serve as a project prototype for community involvement throughout the Reservation.
03/03/2009	Vol 9 Num 30	Lawrence Walchuck informed council that there used to be a Quonset hut located in Hot Springs that Mission Valley Power had that was torn down. There is a cement block and a broken slab there, and Mr. Walchuck would like to obtain the space there under a long-term lease to add on to the medical clinic. The government gave the land to the Tribe. Bud Moran suggested referring the request to the Lands Committee.

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

03/12/2009	Vol 9 Num 34	Al Shear, Hot Springs Medical Director; and Lawrence Walchuck; followed up on Mr. Walchuck’s previous request to lease a piece of tribal property located in Hot Springs that was the former Mission Valley Power site. Nate Shourds, Tribal Lands Department, reported that the Bureau of Indian Affairs Superintendent has the deeds completed and is awaiting signature from the Regional Director; then it will be turned over to the Tribes. At this point it is still under the BIA ownership. When the land is turned over to tribal ownership the Tribes could enter into a lease with the hospital. There is a parcel in St. Ignatius that was going to be transferred to the Tribes. Terry Pitts would like a letter of request sent to the BIA requesting the transfer. Council requested that Lawrence provide the request for lease in writing. MOTION by Terry Pitts to direct Nate Shourds to send a letter to the Regional Director requesting that the transfer of the properties located in Hot Springs and St. Ignatius occur as soon as possible. Seconded by Mike Kenmille. Carried, unanimous (7 present).
08/25/2009	Vol 9 Num 77	Ralph Goode, Mission Valley Power; and Floyd Nicolai, Mission Valley Power Utility Board Chairman; requested approval of a \$300,000 budget modification to be submitted to the Bureau of Indian Affairs for their approval. Income from sales revenue was better than anticipated. The modification addresses additional revenue and purchases capital items. Reuben Mathias asked if there was money in the budget to train tribal members for jobs. Ralph said no. New services are down, and there are apprentices in place so MVP is in a good place. MOTION by Joe Durglo to approve the \$300,000 budget modification to be submitted to the Bureau of Indian Affairs for their approval. Seconded by Jim Malatare. Carried, unanimous (8 present).
12/10/2009	Vol 10 Num 18	Ranald McDonald and Rhonda Swaney, Legal Department, discussed FIIP start-up costs and the operating budget potentially being used for retirement and severance packages for employees. They requested approval of a letter addressed to Jerry Gidner, Director of the Bureau of Indian Affairs, requesting that the debt of construction for the FIIP on Indian lands, deferred by the Act of May 10, 1926, as amended by the Act of July 1, 1932, be cancelled immediately pursuant to the elimination authority contained in the 1932 Act; and that the account balance of the Indian deferred construction debt be returned as soon as possible to the Mission Valley Power utility as net revenue to be disbursed to the CSKT for transfer to the CME as soon as it is legally constituted, to be spent on the management and operation of the FIIP by the CME pursuant to the Act of May 25, 1948, as all the other priorities for payment by net revenues from the electricity utility pursuant to this Act have been paid. If the money is used for retirement and severance packages the entity will start off with no money. Joe Durglo reported that there are a lot of concerns by employees. Rhonda Swaney advised that the employees cannot be transferred and will not be federal employees any longer. The largest complaint was the salaries wouldn’t be as large, but it won’t be a federal entity. If the employees are eligible for retirement the government will retire them; they have no choice. They will not be retained as federal employees. Bud Moran would like Rhonda to join him at a meeting with the FIIP employees to answer questions. It is not a 638 contract turnover. Ranald McDonald thought Personnel was going to attend the last meeting but they were not there. Carole Lankford requested copies of the CME meeting minutes and more reporting from the CME. Rhonda said a lot of the questions are regarding BIA and specific offers, which she couldn’t answer. The benefit package was not decided, so they couldn’t answer the questions. Half of the budget would pay off employees. MOTION by Carole Lankford to approve the letter addressed to Jerry Gidner, Director of the Bureau of Indian Affairs, requesting that the debt of construction for the FIIP on Indian lands, deferred by the Act of May 10, 1926, as amended by the Act of July 1, 1932, be cancelled immediately pursuant to the elimination authority contained in the 1932 Act; and that the account balance of the Indian deferred construction debt be returned as soon as possible to the Mission

