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H.R. 3658, A BILL TO PROVIDE FOR THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, AND FOR OTHER PURPOSES

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

SEPTEMBER 23, 1998, WASHINGTON, DC

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HEARING ON H.R. 3658, A BILL TO PROVIDE FOR THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, AND FOR OTHER PURPOSES

WEDNESDAY, SEPTEMBER 23, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m. in room 1334, Longworth House Office Building, Hon. John Doolittle (chairman of the Subcommittee) presiding.

STATEMENT OF HON. JOHN T. DOOLITTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DOOLITTLE. The Subcommittee will come to order.

We are here today to hold a hearing on H.R. 3658, a bill to provide for the settlement of the water rights claims of the Chippewa Cree Tribe of the Rocky Boy's Reservation, and for other purposes.

This is the first new Indian water rights settlement bill to come before the Congress in many years. Although there are a number of pending and potential Indian water rights claims throughout the country, this legislation is also the first Indian water rights settlement proposed by the Clinton Administration.

We need to take steps to advance the resolution of these issues as quickly as possible. These claims have been outstanding for decades and, frankly, the process is too cumbersome and does not reflect the unique nature of each situation. The opportunity must exist to meet the long sought needs of the tribes and at the same time reduce the impacts on existing water users. I am encouraged by the comments we have received from the Western Governors concerning their commitment to negotiate rather than litigate these claims.

As many of you are aware, the Senate has held an oversight hearing and a markup this year on the Rocky Boy Reservation's implied reserve water rights settlement. Unfortunately, many of the underlying questions have been left unanswered on the Senate side.

While there is no question about the need to settle Indian water rights issues, it is imperative, in order to arrive at a wise, fair and equitable solution, that the following issues be fully considered: One, the statutory, regulatory and judicial history of the implied

Federal reserved water rights; two, State jurisdiction in the appropriation and later distribution of water; three, the appropriate funding mechanisms to resolve these problems; and, four, the appropriate methods for determining the liability in Indian water rights settlements.

Over the years, both Indian and non-Indian implied reserved water rights have undergone a judicial evolution. It is clearly time to consider those trends and look for ways to meet the growing needs of Indian populations while preserving the stability of current water rights holders.

Although the courts have not fully reconciled the Indian and non-Indian reserve water rights cases, the opportunity exists to weave the many threads of existing trends in case law together; to consider existing demands, needs and technology; and to develop a process that is faster and more equitable to all the parties.

The legislation we have before us is the product of hard work and thoughtful consideration of a complicated situation. I believe that everyone involved has a genuine desire to address the fundamental need the Indian tribes have for adequate water resources.

I look forward to hearing from our witnesses today. We at this point don't have a minority member to make the opening statement on their side, and I guess if we do, when they come in, I will recognize them for that purpose.

[The prepared statement of Mr. Doolittle follows:]

STATEMENT OF HON. JOHN T. DOOLITTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

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While there is no question about the need to settle Indian water right issues, it is imperative, in order to arrive at a wise, fair, and equitable solution, that the following issues be fully considered:

- The statutory, regulatory, and judicial history of implied Federal reserved water rights.
- State jurisdiction in the appropriation and later distribution of water.
- The appropriate funding mechanisms to resolve these problems.
- The appropriate methods for determining liability in Indian water rights settlements.

Over the years both Indian and non-Indian implied reserved Federal water rights have undergone a judicial evolution. It is clearly time to consider those trends and look for ways to meet the growing needs of Indian populations while preserving the stability of current water rights holders.

Although the courts have not fully reconciled the Indian and non-Indian reserve water rights cases, the opportunity exists to weave the many threads of existing trends in case law together; to consider existing demands, needs, and technology; and to develop a process that is faster and more equitable to all the parties.

The legislation we have before us is the product of hard work and thoughtful consideration of a complicated situation. I believe that everyone involved has a genuine desire to address the fundamental need the Indian tribes have for adequate water resources.

I look forward to hearing from our witnesses today.

Mr. DOOLITTLE. We are going—we have Mr. Hill, whose bill this is, joining us today. I recognize you for any statements that you would like to make.

STATEMENT OF HON. RICK HILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. HILL. I thank you, Mr. Chairman, and thank you for holding this hearing. I want to welcome Bruce Sunchild, who is the vice chairman of the Chippewa Cree Tribe of the Rocky Boy's Reservation; Barbara Cosens, legal counsel from the Montana Reserve Water Rights Compact Commission; and David Hayes, counselor to the Secretary of the Interior.

The benefits of this legislation are that it addresses the long-term water needs of the Rocky Boy's Reservation; without this compact, those water needs cannot be met. The Indian Health Service designed the current water supply system which, Mr. Chairman, provides an average daily use of about 60 gallons per person. The average Montana use is about 170 gallons per person.

The reservation's population is predicted to grow at about 3 percent per year, so clearly the current system cannot meet either the current demand or projected demand. This bill enacts a water needs assessment study for all of north central Montana where water, in that area of Montana, is scarce. And this is a first step in ratifying a solution to address not only the tribe's needs but the needs of others.

This bill will reduce the potential for future water rights disputes by setting up a dispute resolution mechanism. This legislation represents a successful culmination of a long-standing negotiation between the tribe and the State, and has the blessing of the administration.

Mr. Chairman, since 1916 when the reservation was created, the tribe has sought to meet its water needs. The tribe's current water needs process began in 1982, when the U.S. filed a water claim for the tribe in the Montana water court. This led the U.S. Government, the tribe and the State of Montana to enter into negotiations, and these negotiations represent a good faith effort to avoid costly legislation to provide a win-win solution for all Montanans.

The State of Montana held a series of public meetings regarding these negotiations beginning in 1992. And with that in mind, over a decade of technical studies, an agreement was reached in 1997 for the benefit of all Montanans. The Montana State Legislature approved this compact on April 14th, 1997.

This legislation would ratify the compact, which will achieve the following things: It will allow the tribe to exercise its on-reservation water rights of 10,000 acre feet of water. For this to happen, the Federal Government would contribute $24 million for on-reservation water development projects. It would contribute $15 million toward the planning and the construction of a future water reservation water supply system. And it would contribute $4 mil-

lion for the feasibility studies on enhancing the water supplies for others in the tribe in northern central Montana.

In conclusion, Mr. Chairman, this bill represents a Montana consensus, and I look forward to working with the chairman and my colleagues in moving this forward. Mr. Chairman, I do have a bill on the floor, and I am going to have to leave here shortly. With your consent, I would like to submit questions in writing to the panelists.

Mr. DOOLITTLE. Of course, that will be perfectly appropriate, and then we will ask them to respond expeditiously.

Mr. HILL. Thank you, Mr. Chairman.

[The prepared statement of Mrs. Chenoweth follows:]

STATEMENT OF HON. HELEN CHENOWETH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. Chairman, I am pleased that we have the opportunity to hold a hearing on H.R. 3658, the "Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Water Right Settlement Act of 1998." This is a bill that could have major future implications on water rights throughout the west.

Mr. Chairman, on the surface, H.R. 3658 simply affirms a compact that has been made between the State of Montana and the United States over water rights for the Chippewa Cree Tribe. I do not oppose the right for the Montana or any other state to make these type of agreements. However, what I am concerned about is how this new law, which would codify an "Indian reserved water right," could impact the many numerous disputes over water between my own State of Idaho and the United States over this very doctrine.

Mr. Chairman, I understand that this bill tries to restrict the precedents for future litigation this bill would establish for Federal reserved water rights. But there is no way to ensure that this limitation will be enforced by future courts—and at the very least, the first-time codification of a Federal reserved water right will lead us down a dangerous and unintended path.

Mr. Chairman, we all are aware of a concept that has been established through common law known as the "Winters doctrine," which had its origin in the 1908 Supreme Court case *Winters v. U.S.* This case held that water which was flowing through an Indian Reservation in Montana was impliedly reserved by the government in the treaty establishing the reservation. In other words, the court held that although no mention was made in the treaty regarding the reservation of water rights, it was assumed that such a right was meant to be implied when the treaty was created.

Ever since this decision, the U.S. government has made numerous attempts to broaden the "Winters doctrine" to suggest that the United States has an implied reserved right to water above the rights that belong to the state. However, the Supreme Court has consistently ruled that the primary authority for water rights belongs to the states. In *California v. U.S.* current Chief Justice Rehnquist opined what would be the consequences if we were to undermine this right. He said:

> *"To take from the legislatures of the various states and territories, the control of (water) at the present time would be something less than suicidal . . . If the appropriation and use were not under the provisions of the State law, the utmost confusion would prevail."*

The Court has held in cases such as *Cappaert v. U.S.* and *Arizona v. California* that when the Federal Government reserves land from the public domain, by implication it reserves water rights sufficient to accomplish the purpose of the reservation. But the Court clarifies in later cases such as *U.S. v. New Mexico* that this reserved right is extremely limited and reaffirms that water rights should be "established in accordance with local custom, laws, and decisions of the courts." In this decision, Judge Rehnquist again emphasizes the importance of state rights, even in the spectrum of Federal reserved rights, when he states:

> *"Congress has seldom expressly reserved water for use . . . lf water were abundant, Congress' silence would pose no problem. In the and parts of the west, however, claims to water for use on Federal reservations inescapably vie with other public and private claims for the limited quanties to be found in rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the western states, which lands form brightly colored swaths across the United States."*

Mr. Chairman, despite these clear limitations that the Supreme Court has established on Federal reserved rights, in the past few years we have witnessed an attempt by the Federal Government to dramatically widen the scope of the Federal reserved water rights doctrine. In my own state of Idaho, along the Snake River, thousands of cases are being adjudicated on this very issue.

Moreover, we are seeing Federal district judges ignore clear precedent set down by both statutory and common law in favor of non-binding Federal "biological opinions." In addition, just a month ago, a Federal District Court ruled that one-third of Lake Ceour d'Alene, in northern Idaho, belonged under the ownership of an Indian tribe.

These type of actions may seem inconsequential now, but in the long run will dislodge the delicate system now in place for controlling water. This will result in a devastating impact on the livelihoods that depend on that system of for survival. Already, it is creating a sense of "confusion" and uncertainty that the Supreme Court warned about. The ability for citizens who are attempting to make a living in our state to adequately know how to protect their investments is in serious jeopardy.

Mr. Chairman, to relate back to the bill we are considering today, H.R. 3658 will codify an Indian reserved water right. Yet, the bill does not define the exact nature of that right. In fact, the vagueness of this "reserved" right leaves it wide open for future interpretation. I hesitate to think what a ambiguous codification of the term "Federal reserved water right" could mean to the many water appropriation holders up and down the Snake River, who are at this time having to fight to preserve their water rights against the government. It is these type of precedents and ambiguities that threaten the future stability of the long-established system of water rights in Idaho and the West. We have a duty as Congress to stop this from happening.

Mr. Chairman, I cannot emphasize enough the seriousness of the matter before us today. Before we allow this bill to move further in the process, we need to take a very close look at vhat they "reserved water right" means, and how it could impact state water rights. I hope that we may examine and clarify this issue today before the Subcommittee.

Mr. DOOLITTLE. Thank you. Well, let me ask our 3 witnesses please to rise and raise their right hands. We actually have someone who—Ms. Knight, maybe you would like to join them just in the event that you are going to be giving testimony.

[Witnesses sworn.]

Mr. DOOLITTLE. Thank you. Let the record reflect each answered in the affirmative. We are pleased to have you here on an important subject.

Our first witness will be Mr. David J. Hayes, Counselor to the Secretary of the Interior. And we are pleased to have you here Mr. Hayes, and you are recognized.

STATEMENT OF DAVID J. HAYES, COUNSELOR TO THE SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR

Mr. HAYES. Thank you, Mr. Chairman, and thank you for calling this hearing. We very much appreciate, particularly given the late hour of the session, the Subcommittee having this hearing.

Mr. Chairman, I will not repeat the material in our written statement, which I hope will be accepted for the record. Instead, I would simply like to highlight a few points this afternoon.

First is that this bill would approve a water rights compact that was entered into truly under the leadership of the tribe and the State parties. To our mind, as Federal representatives, this represents the model of how Indian water rights settlements should be solved, which is at the grass roots level, with the leadership of the Montana State Reserved Water Commission and tribal representatives, as described in some detail in the State's testimony before the Subcommittee today.

There was an effort to involve all water users in the entire affected basin, to literally work ranch by ranch, water user by water user to try to reconcile water uses and water rights of the various parties. The result was a very creative, thoughtful accommodation of the rights and interests of all parties. And we as the Federal Government were happy to play our part in helping to make that grass roots agreement become a reality.

In terms of our role here, Mr. Chairman, really two things are asked of us as Federal authorities. One is to validate the State compact, the key components of the State compact, so that they may become Federal law; and as part of that, to confirm that any otherwise existing Federal rights and as trustee to the tribe dealing with potentially senior water rights would be waived.

And we think it's appropriate for the Federal Government, in consultation with the tribe and with this entire package, to provide those assurances. And that is why through this settlement, the question of potentially otherwise unenforced Federal rights for—on behalf of the tribe for water rights will be resolved in favor of the system that the State and the tribes have essentially worked out together.

The second thing that is asked of the Federal Government is for help in implementing the scheme that basically the State and the tribe came up with to help satisfy the water needs of both the tribe and the non-Indian water rights holders in the area. And in order to do that, two things needed to happen:

First, the on-reservation water supplies of the tribe, which are limited, need to be enhanced so that the most can be made of those water supplies. Once the most is made of those water supplies through, for example, the Bonneau Reservoir, then an accommodation can be made so that the downstream non-Indian water rights holders and those depending on water will be able to count on the continued flow of water for their purposes, while the tribe at the same time can count on the water it needs for its reservation.

And much of this bill is essentially a series of, in the grand scheme of things, small projects that will enhance the on-reservation capability of the tribe to utilize its water for not only its benefit, but quite directly for the benefit of non-Indians as well, who therefore will be able to count on and, in fact, with the tribe being required to do, ensure that adequate supplies will flow down downstream to non-Indian parties.

The second thing we've been asked to do in terms of funding is to help, long term, by examining the tribal water need for additional drinking water supplies. It's clear that over the long haul, with the projected increase in population by the tribe, that they will not have adequate drinking water on the reservation, even with the enhanced water supplies.

We as the Federal Government did not believe that we have the wherewithal or the responsibility to fully fund any project that might provide that enhanced water supply. But we do believe a significant financial commitment here of $15 million to be put in trust to satisfy the long-term drinking water needs of the tribe is appropriate, and that has been incorporated into this settlement, along with a planning effort that Congressman Hill outlined in his opening statement.

So in conclusion, we enthustiastically endorse this legislation. It exemplifies the type of grass roots resolution of conflicting water rights that we think serves as an excellent model of how these issues should get resolved. Negotiation, not litigation, is the policy of this administration, as it was for the previous administration in resolving Indian water rights.

