

MEMORANDUM

TO: Marcia Rundle, Staff Attorney/Program Manager  
FROM: Susan Cottingham, Research Specialist  
SUBJECT: "Secretarial Water Rights"/Joint Board Legislative Proposal

DATE: January 15, 1987

The Joint Board of Control of the Flathead Irrigation Districts, through its legal representative, has suggested that a special kind of water right exists on the Flathead Indian Reservation, necessitating a legislative expansion of RWRCC negotiating authority.

On December 22, 1986, Leo Berry, counsel for the Joint Board, made an informal presentation to one of the RWRCC negotiating teams regarding so-called "Secretarial water rights." He asserted that the irrigators on the Reservation who are represented by the Joint Board have essentially "three different types of water rights... They have appropriated rights. They have reserved rights which they have succeeded from allottees, original allottees, and they have Secretarial rights which are federally created water rights that the Secretary of the Interior issued back when the irrigation project was developed." (Transcript of Meeting, 12/22/86, p. 1). He went on to emphasize that "these are federally created Secretarial rights. They're not reserved rights in any way in the context of reserved rights." (Transcript, p. 2). For this reason, the Joint Board believes the authority of the RWRCC should be expanded to include the ability to negotiate with the Joint Board for these "non-reserved Federal rights." Mr. Berry also indicated at that time that he believed that there weren't very extensive irrigation works in place at the time the Flathead Indian Irrigation Project was built and "So, the water rights we're talking about are those that were put to use pursuant to the construction of the project." (Transcript, p. 8).

At this meeting, Commission members requested that the staff research the history of these rights. Accordingly, I've examined current RWRCC files which contain some information on these "Secretarial rights," looked at SB 76 claims filed on the Flathead Indian Reservation, and researched potentially applicable statutes and case law. I have also looked into the history of irrigation on the Reservation contained in documents at the State Historical Library.

Essentially, the term "Secretarial water rights" refers to "rights" identified through a process that the Interior Department developed to examine and confirm water rights in existence before development of the Flathead Indian Irrigation Project. According to the Comprehensive Review Report on the Flathead Indian Irrigation Project "In 1912, after concern over water rights was expressed by the Agency Superintendent, the Acting Commissioner of Indian Affairs authorized investigation of private ditches and water rights within Flathead Indian Irrigation Project boundaries. The Superintendent, pursuant to the Commissioner's direction, formed a committee to make the investigations. The Committee was instructed to give careful consideration to all evidence of irrigation, both in the past and at the time, and to determine the size and capacity of all ditches with the view of protecting the Indians' water rights." (emphasis added). (Comp. Review Report, Background p. 2-5).

Apparently, extensive irrigation systems were already in place at the time the Flathead Indian Irrigation Project was authorized. Evidently, Project planners contemplated destruction of some of the old ditches during Project construction. Water users at the time wanted confirmation of their rights and the subsequent survey by the Committee and approval of their findings by the Secretary of the Interior provided this confirmation.

A brief look at the history of irrigation on the Reservation prior to Project authorization shows the growth of Indian irrigation over the years. Indian agents for the Jocko Agency indicated that as early as the mid-1860's land was being fenced and plowed and ditches were being prepared for irrigation (letter from Augustus Chapman to USDIA, 4/20/1866). It would be several decades, however, before any extensive irrigation was in place and in the meantime, agents reported "appalling conditions" of starvation and disease on the Reservation. Little financial support came from the Federal government during this period despite provisions in the Articles of Agreement of 1872 (removing the Flathead Tribes from the Bitterroot to Jocko Reservation) which promised land, buildings, equipment and assistance in "fencing and breaking up of fields." In 1876, agent Medary reported that nearly 100 Indians desired to be farmers, but had no equipment. From 1877 to 1893, however, under the management of Indian agent Peter Ronan, "Flathead agricultural improvements were significant. During his 16 years in office, the cultivated acreage for the Confederated Tribes increased to 10,600 acres." (1893 Annual Report, cited in "Early Administration of the Flathead Indian Reservation 1855-1893" by R.D. Seifried, U.M., 1968, p. 176).

Credit for improved irrigation should also be given to Eneas, Chief of the Kootenai Tribes, living along Flathead Lake, who "worked diligently to convert his impoverished people to agrarian ways", even using his government income to buy agricultural equipment. (Seifried, p. \_\_\_\_\_)

Thus, by 1911 (only 3 years after the first authorization of Flathead Indian Irrigation Project), a Map of the Flathead Indian Reservation, prepared by the Department of the Interior, Office of Indian Affairs, showed extensive irrigation in place. On this map, the Reservation is broken into four "Farmer's Districts", apparently administered by "expert farmers" headquartered at the Agency. Signed documentation by each of the farmers for each district shows approximately 26,800 acres "under cultivation by the Indians", close to another 25,000 acres "leased to whites" and 275 miles of

Irrigation canals. It was these rights that the Committee was authorized to investigate. A letter dated June 27, 1912 from C.F. Hauke, Flathead Agency, to the Commissioner of Indian Affairs advised that the "Secretary of the Interior approved a recommendation that a Committee which should include the Superintendent of the Reservation, the Engineer engaged in the work, and an Indian to be selected by the Indians, to be appointed to make an examination for the purpose of determining the lands affected by appropriation of water and that all lands so irrigated should be determined to have a paid up water right under the new system."

