

PROPOSED AGREEMENT
BETWEEN THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION,
THE UNITED STATES,
ACTING THROUGH THE BUREAU OF INDIAN AFFAIRS
OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,
AND THE FLATHEAD JOINT BOARD OF CONTROL,
OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION
DISTRICTS.

January 17, 2013

Negotiators for the Confederated Salish and Kootenai Tribes (CSKT) the Flathead Joint Board of Control (FJBC), and the United States have developed a proposed Flathead Indian Irrigation Project Water Use Agreement for consideration by the organizations they represent. The FJBC Board will conduct a vote by its membership on the proposed agreement. FJBC meetings are scheduled on Monday, February 4th at the Arlee Community Center at 1 pm and the Saint Ignatius Senior Center at 6 pm and on Tuesday, February 5th in Hot Springs at the Lone Pine Hall at 1 pm and in Ronan at 6 pm (location to be determined).

Information on the meetings and the election and copies of the proposed agreement are available at the FJBC office 406-745-2090 and the following websites

Montana: <http://www.dnrc.mt.gov/rwrcc/Compacts/CSK1/Default.asp> and

CSKT: http://www.cskt.org/ir/nrd_waternegotiations.htm

For more information, contact Jon Metropoulos, attorney for the Flathead Joint Board of Control at (406) 442-0285 or Seth Makepeace, Confederated Salish and Kootenai Tribes at (406) 675-2700 ext 6255

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I PREAMBLE

THIS AGREEMENT is entered into pursuant to the Treaty of Hellgate, July 16, 1855 12 Stat 975 (1859), numerous Federal enactments relating to the Flathead Indian Reservation and the Flathead Indian Irrigation Project located there, including but not limited to the Act of April 23, 1904, Public Law 58-159 33 Stat 302 (1904) (the 1904 Act), the Act of May 29 1908, Public Law 60-156, 35 Stat 444 (1908) (the 1908 Act), the Act of May 10, 1926, 44 Stat 453, 464 (1926), the Act of May 25, 1948, Public Law 80-554, 62 Stat 269, (1948) (the 1948 Act), Title 85, Chapter 7, Parts 1 through 22, Mont Code Ann (2011) and Article VI Section 1(c) of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Nation, which was approved by the Secretary of the Interior on October 28, 1935 This Agreement includes Appendices A, B, and C, which are incorporated by reference as integral to this water use Agreement The rights of all parties to this Agreement are subject to the limitations of statutory regulatory, or other legal obligations of the parties

II PARTIES

THIS AGREEMENT is entered into by and between the CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION (CSKT), in its own right and on behalf of its enrolled membership, the UNITED STATES OF AMERICA for itself and in its capacity as trustee for the Confederated Salish and Kootenai Tribes, allottees and CSKT Tribal members, acting through the Secretary of the Department of Interior (Department), and THE FLATHEAD JOINT BOARD OF CONTROL (FJBC) of the Flathead Mission, and Jocko Valley Irrigation Districts (collectively, the Parties)

III PURPOSE OF THE AGREEMENT

- 1 This Agreement is entered into as a component of the settlement of the rights to use water for the FIIP and for Instream Flows as portions of the comprehensive settlement of the water rights claims of the CSKT of the Flathead Reservation reflected in the Compact This Agreement and the Compact to which it is an Appendix also settle the rights of irrigators served by the FIIP and represented by the FJBC to receive irrigation water from the Project
- 2 The terms of settlement of the CSKT water rights and that portion of the Federal reserved water rights of the United States pertaining to the Flathead Indian Reservation are contained in a Water Rights Compact entered into between the United States, the State of Montana, acting through the Montana Reserved Water Rights Compact Commission, and

the CSKT The Compact will become effective upon ratification by Montana, the United States, and the CSKT This Agreement will be appended to the Compact

- 3 This Agreement and the Compact specify the terms under which the United States and the FJBC agree to withdraw and cease prosecution or defense of all claims to water whether arising under Federal or State law, held in their names and filed in the Montana General Stream Adjudication, and whatever permits and other rights to the use of water recognized under State law that are held in their names for use on lands served by the FIIP In exchange for withdrawal of all such water rights and claims, the CSKT commit to the use for irrigation and Incidental Purposes of the water right identified in Article III C 1 a of the Compact (identified as the FIIP right) to be delivered by the Project Operator pursuant to the terms and limitations of this Agreement, including the Appendices
- 4 As set forth in the Compact, the water the CSKT shall make available to serve the FIIP under this Agreement is a portion of the CSKT Federal reserved water right recognized in the Compact with a priority date of July 16, 1855
- 5 All Parties enter into this Agreement fully informed of their legal rights and the strengths and weaknesses of their positions for the purpose of authorizing and supporting the use and management of a portion of the CSKT Federal reserved water right on the lands served by the FIIP within the exterior boundaries of the Flathead Indian Reservation, whether or not those waters are diverted outside the Reservation boundaries

IV EXPLANATORY RECITALS

WHEREAS, the CSKT have lived on the lands comprising the Flathead Indian Reservation (Reservation) since time immemorial and expect to continue to do so using sustainable resource-based economies

WHEREAS, pursuant to the Treaty of Hellgate, entered into on July 16, 1855 the United States entered into a permanent settlement with the Confederated Tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians for relinquishment of certain lands, reserving to the CSKT a permanent tribal homeland dedicated to the exclusive use and benefit of said confederated tribes as an Indian reservation, and acknowledging the CSKT dependence upon the government of the United States,

WHEREAS, the CSKT possess hunting and fishing rights in the waters of the Reservation that have associated aboriginal water rights for Instream Flows necessary to sustain the fisheries at a protected level,

WHEREAS, pursuant to the 1904 Act, Congress authorized and directed the allotment of land within the Flathead Reservation to persons with tribal rights on the Reservation, and

directed the opening for homestead purposes of the remaining unallotted lands, with certain limitations and exceptions,

WHEREAS pursuant to the 1908 Act Congress authorized the Secretary to construct the Flathead Indian Irrigation Project (FIIP) to deliver irrigation water to irrigable lands on the Reservation

WHEREAS the FIIP was built in such a manner as to intercept numerous natural streams, wetlands, ponds and lakes on the Reservation and to impact the natural hydrology of those bodies through diversion, artificial carriage and storage, inextricably intertwining the FIIP with water bodies on the Reservation

WHEREAS, the FIIP serves lands owned by the United States, the CSKT, enrolled members of the CSKT, allottees the State of Montana, and non-tribal members, the owners of which are represented by the Parties to this Agreement,

WHEREAS, the State of Montana Water Court is conducting a general stream adjudication which encompasses water rights on the Reservation, including those related to the FIIP,

WHEREAS, the State of Montana has provided a process for the equitable division and apportionment of waters between the State and its people and Indian tribes and the Federal government claiming reserved water rights through negotiation,

WHEREAS, the United States and the FJBC have asserted claims to irrigation water distributed by the FIIP,

WHEREAS, there are significant legal disputes among the Parties as to essentially all the water delivered and affected by the FIIP and every characteristic of water rights, including but not limited to their existence, ownership, priority dates and quantity,