We also believe that the settlement satisfies the Federal trust responsibility to the tribe. And that, of course, is a fundamental guidance to our actions and is a reason for our support for the legislation.

We think this is a remarkable achievement. We congratulate the citizens and the leaders of the State of Montana, both tribal and nontribal, in putting this deal together. And we're happy to do what we can to make it a reality. We hope the Committee will move on the bill.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Hayes may be found at end of hearing.]

Mr. DOOLITTLE. Thank you.

Our next witness will be Mr. Bruce Sunchild, vice chairman of the Chippewa Cree Water Rights Negotiating Team. You are recognized.

STATEMENT OF BRUCE SUNCHILD, VICE CHAIRMAN, CHIPPEWA CREE WATER RIGHTS NEGOTIATING TEAM

Mr. SUNCHILD. Thank you very much, Chairman Doolittle, Representative Hill, honorable members of the Committee. My name is Bruce Sunchild. I'm a member of the Business Council of the Chippewa Cree Tribe of the Rocky Boy's Reservation. The Business Council is the governing body of the Chippewa Cree Tribe. I also serve as vice chairman of the Tribe's Water Rights Negotiating Team.

I am here to testify on behalf of the tribe in support of H,R. 3658 entitled, the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998. I am accompanied today by the tribe's water resources staff, Paul Russette, also Yvonne Knight, the tribe's attorney. I appreciate the opportunity to testify before you today. I submit for the record the tribe's detailed written testimony.

I would like to begin by expressing the tribe's great appreciation to Representative Hill and to his staff for their help and support of moving this bill forward. I would also like to thank Representative Doolittle and his staff of the Energy and Power Subcommittee, for assisting the tribe in obtaining a hearing on H.R. 3658.

The tribe and the state of Montana and the United States are in full agreement that the settlement embodied in H.R. 3658 is beneficial to all parties. The settlement consists of the compact entered into between the tribe and the State of Montana on April 14th, 1997, and the bill before you today.

The bill ratifies the compact and provides funding to enable the tribe to fulfill its obligations under the compact, to compensate the tribe for its release of breach of trust claims against the U.S. Government, and to enable the United States to carry out its trust obligation by assisting the tribe in obtaining the water necessary to

make Rocky Boy's Reservation a permanent self-sustaining homeland.

The settlement benefits the tribe in a number of different ways. First, it ratifies the compact and quantifies the tribe's on-reservation water rights at 10,000 acre feet per year. The remainder of the annual water supply on the reservation will be used to mitigate impacts on downstream non-Indian users. The settlement provides $3 million to enable the tribe to carry out administrative duties under the compact.

Second, the settlement provides a future source of drinking water for the tribe by setting aside 10,000 acre feet of water in Lake Elwell behind Tiber Dam. The Rocky Boy's Reservation is located in a water-short area, and existing on-reservation water supplies are insufficient to meet the tribe's current and future drinking water needs. The settlement provides $1 million to study alternative means to transport the Lake Elwell water to the reservation, and $15 million is authorized as seed money to be applied toward the design and construction of the selected importation system.

Third, the settlement provides $25 million to improve on-reservation water supply facilities. These facilities will enable the tribe to enhance the availability of water supplies on the reservation, to improve tribal agricultural products, to ensure the existing dams are made safe, and to meet the tribe's obligation under the compact to mitigate impacts on downstream water users.

Fourth, the settlement provides the tribe with an economic development fund of $3 million to assist us in furthering our economic development plans on the reservation.

The settlement also benefits the tribe's non-Indian neighbors in Montana. First, it quantifies the tribe's water rights and brings certainty to the rights of tribe's non-Indian neighbors. It thus eliminates the need for lengthy, expensive and divisive litigation.

Second, the compact establishes guidelines for day-to-day administration for the water rights projected under the compact, both tribal and non-Indian, and establishes a local system for resolving disputes that may arise between tribal water users and nontribal water users.

Third, H.R. 3658 will benefit the entire north central Montana region by authorizing a $5 million feasibility study to examine ways to supplement the Milk River Basin water supply. This study will also undoubtedly further the United States' effort to settle the water rights of the two other tribes in Milk River Basin, Blackfeet and Fort Belknap.

The tribe strongly urges Congress to enact H.R. 3658 into law during this session. First, two of the dams on the reservation which will be repaired in and enlarged with funds from this settlement are classified by BIA as unsafe dams. However, these funds cannot be expended by the tribe until a final decree approving settlement is approved by the State water court. A final decree cannot be entered until the compact is ratified by Congress through H.R. 3658. And even then, State court procedure could take as long as 2 years. The longer we must wait for funds to repair the unsafe dams, the greater the risk that a tragedy will occur.

Second, there is no opposition to H.R. 3658. It is fully supported by the administration, as well as the tribe and the State, the first Indian water rights settlement to have this distinction.

In conclusion, I thank you for the opportunity to testify on behalf of the tribe in wholehearted support of H.R. 3658, the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998, and we will be happy to answer any questions this Committee may have.

Thank you very much.

[The prepared statement of Mr. Sunchild may be found at end of hearing.]

Mr. DOOLITTLE. Thank you, sir.

Our final witness is Ms. Barbara Cosens, legal counsel, Montana Reserved Water Rights Compact Commission. Ms. Cosens, you are recognized.

STATEMENT OF BARBARA COSENS, LEGAL COUNSEL, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Ms. COSENS. Thank you, Mr. Chairman. Chairman Doolittle and Congressman Hill, my name is Barbara Cosens. I'm legal counsel for the Montana Reservation Water Rights Compact Commission. I'm here to testify on behalf of the State of Montana and Governor Marc Racicot in support of H.R. 3658 and to urge your approval of the Act. My written testimony has been submitted for the record.

Congressman, it would be impossible for me to overstate the importance of this bill for the State of Montana. The unquantified nature of reserved water rights casts a cloud over certainty regarding investment in private water development throughout the West.

In 1979, the Montana legislature created the Montana Reserved Water Rights Compact Commission in order to settle these issues. And in doing so, our legislature articulated a policy in favor of negotiated settlements. In 1983, in a suit before the U.S. Supreme Court in which Montana was a participant, the Supreme Court held that State courts do have jurisdiction to join the United States in a general stream adjudication for settlement of these issues.

That case strengthened our ability to bring tribes in the United States to the table to settle these issues, and since 1983, we in Montana have been very successful in doing this. We have settled with three Indian reservations and with nine other Federal reservations, in every case we've been successful in protecting existing water users and in protecting the State's interests in maintaining control over its water.

Similar to Montana, most Western States favor a policy of negotiated settlements, and they've supported their neighbors in seeking their own unique solutions. In June of this year, the Western Governors Association passed a resolution in favor of negotiated settlements, urging the Federal Government to participate in these efforts and help us move forward to finalize these issues. That resolution has been submitted as an attachment to my written testimony.

It's not hard to understand this preference for negotiated settlements, which allows us to tailor unique solutions to meet the needs of the specific locale that we're dealing with. If you think about the diversity of the Western landscape, our climate varies drastically.

We have wide differences in water supply, in precipitation, in growing season, in access to markets, and in the economic value of water, which varies widely from Southwestern urban areas to agricultural areas like Montana.

In the area of this particular reservation, most of the precipitation comes as snow pack in the Bearpaw Mountains. It runs off in early spring. Springs run dry in late summer. The only way to provide a firm yield of water supply is through storage.

This Act, by authorizing enlargement of existing dams on the reservation, chooses a relatively low cost to do that, and in doing so, has minimal impact on the environment. Also, by storing early spring runoff, it minimizes the impact on downstream water users.

We took further measures in the settlement to protect downstream water users from any harm, and we did this with the process of working with water users literally on a ranch-by-ranch basis. Years of experience has taught us that no amount of expert study can replace the knowledge that ranchers have gained through generations of living and making—working on these streams. We made staff engineers and contract engineers available to them to design improvements and conveyance in diversion structures, to allow them to take water at the lower flows while the tribe is storing water.

In Beaver Creek we purchased water from an off-reservation reservoir for release to make up for water stored on the reservation. All of these measures were funded by State grants. In addition to these local protections, the compact protects the State's interests in maintaining control over its waters by assuring that any off-reservation use of the tribal water rights subjects it to full compliance with State law.

On behalf of Montana, I would urge you not only to pass this bill, but to do so this session. The Montana legislature has prioritized the Milk River Basin in which the Rocky Boy's Reservation is located for adjudication by our water court, and the reason for doing this is because this is an area with high potential for conflict over water use. Our water court is prepared to begin working on a decree next year if Congress passes this Act.

Of even greater urgency is the need to repair the unsafe dams on the reservation. On Friday I spoke with Hill County Commissioner Kathy Bassett and we talked about a rainstorm that occurred this June in the Bearpaw Mountains. It dropped 9 inches of rain in the 24-hour period, and Kathy said that it appeared for a while that the East Fork Reservoir, which is an unsafe Federal dam on the reservation, would not hold. A county park downstream from the reservation was evacuated.

Downstream from that, there is a larger reservoir. Had East Fork gone out and taken the lower reservoir with it, the 10,000 residents of the community of Havre would have been directly in the path of the flood. Repair of these dams is needed before this situation occurs again.

Congressman, we know of no opposition to this settlement. Passage of the Act would send a signal to Western States that the United States is once again prepared to help us move forward toward finality on these issues.

I appreciate the opportunity to testify on behalf of the state of Montana in support of H.R. 3658. I urge your timely approval of this bill, and I would be happy to answer any questions by the Subcommittee.

[The prepared statement of Ms. Cosens may be found at end of hearing.]

Mr. DOOLITTLE. Thank you very much.

Mr. Hayes, is it my understanding that the administration then supports H.R. 3658?

Mr. HAYES. That's correct, Mr. Chairman.

Mr. DOOLITTLE. What does the language in Article VII, section A(4) of this bill mean? Is that in the compact? That's in the compact. And, Mr. Hayes, it's not in the bill. But let me ask you about the compact. I don't have the full text of that in front of me, but there's language in there that I understand Article VII, section A(4), that says notwithstanding any other provision in this compact, the Department of the Interior reserves the right to refuse support for Federal legislation ratifying this compact.

Mr. HAYES. Mr. Chairman, let me explain. The compact was passed and signed into State law at a time when there was not agreement by the Federal Government on some of the basic terms of the compact, including an open-ended request or requirement, really, for Federal funding of as yet unidentified potential projects.

Essentially, what we did, in close cooperation with the State and with the tribe, is, following the enactment into State law, the compact looked at the Federal piece, we agreed consensually on the Federal role. And the way the statute before you is drafted, is that the compact applies except to the extent that there's anything in this Federal law that is inconsistent with it. And that provision, in particular, is essentially moot by the—I think, by the fact that this Federal law would be enacted.

Mr. DOOLITTLE. OK. So you've subsequently determined that it merits your support?

Mr. HAYES. That's correct.

Mr. DOOLITTLE. The legislation, I guess, reflects your desires as to what should happen?

Mr. HAYES. That's absolutely correct, Mr. Chairman. Just to explain a bit more, at the time the State passed the compact, there was not any precise understanding of what the Federal role, funding-wise, responsibility-wise, might be. There were certainly some indications of what the State was looking for, but we needed to work those out, and we subsequently did, and this legislation embodies the results of that shared view.

Mr. DOOLITTLE. Does the administration have any reservation about the legislation?

Mr. HAYES. We do not.

Mr. DOOLITTLE. What happens to the settlement if the Federal Government fails to construct the works authorized in the settlement?

Mr. HAYES. Mr. Chairman, I'm not certain, to be honest, what would happen. I mean, I think we have a very clear and explicit responsibility under this law to construct those works. I would imagine that if we failed in that responsibility, we would be subject to some legal challenges at the least.

Mr. DOOLITTLE. I guess there's language in here in the bill on page 21, (c)(1), it says, "Upon passage of this act, the tribe shall execute a waiver and release of the following claims against the United States, the validity of which are not recognized by the United States, provided that the waiver and release of claims shall not be effective until completion of the appropriation of the funds set forth in Section 11 of this act and completion of the requirements of Section 5(b) this act."

So it appears to read that unless everything is done, then this waiver will not be complete. Is that your understanding?

Mr. HAYES. That's correct. My counsel is telling me that's correct.

Mr. DOOLITTLE. So if you did nine-tenths, just for the sake of argument, of the funding of the projects and didn't do the remaining one-tenth, then there would be no waiver in effect?

Mr. HAYES. I suppose there's that theoretical possibility, Mr. Chairman. These are quite well-defined projects, though, and very doable. I don't think any of the parties are concerned about that issue.

Ms. COSENS. Mr. Chairman, may I supplement the answer?

Mr. DOOLITTLE. Yes, Ms. Cosens.

Ms. COSENS. I think if I could refer you to the same section that you're looking at, number (c)(4) in the tribal release of claims, one of the concerns that came up when we were finally negotiating these with the Federal Government, since appropriations would occur over a period of time, is what happens if some of the appropriations occurs, some of the dams are repaired, and then the will to provide further funding is not there. Does the tribe still retain its entire claim against the United States? And this provision provides that there would be offset for funds that have already been spent.

Mr. DOOLITTLE. OK. Thank you for pointing that out.

Suppose the government took 20 years to do this. Is there any maintenance of effort, or is this anything in here governing how long this might take?

Ms. COSENS. Mr. Chairman, the one provision of the compact that does have a deadline in it is entry of the decree in water court. The funding does not have a deadline on it for entry of the decree. The parties were concerned with finalizing these claims as quickly as possible, and we provided a 3-year deadline. If that deadline is not met, the United States' approval is withdrawn from the compact and then the tribe may withdraw. A 3-year deadline with our water court we feel is quite reasonable to meet.

We had similar provisions in the Northern Cheyenne Settlement Act that was passed by Congress and we did meet those deadlines.

Mr. DOOLITTLE. But it's—knowing just how the Federal Government works from time to time, at least the congressional part of it, if that decree actually won't be allowed, even if it's sought in court, under this (c)(1), I don't think it takes effect until all of those things have been done, does it?

Ms. COSENS. Actually, Mr. Chairman, the appropriations are contingent on entry of the decree. The Department of Justice communicated to us that they were very concerned that there be a final decree before the Federal obligations to provide funding kicked in.

So we need to get the decree entered before the funding can actually be used by the tribe.

Mr. DOOLITTLE. But the decree isn't effective until the appropriations are completed, is it?

Ms. COSENS. Mr. Chairman, the waiver by the tribe is not effective until the appropriations are completed.

Mr. DOOLITTLE. The waiver is not effective until the appropriations are completed. I suppose the way as a practical matter it would work, they would fund the appropriations, hopefully complete them.

But, I mean, suppose they run into budget problems or something? For whatever reason, it's never completed. Is this—what happens then? Are you just in limbo? I mean, they've never declared they're not going to complete them, they just haven't appropriated all the money they're supposed to appropriate. What would happen to that in that circumstance?

