

AGREEMENT

BETWEEN THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

AND

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD

NATION

AND

THE FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD,

MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS,

ACTING THROUGH A COOPERATIVE MANAGEMENT ENTITY,

TO

MANAGE AND OPERATE THE FLATHEAD INDIAN IRRIGATION PROJECT

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PREAMBLE

THIS AGREEMENT is entered into pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904) (the 1904 Act); the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908) (the 1908 Act); the Act of May 25, 1948, Public Law 80-554, 62 Stat. 269 (1948) (the 1948 Act); Title 85, Chapter 7, Sections 101, et seq., Mont. Code Ann. (2009); and Article VI, Section 1(c) of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Nation, which was approved by the Secretary of the Interior on October 28, 1935; by and between the UNITED STATES OF AMERICA, acting through the Secretary of the Department of the Interior (Secretary or Department), the CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION (CSKT), and THE FLATHEAD JOINT BOARD OF CONTROL (FJBC) of the Flathead, Mission, and Jocko Valley Irrigation Districts.

EXPLANATORY RECITALS

WHEREAS, pursuant to the 1904 Act, Congress authorized and directed the allotment of land within the Flathead Reservation to persons with tribal rights on the Reservation, and directed the disposal of the remaining unallotted lands, with certain limitations and exceptions.

WHEREAS, pursuant to the 1908 Act, the Secretary constructed the Flathead Indian Irrigation Project (Project) and is authorized and directed to transfer the management and operation of the Project to the owners of the lands irrigated by the Project, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary;

WHEREAS, the Project remains a Federal Indian Irrigation Project, and title to Project rights-of-way and real property shall remain in the United States;

WHEREAS, the governing bodies of the CSKT, a sovereign tribal government, and the FJBC, a subdivision of local government under Montana law, have created the Flathead Indian Irrigation Project Cooperative Management Entity (CME) and, acting through the CME, are willing and able to accomplish the work as provided for herein;

WHEREAS, the United States, through the Secretary, retains any and all existing obligations and responsibilities, and this Agreement does not affect those responsibilities in any way;

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

DEFINITIONS

1. For this Agreement, the following definitions are used:
 - (a) “Agreement” means this Agreement in its entirety, including (1) the preamble, explanatory recitals, attachments, and text herein; and (2) any addendums, letters of agreement, and annual operating plans subsequently agreed to by the parties in writing; (3) the Bureau of Indian Affairs (BIA) Operation and Maintenance (O&M) Guidelines included as Attachment A; and (4) any attachments or appendices, including, but not limited to the Plan of Operations (Attachment B), and the pertinent Biological Opinion (Attachment E), all of which are part of the consideration heretofore.
 - (b) “Assessments” means the funds provided to the Flathead Indian Irrigation Project Cooperative Management Entity (CME) by the CSKT and FJBC, as provided herein, as well as those collected by the CME for the management and operation of the Project.
 - (c) “BIA” means the Bureau of Indian Affairs, United States Department of the Interior.
 - (d) “BIA Operation and Maintenance Guidelines” means the existing operating guidelines for the Flathead Indian Irrigation Project, including references to existing regulations, the BIA Irrigation Handbook and Indian Affairs Manual, Part 50, Chapter 1. These guidelines are included as Attachment A.
 - (e) “CSKT-FJBC Cooperative Agreement” means the separate agreement entered by the CSKT and the FJBC as provided by 18-11-101, Mont. Code Ann., *et seq.* (2007) which allows them to create the CME and transfer public funds to it for the purposes of managing and operating the Project as provided herein.
 - (f) “District fee lands served by the Project” means lands owned in fee and assessed the management and operation assessment by the FJBC or one of its constituent Irrigation Districts under the statutory powers provided by Montana law for the delivery of service by the Project.

- (g) “Emergency” means a situation that may adversely impact the Flathead Indian Irrigation Project facilities, operations, maintenance or other irrigation activities; adversely impact public safety; damage property or equipment; or adversely impact tribal or allottee resources, threatened and/or endangered species.
- (h) “Flathead Indian Irrigation Project Cooperative Management Entity,” or “CME,” means the entity formed pursuant to the State-Tribal Cooperative Agreements Act, 18-11-101, et seq., Mont. Code Ann. (2009) by the CSKT and the FJBC to manage and operate the Project consistent with this Agreement (Attachment G.)
- (i) “Flathead Indian Irrigation Project” or “Project” means the Irrigation Project developed by the United States to irrigate lands within the Flathead Reservation pursuant to the 1904 and 1908 Acts, and includes, but is not limited to, all lands, reservoirs, whether situated on or off the Flathead reservation, easements, rights-of-way, canals, ditches, laterals, any other Project facilities, headgates, pipelines, pumps, buildings, heavy equipment, vehicles, materials, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the Project.
- (j) “Implementation Committee” means the committee that will advise the CME on issues related to compliance with the Endangered Species Act (ESA), as required by the U.S. Fish and Wildlife Service’s Biological Opinion for the operation and management of the Project (see Appendix E) and any future amendments thereto.
- (k) “Major asset” means any component of the Project that has an Asset Priority Index (API) greater than or equal to 40, as defined in the Comprehensive Condition Assessment completed by HKM Engineering (updated March 2008). Major assets include, but are not limited to: diversion dams, headworks, siphons, flumes, pumps, drops, chutes, checks, wasteways, fish ladders, and fish screens.
- (l) “Management and operation” or “manage and operate” means the administration, management, operation, maintenance and rehabilitation of the Flathead Indian Irrigation Project or portions thereof now in existence or

created or incorporated in the future, the authority for which is transferred by this Agreement to the CME from the Secretary pursuant to the 1908 Act.