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

		Valley Power utility as net revenue to be disbursed to the CSKT for transfer to the CME as soon as it is legally constituted, to be spent on the management and operation of the FIIP by the CME pursuant to the Act of May 25, 1948, as all the other priorities for payment by net revenues from the electricity utility pursuant to this Act have been paid. Seconded by Steve Lozar. Carried, unanimous (8 present).
12/29/2009	Vol 10 Num 22	Teresa Wall-McDonald, Anita Matt and Leonard TwoTeeth, Tribal Lands Department, discussed the proposed Arlee bike path. In 2007, tribal staff met with Scott Petersen, nonmember fee landowner, regarding a proposed land exchange to accommodate a pedestrian/bike path from the Arlee School to the new Community Center. The exchange would include approximately a 30-foot wide strip of Mr. Petersen's fee land for a 30-foot wide strip of tribal trust land (tribal rodeo grounds). The Arlee School District applied for a grant that would fund the development of the pathway. To complete the grant application process, it requires an acknowledgement that both parties have agreed to the land exchange and to verify that the exchange transaction will take place in the future. They need to know about the easement. The proposed action is part of the annual departmental work plan and goals and would not require a modification to the plan. Terry Pitts is not in favor of trading trust land, and would like staff to see if Mr. Petersen would grant an easement instead. Council suggested that Mary Stranahan submit the grant application stating that they are working with the landowner. Council directed Leonard to see if Mr. Petersen would grant an easement for the path. Mission Valley Power has agreed to donate the lights.
06/15/2010	Vol 10 Num 59	Ralph Goode, Mission Valley Power General Manager; and Floyd Nicolai, Mission Valley Power Utility Board Chairman; discussed upcoming issues Mission Valley Power will be facing. Discussion was held regarding the Bonneville Power Administration contract, cash flow, Tier 2 power, other areas restricted by the 1948 Act or 638 Contract, Tribal Energy Ordinance, geothermal at Hot Springs, and rate increase being released for customer feedback. It was suggested that a letter be sent to Larry Echo Hawk and send a copy to Jon Tester. Ralph will draft a letter for the chairman's signature. Council commented that the Tribes may need MVP's expertise on energy issues at some point. The Tribal Council stated they did not intend to change how the Tribes and Mission Valley Power are currently administrated.
01/10/2012	Vol 12 Num 18	Ralph Goode, Mission Valley Power General Manager; and Floyd Nicolai, Mission Valley Power Utility Board Chairman; presented the fiscal year 2011 annual report. The annual meeting is scheduled for April 25, 2012 at 5:00 p.m. Council was invited to attend the annual meeting. There are currently 82 employees. There were 158 new services, which was the slowest year since 1990. MVP completed a ten-year contract with BPA. Any money left over in the budget goes into a reserve budget. MVP completed the automated meter conversion project prior to the new rate change. The Utility Board is appointed by the Tribal Council. The Consumer Council is appointed by the Superintendent. 16,000 bills are issued by the Customer Service Department each month. Crews replaced underground cabling and completed the automated meter conversion project. Five people have gone through the apprentice program. The company's net revenue in 2011 was \$20,058.00. \$20,000 was placed into operating reserves.
08/14/2012	Vol 12 Num 74	Joe McDonald, Corky Clairmont, Tana Seeley, Hu Beaver, Co Carew, Allie Bronson, David Waterman, Vic Charlo, Margene Asay, and Emerald Barker, met with council to discuss Mission Valley Aquatics. Mission Valley Aquatics is a nonprofit organization that was formed in 2003. Its mission is to provide an indoor aquatic facility to enhance the health, fitness, safety, recreation, and quality of life for all. In 2008 a ballot measure for a new recreation district passed, ensuring mill levy funding for maintenance and operations of the facility. Construction began in August 2011 and is scheduled for completion by October 2012. Their goal is

