WESTERN MONTANA WATER USERS ASSOCIATION, LLC

P.O. Box 1042

St. Ignatius, Montana 59865

January 6, 2014

Senator Chas Vincent, Chairman

Water Interim Policy Committee

O Box 201704

Helena, MT 59620-1704

Re: Proposed CSKT Compact

Dear Senator Vincent and Committee members:

Thank you for the opportunity to provide an update on the status of the CSKT Water Compact litigation and negotiations. The Western Montana Water Users Association, LLC ("WMWUA") is an association of 100-150 irrigation operations, many of which are family farms, with water rights on the fee-patented lands they own and farm in the Flathead basin. Below, we outline recent developments as well as our recommendations and a course of action.

1. RECENT DEVELOPMENTS MAKING A CSKT COMPACT PREMATURE.

- **Court Orders Prohibit the FIP Agreement From Being Executed.** There are 2 Writs of Prohibition currently in place in 2 separate Court cases prohibiting the FIP Agreement (aka Water Use Agreement) from being entered into by the Flathead Joint Board of Control (FJBC), the Jocko Valley Irrigation District (JVID), and the Mission Irrigation District (MID). See **Exhibits "A" and "B."** One Order was issued in April, 2013 and the other issued in June, 2013. **Both Writs of Prohibition are the controlling law and prohibit the proposed FIP Agreement or any other FIP Agreement from being executed with similar offending terms.**[1] In short, the Compact a **"3-legged stool"** consisting of: 1.) the proposed Compact, 2.) the proposed Unitary

[1] Although the Montana Supreme Court overruled C.B. McNeil's first Writ of Mandate in April of 2013, there were numerous grounds upon which the Court must find the FIP Agreement is unlawful. In fact, a new Court Order was put in place prohibiting the FIP Agreement from being enacted within days. Therefore, the damage done by the Montana Supreme Court decision was repaired within days. If fact, there are 2 Court Orders in 2 cases prohibiting the FIP Agreement from being executed.

Management Ordinance, and 3.) the FIP Agreement. Without the FIP Agreement, the Compact cannot stand. Therefore, the FIP Agreement is a crucial part of the proposed Compact.

- **The CME is Void.** The Cooperative Management Entity (CME) was established in 2010 as a vehicle to take over Operation and Maintenance (O&M) of the irrigation system. However, WMWUA recently received an admission admitting the FJBC did not comply with Montana Code sections 18-11-103 by providing notice in newspapers in the affected counties prior to the meetings. Therefore, the CME was never properly formed and is void. We are awaiting supplemental discovery responses that are expected to provide admissions of additional failures to follow additional minimum due process safeguards required by the Montana Code. As a result, the CME is void and the federal government is mandated by the Act of 1908 to turn over operation and maintenance of the irrigation project to the "owners of the land irrigated thereby." See 35 Stat. 44, 450, section 9. The CME never fulfilled that federal mandate anyway, which is likely why the matter was rushed and due process requirements to establish such a joint tribal-local government entity were not followed – it never would have withstood public scrutiny.

2. RECENT DEVELOPMENTS DEMONSTRATING IRRIGATORS ARE WINNING THE BATTLE.

- **Irrigators Voted and Removed Those Supporting the Proposed CSKT Compact.** In November, 2012, the FJBC removed Mr. Alan Mikkelsen from their negotiation team. Further, in January of 2013, the FJBC chose not to renew Mr. Mikkelsen's consulting contract. Mr. Mikkelsen continues to vocally support the Proposed Compact and FIP Agreement, but he no longer represents the FJBC. Mr. Mikkelsen fails to clearly identify whether he works for a Washington, DC or other national PAC or interest group – no one really knows who he works for. Further, in early May, the irrigators held elections of Commissioners and voted incumbents out of office, including the Chairman, who had supported the Compact and FIP Agreement and Mr. Steve Hughes, the at-large member on the FJBC, who was replaced. As a result, the new FJBC majority no longer supported the Compact and FIP Agreement as drafted.

Ironically, many Compact proponents have been removed from office, are in the process of being removed from office, or were rejected during irrigator elections. These people include:

a. **Alan Mikkelsen** – his role on the FJBC negotiating team was terminated by irrigators in November, 2012 and his consulting contract with the FJBC was not renewed in January 2013.
b. **Susan Lake** – she ran for office as an irrigation district commissioner in April, 2013 and voters rejected her.
c. **Steve Hughes** – he also was not elected by irrigators when he ran for office, but was appointed to an at-large position of the FJBC. In May, 2013, the irrigators did not renew his at-large position on the FJBC and chose someone else for the at-large position.
d. **Jerry Johnson, Paul Wadsworth** – recall petitions are pending against them for alleged violations of Montana's public meetings laws.
e. **Walt Schock** – former FJBC Chairman, an incumbent of 15-20 years, was voted out of office during the 2013 irrigation district elections.
f. **Jay Weiner** – we understand he was removed from his role as attorney for the Compact Commission.

