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SENATE

{ REPORT
{ 115-240

TO PROVIDE FOR EQUITABLE COMPENSATION TO THE SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION FOR THE USE OF TRIBAL LAND FOR THE PRODUCTION OF HYDROPOWER BY THE GRAND COULEE DAM, AND FOR OTHER PURPOSES

MAY 7, 2018.—Ordered to be printed

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

R E P O R T

[To accompany S. 995]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 995) to provide for equitable compensation to the Spokane Tribe of Indians of the Spokane Reservation for the use of tribal land for the production of hydropower by the Grand Coulee Dam, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends the bill, as amended, do pass.

PURPOSE

Specifically, S. 995 would provide the Spokane Tribe with annual payments for the past and continued use of tribal lands, which are now submerged under the reservoir created by the Grand Coulee Dam. The annual payments are to be based on revenues from the sale of electric power from the Grand Coulee Dam and the transmission of the power by the Bonneville Power Administration.

BACKGROUND

From 1927 to 1931, the United States Army Corps of Engineers (Corps), at the direction of Congress, investigated the Columbia River and its tributaries to identify sites where dams could be constructed to produce hydroelectric power at low cost.¹ During this time, the Corps made a number of site recommendations for dam construction, including the site where the Grand Coulee Dam is

¹ Federal Power Act of 1920 Sec. 4, 16 U.S.C. Sec. 797 (1920).

now located. The site chosen for the Grand Coulee Dam consisted, in part, of lands held in trust by the Federal government for the benefit of the Spokane Tribe and the Confederated Tribes of the Colville Reservation (Colville Tribes).

The Federal Power Act and its effect on Indian tribes. The Corps recommended local governments or private utilities, as a licensee under the authority of the *Federal Power Act*,² undertake construction of the Grand Coulee Dam. When tribal lands are involved, licensing procedures require the licensee to pay an annual payment to Indian tribes who have jurisdiction over the tribal lands.³ In 1933, the Federal Power Commission issued a preliminary permit to the Columbia Basin Commission to construct a dam at the recommended Grand Coulee site. During the mid-1930s, the Federal government federalized the Grand Coulee Dam project and began construction of the dam. The Federal government is not subject to the *Federal Power Act* and is not obligated to make annual payments to Indian tribes when tribal lands are used for projects such as the Grand Coulee Dam project.⁴

Compensation to the Tribes. The Federal government's decision to federalize the Grand Coulee Dam project affected the Spokane Tribe and Colville Tribes' interests. The Federal government acknowledged these effects and determined that both tribes should receive a share of revenue from the disposition of power produced by the Grand Coulee Dam. To that end, the *Act of June 29, 1940*, directed the Secretary of the Interior to provide compensation to the Spokane Tribe and Colville Tribes for the use of tribal lands in an amount determined by the Secretary to be just and equitable.⁵ Interior paid \$4,700 to the Spokane Tribe and \$63,000 to the Colville Tribes.

The Indian Claims Commission. Prior to passage of the *Indian Claims Commission Act* in 1946, there was no forum for an Indian tribe's claim for damages against the United States. Instead, these types of claims would proceed on a case-by-case basis, with each tribe seeking an individual authorization from Congress to pursue litigation against the United States. Dissatisfied with this ad hoc approach, Congress enacted the *Indian Claims Commission Act* to establish the Indian Claims Commission (ICC), a forum where Indian tribes could pursue historic claims against the United States, so long as those claims accrued prior to the Act's passage (August 13, 1946). Under the Act, Congress granted only a five-year statute of limitations for tribes to file claims with the ICC.

While the ICC's jurisdiction over these claims was broad—covering everything from claims of a breach of fair and honorable dealings to violations of the Constitution—the remedies available to tribes were not. Rather than vest the ICC with the authority to provide equitable relief, Congress instead allowed for monetary damages only.

Both the Spokane Tribe and the Colville Tribes filed separate, unrelated land claims prior to the August 13, 1951, deadline. During the five-year period to file claims with the ICC, neither the

² *Id.*

³ Federal Power Act of 1920 Sec. 10, 16 U.S.C. Sec. 803(e) (1920).

⁴ *Id.*

⁵ Act of June 29, 1940 Sec. 2, 16 U.S.C. Sec. 835d (1940).

Spokane nor the Colville Tribes filed claims for compensation for the use of tribal lands to construct the Grand Coulee Dam.

The ICC fully adjudicated the Spokane Tribes' land claims by 1967. By settling the land claims against the Federal government, the Spokane Tribe had no further mechanism to litigate claims over the Grand Coulee Dam project in Federal court due, in part, to the 5-year statute of limitations set in the *Indian Claims Commission Act*.