Mr. HAYES. I think, Mr. Chairman, what would happen is that the tribe would potentially have at least part of its claim still against the United States but there would be an offset. To the extent that funds have been provided for the projects and there are benefits flowing to the tribe, they would be an offset against a breach of trust claim.

Mr. DOOLITTLE. So you think they would have to file an action for breach of trust, then?

Mr. HAYES. Yes, yes.

Mr. DOOLITTLE. I mean, but that's—how do we know when the trust has been breached?

Mr. HAYES. Well, that would be in litigation. That would be a subject for a Federal Government action. So in our sense, we think that's fair, Mr. Chairman. We do not—we would not expect the tribe to waive completely its potential rights against the United States unless and until, rather, any—precisely because of the potential that this would not be fully implemented.

Let me say, though, that we have worked closely with OMB in connection for the funding for this matter. And as you can see, the funding is a multiyear funding scenario, which has been worked into the potential budgets in outyears for both the BIA and Bureau of Reclamation budgets which would be sharing responsibilities for this funding. And, in fact, our track record in terms of implementing Indian water rights settlements has been quite good in terms of Congress and the administration working together to come up with the funding to actually implement enacted settlements.

Mr. DOOLITTLE. What are you estimating is the total amount of time to complete the appropriations?

Mr. HAYES. I think it's over a 3-year period.

Mr. DOOLITTLE. OK. Well, is the Secretary's signature of this settlement a final commitment, then, to carry out the terms of this agreement?

Mr. HAYES. Yes, Mr. Chairman.

Mr. DOOLITTLE. Is it the administration's position that executing paperwork that makes no change in the physical world does not constitute a major Federal action under the National Environmental Policy Act?

Mr. HAYES. Well, let me explain that if I can. I think you're referring, Mr. Chairman, to Section 11, or rather 13, 13 (f), of the bill.

Mr. DOOLITTLE. Right.

Mr. HAYES. That needs to be read in connection with 13 (e). The administration's position is that environmental compliance for all physical elements of the project needs to be completed. And, in fact, in connection with our policy of trying to identify if there are any environmental issues as soon as possible, much of the NEPA analysis on the major on-reservation activity, the enlargement of the Bonneau Reservoir, has already been completed.

So we are comfortable with the substantive application of NEPA for all physical activities. What section 13 (f) does is simply say that the signing of the compact itself in the context in which we are, with the NEPA applying to the physical activities, does not itself trigger an additional obligation.

Mr. DOOLITTLE. Well, then, I think your answer—which was fully explained, I appreciate that—but it would be "yes," then. It does not constitute a Federal—a major Federal action in your view, the mere execution of it?

Mr. HAYES. In this context, we're comfortable with that.

Mr. DOOLITTLE. And so I think you've explained this, but apparently then—well, I will just ask the question: Does the administration believe that it is more appropriate for NEPA, ESA and other environmental compliance processes to be carried out at the implementation stage, when actions are not merely contemplated in theory but actually proposed?

Mr. HAYES. I'm not sure I understand the question, Mr. Chairman.

Mr. DOOLITTLE. Well, I was just looking—I think that particular sentence came out of the letter that you sent, and I was just—I have a special interest in this. Let's see. This is a letter to—I guess responding to questions posed by Senator Campbell's committee. There's a date stamped on it, August 31st. And in there—let's see, you're responding to questions, and you state in that letter, "Moreover, we believe that it is more appropriate for full NEPA, Endangered Species Act and other environmental compliance processes to be carried out at the implementation stage, when actions are not merely contemplated in theory but actually proposed." I assume you still believe that.

Mr. HAYES. Certainly. In this context, but I hope this won't be taken out of context, this is—the context here is in a situation where the possibilities for enhancing the water supplies have been well studied for years on the reservation, where NEPA in fact had already been well underway for the major aspect of the water enhancement program on the reservation. I guess I would caution use of that sentence outside the context of this matter.

Mr. DOOLITTLE. I just—I'm glad you've got it in there, because I felt it's been appropriate on a number of occasions for many of the reasons that you've mentioned. I don't think this is a unique circumstance. But, you know, we constantly get the administration objecting and calling that type of language "veto bait" and implying that it's—or not implying, I mean it's basically stating that it's unreasonable, and I don't believe it is a major Federal action.

And I guess you don't either, or else if it were, you would have to be doing all of these studies before the Secretary were able to execute the contract.

Mr. HAYES. Well, in fact, we have done most of the studies already.

Mr. DOOLITTLE. But you haven't done them all, and to all the specificity required, have you?

Mr. HAYES. No, that certainly is the case. That's certainly the case.

Mr. DOOLITTLE. And as you pointed out, or as it says in the law itself, of course, before any of these projects is actually carried out, all the necessary environmental work will have to be completed?

Mr. HAYES. That's correct.

Mr. DOOLITTLE. That I think is a reasonable policy, and I'm glad the Clinton Administration agrees.

This matter of the reservoir, Elwell, Lake Elwell off the reservation, let me ask, Mr. Sunchild, do you envision receiving a distribution system from Lake Elwell to the reservation?

Mr. SUNCHILD. Yes, we do.

Mr. DOOLITTLE. And who are you anticipating will be providing that?

Mr. SUNCHILD. At this point right now there's a feasibility study that will happen with this money that's—if it's allocated.

Mr. DOOLITTLE. What is the approximate cost that you're hearing for—I realize it's being studied, so you only will perhaps have a ballpark figure. But what's a ballpark figure for building the distribution system from that reservoir to your reservation?

Mr. SUNCHILD. Mr. Chairman, at this point I can't answer that without the feasibility.

Mr. DOOLITTLE. Can anyone give us a ballpark figure, stipulating that it's subject to completion of the study?

Mr. Hayes, do you have any idea about that?

Mr. HAYES. Well, we really can't, Mr. Chairman, because the method of potential delivery is a key question. There has been discussion in the past of a potential pipeline from Tiber Reservoir to the reservation, but that is extraordinarily expensive.

And the feasibility study is going to look at other potential options, including the release of the water at the reservoir and the potential pickup of the water downstream out of the Missouri right up to the reservation, which will be a much shorter distance and potentially tremendously cheaper in terms of costs.

Mr. DOOLITTLE. The distance from the reservoir of that pipeline you're talking about to the reservation is about 50 miles?

Mr. HAYES. That's correct.

Mr. DOOLITTLE. And if you did, it would be releasing the water and then picking up it in Missouri river. What distance would that be from there to the reservation?

Mr. SUNCHILD. Mr. Chairman, I would estimate about 30 miles.

Mr. DOOLITTLE. That would be 30 miles. We're still talking about a major, even at 30 miles, a major conveyance system?

Mr. HAYES. Yes.

Mr. SUNCHILD. Yes.

Mr. DOOLITTLE. And I guess, what is the intention then with releasing the acre feet? Is that then—the intention is to release it to pick up at the other end?

Mr. HAYES. That's potentially one scenario that will be evaluated, Mr. Chairman.

Mr. DOOLITTLE. Is there any intention to satisfy existing water needs to downstream water users?

Mr. HAYES. I think, Mr. Chairman, the downstream water users' needs will be satisfied with the on-reservation enhancements, and what we're talking about here is a longer term imported water supply that would be needed at some point in the future for anticipated on-reservation growth.

Ms. COSENS. Mr. Chairman, if I could also answer that question.

Mr. DOOLITTLE. Yes. Yes, please jump in there, Ms. Cosens.

Ms. COSENS. As Mr. Hayes says, the compact fully protects downstream water users for any impact by the tribal water right. In this part of Montana, the groundwater resources are very saline for the most part, and in some areas where there is good water, it's a very low yield. And many of the communities in the surrounding areas already have put in rural water systems for treatment and transport of surface water, so there's an existing infrastructure already in place.

Part of the feasibility study will look at whether it will sort of bring in an economy of scale and reduce costs if more of those rural water systems that are already in place actually attach to a system that would go to the tribe, and that's one thing that may lower costs in this area. But certainly at this point the development and treatment of surface water for drinking for the tribe lags way behind the surrounding communities.

Mr. DOOLITTLE. The tribe in its testimony has indicated they're going to come back to Congress to provide for the money for this, I guess, for their part of the system, and it wouldn't be paid for by other water users as was described.

Is that your understanding, Mr. Hayes?

Mr. HAYES. We don't know what the tribe's ultimate intentions are or what—how this would play out in the future. If I can make a couple of comments, as the administration, we were uncomfortable with making an open-ended financial commitment to the tribe in connection with a potential future water delivery system whose outline and potential costs and timing and everything else is unknown.

We recognize, obviously, a trust responsibility. And we evaluated that and concluded that setting aside a $15 million trust fund, which could earn interest over time, would satisfy the Federal trust responsibility in this regard and would be the basis for waiving claims, both ways, in terms of Federal reserve water rights.

If at some point in the future the tribe wants to approach the administration, the then administration or the Congress, and ask for programmatic funds to supplement this fund, I suppose they're free to do so. And that will be for a future Congress and a future administration to evaluate. But that would not be in the context of a resolution of an Indian water rights settlement, that would be in the context of a request for programmatic funds.

Mr. DOOLITTLE. Ms. Cosens, could the proposed MNI water system from the Tiber be tapped by nontribal members for tribal profit?

Ms. COSENS. Mr. Chairman, I believe that is one of the options that the tribe has looked at, is ownership of the system. I think the tribe could better answer on their discussions with surrounding communities on that. Certainly, one aspect, as I mentioned earlier, that would be looked at is I think there are eight rural water systems between Tiber and the reservation whose lines are very close to or actually cross the path that a pipeline would have to take.

And contribution by those systems to building the pipeline so that they can tie into it would certainly reduce the overall per capita costs of a system. I know that's being looked at seriously. And I would defer to the tribe whether there have been discussions of marketing.

Mr. DOOLITTLE. Do you want to comment on that, Mr. Sunchild?

Mr. SUNCHILD. Yes, Mr. Chairman, as far as marketing, I think there was some thought that some individual communities would go to the BOR for some sort of allocation for their water needs.

Mr. DOOLITTLE. OK.

Mr. SUNCHILD. We never intended to sell to non-Indian communities.

Mr. DOOLITTLE. It was your intent to keep it for the tribe, then?

Mr. SUNCHILD. Yes, sir.

Mr. DOOLITTLE. OK. Back to Ms. Cosens. What impact do you think this settlement will have on other implied reserve Federal water rights that are being expanded, such as those for Forest Service, national parks, wilderness areas, watershed protection, cattle grazing, big game and waterfowl refuges, recreation, planned occupancy for the military and other governmental personnel, tree nurseries and seed beds, fire fighting? I mean, what impact do you think that might have on some of those other things?

Ms. COSENS. Mr. Chairman, the short answer to your question would be no impact whatsoever.

Maybe I could supplement that by explaining one of the reasons why Montana has chosen this process of negotiated solution is, it does allow them to tailor solutions to the specific circumstances of a particular reservation, come up with site-specific solutions, and avoid wading into any of the questions that might raise a precedent in other areas.

In addition, it has allowed the State of Montana to provide some certainty in these areas by quantifying the reserve water rights that are unquantified at this point and place some uncertainty on it. I think that the State of Montana has been very successful in this process, and the values of negotiations for the people of Montana have been substantial.

Mr. DOOLITTLE. Is it fair to say your main interest in this is certainty?

Ms. COSENS. Mr. Chairman, I think that we have several interests in this process. Certainly, certainty is probably the primary thing that caused the legislature to create the Reserve Water Rights Compact Commission, starting the general stream adjudication in order to quantify these rights. But over the years I think we have found that the benefits are far greater than that.

If I could just go through maybe three of the main benefits that we've seen from these negotiations, certainty is definitely one quantification. But quantification can be achieved through litigation as well, and you can get certainty that way.

Litigation is a highly costly alternative, and what litigation can't accomplish is protection from junior water users. In Montana most of the basins that have Indian reservations in them are highly appropriated, and in most cases the Indian reservations was created prior to most of the development of water. And the only avenue we have for protecting those junior uses is through settlement, and again, we've been very successful in doing that.

Secondly, through these compacts, we've been able to resolve many more issues then simply the quantification of water. The beauty of settlement is that you can wrap a number of issues into a single package.

And the main one that I'm thinking of is the dispute resolution once the compact is implemented. If a reserve water right is litigated, you get a quantification, but the question remains open as to what form people have to resolve disputes after that quantification occurs. And I can tell you in our negotiations, working with the ranchers around Rocky Boy's, that they were probably as concerned or more concerned with what remedy they would have if the obligations that were put forth in the compact were not lived up to or water wasn't being used in that way than they were with the actual quantification.

It's a small comfort to a water user that has their head gate opening on to a dry stream that they have the right to spend the entire irrigation season arguing over what court they should be resolving their disputes in. And this compact and the other ones that we have settled set up a dispute resolution mechanism by creating a tribal-State compact board that would resolve those disputes.

And I think the third benefit that we've seen is that it creates negotiation rather than litigation, creates improved relationships, both between tribes and their neighbors and between tribes and States. We can all go home tomorrow, but the tribe and the ranchers out around the Rocky Boy's Reservation will live with whatever we end up with for generations to come.

I think in the Western Governors Association letter that I attached to my testimony, there was also a concern expressed with this. The letter talks about the hiatus in Federal approval of these settlements and the concerns of what that break down might be. And if I can quote from that, they stated that the prospects for returning to an era of adversarial relations between tribes and their local neighbors and the neglect of addressing tribal rights appeared imminent because of that breakdown. I think that many of the Western States are concerned with going back to a system in which the only avenue we have is litigation.

Mr. DOOLITTLE. Mr. Hayes, we've read and heard that several of the dams in the reservation are at risk. I just wondered if you could tell me why the department has allowed them to deteriorate to such an extent?

Mr. HAYES. Well, the funding for the safety of dams program in the BIA has been significantly curtailed in recent years. And the——

Mr. DOOLITTLE. Can I just jump in and ask, why have you pursued such a policy of allowing that to be curtailed?

Mr. HAYES. We have sought appropriations from Congress for the BIA budget for this purpose and have not gotten the appropriations we've requested, Mr. Chairman. It's quite—it's as simple as that. What we've had to do is prioritize the dams that are in the worst shape so that the limited funds available can be put to those BIA facilities.

In the case of the Bonneau Reservoir, at one point the Bonneau Reservoir I think was in the top five or so as one of the most unsafe dams. The Bureau took funds to stabilize the facility and take it out of the red zone, if you will. However, it was—it's not efficient to do a permanent fix at the same time that there's a contemplation of an enlargement of the facility. So the permanent fix will be done in connection, in fact, with the enhancement of the reservoir capacity. And that is an important purpose here. But we're hopeful that the temporary fix will provide adequate safety.

Mr. DOOLITTLE. Has Congress actually specifically turned down the requests for the safety of dams program?

