

Fort Belknap Indian Community



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Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
(Elected to administer the affairs of the community and
to represent the Assiniboine and the Gros Ventre
Tribes of the Fort Belknap Indian Reservation)

TESTIMONY OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

LEGISLATIVE HEARING ON S. 1987 FORT BELKNAP INDIAN COMMUNITY WATER RIGHTS SETTLEMENT ACT OF 2023

JULY 12, 2023

Chairman Schatz, Vice Chairman Murkowski, and Members of the Senate Committee on Indian Affairs, my name is Jeffrey Stiffarm. I serve as President of the Fort Belknap Indian Community Council. Thank you for the opportunity to testify in support of S. 1987, the “Fort Belknap Indian Community Water Rights Settlement Act of 2023.” We also want to thank our Senators from Montana, Jon Tester and Steve Daines, for introducing this bipartisan bill in the Senate, as well as our Montana Congressional Representatives, Matt Rosendale and Ryan Zinke, for their support. Our bill also enjoys the support of Montana Governor Greg Gianforte. We respectfully request that the Committee work to pass S. 1987 to finally secure our Indian reserved water rights.

The Fort Belknap Indian Community (FBIC) consists of the Gros Ventre and Assiniboine Tribes (Tribes) who fought in 1908 for the right to use the water on our Ft. Belknap Reservation (Reservation), establishing the “longstanding reserved water rights doctrine,” known as the Winters doctrine, in which “the Federal Government’s reservation of land for an Indian tribe also implicitly reserves the right to use water . . . to accomplish the purpose of the reservation.” *Arizona v. Navajo Nation* case (U.S. Supreme Court, June 22, 2023).¹ Now, more than a century later, it is time for Congress to ratify our historic Indian water rights, ratified by the state of Montana in our 2001 Water Compact, and approve our Water Rights Settlement, which will provide us the ability to develop and use our Indian water rights for our agricultural lands and to provide clean and safe drinking water for our people.

In his writings as an Indian law scholar, Department of the Interior Solicitor Robert Anderson recognized the importance of Congressional action to approve Indian water rights settlements. He wrote that:

The struggle of Indian tribes to maintain their property and survival as distinct communities is revealed by examining the status and treatment of Indian water

¹ *Arizona v. Navajo Nation*, Case No. 21-1484, 2023 WL 4110231, at *3 (S.Ct. June 22, 2023) (internal citation omitted).

rights by the federal government. Indian reserved water rights are trust property with legal title held by the United States. They were first recognized in 1908 in *Winters v. United States*. As such, one might expect to find that by now a trustee would have developed an effective system for defining and protecting the trust corpus.²

Increasing the availability of water on our Reservation through funding for critical infrastructure that will support the FBIC's development of its Indian water rights will give the Tribes the kind of economic opportunity that can improve the social and economic well-being of our people. In a partnership with the Federal government, we can construct, develop, restore, operate, and maintain the infrastructure required to secure the settlement promise of "wet water," develop a sustainable agricultural economy, and provide economic self-sufficiency for our permanent homeland.

Our Indian Water Rights Settlement is structured to promote economic efficiency on our Reservation and our Tribal self-sufficiency.³ It is an agricultural infrastructure development plan and includes infrastructure to develop and ensure clean and safe drinking water to end water insecurity on our Reservation; it provides for the FBIC to develop, administer, use, manage, and enforce our reserved water rights and improve the poor economic condition of our members on the Reservation. This is an Indian water settlement—where 97% of our Reservation lands are trust lands, held by the United States for the benefit of the FBIC and our allottees.⁴ Our Fort Belknap Indian Irrigation Project and other Reservation irrigated lands serves primarily the trust lands of Indian people.

Brief History of the Gros Ventre and Assiniboine Tribes and the Reservation

Our Gros Ventre and Assiniboine Tribal members are resilient people. But certain stark facts about our lives when compared to our non-Indian neighbors support the conclusion that the United States has failed as our trustee to establish our permanent homeland as a self-sufficient, economically vibrant, and sustainable Reservation with healthy and thriving people.

We have 8,150 enrolled members and a large land base of 625,000 acres (nearly the size of Rhode Island), with half of the population living on the Reservation.⁵ Due to a lack of adequate housing, many of our members live in nearby towns or rural areas and drive to the Fort Belknap Reservation each day or throughout the week.⁶ The FBIC Council is responsible for providing services to these members the same as to any other member.⁷ Poverty has become the norm fueled

² Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 *Natural Resources Journal*, 399-400 (Spring 2006) (internal citations omitted) [hereinafter "2006 Anderson Paper"].

³ See 1990 Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 *Fed. Reg.* 9223-9225 (Mar. 12, 1990) [hereinafter "1990 Criteria"].

⁴ Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country Part 2: Tribal Governments* (November 2017), (citing *Tribal Nations in Montana: A Handbook for Legislators*, 2016).

⁵ President Andrew Werk, Jr., President, Fort Belknap Indian Community, letter to Janet Yellen, U.S. Department of Treasury, Washington, D.C. (March 9, 2021) [hereinafter "Werk 2021 Letter to Yellen"].

⁶ Werk 2021 Letter to Yellen.