- (m) “Non-district fee lands served by the Project” means lands owned in fee and served by the Project but temporarily not included within an Irrigation District and therefore assessed by the CME in its management and operation assessment.
- (n) “Personal Property” means the personal property currently owned by the United States and held by the BIA for the purpose of managing and operating the Project. The term includes, but is not limited to: heavy equipment, vehicles, materials, and most office supplies, including all personal computers not maintaining connectivity to the BIA network.
- (o) “CME Plan of Operations” means the Flathead Indian Irrigation Project Cooperative Management Entity Plan of Operations, and any subsequent revision, amendment, or replacement thereof adopted by the parties to this Agreement. The Plan of Operations is included as Attachment B.
- (p) “Project facilities” means all personal and real property as defined in this Agreement currently owned by the United States and possessed by the BIA for the purpose of managing and operating the Project.
- (q) “Real property” means land, land rights, improvements to land, buildings, and other structures that have acquisition costs of \$5,000 or greater and are recorded in the Federal Fixed Asset Subsidiary (FAS) system.
- (r) “Rehabilitation” means the repair and/or replacement of any existing real property.
- (s) “Secretary” means the Secretary of the United States Department of the Interior.
- (t) “Substantial change” means the rehabilitation, replacement, or removal of a major Project asset or a change in the Project’s operational function that is not provided for in the Annual Work Plan. Examples of “substantial change” include, but are not limited to: replacing a flume with a siphon, modifying a diversion structure to add/remove fish passage, or modifying irrigation water flow rates through Project facilities that differ from legally mandated instream

flows. Routine or preventative maintenance or repairs not listed in the Annual Work Plan do not constitute a substantial change (i.e. lubricating moving parts, painting, repairing or replacing small components of a structure, etc.)

- (u) “Superintendent” means the Superintendent of the Flathead Agency, Bureau of Indian Affairs.
- (v) “Trust lands served by the Project” means land that is owned by the United States and held in trust for the CSKT or individual Indians that is assessed the management and operation assessment for the delivery of service by the Project by the Project operator.

PURPOSE OF AGREEMENT

2. The purpose of this Agreement is to fulfill the requirements the 1908 Act by enabling the owners of the lands irrigated by the Project, acting through the CME, to manage and operate the Project.

TRANSFER OF MANAGEMENT AND OPERATION OF THE PROJECT TO THE COOPERATIVE MANAGEMENT ENTITY

3. Pursuant to the 1908 Act, the Secretary, through the BIA, hereby transfers to the CME the authority to manage and operate the Project in accordance with this Agreement, its attachments and appendices, and the applicable operational guidelines. The Secretary, through the BIA, also transfers to the CME all Project personal property. At the time of transfer and for a reasonable period thereafter, the existing BIA Operation and Maintenance Guidelines will be used to guide day-to-day operations (see Attachment A). The parties intend that the CME will transition to the CME Plan of Operations over time and will use that document to guide day-to-day operations of the Project. Future management and operation shall be completed and the subsequent administration, management, operation, maintenance, and rehabilitation of the Project by the CME shall be conducted pursuant to the CME Plan of Operations, subject to the availability of funds, and subject to revision, amendment and replacement as provided in the CME Plan of Operations at Attachment B.

THE COOPERATIVE MANAGEMENT ENTITY

4. The CME is an entity created by the CSKT and FJBC pursuant to the State-Tribal Cooperative Agreements Act, Title 18, Chapter 11, 101, et Seq., Mont. Code Ann. (2009), to manage and operate the Project.

(a) **Establishment of the CME** - The CME shall consist of eight members. The Flathead Joint Board of Control shall appoint four members, one member each from the Jocko Valley and Mission Irrigation Districts and two members from the Flathead Irrigation District. The Tribal Council of the Confederated Salish and Kootenai Tribes shall appoint four members, one member from each the Jocko, Mission Valley and Camas Divisions and one member representing Flathead Indian Reservation trust resources at large.

(b) **Member Terms** - Upon the formation of the CME, the FJBC shall appoint two members for 1-year terms and two members for 2-year terms. Thereafter, as terms expire the FJBC shall name successor members for 2-year terms representing the same district as the incumbent of the expiring term.

