

**BRIEFING PAPER**  
**WATER RIGHTS SETTLEMENT PROPOSAL**  
**PRESENTED BY THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE**  
**FLATHEAD INDIAN RESERVATION**

July 27, 2010

**1 INTRODUCTION**

The Confederated Salish and Kootenai Tribes (Tribes) of the Flathead Indian Reservation, located in Western Montana, are pleased to present this overview of the water rights settlement we anticipate achieving in the next two years. The Tribes, the Montana Reserved Water Rights Compact Commission and the United States are aggressively negotiating a settlement of the Tribes' extensive reserved and aboriginally-based claims to water on and off of the Flathead Reservation. If settlement is to occur, it must happen prior to June, 2013, which is the statutory deadline for all Indian water rights compacts to be completed under Montana State law. If no Compact is approved by the Montana Legislature by that date, the Tribes and the United States will be required to file water rights claims for the Tribes in the ongoing Montana general water rights adjudication proceedings. The Tribes are prepared to make those filings for aboriginal and Winters reserved water rights on and off of the Reservation.

The Tribes propose a settlement approach unique in many aspects. While our final settlement package is not yet complete, we anticipate that the main components of that settlement will protect both Indian and non-Indian verified existing water uses, manage Reservation surface and ground water as a unitary natural resource by a joint State/Tribal management entity under a single body of law, foster rehabilitation of the degraded habitat for Tribal fisheries and wildlife on and off of the Reservation, and provide for Tribal economic and educational development. This settlement will also provide redress to the Tribes for injuries to Tribal natural resources arising out of or resulting from the acts, errors and omissions of the United States and the State of Montana pertaining to water management and related issues since the Reservation was reserved by the United States in trust for the Tribes. It is assumed that the State of Montana will contribute materially to the final settlement.

**2 THE FLATHEAD INDIAN RESERVATION AND THE HELLGATE TREATY**

The Tribes have occupied central and western Montana, as well as portions of Idaho and Canada, as their homeland for thousands of years. The Smithsonian Institute's Handbook of North American Indians, Vol. 12 (1998), entitled Plateau Indians, describes in detail the aboriginal reliance of the Tribes on the panoply of natural resources this region has to offer. They practiced their cyclic way of life based upon the harvest of seasonally available fish, game, and plants for food, medicinal purposes and cultural needs.

Water has been central to the Tribes' existence since time immemorial. It is a source of travel and trade as well as an essential component of the habitat for the fish, wildlife and plants necessary to support our physical and cultural existence. In August of 1805, the Tribes greeted Lewis and Clark in the Bitterroot River Valley and showed them the way over the Lolo Creek Trail towards the Pacific Coast. In 1841 the Jesuits built Saint Mary's Mission in the Bitterroot Valley to satisfy the resident Salish Tribes' request for education and assistance. The Church joined with the Tribes to create the first irrigation canals in Montana. Prior to 1854 the Jesuits developed irrigation facilities near the Catholic Mission of St. Ignatius for the benefit of the Tribes in what became the Flathead Indian Reservation with the signing of the Hellgate Treaty.

The Flathead Indian Reservation was reserved by the Tribes as their permanent and exclusive homeland in the Hellgate Treaty of July 16, 1855 (12 Stat. 975). The Hellgate Treaty is one of a series of similar Indian treaties entered between the United States, represented by Isaac Stevens, and numerous tribes of the Columbia River system. In Article One of the Hellgate Treaty the Tribes ceded to the United States a significant portion of their aboriginal territory. In Article Two the Tribes reserved to themselves from their aboriginal territory the Flathead Indian Reservation.

A common attribute of Stevens treaties is express perpetuation of tribal aboriginal hunting, fishing and gathering rights on and off of Reservations. Hunting, fishing, trapping and gathering throughout their aboriginal territory were essential to the Tribes' existence before and after non-Indian contact. That reliance is expressly ratified in Article Three of the Treaty, when the Tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Flathead Indian Reservation. They also expressly reserved the right to continue their hunting, fishing and gathering needs off of the Reservation in their aboriginal territory. This Treaty language is indistinguishable from the treaty language that has secured to other tribes the right to a federally-protected salmonid allocation both on and off of their Reservations.

