

Matthew W. Williams  
777 E. Main, Ste 205  
Bozeman, Montana 59715  
[mattheww53@aol.com](mailto:mattheww53@aol.com)  
(406) 551-6169  
*Attorney for Mission and Jocko Irrigation Districts*

WC-0001-C-2021

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Montana Water Court

**IN THE WATER COURT OF THE STATE OF MONTANA  
CONFEDERATED SALISH AND KOOTENAI TRIBES –  
MONTANA – UNITED STATES COMPACT**

**CASE NO. WC-0001-C-2021**

**Motion for Summary Judgment and Brief in Support**

Comes now the Mission and Jocko Irrigation Districts, by and through their attorney, and pursuant to M.R.Civ.P. 56, move this Court for summary judgment. This Motion is supported by the following brief.

**The Compact Fails to Provide for the Necessary Administration  
of Its Asserted Entitlements**

The Compact creates the Flathead Reservation Water Management Board (the “Board”). MCA 85-2-1901 (34). Generally, this Board is charged with the administration of entitlements under the Act. Art. IV I(1). The rule of law is ostensibly reflected by these principles of administration as the decisions of the Board are subject to judicial review. See Art. IV I(6). However, eligible courts with the authority to conduct such necessary reviews are defined differently by the compact as enacted by the State of Montana, and as that compact was approved by Congress. Nor is there otherwise a single court eligible to infuse the rule of law within compact administration by conducting judicial review of Board actions. As a result, there is no

effective administration provided for in the compact as there is no judicial review of determinations made under the compact, and consequently the compact is neither fair nor adequate.

Moreover, by limiting the authority of the Board to the reservation boundaries, the compact virtually requires parallel systems of water administration for single unitary river systems, and it therefore mandates the confusion otherwise implicit in administering the same water rights under different authorities.

Resolution of these issues requires some context. As a result, Part A sets forth a summary of water right administration as set forth in the new compact, and then a parallel summary of Montana's system is set out in Part B. Part C explains the significance of the McCarren amendment for the exercise of this Court's authority over Montana's water, and Part D explains why the compact fails to provide for the expression of the rule of law by judicial review of actions taken by the Board or the Compact Implementation Technical Team ("CITT"). *See* Art. II, (14). Part E underscores that any judicial review would be inappropriately limited even if such judicial review could occur.. Part F describes why the compact fails to properly express any enforceable mechanism for adjudicating changes of water rights or confirming new uses, or otherwise administering water rights.

Finally, Part G explains why the compact fails to set forth the water rights of the Districts in any adequate manner, or otherwise provide for the proper relationship of these rights to the Tribes' entitlements.

A. **Compact and Administration.** The Board is "the exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in the Use

of Appropriation Rights and Existing Uses, and for the administration and Enforcement of all Appropriation Rights and Existing Uses.” Art. IV I(1). Appropriation Rights are generally those uses approved by this same Board, see Art II (5), and “Existing Uses” are those water rights arising under Tribal, State, or Federal law that exist on the effective date of the compact. *Id.* at (29). They include water rights arising under the laws of the State of Montana. See Art. II (70). The Board’s authority under the compact may be delegated to a Water Engineer employed by the Board. I(5)(c).

In addition to these authorities, the Board is also deemed the sole authority on the meaning and construction of the compact,<sup>1</sup> Art. IV I(1); *see also* Art. IV G(d)(ii), although it is expressly prohibited from extending its authority “to any water rights whose place of use is located outside the exterior boundaries of the Reservation.” *Id.*

The Board may in addition appoint Water Commissioners, Art IV (I)((d)(i), “to provide day-to-day administration of water on the Reservation.”

Judicial review is ostensibly available for the decisions of the Board, although they are required to be styled as an appeal of agency decision, Art. IV (I)(6)(a), and in addition, the petitioner must name and join not just parties to the proceedings before the Board, but in addition the State of Montana, the Tribes, and the United States in the event that they were not otherwise

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<sup>1</sup> This statement cannot be true if construed in accordance with its literal terms. The meaning of the compact and its terms is solely a question of law. *In re Crow Compact*, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217. Montana cannot delegate to the Board sole authority over legal issues, because any such effort is a direct affront to Montana’s edict that “no person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.” Mont. Const. Art. III, Sec. 1. Because Montana’s judicial authority is vested in its Courts, Montana’s legislature lacks the authority to give it to an administrative body of the Confederated Tribes. See Mont. Const. Art. VII, Sec. 1. Thus, the meaning of the Compact must be subject to judicial review without deference.

parties to those Board proceedings. *Id.* The appeal must be filed in a Court of Competent Jurisdiction, defined as a “State or Tribal court that otherwise has jurisdiction over the matter so long as the parties to the dispute to be submitted to the court consent in its exercise of jurisdiction, but if no such court exists, a Federal court.” Art. II (26). Notwithstanding this acknowledgement, the compact insists that any such court can review factual findings only for an “abuse of discretion.” Art. IV (I)(6)(f).

**B. Montana’s Water Administration.** Like most Western States, Montana comprehensively addresses water rights in a manner that reflects the common pool incidents of defining respective entitlements to a single resource whose yield commonly fluctuates from year to year. This administration includes water rights held by the United States on behalf of any Tribe, as well as other water uses of the government. See MCA 85-2-701.

This Court adjudicates all water rights that would be protected by the law as it existed in 1973 and that are otherwise claimed in a timely statement of claim. See MCA 85-2-212 *et. seq.* Appeals of this Court’s judgment are heard by the Montana Supreme Court. MCA 85-2-235.

For water rights developed after 1973, Montana requires a permit from the Department of Natural Resources for such new uses, MCA 85-2-311, and all changes of water rights after this date likewise require approval by this agency. MCA 85-2-402. Appeals of DNRC determinations are governed by the Administrative Procedures Act, MCA 2-7-701 *et. seq.*

Montana’s district courts have authority over the distribution of waters in accordance with the decrees entered by this Court, and until those decrees are effective, under prior district court decrees or the common law of water rights. This authority breathes life into the priorities and flow rates confirmed by the Water Court and the determinations made by the DNRC. MCA

85-2-406. The district courts may appoint water commissioners to admeasure and distribute entitlements to assist them in enforcing Montana's judicial decrees, and other supervise the actions of this commissioner. MCA 85-5-501 *et. seq.*

**C. The McCarren Amendment and Montana's Authority.** A significant part of the accomplishments of Montana are underwritten by the McCarren Amendment. Codified at 43 U.S.C. 666, the measure waives the sovereign immunity of the United States and consents to its joinder in state court proceedings where those proceedings comprehensively address the determination of water rights and their administration.

In part, this statute was just another chapter to a long federal deference to the laws of the Western states governing water and water rights. Even prior to statehood in the West, where the use of water on the public domain was necessarily a federal matter, "[t]he rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection . . ." *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935); *see also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-09 (1899).

The Desert Land Act of 1877 expressly relinquished plenary control over water resources on the public domain to the states. According to its terms " . . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public...." *As explained in California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935):

What we hold is that following the act of 1877, if not before, all non-navigable

waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. 295 U.S. at 163-64.

These principles and their outlet in the McCarren Amendment underscore that the United States and the Tribes' water entitlements are subject to the authority of this Court. As explained in *State ex rel Greely v. Confederated Tribes*, 216 Mont. 76, 712 P.2d 754, the McCarren Amendment and the Water Use Act provide an adequate forum for the determination of any water rights held by the United States for the Tribes, and that accordingly under the McCarren Amendment, it is Montana Water Courts and not federal courts that are imbued with authority over these water entitlements. *See also, Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983).

While these concepts are expressed in the lofty and abstract principles of sovereign immunity, for the present purposes of determining fairness and adequacy, this Court should not be unmindful of the Amendment's necessary accommodation of the rock-ribbed requirements of reality. Water entitlements are expressions of rights to common pools or resources, and accordingly the enunciation of any such rights in any single instance also implicates the amounts remaining as water supplies for other users. The legislative history of the McCarren Amendment speaks to the impracticality of administering the same river system under parallel authorities.

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.  
S. Rep. No. 755, 82nd Cong., 1st Sess. 6 (1951).

The Government has long recognized and conceded, particularly in the Desert Land Act of 1877, the supremacy of State law in respect to the acquisition of water. It has been under these State laws that the water rights of the owners on a given stream have been adjudicated. Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties owning or claiming to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results. 97 CONG. REC. 12947-48 (1951).

As anticipated in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), there is likely to be "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." 736 F.2d at 1365, citing *FPC v. Oregon*, 349 U.S. 435, 448 (1955). Indeed, Montana's assertion of its authorities under the Amendment is a frank embrace of the need for a unitary determination and management "(b)ecause the water and water rights within each water division are interrelated." MCA 85-2-701; *see also, State ex. rel. Swanson v. District Court*, 107 Mont. 203, 82 P.2d 779 (1933) (Water commissioners appointed by different district courts is likely to result in confusion of water administration); *see also State Dept. of Ecology v. Grimes*, 121 Wm. 2d 459, 852 P.2d 1044 (1993).

These authorities implicitly underscore that Montana is not conducting its general adjudication of water rights merely to catalogue rights to waters owned by Montana. ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law" Mont. Const..Art. IX, Sec. 3. ) Instead, the purpose of the current proceedings is to comprehensively adjudicate all rights to use water in a single proceeding where each user's due process rights to be heard on his entitlements and the entitlements of all those claiming competing interests can be accorded for the singular goal of the

administration of those rights. Without this framework, it is not possible to administer water rights, as their priorities, flow rates, and purposes and place of use can't be ministerially enforced without infringing the due process rights of users not participating or otherwise subject to any decree. As a result, comprehensive systems are required so that it is not preferable to be upstream with a shovel rather than downstream with a priority. See Stone, Problems Arising out of Montan's Law of Water Rights, 27 Mont.L.Rev. 1; Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont.L.Rev. (1967); Stone, Montana Water Rights-A New Opportunity, 34 Mont. L. Rev, (1973); see discusiion, infra.

Give this context, it is not enough for this Court to determine that the types and amounts of water rights set forth in the compact are not unfair or unreasonable. This Court must in addition determine that the compact provides for an adequate means of administration, and the terms of the Compact, the Federal ratification, and Montana law preclude this necessary finding.

**C. The Federal Act Vitiates Judicial Review of the Administration of Rights, and Therefore Frustrates the Adequacy of the Compact.** Under the guise of approving the compact between the State of Montana and the Tribes, the United States amended it instead. These amendments make any application of the rule of law to the implementation of the compact a pretense, and further frustrate the adequacy of measures set forth in the compact by enunciating different standards and criteria the govern the same actions.

Section 13K of the Act provides as follows:

(k) REVIEW OF DECISIONS.—A court of competent jurisdiction shall review the decisions of the Flathead Reservation Water Management Board and the Montana Department of Fish, Wildlife, and Parks in accordance with—



- (1) the Compact;
- (2) the Law of Administration; and
- (3) this Act.

This provision for judicial review is not the one Montana approved. *See discussion, supra.* Among other things, it omits any requirement that a petitioner join the United States, the Tribes, and the State of Montana, in the event that they are otherwise not a party to the proceedings.

The omission has import for the very reasons acknowledged by the State of Montana and the Tribes. In Art. IV, I (8), Montana and the Tribes both expressly underscored that the integrity of judicial review, and thus the infusion of the rule of law into the expression of the compact and its administration, required the waiver of any sovereign immunity attendant to the Tribes, the United States, and the State of Montana. To that end, the Tribes and Montana expressly waived any such immunities “in order to permit the resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions...” *Id.*

The Tribes and Montana did not purport to speak for the United States, although they both recognized that “only Congress can waive the immunity of the United States and that the participation of the United States in the proceedings of the Board shall be governed by Federal law, including 43 U.S.C. 666”

Accordingly, when the compact approved by the State of Montana and the Tribes was presented for ratification, the underlying importance of any immunity of the United States was obvious.

Congress acted in the face of Montana’s and the Tribes’ concerns by adopting Section 13 (c) of the so-called Montana Water Rights Protection Act.

WAIVER OF SOVEREIGN IMMUNITY.—Except as provided in subsections (a) through (c) of section 208 of the Department of Justice Appropriation Act, 1953 (43 U.S.C. 666), nothing in this Act waives the sovereign immunity of the United States.

The referenced Act is the McCarren Amendment. Accordingly, the compact preserves the rule of law only to the extent that the terms of the Amendment authorize the adoption and implementation of the compact's terms.

Montana and the Tribes were correct in their assessment of the fundamental importance of the sovereign immunity of the United States. Sovereign immunity is more than a simple echo of subject matter jurisdiction. It is well settled that a Court can have authority over the subject matter of a dispute, but fail to have the power to exercise that jurisdiction as a result of the sovereign immunity of the United States. See *Jachetta v. United States*, 653 F.3d 898 (9th Cir. 2011).

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S.206, 212 (1983). The government's waiver of sovereign immunity cannot be inferred, but rather must be "unequivocally expressed." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (internal citation omitted). Any person seeking a review of a Board determination would bear the burden of demonstrating the unequivocal waiver of sovereign immunity. *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986).

To be sure, the McCarren Amendment did waive the sovereign immunity of both the United States and the Tribes, but only in judicial proceedings conducted by the courts of the State of Montana pursuant to their authorities under the Montana Water Use Act, as this is the source of Montana's comprehensive system of water adjudication and administration. *See discussion, supra.* The compact purports to negate the expression of Montana's judicial authority under the McCarren Amendment, however, by insisting that Montana courts may not exercise their authority unless all parties to a proceeding before the Board, and in addition the State of Montana, the Tribes, and the United States, agree to the exercise of such jurisdiction. *See discussion, supra.*

Moreover, even consent of all the parties would not save McCarren Amendment jurisdiction by Montana courts. The McCarren Act waives no sovereign immunity other than to authorities that express elements of a comprehensive system of determining and administering water rights. Piecemeal litigation between particular parties and/or over particular issues do not authorize the joinder of the United States, and therefore the Tribes. *Dugan v. Rank*, 372 U.S. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15 (1963); *see also U.S. v. District Court for Eagle County*, 401 U.S. 520, 525, 91 S.Ct. 998, 1002, 28 L.Ed.2d 278 (1971); *U.S. v. District Court for Water Div. No. 5*, 401 U.S. 527, 529, 91 S.Ct. 1003, 1005, 28 L.Ed.2d 284 (1971).

