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S. 134, S. 399, S. 1327, AND S. 1345

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

S. 134, MESCALERO APACHE TRIBE LEASING AUTHORIZATION ACT

S. 399, BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2011

S. 1327 A BILL TO AMEND THE ACT OF MARCH 1, 1933, TO TRANSFER CERTAIN AUTHORITY AND RESOURCES TO THE UTAH DINEH CORPORATION, AND FOR OTHER PURPOSES

S. 1345, SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION GRAND COULEE DAM EQUITABLE COMPENSATION SETTLEMENT ACT

OCTOBER 20, 2011

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S. 134, S. 399, S. 1327, AND S. 1345

THURSDAY, OCTOBER 20, 2011

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3:12 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. The Committee will come to order.

Aloha. Today, the Committee will hold a legislative hearing on four bills dealing with issues that will have significant impacts on the ability of Tribes to control and use their own resources.

Two of these bills deal with water. The Committee held a roundtable discussion in June on Tribal water issues. What we heard from Tribal leaders was that Tribal access to and control over water resources is instrumental in supporting Tribal self-determination and self-governance.

The third bill deals with the transfer authority over trust funds put in place to benefit the Navajo people.

The final bill would compensate a Tribe for the use of a plan by the Federal Government to produce hydropower.

The first bill, S. 134, the Mescalero Apache Tribe Leasing Authorization Act, was introduced by Senator Bingaman and Senator Udall. I am pleased that we have Senator Bingaman here with us today to testify on this bill, and I am sure Senator Udall will also say more about this important bill during his opening statement.

The second bill we will consider is S. 399, the Blackfeet Water Rights Settlement Act of 2011. Senators Tester and Baucus have been working hard on this bill for several years. So today, the Committee will be able to learn about the progress made as a result of their efforts.

The third bill we will consider, S. 1327, deals with the transfer of authority of the Utah Navajo Trust Fund. This bill was introduced by Senator Hatch. I look forward to hearing testimony from those on both sides of this issue.

Finally, we will consider S. 1345, a bill that was introduced by Senators Cantwell and Murray. This bill would provide fair and just compensation to the Spokane Tribe whose land was used by the United States for the development of hydropower, but was never fairly compensated for that use.

So, today we will hear from the Administration, the affected Tribes and other parties to the legislation. I encourage any other interested parties to submit written comments to the Committee. The hearing record will remain open for two weeks from today.

I know that my good friends, Senators Tester, Udall, and Cantwell, have done a significant amount of work on these bills. So I would like to hear from them at this time.

Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman. I want to thank you for holding this hearing on all the bills, but particularly the Blackfeet water rights settlement. It is a very important bill to the folks with the Blackfeet Tribe there in Montana. It is important to me. It is important to the United States and Senator Baucus also.

First of all, I want to welcome our witnesses from Montana Blackfeet Nation, Chairman T. J. Show. He is new to the job, but he is certainly not new to this issue. He knows it very, very well.

Mr. Chris Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission. Chris has been at this job for a very long time. He has the best mind when it comes to water rights settlements from a Compact Commission standpoint around, and a true pleasure to have him here, too.

They are joined by colleagues and staffs from Montana. I want to welcome them all. And I would also like to welcome Del Laverdure from the Department of Interior. He is the Principal Deputy Assistant Secretary of Indian Affairs from the Department of Interior, also a Montanan. And we should have an interesting discussion on this because we are kind of on opposite sides of this bill, but I know Del well. He is a good friend and hopefully through good conversation, we will be able to get on the same sheet.

I also want to note that Senator Baucus and I are cosponsoring this bill, as you have already said, Mr. Chairman. He has submitted a statement for the record in full support. He and I have cosponsored bills the last two sessions of Congress to get this done.

And as we talk about improving life in Indian Country, specifically Blackfeet Territory, I would be remiss to not take a moment to recognize the passing of Elouise Cobell. Elouise was a member of the Blackfeet Tribe. She fought tirelessly to hold government accountable for the promise it made to American Indians. She was a friend of mine. She was a friend to all Native Americans. I will absolutely miss her, as will thousands and thousands of other people around the Country. And I just want to take just a brief moment. I don't know if it is appropriate or not, but I hope so, just to think about all that Elouise Cobell had done for Indian Country in the United States.

Thank you for that, Mr. Chairman.

We are here to talk about the Blackfeet Water Rights Settlement Act. This bill is the right thing to do. It will create jobs in Blackfeet Reservation and it will improve reservation infrastructure for generations to come.

Water is the foundation of life for every community, but particularly in rural communities. This bill will provide clean drinking

water for Tribal communities. It will provide good Montana water for irrigation, for livestock, for other economic development opportunities.

The bill is the right thing to do because it is the product of a complex negotiation to fulfill a trust responsibility that the United States has to the Blackfeet Nation. In 1908, the U.S. Supreme Court in its decision in *Winters v. United States* said that the government must provide sufficient water to reservations that it creates.

The purpose of creating the Blackfeet Indian Reservation in 1855 was to create a permanent homeland for the Blackfeet people. This bill fulfills the promise to provide the water it needs. It will create jobs building water infrastructure necessary to, in turn, pay for water rights in the quantified Blackfeet Water Compact into usable water for all Montanans that live on the Blackfeet Reservation.

Rather than fight it out in court, Tribal, State and Federal officials worked on a government-to-government basis to negotiate this contract. The Montana Legislature approved the water compact in 2009. The State of Montana supports this bill and has agreed to appropriate $35 million to enact it. Now, we need support from our end at the United States Federal level.

Senator Baucus and I have been asking the Department of Interior to comment on the proposed legislation in an effort to gain their support. I know they have been busy working on other settlements, including the Montana Crow Water Settlement, which we passed last year, and I want to thank you for your work on that, but now it is time to fully engage on the Blackfeet bill.

I look forward to everybody's testimony today. And of course, I am going to have some questions for them when it gets done.

Thank you all for traveling here. I appreciate your commitment to Indian Country.

And thank you again, Mr. Chairman, for giving our bill the Committee's attention.

The CHAIRMAN. Senator Udall?

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Akaka.

Just as Senator Tester has done, I thank you very much for holding hearings on all these bills today.

And let me also welcome President Chino and his lovely wife, who is the First Lady of Mescalero.

I am especially pleased that the Committee will be considering the merits of S. 134, the Mescalero Apache Tribe Leasing Authorization Act, a bill that will allow the Mescalero Apache Tribe in Southern New Mexico to lease their adjudicated water to communities in New Mexico that are in great need of water.

I would like to welcome Senator Bingaman, with whom I have been working closely to move Mescalero water legislation forward. Senator Bingaman has long been a great advocate of Tribal water legislation and has been persistently diligent in moving this and other important pieces of water legislation through Congress.

Last year, we celebrated final passage of two 40-plus-year water settlements, and this year we continue to press the Administration

and Appropriations Committees to ensure that projects related to these and other Tribal water settlements are funded.

Senator Bingaman is truly an expert on Tribal water issues and I look forward to hearing his testimony.

I hope that through the testimony we hear today, my colleagues on the Committee will, number one, understand the need for flexible and innovative approaches to water management in the arid west; and number two, appreciate the simple and logical nature of the Mescalero Apache Tribal Leasing Authorization Act; and number three, recognize the great benefits that the Mescalero Apache Tribe Leasing Authorization Act will be to the Mescalero Tribe and the neighboring communities.

I look forward to hearing from the witnesses and thank my colleagues for their careful attention and support of the Mescalero Apache Tribe Leasing Authorization Act.

And I yield back, Mr. Chairman, and thank you again.

PREPARED STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

President Chino Introduction

I am please to introduce my good friend, Mescalero Apache President Mark Chino to the Senate Committee on Indian Affairs.

President Chino has diligently served the Mescalero Apache as president for years. He is currently finishing his 3rd two year term as President of the Tribe, and has led his Tribe in many great efforts. With a focus on economic development, President Chino continues to build ties with neighboring communities, and to advocate for federal contracts and other economic development opportunities for the Tribe.

Public service is a family tradition for the Chinos. President Mark Chino is the son of President Wendall Chino, an icon in Mescalero history, who led the Tribe for over 40 years. I look forward to President Chino's continued leadership of the Mescalero Apache, and thank him for his dedication to his constituency.

The Mescalero Apache Tribe Leasing Authorization Act presents great opportunities for President Chino and the Mescalero Apache to bolster economic development, while helping neighboring communities. I thank President Chino for his willingness to participate in today's hearing and look forward to hearing from him.

Vice President Jim Introduction

I am please to introduce my good friend, Navajo Nation President Rex Lee Jim to the Senate Committee on Indian Affairs.

Formerly the Ranking Member of the Judiciary Committee, and Chairman of the Public Safety Committee in the 21st Navajo Nation Council, Vise President Jim was sworn in with President Joe Shirley on January 11, 2011.

Vice President Jim was raised in the Rock Point in Arizona, where he returned to teach at the local community school after graduating from Princeton University. Beyond being an educator, Vice President Jim is an author, playwright, and medicine man. He has long been a dedicated public servant and continues be a strong leader of the Navajo Nation.

I thank Vice President Jim for his willingness to participate in today's hearing, and give testimony on S. 1327, a bill to amend the Act of March 1, 1933, to transfer certain authority and resources to the Utah Dineh Corporation.

The CHAIRMAN. Thank you very much, Senator Udall.

Before I call on Senator Cantwell, I would like to call on Senator Bingaman for his statement and welcome him as a good friend and a brother. He will serve as our first panelist today, speaking about S. 134, the Mescalero Apache Tribe Leasing Authorization Act.

Senator Bingaman, will you please proceed?

STATEMENT OF HON. JEFF BINGAMAN,
U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much, Chairman Akaka, for your courtesy. And thank you for the chance to speak in favor of this bill.

Senator Udall did a good job of summarizing what is involved here. I join him in welcoming President Chino who is here today, and who I believe will be testifying here before your Committee in a few minutes.

The Mescalero Apache Tribe I believe will benefit from this legislation, which is called the Mescalero Apache Tribe Leasing Authorization Act.

In 1993, the New Mexico Court of Appeals adjudicated about 2,300 acre-feet of water to the Mescalero Apache Tribe as part of the Pecos River Adjudication. But without specific Congressional approval, the Tribe is not authorized to lease those water rights to others. So that is what this legislation would provide. It would provide that authorization.

S. 134 will allow the Tribe to lease its water rights to other communities in their part of New Mexico, in the southeastern part of New Mexico, and central New Mexico, that have significant water supply needs. We are still in a drought situation in New Mexico. We have been now for well over a year. This last year has been one of the worst on record in our State's history, and unfortunately that circumstance may not change that quickly.

There are various communities such as the Village of Ruidoso, the Village of Cloudcroft, the City of Alamagordo that will be able to negotiate to lease some of this water from the Mescalero Apache Tribe if we are able to pass this legislation. So this will be beneficial to the Tribe, of course. It will be beneficial to these communities.

All of this is done under our State law in New Mexico, under a process that is overseen by the New Mexico State Engineer, who has overall responsibility for water transactions and water rights in our State.

This will also help to strengthen the relationship which is already a very good one between Indian and non-Indian communities in our State. The bill will greatly benefit all concerned, and I appreciate your willingness to consider the legislation at this hearing, and I hope you are able to act favorably upon it.

Again, thank you for letting me testify. It is an honor to work with Senator Udall on this legislation. I think it is a good piece of legislation and one that we need to pass and send to the President for signature.

The CHAIRMAN. Thank you, Senator Bingaman, for your insights on this bill. And thank you for being here and for being patient, and we wish you well. Thank you.

And now, we will hear from Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman. And I appreciate your determined advocacy for Indian Country and the leadership of this Committee.

I thank you for having this very important hearing today on several pieces of legislation, specifically the Spokane Tribe and having the Department of Interior here on S. 1345, legislation to provide compensation to the Spokane Tribe for the building of a Federal dam on their land 70 years ago, and the continued impacts of that today.

The Grand Coulee Dam project destroyed Tribal schools, roads, sacred sites and salmon runs critical to the Tribe's livelihood, and culture. This legislation fulfills the Federal Government's moral and equitable obligation to treat the Spokane Tribe honorably and fairly by finally settling their claims and providing the Tribe with just and equitable compensation.

Let me begin by welcoming the Chairman, Greg Abrahamson, who is going to be on one of the panels that we have today. He has traveled over 2,000 miles to be here from Washington State and I thank you for doing that. He has testified in the past on similar legislation to S. 1345 and today he is going to be making comments about changes to this legislation since the last Congress.

For more than a half-century, the Columbia Basin Project has made incredible contributions to our Nation. It has helped pull the economy out of the Great Depression. It provided electricity that provided aluminum to build airplanes and many other things. The project continues today to produce enormous revenues and it is a key component of the agricultural economy in Eastern Washington, helping to irrigate over 600,000 acres of land and provide about 11 percent of the electricity needed by various towns across various areas of our State and the Pacific Northwest.

However, these benefits come at a great direct cost to Tribal property that have been inundated when the U.S. Government built the Grand Coulee Dam. And before dam construction, the free flow of the Columbia supported a robust and plentiful salmon run that provided virtually all of the subsistence of the Spokane Tribe.

After construction, the Columbia and its Spokane River tributary flooded the Tribal communities and sacred places, schools and roads, and to this day the effects of the flooding are being felt by the Spokane Tribe.

To date, the Tribe has received only $4,700 for the damages that have been done. By comparison, the Colville, whose reservation lies just to the west of the Spokane Tribe Reservation, received well over $53 million for the losses it suffered and continues to suffer as a result of the Columbia Basin Project.

It is an injustice that the Spokane Tribe has not received fair and equitable compensation for suffering from similar damage, and this legislation would fulfill our obligations to the Spokane Tribe. Getting to this point today has been a long and evolving process, but I believe the language in this legislation addresses any concerns the Department of Interior has previously raised and I look forward to hearing their testimony today.

We have also made some key changes to the legislation to satisfy the concerns of the Bureau of Reclamation expressed during the last hearing on this legislation and in correspondence to the Committee in 2008. The Spokane Tribe spent several months this year working with the Bureau of Reclamation to address their concerns and with the overall settlement agreement.

So I want to thank you, Mr. Chairman, for allowing this to be on the agenda today and for the Spokane Tribe coming here today to talk about this legislation. I know that there will be many people working on this legislation within the Northwest delegation, and so I just look forward to working with my House and other Senate colleagues, Senator Murray, and other House colleagues on this legislation.

I want to say that I have received letters from different local counties, the Governor, the Mayor of Spokane, and many others in support of this legislation.

So I look forward to hearing today's testimony.

The CHAIRMAN. Thank you very much, Senator Cantwell.

And now, I would like to invite the second panel to the witness stand, Mr. Del Laverdure, the Principal Deputy Assistant Secretary for Indian Affairs at the Department of Interior; and Ms. Pamela Williams is accompanying Mr. Laverdure today.

So welcome, Mr. Laverdure, again and please proceed with your testimony.

STATEMENT OF DONALD "DEL" LAVERDURE, PRINCIPAL DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY PAMELA WILLIAMS, DIRECTOR, INDIAN WATER RIGHTS OFFICE

Mr. LAVERDURE. Good afternoon, Mr. Chairman.

The CHAIRMAN. Good afternoon.

Mr. LAVERDURE. And Members of the Committee. My name is Del Laverdure. I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior.

I am here today to provide the Department's position on S. 134, the Mescalero Apache Tribe Leasing Authorization Act; S. 399, the Blackfeet Water Rights Settlement Act of 2011; S. 1327, a bill to transfer certain authority and resources to the Utah Dineh Corporation; and S. 1345, the Spokane Tribe of Indians Equitable Compensation Settlement Act.

But first before I begin, I would like to do, as Senator Tester did, and acknowledge the passing of a very significant Indian leader, Elouise Cobell, and in fact the Assistant Secretary, Larry Echo Hawk, is in flight out there to be attending services. Otherwise, he might be here today.

As far as the testimony, it is important to begin by stating that the Administration strongly supports the principles of self-determination and self-governance, and recognizes that intrinsic to these principles is Tribal control over Tribal resources.

Like Tribal homelands, water is essential to the health, safety and welfare of Native people and Tribal governments are in the best position to determine how their water will be used.

S. 134 would enable the Mescalero Apache Tribe to lease its adjudicated and quantified water rights for use within the State of New Mexico for up to 99 years. The bill to lease water rights under S. 134 is consistent with the department's longstanding support for leasing quantified water rights recognized in Indian water rights settlements.

Leasing is an important and acceptable way for which Tribes may achieve economic value from the use of their resources. The Department believes that the policy on approval of water leases should parallel aspects of its policies on approving leases of land. Therefore, the department supports S. 134, the Mescalero Apache Tribe Leasing Authorization Act, with the amendments discussed in my full statement for the record.

It is also important to note that this Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles that include the following.

That the United States participate in water settlements consistent with its responsibilities as trustee to Indians, that Indian Tribes receive equivalent benefits for rights which they and the United States may release as part of the settlement; that Indian Tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all of the parties benefitting from the settlement.

I want to affirm the Administration's support for settling Indian water rights where possible. However, as discussed more fully in my written statement, the department cannot support S. 399 as introduced. S. 399, the Blackfeet Water Rights Settlement Act of 2011, would provide approval for and authorization to carry out a settlement of the water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation in Montana.

The Department's major concerns with S. 399 include the following. Number one, the high cost of implementing this bill, including $591 million of specifically authorized costs and unspecified, but significant, additional costs from several obligations imposed on the Federal Government without specific authorization of funds; number two, the settlement does not include a reasonable State cost share to reflect the benefits that would enure to the non-Federal and the non-Tribal beneficiaries; number three, the lack of information regarding what infrastructure projects the Tribe would pursue under the settlement and the actual costs for such proposed projects; number four, the requirement that the United States establish a mitigation fund to benefit a non-Tribal beneficiary; and number five, that the settlement does not achieve finality in resolving contentious water management issues in the relevant basins.

These are not all of the concerns the Department has with S. 399, but they are the most significant concerns as are discussed in my written statement submitted for the record.

The Department believes that the settlement can be accomplished in a manner that protects the rights of the Tribe and also ensures that the appropriate costs of the settlements are borne proportionally. While we do not support S. 399 as introduced, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can support.

Consistent with the Administration's strong support for the principles of self-determination and self-governance, and our recognition that the intrinsic to those principles is Tribal control over Tribal resources, the department opposes S. 1327, a bill to transfer

certain authority and resources to the Utah Dineh Corporation. S. 1327 would amend the 1933 Act and its subsequent 1968 amendments by identifying the Utah Dineh Corporation as the trustee of the former Utah Navajo Trust Fund.

Consistent with our government-to-government relationship with the Navajo Nation, the department acknowledges and respects the position of the Navajo Nation as it pertains to the Utah Navajo Trust Fund. The Department understands that the Navajo Nation would like to manage the trust and disburse the funds to the Utah Navajo beneficiaries consistent with the current disbursements and percentages.

We also understand that the Navajo Nation opposes this bill and has opposed a similar version in the 111th Congress. At this time, the department believes it is more appropriate for the Navajo Nation to manage the trust and disburse the funds consistent with and to further the intent of the 1933 Act.

And finally, Mr. Chairman, S. 1345, Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act. S. 1345 would provide compensation to the Spokane Tribe for the use of its land for the generation of hydropower by the Grand Coulee Dam. Specifically, S. 1345 would require the Secretary of the Interior to deposit $99.5 million over five years into a trust fund held by the United States Treasury for the Spokane Tribe.

The Department is encouraged by significant progress made in recent months towards resolving issues of concern to the Administration. An example of significant progress is the Department's support for the removal of the land transfer provisions that were included in previous legislation.

However, the Administration cannot support S. 1345 in its current form. With respect to section five of S. 1345, titled Settlement Fund, we believe the basis for the settlement has not been established by legal claim of the Spokane Tribe. Since the Spokane Tribe has no legal claim, the Department does not believe that legislation is appropriate as a settlement of claims.

However, the Department could examine with the Tribe and Congress other avenues to address the concerns of the Spokane Tribe. The Department, in consultation with the Bonneville Power Administration, would be pleased to work with the Committee on substitute language or amendments to the legislation that we believe could meet the needs of the Spokane Tribe and the United States.

This concludes my statement and I would be happy to answer any questions the Committee may have.

[The prepared statement of Mr. Laverdure follows:]

PREPARED STATEMENT OF DONALD "DEL" LAVERDURE, PRINCIPAL DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

S. 134

Good afternoon Mr. Chairman, Vice-Chairman Barrasso and Members of the Committee. My name is Del Laverdure. I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's position on S. 134, the Mescalero Apache Tribe Leasing Authorization Act.

The Administration strongly supports the principles of self-determination and self-governance, and recognizes that intrinsic to these principles is tribal control over tribal resources. Like tribal homelands, water is essential to the health, safety, and welfare of Native people, and tribal governments are in the best position to determine how their water will be used. Accordingly, the Department supports S. 134 with the amendments discussed below.

S. 134 would enable the Mescalero Apache Tribe to lease its adjudicated and quantified water rights for use within the State of New Mexico for up to 99 years. The term "adjudicated water rights" is defined as those rights adjudicated to the Tribe in *State v. Lewis,* 861 P. 2d 235 (N.M. Ct. App. 1993). In leasing its adjudicated water rights, the Tribe would have to comply with New Mexico laws and regulations. In addition, the bill expressly states that the Tribe may not permanently alienate any of its adjudicated water rights.

The ability to lease water rights under S. 134 is consistent with the Department's long-standing support for leasing quantified water rights recognized in Indian water rights settlements. Leasing is an important and acceptable way for which tribes may achieve economic value from use of their resources. The Department believes that the policy on approval of water leases should parallel aspects of its policies on approving leases of land. The Department recommends including language in the bill that provides that the Tribe shall develop tribal water leasing standards and submit such standards to the Secretary of the Interior for approval. The tribal water leasing standards should include provisions under which the tribe would identify and mitigate impacts that could potentially result from water leasing. Following this one-time approval of tribal water leasing standards, the Tribe would then have the authority to approve its own leases of water. In addition, the Department recommends that language should be added clarifying that the bill applies to water leases off the Tribe's reservation.

S. 399

The Department's position on S. 399, the Blackfeet Water Rights Settlement Act of 2011, which would provide approval for, and authorizations to carry out, a settlement of the water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana.

I. Introduction

This Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. I want to affirm the Administration's support for settling Indian water rights where possible.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are a tangible barrier to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for nearly 30 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

A Blackfeet water settlement would bring an end to Federal and state court litigation that has been ongoing for more than thirty years, and resolve conflicts over water use that began more than 100 years ago. It would open a path forward for the Blackfeet Tribe to manage its water and related natural resources in a manner most beneficial to its members and future generations, and provide certainty to the communities that surround the Reservation. The Department recognizes the sub-

stantial work and effort that have been put into negotiating this settlement by the Blackfeet Tribe and the State of Montana. We would like to continue to work with the parties and the sponsors to address certain concerns, including those discussed in this statement (such as appropriate non-Federal cost share) that could make this a settlement that the Administration could support.

As discussed below, however, we cannot support S. 399 as introduced. Our major concerns with this legislation include: (1) the high cost of implementing this bill, including $591 million of specifically authorized costs and unspecified but significant additional costs from several obligations imposed on the Federal government without specific authorizations of funds; (2) that the settlement does not include a reasonable State cost share to reflect the benefits that would inure to the non-Federal and non-tribal beneficiaries; (3) the lack of information regarding what infrastructure projects the Tribe would pursue under this settlement and the actual costs for such proposed projects; (4) the requirement that the United States establish a mitigation fund to benefit a non-tribal beneficiary; and (5) that the settlement does not achieve finality in resolving contentious water management issues in the relevant basins. We have other concerns with this legislation; only the most significant of our concerns are discussed in this statement. However, before we address our significant concerns it is important to acknowledge the historical background associated with the water rights of the Blackfeet Tribe.

II. Historical Context

The history of the relationship between the Blackfeet Tribe and the United States is not one of which the United States can be proud. The Treaty with the Blackfeet in 1855 encompassed some 27,500 square miles of Blackfeet tribal lands in what was to become Montana. The discovery of gold in the early 1860s brought the first wave of non-Indians into the territory, along with increasing pressure to open the Reservation to non-Indian settlement. A series of executive orders reduced and reconfigured the Reservation and then in 1888, it was divided into three separate and smaller reservations: the Fort Belknap Reservation, the Fort Peck Reservation, and the Blackfeet Reservation. The Blackfeet Reservation was further diminished in 1895 (Agreement of September 19, 1895, ratified on June 10, 1896, 29 Stat. 321, chapter 398, hereafter "1895 Agreement"), when the United States purchased from the Tribe 800,000 acres of land along the western boundary of the Reservation, with the Tribe reserving rights to hunt, fish and cut wood and remove timber on the "ceded lands," so long as they remained "public lands" of the United States. The land was thought to have contained valuable deposits of gold, silver, and copper, but the mineral reserves did not prove out. Instead, a plan to establish a national park on the land moved forward. The rights retained in the ceded lands by the Tribe in the 1895 Agreement almost immediately became an issue between the Tribe and Glacier National Park and have remained so to the present.

In the 1895 Agreement, the United States promised that the Reservation would not be allotted without the consent of the adult men of the Tribe (Article V), and, that if the government were to build a canal to control the abundant supply of water available seasonally in the St. Mary River, the canal would be constructed to provide irrigation water for the Reservation (Article III and Meeting Minutes). Within just a few years, the Reservation was opened to allotment; construction of a canal to capture the supply of the St. Mary River had begun, which was done in conjunction with land purchases by the Bureau of Reclamation; and the canal was designed and constructed to divert St. Mary water off of the Reservation for the benefit of the Milk River Project, which is located some 200 miles away, and not for the benefit of the Tribe. In 1909, the United States entered into a treaty with Canada apportioning the waters of the St. Mary and Milk Rivers. This Treaty did not specifically address the water rights of the Blackfeet Nation and other Tribes, even though it was concluded just after the United States Supreme Court handed down its 1908 decision in *Winters v. United States*—a case involving the Milk River, which established the doctrine of Federal Indian reserved water rights.

There is an abundant supply of water arising on or near the Blackfeet Reservation, but much of it is diverted off the Reservation, which along with a lack of storage capacity for on-Reservation use and a limited growing season, creates numerous challenges for the Tribe. These challenges in part account for the high unemployment and devastating poverty rate that has plagued the Reservation for generations. Securing control of and actively managing Reservation water resources would be an important step towards improving economic conditions on the Reservation and creating the homeland envisioned in the numerous treaties and agreements that serve as the foundation of the United States and Blackfeet Tribe's relationship.

III. Blackfeet Montana Water Rights Compact and Proposed Legislation

S. 399 would approve a Compact entered into by the Blackfeet Tribe and the State of Montana in an effort to settle all the Tribe's water rights claims in Montana. The legislation specifically authorizes funding of $591 million, but the actual cost to the United States of implementing S. 399 would be substantially higher because the legislation requires the United States to carry out a number of actions spending "such sums as may be necessary." Major costs would be incurred to carry out the requirements of section 5(a) related to the St. Mary River, section 5(b) related to compensation to the Tribe for Milk River Project Rights-of-Way and easements, and section 11 regarding Milk River water rights. S. 399 as introduced does not even attempt to quantify the amounts that the United States would be required to pay to satisfy the requirements of these sections. Likewise, S. 399 is silent on the amount required for the Birch Creek Mitigation Fund that would be established under section 9.

Of the $591 million that are specifically authorized, $466 million are slated for the Blackfeet Land and Water Development Fund established in section 8(a) of S. 399. This trust fund would be used by the Blackfeet Tribe to carry out activities at its option. The list of authorized uses in section 8(a) is extremely broad. $125 million is authorized for the Secretary of the Interior to carry out rehabilitation and improvement activities for the Blackfeet Irrigation Project and Four Horns Dam and Reservoir. The legislation does not make clear what would happen if $125 million is not enough to complete the work called for in section 5(d) of the Act, although the Tribe may be able to use funds provided to it through the Land and Water Development Fund to complete the work. As will be discussed further below, this needs to be clarified so that the Secretary does not face open-ended and unfunded mandates and the United States does not face continuing liabilities, instead of finality, despite the expense and breadth of this settlement.

The settlement would recognize a tribal water right to approximately 750,000 acre-feet per year of surface water from the flow of several rivers on the Reservation, including the St. Mary River, the Milk River, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. Citizens of the State of Montana benefit under the settlement as non-irrigation State based water rights are protected under the Compact in each of these basins, while irrigation State based water rights are protected for a period of ten years in the Cut Bank Creek and Milk River Basins and are then subject to a call by the Tribe.

The remainder of this testimony will summarize a number of significant concerns regarding S. 399 as introduced.

IV. Major Concerns

A. Federal Cost

The Department has serious concerns with the amount of the appropriations that would be needed to carry out this settlement. Section 14 authorizes appropriations in the amount of $591 million plus additional sums as may be necessary to resolve the St. Mary and Milk River conflicts and to implement the Birch Creek Agreement discussed above. Aside from just the sheer magnitude of the cost of this proposed settlement, there is little information regarding the projects the Tribe plans on funding using the trust fund that would be established under legislation. The Department has made it clear to the Tribe that it needs much greater detail and certainty along with a more realistic level of funding before it will be able to support S. 399.

As a practical matter, the size of the Federal obligation created under S. 399 in relation to the Department's budget presents significant challenges. As an example, the Bureau of Reclamation currently has a backlog of more than $2 billion in authorized but unfunded rural water projects. This is in addition to other authorized but unfunded Reclamation projects. Moreover, the breadth of the many benefits that would flow to the Blackfeet Tribe and the non-tribal beneficiaries under the settlement at almost exclusively Federal cost, such as the rehabilitation and improvement of the Blackfeet Irrigation Project and significant funding for unspecified and open-ended water and economic development projects, raises serious concerns because of the precedent that enactment of such a large settlement could set for future Indian water rights settlements.

B. Non-Federal Cost Share

S. 399, as introduced, authorizes almost $600 million in Federal appropriations. Significantly, the legislation authorizes $125 million of this cost for the rehabilitation, improvement, and expansion of the Blackfeet Irrigation Project and Four Horns Dam and Reservoir. Many of the benefits from Four Horns Dam and Reservoir would go to secure a guaranteed water supply for the Birch Creek water users associated with Pondera County Canal and Reservoir Company (PCCRC), a

private off-Reservation irrigation company south of the Reservation. Birch Creek forms the southern boundary of the Blackfeet Reservation and was the subject of *Conrad Inv. Co. v. United States,* 161 F. 829, 831 (9th Cir. 1908), where "the paramount rights of the [Blackfeet] Indians" to Birch Creek were decreed. If the Tribe develops the full Birch Creek water right it negotiated under the Compact with Montana, the water supply available to PCCRC will decrease.

The Birch Creek Agreement between the State and the Tribe attempts to solve this problem by authorizing the construction of a new pipeline to deliver 15,000 AF/yr to PCCRC, water that is made available by the enlargement of Four Horns Dam, a Bureau of Indian Affairs (BIA) irrigation project facility. Though the Tribe's consultant estimates that full implementation of the cost for the Four Horns project will cost as much as $215 million, S. 399 authorizes only $125 million for the Secretary to pay for both Four Horns Dam and Reservoir and expansion of the Blackfeet Irrigation Project. Any additional required funding for this project would need to come from the Tribe's water development fund, although this is not clear from the language used in S. 399 and would require clarification. The Administration estimates that about half of the full implementation cost of $215 million is attributable to non-tribal water users. Montana agreed in the Birch Creek Agreement to pay the Tribe $14.5 million for its deferral of its Birch Creek water right for a period of up to 15 years during construction of the Four Horns Dam enlargement and associated infrastructure, then for its delivery of 15,000 AF/yr to PCCRC for 25 years. Additionally, the State, during water rights negotiations, paid the Tribe $500,000 to conduct appraisal level designs of the Four Horns enlargement project. The State also will contribute an additional $20 million towards construction of the PCCRC pipeline for a total cost share by the State of $35 million, just 6 percent of the specifically authorized costs of the settlement and around 33 percent of the Administration's estimate of the State's share of the capital cost of this project.

Additional benefits to State users in the Compact arise from the Tribe's agreement to protect junior state water rights holders, especially in the St. Mary and Milk River basins. These benefits are substantial although not quantified in the settlement. The Department is confident that settlement benefits, e.g., protecting existing non-Indian water users, securing the Tribe's water rights, and empowering the Tribe to control and manage its water resources, can be achieved at a lower cost than the Birch Creek Agreement contemplates. The United States has engaged experts to identify alternatives, and working in collaboration with the Tribe, is preparing an alternative proposal for consideration by the State. While the Department supports the goal of preserving existing water uses whenever possible, substantial Federal outlays that benefit non-Indian water users are not acceptable.

C. Lack of Information Regarding Proposed Use of Trust Fund and Infrastructure Projects

Section 8 of S. 399 authorizes the Tribe to use a $466 million Land and Water Development Fund for: (1) the acquisition of land or water rights; (2) water resources planning, development, and construction, including storage and irrigation; (3) agricultural development; (4) restoring or improving fish or wildlife habitat; (5) fish or wildlife production; (6) any other water storage project, land or land-related project, or water or water-related project; (7) cultural preservation; (8) the operation and maintenance of water and water-related projects and environmental compliance related to projects constructed under this Act; (9) development of administrative infrastructure to implement this Act, including development of the tribal water code; (10) design and construction of water supply and sewer systems and related facilities; (11) measures to address environmental conditions on the Reservation; and (12) water-related economic development projects. The authorized uses of this fund are so broad that it is difficult for the United States to evaluate whether the fund is sized appropriately.

Likewise, the Department does not have sufficient information regarding the infrastructure projects that the Tribe wants to carry out under this settlement. Without this information, we cannot evaluate the Tribe's estimated costs for the proposed projects or determine an appropriate Federal cost share. The $125 million authorized for the Secretary to carry out infrastructure projects would not be sufficient to complete the actions called for under section 5(d) of S. 399 as introduced. The legislation should clarify the respective responsibilities of the Secretary and the Tribe under the legislation. It is our understanding that the Tribe would be responsible for completing these infrastructure projects using funds provided to the Tribe under this settlement after the Secretary has spent the amount specifically authorized in section 14 for these purposes.

The Blackfeet Irrigation Project (Project) was authorized for construction in 1907 at 106,000 acres but only 51,000 acres have been completed. Sixty percent of the

Project's land is in trust owned by either the Tribe or individual tribal members and about 40 percent is owned by non-Indians. The BIA estimates the Project's total deferred maintenance costs at over $29 million. About 38,300 acres are being assessed operation and maintenance fees. Section 5(d)(1) of the legislation calls for full build out of the Project to the authorized acreage. The rehabilitation of the Project includes plans to enlarge Four Horns Reservoir and associated delivery systems, including the Birch Creek portion of the Project discussed above. The legislation lacks specifics with respect to the proposed rehabilitation projects the Tribe plans to undertake. The Department has expressed its concerns about the scope and cost of the proposed rehabilitation of the Project, and the Tribe is working with us to more narrowly focus its plans for rehabilitation. The Tribe is also considering the Department's proposal that after completion of an agreed upon rehabilitation and improvement of the Project, the United States would transfer to the Tribe title to the Project.

Although not specifically referenced in the legislation, it is understood that the Tribe intends to develop a regional drinking water system using funding provided under this settlement. Parts of the Blackfeet Reservation have been under a "boil order" for more than a decade. While the Tribe has been working to develop and construct a regional water supply system, only portions of it are complete. The $466 million Blackfeet Land and Water Development Fund authorized in this legislation could be used by the Tribe for funding the proposed regional water system, which according to the Tribe's estimates will cost around $110 million. If the actual costs of construction are higher than that, the Tribe would need to use more of the Fund for this purpose. Assuming that the system would serve over 25,000 users, the $110 million estimate reflects a cost per person of approximately $4,300 for the system, which compares favorably with costs associated with other projects in the region. The Tribe is considering how to modify its proposal, however, in view of the Department's concerns about the expense of the project. Our respective technical experts are exploring ways to achieve cost savings through possible redesign of certain elements of the proposed regional water system. We are confident that a better, more efficient design is possible.

D. Mitigation Fund to Benefit non-Indians

The State and the Tribe entered into a side agreement, which the proposed legislation would approve and to which it would bind the United States, to secure a permanent supply of water for the PCCRC, which supplies irrigation water to its members as well as the municipal supply to the City of Conrad. Under this side agreement, the State will pay the Tribe to defer its use of Birch Creek for a period of up to 15 years while infrastructure is built to guarantee delivery of water to the PCCRC. Once the infrastructure is completed, the Tribe will supply 15,000 AF/yr for 25 years to PCCRC. Moreover, Section 9 of this bill requires the United States to establish a fund "to be used to mitigate the impacts of development of the tribal water right . . . on the Birch Creek water supplies of the PCCRC Project" and authorizes the appropriations of "such sums as are necessary" for this purpose. The United States strongly opposes this unprecedented inclusion of a fund to benefit non-Indian beneficiaries in a settlement using scarce Federal dollars. While Indian water rights settlements routinely seek to protect existing non-Indian water uses so as not to unduly impact local economies, they have not to date included Federal funds to compensate non-Indian water users if the future exercise of a tribe's established water rights causes an impact on future non-Indian water uses. The United States cannot afford this sort of precedent, and it is unclear what additional potential liabilities this may impose on the United States.

E. Lack of Resolution in the St. Mary and Milk River Basins

The proposed legislation leaves important matters involving the Tribe's water rights in the St. Mary River and Milk River Basin unsettled, imposing upon the Department the obligation to develop solutions to these problems after the settlement is enacted. This guarantees that there will be significant obstacles to ever achieving realistic solutions to these problems. The Department is committed to developing real solutions to the issue of Tribe's water rights in the St. Mary River and the Milk River before a settlement is enacted. The two main concerns of the Department are found in sections 5 and 11 of the Blackfeet legislation, although we have other concerns with the indefiniteness of some of the legislation's provisions as discussed more fully below. Section 5 of the legislation directs the Secretary to allocate to the Tribe 50,000 AF/yr of stored water in Lake Sherburne Reservoir free of any charges and to agree to lease the water back from the Tribe at an undetermined price for an indefinite period of time. The provision's apparent goal is to have the Department find a way to provide the Tribe with a firm supply of 50,000 AF/yr on a per-

manent basis and use the lease provision as a stop gap measure while the effort to find the additional supply is underway. This requirement is complex and raises difficult issues, including feasibility and future liability. Water rights in the Milk River Basin for both the Blackfeet Tribe and the Ft. Belknap Indian Community are set forth in their respective Water Rights Compacts with Montana and Section 11 directs the Secretary to resolve conflicts that may arise between the two tribes.