Articles Four and Five of the Treaty demonstrate the commitment of the United States to provide the necessary materials, equipment, facilities, educational facilities, instruction and monetary support to convert the Tribes to an agrarian society. These promises and more are what underpin the continuing existence of the Tribes. We have worked hard to protect our rights and resources for future generations at considerable cost and fair success.

### **3. HYDROLOGIC SETTING**

Streams and rivers on the Reservation, with the exception of the Flathead and Little Bitterroot Rivers, arise in mountainous terrain that is predominantly in Tribal ownership. Extensive valley-floor wetland and groundwater resources also originate from Reservation watersheds. Stresses on Tribal water resources began with the allotment-era opening of the Reservation, followed by construction and operation of the approximately 130,000 acre federal Flathead Indian Irrigation Project (Project), and ongoing water development under the State of Montana appropriation system. Development has culminated in the current pattern of surface

and ground water use, which substantially diminishes Reservation riparian and aquatic habitats and the ability of the Tribes to utilize their resources in a manner consistent with the 1855 Treaty of Hellgate

The Flathead River originates in southern British Columbia and the Bob Marshall Wilderness and flows through portions of the Tribes' aboriginal territory. Once on the Reservation it flows for over 70 miles and drains the entire Reservation. The Flathead River is a large headwater tributary to the Columbia River, with a mean annual runoff exceeding eight million acre-feet of water. Two hydropower facilities, Kerr Dam and the Hungry Horse project, respectively have storage capacities of approximately 1.8 and 3.5 million acre-feet. Water management of both facilities is fully integrated with operations for the Federal Columbia River Power System including system-wide flood control, power generation, and reservoir maintenance and release patterns to enhance both anadromous and inland fisheries. **Figure 1** depicts the regional nature of the waters at issue.

Kerr Dam, located on the Reservation at the outlet of Flathead Lake and completed in 1938, is currently operated by PPL Montana. Following FERC relicensing, the Tribes were designated co-licensees with the option to operate the facility starting in 2015. Kerr Dam regulates the top ten feet of Flathead Lake, a natural waterbody, of which the south half is located within the Reservation. While there are clear power and recreational benefits attributable to the facility, these were generally achieved at the expense of Tribal natural resources. The facility was operated as a load following power plant until implementation of ramping rate and daily flow schedules in the late 1990's. Prior to this, dramatic flow fluctuations substantially degraded Flathead River riparian and aquatic habitats and lead to the lowest trout densities of any large Montana river. Maintenance of the full pool elevation of Flathead Lake resulted in widespread shoreline erosion, including the complete loss of the unique 800 acre delta where the Flathead River enters the lake.

Hungry Horse Dam, located on the lower South Fork Flathead River, was completed in 1958 and is operated by the Bureau of Reclamation. The dam inundated 80 miles of the South Fork Flathead River and tributaries, irreversibly influencing the physical and cultural landscape in this portion of the Tribes' aboriginal territory. Due to the reservoir's large storage capacity and flood control mandate, peak streamflows have been measurably reduced throughout the lower Flathead system. Again, there are clear economic benefits that can be attributed to the facility, but the reduction in peak flows has diminished the formation and maintenance of riparian habitat along large stretches of the Flathead River within the Flathead Reservation.

The ecology of streams and rivers on the Reservation is linked to seasonal mountain snowmelt with spring and early summer streamflows that typically account for 60 to 80 percent of the annual runoff. During this critical water management period the 17 federal Project irrigation reservoirs are filled, state-based appropriations are met, wetland and groundwater resources are recharged and, to the extent not diverted for irrigation, elevated streamflows form and maintain the riparian and aquatic habitat upon which native and introduced species depend.

However, in all but the wettest years, there is insufficient natural runoff to meet competing demands for water use. Tribal natural resources bear the brunt of water shortages, with the Little Bitterroot River exhibiting some of the most severe water shortages. This river flows for over 50 miles on the Reservation. However, below the primary Project irrigation diversions in upper reaches of the river over 60% of the total annual runoff is depleted, and by the mouth the river is either dry or at very low flows during the summer irrigation period. **Figure 2** shows the inextricably intertwined nature of Flathead Indian Irrigation Project facilities and water bodies on the Reservation.

Streams and rivers that support higher summer flows are often maintained by surface water and ground water interactions. In some watersheds the exchange is very substantial, and it becomes a somewhat artificial distinction to physically separate surface and ground water resources.