⁷ *Id.*

by economic depression and high jobless rates, lack of infrastructure, and substandard housing. The Fort Belknap Reservation economic hardship can be broken down as follows: 40% poverty rate; 34% unemployment rate; \$29,566 median household income and \$10,896 per capita income.⁸ Our very high unemployment rate can be compared to the much lower unemployment rate in the State of Montana (2.3%).⁹

Agriculture remains the mainstay of our Reservation economy and virtually our sole industry. Farms located on the Reservation are largely operated by Tribal members.¹⁰ However, the low level of agricultural productivity, due largely to inadequate infrastructure, is reflected in the low family incomes and standard of living currently experienced by our members.

The first tract of land set aside by the United States with the major purpose of creating a self-supporting, agrarian homeland was under the Treaty of the Blackfoot Nation in 1855.¹¹ At that time, our Gros Ventre Tribe was part of the Blackfoot Nation. The federal government's policy included the expectation that the tribes would be confined to and settle permanently within their territorial boundaries where they would abide in permanent houses and obtain their sustenance by agricultural pursuits and stock raising.

Through a series of treaties and agreements with the United States, Congress established our current, permanent homeland in 1888, the Fort Belknap Reservation for the Gros Ventre and Assiniboine Tribes.¹² The 1888 Agreement required the relinquishment of most of our Tribes' ancestral territory and resulted in a significant reduction in the lands that the Tribes could occupy and use. The federal purpose of the 1888 Agreement continued the policy of establishing an agricultural economy for the Tribes. The Agreement expressly stated that the Tribes would "obtain the means to enable them to become self-supporting, as a pastoral and agricultural people[.]"—creating an agricultural Reservation economy. Funds were provided for the purchase of cows, bulls, and other stock, and agricultural implements, among other purchases, and for "undertak[ing] the cultivation of the soil."¹³

In these negotiations we ceded millions of acres of our ancestral lands and resources. In return, through the Treaty of 1855, the 1888 Congressional Act, and other agreements, the United States promised to provide and support an agricultural economy that would sustain our Tribes on our reserved homelands. Irrigation began on our Reservation in 1889. By 1898, the Tribal members were irrigating about 30,000 acres on the Milk River, which forms the northern boundary of our Reservation, for grain, grass, and vegetables. Congress authorized the construction of irrigation systems on the Reservation, now known as the Fort Belknap Indian Irrigation Project.

⁸ Werk 2021 Letter to Yellen, (citing the Bureau of Business and Economic Research, University of Montana, Oct. 2019, and Center for Indian Country Development, Federal Reserve Bank of Minneapolis).

⁹ U.S. Bureau of Labor Statistics, <https://data.bls.gov/timeseries/LASST300000000000003> (last visited June 28, 2023).

¹⁰ FORT BELKNAP RESERVATION: DEMOGRAPHIC AND ECONOMIC INFORMATION (Oct. 2013); *see also* <https://www.montana.edu/extension/aboutus/documents/2018programhighlights/Fort%20Belknap%202018%20AR-ADA.pdf>.

¹¹ Treaty of October 17, 1855, 11 Stat. 657.

¹² Agreement of May 1, 1888, 25 Stat. 113 [hereinafter "1888 Agreement"].

¹³ 1888 Agreement at Articles III, V.

Soon, non-Indian, upstream irrigators were depleting our main water supply, the Milk River. The United States, our trustee, protected a portion of our Indian water supplies and went to court to defend our right to water for our Reservation. In 1908, the U.S. Supreme Court concluded that the lands of the Fort Belknap Reservation were “practically valueless without irrigation—a barren waste[,]” *Winters v. United States*,¹⁴ and established the “*Winters Doctrine*.” The Indian reserved water rights began with our Reservation, and we are the “*Winters Tribes*.”

Over the next 100 plus years, the United States failed to fulfill many of its promises and commitments, including protecting and preserving our waters, and we now have the highest poverty rate of any tribal reservation in Montana.¹⁵ Because of a failure by the Federal Government to maintain and complete construction of our federal Indian Irrigation Project, we are currently irrigating only about 10,000 acres of our irrigable lands.

History of Settlement Negotiations

We spent many years negotiating with the United States through our assigned Department of the Interior, Federal Negotiations Team and the Secretary’s Indian Water Rights Office (“SIWRO”). We came to the bargaining table in good faith that our Federal Negotiations Team was fully participating as the trustee over what is our most valuable natural resource—water. We are not a wealthy Tribal government nor wealthy people; we do not have fancy casinos or vast energy resources. A settlement of our Indian water rights will bring long overdue investments in infrastructure on our Reservation. In the 1980s, we chose settlement over litigation with the State and Federal governments when we initiated negotiations with the Montana Reserved Water Rights Compact Commission and an assigned Federal Negotiations Team. President George H. Bush established the Secretary’s Office of Indian Water Rights Settlements in 1989, and the Department adopted federal regulations promoting Indian water settlements in 1990.¹⁶ This provided the structure and guidance for the negotiations and settlement of claims concerning Indian water resources over litigation, offering a promise to tribes that their right to water would be developed at long last with the support of its trustee.

We adopted the court-approved principles of practicably irrigable acreage (PIA) to quantify the volume of our Indian reserved water rights,¹⁷ and negotiated the administration of our water. Many hours of negotiations, extensive studies, dozens of public meetings across northcentral

¹⁴ *Winters v. United States*, 207 U.S. 564, 576 (1908).

¹⁵ U.S. Census Bureau, My Tribal Area, <https://www.census.gov/tribal/?aianihh-1150> (last visited June 27, 2023).