WHEREAS, the FIIP remains a Federal Indian Irrigation Project, and title to FIIP rights-of-way and real property remain with the United States

WHEREAS the CSKT, FJBC, and the United States differ in their views on operation and maintenance of the FIIP, including maintenance of appropriate Instream Flows, reservoir levels and quantities of diversions for irrigation water deliveries

WHEREAS the uncertain outcome of litigation as well as the cost in time, money and social disruption inherent in adjudicating those legal disputes and implementing the results has inspired the Parties to compromise their legal claims and defenses and enter into this Agreement,

WHEREAS, the Parties have reached an accord on the exercise and management of the water rights for Instream Flow and for use on the FIIP recognized in the Water Rights Compact (Compact) among the CSKT, the State of Montana and the United States made pursuant to

Mont Code Ann §§ 85-2-702 and 703 settling the reserved and aboriginal water rights of the CSKT and the United States

WHEREAS, that accord is contained in this Agreement,

WHEREAS, this Agreement is a binding condition on and covenant controlling the exercise of a portion of the Tribes' water rights and the operation of the FIIP and will be appended to the Compact,

NOW THEREFORE, in consideration of the mutual covenants herein contained, the Parties hereto agree as follows

V DEFINITIONS

These definitions are integral to this Agreement and must be applied and construed by the Parties, and any reviewing authority, in accordance with their substance

“Adaptive Management” means a structured, iterative process of optimal decision making in the face of uncertainty, with an aim to reducing uncertainty over time via system monitoring. In this way, decision-making aims to simultaneously maximize multiple resource objectives and, either passively or actively, accrues information needed to improve future management.

“Compact” means the negotiated water rights settlement entered into by the CSKT, the State of Montana, and the United States forever settling the CSKT aboriginal and reserved water rights as provided for by Federal law (the McCarran Amendment 43 USC § 666 (2012)) and Montana law (Mont. Code Ann §§ 85-2-701-703 (2011)).

“Confederated Salish and Kootenai Tribes” or **“CSKT”** or **“Tribes”** means the federally-recognized Indian Tribe residing on the Flathead Indian Reservation.

“Cooperative Management Entity” or **“CME”** means the management entity for the FIIP pursuant to the Transfer Agreement between the United States Department of the Interior, the CSKT, and the FJBC dated April 7, 2010.

“Farm Turnout Allowance” or **“FTA”** means the legally enforceable volume of water identified in Appendix A4 for irrigation and Incidental Purposes the Project Operator must deliver to farm turnouts through diversion and pumping as appropriate, each Irrigation Season on a just and equitable basis during wet, normal, and dry years in the amounts indicated in Appendix A4 and consistent with the order of distribution found in Section 22. The legal status and nature of this right remains controlled by State and Federal law and this Agreement and related documents do not alter that status or nature in any way. The deliverable maximum FTA for all irrigable acres served by the FIIP may reach but may not

exceed the volumes specified in Appendix A4, except in accordance with other provisions of this Agreement

“Flathead Joint Board of Control” or “FJBC” means the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts, a local government under Montana law

“Flathead Indian Irrigation Project” or “FIIP” means the irrigation project that was developed by the United States to serve irrigable lands within the Flathead Reservation pursuant to the Flathead Allotment Act of 1904 and amendments thereto. The FIIP is owned by the United States and managed by the Project Operator pursuant to the Transfer Agreement

“FIIP Manager” means the person or team of persons hired by the Project Operator to operate and manage the FIIP in accordance with its direction, this and other applicable agreements, and applicable law including the Compact

“FIIP Service Area” means the areal extent of irrigated lands that are served from the existing network of delivery systems (canals and laterals) of the FIIP

“FIIP Water Use Right” means, for purposes of this Agreement, that portion of the water right set forth in Article III C 1 a of the Compact (identified as the FIIP right) that is dedicated to use by the FIIP pursuant to the terms of this Agreement. The maximum deliverable amount of water under the FIIP Water Use Right is defined as the FTA for all irrigable acres served by the FIIP and may reach but may not exceed 1.4 acre-feet per acre per year, provided however, that additional water may be delivered up to a total of 2.0 acre-feet per acre pursuant to the provisions of the Measured Water Use Allowance described in Section 25. See Appendix A4 for more details on the FIA

“Incidental Purpose(s)” means water delivered through or diverted from FIIP facilities for purposes incidental to irrigation, including but not limited to Rehabilitation and Betterment, and lawn and garden purposes allowed by the FIIP through water service agreement

“Instream Flow” means the CSKT water right recognized in Article III C 1 d ii (the FIIP Nodes) of the Compact that is allocated here in this Agreement to stream flows reserved for fish and wildlife purposes, with a time immemorial priority date

“Irrigation Districts” means the Flathead Irrigation District, the Mission Irrigation District, and the Jocko Valley Irrigation District each a local government under Montana law required to be organized and to represent all fee land owners whose land is served by the FIIP

“Irrigation Season” means the period in which the FIIP actively delivers irrigation water i.e. the period between April 15 and September 15 of each year, however, the period can be extended to October 15 at the discretion of the Project Operator

“Measured Water Use Allowance” or “MWUA” means an allocation of water that may be delivered to farm turnouts that is greater than the maximum Farm Turnout Allowance. The Measured Water Use Allowance is intended to address variability in the FIIP irrigation distribution works and soil and climate variability that exists across the acres that are served by the FIIP. The conditions on the use of this allowance are defined in Section 25. The legal status and nature of this right is coincident with that of the Farm Turnout Allowance in this Agreement.

“Minimum Enforceable Instream Flow” or “MEF” means the schedule of monthly streamflow values that are minimum or floor-level enforceable values of the Instream Flows and that are found in Appendix A1. The MEF values shall be met, unless Natural Flow falls below the MEF values, in which case the MEF values shall equal the Natural Flow. There shall be incremental, or stepped, increases in the MEF values as Operational Improvements and Rehabilitation and Betterment are implemented by the Project Operator. The MEF values shall be fully met once the deferral period criteria outlined in Articles XV, XVI and XVII of this Agreement are achieved. The MEF’s are an exercise of the portion of the CSKT’s Tribal Water Rights for Instream Flows set forth in Article III C 1 d ii of the Compact and have a time immemorial priority date.

“Minimum Reservoir Pool Elevations” means minimum elevations for reservoir levels that are identified in Appendix A of this Agreement and that shall be effective as of the date the ratification of the Compact by the Montana Legislature becomes effective under State law.

“Natural Flow” means the rate of water movement past a specified point on a natural stream from a drainage area for which there have been no effects caused by stream diversion, storage import, export return flow, or change in consumptive use caused by man-controlled modification to land use.

“Net Power Revenue” means the revenue derived by the United States, after the deduction of operation and maintenance expenses and the establishment of appropriate reserves, from the distribution and sale of power by the power system (now known as Mission Valley Power) as directed by the 1948 Act.

“Operational Improvement” means improved management of FIIP facilities, including the incorporation of measurement of on-farm deliveries, implementation of water management accounting, management of stockwater deliveries, improved adherence to Instream Flows, dedicated efforts to reduce flows in FIIP waste ways, enhanced efficiencies, and upgraded measurement and management.

