

**Flathead Joint Board of Control of the Mission, Jocko and Flathead Irrigation Districts**  
**Regular Meeting Minutes**  
**November 10, 2015**

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**DRAFT**

**Present:**

**Jocko: Boone Cole, Dean Brockway**

**Mission: Jerry Laskody, Tim Orr**

**Flathead: Wayne Blevins, Shane Orien, Richard Erb, Paul Guenzler, Bruce White**

**Member at Large: Ted Hein**

**Attorney of Record: Kristin Omgvig**

**Staff: Johanna Clark**

**CTO: 2:15 p.m.**

Pledge of Allegiance was conducted.

Chairman Boone Cole amended the current Agenda topic of discussion format as listed below.

**Agenda Item #1 – Larry Kogan’s offer to withdraw from FERC proceedings.**

Chairman Boone Cole informed the public of recent communications received by Attorney Larry Krogan in which 13 conditions were listed that if met, Larry Krogan would agree to withdraw Intervention documents most recently filed. Chairman Cole stated that this board under guidance from legal counsel cannot comply with the demanded terms and that by doing so, it would be detrimental to the current FERC proceedings.

- **Commissioner Jerry Laskody moved to reject the terms of withdrawal (FERC) as outlined in the November 2, 2015 communication from Attorney Larry Krogan and was seconded by Commissioner Tim Orr.**

**Public Comment:** Gene Erb asked the board to consider allowing L. Krogan to attend/participate in FERC proceedings. He believes there are questions related to the license. (i.e. Interveners, Funds Accountability) G. Erb stated that it is his opinion that the 2007 Compact/Water Use Agreement be reviewed and that a number of questionable activity has taken place without the public being aware. The public questioned whether there was a significant down-side related to considering L. Kogan’s terms. Chairman Cole responded that all options had been heavily considered and it did not seem beneficial to further entertain the recent demands as listed.

Washington D.C. Attorney of Record Kathleen Mazure commented that there was no downside legally to refusing to adhere to Kogan’s terms but that there were many repercussions related to accepting the offer in question. Mazure stated that the FERC Chief judge is expected to submit final ruling on the many filings offered by L. Kogan over the coming weeks. Chairman Cole questioned Mazure if she would wish to respond to the concerns stated by Gene Erb and ask G. Erb to restate the issues of importance. (i.e. License and Revenue) Chairman Cole responded to the public and Mazure that he believed there to be a great deal of confusion regarding the actual scope of ability and willingness concerning FERC proceedings and that by clarifying the issues, public concerns could be addressed.

K. Mazure responded that a FERC hearing will be established and scheduled regarding the limited issue of the Kerr Hydroelectric License and the Low Block Cost of Power. The courts will determine the rate/terms and conditions as it relates to that subject matter only as per the Intervention filed by the FJBC. The scope of the hearing is specific and it is the opinion of legal counsel that the current subject being discussed is all that this board can ask for legally due to the 1985 Agreement. Chairman Cole questioned Mazure if there was an avenue available to Kogan and his clients to have their issues addressed. K. Mazure responded that within the FERC, there exists re-open clauses but that such exceptions have high standards for admittance. She believes that it would be unlikely that FERC would respond favorably and that she believes FERC has made its position quite clear.

Elaine Willman questioned whether the board and/or its attorneys had read the November 4, 2015 article in the Valley Journal containing an article from the CSKT tribal council. Brian Lipscomb stated that the Low Block Cost of Power previously agreed upon by the tribal government was not mandatory and that it was the CSKT's position that they would not agree to such delivery unless the 2015 CSKT Compact passed Congress. K. Mazure responded that she was aware of such communications and that the issue had been addressed and corrected in previous negotiations. Mazure stated that parties are continuing to provide data and documentation showing the FJBC's right to the Low Block Cost of Power and that it would prove very difficult for the tribal government to back away from current requirements. (i.e. 3mw to the 7mw under discussion)

