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GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-249056

June 30, 1992

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The Honorable Pat Williams
House of Representatives

Dear Mr. Williams:

You requested that we provide information on two 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 the Mission Valley Power utility, which 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 utility's performance, and BIA's oversight. 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 a term of 3 years. However, a legal challenge precluded the implementation of the contract. It was updated with a contract modification and thus 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. Mission Valley Power provides service to the entire 1.25-million-acre reservation, and 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

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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 and the utility's board of directors, general manager, and consumer council. The 10-member tribal council is the contractor, which agrees to provide the electrical service. The utility's five-member board, 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 6 and 8), these general functions remained the same. In this report, we use the term "utility" to mean any or all of these parties: the tribal council, board of directors, general manager, and consumer council.

INFORMATION ON THE EIGHT QUESTIONS

Question 1. What actions did the utility take to accomplish the work required by the first contract between the Tribes and BIA that was in effect from October 8, 1988, through September 30, 1991?

The 1988 contract required the utility to meet four general performance requirements, as set forth in the statement of work: operating and maintaining the utility, enhancing and expanding the electrical system, collecting and reporting data on the system, and carrying out special projects and plans. The contract's plan of operations required many more specific tasks, some of which are highlighted here and discussed in more detail in the responses to other questions.

To meet the requirement to operate and maintain the utility, the utility provided personnel to carry out the work (most of the former employees of the Flathead Indian Irrigation Project power division were transferred to Mission Valley Power), developed and implemented a program to monitor substations and other equipment, established systems to respond to service interruptions and requests for new service, and established a billing and collection system. The utility also hired a safety manager to ensure that all alterations to the electrical system met electrical and safety codes.

To fulfill the requirement to enhance and expand the electrical system, the utility identified additions, expansions, and improvements needed in the system to maintain effective and efficient service. The utility also developed construction plans to provide requested service to new customers and to bring voltage levels into compliance with standards.

To meet the requirement to collect and report data on the system, the utility gathered quantitative data on electrical power consumption, categories of consumers, and costs of operations and other information needed to support adjustments to the rate schedule. The utility also made available, to tribal members and the public, a monthly accounting of expenditures from the contract fund.

To meet its obligation to carry out special projects and plans, the utility developed a long-range (10-year) plan for the distribution of electrical power, laying out the optimal modifications to the system. The utility also developed a more detailed plan for construction projects to modify or enhance the system, with related cost estimates.

Question 2. What actions did the utility's consumer council take through January 1992 to accomplish its required tasks during the recent rate-setting process, and what complaints about the new rates did BIA receive from consumers through April 1992?

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 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 same provisions.

The consumer council received proposed rate increases from the utility's former board of directors on July 30, 1991.[1] The 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 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

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[1]The utility's board of directors resigned on October 4, 1991 and was replaced by a new board on October 7, 1991.

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. As of April 22, the utility had received complaints about the rate increases from 48 customers, according to utility records, and BIA's Flathead Agency Office had received no such complaints, according to the office's superintendent.

Question 3. What actions did the utility's former board of directors take through September 1991 to provide any required involvement by consumers in establishing the utility's policies?

The 1988 contract required that the utility establish an organizational structure whereby customers were afforded opportunities to participate in the development and implementation of the utility's policies. The contract instituted these opportunities primarily by establishing the consumer council. Also, the former board opened its annual and biweekly meetings to the public, as required by the contract.

The former board of directors, during its tenure, had no specific contractual requirements to encourage and consider public input. The former board did, however, authorize several actions by the utility to do so. For example, the utility hired a customer service representative to record and respond to customers' concerns. Also, to provide customers information about the rate-setting proposal, the utility held three public informational workshops on August 27, 28, and 29, 1991.

Question 4. What actions did the utility take between October 8, 1988, and April 30, 1992, to comply with federal environmental and safety requirements and the federal requirement that in hiring, preference be given to Indians?

In meeting the many federal environmental and safety requirements, the utility took many steps, a few of which are highlighted here. For example, the utility hired an employee to develop and implement a compliance program. The program included increased training for employees; a project to remove the toxic chemicals, PCBs (polychlorinated biphenals), from the electrical transformers located throughout the reservation; the monitoring and replacement of equipment; and preventive maintenance. The utility also

hired a consultant to assess operational safety and risks, primarily for insurance purposes.

