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MONTANA FLATHEAD IRRIGATION PROJECT

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

THE OPERATION, BY THE BUREAU OF INDIAN AFFAIRS, OF THE FLATHEAD IRRIGATION PROJECT IN MONTANA

MAY 17, 2000

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WEDNESDAY, MAY 17, 2000

U.S. SENATE,
SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:45 p.m. in room SD–366, Dirksen Senate Office Building, Hon. Gordon Smith presiding.

OPENING STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM OREGON

Senator SMITH. Good afternoon, ladies and gentlemen. We will call to order this committee hearing of the Energy and Natural Resources Subcommittee on Energy and Natural Power. I apologize for the delay. There is a mess down on the Senate floor, and we may be called back to vote and I did not want to keep you waiting longer. I thought we should at least begin.

I would like to thank our witnesses who have traveled from Montana to be with us today. We have a slightly different hearing today. It is an oversight rather than a legislative hearing. An important part of the committee's function is to conduct oversight. In this case our oversight is designed to be educational both for the committee and those gathered here to observe.

The Flathead Indian Irrigation Project in Montana is currently run by the Bureau of Indian Affairs. Some believe that operations and maintenance of this project might be better accomplished if it were done by the irrigators. Others believe that to take O&M from the Federal Government would be a violation of the United States' trust responsibility for Indian tribes. We are not here to make that judgment today but rather learn more about the irrigation project itself.

Although legislation has been introduced in the Congress and in several past Congresses we are not here to talk about that legislation. This hearing is meant to be a broader, more general look at the project and how it is being operated.

In order to conduct the hearing today we have three witnesses, a representative from the Bureau of Indian Affairs, the chairman of the Confederated Salish and Kootenai Tribes of the Flathead Nation, and a representative from the non-Indian irrigation community.

The issue is of great importance to Senator Burns and the State of Montana, and I hope by having this oversight hearing today some of the difficulties that have surrounded this issue will be resolved, or at least have a resolution in sight.

Senator Burns unfortunately is on the floor. His subcommittee of Appropriations is the one at issue, and so we will proceed and hope he can join us. I know he wants to.

Our first witness is Sharon Blackwell, Acting Deputy Commissioner, the Bureau of Indian Affairs in Washington, who will be followed by John Metropoulos, an attorney with the Flathead Joint Board of Control, and then Fred Matt, chairman of the Confederated Salish and Kootenai Tribes of the Flathead Nation.

So in that order will start with you, Commissioner Blackwell.

STATEMENT OF SHARON BLACKWELL, ACTING DEPUTY COMMISSIONER OF INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS

Ms. BLACKWELL. Good afternoon, Mr. Chairman, members of the subcommittee. My name is Sharon Blackwell, and I am the Acting Deputy Commissioner of Indian Affairs for the Bureau of Indian Affairs at the Department of the Interior. I am pleased to provide you with a brief overview of the BIA's operation of the Flathead irrigation project located in northwestern Montana on the Flathead Indian Reservation.

First, I would like to give you a brief background. The project was originally authorized in 1904 to provide irrigation water for the benefit of Indians on the Flathead Indian Reservation. In 1908, the project was authorized to also serve non-Indians who had started to homestead on unallotted lands within the reservation.

In 1926, a power division was authorized in addition to the irrigation division within the project because the fee landowners had not been paying the construction debt. In 1948, Congress directed that net power revenues be used to pay that debt. As a result of the power revenue subsidy the irrigators have not had to pay the irrigation construction debt to date. The current unpaid construction debt of approximately $3.4 million for the entire project is projected to be paid off by the power revenues in 2038.

It is also significant to note that 53 percent of the irrigated lands within this project are tracts that are under the size of 40 acres.

Turning now to the project, the Bureau of Indian Affairs serves approximately 1,700 irrigators, providing water to 127,000 acres. Included in the project are 17 reservoirs located on tribal trust land and over 1,300 miles of carriage system and over 10,000 structures for diversion and control of the water supply.

The irrigation system is divided into subdivisions, or camps for management purposes. They are Camas, serving the communities of Lonepine and Hot Springs, Mission, serving the community of St. Ignatius, Jocko, serving the communities of Arlee and Dixon, Post, serving the communities of Charlo and Moise, and Pablo, serving the communities of Pablo, Ronan, and Polson.

Since 1988 the Confederated Salish and Kootenai Tribes have operated the power division under a contract with the Bureau of Indian Affairs pursuant to the Indian Self- Determination and Education Assistance Act, which is commonly referred to as Public Law 93-38. Accordingly, the tribes are responsible for operating and maintaining the approximately 1,473 miles of distribution lines, 172 miles of high voltage transmission lines, and 20 substations, and they serve approximately 23,000 people on the reservation.

On October 1, 1991, in recognition of the tribe's success in operating and managing the power division, the Federal Government renewed for an indefinite term this Public Law 93-638 contract. There are accomplishments that have been achieved over the last 3 years. Looking at the last 8 years from 1992 to 1998, the Bureau of Indian Affairs (BIA) has invested $1.9 million in rehabilitation and betterment projects at the Flathead irrigation project, of which $1.5 million has come directly from the BIA's operation and maintenance budget. Another $20 million has been expended to rehabilitate project dams through the Department of the Interior's safety of dams program.

The BIA continues to identify and plan for rehabilitation and betterment activities that will improve our operations and reliability. A few examples of the BIA's accomplishments are shown on this board. The Bureau of Indian Affairs replaced the Jocko R Siphon in 1993 at a cost of $91,000. This siphon was originally a wood stave above-ground and exposed to the elements. It was buried and replaced with reinforced concrete.

The BIA began rehabilitating and upgrading the wiring pumps and motors at the Flathead River pumping plant in 1993. This is an ongoing effort, with over $100,000 spent to date. More work is scheduled to complete the renovation to improve the reliability and the efficiency of these pumps. The BIA replaced 6,100 feet of the wooden Post A Siphon in 1996 at a total cost of $293,000. The BIA replaced the Camas 3 bridge's wooden headgate structure with a concrete structure in 1997 at a cost of $61,500.

Since 1987, the Bureau of Indian Affairs has invested over $20 million for rehabilitation on the dam structures for the project storage system as part of the BIA's and the Department's safety of dams program and the dams located within the system that have been rehabilitated are shown on the chart. That is the Crow dam, Pablo, and McDonald.

Additional rehabilitation needs have been identified and are being discussed with the water users in the system and are projected to be accomplished in future years.

While making these improvements, it is important to note that the Bureau of Indian Affairs has been able to keep its project operations cost-efficient. Since the BIA assumed management from the Bureau of Reclamation in 1993, the assessment rates have had to increase only 12 percent and have remained at $19.95 per acre since 1998.

The chart that is being shown now shows the history of the irrigation assessment rates going back to 1992. In 1992, the BIA's assessment was $17.80 per acre. Now, in 8 years there has been an increase of only 12.5 percent. Against an increase in the consumer price index which is shown on the chart to be 18.8 percent.

In conclusion, the efficient management of BIA irrigation operations continues to be a formidable challenge. For the most part, BIA systems like Flathead are antiquated and require ongoing maintenance and repair and periodic replacement of equipment and structures. At Flathead, we have been able to avoid the need for special assessments to meet these daily challenges.

This concludes my statement. I would, however, like to introduce Mr. Charles Corville, who is the irrigation systems manager at Flathead, and he has had 18 years on the project.

I would also like to introduce Ross Mooney, who is the Chief, Branch of Irrigation Power and Safety of Dams for the Bureau of Indian Affairs here in Washington, D.C.

I will be more than happy to attempt to answer your questions. However, Mr. Corville and Mr. Mooney may assist me.

Senator SMITH. Very good. There is a vote that has been called. I do not know whether it is one or three, but I am going to stay for as much of your testimony as I can, and the staff will continue the hearing, and if I am not able to get back we will pose some written questions that we have for you, but we appreciate your indulgence and apologize for the hectic schedule, the battle taking place on the floor of the Senate, so go right ahead.

Mr. METROPOULOS. I appreciate that, Senator, but is Mr. Matt supposed to go second here?

Senator SMITH. That is fine.

STATEMENT OF D. FRED MATT, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION, PABLO, MT, ACCOMPANIED BY DANIEL DECKER

Mr. MATT. Mr. Chairman and members of the subcommittee, my name is Fred Matt, and I am the chairman of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Nation. I am accompanied today by Dan Decker, our tribal attorney. We have submitted detailed written testimony and related exhibits which we will show on the points that I will make for the record.

I will now summarize our position on the Flathead Indian irrigation project located in the center of our Indian reservation. My people have lived in the Flathead and Bitteroot Valleys for thousands of years. In the treaty of Hellgate of 1855 we ceded to the United States millions of acres of our aboriginal land, and that treaty reserved for our exclusive use the remaining one point quarter million acre of the Flathead Indian Reservation with a guarantee that the United States would protect that reservation and our people.

Within 50 years the United States violated that treaty by passing the Flathead Allotment Act of 1904. The United States thought we needed to be turned into farmers, so our reservation was broken up and each tribal member was given an 80-acre farming allotment, or 160-acre allotment in timbered acres.

