

RESERVED WATER RIGHTS
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BACKGROUND PAPER

To: Brace Hayden, Governor's Office
From: Marcia Rundle, Counsel *M. Rundle*
Reserved Water Rights Compact Commission
Date: March 6, 1987
Re: Flathead Reservation Issues

Not surprisingly, the current controversies on the Flathead Reservation are primarily resource management issues. There are three fundamental sources of contention: (1) the management of the Flathead Indian Irrigation Project (FIIP), which serves primarily non-tribal irrigators, (2) the potential impact on non-tribal members of the quantification of water rights on the Reservation, and (3) ordinances passed by the Tribal Council of the Confederated Salish & Kootenai Tribes (CS&K Tribes) that affect non-tribal members.

The Flathead Indian Irrigation Project

The Flathead Indian Irrigation Project is an irrigation and power project operated by the Bureau of Indian Affairs from 1910 until 1986. The irrigation portion of FIIP was authorized by Congress in the 1904 Flathead Allotment Act; there have been numerous amendments to the original act that have adjusted the responsibilities for repayment of the project. As a result of a comprehensive review by the Department of the Interior completed in October of 1985, the management of the irrigation portion of FIIP was assigned to a Bureau of Reclamation team.

The project delivers water to approximately 127,000 acres; 90 percent of the 2600 water users are non-tribal members. In 1926, as a condition for further appropriations, Congress required the water users to form irrigation districts pursuant to state law and to execute contracts with FIIP for payment of delinquent construction, operation and maintenance costs. As a result, the Flathead, Jocko and Mission districts were formed; they are represented by the Joint Board of Control of the Flathead Irrigation Districts.

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Proposals have been made sporadically since at least the 1950's to turn the project over to the water users; some consideration has also been given to assumption of the project by the Tribes. A suit recently filed in federal district court seeks the transfer of the project to the irrigators. About 10% of the FIIP revenues are generated by contracts with the water users; the other 90% is generated by the power portion of the project.

The power portion of FIIP was authorized in 1926 when Congress appropriated funds to complete the Newell Tunnel, originally intended to provide power to pump water from the Flathead River for irrigation. In 1930 FIIP contracted with a Montana Power Company subsidiary for a block of power in exchange for relinquishment of the hydro site. MPC subsequently obtained a 50-year license for the operation of Kerr Dam and FIIP began construction of the existing electrical transmission and distribution system which serves the Reservation.

In 1948, Congress established a permanent subsidy of the irrigation system construction, operation and maintenance costs by the power portion. In 1985 the CS&K Tribes renegotiated their leasing contract for Kerr Dam with the Montana Power Company. As a result of those negotiations, the Tribes obtained higher lease payments and the opportunity to eventually acquire the hydropower license for Kerr Dam and management of the facility.

In October of 1986, the BIA approved a three-year contract with the CS&K Tribes for the management of the power portion of FIIP, which has been renamed Mission Valley Power. The Tribes have appointed three tribal members and two non-tribal members to the Utility Board that will begin managing the utility in July. An alternate proposal by the water users to organize a rural electrical coop to manage the power portion of FIIP was unsuccessful. The Joint Board subsequently filed two suits in federal court in Helena: one suit seeks an injunction to prevent the management of the power system by the Tribes, the second, already mentioned above, seeks the turnover of both the irrigation and the power systems to the Joint Board of Control.

Over the past two years, two other federal lawsuits have been filed concerning the management of FIIP. In 1985, the CS&K Tribes filed suit against FIIP seeking to enjoin the project from endangering their treaty hunting and fishing rights. The Court granted a temporary order restraining the FIIP from diverting water from specified streams unless the project first ensured "that there are sufficient waters left in said streams and reservoirs to maintain and preserve the native and wild trout fishery therein." The state intervened on the jurisdiction issue; the Joint Board intervened on the

jurisdiction issue and on the merits. The suit was dismissed when the BIA and the Tribes filed a stipulation with the court that guaranteed instream flows to protect the fisheries.

