But I am not suggesting that the BIA and the Department alone are responsible. I think there is a heavy burden of responsibility upon the Congress of the United States, and I can assure you that this little old committee here will do its best to rectify that.

Mr. Vice Chairman.

Senator McCAIN. Thank you, Mr. Chairman.

"Little old committees" are about as effective as the influence of their chairmen, as you know, Mr. Hayes. Therefore I don't know if you could describe this as a "little old committee."

Mr. HAYES. Senator, I think Indian country is fortunate to have such an influential chairman for this "little old committee."

Senator McCAIN. I agree, Mr. Hayes.

The CHAIRMAN. As my colleague once said, "I am just an old country lawyer." [Laughter.]

Senator McCAIN. A couple of comments, one to followup on what the Chairman just said.

Mr. Hayes, I also agree with the Chairman. I consistently state that the Congress bears great responsibility for this state of affairs, but please understand, you've got to ask for the money. We can't go out and solicit program areas where we think you need money. The process has got to start with a request for funds, and I will try to make that clear to the Secretary of the Interior.

I do note with some interest, Mr. Chairman, that at the very interesting and enlightening hearings that we had out at the Hawaiian Islands, at Molokai in the State of Hawaii, that water was a major issue there, that native Hawaiians have had great difficulty in maintaining their livelihood without an adequate supply of water.

So although I think that a majority of this issue is probably located in the Southwest, I think in your statement you point out that in the Northwest and other parts of the country water remains the key element in maintaining tribal economies.

Mr. Chairman, because of this recent rumor about turning the BIA irrigation program over to the Bureau of Reclamation, I would request that the staff draft up a letter for your and my signature to the Secretary of the Interior requesting if there are any plans to do this, so that we can get it in writing that such is not the case, or that it is the case.

The CHAIRMAN. I think that's most appropriate. The staff will begin doing that.

Senator McCAIN. Mr. Hayes, we have numerous other witnesses, and the Chairman has asked the most important questions. But I would just like to ask one or two more.

Perhaps this is a matter of conjecture. Why has the irrigation construction program been suspended, and why is it a low priority?

Mr. HAYES. I don't know if it is a correct characterization, Senator McCain, to say that the construction program has been suspended. The fact is that, for many years now, there has never been money requested and appropriated through the appropriations process outside of when Indian tribes come in and make their case, make a presentation to the Congress, and the Congress listens and acts. It is generally only at that time that construction money is made available.

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Senator McCAIN. Could you interpret that to mean that the BIA, therefore, has not fulfilled its obligations as the advocate for the tribes?

Mr. HAYES. Well, Senator, I think you can only carry the advocacy so far. At some point in time in the decision process someone makes a decision, and carrying advocacy above that individual's head can cause you some problems.

Senator McCAIN. Okay. Well, let me narrow it down, then, to more specific cases.

There is a water settlement. Part of the water settlement is that the U.S. Government shall provide certain quantities of water and the means to convey it as part of the settlement. Then is it the responsibility of the BIA to come in with those requests? Or the Department of the Interior? Or anyone?

Mr. HAYES. Yes, sir; I believe that responsibility does lie within the Department of the Interior to do that. I am aware of some situations that I believe you are referring to where legislation has been adopted which requires the construction of an irrigation project, and that irrigation project has languished incomplete over many years. It was only through threat of further litigation that the project moved to some further stage of completion.

Senator McCAIN. I was happy to see in your statement that you felt that this kind of hearing was not only appropriate, but long overdue. Is that an accurate depiction of your views?

Mr. HAYES. Yes, sir.

Senator McCAIN. Second, I would like your views now or in the future as to whether you think legislation is required.

Mr. HAYES. If I could reserve judgment on that, Senator. As I mentioned in response to a previous question from the Chairman, I indicated that we have a small task group which has begun a study of the state of our irrigation system. When that study moves to a little further stage of finality, I think then we would be in a better position to respond to you more definitively, saying, "Yes, we think some legislation is needed in order to bring some uniformity," or possibly not.

Senator McCAIN. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Thank you very much, Mr. Secretary.

Mr. HAYES. Thank you, Mr. Chairman, Senator McCain.

The CHAIRMAN. Our next panel consists of the Chairman of the Confederated Salish and Kootenai Tribal Council, Pablo, MT, Michael T. Pablo; the Chairman of the Fort Belknap Community Council, Harlem, MT, Donovan Archambault; and the General Manager of the Hoopa Valley Utility, Hoopa, CA, Barbara Ferris.

Chief Pablo, it is always good to see you, sir.

STATEMENT OF MICHAEL T. PABLO, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBAL COUNCIL, PABLO, MT

Mr. PABLO. Thank you, Mr. Chairman. It is an honor to be present with your committee and Senator McCain and all the staff. I know you work very hard for Indian country, and that is greatly appreciated. Thank you.

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To begin, I am an irrigator. I irrigate 160 acres, farm 160 acres of land that is in trust, and also I farm 200 acres that is in fee status. So I have enough farming to do. The wife is home doing that, and I will catch heck when I get home. [Laughter.]

The Flathead Irrigation Project is the largest irrigation project in the State of Montana. It consists of about 127,000 acres. There are roughly 1,200 or 1,300 miles of irrigation canals, and those canals intercept nearly every stream on the reservation.

One of the things that is needed right now is a rights-of-way study and survey to be done. There has never been a survey done on those canals. We don't know how wide the easements are. We don't know in all cases if there are even easements for the canals going across properties.

We have put a proposal together, and we will soon be sending that to the BIA to begin that rights-of-way study. Whatever happens, talking about rehab or any other issue, we need to find out what the rights-of-way are. We have put that proposal together, and that will be coming in.

When the project construction was first begun—I think it was authorized in 1904 and construction began later, after that—there was no consideration for tribal resources, such as fish and wildlife. With the project canals intercepting all the streams, about 90 miles of prime trout spawning grounds were lost because there were no fish ladders. There were no mitigation plans built in for wildlife. It was built strictly for irrigation.

Those are some of the problems that we have today.

Through the operations of the project there have been washouts on tribal lands consisting of tens of thousands of cubic yards of material being washed down mountains. There have been tribal lands that have been washed out, gullies on tribal lands because of the drainage problems, no drainage operation plan in place.

On the Flathead Irrigation Project, of the total of 16 reservoirs, nearly all are on tribal land, with easements to the BIA for an irrigation project.

There are many issues to be discussed and gone over: The rights-of-way issue, water rights. Everything kind of falls in at one time, and we appreciate the first hearing that you're having today to begin to see where we need to go.

Also at this time I would like to thank the committee for opposing the transfer of the BIA's sod program to the Bureau of Reclamation. I think that is an issue that needs to be decided upon by each individual tribe, which is the best way for that tribe to go, and they need to have that opportunity instead of having a wholesale transfer put into place.

We have a 638 contract on the Flathead Reservation with the BIA for the sod program. We feel that is working very well. We have 12 dams that are high hazard dams that are on the Safety of Dams Program. We have a full time engineer, and we are subcontracting some of that engineering work back to the Bureau of Reclamation. That seems to be working very well. If staff or anyone needs to come out and look at that program, we would make everyone available. We feel that that is working.

On the other hand, we have a Bureau of Reclamation Technical Management Team that ended up on the project about four years

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ago. That came about because then-Senator John Melcher put a hold on Ross Swimmer's appointment as Assistant Secretary, brought the Bureau of Reclamation Technical Management Team to the irrigation project. That causes many difficulties because for trust responsibility issues, we go to the BIA. The superintendent answers to the Portland Area Director. If that involves trust resources in relation to anything done with the irrigation project, the Bureau of Reclamation Management Team answers to the Boise Area Office of the Bureau of Reclamation.

Under the consolidation plan that was recommended, the agency superintendent would have line authority over the entire project. At the very least, if the BOR is not removed from the Flathead Indian Irrigation Project, then we feel that the agency superintendent needs to have that line authority so that we can go to one individual when there is a problem and get that problem resolved instead of having to try to deal with two Area Offices, one in Bureau of Reclamation and one in the BIA.

One of the biggest problems that we have seen is the lack of overall general planning and management for water delivery and protection of other resources on the reservation. In 1986 was the first time there was an operational plan put into effect for the irrigation project. Prior to that, you would just run the water down the canals when you could and get all the water there that was needed. But since 1986, many of these issues are starting to get planned out. There are plans that have been put together and put out for public comment, so we feel that we are gaining on that issue.

On the Flathead Project, as an irrigator I have a very good deal because the debt of construction is paid for by the power consumers on the reservation. It is not paid for directly by the irrigators. The irrigators, when they pay their electric bills, pay part of the debt of construction, but the electrical consumers on the reservation are paying for the debt of construction. So as an irrigator, I have a very good deal.

So I think that, as this is our first session and we move along, there are many issues that need to be looked at and handled. It's a monumental task to look at, and we appreciate the opportunity to be in on it at the beginning.

Thank you.

[Prepared statement of Mr. Pablo appears in appendix.]

The CHAIRMAN. Chief Pablo, I thank you very much.

I have been advised that one of your major concerns evolves around so-called "barriers" to tribal management under 638. Would you favor this committee by submitting a memo setting forth what you consider to be these barriers, bureaucratic or otherwise?

Mr. PABLO. Yes; I will, Mr. Chairman.

[Information to be supplied appears in appendix.]

The CHAIRMAN. Second, Secretary Hayes has assured the committee that he will be submitting a memo setting forth estimates of costs of completing or rehabilitating or improving upon these projects. I don't suppose that it necessarily follows that completing each project would be the best solution, because these projects were planned 90 years ago and some of the techniques that we know of

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today might suggest that completing the project would not be cost-effective, would not be feasible, et cetera.

From your vantage point as an Indian irrigator, and also taking into consideration the concerns and benefits that may accrue to other Indian irrigators and non-Indian irrigators, how would you spend the money if such were allocated to the Flathead Project?

Mr. PABLO. I think the first thing we would need to do, Mr. Chairman, is get the rights-of-way study and survey done to find out what the rights-of-way actually are.

Then we would also need to be involved—any decision made by the irrigation project would be made in conjunction with, and with the recommendations of, the tribes being considered for everyone. The irrigation project provides a very sound economic base for the area. We live in an area that is very marginal. If we can afford to pay too much more than what is proposed for O&M this year—this year, I believe the proposal is about $18.40 per acre. That's right in an area where it's very marginal to be able to pay that and to get by, for Indian and non-Indian irrigators.

The first thing we need to do is get the rights-of-way study done, and then continue with the sod program, because with the sod program there could be the possibility of health and life being at stake. Also, if we get the sod program completed, there are filling restrictions on some of the reservoirs that cannot be filled to their capacity, so with the sod program and the rights-of-way, I think those are two of the main issues to begin with right now. And once those two get moving forward and we can see where we are from there, then we can look and see what is needed further.

The CHAIRMAN. Thank you.

Senator McCain.

Senator MCCAIN. I have no questions.

Thank you for being here.

Mr. PABLO. Thank you.

The CHAIRMAN. May I now call upon Chief Archambault.

STATEMENT OF DONOVAN ARCHAMBAULT, CHAIRMAN, FORT BELKNAP COMMUNITY COUNCIL, HARLEM, MT

Mr. ARCHAMBAULT. Thank you, Mr. Chairman, Mr. Vice Chairman. I have been waiting for this for a long time. I want to thank you on behalf of our tribe and the Billings area in general for the opportunity to express our concerns about the present irrigation systems in Indian country, with particular emphasis on Fort Belknap in Montana.

I believe the intent to provide irrigation was good. However, the history of what has happened over the past 100 years is not so good. If the Bureau recognizes the fact that the systems are not functional, then I believe, as a trustee for me and for my people, something should have been done before this. It should not have been 80 years or 90 years before a hearing took place.