The 1904 Allotment Act also authorized the establishment of the Flathead Indian irrigation project, or FIIP, for the benefit of the Confederated Salish and Kootenai Tribes. To this day, FIIP has remained a Bureau of Indian Affairs project. It is owned, operated, and maintained by the Bureau of Indian Affairs. Unfortunately, the Allotment Act had an ulterior motive. After my people received their allotments, the remainder of the reservation was declared surplus and opened to non-Indian homesteading, actions subsequently declared illegal by the U.S. Court of Claims.

I have with me today a map of our reservation that shows in blue the rivers and streams crossing our land. The irrigation project is colored in red. The project intercepts most reservation

streams, and frankly whoever controls the project literally has the ability to totally dewater major treaty-protected streams.

The map also shows the original Indian allotments. I think they are colored in gray. The project was originally laid out primarily to serve those individual Indian allotments. You will also note the portions of the FIIP going beyond the allotments. The 1904 Allotment Act was amended in 1908 to serve non-Indians who homesteaded. This is where the so-called turnover provision came into play.

In the 1908 amendment the United States authorized the irrigation project to extend it to serve unallotted lands, but also required that the non-Indians would repay the debt of construction for those portions of the project that served them, and that after such repayment occurred, management and operations of such irrigation works serving the unallotted lands would be turned over to them, and this is still a law today.

The irrigators never made those payments, and so in 1926 Congress conditioned future Federal construction appropriations upon the irrigators forming districts and entering into repayment contracts. Owners of Indian trustlands were excluded from the districts and therefore had and have no voice in district affairs.

A Federal study done in 1946 again concluded, despite the 1926 congressional requirement, that the irrigation districts had still not repaid the United States for 1 penny of the original debt of construction for those portions of the project serving unallotted lands. The irrigation districts then lobbied the Congress, which passed the subsidy to end all subsidies. Under the 1948 Act net power revenues from the electric utility are used to pay off irrigation construction debt owed the United States. Indeed, net power revenues, which are paid by power consumers, have paid each and every construction payment to date.

The irrigation districts never levied an assessment on their members' land to pay for irrigation construction debt. This further erodes the argument that the irrigators paid for it and therefore they should have it. Beyond that, however, the 1948 Act contained an interesting provision. Once the debt of construction is paid off, net power revenues then are to be used to subsidize the irrigators' O&M charges for water delivery.

In other words, once the power consumers pay off the irrigation districts' construction debt, the 1948 Act requires that power consumers to all assume the financial burden of paying the individual irrigators' annual water delivery O&M fees in perpetuity.

The provisions of S. 630 suggest deleting this O&M subsidy from the payment contracts but do not amend the underlying law.

For many years, the irrigation districts have argued that once repayment occurs the entire Indian irrigation project, including the electrical utility that was not even authorized until 1928, should be turned over to them. The irrigation project includes 17 dams and reservoirs, all located on tribal or Federal lands. It is 1,300 miles of canals and laterals across tribal land, individual lands throughout the reservation. These trustlands cannot be managed by non-Indian irrigation districts that exclude Indian representation on those lands.

The tribes have proven their management capabilities. For example, the tribes have successfully operated the electrical utility division of FIIP for over a decade. It serves over 20,00 customers, over 80 percent of whom have nothing to do with irrigation, yet who, as a result of the 1948 Act, pay the irrigators' debt of construction.

The tribes have operated the reservation safety of dams program for over a decade, and have benefited all water users. With that $100 million undertaking. Nonetheless, for over a decade, irrigation districts have repeatedly sought legislation turning the irrigation project and electric utility over to them based on a skewed reading of the turnover provision in the 1908 legislation.

Finally, after solicitors in the Reagan, Bush, and Clinton administration's opinion that they were incorrectly reading the statute, and after numerous Federal courts have ruled against them, the argument is now that the management and operation of the project, including trustlands and resources, should be transferred to them simply because they claim that they can operate it cheaper.

They provide this committee with no evidence to support that claim. Despite the fact that it is a BIA project, despite the fact that it intercepts nearly all reservation rivers and streams, despite the fact that our treaty has express language in it protecting our fishing rights, and despite the fact that irrigation districts have litigated time and time again the most basic right of the tribe, and despite the fact that several hundred Indian irrigators, including the tribes as a single largest irrigator, have no say in the district management, despite all these things, S. 630 would turn operation and maintenance over to the single entity that has most consistently opposed us. It is truly an astonishing proposal.

We have provided the committee with data showing what the costs are at other irrigation projects for water delivery. The cost the BIA charges at FIIP are lower than many projects on and off the reservation. If the districts really wanted to save their members some money, they could save over $3 per acre by dropping the non-Federal assessment they charge and use to pursue frivolous litigation and meritless legislation.

This includes unsuccessful challenges to such diverse issues as instream flows to protect treaty fisheries, a decade-old State tribal hunting and fishing agreement challenging tribal water quality standards, even though irrigation is excluded from the tribal implementation of the Clean Water Act, and even tribal jurisdiction over Indians on our reservation.

I hope you are able to personally review the more detailed submittal we have made on these points, and I am confident that you will be persuaded that the FIIP management should remain as it is.

Thank you.

[The prepared statement of Mr. Matt follows:]

PREPARED STATEMENT OF D. FRED MATT, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION PABLO, MT

For thousands of years the Flathead Nation called Montana home. We welcomed white "explorers" to our home. In August 1805, we greeted Lewis and Clark in the Bitterroot Valley and showed them the way up the Lolo Trail and across the Continental Divide. The Flatheads sent four different parties—in 1831, 1835, 1837, and

1839—on long and dangerous journeys through enemy territory to St. Louis in search of a missionary. In 1841 Father DeSmet honored our request and built the St. Mary's Mission in the heart of Sallish County. The mission is recognized by Montanans as a birthplace of Montana history. It was also the birthplace of irrigation in Montana. There, in 1846, our Indian ancestors assisted Father DeSmet in building the first irrigation canals in Montana. By 1854 extensive irrigation by Indians was underway on the present Reservation in connection with the St. Ignatius Mission.

In the Treaty of Hellgate, our Tribes consented to relinquish millions of acres of present Montana west of the Continental Divide (in excess of 20 million acres). In return, we reserved for ourselves and our future generations the 1.25 million acres of the Flathead Indian Reservation and accepted the United States Government's promise that the "White Father" (the term utilized by the United States' negotiator according to treaty transcripts) would safeguard our lands and treaty rights from encroachment—forever. That treaty was entered into by the United States government and the Flathead Nation pursuant to Article II of the Constitution of the United States which authorized treaties with tribal governments. (Art. II, § 2, cl. 2). It was ratified by Congress in 1859. Under the Supremacy Clause of the U.S. Constitution, these treaty rights are the supreme law of the land and take precedence over state laws. (Art. VI, § 2).

Political pressures by Missoula merchants to open the Flathead Reservation to white settlement and exploitation mounted at the end of the nineteenth century. Efforts by the United States government to get our tribal leaders to consent to allotment and sale of "surplus lands" were persistent, but unsuccessful. In rejecting a 1901 U.S. Special Commissioner's offer to purchase Reservation lands from the "poor" Indians, Isaac, the Chief of the Kootenai, responded:

> My body is full of your people's lies. You told me I was poor and needed money, but I am not poor. What is valuable to a person is land, the earth, water, trees, and all these belong to us . . . We haven't any more land than we need, so you had better buy from somebody else. Maybe some poor people are willing to sell land.

This political pressure peaked in 1904 when Montana Congressman Joseph Dixon, a Missoula merchant and newspaper owner with family interests in Reservation mercantile establishments, pushed through the Flathead Allotment Act of 1904 ("FAA") over the objections of the Tribes.[1]

The FAA directed that 80 acre farm allotments (or 160 acre rangeland allotments) be issued to each tribal member. Initially, 2,400 Indian trust allotments were issued covering 228,434 acres. The remaining lands were (unlawfully) declared "surplus" and opened for exploitation by land speculators, settlers, and mining and timber companies. Section 14 of the FAA authorized the Secretary of the Interior to expend up to half of the monies obtained from the forced sale of our lands (after deducting the costs of the sale) to construct an irrigation project "for the benefit of the Indians."

In 1907, the Interior Department's Office of Indian Affairs arranged for the Reclamation Service to survey, design, and construct the Flathead Indian Irrigation Project ("FIIP"). The survey was completed in 1907. The project was funded by the Bureau of Indian Affairs (BIA), and the BIA maintained oversight and supervision over the Bureau of Reclamation's (BOR) construction. On May 3, 1924, the Acting Commissioner of Indian Affairs directed transfer of all administration of the FIIP back to the BIA. The BOR was to play no major role in FIIP again until 1985.

The irrigation system authorized by the 1904 Act was to be "built for the benefit of the Indians" whom the United States wanted to "civilize." White settlers were not authorized to be served by the project. The FIIP was to be built and paid for by tribal funds (land and timber sales revenue). By mid-1907, however, it was apparent that a small portion of the project—no more than 25%—could serve "unallotted lands" (i.e., land that had been declared surplus subsequent to the allotment action and opened for homesteading.) By then it was apparent the best lands within the irrigation project were allotted to Indians.[2] Congress amended § 14 of the FAA in

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[1] The Court of Claims has since held that the FAA unlawfully confiscated tribal land. *Confederated Salish and Kootmai Tribes* v. *United States,* 437 F.2d. 2d 171 (Ct. Cl. 1971).