Taken together, these issues create real and significant conflicts over water use and water availability and will create difficult problems for the United States and for the communities that are affected by this proposed settlement. They must be resolved before the Administration will be able to lend its support to the Blackfeet water rights settlement. The purpose of a water rights settlement is to create the conditions for harmonious working relationships among the parties, but these goals will not be achieved if a settlement creates significant new liabilities and leaves significant conflicts over water use and water availability unresolved.

F. Additional Concerns

We have other concerns with the proposed legislation, including but not limited to the following. First, the waivers as set forth in section 12 of the legislation are inadequate, particularly given the broad nature of this legislation. The Administration has developed language that we believe is appropriate for waivers in Indian water rights settlements and such language should be followed here. Second, further analysis is needed with respect to the rights of allottees. The Administration has an obligation to protect allottees and the language of Section 7(b) does not contain the certainty that we require so that allottees are fully protected under the settlement. Third, the Department, including the National Park Service (NPS), believes that the water rights (including instream flows) that Glacier National Park had quantified in the 1994 Water Rights Compact with the State of Montana and the water rights that the Tribe seeks to have confirmed in its water rights settlement generally are consistent. The Department is working with the Tribe and the NPS to seek a resolution to several concerns with the legislation, including water rights of the park, potential impacts of the settlement, if any, on park resources, or other issues related to the park." Lastly, Section 7(f) permits the Tribe to lease "any portion of the tribal water right" for use off the Reservation. While the Department has supported authority for tribal water leasing in several prior settlements, it is concerned with the broad and uncertain aspects of this language.

V. Conclusion

S. 399 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This Administration shares that goal, and hopes to be able to support a settlement for the Blackfeet Tribe after a full and robust analysis and discussion of all aspects and ramifications of this large settlement.

The Administration is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims. This settlement, when completed, will provide certainty to the State of Montana and non-Indian users and will enable the Blackfeet Tribe to put its water rights to use for the economic benefit of the Blackfeet Reservation and its residents. If the parties continue to negotiate in good faith, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

We believe settlement can be accomplished in a manner that protects the rights of the Tribe and also ensures that the appropriate costs of the settlement are borne proportionately. While we do not support S. 399 as introduced, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support.

S. 1327

The Department opposes S. 1327, a bill to amend the Act of March 1, 1933, to transfer certain authority and resources to the Utah Dineh Corporation, and for other purposes.

Background

In 1933, Congress established the Utah Navajo Trust Fund (UNTF), Pub. L. No. 72–403, 47 Stat.1418 (1933 Act), which designated Utah as the trustee. UNTF's corpus was derived from 37.5 percent of net royalties from the extraction of oil and gas deposits under the Navajo Reservation's Aneth Extension. According to the statute, the 37.5 percent net royalties are to be paid to the State of Utah, for the health,

education and general welfare of the Indians residing in the Aneth Extension. In 1968, Congress expanded the beneficiary class to include all Navajos living in San Juan County, Utah, Pub. L. No. 90–306, 82 Stat. 121. The Navajo Nation has managed 62.5 percent of the net royalties since the initial development of oil and gas on the Navajo Reservation.

In approximately 1959, oil and gas wells in the Aneth Extension began producing in paying quantities, and the Department, through oil and gas mining leases on the Navajo land, began collecting oil and gas royalties. The leases are between the Navajo Nation and the producer, and are subject to approval by the Secretary of the Interior.[1] The State of Utah is not a party to the tribal leases for these oil and gas royalties.

In 2008, the State of Utah decided to resign as trustee of the UNTF, and allowed UNTF, as a state agency, to sunset. The State moved the responsibility to fulfill the liabilities and obligations of the repealed UNTF to the State of Utah's Department of Administrative Services. The State also provided for a transition process until the United States Congress designates a new administrator of the 37.5 percent of the Utah Navajo royalties identified in the 1933 Act.

The Office of Natural Resources Revenue (ONNR) receives the Report of Sales and Royalty Remittance from the royalty payor and prepares a monthly summary of the reported royalties for 21 Aneth leases. Currently, the royalties are paid to the ONRR, the same as all other Indian leases. The ONRR then forwards the funds to the Navajo Nation, and simultaneously reports to the Navajo Regional Office of the Bureau of Indian Affairs (BIA) on the respective funding amounts due to Navajo Nation and to the State of Utah Navajo trust entity. The BIA then forwards correspondence to the Navajo Nation recapitulating the ONRR-calculated funding split and directing Navajo Nation to forward the appropriate amount to the Utah Navajo trust entity.

Department's Concerns with S. 1327

S. 1327 would amend the 1933 Act and its subsequent 1968 amendments by identifying the Utah Dineh Corporation as the trustee of the former UNTF. Consistent with our government-to-government relationship with the Navajo Nation, the Department acknowledges and respects the position of the Navajo Nation as it pertains to the UNTF. The Department understands that the Navajo Nation would like to manage the trust and disburse the funds to the Utah Navajo beneficiaries consistent with the current disbursement and percentages. We also understand that the Navajo Nation opposes this bill and has opposed a similar version in the 111th Congress. The Department, therefore, opposes S. 1327. At this time, the Department believes it is more appropriate for the Navajo Nation to manage the trust and disburse the funds consistent with and to further the intent of the 1933 Act.

Furthermore, without additional background or definition of whom, or what makes up, the Utah Dineh Corporation, the Department is concerned with the designation of the Utah Dineh Corporation as the trustee for the 37.5 percent. We are also concerned with the deletion of a significant portion of the 1933 Act and its subsequent amendments that required "planning of expenditures" in cooperation with the appropriate department, bureaus of the United States and with the Navajo Nation. The planning and cooperation would not be required by the Utah Dineh Corporation under S. 1327. Also, the Department is concerned that S. 1327 would eliminate the reporting requirement of the 1933 Act, whereby an annual report was sent to the Navajo Area Regional Director of the BIA.

Again, for the above stated reasons, the Department opposes S. 1327. This concludes my statement. I would be happy to answer any questions the Committee may have.

S. 1345

Thank you for the opportunity to present the Administration's views on S. 1345, the Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act.

S. 1345 would provide compensation to the Spokane Tribe of Indians for the use of its land for the generation of hydropower by the Grand Coulee Dam. Specifically, S. 1345 would require the Secretary of the Interior to deposit $99.5 million over 5 years, $23,900,000 for fiscal year 2012 and $18,900,000 for the following 4 fiscal years, into a trust fund held by the United States Treasury for the Spokane Tribe.

[1] See, e.g., 25 U.S.C. § 396a (provision in 1938 Indian Mineral Leasing Act allowing tribe to lease unallotted Indian land for mining purposes, subject to Secretary of Interior approval); 25 C.F.R. Pt. 211 (Leasing of Tribal Lands for Mineral Development).

The Department is encouraged by significant progress made in recent months toward resolving issues of concern to the Administration, however, the Administration cannot support S. 1345 in its current form.

As an example of the significant progress, the Department supports the removal of the land transfer provisions that had been included in prior legislation. Section 9 (a) of S. 1345, "Delegation of Authority," presents an alternative approach for addressing the Spokane Tribe's interest in reestablishing its law enforcement authorities within the boundaries of the Spokane Reservation. While the Department supports the concept of providing a clear delegation of authority to the Tribe to achieve its law enforcement goals, we are concerned that the language in S. 1345 is overbroad and could be construed to delegate more than just the authority intended by the Tribe. The Department is willing to work with the Committee or the Tribe to craft acceptable language for this provision, and, alternatively, is willing to accomplish the intent of this provision of the legislation administratively through a written delegation letter from the Secretary to the Spokane Tribe.

With regard to Section 5 of S. 1345, "Settlement Fund," the basis for this settlement has not been established by a legal claim of the Spokane Tribe. Since the Spokane Tribe has no legal claim, the Department does not believe this legislation is appropriate as a settlement of claims. However, the Department could examine with the Tribe and Congress other avenues to address the concerns of the Spokane Tribe.

Finally, although the Department is concerned with this legislation being styled as a settlement act, settlement acts generally should include a provision that requires the Tribal government to ratify and approve this legislation as a complete settlement prior to the Act becoming effective.

The Department, in consultation with the Bonneville Power Administration, would be pleased to work with the Committee on substitute language or amendments to the legislation that we believe could meet the needs of the Spokane Tribe and the United States.

Mr. Chairman, this concludes my written statement. I would be pleased to answer any questions the Committee may have.

The CHAIRMAN. Thank you very much, Mr. Laverdure.

For each bill that we are hearing about today, can you tell me how the Department will work with sponsors and this Committee so that we can all move forward legislatively, while still addressing the concerns of the Department and not delaying the legislation?

Mr. LAVERDURE. Thank you, Mr. Chairman.

With respect to the Blackfeet Water Rights Settlement Act, our Secretary's Indian Water Rights Office has been working closely with the Blackfeet Tribe over this past year to try to resolve Federal concerns. Our testimony today makes clear that the Department still has several significant problems with the legislation as introduced, but that we are committed to working with the Tribe to find solutions so that the Administration can support a Blackfeet settlement.

With respect to the Spokane Equitable Compensation Act, the Department's Associate Deputy Secretary, Meghan Conklin, has been working closely with Senator Cantwell's office to resolve our concerns and we will continue to do so.

In addition, the Department would be happy to work with the sponsors of the Mescalero Water Leasing Authorization Act, which we support, and on S. 1327 regarding the management of the trust fund and the Utah Dineh Corporation.

The CHAIRMAN. Thank you.

Let me call for questions from Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

And thank you for being here today, Del. I appreciate your testimony.

You had mentioned one of your first concerns is the high cost, $591 million. And then you talked about unspecified dollars with-

out specific authorization. Could you flesh that out a little bit for me? What are you talking about?

Mr. LAVERDURE. Yes, Senator Tester. On page three of the formal written testimony submitted to the Committee, the paragraph under section three talks about the phrase on a number of actions of spending "such sums as may be necessary" and that is in several of the provisions so that it doesn't have a finite number. And that is in addition to the $591 million price tag in the bill as introduced.

Senator TESTER. And so what you are looking for is a conversation between the Department and the Tribe to put actual numbers in those areas, instead of the verbiage such sums as necessary?

Mr. LAVERDURE. Yes.

Senator TESTER. Okay.

Chris, when you get up, I am going to ask you why that language is in there so remind me if I forget. Okay?

The other question I had was, look, I have a lot of respect for you. I think you are a good guy. We need somebody in the Department that is going to sit down and negotiate in good faith with the Tribe and with us. Who is that going to be? Is that going to be you? Is that going to be somebody else?

Mr. LAVERDURE. We send the entire Federal water rights team out to Browning just I think two and a half to three weeks ago. If I hadn't had a prior commitment, I would have went myself personally, but I can commit to you today that I would be happy to be the person heading the Federal water rights team to go out there and try to resolve the issues of concern that we have.

Senator TESTER. That is good because if we have a point person, when we have a point person and you don't get ping-ponged around. So I appreciate that.

Do you know of or have you proposed any alternatives to the Tribe or the State to address some of the five major comments that you had negative about it? Have we got to that point yet?

Mr. LAVERDURE. I would like to turn to my colleague, Pam Williams. She is the head of the Secretary's Indian Water Rights Office and I know she works closely with all of the negotiating teams, so she can answer with specificity the questions you have.

Senator TESTER. Okay.

Ms. WILLIAMS. Senator Tester, we have been working with the Tribe closely, very intensely in the last few months. And only recently we received some proposals from the Tribe that we find to be very useful, I think progressive, and we are very excited about some of those concepts. And we are looking forward to beginning a dialogue immediately with the Tribe on those new concepts with them.

Senator TESTER. I appreciate that. Is it within your, I mean, negotiations are something that you kick stuff back to them. This is a possible solution; this is an idea that could work. Have you guys done any of that? Have you guys proposed any solutions for the problems that you see?

Mr. WILLIAMS. Yes, we have proposed a number of alternatives in the settlement.

Senator TESTER. Okay, good.

Let me go back to some of the concerns. The size of the project, for one. The second one was there wasn't a reasonable amount of

State dollars. I think about $35 million, correct? And hasn't there been water compacts that have been passed that had no State match in them whatsoever?

Number one, what is a reasonable amount? And number two, I will say it the way I see it. Why are we holding Blackfeet to a higher standard than we hold some of the other water settlements to?

Mr. LAVERDURE. Three things, Senator Tester. Number one, the State contribution is roughly 6 percent of the total amount that is proposed in the introduced bill. In addition, the Department, to my knowledge, has had concerns with every Indian water rights settlement that came from Montana and Montana's proportional contribution. And all of them I think have been deemed insufficient in the records in each of the testimonies. In fact, I had experienced the same when I was on another side of the table.

And with respect to the $35 million that you mentioned, $15 million was to go for the deferral of 15 years for the call right of the Blackfeet, the senior water rights for the irrigation project just south of the reservation boundary. And then the $20 million was meant for the outlay of the pipeline coming from the, to increase the capacity of the irrigation project to go down to the community south, which is all to benefit a community south of the reservation, as opposed to the Blackfeet directly.

Senator TESTER. So what are you saying? Are you saying that $35 million isn't being spent correctly? Or are you saying that $35 million isn't an adequate amount?

Mr. LAVERDURE. We are saying that the $35 million, when the State provides proportional contribution, that it should be to the benefit of the Blackfeet Nation and its citizens.

Senator TESTER. Okay. If we get this water settlement through, and no matter how that $35 million is spent, you understand better than anybody in this room what kind of benefit it is going to be to the Blackfeet people. Okay.

I have run out of time. If we have a second round, I have more questions.

The CHAIRMAN. Senator Cantwell?

Senator CANTWELL. Thank you, Mr. Chairman.

Mr. Laverdure, are you speaking on behalf of the entire Interior Department? I mean, is the Bureau of Reclamation satisfied with this legislation since they are the ones who had issues or concerns and actually run Lake Roosevelt from a reservoir perspective?

Mr. LAVERDURE. Senator Cantwell, I am speaking on behalf of the Department, and Reclamation's concerns are partially included in the written statement that we provided, which was fairly short.

Senator CANTWELL. So even though we have heard from the Bureau of Reclamation that they don't have any concerns, you are now saying they do?

Mr. LAVERDURE. Actually, there were two underlying issues submitted in the formal written statement. One was some law enforcement provisions that thought could be taken care of better outside of some of the underlying Acts that created Grand Coulee Dam or authorized it.

In specific law enforcement, we thought that the Secretary could simply delegate the law enforcement authority that the Spokane Tribe is seeking, rather than in this legislation where there are a

number of other non-law enforcement delegations that could be provided under that.

And the second was that this was titled as a settlement act from claims and that from the Department's perspective, it is more of an equitable compensation because of the long history dealing with the Indian Claims Commission Act and the fact that Colville was able to amend its underlying claim to include the hydropower value and the fisheries issue. Whereas, the Spokane Tribe was unable to include that. And that is the piece of the equitable compensation.

Senator CANTWELL. But are those Bureau of Reclamation issues, the law enforcement and the claim issue?

Mr. LAVERDURE. The claim issue is from the Department of Justice's perspective; the legal claim issue.

Senator CANTWELL. So does the Bureau of Reclamation, are they satisfied with the legislation as it relates to the Lake Roosevelt Reservoir?

Mr. LAVERDURE. Except the law enforcement aspect of it.

Senator CANTWELL. Okay.

And then back to this issue, the second issue that you are raising. Do you see any difference between the damage to the Spokane Reservation, to its way of life, and the damage that was done to the Colville Tribe? Do you see any difference in the damage?

Mr. LAVERDURE. No.

Senator CANTWELL. No, okay. So the damage was the same.

And the fact that the Colville received a settlement in 1994 for the exact same harm. You know, they lost access to salmon and land and burial sites and all sorts of thing. That settlement, my understanding is, had Department of Justice support despite the assertion that the Tribe had no legal claim, a position that it had argued for many years. Is that correct?

Mr. LAVERDURE. My understanding, and it was included in the 2000 GAO report, that Colville actually was able to amend its underlying Indian Claims Commission filing and it did include the fisheries, as well as the hydropower value. Whereas the Spokane were seeking outside the legal ICC claims and were unable to amend their underlying claim to include that.

That was my understanding of the basis of the Colville settlement in the mid-1990s.

Senator CANTWELL. So you are saying that the technicality of how they reached the agreement and what it was called at the time, the Department of Justice basically was supporting the agreement because of the structure.

Mr. LAVERDURE. I think because of that history that there was less objection to that.

Senator CANTWELL. Well, they either objected that they had no legal claim, or they did. So I am just trying to understand. Do you think the Department of Justice objected to the settlement, because they didn't object to it, so I am trying to understand that they didn't object to it, what are they, they also, what are they saying about the fact that Colville had no legal claim?

Mr. LAVERDURE. Actually, Senator, I think they did have a legal claim, the Colville, because they were able to amend their original ICC claim to include the two things that Spokane unfortunately did not get to amend their underlying claim to include.

Senator CANTWELL. Well, I appreciate that you at least have testified today that the damage done to both is exactly the same. So at least thank you for that.

I don't have any more questions. I will have questions for the Spokane Tribe when they are before us, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you very much, Senator Cantwell.

Let me welcome and ask our Vice Chair here to make any statement and questions that he may have.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman. I appreciate both the business meeting that we have been working on together and I look forward to continue working with you on those matters. And thank you for holding the discussion and the hearings today.

I note that in the third panel, the Honorable Kenneth Maryboy from Monticello, Utah will be here, and Senator Hatch and I had a chance to visit at lunch and he is unable to be here to welcome Kenneth Maryboy, but wants to extend that welcome and I will do that on Senator Hatch's behalf.

I do have a couple of questions, if I could, Mr. Chairman. And it goes back to a 1930s report of advisers on irrigation on Indian reservations. We are going back now quite a few years. So it was submitted to this Committee over 80 years ago and it questioned the viability of the Blackfeet project.

The report noted that adequate preliminary investigations and studies would have condemned the irrigation project as unfeasible. And then in 2006, the GAO cited that report, that report from 1930, raising very similar concerns about this project. So we hear it in 1930 and then we hear it again in 2006.

So I realize that the earlier report really is over a half-century old, but in light of the recent GAO report, the one from 2006, I would like to know: Is it a wise use of taxpayer funds to rehabilitate the Blackfeet project?

Mr. LAVERDURE. Thank you, Vice Chairman Barrasso.

I don't dispute some of the background and the factual information you provided on that. In fact, we have that. I think from the beginning there was 106,000 acres, but only roughly half was completed. And you cite some of the conditions of it.

My understanding is there has been some new movement on whether in fact aspects of the Blackfeet irrigation project would be part of the settlement going forward. That has not been changed in the bill as introduced, but that is my understanding. And I think that our view is that we would tentatively agree without knowing all the details right now.

Senator BARRASSO. Yes, because I was wondering what may have changed since that 1930 report to make this project now a viable consideration under the water settlement.

Mr. LAVERDURE. To my knowledge, I don't think anything has changed.

Senator BARRASSO. And I didn't know if there was any BIA or other interagency financial feasibility studies of all of the projects contemplated by S. 399. Is there such a study? Do you know?

Mr. LAVERDURE. No.

Senator BARRASSO. Thank you.

Thank you, Mr. Chairman. I appreciate the time. Thanks.

The CHAIRMAN. Thank you very much, Senator Barrasso.

Senator Udall?

Senator UDALL. Thank you, Chairman Akaka, and I thank you for the witnesses being here today. And let me also echo what several Members of the Committee said in terms of Elouise Cobell. It is a big loss, I think, to all of us. She was a great lady and I think we will all miss her very much.

Del, I am asking you now about the Mescalero Apache Tribal Leasing Authorization Act. Is there a precedent of Tribes being able to lease their adjudicated water rights for up to 99 years?

Mr. LAVERDURE. Yes, Senator. The majority of Congressionally approved Indian water rights settlements contain leasing provisions. However, each marketing provision is unique and often tailored to the agreements among the settling parties. A 99-year lease term is not unusual and all of the Arizona water rights settlements allow them in some way, shape or form.

At this time, the Department doesn't have a precise list of all of those that allow a 99-year term because each settlement's marketing provisions are worded differently and sometimes the key details are omitted from the Federal legislation and are in the relevant language within the underlying settlement documents.

Senator UDALL. Could you provide to the Committee a rough idea of how many Tribes have this authority?

Mr. LAVERDURE. We are going to have to go back and look at not only the Federal legislation, but the underlying agreements, but we can provide that to the Committee.

Senator UDALL. Thank you very much.

How has water leasing authority been beneficial or detrimental to Tribes?

Mr. LAVERDURE. I think in general, allowing Tribes to receive economic value from their resources is beneficial in untold ways, including having direct exercise over control over their own resources and receiving much-needed revenues. And I fully anticipate that the panel afterwards will be able to explicate many of the other reasons that they could utilize that authority for.

Senator UDALL. In your testimony, you make the recommendation that the Mescalero Apache Tribal Leasing Authorization Act be changed to include language that provides that the Tribe, and I am quoting now, your testimony, "shall develop Tribal water leasing standards and submit such standards to the Secretary of Interior for approval."

Will you flesh that out a little bit, expand on your idea for the Committee? What would these water leasing standards entail?

Mr. LAVERDURE. Today, the Department is considering an individual bill that will allow a Tribe to lease its water off the reservation without secretarial approval of the underlying lease. And that is a novel and new issue for the Department.

The Department has consistently held the view that 25 USC Section 177, the restraint on alienation of lands, also applies to the water resource as well. So to make water leasing consistent with the Department's policy on legislation that allows Tribes to lease

their own land, the Department believes it is prudent for the Secretary to approve standards for the leasing of Indian water rights.

And in terms of detailing those types of standards, they would include things like identify and mitigate any environmental impacts; ensuring that the fair market value is received that could potentially result from this water leasing; and more or less things like that that are of a transactional business nature, as opposed to regulatory nature.

Senator UDALL. Do you consider these to be part of the Department's trust responsibilities vis-a-vis the Tribe?

Mr. LAVERDURE. Yes.

Senator UDALL. And I know Senator Tester asked a question who, and President Chino is here, I mean who should the Mescalero Apache Tribe be dealing with? Will they be dealing with you in terms of the expectation on the standards? Or with Ms. Williams?

I know I am going to be asking President Chino. Make sure, President Chino, that I ask you about this. And I don't know if this is the first time you have heard this or not, but we want to make sure that you have somebody to work with so that we don't get ourselves in a situation where standards are developed and then they aren't acted on quickly, and we can't move things along.

So, it would be you or Ms. Williams or both?

Mr. LAVERDURE. Yes, I mean, if you want one point person, if it came to me, then I would make sure that we have the legal and the policy review of the standard so it doesn't get caught up.

Senator UDALL. Great. Are there standards that you have in mind right now that are in other water settlements that would be able to be looked at right off the bat?

Mr. LAVERDURE. Because this is a novel issue, we don't have those necessarily there. One, the types of concerns that could be utilized are from the Navajo Nation who took over its own leasing where they had their leasing of land regulations developed and they have some of those concerns listed in there that could be utilized in standards.

Senator UDALL. I think both Navajo and Jicarilla Apache, both have provisions allowing off-reservation leasing. And so that may be an area to look at, too. I think you both are nodding in agreement to that.

So thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Udall.

Before I move to the third panel, let me ask whether our Members have a second round of questions?

Senator TESTER. I do, Mr. Chairman, if I might.

The CHAIRMAN. Senator Tester?

Senator TESTER. Okay. First thing, Del, could you, and you don't have to do it today, if you could get it to me, if you don't have it today. If you have it, I would love to hear it. What specifically, or maybe this is for Ms. Williams, what specifically has been offered up to the Tribe as far as solutions from the Department?

Mr. LAVERDURE. I think we will have to get back to you on that because it is a moving target, from what I understand.

Senator TESTER. That would be fine. Good.

Well, your recommendations shouldn't be a moving target, though. I mean, the negotiations should be a moving target, but your recommendations to the negotiations shouldn't be a moving target.

Mr. LAVERDURE. That is correct.

Senator TESTER. Okay. Good.

I didn't have anything about the 1930 irrigation project so I have to do this first. Things change in 80 years. I have a 1931 Model A and I have a 2011 GMC pickup and they are a whole lot different as far as what is available to them.

So I am going to approach this from a little different perspective. You are familiar with the Bureau of Reclamation design, engineering and construction review process? Okay.

It is my belief that the Bureau sent a review team to the reservation to review and analyze the project's information before issuing a report on those projects. Is that correct?

Mr. LAVERDURE. Yes, I think there has been a DEC review.

Senator TESTER. Yes, and my understanding is that the DEC review came out fine. Right?

Ms. WILLIAMS. My understanding, Senator, is when the Bureau of Reclamation DEC review took place, they found there wasn't sufficient information to conclude that the costs were realistic or not realistic. There was simply not enough material developed to make definitive determinations.

I think they found that the material developed was accurate, but it simply wasn't enough.

Senator TESTER. Okay. Did they make a request of the Tribe for more information? Do you know? If there wasn't enough information, did they make that request?

Ms. WILLIAMS. I think they talked about the need for additional studies.

Senator TESTER. Okay. Well, that is cool, I just don't want to end up, I mean we can go back to the timeline. I think the Department got involved with this settlement in 1991, if I am not mistaken. And the timeline then means we are going on 20 years. Correct me if I am wrong.

And I think that if they need information, we need to get them information. Another study isn't exactly what I think we need here myself, my opinion.

One of the last things you said, Del, was that this settlement wasn't finished. And let me tell you what I think I heard, then you tell me if I was right, that if you supported this settlement and this settlement was ratified, the water settlement wasn't finished. Is that correct?

Mr. LAVERDURE. Senator Tester, just the finality piece was more are all the legal claims tucked into the settlement and finalized as all the benefits then go in commensurate to that. And my understanding was that not all of the provisions that are typically required in these settlements were in there.

Senator TESTER. Okay. Well, look, if the Department's right on that, we need to get that fixed because the settlement is exactly what it is. It is a settlement. And if it isn't a settlement, if we are going to come back to this in 20 years or 50 years or 100 years, then it is not a settlement.

So if that is not fixed, we definitely, absolutely need to get it fixed. So I would just say that.

Just in the last, just very much in closing, you know unemployment in Indian Country, Montana. I mean, you know, the challenges that are out there and you know what impact water can have on opportunity. And I would just say that if there are ways that Senator Baucus and myself can work with the Department or with the commission, can work with the Tribe, especially the Tribe, so we can all get on the same page, it is something that needs to be done. You know that. We can't continue to keep saying no. What we have to do is try to find ways we can say yes.

So I appreciate your being here today and thank you for your input, and hopefully we can roll up our sleeves and get after it.

Thanks.

Mr. LAVERDURE. Thank you, Senator Tester. And we are absolutely committed for the resources to deploy and work on all of those things.

The CHAIRMAN. Thank you very much, Senator Tester.

Are there any further questions?

Senator CANTWELL. Yes, Mr. Chairman.

The CHAIRMAN. Senator Cantwell?

Senator CANTWELL. Yes, I just had one last question for Mr. Laverdure.

In your testimony, you say that the Department would examine other ways that Tribes and Congress could, avenues for concerns of the Spokane. What were you thinking?

Mr. LAVERDURE. In the discussions in the Department, I think the idea was, at least from a policy perspective, the one that I have was to seek some type of measure of justice or compensation for the Spokane, just like the Colville did, without running into the issues that are listed.

We are committed to sitting down and working with your office and the Spokane Tribe and trying to resolve those issues so that they have their share of the equitable settlement.

Senator CANTWELL. And are you saying that that is something that is done legislatively or not done legislatively?

Mr. LAVERDURE. It would still be accomplished legislatively, but we would just work on the language so that we alleviated these concerns to get to where I think you and the Spokane people would like to be.

Senator CANTWELL. Because you think the word claim sets a precedent?

Mr. LAVERDURE. The legal team has reviewed it and believes that there is no legal claim and the filing was not made at the right time.

Senator CANTWELL. Even though they thought the same thing on the substance of the Colville?

Thank you, Mr. Chairman. I got the answer I needed. Thank you.

The CHAIRMAN. Thank you.

Any further second-round questions?

Thank you. And let me say thank you very much to Mr. Laverdure and Pamela for your testimony and your responses. We certainly appreciate it. Thank you.

Mr. LAVERDURE. Thank you, Mr. Chairman. I appreciate it.

The CHAIRMAN. Now, I would like to invite the third panel to the witness table. On our third panel is the Honorable Mark Chino, President of the Mescalero Apache Tribe; the Honorable Terry Show, Chairman of the Blackfeet Nation; Mr. Chris Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission; the Honorable Rex Lee Jim, Vice President of the Navajo Nation; the Honorable Kenneth Maryboy, the San Juan County, Utah Commissioner; and the Honorable Greg Abrahamson, Chairman of the Spokane Tribal Council.

We welcome all of you here to this hearing. Thank you for being here. We look forward to your testimony and your responses.

President Chino, will you please proceed with your statement?

STATEMENT OF HON. MARK CHINO, PRESIDENT, MESCALERO APACHE TRIBE

Mr. CHINO. Thank you, Mr. Chairman.

Good afternoon, Chairman Akaka and Members of the Committee. I bring greetings from the great State of New Mexico and also from the Mescalero Apache people. I am pleased today to be joined by three members of our Tribal Council who are here to offer a little moral support and also support of our testimony before the Committee today.

Thank you for having this hearing on S. 134, which was introduced by Senator Bingaman and Senator Udall, which would authorize the Mescalero Apache Tribe to lease its adjudicated water rights. The Mescalero Apache Tribe is located on the Mescalero Apache Indian Reservation in the White and Sacramento Mountains of South-Central New Mexico, which is within our aboriginal territory.

The reservation is home to a majority of the Mescalero Apache Tribal members and we are known for our natural beauty and abundant resources which we are obviously very thankful for.

We are a treaty Tribe, having entered into a treaty with the United States on July 1st, 1852. Our treaty is called the Treaty with the Apaches. And it promised specifically that the Tribe would have a permanent homeland in our aboriginal territory and impliedly reserves sufficient water rights or sufficient water to meet the Tribe's historic, current, and future water requirement.

In 1975, the State of New Mexico sued the United States in State court to determine a certain portion of the water rights of the United States and of the Mescalero Apache Tribe in the Pecos Stream system. The suit, which was State ex rel Reynolds v. Lewis et al, was filed pursuant to the McCarran Amendment, 43 USC Section 666.

First, the court had to determine whether the McCarran Amendment, which waived the United States' sovereign immunity from suit in State court to determine the water rights in the stream system, allowed for the adjudication of the right of the Mescalero Apache Tribe.

In 1975, after the lease was appealed, the New Mexico Supreme Court held that the waiver contained in the McCarran Amendment did allow for adjudication of the Tribe's water rights. The case was

then remanded to the State District Court in Chaves County, New Mexico for a determination of our water rights.

The Mescalero Apache Tribe intervened in that particular action as a party defendant and a trial was held to determine the Tribe's water rights. After the trial, on July 11th, 1989, the State court held that the Tribe was entitled to consumptive water rights for its historic, present, and future requirements in the amount of 2,322.4 acre-feet per year.

But the State court held that the Tribe would have five different priority dates. On appeal, the New Mexico Court of Appeals affirmed the consumptive water rights amount and reserved the five different priority dates. The Court of Appeals held that the Tribe's priority date is that of our Treaty with the Apaches, July 1st, 1852.

After many years of litigation, a portion of the Tribe's water rights in the Pecos Stream system have been adjudicated. At present, the Tribe has been approached by our governmental neighbors to lease water. There is a need for water that the Tribe can meet. Additionally, the Tribe will be able to use the proceeds from water rights leasing legislation to fund basic governmental services.

Federal law imposes certain restrictions on the alienation of the Tribe's property. In particular, the Tribe cannot lease our water without Federal legislation specifically authorizing us to do so. S. 134 will provide such Federal legislation and the Tribe will be authorized to lease our adjudicated water rights for a period not to exceed 99 years.

There are no budgetary concerns with the passage of S. 134 as implementation of the bill does not require any appropriations or expenditures. The legislation holds the United States harmless if there is any loss or other detriment resulting from any lease, contract or other arrangement entered into pursuant to the bill if passed.

The other treaty Tribes in New Mexico have been authorized to lease their water rights for a period not to exceed 99 years. Under State law, owners of water rights can lease their water rights. The Mescalero Apache Tribe is simply seeking the same rights to lease our adjudicated water rights.

Lastly, Mr. Chairman and Members of the Committee, I am pleased to inform the Committee that I have met in person with Mr. John D'Antonio, the New Mexico State Engineer, and he has informed me that the State of New Mexico does not oppose this bill. In fact, Mr. D'Antonio stated that he saw this legislation as a win-win situation for the State and for the Tribe.

Lastly, Mr. Chairman and Members of the Committee, I am disappointed and dismayed that the Department of the Interior has in fact tried to propose amendments to this legislation. The Tribe was not informed of their intent to do so. In fact, we were led to believe that the Department of Interior had no specific concern and did not intend to offer any specific amendments. And I am disappointed that they have seen fit to do so today.

And with that, Mr. Chairman and Members of the Committee, that does conclude my written testimony. I will be pleased to answer any questions that the Committee may have.

Thank you very much, sir.

[The prepared statement of Mr. Chino follows:]

PREPARED STATEMENT OF HON. MARK R. CHINO, PRESIDENT, MESCALERO APACHE TRIBE

Chairman Akaka and Committee Members:

Thank you for having this hearing on Senate Bill 134, introduced by Senator Bingaman and Senator Udall, to authorize the Mescalero Apache Tribe to lease its adjudicated water rights.

The Mescalero Apache Tribe is located on the Mescalero Apache Indian Reservation in the White and Sacramento Mountains of south central New Mexico, which is within the Tribe's aboriginal territory. The Reservation is home to the majority of Mescalero Apache Tribal members and is known for its natural beauties and abundant resources.

We are a treaty tribe, having entered into a treaty with the United States on July 1, 1852. Our treaty, known as the "Treaty with the Apaches," promised that the Tribe would have a permanent homeland in its aboriginal territory and impliedly reserved sufficient water to meet the Tribe's historic, current and future water requirements.

In 1975, the State of New Mexico sued the United States in state court to determine a certain portion of the water rights of the United States and the Mescalero Apache Tribe in the Pecos Stream System. The suit, State ex rel. *Reynolds v. Lewis* et al., was filed pursuant to the McCarran Amendment, 43 United States Code, Section 666. First, the court had to determine whether the McCarran amendment, which waived the United States' sovereign immunity for suit in state court to determine water rights in a stream system, allowed for the adjudication of the rights of the Mescalero Apache Tribe. In 1975, after the issue was appealed, the New Mexico Supreme Court held that the waiver contained in the McCarran Amendment did allow for adjudication of the Tribe's water rights.

The case was remanded to the state district court in Chaves County, New Mexico, for a determination of the Tribe's water rights. The Tribe intervened in the action as a party defendant and a trial was held to determine the Tribe's water rights.

After the trial, on July 11, 1989, the state court held that the Tribe was entitled to a consumptive water right for its historic, current and future requirements in the amount of 2,322.4 acre feet per year. But, the state court held that the Tribe would have five different priority dates. On appeal, the New Mexico Court of Appeals affirmed the consumptive water rights award of 2,322.4 acre feet per year and reversed the five different priority dates. The Court of Appeals held that the Tribe's priority date is that of the "Treaty with the Apaches," July 1, 1852. See 116 N. M. 194.

After many years of litigation, a portion of the Tribe's water rights in the Pecos Stream System have been adjudicated.

At present, the Tribe has been approached by its governmental neighbors to lease water. There is a need for water that the Tribe can meet. Additionally, the Tribe will be able to use proceeds from water rights leasing to fund basic governmental services.

Federal law imposes certain restrictions on the alienation of the Tribe's property. See 25 United States Code, Section 177. In particular, the Tribe cannot lease its water without federal legislation authorizing the same.

Senate Bill 134 will provide such federal legislation. The Tribe will be authorized to lease its adjudicated water rights for a period not to exceed 99 years. There are no budgetary concerns with the passage of Senate Bill 134 as implementation of the bill does not require any appropriations or expenditures. The legislation holds the United States harmless if there is any loss or other detriment resulting from any lease, contract or other arrangement entered into pursuant to the Bill, if passed.

The other treaty tribes in New Mexico have been authorized to lease their water rights for a period not to exceed 99 years. See the Navajo Nation Settlement Act, Public Law 111–11, Act of March 30, 2009, and the Jicarilla Apache Tribe Settlement Act, Section 7 of Public Law 102–441, 106 Stat. 2239. Under state law, owners of water rights can lease their water rights. The Mescalero Apache Tribe is seeking the same right to lease water.

Lastly, I am pleased to inform the Committee that I met with John D'Antonio, New Mexico State Engineer, and he informed me that the State of New Mexico does not oppose this Bill. Mr. D'Antonio stated that he saw this legislation as a win—win situation for the State and the Tribe.

This concludes my written testimony.

The CHAIRMAN. Thank you very much, Mr. Chino.

All or your full statements will be entered into the record.

Mr. Show, please proceed with your testimony.

STATEMENT OF HON. TERRY J. SHOW, CHAIRMAN, BLACKFEET NATION

Mr. SHOW. Thank you, Mr. Chairman. I feel too that on behalf of the Blackfeet People, that I also recognize Elouise Cobell. She was a Blackfeet Tribal member and to me she was the epitome of a Blackfeet member. And I believe she is the epitome of all Native people.

With that, Mr. Chairman and Members of the Committee, my name is T. J. Show. I am the Chairman of the Blackfeet Tribal Business Council. I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement Act, a bill that is crucial to the future of the Blackfeet people.