The State, the Tribes, and the United States cannot claim that the compact in any way reflects elements of comprehensive principles of water right determination or administration, because they expressly treat the compact as a one off, *see compact*, Art. V (A); *see Federal Act*, Sec. 13(d) and 13(n), and otherwise do not purport to integrate the administration of rights on the Reservation with the property rights in water uses developed outside the

Reservation. *See discussion, infra.* Indeed, the Board itself is expressly limited to measures that are confined to the boundaries of the Reservation, and accordingly it is not part of any comprehensive system of administering water rights.

These circumstances are no doubt precisely why the State and the Tribes were focused on further waivers of judicial review in Art. IV, I (8). The tension implicit in the Art. IV, I (8) immunity provision is exacerbated by Art. VIII B(1). Pursuant to its terms, the State and the Tribes, despite what they had just confirmed as mechanisms for judicial review in their adopted definition of Court of Competent Jurisdiction, provided that they would support federal legislation that would authorize the United States District Court in Montana as a reviewing authority for decisions made by the Board and the Montana Department of Fish, Wildlife, and Parks, “provided that, (sic) the sovereign immunity of the United States is not waived by such provision of the legislation.”

A law passed by Congress that imbues Montana’s federal district courts with jurisdiction over proceedings to which the United States is necessarily a party must be read as a waiver of the sovereign immunity of the United States, else the measure would effectively take what it purported to give. Accordingly, the ratification of the compact by Congress without such an embrace of federal court jurisdiction cannot be read as anything other than an election to reserve that immunity of the United States in any such proceeding.

For all these reasons, there is no judicial review available for the determination of the Board or CITT. No federal court has jurisdiction that it can exercise to review any such decisions, because there has been no “unequivocal” or “unambiguous” waiver of the sovereign immunity of the United States. This leaves a Tribal Court or a Montana Court, but they may not exercise the jurisdiction they may otherwise have except where all the parties agree to the

exercise of such authority. This is no meaningful interjection of judicial review. This Court should determine that the compact fails to provide for the application of the rule of law, and reject its adoption.

**E. The Compact is Inadequate in Specifying the Reach of Judicial Review.** Assuming in the face of the actual terms of the compact that judicial review of Board determination can somehow occur, the compact otherwise frustrates meaningful review by a truncated standard of review. According to Art. IV 6 (e), on review, “the Board’s legal conclusions shall be reviewed for correctness and its factual findings for abuse of discretion.”

Decisions of lower courts “are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).” *See Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000) The identification of the appropriate standard of review can determine the outcome of the review. *See Dickinson v. Zurko*, 527 U.S. 150 (1999)

Montana defines an abuse of discretion as whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *Colstrip Energy L.P. v. N.W. Corp.*, 2011 MT 99, 360 Mont. 298, 253 P.3d 870. The application of this standard in the realm of factual findings is strained, because the concept of an abuse of discretion implies that there is discretion, as in weighing relevant factors under the Montan Rules of Evidence or discovery to determine a proper course of action.

This issue comes into sharpest focus in the Law of Administration. In that document, the Board is assumed to have delegated its authority to the Water Engineer, and thus sits in an appellate capacity. It can review the decision of the engineer to determine whether it was in excess of constitutional; whether

the decision was in excess of his authority; whether the decision was made upon unlawful procedure or otherwise affected by other error law, made upon unlawful procedure; clearly erroneous in view of the record as a whole; or arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted abuse of discretion. 2-2-111(4)(d).

These standards more fairly mimic the standards governing Montana courts under the Montana Administrative Procedures Act. See MCA 2-4-704. Indeed, the standards applied by Montana courts in determining whether an agency decision is clearly erroneous also inform review of district court factual findings. In *Debuff v. Department of Natural Resources and Conservation*, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183, the Court confirmed that it can

either affirm or remand a case for further proceedings, but it may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact in either affirming or remanding a case for further proceedings. Section 2-4-704(2), MCA. A reviewing court may reverse or modify the agency decision if substantial rights of a party have been prejudiced because the decision violates constitutional or statutory provisions, is based upon unlawful procedure, is clearly erroneous in view of the substantial evidence on the whole record, is arbitrary or capricious, or may be properly characterized as an abuse of discretion. Section 2-4-704(2)(a), MCA.

"A three-part test is used to determine whether agency findings are clearly erroneous: (1) the record is reviewed to determine if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the agency misapprehended the effect of the evidence; and (3) if substantial evidence exists and the effect of the evidence has not been misapprehended, the reviewing court may still decide that a finding is clearly erroneous if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Schmidt v. Cook*, 2005 MT 53, ¶ 21, 326 Mont. 202, 108 P.3d 511 (citation omitted).

While the Board is granted this authority in reviewing its Engineer, it insists upon greater deference from any reviewing court. Pursuant to 2-2-212, it once again limits judicial review to a determination of whether its legal conclusions were correct, and whether its factual findings were an abuse of discretion, on any review of its decision of the Engineer's determination. Beyond the difficulties of determining just how an appellate review results in factual findings, the regression to abuse of discretion language again suggest that the Tribe's are claiming a more

unfettered right to determine factual issues, and thereby control of the application of legal standards, than would be true in any other tribunal

There is no reason that a Montana resident living within the Reservation and all other Montana residents should not have the same standards for judicial review of their water entitlements. Fashioning extended deference to Tribal determinations does nothing to promote the purposes of a compact, and invites further confusion in the application of its terms. The compact is therefore unfair and inadequate, even if it had properly provided for judicial review.

**E. The Compact Frustrates Comprehensive Administration.** In Art. I of the compact, the State and the Tribes acknowledge “that there is a clear hydrological interrelationship between the surface water and Groundwater of the Reservation, and each use of water on the Reservation may affect all other water users on the Reservation.” This is an undeniably accurate statement.

However, it is just as accurate to acknowledge its corollary. All waters flowing into, across, under, or through the Reservation are interrelated, and thus each use of water whether in or outside of the Reservation may affect any other water use anywhere in the drainage basin. That is just an expression of the fundamental first in time, first in right principle defining the priority system, as it necessarily demands accountings amongst the priorities on any given source as against the then yields of the hydrologic system at various points. Thus, for example, a change in water rights that inadvertently purports to authorize an altered use that increases the historic consumption under that right can result in calls that reverberate anywhere upstream of the changed right, as the added consumption prompts new calls against upstream juniors. Indeed, the integrated character of water and water uses was the painful lesson experience taught the State of Montana when it abandoned its former proceedings governing the determination of

water right in favor of the present truly comprehensive accounting that insists upon the determination of all water rights in Montana. *See discussion, supra.* Better that a legal system accommodates the reality of water and water supplies than a legal system that insists that hydrology heed its edicts.

Given this interrelationship, the compact threatens comprehensive administration precisely because Art. IV G(d)(ii) expressly prohibits the Board from extending its authority “to any water rights whose place of use is located outside the exterior boundaries of the Reservation.” See also, 1-2-101, Unitary Ordinance (The purpose of this Part is to establish the processes applicable to all surface and groundwater use within the exterior boundaries of the Flathead Indian Reservation.) Because the Board cannot adjudicate necessary elements of water rights outside the Reservation in the course of administering rights within the Reservation, it cannot act in any way that preserves the comprehensive character of water administration envisioned by the Montana Water Use Act.

The Districts anticipate that the Tribes may claim that it will adopt and implement the Unitary Administration and Management ordinance, MCA 85-20-1902, and that inasmuch as the principles and standards set forth therein largely mimic those set forth in DNRC administrative rules or other areas of law, the compact answers to the comprehensive character of hydrologic systems. This is simply not so, even if the ordinance exactly mirrored Montana requirements.

Montana does not have a regulatory system of water rights. It has a system of water rights that are a product of the expression of property rights in the use of water. That is precisely why Montana’s Constitution took the extraordinary step of separately providing that “(a)ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.” Mont. Const. Art. IX, Sec. 3(1). Accordingly, administration of



rights on a single river system must provide for the adjudication of the interests in those water rights that inure in all water rights within the basin., and this in turn requires a forum that is effective as against all owners of water rights within the basin.

For example, each owner of a water right in Montana has the authority to change the point of diversion, purpose of use, place of use, and/or point of diversion of his water right. This is not the product of legislative largesse or administrative indulgence. It is one of the sticks in the bundle of sticks that comprise that owner's property rights in his water entitlements. See *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896); *Hanson v. Larson*, 44 Mont. 350, 120 P. 229 (1911); *Galiger v. McNulty*, 18 Mont. 216, 44 P. 959 (1896); *Woolman v. Garringer*, 1 Mont. 535 (1872).<sup>2</sup>

To be sure, one can only change what one has, so the scope and extent of water rights in Montana must be circumscribed to the underlying use confirmed in any water right. Otherwise, additional users cannot assess whether there were sufficient remaining flows to develop their own more junior interest. See *Gassert v Noyes, supra, Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940).<sup>3</sup>

In addition to this limitation on the right to change, Montana law also confirms property interests in each appropriation that accord its holder a right to maintenance of the stream conditions as of the time of his appropriation. In other words, the change may not result in

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<sup>2</sup> To be sure, this power to sell one's water right and provide for such changes is an important incident to Montana's water law system, as it allows changing economic conditions to express old priorities in new circumstances. The fact that is good for everyone in the end, however, does not mean that it is not an expression of property rights in the appropriation.

<sup>3</sup> The Districts are aware that the entitlements under an appropriation are the product of not just the water then used, but in addition those amounts that are then still protected under an inchoate or conditional rights. See *Intake Water Co. v. DNRC*, 171 Mont. 416, 558 P.2d 1110 (1977). It is not necessary for present purposes to plumb the scope of those inchoate interest which require remaining entitlements to be developed with reasonable diligence.

injury to even junior rights.<sup>4</sup> Translated functionally, a right to maintenance of the stream conditions means that one of the sticks in every appropriation is the right that no change work injury to his own water right, including by reduction of return flows return from more senior users, and accordingly a change of water right cannot preempt those return flows that any junior use has relied upon. *Creek v. Bozeman Water Works*, 15 Mont. 121, 38 P. 459; *Featherman v. Hennessey*, 43 Mont. 403, 482 P.3d 1183 (Appropriator may not increase the consumption of water under his right to the detriment of junior users, as such an increase would necessarily reduce return flows.) Reliance upon return flows does not mean that a particular junior has historically diverted those amounts, but also includes instances in which those return flows are required to keep his right in priority as against rights senior to him downstream.

Changes of water rights raise inherently factual matters that may differ from place to place. See *Hohenlohe v. DNRC*, 2010 MT 203, 357 Mont. 438, 240 P.3d 628; *Vogel Minnesota Canal Co.*, 47 Colo. 534, 107 P. 1108 (1910). However, at the end of the day the proceedings to authorize such changes necessarily determine the limits of the property interest in the right to change as circumscribed by the property interest of other users in the right to maintenance of the stream conditions as of the time of their appropriation.

Montana practitioners would have no difficulty endorsing Colorado's summary of the framework of water administration.

It is elementary learning in Colorado that a water priority is a property right—not a mere revocable privilege; that it is not a fixed appurtenance; that the right to change its place of use and the point of diversion is an inherent property right, not conferred by our remedial statute, but pre-existing as an incident of ownership, and always enforceable so long as the vested rights of others are not injuriously affected. *Wadsworth Ditch Co. v. Brown*, supra; *Lower Latham Ditch Co. v. Bijou Irr. Co.*, 41 Colo.

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<sup>4</sup> It may be analytically inconsequential to note that these vested rights to maintenance of stream conditions inure in interests senior to the changed right, as obviously a senior to the changed right gets his water regardless of the change..

212, 93 P. 483. The limitation upon such change is not the mere inconvenience in use or even loss to others resulting thereby, but injury affecting 'the vested rights of others in and to the use of water.' Such vested rights included not only right to diversion of water from the stream in the chronological order of priority, but also the right to maintenance of conditions on the stream existing at the time of appropriation.

Brighton Ditch Co. v. City of Englewood, 237 P.2d 116, 124 Colo. 366, 372-373. (1951).

Because water rights and their administration are expression of property rights, due process protections attach and owners of appropriations necessarily must be accorded notice and a meaningful opportunity to be heard prior to any enforcement that implicates their supply. The decrees themselves authorize their execution so long as the terms of the decree are scrupulously followed. *Brennan v Jones*, 161 Mont. 550, 55 P.2d 687 (1936); *Luppold v. Lewis*, 171 Mont. 280, 563 P.2d 538 (1977). Otherwise, it offends due process to administer water rights without further notice and an opportunity to be heard, and this necessary hearing cannot be countenanced in the truncated setting arising in enforcement actions. *State ex. rel Reeder v. District Court*; 100 Mont. 376, 47 P.2d 653 (1935); *State ex. rel McKnight v District Court*, 111 Mont. 520, 111 P.2d 292 (1941).

A particular change of water right that may hereafter be pursued obviously cannot be included in a decree of priorities in this action, nor can it be adjudicated in any enforcement action of those water rights. *Allen v. Wempler*, 143 Mont. 485, 103 P.2d 1067 (1946).

However, inasmuch as the compact integrates the resolution of priorities with the administration of water rights as expressed in changes of water rights and indeed the confirmation of new priorities, this Court must nonetheless find these incidents fair, reasonable and adequate.