In light of this, this committee must be aware that many Compact proponents no longer speak for irrigators or have been removed from their positions.

- **The Irrigators are awaiting the Court's decision re: FJBC and FID's Default.** The FJBC and FID have failed to file an Answer, not only once, but twice, in pending litigation involving the FIP Agreement. After waiting 7-8 months for one answer and almost 2 months of the second answer, irrigators had no choice but to request an entry of default against the FJBC and FID.

- **The Irrigators Await Court's Decision on Their Motion to Compel Discovery and for Default Judgment Ruling the CME Agreement is Void.** On December 12, 2012, irrigators served the FJBC, FID, MID, and JVID with discovery requests. Those requests for admissions were wrongfully denied. In January of 2013, the irrigators again made discovery requests. The rules require a response within 30 days. However, a response was never received. After waiting for more than 8 months and after reminders to defense counsel, irrigators eventually filed a *Motion to Compel Discovery* and request for sanctions for failure to admit requests for admissions and otherwise respond to discovery requests. **Irrigators are concerned the irrigation districts have been withholding crucial information and questions what other crucial information has been withheld.**

- **Water Right Claims were Amended to Assert, in the Alternative, that Irrigators Own the Water Rights.** As you will recall, Mr. Weiner and Mr. Tweeten were fond of telling irrigators: "you don't have a water right." This was based on their interpretation of water rights claims that were filed on behalf of irrigators by their FJBC in the FJBC's name as their agent. No Flathead irrigator dreamed that one day the FJBC would argue that irrigators with water rights specifically granted to the landowners in the landowners' fee-patents would someday argue that they do not own the water right attached to their land. However, that is what happened a few months before the Compact was proposed to the Legislature. This flimsy argument has been taken away from them and the 146 Water Right Claims for water rights appurtenant to the irrigated lands in the Flathead Irrigation project were amended on December 4, 2013 to assert that the water rights are owned either by the FJBC (as a fiduciary for the irrigators) or by the owners of the irrigated lands. The various State and federal acts clearly demonstrate the water rights are appurtenant to the irrigated lands and owned by the irrigators. See an excerpt from one of WMWUA's 2 Montana Supreme Court briefs filed in the spring of 2013, which outlines the chronology of relevant federal and State acts demonstrating irrigators' ownership of water rights, **Exhibit "C."** The Supreme Court chose not to decide the issue of the irrigators' ownership of the water rights and instead dismissed the CSKT's appeal.

- **The Klamath Water Rights Battle is Now Settled.** In December of 2013, the parties in the Klamath water dispute announced they achieved a settlement that will end the tribal and federal game-playing in which they denied water to irrigators and other State-based water right holders. Unfortunately, the federal team involved in the proposed CSKT Compact includes the same cast of characters on the Klamath. The good news is that a settlement was achieved in which the denial of water to State-based water right users will be largely avoided and the federal agencies backed away from their extreme positions. The take-away from this is that the Klamath water users prevailed (even though the Klamath irrigation district is 1/3 the size of the Flathead districts), based on similar issues and dealing with many of the same federal agencies

and employees, and the federal government backed away from its extreme positions. **If the State of Montana and its irrigators stand up to them, we will prevail, too.**

- **Recall Petitions Pending Against 2 MID Commissioners for Public Meetings Violations.** The WMWUA has filed a Petition to Recall MID Commissioners Jerry Johnson and Paul Wadsworth. The MID and JVID irrigation district commissioners have allegedly held meetings in violation of the public meetings acts, which are grounds for removal from office through recall elections. As a result, a recall petition is pending with the Lake County Elections Administrator and a recall election should be held in the near future to recall MID Commissioners Jerry Johnson and Paul Wadsworth.