I would view irrigation on Indian lands as a trust responsibility, just as the land itself is a trust responsibility for the Bureau. In some instances on our reservation, projects were told over to the individual as if, "Well, now that I'm done with it, you take it." Even those projects weren't complete. I have about 700 pages of

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TESTIMONY OF MICHAEL T. PABLO
CHAIRMAN OF THE TRIBAL COUNCIL
OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION

Senate Select Committee on Indian Affairs
Oversight Hearing on Indian Irrigation Projects

July 12, 1990 - Washington, D.C.

On behalf of the Flathead Nation, I would like to thank this Committee for holding a hearing on this important issue. The largest irrigation project in the State of Montana is owned and operated by the Bureau of Indian Affairs. It is located in the heart of the Flathead Indian Reservation. The Flathead Indian Irrigation Project impacts the daily lives of Reservation residents. Its vast network of canals, reservoirs, stream diversions have reshaped the landscape, hydrology, and economy of the Flathead Reservation. It has greened the valley floors and brought prosperity, but it has also brought problems. These problems find their root in the historical failure of the Tribes' federal trustee to carry out its trust duty.

My testimony will address the major concerns and recommendations the Tribes have on this topic. I have also attached to my testimony, and would like to submit into the record, a background memorandum which will provide this

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Committee and your staff some additional information on the project.

Nearly all of the water the project diverts from streams for irrigation arises on tribal lands (mostly flowing west out of the Mission Mountain Range). These fresh-water mountain streams, which are intercepted by project canals, contain aboriginal fisheries exclusively reserved by the Tribes in the 1855 Hellgate Treaty. The Tribes are entitled to instream flows to protect these fisheries. Joint Board of Control v. United States and Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 108 S. Ct. 1127 (1988). Because this irrigation project is sprawled across the heart of the Reservation, its operation and management directly impacts Tribal treaty and property rights. The Reservation environment (particularly water quality) and the Reservation economy are greatly influenced by project management decisions.

Indian irrigators, like non-Indian irrigators, want water for their fields. This can be done without sucking the streams dry and without polluting Reservation waters. The key is improved management. Improved management also requires that the federal trustee ensure that project management decisions be made in consideration of and in conjunction with the Flathead Nation.

Prior to 1986, the project failed to coordinate its management with the Tribes or the BIA's Flathead Agency. Tribal treaty rights and concerns were ignored or overlooked. The

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project simply took whatever water or rights-of-way it wanted. It did not seriously engage in facility maintenance, planning or water management. The project was supervised by a BIA Project Engineer who aligned himself with the three state chartered irrigation districts served by the project (Indian trust lands are excluded from these irrigation districts) and to their umbrella organization, the Flathead Joint Board of Control ("Joint Board"). Under this former approach to project management (which spanned more than four decades) Reservation streams (including the Jocko River) were routinely dewatered, water quality and fishery impacts were ignored, irrigation facilities deteriorated due to lack of maintenance, water was wasted, and supervisory federal officials openly evidenced an anti-Indian bias. (See attached memorandum, at 3).

During this era of project management, the irrigation districts (and later the Joint Board) exercised a "de facto" control over the Project Engineer and the BIA employees supervised by the Project Engineer. For example, in some years, the Joint Board actually hired the project employees (circumventing statutory federal Indian preference requirements). This de facto control was so extensive that the Project Engineer would often take direction from the Joint Board and actually serve as the liaison between the Joint Board and the Joint Board's attorneys on matters adverse to federal and tribal interests. (See attached memorandum, at 4-5, and its Appendix). In Orwellian fashion, the Tribes' federal trustee at

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the project was working against, rather than for, the interests of the Tribes.

It was this former approach to project management which was critiqued and roundly criticized in the three-volume 1985 Comprehensive Report. This report came about because the Tribes, in 1984, were investigating the irregularities described above as well as investigating the project's unauthorized involvement in a utility consortium which sought to dam and destroy Kootenai Falls - a sacred religious site to the Kootenai Tribes. Increasing Tribal and Congressional inquiries into project mismanagement, combined with a renewed effort to get the Project Engineer to adhere to his trust duty to the Tribes, resulted in the Joint Board abandoning its former collaborator (the BIA Project Engineer) and seeking the immediate transfer of the entire project to the Bureau of Reclamation (BOR). Former Senator John Melcher took up this cause on behalf of the Joint Board and, in the fall of 1984, sought to achieve the BOR transfer by Secretary of the Interior directive. Instead of acceding to this political pressure, Interior Secretary William Clark commissioned a BOR-BIA team to study the matter and report back to him.

The BOR-BIA team, after studying the matter for a year, issued the 1985 Comprehensive Report and recommended against transferring the project to the BOR. The study team concluded that the BOR lacked the prerequisite experience and expertise in Indian trust issues to manage this large Indian irrigation

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project, which is located almost entirely on the Flathead Indian Reservation. In its report, the study team cautioned against BOR transfer on the grounds it would increase already heightened racial tensions on the Reservation. Given the documented failure of the Project Engineer to coordinate his actions with the Tribes or the Flathead Agency, the study proposed as its top recommendation that the Project Engineer position be eliminated and that the project be consolidated with the Flathead Agency.

Soon after the release of the report, Senator Melcher (displeased with the report's recommendation against BOR transfer) placed a "hold" on the Senate confirmation of Ross Swimmer to be the new Assistant Secretary for Indian Affairs. His hold was released after Interior Secretary Donald Hodel signed a November 29, 1985 memorandum ordering a BOR "management team" onto the project. This three person BOR "management" team has been on Flathead since June 1986. The professional background of the BOR irrigation manager brought in by this team is in irrigation system construction--not in irrigation management. The BOR's presence on the Reservation since 1986 has indeed heightened tensions on the Reservation (as predicted in the 1985 Comprehensive Report).

The Flathead Nation seeks the removal of the BOR team for the following reasons:

1. The Tribes view the BOR management team's presence on the Reservation as illegitimate: it was politically-induced

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and contrary to the Interior Department's own study and recommendation on the issue.

2. The BOR management team continues to demonstrate its lack of understanding of Indian trust issues and lack of concern for Indian trust resources. For example, within weeks after the arrival of the BOR Irrigation Division manager, that BOR official facilitated the Joint Board in a lawsuit the Joint Board filed against the Interior Department (his employer) which sought to invalidate interim instream flows to protect the tribal fishery.

3. Importantly, the BOR management team stymies the effective implementation of the Flathead Consolidation Plan (which sought to place project management under the Flathead Agency Superintendent and which was approved by the Secretary of the Interior in July 1986) because the Irrigation Division manager's supervision is divided between the Flathead Agency and the BOR Area Office in Boise, Idaho.

4. The BOR team has been present on the project for four years and is clearly not a short-term dispatch. Therefore, the placement is contrary to federal Indian hiring preference requirements applicable to BIA programs.

5. If the BIA determined that any BOR expertise was needed at the project for a particular matter, that work could be obtained by contract.

6. And finally, the annual cost of the three member BOR team in FY 91 is about $230,000, which includes a 35%

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overhead charge. Thus the BOR management team costs each Indian and non-Indian irrigator about $2.00 per acre in operation and maintenance charges.

We have been asked by Committee staff to comment on what physical improvements may be needed in the irrigation project. Obviously, the irrigation system is deteriorated and a number of irrigators believe it is in need of a major rehabilitation. Before a decision can be made on rehabilitating the project, a number of threshold questions need to be addressed, such as: (1) who will pay for the rehabilitation, which will surely cost millions of dollars?; (2) who and which regions of the Reservation will benefit the most?; (3) who owns the water rights (which are unquantified on the Reservation)?; (4) should not the rights of way problem be addressed before rehabilitation?; (5) and who will manage the project once it is repaired?.

The Flathead Nation would like to thank this Committee for opposing the Administration's proposal to transfer the Safety of Dams (SOD) program from the BIA to the BOR. As evidenced by the attached 1988 internal BOR memorandum, the BOR would like nothing more than to completely take over operation and management of all Indian irrigation projects.

The irrigation project on Flathead has 12 "high" or "significant" hazard dams, providing the Flathead Reservation the dubious distinction of having the highest concentration of unsafe dams of any Indian Reservation in the nation. These

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dams pose a risk to the Reservation community. Concerned about this, the Tribes, in February 1988, entered into a "638" contract with the BIA to assume management over this SOD program. The Tribes have hired a full-time coordinator to manage this program. This program is running well, but the cost of repairing these dams will be expensive. The tentative six year projection of the cost of SOD work on Flathead totals more than $43 million. Unless these dams are repaired, they will continue to pose a risk to Reservation residents and, in certain instances, storage restrictions will be implemented on several of the unsafe dams.

In closing, I would like to summarize some of the Flathead Nation's major concerns and recommendations to this Committee:

1. Because the irrigation project has a profound impact on the Tribes and the Reservation environment and economy and because the operation of the project must be undertaken in a manner consistent with the most exacting of fiduciary standards, decisions involving its operation and management must be made in consideration of and in conjunction with the Flathead Nation.

2. Since the irrigation project was consolidated with the Flathead Agency in 1986, the project has improved its coordination and communication with the Tribes. However, the continued presence of the BOR "management team" continues to stymie the implementation of the consolidation plan. The BOR

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management team's tenure at the project should be terminated.

3. Because the project's 12 high or hazardous dams pose a risk to public safety, Congress should make every effort to fund the Tribes' efforts to repair these dams.

4. The irrigation project must better manage water so as to minimize or eliminate environmental degradation, to conserve water and create incentives for water conservation, and to accurately measure and enforce water deliveries and water quotas.

5. Any consideration of rehabilitating the project should first address the difficult and unanswered questions previously mentioned.

6. There is a need for Congress to fund (as recommended in the 1985 Comprehensive Report) a rights of way study to properly survey, record and, if needed, compensate landowners for rights of way used by the irrigation project.

On behalf of the Flathead Nation, I express our gratitude to the Committee for holding these oversight hearings and hope that our comments and concerns are useful and informative to you.

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A SYNOPSIS OF LEGAL HISTORY AND RECENT EVENTS AT THE FLATHEAD INDIAN IRRIGATION PROJECT

Prepared By
The Confederated Salish and Kootenai Tribes
for the
Senate Select Committee on Indian Affairs'
Oversight Hearing on Indian Irrigation Projects

July 12, 1990

Early Project History

The Flathead Indian Irrigation Project is located in the heart of the Flathead Indian Reservation. The Flathead Reservation was reserved by the Confederated Salish and Kootenai Tribes to themselves in the 1855 Treaty of Hellgate (12 Stat. 975). In that treaty, the Tribes ceded most of their aboriginal homeland, which included much of what is now known as western Montana, to the United States Government. In return, they reserved a portion of their aboriginal holdings --the Flathead Reservation--and the exclusive right to hunt and fish on this Reservation.

In 1904, Congress, over the objection of the Tribes, passed the Flathead Allotment Act (33 Stat. 302). The Reservation was opened to non-Indian settlement by this Act, and members of the Tribes received individual allotments. This Act also authorized the construction of an irrigation system to serve the Indian allottees. The 1904 Act was amended in 1908 (35 Stat. 444) to allow non-Indians to be served by the irrigation project that was being constructed for the Indians. The irrigation system was intended to

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benefit the non-Indians only in an incidental manner. The legislative history reflects the understanding of Congress "that in all probability three-fourths of the irrigable lands would be allotted to Indians." H. Rep. No. 1189, 60th Cong., 1st Sess. 2 (1908). Construction on the irrigation works commenced in 1909 and continued until the 1960's.