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

		to reach \$5.2 million and they have raised \$3.3 million in contributions to date. They requested a letter of support and/or a resolution of support; tribal council involvement on Mission Valley Aquatics Board of Directors; operation and maintenance support; and financial support. Joe McDonald asked for a \$500,000 donation. The therapy pool could be named after a tribal elder. The facility will be all electrical, and they would like assistance from Mission Valley Power. They also requested a \$1 million loan from the Tribes to complete construction. Council advised that the funding request must go through the budget committee and finance office.
08/29/2013	Vol 13 Num 81	Ranald McDonald and Rhonda Swaney, Legal Department, requested authorization to send a letter to Stan Speaks, Portland Area Director, regarding additional funding of \$200,000 to support water quality issues. As part of the water use agreement the money was supposed to go to the CME. The letter is requesting that the money come to the Tribes in the interim on finding out the outcome of the water use agreement and compact. That money would be used for water quality and water measurement activities. MOTION by Leonard Gray to approve the letter to Stan Speaks requesting funding of \$200,000 for the water measurement activities. Seconded by Steve Lozar. Carried, unanimous (9 present).
11/12/2013	Vol 14 Num 9	Ranald McDonald, Legal Department, gave a report on a meeting attended via teleconference. He discussed matters with Stan Speaks on Ranald's view of options to move forward and problems Stan is incurring in getting a superintendent located in Pablo. Options discussed were: (1) Stop fighting and get on board with a compact. (2) If the Flathead Joint Board of Control (FJBC) dissolved, continue the Cooperative Management Entity (CME) and each district would obtain one representative on the CME. (3) In the event of dissolution of the FJBC and the parties cannot reach agreement to continue the CME, enter into an emergency federal acquisition regulation contract to operate the project for the 2014 irrigation season. The CSKT would be paid an indirect cost rate to operate the project. The other thing included in the contract would be language stating that the Tribes agree to enter into this contract pending negotiation and execution of a PL 93-638 contract. Ranald would like to add Jane Clairmont on to the water rights claims development. There would be no impacts to the budget.
07/01/2014	Vol 14 Num 65	Ralph Goode, Mission Valley Power, handed out a report on the results of the remodel at the tribal jail in kWhs savings. The new building was designed with more insulation in the walls, roof, and doors; and also had a heat recovering ventilation. The total value of benefits is estimated to be \$71,500. The Tribes' rebate was \$18,000. Ralph discussed the incentive project at KHJCC. MVP set aside up to \$25,000 for that project. Some rebate/incentive projects are limited.
08/12/2014	Vol 14 Num 77	Ralph Goode and Jean Matt, Mission Valley Power, requested approval of a letter to Stan Speaks, Northwest Regional Director, requesting a budget modification to increase the fiscal year 2014 budget by \$1,200,000, due to increased power costs. MOTION by Leonard TwoTeeth to approve the letter to Stan Speaks, Northwest Regional Director, requesting a budget modification to increase the fiscal year 2014 budget by \$1,200,000, due to increased power costs. Seconded by Bing Matt. Carried, 4 for; 2 abstentions (Terry Pitts and Vernon Finley); 1 not voting (Leonard Gray out of the room)
10/07/2014	Vol 15 Num 3	Jean Matt, Mission Valley Power, requested approval of a revised organizational chart; the PPL Annual Pass through Increase; and a \$500 donation to the Dixon Elementary Playground Project. MOTION by Terry Pitts to approve a \$500 donation to the Dixon Elementary Playground Project. Seconded by Patty Stevens. Carried, unanimous (8 present - Carole Lankford out of the room).

TABLE 2: Excerpts from CSKT Minutes Referencing Mission Valley Power Money / Assets