With me today are Council Member Shannon Augerre and Reese Fisher; our Director of Research Monitoring Jerry Lunak; and our Water Rights Attorney Jeanne Whiteing.

I want to thank the Committee for holding this hearing. I also want to thank Senator Max Baucus and Senator Jon Tester for their strong support of the Tribe in introducing this bill, and their understanding of the importance of this settlement to the Blackfeet Tribe. I also want to thank their staff and their Committee staff for their hard work on this bill.

The Blackfeet water rights settlement is a culmination of over two decades of work by the Tribe, the State, and the Federal Government. It represents an historic breakthrough in a Tribe's over century-long battle to secure and protect its water rights.

S. 399 ratifies the Blackfeet Montana Water Rights Compact, resolves certain water-related claims against the Federal Government, and provides critical resources for development of a self-sustaining economy in a permanent homeland for the Blackfeet people.

The Blackfeet Reservation was established by treaty in 1855. The reservation originally encompassed much of the State of Montana, but was reduced in size by various Federal actions to the present 1.5 million acres. The reservation is located along the Rocky Mountains in North-Central Montana along the U.S.-Canadian border and adjacent to Glacier National Park to the west.

Our reservation is renowned for its protecting mountains, majestic plains, abundant national resources and our pristine streams and lakes. Over 518 miles of streams and 180 bodies of water, including eight large lakes, are located on the reservation. More than 1.5 million acre-feet of water arrives on or flows through the Blackfeet Reservation on an annual basis, the St. Mary River alone contributing to over one-third of the total supply.

Water is critical to the continuing survival of the Blackfeet people culturally, spiritually, and economically. We have over 18,000 members, about half who live on the reservation. Safe and clean drinking water supplies are essential for our Tribal communities to grow and thrive.

Our reservation economy is heavily dependent on agriculture, stock raising, requiring substantial stable water supplies. Reservation unemployment can run as high as 70 percent to 80 percent,

however, and our economic future increase depends on development of our natural resources, along with alternative energy resources including hydropower and wind energy, all which requires significant water supplies.

At the same time, the Tribe is committed to preserving our unique and special environment and is mindful of conserving the quality and quantity of our resources for generations to come. Historically, water has been a controversial issue on the Blackfeet Reservation, beginning with the 1909 Boundary Waters Treaty that divided the St. Mary and Milk River between the United States and Canada without consideration or even mention of the Blackfeet water rights.

The treaty facilitated diversion of the United States' share of the St. Mary's water off-reservation for 100 years for the use of the Bureau of Reclamation Milk River Project. Early conflicts on the Birch Creek, the southern boundary of the reservation, resulted in a 1908 Federal water rights decree in the Conrad Investment case, a case brought by the United States at the same time as the Winters case. The case spawned efforts to obtain allotment of the reservation as a means of controlling the water through ownership of land.

Given the historical water rights issues on the reservation, the Blackfeet Water Rights Compact is truly a milestone achievement. The compact, together with S. 399, represents a comprehensive settlement of the Blackfeet water rights and related issues and achieves three important goals.

First, it confirms the Tribe's right to surface and groundwater on the reservation and provides for an allocation of water from the Bureau of Reclamation's Tiber Dam. Second, it provides for Tribal administration of Tribal water rights, along with protection for State water users. Third, it provides funding for projects that are critical to the implementation of the Tribe's water rights and homeland purpose of the reservation.

These projects include long-term municipal water systems for reservation communities, irrigation and water storage improvements on the reservation, energy development, and land acquisition.

The compact was approved by the Montana Legislature in April of 2009, two and a half years ago. At that time, the State submitted $20 million to the contribution of the settlement, which is now fully authorized and available. In addition, the 2007 Legislature appropriated $15 million for Birch Creek mitigation, for a total of $35 million, the State's largest contribution to a Montana settlement. A vote of the Tribal membership is also required to give final approval.

I thank the Committee and the staff, and look forward to responding to any questions you may have.

Thank you.

[The prepared statement of Mr. Show follows:]

PREPARED STATEMENT OF HON. TERRY J. SHOW, CHAIRMAN, BLACKFEET NATION

Mr. Chairman, and members of the Committee, my name is T.J. Show. I am Chairman of the Blackfeet Tribal Business Council. I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement Act.

I want to thank the Committee for holding this hearing on S. 399, a bill that is critical to the future of the Blackfeet People. I also want to thank Senator Max Bau-

cus and Senator Jon Tester for their strong support of the Tribe in introducing this bill, and their understanding of the importance of this bill to the Blackfeet Tribe. I also want to thank their staffs and the Committee staff for their hard work on this bill.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe. It represents an historical breakthrough in the Tribe's over century long battle to secure and protect its waters rights. S. 399 ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the Federal Government and most importantly provides the critical resources needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

The Blackfeet Reservation and the Blackfeet People

The Blackfeet Reservation was established by treaty in 1855. The Reservation is located along the Rocky Mountains in north central Montana adjacent to Glacier National Park. Our Reservation is renowned for its spectacular mountains, majestic plains and abundant natural resources. The Blackfeet People have occupied this area since time immemorial. As we say: "We know who we are and where we come from. We come from right here. We know, and have always said, that we have forever lived next to the Rocky Mountains."

Our treaty, known as Lame Bull's Treaty, was signed in 1855. Executive orders and statutes followed, each taking large areas of our traditional land. In the end, we ended up with the land that was most sacred to us: our present day reservation

In 1896, the Northern Rockies were taken from us because speculators believed there were rich minerals to be had. When mineral riches did not materialize, this most sacred part of our homeland became part of Lewis and Clark National Forest and a portion later became part of Glacier National Park in 1910. To this day we question the legitimacy of the 1896 transaction. While the Tribe retained hunting, fishing and timbering rights in the area taken, we hope that one day our claims to this area will be resolved.

The present Blackfeet Reservation is about 1.5 million acres. Although the United States had promised our reservation would never be allotted in the 1896 Agreement by which the Northern Rockies were lost, the Federal Government went back on its word and lands within the reservation were allotted to individual Tribal members under allotment acts in 1907 and 1919.

The Tribe now has over 16,000 members, about half of whom live on the Reservation. Our people have worked hard to survive in the sometimes harsh climate of the Rocky Mountains, and to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

The Critical Importance of Water

Water is critical to the Blackfeet People. It is central to our culture and our traditions. It is an essential element of our way of life, and is crucial to our continuing survival culturally, traditionally and economically. Six different drainages are encompassed within the Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. These are the veins and arteries of the Reservation and provide life to the Blackfeet People and bind us together as a People.

Water is the source of creation to the Blackfeet People. We believe that rivers and lakes hold special power through habitation of Underwater People called the *Suyitapis*. The Suyitapis are the power source for medicine bundles, painted lodge covers, and other sacred items. Contact with supernatural powers from the sky, water and land is made through visions and dreams and manifests itself in animals or particular objects. The beaver ceremony is one of the oldest and most important religious ceremonies, and beaver bundles have particular significance. The ceremonial importance of water is especially present in the use of sweat lodges as a place to pray, make offerings and cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Water is truly the lifeblood that sustains the Blackfeet people and our way of life. The water resources of the Blackfeet Reservation are essential to make the Reservation a productive and sustainable homeland for the Blackfeet people and for our communities to thrive and proposer. Safe and clean drinking water supplies are vital for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture.

The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of abundant fish and wildlife, which depend directly on the water resources of the Reservation to support them and allow them to thrive. Large game animals, including moose, elk, and deer abound. The Reservation provides signifi-

cant habitat for grizzly bears and other bears, and for other animals such as lynx, pine marten, fisher, mink, wolverine, weasel, beaver, otter, grey wolf, swift fox and others. Numerous bird species are also found on the Reservation including bald eagle, golden eagle, osprey, ferruginous hawk, northern goshhawk, harlequin duck, piping plover, whooping crane, and all migratory and shoreline birds, as well as game birds such as the sharptail grouse, ringnecked pheasant, mountain dove, Hungarian partridge and two species of grouse. The fishery on the Reservation is renowned, and includes the west slope cutthroat trout, northern pike, lake trout, rainbow trout, mountain white fish, lake white fish, brook trout, brown trout, Yellowstone cutthroat trout, walleye, and many others. The threatened bull trout is also be found on the reservation. The habitats of these wildlife and fish species depend directly on the water resources of the Reservation to support them and allow them to thrive.

The Reservation also possesses significant timber, and oil and gas resources and other natural resources. Oil and gas production has occurred on the Reservation since the 1930s, and the Tribe has recently experienced a significantly increased interest in new development on the Reservation. The Tribe has also been working hard to develop wind energy and the hydroelectric potential on the Reservation. All of these activities are dependent on adequate supplies of water.

Fortunately, we are blessed with an abundant supply of water. Over 518 miles of stream and 180 water bodies, including eight large lakes, are located on the reservation. More than 1.5 million acre-feet of water arise on or flow through the Blackfeet Reservation on an annual basis, the St. Mary River alone contributing over one-third of the total supply. Despite the significant water supply, or maybe because of it, historically others have sought to appropriate it for themselves, and water has become a precious resource in more modern times.

Historical Water Conflicts

In 1909, the United States entered in to the Boundary Water Treaty with Canada, which among other things, divided the Milk River and St. Mary River between the two countries. However, not a word in the Treaty, or the negotiations leading to it, mention the Blackfeet, that these streams arise on or near the Blackfeet Reservation, or that the Blackfeet have rights to water in these streams.

Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Blackfeet Reservation under the 1902 Reclamation Act, and began construction of the St. Mary facilities that would divert most of the United States' share of the St. Mary River off the Reservation for use by the Milk River Project over a hundred miles away, notwithstanding that there was an equally feasible project on the Blackfeet Reservation to which the water could have been brought. The diversion is accomplished through facilities on the Reservation, including Sherburne Dam, and a twenty-nine mile canal through the Reservation that eventually empties into the Milk River. The Milk River flows north into Canada and then back into the United States near Havre, Montana, where it is heavily utilized by the Milk River Project and by the Fort Belknap Reservation. There are few historical acts, other than loss of land, that have engendered more passion and outrage than this wholesale transfer of Reservation water to serve non-Indians far downstream, without a word about or any consideration of Blackfeet Tribe's water rights or the Blackfeet water needs. The Tribe is left not only with no access to and no benefit from its own water, but a tangled web of confusing and non-existent rights of way and easements for the St. Mary Diversion facilities on the Reservation.

At the same time that the St. Mary diversion was taking place, non-Indian water users south of the Reservation built a dam on Birch Creek, the southern boundary of the Reservation, which was intended to appropriate Birch Creek water for use by the non-Indian water users off the Reservation. In *Conrad Investment Company v. United States,* decided by the Ninth Circuit in 1908, the same year as the *Winters* case, the court upheld the Tribe's prior and paramount right to the water. But the court did not award the full amount of water necessary to irrigate all of the Tribe's irrigable lands, leaving it open for the Tribe to claim additional water in the future. *United States v. Conrad Investment Company,* 156 Fed. 123 (D. Mont. 1907), aff'd *Conrad Investment Co. v. United States,* 161 Fed. 829 (9th Cir. 1908). In the meantime, Birch Creek has been fully appropriated through non-Indian development of 80,000 acres of irrigation immediately off and adjacent to the Reservation.

In an attempt to control the water through the land, the *Conrad Investment* case served as the springboard to the first Blackfeet allotment act in 1907. Over a span of two congresses, the Blackfeet allotment act moved forward with various water rights provisions intended to make Blackfeet water rights subject to state law, to enjoin the United States from prosecuting any further suits against water users, and to give preference to settlers on surplus lands to appropriate water on the Res-

ervation. *See, John Shurts, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s–1930s* (University of Oklahoma Press, 2000). These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding the promise that the Reservation would never be allotted. See Agreement of September 26, 1895, ratified June 10, 1896, 29 Stat 321, 353, Art. V.

Allotment brought the third serious conflict between the Tribe and non-Indian water users. The Bureau of Indian Affairs Blackfeet Irrigation Project was authorized in the 1907 Allotment Act. However, many of the prime irrigation lands both within the Project and in other areas of the Reservation on Cut Bank Creek and the Milk River quickly went out of trust. The Tribe's water rights have gone unprotected from the use of water by non-Indian development on former allotments. Numerous disputes have arisen over the years of varying severity, and the need to resolve the Tribe's water rights has increasingly become critical. At the same time, the BIA built the Blackfeet Irrigation Project with undersized and inadequate delivery systems and storage facilities, thereby ensuring that the economic promise of the Project would be unfulfilled for the Tribe and Tribal members.

Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but increased shortages during the late irrigation season in both the Milk and Cut Bank Creek, and the dilapidated condition of the Blackfeet Irrigation Project have become serious impediments to water use within the Reservation. Plans to rehabilitate the hundred year old St. Mary Diversion facilities have further raised water right concerns, and have emphasized the need for the Tribe to finally resolve its water rights.

Water Rights Compact

Given the historical water rights issues on the Reservation, the Blackfeet Water Rights Compact is truly a milestone achievement after nearly two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and the Federal Government. The Compact was complete in December 2008. It was approved by the Montana Legislature in April, 2009 (85–20–1501 MCA), and it is now before this Committee for ratification in the Blackfeet Water Rights Settlement Act. It will further require approval of the Tribe through a vote of the Tribal membership. In general, the Compact confirms the Tribe's water rights to all streams on the Reservation, bringing certainty to the Tribe's water rights and the ability to protect and use the water for the Tribe's growing population and needs to make the Reservation a productive and sustainable homeland. The Compact:

- Establishes the Tribe's water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages except for the St. Mary River and Birch Creek.
- Establishes a St. Mary water right of 50,000 acre-feet, and requires the parties to identify how the water will be provided to fulfill the Tribe's water right.
- Establishes a Birch Creek water right of 100 cfs, plus 25 cfs for in stream flow during the summer and 15 cfs during the winter.
- Protects state water right non-irrigation use and some irrigation uses through "no-call" provisions.
- Provides for water leasing off the Reservation.
- Closes on-reservation streams to new water appropriations under state law.
- Provides for Tribal administration of the Tribal water, and State administration of state law water rights, and creates a Compact Board to resolve disputes
- Provides for an allocation of water stored in Tiber Reservoir (in an amount to be determined by Congress).
- Mitigates the impacts of the Tribe's water rights on Birch Creek water users through a separate Birch Creek Agreement by which the Tribe defers new development on Birch Creek for 15 years and provides 15,000 acre-feet of water per year to Birch Creek water users from Four Horns Reservoir, the total agreement not to exceed 25 years.

Additional identification and study of alternatives to provide the Tribe's St. Mary water right will be necessary and are included as part of the legislation. As described above, nearly the entire United States' share of the St. Mary River is diverted off the Reservation to the Bureau of Reclamation's Milk River Project. In the meantime, S. 399 provides that the Tribe will receive its water right through an allocation of Sherburne Dam, the Milk River Project storage facility on the Blackfeet Reservation. The Tribe will lease back the water to the Project, until a permanent water supply is identified and implemented for the Tribe. Such an arrangement is

the only way to ensure that the water rights of both the Tribe and the Milk River Project are fulfilled.

Upon completion of the Compact, a separate concern was raised by the Fort Belknap Indian Community relating to the Milk River, and the potential for conflict between the Blackfeet and Fort Belknap Milk River water rights. While the Blackfeet Tribe believes that the potential for conflict is extremely minimal, the two tribes met on a number of occasions to resolve any possible conflict. Language was agreed upon to be inserted in our respective settlement legislation. The language requires the Secretary to insure that the water rights of both tribes are fulfilled. This is a particular federal responsibility due to the United States trust responsibility to both tribes, and particularly because the Federal Government was party to the negotiations of both tribes.

State Approval and State Contribution

As described above, the Blackfeet water rights compact was approved by the State Legislature in April 2009. The State of Montana has committed to contribute $20 million to the Compact. These funds were fully authorized and are available when the Compact becomes final. In 2007, the Montana Legislature also appropriated $15 million for Birch Creek mitigation. Of these funds, $14.5 million has been placed in an escrow fund for the Tribe as part of the Birch Creek Agreement, and $500,000 was used for engineering studies for the Four Horns enlargement. Therefore, the State has committed to a $35 million contribution to the Blackfeet settlement. This is very major contribution on the part of the State, and the largest for an Indian water rights settlement in Montana.

Blackfeet Water Rights Settlement Act

S. 399 carries forward the terms of the Blackfeet Water Rights Compact, and addresses issues of particular federal responsibility and federal concern. The bill would do the following:

- Approves and ratifies the Compact and the associated Birch Creek Agreement.
- Authorizes the allocation of Tiber Dam water.
- Provides 50,000 acre feet of Sherburne Dam water to the Tribe in fulfillment of the Tribe's St. Mary water right and authorizes necessary investigation and studies to provide a firm supply to the Tribe.
- Requires resolution of all rights of way issues related to the Milk River Project facilities, involving tribal lands and allotted land.
- Authorizes the rehabilitation and improvement of the Blackfeet Irrigation Project, including the enlargement of Four Horns Reservoir.
- Establishes a Blackfeet Water Settlement Fund and authorizes $125M for the Blackfeet Irrigation Project and $93.2 for each of five years for other water projects and water related projects.
- Provides for a waiver of water related claims against the Federal Government.

The Tribe has identified a number of projects that are critical to the implementation of the Tribe's water right under the Compact. These projects include a regional water system to provide a long term municipal water supply to Reservation communities, improvements to irrigation and water storage on the Reservation associated with the Bureau of Indian Affairs' Blackfeet Irrigation Project including enlargement of Four Horns Reservoir as provided for in the Birch Creek Agreement, putting new lands outside the Project into production through new irrigation facilities and small water storage projects, stock water and domestic water developments, energy development projects, and acquisition of lands on the Reservation that have gone out of trust. Settlement funds would also fund the implementation of the Compact and the administration of the Tribal water right through the Tribal Water Code.

In particular, it is critical to establish a long term supply of water to Reservation communities. The Tribe has continually had to address community water supply problems by cobbling together short term fixes. At the same time, the Reservation population has significantly increased, and projections are that such increases will continue. A long term supply will provide the necessary stability that will allow for long term community growth.

For many years, East Glacier has been under a boil order issued by EPA. The Town of Browning has had frequent problems with its current water supply which is provided by groundwater wells. These wells have experienced supply and quality problems that have affected a continuous water supply for Browning. The Seville water supply is currently provided through an agreement with the City of Cut

Bank. However, the ability of Cut Bank to continue to provide water to this reservation community given the City's own water supply problems is in doubt.

The Blackfeet Tribe, Indian Health Service (IHS) and other entities have designed and are currently constructing a Phase 1 regional water system within the Reservation. The source is at Lower Two Medicine Lake, with an associated water treatment plant, with water service pipelines going to the towns of East Glacier and Browning. The Phase I project focuses on current needs. The proposed project would provide a 50 year water long-term community water supply and would include enlarging the treatment plant and Phase 1 pipelines and extending the pipeline from Browning to serve Indian communities to the eastern boundary of the Reservation, including the Star School and Seville areas.

The Cost of Settlement

The Tribe's technical consultant, DOWL HKM of Billings, Montana, has assisted the Tribe in the development of the above projects and has prepared reports on each of the projects and the associated costs. Separate costs have been developed for each of the projects.

The cost of settlement is fully justified by the needs of the Reservation and the potential Tribal claims against the United States associated with (1) the one-hundred year old diversion of St. Mary water off the Reservation to the Milk River Project over a hundred miles away, (2) the environmental and resource damages caused by the St. Mary diversion facilities, (3) claims relating to the 1909 Boundary Waters Treaty, (4) the United States promise to construct a new storage facility on Two Medicine after a catastrophic flood in the 1960's, (5) the failure of the United States to properly operate and maintain the Blackfeet Irrigation Project, and (6) the failure of the United States to protect the Tribe's water right from development by others, particularly on Birch Creek, Cut Bank Creek and Milk River.

Conclusion

The Blackfeet Water Rights Settlement has critical importance to the future of the Blackfeet people and represents decades of hard work by many people. The legislation will secure the water rights of the Tribe through ratification of the Tribe's water rights compact, and will also provide the necessary funding for the development of vital reservation water projects, including drinking water projects, water storage projects and irrigation and stock development. The settlement will significantly contribute to the development of a strong Reservation economy, jobs for Tribal members, and a better life for the Blackfeet people.

Even though the Department of the Interior was involved in our negotiations every step of the way in the decades long process, and was intimately involved in the drafting of the Compact, the Administration has raised a number of issues relating to S. 399. We are engaged in discussions with the Department of the Interior to address these concerns, and expect they will be resolved in a satisfactory manner to both parties.

We thank the Committee and Committee staff and look forward to responding to any questions you may have.

SUPPEMENTAL PREPARED STATEMENT OF HON. TERRY J. SHOW

Mr. Chairman, and members of the Committee, we appreciate the opportunity to provide this Supplemental Testimony in support of S. 399, Blackfeet Water Rights Settlement Act. This supplemental testimony provides additional information about the Settlement, and responds to certain issues raised at the hearing on the bill held on October 20, 2011.

As stated in our hearing testimony, the Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe, and represents an historical breakthrough in the Tribe's over century long battle to secure and protect its waters rights. S. 399 ratifies the Blackfeet-Montana Water Rights Compact, resolves certain water related claims against the Federal Government and provides the critical resources needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

Cost of the Settlement

The Department of the Interior has expressed concern about the cost of the Blackfeet settlement. In particular, Interior has expressed concern about the precedent the settlement would set for future water settlements. However, the cost of the Blackfeet settlement is consistent with other Indian water rights settlements involving reservations of similar size, water allocations, types of resources and Bureau of Indian Affairs irrigation projects. For example, the cost of the recently enacted Crow

Tribe Water Rights Settlement, Title IV, P.L. 111–291, 12 Stat. 3097 (2010) is $464.99 million, principally for an MR&I water system and rehabilitation of the Crow Irrigation Project. The total cost of the recent Navajo San Juan Settlement, Subtitle B, P.L. 111–11 (2009), is $934.1 million principally for the Navajo-Gallup Water Supply Project ($870M), conjunctive use wells ($30M), and for irrigation projects ($34.1M).

Since the Blackfeet water rights compact was completed in 2007, the Blackfeet Tribe has consistently indicated a willingness to enter into discussions with the Administration to further refine the costs of settlement. However, the Administration only recently began discussions with the Tribe in July of this year (2011).

Otherwise, we are unaware that the Department of the Interior's consideration of Indian water rights settlements is intended to or should take into account any backlog for appropriated but unfunded Bureau of Reclamation projects as Interior suggests in its testimony. Whether and to what extent the Bureau of Reclamation has a backlog has nothing to do with the settlement of Indian reserved water rights and the Federal Government's trust responsibility to ensure that the Tribe's water rights are fully established and protected.

Information Regarding Settlement Project

The Department of the Interior also expressed concern about the level of information regarding the Tribe's projects funded under the settlement. Interior requested and the Tribe provided a list of projects and estimated costs for each proposed project for purposes of a BOR review. However, the level of information required by BOR is not possible without the expenditure of millions of dollars upfront. For example, the $500,000 spent on studies for just one project—the Four Horns project—was not adequate, according to BOR, to verify cost estimates. We believe the issue has to do with the Departments attempt to treat Tribal settlement projects like BOR projects. BOR projects are developed for funding by Congress over many years. By the time BOR proposes funding for its projects, it has already received millions of dollars in appropriations to develop the project. For Indian water settlements, federal funds are not available for development of projects to the degree BOR prefers. Nevertheless, Congress has consistently funded tribal projects. See e.g., P.L. 111–291 (2010), which authorizes funding four Indian water rights settlements, including funding for MR&I projects and irrigation projects with similar levels of information to the Blackfeet projects.

Four Horns Enlargement Project

As part of the Birch Creek Agreement entered into between the State and Tribe, the Tribe agrees to mitigate impacts to Birch Creek water users for a 25 year period by providing 15,000 acre feet of water from an enlarged Four Horns Reservoir through a pipeline to Birch Creek. The Department of the Interior's testimony states that the total cost of implementing the Birch Creek agreement is $215 million, half of which is attributable to benefits to Birch Creek water users. Interior has significantly misinterpreted and misstated the costs.

The $215 million cost is the cost for the complete rehabilitation and improvement of the Badger-Fisher unit of the Blackfeet Irrigation Project, including full build out and enlargement of Four Horns and the pipeline to provide water to Birch Creek. However, the Tribe has not proposed full rehabilitation and build-out of the Badger-Fisher unit. Instead, the Tribe has proposed to spend $125 million for the Badger-Fisher unit, including partial rehabilitation of the unit and the Four Horns enlargement and pipeline. Of this amount, the pipeline to provide the 15,000 acre feet of water to Birch Creek plus a proportionate share of an increased feeder canal is approximately $36 million. Therefore, the amount attributable to non-Indian benefits at the high end is $36/$125 or 28 percent. Taking into account the State contribution of $20 million, the amount attributable to non-Indian benefits from federal funds is $16 ($36-$20)/$125 or 13 percent. Further, taking into account that the benefit is only for 25 years and after that time the Tribe would receive 100 percent of the benefit from the enlarged Four Horns, and assuming a life expectancy of 100 years (the age of the current project), the amount attributable to non-Indian benefits from federal funds is reduced to a little over 3 percent (one-fourth of 13 percent).

In addition, under the Birch Creek agreement, the Tribe receives a payment from the State of $14.5 million to provide the 15,000 acre feet of water for the 25 year period. In effect, the Tribe is marketing the 15,000 acre feet to Birch Creek paid for by the State. Taking the State payment to the Tribe into account, the federal funds benefit to Birch Creek water users is effectively reduced to zero.

We are requesting the Department of the Interior to correct its statement to the Committee on this issue.

We also point out that the reason mitigation is necessary for Birch Creek water users is the failure of the United States to fully ensure and protect the Blackfeet Tribe's water rights in Birch Creek. Pursuant to a 1908 federal court decree in *Conrad Investment Co. v. United States,* 161 F.829 (9th Cir. 1908), contemporaneous with the *Winters* case, the Tribe's water rights were partially quantified based on its then existing uses. However, the court made clear that the Tribe could obtain additional water for additional irrigable lands when needed. In the meantime, the Birch Creek users developed over 70,000 acres of land immediately adjacent to the Reservation, fully utilizing all remaining water in Birch Creek. The United States never took steps to limit such development or to go back to court to obtain a complete adjudication of the Tribe's water rights in the face of such development until the 1970s. Indeed, the Birch Creek water users argue that the United States facilitated the development of their lands through the 1894 Carey Act.

Additional Benefits to Non-Indians

The Department of the Interior also argues that there are additional benefits to state users through protections to junior state water users in the St. Mary and Milk Rivers, and that the costs relating to such benefits are unquantified. Nevertheless, Interior insists that such unquantified benefits can be secured at a lower cost. However, Interior fails to mention that the largest beneficiary from the protections for the junior state water in the St. Mary River is the Bureau of Reclamation's Milk River Project. The Milk River Project diverts the entire U.S. share of the St. Mary River off the Blackfeet Reservation through a 29-mile canal and uses it over a hundred miles downstream for the benefit of non-Indian water users. It is the Bureau of Reclamation that insisted the Tribe protect its junior state water rights in the St. Mary for the benefit of the Milk River Project and its water users. Indeed, BOR wanted stronger language in the Tribe's water rights compact for this purpose.

The only protection for junior state water users in the Milk River is for non-irrigation uses such as domestic water supplies and stock water uses. The Tribe agrees to not make a call on such uses. There is no cost relating to such protection, and we are unclear why Interior objects to such protections for domestic and stock uses.

Resolution of St. Mary/Milk Issues

The Milk River Project's use of the entire U.S. share of the St. Mary River is the reason why the Tribe's 50,000 acre feet of St. Mary water is problematic to the Department of the Interior. In addition, a question has also been raised as to whether the Blackfeet Tribe's Milk River water right and the Fort Belknap Tribe's Milk River water right can both be fully satisfied. While the Tribe believes that the potential for such conflict between the Tribes is extremely remote, since the Department of the Interior participated in the negotiations of both Compact, both Tribes feel that if there is an issue, it is an issue for the U.S. to resolve. The Fort Belknap Compact was completed in 2001; the Blackfeet Compact was completed in 2007. The Department has made no attempt to determine whether a conflict exists, and if so, the extent of such. Again, however, the Blackfeet Tribe believes that such a conflict is extremely remote.

Because the St. Mary/Milk issues are uniquely federal issues that the Department has not yet resolved, the exact costs, if any, are not yet known. However, Interior cannot complain since it is within its authority to fully resolve the issues and to determine any costs involved.

Non-Federal Cost Share

As previously set out in our testimony, the State contribution to the settlement is $35 million. Of this amount, $15 million was appropriated and made available by the Montana Legislature in 2009—$14.5 million has been put into an account for the Tribe as part of the Birch Creek agreement, and $500,000 already has been utilized for studies relating to the Four Horns enlargement. The 2011 Legislature authorized the issuance of bonds for the remaining $20 million. The State contribution is therefore fully available.

The $35 million state contribution to the Blackfeet settlement is also the largest Montana contribution to a settlement. The contribution to the Crow settlement was $15 million. The State contribution to the Rocky Boys settlement was $550, 000, $400,000 of which is in the form of State services. There was a $16.5 million contribution to the Northern Cheyenne settlement which the State paid in the form of a loan from the Federal Government. We are aware of other settlements where there has been no federal contribution at all. For example, there is no state contribution at all in the Nez Perce Snake River Basin Settlement, Div. J, Title X, P.L. 108–447 (2004), a settlement of over $120 million. Indeed, in the Nez Perce settlement, the State of Idaho received federal funds of over $25 million for a habitat fund.

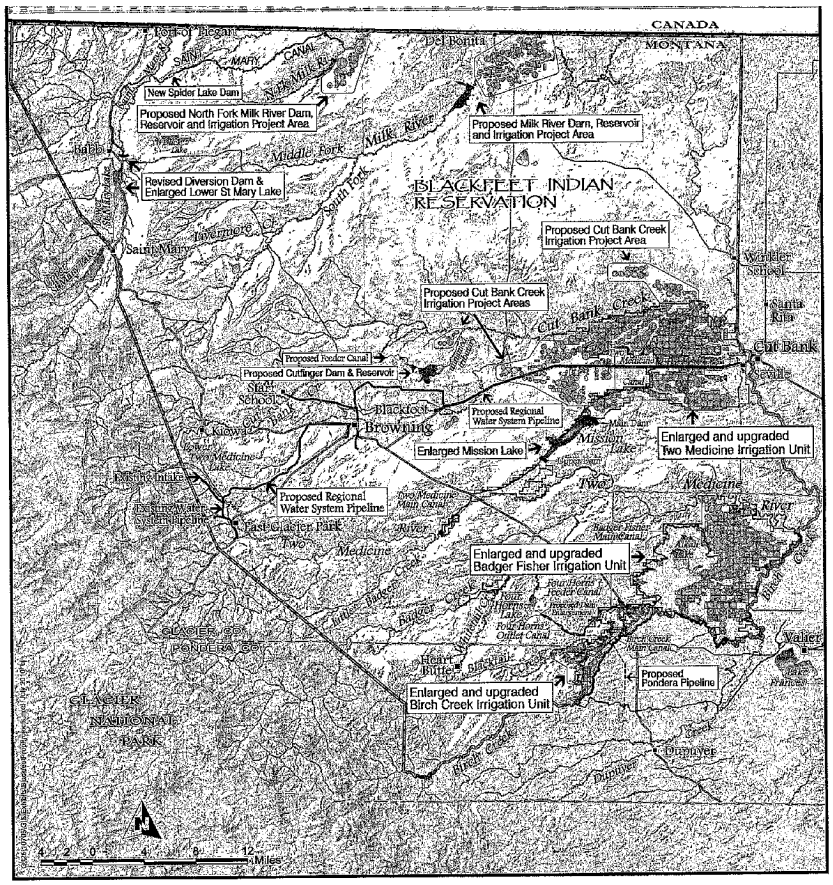
Mitigation Fund for PCCC

At the request of the Pondera County Canal and Reservoir Company, located on Birch Creek south of the Reservation, a mitigation fund was included in the present bill for the purpose of mitigating any impacts at the end of the 25 year term of the Birch Creek Agreement. The Tribe supports this provision, but it is up to PCCRC and the United States to resolve any issues relating to it. We note however, that notwithstanding Interior's statements that such a fund is unprecedented, such provisions have been included in other Indian water rights settlements. Indeed, settlements have routinely included funding for mitigation. For example: (1) the Taos Pueblo Indian Water Rights Settlement, Title V of P. L. 111–291 (Sec. 509(c)(1)(B)), authorizes $38 million to mitigate impacts non-Indian water users, a portion of which is a mandatory appropriation; (2) the Soboba Band of Luiseno Indian Settlement Act, P.L. 110–297 (2008) (Sec. 5a and Sec. 6) authorizes $10 million for the San Jacinto Restoration Fund to operate and maintain a recharge project (this is compared to the total appropriation for the Tribe of $11 million); and (3) the Snake River Water Rights Act of 2004 (Nez Perce), P.L. 108–447, Div. J., Title X (Sec. 5(b)(1), authorized $2 million for mitigation for local governments.

The Tribe also notes that while the United States has criticized the Tribe for including certain protections for non-Indian water uses, it states in this section of its discussion of the PCCRC mitigation fund, that Indian water rights settlements "routinely seek to protect existing non-Indian water user so as not to unduly impact local economies." We agree.

Additional Concerns

We believe the additional concerns raised by Interior are all matters that are easily resolved through discussions between the Tribe and Interior. We note that the nature of many of these concerns arise from the Department's many conflicts of interest in seeking to represent and protect water rights of various federal entities like the Bureau Reclamation and the Park Service, as well as other Tribes and allottees, and its conflicts of interest in limiting its own liability relating to failures to protect the Tribe's water rights while at the same time purporting to protect such rights in the context of this present settlement.



DOWL HKM

Blackfeet Indian Reservation
Proposed Settlement Projects

The CHAIRMAN. Thank you very much, Mr. Show, for your testimony.

We will now hear from Chris Tweeten. Please proceed with your statement.

STATEMENT OF CHRIS TWEETEN, CHAIRMAN, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Mr. TWEETEN. Thank you, Mr. Chairman, Members of the Committee.

First of all, I would like to remind the Committee that we saw the United States' objections to this bill for the first time within the last 24 hours, so we obviously have not had an opportunity to fully develop our reactions to those objections. And with your permission, we would like to submit a supplemental statement in which we will fully respond to those objections as we understand them.

The CHAIRMAN. Without objection.

Mr. TWEETEN. One, I would like to respond briefly to Senator Barrasso's observation regarding the lack of recent studies with respect to the feasibility of the improvements that are recommended in this legislation. As part of our $15 million appropriation that Chairman Show referred to a minute ago, $500,000 was set aside and expended for a feasibility study with respect to the feasibility of the enlargement of the Four Horns Reservoir and the improvement of infrastructure to deliver water trans-basin from Badger Creek into the Birch Creek drainage.

That study was done. The conclusion was that the improvement of Four Horns and the creation of that infrastructure was both technologically and financially feasible. So, that part of the expenditures in the bill at least has been studied and we would be happy to provide whatever further information we can gather with respect to those studies for the Committee's consideration.

With respect to Senator Tester's question regarding the objection as to the open-endedness of certain aspects of the compact, the inclusion of language regarding the expenditure of such sums as may be necessary was not, obviously, original to this compact. That language appears in lots of other Federal legislation, as I understand it. Those projects that are being discussed, of course, are projects that are going to be designed and developed by the Blackfeet Tribe. And so we would like to have an opportunity to visit with them specifically about those before we respond more directly to Senator Tester's question and we will include that in our supplemental statement.

The Blackfeet Compact is a linchpin of the settlement of water rights for Native American Tribes that covers virtually the entire northern half of Montana east of the Rocky Mountains. The Blackfeet Tribe is the northern headwaters of the Missouri River. It also provides the headwaters for the Milk River, which in our written statement we explain begins on the reservation, goes into Canada.

It is the subject of an international treaty apportionment. It then comes back into the United States, where its waters are collected in Fresno Reservoir, which is a Bureau of Reclamation project, and then distributed to irrigation interests downstream. One-seventh, I believe, of the storage in Fresno Reservoir has been allocated by the bureau to the Tribes at Fort Belknap.

So when you consider that there are four Indian reservations across northern Montana that touch upon the Milk River, beginning with Fort Peck in the east and then ending at the headwaters with the Blackfeet Tribe, you can understand how complicated and interrelated all these water rights issues are and how important it is for us to obtain finality with respect to the issues surrounding the Blackfeet water rights.

We agreed wholeheartedly with Senator Tester's observation about the importance of economic development on the Indian reservations in Montana in general, and on the Blackfeet Reservation specifically. It provides intrinsic benefits to the people of the Blackfeet Reservation who are among the poorest residents of the State of Montana.

The State of Montana develops whenever economic development occurs within our boundary, whether it is on an Indian reservation

or not. Economic development on our reservations is economic development for the State.

And finally, and most importantly, the uncertainty that surrounds the unquantified nature of Indian reserve water rights is eliminated when those rights are compacted and those compacts are brought to the Congress and ratified by the Congress.

So the benefits to the State of Montana from this bill, both economically and in terms of creating certainty for our water development going forward, are substantial incentives for the State.

Hopefully, Senator Tester will ask me a question and give me an opportunity to respond to the United States' concern regarding the adequacy of the State's cost share. As Mr. Laverdure said, the United States has objected to the cost share in all of our compacts that have come before Congress. Congress has seen fit to overrule all of those objections. And as I hope to be able to explain, it ought to overrule that objection here as well.

Thank you, Mr. Chairman. I look forward to questions.

[The prepared statement of Mr. Tweeten follows:]

PREPARED STATEMENT OF CHRIS TWEETEN, CHAIRMAN, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Chairman Akaka and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Chris Tweeten, and I am the Chairman of the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of Attorney General Steve Bullock, the Commission, the State of Montana and Governor Brian Schweitzer, in support of Senate Bill 399, the Blackfeet Water Rights Settlement Act of 2011, and to urge your approval of this bill.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the state of Montana. The Compact Commission was established as an alternative to litigation as part of the statewide water adjudication. It is charged with concluding compacts "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes" and the Federal Government. (Mont. Code Ann. § 85–2–702 (2011)).