The Colville Settlement Agreement. In 1976, against objection by the United States because of the cessation of the ICC, the Colville Tribes successfully amended their ICC land claim to add the Grand Coulee Dam project, creating an opportunity for the tribe to seek compensation.

In 1994, to halt litigation pending under the *Indian Claims Commission Act*, Congress ratified the *Colville Settlement Agreement* (Agreement) requiring a payment of \$53 million to the Colville Tribes for the federal government's past use of tribal lands.⁶ Under the Agreement, the United States also agreed, in exchange for the continued use of Colville tribal lands, to provide the Colville Tribes annual payments of \$15,250,000, adjusted annually based on revenues from the sale of electric power from the Grand Coulee Dam project and the transmission of that power by the Bonneville Power Administration.⁷ Unlike the Colville Tribes, the United States did not compensate the Spokane Tribes under the Agreement for the continued use of their tribal lands.

NEED FOR LEGISLATION

The bill, S. 995, would provide fair and equitable compensation to the Spokane Tribe by requiring annual payments from the Bonneville Power Administration to the Spokane Tribe for past and continued use of tribal lands in generating hydropower from the Grand Coulee Dam in the state of Washington. With no further opportunity to litigate the Spokane Tribe's lands claims in federal court, legislation is necessary.

LEGISLATIVE HISTORY

On May 1, 2017, Senator Cantwell and Senator Murray introduced S. 995, a bill to provide for equitable compensation to the Spokane Tribe of Indian of the Spokane Reservation for the use of tribal land, and for the production of hydropower by the Grand Coulee Dam, and for other purposes (also known as the *Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act*). The Committee did not hold a legislative hearing on this bill. A House companion bill has not been introduced at this time.

On February 14, 2018, by voice vote, the Committee ordered the bill, as amended, to be reported favorably to the Senate. The amendment, offered by Senator Cantwell, removed Section 5, the "Spokane Tribe of Indians Recovery Trust Fund" of the bill and included conforming, technical amendments. The amendment eliminated the \$53 million upfront payment but retained the provisions for annual payments.

⁶ Act of August 13, 1946, omitted 25 U.S.C. Sec. 70 et seq. in that the Indian Claims Commissions was terminated on September 30, 1978 by Pub. L. No. 94-465 (1976).

⁷ *Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act*, Pub. L. No. 103-436, 108 Stat. 4577 (1994).

Prior Congresses

114th Congress. On March 17, 2016, Senator Cantwell and Senator Murray introduced S. 2739. The Committee did not hold a legislative hearing on this bill. On May 11, 2016, the Committee held a duly called business meeting to consider S. 2739. The Committee ordered the bill to be reported favorably without amendment.

113th Congress. On August 1, 2013, Senators Cantwell and Murray introduced S. 1448, the *Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act*. Senator Begich was added as a cosponsor on February 4, 2014. The Committee held a legislative hearing on September 10, 2013. The Committee held a duly called business meeting on January 29, 2014 to consider S. 1448. The Committee ordered the bill to be reported favorably with an amendment in the nature of a substitute. No further action was taken on the bill.⁸ There was no House companion bill.

112th Congress. On July 11, 2011, Senators Cantwell and Murray introduced S. 1345, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. The Committee held a legislative hearing on October 20, 2011. The Committee held a duly called business meeting on September 13, 2012 to consider S. 1345. The Committee ordered the bill to be reported favorably with an amendment in the nature of a substitute. No further action was taken on the bill, S. 1345. There was no House companion bill.

111th Congress. On June 25, 2009, Senators Cantwell and Murray introduced S. 1388, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Senator Inouye was added as a cosponsor on July 28, 2009. The Committee held a duly called business meeting on September 10, 2009 to consider S. 1388. The bill, S. 1388, was ordered to be reported favorably without amendment. No further action was taken on the bill, S. 1388.

On June 26, 2009, Representatives Inslee and Dicks introduced a House companion bill, H.R. 3097, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Representative Kildee was added as a cosponsor on October 7, 2009. Representative Richardson was added as a cosponsor on February 3, 2010. The House referred the bill, H.R. 3097, to the Committee on Natural Resources of the House of Representatives where no further action was taken on the bill.

110th Congress. On December 17, 2007, Senators Cantwell and Murray introduced S. 2494, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Senator Inouye was added as a cosponsor on January 24, 2008. The Committee held a legislative hearing on May 15, 2008. The Committee held a duly called business meeting on June 19, 2008 to consider S. 2494. The Committee ordered the bill, S. 2494, to be reported favorably without amendment.⁹ No further action was taken on the bill.

On July 17, 2008, Representatives Inslee and Dicks House introduced a House companion bill, H.R. 6547, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable*

⁸S. Rep. No. 113–202 (2014).

