

October 8, 2014

Proposals of the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts for modifications to the existing Water Use Agreement of the Flathead Compact for consideration by the 2015 Montana Legislature.

The FJBC in September 2013, after holding approximately one dozen open, public meetings to take comments on the proposed Water Use Agreement which was part of the Flathead Compact that had been rejected by the 2013 Legislature, identified three concerns with the proposed Water Use Agreement. Those concerns, described more fully below, are labeled: Ownership of the Irrigation Project Water Rights; Verification of the volume of those rights; and Unitary Management Ordinance and Board (UMO/UMB). Since then, it has been and remains the FJBC's position that it recognizes and prefers the benefits of a negotiated solution as a means to resolving conflicting claims to water rights on the Flathead Reservation, including its claims to the irrigation water delivered by the Flathead Project. Consequently, its position has been, and remains, that if all of these concerns are adequately addressed to the FJBC's satisfaction in a modified Water Use Agreement as part of a modified Compact, the FJBC could support passage of such a Compact.¹

Although the FJBC does not have a formal "seat at the table" with the Compact Commission in the limited reopening of negotiations, discussions began with representatives of the State of Montana Governor's and Attorney General's offices about how to address these concerns. Previously, the Water Policy Interim Committee (WPIC) and Compact Commission undertook their own limited reviews of the modeling underpinning the proposed Water Use Agreement (WUA), which is an appendix to the proposed Compact. The FJBC respectfully submits the following proposals after having participated in all these processes. It hopes that, through discussions regarding these proposals and a continuation of this process, an agreement can be reached. It appreciates the efforts of all involved, but most importantly the WPIC, the Compact Commission, the Governor, and the Attorney General, in presenting this opportunity and working to make it successful.

FACTUAL, LEGAL, AND POLITICAL BACKGROUND

Pursuant to the 1855 Treaty of Hellgate, 12 Stat. 975, the 1.2 million acre Flathead Reservation was set aside for the Flathead Tribes from the lands the United States had acquired under the Treaty of 1846 with Great Britain. Congress ratified the Hellgate Treaty in 1859. The Flathead Reservation was established for the Flathead

¹ The FJBC recognizes that there are many other public concerns about the proposed CSKT Compact that suggest a revision of the existing compact may be required.

Tribes, incorporated as the Confederated Salish and Kootenai Tribes (CSKT), to serve the purposes stated in the Treaty. Article VI of the Treaty of Hellgate provided that when the lands of the reservation were allotted, the Congress and the President could “dispose” of surplus lands with the proceeds to benefit the Tribes. In 1904, Congress, applying the policies of the General Allotment Act, 25 U.S.C. §§331 *et seq*, to the Flathead Reservation, enacted the Flathead Allotment Act. *See* 33 Stat. 302. Exercising its plenary power over Indian affairs, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Congress required the reservation to be allotted in severalty to tribal members and other qualifying Indians and then the remaining surplus lands to be opened to settlement by nonmembers.

In 1908, Congress amended the FAA to authorize the creation of the Flathead Irrigation and Power Project with the purpose of delivering irrigation water to all irrigable land on the Reservation, allotments and unallotted homestead land alike. Act of May 29, 35 Stat. 448. That FAA amendment and subsequent legislation included provisions regarding repayment of the costs of constructing the Project. *See* 35 Stat. 448, Section 15. Included among these provisions are two requiring the United States, through the appropriate agency or official, to accept a water right application and recognize the right as vested upon certain payments being made, and to transfer the operation and management of the Project to those landowners. *Id.* These acts breached provisions of the Hellgate Treaty. The CSKT have sought and received judicial relief against the United States for these actions.

The allotment process began in 1907, and was completed a few years later. Once it was completed, by Presidential proclamation dated 1909, the remaining lands were opened to settlement under the general homestead, townsite, and mining laws of the United States, as Congress required in the FAA.

