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A BILL TO SETTLE LAND CLAIMS WITHIN THE FORT HALL RESERVATION

DECEMBER 2, 2010.—Ordered to be printed

Mr. DORGAN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 2802]

The Committee on Indian Affairs, to which was referred the bill (S. 2802) to settle land claims within the Fort Hall Reservation, having considered the same, reports favorably thereon, and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 2802 is to settle pending land claim disputes occurring between the Shoshone-Bannock Indian Tribes of the Fort Hall Indian Reservation and certain non-Indian landowners.

BACKGROUND

The Fort Hall Reservation was established by Executive Order in 1867 and confirmed in the Fort Bridger Treaty of 1868. The Blackfoot River was established as the northern boundary of the Fort Hall Reservation. The land disputes in question arose as a consequence of the realignment of the Blackfoot River by the Corps of Engineers in 1964 to address flow and periodic flooding issues. Following the realignment, 25 parcels of land (approximately 37.04 acres of individually and tribally-owned land) ended up on the north side of the river, outside of the reservation boundary, and 19 parcels (approximately 31.01 acres) of non-Indian owned land ended up on the south side of the River, within that boundary. Over the years, these parcels of land have remained idle due to lack of access.

In the late 1980s, the Snake River Basin Adjudication began decreeing water rights on all streams and rivers within the Snake

River Basin in Idaho, which includes the Blackfoot River basin. Several non-Indian landowners whose lands were affected by the realignment of the Blackfoot River asserted claims that their place of use was on the Fort Hall Reservation. The Shoshone-Bannock Tribes filed objections to those claims which resulted in litigation currently pending as part of the Snake River Basin Adjudication.

NEED FOR THE LEGISLATION

S. 2802 embodies the terms of a negotiated settlement among the parties, including the Shoshone-Bannock Tribes, the non-Indian litigants, and the State of Idaho. Congressional approval of the settlement agreement is required to extinguish claims and title to land, to place land into trust and to appropriate funds. Further, without legislation the pending legal proceedings will resume, resulting in lengthy and costly litigation for all affected parties.

S. 2802 would resolve the land ownership disputes and extinguish claims relating to the ownership of lands and water rights. These ownership disputes would be resolved by conveying title to the lands within the Reservation to the United States to hold in trust for the Tribe or Indian allottee, and by conveying title to the lands outside the reservation boundaries to the Black River Flood Control District No. 7 for re-conveyance to the non-Indian landowners.

The legislation would authorize \$1 million to compensate both the Indian and non-Indian landowners for years of trespass and the value of their lands. The compensation would be divided as follows: (1) twenty-eight percent to be deposited into a tribal trust fund account from which amounts shall be distributed to the Tribes for activities related to construction of natural resources facilities, water resources needs, economic development, and land acquisition; (2) twenty-five percent to be paid into individual Indian money accounts for the allottees; and (3) forty-seven percent to be provided to the Blackfoot River Flood Control District No. 7 for distribution to the non-Indian landowners on a pro rata, per acre basis and for associated administrative expenses.

LEGISLATIVE HISTORY

On November 19, 2009, Senator Crapo, for himself and Senator Risch, introduced S. 2802, which was referred to the Committee on Indian Affairs. On February 4, 2010, a companion bill, H.R. 4613, was introduced in the House by Congressman Michael K. Simpson for himself and Congressman Walter Minnick. The bill was referred to the House Committee on Natural Resources.

On April 29, 2010, the Committee on Indian Affairs held a legislative hearing to consider S. 2802 and other measures. On June 10, 2010, the Committee on Indian Affairs convened a business meeting to consider S. 2802 and other measures, and Senator Crapo offered technical amendments to the original bill. The Committee approved the amendment and the bill, by voice vote, and ordered the bill reported to the full Senate with the recommendation that the bill, as amended, do pass.

SUMMARY OF THE AMENDMENT

The amendment, offered by Senator Crapo, made technical changes to the bill to ensure that exhibits and other references were correctly stated and referenced, to make grammatical corrections, and to accurately reflect the confirmation year of the Second Treaty of Fort Bridger.