Upon the formation of the CME, the Tribal Council of CSKT shall appoint two members for one-year terms and two members for 2-year terms. Thereafter, as terms expire, the Tribal Council of the CSKT shall name successor board members for 2-year terms representing the same district as the incumbent of the expiring term.

(c) **Chair** - One member of the CME shall be appointed Chair. The chair is a voting position. The chairmanship shall rotate annually between members appointed by the FJBC and CSKT. A coin toss at the first meeting of the CME will decide the chairmanship for the first year of operation and the chairmanship shall rotate between the parties on an annual basis thereafter.

(d) **Member Replacement** - In the event a member position becomes vacant, through resignation, incapacitation, death, or removal, the appointing entity shall appoint a replacement within 30 days.

(e) **Member Removal** - A member of the CME may be removed by the appointing party without cause.

(f) **Meetings** - The CME shall meet at least monthly, or more frequently as required. Notice of meetings shall be made in writing by the CME to the FJBC and the CSKT and made available to the public in accordance with Montana law. Emergency meetings can

be conducted after telephonic notice to the Chairman of the FJBC, or designee, and the Chairman of the Tribal Council of the CSKT, or designee.

(g) **Records** - The CME meetings and records shall be open to the public in accordance with Montana law.

(h) **Decision Making** - Each member shall possess one vote when present and voting at scheduled and emergency noticed meetings. The CME shall operate by simple majority. In the event a tie vote occurs, the CME shall follow the tie-breaking process outlined below in paragraph (i).

The CME will implement the applicable operational guidelines without regular consultation with the BIA. However, the CME may request to consult with the BIA when issues arise. Moreover, the CME shall consult with the BIA whenever the CME contemplates a management action that 1) causes a substantial change from the applicable operational guidelines or a substantial change to the Project's real property, or; 2) impacts the BIA's ongoing trust and Endangered Species Act responsibilities.

(i) **Tie Votes by Management Board** - In the event of a tie vote by the Management Board when less than eight members of the Management Board are present; the action item can be tabled until a later meeting. In the event of a tie vote by the Management Board when all eight members are present and voting, the Management Board shall deem the item a failed vote.

PROJECT MANAGEMENT AND OPERATION BY THE CME

5. (a) By December 15 of each year the CME shall prepare an Annual Work Plan for the upcoming calendar year and present it to the BIA for review and approval.

(b) The Annual Work Plan shall contain:

(1) Proposed O&M assessment for the upcoming year(s), based on the costs set forth in (b)(4), below.

(2) A specific description of the proposed maintenance work, including rehabilitation, to be accomplished by the CME and, if applicable, a descriptive statement as to how the work shall be accomplished, including plans and specifications.

- (3) A schedule for the proposed maintenance work.
- (4) A Project budget detailing the estimated costs of project operations and management, including: personnel salary and benefits, materials and supplies, vehicle and equipment repairs, equipment costs, depreciation, maintenance of a reserve fund available for contingencies or emergency costs needed for the reliable operation of the Project, maintenance of a vehicle and heavy equipment replacement fund, systematic rehabilitation and replacement of Project facilities, and contingencies for unknown costs and omitted budget items.
- (5) A copy of the CME's liability insurance and errors and omissions insurance.
- (6) A detailed description of any operational activities, or maintenance projects, that may directly impact or influence Endangered Species Act compliance.
- (7) Other information as necessary.

(c) The BIA shall review the Annual Work Plan and provide written approval, or written comments, by January 30 of each year. If the BIA does not provide written approval or written comments in accordance with this timeline, the Plan for that year shall be deemed approved. The CME shall submit written responses to comments by March 15 of each year, and shall confer with the BIA as appropriate to resolve outstanding issues or concerns.

(d) No party shall make substantive changes or modifications to the Annual Work Plan without the written approval of the CME.

(e) The CME agrees to manage the Project in compliance with the terms of this Agreement and the Annual Work Plan.

(f) The CME shall not make any substantial change to a real property major asset without first consulting with BIA, unless such change was already approved as part of an Annual Work Plan. A request to make a substantial change shall be made in writing and shall include a sufficiently detailed description of the contemplated work to allow evaluation. If BIA does not deny the request or grant it with conditions within 30 days of its submittal it shall be deemed granted. If additional rights-of-way are needed to accomplish such change, they will be acquired under appropriate Federal or State laws as determined by BIA.