Mr. HAYES. Mr. Chairman, I don't know the answer to that, in terms of whether it's been targeted at this program or not. I suspect not. I suspect it's part of the programmatic cuts for the BIA, which has forced the BIA to try to put its scarce dollars to any number of often life-threatening situations, be it safety of dams or people-oriented projects. I'm happy to look into that and get you some more information, if you would like, Mr. Chairman.

Mr. DOOLITTLE. I would appreciate that, because my hunch is if you made a specific request for that, it would be fully funded. I just wonder how many other dams are in the yellow zone or the red zone.

Mr. HAYES. It's a serious issue, and we would be happy to get some more information to you, Mr. Chairman.

Mr. DOOLITTLE. I think that would be good.

Ms. Cosens, you state that the Western Governors continue to support negotiating rather than litigated settlement of Indian water rights disputes, and that's certainly the direction I would want to encourage.

Do the Western Governors generally support extending implied reserve water rights to include the quantification of additional uses, such as fish and wildlife enhancements?

Ms. COSENS. Mr. Chairman, what the Western Governors Association supports is the ability of States to choose their own paths in this. Certainly there is no specific endorsement of specific types of reserved water rights. As I stated earlier, one of the things that we're able to avoid when we negotiate is setting precedent. We can tailor a solution to the specific needs of the reservation.

In the case of Rocky Boy's with the fish and wildlife enhancement, it was a need that the tribe brought to the table that we were able to agree to without affecting any other water users and with the support of the other water users. I think that there has been a long history of Federal deference to State water law, probably because we each have our own unique solutions that we can put forward in these cases. Certainly the Western Governors Asso-

ciation supports their neighboring States' efforts to choose their own solutions in those cases.

Mr. DOOLITTLE. How many people do you have in Montana?

Ms. COSENS. Less than a million, Mr. Chairman.

Mr. DOOLITTLE. You're in the fortunate circumstance of, I believe, of having sufficient water for your needs. Is that not the case?

Ms. COSENS. Mr. Chairman, that's not, certainly when you compare our State to other States. Because of our low population, that's probably true, but because of our high reliance on agriculture, there are basins that are water short and because particularly east of the Continental Divide it is a very arid region. The Milk River Basin, in which this reservation is located, has many periods of short water supply.

And part of that is brought on by the fact that our climate is highly variable. We can have years where we have more water than we could ever need, and then we have expanses of years where we have extreme drought, so it is variable. We're not without our shortages, but certainly I think we are at an advantage in having a low population.

Mr. DOOLITTLE. And you do have the—you're able to—in my State, where we're water short on the average now and are going to be more water short when some of those other basin States claim everything they're entitled to, we—it's not just theoretical. We're at the point where somebody is making a claim, somebody else is going to give up the water they have, whereas you are apparently able to parcel this out and make everybody happy and that's good. I wish it were that way for everyone.

But there is some concern about approving this kind of a settlement that may be setting some real precedent. I know it says it's not intended to set a precedent. But it will set a precedent, and most of our Western States are water short.

And so there is no reluctance on the part of the Committee to acknowledge the hard work that has gone into this legislation and the compact. And certainly we understand your desire, for the reasons you mentioned, certainty and a more desirable dispute resolution process, and just the comity and general good feelings amongst the different interests within your State. Those are all positive goals.

But this whole implied water right reservation system has some substantial ambiguous areas in it. And when it comes to dealing with the non-Indian claims or the downstream, the junior rights holders, there's lots of issues that come into play, as you know, but you've been able to work them all out in your case.

The Subcommittee is grappling with what do we do in some of these other areas where we're not going to be able to work them out as nicely as you have and, where you're going to have to deal with taking—you know, not having a larger pie, so to speak, but reallocating the pieces thereof, and that's a much more difficult question.

And I think this hearing has afforded us the opportunity to at least begin to explore some of these issues. And I'm sure we will have—if Mr. Hill were here, I know he would have a number of questions that he would want to ask you, and frankly a number of

other members who are just probably in the air now as we speak. So there will be lots of other questions we will probably tender in writing, and I ask you to respond as expeditiously as you can.

Ms. COSENS. Mr. Chairman, could I respond to the last comment?

Mr. DOOLITTLE. Yes, certainly.

Ms. COSENS. I apologize if I misled you into thinking that the Milk River Basin has abundant water to allocate. That's not why we were able to settle in this area. We have 6 years of intensive work with water users in the area resting on this settlement and waiting for it to move forward. This is by no means a region with abundant water. We get 12 inches of precipitation a year on the average in the part of the reservation that has agriculture, and ranching and farmland around it is fully developed.

Milk River notoriously has shortages in waters. The Milk River has one of the earliest Bureau of Reclamation projects authorized by Congress. And I'm sure you know enough about reclamation projects, having a number of them in your State, that those projects historically were built in areas where there was not sufficient water to support the agriculture in the area.

So as early as the early 1900's when that project was authorized, there were water shortages in this part of Montana. It's not because of the population, it's because of the agriculture, which uses substantially more water than in municipalities. We don't have the concern that other States do with municipal water supply, and one of the results of that is that the water isn't worth a lot in Montana, like it is in the Southwest.

But in terms of shortages for allocations, we have very difficult issues that we need to deal with. This compact allocates 20,000 acre feet to the Rocky Boy's Reservation. I think if you compare that with other agreements, both in the Southwest and in Montana, that's a very small amount of water, and it reflects the fact that the water supply on the reservation is extremely limited.

Mr. DOOLITTLE. Well, I didn't mean to imply that it was an easy thing for you to do. But we're losing, even in wet years, 60 percent of water deliveries say to our farmers in the San Joaquin Valley, which is probably the most productive area in the world for agriculture, and we're losing it due to fish and wildlife requirements.

You're not experiencing that kind of thing to that degree in Montana, are you?

Ms. COSENS. In certain areas, Mr. Chairman, in certain areas of Montana, we are. The whole western part of the State is part of the Columbia River System.

Mr. DOOLITTLE. You do have a taste of it, don't you?

Ms. COSENS. We do.

Mr. DOOLITTLE. Well, I appreciate all of you coming up here to offer your testimony. We are very interested in this subject. We want to achieve a good result for you and for others in the future, so we will be looking carefully at the facts and the information you provide us. And we'll hold the record open for the responses that you provide to our questions.

And with that, why, this hearing is adjourned.

[Whereupon, at 3:16 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF DAVID J. HAYES, COUNSELOR TO THE SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR

Good Afternoon. I am David J. Hayes, Counselor to Secretary of the Interior Bruce Babbitt. It is my pleasure to be here this afternoon to testify on behalf of the Administration in support of H.R. 3658. This bill represents the successful culmination of approximately eight years of negotiation among the United States, the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation over water rights disputes being litigated in the case entitled, *In the Matter of the Adjudication of All Rights to the Use of Water. Both Surface and Underground, within the State of Montana.* It represents a true partnership among Federal, State and Tribal interests. By working hard, together, the parties have forged a water rights settlement that satisfies Tribal rights and needs, while also taking into account the rights and needs of non-Indian neighbors, and enabling all affected Montanans to plan for the future with confidence and certainty.

The Rocky Boy's Reservation, located in North Central Montana, consists of approximately 110,000 acres and includes several tributaries of the Milk River. The average annual water supply on the Reservation is limited by hydrological delivery constraints and inadequate storage infrastructure. The Tribe has over 3,500 enrolled members and a population growth rate well above the typical rate for tribes of 3 percent. Tribal unemployment averages around 60–70 percent in an economy based primarily on agriculture, including raising livestock. Existing Reservation water use includes irrigation, livestock consumption, wildlife and recreational use, and municipal and industrial uses. The Tribe's municipal water is derived from 12 community wells and approximately 240 individual wells. A majority of the domestic wells suffer from low production due to aquifer overdraft or improper siting. In addition, groundwater contamination from hydrogen sulfide, iron and manganese contributes to well casing corrosion and makes the water very unpleasant to drink or use for other domestic needs.

Since the Tribal economy is heavily based on livestock and hay is the principal crop grown using irrigation, the Tribe's goal is to maintain, or perhaps slightly increase, the current level of irrigated agriculture on the Reservation in order to avoid having to purchase supplemental livestock forage on a regular basis. Without enhanced on-Reservation storage and other infrastructure improvements, experts calculate that, within 20 to 40 years, the Tribe will be unable both to maintain its modest agricultural base and meet the domestic water needs of its rapidly growing population.

The United States, the State and the Tribe struggled for many years to find an immediate solution to the problem of an inadequate Reservation water supply. For a time, the Tribe viewed the only solution to be the importation of water from the Tiber Reservoir, a Bureau of Reclamation facility some 50 miles from the Reservation. In this context, the water would have been delivered to the Tribe as part of a combined Indian/Non-Indian system. This system would have been very expensive and would have required an extensive Federal subsidy. Moreover, this system would have cost the Federal Government far more than it could reasonably be expected to pay to settle the Tribe's water rights. Rather than pursue this expensive regional water system, the parties decided to focus on developing existing Reservation water supplies and setting aside funds that will be available for use in a future plan to supplement on-Reservation water supplies. This is the approach that has been adopted in H.R. 3658.

Under the terms of H.R. 3658, Congress would approve, and authorize participation in, a Water Rights Compact entered into by the Tribe and the State. The Compact was enacted into Montana law on April 14, 1997, and recognizes the Tribe's right to approximately 10,000 acre feet of water on the Reservation. In order to enable the Tribe to exercise its on-Reservation water right, the United States would contribute $24 million for four specific on-Reservation water development projects and additional funds of no more than $1 million to cover Bureau of Reclamation (BOR) administrative costs associated with these construction activities. First and foremost among the projects is the repair and enlargement of Bonneau Reservoir, a facility that has ranked in the top ten of the Department's ranking list of most dangerous dams. Other projects include repair and enlargement of several smaller on-Reservation irrigation and recreational dams, including East Fork, Brown's and Towe's Pond dams.

H.R. 3658 also addresses the Tribe's future water needs by providing the Tribe with the right to an additional 10,000 AF of water stored in Tiber Reservoir. This allocation is only a small percentage of the 967,319 acre feet of water stored in Tiber Reservoir and will not impact on any other use of the Reservoir. The Department has carefully considered the impact of the allocation on the reserved water rights

of other Indian tribes and has concluded that such rights will not be negatively affected.

It is important to note that by making the Tiber Reservoir allocation, the United States is not undertaking any obligation to deliver water to the Reservation. Section 8(d) of the bill expressly provides that the United States shall have no responsibility or obligation to deliver the Tiber allocation or any other supplemental water to the Reservation.

Nonetheless, in order to assist the Tribe when the time comes that it needs additional on-Reservation water supplies, H.R. 3658 provides that the United States will set aside $15 million in trust toward the planning, design, construction, operation, maintenance and rehabilitation of a future Reservation water supply system. In addition, the bill authorizes BOR feasibility studies totaling $4 million to explore alternative methods of augmenting the Rocky Boy's Reservation water supply, as well as analyzing region-wide Milk River water availability and enhancement opportunities. One particular alternative that will be studied will be the feasibility of releasing the Tribe's proposed Tiber Reservoir allocation into the Missouri River for later diversion into a treatment and delivery system for the Reservation. We are hopeful that this alternative or others identified by the BOR studies will prove to be more realistic and reasonable solutions than an expensive rural water supply system centered upon a pipeline from Tiber Reservoir. The BOR studies should provide an in-depth understanding of the Milk River Basin water supply, its potential and limitations, that will be of valuable assistance to the United States, the State of Montana and Montana Indian tribes in our efforts to address Indian water rights disputes. The studies will address, as well, some of the water supply problems facing many small North Central Montana communities.

Other components of the Chippewa Cree settlement are a $3 million Tribal Compact Administration fund to help defray the Tribe's Compact participation costs and a modest $3 million Tribal Economic Development fund to assist the Tribe in putting its water to use.

The total Federal contribution to the settlement is $50 million. We believe that this expenditure is justified. The Tribe has presented the United States with a legal analysis setting forth a substantial damages claim against the United States. The Department of Justice and the Department of the Interior have analyzed the claim and concluded that settlement is appropriate. In addition to releasing the United States from damage claims, the settlement also will relieve the United States of the obligation to litigate, at significant cost and over many years, the Tribe's water rights. The certainty secured by the settlement is, in fact, its central feature. By resolving the Tribe's water rights, all of the citizens of this area of the State of Montana will be able to plan and make investments for the future with the assurance that they have secure and stable water rights.

Like other Indian water rights settlements, the benefits to accrue to the Tribe and other settlement parties will be available only after a final water rights decree is issued by the appropriate court. We expect that the process of entering and gaining final approval of the decree will take approximately eighteen months to two years. As motivation to keep the court approval process moving, the settlement parties have set a three year deadline for finalization of the decree. The Department of the Interior is committed to advancing the court process and other settlement implementation tasks as expeditiously as possible in order to avoid having to seek Congressional relief from the settlement deadline. The Tribe has waited many years to see its water rights become a reality and we do not want to see that wait prolonged any more than absolutely necessary.

In summary, the Administration strongly supports H.R. 3658. To strengthen the probability of securing appropriations for this settlement, we support swift passage of H.R. 3658. We congratulate the Chippewa Cree Tribe for this historic achievement and we extend our thanks to the State of Montana, and, in particular, the States Reserved Water Rights Commission, for the indispensable role it played in bringing this settlement to fruition.

I will be happy to answer any questions you may have.

STATEMENT OF BRUCE SUNCHILD, MEMBER OF THE BUSINESS COMMITTEE OF THE CHIPPEWA CREE TRIBE OF THE ROCKY MOUNTAIN BOY'S RESERVATION, AND VICE-CHAIRMAN OF THE CHIPPEWA CREE WATER RIGHTS NEGOTIATING TEAM

Chairman Doolittle, and Representative Hill, Honorable Members of the Committee:

My name is Bruce Sunchild. I am a member of the Business Council of the Chippewa Cree Tribe of the Rocky Boy's Reservation. The Business Council is the gov-

erning body of the Chippewa Cree Tribe. I also serve as the Vice-Chairman of the Tribe's Water Rights Negotiating Team. I am here to testify on behalf of the Tribe in support of House bill 3658 entitled "The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998." I am accompanied today by Paul Russette, the Tribe's Water Resources staff, and the Tribe's attorney. I appreciate the opportunity to testify before you today, and I subunit for the record, the Tribe's detailed written testimony.

I would like to begin by expressing the Tribe's great appreciation to Representative Hill, and to his staff for their help and support in moving this bill forward. I would also like to thank Representative Doolittle, and the staff of the Energy and Power Subcommittee for assisting the Tribe in obtaining a hearing on H.R. 3658.

The Tribe, the State of Montana, and the United States, are in full agreement that the settlement embodied in H.R. 3658 is beneficial for all parties. The settlement consists of the Compact entered into between the Tribe and the State of Montana on April 14, 1997, and the bill before you today. The bill ratifies the Compact and provides funding to enable the Tribe to fulfill its obligations under the Compact, to compensate the Tribe for its release of breach of trust claims against the United States, and to enable the United States to carry out its trust obligations by assisting the Tribe in obtaining the water necessary to make the Rocky Boy's Reservation a permanent self-sustaining tribal homeland.