[2] In a July 16, 1907 letter from the U.S. Reclamation Services' Supervising Engineer to its Montana survey team, the Chief Engineer noted that, by that date, the allotment process was nearly complete and that there will be a "a relative small area, possibly less than 100 eighty acre tracts of good irrigable land within the Mission Valley that was unallotted and, therefore, may be available for non-Indian irrigators." The letter also noted "that all irrigable land in the reservation along the Jocko River has already been allotted to Indians."

1908 to allow some of the white settlers to be served by the small portion of the surveyed irrigation project that served the "unallotted lands." The legislative history appurtenant to the 1908 amendment reflects the understanding of Congress "that in all probability three-fourths of the irrigable lands would be allotted to Indians."[3]

Construction of the project commenced in 1909. A map of the FIIP irrigation system today, when overlain with a map of the original Indian allotments, graphically confirms that the project was designed and constructed to serve the Indian allottees. The irrigation works constructed serve the "unallotted" lands in only an incidental manner. In fact the government cautioned settlers that it could not guarantee water to the white settlers of the unallotted lands.[4]

The so-called "turnover" provision was included in the 1908 amendment to §14 of the FAA. It states:

> 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 land irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. (emphasis added)

The Act provided that the white entrymen and buyers of Reservation lands must pay for their pro-rata share of the irrigation construction costs. Each homesteader was to repay his full share of irrigation construction costs in not more than fifteen annual installments. Each parcel of unallotted lands would have an installment schedule, commencing on the year that the parcel began to receive project water. For example, unallotted lands located in one region of the Reservation may have commenced receiving water years after unallotted lands in a different location on the project. When a "major part of the *unallotted lands*" were fully paid by the white settlers, turn over of the management of "such irrigation works" on *unallotted lands* could be transferred to the water users (see below). The statute limits the scope of any management turn over to the unallotted lands. (Construction costs on Indian lands were to be paid from tribal revenues under authority of the 1904 Act.)

During the tenure of the Reagan Administration, a 1987 Justice Department brief submitted in response to a lawsuit brought by the Flathead Joint Board of Control (JBC) notes: "The 'turn over' provision, on its face, refers solely to an irrigation system *serving unallotted land* and authorizes 'turn over' of that system once the required payments are made." (emphasis added) The legal section of the 1985 Comprehensive Report states: "[B]ecause the turnover provision specifically applies only to those irrigation systems *serving unallotted lands,* it would appear that the question of turnover would have to be analyzed separately with respect to each qualifying irrigation system forrning a discrete operational *segment serving unallotted lands.*" (emphasis added)

The JBC continues to advance its illegitimate theory that turnover—of the entire project no less—can occur when a "major part" of the debt is repaid. This interpretation flies in the face of the plain meaning of the turnover statute itself which requires that all of the debt be paid on the "major part of the unallotted lands." Refuting the JBC's theory, the Interior Department and Justice Department attorneys informed the Montana Federal District Court in 1987: "The Secretary submits that the plaintiff [JBC] asks the court to read a statute Congress never wrote. . . . The plaintiff's interpretation of the law is inaccurate. "

This is also the conclusion rendered in an April 21, 1982, opinion by Associate Solicitor Larry Jensen in response to a previous attempt by the JBC to seek turnover. His opinion concludes that the Secretary is unauthorized to turnover management of the FAID until all construction debt is repaid. This is also the conclusion of the Interior Department attorneys who prepared the legal section of the 1985 Comprehensive Review Report on FIIP:

> It is clear from the context that "major part" refers to *full* payment for a major part of the lands comprising the system and does not mean a major part of the aggregate amounts of payments required to be paid. (emphasis added)[5]

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[3] H. Rept. No. 1189, 60th Cong. lst Session 2 (1908).

[4] See, e.g., Letter from FIIP Supervising Engineer to potential homesteader J.W. Bonham, dated June 9, 1911: "The Flathead is not a Reclamation Project, but is an Indian Reservation irrigation project. It is possible that water may be available for a limited portion of the homestead irrigable lands in the near future, but no assurances can be given to this end."

[5] There is probative evidence that the JBC itself lacks faith in its disingenuous interpretation of the 1908 turnover provision. In a January 29, 1980 letter from the irrigation districts to Sen-

The original design of the FIIP contemplated the construction of a small hydroelectric power plant on the Flathead River. Work on the penstock tunnel for this power plant was abandoned about 1911 when it was determined that the gravity-fed irrigation system under construction was more than adequate to meet foreseeable irrigation needs. The small power plant plan was briefly considered in 1926, but in 1928 Congress authorized an alternative plan to construct an electric distribution utility that would purchase electricity from the massive Kerr Dam project that was proposed on the Flathead River on tribal lands. It was this 1928 statute which authorized the construction of the electric distribution system that presently serves nearly the entire Flathead Reservation. That Act also authorized any "net revenues" from the power system to repay both power and irrigation system construction costs. Construction of the electric distribution system commenced in the 1930's commensurate with the construction of Kerr Dam.

Non-Indian irrigators, the project engineer, and a private utility attempted to expropriate the valuable Kerr Dam site from the Tribes in the late 1920's. The present day Kerr Dam site, located four miles down river from the mouth of Flathead Lake, was one of the premier hydroelectric sites in the nation in the 1920's. Congress in 1927 rejected an attempt to enact legislation that sought to divert two-thirds of the rental payments out of the Tribes' pockets and into the pockets of the FIIP to benefit the white settlers. See *Confederated Salish and Kootenai Tribes* v. *United States,* 199 Ct. Cl. 599, 631 (1967).

In 1928, with backing from national Indian organizations and Montana Senator Burton K. Wheeler, Congress affirmed the Tribes' complete ownership of the Kerr Dam site,[6] and later confirmed its right to rentals as a part of the 1930 Federal Power Act license. In 1930, the irrigators succeeded in getting a provision included in the original Kerr Dam license to earmark a "Bargain Block" of electricity to the FIIP during the initial 50 year term of the license.

Several federal policies (combined with unscrupulous land transactions) facilitated the transfer of many irrigable Indian allotments to non-Indians. First an amendment to the FAA in 1910 authorized the Secretary of the Interior to sell and dispose of up to 60 acres of the Indians' 80 acre allotments of irrigable lands. Second, the Secretary of Interior (without Congressional authority) implemented a "forced fee" patenting policy whereby by virtue of an Indian's blood quantum (if 50% or more white blood), the trust allotment could be "forced" into non-trust "fee" status. Third, the Indian agents at the Flathead Agency were quick to remove an Indian's allotment from trust status in order to pay for federal commodities or to allow for liens to be placed against such allotments by private mercantiles to whom an Indian owed money. Some mercantiles then diversified into the real estate business. By 1930 the land status changed considerably from that reported in 1907. Tragically, by 1930 most of the Indian allotted lands were owned by whites.

By 1926 it was clear that the non-Indian irrigators were not repaying the federal government for the construction costs of the irrigation system. Therefore, in the 1926 Act (44 Stat. 464), Congress conditioned further FIIP 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 Act expressly excluded Indian trust lands from the jurisdiction of the irrigation districts. The three imitation districts that the JBC represents signed repayment contracts with the United States in 1928 (Flathead Irrigation District), 1931 (Mission Irrigation District), and 1934 (Jocko Valley Irrigation District). The 1926 Act also authorized funds to revitalize plans for the small power plant proposed on

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ator John Melcher, the JBC sought to have the Senator sponsor an amendment to the 1908 provision to try and prop up their turnover theory. The amendment proposed by the JBC sought to rewrite the turnover provision by adding the following underlined words: "When the payments required by this Act have been made by the major part of the *construction indebtedness [sic] of the* unallotted land irrigable under any system . . . the management and operation of such irrigation works *and appurtenant power systems* shall pass to the owners of the lands irrigated thereby . . ." (underlining by JBC).

[6] The 1928 Act provides that the Tribes are entitled to all of the rentals from the Kerr Dam site because the Tribes own the site. In *Confederated Salish and Kootenai Tribes* v. *United States*, 199 Ct. Cl. at 744–50, the court held that Congress had reserved the power sites for the Tribes and was not appropriating them for the federal government: "Senator Wheeler of Montana repeatedly stressed that the power site belongs to the Indians in our judgment' and noted that the Indians 'wanted to be fully protected to the extent that they are not going to have any of the profits from this matter taken away from them and given to anyone else. . . . I want to see the Indians protected in this matter'. . . . The Indians are very skeptical that this property is going to be taken away from them'" *Id.* The Court concluded that, "*the note struck again and again was that this power site was the Tribes' own property for which they should be fully compensated . . . the project has, and has had, no interest in the Kerr Dam site.*" (emphasis added)

the Flathead River. That plan, however, was 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 FIIP. By then, a Montana Power subsidiary had already filed for a federal license to construct a much larger hydroelectric dam (150,000 horsepower) at the site.

In 1946, an extensive federal study on the FIIP, known as the "Walker Report" was completed. This report called the attention of Congress to the fact that the irrigation districts had made *no* irrigation construction payments since organizing and that the irrigation construction debt had grown to approximately $9 million. The report also found that the operation and maintenance (O&M) charges on the non-Indian lands were seriously delinquent (in some cases by nearly two decades), and that the project was in a state of disrepair. It also confirmed a long-standing Tribal complaint: the Tribes had never authorized or been paid for the project's use of their lands for reservoirs, canals, work camps, power lines, etc.