Chairman Cole informed the board and the public that the LBC has been the right of the individual irrigation districts on behalf of the irrigators for more than 80 years and the 2015 CSKT Compact in no way binds the actions/decisions of the FERC. The 2015 CSKT Compact is irrelevant to these proceedings. K. Mazure stated her agreement to the statement made by Chairman Cole, following with the possibility of an increase to the LBC requirement to 11.2mw. Member at Large Ted Hein questioned the availability of a compromise. Hein would like the board to allow Kogan to participate (quietly as an observer) in ongoing FERC proceedings on behalf of his clients and possibly all the irrigators. Hein believes that the non-consumptive water effects production costs (the value of the water) and that placing a value on such water has nothing to do with adjudication. K. Mazure responded that the valuation of non-consumptive water has nothing to do with the current issue.

Member at Large Ted Hein commented that participants in Washington D.C. (FERC) proceedings consisted of Kathleen Mazure and Chairman Boone Cole only. He believes that there is a need of additional parties, residential and irrigators alike are in need of representation and accountability during these negotiations. K. Mazure responded that the FERC judge will entertain Kogan's request and if found reasonable, he will allow Kogan to participate. She reminded Hein that Kogan had not been hired by the irrigation districts and therefore could not legally participate in the negotiation process. Chairman Cole stated that the board recognized the issues relayed by Member at Large Ted Hein and follow plaintiffs who had retained Kogan's services, he is confident that this proceeding is not the venue to address those issues though.

Gary Grande stated his confusion of the issues being discussed due to missing recent FJBC meetings and requested that the FJBC recap recent events. Elaine Willman commented that Kogan based out of New York, had studied the current issues and had been retained by eight (8) land owners in an effort to provide representation to the irrigators. She stressed that this board could choose to cooperate with Kogan's efforts in fighting the Federal Government or participate in the Federal monopoly by cooperating with the perceived guidelines and requirements presented. K. Mazure

responded that she believed there to be up to twenty (20) plaintiffs represented by Kogan at the time of filing but that ten (10) or more had withdrawn from the proceedings asking for their names to be removed. Christopher C. questioned the board if a transcript of negotiations would be available for public review with the board responding the confidentiality requirements of FERC would not make such negotiations available for FOIA request. Member at Large Ted Hein questioned whether an additional FJBC Board member would be allowed to participate outside of the Chairman. K. Mazure responded that Hein would be welcome to attend if he so chose and that any board member of the FJBC would be allowed to do so.

Gene Erb stated the need for accountability within the FERC proceedings. (i.e. turnover and license)

\*\* Attorney K. Mazure left the meeting at this time (telephonic).

- **Chairman Boone Cole called for a vote on the Motion presented by Commissioner Jerry Laskody. Vote was read for the benefit of the board and public.**

(Commissioner Jerry Laskody moved to reject the terms for withdrawal (FERC) as outlined in the November 2, 2015 communication from Attorney Larry Krogan and was seconded by Commissioner Tim Orr.)

- **Motion Carried – Member at Large Ted Hein and Commissioner Dean Brockway against said motion.**

#### **Agenda Item #2 – Settlement of Bureau of Indian Affairs (BIA) Turnover matter.**

Attorney of Record Kristin Omgig provided an update to recent events stating that a Plan of Operations has been drafted and will be presented during upcoming mediation efforts as directed by Federal Court. Omgig stated that the draft in questions was the end result of multiple meetings conducted by the FJBC directed technical committee. Commissioner Tim Orr oversaw the gathering of pertinent information as it related to project operation and proposed representation. Commissioner Tim Orr provided a brief breakdown of the proposed Plan of Operations/Agreement offering the following points for discussion:

1. Project Management Entity (PME) accountable to the FJBC, BIA and the CSKT Tribal Government jointly.
2. Makeup - change of board representation.
3. Elected representation, not appointed.
4. Eight (8) member PME board.
5. Scope of responsibility – Project Only – Not to set policy.
6. Safeguards implemented in the case of FJBC disbandment. (The Federal Gov. will not turn the project over the individual districts.)
7. Seven (7) members representing fee-land and One (1) Tribal Member at Large to represent trust land.
8. Representation will focus on distribution areas within the project.