REASSUMPTION

6. (a) Temporary reassumption - If, in the opinion of the Secretary, the CME is found to be operating the Project or any part thereof in material violation of this Agreement, the Secretary may elect to re-assume from the CME the operation and management of all or any part of the Project. If such an election is made, the following procedures shall be followed:

- (1) Notice - if the Secretary determines that the Project or any part thereof is being operated in violation of this Agreement, the Secretary shall notify the CME in writing of the deficiencies of performance and request corrective action.
- (2) Opportunity to cure - the CME shall have 60 days to cure or take appropriate steps to cure such deficiencies. During those 60 days, if requested, the BIA shall provide technical assistance or advice to assist the CME in overcoming the deficiencies to the extent resources are available.
- (3) If after 60 days, the Secretary determines that the CME has not cured, or taken sufficient steps to cure, the deficiencies, the Secretary shall notify the CME in writing of the intent to reassume the operation and management of all or part of the Project. Such notice shall include the intended effective date of the reassumption and explain the rationale for reassumption.
- (4) Any decision by the Secretary to reassume operation and management of all or part of the Project may be appealed consistent with the provisions set forth in section 29(c) of this Agreement.
- (5) Following such notice, the Secretary shall direct the BIA to temporarily reassume the operation and management of all or part of the Project, including control over or access to all personal property. Such management by the BIA shall continue until the Secretary determines that the CME is capable of performing the necessary management. During the period of reassumption, the United States shall operate and manage the project using O&M funds.
- (6) Upon written notice to the CME establishing the effective date, the BIA may return all or part of the reassumed management responsibilities (and associated funds and personal property) back to the CME. Upon receipt of such notice, the CME shall accept the operation and management responsibilities in accordance with this Agreement.

(b) **Emergency reassumption**

- (1) The Secretary may determine that an emergency re-assumption of the operation and management of all or part of the Project is necessary in the following circumstances. An emergency re-assumption may be necessary if the CME has failed to fulfill the requirements of the Agreement and this failure poses:
 - a. An immediate threat of imminent harm to the safety of any person; or
 - b. Imminent substantial and irreparable harm to Project funds, trust lands, or interests in such lands, real property assets, and trust resources.
- (2) If the Secretary determines that an emergency re-assumption is necessary, the Secretary shall direct the BIA to assume control of the operation and management of all or part of the Project. The Secretary shall notify the CME in writing of this emergency re-assumption. During the period of re-assumption, the United States shall operate and manage the project using O&M funds.
- (3) Any decision by the Secretary to re-assume operation and management of all or part of the Project may be appealed in an appropriate forum with jurisdiction to review the matter and in accordance with the provisions set forth in Section 29(c) of this Agreement.

(c) **CME request for Permanent BIA re-assumption**

- (1) If the CME officially decides to request that BIA re-assume the operation and management of the Project, the CME may make such a request in writing. Such a request shall be submitted to the Secretary and shall include, at a minimum, the reasons for seeking re-assumption and a proposed time period for such re-assumption.
- (2) If the Secretary receives such a request, the Secretary or his/her designee shall meet with the CME to discuss the request. If, after such discussions, the Secretary determines that temporary re-assumption of operation and management of the Project is appropriate, the Secretary shall direct the BIA to re-assume those functions consistent with the provisions of subsection 6(a), above. If, after such discussions, it is determined that permanent re-assumption of the operation and management of the Project is appropriate, the Secretary or his/her designee and the CME shall work together to determine next steps.

FEDERAL RESPONSIBILITIES

7. (a) The United States, through the Secretary of the Interior, retains any and all existing obligations and responsibilities, and this Agreement does not affect those responsibilities in any way.
- (b) The United States retains the responsibility to ensure compliance with applicable Federal laws, including responsibility regarding Endangered Species Act compliance.
- (c) Consistent with Section 15 below, the United States retains liability for acts, omissions, neglect or misconduct during the construction, operation, management, and maintenance of the Project from the date of its Congressional authorization to the date of transfer.
- (d) The United States retains the responsibility for formal redesignation of lands to be served irrigation water by the FIIP. The parties to this Agreement agree that formal re-designation of lands need not be completed prior to transfer.
- (e) The United States will transfer to the CME, at no cost, title to all personal property for the operation and management of the Project. A list of personal property that will be transferred is listed in Attachment C. The United States will retain title to all Federal real property, as specified in the FAS at the time of transfer (see Attachment D).
- (f) The BIA will maintain all records existing at the time of transfer pertaining to water rights, land ownership, leases and rights-of-way. The CME shall have access to all records and documentation necessary for FIIP operation and management. All records shall remain in place at St. Ignatius, Montana, until the parties to this Agreement agree on appropriate duplication, transfer, and storage, and funding for those tasks. All new records generated after transfer shall be maintained by the CME.
- (g) The BIA shall review and approve the Annual Work Plan consistent with the process and timeline set forth in Section 5 of this Agreement.

USE OF RIGHTS-OF-WAY AND PROJECT FACILITIES

8. (a) **Existing Rights-of-Way** - The lands and rights of way reserved, acquired, withdrawn or held by the United States at the time Project operations are transferred may be used by the CME pursuant to and consistent with the purposes of managing and operating the Project. Such use shall be in accordance with the language contained in such instruments. As provided in applicable operational guidelines, the CME agrees to actively manage rights-of-way and ensure that no unauthorized use or encroachment occurs on the Project lands and/or rights-of-way required for the operation and maintenance of Project Facilities.

