

## Metropoulos Law Firm, PLLC

Jon Metropoulos, Attorney

50 South Last Chance Gulch, Suite 4

Guardian Building

Helena, Montana 59601

Phone: 406-442-0285

Mobile: 406-461-4296

Fax: 406-449-2256

Email: jon@metropouloslaw.com

Sen. Chas Vincent  
Chair WPIC  
By email

26 February 2014

Re: WPIC, March 18, 2014—Proposed CSKT Compact—claims to FIP  
Water

Dear Senator Vincent:

Enclosed with this letter are copies of a few seminal documents that illustrate some of the historical legal foundation of fee-land irrigators' claims to own property rights in the water delivered by the Flathead Irrigation Project. These documents are by no means all that provide the foundation for our claims, but I think they will indicate to any reasonable reader that irrigators clearly have solid legal claims to water rights that, under the proposed CSKT Compact, are not protected or respected. Hence, I offer these as a basis for the WPIC's consideration of the points I made in January and those I will make on March 18, as part of my representation of the Flathead Irrigation District (FID), to the effect that certain changes should be made to the proposed Compact so as to both protect these property rights and other rights of individuals who would be directly affected by the Compact and garner broad public support for a Compact.

By providing the committee these documents, FID is obviously not asking that you stand in judgment of its or any stakeholder's legal rights, as if WPIC were a court. Rather, our goal is more limited: simply to illustrate that, in fact, there are two sides to this story, and the irrigators from whom you have heard do, in fact, have sound historical and legal reasons to assert that they or their irrigation representative—the districts—own the water right to irrigation water delivered by the Project, not the Tribes, as is

provided in the proposed Compact. In addition, I have to emphasize the complexity of the legal background, without detracting from the fact, for I believe it is a fact, that the irrigators themselves own the primary property right in the irrigation water. Thus, these documents do not represent the entire universe of applicable statutes, nor do they indicate all the non-frivolous legal theories that exist in support of irrigators' property rights in this water. But they do, I think, indicate irrefutably that irrigators' claims should not be dismissed out of hand, as if they have no footing in the law. Indeed, if anything, the applicable law, viewed objectively, supports the opposite conclusion.

By way of background, and emphasis, I want also to reiterate that the FID is in support of a negotiated settlement that respects the property rights of all involved. The three concerns the FID relayed to the State, United States, and Tribes in September 2013, if addressed in amendments to the proposed Compact, could accomplish this. If the Compact cannot be amended to do this, the FID is opposed to its passage. The FID simply cannot support an agreement between the CSKT and the State that solves their issues and accomplishes their goals by taking rights, including property rights, away from others.

I must also reiterate that the FID, an elected local government under Montana law, is the representative for irrigation matters of the fee owners of 88,000 of the 107,000 fee acres served by the Flathead Project. As such, and in complete contrast to what may have been said or implied to you, the FID represents tribal members and nonmembers alike, equally. As Congress mandated in the Act of May 10, 1926, 44 Stat. 464, the Districts represent all fee landowners, tribal members and nonmembers, without distinction among them.

The documents I submit, with pertinent highlights, are:

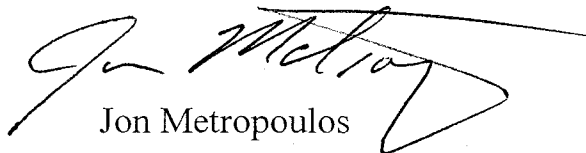
1. A copy of the Flathead Allotment Act (FAA), the Act of April 23, 1904, 33 Stat. 302, which among other things, clearly applied the general Homestead Act to the surplus or unallotted land remaining after allotments were made to tribal members.
2. A copy of the amendment to the FAA Congress enacted in 1908 authorizing the construction of the Flathead Irrigation Project, Act of May 29, 1908, 35 Stat. 448.

3. A copy of a trust patent, indicating an allotment made to a tribal member in 1908 and a fee patent for that same land issued in 1917, demonstrating a documentary basis for an allotment on which successors in interest, today, claim a property interest in water rights for irrigation water delivered by FIP.
4. A copy of a fee patent for surplus, unallotted land also delivered irrigation water by FIP demonstrating a documentary basis for surplus, unallotted land on which successors in interest, today, claim a property interest in water rights for irrigation water delivered by FIP.
5. A copy of three pages from a National Park Service Website that provides basic statistics about homesteading under the Homestead Act generally, and, specifically, showing that approximately 1/3 of Montana, more than 32 million acres, was homesteaded under the same law Congress applied to the Flathead Reservation in the FAA and pursuant to which tens of thousands of acres are now owned in fee and irrigated by FIP water on the Reservation.

Finally, I want to assure you, Mr. Chairman, and the members WPIC, that I have not forgotten the commitment I made to you, and the opportunity you provided me, to submit a written response to the Compact Commission's Report. While I have devoted many hours to that task, its completion has been delayed through the litigation burdens I mentioned in January and other developments in regard to Project operations. I will submit it as soon as possible, and it will be comprehensive. Again, thank you for that opportunity.

Thank you also for your hard work and leadership on this complex issue. I look forward to presenting more information, and to answering questions, on March 18, when the WPIC meets next.

Respectfully,



Jon Metropoulos

## FLATHEAD INDIAN RESERVATION.

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

Flathead Indian  
Reservation, Mont.  
Allotment and sale  
of lands in.  
Vol. 12, p. 975.

Allotments.

Commission to ap-  
praise unallotted  
lands.

Composition of.

Organization of  
commission.

Clerk.  
Classification, etc.,  
of lands.

ACTS RELATING TO FLATHEAD INDIAN RESERVATION.

Timber lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

Mineral lands.  
Compensation.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

Time limit.

Disposal of lands.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby

Timber and school lands excepted.

Selection of school lands in lieu of lands formerly allotted.

granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

*Proviso.*  
Price to be paid Indians.

Opening to settlement.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land

*Provisos.*  
Existing rights of soldiers and sailors unimpaired.  
Vol. 31, p. 847.  
R. S., secs. 2204, 2205, p. 422.

Payments.

Patent.

Forfeiture funds.



covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

Right to commute entries not affected. R. S., sec. 2301, p. 421.

Sec. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

Mineral-land entries.

*Proviso.*  
Exceptions.

Sec. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

Sale of timber lands.

Sec. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

Reservations. For Catholic religious organizations. Post, p. 1630.

For other religious organizations.

For agency, etc., buildings.

Sec. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

Sale of undisposed lands.

Maximum.

Sec. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower

Disposal of proceeds.

Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

Ante, p. 304.

Payment for  
lands reserved.  
Appropriation.

Sec. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

Ante, pp. 303, 304.

Reimbursement.

Ante, p. 302.

Liability of the  
United States lim-  
ited.

Sec. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904. (33 Stat. L., p. 302.)

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled—*

\* \* \* \* \*

SEC. 9. That section twelve, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended so as to read as follows:

Land for Catholic  
mission schools, etc.  
Ante, p. 304,  
amended.

"SEC. 12. That the President may reserve and except from said lands not to exceed one thousand two hundred and eighty acres for Catholic mission schools, church, and hospital, and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely: To the Society of Jesus, six hundred and forty acres; to the Sisters of Charity of Providence, three hundred and twenty acres; and to the Ursuline Nuns, three hundred and twenty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained, used, and occupied by