SECTION-BY-SECTION OF S. 2802 AS AMENDED

Section 1. Short title

The short title of the Act is the “Blackfoot River Land Settlement Act of 2009.”

Section 2. Findings; Purposes

This section sets out the findings that led to the introduction of this Act. The findings include references to the 1964 Corp of Engineers flood protection project on the Blackfoot River, which realigned the River so that certain parcels of non-Indian land ended up being located within the reservation boundaries and certain Indian lands ended up located outside of the reservation boundaries. The findings also note that the affected parties have filed claims in the Snake River Basin Adjudication seeking water rights based on the realignment of the Blackfoot River.

Section 2 also states that the purpose of the Act is to resolve the disputes resulting from the realignment of the Blackfoot River by the Corps of Engineers in 1964, and to achieve a fair, equitable, and final settlement of all claims arising from those disputes.

Section 3. Definitions

This section defines the key terms in this Act. The defined terms are “Indian land,” “non-Indian land,” “Realigned River,” “River,” “Reservation,” “Non-Indian Landowner,” and “allottee.”

Section 4. Extinguishment of Claims and Title

Section 4 provides that all claims, past, present, and future will be extinguished on the date on which appropriations are distributed in accordance with this Act, unless specifically exempted by another section of this Act.

Section 5. Land to be Placed Into Trust for Tribes

Section 5 states that upon distribution of the funds appropriated in this Act, that the non-Indian lands shall be held in trust by the United States for the benefit of the Tribes.

Section 6. Trust Land to be Converted to Fee Land

This section provides that upon distribution of the funds appropriated in the Act, that the Indian lands, as defined by the Act, will be transferred to the Blackfoot River Flood Control District No. 7 for conveyance to the non-Indians acquiring Indian lands.

Section 7. Tribal trust fund account and allottee trust account

This section provides for the establishment of a “tribal trust fund account” in the Treasury of the United States which shall be invested for the benefit of the Tribes. The funds in the account are to be distributed based upon a budget adopted by the Tribes which

describes the amounts required and intended uses of the funds. The funds may be used for construction of a natural resources facility; water resources needs; economic development; land acquisition; and other such purposes that the Tribes determine to be appropriate. A separate account, the “allottee trust account,” is to be set up in the Treasury of the United States, which must be invested by the Secretary of the Treasury and deposited into the individual Indian money accounts for the affected allottees no later than 60 days after which funds are deposited into the allottee trust account.

Section 8. Attorneys fees

This section states that the Secretary of the Interior shall pay the attorneys fees of the Tribes and the non-Indian landowners, and the total amount of attorneys fees paid shall not exceed two percent of the total amounts distributed to the Tribes, allottees, and non-Indian landowners.

Section 9. Effect on original reservation boundary

This section confirms that nothing in the Act affects the original boundaries of the Reservation as established by Executive Order in 1867 and confirmed by Treaty in 1868.

Section 10. Effect on Tribal Water Rights

This section confirms that nothing in the Act extinguishes or conveys any water rights of the Tribes as established in the “1990 Fort Hall Indian Water Rights Agreement,” ratified by section 4 of the Fort Hall Indian Water Rights Act of 1990 (Pub. L. 101–602).

Section 11. Disclaimers regarding claims.

This section confirms that nothing in this Act affects the sovereign claim of the State of Idaho to title in and to the beds and banks of the Blackfoot River under the equal footing doctrine; affects any action by the State of Idaho under the Quiet Title Act; affects the ability of the Tribes or the United States to claim ownership of the beds and banks of the River; or extinguishes or conveys any water rights of non-Indian landowners or the claims of such landowners to water rights in the Snake River Water Basin.