In July of 1986, when there was again a water shortage on the Reservation, the Joint Board filed suit seeking an injunction to restrain the BIA from implementing a water management plan for the 1986 irrigation season which included instream flow levels which the irrigators alleged were agreed upon by the BIA and the CS&K Tribes without input from the irrigators or consideration of their rights. The Tribes intervened on the merits.

The Court issued a temporary restraining order on August 6, 1986 to prevent the BIA from implementing the 1986 Interim Agreement which the court found "established minimum instream flows and reservoir pools which appear(ed) to be in excess of the reasonable amount necessary to maintain fisheries on the Reservation" and, as a result, posed an immediate economic threat to the irrigators. In October the Court issued its opinion, granting the Joint Board motion for preliminary injunction and ordering the BIA to fairly and equitably administer the irrigation system, taking into consideration both the treaty rights of the CS&K Tribes and the rights of the irrigators.

Quantification of Water Rights

At the request of the Joint Board, legislation was introduced in the current session, sponsored by Rep. Al Meyers and Sen. Dick Pinsonneault, which would have authorized the Compact Commission to negotiate with political subdivisions and public corporations of the state that claim federal reserved water rights. HB770 was tabled in Committee after opposition was expressed by several tribes, including the CS&K Tribes, and the BIA and the Attorney General's office. The legislation was supported by the Joint Board and the Water Development Association. The Compact Commission took no position on the legislation.

The concern expressed by the Joint Board representatives is that they claim water rights that have the same genesis as those of the CS&K Tribes, i.e. the withdrawal of the Flathead Reservation from the public domain, which are the subject of negotiations between the CS&K Tribes and the Compact Commission. The Joint Board wants to participate directly in those negotiations.

Since negotiations resumed in 1984, the Compact Commission has met twice with the CS&K Tribes, and has participated in a tour of the irrigation project with tribal council members, tribal staff, and the BIA superintendent of the Flathead

Agency. The Joint Board representatives attended all of the first negotiating session and the first half of the second session. In addition, the Compact Commission has met twice with the representatives of the Joint Board, once in Helena and once in St. Ignatius; representatives of the Joint Board have also attended and made extensive presentations at two Commission meetings during this time. At the request of the Tribes, the second half (approximately three hours) of the second negotiating session was closed to the public during a presentation of confidential materials. The Joint Board also did not participate in the tour of FLIP, again at the request of the Tribes.

The Commission has interpreted the statute as mandating the Commission to negotiate on behalf of the citizens of the state, which would by definition include water users on the Flathead Reservation. The Commission has also cited the Fort Peck-Montana Compact as an indication of the commitment of the Commission to protect existing water users when possible.

The Commission position on open meetings which is at issue with the Joint Board was established in 1981. It was reviewed in 1985 with the Governor's Attorney, Mona Jamison, and the attorney for the Board of Natural Resources, Steve Brown, who was a member of the Commission in 1981 when the position was first established.

State/Tribal Jurisdiction: Tribal Ordinances

There are three major resource management areas which involve state/tribal jurisdictional issues: (1) the management of the southern half of Flathead Lake, including licensing issues and the enforcement of tribal ordinance 64A; (2) the relationship between the state statutes on stream and streambed protection and Tribal Ordinance 87A; and (3) the relationship between state hunting and fishing statutes and Tribal Ordinance 44D.

Flathead Lake Management, Licensing, and Ordinance 64A:

In 1977, the CS&K Tribal Council enacted an ordinance to regulate both existing and future structures on the bed and banks of the south half of Flathead Lake. In 1982, the Ninth Circuit Court of Appeals held that the Tribes hold equitable title to the southern half of Flathead Lake and that, therefore, the Tribes have the authority to regulate the use of the lake and the lakeshore by non-tribal members. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (1982). The authority of the Tribes to regulate tribal members was not in question.

Subsequent to this decision, the Tribes created the Shoreline Protection Board to regulate uses along the lakeshore. The Tribal Council appointed four tribal members and three non-tribal members to the Board; the three non-members were the Lake County Commissioners. The Commissioners attended one meeting, after which they resigned; three other non-tribal members were appointed who still serve on the Board.