With the above as context, two of the primary tenets of the Tribal proposal to settle water rights - unitary management and protection of existing verified uses - come into focus. Land use patterns that have developed over the last century, including over 155,000 combined Project and private irrigated acres, development of over 7,000 domestic wells and numerous municipal and community wells, lead the Tribes to recognize that verified existing uses would need some level of protection through the settlement process. Concurrent with this, the Tribes perceive (a) a complex physical environment where surface and ground water as well as natural and irrigation-influenced flows are co-mingled, and (b) a legal and institutional pattern of appropriations and water use that is highly complex. Logically, the Tribes consider that unitary management, a legal and administrative framework that sees surface and ground water as a single resource to manage, and does not bifurcate administration between State of Montana and Tribal codes, as an appropriate path to implement a compact. **Figure 3**, demonstrating the checkerboard land ownership pattern on the Reservation, casts light on the illogic of the traditional bifurcated system of water administration perpetuated in most Indian water rights settlements.

#### **4 THE FLATHEAD ALLOTMENT ACT AND THE FLATHEAD INDIAN IRRIGATION PROJECT**

##### **A The Flathead Allotment Act**

The Flathead Indian Reservation remained in communal Tribal ownership until Congress, over the objection of the Tribes, passed the Flathead Allotment Act of April 23, 1904 (33 Stat 302). That Act, as amended, set the stage for the Tribes' efforts to achieve a water rights settlement. The three primary components of the Act consist of (1) allotment of Tribal land to individual Indians, (2) opening "surplus" unallotted Tribal lands to non-Indian homestead entry, and (3) authorization of the development of the Flathead Indian Irrigation Project (Project) "for the benefit of the Indians" of the Flathead Reservation contained in Section 14 of the Act. The Act contains additional considerations that play into a settlement, such as the grant to the State of Montana of sections 16 and 36 of each township on the Reservation.

(1) Allotment

Members of the Tribes received individual allotments of Tribal land consisting of 80 or 160 acres covering approximately 220,000 acres of the 1.2 million acre Reservation. As the Reservation land status map (Figure 3) demonstrates, most of the allotments are no longer in Indian ownership and in fact, most were lost from Indian ownership by the late 1920's.

(2) Homesteading

Tribal lands the Secretary of Interior deemed "surplus" to allotments were opened to non-Indian entry in 1910. Approximately 410,600 acres of Tribal land were taken as homesteads in the early 1900's. The Secretary of Interior sold these lands in his capacity as trustee to the Tribes.

(3) Flathead Indian Irrigation Project

The Project, the single largest impact on the history of the Flathead Indian Reservation, is discussed in detail in the next portion of this briefing paper.

The Court of Claims has determined that the Flathead Allotment Act constituted an unlawful breach of the Hellgate Treaty and resulted in compensable takings of Tribal lands. The Tribal government has received compensation from the United States for taking Tribal land for State sections and homestead lands and other federal purposes. The 1948 amendments to the Act provided the Tribal government *de minimis* compensation for undefined and perpetual easements over Tribal land for Project facilities. Owners of allotted and homesteaded lands have received no compensation for Project rights-of-way over their lands. The Tribes have received no compensation for taking Tribal aboriginal or reserved water rights.

B. The Flathead Indian Irrigation Project

(1) Purpose of the Project

The Act and its 1908 amendments directed the United States to build an irrigation project for the benefit of the Indians of the Reservation. The Act also provided for the homestead entrymen to be served. That project is called the Flathead Indian Irrigation Project (Project). The Project serves approximately 130,000 acres of land on the Reservation.

Prior to initiating construction of the Project, the Secretary acknowledged the existence of extensive irrigation by members of the Tribes and directed the survey of those Indian uses of water. This federal undertaking recorded approximately 470 cases of Indian irrigation that predated construction of the Project. Congress provided no statutory authority or guidance to the Secretary for this federal endeavor. These early Indian irrigation uses have come to be known locally as "Secretarial water rights." As with the allotments those Secretarial water rights became attached to, most are now in non-Indian ownership. Secretarial water rights provide one basis for non-Indian claims to water on the Reservation.