The Irrigation System Today

Today, the Project, the largest in Montana, includes 16 dams and storage reservoirs and 1300 miles of canals and laterals. Most of the water stored or diverted for Project use flows westwardly from the majestic Mission Mountains, which arise on tribal lands. Many of its facilities, including nearly all of its reservoirs, are located on tribal or Indian lands. Excluding the Flathead River, the Project's extensive canal system intercepts nearly all streams on the Reservation. These streams and rivers are subject to the exclusive hunting and fishing rights reserved by the Tribes in the Treaty of Hellgate. The Tribes are entitled to instream flows to protect these fisheries. Joint Board of Control v. United States and Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 108 S.Ct. 1127 (1988). In addition to directly impacting the Tribes' treaty rights, the Project also has a significant impact on the environment, economy, and quality of life on the Reservation.

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The 1985 Comprehensive Report on the Project

In 1985, a joint Bureau of Reclamation-Bureau of Indian Affairs team issued the most comprehensive analysis of the Project that has ever been undertaken: the three volume 1985 Comprehensive Review Report, Flathead Indian Irrigation Project. The report was highly critical of the former Project management:

> The FJB (Joint Board) was, in effect, intervening in FIIP management, a situation the BAO (the Billings Area Office of the BIA) allowed to exist. [Page 3-20].
>
> There is no indication that there has ever been a meaningful coordination or planning with the Confederated Salish and Kootenai Tribes relative to natural resource planning and development, planning for environmental protection, and economic development. [Page 3-32].
>
> There is serious absence of knowledge and understanding among FIIP staff concerning the Reservation, CSKT, Tribal history, roles of the water districts and the FJB. This has caused misunderstandings,rumors and conflict. During interviews with employees, it was also revealed that some informational orientation sessions conducted by supervisory staff reflected an anti-Indian bias. [Page 3-27].
>
> The team was unable to find any documentation indicating that FIIP was involved in either short-or long-range planning or budgeting. FIIP operates on a crisis basis with no scheduled maintenance, no systematic review of structures, and no planning for replacement of structures on a routine basis. Largely because of the lack of planning, FIIP is in an advanced state of deterioration and in need of major rehabilitation. [Page 3-32].

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Collusion Between the Non-Indian Irrigation Districts and the Former BIA Project Engineers

Both the power and irrigation components of the Project have always been operated by the Bureau of Indian Affairs. The Congressional authority for funding has always been the Snyder Act (25 U.S.C. 13). Prior to 1986, the Project was supervised by a Project Engineer, a BIA employee who reported to the BIA Area Director and who was not accountable to the BIA's Flathead Agency. Ostensibly, the irrigation districts' function was to ensure repayment obligations under the repayment contracts and to collect annual operation and maintenance fees from its members. But that is not how things actually worked prior to 1986. The Tribes have discovered records documenting a collusive relationship between the Project Engineer and the irrigation districts. The BIA Project Engineer and the irrigation districts often collaborated to work against tribal and Indian trust interests.

The irrigation districts (now organized under the Flathead Joint Board of Control) exercised de facto control over the Project. The BIA Project Engineer and the irrigation districts worked collusively on the irrigation districts' legal, political, and public relations undertakings. The Project Engineer would actually operate as the irrigation districts' liaison with their attorneys, and would be directed by the irrigation districts on how to assist them on their political and legal strategies and on when to accompany them

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on trips to Washington, D.C. (See attached documents). It was during this period of de facto control by the irrigation districts -- a period that spanned four decades -- that the irrigation facilities deteriorated due to inadequate maintenance (notwithstanding the fact that the irrigation districts did not have to assess their members' lands for construction debt repayment because net power revenues were paying all matured reimburseable construction debt during this period).

The 1986 Flathead Consolidation Plan

The 1985 Comprehensive Report's principal recommendation was to terminate the former organizational structure whereby the Project Engineer was not required to coordinate with the BIA's Flathead Agency office. Instead, the report recommended that the Project be reorganized so that both divisions of the Project (power and irrigation) reported to and were supervised by the Flathead Agency Superintendent. This recommendation was implemented on July 11, 1986 when Secretary of Interior Donald Hodel signed Manual Release 2694 placing both divisions of the Project under the direct control of the BIA Agency Superintendent (hereafter the "Consolidation Plan"). The Flathead Indian Irrigation Project, per se, was reorganized into the Flathead Agency Irrigation Division and the Flathead Agency Power Division.

The 1986 Consolidation Plan brought about a new era in Project management. It marked the beginning of better

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coordination of Project activities with the BIA's fiduciary duty to protect Indian trust resources.

Politics Involving Senate Confirmation of High-Ranking Interior Department Officials

As tribal and public scrutiny focused on the Project and its failure to protect Indian trust resources, it became apparent that the Flathead Joint Board of Control's intervention in project management and collaborative relationship with the Project Engineer was exposed. The Joint Board advocated for a transfer of project management to the Bureau of Reclamation (BOR). Senator John Melcher came to their aid. Displeased with the Comprehensive Report's recommendation not to transfer management of the irrigation division to the BOR, Senator Melcher placed a "hold" on the Senate confirmation of the designate Assistant Secretary for Indian Affairs, Ross O. Swimmer. As a direct result of this political maneuver, Interior Secretary Donald Hodel, on November 29, 1985, issued a directive establishing a BOR "management" team on the Reservation.

In December 1987, Senator Melcher delayed Senate confirmation of Earl Gjelde as Under Secretary for the Department of Interior, and that time obtained further commitments from Secretary Donald Hodel which were confirmed in the Secretary's December 9, 1987, letter to the Flathead Joint Board of Control.

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On October 30, 1989, the Flathead Joint Board of Control requested Senator Conrad Burns to place a hold on the Senate confirmation of Dennis Underwood to Commissioner of Reclamation until Interior Secretary Manuel Lujan commits to a process and timeframe to resolve conflicts on the Project.

The BOR management team's presence on the Reservation continues to stir up conflict on the Reservation (as predicted in the Comprehensive Report) and prevents the 1986 Consolidation Plan from achieving its potential. The root of the problem is the BOR's lack of expertise in and insensitivity to Indian trust resources.

The Joint Board of Control's Litigation

The Project's historical practice of dewatering Reservation streams intercepted by the Project's canals was enjoined by the federal court in 1985. Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, 616 F.Supp. 1292 (D. Mont. 1985). The 1986 Consolidation Plan, coupled with the 1985 court order that the Project must maintain instream flows to protect tribal treaty fishing rights, was followed by a series of lawsuits by the Flathead Joint Board of Control. It temporarily enjoined the Project's 1986 interim instream flows, but the injunction was nullified and the district court opinion was reversed by the appeals court. Joint Board of Control v. United States and Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 108 S.Ct. 1127 (1988). It sought to enjoin the BIA's 1987 interim instream

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flows, but its suit was dismissed because the Joint Board failed to exhaust administrative remedies. Joint Board of Control v. United States, 862 F.2d 195 (9th Cir. 1988). It failed in its attempt to block the Indian Self-Determination Act contract under which the Tribes manage the Flathead Agency's power division. Joint Board of Control v. United States, ___ F.Supp. ___, No. CV-86-216-M-CCL (D. Mont. 1988). It also failed in its attempt to use the Freedom of Information Act to obtain water rights information the United States was preparing in its trustee capacity to be used in water rights negotiations and/or litigation on behalf of the Tribes. Joint Board of Control v. United States, ___ F.Supp. ___, No. CV-87-217-BLG-JFB (D. Mont. 1988).

The Turnover Suit

The Joint Board's last remaining suit, the 1986 "turnover suit," was dismissed by the federal court, without prejudice, on October 16, 1989, by the consent of all parties involved. In that suit, the Joint Board contended the "turnover" language in the 1908 Act required the Secretary of the Interior to transfer management of both the irrigation and power systems to the Joint Board upon the irrigation districts paying over half of the irrigation system construction debt. Both the United States and the Tribes challenged the Joint Board's legal interpretation because the turnover provision plainly requires that all irrigation construction debt be repaid prior to any turnover, and because the power system is

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not subject to turnover. The Joint Board's turnover theory is also flawed because -- if and when turnover is ripe -- the turnover is limited to only certain irrigation works on unallotted lands and does not involve, for example, the storage system, feeder canal system, or the stream diversion which are mostly located on tribal lands and directly impact Indian trust resources.

Formation of Irrigation Districts--Kerr Dam Bargain Block

The Project was originally envisioned to include the construction of a small power plant on the Flathead River at the present site of Kerr Dam. The power plant proposal, however, was abandoned in about 1911. By 1926, it was clear that the non-Indian irrigators were not repaying the federal government for the construction costs of the irrigation system as required by the 1908 Act (Indian irrigators' portion of the construction costs were indefinitely deferred under the authority of the Leavitt Act, 47 Stat. 564). Therefore, in the 1926 Act (44 Stat. 464), Congress conditioned future Project construction appropriations on the irrigators forming irrigation districts and entering into repayment contracts with the United States to repay their portion of past and future construction debt. The three irrigation districts signed repayment contracts with the United States in 1928 (Flathead), 1931 (Mission), and 1934 (Jocko). The 1926 Act also authorized funds to revitalize plans for the small power plant proposed on the Flathead River. That plan, however, was

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scrapped in 1927 when a Montana Power Company subsidiary announced that it would be willing to earmark 15,000 horsepower of inexpensive electricity (the 11.2 megawatt "bargain block") to the project. By then, Montana Power had already filed for a federal license to construct a much larger hydroelectric dam (150,000 horsepower) at the site.

Authorization for Power Distribution System
Kerr Dam Relicensing

In 1928, Congress authorized the construction of the Project's electric distribution system to deliver the bargain block power purchased from Montana Power to the project and the Reservation community. Construction of the electric distribution system commenced in the early 1930's.

The Kerr Dam site is on tribal lands. The Tribes received annual rental from Montana Power under the terms of the original fifty year license granted by the Federal Power Commission in 1930. However, the irrigation "project has, and has had, no interest at all in the Kerr Dam site." Confederated Salish and Kootenai Tribes v. United States, 181 Ct.Cl. 739, 750 (1967).

The Kerr Dam site has since been relicensed in 1985, under a unique joint license concept, to the Montana Power Company and the Tribes. Under this arrangement, MPC operates the plant for the first 30 years of the fifty year license and pays annual rental to the Tribes, and the Tribes own (buy out MPC's interests) and operate the plant for the remaining 20

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year term of the license. All parties to the license, including the irrigation districts, have agreed that the 11.2 megawatt bargain block will be made available to the Project for Project and Reservation use at a low price until July 17, 2015 (during Montana Power's 30 year tenure on the license). The issue of whether the bargain block will be made available after that will be determined by subsequent negotiations, or through litigation before the Federal Energy Regulatory Commission.[1]

Under the terms of the 1928 Act, which was superseded by the 1948 Act, the "net revenues" from the power system may be used to repay both power and irrigation system construction costs. Because of this power revenue subsidy of the irrigation costs, the irrigation districts have never made an assessment on their members' lands to pay for irrigation construction debt. Under the terms of the 1948 Act (63 Stat. 269), all power system construction debt is repaid from power revenues and the irrigation districts are relieved of any financial liability for the electric utility.

1/ Under the terms of the 1985 license, this litigation may be filed with FERC at any time with the consent of all the parties or, without mutual consent, at any time after the fifteenth anniversary of the license. The Secretary of the Interior and Irrigation Districts must file the litigation with FERC during the tenth year of the license if either intends to allege a right to more than the 11.2 megawatts.

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Tribal Management of the Project's Electric Utility

Since October 8, 1988, the Tribes have managed the Project's electric utility (renamed "Mission Valley Power" under tribal management) pursuant to an Indian Self-Determination Act contract[2]. Attempts to block this contract in Congress and in the federal courts failed. See, Joint Board of Control v. United States, ___ F.Supp. ___, No. CV-86-216-M-CCL (D. Mont. 1988). The utility presently serves about one-third of its customer load from bargain block power purchased from Montana Power, and the balance is provided by the Bonneville Power Administration at the wholesale preference customer rate.