The utility developed personnel policies and procedures to meet the federal requirement that in hiring, preference be given to Indians. This requirement was mandated by the Wheeler-Howard Act of 1934 (25 U.S.C. 472). Under the contracts, qualified Indians must be given preference over non-Indians in hiring, and nonqualified Indians must be given training and employment opportunities, when feasible and compatible with efficient operations. Under the 1988 contract, when the operation of the utility passed from BIA to the Tribes, the utility allowed employees to stay on, rather than terminate their employment. Since then, as vacancies have occurred, the utility has given preference to Indians in hiring. Table 1 shows the number of Indian and non-Indian employees, as well as vacancies, in October 1988 and April 1992.

Table 1: Utility Employees, October 1988 and April 1992

Date	Indians[a]	Non-Indians	Vacancies	Total positions
October 1988	38	25	18	81
April 1992	45	30	6	81

[a]Enrolled members in federally recognized tribes.

Question 5. What documented commitments about personnel management did the Tribes make, prior to the start of the 1988 contract and the 1991 renewal, to secure either contract, including those commitments 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 1986 preliminary contract. We could not determine whether statements in either document were intended "to secure" either the 1988 or 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 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 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--and 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 the 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, 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 6. What documented commitments did the Tribes make through October 8, 1988, to allow the utility to operate

autonomously or to maintain the autonomy of its board of directors, consumer council, or general manager?

We reviewed two documents, issued by the Tribes prior to the 1988 contract, containing information relevant to the utility's autonomy: (1) a July 1986 summary of plans for managing the utility and (2) the 1986 preliminary contract. The July 1986 summary stated, "The Tribes, as the contracting party, are committed to exercising responsible control over the utility for the benefit of all power consumers on the Reservation." The summary went on to say the following:

> The Manager's functions are similar to the responsibilities of the Chief Executive Officer of any utility. 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. The Manager would serve under contract at the pleasure of the Board.

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

The 1986 preliminary contract did not include these statements or refer to the utility's "autonomy." According to the preliminary contract's terms, the tribal council was to "operate and manage the electric power system . . . in accordance with the terms of this contract and the 'Plan of Operation'. . . ." Furthermore, the preliminary contract stated that 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."

The 1986 preliminary contract required that the utility's board members be appointed by the tribal council, and they could be removed by the council only for cause (e.g., malfeasance). The board's management and operation of the utility was to be "subject to and consistent with applicable federal and tribal law and the Contract. . . ." The tribal council was to delegate aspects of its responsibilities to

the board. According to the preliminary contract, this delegation was "intended to insulate the Tribal Council from many details of utility operation and foster prudent business operation of the utility."

As for the consumer council, the 1986 preliminary contract required that its members be appointed by the superintendent of BIA's Flathead Agency Office, and they could be removed (by the superintendent) only for cause. The consumer council was to serve in an advisory capacity to the utility's board. According to the preliminary contract, 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."

Under the 1986 preliminary contract, the general manager was to be hired by the utility's board, with the approval of the tribal council. According to the contract, the general manager, as "the chief executive officer" of Mission Valley Power, would "direct all aspects of utility operations" and would be "responsible to the Utility Board."

The 1988 contract retained these statements from the 1986 preliminary contract but added the following requirements: (1) Both the utility's board and consumer council were required to use the Tribes' legal department, instead of being allowed to contract for other legal services, as stated in the preliminary 1986 contract; (2) both the board and consumer council were required to honor the contract negotiated by the Tribes with IBEW; and (3) the tribal council was required to approve Mission Valley Power's personnel system and any changes to it. (See the response to question 8 for a description of the key substantive changes made to the contract after October 1988.)

Question 7. What monitoring and oversight of the 1988 contract and the renewal has BIA performed to ensure compliance with the contracts' provisions and applicable laws and regulations?

According to a November 1988 memorandum, signed by the contracting officer of BIA's Portland Area Office, he designated a subordinate contracting officer (located in BIA's Flathead Agency Office) as his representative for the 1988 contract. The representative was to conduct quarterly

on-site reviews of the utility's progress, performance, and compliance with all reporting requirements. These quarterly reviews were to use reports, required under the 1988 contract, on the following topics: (1) new customers, power outages, and voltage levels; (2) the status of the construction of major additions to the electrical system and additions required by the general plan; (3) rate schedules, as compared to those of neighboring utilities; (4) long-range plans detailing the optimal electrical system, specifying any components that should be removed, added, or replaced; (5) 2-year work plans (based on the long-range plan) detailing the construction needed annually and the associated costs; and (6) maintenance procedures for the system.

BIA's representative also was to monitor and evaluate the contract to identify issues that could create problems, review expenditures to ensure they were allowed, maintain a chronological list of all transactions involving the contract, and evaluate the Tribes' property management system every quarter.