3. RECENT NEGATIVE DEVELOPMENTS

- **Tribes' Attorneys Now Represent MID and JVID.** The CSKT's attorneys have entered into an agreement to also represent the 2 small irrigation districts – the MID and JVID. After the irrigation district elections in May, 2013 did not go their way, these attorneys wasted no time. Less than 5 weeks after democratic elections were held, they acted on behalf of the 2 small irrigation districts – which make up less than 20-25% of the 109,000 irrigated acres in the 3 irrigation districts, to dismantle the democratically-elected FJBC. The JVID (approx. 7000 acres) and MID (approx. 15,000 acres) voted to cease joint operations with the FID (approx. 88,000 acres) and withdraw from the FJBC (approx. 109,000 acres total).

- **CME Fired 2 Irrigators Who Testified Before You Last Session.** The CME, controlled by the CSKT and Compact supporters, acted with retribution toward 2 ditch riders, Tim Orr and Harlan Gerdes, for testifying before you last spring. First, this summer, it demoted them and reduced their pay for exercising their 1st Amendment right to free speech. Next, a week before Christmas, they "furloughed" (fired) them. Tim Orr is a tribal member of the CSKT, previously served as a Supervisor over the JVID ditch riders, and worked delivering water in the Flathead irrigation Project for many years. Harlan Gerdes also delivered water to irrigators for many years. **Both men were extremely knowledgeable regarding water deliveries in the Flathead irrigation system and understood better than anyone the disasterous effects the proposed CSKT Compact and FIP Agreement would have on irrigators, both tribal members and non-tribal members alike. However, as a result of exercising their 1st Amendment rights, they were fired.** Investigations are pending before the NLRB and at the State–level as well.

- **Retribution Against Irrigators Continues in Many Other Forms.** Since the Compact was not enacted last spring, WMWUA members have been targeted for retribution by the CSKT and Compact proponents. For example, WMWUA members holding tribal grazing leases have been targeted and told their leases will be terminated if they do not terminate their WMWUA membership. Other people and businesses have been subjected of threats of violence and other forms of retribution. Further, the federal government has threatened to use the Endangered Species Act (ESA) to increase instream flows in the area in an effort to manufacture a water crisis in the most water-abundant drainage in the nation and deny water to irrigators. See letter from DOI attached as **Exhibit "D."**

- **6 Human-Caused Wildfires were Set Upwind from WMWUA Members' Ranches.** In July, 6 separate fires were set in forested land upwind from WMWUA members' ranches and farms. Fortunately, the prevailing winds switched at a crucial time and the fires moved to away from the ranches and were eventually extinguished. Reports indicate at least 2 of the 6 fires were human-caused. There were no thunderstorms in the area; therefore, lightning was not the cause. Disappointingly, no further investigation has been conducted, nor has the Governor's office called for an end to these dangerous acts of retribution.

- **CSKT and Federal Agencies Seek to Avoid Democratic Representation on CME and FJBC.** These entities continue to support a CME, which was never democratically-elected, is not accountable to voters, and its board members cannot be voted out of office. Further, the structure of the CME ensures the Tribes have a 50% membership on the Board and a tie vote on any issue means the proposed action fails and the CME then follows its previously-established practice.

  Further, once the FJBC elections were over and the majority in control changed, the Tribes' attorneys suddenly represented the JVID and MID and moved to withdraw the 2 small irrigation districts from the FJBC. Although it is a classic example of the "tail wagging the dog," the maneuver has accomplished the CSKT's goal of introducing chaos into the irrigation system. **One must question – why are the Tribes and federal agencies threatened by local government entities comprised of elected local citizens and opposed to the principle of "one acre, one vote?"** The federal attorneys and the attorneys for the MID and JVID are working hand in hand in an effort to give away irrigators' State-based water rights to the Tribes. See **Exhibit "E,"** Affidavit of federal attorney stating he has received numerous documents from the 2 small irrigation districts' attorney.

- **JVID and MID's Numerous Public Meetings Law Violations**. On June 14, and December 6, and other occasions, the JVID and MID have held meetings that violated the Montana Public Meeting Acts. In fact, such meetings have occurred with the attorney present. This type of behavior by local government entities does not give irrigators much faith in these entities or their attorneys.

4. IRRIGATORS' RECOMMENDATIONS:

- The federal agencies must turn over O&M of the irrigation system to "the owners of the lands irrigated thereby."

- Leave state-based water rights on fee-patented lands alone.

- Federal agencies need to back away from threats and extreme positions.

- The water rights issues must be resolved first in the Water Court.

- Voting related to the irrigation system must be based on "one acre, one vote."