The Tribes have delegated their management of the utility to a five member Utility Board comprised of tribal members and non-members. This Board is assisted by a seven member Consumer Council which is similarly comprised. Under tribal management, the mission of the utility has been redirected towards better customer service and greater local control. This year, the utility will have completed the first long-range planning documents (including a 20 year load forecast

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2/ Tribal management of the Flathead Agency Power Division was recommended in the 1985 Comprehensive Report because of the important role electricity management will play in the Tribes' future when they take over management of Kerr Dam in the year 2015.

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and 10 and 3 year construction plans) that have been prepared in its history.

Tribal Management of the Safety of Dams Program

The Flathead Reservation has more unsafe dams than any other Indian Reservation in the nation. One-fourth of the BIA's "top 40" unsafe dams (there are 54 nation-wide) are Flathead Project dams. Concerned about this problem, the Tribes contracted the Safety of Dams program at the project in February, 1989, through the Indian Self-Determination Act. The Tribes, in turn, have subcontracted with the BOR to perform most of this work under the supervision of the Tribes' dam safety coordinator who was hired in May, 1989. The Tribes are moving swiftly to perform the necessary verification studies and fix the dams. The BOR's tentative six year projection of the cost of of SOD work on Flathead totals more than $43 million. These dams pose a major threat to the public and property on the Reservation, and it is imperative that this program be adequately funded.

Tribal Water Rights Quantification

The issue of water rights is ever present on the Reservation and at the Project. The quantification of the Tribes' instream and consumptive water right will take years. The Tribes are formally engaged in water rights negotiations with the Montana Reserved Water Rights Compact Commission. The Montana Legislature has established a July 1, 1993,

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deadline for state/tribal compacts to be negotiated. Until such time as the Tribes' water rights are negotiated through a state/tribal compact, or resolved through litigation, the project will have to continue with its practice of establishing interim instream flows on Project-impacted streams.

Attachment: Appendix

This Appendix contains a few examples of documents evidencing a collusive relationship between the Irrigation Districts and former Project Engineers. The attached documents are only a small, but representational sample of a much larger volume of similar documents.

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Item	Description of Document
A-1	Correspondence from JBC attorneys to Project Engineer regarding relicensing of Kerr Dam, Tribes' request for increase of annual rentals on Kerr Dam, turnover of the project to the districts, and water rights litigation. (May 2, 1978)
A-2	JBC board meeting minutes wherein the board directs the Project Engineer to call JBC attorneys and get the attorneys' advice on water rights matters in United States v. Abell (a case in which the JBC attorneys represent waterusers who are being sued by the United States). (May 5, 1979)
A-3	JBC board committee meeting minutes reflecting the Project Engineer's (Murl Axtell) and the FIIP Power Superintendent's (Joe Nelson) participation in public relations with the JBC's "public relations man" regarding newspaper publications. (August 26, 1983)
A-4	JBC board meeting minutes wherein the JBC asked the Project Engineer to call their attorney regarding potential JBC intervention in the Tribes' request for an increase in the annual rentals from Kerr Dam. The JBC also directed the Project Engineer "to get all the information needed to organize the Board of Control, draw up plans, using Jean Turnage [JBC attorney] where necessary, and send information to Commissioners prior to the next meeting." The Project Engineer also reported his conversation with Senator Melcher's assistant about "financing legislation" for the Kootenai Falls Project. (July 22, 1978)
A-5	Cover letter from Project Engineer to JBC proposing agenda for quarterly JBC meeting, which included "Your wishes on a document of takeover. . . . The Walton case and Attorney fees". The enclosure included a December 15, 1978 letter from the JBC attorney to the Project Engineer thanking Mr. Moon for payment of attorneys fees and updating the Project Engineer on the Walton litigation. (January 19, 1979)
A-6	JBC board minutes reflecting JBC request to have Project Engineer attend upcoming political meeting in Washington, D.C.. Project Engineer in attendance. (April 26, 1983)

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May 2, 1978

Mr. George L. Moon
Project Engineer
Department of the Interior
Bureau of Indian Affairs
Flathead Irrigation Project
St. Ignatius, Montana 59865

Dear George,

This rather long letter will bring you up to date on various facets of activities and proceedings affecting the interests of the districts.

The Relicensing of the Kerr Project No. 5

As you know, on November 5, 1976, the Federal Power Commission (now the Federal Energy Regulatory Commission) issued an order allowing the Districts to intervene in the relicensing proceeding. There still has been no notice of hearing in this case, and accordingly, the time for other parties to seek intervention (for example, the Secretary of the Interior) has not yet come. However, as you know, we have already petitioned the Secretary to intervene on behalf of the Districts to make sure that the power blocks are given to the Districts under the new license. We did this in July of 1977. We understand that the matter is still under consideration

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by the Department, and probably will not be decided until the time for making formal petitions for intervention arrives.

Annual Charge Proceeding

This is the proceeding resulting from the Tribes' request for an increase of the annual rentals paid and to be paid to them under License No. 5, which expires in 1980. You will recall that we petitioned to intervene in this proceeding as well, but that the Federal Energy Regulatory Commission denied our petition on the ground that the Districts' interests are not involved in this proceeding, and can be adequately protected in the relicensing proceeding. The denial was expressly without prejudice to renewal if circumstances warrant.

Because we basically agree with this proposition, we accepted the ruling of the Commission. When and if it becomes important for the Districts to take part in the annual charge proceeding, we will so advise the Districts and recommend filing another petition to intervene. Most likely, this would be done, if at all, by the filing of a brief after the hearing which will begin May 24.

The only reason we petitioned to intervene in the first place was to be absolutely certain of preserving the rights of the Districts with respect to the power blocks in the relicensing proceeding. Since the Tribes and the Department

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of the Interior both opposed our petition, stating that the Districts' rights in the relicensing proceeding would not be affected, we were satisfied that it would not be necessary to intervene. Our initial concern, and the reason we will monitor the proceedings to decide ultimately whether or not the Districts should participate to some extent, is that it is not inconceivable that the annual rental proceeding could turn on an analysis of the costs, legitimate and otherwise, of the Montana Power Company as licensee. If it were argued by the Tribes, for example, that the power blocks given to the Districts are not lawful and legitimate, and hence should not be taken into account as an expense or deduction relating to the Montana Power Company's cost, then we might want to intervene to make a showing as to the legitimacy and lawfulness of the power blocks. We would not want such an issue passed upon without our participation.

Turnover of the Project to the Districts

You will recall that on June 1, 1977, we petitioned on behalf of the Districts for the Secretary of the Interior to turn the irrigation project over to the Districts. The Tribes filed opposing views in November and we wrote in early January inquiring as to the status of the matter. On January 30, we received a letter from Thomas W. Fredericks, Esq. Asso-

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ciate Solicitor for Indian Affairs, stating that his office was studying whether turnover is mandated as we contended. In a recent telephone conversation with Charles E. O'Connell, Esq., in the Solicitor's Office, we learned that he would expect to make a recommendation on this question to Mr. Fredericks sometime after the hearing on the annual charges matter, which begins May 24. Thereafter, if it is determined that turnover is not mandated, Charlie would then address our contention that turnover should be ordered as a matter of discretion and practice.

In your letter of February 22, 1978, George, you stated, first, your general understanding that the language of the statute made the payment of deferred construction costs the critical thing, and not payment for title to the land as distinguished from irrigation project construction costs. You also stated, second, as you had previously, the general view that turnover would be triggered by discharge of all construction debt against more than one-half of the land, and not discharge of one-half of the total debt against all the land.

We understand these interpretations and that they are the views commonly held. However, on behalf of the Districts (based on what we think is a reasonably good interpretation of the statutory language) our first contention is that it is payment for title to the land, without regard to the de-

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ferred charges for the irrigation project, which under the wording of the statute triggers the mandated turnover of the project to the landowners. It is for this reason that we asked you about proof of title to the land, which would show payment therefor. However, in view of your response as to the difficulty of obtaining this, we have made certain that the Solicitor's Office understands that the Department will undertake to determine this on its own, and would not reject the Districts' petition because of lack of proof in this regard.

If we do not prevail as to this first contention, then we would argue that under the present day state of affairs, payment of a majority of the debt should be the significant thing triggering turnover, since no part of the land will be free of debt for construction costs under the present scheme until all of it is. If we prevail as to this, the Districts should then consider whether or not to pay the amount necessary to exceed repayment of one-half the debt, so as to be entitled to turnover. If we lose this point as well, we fall back to the Secretary's power, in his discretion, to turn the project over to the Districts even though this may not be required.

I hope this clarifies the matter somewhat. Don't hesitate to give me a call if you wish to discuss it. It is

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cases in which we are interested. A one-month trial in the United States District Court for the Eastern District of Washington has just been completed in the case of United States v. Walton, involving the extent of the rights of non-Indian successors to Winters reserved water rights. The parties are now preparing proposed findings of fact and conclusions of law, and oral argument is scheduled for June 16. Judge Neal had indicated that he intends to decide the case shortly thereafter. Mr. Burchette was of the view that the court would afford at least some recognition to the rights of the non-Indians.

In the Bel-Bay case, pending in the United States District Court for the Western District of Washington, Judge Voorhies has granted partial summary judgment against the State of Washington, holding that it has no jurisdiction to appropriate water on an Indian reservation. The State of Washington is attempting to have this ruling certified to the United States Court of Appeals for the Ninth Circuit for interlocutory review. Judge Voorhies refused to rule at the present time on the issue of the extent of the rights of non-Indian successors to Winters rights, holding that the issue was not ripe for review at the present time and should be resolved after a trial. Mr. Burchette thought that Judge Neal

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in Walton would be guided by whatever decision Judge Voorhies reaches on the Winters issue in Bel-Gav.

Because of the importance of these cases to the Districts, we will monitor them with a view towards possible eventual participation as amicus curiae in connection with the Winters issue at either the trial or appellate level.

Best wishes.

Sincerely,

Frank J. Martin, Jr.

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Flathead Irrigation Project
St. Ignatius, Montana
- 59865

MINUTES OF JOINT BOARD MEETING
May 5, 1979

Members Present:

Flathead	Mission	Jocko	Flathead Project
Everitt Foust	David Johnson	Morris Beck	George Moon
Glen Bingham	Joe Lee		
Robert McConkey	Frank Toavs		
Chas. Caffrey	Ray Jensen		

Everitt Foust called the meeting to order at 8:15 P.M.

Everitt Foust reported on his interview with Sam Haddon, Attorney at Law of Missoula, indicating his satisfaction.

Everitt Foust said he had received calls from water users questioning him about the serving of a summons that would require them to appear in court and defend their water rights to water from the Flathead River Basin.

The purpose of this meeting was to determine how, and to what extent, the District's Attorney would serve the individuals of the districts involving the adjudication of water on the Project.

Chas. Caffrey made a motion that George Moon call Frank Martin Jr. and get his advice on some questions at hand. Dave Johnson seconded the motion. All voted yes.

1. First step of individuals in the procedure of handling the summons.
2. Does the attorney handle individual or as a group.
3. What about Secretarial Water Rights or State Rights.
4. Clarify who Sam Haddon is working for.
5. How to handle Sam Haddon's billing.

Ray Jensen was asked to call Selmer Detert and Mrs. Robert Jensen regarding the summons.

Submitted by W. Ray Jensen
May 8, 1979

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FLATHEAD JOINT BOARD OF CONTROL

BOX G.
ST. IGNATIUS. MT 59865

August 26, 1983

Pursuant to action taken at the Joint Board meeting of August 18, 1983, to contact their public relations man and have him write articles for publication, Everitt Foust called a meeting with George Ostrum, Murl Axtell, Joe Nelson, Dean Stipe and Ray Jensen to discuss material to be published.