The construction of the Project resulted in the irrigation, today, of approximately 130,000 acres. As completion of the Project irrigation works neared, in 1926, Congress mandated the creation of irrigation districts under state law to represent the fee landowners served by the Project, whether they are tribal members or nonmembers. The three Irrigation Districts were accordingly created under Montana law and pursuant to Montana State District Court decree in the late 1920’s and early 1930’s. Trust land is not represented by the Irrigation Districts, pursuant to the 1926 Act. As required by Congress, the Districts entered repayment contracts for the costs of the Project, securing such repayment by a lien on each acre of the irrigable fee land they represent. This repayment obligation and the liens which secured it covered the cost of both the Power Division and the Irrigation Division. Pursuant to federal statutes enacted in 1926 and 1948, the primary source of repayment was to be the revenues generated by the Power Division, with the fee land owned by irrigators represented by the Irrigation Districts securing that repayment, as the first lien on each acre was for its *pro rata* share of the construction costs.

Under federal laws Congress enacted between the allotment and opening of the Reservation in 1904 and 1934, the Project was constructed and began delivering irrigation water and power to approximately 130,000 acres of land. Examples of a patent for both allotted land and unallotted land are attached as Exhibits 1 and 2.

In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (“IRA”), repudiating the previous General Allotment Act policies but not repealing those laws or attempting to reverse their effects. Indeed, at 25 U.S.C. § 463(a), Congress specifically provided:

“The Secretary of the Interior...is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.”

In light of this, the United States Supreme Court has consistently held that the IRA did not reverse the allotment acts, and Congress’ policy and purpose in enacting them must still be implemented. The text from the Montana decision is attached hereto in full.ⁱ Since its decision in *Montana*, the Court has consistently referred to this description of the allotment act policies.

At this time, approximately 50% of the Reservation acreage is owned by the CSKT, most of which is located in the mountains of the reservation. However, the 50% owned by individuals represents almost all of the arable land, which is situated on the valley floors. Similarly, of the land irrigated by the delivery of water by the Project, 90% is owned in fee by individuals, both tribal members and nonmembers. Virtually all of the privately-owned real property on the Reservation today derives its title from Congress’ acts imposing the General Allotment Act policies on the Reservation, starting in 1904 and continuing for 20 years until the enactment of the IRA in 1934.

Thus, it bears emphasis and elaboration that in the IRA, while Congress turned away from its General Allotment Act policies, it also preserved all the claimed land and water rights that derived from its previous acts and their policies. 25 U.S.C. §463(a). When enacting the IRA, it not only did not repeal the allotment acts, it specifically preserved the rights previously obtained by individuals under those acts. In fact, as to irrigation project land, in the second proviso to 25 U.S.C. §463(a), it specifically exempted fee land served by such projects from the working of the IRA programs authorizing re-acquisition of reservation land by the United States in trust for a tribe.

In summary, the policy of the General Allotment Act, which Congress specifically and intentionally imposed on the Flathead reservation in the Flathead Allotment Act and later acts amending and implementing it, had two aspects, one “positive” and one “negative.” First, it was intended to benefit individuals, both tribal members and nonmembers, by allowing them to acquire real property. Thus, Congress required that allotments be made to tribal members in severalty. (Allotment in severalty is a term of art in Indian law. “It means a selection of specific land awarded to an individual allottee from a common holding.” *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972).) Consequently, it was Congress’ intent that allotments could, at the appropriate time, be owned in fee by tribal members and alienated freely by them. This in fact took place. Then the unallotted land was opened to settlement under the general homestead, townsite, and mining laws of the United States, allowing individual nonmembers to acquire personal ownership of real property on the reservation. This also took place, as Congress provided. Congress’ intention was to fully assimilate tribal members into American society, through the ownership and cultivation of private property. This was the “positive” aspect of its policy.

To effectuate this, however, Congress intended the dissolution of Tribes as governments and also the dissolution of reservations. *See Montana, supra*, 450 U.S. 544, 559 n. 9, discussed above and appended at the end of this document. This “negative” aspect of Congress’ intent for its allotment act policies also informs any analysis of respective rights and claims to land, water, and governing authority on the reservation. *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Plains Comm. Bank v. Long Family Land*, 554 U.S. 316 (2008).

