

FLATHEAD INDIAN IRRIGATION PROJECT, MONTANA

OCTOBER 12, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3056]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3056) to provide for the preservation and sustainability of the family farm through the transfer of responsibility for operation and maintenance of the Flathead Indian Irrigation Project, Montana, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. TRANSFER OF RESPONSIBILITY FOR OPERATION AND MAINTENANCE OF THE FLATHEAD INDIAN IRRIGATION PROJECT, MONTANA.

(a) **PURPOSE.**—The purpose of this Act is to preserve and protect the viability and sustainability of the family farms and ranches of the Jocko Valley, Camas Valley, and Mission Valley, Montana, through the transfer of responsibility for operation and maintenance of the Irrigation Division of the Flathead Indian Irrigation Project in Montana. This Act does not affect and is not intended to affect in any way the negotiation or adjudication of water rights, including those of the Confederated Salish and Kootenai Tribes of the Flathead Nation.

(b) **DEFINITIONS.**—In this Act:

(1) **IRRIGATION DISTRICT.**—The term “irrigation district” means 1 or more irrigation districts organized in accordance with the paragraph relating to the irrigation systems on the Flathead Indian Reservation, Montana, under the sub-heading “IRRIGATION AND DRAINAGE” under the heading “BUREAU OF INDIAN AFFAIRS” in the Act of May 10, 1926 (44 Stat. 464; chapter 277).

(2) **PROJECT.**—The term “Project” means Irrigation Division of the Flathead Indian Irrigation Project constructed under section 14 of the Act of April 23,

1904 (33 Stat. 305, chapter 1495) and section 14 of the Act of May 29, 1908 (35 Stat. 450, chapter 216).

(3) **TRIBE.**—The term “Tribe” refers to the Confederated Salish and Kootenai Tribes of the Flathead Nation, a federally recognized tribe organized pursuant to the Indian Reorganization Act of 1934.

(c) **CONTRACT.**—Not later than 1 year after the date of enactment of this Act, the Secretary of the Interior (in this Act referred to as the “Secretary”) shall offer to enter into a contract with the irrigation district under which the irrigation district will operate and manage the Project, including all rights and powers exercised by the Secretary in the operation of the works, which include the right to use permanent easements purchased under the Act of May 25, 1948 (62 Stat. 269, chapter 340). Such contract shall contain each of the following provisions:

(1) Provisions identifying the trust responsibilities of the United States to the Tribe that are affected by the operation and maintenance of the Irrigation Division and ensuring that the United States is able to fulfill such responsibilities.

(2) Provisions ensuring that in its operation and maintenance of the Irrigation Division the irrigation district maintains the interim instream flows established by the Bureau of Indian Affairs to preserve fisheries pending adjudication of water rights and, thereafter, as required by the rulings of said adjudication or negotiation.

(3) Provisions ensuring that existing obligations governing the repayment of the construction costs of the Project are continued unaffected by this enactment and the contract; except that providing the irrigation districts shall make a payment of \$1,000,000 to the United States Treasury on the unmatured installments of construction debt by December 31, 2001.

(4) Provisions amending the existing repayment contracts between the irrigation district and the United States to provide that net revenues from the operation of the Power Division shall not be used to pay operation and maintenance costs of the Irrigation Division.

(5) Provisions providing for revocation of the contract and the irrigation district’s right to operate and maintain the Project if a court of the United States finds that the irrigation district has operated and persists in operating the Project in a manner willingly and knowingly damaging tribal trust assets, but operation of the Project as it was operated by the Bureau of Indian Affairs Plan of Operations in effect on October 31, 1997, shall be presumed to provide adequate protection of such assets, and any changes in operation required as a result of new information and administrative policies and decisions adopted pursuant to title 5, United States Code, judicial decisions, or negotiations shall not be a ground for revocation of the contract unless the irrigation district refuses to adapt its operation and maintenance of the Project to the requirements of such new information, judicial decisions, or negotiations.

(d) **TIMING.**—The Secretary shall commence negotiations with the irrigation district as soon as practicable to enable the Secretary and the irrigation district to enter into the contract not later than 1 year after the date of enactment of this Act.