The settlement benefits the Tribe in a number of important ways.

First, it ratifies the Compact and quantifies the Tribe's on-reservation water rights at 10,000 acre feet per year. The remainder of the annual water supply on the Reservation will be used to mitigate impacts on downstream non-Indian users. The settlement provides $3 million to enable the Tribe's to carry out its administrative duties under the Compact.

Second, the settlement provides a future source of drinking water for the Tribe by setting aside 10,000 acre feet of water in Lake Elwell behind Tiber Dam. The Rocky Boy's Reservation is located in a water-short area, and existing on-Reservation water supplies are insufficient to meet the Tribe's current and future drinking water needs. The settlement provides $1 million to study alternative means to transport the Lake Elwell water to the Reservation. and $15 million is authorized as seed money to be applied toward the design and construction of the selected water importation system.

Third, the settlement provides $25 million to improve on-Reservation water supply facilities. These facilities will enable the Tribe to enhance the availability of water supplies on the Reservation to improve Tribal agricultural projects, to ensure that existing dams are made safe, and to meet the Tribe's obligations under the Compact to mitigate impacts on downstream water-users.

Fourth, the settlement provides the Tribe with an economic development fund of $3 million to assist us in furthering our economic development plans on the Reservation.

The settlement also benefits the Tribe's non-Indian neighbors in Montana.

First, it quantifies the Tribe's water rights and brings certainty to the rights of the Tribe's non-Indian neighbors. It thus eliminates the need for lengthy, expensive, and divisive litigation.

Second, the Compact establishes guidelines for the day-to-day administration of the water rights protected under the Compact, both Tribal and non-Indian, and establishes a local system for resolving disputes that may arise between Tribal water users and non-tribal water users.

Third, H.R. 3658 will benefit the entire North Central Montana region by authorizing a $5 million feasibility study to examine ways to supplement the Milk River basin water supply. This study will also undoubtedly further the United States' efforts to settle the water rights of the other two tribes in the Milk River basin–Blackfeet and Ft. Belknap.

The Tribe strongly urges Congress to enact H.R 3658 into law during this session.

First, two of the dams on our Reservation which will be repaired and enlarged with funds from this settlement are classified by BIA as unsafe dams. However, those funds cannot be expended by the Tribe until a final decree approving settlement is entered by state water court. A final decree cannot be entered until the Compact is ratified by Congress through the enactment of H.R. 3658. And even then state court procedure could take as long as two years. The longer we must wait for funds to repair the unsafe dams, the greater the risk that a tragedy will occur.

Second, there is no opposition to H.R. 3658. It is fully supported by the Administration, as well as the Tribe and the State-the first Indian water rights settlement to have this distinction.

In conclusion, I thank you again for the opportunity to testify on behalf of the Tribe in wholehearted support of H.R. 3658—"The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998." I will be happy to answer any questions from these Committees.

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TESTIMONY OF BRUCE SUNCHILD
MEMBER OF THE BUSINESS COMMITTEE
OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION
AND VICE-CHAIRMAN
OF THE CHIPPEWA CREE WATER RIGHTS NEGOTIATING TEAM
REPRESENTING THE CHIPPEWA CREE TRIBE
IN SUPPORT OF H.R. 3658
- "THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION INDIAN RESERVED WATER RIGHTS SETTLEMENT ACT OF 1998" -
BEFORE THE
HOUSE SUBCOMMITTEE ON WATER AND POWER

SEPTEMBER 23, 1998

Chairman Doolittle, and Honorable Members of the Committee:

My name is Bruce Sunchild. I am a member of the Business Council of the Chippewa Cree Tribe of the Rocky Boy's Reservation. The Business Council is the governing body of the Chippewa Cree Tribe. I also serve as the Vice-Chairman of the Tribe's Water Rights Negotiating Team. I am here to testify on behalf of the Tribe in support of House bill 3658 entitled "The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998". I am accompanied today by members of the Tribe's Business Council, the Tribe's Water Resources staff, and the Tribe's attorney. I appreciate the opportunity to testify before you today, and I submit for the record, the Tribe's detailed written testimony. I would also like to take this opportunity to express the Tribe's great appreciation to Representative Hill, and to his staff for their help and support in moving this bill forward.

H.R. 3658 represents a milestone of momentous significance in the century-long struggle of the Chippewa Cree people to secure a viable self-sustaining tribal homeland, and in particular to secure rights to water for drinking and for agriculture. The bill and the Water Rights Settlement Compact, which the bill ratifies, reflect 16 years of technical and legal research, and negotiation, among the Tribe, the State of Montana, and the Administration. This bill and the Compact it ratifies represent a turning point in the Chippewa Cree Tribe's history for these documents set the foundation for the Tribe's future growth and the development of a self-sustaining tribal homeland. The Tribe has been working toward this end since well before 1916 when the United States set aside the Rocky Boy's Reservation for our People.

I. HISTORY OF THE TRIBE'S EFFORTS TO SECURE A VIABLE HOMELAND

A. THE LONG ROAD TO ESTABLISHMENT OF A RESERVATION

As early as 1893, our forefathers were petitioning the United States to set aside a reservation for the Chippewa Cree people in Montana who were attempting to live and work in northern Montana as their ancestors had for centuries before them. Being without a federally set aside land base, they became known as and referred to in Montana as the "landless" Indians. The Chippewa Chief Rocky Boy and the Cree Chief Little Bear led these early efforts of our people to secure a permanent tribal homeland in Montana. In 1902, a petition by the Chippewa Cree to President Theodore Roosevelt finally prompted federal efforts to establish a reservation in Montana. Those efforts were ineffectual until federal land became available with the abandonment of the Fort Assinniboine military reserve in 1911. A Chippewa Cree Chief in a letter on June 14, 1915, pleaded with Congress to set aside for the Tribe the northern portion of the military reserve which had the better land and greatest volume of water.

> I and my people are anxious to have a home; to settle down and become self-supporting. Other tribes have their own land and homes; we are homeless wanderers. We are anxious to learn to farm, and if given land that can be farmed and which will be our own, we will soon be self-supporting.

Regarding the pending legislation to divide up the military reserve land between the Tribe and the local non-Indian community, Superintendent, Jewell Martin, whose duties included the supervision of Rocky Boy's band, said predictably:

> If they should pass the bill giving only the two south townships we will still have the Rocky Boy problem, as they will still have no home.

In 1916, Congress enacted a law setting aside the Rocky Boy's Reservation for the Chippewa Cree Indians on little more than two townships, about 55,000 acres, in the least productive southern portion of the abandoned military reserve. About 450 Chippewa Cree people settled on this Reservation. Consequently, the Reservation from the beginning did not contain adequate water or land to sustain the Tribe. The part of the military reserve that contained the best land and the most water was granted by Congress to the local non-Indian community for a recreational and sportsmen's park.

B. A WATER-SHORT RESERVATION

From the very beginning, the United States recognized that the 1916 Reservation lacked sufficient land and water to make the Reservation a viable homeland for the Chippewa Cree Tribe. The Chippewa-Cree tried to farm their Reservation which was described in Federal Annual Reports

as "rough, dry unsettled section of old military reserve" and "not suited to farming". These reports, from 1918 through the 1930's, were replete with statements that the Reservation was not suited to farming, and that irrigation was difficult or not possible and more water was needed. They said farming would not lead to self-sufficiency; stock raising was felt to be the only feasible activity, provided enough winter feed was available. These reports provide a litany of crop failures due to drought, short season, lack of equipment and horses, and a picture of dogged perseverance against these formidable odds.

Irrigation was essential to stock-raising as well. The 1937 Federal Extension Report stated that, besides being the sixth consecutive year of near complete crop failure:

> The cattle industry received a severe blow this year when no feed was produced to carry the stock through the winter. The breeding stock was culled very closely and approximately fifty percent of them were put on the market. Three hundred fifty-six selected cows and one hundred thirty-eight steer calves were shipped to Dixon, Montana, for winter feeding. Thirty bulls and three milk cows are the only Indian cattle remaining on the reservation. The livestock men were very discouraged.

Commissioner Collier lamented that the Reservation was "entirely inadequate for the needs of the Indians for whose benefit it was set aside....." Due to the prevailing unfavorable crop and livestock conditions, and the lack of irrigable land and water, the Indians and the United States began to look for ways to enlarge the Reservation. During subsequent years, various Federal efforts to obtain additional land and water for the Tribe and to develop the Tribe's agricultural projects were undertaken. However, these efforts largely failed because of poor planning and implementation by the Federal Government, and because of the legal uncertainty over the nature and scope of the Tribe's water rights.

C. INEFFECTUAL FEDERAL EFFORTS TO SECURE SUFFICIENT WATER FOR THE RESERVATION

1. Poor Federal Land Purchase Decisions

In the 1930's, and 1940's the United States purchased land for the Rocky Boy's Reservation, adding approximately forty-five thousand (45,000) acres to the Reservation. Unfortunately, the additional lands did little to alleviate the Reservation's problems. The lands acquired were scattered, of poor quality, and were without significant water resources. The Chippewa-Cree still could not raise enough crops or feed for stock to meaningfully improve reservation conditions. The United States recognized the Reservation was still wholly inadequate as a self-sustaining homeland. This is evidenced by the government's 1938 Land Acquisition Plan for the Rocky Boys Reservation which planned for a reservation of more than 800,000 acres with access to the Milk River Irrigation system - a plan which was never implemented.

In the 1930's, the United States took options for the Chippewa-Cree Indians on approximately 30,000 acres, under the submarginal land program. The intent of this program was to take submarginal land out of commercial farm production forever. The program was ill-suited to the Chippewa-Cree's needs; the government's ill-advised decision to utilize the program as a way to obtain more lands for Indians was made worse by the poor land selections made, when better lands were available. The government planned to carve up the submarginal lands into subsistence farms for the Indians. But without water or sufficient irrigable land, even subsistence farming could not succeed. Before the purchases could be completed, funding for the submarginal land program fell through and the options were transferred to the Indian Reorganization Act, which allowed for purchases of lands to be added to reservations.

The Indian Reorganization Act did not require the purchase of submarginal lands. Nevertheless, rather than identifying lands better suited to the Indian's needs, against the recommendations of the Reservation Superintendent, and over the objections of the Indians and government personnel, the Indian Office accepted wholesale the badly scattered options taken under the submarginal land program.

Subsequent purchases were an effort to consolidate the scattered purchases to simplify fencing and alleviate jurisdictional problems. Even less attention was given to obtaining irrigable lands with water rights. In fact, good sources of water were sold or traded away in efforts to consolidate purchased land through land and lease exchanges.

2. Failure to Obtain and Develop Adequate Water and Land for the Tribe

In 1937, the United States developed a greatly detailed land purchase plan, which was said to be the result of the collaboration of all units of the Indian Service, and endorsed by the Tribe. Even without consideration for a normal population increase, the plan called for the purchase of an additional 660,000 acres, including 16,000 acres of irrigated land, at a cost of $5,040,000.00, to serve the then existing Reservation population of 150 families and 400 eligible homeless families. The purchase area took in part of, and was intended to benefit from, the Milk River Irrigation System. While never followed, this plan has apparently never been discarded.

From the beginning, the United States recognized that water for irrigation was needed, but did little to obtain it. The supervising engineer investigated Indian water rights and reported in 1926 that Indian rights were doubtful because of the late date of the Reservation, and that diversions by Indians from creeks should not be encouraged. The United States did not make a determination as to whether this was legally correct; instead the United States deferred continually to non-Indian interests. Thus, no irrigation project was ever built or utilized at the Rocky Boy's Reservation.

3. Failure to Provide the Tribe with a Self-Sustaining Tribal Homeland

The United States' mismanagement of tribal resources on the Reservation was at great expense to the Tribe. Poor land purchase decisions provide the most egregious example. While more suitable lands were available, purchased lands either lacked usable water rights or lacked the quality to support irrigation development. Another example is Bonneau dam which could have been designed and constructed, easily and at minor additional cost, at a higher level to store sufficient water to adequately irrigate the Tribe's cropland. This would have greatly enhanced the Tribe's ability to be self-sufficient. Yet another example is the chronic past under-performance of the Tribe's agricultural lands due, among other things, to lack of training, equipment and water for irrigation. In addition, thousands of acres of purchased lands were never farmed. The Tribe has suffered and continues to suffer tremendously, financially and otherwise from the United States' historic mismanagement of its resources.

The Federal Government's efforts to secure land and water for the Tribe diminished over the years. However, the Tribe never ceased to press forward in its quest for a viable permanent homeland -- a critical goal being to secure rights to sufficient water for its people and its economy.

II. THE CHIPPEWA CREE TRIBE'S NEED FOR WATER

Presently, the Rocky Boy's Reservation occupies about 109,620 acres. (See attached map of the Reservation and its drainages.) The Reservation has never been allotted, and all land is held in trust by the United States for the Chippewa Cree Tribe. The present population on the Rocky Boy's Reservation is about 3500. The population is expected to increase at an average annual growth rate of at least 3%. Unemployment on the Reservation is at least 70%. The annual per capita income of a tribal member on the Reservation is $4,278 as compared to $14,420 for the nation as a whole (based on 1989 dollars). The percentage of tribal members who live below the poverty level is about 48.9% as compared to 13.2% of the general population in the United States.

The current water supply systems on the Reservation were designed by the Indian Health Service (IHS) with an average daily rate of use of 60 gallons per capita per day (gpcpd), significantly below the Montana average domestic water use rate of 170 gpcpd. Many Chippewa Cree homes on the Reservation have wells which provide poor quality water in insufficient amounts. The IHS acknowledges the need for a better and more reliable municipal, rural, and industrial (MR&I) water supply on the Reservation. The primary sources of domestic water for the several small on-Reservation systems are wells. There is great difficulty in developing reliable sources of water from the groundwater aquifers. The quantity of water from the shallow aquifers on the Reservation is not sufficient for sustained domestic use. The quality of water from deeper aquifers is not suitable for domestic use, although such water may have some use in the future for certain industrial purposes. Wastewater treatment on the Reservation is provided by either individual septic systems or by community lagoon systems which are marginally effective under the current conditions. Because many of the tribal wells are located in close proximity to these wastewater systems and to stock grazing areas, there is a continuing threat to the water supply

from bacterial and viral contamination. Before a chlorination unit was added to the current Rocky Boy Rural Water System in March, 1992, boil orders were occasionally imposed on water from the System due to contamination of one of the system wells. As the population continues to increase at a relatively rapid pace, improvements to the wastewater collection and treatment facilities will needed to protect existing ground and surface water needs.