The federal acts under which individuals obtained ownership of real property and water rights, therefore, must be understood and applied in accordance with Congress’ intent. Congress’ change in policy in 1934, while recognized as significant and important, does not change the meaning or intention of its previous acts under its previous allotment policy. Nor does it alter what, in fact and law, Congress intended individuals to acquire through those acts: ownership of real property, including under the Project, a property right in the irrigation water on which they depend. In fact, Congress’ change in policy serves to emphasize both its previous intention and the legal rights it allowed individuals to acquire under its laws. The rights, including property rights, acquired by individuals under those still-enforceable laws can only be properly understood and respected through that lens.

In response to Congress’ mandate in the 1926 Act, the fee land irrigators served by the Project formed three irrigation districts in the late 1920’s and early 1930’s. These are the Flathead Irrigation District, approximately 88,000 acres, the Mission Irrigation District, approximately 15,000 acres, and the Jocko Valley Irrigation District, approximately 7,000 acres. In addition to these 108,000 fee-owed acres

served by the Project, approximately 8,000 acres are served by the Project and owned in trust for the CSKT or individual Indians by the United States.

In 1982, the three Districts formed the Flathead Joint Board of Control (“FJBC”) as authorized under Montana law to serve as their central operating agency. The FJBC has twelve commissioners, eleven elected by their District irrigators and one appointed at-large member. As a consequence of differing opinions about the proposed Flathead Compact, including the proposed Water Use Agreement (WUA), a minority of four FJBC commissioners, two each from the MID and JVID, dissolved the FJBC in December 2013. Two of those four were recalled by their constituents, and a third lost an election in May 2014. As a consequence, the FJBC was re-formed on May 27, 2014. Its first act was to appoint an at-large member. It then reaffirmed the position of the previous FJBC:

“The FJBC prefers and has been working toward a settlement of water rights issues regarding the Project and will continue to do so. It will support a Compact that adequately addresses the three concerns that it identified in September 2013: Ownership of the irrigation water right; Verification that it will protect historic irrigation uses; the make-up and operation of a Unitary Management Ordinance and Board.”

The proposals below are the suggestions of the FJBC, as approved at its September 30, 2014 Special Meeting, to amend the existing proposed Water Use Agreement in ways that will garner the FJBC’s support. It is significant, of course, that a full Compact, of which a water use agreement would be a part, would represent a settlement of conflicting claims that would be adopted into Montana law. Consequently, some latitude exists to either resolve or decline to resolve certain open legal questions, or even depart from what in the opinion of some are resolved matters. This latitude, however, is somewhat limited by what is factually and legally plausible in the circumstances. The proposals below have been designed with this in mind.

- I. **Ownership of the right to irrigation water delivered by the Project, water rights for power generation, stockwater and other purposes: Bare legal title to these water rights owned by the FJBC and Districts, as appropriate, as fiduciaries in trust for the owners of the land within the Project, who as the people who put it to beneficial use are the owners of the beneficial title; water right certificate issued by the federal government to that effect for each acre of land under the Project; priority date of 1855.**

RATIONALE:

At this time, there are three conflicting claims to at least some of the irrigation water delivered by the Project. The FJBC timely filed its claims to this water; the Bureau of Indian Affairs then filed almost identical claims; and a small minority of land owners

filed claims to the water delivered to their land. The CSKT may also file claims to this water. The existing WUA provides that the CSKT own the water right.

The facts do not support CSKT ownership of the irrigation water right to others' land. Stated another way, the CSKT, as owners of land served by the Project either in fee or as the trust owner, must own the property right to that water like any other land owner. There is no factual or legal basis for a resolution of this issue in their favor as a tribe owning water rights to water that is delivered to others' land. Indeed, in 2007 the Interior Department denied the CSKT's attempt to contract the Flathead Project under a 638 contract because the Project was not built solely for the CSKT. Congress' intent for the FAA and the 1908 Amendment to the FAA, in which it authorized construction of the Project, was to benefit individuals. Most importantly, it was the intention of Congress under which the Project was authorized and constructed, that individuals, both tribal members and nonmembers, acquire their property rights in the land and water under the Project. Moreover, the individual land owners put the water delivered by the Project to beneficial use, not the CSKT. Congress intended that individuals would use the water and they have in fact done so since the inception of the Project. The fact that the CSKT have had numerous opportunities to sue the United States for Congress' acts in this regard and did in fact sue specifically for the taking of water for delivery by the Project to individuals provides confirmatory support for this conclusion. There is no factual or legal basis for the CSKT to own the water right to Project water, other than their status as owners of some lands within the Project.