“Project Operator” means that entity with the legal authority and responsibility to operate the FIIP, i.e. the CME, a joint CSKT and FJBC entity.

“Reallocated Water” means that portion of any given River Diversion Allowance that becomes unnecessary to deliver the FTA and any applicable MWUA to the lands served by the FIIP after the completion of Operational Improvements and Rehabilitation and

Betterment Reallocated Water shall be dedicated first to meet the CSKT Minimum Enforceable Instream Flows and Target Instream Flows, and after those are fulfilled, shall be split equally between the CSKT Instream Flows and irrigation purposes

“Rehabilitation and Betterment” means the process by which the FIIP infrastructure undergoes major repair, replacement upgrade and technological improvement of major structures, as referenced in Appendix C, and any project that has significant design and cost considerations that are subsequently agreed to by the Parties

“River Diversion Allowance” or “RDA” means the volume of water identified in Appendix A necessary to be diverted or pumped at the indicated points of diversion for places of use in the areas identified therein to supply the FIIP Water Use Right and which are subject to Adaptive Management identified in Appendix B

“Secretarial Finding” means the notice that the Secretary shall publish in the Federal Register by March 31 2020 that all of the following events have occurred (a) the Compact has been ratified by the CSKT by the State, and by the United States, (b) Montana has authorized and expended all amounts due under the State legislation approving the Compact, (c) the United States has appropriated and paid to the CSKT and FJBC all amounts then due under the Federal legislation approving the Compact, and (d) the Montana Water Court has approved the proposed decree attached to the Compact and the time for all appeals has expired

“Secretarial Water Rights” means those interests in irrigation water represented by written statements of historic water use on Reservation land, compiled and published by the United States Department of Interior under authority of a June 27 1912, letter of the Acting Commissioner of Indian Affairs, C.F. Hauke, entitled “Field-Irrigation, 20512-1912 16332-1912 McG C; Private Ditches” to document irrigation water use that pre-existed the construction of the Flathead Indian Irrigation Project The written statements were produced by several three-member committees appointed by the Acting Commissioner of Indian Affairs during the first two decades of the twentieth century The several committees were comprised of the Flathead Agency Superintendent of the Bureau of Indian Affairs a Tribal representative selected by the Tribal Council and an Engineer for the United States Reclamation Service

“Target Instream Flows” or “TIF” means wet and normal year instream flow hydrographs specifically identified by wet and normal years in Appendix A for select points and reaches which are desirable and achievable for Instream Flows, as determined in accordance with Appendix B, and subject to change through Adaptive Management identified in Appendix B The Target Instream Flows are an element of the CSKT’s Instream Flows and have a time immemorial priority date

“Transfer Agreement” means the agreement by which operation and management of the Flathead Indian Irrigation Project was transferred from the United States to a Cooperative Management Entity comprised of the CSKT and the FJBC The Transfer Agreement is dated April 7, 2010, and its full title is Agreement Between the United States of America

Department of the Interior and the Confederated Salish and Kootenai Tribes of the Flathead Nation and The Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts, Acting Through a Cooperative Management Entity to Manage and Operate the Flathead Indian Irrigation Project

“Water Management Program” means the program to be located in the CSKT Natural Resources Department which will be merged with the existing CSKT Water Management Program and will become responsible for water measurement, Instream Flow monitoring and reporting as this Agreement and the Compact are implemented

VI DISCLAIMERS AND RETENTION OF RIGHTS

- 6 Nothing in this Agreement authorizes any access to private property by any Party nor shall any provision herein be construed to authorize such access. However, nothing in this Agreement shall in any way diminish rights previously created or reserved under Federal or State law.
- 7 Nothing in this Agreement is intended or shall be construed or argued by any Party to in any way affect, whether by expansion, contraction, limitation or modification, the legal authority, whether legislative, regulatory, or judicial, whether based on inherent sovereign authority or statute of any Party. Nor does it in any way affect or limit the legal ability or obligation of any Party to fulfill its constitutional, statutory and regulatory responsibilities or comply with any judicial decisions. Nothing in this Agreement shall be interpreted to require the Department, the CSKT or the FJBC to implement any action which is not authorized by applicable law or where sufficient funds have not been appropriated for that purpose by Congress or the State of Montana. Nothing in this Agreement or any of the attachments thereto shall be offered for or against a Party, as argument, admission, admission of wrongdoing, liability, or precedent regarding any issue of fact or law in any mediation, arbitration, litigation, or other administrative or legal proceeding, except that this Agreement may be used in any future proceeding to interpret or enforce the terms of this Agreement, consistent with applicable law. The Parties expressly reserve all rights not granted, recognized, or relinquished in this Agreement.
- 8 Obligations required of any Party in implementing this Agreement which are subject to appropriations or allotment by Congress or the State of Montana shall not become requirements until such appropriations or allotments are made. Nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or other applicable law. Nothing in this Agreement is intended or shall be construed to commit a Federal official to expend funds not appropriated or allocated for that purpose. To the extent that the expenditure or advance of money or the performance of any obligation of the Department, the FJBC, or the CSKT under this agreement is to be funded by appropriation or allotment of funds by Congress or the Montana Legislature.

the expenditure advance or performance shall be contingent upon the appropriation or allotment of funds that are available for this purpose and the apportionment of such funds by the responsible agency. No breach of this Agreement shall result and no liability shall accrue to the United States, the FJBC, or the CSKT in the event such funds are neither authorized nor appropriated.

VII MUTUAL SUPPORT, DEFENSE AND LIMITED WAIVER OF IMMUNITY

- 9 All Parties covenant to take all steps within their lawful authority to support enactment of all Tribal, State and Federal legislation that may be necessary to fully adopt, ratify or implement this Agreement.
- 10 All Parties covenant to take all steps within their authority to support judicial approval or other judicial action necessary to fully approve and implement this Agreement.
- 11 All Parties covenant to take all steps necessary and lawful to defend this Agreement from judicial and legislative challenge that in any way materially impacts the ability of any Party to fulfill its obligations under the Agreement or that materially impacts the execution of the Agreement.
- 12 Consistent with the sovereign immunity of the Parties, the mutual defense covenant shall apply regardless of the forum and venue in which a challenge is prosecuted, be it judicial or legislative, of international bodies or the Federal, State and Tribal governments.
- 13 FJBC and the CSKT covenant to waive the defense of sovereign immunity in any forum in which a challenge to this Agreement may be raised for the limited purpose of defending the Agreement except that such waivers of sovereign immunity by the CSKT or the FJBC shall not extend to any action for money damages, costs or attorneys' fees. Such limited waiver of sovereign immunity shall not include waiver for the purposes of cross-claims, counterclaims, or pendant or ancillary jurisdiction.

VIII WATER USE SUBJECT TO THIS AGREEMENT

- 14 The Compact in Article III C 1 a recognizes a consumptive use Tribal Water Right held by the United States in trust for the CSKT for the water use of irrigators served by the FIIP with a priority date of July 16 1855. It is the exercise of this right in conjunction with the portion of the Tribal Water Right recognized in Article III C 1 d ii (FIIP Nodes) of the Compact for Instream Flows that is the subject of this Agreement.
- 15 The FIIP shall serve no more than 130,000 acres with the water right set forth in Article III C 1 a of the Compact.