The compact sets things up to fail this necessary test of comprehensiveness. The Board can simply not adjudicate the vested rights to maintenance of stream conditions of water right holders outside the Reservation, because its authority does not extend to such

users. As a consequence, any change of water right it approves is not effective as against any user outside the Reservation.<sup>5</sup> This is so even if the Board purported to find that no return flows from a use within the Reservation returned via groundwater to any source, including groundwater, located off the Reservation. This finding cannot be given effect as against off Reservation uses, precisely because such users have a constitutional right to be heard on this very question.

The problem metastasizes in the event that the Board applies standards to changes that in any way deviate from those otherwise applicable to Montana water rights off the Reservation. For example, the DNRC insists that the relevant measure of the use for the purposes of a change is not the decreed amount, but the amount historically use prior to July 1, 1973. ARM 36.12.1902. To the extent that this states the applicable law, *see Sante Fe Trail Ranches v. Simpson*, 990 P.2d 54 (Colo. 1999), it also defines a component of the stream conditions that inure in junior water rights.<sup>6</sup> Consequently, the failure of the Board to apply those principles in effect takes elements of junior rights, in contravention of the Fifth Amendment to the US Constitution, and Montana's protections under Art II, Sec. 29.

These exact same problems permeate the confirmation of new uses, unless they are assigned the most junior right in the Basin, particularly where any part of the new use is premised on mitigation that offsets all or relevant parts of the depletive effect of the new use. *See Uniform Code, 1-1-104, compare MCA 85-2-102(16)*. Any mitigation is not effective,

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<sup>5</sup> The problem does not go away even if one required the applicant for a change before the Board to file an identical application to the DNRC under MCA 85-2-402 for determination of off-Reservation effects. This sort of Byzantine outgrowth merely postpones the problem to an instance in which the DNRC and the Board do not agree with every incident expressed by the other tribunal.

<sup>6</sup> There is no such concept formally included in the Law of Administration.

however, as against off Reservation uses, again because they have not had an opportunity to be heard on the depletions generated by the new use, or the amounts of those depletions offset by the mitigation. As to those users, therefor, the new use is unlawful.

It is no answer to this dilemma that off reservation users could if they chose participate in the Board's proceedings. The issue is what happens when they don't elect that remedy, and so long as the Board's authority is limited to Reservation boundaries, as to them the Board's decision is without constitutional effect.

These principles set the stage for a clash of water commissioners Montana courts retain the right to enforce their own decrees for rights off the administration. Accordingly, their commissioners must be empowered to administer rights within the Reservation insofar as necessary to fulfill the water rights of those outside its boundaries. Because, however, changes of water rights and new uses with mitigation cannot be recognized as incidents to the water rights of non-reservation users, they should be the first shut off in the face of shortages. Moreover, the compact makes it impossible to discern the effect of a call emanating from a priority on the Reservation against upstream users off the Reservation. Do such users, or the water commissioner administering their rights, ignore the demand if the call for water emanates from a change not approved by authorities for those upstream users, or indeed otherwise is senior to a Board approved change that remains renegade under the laws of Montana as against those off-Reservation users?

The compact functionally attempts to amend Montana's Constitution by altering the edict that "all the surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Mont. Const., Art. IX, Sec. 3(3).

Now, the compact effectively declares the wholly dysfunctional system of the State owning waters above and below the Reservation, with the Tribes in the middle, all as each are taking water from the other.

In some respects, the dilemma portended by compact infected decrees on the Beaverhead River. There were two separate decrees from drainages in the upper part of the Basin, and one on the lower part. The water commissioner took the priorities from the lower basin decree and interlineated them with priorities from the upper Basin, so that he had a comprehensive list of water entitlements. Despite the fact that all courts were using the same principles in resolving the disputes that led to the decrees, the Court in *State ex. rel McKnight v District Court*, 111 Mont. 520, 111 P.2d 292 (1941) condemned the integration. Because the priorities described in the lower decree had not had an opportunity to be heard on the otherwise senior rights in the upper Basin, it would deny due process to so summarily integrate entitlements.

The compact presents an anomaly. The McCarren Amendment was adopted to prevent the confusions otherwise attendant to parallel systems of water administration. The compact insists upon such confusions. This Court should not allow the benefits of the McCarren Amendment to be undone in such a backdoor fashion. It should reject the compact.

### **G. The Compact Fails To Fairly and Reasonably Recognize the Rights of the Districts**

The Flathead Irrigation Project was authorized by Congress pursuant to Public Law 60-156, 35 State 441 (1908). Public Law 58-159, 33 State 302, (1904) had previously provided for the survey of Reservation lands, and their allotment to members of the Tribes. The remaining

surplus lands were earmarked for entry by members of the public. *Id.*

Public Law 60-156 provided that those seeking ownership of any of those surplus lands must reclaim them for agricultural purposes, and of course pay for those lands at designated rates. In addition to ownership of a parcel of land, Congress assured such families seeking a life in farming and ranching “a water right” to irrigate their new holdings. Entrymen were required to pay for their water right a proportionate amount of the construction charges attendant to the new reservoirs, ditches, canals, and other diversion works required for the exercise of their water right. *Id.* Member of the Tribes that were allocated parcels were not required to pay these construction charges for the “water required to irrigate such lands,” *Id.* and all users were required to pay their share of operation and maintenance expenses. *Id.*

It is no accident that this structure echoes the Reclamation Act of 1902. *See* 43 USC 371 *et. seq.* Indeed, it was the Bureau of Reclamation that designed the Flathead Irrigation Project, and administered its construction and operation for the first some 30 years. *See* Exhibit A, pp 9-20. In the 1920’s when the Reclamation Act was amended, contracts with users were supplanted by contracts with irrigation districts that included those users’ lands. *See* 43 USC 485(h)(d)-(e). This was the genesis of the Mission and Jocko Irrigation Districts. Formed under Montana law, *see* MCA 85-7-101 *et. seq.*, contracts with the Districts secured debt owing under the Flathead Irrigation Project through the ad valorem taxing authorities of the Districts and the Districts distributed water to members in accord with their entitlements. *See* MCA 85-7-2101 *et. seq.*

In *Ickes v. Fox*, 300 US 82 (1987), the Department of the Interior attempted to construct another division of the Yakima Project in order to provide water supplies to different users than its existing project. To answer to the costs of that new development, the United States attempted

to reduce water supplies to its existing users, unless they executed supplementary contracts obligating them to pay additional amounts for more water. The Court swiftly interred such plans to move water from existing uses to devote to new purposes.

Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded.

Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr* (D.C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*Id.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands and the water rights appurtenant thereto—a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner. At 94-95.

*Nevada v. United States*, 463 US 110 (1983), endorsed a similar truncation of the power of the United States to reassign water supplies from existing users to others. Involving the fabled “Orr Ditch Decree,” the matter involved the rights of the United States to the Truckee River system. The United States appeared in the general adjudication of the Truckee River rights, and appropriations were confirmed by the Court for the Newlands Project under Reclamation Law, and rights for the irrigation of the Pyramid Lake Indian Reservation under the *Winters* doctrine. Thereafter, the United States sought additional waters for the Reservation asserting the right to reallocate some of the water then earmarked for the Newlands Project to the Tribes, so that the Tribes could amongst other things protect instream flows in the lower portions of the Truckee River. The Reclamation users asserted that this reallocation could not be given effect, given *res judicata* principles and the Orr Ditch Decree.

The Court foreclosed the efforts of the United States.



In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. At 126

.....  
The Government's brief is replete with references to its fiduciary obligation to the Pyramid Lake Paiute Tribe of Indians, as it properly should be. But the Government seems wholly to ignore in the same brief the obligations that necessarily devolve upon it from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere. At 127.

Despite the striking factual resemblance of this matter to *Nevada*, the Districts understand that they are not claiming through a prior decree. However, that observation does nothing to discount the import of the decision on this Court's fair and reasonableness inquiry. Nor can that matter otherwise be distinguished based on and language in the Reclamation Act that otherwise refers to Montana's water law.

*Winters v. United States*, 207 US 564 (190), was a bolt from the blue, reverberating throughout the Western states as it announced an implied federal right to water based on the practicably irrigable acreage within an Indian reservation. However, nothing in *Winters* or Section 8 of the Reclamation Act, *see California v. United States*, 438 U.S. 645 (1978) should be interpreted as barring the exercise of water rights otherwise available to the Bureau for reclamation projects. In other words, Section 8 declared that there was no federal water right for reclamation projects arising simply because the Bureau of Reclamation was implementing federal law. In 1902, Congress itself could not have anticipated *Winters*, and accordingly its directive to secure water rights under state law supposed that such law was the only source of

such entitlements given the federal deference to state water law systems. Where there was otherwise a federal water right available to reclaim arid lands, there is no reason to suppose that Congress insisted that such entitlements be ignored.

When Congress elected to adopt the Flathead Irrigation Project in 1908, it was acting in the outwash of decades of federal deference to State water right systems. It promised new families willing to gamble on a life in agriculture a “water right,” and each of these people in exchange for the fees demanded by the United States for such appropriations was fully warranted in believing that he had a right to water sufficient for his lands.

For the better part of a century, there was no material interference with the supplies available for the Projects, and the families and communities developed in reliance upon the federal assurances prospered. It was not until the 1980’s that the BIA’s efforts to accommodate instream flows led to litigation between the irrigators and the Bureau of Indian Affairs. *See Joint Board of Control v. United States*, 832 F.2d 1127 (9<sup>th</sup> Cir. 187).

While Congress may retain plenary control over the Tribes, *Lone Wolf v. Hitchcock* 187 US 553 (1903), it does not have similar authority over the Districts or their members. There can be no question that the members of the Districts hold “water rights” to irrigate their lands that were accorded them under the Flathead Irrigation Project. *See discussion, supra*. These rights are now subsumed within the definition of a “Tribal Water Right.” Art. II (67). As the Compact otherwise purports to embrace the Project, there is no reason to object to what the collective entitlements may be called, unless they represent a back-handed attempt to abrogate the legal interests the Districts hold their supply and treat them instead as some sort of legislative largesse to other Tribal entitlements.

These interests must make this Court chary of applying the same sort of deference it typically employs in examining compacts. After all, it is called upon to adjudicate the very entitlements of the Districts, and as *Reeder* and *McKnight, supra*, make clear, that exercise of judicial authority must be conducted consistently with due process. The Districts note that in parallel contexts this Court has not hesitated to record both the United States and the attendant Districts as owners of the appropriations expressed in more typical reclamation projects. See Water Right No. 41K 40871-00, 41K 40877-00.

In this context, it is difficult for the Districts to assess those matters that they will as a practical matter just continue to live with, and which matters guarantee a slide to extinction for its members, as this Court has denied discovery to date. For example, the Districts do not know if the instream flow claims it has survived in the past are the “Minimum Instream Flows” insisted upon in the Compact. See Art. II, (48).

These same infirmities afflict the definition of Flathead Irrigation Project. Art II (30). While the definition correctly notes all the headgates, pumps, laterals, and all the other features of the system, it overstates things to say that they are all Tribal. Congress in 1908 directed the BIA to allow the irrigators to manage and maintain their own systems once requisite portions of their debt was retired. While the compact contemplates petitions to the BIA to the same ends, it does not faithfully replicate the duty to accommodate.

These are no small matters to the Districts. The recent spate of rising costs from the BIA must be answered by a formal return to the community system formally used to manage and repair, where the hydraulics on one owner’s tractor were used to implement this repair, in return for an afternoon of labor on another segment by another. This sort of accommodation is the sort

of mechanisms that has allowed the Districts to survive on relatively small holdings through the years. The failure of the compact to formally preserve it misses the mark.

The Tribes embrace of Rehabilitation and Betterment projects, Art. II (57), is a good expression of principles that may ultimately allow for “Target Instream Flows,” Art. II (64), but the program is unacceptable if it authorizes the use of the Districts’ water rights to effectively reduce their yield. For example, it is undoubtedly true that lining the Districts’ ditches would “save” water in the sense that the diversions reduced by the same leakage could irrigate the same acreage. However, in the event that the groundwater the leakage infiltrated expresses itself in stream flows months later, what looks to be an inefficient means of diversion turns out to be an efficient means of storage. Ignoring this principle would mean that the Districts’ own water rights could be used in a way that increases the Tribes’ instream flow rights, which in turn would result in a further ratcheting down of the Districts’ now reduced diversion entitlements when the yield of the affected sources is further reduced in hot summer months by the claimed boost in efficiency.

Again, the Districts are aware that the Compact assigns the issues attendant to the rehabilitation and betterment projects to its newly created CITT and CMC, see Art II (24) and (25), but there is no express provision protecting the Districts’ water rights from these effects. Even in the event that the Districts navigate all these acronyms, there is no Court that can infuse the rule of law into the process. *See discussion, supra.*

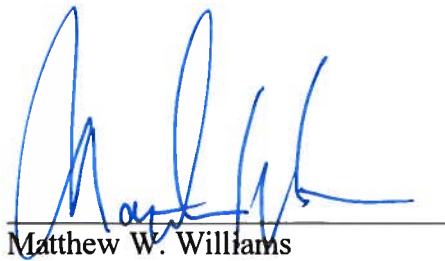
Quite apart from the Tribes’ instream flow claims, the Districts are entitled to a decree that protects their own water rights by correctly expressing their entitlements. The Compact fails to do so currently, and it is not fair, reasonable, or adequate until it does.

## Conclusion

The Court should not dismiss the compact. To be sure, it is infirm, and cannot be allowed to walk on its own in public, and therefore this Court cannot approve it. This does not mean, however, that all its features should be ignored, or otherwise interred in the face of the disabilities set forth herein.

Instead, this Court should enter an Order itemizing those features of the Compact that it cannot sustain, and then stay further proceedings until further petition of the parties. Such a hiatus would allow the parties an opportunity to remedy those shortcomings, and otherwise adopt and express water management principles that might provide for the optimum balance of respective needs if such a further accord can be reached.