Commissioner Orr provided an area map to further show equal representation stating that George Moon (1966 Project Manager) had designed a similar method of distribution/representation during his time with the irrigation project. Orr stated that an Economic Impact Study had already been completed and that Engineer, Ed Evereart had assisted in completing the technical aspects of this presentation to include fiscal budgets and employee requirements. Ray Swenson commented that he believed all portions of this agreement to be possible for the current tax rate of twenty-six (26.00)

dollars per irrigated acres. The public questioned if the draft document was available for public distribution. Commissioner Orr directed the public to contact board administration to receive a copy. K. Omvig reminded the public that the Draft Agreement was still in its initial phase and that it could and would be updated as negotiations progressed. Terry Backs questioned whether non-district land/irrigators were included within the document. Commissioner Orr responded that such land parcels do not pay administration tax and therefore are not represented by the FJBC, but were represented by the Project Manager of the irrigation project.

Chairman Boone Cole outlined the procedure to have fee-land currently listed as non-district brought under the representation of the FJBC. Such intentions would require a letter of intent submitted to the FJBC administration and would then be processed and communicated to the County and Project. Commissioner Jerry Laskody commented his approval of the current draft and commended all parties that has assisted in its creation. Laskody believes that it is a good starting point for upcoming negotiations. Terry Backs questioned who the Project Manager would report to within this document. Ray Swenson (team member) responded that the Manager would report to the PME. Gene Erb recommended that owners of non-district land conduct research as to the legality of their property and the rights associated.

Commissioner Orr commented on the previous ten (10) year term of the CME agreement adding that the committee had done away with such clauses. He stated that financial accountability was a priority and that it was his intention to have the Project Manager report to the FJBC board at least once per year as currently mandated in the BIA operating manual. Orr commented that the original CME agreement was signed and approved by the FJBC in which left the entity vulnerable, this formation has listed the individual irrigation districts to offer a more solid foundation for operation. Member at Large Ted Hein offered an amendment, Project Manager and Assistant Project Manager should have separate reporting requirements to ensure a balance of power and uninterrupted informational flow. John Swenson questioned whether the PME would be a Municipal Entity with its intended elected status for representation. Member at Large Ted Hein questioned the employee hiring process and if such positions were mandated to be Indian preference. (i.e. Federal, State or Tribal)

Commissioner Jerry Laskody commented the need for strong communication between the PME and the FJBC and that such a relationship should be well defined within the agreement. Laskody believes that MCA 85's clearly defines the responsibilities of the FJBC and that this board should be responsible for setting rules and procedures as so defined by Montana law. John Swenson stated his concern over the complications that could arise by forming yet another elected board and if the current laws would dictate that it would have to answer to the FJBC and not the public. (elected body in control of another elected body)

\*\* K. Mazure reentered the FJBC meeting. (telephonic)

Chairman Boone Cole welcomed Gene Erb to present additional questions to K. Mazure. Mazure addressed G. Erb's concerns over financial accountability by stating that the CSKT government would be required to file a FERC Form-1, keeping records of accounts and that transparency is important within the FERC requirements. Mazure went on to state the CSKT tribal government has recognized the requirement and admitted that they would adhere to the regulation. G. Erb questioned if the board or the D.C. attorneys were aware at this time where the net-power revenues from 1990-2014 could be found. Mazure responded that ownership of Kerr Dam had changed over that specific time period to include Montana Power Company – upon them divesting their interest in the Dam, there are no records

filing pertaining to that time schedule anymore. Mazure believes additional filing may be found within PPL or Northwestern. G. Erb questions resources to obtain information relating to non-consumptive water values.

Mazure responded that finding that information would prove difficult and may be easier once the tribal government begin its reporting requirements as it related to Kerr Dam. She went on to add that if the CSKT tribal government fails to report as required by FERC, they are at severe risk of losing their license to own/operate Kerr Dam. She did not find such behavior likely due to the possible negative outcomes.