- 16 The Department, through the Bureau of Indian Affairs shall continue to be responsible for the formal re-designation of lands to be served irrigation water by the FIIP pursuant to applicable Federal regulations for Indian Irrigation projects
- 17 The FJBC shall continue to have all its existing duties and powers provided by State and Federal law including but not limited to collecting annual operation and maintenance assessments, requesting the State District Court to designate lands held in fee simple status as Irrigation District lands pursuant to Mont Code Ann § 85-7-107 (2011), and to otherwise represent the interests of fee landowners served by the FIIP
- 18 This Agreement and the Compact to which it is an Appendix also settle the rights of irrigators served by the FIIP and represented by the FJBC to receive irrigation water from the Project The legal status and nature of those rights remains controlled by State and Federal law and this Agreement and related documents do not alter that status or nature in any way No party to this Agreement may unilaterally change, amend or abrogate the water use rights contained herein and in the FIIP abstracts attached to the Compact as Appendix 5 The use and administration of these water use rights are subject to the provisions of the Compact and Law of Administration except that individuals whose lands are served by the FIIP may petition to remove or add lands to the FIIP in accordance with 25 CFR 171.00 through 171.00 and other applicable BIA policies and procedures and, as applicable Title 85, Chapter 7, Part 18, Mont Code Ann
- 19 The FIIP water users right to receive irrigation water delivered by the Project Operator is appurtenant to the land and runs with the land and is fully transferable under applicable law, but this does not include the power to sever this right from the land and there shall be no severance of this right from the designated or re-designated lands served by the FIIP as a result of transfer sale or exchange of land Nothing in this agreement detracts from or adds to, or reduces or enhances, the legally enforceable right of individual irrigators under the Project to receive irrigation water Nothing in this Agreement alters, diminishes, or enhances applicable operating procedures concerning a FIIP irrigator's ability to transfer or marshal, within a FIIP irrigation system operator's administrative area, irrigation water allocated to that irrigator, provided however there shall be no water marketing among FIIP irrigators
- 20 The FIIP Water Use Right shall be managed by the Project Operator as authorized under Federal, State and Tribal law, the Compact and the terms and conditions of this Agreement
- 21 The Project Operator shall manage the FIIP Water Use Right for use for irrigation and Incidental Purposes Such management shall include the use of the Flathead Pumps as provided herein Within the administrative areas identified in Appendix A3 and pursuant to the terms and conditions of this Agreement the Project Operator retains the authority and discretion to temporarily transfer or reallocate irrigation water among or between FIIP lands as practicable and beneficial for irrigation and Incidental Purposes

- 22 The Project Operator shall deliver available water in a given year in the following order of priority in accordance with this Agreement and its Appendices A and B
- (a) Minimum Enforceable Instream Flows and Minimum Reservoir Pool Elevations, administered at locations and reaches identified in Appendix A
 - (b) Farm Turnout Allowances and River Diversion Allowances which vary depending on the water year and water availability conditions as identified in Appendix A
 - (c) Target Instream Flows administered at locations and reaches identified in Appendix A and as provided in Appendix B,
 - (d) Maximum Farm Turnout Allowance, the limit of which is as specified in Appendix A4, except in accordance with other provisions of this Agreement, and
 - (e) Measured Water Use Allowance for those lands where the allowance is applicable as defined in Section 25. If necessary, delivery of the MWUA may limit or delay attainment of TIF at any given Instream Flow location, the Project Operator shall meet the MWUA before full attainment of the TIF flows
- 23 As an exercise of the portion of the Tribal Water Right set forth in Article III C 1 e of the Compact, the Project Operator shall maintain Minimum Reservoir Pool Elevations, as identified in Appendix A. The CSKT recognize that instances will occur where reservoir maintenance and the Bureau of Indian Affairs' annual review of reservoir operations will require deviations from the Minimum Reservoir Pool Elevations. With the exception of emergency conditions, minimum pool deviations shall be coordinated between the Project Operator and CSKT Natural Resources Department
- 24 The Parties agree to implement Adaptive Management, as identified in Appendix B, for the purposes of allocating water between Instream Flows and irrigation demands, and water made available through FIIP upgrades as identified in Appendix C
- 25 The Measured Water Use Allowance may be delivered to farm turnouts after the deferral period described in Articles XV and XVI based on the following criteria
- (a) Water must be available in a given year after meeting the order of priority set forth in Section 22,
 - (b) In no instance shall the sum of the Measured Water Use Allowance and the maximum Farm Turnout Allowance exceed 2.0 acre-feet per acre,
 - (c) The Measured Water Use Allowance may only be applied for after a farm turnout measurement system has been installed and is operating and in no event more than five years after the end of the deferral period,

- (d) The Measured Water Use Allowance shall be available only to those irrigators who have diligently pursued on-farm irrigation system efficiency measures to meet agronomic crop water requirements and who have met the following criteria
- i Three to five years of on-farm delivery and run-off measurement, at the discretion of the Project Operator, in consultation with the irrigator,
 - ii Have met the conditions of an on-farm irrigation efficiency audit, and
 - iii The Measured Water Use Allowance for any individual irrigator will be based on the average of the on-farm delivery measurements of the water delivered to that irrigator during the measurement period identified in Section 25(d);
- (e) The on-farm efficiency audits shall be completed by the Project Operator, or a third party designee acceptable to the Project Operator and the irrigator, and shall include at a minimum the following criteria
- i On-farm measurement system,
 - ii Quantify the number of irrigated acres,
 - iii Type of irrigation system,
 - iv Uniformity of irrigation application,
 - v On-farm surface run-off, and
 - vi Soil moisture content
- (f) Within 12 months of the passage of the Compact by the Montana Legislature the Parties will define the application of criteria for the on-farm efficiency audit in Section 25(e)
- i The Parties may enter into a contract with the Natural Resources Conservation Service or the Bureau of Reclamation to develop recommendations for the application of the criteria
 - ii The Parties will review the recommendations and make a decision to adopt or revise the recommendations
- (g) If the Parties fail to agree upon the criteria in Section 25(f) the Measured Water Use Allowance shall not be implemented until such time as agreement is reached
- (h) The volume of a MWUA shall be reevaluated by the Project Operator every ten years or at some shorter time period determined by the Project Operator Based

on a reevaluation using the criteria in the on-farm efficiency audit, the Project Operator may modify the MWUA

- (i) If an irrigator fails to meet the efficiency conditions of the audit, access to the Measured Water Use Allowance shall be denied until such time as the efficiency deficiencies are met
- (j) An individual irrigator aggrieved under this Section or any Party to this Agreement may invoke the dispute resolution procedures in Article XXVI of this Agreement

IX PARTIES TO WITHDRAW CLAIMS

26 The Montana Water Court operates a process under which any person or entity who has filed a water right claim for use of water subject to the Montana General Stream Adjudication proceedings may terminate a filed claim. The process is generally referred to as the "withdrawal" of a claim and is initiated by filing with Montana Water Court a form captioned "Request to Withdraw Statement of Claim."