The total storage capacity of the existing on-reservation water system is 339,000 gallons. This water system is inadequate to meet the tribal drinking water needs of the current population of about 501,000 gpcpd (assuming an average per capita demand of 144 gpcpd). Certainly the existing system is far from adequate to meet the Tribe's future drinking water needs estimated to be about 1,216,000 gpcpd for a tribal population of about 8500 in 2025, and 2,195,000 gpcpd for a tribal population of about 16000 in 2045. In addition to the drinking water needs, the Tribe currently needs 569,000 gallons per day for commercial, industrial, stockwatering, and recreational needs. In 30 years, this need will increase to about 1,331,000 gpd, and in 50 years, to about 2,311,000 gpd. H.R. 3658 provides funds to enlarge Bonneau Reservoir as well as other reservoirs. The Tribe plans to use the water from the increased storage in Bonneau to increase agricultural development on the Reservation. However, even if Bonneau Reservoir were to be used to supply drinking water at the expense of the Tribe's agricultural economy, the water would be sufficient only until the year 2025.

Presently, there are approximately 1,100 acres of actively irrigated land on the Reservation utilizing about 2000 AFY of water. This acreage includes about 650 acres served by Box Elder Creek and about 450 acres served by Gravel Coulee and groundwater. Even this limited acreage does not receive a full water supply in 1 out of 2 years, requiring use of cropping patterns which include early season water use crops such as barley and wheat. The settlement contemplates the expansion of the Tribal irrigation base from 1,100 acres to 2,500 acres through the enlargement of two on-Reservation reservoirs -- Bonneau Reservoir and Towe Ponds. The Compact provides the Tribe with approximately 7700 AFY from direct flow, storage, and groundwater from Big Sandy and Box Elder Creeks to serve the expanded tribal irrigation base.

Clearly, a dependable source of high quality water is needed to enable the Tribe to achieve an adequate standard of living and quality of life. An adequate supply of water is the a cornerstone of economic development on the Reservation. Without an adequate supply of good quality of water, the Tribe can never achieve its long-standing goal of economic self-sufficiency.

III. SETTLEMENT OF THE CHIPPEWA CREE WATER RIGHTS CLAIMS - THE COMPACT AND THE CONGRESSIONAL ACT.

The Tribe's best opportunity to obtain an adequate water supply for its current and future needs began in 1982 when the United States filed water rights claims for the Tribe in Montana water court. Subsequently, the United States, the Tribe and the State of Montana entered into negotiations to settle the Tribe's water rights claims. The Tribe constructed a water rights settlement plan to further the ultimate goal of making the Rocky Boy's Reservation a self-

sustaining homeland. The settlement plan consists of four main elements: (1) quantification of on-Reservation water and establishment of an water administration program; (2) supplementation of the on-Reservation drinking water supply to meet future population needs; (3) construction of on-Reservation facilities to deliver drinking and irrigation water; and (4) compensation for federal failure to protect the Tribe's water rights followed by Tribal release of claims against the federal government for such breach of trust. The Tribe's settlement plan would require negotiation of a Compact with the State of Montana settling issues of quantification and administration of on-Reservation water supplies. And the plan would require enactment of the bill before you today to ratify the Compact, provide a source of water to supplement the short water supply on the Reservation, authorize the construction of an on-Reservation distribution and irrigation system, and provide an economic development fund.

A. THE CHIPPEWA CREE - MONTANA COMPACT

In 1982, pursuant to state law, the Federal Government filed water rights claims in Montana water court for the Chippewa Cree Tribe. The Tribe then notified the State of Montana that the Tribe wished to negotiate a settlement of its water rights claims. At that point, the State water court stayed proceedings on the Tribe's claims pending settlement negotiations involving the Tribe, the State and the United States. The Tribe then commenced the formidable task of negotiating a compact with the State of Montana and the United States which settles its water rights claims.

On April 14, 1997, after 10 years of extensive technical studies, and five years of intensive negotiations, the Chairman of the Chippewa-Cree Tribe and the Governor of Montana signed an historic water rights compact between the two governments. The Chippewa Cree - Montana Compact accomplished the first element of the Tribe's settlement plan - it quantifies the Tribe's water rights and establishes a joint Tribe/State water administration system. The Compact was ratified by the Tribe on February 21, 1997 and was approved by the Montana Legislature on April 10, 1997. The Chippewa-Cree Tribe thus became the third tribe in Montana, after the Northern Cheyenne Tribe and the Assiniboine & Sioux Tribes of the Fort Peck Reservation, to agree to a water rights compact with the State. However, with few exceptions, all provisions of the Compact are subject to approval by the United States Congress.

The Compact establishes the Tribe's water rights to the Big Sandy, Box Elder, and Beaver Creeks on the Reservation, and contemplates tribal rights to supplemental water for drinking. The Compact provides for 9260 acre-feet of water per year from the Big Sandy Creek and its tributaries, and 740 acre-feet per year from Beaver Creek. The Tribe reserves the right to divert from surface water flows for irrigation and other uses from the Lower Big Sandy Creek, Gravel Coulee, and from Box Elder Creek. Additional water for irrigation provided by the Compact will enable the Tribe to expand its irrigation base from 1,100 acres to 2,500 acres. On Beaver Creek, the Tribe reserves the right to divert from surface water flows for recreational uses, subject to a requirement that 280 acre-feet be returned to the stream. The Compact does not address broad issues of jurisdiction over water quality. The Compact does address specific water quality

concerns raised by non-Indian water users in provisions that provide (1) for Tribal releases of reservoir water for water quality maintenance on Lower Big Sandy Creek for downstream stock watering purposes (Article IV.B.1.c&d.), and (2) for the establishment of a joint Tribal/State system for monitoring salinity levels of surface and groundwater associated with the contemplated enlargement of Towe Ponds (Article IV.B.2.b.).

The Compact also calls for Tribal administration of its water rights. The Compact specifies that any change in water use must be without adverse effect on other water users. To resolve disputes concerning water use between Tribal and non-tribal water users under the Compact, a pre-adjudication Tribal/State administrative process is established, and an adjudicatory process is established consisting of a Compact Board made up of three members: one Tribal, one local off-Reservation, and one chosen by the other two.

The Administration, while supportive of the quantification aspects of the Compact, declined to sign the Compact for the United States primarily because the issue of a supplemental water supply for the Tribe had not been resolved. With the signing of the Compact, Congressional legislation became the next step. This necessarily involved continuing negotiations with the Administration to obtain its support.

B. CONGRESSIONAL ACTION IS NEEDED TO RATIFY THE COMPACT, PROVIDE ADDITIONAL SOURCES OF WATER FOR THE TRIBE, AND PROVIDE COMPENSATION FOR THE TRIBE'S RELEASE OF BREACH OF TRUST CLAIMS AGAINST THE UNITED STATES

The Chippewa Cree - Montana Water Rights Compact, intended to permanently settle all existing water rights claims of the Chippewa Cree Tribe in the State of Montana, accomplishes one important element of the Tribe's settlement plan. The remaining three elements -- supplementation of the on-Reservation drinking water supply to meet future population needs; construction of on-Reservation facilities to deliver drinking and irrigation water; and compensation for federal failure to protect the Tribe's water rights followed by Tribal release of claims against the United States -- must be obtained through Congressional action. In addition, congressional ratification of the Compact is needed to confirm the quantification of the Tribe's water rights under that agreement. Because of the permanence of the settlement once secured by congressional legislation, the Tribe seeks a settlement that provides not merely for its present water needs, but also for its future water needs.

Accordingly, each and every provision of H.R. 3658, entitled "The Chippewa Cree of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998", was negotiated among the Tribe, the State and the Administration over the past year. Thus, H.R. 3658, as modified somewhat since its introduction on April 1, 1998, has the support of all three parties - the first water rights settlement to have such all encompassing support. The bill would accomplish the following:

1. Ratify the Chippewa Cree - Montana Water Rights Settlement Compact providing 10,000 acre feet per year from surface and groundwater sources on the Reservation.

2. Authorize the appropriation of $3,000,000 to the Tribe to perform its administration obligations under the Compact, such as the installation and maintenance of Compact-required water gages, and the staff costs associated with administration of the Tribe's Compact-related obligations. However, except for $400,000 for capital expenditures, the Tribe may only expend the interest on this fund for Tribal Compact administration obligations.

3. Authorize the appropriation of $25,000,000 to the Department of the Interior for the Bureau of Reclamation for the construction of certain on-Reservation water development projects, including the enlargement of Bonneau Dam, and other designated on-Reservation dams. The Tribe expects to assume responsibility for this work under its Self-Governance Compact. The Tribe and the Bureau of Reclamation have negotiated the terms of an agreement as to the Bureau's oversight role in this work.

4. Authorize the allocation of 10,000 acre feet per year from Lake Elwell located behind Tiber Dam, a Bureau of Reclamation project, approximately 50 miles from the Reservation on the Marias River to provide a source of future drinking water supplies for the Tribe. The 10,000 acre feet in Lake Elwell replaces on-Reservation reserved water rights claims, which, under the water settlement, are released by the Tribe to satisfy existing water needs of downstream non-Indian water users. The Tribe's Lake Elwell water rights are not Winter's/reserved water rights. The rights are BOR project water rights assigned to the Tribe in perpetuity by H.R. 3658. Under the Compact, the Tribe can market its Lake Elwell project water rights for use off the Reservation. However, such marketing is expressly subject to applicable state law. See, 85-20-601, MCA (1997), Article IV.A.4.b.(1) and Article VI.A.1.. In addition, the Compact provides that any such marketing shall not exceed 100 years; shall not be permanent; and shall not be transferred to a location outside the Missouri River drainage. See, id, Article IV.A.4.b.. And further, the Compact gives Milk River water users the right of first refusal in any marketing of Lake Elwell water rights outside of the Milk River drainage. See, id, Article IV.A.4.b.. If any precedent is set by the Chippewa Cree water rights settlement as to the right of tribes to market water off the reservation, it is only that such rights must be negotiated with the affected states and non-Indian water users to mitigate any concerns raised to the satisfaction of all parties. The allocation of Lake Elwell water does not impose on the United States a present obligation to develop or to transport the allocated water to the Rocky Boy's Reservation. However, the bill authorizes other appropriations intended to pave the way for the future importation of water to the Reservation.

a. $1,000,000 is authorized to be appropriated to the Secretary of the

Interior, through the Bureau of Reclamation, to perform a municipal, rural, and industrial feasibility study of water and related resources in North Central Montana for the purpose of evaluating alternative means of transporting needed water to the Reservation. ($3,000,000 is authorized to be appropriated to the Secretary of the Interior for a regional feasibility study of water and related resources in North Central Montana.)

b. $15,000,000 is authorized to be appropriated to the Department of the Interior for the Tribe to be used as seed money for future water supply facilities needed to import drinking water to the Rocky Boy's Reservation consistent with the agreement of the Tribe, the State, and the United States that importation of water is necessary to meet the current and future drinking water needs of the Tribe. However, the Tribe expects that it will be required to return to Congress in the future for additional moneys to fund the final design of a future water importation system.

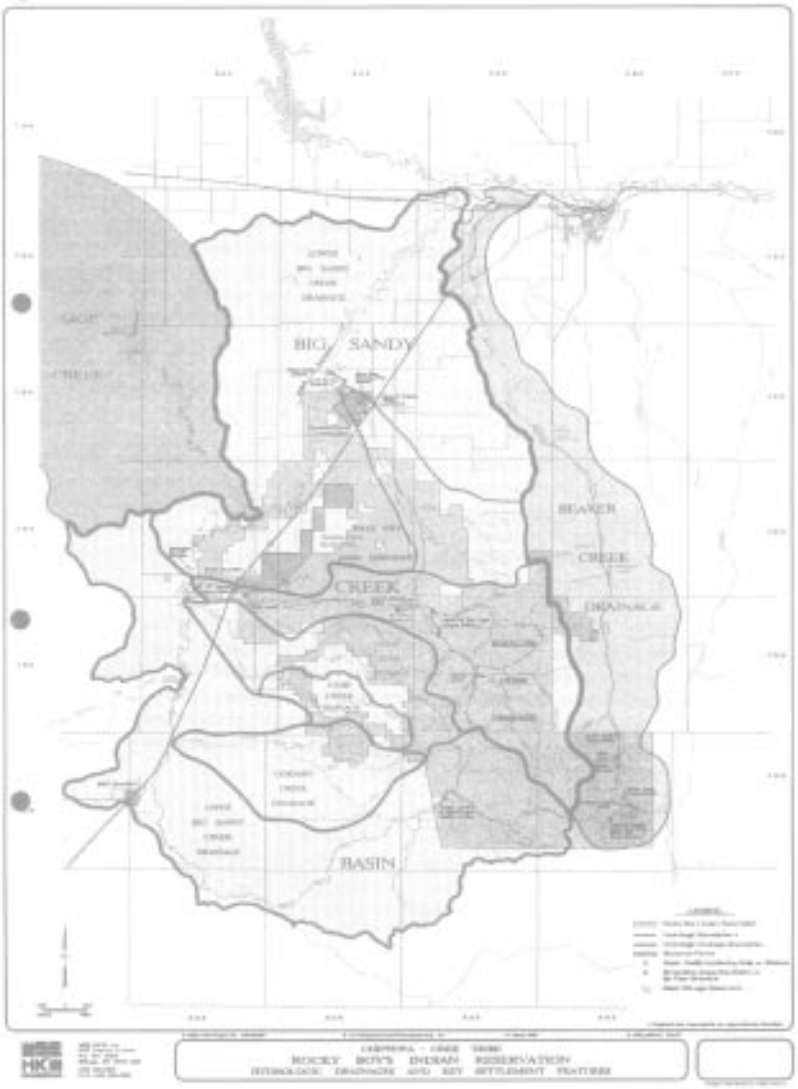
5. Authorize the appropriation of $3,000,000 for a Tribal economic development fund.

The Tribe may expend the funds appropriated for the Rocky Boy's Reservation feasibility study and for Tribal Compact administration obligations immediately upon appropriation. However, all other funds may not be expended by the Tribe until a final decree is entered by the Montana water court dismissing the Tribe's water rights claims. Upon entry of the final decree and appropriation of the funds authorized by H.R. 3658, the Tribe's waiver and release of damages claims against the United States will become effective.

The history of the United States' breach of trust toward the Chippewa Cree Tribe — poor land choice decisions, poor land management, and failure to obtain sufficient water for, or to protect the little water available to, the Rocky Boys Reservation justifies a substantial federal contribution to the Chippewa-Cree water settlement in the form of authorization of federal projects and an economic development fund. By enacting H.R. 3658 the United States will at long last set a firm foundation for providing sufficient water to support the Rocky Boy's Reservation as a viable, self-sustaining homeland for the Chippewa-Cree Tribe.