¹⁶ 1990 Criteria; *see also* Tracy Goodluck, former Deputy Director of the Secretary’s Indian Water Rights Office, Presentation at the April 11, 2019, Federal Bar Association Indian Law Conference, Albuquerque, New Mexico. [Hereinafter “Goodluck 2019 FBA Presentation”]

¹⁷ *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964) (quantifying the tribes’ *Winters* water rights on the basis of practicably irrigable acreage (PIA), holding that PIA is the only fair and feasible way to determine the measure of an Indian reservation water right.); *See also, e.g.*, 2006 Anderson Paper at 429 (“Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework.”); *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985); and *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988); *aff’d by equally divided court per curiam, Wyoming v. United States*, 492 U.S. 406 (1989), *cert. denied, Shoshone Tribe v. Wyoming*, 109 S.C. 3265 (1989).

Montana, and Tribal community meetings took place to reach an agreement, not only on the quantity and administration of our water rights, but also for the mitigation of the impact on non-Indian state water users as we development of our agreed-upon reserved water rights. After more than 10 years of negotiations, we reached an agreement with the State and Federal governments, and entered into the 2001 Fort Belknap-Montana Compact (“Water Compact”).¹⁸ Our Water Compact passed the Montana Legislature with a large, bipartisan majority vote.

Our Water Rights Settlement is based on long-standing, historical principles of federal policy on the reserved water rights of Indian people that ensure we will receive the full benefit of the water rights promised to us in treaties and agreements with the United States. These principles include (1) recognition of a reservation of water for reservation homelands and the promise of assistance in establishing an agricultural economy when valuable tribal lands were ceded to the United States; (2) a method of quantifying our Indian water rights based on the practicably irrigable acreage (PIA) of the reservation; and (3) the importance and obligation of the United States to honor its treaty promises and keep its word to assist us with the establishment of a viable agricultural economy in order to create a permanent homeland.

A final settlement of our Indian reserved water rights with the United States will allow us to protect this critical natural resource and will reaffirm the *Winters* rights for all tribes. Additionally, as Department Solicitor Robert Anderson has stated:

Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework.¹⁹

Under Congressional leadership, and after 30 years of negotiations with the federal government and the State, the Indian water rights and claims of the Fort Belknap Indian Community can now be approved. Passage of our Water Rights Settlement reflects the U.S. Supreme Court reasoning that “Congress and the President exercise the ‘sovereign function’ of organizing and managing ‘the Indian trust relationship.’”²⁰ It is long overdue.

Congress has a long history of honoring and recognizing its responsibilities and obligations to Indian tribes. In 1956, Congress enacted the Colorado River Storage Project Act and made an affirming statement of its recognition of fiduciary responsibility in the following provision for the Navajo Nation’s participation in water infrastructure development:

[T]he costs allocated to irrigation of Indian-owned tribal or restricted lands within, under, or served by such project, and beyond the capability of such lands to repay, shall be determined, and, *in recognition of the fact that assistance to the Navajo*

¹⁸ Mont. Code Ann. §§ 85-20-1001 through 85-20-1008 (ratified on April 16, 2001).

¹⁹ 2006 Anderson Paper at 429.

²⁰ *Navajo Nation*, 2023 WL 4110231, at *5.

*Indians is the responsibility of the entire nation, such costs shall be nonreimbursable.*²¹

Assistance to the Navajo Indians, of course, was representative of the Government's responsibility to Indian people, generally. But progress in funding the federal support for Indian water rights development has been exceedingly slow while the United States focused on and built western water infrastructure projects for the non-Indians.²²

After *Arizona v. California* adopted and reinforced the *Winters* doctrine for the recognition of Indian water rights in 1963, and created the practicably irrigable acreage standard for quantifying a tribe's water rights,²³ Congress passed the Indian Self-Determination and Education Assistance Act of 1975.²⁴ President Nixon signed and introduced it as the "dawn of the self-determination age," and described the following:

"[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force."²⁵

This was followed by President Jimmy Carter's adoption of the Federal Water Policy initiative in 1978 to promote Indian water rights settlements over litigation.²⁶

Congressional frustration over the slow pace of Indian water settlements by the Department of the Interior was evident in 1989 when Senators Mark Hatfield (OR) and James McClure (ID) drilled Interior Secretary Manuel Lujan and asked: "Why can't the administration agree that these settlements are a national obligation now to be funded?"²⁷

²¹ 70 Stat. 109, 43 U.S.C. § 620e (Apr. 11, 1956) (Cost allocations, Indian lands; report to Congress) (emphasis added).

²² See, e.g., James P. Merchant & David M. Dombusch, *The Importance of Water Supply to Indian Economic Development* (1977), stating that in 1968, 370,000 acres of Indian were irrigated (1% of all Indian agricultural lands), contrasted with 5.1 percent of all irrigated agricultural lands in the seventeen western states; *Hearing on S. 2969, Central Utah Completion Act Before the Senate Committee on Energy and Natural Resources*, 101st Cong. 161 (Sept. 18, 1990), (Testimony of Dennis B. Underwood, Commissioner of the Bureau of Reclamation): "The ceiling for CUP increased in 1972 and 1988. In 1990, the total cost of the Colorado River Storage Project, meaning all components, as authorized, is currently \$2,938,059,000."; At the 2019 Federal Bar Association Indian Law Conference, Tracy Goodluck, Deputy Director of the Secretary's Indian Water Rights Office, acknowledged what everyone knows, that "in the decades" since the 1908 *Winters* decision, "Federal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West."