The applicable law, both state and federal decisions, does, however, address the question of ownership of the irrigation water right. Under a federal irrigation Project, the bare legal title to a "Project right" is owned by the irrigation entity, usually an irrigation district that represents the landowners; i.e. in which they have full political rights of participation. But the District only owns the "bare legal title" in trust, as a fiduciary for the landowners. The landowners, who are the ones who actually put the water to beneficial use, own the "beneficial title." The beneficial title is an enforceable property right, which, if necessary, the land owner can protect by bringing an enforcement action against the operator of the Project. The water right is appurtenant to the Project land, ensuring it cannot be sold off the land.

II. Verification of the volume of irrigation water deliveries obtained through a measurement program, verification phase, coupled with adaptations in accordance with the results thereof.

RATIONALE:

After a good deal of work, the recent reviews of the modeling on which the WUA is based demonstrates that while it may be "reasonable" for planning purposes, it is not adequate for use in making actual allocations of Project water and in-stream flows and cannot protect historic irrigation uses. However, while the modeling of the proposed Water Use Agreement is uncertain, it does contain a good deal of

usable work product. But some modification is needed. Additional operational modeling is needed, and clarification of historic deliveries, extra duty water, stock water, and the use of “non-quota” water needs to be addressed. For example, it is difficult to say historic uses will be preserved when (or if) extra-duty water or non-quota water would not be delivered.

Regarding the use of HYDROSS as a modeling tool, while both the Technical Working Group of the Water Policy Interim Committee and DNRC, on behalf of the Compact Commission, recognized its usefulness, they also recognize its limitations. It is not an operational model. Its outputs cannot be cited as demonstrating “historic uses will be protected” when it is not designed or intended to model historic uses.

Thus, in light of the Compact Commission’s stated objective to preserve historic beneficial uses, the question is how, given the recognized limitations of the modeling used, to accomplish that. The answer, also supplied by the Compact Commission, could be a phased approach including measuring and adjustment. Such a process would start with the estimated historic beneficial use as derived from BIA Project reports and records, and, with existing in-stream flows, engage in an appropriate measurement program to gather and verify sufficient data to develop an operational model that would ensure historic uses, both of irrigation and existing in-stream flows, have been preserved.

Operational improvements coupled with R&B of Project infrastructure can help both irrigation efficiency and in-stream flows. Additionally, improving on O&M and R&B programs and implementing aggressive and progressive programs year after year can bring the Project up to a much higher level of efficiency, in effect “saving water” for its appropriate uses. These programs and opportunities should be identified and explored.

Background:

The second issue the FJBC has with the initial Water Use Agreement (WUA) is the determination of the volume of water to be delivered to irrigation. The fundamental philosophical difference between the FJBC’s approach and the Compact Commission’s approach is that the basis for the WUA agreement was that the CSKT “owns” all the water within the reservations boundaries. This false premise allowed the Tribe and Compact Commission to prioritize fisheries flow over irrigation water deliveries as the major purpose of the irrigation project and their goal for water apportionment.

While the WUA agreement purports to preserve “historic usage”, the facts do not support this contention. The CSKT’s focus, indeed the purpose of the HYDROSS model, was to see how much water diverted into the project and lost through system inefficiencies could be recovered by infrastructure improvements to improve in-stream flow for fisheries purposes. The Tribes also proposed to eliminate stock water entirely, and turn that into in-stream flow as well. A badly

flawed analysis of agricultural consumptive use drove the “model” to make “additional” water available for fisheries purposes. But the Technical Work Group found that agronomic principles do not support their consumptive use determinations. In addition, the Technical Work Group also found that there is no fisheries science or technical basis for these in-stream flows or for even claiming there is a need for more water for fishery uses. And conclusions by the Compact Commission staff and the WPIC TWG determined that HYDROSS is only a planning tool, is not an appropriate tool for determining on-farm or even river diversion allowances, and that the consumptive use determinations are questionable.

