

Executive Branch of the Apsáalooke Nation

Post Office Box 159 –BACHEEITCHE Avenue

Crow Agency, Montana 59022

P: 406.638.3700/3715 F: 406.638.3881



Crow Country

Carl E. Venne, Chairman
Cedric Black Eagle, Vice-Chairman
Scott Russell, Secretary
Darren Old Coyote, Vice-Secretary

Testimony of Vice Chairman Cedric Black Eagle, Crow Nation

Senate Committee on Indian Affairs

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S. 3355, the Crow Tribe Water Settlement Act

Good Morning Chairman Dorgan, Vice Chair Murkowski, and members of the Committee. Thank you for the good work you continue to do for Indian people. Also, thank you for holding a hearing on Senate Bill 3355 -- the federal legislation that ratifies the Crow/Montana water compact and authorizes the federal contribution to the overall settlement.

My name is Cedric Black Eagle. I am Vice Chairman of the Crow Nation. The Crow Nation (Apsáalooke), the largest of Montana's seven reservations, is approximately 2.3 million acres. It is located in south-central Montana. We have a membership of approximately 11,000, of whom 7,900 reside on the Crow Indian Reservation. I am delighted to be here on behalf of Chairman Venne and the Crow Tribe of Indians.

Since 1998, I have been involved in water negotiations at Crow as a member of or the lead negotiator for the Crow, so I am quite familiar with the history and terms of this agreement.

I would like to thank the many people who have worked to bring this historic agreement to this stage, including all of those who have negotiated on behalf of the Tribe, the State, and the United States over the years. In particular, I would like to thank Senator Tester for his hard work on our behalf and for sponsoring this federal legislation, along with Senator Baucus.

1. Water is Critical to Crow People.

Water is profoundly important to the Crow people. It is vital to our health and a central part of our culture and traditions. As one of our teachers wrote in her book on Crow Indian recipes and medicines, "Water has always been the main drink of the Crow people. Elders tell us that rivers are like the veins of the world. They teach us to respect the waterways and to be thankful to the Creator every time we take a drink."¹ Those who are ill are invited to drink pure water to thin their blood and restore their health. Tribal ceremonies such as those of the sweat lodge depend upon particular uses of waters in places that are sacred to the Crow people.

¹Alma Hogan Snell, *A Taste of Heritage: Crow Indian Recipes & Herbal Medicines*, Ed. Lisa Castle; Foreword Kelly Kindscher; University of Nebraska Press; Lincoln & London, at 59 (2006).

According to Dale Old Horn, an ex officio member of the tribe's culture committee and the Tribal Historic Preservation Officer, water is one of the primary elements through which the Creator gives us the ability to sustain our lives. When Crows have anything spiritual and become disenfranchised from it, it causes great injury. But the Crow will say, even grass once downtrodden will revive and rejuvenate when water touches it. Today we are asking you to help us to rejuvenate our culture.

The Crow people respect the beings that live in the rivers and pay appropriate tribute to the waters. In our creation story, the land is brought up from the water and in many of our other traditional stories water is central as well. We believe that all things of tangible substance, all things that we can touch, feel, smell, see and hear come from water. In the Tobacco Dance, a central ceremony of our tribe, we repeat this central truth that all things come from water and with water it goes.

2. Crow Tribe and Montana Entered Into a Compact.

The Montana Reserved Water Rights Compact Commission was established by the Montana legislature in 1979 for purposes of concluding compacts for the equitable division and apportionment of waters between the State and its peoples and the Indian Tribes claiming reserved water rights within the state. As Senator Tester knows -- because he was serving there -- in 1999, Montana's state legislature ratified a Compact we negotiated with the State of Montana². By entering into a compact, we settled our claims and avoided costly and lengthy litigation. In addition, the compact settled our coal severance tax dispute with Montana. This Compact strikes a good balance between Indian and non-Indian users.