IV. CONCLUSION

The bill before these Committees today represents the culmination of many years of hard work on the part of many people. The bill has the support of the Tribe, the State of Montana, and the Administration. It ratifies a water settlement Compact that has the support of the State of Montana, the non-Indian neighbors of the Tribe, the Administration, and the Tribe. And it resolves the Tribe's water right related claims against the United States in a fair and reasonable manner. The Chippewa Cree Tribe urgently requests Congress to act expediously and to enact H.R. 3658 into law during this session of Congress.


BIG SANDY
CREEK
BEAVER
CREEK
DRAINAGE
BASIN

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TESTIMONY OF BARBARA COSENS REPRESENTING THE STATE OF MONTANA ON H.R. 3658 THE "CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION INDIAN RESERVED WATER RIGHTS SETTLEMENT ACT OF 1998" BEFORE THE WATER AND POWER SUBCOMMITTEE OF THE HOUSE COMMITTEE ON RESOURCES

Chairman Doolittle and members of the Subcommittee, my name is Barbara Cosens. I am the Legal Counsel to the Montana Reserved Water Rights Compact Commission. The Commission was established by the Montana Legislature in 1979 to act on behalf of the Governor to negotiate the settlement of reserved water rights as part of the state-wide general stream adjudication. I am here to testify on behalf of the State of Montana and Governor Marc Racicot in support of House Bill 3658, the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998, and to urge your approval of the Act. The purposes of the Act are to ratify the Compact which settles the quantification of the Tribe's water rights in Montana, provide the necessary authorization for implementation of the Compact, and to settle federal liability regarding the Tribe's water resources by authorizing appropriations for their development. My testimony will focus on the Compact.

The unquantified and open ended nature of reserved water rights places a cloud over the certainty regarding investment in private water development throughout the west. We have found through years of experience that the best approach to resolving that uncertainty is through negotiated settlements that allow tailoring of solutions on a site specific basis. We have successfully resolved uncertainty in Montana by settling the water rights claims of three Indian reservations, five National Park units, two Fish and Wildlife refuges and two wild and scenic rivers. In each of these settlements we have successfully protected existing water use, and in many cases provided substantial water for future development.

The policy of the State of Montana in favor of negotiated solutions to quantification of tribal water rights recognizes the need for individual, site specific solutions to water supply and water allocation problems. It allows consideration of the fact that each tribe is unique in its culture, history, water needs and potential for conflict over water use with its neighbors.

Similar to Montana, most western states have adopted the settlement approach and support the efforts of neighboring states to find their own unique solutions. Attached to my testimony is Resolution 98-029 of the Western Governors' Association, sponsored by Governor Kitzhaber of Oregon and Governor Hull of Arizona and passed on June 30, 1998. The following quote is from that resolution:

> The western governors continue to support negotiated rather than litigated settlement of Indian water rights disputes. The federal government has major responsibility for ensuring

> successful conclusion of the process, including providing information and technical assistance to tribes, providing federal negotiating teams to represent one federal voice and further the process, seeking approval of agreements, fully funding the federal share, and ensuring that the settlements are implemented.

If you look closely at the west, it is not difficult to see why we favor negotiation that allows maximum use of the uncertainty in the law to craft unique solutions tailored to a specific location. We are not one people. We are influenced by our landscape to a degree not found in the east, and that landscape is diverse. Our climate, even in agricultural areas, varies from desert to rain forest. The portion of the Rocky Boy's Reservation suitable to agriculture receives an average of 12 inches of rain per year, almost half that of portions of the Central Valley of California. Our growing season is as short as 45 days in the Centennial Valley of Montana, compared to almost year around in the Imperial Valley of California. Because some of us are landlocked, we do not have equal access to markets. Water, valued as high as $1000 per acre foot by urban areas in the southwest, cannot be sold in Montana when priced at $10.50 per acre foot.

The Compact before you for ratification is uniquely tailored to meet the needs of the citizens of Montana. The State of Montana concurs with the Chippewa Cree Tribe and the Administration that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a sustainable economy while protecting existing investments in water use by off-Reservation ranchers who rely on state-based water rights. We appreciate the efforts of both the Tribe and the Administration to work with us in reaching this agreement and, in doing so, to listen to and address the concerns of water users off the Reservation.

The Tribal Water Right created by the Compact and the Act is a settlement right and its attributes should not be considered to represent a legal interpretation of how the rights of the Tribe would be interpreted should they be litigated in court. Negotiation differs from litigation. The focus in negotiation is on finding a compromise that meets the needs of the Tribe and can therefore be approved by their Council, while, at the same time, protecting investment in state-based water rights. The following paragraphs will briefly describe some of the unique aspects of the agreement.

The Rocky Boy's Reservation is located in the Bearpaw Mountains with portions extending onto the plains between the mountains and the Milk River in north-central Montana. The Reservation is home to over 3500 Tribal members who are also citizens of Montana. The Reservation has an estimated 70% unemployment rate. The Reservation is located in an area of scarce water supply. The drinking water system on the Reservation is currently inadequate, providing only 60 gallons per capita per day to households served, compared to a Montana average of 170. Not all households on the Reservation share in even this inadequate supply. Because groundwater is of poor quality and low yield in this region of Montana, many of the surrounding communities and ranches rely on treated surface water for their drinking water supply. The Reservation lags behind the region in the development and treatment of surface water for domestic purposes.

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The region is arid with an average annual precipitation of 12 inches in the area of the Reservation suitable for growing hay. Snowpack in the Bearpaw Mountains, which receive an average annual precipitation of 30 inches, contributes to high spring runoff. The two drainages arising on the Reservation are: Big Sandy Creek and its tributaries; and Beaver Creek. Land use in the area is primarily for grazing and growing of hay. Both Creeks flow through Reservation and private farm and ranch land on which more than 10,000 acres of irrigation is achieved primarily through flood methods in early spring. Return flows drain into the Milk River. Without storage many streams in the area, including Big Sandy Creek, run dry in late summer.

The Compact provides a settlement quantification of 20,000 acre-feet per year. Comparison of this sum to the rights agreed to in our two other Compacts, slightly over 1 million acre-feet for the Assiniboine and Sioux Tribes of the Fort Peck Reservation and 65,000 acre-feet for the Northern Cheyenne Reservation, illustrates the variability in water supply even within Montana. In exchange for the settlement the Tribe and the United States on behalf of the Tribe agreed to release all other claims to water within the State of Montana. The release states:

> "The parties intend that the water rights and other rights confirmed to the Tribe in this Compact Are in full satisfaction of the Tribe's water rights claims, including federal reserved water rights claims based on Winters v. United States, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, . . . the Tribe and the United States as trustee for the Tribe hereby relinquish any and all claims to water rights of the Chippewa Cree Tribe within the State of Montana existing on the date this Compact is ratified by the State and the Tribe, whichever date is later.

The provisions in the Settlement Act providing for on-Reservation storage and development will allow the Tribe to maximize the utility of this limited water supply by providing a reliable supply of irrigation water for approximately 2500 acres of Reservation land. On-Reservation water development authorized by H.R. 3658 involves enlargement of existing storage on the two dominate drainages on the Reservation, Beaver Creek and Box Elder Creek (a tributary to Big Sandy Creek).

The enlargement of the Tribe's Bonneau Reservoir on Box Elder Creek will enhance stream flow during late summer, but will reduce spring flow that is generally relied on by irrigators downstream on Big Sandy Creek. A State grant will be used to improve conveyance and diversion structures off the Reservation so that water users may operate on the lower spring flows anticipated once the Tribe enlarges existing storage on the Reservation.

In addition, a 240 acre-foot pool of water will be held in Bonneau Reservoir to be released during late summer to maintain water quality for stockwatering that might otherwise be impaired by low quality irrigation return flow. In general, settlement of Indian water rights in Montana does not involve water quality. Montana and federal statutes separately address that subject. However, water quality issues may be raised by water users or the Tribe if a particular proposed water use

or existing water use has the potential for impacting water quality. In negotiations with the Chippewa Cree, downstream water users expressed concern with the impact of return flow from Tribal irrigation on late summer stockwatering when stream flows are too low to dilute saline water. To resolve this issue the Tribe agreed to hold a pool of 240 acre-feet in Bonneau Reservoir for release in late summer to maintain water quality and stockwatering. This agreement can be found at Article IV.B.1. of the Compact.

Increased storage and diversion from Beaver Creek on the Reservation could impact downstream irrigators with a senior right to divert from natural stream flow. Coordinated use of reservoirs on and off Reservation will mitigate impacts on downstream senior water rights. However, release of water from the small reservoir on the Reservation for irrigators with operations over fifteen miles downstream would be highly inefficient due to conveyance loss, and would prevent realization of the Tribe's development plan. Lower Beaver Creek Reservoir, owned by Hill County and located downstream from the Reservation, had contract water available for sale when contracts were renewed in 1996. Pursuant to the Compact, the State entered an Option to Purchase contract water for release to mitigate impacts from development of the Tribe's right. In effect, this transfers any "call" for water by senior water users from the Tribe's diversions to Lower Beaver Creek Reservoir. Included in the senior downstream water use are the Assiniboine and Gros Ventre Tribes of the Fort Belknap Reservation, located on the Milk River below its confluence with Beaver Creek.

Beaver Creek Park is owned and operated by Hill County, and is located immediately downstream from the Reservation on Beaver Creek. It is a natural park with camping and an important brook trout fishery. A minimum instream flow is necessary to maintain a viable fishery. The Compact includes provisions for release of water from the Tribe's enlarged East Fork Reservoir to maintain a minimum flow. In addition, the Compact includes an agreement by the State and the Tribe to jointly study the streamflow and the needs of the fishery to more precisely define the minimum flow.

The Compact also contains provisions on administration that should reduce the potential for future conflict between the Tribe and its neighbors. To avoid daily administration between the Reservation and off-Reservation water users in dry years, water is allocated as a block for each tributary on which there is both private and Reservation land. Montana, as with most western states, allocates water in times of shortage in order of priority of the date of development. In dry years, junior priority water users must curtail or cease water use so that senior rights are satisfied. This requires close monitoring of stream flow and coordination of diversion. The Compact eliminates priority administration between the Tribe and other water users. Provided the Tribe is using water within its allocation, water users off the Reservation agreed not to assert priority over the Tribe's water. Similarly, provided water users off the Reservation are using water within the amount of their right, the Tribe agreed not to assert priority over state-based rights. To give effect to the allocation by preventing further demands on a short water supply, the drainages are closed to new permits for water use under state law. This approach minimizes the interaction

necessary and, therefore, the potential interference with the jurisdiction of each sovereign to manage its water.

In the event a dispute does arise, the Compact provides for an initial effort between the water resource departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board with both Tribal and off-Reservation representation to hear disputes. Decisions may be appealed to a court of competent jurisdiction.

Additional protections provided for the State in the Compact reflect the fact that the settlement is not intended as an interpretation of what might happen in court. Pursuant to Article IV.A.4.b. of the Compact any off-Reservation use or transfer of any portion of the Tribal Water Rights must comply with state law for both water use and diversion facilities. Thus, when tribal water is used off the Reservation, the Tribe or its permittee stands in the same shoes as other water users. Included in the rights of state-based water users is the right to market water, both in- and out-of-state. The United States Supreme Court in Sporhase v. Nebraska, 102 S.Ct. 3456 (1982), determined that a state could not impose an impermissible burden on interstate commerce by imposing an explicit barrier to out-of-state transfer of water. Concerned with the open ended application of this principle, Montana imposed a 50,000 acre-foot limit on marketing that, under the Compact, also applies to the Tribe. In addition to state law protections, the Compact limits marketing of tribal water to the Missouri River basin and gives water users on the water-short Milk River a right of first refusal for any marketing of tribal water. Article IV.A.4.b.

In addition to protection of state-based rights, Montana has strongly asserted that in negotiating water allocation solutions, it will not pit tribe against tribe. In settling, we considered the rights of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation located downstream from the Rocky Boy's Reservation on the Milk River. As a practical matter, the impact from use of water on tributaries to the Milk River by the Chippewa Cree Tribe will not have a measurable impact on the flow of the Milk River. Furthermore, release of the water purchased from Lower Beaver Creek Reservoir by the State will help prevent impact on the Milk River on which Fort Belknap relies. In addition we included the following language in Article V.A. of the Compact:

1. The relationship between the water rights of the Chippewa Cree Tribe described herein and any rights to water of any other Indian Tribe, or of any federally derived water right of an individual, or of the United States on behalf of such Tribe or individual shall be determined by the rule of priority.
2. Nothing in the Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribes and tribal members of other Indian tribes.
3. Nothing in the Compact is otherwise intended to conflict with or abrogate a right or claim of an Indian Tribe other than the Chippewa Cree Tribe regarding its boundaries or property interests.

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4. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of any other federal agency or federal lands other than those of the Chippewa Cree Tribe.

The Montana Reserved Water Rights Compact Commission is also charged with the task of negotiating settlement of reserved water right claims for federal reservations such as National Parks and Forests. We have founds that the types of issues associated with tribal and federal water claims rarely overlap. Nevertheless, we also included the following language at Article V.B.1. of the Compact:

> Nothing in this Compact shall be so construed or interpreted: 1. As precedent for the litigation of reserved water rights or the interpretation or administration of future compact between the United States and the State, or the United States and any other state.

Arriving at these unique solutions involved the most intensive process of public involvement undertaken by the Commission to date. Because both the timing and volume of stream flow on the two drainages shared with the Reservation is so constrained, it was essential for the Commission to understand the water needs of each rancher and to engage them in the process of designing solutions. Public involvement began in 1992 with a public meeting in which over 200 citizens attended. Following that meeting the Commission began a five year process of kitchen table meetings with individuals ranch-by-ranch. Out of this process, a certain degree of trust and mutual respect developed. Many of the solutions suggested by ranchers are now found in the Compact. The same ranchers who expressed concern in 1992 testified in support of the Compact during legislative hearings in 1997. The Compact received overwhelming support in the Montana Legislature. The Compact also received the support of local county commissioners who were instrumental in providing ideas for resolution of issues. The level of support reflects the fact that this is truly a settlement that addresses the needs of all those affected. The Compact was ratified by the Montana Legislature without opposition and is codified in the Montana statutes at 85-20-601, MCA.

Once Congress ratifies the Compact through passage of this Act, the final step is entry of the Tribe's water right in a decree issued by the Montana Water Court in the Montana general stream adjudication. In 1979, the United States filed suit in the U.S. District Court for Montana to quantify the water rights of tribes with reservations in the Milk River basin, including the Chippewa Cree. United States v. Aageson, CV-79-GF (4-5-79) District Court, Montana. Montana sought dismissal in favor of the state adjudication and joined other states in taking the issue of the appropriateness of state court jurisdiction to adjudicate tribal water rights to the United States Supreme Court. In 1983, the Court held that federal law known as the McCarran Amendment, 43 U.S.C. 666 (1966), waived the sovereign immunity of the United States in its capacity as trustee for Indian tribes to be joined in a general stream adjudication in state court. Arizona v. San Carlos Apache Tribe, 463 U.S. 545. Thus, dismissal of the federal suit was

appropriate in deference to concurrent state court jurisdiction. Id.