The irrigation districts lobbied the Congress in 1947 and 1948 to devise a new scheme for power development to subsidize irrigation. Congress responded with the 1948 Act (63 Stat. 269). Under the 1948 Act, all power construction debt is repaid exclusively from power revenues and the irrigation districts are relieved of any financial liability for the electric utility. The legislative history to this Act confirms that the three irrigation districts sought to cement in to the law the *complete* subsidy of irrigation by power consumers. The Act amortized existing irrigation construction debt over a 50 year period (new construction debt has extended this amortization schedule further into the 21st Century). "Net power revenues" from the power system are authorized to be used to pay this irrigation construction debt. Indeed, net power revenues (paid by the power consumers—over 90 per cent of whom are not irrigators) have paid each and every matured construction payment to date. The irrigation districts have never once levied even a penny's worth of an assessment on their members' lands to pay for irrigation construction debt. (See *Flathead Joint Board of Control* vs. *United States,* 30 Fed. Cl. 287 (Cl. Ct. 1993), affirmed at 59 F.3d 180 (Fed. Cir. 1995). History has proven that the underlying logic and premise supporting the "turnover" provision (that the irrigators would pay for their portion of the project) is completely fallacious. It is remarkable that with straight faces, representatives of the JBC continue to contend that they paid for the costs of the project and therefore they should have control over it. Additionally, the net power revenues created by the Tribes' subsidization of the FIIP (through reduced Kerr Dam rentals by selling electricity at bargain rates) creates yet another reason why the Tribes have a considerable equitable interest "in the irrigation system itself.

The 1948 Act also authorizes net power revenues to be used to subsidize the irrigators' annual O&M charges for water delivery. In other words, once the power consumers pay off all the irrigation districts' construction debt ($12 million), the 1948 Act authorizes the power consumers to *also* assume the financial burden of paying the individual irrigators' annual water delivery (O&M) fees—in perpetuity. Thus the irrigators pay for neither the cost of constructing the irrigation system nor the annual cost of operating and maintaining the system. To date, this unjust subsidy of the irrigators' O&M has never been effected because the net power revenues are presently allocated to payment of the remaining dollars of irrigation construction debt still owing. This anachronistic and unjust O&M subsidy provision should be repealed.

Prior to 1986, the FIIP was supervised by BIA project engineers who were not accountable to, and refused to coordinate FIIP management with, the Tribes or the BIA's Flathead Agency (located within 20 miles of the irrigation office). Although federal law limited the irrigation districts' role to repaying construction debt (a role the power consumers assumed) and collection of annual O&M fees from its members, that is not how things actually worked. The Tribes have uncovered extensive and uncontrovertible records (notwithstanding the JBC denials to the contrary) documenting a long-standing, collusive relationship between the BIA project engineers and the irrigation district supervisors, who routinely conspired together to work against tribal and Indian trust interests. (Copies of these voluminous documents are available upon request). The following example is illustrative. The minutes of the May 5, 1979 JBC board meeting confirm that the board directed the BIA project engineer to call the JBC's attorneys to get their legal advice on pending water rights litigation wherein the project engineer's employer (the United States) had brought the suit against the individuals represented by the JBC attorneys. The collusion was so pervasive that the JBC's attorneys would present their attorney fees bills to the project engineer who, upon receipt (and often after discussing legal strategy to be employed against Indian trust resources) would dutifully arrange for their payment.

This collusion is confirmed and discussed by the 1985 FIIP Comprehensive Report which found that the BIA had improperly allowed the JBC to intervene in project management. Indeed it was because of this collusion and the absolute failure and refusal of the FIIP to coordinate project operations consistent with its legal obligation to protect Indian trust resources that was the premise for the 1985 Report's principal recommendation to consolidate the FIIP with the Flathead Agency.

The Comprehensive Report also found that during this period of de facto control that the orientation meetings conducted by FIIP supervisory staff "reflected an anti-Indian bias." It was also during this time that the JBC directly hired 28 of the FIIP employees, a bizarre employment practice that was later criticized by federal investigators as a deliberate circumvention of federally-required Indian hiring preference. The Comprehensive Report states:

> Of the 28, only three were Indians. Furthermore, careful scrutiny of the personnel records reveals that during this very period of severe personnel constraints, FIIP actually abolished at least 20 established, approved positions. New positions were then created by the districts and filled almost entirely with non-Indians.

The consolidation of the FIIP with the Flathead Agency in 1986 weakened the de facto control by the JBC—and intensified the JBC's campaign to oust the BIA and seek direct control of the project. Within one month of the release of the 1985 Comprehensive Report, under political pressure from a Montana U.S. Senator (who placed a "hold" on the Senate confirmation of the Asst. Secretary for Indian Affairs), the Secretary of the Interior mandated a three person Bureau of Reclamation "management team" on to the FIIP. This directive was issued with no prior consultation or even notice afforded to the Tribes. This precipitous action directly conflicted with the recommendation of the BOR–BIA team who prepared the Comprehensive Report, and who had recommended against BOR management because of BOR's lack of understanding and experience with Indian trust issues and because BOR management would increase racial tensions. This team stayed for a few years, made recommendations on infrastructure improvements and then left. Of course, the salaries for this BOR team had to be added to the cost of operating FIIP which in turn resulted in increased O&M charges to the irrigators. They then complained that the BIA was not operating HIP efficiently enough because their O&M costs were too high! This then became another rationale for turnover.

Two events factored prominently in triggering the barrage of federal lawsuits and administrative appeals filed by the JBC since 1985: (1) the consolidation of the FIIP with the Flathead Agency, and (2) the new court-mandated requirement that instream flows be provided to protect the Tribes' treaty rights.

In the midst of a serious drought in 1985, the Tribes' fishery biologists warned that the FIIP's long-standing practice of dewatering Reservation streams and rivers, coupled with the abnormally low stream flows, would result in massive fish kills throughout the Reservation. The Tribes apprised the FIIP of this dire situation and requested that the project release sufficient flows to protect the fishery. Under pressure from the JBC, the FIIP refused. The Tribes filed suit. Citing the express language in the Hellgate Treaty wherein the Tribes reserved "exclusive" fishing rights on their Reservation, the Court ordered the FIIP to release minimum instream flows to protect the tribal fishery. *Confederated Salish and Kootenai Tribes* v. *Flathead Indian Irrigation and Power Project,* 616 F. Supp. 1292 (D. Mont. 1985).

The JBC sought to intervene in the 1985 suit and vigorously opposed any instream flows. In 1986, the JBC filed suit to nullify the Flathead Agency Irrigation Division's (after consolidation, the irrigation component of FIIP's name was changed to FAID) 1986 instream flow plan. The district court enjoined the flows—ordering the flows to be reduced substantially. The Tribes appealed to the Court of Appeals for the Ninth Circuit. That fall the JBC filed two more lawsuits. One sought to nullify the Tribes' contracting of the Flathead Agency Power Division pursuant to the Indian Self-Determination Act. *Flathead Joint Board of Control* v. *United States,* No. CV 86–216–M–CCL (D. Mont. 1988) (The Court ruled against the JBC and dismissed their lawsuit in 1988). The second was a mandamus action seeking the immediate "turn over" of the FIIP. *Flathead Joint Board of Control* v. *United States,* No. CV 86–217–M–CCL. This "turn over" suit was voluntarily dismissed by the JBC in 1989 once the Justice Department position was made clear. The Justice Department expressly rejected the JBC's request that dismissal be premised on any JBC preconceptions or preconditions.

Before the Ninth Circuit Court of Appeals issued its ruling on the 1986 instream flow case, the irrigators sponsored a tractor convoy that descended on the tribal complex. This tractor convoy included large signs such as "End the Reservation and Live as Equals" and "Raise Water For Farmers But Make Sure They Get Commod-

ities Free." Shortly thereafter, the JBC filed suit to nullify the 1987 FAID instream flow plan, seeking to further reduce the flows that had already been lowered by the 1986 injunction against the BIA. The Court flatly dismissed their lawsuit; the JBC appealed this in ruling to the Ninth Circuit Court of Appeals. In 1988 the Court of Appeals reversed the Montana federal district court's injunction on the 1986 instream flow case holding that BIA acted properly in exercising its fiduciary duty by affording the Tribes' time immemorial fishing right precedence over any irrigation water rights. *Flathead Joint Board of Control* v. *United States and Tribes,* 832 F. 2d 1127 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 1127 (1988). That same year the Court of Appeals affirmed the district courts dismissal of the JBC's suit to nullify the 1987 instream flow plan. *Flathead Joint Board of Control* v. *United States,* 862 F. 2d 195 (9th Cir. 1988). The JBC also filed another unsuccessful lawsuit to try 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,* No. CV–87–217–BLG–JFB (D. Mont. 1988).

