

# Flathead Joint Board of Control

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September 18, 2013

## **Re: Flathead Compact and Flathead Irrigation Project Water Use Agreement—Views of FJBC.**

Honorable Chairman Durglo:

As I think you are aware, this summer the Flathead Joint Board of Control conducted a process of internal and public review of the Water Use Agreement concerning water distributed by the Flathead Project. We began soon after the Commissioner elections in early May with an internal review. Then we conducted approximately one dozen public meetings throughout the area to gather public input. The FJBC concluded this process September 5, by voting to send three concerns to the Flathead Tribes and the United States regarding discussions we suggest would be helpful to conclude a WUA and a Compact that can gain broad public support. Before explaining those concerns, please allow me to state some background information.

I am the Vice - Chairman of the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts (FJBC), which under Montana law serves as a central operating authority for these Districts. All four entities are creatures of Montana statute and are public corporations in the nature of local governments. The officials responsible for their operation are eleven commissioners duly elected under Montana law and one at-large commissioner, whom the other eleven appoint. The Districts were formed pursuant to congressional mandate, Act of May 10, 1926 (44 Stat. 464), and pursuant to that Act the Irrigation District laws of Montana embrace all fee-owned lands that are delivered irrigation water by the Project.

At this time, approximately 111,200 acres of fee land, owned by about 2,400 farms and ranches, receive such water. The Flathead District has approximately 88,000 acres, the Mission District about 16,000 acres, and the Jocko District about 7,200 acres. As commissioners are distributed proportionally among the Districts based on their size, the Flathead District has five (5) elected commissioners, the Mission District three (3), and the Jocko Valley District three (3).

As you are aware, the proposed Compact and Water Use Agreement (WUA) released earlier this year engendered a good deal of debate, both for and against. Ultimately, the 2013 Legislature refrained from adopting the Compact and the WUA, which is appendix three. Since then, the FJBC has worked diligently to separate the wheat from the chaff in the public debates and address only those concerns relevant to the fee land irrigators, both tribal members and nonmembers, we are legally responsible to represent. While these concerns center on the WUA, they also encompass some issues with the Compact itself.

The three concerns are: 1. Ownership of the irrigation water right in accordance with landowners' property rights in land and water created by the applicable legal framework; 2. Reasonable verification that the amount of irrigation water that would be delivered pursuant to the WUA as it is phased in would remain essentially what it has historically been, as we have been assured; 3. Details regarding the makeup, operation, and jurisdiction of the Water Management Board, provided in the Compact. Please allow me to explain these three concerns a little.

As to the ownership of the irrigation water right, both the FJBC and the Bureau of Indian Affairs made claims in the water court decades ago to own this right, for the benefit of the land to which it is appurtenant, based on the theory it is a state appropriative right. The claimed priority date, therefore, was

after the 1908 authorization for the Project. Congress authorized the Project as part of its allotment and opening to settlement policy initiated on the Flathead Reservation by the 1904 Flathead Allotment Act. Consequently, land owned in fee under the Project is fee land like any other in Montana. Moreover, the patents to this fee land specifically mention appurtenant water rights for that land. Under this legal framework, the FJBC believes the property rights in land and water of fee land irrigators must be recognized and maintained in any Compact, which would be in accord with the practice on other federally-owned irrigation projects in Montana and with long-established and recent case law. *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Nevada v. U.S.*, 463 U.S. 110 (1983), *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007). It would also comport with the statutory foundation of fee land ownership under the Flathead Project laid by Congress. See Flathead Allotment Act (FAA), Act of April 23, 1904, (33 Stat. 302), as amended by the 1908 amendment, Act of May 29, 1908, (35 Stat. 448), authorizing the construction of the Project as an integral part of applying the policies and purposes of the General Allotment Act of 1887, 24 Stat. 388, to the Flathead Reservation. See *Montana v. United States*, 450 U.S. 544, 559, n. 9 (1981); see also, citing *Montana* with approval, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650, n. 1 (2001).