27 Within thirty days of the issuance of a final decree from the Montana Water Court recognizing the CSKT's water right found in Article III of the Compact, and the completion of any direct appeals therefrom, or from the expiration of the time for filing any such appeal, the FJBC and the United States will file with the Montana Water Court a "Request to Withdraw Statement of Claim" for every water right statement of claim the FJBC and the United States have of record for the FIIP with the Montana Water Court and covenant to take all steps necessary to satisfy the process for completing the claim withdrawal process.

X OBLIGATIONS OF THE PARTIES ARISING FROM THIS AGREEMENT

28 **Obligations of the CSKT**

- (a) Measure water flows and document compliance or non-compliance with flow requirements at locations and stream reaches identified in Appendix A,
- (b) Notify the Project Operator verbally if Instream Flows are violated and follow with written notification,
- (c) Measure the River Diversion Allowances and document compliance or non-compliance with said allowances at locations identified in Appendix A,

- (d) Notify the Project Operator verbally if River Diversion Allowances are violated and follow with written notification,
- (e) Participate in the planning design and environmental analysis of proposed FIIP infrastructure improvements,
- (f) Participate in Adaptive Management as described in Appendix B
- (g) Analyze hydrologic data and provide annual hydrologic reports,
- (h) File and prosecute objections to water rights claims filed with the Montana Water Court that duplicate pre-existing FIIP water rights claims or that claim FIIP water as a private right, whether State or federally based, both on and off the Reservation,
- (i) Defend off-Reservation water diversions as quantified in the Compact serving the FIIP in the Montana General Stream Adjudication or other proceedings,
- (j) Allocate a portion of the CSKT Water Rights Settlement potentially funded either by the State of Montana the United States and including any available local in-kind resources sufficient to implement Operational Improvements and Rehabilitation and Betterment as prioritized in Appendix C The CSKT guarantees to utilize funds appropriated by Congress for Appendix C projects in the prioritized order that they appear and as defined in the Federal legislation, and
- (k) Enter into consensual agreements pursuant to Article III G 3 of the Compact

29 Obligations of the Project Operator

- (a) Install water measurement devices to track and maintain compliance with FTA,
- (b) Perform water accounting for water delivered through the FIIP,
- (c) Ensure FIIP compliance with the MEFs Target Instream Flows Minimum Reservoir Pool Elevations and River Diversion Allowances
- (d) Participate in Adaptive Management as described in Appendix B,
- (e) Dedicate Reallocated Water realized by Operational Improvements to the FIIP to Instream Flow use within five (5) years of the appropriation of funds earmarked for Operational Improvements,
- (f) Dedicate Reallocated Water realized by Rehabilitation and Betterment to the FIIP to Instream Flow and irrigation uses as provided below, within seven (7) years of the appropriation of funds earmarked for Rehabilitation and Betterment, or the target identified through Adaptive Management,

- (g) Utilize appropriate portions of the CSKT Water Rights Settlement (funded either by the State of Montana the United States, or local contribution) for Operational Improvements and Rehabilitation and Betterment as designated in Appendix C,
- (h) Defend off-Reservation water diversions as quantified in the Compact serving the FIIP in the Montana General Stream Adjudication or other proceedings,
- (i) Manage the FIIP Water Use Right in accordance with this Agreement,
- (j) Deliver FTAs in accordance with this Agreement, and
- (k) Enter into consensual agreements pursuant to Article III G 3 of the Compact

30 Obligations of the FJBC

- (a) Participate in the planning design and environmental analysis of proposed FIIP Rehabilitation and Betterment,
- (b) Request the State District Court to designate lands held in fee simple status as Irrigation District lands pursuant to Mont. Code Ann § 85-7-107 (2011),
- (c) Defend off-Reservation water diversions as quantified in the Compact serving the FIIP in the Montana General Stream Adjudication or other proceedings,
- (d) File and prosecute objections to water rights claims filed with the Montana Water Court that duplicate or claim FIIP water as a private right, whether State or federally based, both on and off of the Reservation,
- (e) Participate in Adaptive Management as described in Appendix B,
- (f) Notify the Project Operator in writing if the FTAs are violated, and
- (g) Enter into consensual agreements pursuant to Article III G 3 of the Compact

31 Obligations of the United States

- (a) File and prosecute objections to water rights claims filed with the Montana Water Court that duplicate or claim FIIP water as private rights. whether State or federally based, both on and off the Reservation,
- (b) Defend off-Reservation water diversions as quantified in the Compact serving the FIIP in the Montana General Stream Adjudication or other proceedings, and retain the responsibility for compliance with applicable Federal laws, including responsibility regarding Endangered Species Act compliance, and

- (c) Enter into consensual agreements pursuant to Article III G 3 of the Compact

XI SECRETARIAL WATER RIGHTS

32 Secretarial Water Rights serving trust property

- (a) Served by the FIIP shall be subject to the FTA under existing terms and conditions of delivery as set forth in this Agreement and
- (b) Outside the FIIP boundaries or within FIIP boundaries but not served by the FIIP shall be subject to the terms and conditions of the Secretarial Water Rights findings maintained by the Bureau of Indian Affairs

33 Secretarial Water Rights serving fee property

- (a) Served by the FIIP shall be subject to the FTA and the Project Operator's terms and conditions of delivery and
- (b) Utilized outside FIIP or within FIIP boundaries but not served by the FIIP shall be as finally adjudicated in the Montana General Stream Adjudication and shall be administered as all other non-FIIP water rights on the Flathead Reservation by the Water Management Board pursuant to the Law of Administration

XII OPERATIONAL IMPROVEMENTS

34 The CSKT and FJBC agree that Operational Improvement of the FIIP will occur as a result of this Agreement and associated CSKT water rights settlement (whether funded by the United States, the State of Montana, or local contribution) The Parties agree that Operational Improvements shall be accomplished so as to bring the greatest possible benefit to Tribal natural resources FIIP management the FIIP land base and to the Reservation economy. In furtherance of this goal the following water management activities will be undertaken subject to appropriations

- (a) Installation or upgrade of new or relocated Instream Flow measurement points or streamflow measurement points needed for water management,
- (b) Installation or upgrade of new or relocated flow measurement sites at river or water supply diversion headgates,
- (c) Installation or upgrade of new or relocated flow measurement sites at lateral and distribution canal locations,

- (d) Installation of on-farm measurement devices,
- (e) Implementation of a stockwater mitigation plan,
- (f) Installation of automated gate operators at river or water supply diversion headgates where water management will benefit,
- (g) Development of water accounting and water operations planning tools,
- (h) Enlargement of the size and scope of the existing CSKT Water Management Program in order to monitor and advise on water allocation at FIIP diversion/Instream Flow measurement points and to monitor and advise on the size and frequency of FIIP return flows.
- (i) Establishment of water measurement activities by the Project Operator to assure the compliance with the annually established Farm Turnout Allowance, and
- (j) Compliance with the agreed upon water allocations contained in Appendix A by all Parties

XIII REHABILITATION AND BETTERMENT

- 35 The CSKT and FJBC agree that significant Rehabilitation and Betterment of the FIIP is necessary to implement this Agreement and the CSKT water rights settlement (whether funded by the United States, the State of Montana, or local contribution). The Parties agree that Rehabilitation and Betterment shall be accomplished so as to bring the greatest possible benefit to Tribal natural resources, FIIP facilities, irrigated agriculture, and to the Reservation economy. Necessary Rehabilitation and Betterment projects are delineated in Appendix C and will be constructed in the order listed, subject to authorization, appropriation of funds, and priority realignment necessitated by settlement negotiations, existing agreements and/or Federal laws or regulations.
- 36 The CSKT and FJBC agree that realignment of priorities in Appendix C may become necessary and may be accomplished by written agreement of the Parties pursuant to the provisions in Appendix B of this Agreement.