The JBC's assertion that its instream flow litigation was only targeted at the "process" of how instream flows were established is patently false and impeached by the JBC's filings submitted to the federal district court. In all of the JBC's instream flow suits the JBC opposed the process and the flows. Notwithstanding the district court's 1985 directive that the FIIP could no longer dewater Reservation streams, the JBC's fisheries biologist submitted a sworn affidavit attached to the JBC's 1987 complaint for injunctive relief which advocated the complete dewatering of the entire flow of the Jocko River into the K Canal. The biologist justified the dewatering of the river on the grounds that the fishery had grown accustomed to this practice. In addition to the lawsuits, the JBC has filed a series of administrative appeals to the Interior Board of Indian Appeals challenging the instream flow plans and steadfastly challenging any federal O&M fees being used for fish protection devices. They have repeatedly lost these cases. Between 1992 and 1997, the JBC has spent well in excess of $2,000,000 in legal fees to fund its litigation and lobbying; yet the JBC refused in 1992 to pay its O&M dues because the $2 million O&M budget included $35,000 for fish screens.

Eleven percent of the irrigators represented by the JBC control 52% of the irrigable acreage represented by the JBC. These 201 irrigators, who own most of the land, have a disproportionate voting power because, under irrigation district law, voting is based on the amount of land irrigated. The "one man, one vote" principal does not apply. All of these 201 irrigators are in violation of the 160 acre irrigation limitation that applies to the irrigation project. Sixty-eight percent of the "irrigators" represented by the JBC irrigate less than 40 acres. Parcels smaller than 40 acres are not considered farm units under federal regulations applicable to the project. (25 C.F.R. 171.4) One-third[7] of the "irrigators" irrigate less than 10 acres; 220 of these "irrigators" irrigate less than one acre. Bear in mind that the Bureau of Reclamation estimates that for a farm to be a truly viable operation at this project, it would need to irrigate 600 acres of land. It is therefore fairly ridiculous that the legislation refers to "saving the family farm" and that the Joint Board has conned the bill's sponsors into believing that there are over 1,800 "family farms" on the reservation.

It must also be noted that turning over the FIIP to the JBC would disenfranchise both the Flathead Tribes and many tribal members who irrigate land from having any voice in Project operation. Chartered under state law, the JBC only represents owners of fee lands. Individual Indians—and the Tribes themselves, who are by far the single largest irrigator—that irrigate lands held in trust by the United States, are statutorily excluded from being represented by the JBC.

The JBC has spent many years and millions of its member's dollars pursuing its frivolous turnover theory in the courts. After having lost in that forum on a repeated basis, the JBC is now asking the Congress to give them relief the courts would not provide. More recently, the basis of the turnover argument has gone away from the previously novel interpretation of what Congress intended in 1908, to an economic argument. Without offering any proof, the JBC contends that they could operate the FIIP in a more cost effective manner than can the BIA and that this would then "save the family farm on the Flathead." Since they would be operating the project under contract, they would be subject to the same panoply of federal

[7] This one-third figure was calculated in 1995 and is undoubtedly now much larger. A more recent study counted a total of 869 of what the JBC is including in its "family farm" total count that are in fact under 10 acres in size. These are clearly farmettes or hobby farms and are not units where farming is the livelihood of the land's owner. This more recent study indicates that there are only 50 economically viable family farms by BOR standards, not 1,800 as stated by the JBC.

laws and regulations, including labor policies, environment and contracting, that now govern the project. Labor costs would not be reduced. In fact, when compared to other western irrigation projects, present costs are not high. According to the attached (summary) study by one of Montana's most well known economists, (Thomas Power from the University of Montana), FIIP's O&M rates are 53 percent lower than the rates at 65 BOR operated projects in 17 Western states. Of further note, the study by Mr. Power indicates that current project imigation charges make up only 3.5 percent of total agricultural production costs on the Reservation. As Power notes, "Even if, as is extremely unlikely, turnover [of FIIP] would reduce these costs by a third, farm and ranch costs would be reduced by one percent. That would not significantly affect the financial viability of farm and ranch operations on the Reservation."

We ask this Committee to be aware of the extent to which the JBC has demonstrated antagonism to the most basic rights retained by the Flathead Nation, our members and our homeland in areas that have absolutely nothing to do with irrigation or farming. The JBC has opposed our efforts to retrocede from P.L. 83–280 which affects jurisdiction exercised by the Tribes over Indians. They opposed a hunting and fishing agreement we entered into with the state of Montana. They litigated against our effort to set reservation water quality standards even though farms are specifically exempt from the Clean Water Act. They have repeatedly litigated against the most basic and minimum instream flow regimes necessary to protect fisheries (three times in federal district court, twice before the Federal Circuit Court, one before the Supreme Court and five times before the Interior Department's Administrative Appeals process). They lost every one of these cases. Turning over operation and maintenance of the FIIP, which is so inextricably tied to trust resources, property and treaty rights, to the Tribes' singular adversary would be the epitome of asking the fox to guard the hen house and would be a gross abrogation of the trust responsibility the United States has toward the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

We will allow the BIA witnesses at today's hearing to defend their operation and management of the FIIP but it has been our observation that, particularly in recent years, the BIA has worked well with the irrigation districts and has done much to improve and rehabilitate the infrastructure of FIIP. They have spent hundreds of thousands of dollars on repairs of this aging project and have done so while maintaining the same O&M assessment rate for the past three years. The O&M rate has only increased by $2.00 per acre this past decade (essentially from $18 to $20). We find it more than ioruic that the JBC complains that these costs are exorbitant while they are assessing their members an additional $3.00 per acre—over and above the O&M assessment—for "administration" almost all of which goes to pay their lawyers and consultants to pursue the aforementioned frivolous litigation, to lobby for legislation before the Congress and before the state legislature such as federal turnover bills and opposition to state/tribal hunting and fishing agreements, and to take annual trips to Albuquerque to attend Federal Bar Association's Indian Law Conference. An attachment to our testimony includes a chart showing precisely how these funds are used. Remember that this is the same group who contended their members could not possibly afford the 65 cent ($0.65) increase that the BIA implemented in 1994, when O&M was increased from $17.80 to $18.45 per acre.

Unlike the JBC, we have spent much time and effort working to improve one of the most critical components of FIIP's infrastructure, the dams and reservoirs. Since 1989, we have operated the Safety of Dams (SOD) programs on our reservation via a contract with the Bureau of Indian Affairs pursuant to the Indian Self Determination Act. The Flathead Reservation did have the dubious honor of having more unsafe dams on our lands than existed on any reservation in the United States. As indicated in the attached chart, more than $30 million has been expended under the SOD program which has repaired unsafe dams to a recommended standard level of safety and employed many Indians and non-Indians in the process. We are particularly proud that some of our SOD projects have come in under budget and ahead of schedule. Since these are federal dams on an Indian reservation, we successfully urged Congress to deem the funds for these dams' repairs as non-reimbursable. This designation greatly benefited the members of the JBC.

Additionally, for the past twelve years, the Confederated Salish and Kootenai Tribes have successfully operated the Projects electric utility (renamed "Mission Valley Power") pursuant to an Indian Self-Determination Act contract. The JBC attempted to block this contract before both the Congress and the courts and they failed. The Tribes have structured their management of MVP under a five member Utility Board comprised of both tribal members and local non-Indian reservation residents. This Board is assisted by a seven member Consumer Council, which is similarly composed. In fact, the majority of the members of the Consumer Council

have been non-Indians. MVP, with 90 employees, supplies power to approximately 20,000 meters on the Reservation on an annual operating budget of approximately $16 million dollars. We were required to conduct extensive feasibility studies prior to undertaking operation of the electric utility. We were required to show the professional, technical and fiscal capability to operate this project and were already considered one of the most experienced federal/tribal contractors in the nation. It is noteworthy by comparison to realize that S. 630 proposes to turn over a massive, aged federal facility serving 127,000 acres, with 17 reservoirs (on Indian owned trust land) and well over 1,000 miles of canals without so much as a credit check, not to mention a demonstration of feasibility or capability.

We are attaching to this testimony a number of documents that further bolster the arguments presented herein, including a more detailed analysis of the problematic nature of S. 630. Additional attachments include resolutions and petitions from national Indian organizations and tribal leaders from across the country strongly opposing turnover of FIIP and expressing great concern over the precedent of transferring a BIA owned project, on an Indian reservation, over to a group of non-Indians, particularly to a group that has been so overtly antagonistic to tribal concerns and rights.

We hope the members of this Subcommittee will not report any bill out that would propose to transfer operation and maintenance of FIIP to the non-Indian irrigation districts that exist on our reservation. Thank you for your consideration of our views.

Enclosures.

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Ms. DEEGAN. Thank you.

Mr. Metropoulos.

STATEMENT OF JON METROPOULOS, ATTORNEY, FLATHEAD JOINT BOARD OF CONTROL, ST. IGNATIUS, MT

Mr. METROPOULOS. Thank you for this opportunity to present testimony today. I want to emphasize that we would like to concentrate on the management of the project today and in the past, and hopefully to help improve it for the future.

My name is Jon Metropoulos. I am with the law firm of Goff, Shenahan, Johnson & Waterman in Helena, Montana. I represent the Flathead Joint Board of Control, which is the central operating authority for the three irrigation districts Mr. Matt referred to.

They are the Flathead, the Mission, and the Jocko Valley Irrigation Districts. These districts are local governments under Montana law and, as mentioned earlier, Congress in 1926 required that they be formed in order to enter contracts with the United States to repay the cost of construction of the project.