Done this 10<sup>th</sup> day of July, 2024.




Matthew W. Williams  
Attorney for Mission and Jocko Districts

## CERTIFICATE OF SERVICE

This is to certify that the foregoing was E-served to the following persons or entities on December 8<sup>th</sup>, 2023.

<p>Montana Water Court 1123 Research Drive P.O. Box 1389 Bozeman, MT 59771-1389 watercourt@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>David W. Harder Senior Attorney for Legal Issues U.S. Department of Justice Indian Resources Section Environment &amp; Natural Resources Division 999 18th Street South Terrace, Suite 370 Denver, Colorado 80202 David.harder@usdoj.gov efile_denver.enrd@usdoj.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Molly M. Kelly Montana DNRC 1539 Eleventh Avenue P.O. Box 201601 Helena, MT 59601 Molly.kelly2@mt.gov Jean.Saye@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Chad Vanisko Montana Attorney General Agency Legal Counsel Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 chad.vanisko@mt.gov rochell.standish@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>

<p>Daniel J. Decker  Melissa Schlichting  Christina M. Courville  Confederated Salish &amp; Kootenai Tribes  Tribal Legal Department  P.O. Box 278  Pablo, MT 59855  Melissa.Schlichting@cskt.org  Christina.Courville@cskt.org  daniel.decker@cskt.org</p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail</p>
<p>Yosef Negose  Department of Justice  yosef.negose@usdoj.gov</p>	<p>E-Mail</p>




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Matt Williams

# **The Flathead Project**

## **The Indian Projects**

Garrit Voggesser  
Bureau of Reclamation  
2001





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# **The Flathead Project**

## **Introduction**

One of the most expansive and intricate of the Indian irrigation efforts, the Flathead Project symbolizes the commitment of the Federal Government to bring water to reservation lands.<sup>1</sup> The region around Flathead Lake in northwest Montana had long-served as a locale resplendent with natural resources, including fish, wildlife, forests, and the natural waterways that served those features. A wide variety and number of peoples – Indian tribes, European and Euro-American trappers and explorers – found the area to be a prime location for making a living and as a place to call home. Yet, like so many other places in the arid West, it did not always offer the absolute security needed for survival. The Flathead, Pend d'Oreille, and Kootenai Indians migrated in, out, and around a wide stretch of Northern Montana and southern Canada, gathering a variety of subsistence resources in different places at different times.<sup>2</sup> By their very nature, trappers and explorers moved through the area, constantly searching for new opportunities. Once the federal government designated the Flathead Reservation as a permanent settlement for the Indians of those environs, it also began to envision the need for a consistent and controlled water supply to aid the tribes' farming and ranching enterprises. In turn, Anglo-American settlers quickly needed the same assurance. Accomplishing that feat would prove to be a beneficial, though difficult and drawn-out process.

## **Project Location**

Located in Flathead, Missoula, Lake, and Sanders counties of northwestern Montana, the

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1. For more information on the Indian Projects, see Garrit Voggeser, *The Indian Projects* Bureau of Reclamation History Program, Research on Historic Reclamation Projects (Denver, Colorado, 2001) and the other individual histories on the Blackfeet, Crow, Fort Peck, and San Carlos Projects.

2. For the sake of simplicity, I will refer to the region of the Flathead Project as Montana prior to its becoming a territory and a state.

Flathead Project supplies irrigation to approximately 127,000 acres of agricultural land.<sup>3</sup> Reclamation officials classified the location as a semi-arid region based on the average of fourteen inches of precipitation, which at the time of construction was the sixth lowest for any state and nearly eighteen inches below the national average. The project area has an average elevation of 2,950 feet and consists of five primary divisions: Camas, serving an area southeast of Flathead Lake and including the communities of Lone Pine and Hot Springs; Mission, comprised of land bound by mountains on the east, Post Creek on the north, a ridge of hills separating it from the Jocko Valley on the south, and serving the community of St. Ignatius; Jocko, including land lying along the Jocko River and servicing the towns of Arlee and Dixon; Post, embodying an area between Post and Crow Creeks and the Flathead River, south of Flathead Lake and north of the Jocko and Mission divisions, and serving the communities of Charlo and Moise; and, Pablo, southwest of Flathead Lake, including a region lying west of Mud Creek and east of the Flathead River, and providing water to the towns of Pablo, Ronan, and Polson.<sup>4</sup>

The project now includes fifteen reservoirs and dams, over 1,300 miles of canal and lateral systems, and over 10,000 minor structures for the diversion and control of the water supply. The sources of water supply come primarily from: the Flathead, Jocko, and Little Bitterroot Rivers; Mud, Crow, Post, Mission, Dry, Finley, Agency, Big Knife, Valley, and Fall

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3. Original plans called for the irrigation of 150,000 acres.

4. Department of the Interior, Bureau of Indian Affairs (BIA), *Appendix to Flathead Irrigation Project Completion Report: Agricultural Economy and Economic and Financial Analysis*, February 1963, Records of the Bureau of Indian Affairs, Record Group 75, National Archives and Records Administration–Rocky Mountain Region (Denver, Colorado), 1, hereafter all BIA material denoted as RG 75; Department of the Interior, United States Bureau of Reclamation, *Flathead Project, Montana: Project History 1910*, vol. 1, Records of the Bureau of Reclamation, Record Group 115, National Archives and Records Administration–Rocky Mountain Region (Denver, Colorado), 4, 27-33, 37, hereafter all project histories denoted by year and volume only; “Testimony of Sharon Blackwell, Acting Deputy Commissioner of Indian Affairs, At the Hearing Before the Senate on Energy and Natural Resources, Subcommittee on Water and Power, Operation of the Flathead Irrigation Project in Montana, May 17, 2000,” <http://www.doi.gov/oc/2000/flat.htm>, accessed July 9, 2001.

Creeks; and, as many as sixty other small streams. These waterways cover a drainage basin area of approximately 8,000 square miles.<sup>5</sup>

## **Historic Setting**

### **Pre-Contact**

Indigenous peoples have inhabited a wide region surrounding Flathead Lake for hundreds, if not thousands, of years. An abundance of streams, rivers, and lakes formed by glacial moraines dotted the landscape. The water resources, combined with mountains, forests, and vegetation offered abundant habitat for fish and a plenitude of wildlife. Three related, but distinct, groups of native peoples inhabited this thriving environment. The historical experiences of the Flathead, Pend d'Oreille, and Kootenai Indians merged and intertwined, but also diverged based on specific cultural practices and migrational patterns.<sup>6</sup>

The course of the Kootenai (or Kootenay) River defined the territory of the Kootenai Indians, determined their routes of travel, and dictated their subsistence practices. The Kootenai's "orientation to the river," in essence, was the foundation of their culture. The river valley, and thus the tribe's environs, extended from the Columbia River in British Columbia, Canada on the north, to the Kootenai Falls area north of Flathead Lake on the south, and straddling the Rocky Mountains of Canada and Montana in the United States. For the tribe, the river environment divided the year into just two seasons: winter and summer. The winter climate determined a period of village occupancy, hunting and fishing at upriver locations, and bison hunting east of the Rockies. Intensified fishing, communal deer drives, netting waterfowl,

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5. The information on water supply can be found in virtually every Reclamation annual report from the 7<sup>th</sup> to the 21<sup>st</sup>, and in every project history. United States Department of the Interior, United States Bureau of Reclamation (United States Bureau of Reclamation), *Eighth Annual Report of the Reclamation Service, 1908-1910* (Washington, D.C.: United States Government Printing Office, 1910), 92; *Flathead Project History, 1911*, vol. 6, 1; "Testimony of Sharon Blackwell."

6. *Flathead Project History, 1910*, vol. 1, 2.

and the gathering of plant foods characterized summertime activities.<sup>7</sup>

The Kootenai most likely had their roots in the northern regions of what became Canada and then gradually spread southward along the Rocky Mountain Trench and the Kootenai River. Interestingly, as anthropologist Bill B. Brunton notes, one of the tribes's origin myths described them "paddling down the river" as the means of their entrance to the natural world. At one time, another small band, the Plains Kootenai, inhabited the region west of the Rockies, but around 1730 fled the plains to escape bouts of smallpox and attacks by the Blackfeet. The Kootenai had a characteristically "distant and hostile" relationship with other tribes, and their enemies included the neighboring Salish (Flathead and Pend d'Oreille) and the Blackfeet. The introduction of the horse dramatically exacerbated hostilities and precipitated intertribal conflicts over bison.<sup>8</sup>

The domain of the Flathead and Pend d'Oreille overlapped to a wide extent. The Flathead occupied an area north of the Yellowstone from the Bitterroot Mountain range to the east side of the Rockies as far as present-day Billings, Montana. The Pend d'Oreille resided in an area mostly west of the continental divide and along the Clark Fork River, a tributary of the Columbia, in Montana, and their most important region of activity centered on the Flathead Lake area. However, the environments of the two tribes were not fixed; they both ranged on both sides of the divide and onto the adjoining Plains. The portions of the two tribes that lived east of the Rockies utilized an "elaborate system" of drives, jumps, and corrals to hunt bison. The introduction of the horse in the 1730s minimized the complexity of the system and rendered communal drives over cliffs almost obsolete. Both tribes also hunted deer, moose, antelope,

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7. Bill B. Brunton, "Kootenai," in Deward E. Walker, Jr., ed., *Plateau*, vol. 12, in William C. Sturtevant, ed., *Handbook of North American Indians* (Washington, D.C.: Smithsonian Institution, 1998), 223.

8. *Ibid.*, 224-5; John C. Ewers, *Indian Life on the Upper Missouri* (Norman: University of Oklahoma Press, 1968), 4, 12, 159.

mountain goats, small game, and water fowl. Fish played a key role in Pend d'Oreille subsistence practices, but had less significance for the Flathead. Plant foods played a substantial role in the subsistence activities of the two tribes.<sup>9</sup>

### **Post-Contact**

The lives of the Kootenai, Flathead and Pend d'Oreille began to converge on a more frequent basis in the late-eighteenth century. All three tribes encountered Euro-Americans at roughly the same time. The Kootenai first met with explorers around 1792, while the Flathead and Pend d'Oreille ran across members of the Lewis and Clark expedition in 1805. More than likely, the two tribes had come into contact with other Euro-Americans about the same time as the Kootenai. However, as anthropologist Carling I. Malouf aptly remarks, other products of Euro-American culture beat explorers to the Indians. Smallpox ravaged all three tribes between 1770 and 1805, reducing their populations by as much as 45 percent. The beginning of the nineteenth century also witnessed the advent of the fur trade. The Hudson's Bay and Northwest companies brought new material goods to the tribes, but the Flathead and Pend d'Oreille, in particular, showed little interest in the fur trade. The combination of disease, the fur trade, and the increase in horses contributed to growing regional hostilities among the tribes, especially with the dominant Blackfeet.<sup>10</sup>

The coming of the "white man" brought innumerable changes to the tribes. The impact of diseases increased Indian contempt for whites, but the three tribes also looked to them as allies against the Blackfeet. In the 1820s, an Indian named Shining Shirt prophesied that

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9. Some Flatheads dispute their historical use of buffalo jumps, see Ewers, 159-60. Also, for a more in-depth historical discussion of the Flathead from pre-history through the allotment period, see John Fahey, *The Flathead Indians* (Norman: University of Oklahoma Press, 1974). Carling I. Malouf, "Flathead and Pend d'Oreille," in Deward E. Walker, Jr., ed., *Plateau*, vol. 12, in William C. Sturtevant, ed., 297-8; Michael P. Malone and Richard B. Roeder, *Montana: A History of Two Centuries* (Seattle: University of Washington Press, 1976), 11-2.

10. Brunton, 232-3; Malouf, 305-6.

“strange men in black robes” would soon arrive to teach the tribes a new religion. Fur traders most likely carried Christianity, along with the other manifestations of Euro-American culture, to the tribes prior to this time, encouraging a value system that would support the trading practices. Between 1831 and 1839, the Flathead sent four delegations to St. Louis, Missouri in search of the “Blackrobes,” believing that they could help to combat the effects of disease and warfare. In 1840, Father Pierre Jean de Smet, a Jesuit missionary, arrived and established the Saint Mary’s Mission south of Fort Missoula along the Bitterroot River. His efforts conflicted with the needs and goals of the Indians. The Flathead, specifically, wanted to broaden their spiritual power to fight the Blackfeet, while the missionaries desired a complete conversion to Christianity and the elimination of tribal religious practices. Due to its limited influence, the Blackrobes quickly abandoned St. Mary’s. But in 1854, priests returned again to establish the St. Ignatius Mission, which proved to have a lasting influence and place in the community. The Indians and the missionaries cooperated to undertake the first irrigation efforts on the reservation. They diverted water from Mission Creek to irrigate fruit trees and other crops, and to operate a saw and grist mill.