5. PROPOSED COURSE.

- Irrigators cannot continue to protect their property rights without your help. The FJBC and Compact proponents have succeeded in making it cost-prohibitive to stand up for their property rights much longer. Without help, the irrigators will not be able to fend off the CSKT, the federal agencies, and their supporters. It is appropriate for the State of Montana to appropriate funds necessary to protect the water its Constitution clearly states is owned by the State of Montana and safeguard its State sovereignty and preserve its jurisdiction over all its citizens, regardless of skin color. Further, the Flathead Reservation is a Public Law 280 reservation. This means the federal government turned over jurisdiction of the Flathead Reservation to the State of Montana years ago. The State of Montana chose several years ago to terminate its jurisdiction over the reservation to the CSKT. However, by doing so, it has created a host of unintended consequences that were not well–thought through by the State of Montana. As a result, it is necessary and appropriate for the State of Montana to have a hand in fixing the problems and unintended consequences. Further, the State of Montana owns all water within its borders, as set forth in its Constitution and must make arrangements to prepare for the general adjudication of the water rights in this basin by appropriating funds to protect its sovereign interests.

- **The Recent Compact Report Dodged Important Questions – WIPC Must Demand Complete Answers from the A.G., Not from the Compact Commission.** The Compact Commission's report does not answer many important questions raised by WMWUA in its 4 different sets of comments or those raised by legislators. WIPC must demand full, truthful answers. Wyoming adjudicated its Indian reserved water rights issues and achieved drastically better results just a few years ago. WIPC must demand analysis from the Attorney General's Office as to what laws have changed so dramatically in the last few years to justify a completely different result in Montana, one damaging to Montana irrigators' property rights.

- **Legislature Must Stand Down and Wait until Litigation is Complete Regarding these Water Rights.** Irrigators recommend the CSKT Compact not be reintroduced unless and until the litigation is complete regarding the 2 Writs of Prohibition currently in place prohibiting the FIP Agreement from being entered. Further, litigation is pending in the Water Court regarding whether the Irrigators, FJBC, Tribes or federal agencies own the water rights appurtenant to irrigators' fee-patented lands. Until those issues are resolved by the District Court and Water Court, any further consideration of a CSKT Compact would be premature.

- **Immediately Appoint Subcommittee or Task Force to Facilitate Settlement Discussions between the Irrigators and the Federal Agencies and the CSKT.** In response federal agencies' threats to take irrigation water and dedicate it to fisheries issues (see **Exhibit "D"**), irrigators ask WIPC to appoint a subcommittee or task force to facilitate settlement discussions between irrigators and the federal agencies and CSKT. Federal agencies have threatened to deny irrigators water and use it for fisheries purposes instead before the **2014 irrigation season** begins (just 4 months away) if a FIP Agreement and Compact is not passed. **Therefore, this federal bullying poses an imminent threat that must be dealt with immediately.** In the

Klamath River system, its local leaders took the initiative **after** water was denied to irrigators to facilitate settlement discussions. Those discussions recently resulted in a settlement that protected water users. **Irrigators urge this committee to be proactive and take seriously the federal threats to use the Endangered Species Act to manufacture a water shortage and facilitate settlement discussions now -- before damage is done to Montana's local economies and family ag operations.**

- **Amend MCA 85-7-1956 and 85-7-1957.** In a decision contrary to clear statutory language, the Montana Supreme Court ruled in April, 2013 that the District Court does not need to review any proposed FIP Agreement and irrigation districts do not need to submit the matter to a vote. WMWUA asks this committee to overturn the Montana Supreme Court's decision by making clear MCA sections 85-7-1956 and -1957 apply to agreements such as the FIP Agreement and require State district court approval and a clear 60% vote of irrigators in favor of any agreement with the federal government of any kind affecting the quantity of water deliveries or ownership of water or water rights. We have started drafting the legislation and would be interested in hearing from this committee or any individual legislators who would like to sponsor the bill in any upcoming special legislative session. Further, we have drafted other legislation that you may be interested in sponsoring during any special session called.