We seek today, and our sole purpose is to seek your assistance in obtaining information about the way the project is run. We are not asking for a decision about changing the project management, who should be operating it. We need to just find out how it is run and more precisely how the money that irrigators send to the United States each year is spent.

As far as we are concerned, we have no criticisms or concerns to make today with the operations of any other party, specifically the Confederated Salish and Kootenai Tribes of the Flathead Nation and their operation of the power division. Our focus is on the delivery of water and the cost that that takes.

We believe we have a right to such information, because irrigators each year pay approximately $2.24 million to the Federal Government for the delivery of this water. Now, that money is paid, contrary to what has been said here, by irrigators who are tribal members as well as irrigators who are nonmembers. The irrigation do, in fact, include tribal members within their constituents. Tribal members do, in fact, have the opportunity to vote in all irrigation district elections. Tribal members do, in fact, have the opportunity to stand for election.

Land that is held in trust for tribes or tribal members by the United States is excluded from the irrigation districts and their operations by a statute which Congress passed in 1926, and so it is inaccurate to say that Indians have no voice in the districts. In fact, they have all the rights of any other irrigator who is a nontribal member.

Now I would like to briefly address the background of the project, which has been done quite well by the previous two witnesses, but there are some specific statements I need to make. The first is that the irrigation project itself was authorized in 1908, when Congress amended the 1904 Flathead Allotment Act. It was not authorized in 1904.

The second is, when Congress authorized the project in 1908 it required that the project be designed to provide irrigation water to all irrigable lands. There was no designation as to the race or tribal membership of the owner of that land. It is rather an arcane legal principle or point, but it will come to bear some day and needs to be stated.

As I stated earlier, our sole focus is on the irrigation operations. Of the 127,000 acres that are provided irrigation water by the project, 116,000 acres are owned in fee by individuals, and therefore those acres are within the irrigation districts. Those acres are owned by tribal members and nonmembers.

The number of irrigation accounts is something over 3,000 accounts. The number of family farmers and ranchers affected by this is something under 3,000. The irrigation districts entered contracts with the United States in the late twenties and early thirties because they have taxing power under the law of the State of Montana to levy assessments and transfer these to the United States. That gives the United States the security that the payments for the construction costs of the project will be made in all events.

Now, it is a fact that to this date the payments for construction costs of the project have been made out of net power revenues. Congress ordered that in the 1948 Act because the power division

of the project—strike that. The power generation plant, which is the Kerr Dam on the Flathead River, supplanted a project that was to be built by the irrigation project itself to pay for or to generate its electrical power needs.

Consequently, all consumers in the area, irrigators and nonirrigators, receive a relatively low-cost power from Kerr Dam, and a part of that is used, a small part of that $196,000 each year is used to pay off the construction debt of the project, so irrigators will dispute that it is a subsidy at all, let alone a subsidy to end all subsidies.

Now, on this point, let me conclude by saying that it should be recalled that the irrigation debt is a first lien on each acre of irrigable land within the irrigation districts, therefore, it is of great concern to each irrigator when this debt will be retired. It is not within those irrigators' powers, however. They have to pay their O&M payments over to the United States each year.

The net revenues are used to pay the construction costs. How those moneys are used and how the accounts are credited is fully the responsibility of the Bureau of Indian Affairs, and that is one of the issues we are asking for information about today.

We have two broad concerns. One is accountability. We seek your assistance today about financial accountability because we have been asking for some years now for information regarding the accounts in which O&M moneys have accrued, and in which the construction costs have been paid down since 1994.

There was an Inspector General audit which revealed that there was a portion of the construction cost that had not been paid but should have been, and I want you to recall that the BIA, using net power revenues, has been in charge of paying these construction costs or not, and I want to emphasize that this is in no way the responsibility of the Confederated Salish and Kootenai Tribes. It is BIA's responsibility.

That bill, which varied between 400,000 and 700,000, was presented to the irrigation districts for payments. At that time, my clients asked for some verification about what went into that bill, what it was made up, to make sure that the costs were actually reimbursable costs.

We received no such verification for 2 or 3 years. Memorial Day 1997, we did receive a response, however, to our refusal to pay the bill, and that is on Friday water deliveries were cut off.

As you might imagine, and as I hope you know, irrigation in late May in Montana is absolutely crucial, and having water cut off to pay a bill that has not been justified was outrageous. It was stated to a House committee 2 years ago that the water was later turned on after a few hours because the Joint Board of Control had paid the bill. That is erroneous. It was turned on because I was on the brink of obtaining Federal court relief for that arbitrary action. That bill has still not been paid because it has still not been verified by the BIA, and that is one of the specific things we point out in our written testimony that we would like your assistance with.

The relations with the BIA since that date have certainly thawed, and I have enjoyed talking with Ms. Blackwell about continuing the trend. I hope it can continue. The problem is, while re-

lations have thawed, information has not flowed. We still do not have justification for that bill.

A similar account, financial accountability issue concerns the accumulation, unknown to the irrigation districts and apparently unknown to the BIA, of O&M funds in excess of $1 million in a separate Treasury account fund. We discovered that a few years ago when we, looking at ledgers, noticed that we were getting quite a lot of interest payments, and by doing a few calculations we could determine that the principal was over $1 million.

We inquired about that, and only recently were informed that, in fact, yes, there were some overpayments on O&M, and that it had accumulated to over $1 million.

There are two concerns with this. One is, inadvertently accumulating over $1 million makes one concerned about careless use of money. The second is, this O&M payment is difficult for irrigators, farmers, and ranchers to make. To have had to make those payments when they were not needed in that specific year is a burden they should not have to bear. They can use that money much better themselves, rather than having it accumulate inadvertently in a Treasury account.

Once again, we do not know the specific level of that account. We do not know specifically how that occurred, and we do not know how that will be used. We are concerned that it may be frittered away, and would rather work with the BIA to use it on specific, crucial projects, but we have no commitment on that at this point, either.

Now, another concern, or another category of concern is the operations of the project, and it is clear from what has been stated today that there is some disagreement about how well it is operated in terms of the cost, and in terms of the water delivered. I do not purport to be an expert on the issue. I have compared, however, the O&M price per acre of irrigation districts throughout Montana to the Flathead project, and I have compared the amount of water delivered for that price to the Flathead project, and the Flathead project does not come out favorably.

The Flathead project O&M of $19.95 is almost twice that of the average of other projects in Montana which are specified in our written testimony. Those projects uniformly deliver at least 2 acre feet per acre, and in some cases 1½ or 3 acre feet per acre, and the Flathead project we receive on average 7/10ths of an acre foot per acre. That is very expensive irrigation water, and if it is justified, that justification has not been shown to me or my clients.

We do not understand why the administrative costs of the Flathead project are up around 70 percent and in some years exceed 75 percent, while the administrative cost of other irrigation districts in Montana are down around 50 percent and as low as 34 percent. If that can be explained, we would like to see the explanation, because we think there may be some ways to bring down the administrative cost and thereby bring down or put a cap on the O&M.

The other aspect of operational concerns is that 7/10ths of an acre foot is simply not enough. Soil studies have indicated that in the Flathead area 1.2 acre feet per acre to 1.75 acre feet per acre

are needed to optimize the soil. We have not received 1.2 acre feet per acre for, I think, 10 years.

Now, part of that is impacted by the fact that there are instream flows on the project, and we do not dispute the need to maintain instream flows until water rights can be adjudicated or negotiated, but we do think there are ways to save water. There are ways to bring more water into the system. For example, on the Flathead River there are three large pumps that can supplement the water available for irrigation to a very great extent.

Those pumps, however, have not been running simultaneously, all three of them, for, I believe, 7 years. One or the other has been in disrepair. They have not been automated, although all the rehabilitation Ms. Blackwell spoke of is paid for by irrigators, and irrigators have said they will pay for the automation of the pumps. They have not been optimized. They are not turned on early in the irrigation season, and they are not used late in the irrigation season to create carryover storage in the Pablo Canal.

These are operational factors which irrigators have said they will pay for, but which are not listened to and are not put into effect. Now, if there is a good reason for that, again, we have not been able to obtain information. We ask your help in doing so so that we can try to come to a better use of water and a more efficient use of more water on the Flathead Reservation.

I want to conclude just by emphasizing what I started out with. We are not asking this committee or this subcommittee to make any decisions about changing who operates the project, and we are not leveling any criticism about the Confederated Tribes, nor are we trying to take any shots at instream flows.

We do think more water can be delivered for the same amount of O&M for less, if we could have more communication with BIA. We do think, since irrigators pay for all of the O&M on that project, they have a right to know where all the money goes.

Ms. Blackwell gave you, I think down to the penny, the amount spent on various R&B projects on the Flathead project, and I wonder why, if she knows that down to the penny, we cannot receive down to the nickel or dime a clear accounting of where the money has gone.

Thank you.

[The prepared statement of Mr. Metropoulos follows:]

PREPARED STATEMENT OF JON METROPOULOS, ATTORNEY, FLATHEAD JOINT BOARD OF CONTROL, ST. IGNATIUS, MT

I. INTRODUCTION

The Flathead Joint Board of Control, the central operating authority for the Flathead Irrigation District, the Jocko Irrigation District, and the Mission Valley Irrigation District (collectively referred to as "the JBC" or "Districts"), appreciates this opportunity to present testimony at this oversight hearing to the Water and Power Subcommittee of the Senate Energy and Natural Resources Committee.