(2) The Project is a BIA Project

The irrigation project is a Bureau of Indian Affairs (BIA) project authorized under the Flathead Allotment Act. It is not a Bureau of Reclamation (BOR) authorized under the 1902

Reclamation Act The Flathead Allotment Act incorporated only limited portions of the Reclamation Act of 1902 for application on the Reservation For example, the Act did not invoke the application of state water law Consequently the Project does not operate under water delivery contracts or other commitments common to BOR projects

The BIA was solely responsible for operation and maintenance of the Project in accordance with 25 U S C 281, et seq , Title 25 of the Code of Federal Regulation, the BIA irrigation manual and federal judicial guidance prior to April 7, 2010 Since that date, management and operation has been conducted jointly by the Tribes and the Flathead Joint Board of Control, the representational entity for the three state-based irrigation districts authorized to exist within the project boundaries pursuant to a 1928 amendment to the Flathead Allotment Act The United States has retained ownership of the project under the BIA-approved Project operating agreement between the Tribes, the Joint Board and the United States The Project is now operated and maintained by the Cooperative Management Entity (CME), a cooperative undertaking between the Tribes and the Joint Board of Control

### (3) Project Construction, Operation and Maintenance Has Severely Degraded Tribal Natural Resources

Federal construction and operation of the Project began in 1908 and was essentially complete in 1964 The Project consists of 16 reservoirs on the Reservation and one upstream and north of the Reservation on the Little Bitterroot River Most of the reservoirs are natural water bodies modified by the United States to enhance storage capacity There are approximately 1,100 miles of canals and laterals and approximately 10,000 irrigation structures within the Project Many canals divert some to all of the flow of natural streams In many cases, natural streams were and continue to be totally obliterated With the exception of one off-Reservation diversion on Placid Creek (discussed below), not one of these Project structures was designed and built to provide any instream flow, screening or fish passage It was not until 1985, after the Tribes successfully sued to enjoin the United States from dewatering Reservation streams, that the Project made any effort to maintain minimum instream flows to protect the Tribes' aboriginal and Treaty-reserved fishery habitat impacted by the Project on the Reservation Subsequent efforts by the Tribes, including securing funding and materials, finally prodded the BIA to initiate a fish screening effort for Project diversions on the Reservation

To supplement the water supply for the Project the United States constructed numerous trans-basin diversions within the Reservation and four trans-boundary diversions that bring water onto the Reservation from off-Reservation watersheds One trans-boundary diversion, from Placid Creek off of the Reservation, has had a BIA fish screen and ladder in place since the 1930's at the request of non-Indian land owners seeking to protect their portion of the off-Reservation aquatic environment This was 50 years before the federal court mandated the BIA to undertake similar protections for Tribal resources on the Reservation The construction of these watershed diversions has resulted in well-documented massive and ongoing erosional features and numerous lesser but cumulatively significant injuries to Tribal lands and waters within the Reservation, including but not limited to uncontrolled irrigation return flows, canal

breaks, dam failures, flooding and unregulated stream diversions

In the 1948 amendments to the Act Congress directed that a portion of the electrical power generated by the FERC-licensed Kerr hydroelectric facility be dedicated to paying for a portion of Project costs and operational expenses, including eventual coverage of operation and maintenance assessments normally chargeable to the irrigators. The Tribes are co-licensee of the Kerr facility and have the option to assume full ownership in 2015. Unless amended, the Tribes will be bound by the provisions of the 1948 Act that require Kerr to provide a "low cost" block of power to supplement Project operating expenses. In effect, the Tribes will subsidize the operation of the Project, yet as owner of only 10% of the lands served, will receive only 10% of the water delivered by the Project.

(4) The Project Can Not Deliver Water on a Priority Date Basis

The United States did not design and build the Project to serve land based upon a water right priority date scheme. Rather, all lands are served as if they are of equal priority date. The Project serves approximately 130,000 acres of Reservation land, split equally between allotted and homesteaded lands. As the land status map at **Figure 3** shows, the land base under the Project is a highly checkerboard ownership consisting of Tribal, individual Tribal member, non-Indian, State of Montana and Federal (BIA, Fish and Wildlife Service) lands. If settlement negotiations should fail and an adjudication ensue, the Project simply could not serve land on an adjudicated priority date basis without massive redesign and reconstruction.