10/23/2014	Vol 15 Num 7	Carolee Wenderoth, Tribal Lands Department, presented a request from Randy Dupuis for a business lease at the old Mission Valley Power Carpenter Shop building in Polson for a honey extraction operation at a rate of \$400 per month for a five-year period. An appraisal would be done to find out the rental value. There would be no bees kept on the property; the honey combs would be transported to the site and the honey extracted and packaged. MOTION by Leonard TwoTeeth to grant Randy Dupuis a business lease at the old Mission Valley Power Carpenter Shop building in Polson for a honey extraction operation at a rate of \$400 per month for a five-year period, with an option to renew for an additional five years, at which time a rental adjustment would be made. Seconded by Leonard Gray. Carried, unanimous (8 present).
04/28/2016	Vol 16 Num 55	(Stanley Speaks) Council asked the status of Mission Valley Power being turned over to the Tribes. Stan would like to completely turn over the utility to the Tribes. The Tribes are still interested in that. We have an infrastructure that a lot of other Tribes do not have. Tribal Council will form a committee to begin working towards the transfer of the utility to the CSKT.
07/19/2016	Vol 16 Num 71	Alex Muzquiz, Tony Muzquiz and Tara Irvine informed council that they went to MVP, SKT, SKE, SKG, and TED and received \$1,100 in donations. The unmet need is \$900. There are three tribal members on the baseball team. Vernon reported that there is \$300 left in the donation account. Vern Clairmont, Financial Management, joined the discussion. He suggested that the donation account be modified if council wants to add funds into the account to cover the donation amount. MOTION by Ron Trahan to approve by resolution modification 1 to the fiscal year 2016 Gaming Revenue Budget to add \$600 to the Donation Fund and make a \$900 donation to the Mission Valley Mariners.
02/14/2017	Vol 17 Num 28	Troy Felsman commented that Stan Speaks has advocated for many years to have Mission Valley Power turned over to the Tribes, and the opportunity is now for us to pursue this. Troy recommended entering into a relationship with Teresa Wall-McDonald to try to get this completed. Carole Lankford wants Teresa to get with the Legal Department and develop an issue paper on the pros and cons before we enter into a contract with her. Council will follow up.
10/24/2017	Vol 18 Num 6	Jean Matt, Mission Valley Power; and Gordon Fyant, Mission Valley Power Utility Board; requested renewal of the 93-638 contract with the Bureau of Indian Affairs. The contract must be renewed every three years. This contract has not been updated since 2011. The contract needs to be renewed to continue the draw down process.
11/28/2017	Vol 18 Num 13	Jean Matt, Mission Valley Power General Manager; and Cindy Benson, Mission Valley Power Utility Board; requested approval and signature of a letter to Pete Plant, Acting Superintendent, requesting an increase of \$262,000 to the Operating Reserve fund. This would result in the total of the Operating Reserve fund to be \$2,389,000. The increase is available from funds received in excess of expenditures in the fiscal year 2017 forecast/budget, reduction on workers compensation, and interest earned on the account.
02/22/2018	Vol 18 Num 38	Jean Matt, Mission Valley Power; and Cindy Benson, Mission Valley Power Utility Board; requested approval of an education agreement with Zach Felsman, a tribal member electrical engineer major. The Utility Board recommended approval of the agreement. Each year MVP offers a scholarship. 69 out of 72 employees at MVP are tribal members. Carole Lankford challenged MVP to develop a process for all people to be able to come forward for this type of opportunity.
03/13/2018	Vol 18 Num 44	Rodney Bird, Two Eagle River School; Jean Matt, Mission Valley Power; Teresa Wall McDonald; and Carolee Wenderoth, Tribal Lands Department; discussed a request from TERS. The property located next to the school and Clairmont Road is a power reserve. This property will probably never be essential to MVP. Rodney requested that a priority be placed on getting the subject

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		property G4128 (2.5-acre portion) assigned to the TERS for school needs (classroom space, storage space, additional gymnasium, industrial arts building); and request that Jean Matt obtain Utility Board action on declaring the property “excess” to utility needs on March 19. CSKT has the first right of refusal. MOTION by Troy Felsman to approve the exchange. Seconded by Len TwoTeeth. Carried, unanimous (9 present).
07/03/2018	Vol 18 Num 76	Jean Matt, Mission Valley Power, requested approval of the fiscal year 2019 budget and approval of budget modification number 1 to add \$900,000 to the fiscal year 2018 budget. A press release will be issued to explain how the rates will not be increased this year through the CSKT’s decision on the low cost block of power. MOTION by Anita Matt to approve budget modification number 1 to add \$900,000 to the Fiscal Year 2018 Budget. Seconded by Shelly Fyant. Carried, unanimous (9 present).
07/12/2018	Vol 18 Num 79	Jennifer Trahan informed council that Amani Antoine needs \$1600 (\$800 from SKG and \$800 from MVP). She wanted to know if the Tribes could pay it and then get reimbursed from SKG and MVP later. Jami Pluff will report to council with additional information.
11/27/2018	Vol 19 Num 15	Teresa Wall-McDonald and Joe Durglo, Tribal Health Department, requested authorization to use a portion of the former Mission Valley Power property on Round Butte Road in Ronan (across from Ronan Power Products) for staff and GSA vehicle parking. Carolee Wenderoth, Tribal Lands Department, informed council that the Irrigation Project currently uses that site for staff parking and storage of equipment. There was never a permit or lease in place because there was an executive order that reserved use of the property by the Bureau of Indian Affairs, but that went away with the quitclaim deed. The Irrigation Project wants to continue using that site. MOTION by Anita Matt to authorize the Tribal Health Department to use a portion of the former Mission Valley Power property on Round Butte Road in Ronan for staff and GSA vehicle parking. MOTION WITHDRAWN. Council was in agreement to allow the Tribal Health Department and Bureau of Indian Affairs to reach an agreement to share the use of the property.