My name is Jon Metropoulos. I am an attorney for the JBC and a late replacement as a witness for the JBC for Mr. Alan Mikkelsen. I thank the Subcommittee for its indulgence in allowing me to present testimony on behalf of the JBC.

This written testimony falls into two main categories. First, it outlines the background of the Flathead Irrigation and Power Project ("the Project"), which delivers water to the Districts and their constituents and electricity to all consumers on the Flathead reservation, in northwest Montana. This background includes the Project's historical development, the facts "on the ground," and the current division of operational responsibilities. Second, this testimony outlines two issues that the JBC be-

lieves this Subcommittee could assist it in addressing concerning the operation of the Project and related financial matters by the Bureau of Indian Affairs (BIA). Those issues are Financial Accountability and Operational Accountability.

Before proceeding, a preliminary point requires emphasis. While the concerns of the JBC arise out of serious and repeated concerns raised by many of its constituents and, on their behalf, it feels compelled to seek this subcommittee's assistance to address them, the JBC does not want to leave an incorrect impression of the BIA's operation of the Project. There are aspects of that operation which have been improving. The local managers have been, by and large, attempting to work more closely with the Districts. There have been discussions in the last year or so about some of these issues and out of those discussions local and Portland Area Office BIA officials have expressed some desire to come to agreement with the Districts on important issues.

Unfortunately, these have not borne fruit. It appears to us that notwithstanding the good faith of local and area managers systemic obstacles prevent improvements in operation and even communication needed to preserve irrigated agriculture in our area for the future.

We continue to believe, and hope this subcommittee agrees, that irrigated agriculture is vital to our area and its economy. Project lands generate in excess of $30 million dollars in economic activity in our area each year. Viable irrigated agriculture allows farms and ranches to continue as they have for almost a century and resist the pressure to subdivide, reducing even more the open spaces available in western Montana.

A number of factors make this increasingly difficult. The operation of the Project need not be one of them.

But it is a fact that water deliveries in a crucial time of year, Memorial Day weekend, were cut off in 1997 because the Districts did not cave in to what now appear to be unwarranted demands, only to be restored at the last minute just before the JBC obtained federal court intervention.

It is a fact that after years of requests and negotiations the BIA either will not or cannot provide accurate answers to crucial financial questions, such as how much more debt remains as a lien on irrigators' land for the construction of the Project? What expenditures did such debt arise from—i.e. is it actually part of the cost of constructing the Project or something else?

It is also a fact that account balances from excess Operation and Maintenance (O&M) charges accumulated to over $1 million? Why did his happen when farmers and ranchers could better use the money themselves? What will this money be used for?

It is also a fact that the Project administrative costs far exceed administrative costs for other irrigation projects in Montana and that it delivers far less water for more O&M costs. Why can't administrative costs be reduced to a level comparable to other Projects? Why can't more water be delivered? And if the answer is a structural problem with the Project, what is BIA proposing to remedy it?

If the Districts and the approximately 3,000 family farmers and ranchers they represent are completely at the whim and mercy of the BIA, then answers to these and other questions cannot be hoped for. But the JBC, with encouraging communications from the BIA, believes it does have options. This Subcommittee can certainly help to obtain full, timely answers to these questions. We thank you for taking the time to examine them and ask you to help us in obtaining information.

II. BACKGROUND OF THE FLATHEAD IRRIGATION AND POWER PROJECT

A. Historical Development

In authorizing the construction of the Project in 1908, Congress required the Project to provide water to all irrigable land, whether owned by a tribal member or a nonmember. Act of May 29, 1908, 35 Stat. 444, 448; *United States* v. *McIntire*, 101 F.2d 651, 653-654 (9th Cir. 1939). Moreover, Congress authorized this massive Project fully aware that it would capture and divert most if not all the water then running in the streams. *McIntire*, 101 F.2d at 652: instructions to Reclamation Service survey crew "were to find the best way to use all of the water available on that project. . . ." (Internal quotation omitted.)

In 1926, Congress expressly authorized, without limitation, the Districts' formation and operation under State law. It did so in part to make use of the State's legal authority to levy irrigation assessments to repay the construction costs and the yearly operation and maintenance (O&M) costs of the Project, obligations on the part of the Districts which it required to be a part of repayment contracts. Act of May 10, 1926, 44 Stat. 453, 464, Ch. 277. Consequently, after formation of the Dis-

tricts was ratified by the state district court, each District entered a repayment contract with the United States in the late 1920's or early 1930's.

Those contracts, as amended, impose a lien on each acre of District land for a pro rata share of the construction costs of the Project, obligate the Districts to use their legal authority under State law to pay off those liens in certain circumstances, and obligate the Districts to use their authority to levy and pay the yearly O&M charge. In return, the United States is obligated to deliver water for irrigation purposes and to keep the Project in good working condition.

In the 1930's, few if any repayments on the construction costs were made. The Great Depression began and ended in agriculture, and reclamation projects throughout the West that leaned on federal funding for construction were given a reprieve on repayment. Many farmers and ranchers avoided bankruptcy only through such reprieves and some survived only because, in some instances, construction repayments and O&M costs were partially forgiven.

In the late 1930's and early 40's, electrification came to the Project. The Power Division was developed in conjunction with Kerr dam on the Flathead river, and revenues from power sales were anticipated.

In 1948, Congress passed a statute establishing priorities for the use of such revenues. Act of May 25, 1948, 62 Stat. 269. This act provided that "all net revenues hereafter accumulated from the power system shall be applied annually to the following purposes, in the following order of priority." Those six priorities were: to pay matured installments for construction costs of the power system; to pay matured installments for construction costs of the irrigation system; to pay unmatured installments of the power system; to pay unmatured installments of the irrigation system; to pay construction costs chargeable to Indian-owned lands but deferred from collection; to pay annual O&M costs of the irrigation system.

Irrigators' land continued to be subject to the liens for construction costs as well as for the purchase of the reservoir sites and easements thereto from the Flathead Tribes. Thus, while amendments to the original repayment contracts incorporating the requirements of the 1948 Act were executed, irrigators' land remained, and remains today, subject to the lien for construction costs of the Project.

B. Current Status

At this time, the Districts, using their authority under State law, levy, collect and pay over to the United States approximately $2.24 million each year in O&M costs in order to ensure the delivery of irrigation water and the upkeep of the Project.

Irrigators pay for the entire costs of the O&M of the Project each year. No federal funds are appropriated for that purpose, although there is a debt remaining to the federal treasury for the construction cost of the Project.

The Project now controls and delivers, through diversions, impoundments, and pumping from Flathead Lake, approximately 350,000 acre feet of water each year. This water is distributed by the Project pursuant to the requirements of 25 U.S.C. 381 and pertinent federal regulations as outline in 25 C.F.R. 171.

The Project covers 127,763.71 irrigable acres in three major valleys. Assessment notices are prepared for 3,856 water delivery tracts, of which 3,270 are constituents of the Districts, 113 are fee patented non-district and 472 are under trust accounts.

The Project is divided into four operations divisions covering seven hydrologically independent areas. The Camas division covers 13,092.81 acres in the Lonepine/Hot Springs area, along the Little Bitterroot River drainage. The Pablo division handles pumping from Flathead Lake/River and the distribution of water to 52,120.00 acres in the Ronan, Polson, Round Butte and Valley View areas, including the hydrologically independent East Bay area along Flathead Lake. The Post division covers 32,223.17 acres between Post and Crow Creeks, extending to the hydrologically independent Moiese area along the Flathead River which utilizes return flows from the Pablo division and runoff collected in Lower Crow reservoir. The Mission/Jocko division includes 19,659.79 acres in the Mission area of the Mission Valley that is hydrologically connected to Pablo and Post-divisions, and 10,667.04 in the Jocko River Valley extending from East of Arlee to west of Dixon. The Jocko Valley has three hydrologically separate areas. The divisions correspond roughly to the three Irrigation Districts for which the Flathead Joint Board of Control serves as a central operating authority.

All land owned in fee, whether the owner is a member of the Flathead Tribes or not, is subject to the authority of the Irrigation Districts under the Act of May 10, 1926. This amounts to 114,208.63 acres and includes some 3,331.41 acres that have been released from trust status but are still in non-district status. The project also delivers irrigation water to 13,555.08 acres that are held in trust by the United States, either for the Tribes or individual tribal members.

The Project storage and distribution systems are comprehensive and well designed. There are some 108 miles of main supply canals and about 1,077 miles of distribution canals and laterals, with about 10,000 water control structures, such as headgates, checks, drop chutes and diversion dams. There are 16 reservoirs ranging from 28,300 to 95 acre feet in capacity. Many of these small reservoirs are linked together to store water from the numerous water sources and distribute it to common areas of use.

The Project has a comprehensive, pervasive effect on water in the creeks, rivers, and lakes of the reservation and somewhat beyond. Hubbart reservoir and Little Bitterroot Lake reservoir on the Little Bitterroot River, are located off the reservation, three and fifteen miles, respectively, north of its northern boundary. Three other off-reservation diversions also bring water to the project. Project diversion rights are filed on water courses, on and off the reservation. In total, the Project reservoirs have usable capacity to store 156,579 acre feet of water each year.