XIV MONTANA-FUNDED SETTLEMENT IMPLEMENTATION FUND

- 37 The CSKT and FJBC agree that there will be additional costs incurred by the Project Operator for pumping and other activities required of it to comply with this Agreement over those experienced in the past, even though the additional costs are difficult to predict at the time of the signing of this Agreement. The CSKT and FJBC intend to seek a

financial contribution from the State of Montana to establish a fund to offset those and related costs into the future in order to assure that the resulting benefits of the pumping accrue to Instream Flows and adequate irrigation water supply to irrigators served by the FIIP. The funding is subject to appropriation.

- 38 The CSKT and FJBC agree that specific additional non-construction projects and activities are necessary to implement this Agreement and that the cost of those immediately necessary projects and activities can and should be implemented with the fund established below. Funding is subject to appropriation.
- 39 The CSKT and FJBC agree that, if the Montana-Funded Settlement Implementation Fund is funded, it shall be established and utilized as follows:

(a) Funding will be dedicated to the following four general purposes:

- i Water measurement activities conducted by the CSKT and Project Operator,
- ii Improving On-Farm efficiency,
- iii Mitigating the loss of stockwater deliveries from the Project, and
- iv Providing an annual payment to offset pumping costs and related projects.

(b) In the event that the Montana-Funded Settlement Implementation Fund is incrementally or partially funded, the incremental or partial funding shall be apportioned between the four general purposes noted above in the proportions of 40% to (1), 15% to (2), 5% to (3), and 40% to (4) until such time as one or more of these purposes is fully funded. Details of each of the four general purposes are described in the following sections:

(c) **Water Measurement Activities**

To comply with the terms of this Agreement, both the CSKT and Project Operator will need to implement comprehensive water measurement programs to measure and record farm turnout deliveries, river diversions and Instream Flows. The Project Operator will implement water measurement activities to measure farm turnout deliveries while the CSKT will implement water measurement activities for Instream Flows, return flows, and river diversions consistent with Section 6. Both parties shall coordinate their measurement activities with each other and will share all collected measurements.

(d) **Improving On-Farm Efficiency**

Using funds allocated for this purpose, the Project Operator will assist FIIP irrigators on a cost share basis with improving or modernizing on-farm irrigation systems. The Project Operator may develop criteria for selecting projects to fund.

that prioritize the conversion of land which may have been designated as extra-duty lands or for the conversion of flood irrigated land to sprinkler irrigation if it so chooses

(e) Annual Pumping Fund

Consistent with State law the Project Operator shall invest funds allocated for this purpose according to the Prudent Investor rule to produce an annual income to pay for the costs of power to supply the existing FIIP Flathead River pumps. The goal shall be to invest and reinvest (if necessary) such funds so as to maintain the principal and to generate an annual payment no less than \$300,000 per year. If during the first five years following the initiation of funding of this fund by a Montana-Funded Settlement, the annual income payment is less than \$300,000 per year, an amount may be withdrawn from the invested principal so that a total payment of up to \$300,000 per year is available to pay for pumping power costs. If during any subsequent year, the annual income payment exceeds the power costs for the Flathead River pumps, the annual income payment will be invested or used in the following priorities:

- i A pumping reserve account,
- ii Increasing FIIP project efficiencies through piping of laterals, lining of canals or other measures,
- iii Improve, modernize or otherwise rehabilitate FIIP infrastructure not otherwise funded elsewhere,
- iv Establish a FIIP construction materials fund to purchase construction materials for improving FIIP infrastructure,
- v Conduct mandatory Endangered Species Act mitigation work, and
- vi Conduct fisheries mitigation projects

(f) Fund for mitigating the loss of stockwater deliveries

Using funds allocated for this purpose, the Project Operator will assist FIIP irrigators on a cost share basis with projects to mitigate the elimination of stockwater deliveries by the Project during the non-irrigation season. The Project Operator shall develop criteria for selecting projects to fund that prioritizes cost effective projects that assist the most irrigators possible.

(g) In the event the annual payments described in 39(e) above are no longer needed, such as in the event the FIIP is decommissioned, all invested funds shall be dispersed for FIIP removal and landscape rehabilitation.

- (h) The Parties recognize that the amount and structure of the State funding is contingent on action of the Montana Legislature. If the Legislature appropriates funds in a manner inconsistent with the structure contemplated by the Parties in this Article of the Agreement, the Parties agree to meet and confer to consider amendments to this Agreement to make it consistent with the actions of the Montana Legislature.

40 The Montana-Funded Settlement Implementation Fund is not intended to subsidize FIIP operation and maintenance assessments.

XV DEFERRAL FOR IMPLEMENTATION OF THE FARM TURNOUT ALLOWANCE (FTA) AND MINIMUM INSTREAM FLOW (MEF)

41 The implementation of the FTA and MEFs, along with the delivery of the other priorities in Section 22 shall be deferred. During the deferral period the following conditions shall apply:

- (a) The annual quota and extra-duty water delivery systems shall be continued as practiced by CME management,
- (b) On-farm measurement systems to measure irrigation water delivered under the FIIP shall be installed,
- (c) The on-farm efficiency fund established by this Agreement shall prioritize improvements which upgrade irrigation systems from flood irrigation to sprinkler irrigation, and irrigation efficiency improvements to extra-duty water users,
- (d) Measurement of FIIP irrigation water delivery by the Project Operator and measurement of on-farm surface water runoff by the CSKT shall occur with the permission of the land owner in accordance with Section 6 when such measurement requires access to private property.
- (e) Minimum Reservoir Pool Elevations identified in Appendix A shall be effective as of the date the ratification of the Compact by the Montana Legislature becomes effective under State law and
- (f) The coordination process identified in the Adaptive Management Section of Appendix B of this Agreement shall be implemented as of the Effective Date of the Compact.

**XVI IMPLEMENTATION OF THE FARM TURNOUT ALLOWANCE (FTA)
AND MINIMUM ENFORCEABLE INSTREAM FLOWS (MEF)
FOLLOWING DEFERRAL PERIOD**

- 42 Following establishment of an on-farm water delivery measurement system, Operational Improvements and Rehabilitation and Betterment projects shall occur
- 43 On-farm measurement of delivered irrigation water, Operational Improvements, and Rehabilitation and Betterment shall proceed from the Mission Valley, to the Jocko Irrigation District, and finally to the Camas District
- 44 The MEF and TIF shall be implemented incrementally as the Operational Improvements and Rehabilitation and Betterment projects in Section 43 occur, and all reallocated water associated with Operational Improvements and Rehabilitation and Betterment shall be assigned to one or more instream flow locations
- 45 The FTA and MWUA shall become effective in administrative areas as the Operational Improvements and Rehabilitation and Betterment projects specified in Section 43 are made. However, the FTA shall be fully applied no later than the expiration of the deferral periods described in Sections 48 through 50. The MWUA shall be applied as set forth in Section 25.

