



Resources, Community, and
Economic Development Division

B-249056

September 18, 1992

The Honorable Ron Marlenee
House of Representatives

Dear Mr. Marlenee:

You requested that we provide information on the contracts between the Confederated Salish and Kootenai Tribes and the Department of the Interior's Bureau of Indian Affairs (BIA) for the operation and management of Mission Valley Power. This utility provides electricity to the residents of the Flathead Reservation in Montana. As agreed with your office, we obtained descriptive information responding to eight questions regarding such things as the contracts' terms and differences, the role of the consumer council during the 1991 rate-setting process, and the events leading up to the resignation of the former chairman of the utility's board of directors. We agreed not to provide you with conclusions and recommendations.

BACKGROUND

In 1986, under provisions of the Indian Self-Determination and Education Assistance Act of 1975, as amended (25 U.S.C. 450 et seq.), the Tribes contracted with BIA to operate and manage Mission Valley Power for 3 years. However, a legal challenge precluded the implementation of the contract. It was updated with a contract modification and became effective on October 8, 1988. The 1988 contract was subsequently modified nine times. The contract was to expire on October 8, 1991. On October 1, 1991, however, a new contract became effective for an indefinite period of time. According to the terms of the preliminary 1986 contract, the 1988 contract, and the 1991 contract, BIA and the Tribes can modify the contracts at any time.

Mission Valley Power was formerly known as the Flathead Indian Irrigation Project power division, operated and managed by BIA. The utility provides service to the entire 1.25-million-acre reservation. About 88 percent of the

reservation's 30,000 residents are not tribal members. Mission Valley Power has an annual budget of about \$11 million; all of the utility's revenues are provided by the users of the electricity rather than by the federal government.

Four key parties under the Mission Valley Power contracts are the tribal council, the utility's board of directors, the general manager, and the consumer council. The 10-member tribal council is the contractor, which agrees to provide the electrical service. The utility's five-member board of directors, composed of reservation residents who meet certain qualifications and who are appointed by the tribal council, is responsible for managing the utility; board members are reimbursed for expenses and may be paid compensation but are not utility employees. The general manager, a utility employee who is hired by the board with the tribal council's concurrence and who reports to the board, is responsible for directing the utility's operations. The seven-member consumer council, composed of interested reservation residents who are geographically dispersed and who are appointed by the superintendent of BIA's Flathead Agency Office, is responsible for providing opportunities for customers' participation in the utility's operations and hearing customers' appeals; council members are reimbursed for expenses and paid for attendance at meetings and hearings but are not utility employees.

While the specific roles and responsibilities of these parties changed from the 1986 preliminary contract to the 1988 and 1991 contracts (as discussed in our responses to questions 1 and 5), the general functions as described above remained the same. In December 1989, the chairman of the utility's board of directors resigned and was subsequently replaced; in October 1991, the general manager and the entire board of directors resigned and were replaced.

INFORMATION ON THE EIGHT QUESTIONS

Question 1. What modifications to the 1988 contract may have affected the autonomy of the utility's board of directors, consumer council, or general manager?

In a July 1986 summary of plans for managing the utility, the Tribes discussed the utility's "autonomy" from the tribal council:

"The Tribes purposely limited their involvement in the direction of the utility to the choice of a Board and Manager who they believe will operate the Utility efficiently and competently. Once appointed, the Board and Manager then operate autonomously, and not under direct Tribal Council supervision, directing the Utility as they deem appropriate."

Additionally, according to the summary, "The Consumer Council would not be under Tribal control."

The 1988 contract did not include these statements or refer to the utility's "autonomy." According to the 1988 contract's provisions, the tribal council was to "implement aspects of its responsibilities under [the] contract by delegation of the same to the Utility Board as provided in this Plan of Operation, and as may be provided by amendment of this Plan from time to time during the term of the contract." This delegation was "intended to insulate the Tribal Council from many details of utility operation and foster prudent business operation of the utility." However, the contract required the tribal council's approval of Mission Valley Power's personnel system and any changes to it. The 1988 contract further required that the consumer council serve in an advisory capacity to the utility's board and that the general manager "direct all aspects of utility operations" and be "responsible to the Utility Board."

Of the nine modifications to the 1988 contract, one (modification 3, approved by BIA's Portland Area Office on July 12, 1990) affected the autonomy of the board of directors and the general manager. This modification deleted the statement that the purpose of the tribal council's delegation of responsibilities was "to insulate" the tribal council from the many details of the utility's operations. This modification also added two requirements: that the tribal council review and concur with all major policies and plans and that the tribal council approve changes in the organizational chart attached to the contract.