²³ 373 U.S. 546 (1963).

²⁴ Pub. L. No. 93-638 (1975) (codified at 25 U.S.C. § 5301 *et seq.*).

²⁵ Secretary of the Interior, Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* (Aug. 20, 2014) (quoting Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970)).

²⁶ "Federal Water Policy, Message to the Congress," Public Papers of the Presidents: Jimmy Carter, 1044-47 (June 6, 1978).

²⁷ Michael J. Clinton, *Dealing with the Federal Sovereign*, Ch. 16, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), *Indian Water in the New West* 220 (University of Arizona Press 1993).

We urge Congress to also consider this historic trend away from the United States' trust responsibilities to tribes as it relates to Indian water rights and development, in particular, through judicial decisions that seem counter to the historical Congressional positions, and provide the leadership to reverse such a trend in the federal government's policies.

The decision by the U.S. Supreme Court, in *McGirt v. Oklahoma*,²⁸ should inform the Federal government's understanding of the importance of the early Treaty promises and obligations the United States made to tribes and the importance of the Government "keeping its word." The *McGirt* decision was followed by President Biden's promise of a renewed "commitment to fulfilling Federal trust and treaty responsibilities . . . [,]"²⁹ and the current Administration has declared a policy that will reverse the slide away from the federal obligations promised to tribes.

The promise of a true commitment to tribal sovereignty with economically viable homelands can become our reality. The promise of our early agreements with the United States, when we ceded millions of acres of land, was a permanent, livable homeland and assistance in the development and use of our reserved water rights. The United States has a continuing trust obligation and responsibility to provide the Fort Belknap Indian Community a permanent and economically sustainable homeland. Congressional approval of our Water Rights Settlement will be the fulfillment of the United States' Treaty promises to the Gros Ventre and Assiniboine Tribes.

The Winters Doctrine and the United States' Agricultural Promise

When the United States Supreme Court analyzed our 1888 Agreement with the United States, creating the Fort Belknap Reservation, it concluded that certain elements of the agreement were "prominent and significant."³⁰ In particular, the Court found that the purpose and intent of this smaller reservation of land was to "enable [the Tribes] to become self-supporting, as a pastoral and agricultural people." The high Court reasoned that "[i]f they should become such, . . . a smaller tract [of land] would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless."³¹ The Court specifically rejected the argument that the Indians deliberately gave up the means of irrigation.

The Court explained that "[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for . . . grazing . . . or turned to agriculture and the arts of civilization."³² The Winters Court applied "a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."³³ Therefore, under the Winters doctrine, the Court held that the establishment of the

²⁸ 140 S. Ct. 2452 (2020).

²⁹ *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, 86 Fed. Reg. 7491 (Jan. 29, 2021), <https://www.federalregister.gov/documents/2021/01/29/2021-02075/tribal-consultation-and-strengthening-nation-to--nation-relationships>.

³⁰ *Winters*, 207 U.S. at 575-76.

³¹ *Id.* at 576.

³² *Id.*

³³ *Id.*

Reservation impliedly reserved the amount of water necessary to irrigate its lands and to provide water for other purposes.³⁴ Finally, the Court also held that these reserved water rights are exempted from appropriation under state law.

The Winters Doctrine has stood the test of time and for over a century has been applied to recognize tribal, Indian reserved water rights. In summary, the Winters Court created federal, Indian reserved water rights law with the following characteristics: (1) a reservation of water is to be implied when it is required to accomplish the purposes of a Treaty, Congressional Act, or Agreement between the United States and tribes establishing a tribe's reservation of lands with the expressed right to exclusive tribal possession of the land,³⁵; (2) the amount of water must be sufficient for all their beneficial use when the purpose is to allow the Indians to become a "pastoral and civilized people," including the development of an agriculture economy; and (3) Indian reserved water rights are exempted from appropriation under state law.

In *Arizona v. California*,³⁶ the United States Supreme Court adjudicated, in part, the water rights of five reservation tribes on the Colorado River mainstream in the Lower Colorado River Basin to determine the quantity of each tribes' reserved water rights. The Court affirmed the validity of federally reserved Indian water rights under the Winters decision when reservations are created, explaining that such rights also include those reservations established by an Act of Congress or by Executive Order. The Court held that when the reserved water rights are necessary to fulfill the purposes for which it was created, with a new water use that did not exist prior to creation of the Indian reservation, the priority date is the date of establishment of the reservation.³⁷

The Court concluded that Indians are entitled to sufficient water to develop, preserve, produce, or sustain food and other resources of the reservation to make it livable.³⁸ The Court found that when the United States created the five reservations included in this adjudication, "it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands."³⁹ This is now referred to as "practicably irrigable acreage" or PIA—the standard by which Indian water rights are quantified where the purpose of the reservation includes agricultural pursuits. Under this standard, if land within a reservation can be cultivated through irrigation and if such irrigation is practicable when applying relevant economic measures, then the tribe is entitled to the amount of water necessary for such irrigation. The Court reasoned that "[m]ost of the land in these reservations is and always has been arid, if the water necessary to sustain life is to be had, it must come from the Colorado River."⁴⁰ The United States was aware "that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."⁴¹

³⁴ *Id.* at 576-77.