(b) **New Rights-of-Way** – The CME does not have the authority to issue or modify any land use agreement, grant, permit or license that conveys an interest in Federal property, nor to lease or dispose of any interest of the United States. The acquisition of new, additional and/or relocation of rights-of-way, leases, easements, licenses or permits required for the operation and maintenance of the Project may be negotiated by the CME with assistance from BIA. Requests for acquisition of such instruments shall be made to the Superintendent. Acquisition on or across fee land will be in accordance with Federal procurement regulations and the appropriate state, county and local requirements. Acquisition across Federal trust lands will be in accordance with 25 C.F.R. § 169.

ADMINISTRATIVE REQUIREMENTS

9. The CME shall establish administrative requirements, cost principals and audit requirements, each in general conformance to accepted practices. At a minimum, the CME will adopt the applicable requirements from the Governmental Accounting Standards Board, the Financial Accounting Standards Board, OMB Circular A-133 and OMB Circular A-87, pursuant to the applicable provisions of 18 USC §7501 et. seq., and which are also contained in MCA §2-7-503(3).

CONTINGENT UPON APPROPRIATION OR ALLOTMENT OF FUNDS

10. The expenditure or advance of any money or the performance of any obligation of the United States under this Agreement shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States in case funds are not appropriated or allotted.

OPERATION AND MAINTENANCE ASSESSMENTS

11. (a) Assessments consist of three elements. The first element is the public funds paid to the FJBC, or one of its constituent Irrigation Districts, as the result of levies on District fee lands served by the Project made pursuant to State law under the provisions of Title 85, Chapter 7, Montana Code Annotated, for the purpose of conducting Project O&M to District fee lands served by the Project, but does not include the administrative assessment collected under 85 7 1617, Mont. Code Ann. The second element is the funds charged by the CME for conducting Project O&M to trust lands served by the Project. This element shall be identical in per acre amount as the first element. The third element is the funds charged by the CME for conducting Project O&M to non-district fee lands served by the Project.

(b) The CME shall set the annual per acre O&M assessment for each acre served by the Project. The level of that assessment shall be reported in the Annual Work Plan provided in Section 5 of this Agreement and shall comply with applicable State and Federal laws. The rates set by the CME shall be published locally, and will not be subject to publication in the Federal Register.

(b) Pursuant to its powers under State law, the FJBC shall collect the assessment set by the CME and any delinquencies due from district and non-district fee lands served by the Project. The BIA will no longer be responsible for debt management pursuant to the Debt Collection Improvement Act of 1996.

(d) Pursuant to applicable law, the CME shall collect the assessment set by the CME and any delinquencies due from trust lands served by the Project. Debt management will be administered consistent with applicable state, Federal and tribal laws.

(e) The CME shall use the BIA's National Irrigation Information Management System (NIIMS), or its replacement, to update land ownership, water user information, and for management of financial aspects related to billing and collection of O&M assessments. Debt management will be administered consistent with applicable state, Federal and tribal laws.

(f) BIA will provide management and administrative support for the NIIMS application, or its replacement, at no cost to the CME, including updates to the NIIMS application or standard reports. Training that is periodically provided to other BIA irrigation projects shall also be provided to the CME at no cost, and if on-site training is provided to other NIIMS or replacement system users such training shall be on-site for the CME personnel. This support shall include the required access, training, and authorizations,

through and required by the appropriate Federal agencies. Any requests by the CME for customized programmatic changes to the NIIMS application or special NIIMS reports for the sole benefit of the Project will be considered by the BIA and, if approved, may be provided to the CME at a cost to be negotiated between the CME and BIA. Travel and related expenses to attend training sessions will be the responsibility of the CME.

(g) In the event the management and operation of the Project or a part thereof is reassumed by BIA, the CME upon request of the Secretary shall return or deliver to BIA all necessary records, property, equipment, materials, supplies, facilities, and funds advanced or acquired for that work to be performed.

(h) The CME shall establish an account for the receipt of and disbursement from the management and operation assessments levied by the FJBC and the CSKT. Funds deposited into and disbursed from that account may only be used by the CME for the management and operation of the Project in accordance with this Agreement, the Plan of Operations, and applicable law.

(i) In the event BIA changes to a new irrigation billing and collection system, or upgrades the existing NIIMS system, it will continue to do so at no cost to the CME, but the CME retains the right to opt out of any new or upgraded system. If the CME chooses to opt out of a new BIA irrigation billing and collection system in the future, BIA will not provide funding support for any alternative system selected by the CME. The CME shall ensure that any alternative system meets the financial accounting and legal requirements of NIIMS or its replacement.