- **Commissioner Jerry Laskody motioned to direct legal counsel to proceed with mediation efforts with the 9<sup>th</sup> Circuit Court (BIA Turnover) utilizing the Draft Plan of Operations as a beginning negotiation option and was seconded by Commissioner Bruce White.**

**Public Comment:** Tony O. requested that a 48-hour limitation for acceptance of terms be included due to what he perceives to be poor participation with the FJBC up until this point. K. Omvig responded that this is only a talking point so far and that any decisions will be presented for board approval allowing public comment at that time. Elaine Willman questioned a previous statement of Commissioner Tim Orr and that she had perceived him implying that D.C. negotiations were related to project turnover. Commissioner Orr responded that she had misunderstood his statement and that each issue was separate. Christopher C. questioned the board as to its plan B if negotiations were not positive.

Commissioner Richard Erb commented that he had only just received a copy of the draft Plan of Operations and questioned when legal counsel was planning on presenting such information to the other parties in question. K. Omvig responded that she did not believe there to be enough time to hold another public meeting and requested that those with concerns or amendments submit them to her office no later than Monday, November 16, 2016. Omvig believes that negotiation will take place shortly thereafter with the Department of Interior and the Bureau of Indian Affairs. Board members questioned if the CSKT tribal government would be a participant at this time. K. Omvig responded that they would not be an active participant at this time but that the BIA would more than likely communicate with them directly.

Commissioner Richard Erb commented that the CSKT tribal government would need to agree to the proposal in order for it become effective. K. Omvig responded that a mediator will oversee negotiations and then possibly release findings to the public. Commissioner Tim Orr reminded the board members that the draft was just a concept, a possible solution and that this board would need to start somewhere and therefor the committee gathered information to assist in that effort. Orr believes that is important to go into negotiations organized and with a plan of action. G. Erb commented the importance of keeping the public informed.

- **Chairman Boone Cole called for a vote on the Motion presented by Commissioner Jerry Laskody. Vote was read for the benefit of the board and public.** (Commissioner Jerry Laskody motioned to direct legal counsel to proceed with mediation efforts with the 9<sup>th</sup> Circuit Court (BIA Turnover) utilizing the Draft Plan of Operations as a beginning negotiation option and was seconded by Commissioner Bruce White.)
- **Motion carried. Unanimous**

**Agenda Item #3 – Hiring of Engineering Firm (Great West Engineering)**

Chairman Boone Cole introduced Bill Lloyd from Great West Engineering and welcomed him to address the board and public. Lloyd came to the board through legal counsel and was highly recommended by Ed Evereart, previous board engineer. Board members questions the experience Lloyds firm has had historically and the rates associated with services. Lloyd will provide estimated service costs to the board for consideration in the 2016 fiscal budget.

- **Member at Large Ted Hein motioned to postpone the hiring of Great West Engineering until the December 2015 meeting and was seconded by Commissioner Tim Orr.**
- **Motion Carried. Unanimous**

**Agenda Item #4 – FJBC Office (Saint Ignatius, Montana) and other assets.**

Board members discussed the need to have personal property previously quick claimed to the Flathead Irrigation District once again returned to the FJBC now that it has legally reformed. Questions arose as to whether the individual irrigation districts had a vested interest on a per acre bases or whether the FJBC would hold title on behalf of each district. K. Omgig will look into the matter and have appropriate documentation to provide to the board for approval at the December 2015 meeting. K. Omgig was also requested to verifying that the water right interest transferred previously had been returned to the FJBC as well. There was no public comment on this issue.

- **Commissioner Wayne Blevins moved to direct legal counsel to look into the personal property matter and have documentation ready for presentment at the next available public meeting as was seconded by Member at Large Ted Hein.**
- **Motion carried. Unanimous.**

**Meeting was adjourned at 4:24 p.m.**