Ray Jensen was asked to contact Dwight Tracy in reference to his article on Kerr Dam license to see if he would allow the Board to help him give more detail on the subject in next weeks paper.

It was decided that George should work on history of the Project, construction, finance, operation management, policy and a plan of where we go from here. He was asked to give this some thought and present to the Board what he would propose to do, along with a budget to be accepted or altered by the Board.

The possibility of mailing some of this material to consumers of the Project or putting it in a booklet form was discussed.

Joe Nelson said he was negotiating with Montana Power Company to supply all the Project energy needs. He also thought the Commissioners should give some thought to expanding the low cost block of power at the relicensing hearings.

Ray Jensen
Secretary

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Flathead Irrigation Project
St. Ignatius, Montana
59865

MINUTES OF JOINT BOARD MEETING
July 22, 1970

Members Present:

Flathead	Mission	Jocko	Flathead Project
Les Stellman	David Johnson	Gordon King	George Moon ✓
Chas. Caffrey	Walter Cordis		
Everitt Foust	Ray Jensen		
Glen Bingham			
Robert McConkey			

Everitt Foust called the meeting to order at 8:35 P.M.

The minutes of the April 21st meeting were read and approved.

At the last meeting the commissioners asked George Moon to call their attorney to see if the Districts should not intervene in the Tribe's request for an increase of the annual rentals of Kerr, that is before the Federal Energy Regulatory Commission. He reported that he, very shortly after the request, received an extensive report from Frank J. Martin, Jr. which included the following:

> "You will recall that we petitioned to intervene in this proceeding, but that the Federal Energy Regulatory Commission denied our petition on the ground that the District's interests are not involved in this proceeding, and can be adequately protected in the relicensing proceedings. When and if it becomes important for the Districts to take part in the annual charge proceedings, we will so advise the Districts and recommend filing another petition to intervene."

After some consideration, Glen Bingham made a motion that before the next legislature session the Districts request their State Senator and Representative introduce legislation that would allow an existing irrigation district, with power system, to operate that power system.

the matter of the Board of Control, the Mission District on the second ction received approval of the water users 71 to 10. Charles Caffrey made otion, seconded by Less Stellman, that the business of organizing a Board Control be tabled until the next meeting, all voted yes. Everitt Foust d he would go with Gordan King and they would try to interest the Jocko trict in being part of the Board of Control.

Les Stellman moved that George Moon get all the information needed to organize the Board of Control, draw up plans, using Joan Turnage where necessary, and

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send information to the Commissioners prior to the next meeting. Glen Bingham seconded the motion and all voted in favor.

Glen Bingham moved that beginning with the fourth year, District employees will accrue 12 hours leave each month. Les Stellman seconded the motion, and all voted yes.

The Kootenai Falls proposal is not moving noticeably. However, George Moon said he had talked with Senator Melcher's assistant about financing legislation and he had placed $50,000.00 in the budget as a lined item for investigation money.

Submitted by W. Ray Jensen
July 28, 1978

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IN REPLY REFER TO:
1103-09

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Flathead Irrigation Project
St. Ignatius, Montana

January 19, 1979

District Commissioners
Irrigation District Boards

Dear Mr. Commissioner:

It is time for our quarterly meeting again, and I suggest we meet Saturday, January 27th at 8:00 P.M. here at the Mission office. (Sorry, Les, the dairy farmers can't afternoon meet.)

I suggest we can discuss:

a. Your wishes on a document of takeover, operating rules and bylaws of a joint board and a report from your committee on this matter.

b. The Walton case and Attorney fees.

c. Joining or withdrawing from the Water Users organizations as outlined in the letter sent to you on December 20th.

I am enclosing a letter from the Attorneys for your information and the Quarterly Report of financial expenditures from Joan.

See you Saturday the 27th.

Best regards,

George L. Moon
Project Engineer

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December 15, 1978

Mr. George L. Noon
Project Engineer
Department of the Interior
Bureau of Indian Affairs
Flathead Irrigation Project
St. Ignatius, Montana 59865

Re: Your File No. 1103-09

Dear George:

Thank you very much for your letter of December 8, and the accompanying warrant from the Flathead District representing their share of our firm's November 14, 1978 statement. We very much appreciate the attention which the Districts are giving to the payment of our statement.

John Sharer and I are continuing to follow the Walton case closely. John spoke with Richard Price, counsel for Mr. Walton, on December 6, and learned that Mr. Veeder, counsel for the Colville Tribe, has asked the District Court to reconsider a portion of its Findings of Fact which excluded one of the Indian allotments from the water rights quantification. Judge Neil is expected to rule on the request for reconsideration at the beginning of January. In any event, the request for reconsideration will not affect the Court's legal reasoning.

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Since no final order has been entered yet in the Walton case, the time has not yet come for the parties to appeal. Mr. Price stated that his client had not yet decided whether to appeal, and that he would be discussing the possibility of an appeal with us once the Court's final order is entered.

We have also checked on the status of other cases in the West presenting the issue of the Winters rights of non-Indian purchasers of Indian allotments. In the Bel-Bay case, pending in the United States District Court for the Western District of Washington, Judge Voorhees has reversed his own ruling that the State of Washington has no jurisdiction to appropriate water on an Indian reservation. In reversing himself, Judge Voorhees relied upon the United States Supreme Court's March 6, 1978 decision in Oliphant v. Suquamish Indian Tribe, concerning the question of tribal criminal jurisdiction over non-Indians. The parties are preparing for trial, and we were informed that a trial date has not yet been set.

Another case presenting the Winters rights issue is United States v. Adair, pending before Senior District Judge Solomon in the United States District Court for the District of Oregon. This case has been submitted to the Court for consideration on the basis of affidavits, exhibits and briefs. Ronald Redd, a Department of Justice attorney who is involved

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in the case, informed us that Judge Solomon will probably decide the case sometime during the Spring of 1979.

Please let me know if you have any questions. Best wishes for the Holiday Season.

Sincerely,

Frank J. Martin, Jr.

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FLATHEAD JOINT BOARD OF CONTROL

BOX G.
ST. IGNATIUS, MT 59865

MINUTES OF JOINT BOARD MEETING
April 26, 1983

MEMBERS PRESENT:

Flathead	Mission	Jocko	Project
Everitt Foust	David Johnson	John Saunders	Murl Axtell
Eddy Magera	Joe Lee	Morris Beck	Dan Connors
Glen Bingham	Frank Toavs	Gordon King	
Bob McConkey	Ray Jensen		
Jim Knutson			

This was a special afternoon meeting called to hear a report of findings of selected structures on the Project by J-U-B Engineers, Inc. They showed slides and a prepared booklet with maps, colored pictures and detailed explanations.

Eddy Magera made a motion, seconded by Glen Bingham, that Murl Axtell accompany Everitt Foust when he goes to Washington, D. C. on the upcoming Project business. Voting was unanimous.

The Board discussed Frank Martin's letter suggesting they have a direct answer from the Department on the question of Project management. All members were in support of this suggestion.

Everitt Foust encouraged all who possible could to attend the weed meeting to be held in Ronan.

Ray Jensen
Secretary

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SPECIAL
USBR DENVER OFFICE

TRANSFER OF ACTIVITIES RELATING TO INDIAN IRRIGATION
AND RELATED POWER PROJECTS FROM
THE BUREAU OF INDIAN AFFAIRS TO THE BUREAU OF RECLAMATION

I. Purpose. - This document provides for the transfer of responsibilities and activities relating to the design, construction, operation, maintenance, rehabilitation, replacement, and safety of Indian irrigation and related power projects from the Bureau of Indian Affairs (BIA) to the Bureau of Reclamation (BOR).

Due to the nature of this issue, some of the personnal and financial information and data considered essential for a thorough evaluation were not readily available at this time. Upon approval of the transfer of activities, specific estimates regarding workforces and funds to be transferred will be provided, as requested by the Secretary.

II. Current Activities and Organizations of the Agencies. - Although both agencies are a part of the Department of the Interior and have somewhat overlapping missions and functions in terms of water resource development and management, the agencies have acted independant of each other, with the exception of those projects in which BIA has specifically requested the assistance and/or involvement by the Bureau of Reclamation.

BIA implements its responsibilities for operation and maintenance (O&M), rehabilitation, and replacement of Indian irrigation projects through district and project offices and periodically requests technical support from BOR. Actual O&M is usually performed through contracts and agreements with Indian and non-Indian entities who provide the O&M services. BOR provides technical evaluations and reports on the status of maintenance of irrigation projects on a reimbursable basis, as well as safety of dams activities performed under Memorandums of Understanding (MOU) between the BIA and BOR. Inspections and reports of distribution systems are performed at the request of BIA on a selective basis.

Funding for O&M activities is paid for in a variety of ways, including annual BIA appropriations on a reimbursable or nonreimbursable basis, as required by law. The cost for rehabilitation and replacement of irrigation works is not usually included in BIA O&M appropriations.

A. The Bureau of Indian Affairs. - As of 1986, the BIA provided a wide range of services - including education, health and welfare, job training, housing, and a number of other important programs - to 308 tribes, composed of 786,000 Indians, Eskimos, and Aleuts in 32 states.

The BIA also performs a major role in the administration of Indian land and water resources. As of 1982, the BIA assisted the Indians in administering about 42.2 million acres of tribally owned lands,

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10.2 million acres of individually owned lands held in trust, and 947,000 acres of federally owned lands. Of this total acreage, 677,000 acres are within Indian irrigation projects, including 523,000 acres of Indian-owned lands and 154,000 acres of non-Indian owned/farmed lands. Of the 523,000 acres of Indian-owned lands, a total of 201,000 acres (38 percent) were farmed by Indians, 245,000 acres (47 percent) were farmed by non-Indians, and 77,000 acres (15 percent) remained idle. In 1982, the estimated gross crop value from lands located within Indian project areas totaled $116 million - $95 million on Indian-owned lands and $21 million on non-Indian owned/farmed lands.

There are a total of 71 Indian irrigation projects, administered by 6 different BIA area offices, as follows: 29 projects, Phoenix, Arizona; 23 projects, Albuquerque, New Mexico; 7 projects, Portland, Oregon; 6 projects, Billings, Montana; 5 projects, Sacramento, California; and 1 project Navajo, Arizona (refer to appendix 1). Included among these projects are an estimated 143 structures. Many are small rolled earthfilled dams used for watering livestock that were not constructed to the standards used by BOR.

Construction and O&M of Indian irrigation projects are budgeted under separate accounts - Irrigation Systems Activity and the Irrigation and Power O&M program, respectively.

The principal function of the Irrigation Systems Activity is to develop water supplies and distribution systems needed to irrigate all practicably irrigable Indian lands. This includes the construction of new irrigation systems and the extension and/or rehabilitation of existing irrigation systems. In FY 1986, the Irrigation Systems Activity account (No. 1000) had a budget of $18.2 million and a work force of 81 FTE's.

In addition to the Irrigation Systems Activity account, the Irrigation and Power O&M account (No. 1800) provides funds to pay the O&M assessment for those Indians who are financially unable to pay their assessments and where the United States is required by law to provide these services at no cost to the Indian users. In 1986, this program had a budget of $7.9 million and a work force of 17 FTE's.

The total budget of these two accounts was $26.1 million, including a work force of 98 FTE's.

B. The Bureau of Reclamation. - The passage of the Reclamation Act of 1902 established the BOR as the principal agency in charge of developing irrigation projects throughout the West. Since that time, BOR has played a dominant role in O&M of major irrigation projects. As of 1984, there were 225 operating BOR projects which included 355 storage

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reservoirs, 360 diversion dams, 15,843 miles of canals, 1,333 miles of pipelines, 275 miles of tunnels, 36,179 miles of laterals, 16,569 miles of project drains, 243 irrigation pumping plants over 1,000 horsepower, and 52 hydroelectric powerplants.