Montana has been remarkably successful in resolving both Indian and federal reserved water rights claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne, and Rocky Boy's Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne, Rocky Boy's, and Crow Compacts. The Northern Cheyenne and Rocky Boy's Compacts are substantially implemented, and both tribes have seen substantial economic and social benefits from the completed settlements. We are now working actively on the implementation of the Crow Nation's settlement, and we expect similar economic and social benefits to follow implementation. In addition, we have reached a Compact agreement with the tribes of the Fort Belknap Reservation that is in preparation for submission to Congress for ratification. The Blackfeet Tribe-Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. § 85–20–1501 (2011)), and is now before Congress for ratification pursuant to S. 399.

Montana has also been extremely proactive in contributing to these Indian water rights settlements. In the early 1990s, Montana spent $21.8 million as part of the Northern Cheyenne settlement. The State spent $550,000 as part of the smaller Rocky Boys settlement, and $15 million as part of the Crow Tribe settlement. The State has also made-and almost fully funded-commitments for the two settlements that have been ratified by the Montana legislature but not yet approved by Congress. The State has committed $17.5 million to the Fort Belknap settlement, $14.5 million of which has already been appropriated or authorized: $1 million in cash, $9.5 million in bonding authority and $4 million of in-kind contributions in the form of modeling and other hydrology work that has already been implemented. Finally,

as will be discussed in greater detail below, Montana has fully funded its $35 million commitment to the Blackfeet water rights settlement.

Concurrent with the initiation of the Montana general stream adjudication and the establishment of the Compact Commission in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Blackfeet Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in state court. Should the negotiated settlement of the Blackfeet Tribe's water right claims fail to be approved, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Blackfeet Tribe has always had the senior water rights in the basins that are the subject of the settlement embodied in S. 399__this Compact does not create those rights, it simply quantifies them.

The Blackfeet Indian Reservation is located in north-central Montana, bounded by Glacier National Park and the Lewis and Clark National Forest to the west, Canada to the north and prairies and farmland to the east and south. The Reservation encompasses 1.5 million acres (roughly one and a half times the size of Rhode Island), making it one of the largest in the United States. The Reservation is home to approximately half of the 16,000 enrolled Tribal members. Unemployment on the Reservation is estimated at being up to 70 percent. The region is arid, with approximately 13 inches of average annual precipitation. Ranching and farming are the major uses of land on the Reservation, with the principal crops being wheat, barley and hay.

The provisions in S. 399 will recognize and quantify water rights as well as off-Reservation storage allocations that will allow the Blackfeet Tribe to provide for its growing population and to develop its natural resources. The State of Montana and the Blackfeet Tribal Business Council agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a productive and sustainable homeland for the Blackfeet People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. This settlement is the product of over two decades of negotiations among the parties, which included an intensive process of public involvement.

The primary sources of water on the Blackfeet Indian Reservation are the St. Mary River, the Milk River, the Two Medicine River, and Badger, Birch and Cut Bank Creeks. (See Attachment A.) Collectively, these watercourses discharge approximately 1.5 million acre-feet per year (AFY) of water, with the St. Mary River alone accounting for roughly one-third of that total. The St. Mary River originates in the mountains of Glacier National Park and flows north and east across the Reservation before crossing into Canada. The Two Medicine River and Badger and Birch Creeks originate in the mountains to the west of the Reservation and flow east, ultimately uniting to form the Marias River just east of the Reservation. Birch Creek delineates the Reservation's southern boundary. The Milk River and Cut Bank Creek are prairie streams. The Milk River flows from the Reservation northeast into Canada before re-entering the United States just west of Havre, Montana, while Cut Bank Creek flows south and east until it joins the Marias River. The St. Mary and Milk Rivers are both subject to an apportionment agreed to between the United States and Canada in the 1909 Boundary Waters Treaty (BWT), and implemented by a 1921 Order of the International Joint Commission that was established by the BWT. Indian water rights were not considered during the negotiation or implementation of the BWT. The Bureau of Indian Affairs (BIA) manages the Blackfeet Irrigation Project on the Reservation. The Blackfeet Irrigation Project serves land in the Birch Creek, Badger Creek, Two Medicine River and Cut Bank Creek drainages.

The Blackfeet Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Tribal Water Right for the St. Mary River drainage within the Reservation is 50,000 AFY, not including the flows of Lee and Willow Creeks. It is worth noting that this quantified amount of 50,000 AFY is almost exactly what the United States claimed for the Tribe in its November 14, 1997, More Definite Statement of Claim filed in the Montana Water Court.* The Tribe's water right is subject to the limitation that its exercise may not adversely affect the water rights held by the Bureau of Reclamation's Milk River Project (MRP). The MRP diverts almost the entire United States' BWT share of the St. Mary River into the Milk River for use by MRP irrigators in northern Montana approximately 200 miles downstream of the Reservation. The balance between tribal rights and MRP needs,

*A copy of the information referred to has been retained in Committee files.

and the protection of these off-Reservation water users, was a critical aspect of the negotiations of this settlement.

In 1902, when Congress authorized, and the Bureau of Reclamation began to develop, the MRP, insufficient attention was given to the senior water rights of the Blackfeet Tribe. The Tribe has received neither benefits from nor compensation for the St. Mary River water used by the MRP, which can account for up to 90 percent of the MRP's water supply in dry years. At the same time, water users in the Bureau of Reclamation's MRP have for generations depended on the St. Mary River water delivered to Project facilities for their livelihoods. This settlement addresses these two factors by providing for an interim allocation to the Tribe of 50,000 AFY of St. Mary River Water stored in Sherburne Reservoir, which is located contiguous to the Reservation and just inside Glacier National Park. That water is to be leased by the Tribe back to the Bureau of Reclamation for use by the MRP, at a rate to be negotiated between the Tribe and the United States, while studies are conducted to identify a permanent solution capable of satisfying the Tribe's water rights while keeping the MRP whole. The Tribe is also entitled to groundwater in the St. Mary drainage that is not subject to the BWT's apportionment, as well as the entire United States' share under the BWT of the natural flow of Lee and Willow Creeks (which are located in the St. Mary River drainage), except for the water in those streams that is subject to existing water rights under state law. The Tribe has agreed to afford protections for those existing water rights under state law through the inclusion of a no-call provision.

The Blackfeet Tribal Water Right in the Milk River is quantified as the entire United States' share under the BWT of the Milk River on the Reservation, as well as all non-BWT groundwater in the Milk River drainage on the Reservation, except for the water that is subject to existing water rights under state law. In addition, the Tribe has agreed to afford protections for those existing water rights under state law, including a no-call provision for uses other than irrigation, and a 10 year phase-in for new development of tribal irrigation. The tribes of the Ft. Belknap Indian Community also claim water rights in the Milk River downstream of the point at which the Milk River re-enters the United States from Canada. Staff for the Compact Commission has evaluated the potential of competing demands on the Milk River between the Blackfeet Tribe and the Ft. Belknap Indian Community and has concluded that the possibility of actual conflict is, as a matter of hydrology, exceedingly remote. Nevertheless, the Blackfeet Tribe and the Ft. Belknap Indian Community have negotiated a memorandum of understanding over Milk River water uses pursuant to their respective settlements, which contemplates that the Secretary of the Interior shall, with the consent of the tribal governments, identify and implement alternatives to resolve any such conflict that might someday arise. This provision is included in S. 399 as well.

The Blackfeet Tribal Water Right in Cut Bank Creek is quantified as all of the water (both surface and underground) in that drainage within the Reservation, except for the water that is subject to existing water rights under state law. The Tribe has also agreed to afford existing water rights under state law in the Cut Bank Creek drainage the same protections as are provided for in the Milk River drainage. The quantifications of the Tribal Water Right in the Two Medicine River and Badger Creek drainages are done in the same fashion as the Cut Bank Creek quantification, though the protections accorded by the Tribe to existing water rights under state law in these two drainages, as on the streams in the St. Mary drainage, extend the no-call protection to all existing water rights under state law, not just non-irrigation water rights.

The Tribe's water rights in Birch Creek were judicially recognized as early as the 1908 Ninth Circuit Court of Appeals decision in the *Conrad Investment Company* case (161 F. 829 (9th Cir.1908)), which was decided very shortly after the United States Supreme Court ruled in the seminal Indian water rights case *Winters v. United States* (207 U.S. 564 (1908)). The Blackfeet Irrigation Project diverts water from Birch Creek for project water users on the Reservation, but historically the Tribe has taken far less water from Birch Creek than it was legally entitled to take. There is also extensive non-Tribal water resource development immediately to the south of Birch Creek, where roughly 80,000 irrigated acres, as well as several municipalities, are served by the facilities of the Pondera County Canal and Reservoir Company (PCCRC), a privately owned irrigation company. PCCRC also operates Swift Dam, which abuts the southwest corner of the Reservation. During the irrigation season, PCCRC's use diverts nearly all of the water available in Birch Creek. Since the unconstrained development of the Tribe's Birch Creek water right recognized in this settlement has the potential to cause significant impacts to existing users, the balance between tribal and off-Reservation water use from Birch Creek was a major component of the negotiations.

The settlement quantifies a substantial Tribal Water Right in Birch Creek. The quantification consists of a senior irrigation right of 100 cubic feet per second (cfs) of Birch Creek natural flow, a seasonably variable in-stream flow right (25 cfs from October 1 to March 31, and 15 cfs from April 1 to September 30), and all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek. In addition, the Tribe is entitled to the remainder of the water in Birch Creek after full satisfaction of existing uses under state law. As part of the protection of existing water rights under state law for which the State bargained, the Tribe agreed in the Compact to limit the development of its Birch Creek irrigation right to the Upper Birch Creek Drainage. There are also very specific administration provisions in the Compact concerning the manner in which the Tribe may change the use of its Birch Creek irrigation right to other beneficial purposes. In addition, a Birch Creek Management Plan has been appended to the Compact, which commits the Tribe, the BIA and the operators at PCCRC to meet prior to each irrigation season to develop management plans to maximize the beneficial use of Birch Creek for all water users, and to adapt those plans as conditions warrant during the course of each irrigation season.*

When the Compact Commission initially presented this proposed settlement framework at public meetings south of the Reservation, the response was overwhelmingly negative, as stakeholders believed that the risks posed to their livelihoods by full tribal development of its Birch Creek water rights were insufficiently mitigated. Consequently, the parties returned to the negotiating table and entered into an Agreement Regarding Birch Creek Water Use (the Birch Creek Agreement) on January 31, 2008. The Birch Creek Agreement* is a critical component of the overall settlement. Under the Birch Creek Agreement, the State agreed to put $14.5 million into an escrow fund payable to the Tribe after final approval of the Compact by the Montana Water Court. (In anticipation of settlement, the 2007 session of the Montana legislature fully funded this amount.) In the interim, the Tribe is entitled to receive the interest from that fund, up to $650,000 per year. In exchange for these payments, the Tribe agreed to defer any development of its Birch Creek water rights beyond their current use for a period of 15 years from the effective date of the Birch Creek Agreement. In addition, the Tribe agreed to prioritize in this settlement authorization and funding for the Four Horns Project.

The Four Horns Project involves the repair and improvement of the Four Horns Dam and Reservoir and associated infrastructure, features of the Blackfeet Irrigation Project located on the Reservation in the Badger Creek drainage. Preliminary engineering studies, funded by a $500,000 appropriation from the State legislature, indicate that the storage capacity of the reservoir can be substantially increased in a cost effective fashion, and that a delivery system can be constructed economically to move excess water from the reservoir across to Birch Creek for the benefit of all Birch Creek water users. The studies suggest that this can be accomplished without reducing the access of Badger Creek water users, including those within the Blackfeet Irrigation Project, to the quantity of water currently stored in Four Horns that they use. The State has committed to spend $20 million toward the construction of this Four Horns Project, a commitment which has been fully funded by the Montana legislature in the form of a $4 million cash appropriation in 2009, and $16 million of bonding authority approved by the Legislature during its 2011 session. These monies, coupled with the $14.5 million that the State has already put in escrow for the Tribe as part of the Birch Creek agreement comprise the $35 million State contribution to this settlement.

One of the essential mitigation benefits secured by the State in exchange for the financial and other commitments made in the Birch Creek Agreement is the Tribe's agreement to deliver 15,000 AFY of water from Four Horns to Birch Creek, for the benefit of Birch Creek water users, from the time construction is completed on the facilities necessary to make such deliveries possible until a date 25 years from the effective date of the Birch Creek Agreement. This provision of supplemental water is expected to offset the impacts of the Tribe's development of its Birch Creek water rights after the expiration of the 15 year deferral period. In addition, the existence of infrastructure capable of bringing Four Horns water across to Birch Creek provides the Tribe with a potential market for surplus water from Four Horns into the future. With the Birch Creek Agreement in place, PCCRC and other off-Reservation stakeholders supported ratification of the Compact by the Montana legislature in 2009.

The settlement also includes provisions allowing the Tribe to lease to water users off the Reservation those portions of its water rights that it has stored or directly used. The Tribe must offer water users on Birch Creek, Cut Bank Creek, the Milk

*A copy of the information referred to has been retained in Committee files.

River and the St. Mary River, respectively, a right of first refusal on water leased from those drainages to users downstream. The Tribe may lease water from Birch Creek, Cut Bank Creek and the Milk River, all of which are within the Missouri River Basin, but only for use at other locations within the Missouri River Basin.

In addition, under S. 399, the United States will allocate to the Tribe a portion of the water in the Bureau of Reclamation's storage facility on Lake Elwell, located along the Marias River in central Montana. The bill provides for the Tribe's allocation to be all water not yet allocated from that storage facility, less the quantity of water agreed to by the Tribe and the Ft. Belknap Indian Community that may be allocated to Ft. Belknap in the future pursuant to its own water rights settlement. The bill further provides that nothing in this allocation to the Blackfeet Tribe requires the United States to provide any facility for the transportation of the Tribe's allocation from Lake Elwell to any point, and also that nothing in this allocation to the Blackfeet Tribe diminishes the allocation from Lake Elwell that was made to the Chippewa Cree Tribe of the Rocky Boys Reservation as part of the Rocky Boys water rights settlement which was ratified by Congress in 1999. S. 399 authorizes the Blackfeet Tribe to lease water from its Lake Elwell allocation so long as it is for use within the Missouri River Basin.

The Blackfeet water rights settlement also closes all of the on-Reservation basins to new appropriation under Montana law. In all cases, both under Tribal Code and State law, the development of new small domestic and stock uses are not precluded by the basin closures. For all on-Reservation basins, water rights under state law will become part of the Tribal Water Right if the Tribe reacquires the land and the appurtenant water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

The Tribe will administer the Tribal Water Right. The State will administer water rights recognized under state law. The Blackfeet Irrigation Project will use part of the Tribal Water Right and will continue to be administered by the BIA under applicable federal law. The Blackfeet Tribe will enact a Tribal Water Code to provide for administration of the Tribal Water Right in conformance with the Compact, this Act, and applicable federal law. In the event a dispute arises, the Compact provides for an initial effort between the water resources 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 to hear disputes. Decisions of the Compact Board may be appealed to a court of competent jurisdiction.

The Compact will recognize and protect the Blackfeet Tribe's water rights and provides for the improvement of agricultural water systems and tribal economic development. The Compact promotes development for the benefit of the Blackfeet Nation while protecting other water uses. The Compact is the full and final settlement of all of the Tribe's water rights claims within the Blackfeet Reservation and the Tribe waives any claims to water rights not contained or reserved in the Compact. We urge your support in ratifying the Compact by passage of this Act.

SUPPLEMENTAL PREPARED STATEMENT OF CHRIS TWEETEN

Chairman Akaka and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide additional written testimony on this important matter.

This testimony is in direct response to several points raised in both the written and oral testimony presented to you by the United States at the Hearing on S. 399, the Blackfeet Water Rights Settlement Act of 2011, that this Committee held on October 20, 2011.

In both its written and oral testimony, the United States attacked the State of Montana's contribution to this settlement as inadequate. The State takes great issue with this characterization. The $35 million that the State has committed to this settlement and that, in a demonstration of our commitment to the success of this settlement, has already been fully funded, represents one of the largest contributions a state has ever made to any Indian water rights settlement. Indeed there have been many water settlements that have been enacted with no state contribution whatsoever. Montana's contribution to this settlement is also the largest contribution the State has made to any Montana settlement. As a point of contrast, the State contributed $15 million to the Crow Tribe water rights settlement, a settlement that this Administration supported before the Congress less than a year ago, and which the Congress enacted last December.

Part of the United States' position on state contribution appears to stem from its view of the Four Horns rehabilitation project contemplated by the settlement as being "for the benefit of the community south of the reservation, instead of the Blackfeet directly," as Principal Deputy Assistant Secretary for Indian Affairs Don-

ald Laverdure stated at the hearing on October 20, 2011. But this statement, the substance of which is repeated in the United States' written testimony, reflects a fundamental mischaracterization of the Four Horns project, and of the structure of the settlement itself.

According to analysis conducted by the Tribe's technical consultant and independently evaluated by the Montana Reserved Water Rights Compact Commission's technical staff, the Four Horns Project will capture roughly 50,000 acre-feet per year more water than the dam, which the BIA has allowed to fall into a state of disrepair, can store. The Project will also address some significant sedimentation and other repair issues that dramatically limit the utility of the infrastructure at present. The majority of the water made available by the Four Horns Project will provide a firm source of supply for the Badger-Fisher Unit of the Blackfeet Irrigation Project, a Bureau of Indians Affairs project located on the Reservation.

According to the same analysis, this more reliable supply has the capacity to increase the productivity of the lands served by that unit of the Blackfeet Irrigation Project, and thus the value of the crops grown, by nearly $10 million per year. Preliminary engineering analysis, funded by a $500,000 contribution from the State, has indicated that this enlargement is a feasible and economically reasonable project. Moreover, the Tribe's technical consultant has determined that the incremental cost of engineering the Four Horns Project to be capable of delivering water to Birch Creek is roughly $25 million. The State intends to contribute $20 million to the design and construction of this infrastructure.

The State's contribution reflects more than a fair amount for the benefits that will be received by non-Indians from this infrastructure. Pursuant to the Birch Creek Agreement, the substance of and context for which are addressed in my written testimony submitted to the Committee in advance of the Hearing on October 20, 2011, the Tribe has agreed to defer development of new uses of its Birch Creek water right for a period of 15 years, and to provide 15,000 acre-feet per year of water to non-Indian water users on Birch Creek for a period of 10 years, in exchange for a payment from the State of $14.5 million. The tangible benefit provided by the State to the Tribe concerning the use of its water rights. At the end of the 25 year period covered by the Birch Creek Agreement, the Tribe has no further obligation to supply water for the benefit of non-Indians. But the infrastructure to bring water from Four Horns to Birch Creek will remain under the Tribe's control and is available for its benefit should it choose to lease some portion of its water rights to Birch Creek water users or others.

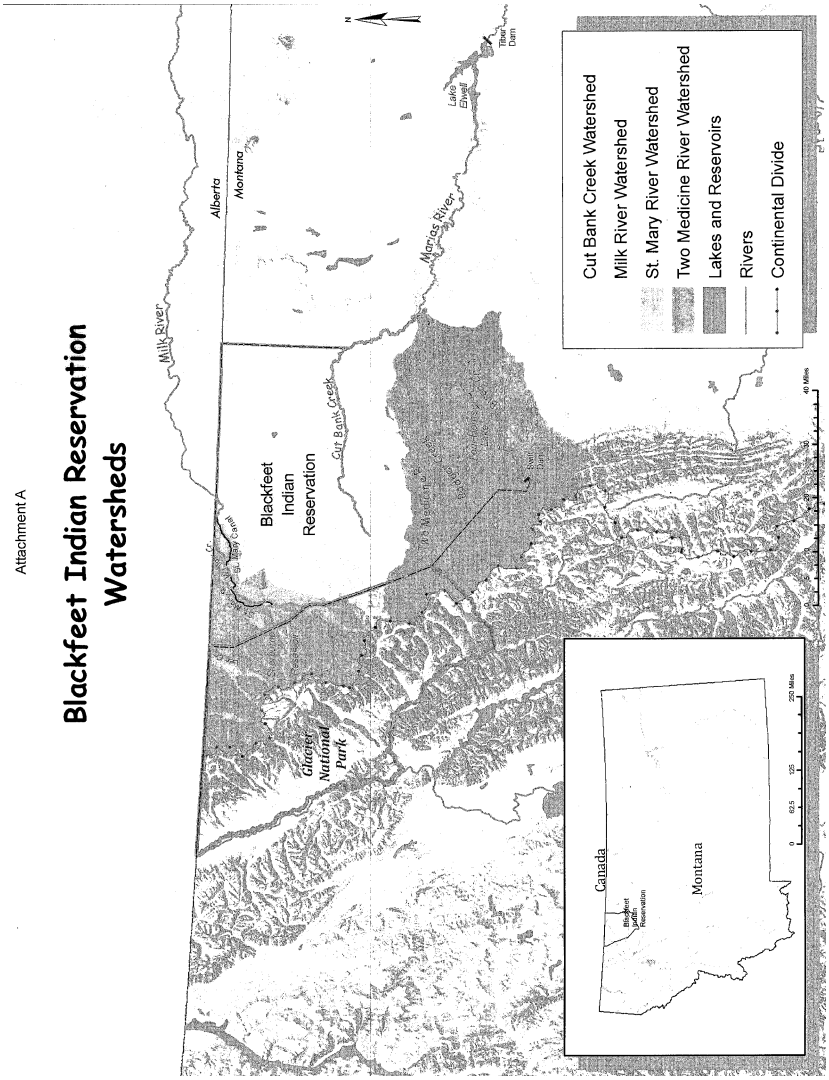
The economy on and around the Blackfeet Reservation is such that Birch Creek water users constitute perhaps the most optimal market for the Tribe to lease its water. As Mr. Laverdure noted in his testimony concerning S. 134, the Mescalero Apache Tribe Leasing Authorization Act, heard by this Committee at the same hearing that considered the Blackfeet Water Rights Settlement Act, leasing is an important mechanism by which a tribe can receive economic benefits from a water rights settlement. The State's contribution of roughly 80 percent of the cost of the infrastructure to bring water from Four Horns to Birch Creek is thus of direct and significant benefit to the Blackfeet Tribe. Thus, contrary to the misperception of the United States, the State contribution directly benefits the Blackfeet Tribe. By benefitting the Tribe, it also protects the non-Indian water users. This is exactly the sort of win-win arrangement that underpins successful settlements.

In its written testimony, the United States also asserts that the State contribution is inadequate because it does not fully account for the "[a]dditional benefits to State users in the Compact arise from the Tribe's agreement to protect junior state water rights holders, especially in the St. Mary and Milk River basins." This statement completely ignores the fact that it is the United States itself (through the water rights claims filed by the Bureau of Reclamation for its Milk River Project) which is overwhelmingly the largest "junior state water rights holder" in those two basins. It is wholly inappropriate for the United States to claim that the protection of its own water rights is a "non-federal" benefit. Montana believes that the United States bears significant responsibility for those costs, and likewise for the benefits achieved in the Blackfeet water rights settlement for protecting that project's water rights—particularly where it is the United States that concomitantly developed that Project over a century ago while failing to safeguard the Tribe's water rights.

The United States has also expressed concern with the "broad and uncertain aspects" of the provisions in S. 399 regarding the Tribe's ability to lease its water rights. It is difficult to see what is uncertain about the leasing provisions. Section 7(f) of S. 399 provides that the Tribe, consistent with expressed United States policy about water leasing, will have the right to lease portions of its water right "in accordance with article IV.D.2 of the Compact for use off the Reservation within the Missouri River Basin, subject to the tribal water code and the terms and conditions

of the Compact and applicable Federal law." Article IV.D.2 of the Compact provides a lengthy explanation (the provision runs three full pages) of both the processes and the conditions whereby the Tribe may lease its water rights. The United States ought to be fully familiar with these provisions, as members of the Blackfeet Federal Negotiating Team participated in scores of public and staff-level meetings and conference calls, including several marathon drafting sessions where all of the Compact language was discussed in extreme detail. Thus it is at best indicative of poor communication within the Department of the Interior and at worst highly disingenuous for the United States to raise before this Committee vague and unsubstantiated "concerns" on an issue of this sort. If the United States has difficulty with specific terms with the language in the Compact, that would obviously be important information to have. The generalized nature of its written testimony is unhelpful if we are to be able meaningfully to address the United States' concerns.

The State of Montana, the Blackfeet Tribe and the United States have been working on reaching this settlement for fully two decades. It is disappointing for the United States, in its testimony before this Committee, to act as though it is a latecomer to the settlement process. Nevertheless, the State of Montana is heartened by the United States' commitment to this Committee that it intends to work diligently on this settlement and to put forward its own proposals for how it would like to resolve the issues it has raised. The State is eager to receive those proposals, and to do all it can to ensure the successful ratification of the Blackfeet Water Right Settlement Act of 2011.



The CHAIRMAN. Thank you very much, Mr. Tweeten, for your statement.

Mr. Rex Lee Jim, please proceed with your testimony.

STATEMENT OF HON. REX LEE JIM, VICE PRESIDENT, NAVAJO NATION

Mr. JIM. Good afternoon, Chairman Akaka and honorable Members of the Committee. Senator Cantwell, Senator Tester, and Senator Udall, thank you for your time.

My name is Rex Lee Jim. I am the Vice President of the Navajo Nation. I am here before you today to discuss the Navajo Nation's position concerning potential changes to the Utah Navajo Trust

Fund pursuant to S. 1327. I will quickly summarize the Navajo Nation's position.

Through oil and gas revenues, the Navajo Nation Trust Fund provides much-needed funding for Utah Navajos. As a result of negotiation between the Navajo Nation, the State of Utah and the Federal Government, 37.5 percent of royalties received through oil and gas development go to the State of Utah to be administered for the benefit of Utah Navajos. The UNTF is funded with royalties from Navajo Nation oil and gas leases on Navajo trust lands. Those funds come first to the Navajo Nation and then are paid out of the trust fund for the Navajo Nation's general funds account.

Utah passed legislation in 2008 that effectively ends both disbursements from the UNTF and ends the trust fund administration. In finding a new trustee, Congress should focus on finding a trustee capable of managing and growing the fund to ensure the fund's long-term survival for the ongoing benefit of Utah Navajos. Congress should not appoint a trustee without a record of such management and without independent capital or assets.

The Navajo Nation believes that, consistent with principles of self-determination, the Navajo Nation should be appointed as the new trustee for the Utah Navajo Trust Fund. The Navajo Nation has a successful record of managing and increasing its own trust fund; has a highly developed legal system that respects the rule of law; and has a well-established budgeting and auditing process for the appropriation of funds.

Finally, the Navajo Nation is concerned about how the process of developing legislation and assigning a new trustee will take place. In a process that so greatly affects the vital interests of the Navajo Nation and Utah Navajos, Congress needs to respect our sovereign status and our government-to-government relationship.

In spite of the Navajo Nation's considerable interest in the future of the Navajo Trust Fund, including who will be designated as the new trustee, S. 1327 was introduced by the Honorable Senator Hatch without adequate consultation by the Senator or his staff with the Navajo Nation government or the beneficiaries. In the previous 111th Congress, Senator Bennett from Utah also did not consult the Navajo Nation when he introduced a near carbon copy of this legislation.

With me today are Jonathan Nez, the Council Delegate representing the Utah Chapters of Navajo Mountain, an objector whose statement I also would like to submit for the record, with your permission of course; John Billie, President of Aneth Chapter; Linda Brown, Secretary of the Aneth Chapter; and Andrew Tso, a beneficiary who lives in the Aneth Extension, and who all also oppose this legislation drafted and introduced without their knowledge or consent.

Designating the Navajo Nation as trustee of the UNTF is the only position consistent with the policy established by the United States Congress to recognize the sovereignty of the Navajo Nation and the right of the Navajo Nation to self-determination in matters which concern the nation's land, resources and citizens.

The Navajo Nation is committed to ensuring that the UNTF continues to grow and benefit current and future generations. In developing parameters of the trust, the Navajo Nation will consult

closely with the local Utah Navajo community, considering first and foremost their interests and the critical importance of local control. Moreover, we Navajos will resolve any conflicts internally by talking things out in conformity with our culture and laws.

S. 1327 was introduced without adequate consultation with the Navajo Nation and government or the beneficiaries and would give the important Federal trust responsibility over the nation's resources and citizens to an unproven nonprofit corporation. S. 1327 does not respect the Navajo Nation's sovereignty and right to self-determination, and this Committee should oppose it.

Chairman Akaka and honorable Members of the Committee, on behalf of the Navajo Nation, I wish to express my appreciation for this opportunity to provide testimony to the Senate Committee on Indian Affairs on a government-to-government basis.

Thank you and I look forward to your questions.

[The prepared statement of Mr. Jim follows:]

PREPARED STATEMENT OF HON. REX LEE JIM, VICE PRESIDENT, NAVAJO NATION

Good Morning Chairman Akaka, Honorable Members of the Committee on Indian Affairs. I am Rex Lee Jim, Vice President of the Navajo Nation. I am here to provide testimony in regard to the future of the Utah Navajo Trust Fund (UNTF) and Senate Bill 1327 introduced by the Honorable Senator Orrin Hatch.

As the Committee knows, the State of Utah has declared its desire to withdraw as trustee of the UNTF. The State of Utah passed legislation in 2008 that effectively ends most disbursements from the UNTF, ends the trust fund administration, and moves the trust assets to a new fund pending selection of a new trustee. The Utah legislation specifically calls on Congress to appoint a new trustee for the UNTF. The Navajo Nation no longer has a role in the planning of expenditures from the UNTF, as is mandated under the 1933 Act. Consistent with federal policy toward Indian tribes, the Navajo Nation is requesting that Congress designate the Navajo Nation as the new trustee of the UNTF.

Please be aware that the Navajo Nation has many elected officials at various levels of government, all of whom have individual agendas that may or may not coincide with the broader goals and policies of the Navajo Nation. However, the Navajo Nation has its own law that governs who may speak on behalf of the Navajo Nation and our People. Pursuant to Navajo Nation law, only the testimony today is representative of the Navajo Nation in this matter. See Exhibit A, Navajo Nation Position Statement.

History of Utah Navajo Lands and UNTF

The Utah portion of the Navajo Nation has a complex history of additions, withdrawals, restorations and exchanges. The United States added the lands in the Utah Territory that lay south of the San Juan and Colorado rivers by Executive Order on May 17, 1884. Navajo People have a historic tie to this area and have continuously occupied this land since long before the captivity of Navajos in 1864. On November 19, 1892, four years before Utah was awarded statehood, then President Benjamin Harrison, by executive order, took back those lands in the Utah portion of the Navajo Nation which lay west of the 110° parallel (what is called "the Paiute Strip"), and placed those lands back in the public domain. Navajo lands in the Utah Territory which lay east of the 110° parallel remained part of the Navajo Nation. On May 15, 1905, by executive order, President Theodore Roosevelt added the Aneth area in Utah to the Navajo Nation. In 1908, the Department of the Interior made an administrative withdrawal of the Paiute Strip from the federal public domain, designating those lands again for exclusive use by the Navajo. In 1922, the Department of the Interior again took the Paiute Strip away from the Navajo, and put the lands back into the public domain. The Paiute Strip was again withdrawn from the public domain in 1929.

The federal legislation that created the UNTF was the result of negotiation and agreement between the Navajo Nation, the State of Utah, and the United States Government. In 1930 and 1931, the Navajo Tribal Council asked the Commissioner of Indian Affairs to negotiate on its behalf to permanently restore the Paiute Strip to the Navajo Nation, based on the previous set asides of this area by the federal government and on historic Navajo occupation. On July 7 and 8, 1932, at its annual

meeting in Fort Wingate, the Navajo Nation Council gave its support to proposed federal legislation which would restore the Paiute Strip to the Navajo Nation and to add lands to the Aneth area of the Nation, between Montezuma Creek and the Colorado border (what is referred to as the Aneth Extension).

After Utah citizens voiced opposition to the proposed addition of the Aneth Extension and the Paiute Strip to the Navajo Nation, the Commissioner of Indian Affairs negotiated on behalf of the Navajo Nation with a Utah committee made up of San Juan County representatives to satisfy their concerns. In order to gain the Utah committees' support for the 1933 Act, the Commissioner of Indian Affairs made several concessions to the Utah committee. These concessions included prohibitions on further Native American homesteads or allotments in San Juan County, fencing of Native allotments outside the new Navajo Nation boundaries, fencing of the Aneth Extension's northern boundary, and agreement that state game laws would apply to Navajos hunting outside the Nation's boundaries. The proposed legislation also included an unusual provision that in the event oil and gas was discovered in the Aneth Extension and the Paiute Strip, instead of all net oil and gas royalties going to the federal government to administer on behalf of Navajo citizens, 37½ percent of those royalties would instead go to the State of Utah to be administered for "the tuition of Indian children in white schools and/or in the building of roads across [the newly added lands], or for the benefit of the Indians residing therein." A final concession to Utah in the proposed legislation provided that Utah could exchange any state school trust lands inside the Aneth Extension and the Paiute Strip for equivalent federal lands, and that any fees or commissions for the exchange would be waived. Congress enacted the legislation Congress in 1933, as Pub. L. No. 403, 47 Stat. 1418 (1933) ("1933 Act").

In 1958, by Act of Congress, the Navajo Nation was further expanded within San Juan County. Under the 1958 Act, the Navajo Nation and the United States government exchanged Navajo Nation lands at Glen Canyon Dam and Page, Arizona for federal lands northwest of and adjacent to the Aneth Extension, including the McCracken Mesa area. In 1949 and 1998, with the Navajo Nation as party to the negotiations, state school trust lands within the Navajo Nation were made Navajo Trust Lands in exchange for other federal lands given to Utah. Currently, negotiations are under way to exchange school trust lands in the Aneth Extension with other federal lands under authority of the 1933 Act.

In 1968, Congress amended the 1933 Act, redefined the purposes of the UNTF, and expanded its class of beneficiaries to include all Navajos in San Juan County. The amended legislation provided that trust monies can be used "for the health, education and general welfare of the Navajo's residing in San Juan County." The 1968 Amendments also provided that trust funds could be used for projects off the Navajo Nation provided that the "benefits" were proportional to the expenditures from the trust. This vague term "proportional" provided one of the main vehicles for mismanagement of the trust monies.

The Navajo Nation Has Sovereignty Over Its Lands, Resources and Citizens

The Navajo Nation is a sovereign Native Nation located in the southwestern United States with territory in the States of New Mexico, Arizona and Utah. Numerous Executive Orders, Acts of Congress and Treaties have guaranteed the rights of our Nation to the surface use, and the subsurface mineral resources, of much of our traditional lands. For over forty years, the Navajo Nation has enjoyed a government-to-government relationship with the United States, respectful of the Nation's sovereignty and self-determination in its own affairs, and free of the policies of paternalism which have blemished the past. It remains critical to the sovereignty and self-determination of the Navajo Nation that the United States respect our government-togovernment relationship in deciding matters that uniquely concern and affect Navajo lands, resources and citizens. It is also crucial to the integrity of our Nation and its political institutions that passage of any federal legislation directly affecting our interests is done with the consent of the Navajo Nation government.

The Utah Navajo Trust Fund is capitalized completely by royalties from Navajo Nation mineral leases on Navajo Nation lands in Utah which were added to the Navajo reservation in 1933. Since the 1970s, the Navajo Nation has been the fiscal agent for all UNTF royalties, distributing money every year to the State of Utah out of the Nation's general funds, for investment in the UNTF. The beneficiaries of the UNTF are those Navajo citizens residing in San Juan County, Utah. Only members of the Navajo Nation are eligible beneficiaries of the UNTF. The future of the UNTF is clearly a Navajo Nation issue and Congress should respect our sovereignty in this matter.

The Navajo Nation Was Never Consulted and Is Adamantly Opposed to Senate Bill 1327

In spite of the Navajo Nation's considerable interest in the future of the Utah Navajo Trust Fund, including who will be designated as the new trustee, Senate Bill 1327 was introduced by the Honorable Senator Hatch without adequate consultation by the Senator or his staff with the Navajo Nation government or the beneficiaries. See Exhibits A and B, Aneth Chapter and Red Mesa Resolutions. In the previous 111th Congress, Senator Bennett from Utah also did not consult the Navajo Nation before submitting his bill.

The Navajo Nation is adamantly opposed to Senate Bill 1327. Senate Bill 1327 would give the federal trust responsibility for royalties from Navajo Nation mineral leases to a nonprofit corporation, the Utah Dineh Corporation. Senate Bill 1327 would give control over approximately thirty (30) million dollars in trust funds and assets, as well as an additional 6 to 8 million dollars a year of royalties from Navajo mineral leases, to a corporation with zero experience as a trustee, and absolutely no outside capital. In the event of any breach of trust by the Utah Dineh Corporation, the beneficiaries would have no remedy against the corporation. Senate Bill 1327 fails to ensure any accountability or transparency in the use of trust fund monies and fails to ensure that the trust will exist into perpetuity for the benefit of future generations of Navajo beneficiaries. Senate Bill 1327 broadly expands the original purposes of the trust and could lead to misuse and misappropriation of trust funds. Senate Bill 1327 would violate the common law of trusts by designating a handful of beneficiaries as the trustee and causing countless conflicts of interest.

On the other hand, the Navajo Nation would be an accountable, responsible and transparent trustee of the Utah Navajo Trust Fund. The Navajo Nation has been the fiscal agent for royalties of the UNTF for over 30 years. The Navajo Nation has a successful record of managing, investing, and increasing the value of multiple Navajo Nation trust accounts, including many multi-million dollar accounts. The Navajo Nation has a well established budgeting and auditing process for the appropriation of funds. Importantly, unlike the Utah Dineh Corporation, the Navajo Nation has sufficient outside assets to be accountable to the beneficiaries and can be sued in Navajo Nation Court with consent of the Navajo Nation Council. Our vision includes further consultation with the local Navajo Chapters and Utah Navajo communities in developing the parameters of the trust.