⁹S. Rep. No. 110–450 (2008).

Compensation Settlement Act. Representative Kildee was added as a cosponsor on July 29, 2008. The House referred the bill to the Committee on Natural Resources of the House of Representatives where no further action was taken on the bill.

109th Congress. On April 21, 2005, Senator Cantwell with Senators Murray, Inouye, and McCain introduced S. 881, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Senator Dorgan was added as a cosponsor on May 18, 2005. Senator McCain withdrew as a cosponsor on April 26, 2005. The Committee did not hold a legislative hearing on the bill. On June 29, 2005, the Committee ordered S. 881 to be reported favorably without amendment. On December 8, 2005, the bill was placed on the Senate Legislative Calendar under general orders. No further action was taken on the bill.

On April 21, 2005, Representatives McMorris Rodgers, Dicks and Kildee introduced a companion bill, H.R. 1797, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Representative Inslee was added as a cosponsor on May 11, 2005. The House referred the bill, H.R. 1797, to the Subcommittee on Water and Power of the Committee on Resources of the House of Representatives. On May 18, 2005, the Subcommittee on Water and Power discharged H.R. 1797 and by unanimous consent ordered the bill to be reported. On June 23, 2005, the Committee on Resources reported H.R. 1797 where the bill was placed on the Union Calendar. On July 25, 2005, Representative McMorris Rodgers moved to suspend the rules and pass the bill, when the House proceeded with forty minutes of debate with the motion to suspend the rules and pass the bill was agreed to by voice vote. On July 26, 2005, the Senate received H.R. 1797. On July 27, 2005, the bill was read a second time and placed on the Senate Legislative Calendar under general orders. No further action was taken on the bill, H.R. 1797.

108th Congress. On July 22, 2003, Senators Cantwell, Murray and Inouye introduced S. 1438, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. The Committee held a legislative hearing on October 2, 2003. On September 22, 2004, the Committee held a duly called business meeting to consider S. 1438 and ordered the bill to be reported favorably with an amendment in the nature of a substitute. On October 8, 2004, Senator Campbell reported the bill with an amendment in the nature of a substitute and an amendment to the title, where the bill was placed on Senate Legislative Calendar under general orders.¹⁰ On November 19, 2004, the Senate passed S. 1438 with an amendment to the title by unanimous consent. The House received the bill, S. 1438, on November 20, 2004, and referred to Committee on Resources of the House of Representatives. On December 1, 2004, the House subsequently referred the bill to the Subcommittee on Water and Power of the Committee on Resources of the House of Representatives. The House took no further action on the bill, S. 1438.

On April 10, 2003, Representatives Nethercutt and Dicks introduced a House companion bill, H.R. 1753, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable*

¹⁰S. Rep. No. 108–397 (2004).

Compensation Settlement Act. Representative Kildee was added as a cosponsor on July 17, 2003. The House referred the bill, H.R. 1753, to the Subcommittee on Water and Power of the Committee on Resources of the House of Representatives. On October 2, 2003, the Subcommittee on Water and Power held a legislative hearing on the bill. The House took no further action on the bill.

107th Congress. On May 23, 2002, Senators Murray, Cantwell and Inouye introduced S. 2567, *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable*

Compensation Settlement Act. The Senate referred the bill, S. 2567, to the Committee. The Senate took no further action on the bill.

On June 4, 2002, Representative Nethercutt introduced a House companion bill, H.R. 4859, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. The House referred the bill, H.R. 4859, to the Committee on Resources of the House of Representatives. The House took no further action on the bill.

106th Congress. On August 5, 1999, Senators Murray and Inouye introduced S. 1525, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. The Senate referred the bill, S. 1525, to the Committee. The Senate took no further action on the bill.

On July 30, 1999, Representative Nethercutt introduced a House companion bill, H.R. 2664, the *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act*. Representative Dicks was added as a cosponsor on August 5, 1999. The House referred the bill, H.R. 2664, to the Committee on Resources of the House of Representatives. The House took no further action on the bill.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act may be cited as the “Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act.”

Section 2. Findings

Section 2 states the findings of Congress that support the need for the Act.

Section 3. Purpose

Section 3 states the purpose of the Act is to provide fair and equitable compensation to the Spokane Tribe for use of its lands for the generation of hydropower by the Grand Coulee Dam.

Section 4. Definitions

Section 4 defines the key terms used throughout the Act.

Section 5. Payments by Administrator

Section 5 provides for annual payments to the Spokane Tribe for continued use of tribal lands, based on the revenue from the generation of hydroelectric power by the Grand Coulee Dam.