The Court left open the question of whether a particular state's adjudication would be considered adequate to adjudicate reserved water rights. In 1985, the Montana Supreme Court held that the Montana Water Use Act establishing the adjudication is adequate on its face to adjudicate tribal water rights, however it remains to be seen if it is adequate as applied. Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 768.

Thus, the validity of the Montana Water Court assertion of jurisdiction over the claims of the United States on behalf of the Chippewa Cree Tribe remains an open question. In addition to this settlement, Montana has settled the water rights for 2 other reservations, 5 national parks, 2 wildlife refuges and 2 wild and scenic rivers. Our investment in these settlements is substantial. In the unlikely event jurisdiction is found invalid, this Compact and our other settlements allow the negotiated water rights to be filed as a consent decree in federal district court. The investment by all parties is just too great not to leave ourselves that alternative should it prove necessary.

I appreciate the opportunity to testify on behalf of the State of Montana in support of the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1998, and urge your timely approval of the Act. The settlement has the full support of the State, the Tribe, ranchers, surrounding communities, and local officials in the area. Because it relies on enlargement of existing storage and mitigation of impacts of new development through efficiency improvements, it has no environmental opposition. No endangered species are known to be involved. We know of no opposition to this settlement. On behalf of Montana I urge you to pass this bill and thereby signal to western states that the United States, after a long hiatus, is once again prepared to help us move toward finality on resolving these federal claims in our adjudications, rather than opening these issues to further uncertainty and protracted debate. Passage of this Act will help us bring this long process of settlement to closure. I would be happy to answer any questions by members of the Subcommittee.

FACT SHEET ON THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION INDIAN RESERVED WATER RIGHTS SETTLEMENT ACT OF 1998

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I. RATIFICATION OF THE COMPACT AMONG THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION THE STATE OF MONTANA and the UNITED STATES OF AMERICA

A. RESERVATION SETTING

The Rocky Boy's Reservation is located in the Bearpaw Mountains with portions extending onto the plains between the mountains and the Milk River in north-central Montana. Historically, the area was part of the large territory north of the Missouri and Musselshell Rivers designated for the Blackfeet Nation in the treaty of 1855. In 1880 the Fort Assiniboine military reservation was established. On disestablishment of the military reservation, Congress on September 16, 1916, set aside a portion of the area for the Rocky Boy's Reservation. Land has been added to the Reservation through both acquisition and reservation since 1916. The Reservation was never allotted. The Reservation is home to over 3000 Tribal members with an annual population growth rate in excess of 3%. The Reservation has an estimated 70% unemployment.

The Reservation is located in an area of scarce water supply. The region is arid with an average annual precipitation of 12 inches in the area of the Reservation suitable for growing hay. Snowpack in the Bearpaw Mountains, which receive an average annual precipitation of 30 inches, contributes to high spring runoff. The two drainages arising on the Reservation are: Big Sandy Creek and its tributaries; and Beaver Creek. Land use in the area is primarily for grazing and growing of hay. Both Creeks flow through Reservation and private farm and ranch land before reaching the Milk River.

B. TRIBAL WATER RIGHT QUANTIFICATION

[Compact codified at §85-20-601, Montana Code Annotated]

10,000 acre-feet per year from surface and groundwater sources on the Reservation:

Big Sandy Creek and tributaries: 9260 acre-feet per year

New water use on Big Sandy Creek and its tributaries is to be accomplished primarily through enlargement of Bonneau Reservoir located on Box Elder Creek to a capacity of 4800 acre-feet. The Tribe has the right to divert from surface water flows for irrigation and other uses: 1690 acre-feet from Lower Big Sandy Creek and Gravel Coulee; and 6590 acre-feet from Box Elder Creek. The Compact quantifies additional minor uses including stockwatering and fish and wildlife enhancement on tributaries to Big Sandy Creek.

Beaver Creek: 740 acre-feet per year (260 acre-feet net depletion)

New water use is to be accomplished primarily through enlargement of East Fork of Beaver Creek Reservoir to a capacity of 665 acre-feet. The Tribe has the right to divert from surface water flows for recreational uses: 540 acre-feet, but could only consume 260 acre-feet of the amount diverted. The remaining water must return to the stream. Additional minor uses are to be from groundwater.

10,000 ac-ft from Lake Elwell:

Lake Elwell is located behind Tiber Dam approximately 50 miles from the Reservation on the Marias River. The reservoir is part of a United States Bureau of Reclamation project. The United States has agreed to allocate 10,000 acre-feet per year for use by the Tribe, however, the settlement does not include any provisions or obligations for development of the water or transport of the water to the Reservation.

C. MITIGATION OF IMPACTS ON OFF-RESERVATION WATER USE

Box Elder and Big Sandy Creeks

- Two pools of water stored in Bonneau Reservoir will be designated for off-Reservation water use:
  - 104 acre-feet for irrigation on Box Elder Creek.
  - 260 acre-feet for stockwatering and maintenance of water quality.
  - The Tribe has the discretion to make additional releases if necessary to mitigate the impact of a change in use of the Tribal Water Right.
- Efficiency improvements to off-Reservation irrigation diversion and conveyance systems, funded by the State.

Beaver Creek and the Milk River

- Maintenance of brook trout fishery in upper Beaver Creek:
  - Study by the Tribe and the State to determine levels for a minimum instream flow
  - Release of stored water by the Tribe to maintain a minimum instream flow of 1 cfs.
- Purchase by the State of 800 acre-feet of contract water in Lower Beaver Creek Reservoir for release to prevent impact on irrigation from Lower Beaver Creek and the Milk River.
- Improved coordination of storage between Nelson Reservoir, part of the Milk River Reclamation Project, and Lower Beaver Creek Reservoir to allow increased storage in Lower Beaver Creek Reservoir.

D. ALLOCATION IN DRY YEARS

Allocation in times of shortage is not in priority. Provided the Tribe uses water within its quantified right, water right holders downstream from the Reservation may not assert priority over the Tribal Water Right. Provided water right holders use water within their quantified right, the Tribe may not assert priority over upstream water users. This is referred to by the State and the Tribe as "Block Allocation" of water. It is accomplished through mutual subordination of the priorities of off-Reservation rights and the Tribal Water Right to upstream rights.

E. ADMINISTRATION / DISPUTE RESOLUTION

- The Tribe administers the Tribal Water Right.
- Use or transfer of any portion of the Tribal Water Right off the Reservation must be in compliance with State law.
- Any change in use must be without adverse effect on water use pursuant to a valid right off the Reservation.
- The State Department of Natural Resources and Conservation and the Tribal Water Resources Department will work on a cooperative basis to resolve disputes concerning water use.
- The Compact establishes a Compact Board made up of three members: one Tribal, one local off-Reservation, and one chosen by the other two. Disputes concerning use of water between users of the Tribal Water Right and users of water rights recognized under State law may be filed with the Compact Board.
- Decisions by the Compact Board may be appealed to a court of competent jurisdiction. On appeal, the hearing is a trial *de novo*.

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II. AUTHORIZATIONS FOR APPROPRIATIONS [$50 million] AND SCHEDULE OF APPROPRIATIONS

A. CHIPPEWA CREE FUND [$21 million, Bureau of Indian Affairs Budget]

Tribal Compact Administration Account
$3 million FY 1999

Economic Development Account
$3 million FY 2000

Future Water Supply Facilities Account
The Tribe, the State, and the United States have agreed that importation of water to the Reservation is necessary to meet the drinking water needs of the Tribe. The bill introduced to Congress will include authorization for $15 million in federal funding for future importation of drinking water to the Reservation.

$15 million
* $2 million FY 1999
* $5 million FY 2000
* $8 million FY 2001

B. ON-RESERVATION WATER DEVELOPMENT [$25 million, Bureau of Reclamation Budget]

$13 million FY2000
Bonneau Reservoir enlargement

$8 million FY 2001
East Fork, Towe and Browns Reservoirs

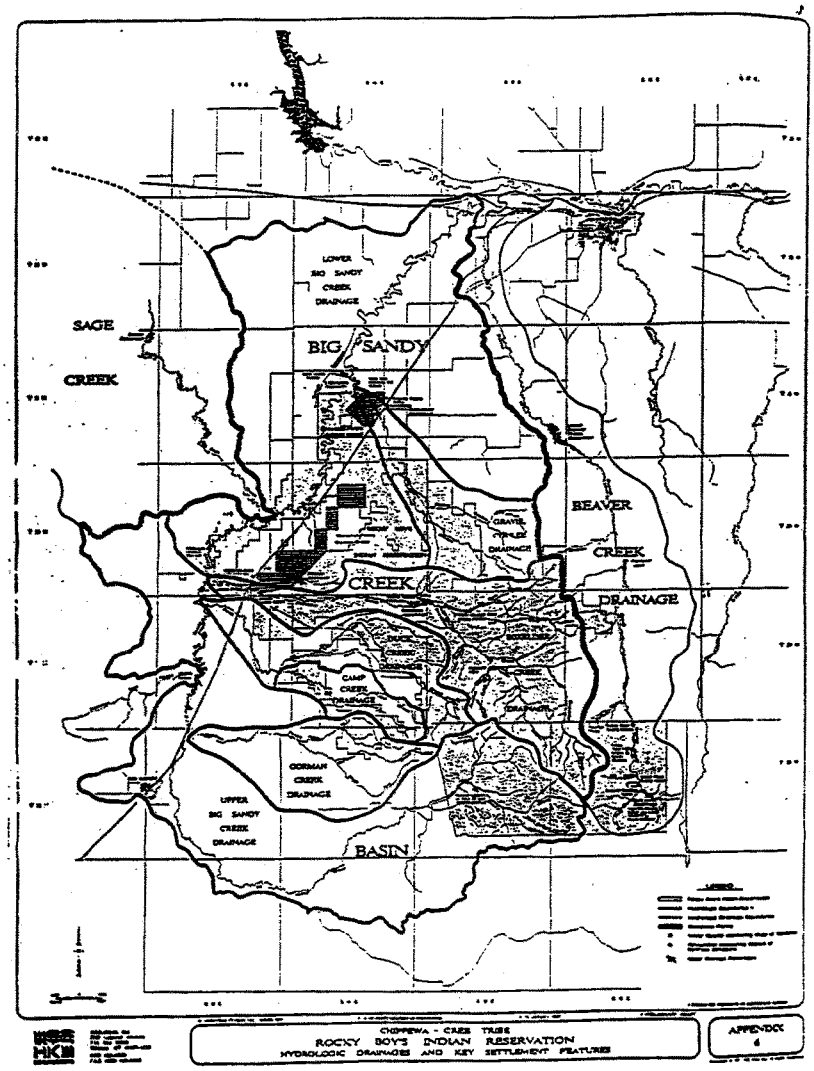
$3 million FY 2002
Completion of the above projects and other water development

$1 million FY 2000
Bureau of Reclamation administrative costs associated with Tribal water development

C. FEASIBILITY STUDIES [$4 million, Bureau of Reclamation Budget]

The Secretary of the Interior, through the Bureau of Reclamation is authorized to perform a municipal, rural and industrial (MR&I) feasibility study of water and related resources in North Central Montana to evaluate alternatives for MR&I supplies for the Rocky Boy's Reservation.
$1 million $.5 million in FY 1999
$.5 million in FY 2000

The Secretary of the Interior, through the Bureau of Reclamation, is authorized to perform a regional feasibility study to evaluate water and related resources in North Central Montana.
$3 million $.5 million in FY 1999
$2.5 million in FY 2000


LOWER
BIG SANDY
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CREEK
DRAINAGE
BASIN
CHIPPEWA - CREE TRIBE
ROCKY BOY'S INDIAN RESERVATION
HYDROLOGIC DRAINAGES AND KEY SETTLEMENT FEATURES
APPENDIX
4

Western Governors' Association
June 30, 1998
Resolution 98 - 029

SPONSORS: Governors Kitzhaber and Hull

SUBJECT: Negotiated Indian Water Rights Settlements

A. BACKGROUND

1. The western Governors have consistently supported negotiated settlement of Indian land and water rights disputes as stated in WGA Resolutions 87-007, 89-011, 92-008 and 95-006.

2. Through participation in the Ad Hoc Group on Reserved Indian Water Rights, together with representatives of the Native American Rights Fund, Council of Energy Resource Tribes, National Congress of American Indians, and Western Regional Council, western governors contributed to the development of a process that led to the approval of (14) Indian water rights settlements.

The Ad Hoc Group sponsored four workshops in Washington, D.C. between 1988 and 1991 for representatives of the Department of Interior, Department of Justice, Office of Management and Budget, House and Senate committee staff, and tribal and local groups to work out solutions to problems as they arose in negotiations. Over time a working process evolved which included the formation of on-site negotiating teams, high level trouble shooters within the Department of Interior, agreement on guidelines for negotiators, agreement on ways to resolve congressional problems without establishing precedents, and addressing funding problems raised by OMB. A line item was established within the budget to ensure that settlements, once negotiated and approved, would be implemented.

3. In the last several years, that process appeared to have broken down. Few negotiating teams were being formed, few new settlements had been approved, tribes were returning to the courts to get their rights established, agreements which had been approved were experiencing difficulties in being implemented, and funding had all but disappeared. The prospects for returning to an era of adversarial relations between tribes and their local neighbors and neglect of addressing tribal rights appeared imminent.

- The unfavorable climate toward settlements of the last several years appears to have recently changed. The Department of Interior created a Tribal Task Force on Funding to begin looking at the issues of funding settlements. The Department has also assigned new personnel to work on these issues.

5. The governors recognize that settlements today will be considered in arduous financial times. At the same time, the need to resolve these disputes and redress tribal grievances is critical. It is time to revisit the need and process for resolving these issues and to rededicate efforts to continue the positive accomplishments of the last decade.

B. GOVERNORS' POLICY STATEMENT

1. The western governors continue to support negotiated rather than litigated settlement of Indian water rights disputes. The federal government has major responsibility for ensuring successful conclusion of the process, including providing information and technical assistance to tribes, providing federal negotiating teams to represent one federal voice and further the process, seeking approval of agreements, fully funding the federal share, and ensuring that the settlements are implemented.

2. Negotiations shall include the federal agencies, states, tribes, and local governments.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. WGA shall convey this resolution to the President; heads of the Office of Management and Budget,

Department of the Interior. and Department of Justice: members of the House and Senate authorizing and appropriations committees: tribal organizations: and Western Regional Council.

2. WGA shall work with the Ad Hoc Group on Reserved Indian Water Rights for purposes of educating key congressional and committee staff and key federal agency staff, and in order to review and recommend steps to facilitate and implement negotiated settlements of Indian land and water rights disputes.

Note: Originally adopted in 1987 and readopted as WGA Resolutions 87-007, 89-011, 92-008 and 95-006.