The Oil and gas revenue for the trust will not last forever. The trust must be grown and managed successfully not only to pay for needed expenditures in the short term, but for the benefit of future generations of Navajos in San Juan County as well. The trust also should be managed to ensure its survival in perpetuity. The Navajo Nation is committed to ensuring that the UNTF continues to grow and benefit current and future generations of Utah Navajos and the Navajo Nation should be made the new trustee. Senate Bill 1327 does not ensure a trust corpus in perpetuity.

Conclusion

Designating the Navajo Nation as trustee of the UNTF is the only position consistent with the policy established by the United States Congress to recognize the sovereignty of the Navajo Nation and the right of the Navajo Nation to self-determination in matters which concern the Nation's lands, resources and citizens. Senate Bill 1327 was introduced without adequate consultation with the Navajo Nation government or the beneficiaries and would give the important federal trust responsibility over the Nation's resources and citizens to a non-profit corporation. Senate Bill 1327 does not respect the Navajo Nation's sovereignty and right to self-determination and this Committee should oppose it.

I appreciate this opportunity to provide testimony to the Senate Committee on Indian Affairs. The Navajo Nation looks forward to working with the Committee and the Utah delegation in a government-to-government relationship as reasonable legislation is introduced to secure the future of the Utah Navajo Trust Fund. Thank you.

Attachments

IGRMY-107-08

RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE

21st NAVAJO NATION COUNCIL - Second Year, 2008

AN ACTION

RELATING TO INTERGOVERNMENTAL RELATIONS; APPROVING THE 2008 POSITION STATEMENT OF THE NAVAJO NATION ON THE FUTURE OF THE UTAH NAVAJO TRUST FUND

BE IT ENACTED:

1. The Navajo Nation hereby approves the 2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund, attached hereto as Exhibit A, upon the recommendation of the Navajo Utah Commission set forth within their Resolution NUCMAY-445-08.

2. The Navajo Nation hereby authorizes the President of the Navajo Nation, the Speaker of the Navajo Nation, the Navajo Utah Commission, and their designee, to advocate with the United States Congress, the Federal Government, the State of Utah, and the sundry states, in accord with the 2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Intergovernmental Relations Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 7 in favor and 0 opposed, this 19th day of May, 2008.

LoRenzo Bates, Chairperson Pro Tem
Intergovernmental Relations Committee

Motion: Francis Redhouse
Second: Sampson Begay

EXHIBIT "A"

2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund

History of Utah Navajo Trust Fund.

Executive Order of May 17, 1884, "withheld from sale and settlement and set apart as a reservation for Indian purposes" land in the Utah Territory that lay south of the San Juan and Colorado rivers. This land has been historically and continuously occupied by Navajo people since long before the captivity of Navajos in 1864. Four years before Utah was awarded statehood, Executive Order of November 19, 1892, put Navajo lands in the Utah Territory west of the 110° parallel ("the Paiute Strip") back in the public domain. Lands in the Utah Territory east of the 110° parallel remained part of the Navajo Reservation. Executive Order of May 15, 1905, added the Aneth area in Utah to the Navajo Reservation. In 1908, the Department of the Interior withdrew the Paiute Strip from the public domain for use of the Navajo. In 1922, the Department of the Interior again put the Paiute Strip back into the public domain.

In 1930 and 1931, the Navajo Nation Council asked the Commissioner of Indian Affairs to negotiate on behalf of Navajo Nation to permanently restore the Paiute Strip to the Navajo Reservation, based on the previous set aside in the Executive Order of 1884 and historic Navajo occupation of the area. On July 7 and 8, 1932, at its annual meeting in Fort Wingate, the Navajo Tribal Council gave its support to proposed federal legislation which would restore the Paiute Strip and add land between Montezuma Creek and the Colorado border to the Aneth area of the Reservation. This legislation was passed by the United States Congress in 1933, as Pub. L. No. 403, 47 Stat. 1418 (1933) (hereafter "1933 Act").

The 1933 Act was the result of an agreement between three parties: the Navajo Nation, the State of Utah, and the United States Government. After Utah citizens voiced opposition to the proposed addition to the Navajo Reservation, the Commissioner of Indian Affairs negotiated on behalf of the Navajo Nation with a Utah committee made up of San Juan County representatives. Several concessions were made to the Utah committee in order to gain its support for the 1933 Act, including prohibitions on further Indian homesteads or Indian allotments in San Juan County, fencing of Indian allotments outside the new reservation boundaries, fencing of the Aneth extension's northern boundary, and agreement that state game laws would apply to off reservation hunting by Navajos.

The 1933 Act provided that "should oil or gas be produced in paying quantities," the State of Utah would receive 37 ½ % of net oil and gas royalties derived from Navajo Tribal Leases on the newly added Navajo Trust Lands. In return, the State of Utah would act as trustee of the funds, and expend the funds "in the tuition of Indian children in white schools and/or in the building of roads across [the newly added lands], or for the benefit of the Indians residing therein." The 1933 Act also provided that Utah could exchange state school trust lands inside

the new Reservation boundaries for equivalent federal lands and that any fees or commissions for the exchange would be waived.

In 1968, Congress amended the 1933 Act, redefining the purposes of the trust and expanding the class of beneficiaries. The amended legislation provided that the trust be used "for the health, education and general welfare of the Navajo Indians residing in San Juan County." The 1968 Amendments also provided that trust funds be used for projects and facilities in San Juan County that were not of exclusive benefit to the designated beneficiaries provided that the benefits to the beneficiaries were in proportion to the amount of trust funds used for the projects and facilities.

Over the course of the last 75 years, through legislation, executive acts and other governmental conduct, the State of Utah accepted its federally appointed role as trustee of the Utah Navajo Trust Fund (UNTF). During Utah's tenure as trustee, funds from UNTF have been used to create and/or acquire significant fixed assets on state lands. These assets include two medical buildings, a government services building, two housing subdivisions, and fairgrounds.

Substantial evidence exists that Utah failed to properly administer Utah Navajo Trust Funds over many decades, and Utah has yet to make a full and complete accounting of its administration and use of trust funds, as required by law. Utah, as UNTF trustee, has been the defendant in several lawsuits. In 1991, serious allegations of mismanagement and misappropriation of trust funds by Utah and other entities using trust monies were made in a 1991 report by the State of Utah, Legislative Auditor General. In Peit v. Utah, the State of Utah is the defendant in a class action lawsuit brought on behalf of UNTF beneficiaries over these issues.

In 2007, the State of Utah announced that it wished to resign as trustee of UNTF. On March 17, 2008, Bills HCR4 and HB352 ("Sunset Act") were signed into law. This legislation purports to cause the resignation of Utah from its role as federally appointed trustee of UNTF effective June 30, 2008. The Sunset Act provides that from March 17 until May 5, 2008, the UNTF administrator can only commit to new projects capped at $100,000, and only to projects that will be completed by January 1, 2010. From May 5 until June 30, the UNTF administrator cannot commit any monies to new projects. After July 1, 2008, all assets of the trust after liabilities are paid will be placed in a New Fund created by the Utah Division of Finance. The New Fund will be managed according to the Utah State Money Management Act. No disbursements will be made from this fund except to pay for maintenance of the fixed assets of the expired UNTF and to continue any educational scholarships awarded through June 30, 2010. The Sunset Act also provides that the State of Utah shall purchase the fixed assets of the Navajo Trust Fund, existing as of May 5, 2008, consistent with the trust obligations of the state in "arms length" transactions and providing "fair market compensation" to the trust. Based on provisions in the Sunset Act and Utah Code 63-55-104 and 63-55-263, the UNTF Administrator probably can continue to function until January 1, 2010. It is expected that the UNTF will maintain a small staff to administer existing UNTF projects until they are completed.

The Fiscal Year 2008 budget for UNTF is $3,879,300.00. Administrative costs are approximately 14.5% of the entire budget at $551,800.00. $650,000.00 is earmarked for chapter projects. Nearly $595,000.00 is budgeted for higher education, primarily scholarships. The remainder of the 2008 budget goes to a variety of specific projects, as well as providing matching grants for housing construction.

The Navajo Nation is an Independent Sovereign Nation.

The Navajo Nation is an independent sovereign nation. The Navajo Nation has the right to self-determination, to freely determine its own political status and to freely pursue its economic, social and cultural development. In exercising its right to self-determination, the Navajo Nation has the right to autonomy and self-government in matters relating to its internal and local affairs, as well as a right to the ways and means for financing its autonomous functions.

In 1933, when the Navajo Utah Trust Fund was created, the Navajo Nation tribal government was only 10 years old. Today, the Navajo Nation is the largest and most sophisticated American Indian government. The Navajo Nation has developed a substantial body of both statutory and decisional law to complement the fundamental laws of the Diné. The Navajo Nation has a well-developed annual comprehensive budgeting process for appropriation of all Navajo Nation funds which should be followed in utilization of all Navajo Nation generated funds, including the proceeds from the Utah Navajo Trust Fund.

1. New Federal Legislation Affecting the Utah Navajo Trust Fund Should Be the Result of Government to Government Negotiations Between Navajo Nation, United States Government, and State of Utah and Should Require Consent of Navajo Nation.

Federal legislation amending or repealing the 1933 Act and designating a new trustee for the Utah Navajo Trust Fund should be the result of good faith government to government negotiations between the Navajo Nation, the State of Utah, and the United States Government. Consistent with the Navajo Nation's status as an independent sovereign nation, any federal legislation that affects royalties generated by Navajo Nation Trust Lands must be made with the consent of the Navajo Nation.

2. Beneficiaries Should Remain "Navajos in San Juan County" Subject to Certain Conditions.

The beneficiaries of the Utah Navajo Trust Fund should remain Navajos in San Juan County, through the Navajo Nation annual budget process. Provided; that special consideration should be made in the annual budget process to use Utah Navajo Trust Fund proceeds for the benefit of Navajos residing within the Aneth Extension for mitigation of environmental impacts and other

negative impacts associated with the development and production processes of oil and gas resources located within the Aneth Extension, and for development of needed infrastructure. Navajos living outside of Navajo Indian Country shall be eligible for educational assistance from Utah Navajo Trust Fund proceeds. Capital outlay funding and housing assistance shall not be provided from Utah Navajo Trust Fund proceeds for projects locating outside of Navajo Indian Country. Provided; that all existing and future health facilities funded by Utah Navajo Trust Fund proceeds and any other facilities funded by Utah Navajo Trust Fund proceeds located outside of Navajo Indian Country shall continue to be operated for the benefit of all Navajos.

3. Consultation of Beneficiaries.

Negotiations to designate a new trustee shall be in close consultation with the existing beneficiaries through the chapters, keeping the best interests of the beneficiaries in mind at all times.

4. New Federal Legislation for Allocation of Royalties Shall Maintain the Status Quo.

The beneficiaries of the Utah Navajo Trust shall continue to receive the benefit of 37 ½% of all royalties generated by oil and gas production from leases on Reservation lands added in 1933. 62 ½% of all royalties generated by oil and gas production from leases on Reservation lands added in 1933 shall continue to go to the Navajo Nation.

5. Disposition of Trust Assets on State Lands.

Negotiations must address UNTF assets on state lands and provide either for fair market value purchase of the assets by Utah, or for acquisition of the state lands in question by Navajo Nation. The Sunset Act provides that the State of Utah Division of Facilities Construction and Management can purchase UNTF assets on state land. Because acquisition of state lands by Navajo Nation could implicate a land exchange involving the federal government, all three governments should be involved in negotiations to dispose of these assets and/or convey, exchange, or purchase lands. In addition, negotiations currently under way to exchange Utah School Trust Lands in the Aneth extension with BLM lands outside the reservation, pursuant to Section 2 of the 1933 Act, should be coordinated with the disposition of UNTF assets.

6. Navajo Nation Would Be Best Trustee.

As a sophisticated tribal government, the Navajo Nation has the resources and expertise to administer the UNTF on behalf of Utah Navajo beneficiaries. The UNTF is generated by royalties from leases entered into by the Navajo Nation on Navajo Nation Trust Lands. Trusteeship of these funds by the Navajo Nation on behalf of the Utah beneficiaries would be consistent with principles of sovereignty and self-determination. The Navajo Nation, through management of its own trust funds, has proved its fiduciary capabilities. The Controller of the

Navajo Nation is the general fiduciary of Navajo Nation funds, and trust funds should be invested consistent with the recommendations of the Investment Committee. A Trust Fund Administrator should be centrally located in San Juan County and trust fund administration should provide for local decision making in how funds are spent.

7. State of Utah Navajo Trust Fund Administrator Should Remain in Existence Until It Winds Up Its Affairs.

The UNTF Administrator has the legal authority under Utah law to continue to administer existing projects until January 1, 2010. The UNTF Administrator should continue to administer existing projects and programs to prevent any gaps in existing services until an interim administrator is designated or a new trustee has been selected.

8. Where Aneth Chapter Suffers Environmental Harms Disproportionate to Its Receipt of Trust Funds, Special Monies Should Be Allocated to Aneth Chapter to Mitigate Environmental Impacts and Develop Needed Infrastructure.

On the Aneth Extension, oil and gas development and production processes that generate royalties for the UNTF cause environmental and other negative impacts. The new terms of the trust should ensure that separate monies are specifically allocated to Aneth Chapter to mitigate the environmental impacts of oil and gas extraction on the Aneth Extension. Additionally, infrastructure needs at Aneth Chapter have not been adequately funded in the past. Future trust administration should provide sufficient funds to develop needed infrastructure at Aneth Chapter.

9. Trust Fund Monies Should Not Be Used in Off-Reservation Projects "Proportional" to the Benefit Received.

Under the 1968 amendments, UNTF monies were allowed to be used in off reservation projects if they were allegedly "proportional" to benefits enjoyed by beneficiaries. This provision has been one of the causes of mismanagement and waste of trust funds. Except for educational endowments, no trust funds shall be used outside Navajo Indian Country without at least 50% matching funds provided by other participating entities.

10. Funds from the Sale of Utah Navajo Trust Fund Administrative Offices Should be Designated Specifically For New Trust Fund Administration Facilities.

One of the goals of the Navajo Nation is to provide for centralized administration of Navajo Nation service providers in the Utah portion of the Navajo Reservation through a Regional Navajo Nation Office centrally located in Montezuma Creek. At present, Navajo Nation services are scattered and not as efficient as they could be in a centralized space.

The State of Utah generally limits its services to the county seat in Monticello. A Regional Navajo Nation Office should be a shared facility for the new UNTF Trust Administrator, Navajo

Nation service providers, and state programs. Along with Navajo Nation and state funds, UNTF should provide matching funds from the sale of the current UNTF administrative offices to help fund the construction of a Regional Office Facility. A Regional Office Facility would improve coordination of projects involving the UNTF Trust Administrator, Navajo Nation service providers, and state entities.

11. Full Accounting by State of Utah.

The State of Utah should provide a full and complete historical accounting of the Utah Navajo Trust Fund before a new trustee is designated. A full and complete historical accounting will specify *how* all UNTF funds were used by both state and non-governmental entities and not merely what entities received UNTF funds and in what amounts.

12. Settlement of Existing Lawsuits.

The State of Utah should use its best good faith efforts to settle the litigation in Pelt v. Utah before a new trustee is designated.

RED MESA CHAPTER
Red Mesa, Navajo Nation, Utah

Resolution RM- 10-16-2011

SUPPORT OF OPPOSING SENATE BILL 1327 AND RESPECTFULLY URGING HONORABLE UTAH SENATOR ORRIN HATCH TO WITHDRAW SPONSORSHIP OF S.B. 1327 DUE TO LACK OF CONSULTATION WITH THE UTAH NAVAJOS.

WHEREAS:

1. Pursuant to 2 N.N.C. § 4002, The Red Mesa Utah Chapter is a duly certified Utah Chapter of the Navajo Nation, whom has the power and authority to approve and rescind resolutions through its membership; and
2. Through the Established Plan of Operations, the Red Mesa Utah Chapter members delegate the authority to the elected Red Mesa Utah Chapter Officials to enact plans that are in the best interest of the community; and
3. The Elected Red Mesa Utah Chapter officials have the authority to act on behalf of its community to recommend, support, and approve community related projects; and
4. The Aneth Extension was added to the Navajo Reservation by the Act of March 1, 1933 and designated the State of Utah as trustee for the oil & gas royalties generated from the Aneth Extension; and
5. The State of Utah abruptly resigned as trustee of the Utah Navajo Trust Fund in 2008, and pursuant to House Concurrent Resolution 2, the 2008 Utah Legislature requested the 110th U.S. Congress to appoint a new trustee for the Utah Navajo Trust Fund; and
6. Senator Orrin Hatch introduced S.B. 1327 during the 1st session of the 112th Congress on July 5, 2011, proposing to amend the Act of March 1, 1933, and designating the Utah Dineh Corporation as the new trustee of the Utah Navajo Trust Fund and transfer of certain authority and resources; and
7. Proposed legislation was apparently read twice and referred to the Senate Committee on Indian Affairs without proper official consultation, meaningful participation, and support of the Utah Navajo Trust Fund beneficiaries; and
8. The long litigative history (e.g. Sakezzie v. Utah Indian Affairs Committee, Jim v. U.S., Bigman v. UNDC, & Pelt v. Utah) of the Utah Navajo Trust Fund require accountability and transparency in selecting and designating a new trustee and establishing fiduciary responsibilities; and
9. The Utah Dineh Corporation is a self-appointed entity of individuals falsely purporting to the representatives of the Utah Navajo Chapters and is not recognized, sanctioned, or supported by the Red Mesa Utah Chapter and or other Utah Navajo Chapters; and
10. The Red Mesa Utah Chapter finds it alarming and completely uncharacteristic for the elected Government officials of the State of Utah in proposing S.B. 1327, in particular, transfer to the Utah Dineh Corporation, all funds, assets, and real property held in trust by Utah for the benefit of the Utah Navajo beneficiaries, pursuant to the Act of March 1, 1933; and
11. The Utah Dineh Corporation (U.D.C.), is a new non profit organization established with unproven creditability, didn't present this Bill 1327 to all Utah Navajo Chapters, whom are the Utah Navajo Trust Fund beneficiaries, to get full understanding of what this Bill entails. Therefore, it resulted lack of local beneficiary support or authorization. The UDC has no financial management and experience in handling the million dollars of the Utah Navajo trust fund without due regard of Red Mesa Chapter's vote of confidence and reassurance. There are self appointed individuals whom were not elected to act or represent in behalf of Red Mesa Utah Chapter or its members are not supported and is unofficial; and
12. The Red Mesa Chapter requests the State of Utah to continue with the responsibilities and involvement of the Utah Navajo Trust Funds until proper and adequate entity is established and organized with full meaningful creditability, and

13. The determination of residency on the Utah Navajo Reservation should be defined and based on (1.) true ancestral descent (2) be a registered member of a Utah Reservation Navajo Chapter.
14. Utah Navajo Trust Fund Beneficiary or beneficiaries can and shall proceed with legal action for any probable cause against any appointed individual, an elected official, or any individual whom is involved with mismanagement if any and or said amount of Utah Navajo Trust Fund will face consequences of lawsuit; and
15. Grassroots people should also be eligible as a legal representative equivalent to elected officials for their respective Utah Navajo Chapters as they can voice their concern and opinions regarding the Utah Trust Fund.

NOW THEREFORE LET IT BE RESOLVED THAT:

1. The Red Mesa Chapter hereby supports and approves in support of opposing the Senate Bill 1327 and respectfully urging Honorable Utah Senator Orrin Hatch to withdraw sponsorship of S.B. 1327 due to lack of consultation with the majority of the Utah Navajos and the greater Utah Navajo Trust fund beneficiaries.

CERTIFICATION:

We hereby certify that the foregoing resolution was duly considered by the Red Mesa Chapter of the Northern Agency at a duly called meeting in Red Mesa, Navajo Nation, Utah, at which a quorum was present and that same passes by a vote of 27 in Favor, 00 Opposed, and 00 Abstained on this 16th day of October 2011.

Motioned by: Mr. Willford Jones Seconded by: Ms. Rosella Mustache

Herman Farley, President

Doris J. Yazzie, Vice-President

Marlene Dee-Ben, Secretary/Treasurer

Kenneth Maryboy, Council Delegate

Aneth Chapter
Aneth, (Navajo Nation) Utah

Council Delegate:
Kenneth Maryboy

Chapter Officers:
John Billie, President
Bill Todachennie, Vice-President
Brenda Brown, Secretary/Treasurer
Calvin Thomas, Grazing Committee

RESOLUTION OF THE ANETH CHAPTER

AC-SEPT-11-0194

OPPOSING SENATE BILL 1327 AND RESPECTFULLY URGING HONORABLE UTAH SENATOR ORRIN HATCH TO WITHDRAW SPONSORSHIP OF S.B 1327 DUE TO LACK OF CONSULTATION, NON-SUPPORT, ADAMANT OPPOSITION BY THE ANETH CHAPTER & GREATER UTAH NAVAJO TRUST FUND BENEFICIARIES

WHEREAS:

1. Pursuant to 2 N.N.C. § 4002, The Aneth Chapter is a duly certified Chapter of the Navajo Nation who has the power and authority to approve and rescind resolutions through its membership; and

2. Through the Established Plan of Operations, the Aneth Chapter delegates the authority to the elected Chapter Officers to enact plans that are in the best interest of the community; and

3. The Aneth Chapter has the authority to act on behalf of its community to recommend, support, and approve community related projects; and

4. The Aneth Extension was added to the Navajo Reservation by the Act of March 1, 1933 and designated the State of Utah as trustee for the oil & gas royalties generated from the Aneth Extension; and

5. The State of Utah abruptly resigned as trustee of the Utah Navajo Trust in 2008, and pursuant to House Concurrent Resolution 2, the 2008 Utah Legislature requested the 110th U.S Congress to appoint a new trustee for the Utah Navajo Trust Fund; and

6. Senator Orrin Hatch introduced S.B 1327 during the 1st session of the 112th Congress on July 5, 2011, proposing to amend the Act of March 1, 1933, and designating the Utah Dineh Corporation as the new trustee of the Utah Navajo Trust Fund and transfer of certain authority and resources; and

7. Proposed legislation was apparently read twice and referred to the Senate Committee on Indian Affairs without proper official consultation, meaningful participation, and support of the Utah Navajo Trust Fund beneficiaries; and

8. The long litigative history (e.g. Sakezzie v. Utah Indian Affairs Commission, Jim v. U.S., Bingaman v. UNDC, & Pelt v. Utah) of the Utah Navajo Trust Fund require accountability and transparency in selecting and designating a new trustee and establishing fiduciary responsibilities; and

9. By resolution no. AC-JUN-11-0168, dated June 9, 2011 (attached hereto as Exhibit "A"), the Aneth Chapter requested direct, active, and meaningful participation in developing the future of the Utah Navajo Trust Fund, including designation of a new trustee, management structure, development of policies & procedures, articles of incorporation have not been shared with beneficiaries (no public hearing) and governmental oversight legislation; and

10. The Utah Dineh Corporation is a self-appointed entity of the individuals falsely purporting to the representatives of the Utah Navajo Chapters, and is not recognized, sanctioned, or supported by the Aneth Chapter; and

11. The Aneth Chapter find it alarming and completely uncharacteristic for the State of Utah leadership in proposing S.B 1327, in particular, transfer to the Utah Dineh Corporation, all funds, assets, and real property held in trust by Utah for the benefit of the Utah Navajo beneficiaries, pursuant to the Act of March 1, 1933; and

12. The Utah Dineh Corporation is an upstart, unproven entity, without local beneficiary support or authorization, without necessary trust fund management experience, without adequate separate assets relative to breach of trust, without Aneth Chapter's vote of confidence and reassurances.

NOW THEREFORE BE IT RESOLVED THAT;

1. The Aneth Chapter hereby opposes Senate Bill 1327 and is respectfully urging Honorable Senator Orrin Hatch to withdraw sponsorship of S.B 1327 due to lack of consultation, non-support, adamant opposition by the Aneth Chapter & Greater Utah Navajo Trust Fund beneficiaries.

2. The Aneth Chapter hereby request the Utah Congressional delegation (including Sen. Orrin Hatch, Sen. Mike Lee, and Rep. Jim Matheson) to recognize, respect, and honor the official position of the Aneth Chapter and to expedite responsive Congressional action in designating a new trustee.

3. The Aneth Chapter hereby request Governor Gary R. Herbert, Utah Legislative leaders, Rep. Christine Watkins, and Sen. David Hinkins to recognize that the State of Utah has not been officially relieved of its fiduciary responsibility by the U.S Congress and to advocate accordingly, in securing the best possible trust fund management arrangement for the Utah Navajo Trust Fund beneficiaries.

4. The Aneth Chapter hereby request the San Juan county Commission to address the conflict of interest lobbying and involvement of Commissioner Kenneth Maryboy, Commissioner Bruce Adams, Commissioner Phil Lyman, and San Juan County Administrator Rick Bailey, and to

immediately discontinue inappropriate expenditure of public funds on unauthorized trust fund lobbying by the Tomhave Group.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Aneth Chapter Membership at a duly called meeting at which a quorum was present and that the same was passed by a vote of 27 in favor, 0 opposed, and 6 abstained this 25th day of September 2011.

Motioned by: Harrison Johnson

Seconded by: Ben Chee Nakai

John Billie, President

Bill Todachenie, Vice-President

Brenda Brown, Secretary/Treasurer

Kenneth Maryboy, Council Delegate

"EXHIBIT A"

Aneth Chapter
Aneth, (Navajo Nation) Utah

Council Delegate:
Kenneth Maryboy

Chapter Officers:
John Bike, President
Bill Toduchennie, Vice-President
Brenda Brown, Secretary/Treasurer
Calvin Thomas, Grazing Committee

RESOLUTION OF
THE ANETH CHAPTER

AC-JUN-11-0168

ANETH CHAPTER HEREBY REQUEST UTAH CONGRESSIONAL DELEGATION INCLUDING HONORABLE SENTOR ORRIN HATCH, AND HONORABLE SENATOR MIKE LEE TO GIVE AN UPDATE STATUS REPORT OF THE UTAH NAVAJO TRUST FUND TO ANETH CHAPTER COMMUNITY

WHEREAS:

1. Pursuant to 2 NTC Section 4002, The Aneth Chapter is a duly certified chapter of the Navajo Nation who has the power and authority to approve and rescind resolutions enacted thru its membership; and

2. Through the Established Plan of Operations, The Aneth Chapter delegates the authority to the Elected Chapter Officers to enact plans that are in the best interest of the community; and

3. The Aneth Chapter has the authority to act on behalf of its community to recommend, support, and approve community related projects; and

4. The Aneth Extension was added to the Navajo Reservation by the Act of March 1, 1933, and designated the state of Utah as trustee for the oil and gas royalties generated from the Aneth Extension; and

5. The State of Utah abruptly resigned as trustee of the Utah Navajo Trust in 2008, and pursuant to House concurrent Resolution 4, the 2008 Utah Legislature requested the 110th U.S. Congress to appoint a new trustee for the Utah Navajo Trust Fund; and

6. Despite resignation in 2008, the U.S. Congress has not officially released the State of Utah from its fiduciary responsibilities and duties regarding management of the Utah Navajo Trust Fund; and

7. The Aneth Chapter community would like to know the status of the Utah Navajo Trust Fund and is requesting to have the opportunity to review and recommend amendments of the latest Legislative Bill prior to its introduction on the Senate floor; and

8. The Aneth Chapter is seeking direct, active, and meaningful participation in developing the future of the Utah Navajo Trust Fund including designation of new trustee, management structure, development of policies and procedures, and governmental oversight legislation; and

9. The Aneth Chapter want control and management of the Utah Navajo Trust Fund to remain in Utah including administrative headquarter in Aneth or Montezuma Creek, chapter-elected board of directors, remediation of environmental destruction within Aneth Extension, and legislative limitation regarding Navajo Nation involvement; and

10. The Aneth Chapter is disappointed and extremely frustrated with the lack of progress in designating a new trustee for the Utah Navajo Trust Fund and is urging the Utah Congressional Delegation to immediately meet with the Aneth Chapter to develop legislation designating a new trustee for enactment by the 112th Congress; and

11. The Aneth Chapter membership and its community who are beneficiaries are highly dependent on the trust fund for many chapter and community projects: like power line projects, student financial assistants and housing projects; and

12. The Aneth Chapter accepts and approves this request, which was presented before the Aneth Chapter Membership in which a legal quorum was present.

NOW THEREFORE BE IT RESOLVED THAT;

1. The Aneth Chapter hereby requests Honorable Senator Orrin Hatch and Honorable Senator Mike Lee to meet with the Aneth Chapter community at Aneth, Utah to give verbal and written status report of the Utah Navajo Trust Fund and to discuss Congressional action necessary to designate a new trustee.

2. The Aneth Chapter community is requesting to have the opportunity to review and recommend amendments of the latest Legislative Bill prior to its introduction on the Senate floor.

3. The Aneth Chapter hereby request direct, active, and meaningful participation in developing the future of the Utah Navajo Trust Fund including designation of new trustee, management structure, development of policies & procedures, governmental oversight legislation.

ANETH CHAPTER HEREBY REQUEST UTAH CONGRESSIONAL DELEGATION INCLUDING HONORABLE SENTOR ORRIN HATCH AND HONORABLE SENATOR MIKE LEE TO GIVE AN UPDATE STATUS REPORT OF THE UTAH NAVAJO TRUST FUND TO THE ANETH CHAPTER COMMUNITY

CERTIFICATION

We hereby certify that this forgoing resolution was duly considered by the Aneth Chapter Membership at a duly called meeting at which a quorum was present and that an approval was passed with a vote of 27 In Favor, 0 Opposed And 2 Abstained this 09th Day, the Month of June, in the year 2011.

Motioned by: Ms. Susie Philemon
Seconded by: Mr. Robert Whitehorse

John Billie, Aneth Chapter President

Bill Todachenie, Aneth Chapter Vice-President

Brenda Brown, Aneth Chapter Secretary/Treasurer

Kenneth Maryboy, Council Delegate

The CHAIRMAN. Thank you very much, Vice President Jim, for your testimony.

Commissioner Maryboy, please proceed.

STATEMENT OF HON. KENNETH MARYBOY, SAN JUAN COUNTY COMMISSIONER

Mr. MARYBOY. Greetings, good afternoon, aloha, Mr. Akaka. Happy birthday, Chairman, a little bit late.

Senators Cantwell, Udall, good afternoon.

My name is Kenneth Maryboy. It is an honor to come before you the second time. I am on the Navajo Nation Counsel. This is going to be my fourth and last term on the Navajo Nation Council and I am one of the lucky 24 to go back on the Navajo Nation Council. I am in a second term as a San Juan County Commissioner for the San Juan County, Utah.

I represent 10,500 Navajos in the State of Utah, and of course, 300,000 Navajo Nation in Arizona, New Mexico and Utah, as well as the Chairman of the five Tribes in Utah, which is the Paiute, Shoshone, Goshu, Ute, and the Navajo.

So with that, it is truly and honor to be able to address you this afternoon regarding the Senate bill 1327. This Committee is important to the Dineh. We are grateful for your insight, of your willing-

ness to listen to the people. We are specifically grateful for the opportunity to shed light on some of the questions surrounding the Utah Dineh Corporation.

The beneficiary of Utah Trust Fund, the certain state of trust, and various functions have an interest in the outcome of this process. In 1933, the United States Congress signed into law an Act which created the Utah Navajo Trust Fund. The Act added the section of Federal land known as an Aneth Extension to the existing Navajo Reservation.

In regard to the 1933 final Act, the United States District Court explained in order to compensate the State for the resulting loss of tax revenues and the increase in the need for the government services to the Act to provide internal ally, that the 37.5 percent of the net royalty of oil and gas production within extension would be paid to the State of Utah provided by the 37.5 percentile.

Of said royalties shall be expanded to the State of Utah in the tuition of Indian children in school and white schools and other building maintenance, roads across the reservation in lands described section and hereafter of all the benefits of Indians residing there, 47 State, 14, 18, 19, 33.

This was an argument of the State of Utah to benefit the Indians living in the Aneth Extension. In 1968, an amendment expanded beneficiary, including the Navajos living in San Juan County, Utah. The Navajo Nation wasn't overlooked in 1933 Act. In 1968 amendment, they were given 62.5 percent of the royalties from those trust fund wells of many other wells located in the Utah portion of the Navajo Reservation.

The Tribe received 100 percent of the royalty in addition to the agreement was amazed at the royalty paid to the Utah would be based on the fixed price at $45 per barrel. This means that when the oil and the selling at $90, that the trust fund received the equivalence of royalties of only 18.75 percent. And the Tribe received 8l.25 percent.

It is not my purpose today to argue whether these past agreements are fair or equitable. They are the laws and we are bounded by laws and the State of Utah has asked Congress to relieve them of their duties over the trust funds. Normally in such cases, if the beneficiary or legal ages, they would be required to select a new trustee.

It is true that we are citizens of the Navajo Nation. We are proud to be the citizens. We are also citizens of the State of Utah. We are also citizens of the San Juan County, Utah. It is our citizenship of San Juan County.

So with this, I submitted my testimony and I stand to answer questions from the Committee.

[The prepared statement of Mr. Maryboy follows:]

PREPARED STATEMENT OF HON. KENNETH MARYBOY, SAN JUAN COUNTY COMMISSIONER

Honorable Chairman Akaka, Vice Chair Barrasso, Members of the Committee, Senator Hatch,

My name is Kenneth Maryboy. I am a Navajo Nation Delegate, and a County Commissioner for San Juan County, Utah:

This is truly an honor to be able to address you in this morning in regard to Senate Bill 1327. This Committee is important to the Dineh. We are grateful for your

insight and for your willingness to listen to the people. We are especially grateful for the opportunity to shed light on some of the questions surrounding Utah Dineh Corporation, the beneficiaries of the "Utah Navajo Trust Fund," the current state of the trust fund, and the various factions who have an interest in the outcome of this process.

In 1933, the Unites States Congress signed into law the Act which created the Utah Navajo Trust Fund.

That Act added a section of federal land, known as the Aneth extension, to the existing Navajo Reservation.

In regard to the 1933 final Act, the United States District Court explained:

> In order to compensate the State for the resulting loss of tax revenues and increased need for governmental services, the Act provided, inter alia, that 37½ percent of net royalties from oil and gas production within the Extension were to be paid to the State of Utah: "provided that the 37½ percentum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building of maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein." 47 Stat. 1418 (1933).

This was an agreement with the State of Utah for the benefit of the "Indians" living on the Aneth Extension.

The 1968 amendment expanded the beneficiaries to include Navajos living in San Juan County, Utah.

The Navajo Nation was not overlooked in the 1933 Act or in the 1968 amendment; they were given 62½ percent of the royalties from those "Trust Fund" wells. Of the many other wells located on the Utah portion of the Navajo Reservation, the Tribe receives 100 percent of the royalties. In addition, an agreement was made that the royalties paid to Utah would be based on a fixed price of $45 per barrel. This means that when oil is selling for $90, that the Trust Fund receives an equivalent royalty of only 18¾ percent and the Tribe receives 81¼ percent.

It is not my purpose today argue whether these past agreements are fair or equitable. They are the law, and we are bound by the law. The State of Utah has asked Congress to relieve them of their duty as the trustee over the Trust Fund. Normally, in such a case, if the beneficiaries are of legal age they would be required to select a new trustee.

It is true that we are citizens of the Navajo Nation. We are proud to be citizens. We are also Citizens of the State of Utah. We are also Citizens of San Juan County, Utah. It is our citizenship in San Juan County along with our Race, which qualifies us as beneficiaries of the Utah Navajo Trust Fund.

There is some disagreement among Utah Navajos about who should be a beneficiary, or who should be the Trustee. Fortunately we have political sub-units which help to determine the "mind" of the people. Our Chapter governments have had their say in the formation of the Utah Dineh Corporation. They have had their say in the appointment of board members. And they will have their say in the reorganization of the board once the Corporation is charged with the responsibilities of Trustee.

We cannot expect a consensus on such a matter any more than Congress would expect a consensus on the matters on which they vote. But we do have the ability to hear all concerns and to put the matter to a vote. We have resolutions from all but the Aneth Chapter in favor of appointing Utah Dineh Corporation as trustee. There is more of a division on this matter in Aneth because they were named as beneficiaries in the 1933 act, and many there believe that the 1968 amendment was a mistake. I acknowledge their concern. I share their frustration. But the 1968 amendment was made for a wise purpose. Over time as the population has shifted from one place to another; as generation has come and gone, to isolate the beneficiaries to a small geographic area like the Aneth extension would cause many more problems than it would ever solve.

Utah Dineh Corporation

In July 2010, this same issue was heard by the Natural Resources Committee. At the time Mr. Ross O Swimmer suggested two possible options for the beneficiaries; to allow the Navajo Nation to step in as Trustee, or have the Utah Navajos form a private non-profit organization to manage the trust. This was the genesis of the Utah Dineh Corporation. Other existing non-profits were also considered, but it was determined that if this was going to be done right, the new beneficiary should be a new entity with no prior history. A fresh new company has been formed. It is fully at the mercy of the Utah Chapters. Until it is named as the trustee, it will remain a dormant shell. The board that is in place was put there by the chapters.

Or, in the case of the Aneth Chapter, by a volunteer until an appointment became necessary.

Currently Utah Dineh does not even have a checking account. It never has had a checking account. There is not possibility of mismanagement, because it has not been activated other than as a shell corporation formed in the State of Utah. It has articles of incorporation, and bylaws. Its current board members serve with not promise of compensation. Travel expenses are born by the individual board members, or by a sponsor.

I am confident that Utah Dineh Corporation can take full advantage of the current management of the Utah Navajo Trust Fund Holding Account. We also have the promise of support from the State of Utah, including the people who were involved with the previous administration of the fund. We have the support of several key people with the Navajo Nation and hope that once this matter is decided in favor of Utah Dineh Corporation that we will have the full support and cooperation of the Navajo Nation as well.

