

**March Madness**  
**0-30 Record**  
**By Alan Mikkelsen**

I think a bit of history might be in order here. After being away from the area for a few years, in early 2003, I was approached by the Flathead Joint Board of Control (FJBC) and asked if I would be willing to return and work on Flathead Indian Irrigation Project (FIIP) Operation and Management transfer issues. After some thought, I agreed, with one stipulation: I had been through the losing battles of the 1980's and 90's and had no desire to repeat that experience. I said that I would not engage in any adversarial relations or activities with the Confederated Salish and Kootenai Tribes (CSKT), but I would be willing to work toward consensus based solutions. The FJBC agreed with that condition.

In the next ten years we negotiated the transfer of the FIIP operation to local control and negotiated a Water Use Agreement for the Flathead Compact that protected irrigators, secured their right to use water, and provided huge financial benefits to the FIIP and irrigators. A great cooperative working relationship was established with the CSKT. But then, people who were more interested in an adversarial relationship and process gained control of the FJBC and the Flathead Irrigation District (FID).

Now we have lawsuits filed by the Flathead District and their attorney against the other two irrigation districts and two months ago the FID filed suit in Montana Water Court and District Court, seeking ownership of the FIIP water rights. The U.S., who owns the FIIP, and the CSKT were not named in these suits, nor could they be unless they waived their sovereignty. In response, the CSKT recently filed an action in federal district court, asking the federal court to halt the state court actions filed by the Flathead District and determine the nature of the CSKT water right and protect any CSKT interests in water rights from an illegal piecemeal adjudication.

The FID has hired a second attorney, with experience in water litigation. Between the two Flathead District attorneys, they have a perfect record of losses against the CSKT legal team. Their combined record approaches 0-30 in litigation involving water against the CSKT. That's right—zero wins, thirty losses. And we are now hearing the same old and tired legal arguments that were raised in the 1980's and 90's by these same attorneys. One definition of insanity is doing the same thing over and over again, while expecting a different result.

The Compact and its associated Water Use Agreement secures the right to use water for irrigators, provides tens of millions of dollars in FIIP improvements, establishes a pumping cost trust fund for the FIIP, establishes a stock water delivery program funded by the State, and grandfathers in and protects all existing wells drilled since 1996, that currently have no legal protections. The Compact provides for future development of water resources by state citizens. Under the Compact and Water Use Agreement, instream flows are not increased until FIIP improvements are made, with the saved water being dedicated to meeting increased flow levels.

Off-reservation, under the Compact there is virtually no impact to existing water rights. With only a few exceptions, the CSKT become co-owners with Montana Fish, Wildlife and Parks

(FWP), in already existing water rights held by FWP, with no change in priority dates. FWP maintains its authority. Hence, no impact on already existing water rights. Contrast that with what off-reservation residents could expect under litigation: The CSKT, because of their treaty language, would expect to win instream flow rights with a priority date of time immemorial. This would be a huge and totally unnecessary loss for off-reservation water users. And those litigated rights potentially extend east of the Continental Divide.

Does anyone really expect that litigation will provide a better outcome than the negotiated Compact, with its protections for all citizens? Why would you want to litigate, when the alternatives are considered? With a 0-30 record already established in various suits/actions/motions/appeals, does anyone really think the thirty first time is going to end differently? Stop the insanity, stop the madness! Support the Compact and Water Use Agreement! Contact your legislators and elected representatives and ask them for their support.

*Alan Mikkelsen has 29 years experience in dealing with water issues on the Flathead Indian Irrigation Project, as well as experience as a state and national expert on water issues. He is a 4<sup>th</sup> generation resident of Lake County and lives near St. Ignatius.*