Agricultural production on BOR project lands plays a major role in United States agriculture. In 1984, almost 10 million acres of BOR land were irrigated which produced a gross crop value of about $7.3 billion.

As a world renowned agency involved in water engineering projects, BOR continues to perform as a consultant to developed and underdeveloped nations in numerous matters, relating to the development and O&M of irrigation and power systems. At this time, BOR is actively involved in major projects with a number of different foreign countries, including Pakistan, Egypt, China, and Spain.

A common method of expressing expenditures for O&M, rehabilitation, and replacement is on the basis of cost per irrigated acre. Over the 10-year period from 1976-85 (inclusive), BOR had an average annual cost of nearly $18 per irrigated acre.

III. Alternatives for Action. - There are three courses of action offered for administering the construction, extension, O&M, replacement, and rehabilitation of Indian irrigation and related power projects.

Alternative 1. - Under this option all of the activities relating to the construction, extension, O&M, replacement, rehabilitation and safety of Indian irrigation and related power projects, including the budgetary processes, will be transferred from the BIA to BOR, as scheduled in appendix 2.

This option would consolidate the O&M of Indian irrigation projects with the irrigation projects of BOR, thus more fully utilizing the extensive experience that BOR has in administering O&M, rehabilitation, replacement, and design of irrigation storage and conveyance systems. The BIA safety of dams responsibilities would also be transferred to BOR under this option. This transfer of O&M responsibilities to BOR would eliminate some of the duplication of similar work activities currently being performed by personnel of the two agencies and, thus, would result in a more efficient use of personnel, office space, and equipment. Although there may be some reassignment of personnel, the actual displacement and relocation of manager and non-manager positions will be minor. Preliminary estimates support an overall annual savings of approximately 10 percent in salaries and related benefits.

Based on the above stated reasons, this option is recommended as the preferred alternative.

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Alternative 2. - Under this option, the responsibility for administering the construction, extension, O&M, rehabilitation, and replacement of Indian irrigation and related power projects would be shared between BIA and BOR. BIA would retain the responsibility for the oversight and budgetary processes and would request annual appropriations for these activities. BOR would be responsible for the actual construction, extension, O&M, rehabilitation, and replacement of both the irrigation and power generation facilities.

Although this option does provide the BOR with the responsibility for O&M activities, the separation of the budgetary process and the actual work to be performed may result in some confusion in administering the overall program.

The impact on maintenance equipment and on space, as well as non-manager positions, would be similar to alternative 1, while the administrative requirements would be equal to or exceed the present situation, alternative 3.

Alternative 3. - Under this option, BIA would continue to retain responsibility for all activities related to the administration and O&M of Indian irrigation projects and secure technical support whenever needed from BOR. Through existing MOU's - BOR is reimbursed for the design, construction, maintenance, rehabilitation, replacement, and safety of dams support it provides to BIA.

In this option, the BIA would rely upon the services of BOR in technical matters relating to construction, extension, O&M, rehabilitation, and replacement of irrigation and power systems. Such an arrangement results in overlapping activities of the agencies and other inefficiencies in the use of resources.

IV. Recommendation. - Alternative 1 is the most viable option and is therefore recommended. This option is recommended because there would be cost savings resulting from a 10 percent reduction in the number of supervisors and non-supervisors. Of even greater importance, there will be increased program efficiencies and reduced training needs because BOR has a larger pool of technical experts and engineers with greater experience in most phases of construction, and O&M of irrigation and related power systems.

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PREPARED STATEMENT OF THE FLATHEAD JOINT BOARD OF CONTROL

INTRODUCTION

The principal purpose of this hearing was to examine the record of the BIA in administering Indian irrigation projects. Unfortunately, too much attention was focused on the BIA. Scant little attention was directed by the witnesses on the irrigation projects themselves. Indian irrigation projects are valuable national resources. This testimony will seek to identify the problems faced by one of these resources, and suggest federal solutions to those problems.

After decades and millions of dollars devoted by Congress to construct the Flathead Indian Irrigation Project ("Project"), neglect and decay threaten its usefulness. Some may profess to welcome the demise of irrigated agriculture in the Flathead Valley. However, the loss of the Project would devastate not only the entire Reservation economy, but also the thousands of people who, like their parents and grandparents before them, depend on water from the Project for their living, and whose children hope to do the same.

The Project's decline is the result of neglect borne of dwindling Congressional interest as well as available federal resources. Vacillating federal policies and practices (as alluded to by the Confederated Salish & Kootenai Tribes in their written testimony) have exacerbated differences between the tribal government and non-tribal members living on the Reservation, who constitute the great majority (80%) of the Reservation population. This Congressional disinterest stems in large part from reluctance to address the many complex problems that have arisen, including

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issues related to the operation of the Project. If the Project is to continue to be useful, such neglect must end. The question now is not whether to save the Project and the prosperity it has brought to the valley, but how Congress can save the Project.

Issues surrounding the operation of the Project, while important, are secondary to ensuring its continued utility. Their resolution in favor of one interest or another must not be used to hold hostage the very future of the Project. A Congressional commitment to ensuring the future of irrigated agriculture in the Flathead Valley by addressing the rehabilitation needs of the Project is needed to move the debate ahead to questions of how best to operate the Project to preserve the rights of both the Tribes and the irrigators it serves. The absence of that commitment promotes unwarranted fears and exaggerated demands on all sides.

THE RESERVATION AND THE PROJECT

The Treaty of Hellgate, in 1855, created the Flathead Indian Reservation, located in what is now northwestern Montana, for the "exclusive use and benefit" of the Confederated Tribes. Fifty years later, Congress required the survey of all lands within the Reservation, with allotments given to tribal members and all surplus lands[1] opened to settlement and entry, and "disposed of under the general provisions of the homestead, mineral and town-site laws of the United States." Act of April 23, 1904, 33 Stat. 302.

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[1] With the exception of timber lands which were sold at auction or by sealed bids, and two sections of each township granted to Montana for school purposes.

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In 1908, Congress appropriated funds to plan and construct a system to irrigate lands allotted to individual Indians and unallotted irrigable lands owned by non-tribal homesteaders.[2] The predecessor of the Bureau of Reclamation (BOR) then designed and began construction of the irrigation works. Within a month, Congress amended the 1904 Act authorizing the entry and homesteading of unallotted lands to provide for the turnover of the management and operation of the Project to the owners of the land it irrigates after the repayment of certain costs associated with construction of the irrigation works.[3]

From these and later statutes enacted after the Treaty of Hellgate, the Project grew. It now supplies water to irrigate 127,079 acres in the heart of the Reservation. In 1925, the BOR transferred administration of the Project to the Bureau of Indian Affairs (BIA). The Project delivers water from 16 reservoirs by way of 1,077 miles of main canals linked with almost every stream and river on the Reservation. Of the acres served by the Project,

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[2] Act of April 30, 1908, 35 Stat. 83. The Act of April 23, 1904, 33 Stat. 302 at § 14 provided for the expenditure of one-half the proceeds from the sale of lands for "the construction of irrigation ditches, the purchase of stock cattle, farming implements . . . to aid Indians in farming and stockraising." This was not, however, the inception of the Project as a systematic plan for bringing irrigation to the Flathead Valley. That was to occur four years later when Congress completely revised this section. Act of May 29, 1908, 35 Stat. 448. The import of this distinction being that while Congress initially intended to assist Indian allottees in developing an agricultural mode of living, the development of the Project was undertaken not only for the benefit of Indian allottees but also non-Indians pursuing agriculture on the Reservation.

[3] Act of May 29, 1908, § 15, 35 Stat. 448, amending § 9 of the Act of April 23, 1904, 33 Stat. 302.

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approximately 91.5 percent are held in fee, not subject to Tribal or federal trust restrictions. Irrigated agriculture generates approximately $25 million in economic activity each year and directly provides income for over 7,000 people. Thus, the Project provides income for nearly one-third of the Reservation population, and nearly double the tribal population.

Largely as a consequence of the opening of the Reservation and the development of the Project, non-tribal members constitute approximately 80 percent of the Reservation population.[4]

The Joint Board of Control (Joint Board) represents the fee landowners and leaseholders, both tribal members and non-tribal members, who irrigate 113,225 acres.[5] The Joint Board is comprised of freely-elected representatives of three irrigation districts, the Flathead, Mission and Jocko Valley, served by the Project. These irrigation districts were formed pursuant to Montana statute as required by Congress. They were established with the express purpose of contracting with the United States to effect the repayment and turnover provisions of the Congressional enactment creating the Project. The Flathead District entered such a contract in 1928, the Mission District in 1931, and the Jocko District in 1935.

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[4] In 1980, the Reservation population was 24,399, of which 3,771 were tribal members.

[5] Tribal and trust lands account for the 13,854 acres served by the Project, but not a part of the Joint Board. Thus, the total acreage irrigated by the Project is 127,079.

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Pursuant to their district's repayment contracts with the federal government, the irrigators and their predecessors represented by the Joint Board have repaid the United States approximately $7.5 million of the $12.8 million total indebtedness. The Joint Board was formed in 1981 for the main purpose of implementing these "turnover" provisions. The Joint Board is a branch of local government under Montana law, possessing the authority to levy assessments, issue bonds, allocate water resources, and institute suits to enforce, maintain, protect or preserve any and all rights, privileges, and immunities enjoyed by the irrigation districts and their members.

Indisputably, the Project has forever altered the landscape, hydrology, culture, and economy of the Reservation. The mode of its operation and management unquestionably affects Tribal rights. It equally affects the property rights of individual irrigators, both tribal members and non-tribal members, to whom the United States owes statutory and contractual obligations.[6]

OPERATION OF THE PROJECT

The operation of the Project should serve Congress's original purpose to deliver water for irrigation as well as other legitimate interests. Thus, Congress should appropriate funds for rehabilitative betterment of the Project. This would result in increased efficiency and allow operation of the Project in a manner protecting the rights and interests of all parties.

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[6] Montana is now engaged in a general stream adjudication which will quantify all water rights in the State, including the Tribes' federal reserved right, unless negotiations between the Tribes and the State result in a compact.

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The BIA has been responsible for the Project for over sixty years. The Joint Board, no less than the Tribes, is concerned with the efficiency and responsiveness of the BIA in operating and managing the Project. The method of operating the Project can seriously impair the entire range of interests of the Joint Board's members, from water rights to land values. Similarly, the operation of the Project can significantly and negatively affect Tribal rights. Unlike the Tribes however, the Joint Board does not believe that improvement in management alone will resolve existing differences. Without rehabilitating the Project, the increased efficiency that would result, improved management would not supply the water needed to meet the concerns of the Tribes as well as those of the irrigators.

In proposing better Project management but neglecting Project rehabilitation, the Tribes actually propose only that their interests be placed above all others. To accomplish this, the Tribes have insisted that the Bureau of Reclamation (BOR) management team on the Project be removed. Thus, the Tribes want the Project to remain entirely in the hands of the BIA, despite the fact that in presiding over the operation of the Project for over 60 years, the BIA has built a record which the Tribes routinely disparage as inefficient, unresponsive, and neglectful of Tribal rights. At the July 12, 1990 committee hearing, this sentiment was repeated by every Tribe which testified concerning the operation of Indian irrigation projects by the BIA.