Question 2. What documented commitments on personnel management were made by the Tribes to secure either the 1988 contract or the 1991 renewal, including those incorporated into the contracts' provisions?

We reviewed two documents containing statements on personnel management that were issued by the Tribes prior to the 1988 contract: (1) an August 1986 statement responding to questions raised by BIA employees of the Flathead Indian Irrigation Project power division and (2) the October 1986 preliminary contract. We could not determine whether statements in either document were intended "to secure" either the 1988 or the 1991 contract.

According to the August 1986 statement, the Tribes would allow BIA employees to transfer to tribal employment while retaining their key federal benefits (e.g., retirement benefits) and would not subject the employees to a reduction-in-force (the elimination of positions). The Tribes would negotiate a new agreement with the International Brotherhood of Electrical Workers (IBEW)--with the involvement of the utility's board--and honor the union's existing wage schedule. Additionally, according to the statement, the utility's general manager would have authority in hiring and firing. The 1986 preliminary contract did not address the first two issues, but it did state that the utility's general manager would have authority in hiring and firing, subject to applicable personnel rules (to be developed and implemented by the utility's board).

Neither the 1988 nor the 1991 contract addressed the transfer of BIA employees. The Tribes made individual arrangements with those BIA employees who wanted to transfer to tribal employment, allowing them to retain their key federal benefits, and these employees were transferred to tribal employment in October 1988. The Tribes negotiated an agreement with IBEW in September 1988--prior to the 1988 contract's implementation and without the former board's involvement. The 1988 contract required the board to honor the agreement. The Tribes renegotiated the agreement in September 1991, and the 1991 contract requires the board to honor the agreement.

Both the 1988 and the 1991 contracts state that the general manager has authority in hiring and firing, subject to applicable personnel rules. Under the terms of the 1988 contract, the utility's former board of directors developed a personnel system to describe these rules that was based directly on the rules of the Tribes' existing personnel system. Under Mission Valley Power's personnel system, the general manager reviewed and approved all hiring and firing. If an employee disputed a personnel action, such as

termination, he or she could pursue a grievance through a four-step process that ended in tribal court. The 1991 contract substituted the Tribes' existing personnel system for Mission Valley Power's personnel system without the former board's agreement. Under the tribal system, the general manager continues to review and approve hiring and firing at the utility, but the executive secretary of the tribal council must review and approve these decisions. Under the tribal system, grievances are also ultimately decided by the tribal court.

Question 3. What changes between the 1988 contract and the 1991 renewal may have increased the personal liability of the board of directors or the general manager, and what proposals and requests were made to provide liability insurance for the board or the general manager?

Modification 3 to the 1988 contract, which affected the autonomy of the utility's board of directors and general manager (see question 1 above), and the 1991 contract, which substituted the Tribes' personnel system for Mission Valley Power's personnel system (see question 2 above), resulted in the Tribes' assuming more responsibility for the utility. However, the extent to which either modification 3 or the provisions of the 1991 contract affected the liability of the utility's board or general manager has not been determined.

The utility's former board first discussed the subject of liability insurance coverage for themselves at an April 1990 board meeting. However, board members were not clear on the need for such insurance and subsequently made a business decision that it was too costly to obtain the insurance. Following further discussions, and because of their evolving concerns about their potential liability, the former board proposed in September 1991 that the utility obtain directors' and officers' (D&O) insurance. Such insurance would cover court defense costs and any losses resulting from claims alleging wrongful acts by board members acting in their capacity as utility board members.

The former board believed that their personal liability escalated under the 1991 contract, when the tribal personnel system was substituted for Mission Valley Power's personnel system, because they lost authority over Mission Valley Power's staff. However, the former board of directors resigned in October 1991, before D&O insurance was acquired. The utility subsequently obtained D&O insurance for the new

board, the general manager, and other key officials of the utility. This insurance took effect in the spring of 1992.

Question 4. What was the content of and basis for the contract modification that required the board of directors and the consumer council to use tribal attorneys rather than independent counsel?

The 1986 preliminary contract stated that the utility board and the consumer council "may utilize the Tribes' legal department." In contrast, the October 8, 1988, contract modification said that the utility board and the consumer council "shall not utilize legal counsel other than the legal services of the Contractor's legal department." Members of the former board believed that the 1988 requirement kept them from receiving adequate or timely legal counsel, especially in situations where other interests of the Tribes might have conflicted with the utility's interests, and began to erode their autonomy.

According to the tribal council, one reason for requiring the services of the Tribes' legal department was that the Tribes had become more sensitive to the potential for legal challenges, partly because of the legal challenge to the 1986 preliminary contract. The tribal council believed that their legal department would be in the best position to represent the Tribes' interests.