The Tribes and its members own approximately 10% of the homesteaded and allotted land served by the Project. The Tribes are the single biggest land owner under the Project and are entitled to a Winters water right with a priority date of July 16, 1855. Following the current status of federal law, owners of allotted lands, be they Indian or non-Indian, would be entitled to the same Winters priority date. Owners of homestead lands under the Project would be entitled to a priority date of the date of first use, which by definition will be no earlier than 1910. In the event the a settlement fails and litigation ensues, the United States would be faced with a Project that cannot satisfy a priority date. Litigated outcome to Tribal water rights quantification without massive infusions of cash and restructuring.

(5) The Project Is in Deplorable Physical Condition

A report entitled Comprehensive Review Report, Flathead Indian Irrigation Project was completed for the Project in October 1985 by a study team consisting of personnel from the Bureaus of Reclamation and Indian Affairs. The three-volume report confirmed what the Tribes already knew – the Project is in deplorable physical condition. In the intervening years since the 1985 Comprehensive Review, some of the deficiencies have been remedied, some have deteriorated further, and new deficiencies have developed.

In 1985, and continuing to the present, the BIA Flathead Agency irrigation Division lacked a planned and budgeted maintenance program for the irrigation storage and distribution facilities, forcing repairs to be made on an emergency basis and often relying on immediately

available materials which generally had a short life expectancy. A total of \$35 to \$40 million of deferred maintenance was identified by the Bureau of Indian Affairs in 2005.

Lack of adequate water measurement continues to be a major operational deficiency. Automated gate control at key diversion points is needed for efficient water management throughout the Project. The need also exists for installation of motor gate controls at key diversion facilities. Replacement of existing turnouts and small headgates with a typical precast structure to facilitate the use of flow meters is also needed.

Rights of way generally are not surveyed and are at best poorly documented for much of the Project. Fences, gates and other obstacles encroach on canal and lateral right-of-ways. Lack of maintenance access to the Project is a serious deficiency.

Key canals and laterals require cleaning and reshaping to restore them to their original geometry or an ideal geometry. Damage from unrestricted livestock access to Project facilities has been a major cause of poor canal and lateral condition. Fencing or some other preventative measure to prevent continued livestock damage is needed prior to implementing canal and lateral rehabilitation. To the extent they exist at all, canal liners are in need of replacement. Concrete liners are old and deteriorated. Many have been patched, some have been patched or relined multiple times.

Fish protection structures are seriously lacking on the Project. The Biological Assessment for Project operation and transfer to the CME specifies protective measures for the ESA-listed bull trout that must be implemented within the next five years. Above and beyond that, the Tribes have developed recommendations and cost estimates for additional fish passage facilities to be constructed at the intersection of certain streams and canals as well as at several reservoir outlets.

The above list merely highlights some of the most profound structural, operational and maintenance deficiencies that currently exist. The Tribes' engineering contractors have developed estimates for rehabilitating and repairing many Project facilities, focusing on rehabilitating canals and laterals, structure rehabilitation at key canals and laterals, automated water management and improved fish protection. Those costs, calculated in 2008 dollars approach \$160,000,000.00. And this would only approach the 1910 "as built" condition which has caused extensive injury to Tribal resources. These estimates do not include past and future expenditures under the Tribally-operated Safety of Dams program for Project reservoirs, nor do they include estimates to repair or remediate ongoing damage and injury to Tribal natural resources arising out of or resulting from Project construction, operation and maintenance.

(6) BIA Land Records for the Project are Deficient

(a) The last official Project land redesignation was conducted by the United States in 1963. Ownership and irrigation usage has changed drastically since that date. As a relic of past politics rather than science, not all Project lands are served equally. Most get approximately



equal per acre allocations, fewer get what is referred to as “double duty” or “triple duty” water. Secretarial water rights are provided the spectrum of zero to full duty allocation and have been assessed by the Secretary anywhere from zero to full cost per acre for operation and maintenance.

(b) With very few exceptions, the canals and ditches of the Project have never been surveyed or platted and the individual Indian and non-Indian owners of land have not been compensated for taking those rights-of-way, which generally appear as easements in gross on Reservation land deeds.

## 5 WATER RIGHTS ON THE RESERVATION

Prior to the Flathead Allotment Act, the Tribes owned all the water in, on and under the Reservation. In the early 1900's, the United States filed appropriations under the laws of Montana for 27,466,984.82 acre feet of water on and off of the Reservation to supply the Project. These filings were done in the name of the United States. Other than a few local state court decrees in the early part of the twentieth century (absolutely incompatible with a McCarran Act adjudication), there are no other primary water right claims to water on the Reservation.