Shortly thereafter, in 1855, Isaac Stevens, the governor and superintendent of Indian Affairs for Washington Territory, convened negotiations for the Hell’s Gate Treaty with the three tribes near present-day Missoula. Stevens primarily aspired to concentrate the Flathead, Pend d’Oreille, and Kootenai on a single reservation of 1.28 million acres surrounding the St. Ignatius Mission, and open the remaining lands to whites. Chief Victor refused to submit to the demand for Flathead abandonment of the Bitterroot Valley. To combat that denial, Stevens inserted “complex language” into the treaty to determine a place “better suited” to the Flathead needs, but mainly confused the negotiations. The subsequent Judith River Treaty of October

1855 defined the buffalo hunting grounds for the tribes east of the mountains. The complexity and ambiguity of the treaties that seemed like shady dealings to the tribes established an enduring animosity with whites over the land in and surrounding the Bitterroot Valley.<sup>11</sup>

During the first gold rushes to Montana in 1864, whites began to settle lands in the region and began to farm in order to take part in the lucrative business of supplying mining camps with goods. The tribes took issue with the settlement and Chief Victor demanded the removal of the whites, but federal officials ignored their wishes and forcibly moved many of the last Flathead holdouts to the reservation in 1871. From there, the relationship only worsened. In 1872, an official delegation led by James Garfield went to the Bitterroot Valley to remove the remaining Indians, but they continued to refuse. According to many accounts, the federal party then forged Chief Charlot's (Flathead), the successor of Victor, mark on the treaties, and Congress ratified them, appropriating a payment of \$50,000 for "improvements" made by the Indians in the valley. In 1883, despite the exposure of the counterfeit signature, two sub-chiefs (Arlee and Ninepipes) signed the treaties, and over the protest of Charlot, designated Arlee as the federally recognized head chief. In the proceeding years, the virtual demise of the buffalo, the coming of the Northern Pacific Railroad and its branches that passed through the reservation bringing a flood of settlers, and disagreements over appropriations for removal weakened the resolve of Charlot's band. In October 1891, federal troops force-marched the Indians north to the reservation. Between 1895 and 1901, Charlot, Chief Isaac (Kootenai), and their followers continued to resist white encroachment and the efforts of the state of Montana and the Federal Government to cede reservation lands, but ultimately to little avail.<sup>12</sup>

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11. For a more extensive discussion of Indian removal and the initial white settlement of of the region, see Malone and Roeder. Brunton, 233; Malouf, 306; *Flathead Project History, 1910*, vol. 1, 6-7; Malone and Roeder, 87-9.

12. Malouf, 307-8; *Flathead Project History, 1910*, vol. 1, 7-8; Malone and Roeder, 92-3.



In the meantime, the tribes managed to maintain religious and cultural practices, language, and establish family farms and cattle operations, but the Flathead Allotment Act of 1904 dealt a serious blow to the “hard-won stability.” Even though the Indians resisted allotment, federal pressure gradually managed to break up communities and scattered tribal members across the reservation on individual plots of land. The Flathead Irrigation Act of 1908 added considerable strain to communal ties, and with its provisions for settlement, whites poured into the Jocko, Mission, and other valleys of the reservation. In 1909, the federal government expropriated 18,000 acres of the reservation for the National Bison Range. The protection of the animals served as a lingering tribute to the tribes’ past, but the bison reservation also signaled the limitations of the future.<sup>13</sup>

### **Project Authorization**

Two separate acts authorized construction of the Flathead Project. The act of April 23, 1904, supplied the foundation for the project, providing for the distribution and irrigation of Indian allotments, and the sale of all “surplus” lands. By act of April 30, 1908, Congress authorized \$50,000 for the survey, plans, cost estimates, and construction of irrigation systems on all lands of the reservation. In essence, the second act added irrigation for white settlers on unallotted lands to the plans for Indians. Although the act of 1908 provided that “no lien or charge for construction, operation, or maintenance shall thereby be created against any such reserved lands [allotments],” the act of 1904 stipulated that reimbursement for the entire project would come from the sale of reservation, and thus Indian, land.<sup>14</sup>

### **Construction History**

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13. Brunton, 234; Malouf, 308-9.

14. Department of the Interior, United States Bureau of Reclamation, *Seventh Annual Report of the Reclamation Service, 1907-1908* (Washington, D.C.: Government Printing Office, 1908), 7-8, 100; Department of the Interior, “Irrigation of Indian Lands,” in *Federal Reclamation and Related Laws*, vol. 1 (Washington, D.C.: Government Printing Office, 1972), 128.

## Reclamation Construction

A long and contested history characterized the construction of the Flathead Irrigation Project (Flathead). Although Reclamation began reconnaissance surveys in 1907 and actual work commenced in the summer of 1908, the project lasted a span of almost fifty-six years until the time of completion in the early-1960s. Several factors contributed to this drawn-out process. Congress, fairly consistently, appropriated substantial sums for Flathead, but sometimes the level simply did not match the expansive amounts needed to make quick progress on the large project. Its immense size also required a considerable labor force that did not always meet with expectations. The 130,000 acres, or 150,000 depending on the source, that federal officials intended to irrigate was not extraordinarily huge, but the topographic features of the area—rugged mountains and valleys, numerous waterways diverse in size, and a large amount of natural lakes—made the project a reclamation challenge.<sup>15</sup>

The challenges did not stop there. Even though work on the project started with agreements of cooperation between Reclamation and the Indian Service, troubles quickly arose. While the arrangement simply called for the Indian Service to handle the money and Reclamation the plans and construction, both roles supplied a large enough measure of control to make the relationship a dangerous one. The two bureaus continuously bickered about the scope of Flathead and who it was being built for—Indians or whites. The inter-bureau rivalry did not always hamper construction, but often cast a negative shadow over the project. The attitude generated by this conflict exasperated successive Interior Secretaries and muddled the decision-making process. In 1924, the problems came to a head when Hubert Work transferred the

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15. The information on the project is often duplicated in Reclamation annual reports and the project histories, however, the histories provide more extensive analysis. *Seventh Annual Report*, 100-1; *Eighth Annual Report*, 92-3; *Flathead Project History, 1910*, vol. 1, 1-2.

project back to the Indian Service. In spite of the tensions, between 1908 and 1924, Reclamation made considerable progress on the Flathead Project that ultimately benefitted a sizable number of farmers and ranchers.<sup>16</sup>

In 1907, project engineers surmised that the project could irrigate 57,000 acres by two pumping plants on the Flathead River, 53,000 acres in the Mission Valley by gravity canals, and 11,500 acres in the Jocko Valley by gravity canals at total cost of close to \$3 million. Following that advice, Congress appropriated \$50,000 for surveys and the commencement of work.

Reclamation made investigations for fifteen reservoirs and sixteen dams—two on Flathead Lake—with a total capacity of 153,584 acre-feet and divided the project into nine divisions:

Jocko, Mission, Post, Crow, Pablo, Polson, Little Bitterroot, Big Arm, and Camas. The Polson, Little Bitterroot, Big Arm, and Crow divisions were later absorbed into the other divisions.<sup>17</sup>

Plans also included a power plant at Newell Dam situated on the south side of Flathead Lake and at the head of Rocky Canyon. Between October 1909 and November 1910, Reclamation made ninety-three separate water filings on lakes, rivers, creeks, and streams for utilization in the project.<sup>18</sup>

### **Jocko Division**

Reclamation selected tracts of land in the Jocko Division for the first areas of development. The system diverted all water from rivers and streams and thus the division required no major features. In 1908, work began by government force on canals and laterals for diverting water from the Jocko River, and by early 1910, they supplied water to nearly 8,000

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16. *Flathead Project History, 1910*, vol. 1, 13; "Operation of Projects Transferred," *Reclamation Record* 15, no. 1 (1924), 131.

17. See page 9 for a description of the areas these divisions encompassed. Polson became a part of the Pablo division, Big Arm a part of Mission, the Little Bitterroot a part of Camas, and the Crow a part of the Post. However, over the years, the names and number of divisions fluctuated.

18. *Flathead Project History, 1910*, vol. 1, 14-6, 21, 27-37; *Flathead Project History, 1911*, vol. 6, 1-3; *Flathead Project History, 1910*, vol. 4, 67-82.

acres of irrigable land. That summer work was completed on a new canal from Big Knife Creek and work began on further extensions of the canal system from Valley and Revais Creeks. In 1911, government forces built the Finley Creek System, including twenty miles of ditches to cover an additional 4,500 acres on the south side of Jocko River and taking water from Finley Creek. Five years later, Reclamation contracted work for building additional minor structures and covering another 5,000 acres. Reclamation conducted no further work on the division.<sup>19</sup>

### **Mission Division**

In 1908, work also began in the Mission Division on the construction of a canal heading on Mission Creek and other canals that were completed in 1909 to irrigate 5,000 acres.<sup>20</sup> Reclamation planned the construction of four reservoirs for the division: McConnell, with an area of 100 acres and a capacity of 2,000 acre-feet; Mission, with an area of 300 acres and a capacity of 3,300 acre-feet; Tabor (St. Mary) with an area of 300 acres and a 16,000 acre-foot capacity; and, Crow (Lower Crow Creek), a 300-acre reservoir with a capacity of 6,000 acre-feet. Due to work in other divisions, the Mission reservoirs received little attention for several years. In August 1916, work began on Tabor Reservoir and in the next two years Reclamation and contract workers completed a 1,400 foot tunnel and the reservoir for 12,500 acre-foot capacity. During its tenure on the project, Reclamation never worked on McConnell, Mission, or Crow dams and reservoirs.<sup>21</sup>

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19. *Eighth Annual Report*, 93; Department of the Interior, United States Bureau of Reclamation, *Ninth Annual Report of the Reclamation Service, 1909-1910* (Washington, D.C.: Government Printing Office, 1911), 144; Department of the Interior, United States Bureau of Reclamation, *Tenth Annual Report of the Reclamation Service, 1910-1911* (Washington, D.C.: Government Printing Office, 1912), 124-5; Department of the Interior, United States Bureau of Reclamation, *Eleventh Annual Report of the Reclamation Service, 1911-1912* (Washington, D.C.: Government Printing Office, 1913), 96; Department of the Interior, United States Bureau of Reclamation, *Fifteenth Annual Report of the Reclamation Service, 1915-1916* (Washington, D.C.: Government Printing Office, 1916), 560.

20. The Mission Division absorbed Big Arm Division.

21. *Eighth Annual Report*, 93; *Ninth Annual Report*, 144; *Tenth Annual Report*, 122; Department of the Interior, United States Bureau of Reclamation, *Sixteenth Annual Report of the Reclamation Service, 1916-1917* (Washington, D.C.: Government Printing Office, 1917), 372; Department of the Interior, United States Bureau of

(continued...)

## **Pablo Division**

In 1909, construction began on the Pablo division. Initial plans for the division included the Pablo Reservoir with an area of 2,100 acres and a capacity of 29,600 acre-feet impounded by an earthfill dam. Workers used a steam shovel to begin the excavation of the Pablo Feeder Canal, a twelve-mile, 300-second-foot canal from Crow Creek to supply Pablo Reservoir with plans to extend the canal another twelve miles to draw water for storage from Post Creek. After extensive pit testing, engineers concluded that a deep bed of gravel underlay the original line for the Pablo Reservoir and Dam, making the proposed location unsafe for the storage of water. Further testing revealed that dense material existed below the southern portion of the original storage basin. They decided that a storage capacity nearly equal to the original plan could be obtained by constructing three reservoirs connected by stretches of canal. By 1910, Reclamation had completed 10 ½ miles of the feeder canal, including a system of laterals covering 4,500 acres of land below the sites of the Pablo reservoirs.<sup>22</sup>

In light of the new complexities and the volume of work on other divisions, Reclamation decided to contract work on North Pablo Dam and on portions of the middle and south dams. Bids opened on August 25, 1911, and Reclamation awarded the work to Nelson Rich Company of Prosser, Washington. The company's crews and subcontractors began work on the dams on October 1, 1911. In the first half of 1912, government crews completed 28 of the proposed 29 miles of the Pablo Feeder canal, including the final stretch from Post Creek to North Pablo Reservoir and concrete headgates and wasteways at Mud, North, Crow, South Crow, and Post Creeks. Nelson Rich built the controlling works for North and South Pablo Dams, portions of

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21. (...continued)

Reclamation, *Seventeenth Annual Report of the Reclamation Service, 1917-1918* (Washington, D.C.: Government Printing Office, 1918), 421.

22. *Ninth Annual Report*, 144-5; *Tenth Annual Report*, 123-5; *Flathead Project History, 1911*, vol. 6, 18.

the supply canals between the reservoirs, and over eight miles of laterals. Despite the advances made, not everything ran smoothly. Reclamation officials remarked that the company's choices had not exhibited good judgement in planning for work and lacked balance between work on excavation and the transportation of quarried materials. C.B. Long, the head Reclamation engineer for that portion of the project, accused Nelson Rich of "repeated attempts to slight work." He criticized the company for a lack of experience and foresight in constructing dams that resulted in an ignorance of the results "necessary and of the means to secure them." Unfortunately, because Reclamation officials had made the decision to award the contract to Nelson Rich they could not lay the full blame on the contractor.<sup>23</sup>

The problems did not end there. In April 1913, Nelson Rich placed 21,376 cubic yards of paving on the South Pablo Dam "in gross violation of the specifications" defined by Reclamation engineers. Reclamation required the company to remove the "rejected work," later complaining that "great care was necessary to prevent the contractor from serious violation of the specifications and he [Nelson Rich] continued his erratic attempts until the last hour's work...on the dam." The unfortunate choice of contractor, the resulting subterfuge, and the removal and correction of the faulty paving cost a large amount of time and \$8,200.76, not a small sum for project of that time. Despite the difficulties, Reclamation crews and the contractors completed distribution systems covering 4,000 acres below (south) the dams, and 1,000 acres under the Pablo Feeder Canal and Polson Slope. On November 3, 1913, Reclamation awarded work on the paving of South Pablo Dam and portions of the work on canals and laterals to Wilson Brothers of Vandalia, Montana. During the winter of 1913-1914, workers placed 5,700 square feet of paving

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23. *Eleventh Annual Report*, 95-6; *Flathead Project History*, 1911, 18, 53; *Flathead Project History*, 1912, 67-9.

on the Pablo dams and finished them to hold 5,000 acre-feet of storage.<sup>24</sup>

Reclamation had big plans for the Pablo Division, but time was not on their side. In 1914, contractors and government forces managed to complete additional paving on South Pablo Dam to increase its capacity to 2,000 acre-feet. Regrettably, they only managed to finish a small amount of the canal and sublateral distribution systems. By early-1915, Wilson Brothers dispatched the rest of the paving on the south dam.. On March 22, tired of waiting for water, residents west of the Pablo Reservoirs requested permission to build canals to irrigate their “farm units.” Resigned to the slow pace of work to that point, chief engineer Long granted permission. Reclamation engineers provided the settlers with designs, and that spring and summer the farmers built canals to irrigate 1,000 acres of their land.<sup>25</sup>

In response to the demand for water, Reclamation added Horte Dam, seven miles west of Ronan, with a capacity of 250 acre-feet to the Division. Government forces quickly commenced work and finished the dam on January 22, 1916. In that year, Reclamation decided to contract the majority of the division’s distribution system in order to speed up the process. It awarded contracts for the construction of canals, tunnels, and sublaterals to four companies: Percy M. Ross of Polson; J. E. Hilton of Billings; Mendenhall, Bird and Company of Springville, Utah; and, Pearson Construction Company of Seattle, Washington. This diligence could not solve all the problems outside of Reclamation’s control. Officials cited three main causes for the problems with delivering water. First, the frequent development of sink holes required that workers devote more time to repairs than new construction. Also, the porous condition of the

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24. Department of the Interior, United States Bureau of Reclamation, *Twelfth Annual Report of the Reclamation Service, 1912-1913* (Washington, D.C.: Government Printing Office, 1914), 114; *Flathead Project History, 1913*, vol. 13, 123-5, 128.