FJBC Philosophy on Agricultural Water Use Needs

The FJBC’s philosophic approach is that we recognize the competing demands for water and we are approaching the problem from the standpoint that, due to the wisdom and ingenuity of the people who designed this Project, we have the basic tools to manage the available water to satisfy these competing demands. We are attempting to rationally and systematically solve the problem to meet all the demands, realizing that when we don’t, we have to have a balanced way of dealing with shortages. This means we must have accurate data on system inflow, pumping capacity, diversion quantities, storage, system losses, consumptive use, and required in-stream flows. The Tribes must provide additional scientifically verified data to justify the need for increased in-stream flows above those that already exist. As stated above, the TWG found that the fisheries flows were not scientifically based.

In our attempts to be reasonable, we must recognize the competing demands and solve that issue in a reasonable way so that it is a “win-win” for both sides. The FJBC believes this is a reasonable approach to moving forward. The FJBC is reasonable and our obligation is to deliver water to have a successful agricultural enterprise while supporting reasonable, scientifically based in-stream flows. Our consultant, who has experience in many other irrigation projects, has said several times that in many projects, betterment and solid operational control can lead to benefits in agricultural deliveries **AND** in-stream flow. Fundamental to having this capability, is fixing this project and instituting measurement programs so as to be able to improve operational control via the development of calibrated, near real time operational models. Clearly HYDROSS is not the way to do that and has never been used as an operational model in any irrigation project.

Historic Diversion Defined

The FJBC’s approach to agricultural water needs determination is significantly different than the method utilized by the CSKT. First, we define historic use as the amount of water diverted into the Project from all sources (including pumping) and beneficially used based on the annual Project reports that are available. Due to a lack of information from the BIA, we are left with one annual report from 1939 that listed the annual diversion of approximately 500,000 acre feet. This was supplied to some 104,000 acres. At present, the project is sized for 130,000 acres.

So the actual water required for the full 130,000 acres would be $500,000 \times 130/104 = 625,000$ acre feet.

It is likely that a range of diversions is more appropriate given different types of water years, so that we estimate a historic diversion of between 625,000 – 725,000 AF. This is our determination, from the existing data available to us, of the annual historic agricultural water diversion that has been historically beneficially put to use. Irrigation and Stock Water quantities that exist in the streams over and above this historically diverted amount are currently available for in-stream flow. If more annual diversion data are made available we will utilize this information appropriately. In the year represented by the 1939 report, “A” acre feet were diverted into the Camas/ Lone Pine Division, “B” acre feet into the Jocko Division and “C” acre feet into the Mission Valley Division, including “D” acre feet of pumped water into the Pablo Reservoir, where “A”, “B”, “C”, and “D” are the amounts from the 1939 report. These will be normalized by the total diversion and will become the proportionate share of diverted water for each division. If more reports are available these proportions will be averaged over the period of years available.

The Process:

The FJBC views the Irrigation Project as part of a natural system that inherently behaves for certain periods of time with an overabundance of water while at other times is water short. We have competing demands for water, including existing in-stream flows, storage capacity AND pumping so we have the possibility that we manage these to minimize the potential damage of low flow years or possibly eliminate it altogether. This does not come without some cost however.

It is important to note that since 1985, the Project has successfully delivered irrigation water and protected the interim in-stream flows for the mutual benefit of agriculture and fish.

The keys to make it possible to meet competing demands are a measurement program, an infrastructure improvement program and the development of near real time operational system models. W. Edwards Deming said “You cannot manage what you cannot measure.” The development of a measuring system is fundamental to improving project operations. The data developed from this measurement program can be used to “bench mark” the system and form the baseline data against which improvements can be made.