The pervasiveness of the project was demonstrated in 1986 when the BIA took the administrative action of instituting interim minimum instream flows in streams throughout the Project. These minimum flows apply to all the major stream reaches and reservoirs affected by the Project. The basis for these flows is the Tribes' claim that under Article 3 of the Treaty of Hellgate the Federal Government has responsibility to exercise reserved water rights to maintain non-consumptive minimum flows sufficient to sustain a fishery. Consequently, the BIA instituted, as an interim policy until this issue is finally adjudicated either by the Montana Water Court or through ratification of a compact negotiated by the Compact Commission and the Tribes, the imposition of minimum instream flows. Since 1988, these flows have been a part of the Operating Procedures of the Project.

C. Current Operational Responsibilities

While the predecessor to the Bureau of Reclamation, the Federal Reclamation Service, constructed the Project, since 1924 the Bureau of Indian Affairs has operated it. In the 76 years of its operational authority and responsibility, the BIA has been responsible for completing the Project, including the Power Division, performing annual O&M, performing rehabilitation and betterment, delivering water on a timely basis, and keeping the various accounts of the Project, specifically the accounts showing the annual retirement of construction costs, and therefore the reduction of the lien on irrigators' lands, and the Power Division net revenue accounts, from which construction costs are paid, and the O&M accounts, which are supposed to be accumulated and used each year. (At this time, the Districts pay to the BIA $2.24 million each year for the O&M of the Project.)

Since the mid-1980's, the Confederated Salish and Kootenai Tribes of the Flathead Nation have operated the Power Division of the Project, which was renamed Mission Valley Power, under a contract with the Bureau of Indian Affairs pursuant to P.L. 638. That relationship did not divest BIA of any of its responsibilities to the Districts under the Repayment contracts, did not transfer ownership of the Power Division, and did not alter the contractual and statutory relationship of the Districts with the BIA.

II. ISSUES

The JBC recognizes the complexity of operating and managing the Project. Furthermore, it recognizes that BIA's position as trustee for the Flathead Tribes provides additional tasks for the local BIA managers to perform in addition to operating the Project, thereby increasing their work-load. The BIA's 76 years of experience in operating the Project, however, in the opinion of the JBC and many of its constituents, should have allowed it ample time to learn how to run the Project efficiently while also allowing it to keep track of the hard-earned money paid to it each year for the upkeep of the Project. This, unfortunately, does not appear to be the case.

The issues outlined below and the questions posed are not the only ones raised by BIA's operation of the Project. But they are of central concern at this time to the Districts and irrigators.

A. Financial Accountability

Each acre of irrigators' land is subject to a lien for a pro rata share of the amount of the construction costs. It is our understanding this applies to trust lands as well as lands owned in fee. The construction costs for the irrigation division of the project as originally set out in a schedule pursuant to the Act of May 25, 1948, 62 Stat. 269, were completely retired when the 1999 installment was made this fall.

Net Power Revenues (NPR) from the Power Division pay for these installments, and the irrigable land has a first lien on it in case NPR does not make the payment.

For some years now, the annual installments for the irrigation system construction costs have been at the maximum amount set in the Amended Repayment Contracts—$196,900. The 1948 Act, however, provided that the original costs and all subsequent construction costs must be repaid either within the useful life of the irrigation works for which they were incurred or within 50 years of the date the cost was incurred, whichever is less. The Bureau has assumed, it appears, that all the works for which construction costs were incurred after 1948 will have useful lives longer than 50 years. Therefore, it put the repayment of those costs on 50-year installments from the date the cost was incurred.

Adhering to this schedule, final costs will not be repaid until 2039. However, the annual installments to retire the construction costs incurred after 1948 do not approach the maximum amount of $196,900 per year. If that maximum amount is applied to the remaining costs, the irrigation division can be paid off in four or five years. This time can be even further reduced through application of amounts of NPR formerly used to pay power division construction costs, which has now been retired.

Other reductions from the total reimbursable amount now showing as due may also reduce the time until final payout. For example, the JBC has been assured by responsible Area Office officials that approximately $450,000.00 now accounted as reimbursable costs will be eliminated from that lien because it accrued as part of a jobs bill program of the federal government between 1983 and 1989. Similarly, the JBC believes approximately $800,000.00 now part of the liens on irrigators' land should be eliminated because they arose from the Safety Evaluation of Existing Dams (SEED) program, which is the first phase of the Safety of Dams (SOD) program that is not reimbursable because it is administered as a public safety program.

The JBC has been attempting to discuss this issue with the BIA and obtain final figures as to the remaining lien on irrigators' land. To pay off the lien as quickly as possible seems to make good sense for all. It would finally remove the lien from irrigators' land, which is an impediment to their operations at this time. Furthermore, it would finally, and more promptly, pay off the debt to the U.S. Treasury. It could then free up net power revenues from this obligation, allowing other uses of this amount as required by the 1948 Act or, upon agreement of the parties, perhaps uses not contemplated by that Act.

The JBC is flexible, willing to talk, ready to compromise, and desirous of agreement. But we need facts.

For example.

Will the BIA stand by its assurance and confirm that the Jobs Bill money will be taken off the repayment schedule as not a properly reimbursable amount? Will it agree that the SEED money should also be eliminated from the amount of reimbursable construction costs?

Does the BIA agree that full payment of the annual amount of $196,900 on the construction debt should be maintained? If not, why? Is it better to keep irrigators' land encumbered by a first lien in favor of the federal government? Is it better to delay repayment to the federal treasury? It is not better to free-up Net Power Revenues for some other use?

Another financial accountability issue leads to a transition in this testimony to a discussion of operational accountability.

Because BIA incorrectly handled the various accounts pertaining to the construction costs and the annual repayment, it asserted in 1993 that a certain large amount, approximately $450,000.00, had been improperly deferred—i.e. not paid. Consequently, it made a demand on the Districts that they use their taxing powers, levy a tax on irrigators and pay this amount.

The JBC first asked for documentation showing that the amount is accurate and, second, asserted that since the mistake was BIA's it may not be owed, at least directly, by irrigators. This issue still has not been resolved because the BIA, upon recognizing that its figures were not sound, engaged in an audit, the conclusions and analysis of which have been completed, we believe, but which have not been given to the JBC. That lack of financial accountability is bad enough.

But in 1997, the Friday before Memorial Day weekend was to start, the BIA shut off water deliveries in an effort to force the JBC to agree to make this payment. To the JBC, this appeared to be high-handed and dangerous. Since the amount of the bill presented to the JBC has not been and cannot be supported by documentation, it seems it would have been negligent on its part to simply agree to levy even higher O&M charges to pay it.

The parties have been attempting to work through this issue but still the BIA has not been able to reconcile its accounts and has not shown the JBC the information it does have.

The JBC would like a commitment from the BIA to provide full access to all audit information so that we can try to agree on the amounts remaining to be paid on the construction cost liens. Will BIA commit to this?

Further, will BIA commit to not shutting off water deliveries, or threatening to do so, to try to force compliance with its demands?

B. Operational Accountability

As noted, irrigators pay approximately $2.24 million, via the Districts, to the BIA each year for the operation and maintenance of the Project. All Project costs are borne by irrigators. No annual federal appropriation contributes to the operation of the Project.

This represents a per acre O&M charge of $19.95. In return, irrigators receive, in an average year .7 of an acre foot of water per irrigable acre. Based on data BIA has divulged, 75% of the O&M payment goes to administrative costs, and it appears this will only increase as federal pay scales steadily increase. This does not compare favorably to other projects in Montana.

For example, the East Bench Irrigation District delivers 2.0 to 2.5 af/ac for an O&M cost of $10.75 per acre. Its administrative cost is 44% of the total. The Greenfields Irrigation District delivers 2.0 af/ac for an O&M cost of $12.00 per acre. The Helena Valley Irrigation District has an O&M cost of $18.00 per acre, but delivers 3 af/ac. It's administrative costs are estimated at about 50% of the O&M. Finally, the Lower Yellowstone Irrigation Project has the highest O&M of $22.50 per acre, but it delivers on average 2.5 af/ac and can deliver far more if the irrigator needs it.

This disparity raises a number of questions to which the JBC has not been able to get answers.

1.What can be done to reduce the administrative costs of the Project without simply shifting the burden on to the irrigators in another manner? What plans does BIA have to cap and reduce the steady growth in administrative costs? Can these be done without sacrificing deliveries in water which are already short?

2.What can be done to increase the amount of water delivered for irrigation? What plans does BIA have to do so? When will these be started?

The JBC believes that BIA must start from the recognition that the O&M charge of $19.95 per acre is simply too high, even exorbitant, in return for .7 af/ac of water, especially in light of the fact that a very high proportion of the O&M goes to administrative costs. If BIA will agree to this proposition, then the JBC would ask what they can do together to reduce the O&M rate, or at least the proportion that goes to administrative costs, and increase the amount of water deliverable for irrigation.

Ms. DEEGAN. Thank you very much. We will take questions from the members to submit to you, and we will adjourn the hearing. Thank you.

[Whereupon, at 3:30 p.m., the hearing was adjourned.]

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