The Committee Report, completed in 1919 states: "The following are the principles observed in making the findings of the Committee...together with recommendation with regard to the taking over of old ditches... The Committee is required to determine the status of all water rights claims conflicting with the U.S. and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and O & M costs..."

"The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity, a reservation of Indian land carries with it an implied reservation of sufficient water to serve the irrigable land within such reservation of all natural streams, springs, lakes or other collections of still water within the boundaries of said tract."

"The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigated lands of the Reservation and were, in substance, appropriated to these lands when the Reservation was established and its control must vest in the U.S. Government."

The Committee, therefore, proceeded to investigate the irrigation systems in place, to hold hearings and to issue specific reports on each allotment. Their final report also recommends "...that wherever practicable the U.S. refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a government ditch he should be entitled to a paid up water right to the extent of 100 percent of the cost of construction for that acreage that is determined to have a valid water right but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment."

Thus, it is apparent that the Committee, in reporting to the Commissioner of Indian Affairs, was concerned solely with water rights on allotments (reserved water). Nowhere do they concern themselves with an investigation of any "surplus", unallotted lands.

According to the Comprehensive Review Report: "The Assistant Secretary of the Interior approved the committee's report on November 25, 1921. The right to the use of water as set forth in the approved report became known as "Secretarial Water Rights" in order to differentiate them from Flathead Indian

Irrigation Project water rights. Following the approval of the committee's report by the Secretary, the U.S. proceeded to file with the State of Montana for additional water on the reservation for use on the Flathead Indian Irrigation Project. Today, "Secretarial Water Rights" use continues. The Flathead Indian Irrigation Project delivers some of the water connected with those rights in project facilities and charges a nominal O & M charge for the service. Other water connected with "Secretarial Water Rights" is delivered through private ditch systems." (p. 2-6)

A couple of early statutes have been cited as Congressional authority for secretarial approval of existing rights on the Reservation.

The Committee itself referred to Section 9 of the Act of May 29, 1908 as its authority. This section "authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and unallotted irrigable lands to be disposed of under the Act of April 23, 1904." (from Committee report 12/10/19.) The 1904 Act referred to provided for the allotment of the Flathead Reservation and the sale of any surplus, unallotted lands. (33 STAT 302). This 1908 Act (35 STAT 444, 448) which was the initial authorization for the Flathead Indian Irrigation Project also states that "lands irrigable under systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. All land allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system..."

Perhaps the clearest language authorizing determination of existing rights is contained in the Indian Appropriation Act of 1916 (39 STAT 123, 142) which stated "That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the Provisions of this Act and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: Provided, that if water be available prior to the announcement of the charge herein authorized, the Secretary of Interior may furnish water to land under the systems on the said reservations making a reasonable charge therefor, and such charges when collected may be used for construction and maintenance of the systems through which such water shall have been furnished."

There is no reference to this statute in any of the Committee documents I've seen. However, this statute was referred to in a memo to the Associate Solicitor of Indian Affairs from the Billings Field Solicitor, dated 4/24/69. It states: "Secretarial rights specified the acreage for which O & M charges (and construction charges) did not have to be paid. Where existing irrigation works had been affected by Project construction, the Secretarial right also granted a carriage right in the project system. This was pursuant to the Indian Appropriation Act of May 18, 1916 (39 STAT 123, 142)."

Other early statutes which may be applicable are:

1. The General Allotment Act of 1887 (24 STAT 390). Section 7 states "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of Interior be, and is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations."
2. The Act of June 21, 1906 (34 STAT 325, 354) amended the 1904 Flathead Reservation Allotment Act (33 STAT 302). Section 19 states: "That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act of the use of water appropriated or used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water."

One document that does seem particularly relevant is the Petition for Irrigation Districts "In the Matter of the Formation of the Flathead Irrigation District" which was made pursuant to the Act of May 10, 1926 (44 STAT 453, 464). The petition states: "2. That an irrigation system has been constructed by the United States under the Federal laws, for the irrigation of that portion of the Flathead Irrigation Project of the United States, situated within the counties of Lake and Sanders, State of Montana; that all of the lands irrigable from the constructed irrigation system of the Flathead Irrigation Project except such areas as have been granted a paid-up water right by the Secretary of Interior on account of use of water prior to the construction of the above-named irrigation system and excepting trust patent Indian lands, are included in the proposed Irrigation District..." (dated June 12, 1926) (emphasis added).