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 21 2007

James Steele, Jr., Chairman
Confederated Salish and Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855

Dear Chairman Steele:

I write in response to your August 17, 2007 letter (Letter), which requests the Department of the Interior's views on the applicability of the Indian Self-Determination and Education Assistance Act of 1975, (ISDEAA), codified at 25 U.S.C. § 450 *et seq.*, to the pending transfer of the operation and management of the Flathead Indian Irrigation Project (Project). Since 2002, the Department has consulted with the Confederated Salish and Kootenai Tribes (Tribes) and the Flathead Joint Board of Control (Board) regarding the necessary provisions and mechanism to transfer the Project's operation and management in an effort to facilitate a local solution.

Throughout this process, the Tribes have posited that a self-determination contract could serve as the appropriate mechanism for transfer. In February 2007, the Principal Deputy Assistant Secretary – Indian Affairs informed the Tribes and the Board that a self-determination contract would not work in this context. In July 2007, the Tribes requested an opportunity to present to the Department its legal views in favor of such a contract. Your August letter sets forth those views.

After further considering the Tribes' views and carefully reviewing the statutes and legislative history governing the establishment, construction and operation of the Project, I remain convinced that a self-determination contract does not provide an appropriate or viable mechanism to transfer the Project's operation and management. A detailed analysis of this position is set forth below.

Background and Statutory History

The ISDEAA, known also as Public Law 93-638, authorizes the Secretary of the Interior (Secretary) to enter into self-determination contracts for specific types of government programs.¹ Most applicably, the Secretary may enter into self-determination contracts for programs "for the benefit of Indians because of their status as Indians[.]" 25 U.S.C. § 450(a)(1)(E).

¹ The ISDEAA authorizes contracts for five categories of federal programs. See 25 U.S.C. § 450(a)(1)(A)-(E). The first three categories, subsections A through C, refer to specific statutes under which tribes can apply for self-determination contracts. The final two categories, subsections D and E, set forth general requirements for such contracts.

In its letter, the Tribes contend that "because the [irrigation Project] was authorized by Congress 'for the benefit of said Indians,' it clearly falls into the category of "contractible programs 'for the benefit of Indians because of their status as Indians.'" Letter at 4. In determining whether the Project is in fact contractible under the ISDEAA, we must consider the history of the Flathead Indian Reservation (Reservation) and, more particularly, the specific statutes that authorized the construction and expansion of an irrigation system on the Reservation.

In 1904, Congress passed a statute requiring the survey and allotment of lands within the Reservation. See 33 Stat. 802 *et seq.* Through this Act, Congress directed allotments to be made to all persons with tribal rights on the Reservation and required the remaining lands on the Reservation to be opened to settlement and entry. *Id.* at 303-04. Congress further directed that one-half of the proceeds received from the sale of lands within the Reservation were to be expended by the Secretary:

for the benefit of the said Indians and such persons having tribal rights on the reservation ... in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising[.]

Id. at 305. Thus, the purpose of the Act was not only to provide for allotments to individual Indians and those with tribal rights on the Reservation, but also to open the remaining lands to settlement and to use a portion of the proceeds to provide agricultural assistance, including irrigation ditches, to the Indians of the Reservation.