XVII DEFERRAL PERIOD FOR REALIZING REALLOCATED WATER

- 46 The Parties agree that the deferral period for implementation of higher Instream Flows resulting from Operational Improvements that yield Reallocated Water including MEFs, and Target Instream Flows instituted during normal and wet water years, shall continue for five years after funding is appropriated for each specific FIIP Operational Improvement identified in Article XII or other identified actions intended to accomplish an Operational Improvement and create Reallocated Water.
- 47 The Parties agree that the currently enforced interim Instream Flows as defined in the Operation and Maintenance Guidelines for the FIIP by BIA shall remain in place as minimum Instream Flows to be maintained by the Project Operator until the MEFs identified in Appendix A are triggered.
- 48 The Parties agree that the deferral period for implementation of FIIP Rehabilitation and Betterment projects contained in Appendix C shall be seven years after funding is appropriated for each separate Rehabilitation and Betterment project.
- 49 The Parties agree that Reallocated Water resulting from FIIP Rehabilitation and Betterment projects funded by the CSK I water rights settlement whether contributed by the State of Montana, United States, or the CSKT, shall be dedicated to increased

enforceable Instream Flow levels through the FIIP water accounting program described in Appendix B

- 50 The Parties agree that they will use Adaptive Management as identified in Appendix B to schedule the deferral period for each project undertaken, whether an Operational Improvement or Rehabilitation and Betterment project, although the deferral period shall be no greater than five (5) years for Operational Improvements and seven (7) years for Rehabilitation and Betterment

XVIII REALLOCATED WATER

- 51 The Parties expect both Operational Improvements and Rehabilitation and Betterment as described above in Sections 34 through 36 and in Appendix C, to result in Reallocated Water. Expansion of the existing CSKT Water Management Program and on-farm measurement activities of the Project Operator, along with other Operational Improvements, are also expected to result in Reallocated Water. The identification of increases in the enforceable levels of the CSKI Instream-Flow rights, and the timing for the implementation of those increased enforceable levels are to be implemented in accordance with the deferral period identified in Article XVII above
- 52 Reallocated Water resulting from construction of structures identified as Rehabilitation and Betterment projects in Appendix C is anticipated and will be identified and dedicated to increased enforceable Instream Flow levels through the FIIP water accounting process (see Appendix B). Construction of such structures and associated planning processes are subject to the appropriation of funds
- 53 Once the MEFs and TIFs are met in any administrative area, saved water that becomes available for reallocation shall be split equally between irrigation and instream flows

XIX PUMPING UTILIZING THE FLATHEAD PUMPS

- 54 The FIIP shall be entitled to pump 65,000 acre-feet annually from the Flathead River utilizing the Flathead Pumps pursuant to the terms of this Agreement
- 55 Additional quantities of water may be acquired from the CSKT Flathead System Compact Water pursuant to the terms of Article IV B 6 c of the Compact
- 56 The Parties agree that water made available through utilization of the Flathead Pumps under the terms of this Agreement may be acquired by irrigators in excess of the annual FTA available pursuant to terms and conditions established by the CME

XX LOW COST BLOCK OF POWER

- 57 The Kerr Project is a hydroelectric generating project located on the Flathead River as authorized by the Federal Energy Regulatory Commission (FERC) pursuant to possessory and generational requirements set forth in a FERC license for the Kerr Project FERC Project No 5 (32 FERC ¶ 61,070, July 17, 1985) as amended. The FERC license is currently held by PPL Montana.
- 58 Ordering Paragraph (C)(1) of the FERC license grants the CSKT a unilateral and exclusive right to acquire the Kerr Project commencing September 5, 2015. The CSKT intends to exercise this right at the earliest opportunity.
- 59 Article 40(a) of the FERC license provides that until such time as the Kerr Project is conveyed to the CSKT, PPL Montana will make available to the United States for and on behalf of the FIIP, or the Irrigation Districts comprising the same, capacity and energy at the Kerr Project 100 kV bus in the following amounts:
- (a) During all months of the year, up to 7,466 megawatts of capacity at up to 100 percent load factor, and
 - (b) During the months of April through October, additional capacity of up to 3,734 megawatts at up to 100 percent load factor.
- 60 Pursuant to this Agreement, the FIIP, or the Irrigation Districts comprising the same, relinquish all claims to power and energy defined in the FERC license from the date of this Agreement forward through the period when the CSKT is no longer the licensee, except as follows:
- (a) A block of energy consisting of 19,178 Megawatt-Hours which will be billed at the low cost block rate identified at Article 40 of the License and may be consumed during the period of April 1 through October 31 of any year. This block of energy is derived from the capacity authorized in License Article 40(a).
 - (b) Energy over and above that identified in (a) above consisting of an indefinite amount of energy as demanded by the FIIP to run its Flathead Pumping Station from the period of April 1 through October 31 of any year. This power utilized by the Flathead Pumps in excess of 19,178 Megawatt-Hours will be billed at the price which Mission Valley power purchases the power for resale.
- 61 Article 40(a) of the FERC license sets forth the amounts and methods to be applied to calculate the rate payable for energy taken by the United States for and on behalf of the FIIP or the Irrigation Districts comprising the same, from the effective date of the license and continuing as adjusted through the period of time when the Kerr Project is conveyed to the CSKT.

- 62 Article 40(c) of the FERC license reserves for future resolution the question of whether, from the time the Kerr Project is conveyed to the CSKT until the expiration of the joint license the CSKT must make any part of the output from the Kerr Project available to the United States for and on behalf of the FIIP or Irrigation Districts, or if so on what terms and conditions
- 63 The CSKT, FJBC and United States agree to jointly and diligently pursue resolution of those questions reserved pursuant to Article 40(c) of the FERC license Recognizing that the FERC license reserves these questions for future resolution and establishes a process for resolving these issues, the CSKT, FJBC and United States agree that they intend to pursue the following
- (a) Upon conveyance of the Kerr Project License to the CSKT the CSKT will continue, during the months of April through October to provide electricity to meet the power demands of the Flathead River pumps including up to 19,178 Megawatt-Hours for the entire period as described in Section 60 (a) and additional power as described in Section 60 (b),
 - (b) The CSKT will deliver the energy to the Kerr Project 100kV bus and/or any Mission Valley Power electrical substation, and
 - (c) The rate payable to the CSKT for provision of energy, commencing upon conveyance of the Kerr Project to the CSKT and terminating when the CSKT is no longer the licensee, will continue to be calculated at the rate specified in the Kerr Project License at Article 40(a)(ii) in the FERC License
- 64 The FJBC waives and disclaims all future interest in the capacity set forth at Article 40(a)(i) of the FERC license which provides a right to up to 7 466 megawatts of capacity at up to 100 percent load factor during all months of the year, and forbears bringing any such claim or cause of action in the future