The 1912 amendments to the Act established a federal system whereby Project water users could apply for, pay and subsequently obtain a federal “water right certificate” for Project water from the Secretary of Interior. Historical research and the results of a subsequent federal Freedom of Information Act confirm that this system was never implemented.

Under the Montana Water Use Act, all persons asserting a claim to a water use predating 1973 were required to file with the State a “claim” to that water. There are approximately 4,200 such claims to Reservation water under State law, predominantly claimed by non-Indians. Under that same body of Montana law, persons who initiated a use of water after 1973 were authorized to seek a “permit” for that water use from the State. Montana was enjoined from issuing new use permits on the reservation in 1996. There are approximately 320 permits on the Reservation, predominantly claimed by non-Indians. Though not required, the United States filed State-wide “protective” water rights claims for the Tribes and its members for water necessary to satisfy Tribal aboriginal and reserved rights throughout the State. The Tribes made similar protective filings three decades ago.

The obligation of Tribes, and the United States as trustee for the Tribes and Tribal members (be they allottees or not), to file water right claims in the Montana adjudication is stayed by state law during the pendency of compact negotiations. If the Montana Legislature fails to approve a compact by June 30, 2013, the Tribes and the United States will be required to file all their water right claims in the Montana adjudication within two years of that date.

If settlement negotiations fail, the Tribes are prepared to file and vigorously prosecute their claims. The Tribes will file claims for instream flows, springs, wetlands, lakes and reservoirs, historic and present irrigation, practicable irrigable acreage, domestic, commercial and industrial uses, hydroelectric generation, and groundwater. The Tribes will also file claims for

instream flows throughout their aboriginal territory in Montana

**6. STATE AND FEDERAL COURTS HAVE CONSISTENTLY CONFIRMED THE PERVASIVE NATURE OF THE TRIBES' RESERVED AND ABORIGINAL WATER RIGHTS**

The record of judicial decisions addressing the nature and extent of the Tribes' reserved and aboriginal water rights is extensive. As **Appendix A** to this briefing paper demonstrates, the Tribes have established a judicially sound basis to claim all the water necessary to revitalize the pre-Treaty natural environment of the Reservation and such additional water necessary to satisfy the many purposes for which they reserved Flathead Reservation as their permanent homeland. In addition, the Tribes' aboriginal rights to hunt, fish and gather off of the Reservation have been confirmed in State and Federal courts. The following discussion summarizes the judicially confirmed nature of the Tribes' rights to water. For a listing and brief annotation of relevant case law from which this summary is derived, please refer to Appendix A.

A. Aboriginal Water Rights

(1) The Tribes have retained their pre-Treaty aboriginal rights to hunt, fish and gather off of the Flathead Reservation. Destruction of those rights, and the attendant habitat, constitutes the basis for monetary compensation to the Tribes.

(2) The Tribes' aboriginal right to take fish in Reservation waters entitles the Tribes to instream flow rights necessary to maintain the fishery.

(3) The Tribal aboriginal right is entitled to a "time immemorial" priority date.

B. Winters Reserved Water Rights

(1) Creation of the Reservation reserved to the Tribes all waters of the Reservation.

(2) Tribal reserved water rights are entitled to a July 16, 1855 priority date under the Winters doctrine.

C. Nature of Tribal Water Rights

(1) Tribal water rights are "pervasive" throughout the Reservation.

(2) They include all water necessary to satisfy the many purposes for which the Reservation was created, including fishing, agriculture, domestic, industrial and future uses. In short, the Tribes' rights include all uses necessary to fulfill the homeland of the Tribes in perpetuity.

D. Duty of the United States

(1) The United States is vested with a trust obligation to maintain instream flows impacted by the Project at a protected level regardless of the equity claims of junior water users.

(2) The United States' trust obligation requires it to protect Tribal and allottee water rights from diminishment or takings.

(3) The United States' trust obligation also extends to protection of all other Tribal natural resources.