In 1908, Congress amended the 1904 Act to clarify the rights and responsibilities that were to be conveyed with settlement and entry and to modify how the proceeds from the sale of lands within the Reservation should be expended. See 35 Stat. 444, 448-50. The 1908 Act prioritized the construction of irrigation systems for all irrigable lands within the Reservation, regardless of Indian ownership, and removed the 1904 Act's limitation on proceeds from "surplus" Reservation lands being used to construct irrigation structures solely for the benefit of the Indians of the Reservation. See *id.* Only after the use of proceeds to construct irrigation systems within the Reservation's boundaries would the Secretary expend the remaining money "for the benefit of said Indians" to purchase cattle, farm implements, and other necessary articles. *Id.* at 450.

Interpreting the 1904 and 1908 Acts

The Tribes' August 2007 letter focuses squarely on the language contained in the 1904 Act. In particular, the letter contends that the Project meets the requirements of the ISDEAA because the 1904 Act states that the proceeds from the sale of "surplus" lands shall be used to "benefit" Indians within the Reservation, including the construction of "irrigation ditches." Letter at 2, 4. The letter interprets this language as explicitly authorizing the construction of an irrigation system "for the benefit of Indians," and contend that the irrigation Project therefore falls within 25 U.S.C. section 450f(a)(1)(E) as a program "for the benefit of Indians because of their status as Indians." Letter at 4.

The cited language, however, must be read in light of the entirety of the 1904 Act, as well as the 1908 Act that amended it. The 1904 Act provided that half of the proceeds from the sale of "surplus" lands could be used to aid the Indians of the Reservation with agricultural endeavors, including the construction of irrigation ditches. In the Department's view, this language falls short of authorizing the construction of a full-fledged irrigation system "for the benefit of Indians because of their status as Indians." Authorization to construct an irrigation system did not come until 1908, when Congress explicitly directed the Secretary to reallocate the proceeds from the sale of "surplus" lands towards the construction of an irrigation system to benefit all irrigable lands within the Reservation, including those lands that passed out of Indian ownership.

Regardless of the percentage of unallotted lands that were held by non-Indian settlers at the time of the Act's passage, one cannot ignore Congress's clear intent to extend irrigation opportunities to all lands within the Reservation. Congress opened the Reservation for entry and settlement in 1904, and clarified in 1908 that these "surplus" lands were also entitled to benefit from an irrigation system. Congress instructed the buyers of Reservation lands to pay a proportionate cost for the construction of such system, and then directed the operation and management of the system to be transferred to the owners of the irrigated lands after construction costs were repaid. See 35 Stat. at 449-50. Even if Congress's original intent had been to authorize the construction of irrigation ditches for the benefit of Reservation Indians, Congress moved away from this intent in 1908 by directing the construction of an irrigation system to benefit *all* irrigable lands on the Reservation. Based on the express language of the 1908 Act, I cannot go so far as to conclude that the irrigation systems on the Reservation were intended to be operated in perpetuity "for the benefit of the Indians because of their status as Indians."

The 1908 Act presents an additional obstacle to transfer the Project via a self-determination contract. As discussed above, the 1908 amendment explicitly directed that "when the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works *shall pass to the owners of the lands to be irrigated thereby.*" 35 Stat. at 450 (emphasis added). It is the Department's longstanding view that the italicized phrase must be read in light of the current ownership of Reservation lands.

In other forums,² the Tribes have emphasized the composition of ownership that existed at the time of the 1904 and 1908 Acts in support of their position that the irrigation of non-Indian lands was to be a "minor part" of the Project and that most of the Project was to serve Indian allotments. The Department cannot ignore, however, the dramatic shift in ownership that has occurred since the 1904 Act authorized the settlement and entry of Reservation lands. Congress authorized the allotment of Reservation lands and the disposal of unallotted lands to non-Indian settlers. Congress also directed that all irrigable lands within the Reservation shall benefit from an irrigation

² See, e.g., "Summary of Testimony of the Confederated Salish and Kootenai Tribes of the Flathead Nation on Senate Bill 1186," April 1996.

system and that such system shall be transferred to the owners of those lands. Through the transfer provision of the 1908 Act, Congress created an explicit statutory right for all landowners served by the Project: i.e., after the repayment of the Project's construction costs, the operation and management of the Project must pass to the owners of the irrigable lands. This construct does not meet the requirements under ISDEAA.