The Montana Department of Fish, Wildlife and Parks and the CS&K Tribes work cooperatively on management issues regarding the lake through the Flathead Lake Joint Management Committee. The DFWP has recently agreed that requiring state fishing licenses on the southern half of Flathead Lake is not consistent with the Namen holding, and has agreed to drop that requirement. The DFWP has also asked the Tribes to discuss other management issues concerning the Lake, including water safety, boat registration, licensing of outfitters, and waterfowl hunting.

Aquatic Lands Conservation Ordinance 87A:

The Aquatic Lands Conservation Ordinance, Ordinance 87A, enacted by the CS&K Tribal Council in reliance on a Montana A.G. Opinion (37 Op. Att'y Gen. 56 (1977)) became effective on March 1, 1987. Last October, the Shoreline Protection Board invited the four state conservation district boards that have responsibilities under the state streambed preservation statutes (Sections 75-7-1-1, et seq.) to develop a cooperative agreement with the Tribes for implementation of the proposed regulations. At least one meeting was held in October, at which time the Tribes requested that the state government become directly involved, either through the Attorney General's office, or through the Department of Natural Resources and Conservation (DNRC).

The stated reasons for that request were that the state has expressly provided for State-Tribal Cooperative Agreements in state statutes and that utilization of that statutory process would remove the multiplicity of agreements that would be necessary with four conservation districts. It is also apparent that the four districts have quite different positions with regard to the Ordinance and that the Tribes want to negotiate with the state through one entity with, presumably, one position. It should be noted that DFWP also has statutory responsibilities for streambed protection (Sections 87-5-501, et seq.) that may be impacted by this ordinance. DFWP has not yet taken any position with regard to Ordinance 87A.

As with Ordinance 67A, the Shoreline Protection Board would receive project applications and would enforce the provisions of this ordinance. One of the major concerns expressed by the Lake County Conservation District board members is the issue of

governance without representation. As noted above, the elected Lake County Commissioners declined to serve on the Board when it was created. If they have changed their position on that, presumably they could apply when a position becomes vacant and is advertised by the Tribal Council.

Hunting and Fishing Conservation Ordinance 44D:

The Hunting and Fishing Conservation Ordinance provides for Tribal regulation and permitting of hunting, fishing and recreation activities on tribal and non-tribal lands within the exterior boundaries of the Flathead Reservation by members and non-members and hunting by tribal members off-reservation.

Currently, the activities of non-tribal members are regulated by the state on non-tribal fee lands. Section 87-1-228, MCA, authorizes the DFWP to conclude an agreement with the CS&K Tribes for uniform regulations for hunting and fishing by non-members on tribal lands. According to the department, an agreement was never negotiated pursuant to this statute.

The DFWP commented on the proposed regulations during the public comment period and suggested that the department and the Tribes meet to work out a cooperative regulation and management scheme. No meetings have yet been held regarding Ordinance 44D.

Off-Reservation Moose Hunting:

Ordinance 44D will supercede an earlier Tribal Ordinance on hunting by tribal members when it becomes effective on April 1, 1987. It is treated separately here because DFWP is currently in court on the issue of off-reservation hunting by tribal members under the earlier ordinance, Ordinance 44B.

In November of 1986, two tribal members were found in possession of moose killed east of the continental divide, under the authority of permits issued under Tribal Ordinance 44B, which allows CS&K tribal members to hunt moose on open and unclaimed lands off the Flathead Reservation, provided they have a valid tribal permit.

The DFWP interprets the right of tribal members to take moose free of state regulation under the Treaty of Hellgate, as applying only on lands west of the continental divide. This position is based upon the decision of the Montana Supreme Court in State v. Stasso, 563 P.2d 562 (Mont. 1977), which appears to limit the treaty hunting rights to "open and unclaimed lands" that were ceded by the Tribes in the Hellgate Treaty.

The tribal members pleaded not guilty; the issue to be determined at trial will be the geographical boundaries of the aboriginal territories of the CS&K Tribes. It is not known if the prosecution of this case will have any effect on proposed negotiations between DFWP and the CS&K Tribes regarding Tribal Ordinance 44D.