REPORTS, RECORD KEEPING AND FINANCIAL ACCOUNTING

12. The CME shall submit to the BIA by December 15 of each year:

- (a)** A summary of Project activities for the current year, which shall include, but is not limited to:
 - (1)** Income and Expenses Summary (summaries of collections, expenditures and delinquencies);
 - (2)** Balance Sheet (assets & liabilities, including reserve fund and sinking fund balances);

- (3) Summary of Water Deliveries, including volume summaries for each major canal system, applicable records of instream flows (where required), and based on the best available records and technology available to the CME at the time of water delivery;
- (4) Maintenance Report, including summary of projects completed, costs for each maintenance project, and the dates each project was accomplished. CME shall identify the maintenance projects that accomplish mitigation measures outlined in the Biological Opinion.
- (b) Additional reports shall be submitted to BIA as required by applicable statute, regulation or other applicable Department reporting requirement(s).
- (c) The CME shall provide to the BIA and to any other appropriate entity an audited financial statement for each fiscal year. Such audits shall be made by qualified persons who are sufficiently independent of those who authorize the expenditure of funds to produce unbiased opinions, conclusions, and judgments. Audits shall be made in accordance with generally accepted accounting principles.
- (e) The CME will conduct all procurement transactions in a manner that promotes free and open competition in accordance with sound business practices and in conformity with State law.
- (f) CME financial records, supporting documents, and all other records pertinent to this Agreement shall be retained indefinitely.
- (g) Subject to applicable State and Federal laws and regulation, each party to this Agreement shall have the right during office hours to examine and make copies of the other party's books and records relating to matters covered by this Agreement.

EXAMINATION AND INSPECTION OF PROJECT FACILITIES

- 13. (a) BIA may, from time to time, examine any or all of the Project facilities being operated by the CME, to assist the CME in determining the condition of the facilities and the adequacy of the O&M program. The BIA may also inspect any Project Facilities to ascertain the extent of any operation and maintenance

deficiencies, to determine any remedial measures required for their correction, and to assist the CME in solving specific problems. Except in an emergency, any inspection shall be made only after written notice thereof has been delivered to the CME by BIA.

- (b) Any party to this Agreement may request an inspection by BIA at any time. The BIA shall make every effort to accommodate these requests and respond in a timely manner, subject to competing priorities and schedules, and available resources.
- (c) The CME shall be reasonably available to assist in any examination or inspection subject to competing priorities and schedules.
- (d) BIA shall prepare reports based on the examinations, and inspections and shall furnish copies of such reports and any recommendations to the CME.

PERIOD OF AGREEMENT, MODIFICATIONS, AND ISSUES BEYOND THE SCOPE OF THE AGREEMENT

14. This Agreement will remain in effect until terminated by written agreement of all signatory parties. The Agreement may be modified with the unanimous consent of all signatory parties. Any modification shall be in writing and signed by all signatory parties. Nothing in this Agreement shall preclude the Parties from discussing and agreeing among themselves on issues that are beyond the scope of this Agreement.

INDEMNITY AND HOLD HARMLESS

15. The Flathead Joint Board of Control, the Confederated Salish and Kootenai Tribes, and the CME agree to indemnify the BIA for, and hold the BIA and all of its representatives harmless from, all damages arising after the date of transfer resulting from suits, actions or claims of any character brought on account of any injury to any person or property arising out of any act, omission, neglect, or misconduct of the CME or its employees in the manner or method of performing any management, rehabilitation, operation, maintenance, supervision, examination, inspection, or other duties of the CME required under this Agreement, regardless of who performs those duties. This indemnification shall include, without limitation, claims, or damages arising out of any violations of applicable environmental and cultural resource laws, regulations, ordinances, or subdivisions thereof. This indemnification

shall not include indemnification for any liability arising from any acts, omissions, neglect, or misconduct on the part of the BIA or any of its representatives prior to the effective date of transfer. Nor does this indemnification include indemnification for any liability arising from acts, omissions, neglect, or misconduct on the part of the BIA or any of its agents or contractors in performing its remaining duties under this Agreement.

PRESERVATION OF PRE-EXISTING CLAIMS

16. Nothing in this Agreement shall be construed to in any way extinguish or impair the right to bring any claims or seek any rights, remedies, damages, or privileges not specifically waived or released pursuant to this Agreement.

LIABILITY INSURANCE

17. The CME agrees to carry sufficient liability and errors and omissions insurance to cover its activities under this Agreement.

SAFETY REGULATIONS

18. All work performed by the CME under this Agreement shall be done in accordance with all applicable Federal and State safety regulations.

RULES, REGULATIONS, AND DETERMINATIONS

19. (a) The BIA shall have the right to make determinations necessary to administer this Agreement that are consistent with the expressed and implied provisions of this Agreement, Federal and State Laws, and the rules and regulations promulgated by the Secretary. Such determinations shall be made after consultation with the CME.

(b) Where the terms of this Agreement provide for action to be based upon the opinion or determination of either party to this Agreement, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations, or any finding, interpretation, construction, or application contrary to law.

ENVIRONMENTAL COMPLIANCE

20. (a) The CME, in carrying out its obligations under this Agreement, shall comply with all applicable Federal, State, tribal, and local environmental laws, regulations, and ordinances.

(b) The CME shall obtain all required permits or licenses from the appropriate Federal, State, tribal, and local authorities.