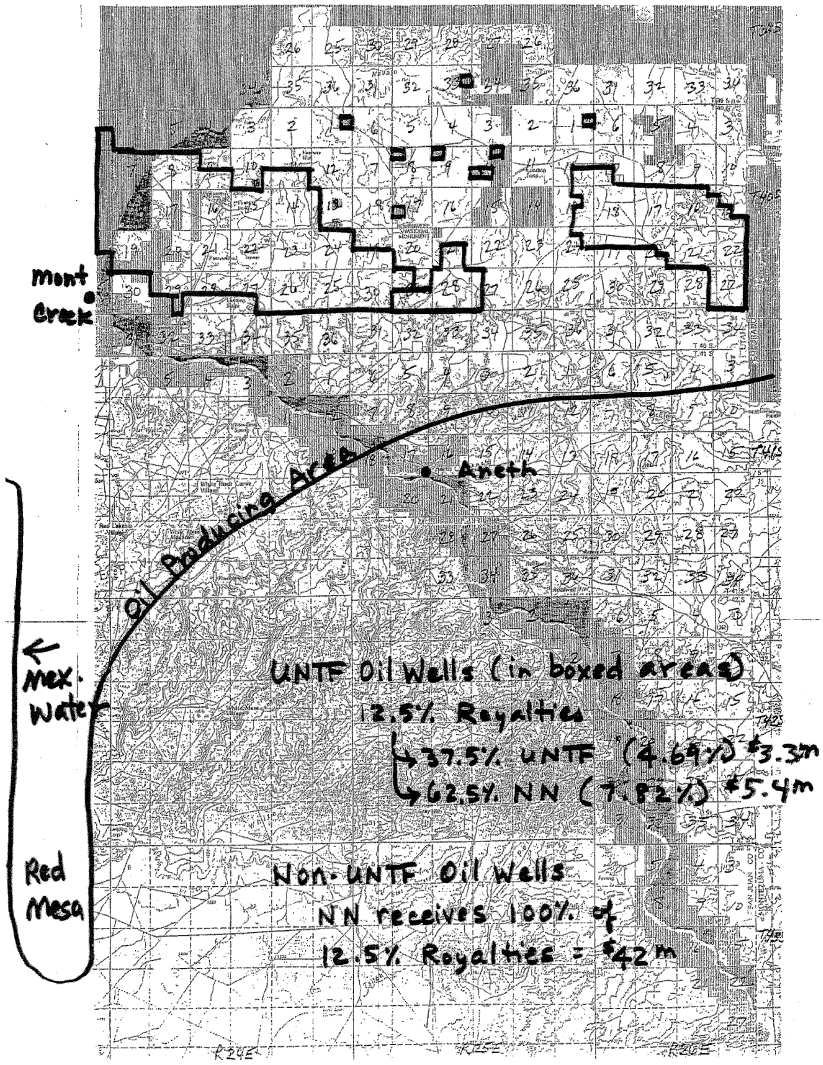
Naturally a transition from the current Trust Fund Holding Account to a new trustee will not happen in an instant. We anticipate an orderly transition.

In the future, we expect that the Trust Fund will provide opportunities for matching funds from Utah's Community Impact Board; from federal program grants such as education, housing, etc; from State and Federal highway funds; from the Navajo Nation for programs that they would like to see offered to members of the tribe in Utah.

With the "Holding Account" simply accumulating money, the people are suffering from lack of services. There is much good that needs to be done, but for the past three years, there has not been an entity authorized by Congress to act. This cannot continue. The people have spoken as a majority. Utah Dineh Corporation is well structured and still in its original wrapper waiting to be used. All we lack is the nod from this Committee.

The Navajo Nation, if they were the trustee would have a distinct advantage of sovereign immunity. It would be nice to lay aside any concerns about potential future law suits. While this is of great benefit to the trustee, it is not of benefit to the beneficiaries who should have legal recourse to ensure accountability of the trustee. Utah Dineh Corporation is not immune from full accountability. Charging them with the fiduciary role of trustee is the correct course for this Committee.

Thank you.



The CHAIRMAN. Thank you very much, Commissioner Maryboy, for your testimony.

Chairman Abrahamson, will you please proceed with your testimony?

STATEMENT OF HON. GREG ABRAHAMSON, CHAIRMAN, SPOKANE TRIBAL COUNCIL

Mr. ABRAHAMSON. Thank you, Chairman Akaka, Senator Cantwell and other Members of the Committee. My name is Gregory J. Abrahamson. I am Chairman for the Spokane Tribe of Indians. I appear before the Senate Committee on Indian Affairs to testify on S. 1345. With me today are Tribal Council Members Michael Spen-

cer, Rudie Peone, David C. Wynecoop, Jr., and Rodney W. Abrahamson.

I would also like to thank Senator Murray and Senator Cantwell for their support on this legislation.

We are here today as a full Tribal Council with the authority from the general membership to act on behalf of the Tribe to finally resolve this matter. We are shocked and dismayed with the statement submitted by DOI and are frankly blindsided by their position, particularly because we had reached agreement with the Bureau of Reclamation and the Bonneville Power Administration and understood that DOI supported S. 1345.

Apparently, the Department has once again failed its trust responsibility to the Tribe. We came here today on behalf of the Spokane Tribe to finally conclude our efforts to work with the Untied States to recognize and fulfill its trust responsibility to keep the promises of the United States to the Tribe, finally treat the Spokane Tribe fairly and honorably, recognize the contributions the Spokane Tribe continues to make for the benefit of our Nation, compensate the Tribe for the use of its land and injuries caused by the construction and operation of Grand Coulee Dam.

I came here today to summarize the written statement for the record submitted by the Tribe and the critical need for this important legislation. Unfortunately, I feel compelled to recount the history one more time of the false promises that underscore the DOI's lack of good faith to resolve this matter.

Spokane Tribe has struggled to protect our reservation since agreement with the United States in 1877. This settlement must be viewed with historic context for over more than 130 years. We therefore have submitted a detailed statement.

The Spokane Reservation is located in Eastern Washington at the confluence of the Spokane and Columbia Rivers. These two rivers are expressly and legally part of our reservation and remain in Tribal ownership today. Our life, culture, economy, and religion center around the rivers. We are river people. We were fishing people. We depended heavily on the rivers and the historic salmon runs they brought to us. We were known by our neighbor Tribes as salmon eaters.

The Spokane River, which is named after our people, was and is the center of our world. We call it the path of life. Our best lands and fishing sites are at the bottom of Lake Roosevelt. Our salmon runs have been destroyed. The history of the last 70 years have led to the systematic destruction of the Spokane Indian people's culture and way of life.

We continue to survive, but the time has come for the United States to recognize the profound effect the construction of Grand Coulee Dam has had on us. The Spokane Tribe has suffered enormous and catastrophic losses due to the project. In short, the construction of Grand Coulee Dam project was deadly for the members of the Spokane Tribe. We lost our salmon runs, which devastated our culture and our lives. Over 3,000 acres of land, Tribal communities, schools, roads, orchards, farms were flooded. Burial sites were flooded. Access across river was blocked. The historic trade and commerce was lost and forced physical relocation of households.

And those impacts continue today. Grand Coulee is operated for many purposes, power, irrigation, salmon flows, and flood control. Lake Roosevelt fluctuates seven feet or more every year. These operations flush our fish, disrupt our enterprises, erode our lands, impair recreation, affect water quality, among other things.

The Grand Coulee project, more than any other economic asset available to Washington State or the Pacific Northwest, has provided extraordinary levels of benefits, not just for the Northwest, but for the entire Nation.

The Spokane Tribe and its members lost a lot to Grand Coulee. The inability of the Spokane Tribe to receive just compensation for the seizure of our lands has severely impacted the ability of the Tribal government to provide for the basic needs of our members. The extreme disparity between the losses suffered by the Spokane people and the contrast to the enormous benefits Grand Coulee provides to the Nation and the Northwest is inconceivable and continues to reflect an extremely sad chapter in America's history.

There is simply no way the United States can ever make up for the damage caused. The United States repeatedly promised to compensate both the Spokane and the Colville Tribes for the use of their Tribal lands. These promises became the basis of U.S. settlement with the Colville Tribe. Only one Tribe has been compensated.

Some Federal agencies have said we did not file Coulee claims within the 1951 deadline. Neither did the Colvilles. They were allowed to amend their original claim in 1975 to add Coulee hydropower claims, but neither Tribe had a legal claim. Both Tribes have a moral, equitable claim, yet only Colville Tribe is compensated.

Technical defenses by the Federal agencies are not fair, honorable or just. Congress recognized that the legislation is the fair and honorable thing to do. The settlement was approved by the Senate in the 108th Congress, by the House in the 109th Congress. Over the years, the Tribe has amended the legislation to address many concerns and has done so once again.

Despite numerous concessions by the Tribe in this effort to resolve this issue, the efforts of key legislators such as Senators Cantwell, Murray, Inouye and others, and agreement with BPA and BOR, the United States has simply failed to fulfill its trust responsibilities to the Tribe.

In 1994, Congress approved a settlement with the Colville Tribe. The Spokane settlement is based on the Colville Settlement. The Spokane Tribe lost 39 percent of its land in proportion to the Colvilles. The payments to the Spokane in the bill before the 106th Congress was set at 39 percent of the Colvilles.

In the 108th Congress, at the request of Members of Congress, the Spokane Tribe was reduced from 39 percent to 29 percent of the Colvilles for return of lands taken by the reclamation of the project, including an enlarged Spokane River outside reservation boundaries known as the far or the south bank of the river.

In the 108th Congress, the Senate passed a bill directing the return of these lands. In the 109th Congress, the House passed a bill directing return of these lands. In the 110th Congress, return of the south bank of the river to the Tribe was removed from the bill. The bill still called for return of the lands within the reservation

taken for the project that included portions of the river within the reservation.

Now to satisfy the Bureau of Reclamation concerns regarding erosion and landslides, no lands are to be returned to the Tribe, in exchange for the confirmation and delegation of authority by the Department of Interior set forth in the 1990 Lake Roosevelt Cooperative Management Agreement with respect to the land within the boundaries of Spokane Indian Reservation.

So now we do not get our land back, yet our payment is 29 percent, not 39 percent of the Colvilles.

Section 9 provides for the protection of the Bureau of Reclamation and project operations. Section 9 leaves intact the authority of the National Park Service over the lands taken from the Tribe. The Spokane and Colville Tribes have agreed to a disclaimer regarding reservation boundaries in section 9 that remain from earlier versions of the bill.

We were promised our reservation and our rivers in 1877. Our rivers have been flooded. We have endured enormous impacts to our lands, culture, and way of life. The United States promised to compensate us, but continues to changes it position and creates more obstacles in an effort to avoid reaching an agreement.

The Colvilles have been compensated for the same wrongs we have suffered. The time has come to treat us equally. We deserve fair and honorable treatment by our trustees in the region and this Country for the use of our lands that are used to generate such enormous benefit at our expense.

I thank you for this opportunity and am open to any questions.

Thank you.

[The prepared statement of Mr. Abrahamson follows:]

PREPARED STATEMENT OF HON. GREG ABRAHAMSON, CHAIRMAN, SPOKANE TRIBAL COUNCIL

S. 1345 THE SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION GRAND COULEE DAM EQUITABLE COMPENSATION SETTLEMENT ACT

October 20, 2011

Thank you Mr. Chairman and members of the Committee. My name is Gregory J. Abrahamson. I am the Chairman of the Spokane Tribe of Indians. I very much appreciate the opportunity to appear before the Senate Committee on Indian Affairs to testify on S. 1345. Accompanying me are Michael Spencer, Vice Chairman of the Tribe, and Bruce Didesch, our attorney. They are available for questions.

SUMMARY

I am here today on behalf of the Spokane Tribe to ask for your help as representatives of the United States of America. I ask that you act on behalf of the United States to finally treat the Spokane Tribe fairly and honorably for the use of our lands for the production of hydropower and for injury to our Tribe and Reservation caused by the Grand Coulee Project. My testimony today summarizes my written statement for the record and the critical need for this important legislation. The Spokane Tribe has been struggling to protect our Reservation since an agreement with the United States in 1877. To understand this settlement it must be viewed in an historic context. As is fitting and proper for that struggle spanning over one hundred and thirty (130) years, we have submitted a lengthy and detailed statement herein.

Grand Coulee's waters flooded the lands of two adjoining Indian reservations that held great economic, cultural and spiritual significance for the people residing thereon. Ours is one of those reservations. The other is the Colville Tribes Reservation.

Our life, culture, economy and religion centered around the rivers. We were river people. We were fishing people. We depended heavily on the rivers and the historic salmon runs they brought to us. We were known by our neighboring tribes as the Salmon Eaters. The Spokane River which was named after our people was and continues to be the center of our world. We know it as the Path of Life. President Rutherford B. Hayes in 1881 recognized the importance and significance of the rivers by expressly including the entire adjacent riverbeds of the Spokane and Columbia Rivers

within our Reservation. But the Spokane and Columbia Rivers are now beneath Grand Coulee's waters. Today our best lands and fishing sites lie at the bottom of Lake Roosevelt.

The proposed Legislation is designed to end a lengthy chapter in American history, in which the United States and American citizens reaped tremendous rewards at the expense of the Spokane Tribe and the Confederated Tribes of the Colville Reservation. The severe devastation wrought upon both tribes was unprecedented. And though the affected land areas held by the Spokane Tribe were roughly only 40% of that held by the Colville Tribes, a portion of the Colville's salmon fishery continues to reach their Reservation, while the Spokane's fishery was lost entirely. Additionally, the Spokanes lost forever a prime site on the Spokane River that it could have developed for hydropower. Ultimately, both Tribes suffered severely. We continue to be greatly impacted by the operation of Grand Coulee Dam each and every year.

Prior to its construction, during its operation and with the completion of the Third Powerplant in 1974, the United States acknowledged and supported its responsibility to fairly and honorably address the losses to be suffered by the Spokane Tribe as well as the Colville Tribes related to Grand Coulee. The Colvilles secured a settlement with the United States in 1994, while the Spokane claims are still unresolved. The United States has all but ignored its trust obligation to the Spokane Tribe. This legislation represents a final settlement of the Spokane Tribe's claims and fulfills the United States obligation to the Tribe as compensation for the use of our lands for the production of hydropower and the disproportionate impact the Spokane Tribe has had to bear from the Grand Coulee Project. The following statement describes and underscores the need for the United States to finally treat the Spokane people fairly and honorably in resolving this matter.

HISTORICAL CONTEXT

From time immemorial, the Spokane River has been at the heart of the Spokane territory.

In 1877, an agreement was negotiated between the United States and the Spokane to reserve for the Tribe a portion of its aboriginal lands approximating the boundaries of the present Spokane Indian Reservation.

On January 18, 1881, President Rutherford B. Hayes issued an Executive Order confirming the Agreement, and with exacting language, expressly included the Spokane and Columbia Rivers within the Spokane Indian Reservation

Section 10(e) of the Federal Power Act (16 U.S.C. 803(e)) requires that when licenses are issued for a hydropower project involving tribal land within an Indian reservation, a reasonable annual charge shall be fixed for the use of the land, subject to the approval of the Indian tribe having jurisdiction over the land. Had a state or a private entity developed the site as originally contemplated, the Spokane Tribe would have been entitled to a reasonable annual charge for the use of its land. The Federal Government is not subject to licensing under the Federal Power Act.

Numerous statements made by federal officials acknowledged the need for the Spokane Tribe to receive fair compensation for the use of its land and water. In one example, William Zimmerman, Assistant Commissioner of Indian Affairs, wrote:

> *"the matter of protecting these valuable Indian rights will receive active attention in connection with applications filed by the interested parties before the Federal Power Commission for the power development."* Letter from William Zimmerman to Harvey Meyer, Colville Agency Superintendent, dated September 5, 1933.

A letter approved by Secretary Ickes, from Assistant Commissioner Zimmerman to Dr. Elwood Mead, Commissioner of Reclamation, stated in connection with the "rights of the Spokane Indians," that the Grand Coulee project, as proposed:

> *"shows the cost of installed horsepower to be reasonable and one that could bear a reasonable annual rental in addition thereto for the Indians' land and water rights involved."* Letter from William Zimmerman to Elwood Mead, dated Dec. 5, 1933.

The United States Department of Justice has recognized these promises as an undertaking of a federal obligation, which promises were made to both the Colville and Spokane Tribes.

> *"The government began building the dam in the mid-1930's. A letter dated December 3, 1933, to the Supervising Engineer regarding the Grand Coulee and the power interests of the Tribes, with the approval signature of Secretary of the Interior Ickes states:*
>
> *This report should take into consideration the most valuable purpose to which the Indians' interests could be placed, including the development of hydro-electric power.*
>
> *We cannot too strongly impress upon you the importance of this matter to the Indians and therefore to request that it be given careful and prompt attention so as to avoid any unnecessary delay.*
>
> *Also, a letter dated December 5, 1933, to the Commissioner of the Bureau of Reclamation and endorsed by Interior Secretary Ickes, stated that 'it is necessary to secure additional data before we can advise you what would constitute a reasonable revenue to the Indians for the use of their lands within the [Grand Coulee] power and reservoir site areas.' And a letter dated June 4, 1935 from the Commissioner of the Bureau of Reclamation requested that additional data be secured to determine 'a reasonable revenue to the Indians for the use of their lands within the power and reservoir site areas.'"*
>
> Statement of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice (Joint Hearing on S.2259 before the Subcomm. on

Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994, at 16).

As stated in the testimony of the Assistant Secretary for Indian Affairs, concerning the 1994 Colville Settlement legislation, approved in P.L. 103-436: "Over the next several years the Federal Government moved ahead with the construction of the Grand Coulee Dam, but somehow the promise that the Tribe would share in the benefits produced by it was not fulfilled."

Pursuant to the Act of June 29, 1940 (16 U.S.C. 835d et seq.), the Secretary paid to the Spokane Tribe $4,700. That is the total compensation paid by the United States to the Spokane Tribe for the use of our tribal lands for the past seventy-five years.

When the waters behind the Grand Coulee Dam began to rise, the Spokane people were among the most isolated Indian tribes in the country. The Tribe's complete reliance on the Spokane and Columbia River system had remained largely intact since contact with non-Indians. That, however, would be completely and irreversibly changed forever. The backwater of the dam, Lake Roosevelt, floods significant areas of the Tribe's Reservation, including the Columbia and Spokane boundary rivers within the Reservation. A 1980 Task Force Report to Congress explains the historical context of the Tribe in relation to the Grand Coulee Dam.

> *"The project was first authorized by the Rivers and Harbors Act of 1935 (49 Stat. 1028, 1039). In spite of the fact that the Act authorized the project for the purpose, among others, of 'reclamation of public lands and Indian reservations . . . .,' no hydroelectric or reclamation benefits flow to the Indians. Hardly any were employed at the project site. Indeed, the Tribes have presented evidence that even unskilled workers were recruited from non-Indian towns far away. The irrigation benefits of the project all flowed south.....*
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> *Furthermore, the 1935 enactment made no provision for the compensation of the [Spokane and Colville] Tribes. It was not until the Act of June 29, 1940 (54 Stat. 703) – seven years after construction had begun – that Congress authorized the taking of any Colville and Spokane lands . . . . Section 2 [of that Act] required the Secretary to determine the amount to be paid to the Indians as just and equitable compensation. Pursuant to this authorization the Secretary condemned thousands of acres of Indian lands, primarily for purposes of inundation by the planned reservoir.*
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> *Apart from the compensation for those lands, which the Tribes claim was inadequate, no further benefits or compensation were paid to the Indians. Nothing was provided for relocation of those Indians living on the condemned lands; and tribal lands on the bed of the original Columbia River were not condemned at all. Worst of all, Grand Coulee Dam destroyed the salmon fishery from which the Tribes had sustained themselves for centuries. The salmon run played a central role in the social, religious and cultural lives of the Tribes. The great majority of the population of the Tribes lived near the Columbia and its tributaries, and many were driven from their homes when the area was flooded. While Interior Department*

officials were aware that the fishery would be destroyed, the technology of the time did not permit construction of a fish ladder of sufficient height to allow the salmon to bypass towering Grand Coulee Dam.

The project also resulted in the influx of thousands of non-Indian workers into the area. Prior to contemplation of the project very few non-Indians lived in the region. Indeed, anthropologist Verne F. Ray, who began his field studies in 1928, reports that there were no more than a handful of white families in the vicinity of the future site of the Grand Coulee Dam, and that in 1930 the Colville and Spokane were among the most isolated Indian groups in the United States. Their aboriginal culture and economy were largely intact up to that time, little reliance having been placed on white trading posts. The subsistence economy of the Indians had continued to focus on the salmon.

Another principal aboriginal pursuit of the Colville and Spokane Indians involved the gathering of roots and berries on lands south of the rivers. That activity was largely curtailed after the construction of the project because of the influx of non-Indians on to those southern lands and because the river was widened to such an extent that crossing it became very difficult. Before the reservoir there were many places where the river could be forded. Similarly, hunting south of the river was also curtailed. Thus, the Grand Coulee project had a devastating effect on their economy and their culture." Final Report, Colville/Spokane Task Force, Directed by the Senate Committee on Appropriations in its 1976 Report on the Water and Power Public Works Appropriations Bill, S.Rep.94-505. (September, 1980).

The salmon runs were entirely and forever lost to the upstream Spokane Tribe. Furthermore, there existed on the Spokane River – within the Spokane Reservation – two prime dam sites the Spokane Tribe could have used for generating hydro electric power. Like the Spokanes' salmon runs, these sites were lost forever to Grand Coulee.

In the 1940 Act, Congress also directed the Secretary of the Interior to "set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife." 16 U.S.C. § 835(d).

In an extraordinary move, the Tribe in December, 1941, sent a delegation cross-country to meet on the issues with Commissioner John Collier. Unfortunately, the meeting took place on December 10 — just three days following the bombing of Pearl Harbor. The Commissioner and his representatives committed to the Tribal delegation they would do all they could in aid of the Tribe, but that the national priorities of war meant that redress would have to wait until its conclusion.

In 1946, the Interior Secretary designated areas within Lake Roosevelt as "Indian Zones" to fulfill the requirements of the 1940 Act's "paramount use" provisions in recognition of tribal lands inundated by Lake Roosevelt. The "Spokane Indian Zone" and the "Colville Indian Zone" were

located generally within the reservations of those Tribes. The Spokane Zone also extended up the inundated Spokane River, within the Spokane Reservation, which today is known as the "Spokane Arm" of Lake Roosevelt.

INDIAN CLAIMS COMMISSION FILINGS

In 1946, Congress enacted the Indian Claims Commission Act. Act of August 13, 1946 (60 Stat. 1049). Pursuant to that Act, there was a five-year statute of limitations to file claims before the Commission which expired August 13, 1951. It was under the Indian Claims Commission Act that the Colvilles were able to settle their claims in 1994. And it was due to a quirk of circumstances that the Spokanes were not.

In 1951, both the Spokane Tribe and the Colville Tribes filed land claims with the Indian Claims Commission prior to the August 13, 1951 Statute of Limitations deadline. Neither tribe filed claims seeking compensation for the use of their lands for the production of hydropower at Grand Coulee before the deadline. Neither tribe understood, nor were they advised, that there would be a need to even file such claims. After all, beginning in the 1930s and then resuming through the 1970s, the historical and legal record is replete with high level agency correspondence, Solicitor's Opinions, inter-agency proposals/memoranda, Congressional findings and directives and on-going negotiations with the affected Tribes to come to agreements upon the share of revenue generated by Grand Coulee which should go to the Tribes for the use of their respective lands. The Tribes had every reason to believe that its Trustee, the United States, was, although belatedly, going to act in good faith to provide fair and honorable compensation to the Tribes for the United States' proportionate use of our Tribal resources for revenue generated by the Grand Coulee Dam.

The ICC Act imposed a duty on the Bureau of Indian Affairs to apprise the various tribes of the provisions of the Act and the need to file claims before the Commission. While the BIA was well aware of the potential claims of the Spokane Tribe to a portion of the hydropower revenues generated by Grand Coulee, there is no evidence that the BIA ever advised the Tribe of such claims. As the Tribe's long-time attorney explained in 1981:

> *"The writer was employed in 1955 as the Tribe's first General Counsel. The tribal leaders of 1951 were still in office. When asked why they had not filed claims for the building of Grand Coulee, the destruction of their fishery and loss of their lands, they were thunderstruck. They had no knowledge at all that they might have filed such claims. They told the writer that no one had alerted them to the possibility of such claims. They did not know that these potential claims might be governed by the Claims Commission Act. They assumed that their rights were still alive, and well they may be. The Superintendent had approached them in about 1949 with the Tri-partite agreement between the BIA, Bureau of Reclamation, and the National Parks Service for the establishment of and administration of the Indian Zones pursuant to the Act of 1940. While he got them to sign pre-written resolutions approving this agreement [so] vital to their river and lake rights, not a word was spoken of the possibility of the tribe filing claims. The deadline of August 13, 1951 was therefore*

> *allowed to pass without the claims having been filed.*" Memorandum of January 12, 1981 with Final Report, Colville/Spokane Task Force (September 1980).

Thus, the Spokane Tribe in 1967 settled its ICCA claims, while the expectation of fair treatment for Grand Coulee's impacts continued. Ironically, the Spokane Tribe's willingness to resolve its differences with the United States would later be used as justification for the United States' refusal to deal fairly and honorably with the Tribe.

Meanwhile, the Colvilles, who had not settled their ICCA claim, continued that litigation against the United States. In 1975, the Indian Claims Commission ruled for the first time ever that it had jurisdiction over ongoing claims as long as they were part of a continuing wrong which began before the ICCA's enactment and continued thereafter. *Navajo Tribe v. United States*, 36 Ind. Cl. Comm. 433, 434-35 (1975). Over objections by the United States, the Colvilles sought, and in 1976 obtained, permission from the Commission to amend their complaint to include for the first time their Grand Coulee claims. With new life breathed into their claims, the Colvilles pursued litigation of their amended claims to the Federal Circuit Court of Appeals, which held that the ICCA's "fair and honorable dealings" standard may serve to defeat the United States' "navigational servitude" defense. *Colville Confederated Tribes v. United States*, 964 F.2d 1102 (Fed. Cir. 1992). In light of this ruling, the United States negotiated with the Colvilles to resolve that Tribe's Grand Coulee-related claims. Unfortunately, however, because the Spokane Tribe in 1967 had acted in cooperation with the United States to settle its ICCA case, it lacked the legal leverage to force settlement.

In 1967, the Spokane Tribe settled its ICCA claims case. That was the very same year that construction of the Grand Coulee Dam third power plant containing six new generating units began. The next thirteen years witnessed a flurry of activity by the United States to address the claims of the tribes to a share of the benefits of the Grand Coulee Project.

NEGOTIATIONS WITH BOTH TRIBES CONTINUE

In 1972, the Secretary of the Interior's Task Force began negotiation with the tribes through multiple policy, legal and technical committees to address the tribal claims. The "Secretaries Task Force" engaged the tribes on a full range of issues, including compensation, riverbed ownership and tribal jurisdiction over the inundated Indian Zones.

In 1974 the Solicitor of the Department of the Interior issued an Opinion which concluded, among other things, that the Spokane and Colville Tribes each retained ownership of the lands underlying the Columbia River and, in the case of the Spokane Tribe, the lands underlying the Spokane River. The Solicitor found the United States intent to reserve those riverbeds in the Spokane Tribe clear. The Opinion suggested that the resource interests of the Tribes were being utilized in the production of hydroelectric power at Grand Coulee.

In December 1975, the Congress directed the Secretaries of Interior and the Army to establish a Task Force and to open discussions with the tribes:

> "*to determine what, if any, interests the Tribe have in such production of power at Chief Joseph and Grand Coulee Dams, and to explore ways in which the Tribe*

might benefit form any interest so determined." S. Rep, 94-505, Dec. 4, 1975, at 79.

While these high-level negotiations were taking place, construction of the third power plant at Grand Coulee continued. The first generating unit of six came into service in 1974.

In May of 1979, following two years of negotiations among federal agencies and the tribes, the Solicitor for Interior proposed to the Secretary of Interior a legislative settlement of the claims of the Colville Tribe and the Spokane Tribe, stating

> *"I firmly believe that a settlement in this range is a realistic and fair way of resolving this controversy. The representatives of the Departments of Energy and Army who participated on the Federal Negotiating Task Force concur. It adequately reflects the relatively weak legal position of the tribes. (If the tribes could get around the Government's defenses they conceivably could establish a case for from 15% to 25% of the power of the Grand Coulee and Chief Joseph dams.) In addition to the threat of legal liability to the federal government, there is the undeniable fact that the Colville and Spokane people have been treated shabbily throughout the 40-year history of this dispute. To this day they have received little benefit from these projects on their lands which totally destroyed their fishery (no fish ladders were included) and inalterably changed their way of life. It has been the non-Indian communities and irrigation districts who have benefited from these projects. Much reservation land remains desert, while across the river irrigated non-Indian lands bloom.*
>
> *I am also hopeful that this is one "pro-Indian" bill that the Washington State congressional delegation will support as a fair resolution of a sorry chapter of our history. The tribes have tried recently to cultivate support for such a settlement proposal among key members of the delegation. My understanding is that the delegation's concerns have focused on the size of a settlement award (tribal demands have referred to hundreds of millions of dollars) and a tribal proposal for allocation of a firm power supply in the 1980's an allocation which might be seen as a threat to domestic users in times of shortage."* Legislative Proposal on Settlement of the Claims of the Colville and Spokane Tribes, Memorandum of Leo M. Krulitz to Eliot Cutler, May 7, 1979.

We do not know what happened to this Interior Solicitor proposal to settle the claims of both tribes. We do know that the sixth and final unit of the third power plant was completed in 1980. In that same year, the congressional Task Force completed its work. In spite of Congresses' direction, rather than determine the tribal interests involved in Grand Coulee and the benefits they might derive from those interests, for the first time in nearly 50 years of promises and negotiations with both tribes, the Task Force asserted legal arguments which the United States might use to defend against or forestall any tribal claims for a share of the hydropower generated by or the revenues derived from the Grand Coulee Project. The report concluded the United States may not be required by law to provide compensation at the same time that the Project's ability to provide benefits to the United States and the region was taking a quantum leap.

The third powerhouse alone provides enough electricity to meet the combined power demand of the cities of Portland, Oregon and Seattle, Washington. However, its contribution to the Federal Columbia River Power System and the inter-connected electric systems serving the western United States goes far beyond the amount of hydropower that is generated.

With completion of the third powerhouse, the Grand Coulee Project was positioned to play a pivotal role in the creation of downstream hydro power benefits from releases from large Canadian storage reservoirs. Grand Coulee became the critical link between water storage facilities in the upper reaches of the Columbia River Basin and downstream generating assets. Rated at 6,809,000 kilowatts capacity, the power generating complex at Grand Coulee became the largest electric plant in the United States, third largest in the world. It now produces about 21 billion kilowatt hours annually, four times more electricity than Hoover Dam on the Colorado River, and is the least-cost power source in the region's resource stack.

In addition to power production, Grand Coulee is the key to maintaining operating flexibility and, most important, the reliability of the Federal Columbia River Power System and inter-connected systems.

Without the third power plant in particular, and the Grand Coulee Project in general, the configuration and operation of the Federal Columbia River Power System would be very different. The electric systems serving the Pacific Northwest (and western United States) would be less efficient, have much higher average system costs and be far less reliable.

In a sad twist of historical events, two tribes — each feeling the irreversible pain of Grand Coulee's devastation — found themselves on separate paths. The Colville Tribes were able to continue their legal battles with the United States through settlement in the mid-1990s, while the Spokane Tribe's uniformed willingness to settle in the 1960's cost it substantial legal and political leverage in future dealings with the United States.

The Tribe notes here that this legislation is not a settlement of legal claims. Rather, it is "to provide for equitable compensation. . . for the use of tribal lands for the production of hydropower by the Grand Coulee Dam. . ."

The Colville settlement was also not a settlement of legal claims. The Department of Justice took the express position before Congress that the Colville also had no legal claim; only a "moral claim". The settlement was based on the history and record of dealings with the Tribe. This history and record includes the repeated promises made by the U.S. to provide compensation to both tribes.

> *"While plaintiff had no legal and equitable claim based on the navigational servitude, they did have a viable moral claim based on the "fair and honorable dealings" provision of the Indian Claims Commission Act of 1946.*
>
> *The resolution reached in the proposed settlement does not constitute an admission of liability. . . . But, we are prepared to recognize that the record, in this timely filed*

> *claim, can be read to reflect an undertaking by the United States with respect to power values. Because of that we think it is fair and just to fashion a complete resolution of this longstanding claim."*

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CONTINUING RECOGNITION OF THE TRIBE'S INTERESTS

In 1990, the federal government and the Tribes entered into the Lake Roosevelt Cooperative Management Agreement, which states that "[t]he Spokane Tribe shall manage, plan and regulate all activities, development, and uses that take place within that portion of the Reservation Zone within the Spokane Reservation in accordance with applicable provisions of federal and tribal law, and subject to the statutory authorities of Reclamation . . . to carry out the purposes of the Columbia Basin Project."

Litigation over the ownership of the original Spokane Riverbed resulted in a separate federal court opinion (*Washington Water Power v. F.E.R.C.*, 775 F.2d 305, 312 n. 5 (D.C. Cir. 1985)), a court order (*Spokane Tribe of Indians v. State of Washington, Washington Water Power Company and United States of America*, No. C-82-753-AAM, Judgment and Decree Confirming Disclosure and Quieting Title to Property (U.D. Dist. Ct., E.D. Wash., September 14, 1990)). Separate settlement agreement (*Spokane Tribe of Indians v. Washington Water Power Company*, No. C-82-AAM, Judgment (U.S. Dist. Ct. E.D. Wash., March 3, 1995)) all of which provide and affirm that the Spokane Tribe holds full equitable title to the original Spokane Riverbed.

In 1994 Congress passed the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act (P.L. 103-436; 108 Stat. 4577, 103d Congress, November 2, 1994) to provide compensation to the Colville Tribes for the past and future use of reservation land in the generation of electric power at Grand Coulee Dam.

A. For past use of the Colville Tribes' land, a payment of $53,000,000.

B. For continued use of the Colville Tribes' land, annual payments of $15,250,000, adjusted annually based on revenues from the sale of electric power from the Grand Coulee Dam project and transmission of that power by the Bonneville Power Administration.

In 1994 Congress also directed the Bonneville Power Administration, Department of Interior and the relevant federal agencies, under the "fair and honorable dealings" standard, to enter into negotiation with the Spokane Tribe to address the Tribe's comparable and equitable claims for the construction and operation of Grand Coulee Dam.

During the hearing on the Colville Settlement bill, the Spokane Tribe sought an amendment that would have waived the Indian Claims Commission Act's statute of limitations to enable the Spokane

to pursue its Grand Coulee claims through litigation. In the words of then Tribal Chairman Warren Seyler, "We believe it would be unprecedented for Congress to only provide relief to one tribe and not the other when both tribes were similarly impacted." Hearing Record, Colville Tribes Grand Coulee Settlement, H.R. 4757, pp. 56-61 (August 2, 1994).

Colville Tribal leaders and the bill's Congressional sponsors asked the Spokane to withdraw the request for an amendment to waive the statute of limitations. The Spokane complied, with the understanding that good faith negotiations to reach a fair and honorable settlement with the United States would be imminent. As a result, the following statements were made in a colloquy accompanying the Colville Tribes' Grand Coulee Settlement legislation. Colloquy to Accompany S. 2259, A Bill Providing for the Settlement of the Claims of the Confederated Tribes of the Colville Reservation Concerning Their Contribution to the Production of Hydropower by the Grand Coulee Dam, and for Other Purposes.

Senator Bradley stated:

> *"S. 2259 settles the claims of the Confederated Tribes of the Colville Reservation, yet the claims of the Spokane Tribe which are nearly identical in their substance, remain unsettled. The historic fishing sites and the lands of the two tribes were inundated by the Grand Coulee Project. It is clear that hydropower production and water development associated with the Project were made possible by the contributions of both tribes. Thus, I believe it is incumbent that the United States address its obligations under the Federal Power Act to both Tribes."*

Senator Murray stated:

> *"The settlement of the claims of the Colville Tribes is long overdue. The claim, first filed by the Colville Tribes over forty years ago, is based upon the authority the Congress vested in the Indian Claims Commission, which provided a five-year period during which Indian tribes could bring their claims against the United States.*
>
> *Unfortunately, the Spokane Tribe did not organize its government in time to participate in the claims process.*
>
> *The fair and honorable dealings standard established in the Indian Claims Commission Act should clearly apply to the United States' conduct and relationship with both the Colville and Spokane Tribes. I would urge, in the strongest possible terms, that the Department of the Interior and other relevant federal agencies enter into negotiations with the Spokane Tribe that might lead to a fair and equitable settlement of the tribe's claims."*

Senator Inouye stated:

> *"I fully support the notion that the United States has a moral obligation to address the claims of the Spokane Tribe, and I would be pleased to join you in a letter to*

> *Interior Department Secretary Babbitt urging that negotiations be undertaken by the Department."*

Senator Bradley added:

> *"Under the Federal Water Power Act, which is now referred to as the Federal Power Act, where an Indian Tribe's land contributes to power production, the licensee must pay an annual fee to the Indian Tribe which represents the tribe's contribution to power production. I too, would be pleased to join Senator Murray and Chairman Inouye in urging the Interior Department and the Bonneville Power Administration to enter into negotiations with the Spokane Tribe to address the tribe's claims."*

Senator McCain stated:

> *I also want to join my colleagues in urging the Department of the Interior to seize this opportunity to address the Spokane Tribe's comparable and equitable claims for damages arising out of the inundation of their lands for the construction and operation of Grand Coulee Dam."*

Thus, as the Colville Tribes' claims were being addressed, the United States Congress made clear its intent that the Spokane Tribe be treated fairly and honorably in connection with its claims for Grand Coulee damages through prompt, good faith negotiations with the Administration.

The Spokane Tribe adhered to the spirit of good faith negotiations over the next several years. While the Administration in general continued its refusal to take Congress' direction to negotiate fully a fair and honorable settlement with the Spokane Tribe, the Administration lead shifted from the Department of the Interior to the Bonneville Power Administration.

For the next six years, from 1998 to 2004, the Tribe engaged in very difficult negotiations with BPA. Finally, in 2004, the provisions of a settlement bill were arrived at in which BPA had no objections.