XXI NET POWER REVENUE DISTRIBUTION AUTHORIZED BY THE 1948 ACT

- 65 The 1948 Act as amended provides that net revenues from the operation of the Flathead Indian Power Project, now known as Mission Valley Power and operated by the CSKT pursuant to a Self-Determination Agreement with the United States, may be applied to liquidate certain costs and installments associated with the FIIP and the power system Section 2(b) of the Act defines Net Power Revenue as gross revenues minus both the expenses necessary to operate and maintain the power system, and the funds necessary to provide for the creation and management of appropriate reserves Section 2(h) contains a list of six specific purposes for which Net Power Revenue can be applied on an annual

basis That distribution list in order of priority, includes priority (6), which is the liquidation of the annual operation and maintenance costs of the irrigation system

- 66 The Parties through the Transfer Agreement, further clarified that Net Power Revenue to be provided for in Section 2(h)(6) of the 1948 Act would be used only for work on the [Flathead Indian Irrigation] Project that has significant fisheries, water conservation, or water management benefits” and “that if on an annual basis such work does not require the full amount of such net revenues the remainder shall be set aside and accumulated for expenditure for these purposes when needed and for building and maintaining an emergency [operational] reserve
- 67 The amount previously paid by the power system and the Mission Valley Power for the liquidation of costs delineated in Section 2(h) totaled approximately \$196,900 per year
- 68 Mission Valley Power which is owned by the United States and operated by the CSKT, plans to budget annually for an anticipated amount of \$200,000 of Net Power Revenue to be made available in the subsequent year to meet the needs of both the power system and the FIIP The Parties acknowledge that such budgeting may require a revision to the rate schedule consistent with the process set forth in Mission Valley Power’s Self-Determination Agreement and its Attachments
- 69 The Parties acknowledge that the 1948 Act does not address the annual budgeting of Net Power Revenue The Parties agree, however that the annual budgeting of Net Power Revenue appears consistent with the intent of the 1948 Act If necessary, the Parties will draft language to be included in the Federal legislation that ratifies and approves the Compact that would resolve any perceived inconsistency
- 70 The Parties agree that the Net Power Revenue that will be made available consistent with Section 68, above, shall be split equally between the FIIP and the power utility to be used by the FIIP for the purposes set forth in the Transfer Agreement, and to be used by the power utility to establish and maintain an emergency operational reserve that allows the Mission Valley Power to operate between reimbursement payments made by the United States pursuant to the Self-Determination Agreement between the United States and the CSKT
- 71 The Parties agree to revisit the distribution of Net Power Revenue generated by the Mission Valley Power or successor power utility within nine (9) years of the effective date of this Agreement for the Department under Section 74 below, with any subsequent agreement to become effective on the tenth (10th) anniversary of the effective date of this Agreement
- 72 In the event the Parties do not agree as to the distribution of Net Power Revenue as provided for in Section 71 above the distribution shall remain as specified in Sections 65 through 70

XXII TERM AND EFFECTIVE DATE OF THE AGREEMENT

- 73 The term of this Agreement is perpetual from the effective date defined in the next section, unless a Party withdraws under Article XXIII or the Agreement is terminated pursuant to Article XXV
- 74 The effective date of this Agreement is the date Agreement is fully executed by all Parties, which for purposes of this Agreement shall be the date of execution of the Agreement by the CSKT, the FJBC and by the United States after Congress adopts legislation approving the Compact

XXIII WITHDRAWAL FROM THE AGREEMENT

- 75 Prior to the Secretarial Finding the FJBC CSKT and United States retain the unilateral right to withdraw from this Agreement if any of the following events occurs
- (a) The Montana Legislature fails to approve the Compact to which this Agreement is appended by July 1, 2013,
 - (b) The Montana Water Court fails to approve the Compact,
 - (c) The Montana Legislature fails to provide funding for the State contribution to implement this Agreement by July 1 2015, or
 - (d) The United States Congress fails to ratify the CSKT water rights settlement, authorize the funding needed to implement said settlement, and appropriate such sums as Congress has directed, by July 31, 2016
- 76 If one of the above events in Section 75 occurs that makes withdrawal from the Agreement possible for the FJBC, CSKT or United States, the FJBC and CSKT and United States shall not be able to withdraw for at least six months while the Parties engage in dispute resolution to seek to prevent the withdrawal of a Party from the Agreement through an amendment to the Agreement

XXIV REEVALUATION BASED ON DATA REVIEW AND AMENDMENTS TO THE AGREEMENT

- 77 Notwithstanding any other provision of this Agreement and the Compact, ten years following the implementation of the FTAs, MEFs, and TIFs, the Parties to this Agreement agree to reevaluate and revise, in accordance with this Section, the Instream

Flows and FTAs herein established. If the data show water is available or can be made available without adversely affecting the METs and the TIFs, additional water will be split equally between CSKT Instream Flows and irrigation purposes up to but not exceeding an amount that can be beneficially used for irrigation purposes. Subsequently the reevaluation can reoccur every ten years. When water is reallocated under this Section 77, the Parties must agree in writing to the changes and the changes shall be accounted for in the water accounting process identified in Appendix B.

78 All Parties must consent in writing to amendments to this Agreement and Appendices

79 No amendment to the Agreement or the Appendices shall be valid if enacted less than four months prior to ratification of the Compact by the United States Congress. Provided, however, that the Parties may also amend this Agreement after ratification of the Compact by the United States Congress pursuant to Section 78 so long as such amendments do not conflict with the Compact ratified by the United States or the Federal legislation approving the Compact.

XXV. TERMINATION OF THE AGREEMENT

80 Prior to the Secretarial Finding, in the event any Party to this Agreement violates any of the material terms or conditions of this Agreement, the violation of the terms shall be considered a termination event unless the Parties agree in writing that they deem the event to conform to this Agreement or whether they can adopt a mutually agreeable amendment to this Agreement pursuant to Sections 78-79 above.

81 If the FJBC, CSKT, or United States withdraws from the Agreement prior to the Secretarial Finding, pursuant to Article XXIII above, the Agreement shall terminate.

82 After the Secretarial Finding, this Agreement shall be permanent.

XXVI. DISPUTE RESOLUTION

83 In the event of any dispute over the interpretation or implementation of this Agreement, the Parties shall seek to timely resolve the dispute through the following steps in priority order:

- (a) Meet and attempt informal resolution among the Parties,
- (b) Complaints to the FIIP Manager,
- (c) Complaints to the Project Operator.

- (d) Actions taken pursuant to the Dispute Resolution Provision Number 29 of the Transfer Agreement,
 - (e) Complaints and objections made to the Unitary Water Management Board created pursuant to the Compact, and
 - (f) Federal Court action to enforce the provisions of this Agreement
- 84 Any controversy that relates to the management and/or operation of FIIP or the administration of water through FIIP facilities shall remain subject to the oversight of the CME
- 85 The forum for disputes between the Parties pertaining to this Agreement shall be Federal Court

ATTEST

Flathead District
Mission District
Jocko Valley District
Project Operator

PARTIES' SIGNATURES

CSKT

FJBC

United States