



United States Department of the Interior

Bureau of Indian Affairs
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169



In Reply Refer To:
Flathead Review
Natural Resources

MAY 22 2013

Honorable Joe Durglo
Chairman
Confederated Salish and Kootenai Tribes
42487 Complex Boulevard
Post Office Box 278
Pablo, Montana 59855

Dear Chairman Durglo:

This letter is to provide you with notice that the U.S. Department of the Interior (Interior), acting through the Bureau of Indian Affairs (BIA), intends to review the current Interim Instream Flows for streams within the Flathead Indian Reservation. These Interim Instream Flows, first established by BIA in 1985, were last modified by BIA in 1996. At that time, BIA shifted from implementing Interim Instream Flows on an annual basis to a single Interim Instream Flow to be implemented on a continuing basis until conditions indicated that the Interim Flows should be revisited. Several factors that I discuss below indicate that conditions are ripe for BIA to consider whether an increase in the Interim Instream Flows is warranted. As part of this evaluation, BIA expects to decide whether to implement increased Interim Instream Flows prior to the 2014 irrigation season.

As a result of extensive litigation in the 1980s, federal courts confirmed that the Confederated Salish and Kootenai Tribes (Tribes), by reserving in the 1855 Hellgate Treaty the exclusive right to hunt and fish on-reservation, were entitled to an on-reservation reserved water right for instream flows. The courts found that this instream flow reserved water right has a priority date of time immemorial and is senior to the irrigation water rights on the Flathead Reservation, including the water rights for the Flathead Indian Irrigation Project (FIIP). The Ninth Circuit Court of Appeals also determined that, even though the Montana general stream adjudication had been commenced in the Montana State courts by the mid 1980s, the federal courts had jurisdiction to determine the Tribes' legal right to reserved instream flow water rights pending the completion of the adjudication.

A critical outcome of this litigation was the establishment of enforced Interim Instream Flows for several streams on the Flathead Reservation. First established in 1985 as a result of a stipulation between BIA and the Tribes, the Interim Instream Flows were the subject of various annual adjustments and agreements through 1996. In 1996, the BIA Superintendent, Flathead Agency, made a decision to implement the Interim Instream Flows on an on-going basis until conditions dictated that the interim levels of flow be reevaluated.

BIA believes there is a clear need to consider, at this time, whether adjustments to the current Interim Instream Flows are warranted. The Interim Instream Flows were an improvement over the status quo prior to 1985, but the parties lacked detailed studies and data to evaluate exactly which levels of flows needed to be maintained for the protection of the Tribes' fishery resources. Since 1996, however, a considerable body of hydrological and biological data and information has been developed which provides an improved technical foundation from which to reevaluate the current Interim Instream Flows. Much of this information was garnered in recent years during active negotiations where State, Tribal and Federal experts collaborated on developing strong technical bases to determine which flows are biologically needed and hydrologically available. BIA believes it is appropriate to use this enhanced level of information and understanding in reevaluating the current Interim Instream Flows.

The need for adequate instream flows was also identified in recent Endangered Species Act (ESA) consultations covering the transfer and continued operations of FIIP. Bull trout, an ESA protected species, currently are found in several streams on the Flathead Indian Reservation, and adequate flows for those streams are critical to ensure compliance with the requirements of the ESA. Because the current biological opinion contemplates improvements to FIIP operations and acknowledges the need to improve instream flows over time, review of the Interim Instream Flows will proceed as part of the implementation of the current biological opinion. Also, as the current biological opinion expires as early as 2014, it is timely for BIA to reconsider the Interim Instream Flows in preparation for the upcoming ESA consultations for FIIP operations.