The basic features of the Montana/Crow Compact include the following:

- 500,000 AFY from the natural flow of the Bighorn River for tribal use.
- Agreements to protect the stream flow in the Bighorn for the benefit of the fishery there.
- Tribal priority date of May 7, 1868.
- Protection of state and tribal existing uses as of 1999.
- No new state claims after 1999.
- Exempt claims for both state and tribal users of small wells and stock uses.
- 300,000 AFY of storage in Bighorn Lake for the Tribe, of which 150,000 AFY may be put to use and 150,000 AFY is primarily to supplement the natural flow right in times of shortage.
- In the accompanying Streamflow and Lake Level Management Plan, Optimum, Standard, and Minimum Instream Flow targets for the Bighorn.
- Tribe has rights to all surface flow, groundwater and storage in other basins on the Reservation, still protecting existing users.
- Tribe waives other water rights claims within Montana.
- \$15 million contributed by Montana to settle the coal severance tax dispute between Crow and Montana and provide a state cost share for the settlement.
- 50,000 AFY of the Tribal Water Right may be marketed off-reservation. In addition, 47,000 AFY may be used on the Ceded Strip.
- Disputes between tribal and state users will be heard by a joint commission, while disputes between tribal users or between state users will be heard by the tribe or the state.

² Tribal State Compact, MCA 85-20-201 (1999).

It is important to note the Compact is an agreement born of compromise, but is fair. Also, by entering into this Compact we avoid a chaos of litigation that will harm all users, and in particular, preclude the Tribe from developing its domestic, agricultural, and industrial uses.

3. Crow Tribe and State of Montana Seek Federal Ratification and Settlement of Federal Issues.

On July 29, 2008, Senators Tester and Baucus introduced Senate Bill S. 3355, a bill to provide federal ratification for the Crow/Montana Water Compact and to provide the federal contribution to the overall settlement. Major features of this bill are:

- S. 3355 provides for federal ratification and returns the Compact to the Tribe for approval or disapproval in a vote of the Crow people.
- The bill protects allottee rights to a just and equitable allocation of water for irrigation purposes and provides for the pursuit of allottee relief through tribal law, section 7 of the Act of February 8, 1887 (25 U.S.C. 381), or other applicable law.
- Appropriations (approximately \$527 million) are authorized, primarily to remediate the Crow Irrigation Project and to construct a Municipal, Rural, and Industrial Water System throughout the Reservation: other funds are to be used for trust funds to fund future OM&R for these systems and to provide for an economic development fund.
- The Tribe shall have the right to develop and market power generation as a water development project on the Yellowtail Afterbay Dam.
- The Tribe waives water rights claims against the United States but retains the right to assert claims for Compact enforcement, enforcement of water rights acquired after the enactment of the Act, water quality, objections under State law proceedings, and other claims not specifically waived and released.
- The Tribe will implement its Tribal Water Code and administer its own water rights.

The United States has many obligations to provide resources for this settlement. For example, the United States has liabilities related to unlawful condemnation of Crow lands and its failure to adequately complete and maintain the Crow Irrigation Project that was first authorized by Congress in 1890 including breach of its fiduciary duty to the Tribe to protect and develop the Tribe's water rights. In consideration of the federal contribution, which finally fulfills the United States trust obligation to the Tribe, section ten of S. 3355 waives significant claims against the United States.

Description of the Costs

The Crow Tribe Water Rights Settlement Act costs are broken down into eight (8) sections, which include the following: (1) Rehabilitation and Improvement of Crow Irrigation Project; (2) Design and Construction of MR&I System; (3) Tribal Compact Administration; (4) Economic Development Projects; (5) Water Development Projects; (6) MR&I System OM&R; (7) Yellowtail Dam OM&R; and (8) CIP OM&R.

The Crow Tribe retained HKM Engineering Inc. to prepare an engineering report for a Municipal, Rural and Industrial (MR&I) water system that would meet the current and future domestic, commercial, institutional water needs on the Crow Indian Reservation. The Tribe also retained HKM Engineering Inc. to prepare the Crow Irrigation Project Betterment Evaluation Report, which depicts the existing conditions of the Crow Irrigation Project and estimated costs

associated with rehabilitating the Crow Irrigation Project. Together, these two reports provide the basis for the costs included in S. 3355.

i. Rehabilitation and Improvement of Crow Irrigation Project

The Crow Irrigation Project is located in south-central Montana, on the Crow Indian Reservation. The first general authorization for the construction of the irrigation project on the Crow Reservation was contained in an agreement between the Crow Tribe and the United States, entered into on December 8, 1890, and ratified by Section 31 of the Indian Appropriation Act of March 3, 1891. Subsequent Acts provided for continued construction and development to date. Designs, surveys, and construction for the Project were performed by the United States Reclamation Service, now the United States Bureau of Reclamation, for the BIA Affairs until 1922. Construction continued intermittently on various aspects of the Project into the 1920's. Further construction was performed by the BIA after 1922. Nearly all of the irrigation facilities were completed before 1940.