This appears to be the clearest confirmation that water uses in existence prior to the establishment of the Flathead Indian Irrigation Project, as confirmed by the Secretary of Interior ("Secretarial Water Rights"), were not considered part of the Flathead Indian Irrigation Project for purposes of repayment of construction and O & M charges nor as part of the Irrigation Districts formed to execute repayment contracts for delivery of water from the project.

There is little applicable case law regarding "Secretarial water rights". Flathead water right cases that deal with this issue are: nine companion Moody cases, 48 F2d 327 (1931), rev. 66 F2d 999 (1933), 70 F2d 835 (1934); U.S. v. McIntire, 101 F2d 650 (1939); and U.S. v. Alexander, 131 F2d 359 (1942).

The Court of Appeals, in the Moody case rehearing of a dismissal order said:

"If no greater amount of water is claimed for the allotments in question upon this appeal than are stated in the report of the committee made to the Secretary of the Interior respecting diversions and applications of water for irrigation purposes prior to the initiation of the Flathead Reclamation Project and such amount of water is recognized as properly

apportioned to said lands in the administration of the project, then the Secretary of the Interior would be the only additional necessary party to actions for the determination of questions whether such lands were liable to construction maintenance, and operation charges imposed on account of the project." (66 F2d 1003) The Court cited the language of the 1916 Act in its opinion.

The next case that made any reference to "Secretarial rights" was U.S. v. McIntire, (100 F2d 650) which generally held that "where waters of [a] creek on [an] Indian reservation were impliedly reserved to Indians by treaty, no title to waters could be acquired by any one except as specified by Congress." In this case the Court simply stated, "Finally, appellees mention that the Secretary of the Interior had allocated certain water rights which, it is said, had been appropriated prior to 1909. Whether or not the Secretary of the Interior acted erroneously in those cases is a question which is not before us."

The only case which deals directly with "Secretarial water rights" is U.S. v. Alexander, (131 F2d 359) which was a "suit by the United States of America against B.W. Alexander and others to enjoin defendants from diverting water through their privately constructed ditches in excess of amounts allotted by the Secretary of the Interior..."

In this case the Ninth Circuit Court stated that Secretarial decrees relating to private rights were not such rules as the Secretary of Interior was authorized to prescribe by the General Allotment Act in order to secure "just and equal distribution" of water on the reservation, the violation of which might be the basis for injunctive relief against wrongful diversion by owners of Indian allotments through privately constructed ditches. The Court notes that no rules had been promulgated under the General Allotment Act; "There not being a rule or regulation, of course a violation thereof could not be shown." At any rate, "The so-called "Secretarial decrees" related to alleged "private" rights and were not of the character required."

The Court also summarized the argument of the U.S.: "The government on this appeal does not rely upon the "Secretarial decrees" and makes no attempt to sustain their validity. It contends, on the contrary, that all irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights and that all diversions, whether from government or private ditches, are to be administered by the project engineer. The government further contends that the diversions made by the defendants are in excess of their pro rata share..." The U.S. asked for injunctive relief but the court denied this relief.

Particularly instructive in this case are the "Findings of Fact, Conclusions of Law and Order" by the U.S. District Court (cause #1529). Finding of Fact #51 states: "Purporting to act pursuant to the Acts of Congress of June 21, 1906 (34 STAT 354) and May 29, 1908 (35 STAT 448-450), the Secretary of the Interior appointed a committee to make findings of the water rights on the Flathead Reservation in Montana. This committee made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the U.S. Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909."

Finding of Act #61 states: "In concluding its report the committee said: "Filings are continually being made in Sanders, Missoula and Flathead counties claiming use to the rights of the water of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior, and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units."

I can find no other cases that deal directly with the nature or legal basis of these so-called "Secretarial water rights."

The final task in my research was to look at SB 76 claims to see whether these "Secretarial water rights" had been claimed, what documentation was provided, and what priority dates were claimed. A random check of Flathead Basin water right claims with pre-1908 priority dates shows both diversity and creativity in how these rights are claimed. Some claimants indicate specifically that these are "Secretarial water rights", others check boxes for decreed rights or use rights and claim the priority date in the findings of the Committee report. Almost all pre-1908 claims I checked had attached as documentation the form the Committee used to confirm these existing uses. (See attached SB 76 claim #149480). Several claimants also attached a notarized statement claiming an 1855 priority date as successors in interest to Flathead allottees. (See attached SB 76 claim #153970).

It is clear from a number of letters and documents in these claim files that administratively these "Secretarial water rights" are considered to be private, non-Project water. (The Comprehensive Review Report mentions this as well.) The administrative distinction probably stems from the initial Committee recognition (and Secretarial approval) that those having pre-Project water rights should not pay construction charges if their ditches were destroyed during Project construction.

In summary, "Secretarial water rights" were simply confirmation by the Secretary of Interior of water uses existing on Indian allotments before construction of the Flathead Indian Irrigation Project. The lands found to have these rights were specifically excluded from the Irrigation Districts when they were formed in 1926.

Bibliography: References, Cases, Statutes, Maps

REFERENCES/MAPS

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