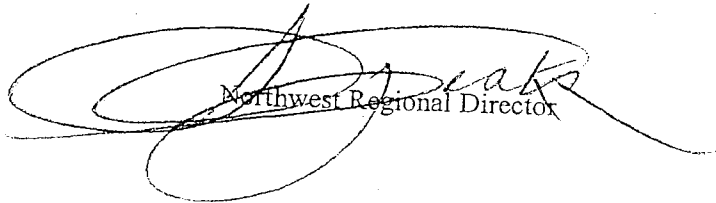
For many years, BIA and Interior have acknowledged that a comprehensive solution for implementing the full range of the Tribes' reserved instream flow water rights would best be resolved through negotiations with all stakeholders on the reservation. BIA and Interior have actively participated in and supported these negotiations. Despite these efforts to negotiate a comprehensive solution, negotiations recently reached an impasse and it is very unclear whether a comprehensive settlement can be successfully negotiated. Further, it is likely that the full quantification of the Tribes' reserved instream flow water right in the Montana water court will not happen for several years. In light of the greatly enhanced body of technical information, and the likelihood that there will not be a settlement anytime soon, current circumstances dictate that BIA initiate this review of the Interim Instream Flows.

The Tribes recently requested that BIA increase the Interim Instream Flows to levels known as the "Minimal Enforceable Flows" or "MEFs." The MEF level was developed in the recent negotiations and was integrated into the proposed Tribes' water rights compact as part of the proposed Water Use Agreement. For your reference, enclosed is a chart setting out the proposed stream-by-stream MEF numbers and the current Interim Instream Flows in cubic feet per second (please note that in some cases the MEF numbers combine two sites so they will be comparable to the Interim Instream Flows).

In evaluating modifications to the Interim Instream Flows, BIA will consider whether to increase these flows to the MEF levels and will also evaluate other levels of flows. To facilitate its review and decision-making, BIA will initiate a process and prepare appropriate environmental documentation under the National Environmental Policy Act.

If you have any questions or comments, please contact Mr. David Redhorse, BIA Natural Resource Officer, at (503) 231-6883, or Mr. Duane Mecham, Office of the Solicitor, at (503) 231-6299.

Sincerely,


Northwest Regional Director

Enclosure

cc: Mr. Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
1625 Eleventh Avenue
Post Office Box 201601
Helena, Montana 59620-1601

Mr. Boone Cole, Chairman
Flathead Joint Board of Control
525 Main Street
Post Office Box 639
St. Ignatius, Montana 59865

Mr. Gordon Wind, Project Manager
Cooperative Management Entity
Post Office Box 666
St. Ignatius, Montana 59865

Mr. John Tubbs, Director
Montana Department of Natural Resources
1625 Eleventh Avenue
Helena, Montana 59601

Minimum Enforceable Instream Flows (MEF) and Interim Instream Flows (IISF) for Instream Flow Sites –All values are reported in cubic-feet per second

Jocko Area

Middle Fork Jocko River below Tabor Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	9	9	10	18	26	22	20	9	9	9	9	9
IISF	20	20	20	20	20	20	20	20	20	20	20	20

North Fork Jocko River below Tabor Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	3	4	9	25	40	30	22	8	6	6	6	6
IISF	18	18	18	18	18	18	18	18	18	18	18	18

Jocko River below Upper S Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	20	20	25	60	100	75	50	25	20	20	20	20
IISF	20	20	20	20	20	20	20	20	20	20	20	20

Big Knife Creek below Upper Jocko S Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	3	3	3	5	7	8	5	5	4	4	3	3
IISF	2	2	2	2	2	2	2	2	2	2	2	2

Jocko River at K Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	40	45	50	100	140	90	42	42	42	42	40	40
IISF	42	42	42	42	42	42	42	42	42	42	42	42

Agency Creek below Upper Jocko J Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	3	3	4	8	15	14	10	6	6	4	4	3
IISF	8	8	8	8	8	8	8	8	8	8	8	8

East Fork Finley Creek below Jocko N Canal near Mouth

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	3	3	3	7	15	10	7	5	4	4	3	3
IISF	8	8	8	8	8	8	8	8	8	8	8	8