(e) **PROPERTY RIGHTS.**—

(1) **IN GENERAL.**—Under the contract, the Secretary shall transfer to the irrigation district ownership of all equipment, machinery, office supplies, and other supplies and equipment paid for with operation and maintenance funds related to the project.

(2) **INVENTORY LIST.**—The Secretary shall provide an inventory list of all supplies and equipment at the Project as of the date of enactment of this Act, that were purchased with operation and maintenance funds.

(3) **REAL PROPERTY.**—Under the contract, the Secretary shall not transfer to the irrigation district ownership of any real property right, whether to land, or an easement therein, nor shall the Secretary transfer to the irrigation district the ownership of any water right.

(f) **WATER RIGHTS.**—This Act does not affect the negotiation of water rights between the State of Montana, the United States, and the Confederated Salish and Kootenai Tribes.

PURPOSE OF THE BILL

The purpose of H.R. 3056 is to provide for the preservation and sustainability of the family farm through the transfer of responsibility for operation and maintenance of the Flathead Indian Irrigation Project, Montana.

BACKGROUND AND NEED FOR LEGISLATION

The Flathead Irrigation Project was authorized in 1908, as an amendment to the Flathead Allotment Act of 1904. The Project is located on the Flathead Reservation, but the amendment required that water be delivered to all irrigable land, whether owned by tribal members or nonmembers. Of the 127,000 acres in the Flathead Irrigation Project, 116,000 acres are in private ownership, with the Irrigation Districts representing 113,000 acres. Of the 22,000 people living on the Flathead Reservation in the 1990 census, only 3000 were tribal members. Moreover, 90 percent of the land-delivered water is owned in fee by non-tribal members.

The operation and maintenance of the Project is now managed by the Bureau of Indian Affairs of the Department of the Interior (the tribes manage the Power Division of the Project). The Project land-owners pay 100 percent of the operation and maintenance costs of the Project associated with their land. However, the operating costs are high, in some cases 50 to 100 percent higher than similar irrigation projects in Montana.

The bill would transfer only the authority to operate and maintain the Irrigation Division to the Districts. It does not transfer any property rights, including water rights.

COMMITTEE ACTION

H.R. 3056 was introduced on November 13, 1997, by Congressman Rick Hill (R-MT). The bill was referred to the Committee on Resources, and within the Committee to the Subcommittee on Water and Power. The Subcommittee on Water and Power held a legislative hearing on the bill on April 30, 1998. On June 25, 1998, the Subcommittee on Water and Power met to consider H.R. 3056. No amendments were offered and the bill was favorably reported to the Full Committee by a rollcall vote of 7-5, as follows:

Republicans	Yea	Nay	Present	Democrats	Yea	Nay	Present
Doolittle	X	.....	.....	DeFazio .....	.....	X	.....
Calvert	X	.....	.....	Miller .....	.....	X	.....
Pombo	X	.....	.....	Pickett .....	.....	.....	.....
Chenoweth	X	.....	.....	Dooley .....	.....	X	.....
Smith, Linda .....	.....	.....	.....	Farr .....	.....	X	.....
Radanovich .....	.....	.....	.....	Smith, Adam .....	.....	.....	.....
Thornberry	X	.....	.....	Kind .....	.....	.....	.....
Shadegg .....	.....	.....	.....	Doggett .....	.....	X	.....
Ensign .....	.....	.....	.....	.....	.....	.....	.....
Smith, Bob .....	.....	.....	.....	.....	.....	.....	.....
Cannon	X	.....	.....	.....	.....	.....	.....
Crapo	X	.....	.....	.....	.....	.....	.....
Total Republicans	7	.....	.....	Total Democrats .....	.....	5	.....

On August 5, 1998, the Full Resources Committee met to consider H.R. 3056. Congressman Hill offered an amendment in the nature of a substitute which clarified the effects of the bill on tribal water rights; clarified the extent of the transfer; and delineated the parameters for the operation and maintenance contract between the Secretary of the Interior and the Irrigation Districts. The amendment was adopted by voice vote and the bill, as amended,

was ordered favorably reported to the House of Representatives by a bipartisan rollcall vote of 25–6, as follows:

Roll No.: 1.