25. Department of the Interior, United States Bureau of Reclamation, *Thirteenth Annual Report of the Reclamation Service, 1913-1914* (Washington, D.C.: Government Printing Office, 1915), 136; *Flathead Project History, 1915*, vol. 16, 10, 61-2.

Pablo Feeder Canal resulted in loss of water needed by farmers. Finally, lack of precipitation created sudden and heavy demand for water and “greatly handicapped operation forces in making deliveries through ditches which had never been used and through ditches not constructed to full capacity.” Reclamation did not finish the Pablo Dams until April 25, 1919, almost ten years after it began the division.<sup>26</sup>

### **Post Division**

Reclamation planned the construction of three reservoirs and dams for water storage in the Post Division: Ninepipe, McDonald, and Kickinghorse. Designs for Ninepipe included an earthfill dam to hold a 1,630 acre reservoir with a 15,100 acre-feet capacity. The plans for McDonald included a loose rock and earthfill dam to impound a 220 acre reservoir with 10,600 acre-feet of capacity, and a 200-foot spillway built around an existing natural lake. Officials projected Kickinghorse as a 675-acre reservoir with a capacity of 6,800 acre-feet with an earthfill dam. Reclamation began the Post division in April, 1910 with the commencement of construction on the main canal projected to irrigate 10,000 acres. Government forces started building the controlling works for Ninepipe Dam using gravel from Crow Creek three miles south of the reservoir. These prompt and auspicious beginnings did not wholly foreshadow the progress on the division.<sup>27</sup>

In 1911, Reclamation constructed canals below Ninepipe Dam to irrigate 5,500 acres and finished one-third of the work on the dam. Within a year, government forces completed the dam and a distribution system covering an additional 16,000 acres of land, including sixty miles of

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26. Department of the Interior, United States Bureau of Reclamation, *Fourteenth Annual Report of the Reclamation Service, 1914-1915* (Washington, D.C.: Government Printing Office, 1915), 121; *Flathead Project History, 1915*, vol. 16, 53-4; *Flathead Project History, 1916*, vol. 18, 10, 14-5; *Flathead Project History, 1917*, vol. 21, 206; *Flathead Project History, 1919*, vol. 26, 8.

27. *Ninth Annual Report*, 145; *Tenth Annual Report*, 122-3; *Eleventh Annual Report*, 93-4; *Flathead Project History, 1910*, vol. 4, 19; *Flathead Project History, 1911*, vol. 6, 2-3.



small ditch lying under Ninepipe and excavated a supply canal between it and Kickinghorse Reservoir. They also built the Kickinghorse Feeder Canal with a length of 2 ½ miles and a 400 second-foot capacity. In 1912-1913, Reclamation constructed a canal from Kickinghorse to the lands below the lake and placed structures hypothetically “ready for serving” 2,600 acres, but had not yet built the dam. The dam would not be built until 1930. Between 1914 and 1915, Reclamation finished the Moise Valley System, diverting water from Crow Creek to water 2,000 acres.<sup>28</sup>

Due to the immensity of the entire project and the slow pace of construction, Reclamation contracted work on the Post distribution system. In 1916, it awarded contracts to Percy M. Ross for earthwork and structures, and to Welch Brothers and Hannaman of Kalispell for laterals. Finally, on October 7, 1916, government forces began the McDonald Lake Reservoir and Dam, completing the “sub-surface storage developments” and work on the reservoir at the end of December 1917. On December 31, 1919, Reclamation finished the work on the dam embankment, providing the reservoir with a capacity of 2,400 acre-feet.<sup>29</sup> In August, 1919, completion of the dam increased its capacity to 8,200 acre-feet, 2,400 acre-feet below initial projections. In 1923, government forces enlarged Ninepipe Dam to, increasing its capacity from 5,000 to 15,150 acre-feet. The division had taken more than thirteen years to that point, and Reclamation never finished Post to the designs of their proposed plans.<sup>30</sup>

### **Polson Division**

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28. *Tenth Annual Report*, 125; *Eleventh Annual Report*, 96; *Twelfth Annual Report*, 113; *Thirteenth Annual Report*, 137; *Fourteenth Annual Report*, 121.

29. The project history for 1919 stated that McDonald was completed to 8,500 acre-feet capacity, but the history for 1920 indicated that the capacity was only 2,400.

30. *Flathead Project History, 1916*, vol. 18, 14-5, 138; *Flathead Project History, 1917*, vol. 21, 12, 16; *Flathead Project History, 1919*, vol. 26, 8, 11; *Flathead Project History, 1920*, vol. 28, ix, 2-3; *Tenth Annual Report*, 125; Department of the Interior, United States Bureau of Reclamation and Bureau of Indian Affairs, *1999 Intermediate Seed Examination Report, Ninepipe Dam, Flathead Indian Reservation, Montana* (Denver, CO., May 2000), 1.

Reclamation designed the Polson division as a “pumping proposition” to service the town of Polson and land east of Flathead Lake via storage in Polson and Twin Reservoirs and supplemental pumping from the Flathead River. The designs for Polson included a seventy acre reservoir with a capacity of 1,700 acre-feet impounded by an earthfill dam. Plans for Twin involved an earthfill dam holding a seventy acre reservoir with a capacity of 937 acre-feet. The proposal for the 107,000-acre existing Flathead Lake called for the Newell Dam constructed of concrete with a capacity of 1.8 million acre-feet and a 1,000-foot spillway. In 1908, surveyors located canals to irrigate 3,000 acres of land near Polson. Engineers proposed the use of water power, developed on Flathead River, for pumping water to the division and drew up plans for a power plant on the south side of Flathead Lake at the Newell dam location.<sup>31</sup>

From June to December, 1909, Reclamation sunk a shaft near the intake end of the Newell Tunnel, and then commenced the work on the tunnel. In the next six months, work only progressed a distance of 418 linear feet. Work proceeded slowly due in large part to the ineffectiveness of using hand drills to drive through the hard limestone, metamorphic shale, and “quartzitic” sandstone. According to project histories, Reclamation completed the tunnel on December 27, 1911, with a length from the west portal to shaft center of 1,703 feet. Driving of the tunnel progressed at a pace of 2.25 feet per day, required 8,462 miner days of work, and used up 262,325 drill bits. In reality, to fully complete the tunnel, crews still needed to drill 100 feet from the shaft to the Flathead River.<sup>32</sup>

In 1912, government crews constructed a two-mile canal from the Pablo Feeder Canal to connect with the Polson Canals and 1.33 miles of sublaterals, including structures to irrigate

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31. *Flathead Project History, 1910*, vol. 1, 33; *Flathead Project History, 1911*, vol. 6, 2-3; *Eighth Annual Report*, 93; *Eleventh Annual Report*, 93-4.

32. *Ninth Annual Report*, 144-5; *Flathead Project History, 1911*, vol. 6, 64-5, 68-70.

1,000 acres. After that time, work stalled on the Polson Division until problems erupted in 1915. When Reclamation put the North Pablo Reservoir into use, sink holes developed with a subsequent loss of stored water. The reservoir water seeped into the ground and precipitated rises in the water level at the town of Polson. The seepage, combined with heavy precipitation, caused water to issue from the ground and cover an area of forty acres inside and on the outskirts of town. The water froze during the winter, then melted in the spring and flooded city streets. Due to the problems, the chief of Construction allotted funds to construct a drainage system. In 1916, government forces completed a 7,100-foot timber drainage system. Reclamation did not conduct any other work on the reservoirs and dams for the Polson unit while they controlled the Flathead Project.<sup>33</sup>

From 1914 to 1916, a “local entrepreneur” constructed Hell Roaring Dam, located six miles east of Polson, as an earth and rockfill timber crib dam. The dam controlled a drainage area of 5.3 square miles and had a capacity of forty acre-feet. A local man built the thirty-foot high and 249-foot long dam to provide power for his flour mill operation. Reclamation had no involvement in the project.<sup>34</sup>

### **Camas Division**

The Camas division was the last section of the Flathead Project undertaken by Reclamation. Plans for Camas included the initial proposals for the Little Bitterroot division. Reclamation officials envisioned five major reservoirs and accompanying features for Camas. The first would be an earthfill dam on the existing 3,000-acre Little Bitterroot Lake with a

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33. *Twelfth Annual Report*, 114; *Flathead Project History, 1915*, vol. 16, 118-24; *Fifteenth Annual Report*, 560; *Sixteenth Annual Report*, 373.

34. Because the Hell Roaring Dam was a private enterprise, no historical data exists on its construction either in the Reclamation annual reports or the project histories. Department of the Interior, United States Bureau of Reclamation and BIA, *Seed Report on Hell Roaring Dam, Flathead Agency Irrigation Division, Montana* (Denver, CO., July 1992). Section A, 1 and Section C-1, 1.

capacity of 6,000 acre-feet and a spillway twenty-feet long. The plans for the 480-acre Hubbard Reservoir included a loose rock and earthfill dam, a fifty-foot spillway, and a capacity of 20,000 acre-feet. Designs for Dry Fork involved a 250-acre reservoir with an earthfill dam, a 100-foot spillway, and a capacity of 1,918 acre-feet. Reclamation planned an earthfill dam for the 901-acre Big Draw Reservoir with a 100-foot spillway and a capacity of 9,330 acre-feet. Finally, the conception of the Camas division included the 160-acre Dog Lake Reservoir with a loose rock and earthfill dam and a capacity of 3,200 acre-feet. Similar to the delay in starting work on the division, the goals for the area took a long time to materialize.<sup>35</sup>

Reclamation began work on the Camas division in 1916, eight years after the commencement of the Flathead Project. On October 12, government forces started the Little Bitterroot Dam, located twenty-five miles west of Kalispell. The lake had an area of 3,000 acres and a drainage of twenty-seven square miles. The outlet on the south side of the lake marked the beginning of the Little Bitterroot River. The construction consisted of an earth dike 800 feet long, containing 6,000 cubic yards of embankment and impounding the lake with a capacity of 9,000 acre-feet. Government crews also began the Camas A canal with a diversion dam, the Camas Dam, of curved masonry construction with a radius of 100 feet in the Little Bitterroot Canyon about 20 miles south of main dam.<sup>36</sup>

In 1917, Reclamation completed the Camas A diversion dam (Camas Dam), lined tunnel, flumes, lined section, laterals, and earthwork on the canals. Government forces began work on Hubbard Dam, located on the proposed Hubbard Reservoir about fifteen miles south of Little Bitterroot Lake, but a lack of sufficient appropriations forced them to quickly suspend operations. In 1918, workers raised the crest of Little Bitterroot Dam and enlarged the river

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35. *Tenth Annual Report*, 122; *Eleventh Annual Report*, 93-4; *Flathead Project History, 1911*, vol. 6, 1-3.  
36. *Flathead Project History, 1916*, vol. 18, 60, 126, 135; *Sixteenth Annual Report*, 372.

channel, increasing the reservoir capacity from 9,000 to 18,000 acre-feet.<sup>37</sup> The next year, most of the work focused on the construction of canals and laterals for irrigating a total of 9,000 acres. In 1920, Reclamation began Dry Fork Dam and Reservoir, for containing runoff from Dry Fork Creek, to supplement storage for the Camas division. Reclamation completed Dry Fork, located about ten miles south of the diversion dam and 2 miles west of the town of Lonepine, in 1921. Immediately thereafter, engineers made plans to raise the dam five feet to increase the storage capacity to 3,375 acre-feet, but never accomplished the proposal.<sup>38</sup>

In 1922, Reclamation commenced Hubbart Reservoir and Dam once again, after a six year layoff. The following year, government forces completed construction of a variable radius arch concrete dam, replacing the initial proposal for a loose rock and earthfill type. Revisions also altered the capacity to 12,000 acre-feet with a 265-foot spillway. The construction of Hubbart, in many ways, typified construction on the Flathead Project; it took many years from design to completion, included adjustments to the specifications, and suffered from slowness of funding. During its tenure on the project, Reclamation never conducted any work on Big Draw or Dog Lake reservoirs and dams.<sup>39</sup>

### **Irrigation and Crops**

The process of irrigation and crop production is a rather dry topic, but it reveals the extent of progress made on a project. Throughout the term of Reclamation control, irrigation

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37. *Seventeenth Annual Report*, 421; *Flathead Project History, 1917*, vol. 21, 16; Department of the Interior, United States Bureau of Reclamation, *Eighteenth Annual Report of the Reclamation Service, 1918-1919* (Washington, D.C.: Government Printing Office, 1919), 442-3; *Flathead Project History, 1918*, vol. 24, 18.