"For the Benefit of Indians Because of their Status as Indians"

Our analysis is informed by the decisions of administrative and federal courts that have considered whether certain programs are operated "for the benefit of Indians because of their status as Indians." In *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005), the U.S. Court of Appeals upheld the Department's determination that the Trinity River restoration program was not eligible for a self-determination contract under 25 U.S.C. section 450f(a)(1)(E). The court affirmed the Department's administrative determination that the purpose behind ISDEAA is "to give Indian tribes more autonomy by enabling tribal governments to contract for 'programs or portions thereof' that the federal government creates or administers for the benefit of a tribe's lands, resources or members," and that Congress did not intend to authorize tribes to administer programs benefiting "the general public or non-Indian lands, resources or people."³ The court concluded that the Trinity River restoration program was not "specifically targeted to Indians" but was instead intended to benefit a wide range of interests. 415 F.3d at 991.

Hoopa Valley relied on *Navajo Nation v. Dep't of Health & Human Services*, 325 F.3d 1133, 1138 (9th Cir. 2003) (en banc), which held that the Temporary Assistance for Needy Families Act (TANF) is also not a program "for the benefit of Indians because of their status as Indians." The *Navajo* court considered the five categories of programs delineated in the ISDEAA and determined that the plain language "underscores that programs or services that are 'for the benefit of Indians because of their status as Indians' must be federal programs specifically targeted to Indians and not merely programs that collaterally benefit Indians as a part of the broader population." *Id.* at 1138.

Finally, the Department considered the applicability of Public Law 93-638 to a Bureau of Land Management "hotshot" firefighting crew that fought fires on tribal and non-tribal lands. See *Tanana Chiefs Conference Inc. v. Acting Associate Alaska State Director, Bureau of Land Management*, 33 IBIA 51 (October 5, 1998). The tribal organization seeking the self-determination contract argued that the portion of the hotshot program that benefited tribal lands should be contractible under Public Law 93-638. *Id.* The Interior Board of Indian Appeals (IBIA) disagreed and concluded that the hotshot program was not operated "for the benefit of Indians because of their status as Indians." The IBIA noted that, because of the "unique, checkerboard pattern of land ownership" in Alaska, "the only logical conclusion is that Alaskan hotshot crews are operated for the benefit of all persons and valuable resources within the State[.]" *Id.*

³ See *Hoopa Valley Tribe v. Northern Area Manager, Bureau of Reclamation*, Docket No. IBIA 00-41-A, 2001 I.D. LEXIS 140, *22-23 (February 8, 2001).

Each of these cases conclude that programs that are contractible under 25 U.S.C. section 450f(a)(1)(E) must be programs that are specifically created and carried out for the purpose of benefiting Indians. Programs that mutually benefit both Indian and non-Indian interests, lands or resources, by contrast, are not contractible under that statutory provision. The Project at issue here was constructed and has been operated for the benefit of all irrigable lands on the Reservation, regardless of Indian ownership. It is not a program that has been "specifically targeted to Indians," but rather a program that benefits both Indian and non-Indian irrigators alike. The cases discussed above provide additional support for the Department's conclusion that the Project has not been operated "for the benefit of Indians because of their status as Indians" such that 25 U.S.C. section 450f(a)(1)(E) would apply to the Project's transfer as mandated by statute.

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Absence of "Federal" Nature After Transfer

As the language of Public Law 93-638 makes clear, self-determination contracts can only be issued for programs and services conducted by the Federal government on behalf of Indian tribes. The 1908 Act clearly states that operation and management of the Project shall be transferred to the owners of the irrigable lands serviced by the Project - and implicit in this transfer is the termination of federal control over such operation and management. Once the Secretary approves rules and regulations to transfer these specific functions and the Project has been transferred to the owners of Project lands, the Project functions will no longer be "federal." While the Department intends to oversee the transfer of the Project to ensure that future operation and management is consistent with the Secretary's rules and regulations, the operation and management of the Project will transfer to the Project land owners and will no longer have a federal imprimatur.⁴

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The intent of Congress to remove the operation and management of the Project from federal control is reinforced by the language of the 1908 Act. At the time of the transfer, after the Project passes to the "owners of the lands irrigated thereby," the Project shall "be maintained at their expense[.]" 35 Stat. at 450 (emphasis added). Congress clearly intended that, after transfer, operation and management of the Project would no longer be funded or subsidized by federal funds. One of the primary objectives of Public Law 93-638 is to transfer federal programs and services to tribes and to ensure that Federal funds are provided to allow tribes to operate those programs and services. Allowing transfer of the Project's operation and management here through a self-determination contract would contradict Congress's directive that these specific functions be stripped of their federal status and maintained through non-federal funds.