(c) The CME recognizes the application of the Endangered Species Act (ESA) to the management and operation of the Project [16 U.S.C. §§ 1532-1543]. The U.S. Fish and Wildlife Service consulted with the BIA under Section 7 of the ESA, and on December 15, 2009, issued a Biological Opinion for the management and operation of the FIIP. Such Biological Opinion is incorporated into this Agreement as Attachment C. Because the BIA will retain title to the Project and its facilities, the BIA retains ultimate responsibility for ESA compliance, including the funding of Implementation Committee activities (to the extent funds are available) consistent with subsection e, below, and the Biological Opinion.

(d) In assuming responsibility for the management and operation of the FIIP, the CME commits to comply with the terms and conditions of the Biological Opinion.

(e) The BIA shall oversee the implementation of any applicable Biological Opinion(s), subject to the availability of funds. Within 6 months of the issuance of the Biological Opinion, the BIA shall create an Implementation Committee to advise the CME in the management of FIIP to ensure that operations and management remain in compliance with the ESA. The CME agrees to participate in the Implementation Committee as described in the Implementation Committee Charter (see Attachment E).

UNCONTROLLABLE FORCE(S) — FORCE MAJEURE

21. No party to this Agreement shall be considered in default in the performance of any of its duties under this Agreement when a failure of performance is due to an uncontrollable force. Uncontrollable force means any cause beyond the control of the party affected, which by the exercise of due diligence and foresight such party could not reasonably have been expected to avoid and includes, but is not limited to: failure of facilities, flood, acts of nature, earthquake, storm, lightning, fire, war, riot, civil disturbance, sabotage, terrorism or restraint by a court or other public authority, and lack of funding, including inability to finance. Any party rendered unable to fulfill any of its duties under this Agreement by reason of an

uncontrollable force shall give written notice of such fact to the other party within a period of time that is reasonable under the circumstances and shall exercise due diligence to remove such inability with all reasonable dispatch.

THIRD PARTY BENEFICIARIES

22. Nothing in this Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third person to any party to this Agreement.

OFFICIALS NOT TO BENEFIT

23. No Member or Delegate to Congress, Commissioner of the FJBC, Tribal Council Member or official of the CME shall benefit from this Agreement other than as an employee, a water user, or landowner in the same manner as other employees, water users, or landowners.

NOTICES

24. Any notice, demand, or request authorized or required by this Agreement shall be deemed to have been given, on behalf of the CME, when mailed, postage prepaid, or delivered to:

Superintendent
Bureau of Indian Affairs, Flathead Agency
P.O. Box 40
Pablo, MT 59855

And on behalf of BIA, when mailed, postage prepaid, or delivered to:

Chairman
CME
P.O. Box 666
St. Ignatius, MT 59865

The designation of the addressee or the address may be changed by notice given in the same manner as provided in this section for other notices.

QUALITY OF WATER

25. BIA does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or improve the quality of water.

SHORTAGES

26. On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs, and while the United States and CME will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States or CME for any damage, direct or indirect, arising there from.

WATER RIGHTS

27. The parties to this Agreement expressly agree that it is not intended to and does not in any way address or resolve any legal or factual issue concerning or involved in the water rights compacting process or the subsequent general stream adjudication in the State of Montana Water Court. They further agree that if the final results of compact negotiations or the subsequent adjudication require modification of this Agreement and/or the operation of the Project, they will promptly confer and adopt the requisite modifications.

HIRING AND EMPLOYMENT POLICY AND PREFERENCES

28. The parties to the CME agree it shall be an equal opportunity employer and it will comply with all applicable State and Federal employment laws. They further agree the goal of its hiring employment policies is to encourage the most applicants possible who are qualified to apply for job openings. They further agree the CME shall give preference in employment to qualified Indians and Veterans.

(a) The CME or its appointee shall establish minimum hiring qualifications for each job or position of the CME. Those shall be contained in the advertised position description, which shall fairly and honestly describe the qualifications necessary to perform the job.

(b) The CME or its appointee shall review the qualifications of prospective employees and determine which applicants are qualified for the position. The CME shall hire only qualified applicants. The preferences for qualified Indians and Veterans shall be implemented among equally well qualified applicants.

(c) In the event no applicant is qualified for the job being advertised, the CME shall re-advertise it without specific reference to any preference in hiring but specifically noting that it is a re-advertisement and stating that all qualified applicants will be considered. Advertising for CME job openings shall occur in media and locations chosen by the CME or its appointee, but is not required to be nationwide or region-wide.

DISPUTE RESOLUTION

29. The parties to this Agreement agree as follows regarding the resolution of disputes that may arise involving water users, the CME, the parties of the CME, and the United States.