38. Department of the Interior, United States Bureau of Reclamation, *Nineteenth Annual Report of the Reclamation Service, 1919-1920* (Washington, D.C.: Government Printing Office, 1920), 446; *Flathead Project History, 1920*, vol. 28, 48-9, 56-7; *Flathead Project History, 1921*, vol. 29, vii; Department of the Interior, United States Bureau of Reclamation, *Twentieth Annual Report of the Reclamation Service* (Washington, D.C.: Government Printing Office, 1921), 463-4.

39. *Flathead Project History, 1922*, vol. 30, 2, 33-4; Department of the Interior, United States Bureau of Reclamation, *Twenty-Second Annual Report of the Reclamation Service, 1922-1923* (Washington, D.C.: Government Printing Office, 1923), 144-5.

water went primarily to wheat, alfalfa, hay, oats, and pasture, indicating a trend toward production for the high prices of grain and livestock forage during the war. In 1910, farmers began irrigation in the Jocko, Mission, and Post divisions, covering an area of 1,500 acres with a possible irrigable area of 10,000 acres. The area for which water was available and the acres irrigated grew gradually from that point. In 1913, irrigation began in Polson and Pablo divisions, and by 1915 project farmers irrigated a total of 3,241 acres. By the end of Reclamation's work, the Flathead Project provided water to over 30,000 acres. The trends in irrigation indicated some major complications with the project. In spite of the admirable increase in area irrigated, the project could have actually irrigated 105,000 acres.<sup>40</sup>

The alarming disparity between possible irrigation and acres provided with water characterized the Flathead Project. The question is why? Project officials suggested one reason, contending that the farmers knew "very little about the value of irrigation or the kind of crops necessary to produce [the] best results." In other words, the farmers were simply not requesting water because they did not know how to utilize it, or because they depended on dryland farming techniques that years of brutal work in the arid West had taught them well. Another possible reason arose from the fact that the number of farmers and ranchers that settled on project land remained low in comparison to the amount of water. Year after year, project officials complained that the one thing Flathead needed to be successful was "real farmers." The situation prompted one official to conclude, "The land is here and, to a greater extent each year, water is available, but the farmers as a whole have not yet grasped the fact that the latter is essential to the maximum development of the former." Depressed markets after the war also

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40. *Ninth Annual Report*, 143; *Flathead Project History, 1911*, vol. 6, 99; *Twelfth Annual Report*, 113; *Flathead Project History, 1915*, vol. 16, 109; *Flathead Project History, 1916*, vol. 8, 159; *Flathead Project History, 1918*, vol. 24, 175; *Twenty-Second Annual Report*, 144; *Flathead Project History, 1922*, vol. 30, 3.

inhibited water usage. But, perhaps the most significant issue, at least in terms of original intent, was that Indians simply had not refashioned themselves into the model farmer envisioned by the Indian Service. Many Indians simply sold or leased their land to whites, and lived off the fees. Others simply did not use the water based on the claim that they had a priority to all the water on the reservation and should not have to bear the burden of financing a project for non-Indian users. They argued that Indian Service funds intended to benefit Indians should have not instead gone to provide irrigation for Anglo settlers. For them, whether tribal members used water for irrigation or any other purpose was a moot point; treaties established that the water was Indian water.<sup>41</sup>

### **Summary Evaluation**

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). This included 863 miles of canals, 15 miles of drains, 75,957 feet of pipe, 24 miles of roads, 6,446,881 cubic yards of material excavated, and the placement of over 132,000 yards of riprap, paving, and concrete. Reclamation accomplished a considerable amount of work with a final construction price tag of \$5.53 million dollars, and an operation and maintenance cost of \$534,430. By an act of Congress on February 14, 1920, Reclamation imposed the first construction charge on project land, totaling \$0.50 per acre irrigated. At the end of Reclamation control, it had collected \$253,273 in construction repayments.<sup>42</sup>

### **Post-Construction**

#### **Construction By Indian Service and Completion**

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41. For example, in 1921 Indians only owned 56 of the 1,105 farms. *Flathead Project History, 1918*, vol. 24, 20-2; *Flathead Project History, 1920*, vol. 28, 5-6; *Flathead Project History, 1921*, vol. 29, 1, 61-2, 155-6, 159; *Flathead Project History, 1919*, vol. 26, 137.

42. *Flathead Project History, 1923*, vol. 31, 1-3, 19, 110; *Flathead Project History, 1920*, vol. 28, 4.

The Indian Service gained control of the Flathead Project in 1924 and conducted construction and improvements until its completion in 1963. Unfortunately, the Indian Service did not continue the tradition of writing project histories, providing, in many cases, for an obscure picture of those years. When completed, the project included 110,500 irrigable acres, 1,184 miles of canals, laterals, and distribution systems, 3 pumping plants, 15 storage reservoirs, and a power plant on the dam at Flathead Lake.<sup>43</sup>

Ninepipe Dam, completed in 1923 by Reclamation, is a homogenous earthfill dam with a structural height of 38 feet, a crest length of 2,800 feet, a crest width of sixteen feet, and a crest elevation of 3,018 feet. Located offstream, five miles south of Ronan, the dam and four dikes along the reservoir rim impound a reservoir with 15,150 acre-feet. The only release facility is the outlet works with a discharge capacity of 740 cfs. In 1999, the Bureau of Indian Affairs (BIA) classified it as a “high hazard” due to a lack of emergency preparedness in case of dam failure during flood conditions.<sup>44</sup>

Hell Roaring Dam is located on Hell Roaring Creek six miles east of Polson. Hell Roaring Dam was originally constructed from 1914-1916 as an earth and rockfill timber crib dam, and in 1964, the Indian Service buttressed it with earthfill slopes. The original timber crib dam had a crest length of 249 feet, width of 16 feet, a crest elevation of 100 feet, and a structural height of 30 feet. The current dam has a crest length of 313 feet and an elevation of 103.5 feet. The spillway consists of an excavated channel along the north rim of the reservoir and has a discharge capacity of 480 cfs. The outlet works include a two-foot diameter pipe with a capacity

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43. *Appendix to Flathead Irrigation Project Completion Report*, 1-3; Department of the Interior, Office of Indian Affairs, *Report On the Conditions Found To Exist On the Flathead Irrigation Project, Montana*, vol. 1, June 1946, 3-4.

44. United States Bureau of Reclamation and BIA, *1999 Intermediate Seed Examination Report, Ninepipe Dam, Flathead Indian Reservation, Montana* (Denver, CO., May 2000), 1.



of 43 cfs, and an eighteen-inch diameter pipe that delivers water to a powerplant located downstream.<sup>45</sup>

McDonald Dam is located on Post Creek ten miles northeast of St. Ignatius. Reclamation constructed the dam from 1917 to 1920. The reservoir has a capacity of 8,200 acre-feet. McDonald Dam is an earthfill embankment with a maximum height of 48 feet, crest width of 21 feet, crest length of 1,480 feet, and crest elevation of 3,604 feet. The dam includes a concrete lined, open-channel spillway and a concrete-lined outlet works conduit. The spillway has a discharge capacity of 75 cfs, and the outlet works has a discharge capacity of 175 cfs.<sup>46</sup>

Little Bitterroot Dam is located at the south end of Little Bitterroot Lake, thirty miles west of Kalispell and north of the northern border of the Flathead Reservation. Reclamation built the dam in 1916-17 and enlarged it in 1918. The dam is an 800-foot long zoned earthfill embankment with a crest width of 31 feet and a height of 17 feet. Upon original construction, the dam was twenty feet wide with a crest elevation of 3,912 feet, and the enlargement in 1918 raised the crest 1 foot and widened the crest from 20 to 31 feet. The reservoir serves as the origin for the Little Bitterroot River and has a capacity of 26,400 acre-feet. The release capacity of the concrete outlet works is 105 cfs. In 1993, engineers classified the dam as “conditionally poor” because of uncertainties in dam strength, plasticity, and density. They also regarded it as a high hazard because failure of the dam would jeopardize the lives of people who live below the

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45. Sources on the time frame of the modifications are missing. United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report On Hell Roaring Dam, Flathead Agency Irrigation Division, Montana* (Denver, CO., July 1992), 1.

46. United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report On McDonald Dam, Flathead Irrigation and Power Project, Montana* (Denver, CO., July 1985), 1, 9.

dam and the lives of people traveling along roads. The *1999 Intermediate Seed Report* maintained the high hazard rating.<sup>47</sup>

Lower Dry Fork Dam (originally Dry Fork Dam) is on Dry Creek, a tributary of the Little Bitterroot River, about one mile west of Lonepine, Montana. Reclamation built the dam in 1921, and the Indian Service raised it 11.5 feet in 1933-1934 and widened the crest in 1964. The reservoir has a storage capacity of 3,860 acre-feet and supplies irrigation water to the Camas Canal. The dam is a earthfill structure with a structural height of 29.5 feet, crest width of 34 feet, and a crest length of 2,700 feet. Lower Dry Fork Dam has an excavated spillway about 3.5 feet below the dam crest with a length of 600 feet, but an access road passes through this area initially designated as the spillway. The outlet works has a discharge capacity of 100 cfs. The dam is classified as a high hazard due to potential inundation of residences downstream if the dam were to fail.<sup>48</sup>

Built by Reclamation in 1923, Hubbart Dam is a variable-radius, concrete arch dam constructed across the Little Bitterroot River, about 25 miles southwest of Kalispell, Montana and 15 miles downstream from Little Bitterroot Dam. Hubbart Reservoir has a storage capacity of 12,000 acre-feet, a structural height of 130 feet, a crest length of 503 feet, and a width of five feet. Possible spillway discharge is 5,000 cfs and a maximum outlet works capacity of 260 cfs.<sup>49</sup>

Kicking Horse Dam, Dikes, and Reservoir are located on the Flathead Reservation, in Lake County, 5 miles southeast of Ronan, Montana. The reservoir is an offstream storage facility and is situated in the Mission Valley on the west side of the Mission Mountains. The

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47. United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report on Little Bitterroot Dam, Flathead Agency Irrigation Division, Montana* (Denver, CO., June 1993), 1.

48. United States Bureau of Reclamation and Bureau of Indian Affairs, *1999 Intermediate Seed Examination Report, Lower Dry Fork Dam, Flathead Indian Reservation, Montana* (Denver, CO., January 2000), 1-2.

49. United States Bureau of Reclamation and Bureau of Indian Affairs, *1998 Intermediate Seed Examination Report, Hubbart Dam, Flathead Indian Reservation, Montana* (Denver, CO., May 1999), 1-2.

Indian Service constructed the dam in 1930. The reservoir is fed by the Kicking Horse Feeder Canal and the South Crow Feeder Canal. The storage capacity of the reservoir is 8,400 acre-feet at an elevation of 3,062 feet. The dam is a homogenous earthfill structure with a crest length of 5,220 feet, crest width of 16 feet, and a height of 29 feet. Two dikes flank the main embankment on the west and north and have a combined length of 2,225 feet and a crest width of 10 feet. The overall safety classification for the dam is “conditionally poor” because of the “inadequacy of the facility during extreme hydrological events.” At this time, the problems have not been corrected.<sup>50</sup>

Tabor Dam and Reservoir (originally a natural lake named St. Mary’s Lake) is in Lake County and serves as one of the principal features of the Mission Division. The dam and reservoir impound flows from Dry Creek and diverted flows from the Jocko River. Tabor Dam and North Dike are homogenous earthfill embankments comprised of gravel, clay, and rock. The embankments were constructed to crest elevation 4,011 feet in 1930 and to their present elevation of 4,033 feet in 1940. Crest lengths of the dam and dike are approximately 535 and 1,700 feet, respectively. The maximum height of the dam above stream is approximately 53 feet, and the height of North Dike is 35 feet. The crest width of the embankments is 20 feet. Structures include a spillway through the left abutment of the dam and a river outlet works through the ridge separating the dam and the North Dike. The maximum discharge capacity ranges from 400 to 1,200 cfs. Inflow to the reservoir is provided by runoff from an 11.5-square mile drainage basin, and supplemental inflow is conveyed from the Jocko River via the Tabor Feeder Canal designed for a capacity of 400 cfs. Storage capacity of the reservoir is 23,090

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50. United States Bureau of Reclamation and Bureau of Indian Affairs, *1999 Intermediate SEED Examination Report, Kicking Horse Dam, Flathead Indian Reservation, Montana* (Denver, CO., April 2000), 1; United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report on Kicking Horse Dam, Flathead Irrigation and Power Project, Montana* (Denver, CO., April 1989), 1.

acre-feet, an increase of 10,970 acre-feet above the original capacity of the natural lake. BIA recently proposed work to enlarge and improve the dam, including new outlet works, because the dam size has become inadequate to provide enough irrigation for downstream property and portions of the dam structures have deteriorated to a dangerous level.<sup>51</sup>

Twin Lake (Turtle) Dam is a homogenous earthfill embankment structure located about 4 miles southeast of Polson. The dam was constructed in 1931-1932 to provide additional storage in the existing Twin Reservoir. The reservoir is located offstream and is supplied by Hell Roaring Creek via the Twin Feeder Canal. The embankment consists of two major sections, the dam and dike, with each having a height of twenty feet and a crest elevation of 3,100 feet. The embankment has a crest width of 30 feet and a crest length of 2,340 feet. The reservoir has a capacity of 899 acre-feet and is utilized for irrigation storage. The only release facility is a cut-and-cover concrete outlet works pipe constructed beneath the dike section with a discharge capacity of 23 cfs. The dam is rated as a “significant hazard” due to limitations in emergency preparedness plans.<sup>52</sup>

Crow Dam is a homogenous earthfill structure with a structural height of 99 feet, a crest length of 900 feet, and a crest elevation of 2,882 feet. The dam is located on Crow Creek seven miles southwest of Ronan. The reservoir impounds 10,350 acre-feet and is principally used for irrigation storage. The dam was originally constructed in 1933 and modified in 1940 to correct seepage and stability problems. The spillway consists of a 180-foot long uncontrolled side-channel, a 210-foot long, 13-foot diameter concrete-lined tunnel underneath a road that crosses the crest of the dam, and a concrete-lined chute and stilling pool. The discharge capacity of the

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51. Department of the Interior, United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report on Tabor Dam, Flathead Irrigation Project, Montana* (Denver, CO., July 1984), 1; *Tabor Dam Modification (Safety Of Dams–SOD Report), Flathead Indian Reservation, Montana* (Denver, CO., February 2001), 1.