LEGISLATIVE HISTORY

Spokane Tribe settlement legislation has been introduced in the 106th, 107th, 108th, 109th, 110th, 111th, and this the 112th Congress. In the 108th Congress, hearings on H.R. 1797 were held before the House Resources Subcommittee on Water and Power on October 2, 2003.

Hearings were also held on the Senate bill S. 1438, on October 2, 2003, before the Indian Affairs Committee. The bill was approved by the United States Senate on November 19, 2004. The House

of Representatives adjourned late on November 20, 2004 without time to consider the Senate-passed bill.

A Spokane Settlement Bill was introduced in the 109th Congress. The House bill, H.R. 1797, was approved by the House of Representatives on July 25, 2005. In the second session of 109th Congress, in 2006, subsequent objections to S. 1438 by the State of Washington Department of Fish and Wildlife, as well as the Lincoln County Commissioners, stalled consideration of the settlement in the Senate. The Senate adjourned without vote on the settlement bill.

AMENDMENTS AND SUPPORT

The Spokane Tribe thereafter agreed to modify the proposed legislation to address various concerns related to the return to Tribal ownership of lands taken for the Grand Coulee Project.

Spokane Tribal acreage taken by the United States for the construction of Grand Coulee Dam equaled approximately 39 percent of Colville acreage taken for construction of the dam. The Spokane settlement previously was based on 39 percent of the Colville settlement. At the request of members of Congress, the payment provisions for the Spokane settlement bill were reduced to 29 percent of the Colville settlement in exchange for return of the Tribe's lands taken for the Grand Coulee Project.

In 2007, the Spokane Tribe met with the State of Washington Department of Fish and Wildlife and the Washington Office of the Governor to address their concerns with the settlement bill. The Tribe and State entered into an Agreement In Principle on May 1, 2007 to resolve those concerns.

The Tribe and the Lincoln County Commissioners held meetings to address the concerns of the Commissioners with provisions of the bill affecting the Spokane River. The Tribe agreed to amend the bill to address these concerns. In 2007, Section 9(a)(2) was removed, thereby excluding transfer to the Tribe of the south bank of the Spokane River, which is located outside Reservation boundaries. Section 9(a) confined the land to be restored to the Tribe to "land acquired by the United States... that is located within the exterior boundaries of the Spokane Indian Reservation." On June 4, 2007, the Commissioners endorsed by letter, "strong support" for the settlement legislation as amended. See Attachment 1.

The Stevens County Commissioners in letters of December 18, 2007, request "renewed support" of the Tribe and for the settlement. "Please continue in your efforts to get legislation passed which finally settles this debt owed to the Spokane Tribe." See Attachment 2. The Tribe also met with landowners concerned about this provision in the bill. The above amendment regarding Section 9(a)(2) resolved their stated concerns.

The Eastern Washington Council of Governments, pursuant to letters of January 23, 2008, by Chairman Ken Oliver provide, "We urge your strongest support and consideration for this issue." See Attachment 3.

The Governor of the State of Washington, Christine Gregoire, by letter dated December 14, 2007, to Senator Cantwell and Congressman Dicks, also voiced strong support for the settlement legislation, stating that it is "clearly appropriate" and "long overdue". See Attachment 4. By letter dated June 29, 2009 to President Obama, Governor Gregoire explained that "t]his legislation [then S. 1388] will correct a longstanding wrong" and "request[ed] the support of your administration in righting this injustice and securing enactment of the legislation." Id.

The Mayor of the City of Spokane, Mary Verner, by letter to the Washington Congressional delegation on August 25, 2009, stated "strong support for the Spokane Tribe" settlement legislation, finding that the Tribe had "suffered devastating impacts" while recognizing the Tribe's "generous efforts to address ... the previously stated concerns of affected State and local governments, Indian tribes and individual landowners as well as federal agencies." See Attachment 5.

The Spokane Tribe also reached an agreement with the Colville Tribe dated May 22, 2009, providing for a disclaimer provision in the prior bill (S.1388) regarding adjoining Reservation boundaries. See Attachment 6.

In light of the foregoing support, Section 9 of the prior 2009 bill (S. 1388) provided for the return to Tribal ownership of lands within the Spokane Reservation taken by the United States for the Grand Coulee Project. DOI's Bureau of Reclamation (BOR) thereafter expressed concerns about the extent of continuing federal liability under that return of ownership provision, citing potential liability for erosion and landslides. After extensive Tribal-BOR discussions, the Tribe agreed to remove language in Section 9 providing for the return of taken Reservation lands to Tribal trust status. In exchange, BOR agreed that new Section 9(a) of the current bill (S. 1345) should confirm the delegation to the Spokane Tribe of Secretarial authority as set forth in the 1990 DOI-Tribal Agreement (appended hereto as Attachment 7). As a result, new Section 9 of S. 1345 provides as follows:

Explanation of Proposed New Section 9(a)

New Section 9(a) of S. 1345 confirms that Section IV.D.3.b. of the 1990 DOI-Tribal Agreement (Attachment 7 at page 7) was intended to and did in fact constitute a proper delegation to the Spokane Tribe of the Secretary's authority to "manage, plan and regulate all activities, development, and uses that take place within that portion of the Reservation [or Indian] Zone within the Spokane Reservation." Id.

That 1990 delegation includes, but is not limited to, the authority of the Tribe to regulate and license the use of the Reservation Zone by Tribal members and nonmembers, including non-Indians, for hunting, fishing, boating, camping, and other activities. As set forth in the 1990 Agreement, the authority delegated thereby to the Spokane Tribe must be exercised "in accordance with applicable provisions of federal and tribal law, and subject to the statutory authorities of Reclamation, and consistent with the provisions of [the 1990] Agreement subject to Reclamation's right to make use of such areas of the Reservation Zone as required to carry out the purposes of the Columbia Basin Project." See Attachment 7 at page 7 (Section IV.D.3.b).

New Section 9(a) of the settlement bill recites, as authority for the Secretary's 1990 delegation to the Spokane Tribe, four separate statutory provisions. Two of those provisions -- the Act of August 30, 1935 (43 U.S.C. 373) and the Act of March 10, 1943 (43 U.S.C. 485i) -- are cited in Section II of the 1990 Agreement (Attachment 7 at pages 3-4) as authority for execution of that document by the Department of the Interior. In addition, the proposed new bill language references the Columbia Basin Project Act of June 29, 1940 (16 U.S.C. 835d, 835h).

The former provision, 16 U.S.C. 835d is referenced as an appropriate, additional source of the Secretary's authority to delegate regulatory power to the Spokane Tribe over hunting, fishing, and boating by all persons within the Indian Zone. The latter provision, 16 U.S.C. 835h, is cited in new Section 9(a) since it empowers the Secretary "to perform any and all acts and to prescribe such regulations as he may deem appropriate to carry out the provisions of sections 835d to 835g" of title 16 U.S.C..

Explanation of Proposed New Section 9(b)

Proposed new Section 9(b) of the settlement bill tracks *verbatim* the same language agreed upon in May 2009 by the Spokane and Colville Tribal Councils with respect to the boundary between the Spokane and Colville Reservations along the Columbia River. That Spokane-Colville common understanding was set forth in the May 22, 2009 letter from Spokane Chairman Abrahamson and Colville Chair Jerred to Rep. Inslee and Sen. Cantwell, enclosing joint Tribal revisions to the bill (then Section 8(c) of S. 1388) and joint Tribal proposed report language on the Reservation boundary. See Attachment 6.

The new Section 9(b) language would replace Section 9(c) of the current version of S. 1388 (at pages 15-16), with the changes thus agreed upon in 2009 by the Spokane and Colville Tribal Councils. The new Section 9(b) language, like the former bill, makes clear that the delegation of authority by the Secretary to the Spokane Tribe in new Section 9(a) does not affect or establish the precise boundary between the Spokane and Colville Reservations along the Columbia River, or the 1973 Spokane-Colville Agreement concerning the common boundary of the Spokane and Colville Indian Zones at the center line of Lake Roosevelt, or the rights of either Tribe to use its respective portion of the overall Indian Zone as provided in the 1940 Project Act (16 U.S.C. 835d).

Explanation of Proposed New Section 9(c)

Proposed new Section 9(c) of the settlement bill tracks in part relevant language from Section 9(d) of S. 1388 (at pages 16-17). The new Section 9(c) language is intended to make clear that the delegation of authority by the Secretary to the Spokane Tribe in new Section 9(a) does not affect the federal statutory authority or responsibility of the BOR or NPS with respect to the Columbia Basin Project or the Lake Roosevelt National Recreation Area.

The Spokane Tribe has made numerous and significant concessions over the course of negotiations on the provisions of the settlement bill. When members of Congress so requested, the Tribe agreed that compensation to the Spokane Tribe could be reduced to 29% of the Colville settlement even though Spokane lands taken for Grand Coulee amounted to about 39% of Colville lands so taken.

That significant payment reduction was in exchange for the return to Spokane Tribal trust ownership of taken lands. Thereafter, at BOR's request, the Tribe relinquished its demand that the BOR land within the Spokane Reservation Zone be transferred to the BIA to be placed in trust for the benefit of the Tribe, in exchange for Congressional confirmation of the delegation of authority by the Secretary of the Interior to the Spokane Tribe under the 1990 DOI-Tribal Agreement (Attachment 7).

Explanation of Changes to Payment Sections 6 and 8 in S. 1345

In addition to the changes to Section 9 to address concerns related to land transfer, S. 1345 modifies the payment provisions in Section 6 and Section 8 to be consistent with the 2004 agreement between the Spokane Tribe and the Bonneville Power Administration regarding such payments and thereby render the payments revenue neutral.

The Tribe has reached agreement with members of Congress, federal agencies, the State and county governments, the Colville Tribe, as well as private individuals, to resolve their concerns or objections to the bill.

CONCLUSION

The Tribe has exerted significant efforts to retain its homelands, to receive the benefit of the promises made by the United States to reserve our lands, and to fairly compensate us for the use of our lands for the production of hydropower. Our people have endured enormous past and present impacts to their resources, their way of life and their culture due to operation of the Project. Grand Coulee delivers enormous benefits to the United States and the region. The Colville Tribes, similarly situated directly across the Columbia River, share in the benefits of the Project. The Spokane deserve fair and honorable treatment by its trustee, and the region, in a settlement due them for the use of their lands for the production of hydropower and many other Project purposes.

SUPPLEMENTAL TESTIMONY
OF
GREGORY ABRAHAMSON

S.1345 THE SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION GRAND COULEE DAM EQUITABLE COMPENSATION SETTLEMENT ACT

November 3, 2011

INTRODUCTION

On October 20, 2011, the Senate Indian Affairs Committee held a hearing on S. 1345. The Chairman of the Spokane Tribe of Indians presented oral testimony as well as a written STATEMENT FOR THE RECORD at the hearing.

The United States Department of the Interior also presented testimony at the hearing through the Principal Deputy Assistant Secretary - Indian Affairs. In that written testimony, the Department of Interior states:

> With regard to Section 5 of S. 1345, "Settlement Fund," the basis for this settlement has not been established by a legal claim of the Spokane Tribe. Since the Spokane Tribe has no legal claim, the Department does not believe this legislation is appropriate as a settlement of claims. However, the Department could examine with the Tribe and Congress other avenues to address the concerns of the Spokane Tribe.

This Supplemental Testimony herein, is in response to the "no legal claim" issue and to clarify the position of the Spokane Tribe on the matter of the Section 5 "Settlement Fund".

THE "SETTLEMENT FUND"

The Tribe understands it has no "legal" claim, only an equitable or moral claim. The Tribe does not seek compensation from the Department of Justice claims "Settlement Fund". The compensation provided for in Section 5, "Settlement Fund," is subject to Section 12. AUTHORIZATION OF APPROPRIATIONS. The Spokane Tribe fully expects to have to seek and secure the necessary subsequent financial appropriations from Congress to fund the settlement as called for in future years. The payments are based on 29% of the payments made to the Colville Tribes in the 1994 Colville Settlement Act. The Spokane Tribe lost 39% as much land as the Colville to the Grand Coulee Project. As agreed to by the Department of the Interior in testimony before the Committee, the Spokane Tribe suffered the same losses as the Colville Tribes.

EQUITABLE NOT LEGAL CLAIM

This legislation is not a settlement of legal claims, it is "to provide for equitable compensation. . . for the use of tribal lands for the production of hydropower by the Grand Coulee Dam. . ." and entitled the "Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act".

The 1994 Colville settlement was also not a settlement of legal claims. The Department of Justice took the express position before Congress that the Colville also had no legal claim; only a "moral claim". The settlement was based on the history and record of dealings with the Tribe. This history and record includes the repeated promises made by the U.S. to provide compensation to both tribes.

> *"While plaintiff had no legal and equitable claim based on the navigational servitude, they did have a viable moral claim based on the "fair and honorable dealings" provision of the Indian Claims Commission Act of 1946.*
>
> *The resolution reached in the proposed settlement does not constitute an admission of liability. . . . But, we are prepared to recognize that the record, in this timely filed claim, can be read to reflect an undertaking by the United States with respect to power values. Because of that we think it is fair and just to fashion a complete resolution of this longstanding claim."*
>
> State of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice (Joint Hearing on S. 2259 before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994. at 17). (emphasis added).

The U.S. made express promises to compensate both tribes with a share of the power revenues for the use of tribal lands in 1933 and 1935.

Numerous statements made by federal officials acknowledged the need for the Spokane Tribe to receive fair compensation for the use of its land and water. In one example, William Zimmerman, Assistant Commissioner of Indian Affairs, wrote:

> *"the matter of protecting these valuable Indian rights will receive active attention in connection with applications filed by the interested parties before the Federal Power Commission for the power development."* **Letter from William Zimmerman to Harvey Meyer, Colville Agency Superintendent, dated September 5, 1933.**

A letter approved by Secretary Ickes, from Assistant Commissioner Zimmerman to Dr. Elwood Mead, Commissioner of Reclamation, stated in connection with the "rights of the Spokane Indians," that the Grand Coulee project, as proposed:

"shows the cost of installed horsepower to be reasonable and one that could bear a reasonable annual rental in addition thereto for the Indians' land and water rights involved." **Letter from William Zimmerman to Elwood Mead, dated Dec. 5, 1933.**

The United States Department of Justice has recognized these promises as an undertaking of a federal obligation, which promises were made to both the Colville and Spokane Tribes.

"The government began building the dam in the mid-1930's. A letter dated December 3, 1933, to the Supervising Engineer regarding the Grand Coulee and the power interests of the Tribes, with the approval signature of Secretary of the Interior Ickes states:

This report should take into consideration the most valuable purpose to which the Indians' interests could be placed, including the development of hydro-electric power.

We cannot too strongly impress upon you the importance of this matter to the Indians and therefore to request that it be given careful and prompt attention so as to avoid any unnecessary delay.

Also, a letter dated December 5, 1933, to the Commissioner of the Bureau of Reclamation and endorsed by Interior Secretary Ickes, stated that 'it is necessary to secure additional data before we can advise you what would constitute a reasonable revenue to the Indians for the use of their lands within the [Grand Coulee] power and reservoir site areas.' And a letter dated June 4, 1935 from the Commissioner of the Bureau of Reclamation requested that additional data be secured to determine 'a reasonable revenue to the Indians for the use of their lands within the power and reservoir site areas.'"

Statement of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice (Joint Hearing on S.2259 before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994, at 16).

In an extraordinary move, the Tribe in December, 1941, sent a delegation cross-country to meet on the issues with Commissioner John Collier. Unfortunately, the meeting took place on December 10 — just three days following the bombing of Pearl Harbor. The Commissioner and his representatives committed to the Tribal delegation that they would do all they could in aid of the Tribe, but that the national priorities of war meant that redress would have to wait until its conclusion.

INDIAN CLAIMS COMMISSION CLAIMS

In 1946, Congress enacted the Indian Claims Commission Act. Act of August 13, 1946 (60 Stat. 1049). Pursuant to that Act, there was a five-year statute of limitations to file claims before the

Commission which expired August 13, 1951. It was under the Indian Claims Commission Act that the Colvilles were able to settle their claims in 1994. And it was due to a quirk of circumstances that the Spokanes were not.

In 1951, both the Spokane Tribe and the Colville Tribes filed land claims with the Indian Claims Commission prior to the August 13, 1951 Statute of Limitations deadline. Neither tribe filed claims before the deadline seeking compensation for the use of their lands for the production of hydropower at Grand Coulee. Neither tribe understood, nor were advised that there would be a need to even file such claims.

The ICC Act imposed a duty on the Bureau of Indian Affairs to apprise the various tribes of the provisions of the Act and the need to file claims before the Commission. While the BIA was well aware of the potential claims of the Spokane Tribe to a portion of the hydropower revenues generated by Grand Coulee, there is no evidence that the BIA ever advised the Tribe of such claims.

This failure by the federal government to provide any notice to the Tribe was compounded by the fact that the Spokane Tribe did not formally organize and receive approval of its tribal government and constitution until June 27, 1951 - only 16 days prior to the ICC statute of limitations deadline. The Tribe's attempt to retain legal counsel to file its claims before the ICC was delayed due to the Commissioner of Indian Affairs, Dillion Meyer's efforts to impose restrictive conditions on the claims attorney contracts with the Spokane Tribe. The Tribe's legal counsel was left with insufficient time to fully investigate the full range of potential claims of the Tribe prior to the filing deadline.

Meanwhile, the Colvilles, who had not settled their ICCA claim, continued that litigation against the United States. Over objections by the United States, the Colvilles sought, and in 1976 obtained, permission from the Commission to amend their complaint to include for the first time their Grand Coulee claims. With new life breathed into their claims, the Colvilles pursued litigation of their amended claims to the Federal Circuit Court of Appeals, which remanded to the trial court to determine whether the ICCA's "fair and honorable dealings" standard may serve to defeat the United States' "navigational servitude" defense. *Colville Confederated Tribes v. United States*, 964 F.2d 1102 (Fed. Cir. 1992). This key legal issue was never determined by the court on remand. In light of this ruling, the United States negotiated with the Colvilles to resolve that Tribe's Grand Coulee-related moral claims. No decision was ever reached by any court that the Colville Tribes had a compensable claim under the ICC "fair and honorable dealings" standard.

In 1967, the Spokane Tribe settled its ICCA claims case.

NEGOTIATIONS WITH BOTH TRIBES CONTINUE

In 1972, the Secretary of the Interior's Task Force began negotiation with the tribes through multiple policy, legal and technical committees to address the tribal claims. The "Secretaries Task Force" engaged the tribes on a full range of issues, including compensation, riverbed ownership and tribal jurisdiction over the inundated Indian Zones.

In 1974 the Solicitor of the Department of the Interior issued an Opinion which concluded, among other things, that the Spokane and Colville Tribes each retained ownership of the lands underlying the Columbia River and, in the case of the Spokane Tribe, the lands underlying the Spokane River. The Solicitor found the United States intent to reserve those riverbeds in the Spokane Tribe clear. The Opinion suggested that the resource interests of the Tribes were being utilized in the production of hydroelectric power at Grand Coulee.

In December 1975, the Congress directed the Secretaries of Interior and the Army to establish a Task Force and to open discussions with the tribes:

> *"to determine what, if any, interests the Tribe have in such production of power at Chief Joseph and Grand Coulee Dams, and to explore ways in which the Tribe might benefit form any interest so determined."* S. Rep, 94-505, Dec. 4, 1975, at 79.

A 1976 DOI Associate Solicitor Memorandum states that the U.S. behavior toward both tribes amounted to an "act of confiscation", where the trustee converts the property of the beneficiary to his own use.

> *"The Department has not only failed to give the Tribes a share of the benefits of developing tribal property, but in the development has largely destroyed what other economic bases, fishing, farming and timbering, the Tribes may have had in their remaining property. The blatant lack of care taken by the Department to protect its own fiduciaries is confirmed by the letters and background activity described previously in the Statement of Fact. In the case of Grand Coulee, the Department knew precisely what destruction was being caused and what types of compensation of tribal property were appropriate. . . . Finally, given the knowledge the Department had of the Indian rights and needs at stake, it appears to have been derelict in not informing Congress of these, so that congress could take informed and specific action. . . . No case law grants executive agencies authority to unilaterally abrogate Indian rights. Certainly throughout the construction of these two projects, the posture of the Department can be described not as . . . an exercise of guardianship, but an act of confiscation."*
>
> Memorandum from Lawrence A. Aschenbrenner, Acting Associate Solicitor, Division of Indian Affairs, to Solicitor, p. 13 (1976) (emphasis added).

In the interim, in 1979, the Solicitor for Interior proposed to the Secretary of the Interior a Congressional settlement of the claims of the Colville and Spokane Tribes, stating,

> *"I firmly believe that a settlement in this range is a realistic and fair way of resolving this controversy. The representatives of the Departments of Energy and Army who participated on the Federal Negotiating Task Force concur.* (emphasis added).

Legislative Proposal on Settlement of the Claims of the Colville and Spokane Tribes, Memorandum of Leo M. Krulitz to Eliot Cutler, May 7, 1979.

In the 1980 Task Force Report, the U.S. instead, for the first time, asserted legal defenses against the Tribes' claims and denied compensation.

> *"[I]n 1975, the Senate Committee on Appropriations directed the Secretaries of the Interior and Army to open discussions with the Tribes to assess a resolution of this dispute. S. Rep. 94-505, p. 79. Pursuant to that directive, a task force, consisting of the Departments of the Interior and Army, and the Bonneville Power Administration, issued a final report in September 1980.*
>
> *The report was approved by the Secretary of the Interior. It concluded among other things that there was "no question but that the Tribes would be entitled to compensation had the projects been built and operated by the Federal Power Act licensees," and that the Tribes would have received a reasonable benefit as fixed by that Commission pursuant to Section 10(e) of the Federal Power Act. The report further suggested that the legal defenses of the United States be exhausted with respect to navigational servitude before further action be taken regarding the Tribes' power claims."* (emphasis added).

Statement of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice (Joint Hearing on S.2259 before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994, at 16).

CONGRESS URGES SETTLEMENT

Following the 1994 Colville Settlement, the Spokane Tribe attempted to carry out the negotiation of a settlement with DOJ and DOI. The Tribe consistently, over several years, got nothing but bounced back and forth between and the run-a-round from both agencies and no actual negotiations occurred.

> *"The hearing records show that Committee members in both the House and Senate were sensitive to the need to provide a settlement for the Spokane Tribe. The report of the House Natural Resource Committee directs the Departments of the Interior and Justice to negotiate with the Tribe to settle its claims. In the Senate, a colloquy between Senators Murray, Inouye, Bradley and McCain stressed that appropriate federal agencies should negotiate with the Spokane Tribe.*
>
> *Based on the foregoing, we are requesting that the Department proceed as soon a possible to negotiate with the tribe on its power value and fishing claims as previously directed by Congress."*

Letter from Sen. Patty Murray, Sen. John McCain, Sen. Daniel Inouye, Sen. Bill Bradley, and Rep. George Nethercutt to Bruce Babbitt, Secretary of the Interior, dated July 9, 1996.

"The claims of the Spokane Tribe of Indians are virtually identical in substance to those of the Colville Tribes related to construction and operation of the Dam: loss of religious, fishing, burial, power and irrigation sites. While the region received significant benefits, the Tribe suffered devastating impacts on their culture, lifestyle and economy which have not yet been addressed. Because of the Administration opposition, the Congress did not settle the Spokane claims when the Colville Settlement Act was passed, nor did the Settlement Act waive the ICCA statute of limitations to open the door for the Spokane Tribe's equitable claim.

The Congress did, however, recognize this Nation's need to resolve the Spokane Tribe's claims regarding Grand Coulee Dam. In fact, the House Committee Report on the Colville bill directs the Departments of Interior and Justice to work with the Spokane Tribe to address the Spokane Tribe's claims on their own merits. A colloquy among Senators Bradley, McCain, and ourselves in November 1994 expressed the same direction to the agencies as the House Report.

We are therefore frustrated that three years after enactment of the Colville Tribes's Settlement Act, the Departments, while conducting numerous meetings with the Tribe, have still failed to enter into negotiations.

We continue to believe it is grossly unjust for one Tribe to be compensated while a similarly affected neighboring Tribe is left with no remedy. Therefore, in the strongest possible terms, we urge the Departments to enter into negotiations with the Spokane Tribe immediately so that a fair and equitable settlement of the Tribe's claims can be reached. A resolution of the Spokane claims, of course, must involve payment for past damages, as well as payment for future power revenues."

Letter from Sen. Patty Murray and Sen. Daniel Inouye to Bruce Babbitt, Secretary of the Interior and Janet Reno, Attorney General, dated March 2, 1998.

The Spokane Tribe finally sought legislative help from Senator Murray and Congressman Nethercutt, and asked for a jurisdictional bill to allow the Tribe to file a legal claim and have it's day in court with the U.S.. The DOJ strongly opposed this effort.

That is why there is no legal claim. The Colville did not have one either. Both Tribes did not file Coulee claims in 1951. Both Tribes did not have legal claims. Both Tribes have equitable moral claims. Both Tribes suffer the same losses. Only one Tribe is being compensated. The U.S. misled both Tribes with promises and negotiations and then reversed position by asserting legal defenses 40 years after the fact when the compensation stakes got too high. Words were much cheaper than fair compensation.

SUBSTANTIAL CONGRESSIONAL PRECEDENT EXISTS

Congress has enacted many equitable settlements and jurisdictional legislation on behalf of Indian tribes for the flooding of tribal lands for the use of hydropower and other purposes in the interest of justice and fairness. These enactments include:

P.L. 95-280. The Zuni Act directed the Secretary of the Interior to purchase and hold certain lands in trust for the Zuni Indian Tribe of New Mexico. Notwithstanding statutes of limitations, the Act also conferred jurisdiction upon the Court of Claims to hear and determine the Zuni's aboriginal lands claim. Congress recognized that "[u]nfortunately, the Zuni Indian tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951." Congress took note of the fact that the Zuni lacked sufficient legal representation .and that the federal government had failed to meet its obligation to provide notice and explanation to the Zuni of their right to file a claim against the United States.

P.L. 95-247. Notwithstanding certain statutes of limitations, Congress conferred jurisdiction on the Indian Claims Commission to consider the merits of the Wichita Indian Tribe's claim against the United States for the taking of lands.

P.L. 95-243. This Act authorized the U.S. Court of Claims to review, without regard to the technical defenses of res judicata or collateral estoppel, the Sioux Tribes claims for compensation for the taking of the Black Hills. Thus Congress overrode the Court of Claims dismissal of the Sioux's claim, which had been dismissed on the grounds of res judicata.

P.L 96-251. Waived the statute of limitation of the ICCA to permit the Cow Creek Band of Umpqua Indians to file a claim against the United States for treaty violations. Congress stated that its enactment of the legislation "will assure the Cow Creek Band their right to due process and a fair day in court." Senate Report No. 96-397, at 2.

P.L. 96-404. Allowed a land claim suit by the Three Affiliated Tribes to proceed in the U.S. Court of Claims notwithstanding statutes of limitation, lapse of time, res judicata, collateral estoppel, or any other provisions of law.

P.L. 96-405. Authorized the U.S. Court of Claims to hear claims by the Blackfeet and Gros Ventre Tribes for land takings not withstanding the Court Claims' earlier dismissal of these tribes suit on grounds of res judicata.

P.L. 96-434. Same relief as in P.L. 96-405 afforded to the Assiniboine Tribe.

P.L. 96-338. Restored lands to the Tule River Indian Tribe despite the fact that the Tribe did not bring a claim for these lands under the Indian Claims Commission Act.

P.L. 96-401. Authorized the Secretary of the Interior to cancel and renegotiate coal leases involving Northern Cheyenne lands in light of an apparent violation of the Federal Government's fiduciary duty to the tribe, and because the present "impass can only lead to expensive and lengthy litigation." House Report No. 96-1370, at 3.

P.L. 102-575. Congress authorized appropriation of $149.2 million for the Three Affiliated Tribes and $90.6 million to the Standing Rock Sioux Tribe as additional compensation for the taking of its lands. Original payment to the tribes was found to be totally inadequate in light of the devastating and inordinate share of the impact borne by these two tribes.

P.L. 104-223. Established a Crow Creek Sioux Tribe Infrastructure Development Fund of $27.5 million to enhance Tribal participation in the benefits of the Fort Randall and Big Bend components of the Pick-Sloan Missouri River Basin Project.

P.L. 105-132. Established a Lower Brule Sioux Tribe Infrastructure Development Fund of $39.3 million to enhance Tribal participation in the benefits of the Fort Randall and Big Bend components of the Pick-Sloan Missouri River Basin Project.

P.L. 106-511. Established a Cheyenne River Sioux Tribal Recovery Trust Fund $290,722,958 to provide additional compensation to the Tribe for takings of land and damages sustained under the Pick-Sloan Project, such funds to be used by the Tribe for economic development, education, health, recreational and social welfare objectives of the Tribe.

The following attachments have been retained in Committee files:

June 4, 2007 Letter from Lincoln County Commissioners to Chairman, Spokane Tribe of Indians

December 18, 2007 Letters from Stevens County Commissioners to Senators Cantwell and Murray

January 23, 2008 Letters from Eastern Washington Council of Governments to Senators Murray and Cantwell and Representative McMorris-Rodgers

December 14, 2007 Letter from Governor Christine O. Gregoire to Senator Cantwell and Congressman Dicks (2 pages) and June 29, 2009 Letter from Governor Gregoire to President Obama

August 25, 2009 Letter from Mary B. Verner, Mayor of Spokane to Senators Cantwell and Murray and Representatives Dicks and Inslee

May 22, 2009 Letter from Chairmen, Spokane Tribe of Indians and Confederated Tribes of the Colville Reservation, to Congressman Inslee and Senator Cantwell (1 page) with proposed changes to Section 8 of S. 1388 (1 page) and proposed report language

1990 Lake Roosevelt Cooperative Management Agreement

The CHAIRMAN. Thank you very much.

I will defer my questions and let me call on Senator Cantwell for her questions.

Senator CANTWELL. Thank you, Mr. Chairman. Thank you. I appreciate it.

Chairman Abrahamson, good to have you here and your testimony is much appreciated. We heard from the BIA earlier about the filing of claims. Could you explain where the Spokane Tribe was in 1951 when this deadline was supposed to have transpired?

Mr. ABRAHAMSON. Yes, thank you, Senator.

We at that time our Tribe was just splitting. The Colville Tribe was over the Spokane Tribe, our agency, at that time because of the ruralness of where we were at. Their agency was there and we just moved away from the Colville agency and was establishing our own reservation and we didn't have our lawyers or anybody intact at that time. Our government was just being formed there.

Senator CANTWELL. So they are penalizing you not because you weren't impacted, but because of the fact that you weren't properly formed at the time?

Mr. ABRAHAMSON. Yes, at that time, the government at that time should recognize and brought it up to our leadership at that time

to file something or to at least acknowledge that the Tribe should do something with that body of water there.

Senator CANTWELL. And that was 16 days before the filing? I mean, we are talking about a small period of time. Is that correct?

Mr. ABRAHAMSON. Yes.

Senator CANTWELL. Okay. And you mentioned fair and honorable dealing standards of the ICCA.

Mr. ABRAHAMSON. Yes. We recognize that we don't have a legal claim and that it is just a moral claim. And it is one that was done by a colloquy when the 1994 legislation was done. And Senator Inouye, Senator Murray, Senator Bradley, and Senator McCain was four of them that did a colloquy to deal with the Spokane Tribe fairly during that legislation.

Senator CANTWELL. And is that your understanding of what the Department of Interior was also saying today, that they believe that there should be an equitable settlement?

Mr. ABRAHAMSON. We would hope that is what the intent was, but our people have been coming back here since the 1940s. We had a delegation of leadership that came back and that was just when the war happened. And they told our delegation leadership that we have a war to fight; we will deal with you later. That has been 71 years ago there, so.

Senator CANTWELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Cantwell.

Senator Tester?

Senator TESTER. Thank you, Mr. Chairman.

We will get right to it. One of the things that Mr. Laverdure said from Interior was the State's share not being reasonable. Being prompted slightly on this, could you talk about the adequacy of the State's share, Mr. Tweeten?

Mr. TWEETEN. Senator Tester, thank you for the question.

I think any fair reading of the bill and the compact would suggest that the proportion of benefits flowing to the Tribe and the State tremendously favors the Tribe. Objections have been raised in prior settlements to the idea of taking projects that States want and trying to "hide them under the Indian blanket," I think was the phrase that was used. There are no such projects in this compact.

The expenditures that the State makes in the compact are specifically designed for the mitigation of the effects of the compact on non-Indian water users, but the benefits of those mitigation efforts flow directly to the Tribe. For example, the compact provides for deferral on the part of the Tribe in the development of its water right on Birch Creek.

In consideration of that agreement to defer, the State has set aside a fund of $14.5 million that will be payable to the Tribe when certain conditions are fulfilled. That is functionally the equivalent of a lease of that water in the sense that there is a payment on the part of the State to protect the flow of that water going downstream.

But as Mr. Laverdure said, allowing the Tribe to receive value for resources is beneficial in many ways, and that provision provides the Tribe the opportunity to directly receive value for the use of its resources. So I think it is directly beneficial to the Tribe.

The Four Horns project is the same. The Tribe has deferred or agreed to provide water downstream for a period of years for the use of the Pondera Canal Company, but once that period of years expires, the use of the Tribe's water is completely up to the Tribe and the canal company has no legal or equitable claim on it.

The hope is, of course, on the part of the canal company, is that the Tribe will agree to negotiate a lease of some of the water in the Four Horns Reservoir to flow downstream to the Pondera Canal Company at a fair market rate. But the Tribe is under no obligation to make that lease and once that mitigation period of 25 years expires, the water in the expanded Four Horns project belongs to the Tribe.

So I think the argument that the State's cost share doesn't somehow contribute to the benefit of this compact and legislation for the Tribe is completely misplaced.

Senator TESTER. Let me get to that point, and this can be for either one of you, T.J. or Chris. When you do these kinds of negotiations, are people from the Federal Government usually at the table when you are doing these negotiations?

Mr. SHOW. Thank you, Mr. Chairman.

To my knowledge, they have been there every step of the way. They have participated to my knowledge in everything. That is kind of what is disheartening about this whole process is they have been intricately and intimately part of this process.

Senator TESTER. That is a good sign on one hand. Did they ever provide you with a written list of concerns?

Mr. SHOW. Not that I know of.

Senator TESTER. Okay. Did they ever present you any alternatives to the compact?

Mr. SHOW. No. To my knowledge, the only thing that was ever brought up is problems.

Senator TESTER. Okay. One of the things that, it was either you or Mr. Tweeten said, I think it was you, that the objection, this was the first time you had seen them happened in the last 24 hours. That is correct, right?

Mr. TWEETEN. Senator, that is correct.

Senator TESTER. And Ms. Williams, I am glad you are still here. I hope there are other folks from the Department here. I am not going to call you up to talk. Don't worry. But I would just say that the only way you solve problems around this place is to talk and to discuss and to negotiate, whether we are negotiating among this Committee or you are negotiating with the Tribes. I would just tell you that for the objections to be heard for the first time by these guys in the last 24 hours is totally unacceptable. It is just totally unacceptable. It just doesn't cut it.

So I would hope that we can ramp that up in the future. What is done is done, but the communication needs to be much better if that is the case. And I don't mean to lecture. It is just a fact that we are not going to get anything done if that doesn't happen. Good communication is that.

Just a last thing, and I know, T.J., it is hard to predict what the Tribe is going to do, but how was the support for this so far among the people on the Blackfeet Reservation?

Mr. SHOW. Mr. Chairman, it is my belief that when the people know what I know, and this is an education process that we all go through, I believe that they will support this and I believe they do support this. You will always have opposition. That is granted. But I believe they do support this and I do support this.

Senator TESTER. Good. Let's go to another Tribe. Let's go to Fort Belknap because I think that you guys talked about the headwaters of the Milk and its impacts on the Fort Belknap Tribe about 150 miles away from you guys. Have you worked with them to resolve problems with them in regards to this water? And either one of you can answer it.

Mr. TWEETEN. I think Chairman Show can probably talk more directly about the specific discussions, but we have done on the State side considerable study with respect to the possibility of the provisions of the Blackfeet Compact somehow affecting flows that we have agreed to compact with the Fort Belknap Tribe downstream. And we think the possibility, as a hydrologic matter, of those conflicts is extraordinarily slim.

Senator TESTER. Do they think that, too?

Mr. TWEETEN. Mr. Chairman, I won't speak for them about that. Perhaps Chairman Show can talk about it.

Senator TESTER. Okay. T.J.?

Mr. SHOW. We have sat down with the Fort Belknap Tribe and we both have come to the same conclusion that the Secretary kind of put us in this situation. We believe it is him that needs to help make a decision to get us out, so to speak, I guess.

Senator TESTER. Okay, all right.

Thank you, Mr. Chairman. I ran over time.

Just as kind of a sidebar, I want to thank Richard Litsey for being here from Senator Baucus's office.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Tester.

Senator Udall?

Senator UDALL. Chairman Akaka, thank you very much. I can't tell you how honored I am to see two of our distinguished Native American leaders here before the Committee. I have prepared longer statements about both of them, about President Mark Chino and also about Vice Chairman Rex Lee Jim, which I will put in the record. We are late in the day here and I want to get directly to the questions. But I was going to flatter both of you greatly and I will do that in the record and try to get directly to questions so that we can resolve the business of the Committee.

And also, of course, welcome Selena, the wife of President Mark Chino, the First Lady of the Mescalero. Good to have you here, and all the other officials with both Tribes.

I would also, and I don't know what the timing was here in terms of when the Department learned it was going to take a position on specific bills, but I find it a little bit striking to hear all of the leaders say that this is the first time they heard from the Department about objections. I agree with what Senator Tester said.

It seems to me a simple phone call, even if the timing, the Department knows it is going to appear at the hearing; the leaders know they are going to be here. To at least receive some kind of

notice that the Department is going to take a position on a piece of legislation that has been working its way through is a reasonable way to work.

It is meant more as a comment to try to urge better communication in the future, so that we can get fully to the issues. Some of the questions, President Chino, that I am going to ask, I don't want you to respond too hastily because I think you need to look at this and hear from the Department about this proposal in terms of standards and that kind of thing. And I don't want to put you in a position to have to take a position against it right now. So if you want to defer on that, that will be fine.