The Crow Irrigation Project consists of eleven units with a total area of 63,365 acres. There are nine diversion dams, one storage dam, nine canal systems and five drainage systems.

The Crow Irrigation Project has been operated and maintained by the BIA, with a majority of the O&M budget weighted towards personnel costs and deferred maintenance. As a result, there are extensive deficiencies within the Project. HKM evaluated the Crow Irrigation Project and identified the nature and extent of the existing deficiencies within the Project and provided cost estimates for rehabilitating the system such that it can function as originally designed.³ Lack of adequate water measurement was identified as a key operational deficiency of the Crow Irrigation Project. Additionally, automated gate controls at key diversion points would allow for more efficient water management throughout the Project.

Based on the deficiencies within the Project, the total costs involved with rehabilitating and improving the Crow Irrigation Project equal \$160,653,000.

ii. Design and Construction of MR&I System

There are numerous compelling needs for the Crow MR&I System. There are multiple documented deficiencies with the existing water systems serving communities on the Crow Indian Reservation. These deficiencies have been documented in at least one previous study (HKM 1999) and by the Indian Health Service's Sanitation Deficiency System (SDS). Additionally, there are large areas of the Reservation that are uninhabitable without a reliable source of high quality water due to the low quality or quantity of groundwater. HKM examined several options for providing a comprehensive water system to service the population of the Crow Indian Reservation. The selected system would provide a reliable supply of safe drinking water to the majority of the population of the Crow Indian Reservation and would include capacity for existing and future economic development.

To determine the volume of water that is needed on an average day the reasonable rates of use were multiplied by the population projections for the year 2050 to determine what a reasonable

³ The HKM report initially recommended replacement of significant portions of the Crow Irrigation Project. In an effort to contain costs associated with this settlement, the Tribe requested that HKM use a rehabilitation approach to the fulfillment of the federal obligation to the Tribe with respect to the Crow Irrigation Project. This resulted in a very significant reduction in the overall federal contribution to this settlement.

range of capacities may be. Additional water needs for livestock and future economic development were also included. This resulted in a peak day system with a diversion capacity of 12.7 cubic feet per second (cfs) capable of treating 7.43 million gallons per day and delivering 3.3331 acre-feet per year to the service area.

The system has been planned using design criteria appropriate for the area and type of system. Some of the more important design criteria include a peak day factor of 2.5 times the average day rate of flow in gallons per minute (gpm) and a peak hour factor of three times the average day rate of flow. A “fire flow” of 1000 gpm for two hours is also provided for the towns of Pryor, Crow Agency, and Lodge Grass.

An estimate of the probable cost to plan, design, and construct the system was based on a variety of data including bid tabs and manufacturers’ quotes. Costs were estimated for major items (i.e. intake, treatment plant, etc.) and a series of multipliers, including a contingency, were applied to establish the field cost and project cost. The major cost items include the following system components: surface water diversion and raw water pump station, water treatment plant, pipelines, pump stations, storage tanks, pressure reducing/control valves, service connections, livestock connections, and the SCADA System. The estimated cost of the system is \$200,840,000.

iii. Tribal Compact Administration

As required by the Compact between Montana and the Crow Tribe, the Crow Tribal Water Resources Department (TWRD) must be established two years after the Effective Date (U.S. Congress, State of Montana, and Crow Tribal Council ratification) of the Compact. The TWRD will administer and enforce the Tribal Water Right pursuant to a Tribal Water Code. The TWRD will also provide Montana Department Natural Resource and Conservation with an annual report listing all current uses and new development of the Tribal Water Right.

The estimated cost to establish the TWRD Office totals \$4,000,000 over a 10-year period. At a 3% inflation rate, the annual cost of the TWRD Office would be about \$470,000. This annual funding level would provide a TWRD staff of four consisting of an Office Head and three Water Rights Specialists. The TWRD Office annual funding also includes office rent, office supplies and equipment, employee benefits and salaries, utilities, and general overhead costs.

iv. Economic Development Projects

The Tribe has considered a number of economic development projects that would involve water on the Reservation. The Tribe envisions that S. 3355 will play a central role in any and all energy development within the Reservation. The Tribe desires to develop its mineral resources in an economically sound, environmentally responsible manner that is consistent with Crow culture and beliefs. One of the major economic development projects that would assist the Tribe with these efforts is a proposed coal-to-liquids project. For any large scale energy development, the Tribe anticipates that its energy partners will need certainty and predictability to be able to use water for development without fear of litigation or uncertainties. With that in mind, the costs involved with Economic Development Projects total \$40,000,000.

v. Water Development Projects

In addition to rehabilitating the Crow Irrigation Project and designing/constructing the MR&I System, the Tribe anticipates that it will have additional water development projects to undertake.

