



## United States Department of the Interior

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Walt Schock, Chairman  
Flathead Joint Board of Control  
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Dear Sirs:

As you know, for the past four years, Federal, State, Tribal and local officials have been actively negotiating to resolve all of the water right claims of the Confederated Salish & Kootenai Tribes of the Flathead Reservation that will be litigated in the Montana general stream adjudication. The negotiators have completed drafts of all of the key settlement documents and are discussing them with their respective decision makers and the public.

I wish to express my appreciation for the effective and respectful manner that each party has exhibited during the course of the negotiations. I recently had the opportunity to brief Department of the Interior officials about this negotiation, and I highlighted the productive engagement of all parties and the high quality of our drafted documents. In those briefings, I was also able to begin the effort within the Department for principals' review of the proposed agreements. As I have previously noted, the Department and this Administration have stated their continued commitment to seek to resolve tribal water right claims through settlement.

I also appreciate the parties' recognition of the need to continue to make progress in these negotiations, and I wish to reinforce this message. From the federal perspective, a failure or significant extension of the negotiations would leave unresolved several critical water resource

needs and conflicts on the Reservation that, with or without settlement, will have to be addressed in the near future.

Specifically, failure or delay of the negotiations should not be equated with a long-term extension of the status quo for irrigation water deliveries on the Reservation. Should negotiations lapse, I anticipate that the federal government will need to address in tandem at least two critical issues in the near-term with the Tribes and others: 1) the adequacy of the current interim instream flows, and 2) the need to implement efficiencies and other measures within the federal Flathead Indian Irrigation Project (FIIP) to conserve water and improve operations.

In the 1980s, the courts conclusively determined that the Tribes, by the terms of the 1855 Hellgate Treaty, are entitled to on-reservation instream flow water rights with a time immemorial priority date. The courts further confirmed that the Tribes' instream flow water rights are senior to the water rights for the FIIP and, in a strict priority situation, have to be met before water deliveries to FIIP irrigators. The federal government, as trustee for the Tribes and the entity ultimately responsible for the federal FIIP, is bound by these court decisions determining the senior priority of the Tribes' instream flow rights. At the time of these court decisions, the Tribes and BIA developed and implemented interim flows for some of the critical streams on the Reservation. Those interim flows have been in place since then, but they were not intended as the full measure of flow needed to meet the Tribes' instream flow water right and were not established for all streams entitled to protected flows.

In recent years, several factors have emerged which indicate that the current interim flows will likely need to be adjusted and expanded in the near future if there is not a settlement. In fact, the level of adequate flows for fishery purposes was extensively discussed in the negotiations. Through these discussions, and to meet the high demand in the negotiations for certainty, the Tribal government and its experts, working with state and federal technical experts, developed a greatly enhanced and scientifically supported body of data and knowledge on what science-based flows for fish and irrigation deliveries for crops should be on the Reservation. Similarly, recent consultations under the Endangered Species Act focused on the need for improvements in flows and in FIIP operations to reduce impacts of flows on fish.

With this recently acquired information indicating that current interim flows on the Flathead Reservation are ripe for reconsideration, the federal government will have to consider all options for ensuring that the Tribes' judicially confirmed rights are protected and that the ESA is complied with. Of course, the current proposed settlement charts a course for implementing a new improved instream flow regimen that I believe provides the needed level of improvements. But without settlement we will have to chart an alternative course for needed improvements (such as considering whether to increase the interim instream flows), which I anticipate could commence as early as this year.

Any actions increasing flows to better meet the Tribes' reserved instream flow water rights and to comply with the ESA would necessarily have an impact on the water supply available for FIIP and non-FIIP irrigation water diversions on the Reservation. To accommodate a corresponding

decrease in the FIIP irrigation water supply, the Bureau of Indian Affairs (BIA), which has ultimate responsibility for FIIP, would need to consider all available options. BIA has indicated to us that, as a first step, BIA would convene the Tribes, the Flathead Joint Board of Control, and the Cooperative Management Entity to work through solutions that adjust Project water supplies and water duties (through, for example, the implementation of individual farm turnout allowances and the elimination of extra-duty deliveries), implement conservation and measurement requirements and address structural improvements to FIIP to prevent entrainment of ESA-listed fish species. Further, unlike the provisions under the proposed settlement, there likely would be no federal or state funding in a non-settlement situation to meet these new requirements, thereby requiring that costs be met by operation and maintenance assessments. Finally, it is important to note that BIA retains ultimate responsibility for and ownership of FIIP; while much less desirable than settlement, we believe that an alternative pathway to improving FIIP operations is currently available and could be implemented in the near-term without waiting for the completion of the Montana general stream adjudication.

In conclusion, I would like to stress that the federal negotiation team remains committed to the negotiations and is not at this time advocating pursuing alternatives to achieving full settlement. Nonetheless, I felt it was important to objectively describe the importance and need for action in the near future and to describe options that are available to address these issues if the effort to settle the Tribes' water right claims fails or is significantly delayed.

Sincerely,

For the Regional Solicitor



Duane T. Mecham  
Attorney

cc:  
Fain Gildea, Dep Dir, US DOI Secretary's  
Indian Water Rights Office