Utilizing the data gathered on the baseline system, an improvement program to decrease system losses and increase operational efficiency can be developed and implemented, and more importantly to develop the near real time control algorithms to utilize in an operational model of the Project. The operational model will allow effective, sound operation of the irrigation project required due to the year to year variations in weather, snow pack, etc. and maximize water delivery to

meet the demands of agriculture and fish. It is important to note that fish flows also must adapt in different year types.

The FJBC believes this is the only way to meet the dual requirement of protecting historic use for agricultural irrigation and meeting the Tribes' desire for increased in-stream flows based on sound fisheries science. We believe our proposal is a reasonable approach to solve the stalemate that we are presently involved in, and that by quantifying our historic diversions and developing a plan to meet both irrigators' historic consumptive use AND peer reviewed science in-stream flow requirements, we can move forward.

III. Administration of water rights uses through the respective state district courts for all users of state-based water rights; Unitary Management Ordinance and Board applies to users of a quantified federal reserved water right.

RATIONALE:

The McCarran Amendment does not require resolution of water administrative controversies in an adjudication or a Compact. This element of the proposed Compact, which proposes creation of a unique, appointed board to administer a unique water code, is not necessary. Since the State of Montana owns the water itself (Montana Constitution, Article IX, § 3) and that is a core aspect of state sovereignty, there is good reason to believe the State ought simply to administer the water rights that result from either the Compacting or adjudication process.

The "Trilogy" of Montana Supreme Court cases on which some rely to support the proposal for a unique ordinance and administrative process, does not, in fact, lead to the conclusion that a unique administrative structure is necessary. Those decisions, often referred to as *Ciotti*, *Clinch* and *Stults*, actually only decided that, prior to an adjudication or compacting of water rights on the Reservation, the State could not -- under its own statutes -- issue new water use permits. See *Matter of Beneficial Water Use Permits*, 278 Mont. 50, 923 P.2d 1073 (1996) ("*Ciotti*"); *Confederated Salish and Kootenai Tribes v. Clinch*, 1999 MT 342, 992 P.2d 244 ("*Clinch*"); and *Confederated Salish and Kootenai Tribes v. Stults*, 2002 MT 280, 59 P.3d 1093 ("*Stults*").

The same Montana Supreme Court that decided the "Trilogy" has also clearly limited the application of those cases to the question of issuing new water use permits **before** quantification of the Tribe's water rights. See *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, ¶¶ 33 - 41, 158 P.3d 377 ("*Axe*"). In that regard, the Court noted that it "discern[ed] no merit in the Tribe's argument that all state appropriative rights on the Reservation are merely 'claims' and not 'rights'", quoting Article IX, Sec. 3(1) of the Montana Constitution and § 85-2-101(4), MCA. *Id.* at ¶ 41. The Court also expressly concluded "... that the State's authority has not been preempted by federal or tribal interests because, as noted, neither the Tribes nor

the federal government have asserted authority over the Axes' water rights." *Id.* at ¶32. Although the *Axe* Court did not ultimately rule on whether state administration would "threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (*see Axe*, 2007 MT 63 at ¶32) and that question remains unresolved, the proposals of the FJBC here avoid it so it need not be resolved.

In sum, the "Trilogy" decisions cannot properly be stretched or over-read to support let alone require an extension of tribal governing authority over nonmembers and their water uses. Some have argued that since the proposal is in fact to be adopted as state law it does not extend tribal sovereignty over nonmembers and nonmember land. The argument is recognized, but too clever, even if it might be cabined by careful drafting. The fact is, sovereignty is not merely a concept; it is the power to self-govern and, in Montana, it is the responsibility of government to the governed. To extend tribal sovereignty implicitly, even if legislative ratification proves possible, over people categorically excluded from participation in that government is contrary to modern notions of constitutional law, both state and federal. Moreover, the UMO/UMB proposal is fraught with other problems.

