RESPONSE OF FLATHEAD JOINT BOARD OF CONTROL TO JUNE 13, 2001 WATER RIGHTS COMPACT PROPOSAL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

The Flathead Joint Board of Control ("FJBC") respectfully submits this memorandum in response to the proposal submitted June 13, 2001 by the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes") for a reserved water rights compact with the State of Montana ("State").

At the outset the FJBC emphasizes its support for resolving such issues through negotiation. It is heartened by the Tribes' desire to reach a negotiated settlement of these thorny issues. The FJBC's strong support for this process rests on the assurance that any negotiated settlement will comport with state and federal constitutional requirements and fit comfortably within the confines of decisional law, primarily federal decisions, regarding federal reserved water rights, the supremacy clause, and tribal sovereignty.

The FJBC believes the recognition of these limitations by all parties will allow them to bring these negotiations to a timely, reasonable conclusion.

1. THE FJBC

The Flathead Joint Board of Control is the central operating authority for three Irrigation Districts organized and operated under state law. These are the Flathead, the Mission Valley and the Jocko Irrigation Districts. The FJBC and these Districts are local governments under Montana law and, pursuant to the Montana Constitution and Legislative enactments, they share in the sovereign power and immunity of the State. They are governed by democratically-elected Commissioners. The Montana Legislature has conferred on these Districts considerable responsibilities over district lands for matters relating to water use as well as the requisite legal authorities, which include powers and immunities, to fulfill these duties. *See* Title 85, Chapter 7, Parts 1-22, Montana Code Annotated.

Congress explicitly authorized these Districts to be formed and operated under State law in the Act of May 10, 1926. In that Act, Congress expressly authorized, indeed directed, the Districts to represent all those people who own their land in fee that are served by the Flathead Irrigation and Power Project ("Project"). Thus, as to matters within the Districts' physical boundaries, established by State District Court, and jurisdictional authorities as established by the Legislature, the Districts represent all such landowners, whether they are members of the Tribes or nonmembers.

At present, the Districts have within their jurisdiction approximately 116,000 acres of land. To fulfill their responsibility to secure the delivery of irrigation water for which they have water rights claims, the Districts employ their statutory powers to levy assessments on landowners to pay for this service provided each year under long-term contracts with the United States. Each year, therefore, these Districts collect and then pay over to the federal government approximately $2.5 million for the operation and maintenance costs of the Project. In this way, the landowners represented by the FJBC pay all the costs of operating the irrigation division of

the Project. Similarly, the Districts are obligated by these same contract with the U.S. to pay yearly installments to pay off the construction costs of the Project, which are a lien on irrigators' land, in the event that revenues from a power generating source fall short.

The irrigation water delivered by the Project to irrigators, estimated to be about 90% of all water use, by volume, on the reservation, fuels the primary economic engine of Lake and Sanders counties. These irrigators, approximately 3,000 family farms and ranches, generate well in excess of $40 million in economic activity in this area each year. The benefit to the State of Montana through the years of this activity is truly incalculable. All the landowners within the Districts pay property taxes, almost all pay state income taxes (tribal members are not required to pay state income tax under federal decisions), and all the individuals and businesses that supply, work for and work with these farmers and ranchers do the same.

The FJBC, on behalf of the Districts and the irrigators who are the source of their governmental authority (MT Const., Art. II, Sec. 1), submitted water rights claims to the Montana Water Court for all the water used and needed to irrigate the land within their boundaries. These claims, based on existing federal case law, federal statutes, and reasonable arguments derived therefrom, assert a priority date of the Hellgate Treaty, 1855, which upon ratification by the Senate in 1859, created the reservation. As such, they assert a priority date equal to that asserted by the Tribes for their reserved water rights. For this and other reasons, the FJBC's water rights claims and the Tribes' are competing to some extent but not in their entirety.

Without irrigation water, or if it is at all reduced below its already paltry level, this land will be useless. Thus, irrigators' water rights claims are the most precious asset they own. Since the people are, in a real sense, the State, and their assets and value determine the strength of the State, the preservation of existing uses and expansion of water availability is crucial not only to these people but to the State of Montana. Absent the value and economic activity created by their use of their water rights, which flows into State and local coffers for schools, services and infrastructure, the State would feel a significant diminishment in its ability to serve its citizens in these counties. Conversely, tribes have no responsibility to provide municipal, educational, emergency or political services to non-tribal members, and they rarely, if ever, have any governmental authority over nonmembers. *See, Atkinson Trading Co. v. Shirley*, ___ U.S. ___, 121 S.Ct. 1825 (2001); *Nevada v. Hicks*, ___ U.S. ___, 2001 WL 703914, decided June 25, 2001.

2. THE TRIBES' PROPOSAL

The Tribes' proposal consists of three principles to which the State is asked to agree: (1) that the Tribes own all the water on, under, and bordering the Flathead reservation; (2) that, as a consequence of this ownership, the Tribes' have sovereign power -- that is governmental jurisdiction -- to regulate all use of such water, including by nonmembers on non-tribal land; (3) that the Tribes' also own water off reservation. (Below the FJBC does not address this third principle.)

In light of these principles, the Tribes' suggest the State and the CSKT should enter negotiations limited to the details of a Tribal Water Rights Ordinance which, presumably, the Tribal Council would enact. The Tribes assert this Ordinance would be similar but not identical to the body of State law, based on the prior appropriation doctrine and federal law concerning

reserved water rights, that controls water use in the rest of the State. Since under the Tribes' first principle--that they own all the water used on the Reservation--they would also have governmental control over its use, this Tribal ordinance would be enforceable in Tribal Court.