³⁵ *Id.* at 575-76.

³⁶ 373 U.S. 546 (1963).

³⁷ *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

³⁸ *Id.* at 599-600.

³⁹ *Id.* at 596.

⁴⁰ *Id.* at 598.

⁴¹ *Id.* at 598-99.

Finally, the Court rejected Arizona’s urging that the amount of water be measured by “the reasonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres.”⁴² The Court reasoned that the quantity of “water was intended to satisfy the future as well as the present needs of the Indian reservations and” [agreed with the Special Master who] “ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.”⁴³ Rejecting the position urged by the State of Arizona, the Court explained that if the quantity of water reserved “is measured by the Indians’ ‘reasonably foreseeable needs,’” it really means that quantification would be based on the number of Indians—and the number of Indians that there will be in the future “can only be guessed.”⁴⁴ The Court also rejected the application of the equitable apportionment doctrine, explaining that it is “a method of resolving water disputes between States.”⁴⁵

FBIC Water Rights Settlement is an Infrastructure Bill

After ceding millions of acres of ancestral territory, the Gros Ventre and Assiniboine Tribes reserved the Fort Belknap Reservation in what is now northcentral Montana. These lands were reserved and set apart “as an Indian reservation as and for a permanent home and abiding place.”⁴⁶ Our Reservation lands have never been broken apart and lost to non-Indians. Our Fort Belknap Indian Irrigation Project and irrigable lands are and remain a federal *Indian* irrigation project. The quantification of our Indian reserved water rights is based on the well-respected and legally adopted principles of Practicably Irrigable Acreage (PIA).⁴⁷ During the negotiations of our rights, we successfully demonstrated that we have an adequate water supply with arable soils to support irrigation system infrastructure.

In 1942, the U.S. Supreme Court stated that the United States “has charged itself with moral obligations of the highest responsibility and trust.”⁴⁸ We ask Congress to consider our historical circumstances, the United States’ moral obligation, and the responsibility of the entire nation⁴⁹ in providing the costs necessary to develop the projects identified in our bill that are designed to allow us to put our Indian water rights to use.

Aaniiih Nakoda Settlement Trust Fund

Funding in our Water Rights Settlement Bill will go toward supporting and developing long overdue traditional infrastructure investments, including the development of both agricultural and domestic water supplies, that the United States promised to the Gros Ventre and Assiniboine

⁴² *Id.* at 596.

⁴³ *Id.* at 600.

⁴⁴ *Id.* at 600-01.

⁴⁵ *Id.* at 596-97, *affirmed in Navajo Nation*, 2023 WL 4110231.

⁴⁶ *Winters*, 207 U.S. at 565.

⁴⁷ 2006 Anderson Paper at 429 (2006).

⁴⁸ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

⁴⁹ 43 U.S.C. § 620e.

Tribes. The Aaniiih Nakoda Settlement Trust Fund in our Water Rights Settlement Bill, S.1987, includes three accounts and their uses, described below.

FBIC Tribal Irrigation and Other Water Resources Development
Account #1 (\$119,524,134)

- Restore the Southern Tributary Irrigation Project (STIP) and Peoples Creek Irrigation Project, including construction of the Upper Peoples Creek Dam and Reservoir, on the southern portion of the Reservation.
- Develop infrastructure for stock-watering across the Reservation.
- Provide on-farm development support.
- Repair, restore, and develop wetlands across the Reservation.
- Conduct all environmental compliance activities.
- Conduct planning, studies, and design work for all activities.

The FBIC Tribal Irrigation and Other Water Resources Development account will provide funding to restore the Southern Tributary Irrigation Project, which was abandoned by the Bureau of Indian Affairs in the 1960-70s in disrepair, preventing tribal members from an irrigation resource, and the Peoples Creek Irrigation Project. This funding includes construction of the Upper Peoples Creek Dam and Reservoir on the southern portion of the Reservation, which will provide mitigation for the FBIC due to its agreement to subordinate its priority Indian water rights on the Upper Peoples Creek to upstream state irrigators on family farms. Funding would also be provided to develop infrastructure for stock-watering across the Reservation, provide on-farm development support, and restore and develop wetlands across the Reservation.

FBIC Water Resources and Water Rights Administration, Operations and Maintenance
Account #2 (\$66,628,407)

- Establish, operate, and provide capital expenditures to establish a Tribal water resources and water rights department for administration, management, and regulation of the Tribal water rights, including development of a Tribal Water Code.
- Create a Tribal trust fund to provide investment earnings for the long-term support of the Tribal water resources and water rights department to administer and manage the FBIC's water rights.
- Create a Tribal trust fund to provide investment earnings to pay a portion of the annual operation and maintenance assessment costs for Tribal irrigators to ensure long-term repair and upkeep of the irrigation projects.

FBIC Water Resources and Water Rights Administration, Operations and Maintenance account supports the traditional Indian water settlement activities crucial to the establishment of a Tribal water resources and water rights department. A Tribal trust fund will be established that will allow the Tribal department to operate on the annual interest earned on the Tribal trust fund and support the costs of the regulation, administration, and enforcement of the FBIC water rights with the development of a Tribal water code, as well as support the cost of capital projects that will provide the necessary infrastructure, equipment, and data to support the Tribal department

activities. Finally, this account provides funds necessary to establish an Operation and Maintenance Fund for the Tribal agricultural irrigation projects on the Reservation, using annual earned interest to support a portion of the annual operation and maintenance costs of Tribal irrigators—proven to be important for sustaining the agricultural economy on the Reservation.