Section 12. Funding

This section authorizes appropriations in the amount of \$1 million to be distributed among the Tribes, the allottees, and the Blackfoot River Flood Control District No. 7 in the following manner: (1) twenty-eight percent to be distributed to the tribal trust fund account; (2) twenty-five percent to be distributed to the allottee trust fund account; and (3) forty-seven percent to be distributed to the Blackfoot River Flood Control District No. 7 for distribution to the non-Indian landowners and associated administrative expenses. This section also states that funds distributed under this Act shall not be used for per capita payments to tribal members.

Section 13. Effective date

This section makes the Act effective on the date on which the appropriations described in Section 12 are appropriated.

COMMITTEE RECOMMENDATION

On June 10, 2010, the Committee on Indian Affairs convened a business meeting to consider S. 2802 and other measures. Senator Crapo offered technical amendments to the original bill. The amendment was approved by the Committee by voice vote. The Committee ordered the bill reported to the full Senate with the recommendation that the bill, as amended, do pass.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate was prepared for S. 2802, as provided by the Congressional Budget Office on September 21, 2010:

S. 2802—Blackfoot River Land Settlement Act of 2009

S. 2802 would authorize the appropriation of \$1 million to settle a land dispute between the Shoshone-Bannock Tribes and certain non-Indian landowners in southeastern Idaho. Based on information from the Department of the Interior (DOI) and assuming the availability of appropriated funds, CBO estimates that implementing the legislation would cost \$1 million over the 2011–2015 period. Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under the bill, DOI would exchange 37 acres of Indian trust land for 31 acres of private land that would be held in trust for the Shoshone-Bannock Tribes. The bill also would authorize the appropriation of \$1 million to settle certain claims made against the federal government. Of those amounts, about \$710,000 would be paid to individual Indian and private landowners as compensation for damages resulting from certain federal activities. An additional \$270,000 would be held in trust for the Shoshone-Bannock Tribes by the U.S. Treasury. The tribes would have the authority to spend those amounts at their own discretion. Finally, up to \$20,000 of the authorized amounts would be available to pay attorneys' fees for the tribes and the non-Indian landowners.

By requiring the exchange of lands through federal statute, S. 2802 would impose both intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA), on tribal and nontribal land owners. The bill would terminate rights to certain parcels of land surrounding the Blackfoot River and extinguish any past, present, or future claims on that land. The cost of the mandates would be the forgone damages that could have been collected through legal actions related to the property and the net value of the land being exchanged by the federal government. In a market study used by DOI, the value of the land is estimated to be less than \$500,000. Therefore, CBO estimates that the aggregate cost of the mandates would fall well below the annual thresholds established in UMRA for both intergovernmental and private-sector mandates (\$70 million and \$141 million, respectively, in 2010, adjusted annually for inflation).

The CBO staff contacts for this estimate are Jeff LaFave (for federal costs), Melissa Merrell (for the intergovernmental impact), and Marin Randall (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee received a letter on August 2, 2010, from the Assistant Secretary of the Interior for Indian Affairs, Larry Echo Hawk, with the Department of the Interior expressing the Department's views on S. 2802. The Committee also received a letter on September 2, 2010, from the Shoshone-Bannock Tribes in response to the Department's views, which will be kept on file with the Committee. The Department of the Interior's letter is below:



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

AUG 02 2010

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

RE: Views on S. 2802 – Blackfoot River Land Settlement Act of 2009

Dear Mr. Chairman:

In response to your letter dated June 30, 2010 to Secretary Ken Salazar, this letter presents the views of the Department of the Interior (Department) on S. 2802, the Blackfoot River Land Settlement Act of 2009, as reported by the Senate Committee on Indian Affairs on June 10, 2010. The Department cannot support S. 2802, but could support the exchange of certain lands for purposes of resolving water rights claims in the Snake River Basin Adjudication.

In 1867, the Fort Hall Indian Reservation was created by Executive Order for various bands of the Shoshone and Bannock Indians. Pursuant to the Executive Order, the Blackfoot River, as it existed in its natural state, formed the northern boundary of the Reservation. In the 1960's, the United States Army Corps of Engineers (Army Corps) completed a flood control project along the Blackfoot River. The project consisted of constructing levees, replacing irrigation diversion structures, replacing bridges and channel realignment.