First, it calls for a governing body, the Unitary Management Board (UMB), with political appointees. In an age of democracy and the recognized benefits of local control, this is an anomalous echo of the non-transparent politics that Montana left behind decades ago. Second, two of the four appointees (with a fifth to be selected by those four) are to be appointed by the CSKT, which does not represent the vast majority of water users on the reservation and which specifically excludes that majority from participation in its counsels. Third, the UMB is to administer a unique water code, developed specifically to treat water use and water users on the Reservation differently than elsewhere in Montana. It has been argued the UMO/UMB concept is needed because of the fact that the land ownership pattern on this open Reservation is inextricably intertwined, and so are the water uses and rights proposed in the Compact. But that argument, if viewed through the lens of who the users are—i.e. what persons and uses will be governed by this entity of government—actually argues for not having a unique law and power-sharing arrangement. Fully 80% of the Reservation residents are nonmembers; they own more than 90% of the individual-owned land on the reservation. They **and** tribal members are citizens of the State of Montana, which is the only one of these two governing entities that recognizes and must respect the legal rights of all of them, including the right to fully participate in its government. There is simply no reason, therefore, to create a new, unique governing law and body that is un-representative of the people it will govern, when in fact the state of Montana already has such an administrative system and already allows the participation, to the full extent, of all those people. Fourth, the proposal leaves water users, tribal members and nonmembers, in a poor position to deal with the governing body proposed to administer their water use: If they want to appeal, they are left with the daunting prospect of finding a "court of competent jurisdiction." This means the likely added legal costs of fighting over which sovereign's courts, the CSKT, the State, or the

federal courts, has the authority over that particular matter. Legal costs and litigation even for the most mundane matter are too high for the average person already. This prospect would give the UMB a very heavy hand in dealing with water users and would chill their access to courts of justice.

There is strong interest in resolving this issue as well. As noted above, however, the FJBC suggests that the UMO/UMB is unnecessary and fraught with legal and practical problems. But if the water administration issue is to be driven forward, the FJBC suggests that existing institutional capabilities should be built on to accomplish that. And it suggests that the UMO/UMB concept apply only to tribal members and users of the quantified federal reserved water right. Nonmembers would simply be governed by the law of Montana, as administered by its agencies and courts. This is the "dual sovereign" administration used in all other Tribal Compacts. The FJBC suggests that a "Compact Board", also used in other compacts, be established to manage water resource conflicts prior to litigation.

ⁱ *Montana* footnote 9 – "The Court of Appeals discussed the effect of the Allotment Acts as follows:

'While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F.2d 1162, 1168 (footnote omitted).

But nothing in the Allotment Acts supports the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by nonresident fee owners. The policy of the Acts was the eventual assimilation of the Indian population, *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U.S. 240, 246. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. See, e. g., Secretary of the Interior Ann. Rep., vol. 1, pp. 25-28 (1885); Secretary of the Interior Ann. Rep., vol. 1, p. 4 (1886); Commissioner of Indian Affairs Ann. Rep., vol. 1, pp. IV-X (1887); Secretary of the Interior Ann. Rep., vol. 1, pp. XXIX-XXXII (1888); Commissioner of Indian Affairs Ann. Rep. 3-4 (1889); Commissioner of Indian Affairs Ann. Rep. VI, XXXIX (1890); Commissioner of Indian Affairs Ann. Rep., vol. 1, pp. 3-9, 26 (1891); Commissioner of Indian Affairs Ann. Rep. 5 (1892); Secretary of the Interior Ann. Rep., vol. 1, p. IV (1894). And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. See, e. g., 11 Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881).

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, e. g., *id.*, at 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 461 et seq. But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.”

EXHIBIT “A”

119392-08

5426-08 I. O.

The United States of America,

On all to whom these presents shall come, Greeting:

825.

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior

June 20, 1908, whereby it appears that

MARY McCLURE, an Indian of the

Flathead tribe or band, has been allotted

the following-described land:

The west half of the southeast quarter of Section twenty-nine in Township nineteen north of Range nineteen west of the Montana Meridian, Montana, containing eighty acres:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said

Mary McClure

the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law. **And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.**

IN TESTIMONY WHEREOF, I, **Theodore Roosevelt**, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the

.....**eighth**..... day of **October**....., in the year

of our Lord one thousand nine hundred and **eight**.....,

and of the Independence of the United States the one hundred

and **thirty-third**.....

