

**TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 399, BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2011
OCTOBER 20, 2011**

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. 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 substantial 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 Blackfoot Tribe and the non-tribal beneficiaries under the settlement at almost exclusively Federal cost, such as the rehabilitation and improvement of the Blackfoot 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 Blackfoot 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 Blackfoot 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 [Blackfoot] 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% of the specifically authorized costs of the settlement and around 33% 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 permanent 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.

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