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Distinguishing Mission Valley Power

⁴ The Tribes correctly note that the Department will retain ongoing responsibilities after transfer. In particular, the Department will continue to exercise its trust responsibilities over tribal trust resources, may incur specific responsibilities under the Endangered Species Act, and will retain ownership of the Project infrastructure. The existence of these responsibilities, however, does not alter the Department's view of the transfer requirements under the 1908 Act.

Your letter correctly notes that, in 1988, the Bureau of Indian Affairs issued a self-determination contract for the operation and management of the power distribution system now known as Mission Valley Power. Like the Project, this power distribution system serves both Indian and non-Indian customers. It is the Tribes' view that the ISDEAA should apply similarly to both of these federal programs. Letter at 5.

The history behind the construction and evolution of these two programs, however, is markedly different. Unlike the statutes authorizing the construction of irrigation works on the Reservation, the statutes that authorized the construction of the power distribution system created no rights for non-Indian landowners. Significantly, the statutes that authorized the power distribution system did not contain language requiring the benefits of the system to be extended to non-Indians on the reservation and did not require operation and management to be transferred to the affected landowners. See, e.g., 45 Stat. 200 (1928); 45 Stat. 1562 (1929); 62 Stat. 269 (1948). In the Department's view, these distinctions highlight why a self-determination contract may have been appropriate for Mission Valley Power but not for the transfer of the Project.

Conclusion

The transfer provision of the 1908 Act has been triggered, and the Department is committed to facilitating the transfer of the operation and management of the Project to the owners of the lands irrigated thereby. Although the Department recognizes the potential advantages that could come from issuing the Tribes a self-determination contract for the operation and management of the Project, the ISDEAA cannot be read in a vacuum and must be considered in light of the language of the 1904 and 1908 Acts.

The 1904 legislation authorizing the construction of irrigation ditches for the benefit of Indians on the Reservation was subsequently amended to require the construction of an irrigation system that would benefit both Indian allottees and non-Indian purchasers of lands on the Reservation. Since its inception, the Project has been operated to benefit both Indian and non-Indian irrigators, and all of those irrigators contribute to the costs of operating and maintaining this system. Applying the standard set forth in *Navajo and Hoopa Valley*, the operation and management of the Project is not "specifically targeted" to the Tribes, but instead benefits both Indians and non-Indians alike.⁵ Accordingly, we cannot conclude that the Project is "for the benefit of Indians because of their status as Indians" such that the Tribes would be entitled to a self-determination contract under the ISDEAA.

Assuming for the sake of argument that the Project may have been entitled to a self-determination contract prior to the repayment of construction costs, Congress directed the operation and management of the Project to be transferred to the owners of all lands irrigated by the Project, and intended that the federal imprimatur on these two functions be terminated. Public Law 93-638 only applies to programs or activities that are carried out by the federal government on behalf of Indian tribes, and a self-

⁵ See *Hoopa Valley*, 415 F.3d at 990-92; *Navajo*, 325 F.3d at 1137-39.

determination contract cannot be issued for programs that are no longer "federal." Thus, Public Law 93-638 cannot provide the vehicle for transferring this Project.

The Department is committed to working diligently with the affected parties to develop the necessary mechanisms to transfer the Project that reflect the rights and interests of all parties and are satisfactory to the Secretary. I am informed that the Tribes have been meeting regularly with the Board and the BIA to develop contractual terms that could govern both the transfer and the future operation and management of the Project. I encourage you to continue on this path, and if I can provide any assistance in this process, please do not hesitate to contact me.

Sincerely,



Edith R. Blackwell
Deputy Associate Solicitor
Division of Indian Affairs

cc: Assistant Secretary - Indian Affairs
Director, BIA
FIIP Transfer Team Leader, BIA
Joint Board of Control