Namely, the Tribe may choose to extend the MR&I System to the Pryor Creek drainage. Thus, the costs involved with Water Development Projects total \$37,594,000.

vi. MR&I System OM&R

All water systems require operation and maintenance in order to deliver a reliable supply of water. Even though the facilities proposed for the Crow MR&I System would involve a high level of automation through the SCADA system, human effort and adequate funding are still essential for successful operation and maintenance. For instance, operation and maintenance costs for the pump stations and pipelines are primarily included within labor and equipment cost. Excluding labor and equipment however, there is still a materials element necessary to keep these components functional.

The useful life for each of the MR&I System components was estimated and the replacement costs included for those components with useful lives less than 50 years. The replacement costs for these components were included to ensure an efficient and operational system through the 50-year life of the project. The life-cycle analysis was undertaken to estimate the cost of operation, maintenance and replacement over the course of 50 years. The costs involved with MR&I System OM&R total \$40,513,000.

vii. Yellowtail Dam OM&R

The Crow Irrigation Project could utilize 150,000 acre-feet/year of irrigation storage water from the Yellowtail Dam/Bighorn Reservoir for irrigation purposes under average precipitation conditions and another 150,000 acre-feet/year of irrigation storage water under drought conditions. If the Crow Tribe were to utilize 150,000 acre-feet/year of irrigation storage from Yellowtail Dam/Bighorn Reservoir, then the average cost would approximate \$8.00/acre-foot through a Water Service Contract with the Bureau of Reclamation. The total annual cost would be \$1,200,000 for 150,000 acre-feet/year irrigation use. If 100% of the annual cost of the 150,000 acre-feet of irrigation storage water from Yellowtail Dam/Bighorn Reservoir were subsidized through a trust fund to the Crow Tribe, then the amount required at a 3% inflation rate for 50 years would cost \$30,876,000. This would produce an annual subsidy of about \$1,200,000 for the 150,000 acre-feet of irrigation storage water from Yellowtail Dam/Bighorn Reservoir to the Crow Tribe.

viii. CIP OM&R

As discussed above, the rehabilitation costs for the Crow Irrigation Project will cost \$23,365,647. This amount is a significant reduction in the irrigation infrastructure full replacement value for the Crow Irrigation Project which would cost \$45,638,497. The Tribe plans to subsidize the Indian-owned land (55% trust land) at 100% of the current irrigation assessment of \$20.50/acre, which results in the Indian trust land portion of the annual OM&R assessment rate decreasing to \$0.00/acre. A trust fund for the Crow Irrigation Project for replacement of irrigation structures for Indian-owned land benefits only would be set at \$495,000/year at a 3% inflation rate for 50 years. Thus, the total trust fund for the Crow Irrigation Project OM&R would total \$12,736,000. The irrigation assessment rate would stay at \$20.50/acre during the construction period of the Crow Irrigation Project Rehabilitation and Betterment. After the Crow Irrigation Project Rehabilitation and Betterment is completed, then the irrigation assessment rate to all water users should decrease to near the Montana OM&R average assessment of \$15/acre in 2008 dollars.

Conclusion

The Montana Reserved Water Rights Compact Commission is scheduled to sunset in June, 2009. If it sunsets before our compact is approved by Congress and signed into law, all existing state claims will go back to court. As such, we are “under the gun” to get congressional action before this expiration date.

This settlement will allow us to complete the water infrastructure needed for our reservation to fulfill its purpose as a homeland for our people. One vital need on our reservation is infrastructure to support housing construction. The settlement will put the Crow Irrigation Project into good repair for the first time in its history, which will benefit all Project users and provide the Tribe with some of the economic and other benefits for which it was intended.

We have worked hard to resolve all remaining issues with the federal team and continue to have fruitful dialogue with it. We ask you to help us pass this piece of legislation and return our compact to the Crow people for their ratification. We look forward to your questions and suggestions and remain grateful for your attention to this issue critical to the Crow Nation and all the people who inhabit our reservation. We also want to thank your staff for their attention to S. 3355.

CROW IRRIGATION PROJECT: CURRENT CONDITION