### E Impact of Tribal Rights on Montana State Law

(1) The State is enjoined from issuing new water uses and changes of existing use on the Reservation until such time as the Tribes' rights are fully adjudicated or resolved through settlement

(2) Montana Water Use Act is "adequate on its face" to adjudicate the Tribes' water rights, the question of "adequacy as applied" is yet to be determined

### **7. ELEMENTS OF THE TRIBAL WATER RIGHT SETTLEMENT**

The story is an old one. Since the arrival of non-Indians in their aboriginal territory the Tribes' gestures of friendship and sharing have resulted in loss of Tribal rights and property interests. Litigation is one way to recoup those losses, but pragmatism suggests the value of a focused effort to resolve water-related claims through negotiation in the first instance. The Tribes have four primary goals in settlement. First, the Tribes will obtain sufficient water to satisfy the homeland needs of the Reservation and aboriginal territory. Second, the Tribes desire to rehabilitate and improve the natural environment of the Reservation. Third, the Tribes seek to maintain flexibility in water management options to provide for future changes in water use and water availability arising out of climate and social change. Fourth, given the uncertainties in the global economy, we desire a settlement that reserves to the Tribes the right to prioritize expenditure of settlement funds to obtain the greatest fiscal benefit from the settlement package. Accordingly, and in response to the information summarized in this briefing paper, the Tribes present the following two-part settlement outline:

#### A Primary Components of a Water Rights Settlement

(1) The Tribes commit to protecting verified existing Indian and non-Indian water uses at least to the level available under current law, thereby avoiding the costs of a McCarran-type general adjudication.

(2) Surface and groundwater will be managed as a unitary natural resource.

(3) All water on the Reservation will be administered by a Tribal/State entity under a consistent body of Reservation water law to be enacted by the Tribal Council and the Montana Legislature.

(a) Management will be based upon scientific forecasting and monitoring of each water year.

(b) Adaptive management will address seasonal and annual variation in the water year.

(c) Instream flows for Reservation streams and rivers will be scientifically formulated and will carry a time immemorial priority date.

(d) The Reservation will be closed to new surface water appropriation.

(e) Groundwater will be managed to avoid mining, stream flow depletion, depletion of existing wells, yet allow scientifically sound new well development.

(4) The Project will have a single priority date, July 16, 1855, and will be a part of the Tribes' Winters right. This component is proposed to be achieved through a stipulation between the Tribes and the Joint Board of Control predicated upon a scientifically-based Project water use per irrigated acre. If achieved, it is anticipated that the Project right would be managed by the

Cooperative Management Entity (Tribes and Joint Board) that recently took over management of the Project, subject to the overarching provisions of the Tribal/State body of law on Reservation water administration

### B Settlement Projects

The Tribes will substantially complete their damage assessment in December, 2010. At that time we will share the report with the Federal negotiating team and we will establish a priority for implementing settlement projects. The following list identifies the types of Settlement projects we anticipate including in a final settlement:

- (1) Transfer ownership of State sections within the Reservation to the Tribes. These were taken from the Tribes under the Flathead Allotment Act.
- (2) Establishment of a Tribal fund to acquire Reservation irrigated lands and water rights.
- (3) Establishment of a Tribal education and economic development fund.
- (4) Establishment of a Tribal fund to rehabilitate fish and wildlife habitat by restructuring Project works and operations to diminish or eliminate adverse impacts caused by Project construction and operation.
- (5) Establishment of a Tribal fund for Reservation water projects, such as new Indian irrigation, regional domestic water supplies and sewer systems.
- (6) Provide the Tribes with an allocation of water from Hungry Horse reservoir and other sources to off-set the loss of Tribal rights inherent in committing to protect existing verified non-Indian water uses of the Reservation.
- (7) Establishment of a Tribal fund to restructure Project works that are structurally unsound or inefficient.

### **8 CONCLUSION**

The Tribes' settlement proposal will relieve the United States from extensive liability that would result from a Reservation-wide general water right adjudication. Those liabilities largely arise out of or result from Project actions, errors, omissions and physical limitations. It will obviate the risks inherent in an off-Reservation aboriginal rights adjudication. If successful, the Tribes' settlement proposal will also save all Reservation residents the expense and anguish of decades of water rights litigation in state and federal court. It will accomplish these goals while affording the Tribes flexibility in water management and in selection of Reservation projects to be implemented with settlement dollars. We request the political and financial support of the United States in achieving these goals.