By the President: *Theodore Roosevelt*

By *M. W. Young*, Secretary.

H. J. ...
Recorder of the General Land Office.

Recorded Patent No.

Doc. 3.

736381

78926-17. I.O.

4-1061-R.

825

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant **Mary McClure, a Flathead Indian**, for the west half of the southeast quarter of Section twenty-nine in Township nineteen north of Range nineteen west of the Montana Meridian, Montana, containing eighty acres:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. The lands hereby conveyed are subject to a lien, prior and superior to all other liens, for the amount of costs and charges due to the United States for and on account of construction of the irrigation system or acquisition of water rights by which said lands have been or are to be reclaimed, as provided and prescribed by the act of Congress of May 18, 1916 (39 Stat., 123) and the lien so created is hereby expressly reserved.

IN TESTIMONY WHEREOF, I, **Woodrow Wilson**

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the **FIFTH**

(SEAL)

day of **NOVEMBER** in the year of our Lord one thousand nine hundred and **SEVENTEEN** and of the Independence of the United States the one hundred and **FOURTY-SECOND**,

By the President: *Woodrow Wilson*

By *M. O. Roy* Secretary,

S. O. Samson

Recorder of the General Land Office.

606273

RECORD OF PATENTS: Patent Number

6-2161

EXHIBIT “B”

THE UNITED STATES OF AMERICA,

-to-

Cra Kvale

P A T E N T

Dated November 15th, 1934
Filed Jan. 21, 1935 at Billings,
Recorded Book 45 Deeds Pg. 177
Records of Lake County, Montana

To all to Whom These Presents Shall Come, Greeting:

WHEREAS, the Act of Congress approved August 9, 1912, entitled "An Act providing for patents on reclamation entries, and for other purposes." provides--as extended by the Act of July 17, 1914 (38 Stat. 510):

"That every patent and water-right certificate issued under this Act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights."

And it is further provided:

"That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own or hold irrigable land for which entry or water-right application shall have been made under the said reclamation Act of June 17th, 1902, and Acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act."

And WHEREAS, it appears from a Certificate of the Land Office at Billings, Montana, that Cra Kvale, assignee by mesne conveyance of Evelyn Aldrich, is under the provisions of said Act, entitled to a patent for

Patent, continued

the Farm Unit "K", according to the Farm Unit Plat, or the following described land:

Principal Meridian, Montana. T. 20 N., R. 21 W.,
Sec. 32, NE $\frac{1}{4}$ SW $\frac{1}{4}$

The area described contains 40 acres, according to the Official Plat of the Survey of the said Land, on file in the Bureau of Land Management.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED and by these presents DOES GIVE AND GRANT, unto the said Ora Kvale

and to his heirs, the tract above described, together with the right to the use of water from the reclamation project in which the tract is situated, as an appurtenance to the irrigable lands in said tract; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said

Ora Kvale and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; but excepting, nevertheless, and reserving unto the United States, rights-of-way over, across, and through said lands for canals and ditches constructed, or to be constructed, by its authority, all in the manner prescribed and directed by the Act of Congress approved August 30, 1890 (26 Stat., 391). To secure payment to the United States, or its successors in the ownership or control of the works constituting and appertaining to the said reclamation project, of all sums due or to become due the United States or its successors in control of said reclamation project in connection with said land and water rights, a lien prior and superior to all other liens, claims, or demands whatsoever upon the lands herein and hereby described and conveyed, upon all water rights thereto appurtenant and upon the right to receive and use water from the reservoirs and canals of said reclamation project, is expressly reserved.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat., 476), has, in the name of the United States, caused these letters to be made patent, and the Seal of the Bureau to be hereunto affixed.

(SEAL)

Patent No. 1147970

(S E A L)

For the Director, Bureau of Land
Management

By S. C. Nichols
Chief, Patents Unit