3. RESPONSE OF THE FJBC

A. The FJBC's support for a negotiated settlement arises primarily from the understanding that it offers the opportunity to reach compromises, perhaps requiring creative solutions that may entail significant monetary expenditures, that can improve the existing situation. The FJBC strongly believes that such improvements can be obtained through negotiated settlement in this case, particularly if water supply augmentation potentials are exploited. Although the issues that need to be encompassed in a Compact are diverse and can be complex, the FJBC is encouraged by the willingness of all parties to embark on this process with optimism and good faith.

B. Any settlement can only survive within the bounds of the Constitution and the relevant statutory and decisional law. The Montana Constitution, Article IX, Sec. 3, does not allow and the pertinent decisional law does not support the ownership of water by any water rights claimant, even an Indian Tribe claiming federal reserved water rights. This alone, as recognized by the Tribes in their proposal wherein they premise their claim of sovereign authority over all water users on their ownership of the water, precludes any discussion by the State of its ownership of the State's water.

Furthermore, the United States Supreme Court has made perfectly clear that tribes lack sovereign jurisdiction over nonmembers in almost all instances. *See Atkinson Trading Co. v. Shirley*, ___ U.S. ___, 121 S.Ct. 1825 (2001); *Nevada v. Hicks*, ___ U.S. ___, 2001 WL 703914, decided June 25, 2001.[1] In this regard, it bears emphasis that tribes and tribal members enjoy

[1] *Atkinson* and *Hicks* rest on and continue a long skein of decisions by the United States Supreme Court since 1978 in which it has increasingly clarified the "very narrow" scope and contours of tribes' jurisdiction over nonmembers. These decisions are: *United States v. Wheeler*, 435 U.S. 134 (1978)(Double Jeopardy clause does not prevent prosecution of Indian by both Tribe and federal government because tribes are separate sovereigns with power over their members); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)(Tribes' sovereignty to prosecute nonmember non-Indian for crimes divested by their incorporation into the United States and its great solicitude for the rights of citizens); *Montana v. United States*, 450 U.S. 544 (1981)(Tribe lacks civil jurisdiction to regulate nonmember hunting and fishing on nonmember-owned fee land within boundaries of a reservation); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)(Tribes lack civil jurisdiction to regulate land use, specifically zoning, on "open" lands with significant nonmember ownership and free access); *Duro v. Reina*, 495 U.S. 676 (1990)(Extends rule of *Oliphant*, holding tribes lack criminal jurisdiction over nonmember Indian); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992)(Holding county has authority to impose certain taxes on fee land owned by Tribe, Court notes "very narrow" powers of tribes over nonmembers) ; *South Dakota v. Bourland*, 508 U.S. 679 (1993)(Applying *Montana*, Tribe lacked civil jurisdiction to regulate hunting and fishing by nonmembers on land owned by federal government within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Tribal court has

with all other Montana citizens, equal rights, protected by the State and federal constitutions, to protect their rights, including water rights, in the appropriate courts of the State and federal government. These rights, of course, are without any limitation not imposed equally on other holders of water rights. The Tribes and their members are also equally entitled to seek to modify or enact changes in the laws of the State pertaining to administration of water rights by voting for responsible legislators and executives and, indeed, by seeking to serve in the Legislature themselves. If subject to the Tribes' governing authority, nonmembers do not have equal rights. Indeed, as noted by Justice Souter in concurring in *Nevada v. Hicks*, *supra*, the "real, practical consequence" of subjecting nonmembers to tribal jurisdiction is the deprivation of their rights under the Bill of Rights.

In light of the centrality of water to life in the West, including western Montana, the primacy of State law over the use of water, and the controlling views of the U.S. Supreme Court, the FJBC respectfully submits that more fruitful avenues for negotiation are presented by discussing an acceptable basis for the priority date and volume of a water right for all lands served by the Project. The FJBC submits there is little reason for the parties to allow negotiations to founder on this issue when the Tribes now enjoy all the rights of access to courts, the Legislature and the Executive as all other claimants and can, thereby, protect their water rights.

C. The FJBC believes in, however, and will strongly support all efforts to address water supply and augmentation issues in a manner that will satisfy the Tribes' instream flow and other claims. Such a benefit to the Tribes will also benefit individual irrigators the FJBC serves and other water rights claimants as well.

October 26, 2001
Walter Schock
Chairman, Flathead Joint Board of Control

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no civil jurisdiction to hear tort action against nonmember arising from auto accident on highway located on easement over tribal land); *Atkinson Trading Co. v. Shirley*, ___ U.S. ___, 121 S.Ct. 1825 (2001)(Tribe has no civil jurisdiction to tax nonmember for transaction on nonmember land); *Nevada v. Hicks*, ___ U.S. ___, 2001 WL 703914, decided June 25, 2001(Tribal court lacks civil jurisdiction to hear civil suit against state fish and game officers who took actions against plaintiff on land owned by tribal member). The Court routinely employs the same principles in deciding civil and criminal jurisdiction cases, explicitly noting decisions in one area are relevant to the other. *See Montana*, *supra*, at 563-566; *Duro*, *supra*, at 687-689; *Hicks*, *supra* at 3-4.