**FBIC Clean and Safe Domestic Water Supply and Wastewater Systems, and
Lake Elwell Project, Account #3**

- Construct and improve access to and the safety of a clean, domestic water supply and wastewater removal systems on the Reservation.
- Develop two new wells at 300-ft deep, and one new well at 480-ft deep to provide water for the communities of the Fort Belknap Agency, Hays, and Lodgepole.
- Develop Homesite wells.
- Construct new water treatment facilities in the Lodge Pole and Hays communities.
- Expand existing tribal domestic water delivery lines.
- Construct a Project to deliver clean and reliable water from Lake Elwell for the southern portion of the Reservation.
- Construct a Tribal wellness center to improve and ensure a healthy workforce that will assume responsibilities related to the Project activities funded under this bill.

The FBIC Clean and Safe Domestic Water Supply and Wastewater Systems, and Lake Elwell Project account supports bringing and storing clean drinking water for the Reservation. FBIC has both drinking water supply issues and water quality concerns. The cost estimates are intended to cover needed improvements to the water facilities at each of the Reservation communities, as well as at individual homes within the rural areas of the Reservation. Renovation of the existing Fort Belknap Agency domestic water system will support the anticipated future growth in domestic water demands on the Reservation.

The Lake Elwell project will bring clean water to the southern portion of the Reservation to ensure an adequate water supply to the Tribal communities and members in this area of the Reservation, which is in need of safe and reliable drinking water. Without the funding provided in this account, the FBIC Tribal members will continue to experience water insecurity on the Reservation.

The coronavirus pandemic resulted in an awakening in America of the importance of tribal community access to reliable, clean, and drinkable water—an essential human need. It is the foundation for healthy communities and growing economies. The National Congress of American Indians issued a report in 2017 stating that tribes receive only 75 cents for every \$100 needed for drinking water, and estimated an Indian Health Service water sanitation facilities' backlog at about \$2.5 billion.⁵⁰ On January 27, 2021, President Biden issued Executive Order 14008,⁵¹ which provides that it is the policy of the Biden Administration to secure environmental justice and spur

⁵⁰ National Congress of American Indians, *Tribal Infrastructure: Investing in Indian Country for a Stronger America* at 6 (2017), <https://www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf>.

⁵¹ 86 Fed. Reg. 7619 (Feb. 1, 2021).

economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.

The health and wellness of our Tribal members remain a significant concern. The median age at death of American Indians residing in Montana is 16 years lower than that of white people.⁵² Diabetes is prevalent among our Tribal members. A Wellness Center is planned so that the health and well-being of our Tribal work force can be improved. Wellness Centers are highly effective in combating our prevalent tribal health conditions currently resulting in adverse health outcomes.

Fort Belknap Indian Irrigation Project System Implementation Non-trust Federal Account (\$415,832,153)

The Bill includes funding for the rehabilitation, modernization and expansion of the Bureau of Indian Affairs' Fort Belknap Indian Irrigation Project (FBIIP) on the Milk River within the Reservation. The Bill includes an expansion of the BIA's Milk River unit that will consist of an additional 16,465 acres of new irrigable lands, for a total of 26,890 acres under irrigation in the FBIIP Milk River Unit. The Tribe's Indian water rights from the Milk River is secured under the Compact for the new future irrigated lands. This will also include construction of a new off-stream water storage reservoir, the Fort Belknap Reservoir, on Three Mile Creek with a capacity of about 60,000 acre-feet, and construction of levees for flood protection of the Milk River Unit lands.

This project was originally authorized for construction in 1895, but construction of the full project was never completed. There are 358 allottee users under the FBIIP and the Tribe's original *Winters* water rights for 10,425 acres of historically irrigated lands will be used by the project. This project was constructed over 100 years ago and is in desperate need of rehabilitation and modernization. The construction of the project is also long past due for being completed. The BIA will be the Lead Agency for the FBIIP activities and the FBIC will be able to enter into self-determination contracts to conduct all or a portion of the activities identified for the FBIIP.

Mitigation for State Water Users

After our long-time cooperation and compromises with our non-Indian neighbors, Congressional support of the agreed-upon mitigation activities consistent with our negotiated FBIC-State-Federal Water Compact will create harmony at a time when water wars between water users are increasing. In fact, Montana has had a severe drought in recent years. Mitigation activities will stabilize the water supply, conserve water, and improve water use efficiency. Continued cooperation among the interested parties through the mitigation activities will also respect the sovereignty of the State and FBIC in our respective jurisdictions.⁵³

The Montana Reserved Water Rights Compact Commission ("Commission") was created by the State legislature to negotiate tribal water settlements with tribes and the federal

⁵² Mont. Dep't of Public Health and Human Services, *Montana Vital Statistics 2020* at 23 (2020), <https://dphhs.mt.gov/assets/publichealth/Epidemiology/VSU/VSU2020AnnualReport.pdf>.