Bill No.: H.R. 3056.

Short title: Flathead Indian Irrigation Project, Montana.

Amendment or matter voted on: Final Passage.

Member	Yea	Nay	Present	Member	Yea	Nay	Present
Mr. Young (Chairman)	X	.....	.....	Mr. Miller .....	.....	X	.....
Mr. Tauzin	X	.....	.....	Mr. Markey .....	.....	.....	.....
Mr. Hansen	X	.....	.....	Mr. Rahall .....	.....	.....	.....
Mr. Saxton .....	.....	.....	.....	Mr. Vento .....	.....	X	.....
Mr. Gallegly .....	.....	.....	.....	Mr. Kildee .....	.....	X	.....
Mr. Duncan	X	.....	.....	Mr. DeFazio .....	.....	X	.....
Mr. Hefley	X	.....	.....	Mr. Falemavaega .....	.....	X	.....
Mr. Doolittle	X	.....	.....	Mr. Abercrombie .....	.....	.....	.....
Mr. Gilchrest	X	.....	.....	Mr. Ortiz	X	.....	.....
Mr. Calvert	X	.....	.....	Mr. Pickett	X	.....	.....
Mr. Pombo	X	.....	.....	Mr. Pallone .....	.....	.....	.....
Mrs. Cubin	X	.....	.....	Mr. Dooley .....	.....	.....	.....
Mrs. Chenoweth	X	.....	.....	Mr. Romero-Barceló .....	.....	.....	.....
Mrs. Linda Smith	X	.....	.....	Mr. Hinchey .....	.....	.....	.....
Mr. Radanovich	X	.....	.....	Mr. Underwood .....	.....	.....	.....
Mr. Jones	X	.....	.....	Mr. Farr .....	.....	X	.....
Mr. Thornberry	X	.....	.....	Mr. Kennedy .....	.....	.....	.....
Mr. Shadegg	X	.....	.....	Mr. Adam Smith .....	.....	.....	.....
Mr. Ensign .....	.....	.....	.....	Mr. Delahunt .....	.....	.....	.....
Mr. Bob Smith .....	.....	.....	.....	Mr. John .....	.....	.....	.....
Mr. Cannon	X	.....	.....	Ms. Green .....	.....	.....	.....
Mr. Brady	X	.....	.....	Mr. Kind .....	.....	.....	.....
Mr. Peterson	X	.....	.....	Mr. Doggett .....	.....	.....	.....
Mr. Hill	X	.....	.....		
Mr. Schaffer	X	.....	.....		
Mr. Gibbons	X	.....	.....		
Mr. Crapo	X	.....	.....		

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(1)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 3056.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 3056. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 3056 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in tax expenditures. According to the Congressional Budget Office, enactment of this bill will affect offsetting revenues by reducing direct spending.

2. With respect to the requirement of clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 3056.

3. With respect to the requirement of clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2108 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 9, 1998.

Hon. DON YOUNG,
*Chairman, Committee on Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3056, a bill to provide for the preservation and sustain ability of the family farm through the transfer of responsibility for operation and maintenance of the Flathead Indian Irrigation Project, Montana.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kristen Layman (for federal costs), and Marjorie Miller (for state, local, and tribal costs).

Sincerely,

JAMES L. BLUM
(for June E. O'Neill, Director).

Enclosure.

H.R. 3056—A bill to provide for the preservation and sustainability of the family farm through the transfer of responsibility of the Flathead Indian Irrigation Project, Montana

H.R. 3056 would transfer responsibility for operating and maintaining the Flathead Indian Irrigation Project from the Bureau of Indian Affairs (BIA) to local irrigation districts in Montana. The bill would require the Secretary of the Interior to enter into a contract with the irrigation districts to transfer this responsibility within one year of the bill's enactment. In addition, the bill would require the districts to make a payment of \$1 million to the U.S. Treasury by December 31, 2001. Finally, H.R. 3056 would transfer all irrigation equipment, machinery, and office supplies to the districts and would grant them access to use permanent easements

purchased by the federal government for operating the irrigation project.