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The Joint Board of Control agrees that the BIA has mismanaged the Project, but, unlike the Tribes, it does not believe the BIA should have the opportunity to continue this mismanagement. The Joint Board urges this committee to examine the benefits that would accrue to the irrigators and the Tribes if the Project were managed by the BOR. Significantly, the BOR was roundly praised by most tribal witnesses in the July 12 hearing for its management of other, non-Indian irrigation projects. With its greater expertise and better record of efficiency in operating irrigation projects, the BOR is the logical choice to operate the Project in a manner which takes into account the rights of all parties. This would allow the BIA to continue to fulfill the government's trust obligations to the Tribes. It would also relieve the BIA of attempting to fulfill the government's statutory and contractual obligations to the irrigators, which at times conflict with its trust obligations to the Tribes.

The operation of the Project is moving toward a multiple-use system. The Project was originally conceived and operated as a single-use project, to deliver water for irrigation purposes. While the Joint Board is not fundamentally opposed to operating the Project based on multiple-use priorities, such a change in the system of operation must be accompanied by a substantial adjustment in the costs to be repaid by the irrigators. The extent and cost of the Project was significantly increased by its design as a single-use project, and its usefulness for irrigators will be significantly decreased if it is operated as a multiple-use project, particularly if it is not rehabilitated.

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Tribal interests and those of irrigators served by the Project are not always in conflict. The Tribes and irrigators have in the past worked together for the benefit of the Project, such as in working to get funds appropriated for the Safety of Dams Project. Similarly, given the economic significance of irrigation for the Reservation's population, the Joint Board believes that its interests and those of the Tribes coincide in the need for rehabilitating the Project and continuing its viability. Currently, the water delivery system operates at 50% efficiency at best, meaning half the water needed for irrigation and for instream flows is lost in transit. Dams, diversion structures, turnouts and other works are severely degraded after years of neglect. (The 18-24 inch trees growing out of some dams on the Project strongly testify to this neglect.) Rehabilitation would benefit not only irrigation but fisheries, the environment as a whole, and the Reservation economy. A 1976 BOR study estimated that increased efficiency from rehabilitation could result in delivery of an additional acre foot of water per acre. This would increase gross revenues by $10 million a year, which is $10 million more that could be brought into the Reservation economy to the benefit of the Tribes as well as irrigators.

But the interests of the Tribes and irrigators served by the Project do in fact conflict in some cases. The Joint Board has opposed tribal control over the Project and the water resource because the Tribes' approach to management of the Project would appear to take little, if any, account of the rights of irrigators. For example, under § 518 of the Federal Clean Water Act, Tribes

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seeking treatment as a state are required to submit a statement to EPA explaining the scope and grounds for their jurisdiction on the Reservation. The Confederated Salish & Kootenai Tribes submitted a jurisdictional statement asserting jurisdiction over all persons and activities within the Reservation, including non-members who own land in fee on the Reservation. Significantly, within that jurisdictional statement, not once did the Tribes mention that there is a large irrigation project on the Reservation, let alone that it serves predominantly non-members who would come within the scope of their authority if they are treated as a state for all purposes under the Clean Water Act.

Perhaps most significantly, the Tribes, in October 1989, passed a resolution asking the BIA to begin the process to turnover the operation and management of the irrigation division to them pursuant to a contract.[7] In light of both the substantial rights of irrigators in the Project and the statutory and contractual obligations the United States owes the irrigators, the Joint Board of Control opposes any such contract. In this regard, amendments to regulations governing the 638 contracting process should be sensitive to the significant factual differences on the various reservations throughout the country.

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[7] The Tribes took this action days after the Joint Board dismissed a suit it had initiated against the United States to require turnover of the Project to the irrigators. The Joint Board dismissed the suit because of representations from the United States and the Tribes that it was an impediment to beginning negotiations concerning a variety of issues. To date, the Joint Board's efforts to engage the Tribes in such negotiations have proven futile.

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On some reservations where tribal members comprise the majority of the population, it may make sense to allow the local Tribe to contract most, and perhaps all, of the programs run by the BIA. On other reservations, particularly Dawes Act Reservations where a substantial majority of the population are non-tribal members, the BIA-operated programs should be examined closely to ascertain the impact on the assets and rights of non-tribal members.

On the Flathead Reservation, which is a Dawes Act Reservation, most of the population is made up of non-tribal members. Moreover, over 90 percent of the irrigators served by the Project are non-tribal members. In addition, as noted above, the federal government has statutory and contractual obligations to these irrigators to turn over the operation and management of the Project to them. Therefore, it appears inappropriate to allow the Tribes to contract the operation and management of the irrigation division. In conclusion, the general goals of the Self-Determination Act are commendable, but the Act must be implemented with sensitivity to the rights of non-tribal members as well as the Tribes, particularly on reservations such as the Flathead, where the great majority of the population are not tribal members.

The Joint Board and the Tribes have in the past often expressed their belief that their differences will be resolved satisfactorily only through negotiations. However, to date, substantive negotiations toward that end have not occurred, although the Joint Board has for the past nine months attempted to start the negotiation process with the Tribes, but to no avail.

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The Joint Board remains hopeful that some of the problems facing irrigators and the Tribes can be solved through negotiation. Rather than siding with either the Tribes or the irrigators, Congress can best assist this process by appropriating funds for Project rehabilitation. Along these lines, the Joint Board suggests that local guidance for assistance from Congress could be achieved by having the Committee staff work with the Tribes and with the Joint Board to produce an analysis of the Project's needs and a plan for its future which would protect and promote the rights and interests of all the parties.

The Joint Board thanks the Committee for the opportunity to submit this written testimony and for the Chairman's assurance that in the near future the Committee will hold an oversight hearing to explore more deeply the interests of irrigators. We look forward to that opportunity. Moreover, we ask to work with the Committee to develop a plan for the future of the Flathead Indian Irrigation Project.

JM/srg

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FLATHEAD JOINT BOARD OF CONTROL

P.O. BOX 639
ST. IGNATIUS, MT 59865
(406) 745-2090

THE FLATHEAD JOINT BOARD OF CONTROL AND THE FLATHEAD INDIAN IRRIGATION PROJECT

The Flathead Indian Reservation is located in one of the most beautiful valleys in western Montana, surrounded by 10,000 foot snow-capped mountains. The Reservation incudes 1.2 million acres south of Flathead Lake, the largest freshwater lake in the western U.S.

In 1980, the Reservation population was 24,399, including 3,771 Indians. The cities of Polson, Ronan and St. Ignatius are integrated communities which are economically and culturally similar to other western towns. A neutral history of the Reservation has never been published.

The Flathead Indian Irrigation Project was first authorized in 1908 as part of the opening of the Reservation to non-Indian settlement. Many descendants of the original settlers are still here. Project lands produce beef cattle, dairy products, seed potatoes, llamas and grains. Administered by the BIA, the irrigation system delivers water to 127,000 acres from 16 reservoirs through 1077 miles of main canals. While most irrigated acres are owned by non-tribal members, in fee, the Project serves tribal members as well. The 1990 operation and maintenance cost for landowners is $14.65 per acre.

The Flathead Joint Board of Control (JBC) is a Montana political subdivision representing the interests of irrigators within the Flathead Project. The owners of 113,225 acres of fee lands elect the JBC Board from three districts. The JBC was created in 1981 to accomplish the "turnover" of the Flathead Project from BIA to the water users, as provided in federal legislation and contracts with the irrigation districts. The irrigation districts were created in the late 1920's and early 1930's and are organized as political units under state law. They were created at the urging of the U.S. government and have signed repayment contracts with the government.

Most Indians on the Reservation are members of the Confederated Salish & Kootenai Tribes of the Flathead Indian Nation (S&K Tribes). The S&K Tribes are one of the strongest tribal entities in the United States. The S&K Tribal government has a total employment of about 800, including large legal and natural resource departments, and a $52 million annual budget. The S&K Tribes have led other Indian groups in seeking environmental and wildlife permitting powers, establishing tribal wilderness areas, creating tribal court systems, and reacquiring Reservation lands. In 1990, the S&K Tribes received $9 million in self determination contract funds from BIA, including $6 million for natural resource development.

Because of the age of the Flathead Project, many physical

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improvements are needed to meet modern standards, including dam safety work, canal linings, fish bypass and other facilities. The JBC is working to develop water quality programs for the Project, as well as rehabilitation and irrigation scheduling programs.

Construction costs for the Project are repaid through net power revenues from Kerr Dam, at the outlet of Flathead Lake near Polson. Kerr Dam, with a capacity of 180 MW was first licensed to Montana Power Company in 1930. In 1985, FERC issued a new license, which set a $9 million annual payment to the S&K Tribes. The 1985 license provides for possible transfer of Kerr Dam to the S&K Tribes in 2015.

In November 1989, the JBC and the S&K Tribes started preliminary discussions of general water issues. Although the S&K Tribes temporarily suspended discussions in May, 1990, the JBC remains hopeful that a comprehensive and fair settlement can be reached to nurture the land and water resources of the Flathead Valley.

For further information, contact:

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should be dropped. Charging a ward for trust services provided by the trustee is not defensible. Similarly, all efforts at redefining irrigation project categories, developing irrigation accounting systems, and collecting monies from Indian people for operation and maintenance should cease. These programs and activities are expensive and inappropriate. The money wasted on these efforts to charge Indian people for these trust services will be much better spent maintaining and developing irrigation systems. If the BIA spent as much effort on developing scheduled operation and maintenance plans as it currently does on its ineffective efforts at financial management, the irrigation projects could be in excellent condition, and this recommendation would be unnecessary.

2. Tribal governments are excluded from decision making on Irrigation matters. The water used by the United States in operating the various BIA irrigation projects is unquestionably the water reserved for the tribes. However, the tribal governments, as the elected representatives of the reservation residents, have been excluded from the decision making processes affecting Indian irrigation projects. The use of the Tribes' waters to operate the Bureau irrigation projects, which may serve primarily non-Indian recipients, constitutes a "taking" without due process. Recent efforts by individual tribes, such as the Unitah and Ouray to enter the decision making process through the Self-determination process have been disallowed by the Bureau of Indian Affairs. Similarly, efforts by the Confederated Salish and Kootenai Tribes of the Flathead Reservation to establish tribal control and use of their waters, and to conduct such conservation projects as instream flows for the protection of watershed and fisheries, have been either thwarted or have required expensive court battles before the tribes can exercise governmental responsibilities for the allocation and use of these valuable tribal resources.

BIA interpretations of existing regulations and the Self-determination Act have effectively precluded any tribal government involvement in irrigation at all. Regulations drafted and implemented by the Bureau decades ago, have resulted in an Irrigation effort which forbids landowners or landusers from assisting the irrigation project employees in routine operation or maintenance, and leaves the owners of the water, the tribes, completely out of the decision making process. Water user organizations, frequently dominated by non-Indians, are the only group that the Bureau irrigation project managers are required to consult under existing BIA regulations.

Each Tribe is in many ways unique, with differing resources, needs and cultural constraints. Additionally, many new and innovative approaches to water use, water conservation, and irrigation project construction and maintenance are available to the tribes. For these reasons, the government of each tribe should be afforded the opportunity to participate in irrigation project administration, under the current interpretation of national Indian policy and in concert with the Self-determination Act, as amended, and the government-to-government relationship which exists between the Indian tribes and the federal government.

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Boundaries of Irrigation Divisions
belonging to
The Flathead Joint Board of Control

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THE CONFEDERATED SALISH AND KOOTENAI TRIBES
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TRIBAL COUNCIL MEMBERS:
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Laurence Kenmille - Vice Chairman
Elmer "Sonny" Mongeau, Jr. - Secretary
Joe Dog Feaman - Treasurer
Louis Adams
Lloyd Irvine
Patrick Lefthand
Henry "Hank" Saylor
Antoine "Tony" Incashola
John "Chris" Lozeau

September 14, 1990

Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510-1102

Dear Senator Inouye:

Enclosed please find a legal memorandum prepared by the Flathead Nation's attorneys which you requested at the July 12, 1990 oversight hearing before the Senate Select Committee on Indian Affairs regarding Indian irrigation projects.