⁵³ 1990 Criteria.

government.⁵⁴ Negotiations among our Parties were conducted in earnest throughout the 1990s. The Commission conducted no fewer than 20 meetings between 1997-2000 throughout our region, known as the Hi-Line area of north central Montana, for public information and input on the proposed Water Compact. The Commission documented over 18 negotiating sessions with the FBIC and Federal government between 1990-2000. In addition, substantial public information and drafts of the Water Compact were distributed through numerous public and FBIC outlets.⁵⁵ This extensive public and tribal information effort led to the overwhelming approval of our 2001 Water Compact by the State Legislature (94% approval in the House and 87.5% in the Senate). The FBIC Council also approved the Water Compact.

As described in the Fort Belknap-Montana Water Compact, the Parties plan improvements in the operating capabilities of the Milk River Project, where the Milk River is the FBIC's largest source of our Indian water rights and forms the northern boundary of our Reservation. These improvements will mitigate the impact of the FBIC's future water development on the Milk River Project and tributary water users. The Water Compact also provides that the FBIC will subordinate its senior water rights in the Upper Peoples Creek to upstream non-Indian irrigation water users so that they will be able to continue their historical irrigation water use.

Milk River Project Mitigation (\$300,000,000)

The water diverted from the Milk River by the FBIC is the most senior water right on the river. All water users in this basin will benefit from the mitigation activities, consistent with the Water Compact. Water Compact Article VI.B., Mitigation of Impacts on the Milk River Project, provides the following:

The Parties agree that, as a result of development and use of the Tribal Water Rights and protection of water use on tributaries, the Milk River Project and its water users will, at times, be adversely affected if no change is made to the Milk River System. . . . to the level of 35,000 Acre-Feet Per Year. . . .

Improvements in the water supply of the Milk River for the Milk River Project will mitigate the impact of the development and future use of our Tribal Water Rights in the Milk River and provide protection of water use on upstream tributaries. This is important because in the Water Compact, the State reserved the right to withdraw as a party if "Congress does not authorize and appropriate the federal share of funding for the modification to the Milk River Project or other alternatives necessary to mitigate the impact of development on the Tribal Water Right."⁵⁶

Extensive studies have been conducted to analyze the impact of FBIC's water development and use on the Milk River. Projects were identified that would provide the required mitigation for the Milk River Project and tributary water users. The Commissioner is required to restore the St.

⁵⁴ *Hearing on Addressing the Needs of Native Communities through Indian Water Rights Settlements Before the Senate Committee on Indian Affairs* (May 20, 2015) (Testimony of Jay Weiner, Assistant Attorney General of Montana).

⁵⁵ This information is taken from the Montana Water Rights Commission archives, provided by the State.

⁵⁶ Fort Belknap-Montana Compact, Mont. Code Ann. § 85-20-1001, Article VII.A.4.c.

Mary Canal and associated facilities in cooperation with the State and FBIC. The Commissioner is also required to rehabilitate and enlarge the Dodson South Canal and associated facilities in cooperation with the State and FBIC.

Upper Peoples Creek (included in Trust Fund, Account #1 funding)

The second mitigation-related agreement of the Parties to the Water Compact is provided at Art. VI.C.:

The Parties agree, that, as a result of the protections provided to the Upper Peoples Creek [non-Indian] water users in the Compact and the variable natural water supply in the Peoples Creek Basin, the water supply available for development of the Tribal Water Right in the Peoples Creek may be limited. The Parties agree that such impacts can and shall be mitigated. . . through the construction of a dam and reservoir . . . and to seek appropriations . . . for the benefit of the Tribes.

During the Water Compact negotiations, non-Indian, state irrigators who have historically farmed on Upper Peoples Creek, upstream of the western boundary of the Reservation, sought protection from the FBIC's agreed-to Indian water rights quantification, development, and use in the Upper Peoples Creek. Additionally, the Peoples Creek Basin has a highly variable natural water supply, resulting in limitations in the development and use of the Tribal Water Rights in Peoples Creek on the Reservation.

Therefore, the FBIC agreed to allow the current irrigation of lands in Upper Peoples Creek by the non-Indian irrigators, subordinating the FBIC's senior reserved water rights. In exchange for the FBIC agreement with these state water users, the State and Federal governments agreed to mitigate the impact on the FBIC water use by constructing a dam and reservoir for the benefit of the FBIC in the Upper Peoples Creek. The dam and reservoir will significantly improve the reliability, availability, and use of the FBIC water rights from Peoples Creek on the Reservation.

State and Federal Land Transfers

The Bill authorizes the transfer of approximately 16,116 acres of federal land from the Bureau of Land Management, Bureau of Indian Affairs, including former allotments, and Bureau of Reclamation. The Bill also authorizes the Secretary of Interior and Secretary of Agriculture, Forest Service, to enter negotiations with the State to exchange approximately 21,705 acres of State trust lands for Federal lands to be transferred and held in trust for the FBIC. The total acreage to be transferred to the Tribe is approximately 37,822 acres. No private lands are included in the Federal land transfer and customary access to private lands will be retained. The federal lands to be transferred will be subject to valid existing rights and requirements and be held in trust for the Tribe. The land transfers provide for consolidation of Tribal lands both on and off the Reservation (including the submarginal land area adjacent to the western boundary of the current Reservation) for improved Tribal administration, better management of forested lands by our experienced land management department and fire response team, and the restoration and protection of the FBIC's cultural resources.