While the flood control project did not change the original boundaries of the Reservation, it realigned portions of the Blackfoot River. Thus, after the Army Corps completed the project, individually-Indian owned and Indian lands (approximately 37.04 acres) ended up on the north side of the realigned River, and non-Indian owned lands (approximately 31.01 acres) ended up on the south side of the realigned River. Over the years, these parcels of land have remained idle because the landowners could not gain access to the parcels of land without trespassing or seeking rights-of-way across the lands of other owners.

In the late 1980's, the Snake River Basin Adjudication (SRBA) began to decree water rights on all streams and rivers within the Snake River basin in Idaho, which includes the Blackfoot River basin. During SRBA, several non-Indian landowners, whose lands were affected by the realignment of Blackfoot River, claimed as their water rights' place of use lands on the Fort Hall Indian Reservation.

The Shoshone-Bannock Tribes (Tribes) filed objections to these water right claims. The United States did not file objections on behalf of the Tribes, but has been closely working with the Tribes and monitoring these and related water right claims in the SRBA. Thus, resolution of the land ownership issues along the realigned portions of the Blackfoot River could resolve related water rights claim in the SRBA.

The primary features of S. 2802 are to:

- authorize the United States to take certain non-Indian lands into trust on behalf of the Shoshone-Bannock Tribes in Idaho;
- authorize the United States to convey certain Indian lands into fee lands;
- extinguish certain claims that potentially could be asserted by the Shoshone-Bannock Tribes against the United States;
- establish a Tribal Trust Fund Account in the Department of Treasury that the Tribes could use for water resources, economic development, land acquisition, and other purposes that the Tribes determine to be appropriate; and
- authorize appropriations of \$1 million to be paid to the Shoshone-Bannock Tribes, Indian allottees, and non-Indian landowners and all parties' respective attorneys.

Again, while the Department could support the exchange of certain lands for purposes of resolving water rights claims in the SRBA, the Department cannot support S. 2802, because we have a number of concerns with the legislation.

As the Department understands, the justification for the \$1 million appropriated in the bill is the alleged harm caused by the realignment of the Blackfoot River in the 1960's. While the Tribes, Indian allottees and non-Indian land owners have claimed harm from the rechanneling of the river in the 1960's, none of these parties has sought to remedy this harm before now. Nor is it clear that there are any valid or cognizable claims arising out of the realignment. There is no reason to believe that the United States would be liable for a legal claim that would warrant it contributing this amount to the settlement.

Second, as we understand it, no settlement exists among the Tribes, Indian allottees and non-Indian land owners. Generally, the United States expects to at least review any settlement it is being directed to fund.

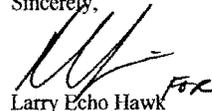
Third, the United States ordinarily expects to see included in a settlement express waivers of any and all claims that they might have against the United States and its agencies relating to the claims at issue in the settlement. This is true particularly when the United States is directed to pay to settle the alleged claims. The Department was not consulted on this proposed settlement before S. 2802 was introduced. We welcome the opportunity to work with the Tribe to develop a mutually acceptable solution for all vested stakeholders. In this instance, the legislation does not waive the parties' claims related to the lands that are to be placed in trust for the benefit of the

Shoshone Bannock Tribes, nor for the Indian lands that are to be conveyed in fee to non-Indians. The exclusion of these waivers against the United States is problematic.

Lastly, the Department finds problematic the provision in the legislation that directs the United States to pay attorneys' fees to all represented landowners. Generally, all parties pay their own attorneys' fees, and such a provision is unusual. We are concerned that including it in the legislation could set a bad precedent.

Thank you for the opportunity to provide these views for the record. Please let us know if you require any further information.

Sincerely,

A handwritten signature in black ink, appearing to read "LEH", with the initials "LEH" written in a smaller font to the right of the signature.

Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Senator John Barrasso

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XDXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2802 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 2802 will not make any changes in existing law.