In addition, according to the tribal chairman and the tribal attorney who was primarily involved with the contract and the utility, the requirement to use tribal legal counsel was established because the tribal government's experience had shown that the in-house tribal legal department was more familiar with BIA regulations and procedures than was private counsel. The attorney believed that he could generally represent the interests of the utility and the other interests of the Tribes and could excuse himself in those rare situations where the interests of the utility might conflict with other tribal interests.

Question 5. What was the role of the consumer council, as defined in the contracts and as reflected in the minutes of its meetings, during the recent rate-setting process as well as prior to any modifications or changes to the 1988 contract?

The 1988 contract's plan of operations required that during the rate-setting process, the consumer council complete

several tasks. Within 30 days of receiving the proposed rate schedule from the utility's board of directors, the council was to hold a public hearing on the proposed changes and afford consumers an opportunity to comment on them. Within 20 days after receiving customers' comments, the council was to submit to the board its recommendations for the rate schedule, accompanied by supporting documentation and a complete record of all oral and written comments received. During the rate-setting process, the council also was authorized to conduct an independent study of the rate schedule and to submit its recommendations to BIA. The 1991 contract retains these provisions.

The consumer council received proposed rate increases from the utility's former board of directors on July 30, 1991. The consumer council held its public hearing on September 10--42 days later--with the knowledge of the board. At this meeting, the council solicited comments from consumers, and subsequently, the council extended its original deadline for comments by a week, from September 30 to October 7. According to a summary prepared by the utility, the council received the following comments relating to the proposed increases: 17 comments said that the proposed increases were excessive, 12 noted concerns about customers' ability to pay, 10 expressed concerns about the proposed minimum monthly charge, 10 expressed concerns about the proposed allocation of costs among different groups of customers, 2 cited overall concerns about the high cost of service, and 2 supported smaller increases in the proposed rates. Another 11 comments generally supported the proposed increases.

During the rate-setting process, the consumer council also hired a consultant to review the former board's proposed rate schedule. This consultant's report was submitted to the former board on August 20 and was used in subsequent discussions between the former board and the consumer council regarding the proposed increases. After the former board resigned, the consumer council worked with the members of the new board to educate them on the rate-setting process and the proposed increases. On October 27 (20 days after the end of the period for public comments), the council submitted to the new board recommendations for the rate schedule and the supporting documentation. On October 29, the council provided the new board with a record of all comments received from consumers.

Discussions between the consumer council and the new board continued. On December 5, the council sent a letter to BIA supporting the modified rate schedule that these discussions had yielded. On December 20, the director of BIA's Portland Area Office approved the rate schedule recommended by the new board and consumer council. The new rates became effective on March 1, 1992, and were reflected in customers' March bills.

The primary role of the consumer council did not change between the 1986 preliminary contract and its first modification (which implemented the 1988 contract). According to the 1986 preliminary contract, the consumer council was to serve in an advisory capacity to the board of directors. The council was to "provide the electric utility consumers with opportunities for participation in the development of policies and schedules to be implemented by utility management and to hear appeals of complaints of power consumers arising from implementation of such policies and schedules." The 1988 and 1991 contracts contained the same provisions.

Question 6. What events led up to the resignation of the chairman of the utility's former board of directors in December 1989, and how consistent are the events with the documented commitments in question 2 and with the provisions of the 1988 contract?

Several events led up to the December 1989 resignation of the first chairman of the former board. The events centered on a proposal by the former board and general manager to eliminate the position of an employee whose performance they believed to be poor and on the tribal council's reaction to their proposal. However, few of the events are documented, and the parties involved have somewhat different recollections of them.

On November 29, 1989, the former board and general manager met and discussed the employee's alleged poor performance as well as various alternatives to remove him, including eliminating his position (i.e., a reduction-in-force). This employee had transferred from BIA's Flathead Indian Irrigation Project power division to tribal employment with the utility and had an employment contract that was due to expire in December 1989. The former board and general manager ultimately decided that the best alternative would be to reorganize the utility to eliminate the position and not to renew the employee's employment contract.

In mid-December, the former board met with the tribal council in executive session to discuss the preferred alternative. The chairman of the former board said that the tribal council did not provide clear direction regarding the proposed reorganization at this meeting. However, the tribal council believed that, at this meeting, it stated in plain terms its concern that the proposed reorganization must not violate the Tribes' commitment to Mission Valley Power employees at the time they transferred from BIA to tribal employment (i.e., that they would not be subject to a reduction-in-force). The tribal council believed that it conveyed its position to the board that the reorganization could not go forward without its consent.