- **Draft Legislation to Fund State's Role in Adjudication and/or Compact.** Irrigators request that WIPC draft legislation for any upcoming special session appropriating funds for either funding: 1.) the State of Montana's representation on behalf of all its citizens in adjudicating all water rights in the Flathead basin and/or, in the alternative, 2.) as a cap for any future settlement and related Compact with the CSKT. Therefore, the funds would be available to represent the State's interest in protecting its sovereignty in the adjudication and/or settlement with the CSKT. By tying the 2 together, it gives the CSKT incentive to come to the table quickly with serious proposals for a Compact. In the meantime, while we wait for a serious proposal, the State's role in the adjudication is funded. In short, the sooner the matter is settled, the less money is spent on litigation and the more that can be used to fund a CSKT Compact settlement. In every other adjudication in every other State, the State itself is a party and must be to protect its sovereign interests. The State of Montana must prepare now to provide funding to protect its State sovereignty and jurisdiction over all the water it owns (which under the Montana Constitution is all the water within the boundaries of the State of Montana) and to administer, regulate and monitor water rights on behalf of all its citizens equally, regardless or skin color. The current administration has made no effort to provide for the State of Montana, through its Attorney General, to safeguard the State's sovereignty and jurisdiction in any settlement or adjudication of the CSKT's water right claims.

- **Retribution Issues.** It is disappointing that neither this Governor nor the federal agencies have done anything to curb the retribution. WWMUA requests that you issue a letter to the Governor and federal agencies requesting that they demand retribution in the Flathead basin

cease and directing the local fire marshal to fully investigate the fires and local law enforcement to take a strong stand to protect all its citizens.

- **Void CME and Push for Federal-Compliance with 1908 Mandate.** WMWUA requests that you issue a letter to the federal entities demanding that they comply with the Act of 1908 mandating that they turn over operation and maintenance of the irrigation system to the "owners of the lands irrigated thereby," as represented by the FJBC or an entity that provides the following minimum due process protections for irrigators:

  a. Is comprised of board members who are themselves irrigators owning land in 1 of the 3 irrigation districts;
  b. Board members are not appointed, but are instead elected through county-run elections of all irrigators owning land in the 3 irrigation districts, and who are subject to State law and jurisdiction;
  c. Such elections are based on the principle of "one acre, one vote;" and
  d. Is subject to the jurisdiction and venue of the State District Court for Lake and

Thank you for the opportunity to present these comments. If you have any questions, please direct them to E.J Redding.

Sincerely,

Steve Tobol, Chairman and Manager

WESTERN MONTANA WATER USERS ASSOCIATON, LLC

United States Department of the Interior

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February 19, 2013

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Dear Sirs:

As you know, for the past four years, Federal, State, Tribal and local officials have been actively negotiating to resolve all of the water right claims of the Confederated Salish & Kootenai Tribes of the Flathead Reservation that will be litigated in the Montana general stream adjudication. The negotiators have completed drafts of all of the key settlement documents and are discussing them with their respective decision makers and the public.

I wish to express my appreciation for the effective and respectful manner that each party has exhibited during the course of the negotiations. I recently had the opportunity to brief Department of the Interior officials about this negotiation, and I highlighted the productive engagement of all parties and the high quality of our drafted documents. In those briefings, I was also able to begin the effort within the Department for principals' review of the proposed agreements. As I have previously noted, the Department and this Administration have stated their continued commitment to seek to resolve tribal water right claims through settlement.

I also appreciate the parties' recognition of the need to continue to make progress in these negotiations, and I wish to reinforce this message. From the federal perspective, a failure or significant extension of the negotiations would leave unresolved several critical water resource

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needs and conflicts on the Reservation that, with or without settlement, will have to be addressed in the near future.

Specifically, failure or delay of the negotiations should not be equated with a long-term extension of the status quo for irrigation water deliveries on the Reservation. Should negotiations lapse, I anticipate that the federal government will need to address in tandem at least two critical issues in the near-term with the Tribes and others: 1) the adequacy of the current interim instream flows, and 2) the need to implement efficiencies and other measures within the federal Flathead Indian Irrigation Project (FIIP) to conserve water and improve operations.

In the 1980s, the courts conclusively determined that the Tribes, by the terms of the 1855 Hellgate Treaty, are entitled to on-reservation instream flow water rights with a time immemorial priority date. The courts further confirmed that the Tribes' instream flow water rights are senior to the water rights for the FIIP and, in a strict priority situation, have to be met before water deliveries to FIIP irrigators. The federal government, as trustee for the Tribes and the entity ultimately responsible for the federal FIIP, is bound by these court decisions determining the senior priority of the Tribes' instream flow rights. At the time of these court decisions, the Tribes and BIA developed and implemented interim flows for some of the critical streams on the Reservation. Those interim flows have been in place since then, but they were not intended as the full measure of flow needed to meet the Tribes' instream flow water right and were not established for all streams entitled to protected flows.