Finley Creek below Finley E Canal near Mouth

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF ¹	9	9	11	23	50	28	15	12	11	11	11	10
IISF	8.5	8.5	8.5	8.5	8.5	8.5	8.5	8.5	8.5	8.5	8.5	8.5

Jocko River below Lower Jocko S Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	78	78	104	168	310	242	135	95	110	80	80	80
IISF	43	43	43	43	43	43	43	43	43	43	43	43

Jocko River below Lower Jocko J Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	95	95	110	175	325	250	145	130	115	110	105	100
IISF	76	76	76	76	76	76	76	76	76	76	76	76

Mission Area

Mission Creek below Pablo Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	11	10	10	20	94	115	102	85	45	20	20	11
IISF	18	18	18	18	18	18	18	18	18	18	18	18

Middle Crow Creek below Pablo Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	2	2	2	2	9	9	2	2	2	2	2	2
IISF	1	1	1	1	1	1	1	1	1	1	1	1

North Crow Creek below Pablo Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	9	9	14	23	56	27	11	10	10	10	9	9
IISF	10	10	10	10	10	10	10	10	10	10	10	10

¹ The MEF addresses two Interim Instream Flow locations: Finley Creek below the E Canal and Finley Creek below the mouth.

Mission Creek below 6C Canal above Post Creek

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF ²	13	13	20	24	50	65	35	25	25	25	20	15
IISF	20	20	20	20	20	20	20	20	20	20	20	20

Post Creek below Post F Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF ³	20	20	22	26	55	60	35	26	24	22	22	22
IISF	22	22	22	22	22	22	22	22	22	22	22	22

Marsh Creek near mouth

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	2	2	2	2	2	2	2	2	2	2	2	2
IISF	2	2	2	2	2	2	2	2	2	2	2	2

South Crow Creek below South Crow Feeder Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF ⁴	5	5	5	10	12	13	10	9	7	7	7	6
IISF	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5

Crow Creek below Crow Pump Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	25	25	25	40	60	55	22	22	25	25	25	25
IISF	17	17	17	17	17	17	17	17	17	17	17	17

Mud Creek below Ronan B Canal

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	3	3	4	5	13	9	5	3	3	3	3	3
IISF	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8

Crow Creek below Moiese A Canal near Mouth

Hydrograph Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MEF	30	30	30	35	50	30	21	21	21	21	21	21
IISF	21	21	21	21	21	21	21	21	21	21	21	21

² This MEF addresses two Interim Instream Flows sites: Mission Creek below the C canal and Mission Creek below the 6C Canal.

³ This MEF address two Interim Instream Flow sites: Post Creek below Kicking Horse Feeder Canal and Post Creek below Post F Canal.

⁴ This MEF address two Interim Instream Flow sites: South Crow Creek below Pablo Feeder Canal and South Crow Creek below South Crow Feeder Canal.

Little Bitterroot Area

Little Bitterroot River below Camas A Canal Headwork's and Mill Creek below Camas A Canal near the Mouth

<i>Hydrograph Type</i>	<i>Jan</i>	<i>Feb</i>	<i>Mar</i>	<i>Apr</i>	<i>May</i>	<i>Jun</i>	<i>Jul</i>	<i>Aug</i>	<i>Sep</i>	<i>Oct</i>	<i>Nov</i>	<i>Dec</i>
MEF	6	6	6	6	6	6	6	6	6	6	6	6
IISF	6	6	6	6	6	6	6	6	6	6	6	6

Hot Springs Creek below Camas C Canal near Mouth

<i>Hydrograph Type</i>	<i>Jan</i>	<i>Feb</i>	<i>Mar</i>	<i>Apr</i>	<i>May</i>	<i>Jun</i>	<i>Jul</i>	<i>Aug</i>	<i>Sep</i>	<i>Oct</i>	<i>Nov</i>	<i>Dec</i>
MEF	1	1	1	1	1	1	1	1	1	1	1	1
IISF	1	1	1	1	1	1	1	1	1	1	1	1