But let me start with President Chino. Would you describe for the Committee the water situation in the region surrounding the Mescalero Apache Nation? What is the size of the surrounding communities? What is the availability of water? Have any of your neighbors expressed interest in leasing the Tribe's adjudicated water? And does the Mescalero Apache Tribe have a surplus of water?

Mr. CHINO. Thank you, Senator Udall.

As you and Senator Bingaman are well aware, we are located in a resort area of the State of New Mexico. To a certain extent, we are isolated, and not only our economy, but the economies of the communities surrounding us rely very heavily on tourism and travel. U.S. 70 is a major east-west route through the reservation that brings a lot of traffic into our area.

And we have been approached, Senator, by the City of Alamagordo, by the village of Cloudcroft, by the village of Ruidoso and the Ruidoso Downs as to the possibility of leasing our adjudicated water rights.

So as Senator Bingaman alluded to in his remarks, the State of New Mexico has been in a very serious drought situation for the better part of a year and a half and we are very much in the middle of that. And the communities' interest in acquiring some of our water certainly indicates to us that not only is there an interest, but there is a very definite need and a very severe need of those surrounding communities for this very precious resource which we have and which we would very much like the ability to interact with those communities and to enter into some type of agreement that would be mutually beneficial.

Senator UDALL. And it would obviously be an economic benefit to the Mescalero Apache Tribe to be able to lease your water to these communities.

Mr. CHINO. Very much so, Senator. The Tribe would use the proceeds, for example, to provide college scholarships for our students who wish to go on and pursue a higher education. We would use it to fund our fire and rescue. We would use it to provide various services that any government would provide to its citizens. So it would be very beneficial to us, Senator, yes.

Senator UDALL. President Chino, I want to ask a question about Mr. Laverdure's testimony where he said that he would like to see language included providing that the Tribe "shall develop Tribal water leasing standards and submit such standards to the Secretary for approval."

But I don't want to force you into a situation to take a position now if you don't want to. The record I believe the Chairman will say will be open for a week or more and you could make a comment like that. But if you want to comment today, I would be happy to hear it.

Mr. CHINO. I definitely would like to comment, Senator.

Senator UDALL. Please.

Mr. CHINO. The notion that the Department of Interior provided to the Committee that the water leasing requirement should be consistent with land leasing requirements is virtually a new policy that certainly the Tribe has never heard of from the Department of the Interior. And I feel very strongly, and I believe I can speak for the Tribal Council as well, that we believe that this is nothing more than an effort on the Department of the Interior to implement new policy at the expense of the Mescalero Apache Tribe's legislation.

In fact, the record will show that the Department of Interior has a precedent of never involving itself in requesting these so-called water use codes and standards of any Tribe. Our cousins at Jicarilla were not subject to the same requirements, nor was the Navajo Nation.

So we feel that it is very, very unfair, grossly unfair to subject us to these requirements when other Tribes weren't subjected to the same. It is simply a matter of fairness, Senator.

Senator UDALL. And it appears to me that Mr. Laverdure's testimony was that this was a first in time. This was a precedent. Do you agree or disagree with that in terms of the leasing situation? He seemed to be describing that this had never been done before. Do you agree or disagree on that one?

Mr. CHINO. Well, I think, Senator, with respect to the leasing, I don't think that that particular aspect is new. I think the concept of equating water rights to land leasing requirements by the Department is certainly a new concept. And as I said, to our knowledge, it has never been put forth as an issue until now.

And our concern is that it is being put forth now in the context of requiring our Tribe to submit to these requirements and to formulate water codes and other things that other Tribes have not been subjected to and requirements have not been made of those Tribes.

Senator UDALL. Thank you.

Mr. Chairman, I have already run over. I have a couple more questions that I can ask and then I will be complete and won't need a second round or anything. Would that be all right?

The CHAIRMAN. Will you please continue.

Senator UDALL. Okay. Thank you.

These questions here are both to Vice President Rex Lee Jim and also to Commissioner Maryboy.

Based on the original 1993 statute, is there any way the Navajo Nation could legally divert these royalties outside of Utah?

Mr. JIM. Senator Udall, thank you for that question.

It is not possible because it is mandated by the U.S. legislation and the Navajo Nation has proven over the years that it has always paid out that amount to the trust.

Senator UDALL. Commissioner Maryboy?

Mr. MARYBOY. Senator Udall, it is an Act that was re-amended in 1968 and furthermore the 1933 Act stands as the body here that was initially enacted in 1933. So with that, I stand on behalf of the Utah Navajos that it is about time we administer our funding. For many years, we never laid a hand on this until now.

Senator UDALL. Which Navajo Nation chapters in Utah support the Utah Dineh Corporation as trustee and which chapters support the Navajo Nation as trustee? And this is also a question for both of you.

Mr. MARYBOY. Senator, we have board members from Navajo Mountain all the way down to Aneth. As a matter of fact, I have the former chapter president, Leonard Lee, which is a part of the board member to the Utah Dineh Corporation. And as far as I know, all the chapters are in support of keeping the money in Utah.

Senator UDALL. Now, I have information here, and it may be incorrect and I want both of you to speak to this. There are seven chapters in Utah. Is that correct?

Mr. MARYBOY. Seven chapters.

Senator UDALL. Both of you are nodding, so I assume that is correct. And apparently, three support the Navajo Nation as trustee. So that would mean there is a split between these chapters.

Is that correct or incorrect, Vice President Jim?

Mr. JIM. Thank you. With me today is Honorable Jonathan Nez, who represents Navajo Mountain and whose chapter opposes the current bill. I spoke to members in Dennehotso and Mexican Water, they also oppose the current bill. We do have a resolution from Red Mesa and Aneth who oppose this bill. We have a process that we go through at the local chapters. It is put on the agenda and discussed and a motion invoked, and that is what we have. Thank you.

Senator UDALL. Thank you.

Mr. Maryboy?

Mr. MARYBOY. Mr. Chairman, for the record, the resolution was submitted from all seven chapters and I just barely got a email and a text from Alex Bitsinnie, which is with the Navajo Mountain Chapter, as well as James Adakai for the record, with Oljato Chapter asking and pleading to continue to support the bill.

Senator UDALL. Vice President Jim, what kind of accountability would the Navajo Nation have if it were trustee?

Mr. JIM. First of all, we have a legal system that is in place. So we do have the Navajo judicial branch who oversees the laws and interprets them. And recently, they have been able to challenge some of the actions of the Council in order to maintain integrity and we have that in place. And we have several trust funds in the multimillions of dollars that we oversee. So we have an auditing process in place to keep us accountable.

And should for any reason, the Navajo Nation violate the trust fund, then the beneficiaries have the ability to take us, the Navajo Nation, to court. And the Navajo Nation Council has agreed to waiver, and with the assets that we have, it would cover anything that may have been misspent.

Mr. MARYBOY. Senator?

Senator UDALL. Yes?

Mr. MARYBOY. The former President, the same question was raised and he refused to waive the sovereign immunity if there is any wrongdoing to the trust fund. Furthermore, there is a legal opinion that was drafted by the former Attorney General which is Lewiston Atocci, telling the Navajo Nation that this is something that the Utah Navajos can do themselves.

And on top of that, I think we have capable and able educated students, young men, that have been looking for jobs elsewhere for the longest time, and are able to do this as well. We have 67.5 percent which is already going into the Navajo Nation, which we hardly or don't see. And outside the wells, 100 percent of that is going to the Navajo Nation we hardly see or don't see.

So we have our own independent medical facilities and we have been doing things on our own for so long.

Senator UDALL. Well, I very much appreciate both of your answers and at this point I think the best thing from my perspective is submit some additional questions for the record for you to answer outside of the hearing, and then we will be able to see everything fully in the record and work with both of you on this issue.

Mr. Chairman, I want to just thank you very much. I realize I went way over and thank you for your courtesies. This has been a long hearing, but I think it has been an important one.

And I would thank all of the witnesses here today. I think you have made an excellent case in your testimony and you have given us a lot to think about. And Chairman Akaka has been very aggressive about moving the agenda on bills. And I think, once again, we have had a very good hearing day here.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator Udall, for your questions and your cooperation here.

I want to add my thanks to all of you, my warm mahalo thank you very much to all the witnesses in today's hearing. I do have questions for you that I will defer and place in the record for you. The record will be open for two weeks so other Members may add questions as they have them and concerns that they can communicate with you.

The whole effort here is to try to work together and resolve some of these issues that have been pending these years and try to resolve them at this point in time.

I want to also thank the Administration for providing their views on these bills, and especially I want to thank the Tribal representatives and the affected parties who are here. It is very important for the Committee to hear from all of you, and that is what I am trying to do, to give more of you an opportunity to let us know how you feel about these issues.

And I would tell you thank you so much for adding to that and we will continue to do this with other issues as well, but ask you to please work closely with us, with the Committee and also with the Administration. In some cases, communication is a problem and we will continue to work on that as well and try to improve that, but we can do it only if we work together and it is happening.

Again, I want to thank you for all of this.

The hearing is adjourned.

[Whereupon, at 5:12 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM MONTANA

Chairman Akaka, thank you for holding this hearing on an extremely important bill.

A wise man from Indian Country once said, "I do not think the measure of a civilization is how tall its buildings of concrete are but rather how well its people have learned to relate to their environment and fellow man." This bill speaks to both lessons.

The Blackfeet Water Rights Settlement Act is a critical step in two decades of negotiations between the Blackfeet Nation, the State of Montana, and the U.S. The bill ratifies the water rights compact with the Blackfeet Nation. It confirms that the United States is a nation that honors its commitments to all its citizens, including those who belong to Tribal Nations.

The Blackfeet people call the mountains of their homeland the "backbone of the world." Yet even the strongest back will bend without water. The backbone of the world is at the same time a wellspring. It is this crucial resource that makes the high plains habitable, and it is this crucial resource before us today. Water is critical for the variety of land uses that occur on the reservation: farming, ranching, timber, oil and gas development, and tourism. These activities also harken back to the efforts of our recently departed friend Elouise Cobell, who forced a long-standing resolution to the payments and royalties of these activities.

In the same spirit as Eloise's legacy, the creation of the Blackfeet Reservation a century and a half ago implied a commitment on the part of the United States to reserve sufficient water to satisfy both present and future needs of a Tribe. With this hearing, we are taking the next step on the slow march toward fulfilling that commitment.

By ratifying this compact, Congress will both establish the federal reserved water rights of the Tribe and authorize funds to construct the infrastructure necessary to make the water available for use. This infrastructure includes rehabilitation of the Blackfeet Irrigation Project and construction of other water projects. It also mitigates the impacts of the Tribe's water rights on current non-tribal water users. The Blackfeet Water Compact has already been ratified by the State of Montana. As this Committee knows well, the obligation is now on Congress to complete the settlement.

Four out of seven tribal water compacts in Montana have already been ratified by Congress. I look forward to diligent work with the other tribes to complete theirs. The wheel is turning, and every compact will be addressed. I am confident, for instance, that any overlapping claims in this bill with the Gros Ventre and Assiniboine Tribes' Milk River allocation are resolvable.

I look forward to cooperating immediately with the Obama Administration, the Tribe, the state, and other stakeholders to strengthen the bill in order to move forward. The Blackfeet have a bright future, and it will be brighter still with this settlement.

PREPARED STATEMENT OF HON. JONATHAN NEZ, VICE CHAIRPERSON, BUDGET AND FINANCE COMMITTEE, NAVAJO NATION COUNCIL

Good Morning Mr. Chairman, Senator Akaka, and members of the Committee. I am here to testify on behalf of my Utah constituents as well as the 22nd Navajo Nation Council.

In 1933 the Navajo Nation began negotiation with the State of Utah and the United States Government to add certain portions of State lands to the Navajo Nation. During these negotiations the Navajo Nation along with the State of Utah and the United States Government agreed to set aside 37 ½ % of net oil and gas royalties for the benefit of Navajo's living on the newly added Navajo Trust Lands.

Since this time the Navajo Nation has been receiving 100% of the oil and gas royalties from various companies as the Lessor and remitting 37 ½% back to the Utah Navajo Trust fund for the benefit of the Utah Navajo's. During this time, the Navajo Nation has never breached its fiduciary responsibilities to the Utah Navajo Trust Fund and continues to maintain an 'A' bond rating by the S&P. The Navajo Nation, through management of our own trust funds, has proved our fiduciary capabilities.

Federal legislation amending or repealing the 1933 Act and designating a new trustee for the Utah Navajo Trust Fund should be the result of good faith government to government negotiations between the Navajo Nation, the State of Utah, and the United States Government.

S. 1327 does not meet these good faith government to government negotiations and should not move forward without the consent and collaboration of the Navajo Nation or the 7 Utah Chapters who are directly impacted by these Trust Funds.

The Navajo Nation is an independent sovereign nation with the right to autonomy and self-government in matters relating to our internal and local affairs, any federal legislation that affects royalties generated by Navajo Nation Trust Lands must be made with the consent of the Navajo Nation.

I plead with you Committee members to consider our government to government relations and trust that has been built over these many years and ask that you allow the Navajo Nation time to settle our internal matters and present a solution that involves the collaborative efforts of the Navajo Nation, the State of Utah and the United States Government.

I realize that time is short as all projects administered under the Utah Navajo Trust will come to a halt on January 1, 2012. Our actions today will have a magnified effect seven generations into the future, it is imperative that we make good sound decision with this in mind.

Thank you for allowing me this time to speak on behalf of my Navajo people.

PREPARED STATEMENT OF HON. TRACY "CHING" KING, PRESIDENT, FORT BELKNAP INDIAN COMMUNITY TRIBAL COUNCIL

To the Members of the Senate Committee on Indian Affairs:

I am the President of the Fort Belknap Indian Community Tribal Council. As a representative and head of the Fort Belknap Indian Community ("FBIC"), I appreciate the opportunity to make this statement on behalf of over six thousand members of the Gros Ventre and Assiniboine Tribes. Our members have serious concerns about certain aspects of the Blackfeet Water Rights Settlement Act of 2011 because of the significant adverse impacts it will have on the FBIC, our own reserved water rights, and the livelihood and economy of the Fort Belknap Indian Reservation.

We have been working many years to secure our reserved water rights for the Fort Belknap Indian Community ("FBIC"). In fact, it was our Reservation water rights that was the focus of the decision of the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908), that recognized that the Gros Ventre and Assiniboine Tribes had reserved their rights to the waters of the Milk River and its tributaries when we accepted the Fort Belknap Indian Reservation as our permanent home, in a region that has been the ancestral home of both the Tribes for centuries. This landmark decision became what is now known as the *Winters* Indian water rights doctrine, and established a prominent Indian water right from which many tribes are benefiting, including the Blackfeet Tribe. The U.S. Supreme Court recognized in 1908 that "[t]he lands [of the Fort Belknap Reservation] were arid, and, without irrigation, were practically valueless." *Id.* at 567. The Milk River forms the northern boundary of our Reservation.

The FBIC recognizes that the Blackfeet Tribe possesses reserved water rights in the Milk River. However, the Blackfeet Water Rights Settlement Act of 2011 compromises the FBIC's Milk River reserved water rights. After many years of negotiations, the FBIC reached a Compact with the State of Montana and the United States in 2001. The FBIC-Montana-United States Water Rights Compact provides the FBIC, in part, with 645 cubic feet per second of the United States' share of the natural flow of the Milk River and its tributaries at the measuring station at Harlem, Montana, with a priority date of October 17, 1855. Of this right, up to 125 cubic feet per second may be diverted for direct use to a maximum of 10,425 irrigated acres within the Fort Belknap Indian Irrigation Project, which will preserve our historic water use protected in *Winters*. Up to 520 cubic feet per second may be diverted for direct use or to off-stream storage for subsequent use for both of the following: use on an additional 19,390 present and future irrigated acres (including land irrigated historically within the Milk River Basin 40J); and up to 4,000 acre-feet per year of use for non-irrigated purposes.

In 2009, the State of Montana entered into a Compact with the Blackfeet Tribe. The Blackfeet-Montana-United States Water Rights Compact provided the Blackfeet Tribe with "*all Natural Flow and Ground Water available to the United States under the Boundary Waters Treaty and all Ground Water non subject to the Boundary Waters Treaty in Basin 40F [of the Milk River Drainage] within the Reservation.*" This 2009 Blackfeet Water Compact provision created a direct conflict with the reserved rights to the Milk River that the FBIC negotiated and secured with the State of Montana and the United States in 2001. There is no doubt that Montana's and the United States' subsequent 2009 Compact with the Blackfeet with regard to Milk River waters appears inexplicable in light of the earlier 2001 Compact with the FBIC. However, after spending more than two years raising this conflict with the State of Montana and the United States during their water negotiations with the Blackfeet Tribe, we have reached the following conclusions about how this significant adverse outcome on the FBIC's water rights came about.

First, the negotiations between the United States, the State of Montana, and the Blackfeet Tribe apparently proceeded under the false assumption that the Blackfeet Tribe has a senior water right to the Milk River. It does not. The FBIC and the Blackfeet have *an equal and senior priority date* in that Fort Belknap has a treaty right claim to the same Milk River waters shared with the Blackfeet Tribe that is based on the same treaty as the Blackfeet. (This is not disputed by the parties). Both Tribes have an equal priority date of October 17, 1855, to the Milk River (based on the Treaty of 1855, 11 Stat. 657), and, consequentially, with all other factors being equal, both the FBIC and the Blackfeet would have an equal water right to the use of water from the Milk River. Given equal priority, the Blackfeet could, potentially, only acquire a larger quantity of water, when compared to the FBIC rights, if they were able to show a greater amount of "practicably irrigable acreage," the standard for quantifying tribal reserved water rights established in *Arizona v. California*, 373 U.S. 546, 600 (1964), or upon a court's decree allocating more water to a specific tribe.

This leads to the second false assumption, and therefore, objection, that the FBIC has to the Blackfeet Water Compact—as well as to its proposed Blackfeet Water Rights Settlement Act of 2011 (submitted, in part, to obtain Congressional approval of its Water Compact). In *Arizona*, the United States Supreme Court held that the quantity of water reserved by an Indian tribe under

the *Winters* doctrine is enough water to develop a viable agricultural economy, or water sufficient to irrigate the "practicably irrigable acreage" ("PIA") of the reservation. Applying this standard, the FBIC and the Blackfeet Tribe are both entitled to enough water to irrigate the PIA. The FBIC's quantification of Milk River water is based upon an analysis of its practicably irrigable acreage. However, the Blackfeet Tribe's quantification of water from the Milk River is not based on an analysis of its practically irrigable acreage; rather, its Compact provides the Tribe with "all Natural Flow and Ground Water . . . ." in the Milk River drainage. Engineering studies by our expert water engineers show that there are limitations on the amount of water available to irrigate the "irrigable" land on the Blackfeet reservation. Therefore, it is far from clear that the Blackfeet Tribe would be able to successfully show a higher level of use of water needed for **irrigation purposes on** their reservation. As a result, they would not be able to make a large PIA claim (which would be required to justify their receipt of "all the natural flow" of the Milk River).

The Blackfeet Compact seeks to preserve a set amount of water for the Blackfeet Tribe that is based on a standard of quantification quite different from the standard utilized to quantify the FBIC's water rights. In fact, we are unaware of any justification for the Blackfeet Tribe's water claim set forth in its Water Compact, which merely states a claim to "all the natural flow." It is our water experts' opinion that the Blackfeet's claim to **(and, therefore, use of)** water in the Milk River would be extremely limited because of physical factors and economics. It is our conclusion that the State of Montana agreed to the Blackfeet's Milk River Water Compact provision because the Blackfeet Tribe agreed to subordinate its Milk River water rights by holding existing State water users harmless. **This protective position by the State of Montana for the non-Indian water users ignored** the potentially disrupting and limiting impact on the FBIC Water Compact rights, which is based on the accepted standard of quantification tied to the use of water for agriculture.

During the State of Montana's and United State's negotiations with the Blackfeet Tribe, we requested that the State Reserved Water Rights Compact Commission address this issue. Characterizing the conflict as "a fight between two tribes," the Commission declined to resolve the Milk River reserved water rights conflict. **Nor did the United States at that time act to avoid what is now an unfortunate, direct conflict between the Milk River rights of the FBIC and the Blackfeet Tribe.** This failure to act to resolve the conflict has decimated the FBIC reserved right to divert water from the Milk River basin.

The FBIC recognized the Blackfeet rights on the Milk River in its original drafting of its Water Rights Settlement Bill, but the Blackfeet Tribe has not reciprocated. The FBIC included a provision in its Compact to allow for consideration of the water needs of the Blackfeet Tribe, but the provision in no way mandates or allows for a subordination of the FBIC interests to the Blackfeet Tribe. Two relevant provisions in the FBIC Compact specifically addressed the rights of the Blackfeet Tribe, which indicate that no subordination to the Blackfeet has occurred or is required under the terms of the FBIC Compact:

ARTICLE III - TRIBAL WATER RIGHT

2. Priority Date/Administrative Priority.

a. For purposes of this Compact only, the priority date of the water rights set forth in Sections A.1.a., b., and d. of this Article III is October 17, 1855. The Parties agree that the senior water right quantified in Section A.1.a. of this Article III, shall be satisfied in the following manner:

(2) The allocation between and relative priority of satisfaction of the water rights set forth in Section A.1.a. of this Article III and the water right of the Blackfeet Tribe in the Milk River Basin shall be resolved among the Fort Belknap Indian Community of the Fort Belknap Reservation, the Blackfeet Tribe, and the United States, or in the event an agreement is not reached, as ultimately decreed by the Montana Water Court or other court of competent jurisdiction, and shall not be prejudiced by this Compact including any agreement on priority date. The amount of the United States' Share of the Natural Flow of the Milk River available to the Tribes as calculated pursuant to Section E.2. of Article IV shall be modified to reflect any adjudication of the water rights of the Blackfeet Tribe or agreement between the Blackfeet Tribe and the Fort Belknap Indian Community of the Fort Belknap Reservation to the extent such agreement or adjudication affects the Calculated Undepleted Flow of the Milk River. The Milk River Project will not be required to provide any exchange water to the Tribes for diversion of the Blackfeet tribal water right.

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ARTICLE IV - IMPLEMENTATION OF COMPACT

E. Administration of the Milk River to Satisfy the Tribal Water Right.

1. Operation of the Milk River to Satisfy the Tribal Water Right.

a. Delivery of water on the mainstem of the Milk River shall include measures necessary to assure satisfaction of the Tribal Water Right.

b. To satisfy the Tribal Water Right, including to replace water depleted on tributaries to the Milk River excluding Peoples Creek, and water depleted on the mainstem of the Milk River upstream from the Western Crossing through exercise of water rights Arising Under State Law, the Milk River Project storage facilities shall be operated to release or bypass the water necessary to assure satisfaction of the water right set forth in Section A.1.a. of Article III, subject to the following conditions:

(1) The Tribes shall notify the Bureau of Reclamation or its successor as operator of the Milk River Project and any water commissioner appointed following petition by the Parties pursuant to Section B.3. of Article VII, or any other person or entity, when the Tribes seek release or bypass of water to satisfy the water right set forth in Section A.1.a. of Article III. The obligation of the Bureau of Reclamation ends with the release or bypass. Enforcement necessary to deliver the water to the Reservation shall be pursuant to this Compact.

(2) The amount of water released or bypassed to satisfy the water right set forth in Section A.1.a. of Article III shall not exceed the lesser of:

i. 645 Cfs; or

ii. the Calculated Undepleted Flow of the Milk River calculated pursuant to Section E.2. of this Article IV, modified to reflect any agreement or adjudication between the Blackfeet Tribe and the Fort Belknap Indian Community of the Fort Belknap Reservation on allocation of water from the Milk River to the Blackfeet Tribe, to the extent such agreement or adjudication affects the Calculated Undepleted Flow of the Milk River; or

iii. the amount and flow rate of water the Tribes can actually divert for use, storage, or diversion under an agreement for Transfer at the time of their notice to the Bureau of Reclamation and any water commissioner.

As the above language makes clear, the Fort Belknap Compact does not in any way subordinate the water rights of the Fort Belknap Indian Community, but authorizes a process by which the two tribes, with the agreement of the United States, can reach a compromised settlement on the priority and allocation of their water rights to the Milk River, and to account for such a settlement in future operations of the Milk River. The only provision in the Blackfeet Water Rights Settlement Bill addressing this conflict is a provision the relies on the Secretary obtaining the agreement of the Blackfeet Tribe and the FBIC to any alternative necessary to resolve this dispute. However, the Department of Interior rejected this approach through Principal Deputy Assistant Secretary Del Laverdure's testimony at the October 20, 2011, Committee hearing on the Blackfeet bill.

However, the FBIC remains committed to finding a compromised solution with the Blackfeet Tribe, which, at this point, can only be resolved by a Congressional "fix" before Congress approves the Compacts of both the FBIC and the Blackfeet. We now implore the Committee to consider both the FBIC Water Rights Settlement Bill in tandem with the Blackfeet Water Rights Settlement Bill so that this dispute over the shared waters of the Milk River may be resolved. Resolving this unequal and disproportionate outcome over the Milk River waters now is consistent with the Congressional policy of achieving finality when it settles Indian water rights. **Otherwise, this unresolved issue will continue into the future, it will not resolve over a century of conflict over waters in Montana, which is the Congressional hope in settling the water rights of the tribes, and it will have a high likelihood of leading to additional litigation between the Tribes to reach a settlement on this issue. The litigation would likely address the federal government's failure to satisfy its trust obligation to the FBIC because of the harm created by the Blackfeet Water Compact with regard to the future use of the Milk River water.**

The Blackfeet bill does not take into consideration the need to resolve this critical dispute. The FBIC supports working out a compromise with the Blackfeet Tribe, with the help and guidance of the Department of Interior, but the Blackfeet need to be willing to compromise, as well. **According to our engineers, a compromise is possible that would achieve an equitable apportionment between these conflicting claims, recognizing our coequal, senior priority rights. We are willing to put forth such a compromise in the spirit of respect and collaboration.**

We believe a resolution can be found and are currently working with individuals from the Department of Interior to explore options for mitigating the future negative impact on the FBIC if the Blackfeet Tribe were to maximize its water rights to all the natural flow of the Milk River under its Compact with the State of Montana and the United States. **We recommend that the Committee approach the dispute by applying a modified version of the long-standing United States Supreme Court doctrine of "equitable apportionment" that has been applied to interstate water disputes.** *See Nebraska v. Wyoming*, **325 U.S. 589 (1945). This doctrine could be modified for inter-tribal reserved water rights disputes, such as that presented here, in such a manner as to reach a fair and equitable solution to the shared Milk River for the FBIC and Blackfeet Tribe—whose senior priority rights to the Milk River are equal.**

We have made extensive progress in preparing our proposed Water Rights Settlement Bill this year by working with the members of the Montana Water Commission and the Federal Water Rights Negotiating Team to reach agreement on the provisions in the Bill. We have secured the support of the Governor of Montana and the Blaine County Commissioners for our Bill. We are now in the process of finalizing the proposed Bill for submission in Congress, revising it in response to extensive feedback from the Federal Water Rights Negotiating Team. In spite of extreme financial stress on our ability to employ our water attorneys and engineering experts to assist us in finalizing our Water Rights Settlement Bill, we are all committed to continuing our work on the proposed Bill and to complete it for submission to Congress in the next couple months. The **Deputy Assistant Secretary of the Department of Interior, Mr. Del Lavedure, has given us a commitment to identify small pockets of funding to keep our effort moving forward. We are also actively working with Senator Tester and Senator Baucus and their staff to restore funding to the water attorneys and expert fees program that has been "zeroed out" by the Department of Interior in its proposed appropriations bill for FY 2012.** Additionally, it should be pointed out that under the terms of the Montana Code relating to the water settlement process, no compact is effective and binding unless it is approved and ratified by "any affected tribal governing body," and that because the interests and rights of the FBIC are adversely affected by the implementation of the Blackfeet Compact, they have not ratified the Blackfeet Water Compact, leaving its enforceability in question.

In conclusion, because of these important competing interests in the reserved water rights in the Milk River in Montana, we believe it is imperative that the Senate Committee on Indian Affairs consider the FBIC Water Rights Settlement Bill at the same time it is considering the Blackfeet water settlement bill. **We will seek to have our Bill introduced by the end of January.** The FBIC remains committed to cooperative discussions with the Blackfeet Tribe, the United States, and the State of Montana to collectively resolve the areas of disagreement and mitigate negative impacts on our reserved water rights. At this point in time, only Congress is in a position to ensure that its Treaty obligations to the Fort Belknap Indian Community are satisfied and that an equitable share of the Milk River waters is achieved through both the FBIC's and Blackfeet's Water Rights Settlement Acts.

I would like to personally thank the staff of the Committee for recently taking the time to meet with us and allowing us to express these concerns directly with them.

PREPARED STATEMENT OF SUSIE PHILEMON, MEMBER, NAVAJO TRIBE, ANETH CHAPTER

We strongly feel that Senate bill 1327 should be constructed and enacted with these amendments for the following reasons:

1. Massive drilling and exploration for oil and gas had devastated our Aneth community, livelihood and health.
2. Fifty-four (54) years of oil and gas extraction had polluted and contaminated our surface and underground fresh drinking water. Nearly all natural springs and artesian wells in Aneth Greater Oil Field are unsafe for human consumption therefore many families still haul drinking water from border towns, 25 to 80 miles away.
3. Half of the land area in Aneth community is impacted and ruined due to clearing of natural vegetation for drilling sites, network of roads, oil pits and holding

trances and exposed pipelines. Drilling site constructed every ¼ of miles apart throughout Aneth community.

4. Miles of high powered electricity lines criss-crossing Aneth land to operate every oil pumps to 1,000 wells. Pipelines are everywhere as well, some unused but still buried underneath the ground.

5. Pollution, contamination and land damaged at this multitude had impacted the health of Aneth residents.

6. Navajo Nation, Utah State, and federal government has consistently ignored and has offered no protection, relief, or solution to the people's health and devastation of our community. In fact Navajo Tribal government designated Aneth community as a "sacrificial area."

7. Despite enormous wealth and revenues from oil, aneth community has no stable economy that would offer decent living. There are only two convenience stores, high price of gasoline which high than the national average, potholes of one central paved road and many families are still lack modern conveniences of electricity and indoor plumbing.

8. For over fifty (50) years, Navajo Nation had flourished on Aneth oil wealth but they never gave serious thought to the problems or to work with us to our desire to grow as a community.

9. Aneth area is still open market for drilling which current tribal administration is strongly advocating for it.

10.We like to have Indian Senate Committee to consider the revision of the Lease Agreement within Aneth Greater Oil Field.

Report No. 91-10 to Utah State Legislature—November 1991 has been retained in Committee files.

Alex Bitsinnie
President

Jean Dejolie
Vice-President

Ella Jean Badoui
Secretary/Treasurer

Lucille S. Krause
Grazing Official

Lena Manheimer
Council Delegate

RESOLUTION OF
NAVAJO MOUNTAIN CHAPTER
OF THE NAVAJO NATION
NM 009-176/2009

A RESOLUTION PROVIDING THE POSITION OF THE NAVAJO MOUNTAIN CHAPTER REGARDING THE FUTURE OF THE UTAH NAVAJO TRUST FUND AND TRUSTEE(S)

WHEREAS:

1. The Navajo Mountain Chapter is officially recognized and certified as a political unit of the Navajo Tribal Government pursuant to Navajo Tribe Council Resolution No. CJ-20-55; and

2. The Navajo Mountain Chapter includes community members who are beneficiaries of the Utah Navajo Trust; and

3. The Utah Navajo Trust was created by federal statute in 1933. Under the Act, Federally owned land within San Juan County known as the "Aneth Extension" was given to the Navajo Tribe. Also under the Act, the State of Utah was assigned the responsibility to manage 37.5% of the oil and gas royalties collected by the Department of Interior on the Utah portion of the Navajo Nation for the benefit of the Utah Navajos (47 Stat. 1418); and

4. In 1968, Congress amended the 1933 Act to redefine beneficiaries as "Navajos residing in San Juan County" and to expand the purpose of the fund "for the health, education and general welfare of the Navajos living in San Juan County" (82 Stat. 121); and

5. A portion of the residents of the Navajo Mountain Chapter reside within San Juan County, Utah; and

6. The State of Utah has given notice that effective June 30, 2008, it will no longer act in the capacity of Trustee for the Utah Navajo Trust Fund; and

7. The State of Utah has created the "Utah Navajo Royalty Holding Fund", which effective July 1, 2008, will extinguish the Utah Navajo Trust Fund, but continue to make expenditures to maintain existing assets in the Fund, continue certain housing and educational projects approved before May 5, 2008. However, no new projects will be authorized; and

8. The Congress of the United States of America will have to, by law, determine who will act in the future as the Trustee of this fund; and

9. The Navajo Nation desires to be named the new Trustee reasoning that since it receives 62.5% of the oil and gas royalty money produced on the Utah Navajo Reservation, that they should receive and manage the remaining 37.5%; and

10. The residents of the Utah portion of the Navajo Nation do not realize the benefits from the remaining 62.5% of the royalties collected by the Navajo Nation; and

11. The Navajo Mountain Chapter has been meeting and discussing the current Utah Navajo Trust Fund and potential future options since the announcement of the Sunset Act by the State of Utah; and

12. The Navajo Mountain Chapter supports keeping the 37.5% royalties uniquely noted, as is, for the specific use and benefit of the beneficiaries residing in San Juan County Utah; and

3. The Navajo Mountain Chapter position is that it supports, and has previously resolved in the affirmative, the formation of a Utah-Navajo-controlled corporate entity, the purpose of which will be the management of trust assets and royalty revenue currently under the control and management of the State of Utah and the Utah Navajo Trust Fund.

THEREFORE, BE IT RESOLVED, the official position of the Navajo Mountain Chapter concerning the creation of Utah Dine Corporation and selecting members to serve on the Board of Directors is as follows:

1. The Navajo Mountain Chapter supports the creation of a Corporate Entity to be recognized by the Utah Department of Commerce and by the Navajo Nation.

2. The name of the corporation shall be Utah Dineh Corporation.

3. That the purpose of the corporation shall be to promote education, healthcare, and general welfare for *eligible* Navajos (as defined by the By-laws of the corporation).

4. The corporation will be governed by a Board of Directors appointed by various Utah Chapters and Blue Mountain Dineh. The board will be comprised as follows: One board member from Red Mesa, Teec nos pos, Mexican Water, Oljato, Navajo Mountain, and Blue Mountain Dineh, and two board members from Aneth.

5. The initial Board of Directors of the Utah Dineh Corporation shall be charged with the responsibility of creating By-laws to further define the roles and responsibilities of the Utah Dineh Corporation, and that the board also further defines the beneficiaries and the eligibility criterion for assistance by the corporation.

6. The Navajo Mountain Chapter recommends Alex Bitsinnie, the Navajo Mountain Chapter President, to represent the chapter as an interim board member for the Utah Dineh Corporation.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Navajo Mountain Chapter at a duly called regular meeting at Navajo Mountain Chapter, NAVAJO NATION, Utah, at which a quorum was present and that the same was passed by a vote of 32 in favor, 00 opposed, and 00 abstained, this 20th day of September, 2009.

Motioned by: Ken Navajo Seconded by: Wilson Sloan

Alex Bitsinnie, President
Navajo Mountain Chapter

Jean Dejohn, Vice-President
Navajo Mountain Chapter

Bila Badoni, Secretary/Treasurer
Navajo Mountain Chapter

Lucille S. Kruse, Grazing Official
Navajo Mountain Chapter

THE NAVAJO NATION

Oljato Chapter Administration
P.O. Box 360455 Monument Valley, Utah 84536
Telephone 435-727-5850 Facsimile 435-727-5852

James Black, Chapter President
James Adakai, Chapter Vice-President
Shirlee Bedonie, Secretary/Treasurer

Jonathan M. Nez, Council Delegate
Vacant, Grazing Member
Albert Tiehara, CSC

OLJATO CHAPTER RESOLUTION
RESOLUTION#: CH-11-06-2012

ENDORSING AND SUPPORTING THE SENATE BILL 1327 ENTITLED "TO AMEND THE ACT OF MARCH 1, 1933 TO TRANSFER CERTAIN AUTHORITY AND RESOURCES TO THE UTAH DINEH CORPORATION AND FOR OTHER PURPOSES.

WHEREAS:

1. Pursuant to 26 N.N.C. the Oljato Chapter is recognized as local government body of the Navajo Nation Government and under Section 4001; the chapter is vested with the authority to consider all matters affecting the Navajo people and its nation; furthermore under 26 N.N.C. Section 4028, the Oljato Chapter is hereby authorized to make appropriate recommendation, request and express support to the Navajo Nation and other local government entities for appropriate action(s); and

2. The Oljato Chapter people has received report on the Senate Bill 1327, whereby on October 20, 2011 a hearing was sponsored by the Senate Select Committee on Indian Affairs, whereby testimony was provided by interest entities; and

3. Furthermore, the proposed Senate Bill 1327 is in the best interest of all Navajo residents of San Juan County, Utah rather than a single interest and/or recognizing the Navajo Nation government as the next trustee; and

4. Lastly, the Navajo people of Oljato Chapter community supports to keep the Congressional Statues of 1933 and subsequent 1968 amendment with out chance and furthermore to keep the 37.5% of Gas & Oil Royalty and related financial matter within the State of Utah; and

5. The Utah Dineh Corporation is established and incorporated under the State of Utah with a state renowned attorney to address all applicable legal issues and also an experiences state Certified Public Accountant (CPA) to address all needs regarding financial management of the corporation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Oljato Chapter hereby endorses and supports the Senate Bill 1327 entitled "To Amend the Act of March 1, 1933 to transfer certain authority and resources to the Utah Dineh Corporation and for other purposes."

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Chapter at a duly called authorized chapter meeting held in Oljato, Navajo Nation, Utah at which a quorum was present and that it was passed by vote of 27 in favor, 0 opposed, and, 1 abstaining, on this 2nd day of November, 2011.

Motion: Carol Tallio

Second: Tommy Rock

James Black, President

James Adakai, Vice President

Shirlee Bedonie, Secretary/Treasurer