In recent years, several factors have emerged which indicate that the current interim flows will likely need to be adjusted and expanded in the near future if there is not a settlement. In fact, the level of adequate flows for fishery purposes was extensively discussed in the negotiations. Through these discussions, and to meet the high demand in the negotiations for certainty, the Tribal government and its experts, working with state and federal technical experts, developed a greatly enhanced and scientifically supported body of data and knowledge on what science-based flows for fish and irrigation deliveries for crops should be on the Reservation. Similarly, recent consultations under the Endangered Species Act focused on the need for improvements in flows and in FIIP operations to reduce impacts of flows on fish.

With this recently acquired information indicating that current interim flows on the Flathead Reservation are ripe for reconsideration, the federal government will have to consider all options for ensuring that the Tribes' judicially confirmed rights are protected and that the ESA is complied with. Of course, the current proposed settlement charts a course for implementing a new improved instream flow regimen that I believe provides the needed level of improvements. But without settlement we will have to chart an alternative course for needed improvements (such as considering whether to increase the interim instream flows), which I anticipate could commence as early as this year.

Any actions increasing flows to better meet the Tribes' reserved instream flow water rights and to comply with the ESA would necessarily have an impact on the water supply available for FIIP and non-FIIP irrigation water diversions on the Reservation. To accommodate a corresponding

decrease in the FIIP irrigation water supply, the Bureau of Indian Affairs (BIA), which has ultimate responsibility for FIIP, would need to consider all available options. BIA has indicated to us that, as a first step, BIA would convene the Tribes, the Flathead Joint Board of Control, and the Cooperative Management Entity to work through solutions that adjust Project water supplies and water duties (through, for example, the implementation of individual farm turnout allowances and the elimination of extra-duty deliveries), implement conservation and measurement requirements and address structural improvements to FIIP to prevent entrainment of ESA-listed fish species. Further, unlike the provisions under the proposed settlement, there likely would be no federal or state funding in a non-settlement situation to meet these new requirements, thereby requiring that costs be met by operation and maintenance assessments. Finally, it is important to note that BIA retains ultimate responsibility for and ownership of FIIP; while much less desirable than settlement, we believe that an alternative pathway to improving FIIP operations is currently available and could be implemented in the near-term without waiting for the completion of the Montana general stream adjudication.

In conclusion, I would like to stress that the federal negotiation team remains committed to the negotiations and is not at this time advocating pursuing alternatives to achieving full settlement. Nonetheless, I felt it was important to objectively describe the importance and need for action in the near future and to describe options that are available to address these issues if the effort to settle the Tribes' water right claims fails or is significantly delayed.

Sincerely,

For the Regional Solicitor

Duane T. Mecham
Attorney

cc:
Fain Gildea, Dep Dir, US DOI Secretary's
Indian Water Rights Office

Correct Chronology of Historical Events.

The CSKTs' chronology of relevant history is confusing and incomplete. Their chronology leaves out the relevant events of 1902, 1903, 1905, 1914 and 1916. A more complete chronology of the history of land and water rights on the Flathead Reservation appears below.

1902. Congress enacted the Act of June 17, 1902, establishing the Bureau of Reclamation ("BOR"). In pertinent part, the act provides:

> Nothing in the Act shall be construed as affecting...the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior,..., shall proceed in conformity with such laws and nothing herein shall...affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; provided, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Id., Ch. 1093, 32 Stat 388, 390, 43 U.S.C.§§372 and 383.

1903. The U.S. Assistant Attorney General issued a Formal Opinion guiding the U.S.'s deference to States in matters involving water rights for decades, stating:

> There is no authority to make such executive withdrawal of public lands in the State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water.

Op. Asst. Atty. Gen. 32 L.D. 254 (1903), see Exh."B." Therefore, the U.S. recognized the need to acquire State-based water rights for lands so it could transfer water rights to homesteaders.

1904. Congress enacted the Flathead Allotment Act, providing lands be allotted to individual Indians and then opening the Reservation for settlement by homesteaders on the unallotted lands. 33 Stat. 302.

1905. Montana Enacted the Act of 1905, entitled "**An Act Authorizing the Government of the United States to Appropriate the Water of the Streams in the State of Montana, subject to certain restrictions** " provides:

> ...the United States may by and through the Secretary of the Interior,..., Appropriate the Water of Streams or Lakes within...Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals;...

MCA§4846 (1908). This State act illustrates where the U.S.'s water rights came from that the U.S. promised irrigators under the Act of 1908. Therefore, the water rights the U.S. required to be awarded to irrigators were "water rights," not mere "rights to use," and were not federally-derived water rights but State-based water rights initially appropriated by the U.S. and then transferred to irrigators.