Concerning the verification process we would like time to perform, for a good number of years irrigators have been told that as the Compact and the WUA are phased into place, the volume of water delivered for irrigation will essentially remain the same as it has been. This assurance is based to a very large extent on modeling. We already must deal with deficit irrigation, meaning we do not receive an ideal amount of irrigation water as it is. Under the Compact and WUA, in stream flows for fish will increase. Thus, there is concern to verify that, in fact, this increase in stream flows can take place without taking precious irrigation water from irrigators. We appreciate the work that has already gone into the studies and modeling performed by the Tribes and the Compact Commission. We have, of course, done what we could to confirm these results. But, although peer reviews have been performed and we asked to review them, including in camera reviews, we have not been allowed to see them. Consequently, we are attempting to gather other data regarding historical irrigation deliveries to verify these assurances. Without that, irrigators are left with a great deal of uncertainty as to whether these assurances are well-founded or not. It is reasonable, the FJBC, asserts, indeed, necessary to perform its functions responsibly, to do such verification. Diminution of an already small and tight irrigation water supply, even if through inadvertence, would devastate the families dependent on it. As the WUA, like the Compact, is intended to permanently settle competing claims to water, verification of the assurances is not only reasonable but vital.

Finally, the Compact calls for the formation of a Flathead Water Management Board to administer water rights, both state-based and reserved, for both fee and trust land within the boundaries of the Flathead Indian Reservation (FIR). The Board is to be composed of two members appointed by the CSKT, two appointed by the governor, and one selected by the previous four and an ex-officio non-voting representative of the US. Taking this position regarding water administration after the adjudication completed seems premature, and perhaps unnecessary. No other tribal compact negotiated in Montana has had the special administrative board proposed in this Compact. The State already has the responsibility for administering its water resources throughout Montana and is perfectly capable of performing this task anywhere in the State. The FJBC is uncertain of the purpose in setting up another bureaucracy, uniquely tied to water management on the Flathead Reservation. It would be a duplication of effort, would require additional revenues to support it that would most likely be borne by fee land owners. Also significant is the fact that the Law of Administration, which this Board would administer, is unique, differing from the applicable law in the rest of the State in regard to state-based water rights.

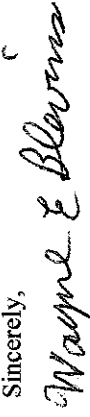
Further, Tribal irrigated lands make up approximately 8 % of the total irrigated lands but the CSKT will receive a disproportionate 40% of the representation on this board. This, coupled with the fact that we do not wish to relinquish our fee land water rights as stated in the WUA, is all the more reason to request State administration of water on fee lands within the FIR. Finally, the fee land residents in the FIR

would be subject to a water administration board for which they have no input regarding the makeup up of the Board. We certainly have no say in Tribal appointees and we have no say in the State appointees.

These concerns have been relayed to the State and other interested officials by separate letter, a copy of which was sent to you and other decision makers. We look forward to hearing from the Tribes and U.S. about scheduling further discussions.

We view addressing these concerns as something vital to our daily survival and to the sustainability of our families on our farms and ranches for generations to come. In fact, it is necessary to sustain the principle in the Montana Constitution that our property rights are equal in importance and legal status to similar property rights elsewhere in Montana. These issues go to the heart of respecting and securing our property rights in land and water. They go to the heart of our rights as citizens of Montana. We think they can be addressed relatively easily through drafting and in ways that respect these interests as well as those of the other parties and that secure the legal and political legitimacy of the Compact.

Sincerely,



Wayne Blevins, Vice - Chairman, FJBC

cc:

Honorable Governor Bullock  
Honorable Tim Fox, Attorney General  
Honorable Jeff Essmann, President  
Honorable Jon Sesso, Minority Leader  
Honorable Mark Blasdel, Speaker  
Honorable Chuck Hunter, Minority Leader  
Senator Chas Vincent, Chair, WPIC  
Senator Janna Taylor  
Senator Jennifer Fielder  
Representative Dan Salomon  
Compact Commission Members  
DNRC Director John Tubbs  
WPIC Members