Montana Water Court Adjudication

In the 1970s, the State started a general stream adjudication of all water rights through the Montana Water Court.⁵⁷ The Legislature set up a process that would allow tribes to negotiate their water rights with the State instead of litigating them through the State Water Court. The negotiations process was carried out through the Reserved Water Rights Compact Commission (“Commission”). In 1981, the FBIC Council chose to negotiate and settle its Indian water rights with the State and United States. In 1990, the FBIC stipulated to stay proceedings in pending lawsuits in the federal court of Montana and the pending adjudication in the Montana Water Courts.

However, the State Legislature ended the activities of the Commission in 2013 and set a deadline for all remaining Indian reserved water rights claims to be filed with the Water Court by June 30, 2015. The United States, as our trustee, filed the FBIC water claims on behalf of the FBIC. Our water rights claims, therefore, are before the Montana Water Court, and it is currently uncertain when the Court will initiate the adjudication of our claims. However, an adjudication of these claims after decades of negotiations, an agreed-upon Water Compact, and a proposed Water Rights Settlement Bill before Congress would be tragic for all Parties now—resulting only in a “paper water right” for the FBIC, with no ability to develop and benefit from our Indian water. Therefore, time for Congressional approval of our Water Rights Settlement is of the essence.

The FBIC should not be required to litigate its claims after good faith bargaining with the Federal government. Yet, our Indian water rights claims have been filed, as required under federal and state law, with the Montana Water Court and its adjudication could proceed at any time. We agree with Master Rifkind who observed in his 1963 *Arizona v. Colorado* report that “Indian water rights litigation turns into sporting matches and endurance contests[,]” and is followed by dozens of years of “a platoon of lawyers at work, committed to either sustaining or destroying its result.”⁵⁸ The United States is too far into our settlement effort, which can now result in fair monetary compensation that will support the FBIC’s development of its agreed-upon Indian reserved water rights. The United States should see that litigating the FBIC water rights claims is no longer an option and should be avoided.

In short, litigation of Indian water rights is a lengthy and costly process, with an uncertain outcome—for everyone. We are seeking a settlement that provides us with “wet water,” with sufficient funding to settle our claims and allow for the development and use of our Indian water rights. That is the promise of settlement over litigation.

Conclusion

Congress has an opportunity to address more than 100 years of neglect and failure of the United States to fulfill its commitments made in treaties and agreements with the Gros Ventre and

⁵⁷ The following historical information is taken from a Briefing Paper (June 2000) in the Montana Reserved Water Rights Commission archives (author unknown).

⁵⁸ Teno Roncalio, *The Horns of a Dilemma*, Ch. 15, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), *Indian Water in the New West* 211(1993).

Assiniboine Tribes by passing S.1987. Indian water rights are one “of the four critical elements necessary for tribal sovereignty.”⁵⁹ Our Water Rights Settlement will provide recognition and enforceability of our reserved water rights, self-sufficiency, and economic success—and supports the permanent, livable homeland for our people that was promised to us by the United States. Our Water Rights Settlement will ratify our negotiated Indian water rights and provide much-needed economic benefits for FBIC and surrounding communities.

“The federal trust responsibility is a legal obligation of the United States dictating that the federal government must protect Indian resources and assets and manage them in the Indians’ best interest.”⁶⁰ The Settlement will provide funding for the rehabilitation, modernization, expansion, and restoration of the irrigation systems that will assist us in establishing a viable agricultural economy and justifies desperately needed expenditures, including for the federal Fort Belknap Indian Irrigation Project and other irrigation projects on our Reservation.

Our Indian water settlement is structured to promote economic efficiency on our Reservation and our Tribal self-sufficiency. It is an agricultural infrastructure plan; includes the development of clean, reliable, and safe drinking water; provides for the FBIC to administer, manage, and enforce its reserved water rights, and will improve the poor economic condition of our members on the Reservation. In the end, perhaps, Charles F. Wilkinson, a renowned scholar on Indian water rights, natural resources, and other issues, explained it the most eloquently in 1993:

“[I]t has been the role of morality that has touched my mind and my heart. It is a morality that comes from a sense of community, a sense of homeland, a sense of history, and a sense of promises. It is fascinating the way an abstraction such as morality can be so intensely practical. Without that morality, there would be no *Winters* doctrine and no water settlements, because it is a sense of morality that drives Indian policy. Tribal leaders are able to express this morality in an evocative and fair way, explaining the history, the promises, and the period of neglect, explaining the importance of homelands and other values that none of us fully comprehend. This morality has carried these Indian water settlements and other aspects of Indian policy. Morality matters profoundly because it is the backdrop for all the technical matters contained in these settlements.”⁶¹

Approval of our Water Rights Settlement is an historic event—we are the *Winters* Tribes with a recognized Indian reserved water right since 1908, and we are the last tribes in Montana to achieve our water settlement with the United States. We respectfully request that Congress work to swiftly pass our Water Rights Settlement, S.1987. It is long overdue.

⁵⁹ *City of Albuquerque v. Browner*, 97 F. 3d 415, 418 (10th Cir. 1996).

⁶⁰ Congressional Research Service, *Indian Water Rights Settlements* R44148 at 4 (updated Mar. 28, 2023), <https://crsreports.congress.gov/product/pdf/R/R44148/28>.

⁶¹ Charles Wilkinson, *Indian Water in the New West* 222 (1993).