CBO estimates that implementing H.R. 3056 would result in new discretionary spending of less than \$1 million over fiscal years 1999 and 2000, assuming the availability of appropriated funds. This spending would be for the costs of negotiating a contract with the irrigation districts and paying severance to BIA employees whose jobs would be eliminated by the transfer.

In addition, enacting H.R. 3056 would affect direct spending, primarily by changing offsetting receipts collected by the federal government; and thus, pay-as-you-go procedures would apply to the bill. In total, CBO estimates that enacting H.R. 3056 would reduce direct spending by about \$1 million either in fiscal year 2001 or the first quarter of fiscal year 2002, and that the net impact on direct spending would be less than \$500,000 in other years over the 1999–2003 period.

First, CBO estimates the bill would increase offsetting receipts by \$1 million in either fiscal year 2001 or 2002 by requiring that the irrigation districts make such a payment as a condition for the transfer. Second, because the federal government would no longer operate and maintain the Flathead Project, enacting the bill would eliminate both the collections of fees charged for operating the project and the direct spending that results from using such fee income. The loss of fees and the reduction in spending of such fees would offset each other. Finally, by transferring irrigation equipment and machinery to the districts, the bill would likely decrease offsetting receipts from the sale of surplus federal property, but CBO estimates that any forgone receipts would probably be less than \$500,000.

H.R. 3056 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act. Local governments might incur some costs as a result of the bill's enactment, but these costs would be voluntary.

The CBO staff contact for this estimate is Kristen Layman (for federal costs), and Marjorie Miller (for state, local, and tribal costs). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

H.R. 3056 contains no unfunded mandates.

CHANGES IN EXISTING LAW

If enacted, H.R. 3056 would make no changes in existing law.

DISSENTING VIEWS

We are strongly opposed to H.R. 3056, legislation proposing to shift operations and management of the Flathead Indian Irrigation Project (FIIP) away from control by the Bureau of Indian Affairs (BIA)—and thus away from the Flathead Tribes—by transferring such authority to the Flathead Reservation's non-Indian irrigation districts (known as the Joint Board of Control or JBC).

FIIP is the largest irrigation project in the state of Montana and includes 17 dams and over 1,300 miles of canals and laterals. Most of the water stored or diverted by the project arises on an flows westwardly from the 10,000 foot Mission Mountain range. This project was built and paid for by the BIA. The original 1904 congressional authorization makes it quite clear that the project was to benefit the Reservation's Indian population. To this day, these are Tribal lands held in trust by the United States. Nearly all of the project's reservoirs are in this area and are on Tribal or Indian owned lands. Transferring these facilities to non-Indian control would violate our trust obligation to the Tribes and the commitments made in Treaty and in the statutory authorizations of the FIIP.

The early part of this century was a time in Federal /Indian relations generally known as the Allotment Era. During that period, the Federal government pursued an ill-conceived policy intended to break up the communal nature of the Indian reservations, contravening the commitments the nation had made to tribes just 50 years earlier during the Treaty Era. In the Treat of Hellgate, the Federal government gave assurances to the Salish and Kootenai Tribes that it would protect the Reservation and its resources and preserve them for the exclusive use of the Tribes. The later concept of allotting the reservations by granting each Tribal member 80 or 160 acres was an attempt to transform the Indian people into a European model of a farming society. On the Flathead Reservation, transforming the Indians into farmers required water for crops, so the Congress authorized the construction of FIIP as part of the Flathead Allotment Act. In addition, those lands that remained after the Reservation was allotted were declared "surplus" and opened to non-Indian homesteading in direct violation of the 1855 Treaty. The authorization for FIIP was amended in 1908, allowing irrigation canals to be extended to also serve homesteaders. The legislative history reflects the understanding of Congress "that in all probability three-fourths of the irrigable lands would be allotted to Indians." (H.R. Rep. No. 1189, 60th Cong., 1st Sess, 2 (1908)).