BIA's representative reported that he conducted one quarterly performance review (in 1989). He said he informally visits Mission Valley Power's main office about six times a year and has other informal contacts continually in order to review and discuss the utility's operations. He also checks whether the utility is submitting all required reports.

Instead of requiring the reports listed above, the 1991 contract, in accordance with the 1988 amendments to the Indian Self-Determination Act, requires quarterly financial reports and brief annual narratives summarizing the accomplishments achieved and the problems encountered. As of June 5, 1992, the Portland Area Office contracting officer had not designated his representative in the Flathead Agency Office under the 1991 contract.

Question 8. What modifications were made to the 1988 contract and the 1991 renewal, and what are the key substantive differences between the two contracts?[2]

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[2]In this report, we use "key substantive differences" to mean those differences affecting (1) the role of the tribal council and its relationship to the utility's board or (2) performance requirements of the utility.

Nine modifications were made by the Tribes and BIA to the 1988 contract, and one modification has been made to the 1991 contract. Table 2, which uses BIA's numbering scheme for the modifications, lists the dates when they became effective and when they were approved by BIA's Portland Area Office.

Table 2: Contract Modifications

Modification number	Effective date	Date of BIA's approval
1986 preliminary contract		
1[a]	10/08/88	10/07/88
1988 contract		
2	10/01/89	05/14/90
3	07/12/90	07/12/90
4	07/12/90	07/12/90
5	08/09/90	08/09/90
6	09/10/90	09/18/90
7	10/01/90	11/07/90
8/1[b]	02/28/91	03/25/91
2	04/25/91	04/25/91
3	05/24/91	05/24/91
1991 contract[c]		
1	02/03/92	02/03/92

[a]Modification 1 updated the 1986 preliminary contract, putting the modified contract into effect. The modified contract is the 1988 contract.

[b]Modification 8 was subsequently renumbered as modification 1.

[c]The 1991 contract was approved and became effective on October 1, 1991.

The modifications generally changed annual budget/funding levels or plans for acquiring equipment. For example, modifications 2 (approved May 14, 1990) and 7 to the 1988

contract established funding levels for the approaching fiscal years (1990 and 1991, respectively) and modified the plan for acquiring equipment. Modification 6 to the 1988 contract and modification 1 to the 1991 contract also adjusted budgets or funding levels. Modifications 4, 5, 8/1, and 3 (approved May 24, 1991) to the 1988 contract also revised the plan for acquiring equipment. In addition, modification 4 revised the organizational chart, staffing plan, and descriptions of key positions. Modification 5 also required that the director of BIA's Portland Area Office decide rate adjustments, transferring this authority from the superintendent of the Flathead Agency Office. Modification 2 (approved Apr. 25, 1991) to the 1988 contract changed the number of modification 8 to modification 1.

Modification 3 (approved July 12, 1990) to the 1988 contract, while retaining most of the contract's language, made the following key substantive changes. The modification deleted some reporting requirements, changed the specified time allowed for providing service to new customers from a requirement to a goal, and added a requirement to work toward increasing the emergency reserve fund to $1 million. The modification also (1) deleted the phrase stating that the intent of the tribal council's delegation of responsibilities to the utility's board was "to insulate the Tribal Council from many details of utility operation and foster prudent business operation of the utility," (2) added a requirement that the tribal council review and concur with all major policies and plans, and (3) added a requirement that the tribal council approve changes in the organizational chart attached to the contract.

The 1991 contract, based directly on the prior contract, made the following key substantive changes. The 1991 contract replaced the reporting requirements remaining in the 1988 contract with the requirement for a brief annual narrative and quarterly financial reports. Regarding the role of the tribal council and its relationship to the utility's board, the 1991 contract deleted the phrase stating that the tribal council would delegate responsibilities to the board and added a phrase stating that the tribal council "retains ultimate control and responsibility for ensuring . . . compliance with the terms of this contract." Also, the 1991 contract deleted a requirement that at least two board members not be enrolled tribal members. Furthermore, the contract replaced the provision explaining that board members could be removed by a majority vote of the tribal council "for cause" with a

statement explaining that they could be removed "after being provided an opportunity to be heard." Finally, the 1991 contract substituted the tribal personnel policies for the utility's personnel policies (as discussed under question 5).

SCOPE AND METHODOLOGY

We performed our work primarily between April and June 1992, 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 new 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.

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

Sincerely yours,

James Duffus III

James Duffus III
Director, Natural Resources
Management Issues

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