1906. The Act of June 21, 1906 assured nothing in the act would be construed to deprive Indians and non-Indians "of the use of water appropriated and used by them." 34 Stat. 354, §19.

1908. Congress enacted the Act of May 29, 1908, amending the 1904 act, creating the FIP, requiring homesteaders to purchase water rights from the U.S., indicating water rights would be permanently attached to lands, outlining the process for issuance of patents and water rights, and providing DOI with authority to promulgate rules.[1] It also assured individual Indian allottees the right to receive irrigation water.[2] 35 Stat. 448.

1909. President Taft issued his Proclamation opening the Flathead Reservation to settlement. In that year, the U.S. obtained State-based water rights from the State of Montana and "Notices of Appropriation" were filed pursuant to Montana Code.[3] Exh."C."

1910. Congress enacted the Act of June 23, 1910, providing patents related to reclamation homestead entries. 36 Stat. 592.

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[1] 38 Stat 686, 690, §15 provides further authority to promulgate rules.

[2] The Act of 1908 repeatedly mentions "water rights." Section 9 provides "settlers under the homestead law...shall be entitled to a patent for the lands." Also, "entryman or owner of any land irrigable by any system...shall...be required to pay for a water right..." *Id.*

[3] CSKTs concede Notices of Appropriation were filed for all water rights under the FIP. However, they fail to mention the U.S. subordinated itself to Montana's State-based water right process out of federal deference to Montana's sovereignty, to obtain State-based water rights for the FIP. Therefore, the FIP water rights are State-based water rights. In light of Montana's 1905 Act and Notices of Appropriation filed to obtain a State-based water rights, CSKTs' assertions that water rights for FIP lands are "implied reserved water rights" are unfounded.

1912. Congress enacted the Act of August 9, 1912, providing any homestead entryman under the Reclamation Act, "including entryman on ceded Indian lands," may submit proof of reclamation and other required data, which prove, if found regular and satisfactory, "shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies..." 37 Stat. 265, ¶1.

1914. Congress enacted the Act of July 17, 1914, extended the Act of 1912 to the Flathead Reservation, providing:

> That **the provisions of** the...Act of [1912]..., **authorizing under certain conditions the issuance of patents on reclamation entries, and for other purposes, be, and the same are hereby, extended and made applicable to lands within the Flathead irrigation project, in the former Flathead Reservation, Montana,** but such lands shall otherwise subject to the provisions of the Act of Congress approved April twenty-third, nineteen and four,... as amended by the act of Congress approved May twenty-ninth, nineteen hundred and eight...

38 Stat. 510.

1916. The DOI promulgated regulations, stating:

> Final water-right certificates are not required for and will not be issued for (a) lands entered under the Reclamation Act; (b) desert-land entries for which water-right application has been made; (c) entries of ceded Indian lands, whether patents for such lands are issued under acts of August 9, 1912, or otherwise, but patent in each of such cases carries with it the water right to which the lands patented are entitled.

45 L.D. 345, 402, codified at 43 CFR §230.69 (1939). Therefore, if lands are homesteaded fee-lands, landowners have a patent. If the land has a patent issued under the 1916 rules, then it has a water right.[4]

1926. Congress enacted the Act of May 10, 1926, providing appropriations for improvements if irrigators organized themselves into irrigation districts under State law and entered into repayment contracts. Contrary to IDs' assertions, nothing in the 1926 Act states the IDs would be somehow severing Irrigators' appurtenant water rights from their lands and acquiring Irrigators' appurtenant water rights by the mere formation of the IDs.[5] 44 Stat. 453, 464.

Allottee Lands – Walton Rights.

In addition, with respect Indian allottee lands, the 1908 Act provides "land... 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..." *Id.* Although their FIP lands may also have a State-based water right, Indian allottees' successors are also entitled to a "Walton water right." *Confederated Colville Tribes v. Walton,* 647

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[4] CSKT argues the Court should have conducted evidentiary hearings regarding the Congressionally-mandated processes. *CSKTs' Brief,* pp.11-12. This is unnecessary. Although there are a number of requirements set forth in the 1908 Act, such factual inquiry is unnecessary in light of the 1916 Rules.

[5] The CSKT argues the Act of May 25, 1948 somehow affects ownership of water rights. It does not. The majority of patents were issued prior to 1948 and water rights were transferred to those lands under the 1916 Rules with the patent.