Section 6. Treatment after amounts are paid

Section 6 describes how the Tribe may use funds provided under section 5 of the Act, and states that there is no trust responsibility of the Secretary of the Interior or the Bonneville Power Administrator for the funds once they are paid to the Tribe.

Section 7. Repayment credit

Section 7 allows the Administrator of the Bonneville Power Administration a credit against future interest payments owed to the Secretary of the Treasury.

Section 8. Extinguishment of claims

Section 8 states that upon the deposit of amounts in the Fund described in Section 5(a), all monetary claims the Spokane Tribe has or may have regarding the Grand Coulee Dam against the United States will be extinguished.

Section 9. Administration

Section 9 states that the Act is not binding or establishing precedent for other power administrations.

COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 19, 2018.

Hon. JOHN HOEVEN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 995 the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kathleen Gramp.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 995—Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act

S. 995 would compensate the Spokane Tribe of Indians for the use of tribal lands in the construction of the Grand Coulee Dam in Washington State. Beginning in 2020, the bill would require the federal Bonneville Power Administration (BPA) to make annual payments to the tribe out of receipts from the sale of electricity. Starting in 2030, BPA could offset a portion of those payments by paying less interest to the Department of the Treasury.

Enacting S. 995 would affect direct spending; therefore, pay-as-you-go procedures apply. CBO estimates that the net costs would be insignificant over the 2019–2028 period but, starting in 2030, would rise to \$2.7 million a year. Enacting the bill would not affect revenues or spending subject to appropriation.

CBO estimates that enacting S. 995 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more

than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

S. 995 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by extinguishing the monetary claims of the Spokane Tribe of Indians against the United States for hydropower revenues and for past and continued use of their land. CBO estimates that the cost of the mandate would not exceed the annual threshold established in the act (\$78 million in 2017, adjusted annually for inflation).

The bill contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The costs of this legislation fall within budget function 270 (energy). Because BPA is a federal entity, its receipts and expenditures are recorded in the federal budget.

Basis of estimate: Beginning in 2020 and extending through 2029, S. 995 would require BPA to make annual payments to the Spokane Tribe of Indians equal to 25 percent of the annual payment that BPA makes under current law to the Confederated Tribes of the Colville Reservation. Beginning in 2030, the annual payment to the Spokane Tribe would increase to 32 percent of the amount paid to the Confederated Tribes.

CBO estimates that those payments would total about \$6 million annually until 2029 and then increase to \$8 million a year, thereafter. Under the bill, those payments would continue as long as electricity is generated by the Grand Coulee Dam. CBO estimates that enacting S. 995 would have no significant net cost over the 2019–2028 period.

Because BPA's operating costs are driven primarily by unpredictable market and environmental conditions, CBO expects that the agency could not offset the costs of the annual payments to the tribe by reducing operating expenses. Instead, CBO anticipates, BPA would raise its rates to cover those costs and, as a result, by 2020, its payments to the tribe would generally be offset by an equivalent increase in receipts from its electricity customers. CBO thus estimates that there would be no net significant effect on the budget through 2029.

Starting in 2030, S. 995 would reduce by \$2.7 million the amount that BPA makes in interest payments to the Treasury each year. CBO anticipates that BPA would reduce rates to mirror that cost reduction and thus create a corresponding drop in BPA's receipts from electricity sales. Because receipts from those sales offset direct spending, starting in 2030, the bill would indefinitely increase annually direct spending by \$2.7 million, CBO estimates.

Pay-As-You-Go considerations: None.

Mandates: S. 955 would impose an intergovernmental mandate as defined in UMRA by extinguishing the monetary claims of the Spokane Tribe of Indians against the United States for hydropower revenues and for past and continued use of their land. Eliminating an existing right is a mandate because the right to seek redress and recover damages beyond that what is provided in the bill would be lost. Using information from the tribe, CBO assumes it is unlikely that the tribe would, in the absence of the provision extinguishing claims, pursue such claims if the bill were enacted. Therefore, CBO estimates that the cost of the mandate would not

exceed the annual threshold established in UMRA (\$78 million in 2017, adjusted annually for inflation). Overall, the tribe would benefit from authorized payments from BPA.

The bill contains no private-sector mandates as defined in UMRA.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 995 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

Estimate prepared by: Federal Costs: Kathleen Gramp; Mandates: Rachel Austin.

Estimate approved by: H. Samuel Papenfuss; Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The Committee has concluded that enactment of S.995 will create only de minimis regulatory or paperwork burdens.

EXECUTIVE COMMUNICATIONS

The Committee has received no official communications from the Administration on the provisions of this bill.

CHANGES IN EXISTING LAW

In compliance with the Standing Rules of the Senate and the Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.