The 1904 Flathead Allotment Act (FAA) authorized proceeds from the forced sale of Reservation lands an Tribal timber to be used to pay for most of the construction costs of FIIP. The 1908 amendments required the homesteaders to repay the United States for their pro rata share of the debt of construction for those por-

tions of the project that were serving homesteaded or unallotted lands. The amendments further specified that when the debt had been repaid on those portions of the project serving unallotted lands, "such irrigation works" would pass to the owners of those lands. The non-Indian irrigators have argued repeatedly that this provision mandates "turnover" of all project works to their control, but this argument has been rejected by the courts and various Solicitors of the Department of the Interior. In 1987, President Reagan's Interior and Justice Department Solicitors informed the U.S. District Court for Montana that, relative to the turnover provision, "The Secretary submits that the plaintiff (JBC) asks the court to read a statute Congress never wrote * * * The plaintiff's interpretation of the law is inaccurate."

It is with this important historical background that we find ourselves addressing H.R. 3056. The basic premise for H.R. 3056 is the JBC's contention that it can quite simply operate the FIIP more efficiently than can the BIA and that the BIA has mismanaged the project so this Indian irrigation project should be turned over to the non-Indian irrigation districts. No evidence has been presented to the Committee regarding the alleged efficiency that would be gained through the JBC's operation. No alternative annual operating plans or budgets were provided to the Committee, just the unadorned claim that they can do it cheaper and that the BIA's annual operations and maintenance (O&M) charges are too high.

As indicated above, FIIP is one of the largest irrigation projects in the country and most of the reservoirs and many of the canals are on Tribal lands, not fee lands owned by non-Indians. The reservoirs have a major impact on Treaty rights, including hunting, fishing and other types of outdoor activities such as camping. The canals intersect most rivers and streams crossing the Reservation and can quite readily be managed to dry up those streams. Since the project has a major impact on the Reservation's Treaty guaranteed fishery population and habitat, costs of operating the project have included fish screens and access to biological experts for questions of stream flows that are needed to protect the fishery.

The Committee has received no evidence that the non-Indian irrigators could better manage these impacts of the project, and in fact, the evidence suggests the opposite. In 1987, 1989, 1990, 1991 and 1992 the JBC went to the Interior Board of Indian Appeals to challenge the project's recommended instream flow regime. The JBC also objected to, and for a period of time refused to pay for, the installation of fish screens to prevent fish from being sucked out of the Reservation's streams and into irrigation canals. The BIA has access not only to fishery biologists, but to hydrologists and many other professionals. Under a contract with the BIA, the Flathead Tribes have undertaken a multi-million dollar Safety of Dams project to repair a number of the dams on the Reservation that are aging and in need of repair. The Committee received no evidence indicating that the farmers who constitute the JBC would be willing and capable to take over these obligations. Ironically, if the Flathead Tribes themselves were to propose to take over management and operation of the FIIP under the Indian Self-Determination Act (P.L. 93-638 as amended) they would have to dem-

onstrate capability. Nothing in this bill imposes the same requirement on the non-Indian irrigators.

While the proponents of H.R. 3056 claim that the BIA O&M charges are too high, the Committee did receive evidence that the immediately adjacent Missoula Irrigation Project, an off-reservation, non-federal project, has O&M fees of \$22 per acre—more than \$2 per acre higher than the O&M fees at FIIP. Without specific evidence that the non-Indian irrigators could produce significant savings, these figures suggest that the BIA O&M costs are not out of line. In addition, the Tribes have expressed concern that Indian employees of the FIIP might lose their jobs with the change in management, contributing to high Reservation unemployment rates.

In closing, we point out the strong distaste we have not just for taking this important piece of Reservation infrastructure away from the people for whom the Reservation was established, but in weighing in after the courts have repeatedly—at the federal, state, tribal and administrative level—and overwhelmingly rejected the position of the JBC on turnover and other aspects of project operation. The courts have had far more opportunity to examine the nuances of this matter than has the Committee and they have not found any justification for the transfer of the project. Similar opinions have been given by Interior Department Solicitors in two Republican and one Democratic Administration that have examined the manner.

Not only is there no justification for this bill, but it establishes a precedent that will be of concern to every other Indian reservation with an infrastructure that also benefits local non-Indians. H.R. 3056 should be rejected.

GEORGE MILLER.
PETER DEFAZIO.
DALE E. KILDEE.
ENI FALEOMAVAEGA.
DONNA CHRISTIAN-GREEN.
BRUCE VENTO.