52. United States Bureau of Reclamation and Bureau of Indian Affairs, *1999 Intermediate Seed Examination Report, Twin Lake (Turtle) Dam, Flathead Indian Reservation, Montana* (Denver, CO., May 2000), 1-2.

spillway is approximately 4,500 cfs via the tunnel section. The outlet works has a possible discharge capacity from 400 to 1,000 cfs. In 1996, engineers classified the dam as a “high hazard” due to the possibility of placing 200 lives in danger at residences along the Flathead River and in downstream communities at Agency and Dixon if the dam failed.<sup>53</sup>

Mission Dam was constructed in 1935 across Mission Creek, about four miles east of St. Ignatius, Montana. Mission Reservoir has a storage capacity of 8,300 acre-feet. The dam is a homogenous earthfill embankment with a structural height of 83 feet, a length of 1,850 feet, a width of 20 feet, and a crest elevation of 3,418.7 feet. The spillway is an uncontrolled, reinforced concrete section with spillway discharge dissipated in a stilling basin before release into Mission Creek. In 1968, the crest was raised by constructing a concrete wall across the spillway to serve as a weir. The spillway chute is concrete lined and has an elevated portion that crosses the Pablo Feeder Canal upstream from the concrete-lined stilling basin. The spillway discharge capacity is approximately 12,000 cfs. The outlet works has a capacity of about 1,000 cfs. Reservoir storage capacity is about 7,400 acre-feet. Inflow to the reservoir is provided by a 14.5-square mile drainage basin on the western slope of the Mission Mountain Range.<sup>54</sup>

Constructed by the Indian Irrigation Service in 1937, Jocko Dam is located on Jocko River. The lake at Jocko Dam is partially formed by a natural barrier consisting of a glacial moraine and landslide debris. The man-made portion is an earthfill embankment with a crest elevation of 4,360 feet, is 310 feet long, twenty feet wide, and has a structural height of twenty feet. The reservoir stores between 6,380 and 8,869 acre-feet of water and is fed by releases from

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53. United States Bureau of Reclamation and Bureau of Indian Affairs, *1996 Intermediate Seed Examination Report, Crow Dam, Flathead Indian Reservation, Montana* (Denver, CO., 1996), 1-2.

54. United States Bureau of Reclamation and Bureau of Indian Affairs, *1998 Intermediate Seed Examination Report, Mission Dam, Flathead Indian Reservation, Montana* (Denver, CO., May 1999), 1-2; United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report on Mission Dam, Flathead Irrigation and Power Project, Montana* (Denver, CO., September 1985), 1.

Black Lake Dam, located one mile upstream on the Jocko River. The main appurtenant structure is the reinforced concrete outlet works located 93 feet below the crest of the dam. The overall safety classification of the dam is poor because of the possibility of embankment failure in a probable maximum flood, and engineers assigned it a “high hazard” rating because of the potential for loss of life in the flood plain below the dam if it failed.<sup>55</sup>

Upper Dry Fork Dam is located on Dry Fork Creek, a tributary of the Little Bitterroot River, about four miles northwest of Lonepine, Montana. The Indian Service constructed the dam in 1940. The reservoir has a storage capacity of 2,815 acre-feet and the dam is an earthfill embankment with a structural height of 40 feet, hydraulic height of 29 feet, crest length of 2,000 feet, crest width of 20 feet, and a crest elevation of 2,935 feet. Two parallel earthfill dikes (East Dike and Parallel Dike) are located in a saddle area at the left rim of the reservoir. The East Dike, the upstream dike, normally impounds water while the Parallel Dike would only impound water in the event of the East Dike’s failure. The dam contains an “ungated,” grass-lined spillway channel about eighty feet wide with a discharge capacity of 1,650 cfs. The outlet works extend through the middle of the dam and has a maximum discharge capacity of 160 cfs.<sup>56</sup>

Black Lake Dam is located on the Jocko River twenty miles east of Arlee, Montana. The dam was constructed in 1967 as a replacement for Upper Jocko Dam which failed on May 20, 1956. The dam has a storage capacity of 5,200 acre-feet. Black Lake Dam is a zoned earthfill structure with a hydraulic height of 46 feet, a structural height of 76 feet, a crest width of 20 feet, and a crest length of 544 feet. In 1986, Reclamation officials classified the dam as a high-hazard facility because the failure of the dam could potentially cause Jocko Dam, 1.5 miles downstream,

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55. United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report On Jocko Dam, Flathead Irrigation and Power Project, Montana* (Denver, CO., June 1988), 1-3.

56. United States Bureau of Reclamation and Bureau of Indian Affairs, *1998 Intermediate Seed Examination Report, Upper Dry Fork Dam, Flathead Indian Reservation, Montana* (Denver, CO., August 1990), 1-2.

to overtop and fail, inundating a variety of public recreation facilities and most of the community of Ravalli, Montana.<sup>57</sup>

In 1909, Reclamation began work on the Newell Tunnel at Kerr (Flathead) Dam and continued for approximately two years before, delaying it until the project needed power for pumping water. In 1926, Congress appropriated funds for the Indian Service to draw up plans for the construction of a small power plant. However, the Indian Service authorized a license for the Rocky Mountain Power Company to build Kerr Dam and generating station. The terms of the license stipulated that the power company pay the Confederated Salish and Kootenai Tribes approximately \$180,000 per year for use of the site. The power company also agreed to supply the project with approximately 9,000 to 15,000 horsepower of electrical energy for pumping and other purposes at rates varying from one to 2 ½ mills per kilowatt hour. The Flathead Power and Pumping Plant, taking water from the Flathead River in the Mission division, is one of three on the project, lifts water 335 feet from the Flathead River, and includes three pumping units with a capacity of 216 cfs. The Crow Creek Pumping Plant, located along Crow Creek in the southern end of the Mission division, lifts water 43 feet from Crow Creek, generates 150 horsepower of energy, and has a capacity of 24 cfs. Revais Pumping Plant lifts water 79 feet from a supply canal in the Jocko division at the southern end of the reservation, generates 115 horsepower of energy, and has a capacity of 10 cfs.<sup>58</sup>

Since 1992, BIA has invested \$22 million in the rehabilitation and betterment of the Flathead Project, particularly through its Safety of Dams Program which is designed to assess problematic dam structures and identify future project improvements. The main concern of these

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57. United States Bureau of Reclamation and Bureau of Indian Affairs, *Seed Report on Black Lake Dam, Flathead Irrigation and Power Project, Montana* (Denver, CO., May 1986), 1.

58. *Report On the Conditions Found To Exist On the Flathead Irrigation Project, Montana, 3-4; Appendix to Flathead Irrigation Project Completion Report, 3.*

studies focuses on the deterioration of structures caused by aging. In May, 2000, Sharon Blackwell, the Acting Deputy Commissioner of Indian Affairs, testified that “efficient management of BIA irrigation operations continues to be a formidable challenge” because of the “antiquated” nature of equipment and structures. Thus, in many ways, the Flathead Project can be considered an ongoing and continually evolving exercise in reclamation work.<sup>59</sup>

### **Settlement of Project Lands**

In 1904, Congress approved allotment in severalty for the Flathead Indian Reservation, providing for surveying, distribution of land to tribal members, and the “disposal” of surplus lands to white settlers. The same act provided for the surveys and construction of the irrigation works of the Flathead Project for benefit of both Indians and whites. As early as 1910, project officials reported that settlers had rapidly taken up land and a “general land hunger [had] caused many attempted filings on lands not officially open, including forest lands, reservoir land, etc.” Slow progress on certain portions of projects hampered settlement. In 1914, the project historian indicated, “Where the prospects for water in the near future are poor [the settlers] are considerably discouraged and many have left their homesteads. Statistics furnished by the Resident Commissioner indicate that in the Little Bitter Root Valley four-fifths of the entrymen are reported to have left their claims.” However, by 1916, the rapid sale of 56 allotments of “deceased and incompetent Indians” evidenced an increasing desire for land ownership by white settlers.<sup>60</sup>

However, for the time being the majority of the land remained in Indians hands. Allotted land accounted for 93,500 acres, white settlers had filed on 47,000 acres, and the state of

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59. “Testimony of Sharon Blackwell.”

60. *Flathead Project History, 1910*, vol. 1, 10; *Flathead Project History, 1910*, vol. 4, 65; *Flathead Project History, 1914*, vol. 14, 81; *Flathead Project History, 1916*, vol. 18, 177.



Montana owned 11,000 acres. During World War I, the completion of railroad lines and the demand for grain to feed the “doughboys” overseas impelled a large number of white farmers to rent land on short terms leases hoping to make a quick fortune. Flathead officials also used an interesting method of record keeping on the status of inhabitants that revealed their attempts to measure progress and efficiency. In a typical project history, they listed the number of people under four categories: “farmers inexperienced in farming”; “farmers experienced in farming”; “farmers experienced in humid farming”; and, “farmers experienced in irrigation farming.” Unfortunately, the fewest number consistently filled the experienced in irrigated agriculture section. Despite these fluctuations, hurdles, and peculiarities, in 1923 the irrigation status of lands on the Flathead Project reached the state that would characterize them to the present time—predominantly white. In that year, whites owned 786 farms with 18,495 acres, and Indians owned 27 totaling 1,200 acres with half of that rented to white tenants. In 1963, when the BIA completed the project, non-Indians owned over 95 percent of the 110,000 irrigable acres.<sup>61</sup>

### **Project Benefits and Use of Project Water**

Reclamation and the Indian Service initially designed the Flathead Project as fully dedicated to irrigation purposes, but the project now serves as a multi-purpose water resource development. Currently, all existing reservoirs provide irrigation water for the project. Flathead Lake and Tabor, Jocko, Upper Dry Fork, Kicking Horse, Mission and Black Lake Reservoirs also provide a wide array of recreational activities, including fishing, boating, camping, and picnicking. The National Bison Range, at the southern end of the Flathead Reservation, and

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61. Tracking the transfer of land from Indians to non-Indians is a difficult task. Information for the final status of ownership of all land on the project in 1923 was unavailable in the sources. *Flathead Project History, 1916*, vol. 18, 179; *Flathead Project History, 1917*, vol. 21, 225; *Flathead Project History, 1919*, vol. 26, 136-7; *Flathead Project History, 1918*, vol. 24, 218; *Flathead Project History, 1923*, vol. 31, 180-1; Department of the Interior, Bureau of Indian Affairs, *Appendix to Flathead Irrigation Project Completion Report: Agricultural Economy and Economic and Financial Analysis*, February 1963, 7.

Flathead Lake draw thousands of visitors each year for wildlife viewing and sightseeing activities.

In 1988, BIA authorized a contract with the Confederated Salish and Kootenai Tribes to operate the power division in accordance with the Indian Self-Determination and Education Assistance Act (Public Law 93-638). The tribes are responsible for the operation and maintenance of 1,473 miles of distribution lines, 172 miles of high voltage transmission lines, and twenty electrical substations that serve 23,000 people on the reservation. On October 1, 1991, based on tribes' ongoing success with managing the power division, the Federal Government renewed the contract for an indefinite term.<sup>62</sup>

### **Conclusion**

On the final map drawn up by Reclamation for the Flathead Project, a warning tucked into the bottom corner stated, "The canals and reservoirs shown on this map as proposed may or may not be constructed and their location or construction is subject to change or abandonment." In many ways, nothing was more true. The Flathead Project included an immense amount of work that posed a challenging task for Reclamation. The grand scope of the project not only beleaguered engineers, workers, and residents, but, as an Indian Project, forced them to face the difficulty of reconciling the goals of different cultures and different federal bureaus.

Passing judgement on the success and benefits of the Flathead Irrigation Project is a difficult task, and perhaps an impossible one. Caught in the trap between the intentions and beliefs of past generations and contemporary views, it may be best to let Reclamation speak for itself. Nearing the end of its term on the project, one Reclamation official concluded, "The project as a whole is far from prosperous...[and] the majority [of farmers] are much in debt and

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62. The only current source found that mentioned the uses of project water were the Seed Reports on the various dams and reservoirs, see endnotes 43-56. "Testimony of Sharon Blackwell."

are paying high rates of interest on mortgages and loans.” In one sense, a more striking indictment could not be leveled against the project. However, hindsight permits us to see the endeavor for what it was and partially allay the harshness of this analysis. The long-delayed completion of the Flathead Project by the Indian Service reveals that Reclamation simply did not have the adequate time or funds to accomplish its goals. In a similar fashion, the time that has passed since Reclamation’s involvement allows us to understand how formidable a task it was to bring water to Indian lands.<sup>63</sup>

#### **About the Author**

Garrit Voggesser was born and raised in Colorado. He spent much of his time outdoors, hiking, camping, and with a fishing rod and a box of flies along the many rivers of the Rocky Mountain West. He received a BA in history from Colorado College in 1996, an MA in history from Utah State University in 2000, and is currently working on a Ph.D. in environmental and Native American history with a focus on the American West at the University of Oklahoma.

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63. *Flathead Project History, 1922*, vol. 30, 5-6.

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All project histories reside in the Records of the Bureau of Reclamation, Record Group 115, and all BIA records reside in the Records of the BIA, Record Group 75, at the National Archives and Records Administration—Rocky Mountain Region (Denver, Colorado). After the first citation, all subsequent references to Reclamation histories will be referred to by title and year only, and BIA sources will be denoted by title and RG 75 only.

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