(a) **Water Users** The CME shall adopt a mandatory dispute resolution procedure providing a water user aggrieved by an action or failure of the CME or its agent in the fulfillment of its duties pursuant to this Agreement the opportunity to first submit his/her grievance to the Project manager for decision in a timely manner, with all supporting documentation the water user or water users believe is necessary; if the water user disagrees with all or part of the Project Manager's decision, he or she may appeal that decision or portion thereof to the CME, for decision in a timely manner; if a water user or the Project Manager disagrees with all or part of the CME's decision, he or she may appeal that decision or portion thereof to the Flathead Agency Superintendent who shall consider BIA's trust responsibility in making the determination; if either party disagrees with all or part of the Agency Superintendent's decision, that party may appeal that decision or portion thereof to the Northwest Regional Office of the Bureau of Indian Affairs. An appeal of the decision of the Northwest Regional Office may be taken as allowed by applicable statute or regulation.

(i) The dispute resolution policy shall require the appellant to submit full documentation of the facts underlying his or her claim and shall provide and explain that the administrative record that will be reviewed in appeals to the Northwest Regional Office if one is taken shall consist only of information submitted to the Agency Superintendent and not more, except in extraordinary circumstances.

(ii) The dispute resolution policy shall require the CME to issue a written decision explaining the facts and reasoning supporting its decision on any appeal from a decision of the

Project Manager, and if an appeal is taken to the Agency Superintendent the appellant shall include this decision in the record in the event of an appeal to the Agency Superintendent.

(b) **Parties to CME** Disputes between the parties of the CME shall be addressed in accordance with the provisions of this Agreement or through voluntary, non-binding mediation or alternative dispute resolution (ADR). The BIA agrees to assist the parties to resolve any such disputes, at their discretion, by facilitating communication between them and/or assisting in acquiring mediation or ADR services.

(c) **CME and CME Parties and United States** Disputes between the CME or one of its parties and the United States concerning actions or failures to act arising from this Agreement shall be subject to voluntary, non-binding mediation or ADR. Remaining disputes shall be raised and resolved in a court of competent jurisdiction.

INCORPORATION OF NON-DISTRICT FEE LANDS

30. Annually the CME shall provide to the FJBC the necessary information to incorporate into the relevant irrigation district all non-district fee lands.

APPLICATION OF NET POWER REVENUE

31. The parties, recognizing the Act of May 25, 1948, 62 Stat. 269, requires the Secretary to ensure electricity from the power division of the Project is sold at the lowest rates which will produce revenues sufficient to, among other things, fulfill the purposes of that Act, and recognizing that the first five of six priorities established in Section 2(h) of that Act have been fulfilled, net power revenues shall continue to accrue to fulfill the sixth priority established by Congress, at Section 2(h)(6), and that this amount shall be used only for work on the Project that has significant fisheries, water conservation, or water management benefits. The parties further agree that if on an annual basis such work does not require the full amount of such net revenues the remainder shall be set aside and accumulated for expenditure for these purposes when needed and for building and maintaining an emergency reserve.

EFFECTIVE DATE OF AGREEMENT AND TRANSFER

32. This Agreement shall become binding upon signature of all parties. It shall become effective, and the transfer of management and operation of the Project from BIA to the CME shall take place, all personal property and records shall be transferred, at the end of the Reduction In Force period for the Federal employees now employed by the BIA to manage and operate the project, but no later than 90 days after this Agreement is signed by all Parties.

SIGNATURES

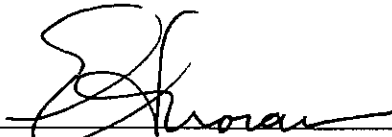
33. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents. This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as the original instrument as if all signatory Parties had signed the same instrument.

LIST OF ATTACHMENTS

- A. BIA Operation and Maintenance Guidelines for the Flathead Indian Irrigation Project.
- B. CME Plan of Operations
- C. Biological Opinion (FWS, 2009)
- D. State-Tribal Cooperative Agreement
- E. Implementation Committee Charter
- F. Personal Property List

By signing below, the Parties agree to the term and conditions of this Agreement.

Confederated Salish and Kootenai Tribes of the Flathead Nation

By: 
E.T. "Bud" Moran, Chairman

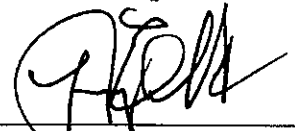
Dated: 4-7-10

**Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley
Irrigation Districts**

By: 
Walter Schock, Chairman

Dated: April 7, 2010

United States Department of the Interior

By: 
Larry Echo Hawk, Assistant Secretary – Indian Affairs

Dated: APRIL 7, 2010

Carle Oankfarsal CSKT Tribal

DONALD LAVERDURE, Deputy Assistant Secretary, Indian Affairs

RICHARD LITSEY, COMMITTEE ON FINANCE FOR SENATOR MAX BAUCUS

George Waters, Waters Consulting DC

Tony & Pitts CSKT Council

Allyson & Irvine / other CMIE / CSKT -

Nether C. Darling, Director Public Affairs ASIA

~~Wm B~~

Thos P. Teeg

Alan M

John J. Anwar
Julia C. Anwar

George F.
Donald M. Donald

~~John McLaughlin~~

Stuart Hughes

Dan Emerson

Charles S. Mangrove

Adol. I. McNeill

John D. McNeill - Congressional Affairs - Indian Affairs