On behalf of the Flathead Nation I want to express our deepest appreciation for holding this hearing and for the courtesy afforded to us at the hearing.

Sincerely,

Laurence Kenmille

Michael T. Pablo
Chairman of the Tribal Council

MTP/cm

Enclosure

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September 14, 1990

M E M O R A N D U M

TO: Senate Select Committee on Indian Affairs

FROM: Confederated Salish and Kootenai Tribes of the Flathead Nation

SUBJECT: Oversight Hearing on Indian Irrigation Projects - Barriers to Tribal Contracting of Management of Indian Irrigation Projects.

Pursuant to the request of Committee Chairman Senator Daniel K. Inouye, the Flathead Nation is pleased to submit this memorandum which analyzes barriers to tribal contracting for the management of Indian irrigation projects.

This memorandum first analyzes existing contracting authority under the Indian Self-Determination Act and then addresses particular concerns relating to the Flathead Indian Irrigation Project ("Project").[1] Before doing so, a brief

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1/ In 1986, the Secretary of the Interior consolidated the Flathead Indian Irrigation Project into the BIA's Flathead

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overview of the Project is provided.

The Project

The Project is located in the heart of the Flathead Indian Reservation. The Flathead Reservation was reserved by the Confederated Salish and Kootenai Tribes in the 1855 Treaty of Hellgate (12 Stat. 975). In that treaty, the Tribes ceded most of their aboriginal homeland, which included much of what is now known as western Montana, to the United States Government. In return, they reserved a portion of their aboriginal holdings--the Flathead Reservation--and the exclusive right to hunt and fish on this Reservation.

In 1904, Congress, over the objection of the Tribes, passed the Flathead Allotment Act (33 Stat. 302). The Reservation was opened to non-Indian settlement by this Act, and members of the Tribes received individual allotments. This Act also authorized the construction of an irrigation system to serve the Indian allottees. The 1904 Act was amended in 1908 (35 Stat. 444) to allow non-Indians to be served by the irrigation project that was being constructed for the Indians. The irrigation system was intended to

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Agency. Under this reorganization, the irrigation component is now known as the Flathead Agency Irrigation Division and the power component is the Flathead Agency Power Division.

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benefit the non-Indians only in an incidental manner. The legislative history reflects the understanding of Congress "that in all probability three-fourths of the irrigable lands would be allotted to Indians." H. Rep. No. 1189, 60th Cong., 1st Sess. 2 (1908). Construction on the irrigation works commenced in 1909 and continued until the 1960's.

Today the Project, the largest in Montana, includes 16 dams and storage reservoirs and 1300 miles of canals and laterals. Most of the water stored or diverted for Project use flows westwardly from the majestic Mission Mountains, which arise on tribal lands. Many of its facilities, including nearly all of its reservoirs, are located on tribal or Indian lands. Excluding the Flathead River, the Project's extensive canal system intercepts nearly all streams on the Reservation. These streams and rivers are subject to the exclusive hunting and fishing rights reserved by the Tribes in the Treaty of Hellgate. The Tribes are entitled to instream flows to protect these fisheries. Joint Board of Control v. United States and Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 108 S.Ct. 1127 (1988). In addition to directly impacting the Tribes' treaty rights, the Project also has a significant impact on the environment, economy, and quality of life on the Reservation.

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The Indian Self-Determination Act

The Indian Self-Determination Act and its implementing regulations explicitly authorize Tribes to contract for the operation and management of Indian irrigation projects.[2] The Act states:

> The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs--
>
> . . . .
>
> (B) which the Secretary is authorized to administer for the benefit of Indians under sections 13 [the Snyder Act] . . . . and any Act subsequent thereto.

25 U.S.C. 450f. The Snyder Act expressly authorizes the Bureau of Indian Affairs (BIA), under the supervision of the Secretary of the Interior, to direct, supervise, and expend moneys for the benefit of Indians for "extension, improvement, operation, and maintenance of existing Indian irrigation systems. (25 U.S.C. 13)

2/ See Title I of Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, codified at 25 U.S.C. 450 to 450n, as amended, including the extensive amendments contained in Public Law 100-472, Act of October 5, 1988, 102 Stat. 2285 (hereafter "1988 Amendments").

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Therefore, because most Indian irrigation projects are administered and funded pursuant to the Snyder Act, they are contractible under Public Law 93-638. In addition, the Act's implementing regulations expressly authorize tribal contracting for Indian irrigation projects. The regulations provide that contractible trust resources programs, or portions thereof, include: "Irrigation: development, construction, record keeping, rehabilitation, operations, and maintenance."[3]

In addition, Congress has stated its clear intent that Tribes have the right to contract for BIA Agency and Area Office functions, and may also work with the Secretary to redesign BIA Field Office, Agency, and Area Office functions.[4] This authority includes Bureau of Reclamation programs where funds are appropriated by the Congress for the benefit of the tribe.[5]

Notwithstanding this clear direction from Congress, the Flathead Nation's "638" contract to manage the Power Division

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3/ (emphasis in the regulations). See also Sections 271.1(a) and 271.2(q) (Read together, these regulations define "programs related to Irrigation and Power Operation and Maintenance" as contractible because they are "tribal governmental functions.")

4/ Senate Report No. 100-274, at 23, 100th Congress, 1st Session.

5/ Id.

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of the Project was challenged in federal court on the grounds that the program was not contractible under Public Law 93-638. This lawsuit was brought in 1986 by the Flathead Joint Board of Control (JBC). One of the specious arguments advanced by the JBC was that the Reservation-based utility was not contractible because the power division primarily serves non-Indians.[6]

The JBC's argument ignores the plain language of the Act and appurtenant regulations and the fact that the BIA has always administered and funded the power division under the Snyder Act. The fact that the Project also benefits non-Indians does not change its status as a program administered to benefits Indians under the Snyder Act. Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970), cert. denied 400 U.S. 942 (1970). Furthermore, the power division is the sole supplier of electricity to the Flathead Reservation and therefore serves nearly every Indian on the Reservation.

The federal district court ultimately dismissed the JBC suit ruling that the JBC did not have standing to bring the

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6/ The JBC complaint also alleged that the 638 contract constituted a breach by the government of its statutory, contractual, and fiduciary obligations to the JBC. These meritless claims were primarily based on the JBC's claim to "turnover" of the management of the Project pursuant to the so-called 1908 "turnover" provision, which is discussed later in this memorandum.

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suit (1) because it failed to show how it would in fact be injured by the 638 contract, and (2) because the interest the JBC sought to protect is not within the "zone of interests" to be protected by the Indian Self-Determination Act. See Joint Board of Control v. United States, ___F. Supp.___, No. CV-87-217-BLG-JFB (D. Mont. 1988) (copy attached).

Although many of the arguments advanced by the JBC were expressly or implicitly rejected by the court, because the case was dismissed for lack of standing, these same or similar arguments could resurface in future attempts to block Indian tribes' efforts to contract for all or certain components of irrigation project management.

Flathead-Specific Concerns

While the Tribes' authority to contract for management of the Flathead Agency Irrigation Division (FAID) under 25 U.S.C. 450f(a) remains clear, the Flathead Nation's ability to include irrigation project management within its tribal self-governance project is thwarted by language contained in the 1988 amendments to the Indian Self-Determination Act. The new amendments preclude (for five years) funds for either the FAID (or the Power Division) from being included in any Tribal Self-Governance Project for the Flathead Nation. (See 102 Stat. 2297 and annotations to 25 U.S.C.A. 450f (Supp. 1990). This amendment was included at the behest of former U.S. Senator

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John Melcher. As a result of this amendment, the irrigation project on the Flathead Reservation is the only Indian irrigation project in the nation that has been singled out for exclusion from tribal self-determination demonstration projects.

When Congress amended the Flathead Allotment Act in 1908 to allow non-Indians to participate in the irrigation project that was being constructed for the Indians, Congress included a provision which allows the management of certain irrigation works to be turned over to irrigators.[7] One of the preconditions to turnover under the 1908 Act is that all irrigation system construction costs be repaid to the federal government. Under the present amortized fifty year repayment schedule for irrigation construction costs, these construction costs are not projected to be repaid until the year 2033. 1985 Comprehensive Report, Flathead Indian Irrigation Project, at 7-133. Moreover, if and when turnover occurs, the turnover is limited to only those irrigation works located on the unallotted lands, and does not include the reservoirs, feeder

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7/ The 1908 "turnover" provision provides: "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. . . . (Act of May 29, 1908; 35 Stat. 444, 450)

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canals, diversion facilities, or irrigation works located on the allotted lands. The turnover does not apply to any power division facilities.

In its 1988 opinion on the JBC's challenge to the power division 638 contract, the federal district court concluded that the 1908 turnover provision does not preclude tribal contracting of the management of the power division. The court reasoned that the 638 contract is subject to existing law and that until such time as a legal interpretation on the turnover provision is rendered by the court the JBC has failed to show that it suffers any injury by the 638 contract remaining in effect.

Thus the 1908 turnover provision is not an obstacle to tribal 638 contracting and only becomes a potential obstacle when and if the court finds that the provision is effective and the conditions precedent to any turnover are satisfied.

The 1908 turnover provision is an anachronism. It does not make sense today. Moreover, the JBC's attempt to misconstrue the turnover provision to authorize a complete transfer of management to the non-Indian irrigators runs contrary to the language in the turnover provision as well as Congressional intent. As pointed out earlier, the contemporaneous legislative history associated with the 1908 amendment to the Flathead Allotment Act states that Congress intended that three-quarters of the irrigable land served by

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the project was to be Indian allotment lands--which are not subject to the turnover provision. Therefore the turnover provision, by its terms, was only intended to apply to the incidental lands that served the non-Indian unallotted lands (the remaining 25% of the irrigable lands). Under the terms of the Flathead Allotment Act as it existed in 1908, the proceeds from the sale of tribal lands were used to pay for the irrigation project works that served the allotted Indian lands.

Moreover, the notion that the non-Indian irrigators would pay back the federal government for their portion of the construction costs has turned out to be illusory. The irrigation districts lobbied for and obtained legislation whereby the repayment of irrigation constructions costs are paid by net power revenues from the project's power system.[8] Thus it has been the Reservation power consumers and not the irrigators who have repaid the federal government for the irrigation construction costs that have been repaid to date.

Conclusion

The Indian Self-Determination Act provides authority for Indian tribes to contract for the operation and management of

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8/ See Act of May 10, 1926, 44 Stat. 453, 464; Act of March 7, 1928, 45 Stat.200, 212; and Act of May 25, 1948, 62 Stat. 269.

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Indian irrigation projects. With the exception of the Flathead Agency Power and Irrigation Divisions, Indian Tribes can also include Indian irrigation projects within the ambit of Tribal Self-Determination Demonstration Projects.

The Flathead Nation's efforts to manage or improve management of the irrigation project on their reservation has been met by vehement resistance by non-Indian irrigators, including litigation and anti-tribal self determination amendments. There is the possibility (if not probability) that the Flathead Nation and other Indian tribes may be similarly challenged by non-Indian irrigator interests in any future efforts by Indian Tribes to assume management of Indian irrigation projects which also serve non-Indians on their Reservations.

"Turnover" provisions appurtenant to certain Indian irrigation projects may--if they are found to be effective and all preconditions are satisfied--impose an impediment to complete tribal management of these projects. In the case of the Flathead turnover provision, it is an anachronism which does not authorize, as the non-Indian irrigators' claim, the wholesale transfer of management to the non-Indian irrigators. Moreover, transfer of even partial management authority of Indian irrigation projects to non-Indian interests would seriously undermine and jeopardize the federal government's ability to protect Indian trust resources.

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