Following the executive session, on December 15, the former board chairman implemented the reorganization (eliminating the position in question) and the general manager notified the employee that his employment contract would not be renewed. On December 19, after learning that the tribal council was very unhappy with the reorganization, the board deferred it. On December 20, the tribal council wrote the board chairman, requesting his voluntary resignation. According to the letter, the board chairman's resignation was sought because the council believed he had exercised poor judgment in ignoring the council's stated position and jeopardizing the commitment made by the Tribes to the utility's employees. On December 22, believing he was forced to do so, the board chairman resigned.

The former board, board chairman, and general manager believed that their decision to reorganize the utility and not renew the employee's employment contract--and their subsequent decision to defer these actions--was consistent with provisions of the 1988 contract, as amended up to that time. Under the contract, the utility's board and general manager could reorganize the utility when they deemed it necessary for efficient operation and control and the general manager had authority to hire and fire utility employees. However, the tribal council believed that its intervention in the reorganization was consistent with its pre-contract commitment to protect former BIA employees who had transferred to tribal employment.

Question 7. What is the current composition of the utility's board of directors, and how consistent is it with the documented commitments in question 2 and with the provisions of the 1991 contract renewal?

In its August 1986 statement, the Tribes said that the utility's board of directors would be made up of both Indians and non-Indians. Neither the 1986 preliminary contract nor the 1988 contract required that Indians and non-Indians be on the board, but they both included a requirement that no more than three board members could be enrolled members of the Tribes and that no fewer than two could be non-tribal members. The 1991 contract deleted the reference to tribal membership for members of the utility's board. As of September 1992, three board members were tribal members and two were neither tribal members nor Indian.

Question 8. How do the Tribes, in conjunction with BIA, set funding and program priorities to operate and manage Mission Valley Power as well as other programs and activities during the yearly budget formulation process?

Contracts entered into under provisions of the Indian Self-Determination and Education Assistance Act of 1975, as amended, include a statement of work. New projects, or changes to projects in the statement of work and the corresponding yearly budget proposals, must be submitted as contract modifications to BIA for review and approval. The statement of work for Mission Valley Power's 1988 contract and the 1991 renewal were modified by the Tribes and approved by BIA during the annual budget formulation process. These modifications originated as project and budget proposals from the utility's general manager and key staff.

Project and budget modifications to Mission Valley Power's contract are submitted first to the utility board and then to the tribal council. The tribal council reviews the modifications for their reasonableness. During this process, the consumer council is informed of the modifications, both as a courtesy and to obtain feedback. Once the tribal council reaches consensus on any needed revisions to the project and budget proposals, it approves them and forwards them to the Tribes' contracting department. However, according to a tribal council member, revisions made by the tribal council have not materially affected the proposals because the tribal council relies upon the expertise of the general manager, utility staff, and the utility's board in formulating the project and budget proposals.

The proposed project and budget modifications are then submitted to BIA's Flathead Agency Office. This office performs an administrative review to ensure that the modifications are complete and consistent with applicable requirements. The proposed modifications are then forwarded to BIA's Portland Area Office, where they are reviewed for legal conformity and approved by contracting and financing officials. The contracting officer at the Portland Area Office then issues a "notice to proceed" with the modifications.

SCOPE AND METHODOLOGY

We performed our work primarily between July and September 1992, and we also incorporated the results of work we had completed between April and June 1992 for another requester. We worked primarily at BIA's Flathead Agency Office and the Mission Valley Power utility, both located on the Flathead Reservation, and at BIA's Portland Area Office. We reviewed the 1986 preliminary, 1988, and 1991 contracts; modifications to these contracts; and related documents, such as personnel policies. We interviewed BIA officials, tribal representatives, representatives of Mission Valley Power, and former members of Mission Valley Power's board of directors.

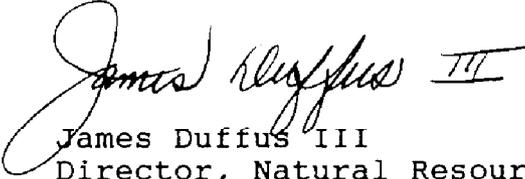
We discussed the information contained in this letter with responsible officials at BIA's Portland Area Office and Flathead Agency Office as well as with members of the Confederated Salish and Kootenai Tribes' tribal council and the utility's former and current board of directors and consumer council. They generally agreed with the facts presented, and their comments were incorporated where appropriate. However, as requested, we did not obtain written agency comments on a draft of this letter.

B-249056

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Please contact me at (202) 275-7756 if you or your staff have any questions.

Sincerely yours,

A handwritten signature in cursive script that reads "James Duffus III". The signature is written in dark ink and is positioned above the typed name.

James Duffus III
Director, Natural Resources
Management Issues

(140772)