F.2d at 42, 50-51 (9th Cir. 1981); *U.S. v. Ahtanum Irr. Dist.,* 236 F.2d 321, 342 (9th Cir.1956); *Big Horn I,* at 112-113; and cases cited therein. The entitlement of allottees' successors to "Walton water rights" is widely accepted in the Ninth Circuit and neighboring States.

The Reclamation Act Was Applied to Issue Patents.

CSKTs insist the 1902 Reclamation Act is inapplicable because, if FIP lands are subject to the Reclamation Act, then the *Ickes, Nevada,* and *Nebraska* holdings unquestionably are dispositive as to landowners owning the water rights appurtenant to FIP lands. Irrigators are not convinced for several reasons.

First, as the CSKT concede, the U.S. applied for Notice of Appropriations for all FIP lands using Montana's State-based water rights system. Notices of Appropriation obtained from records on file with the Courthouse are attached. Exh."C." Notices of Appropriation state: "Be it known that the [U.S.], pursuant to the provisions of the Act of June 17, 1902,..." *Id.* Second, the 1914 Act made portions of the Reclamation Act regarding obtaining water rights applicable to the FIP. Patents were issued for FIP lands awarding water rights. One of WMWUA's members' "reclamation patents," which was obtained from records on file with the Courthouse, is attached.[6] Exh."D." Irrigators request this Court take judicial

[6] Judicial notice is appropriate for these records on file at the Courthouse. This Court has taken judicial notice of maps in other water rights cases. *In re Establishment and Organization of Ward Irr. Dist.,* 216 Mont. 315, 701 P.2d 721

notice of the "Notices of Appropriation" and "reclamation patent." The patent states it is issued "with the right to the use of water from the [FIP] as an appurtenance to the irrigable lands" and references the "Flathead Reclamation Project." The patent also states it's issued subject to the 1912 and 1914 Acts.[7]

Further, the FIP history suggests the Reclamation Act applies or the U.S. applied it. Although the BIA currently owns the FIP, the FIP was initially under the management and control of the BOR. The FIP was owned and managed by BOR from 1908-1924, when BOR transferred the FIP to the BIA. Therefore, the BIA received a BOR project constructed under and subject to reclamation law. The mere fact the BIA later acquired the FIP does not change history, the FIP, or

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(1985). If the Court or any party would prefer, we will provide certified copies; however, the expedited briefing schedule does not presently allow time for that. Judicial notice is not appropriate for the Newspaper articles. *Id.*

[7] CSKTs argue the 1912 and 1914 Acts are inapplicable to FIP lands. In light of patents issued for FIP lands (that specifically refers to the 2 acts), it is clear CSKTs' position is incorrect. If this Court finds even one Irrigator owns water rights, that is sufficient to demonstrate IDs lack authority to give away another's water rights and the Court's *Writ* should be affirmed. Whether the U.S. treated FIP lands as ceded Indian lands or reclamations lands, they issued patents under the Acts of 1912 and 1914 decades ago and should be estopped from arguing the water rights awarded pursuant to the 1916 Rules in the patents don't exist. Note the Act of 1906, ch. 2567, 34 Stat. 205 refers to the "ceded" lands and other acts refer to the "former Flathead reservation." 38 Stat. 510; 41 Stat. 408, 421; *CSKT v. U.S.*, 437 F.2d 458 (Claims Ct. 1971). Regardless of whether they accurately describe the status, it appears the U.S. may have believed that at the time and applied the Acts of 1912 and 1914 to apply to FIP lands.

laws applicable to it under which settlers received patents to their land and appurtenant water rights.[8]

In light of the fact reclamation patents were issued on Irrigators' lands with appurtenant water rights, and BOR developed much of the FIP in the first 16 years of development, the U.S. Supreme Court holdings in *Ickes, Nevada,* and *Nebraska* control and this Court must uphold the Court's conclusion Irrigators own water rights.

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[8] Boggesser, Garrit, *"The Flathead Project: The Indian Projects,"* Bureau of Reclamation 2001, pp.10-11 and ftnt. 16, citing Flathead Project History, 1910, Vol. 1, 13; "Operation of the Projects Transferred," Reclamation Record 15, No. 1 (1924), 131. The report states:

> Between 1908 and 1924, reclamation constructed eight reservoirs and dams, eight diversion dams, 56 canals, and over 9,154 canal structures (bridges, culverts, pipes, and flumes). *** Reclamation accomplished a considerable amount of work with a final construction price tag of $5.53 million, and an operation and maintenance cost of $534,430.

Id., at p.23.