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S. 2956, THE PECHANGA BAND OF LUISEÑO MISSION INDIANS WATER RIGHTS SETTLEMENT ACT, AND S. 3290, THE BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2010

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

JULY 22, 2010

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S. 2956, THE PECHANGA BAND OF LUISEÑO MISSION INDIANS WATER RIGHTS SETTLEMENT ACT, AND S. 3290, THE BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2010

THURSDAY, JULY 22, 2010

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. We are going to call the hearing to order. This is a hearing of the Senate Indian Affairs Committee. It is a legislative hearing on S. 2956, the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act. And S. 3290, the Blackfeet Water Rights Settlement Act of 2010.

Before we begin the discussion of these two pieces of legislation, let me just observe that yesterday was a very important day as far as this Committee is concerned, and as far as Indian Country is concerned. The House of Representatives passed the Tribal Law and Order Act, which originated here in this Committee. We spent a long, long time and a lot of effort to put together the Tribal Law and Order Act, to pass it through this Committee, and pass it through the Senate.

Yesterday, it passed the House of Representatives. I talked to President Obama about it yesterday afternoon. He is excited about it. He was also very helpful and pushed very hard to get it passed.

So that is a significant victory and I just want at the start of this hearing to say we have now in this same year passed the Indian Health Care Improvement Act, which is an issue that had not been dealt with for 17 years by the Congress. We have also passed the Tribal Law and Order Act, both of which are very significant achievements.

The staff of this Committee and the people who worked on it with us here in the Senate should be very proud. I know that it is going to make a difference and it is going to save lives and it is going to have a significant impact on American Indians all across this Country.

We are going to hold a hearing on bills that would approve settlement of Indian water rights litigation. The bills are important for securing water supplies for affected Indian tribes, for States and also for non-Indian water users. They settle longstanding claims against the United States for failing to protect tribal water rights.

The bills provide legal certainty and needed infrastructure to ensure that everyone can provide reliable water supplies for their communities and can contribute to economic development.

The first bill, dealing with the Pechanga Band, is a bill for which a hearing was requested by Senator Boxer of California and Senator Feinstein. But Senator Boxer especially has asked that I hold this hearing today. I am happy to do that. She is, I believe, at a Foreign Relations Committee hearing, but she will be submitting a statement for our permanent record and is a very strong supporter of this bill.

This bill would settle the Pechanga Band's water rights in the Santa Margarita River watershed northwest of San Diego, California. Securing the Band's water rights is necessary to meet their growing need to supply water for commercial, agricultural, municipal and domestic uses.

The second panel will provide testimony on S. 3290, the Blackfeet Water Rights Settlement Act of 2010. Let me just say that Senator Tester has done a really extraordinary job and is pushing very hard to resolve these issues. I know that he has wanted this hearing for some time. I am pleased that we will be able to do that today.

The settlement of the Blackfeet water rights will provide water and infrastructure improvements for municipal and domestic use for irrigation, for livestock and other economic development on the Blackfeet Reservation in north central Montana.

Although the Administration was not able to testify today, we have spoken with them about these bills, and we will see their formal views on both pieces of legislation as we prepare for further consideration of the two bills.

With that, I welcome the witnesses who have traveled to be here with us today. Many have traveled long distances and we appreciate your willingness to do that.

I have to leave after the first panel today. Senator Tester will Chair the Committee for the second panel. I appreciate his courtesy as well.

We would ask the witnesses to limit their remarks to five minutes. Their prepared statements, of course, will be part of the permanent record of this Committee and will be submitted in their entirety.

The hearing record will remain open for two full weeks following today's hearing, in the event that others wish to present formal testimony that would be included as a part of the hearing record. We would invite people to do that as well.

With that, let me call on the witnesses today. The first witness is the Honorable Mark Macarro, Chairman of the Pechanga Band. Mr. Macarro, thank you very much for being with us. Mr. Chairman, you and I have worked together on a number of things. I ap-

preciate the outstanding work you do for American Indians all across this Country.

You may proceed, and you may summarize. Your entire statement will be part of the permanent record of the Committee.

STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF LUISEÑO INDIANS

Mr. MACARRO. Thank you for that, Senator Dorgan.

Good morning. Good morning, Senator Tester.

My name is Mark Macarro. I am the Chairman of the Pechanga Band of Luiseño Indians.

The CHAIRMAN. Mr. Chairman, let me just say, I am going to ask Senator Tester to hold for a moment. Senator Reid is returning a call that I have to take for a moment. So you proceed, and I will be right back.

Mr. MACARRO. Thank you.

My name is Mark Macarro. I am the Chairman of the Pechanga Band of Luiseño Indians. We are in Temecula, 60 miles north of San Diego.

I am honored to be here today to testify on S. 2956, the Pechanga Water Settlement Bill. I have been involved with Pechanga's struggles over our water rights over the past 20 years. I know first-hand what this settlement means to the Pechanga people. It means wet water.

Before I discuss the details of the settlement, I would like to first thank Senator Boxer and Senator Feinstein for their strong support of the Band in our efforts to introduce and move our water settlement bill. We would not be here today without their staunch support and commitment to the Band's efforts.

I would also like to thank this Committee for holding a hearing on our bill before the August recess. Pechanga greatly appreciates Chairman Dorgan's leadership and commitment to Indian water settlements and Indian Country in general.

We understand how busy the legislative schedule is for the rest of this year. But we hope there is still time for passage of our water settlement this year.

Last but not least, I would like to thank the Federal negotiation team for their active participation throughout the settlement process. The Federal negotiation team has been an ally and a strong advocate during the negotiation process. Pechanga is dedicated to continuing to work with the Federal negotiation team to resolve any potential remaining issues in order to gain the Administration's support of our bill.

One member in particular of the Federal negotiation team is Patrick Barry of the Indian Resources Section, Department of Justice. I was a young man when I got to meet Patrick Barry, and his involvement in the water case that this is all about. And I think he is toward the senior end of his career now in Justice. And I think I am in the middle of mine. So we will see how that plays out.

[Laughter.]

Mr. MACARRO. But it has been well over two decades that we have both been working on this settlement. In fact, we met with members of the team day before yesterday, on Tuesday, to further discuss the Administration's concern. In my opinion, it was a very

productive meeting and I firmly believe that we will be able to reach a deal with the Administration.

Water is central to who we are as a people. It is in our name. Pechaa'anga or Pechaanga, means at Pechaa'a, and Pechaa'a means at the place where water drips.

Today, our tribal government operations, such as our environmental monitoring and natural resource management programs, exist to fully honor and protect the land and our culture upon it. In particular, we are concerned about watershed and wellhead protection for our surface and groundwater resources and the availability of water for our community now and into the future. It is of upmost importance to the Band that our water rights are federally recognized in order to protect our water in the basin and ensure that the basin will continue to provide for generations of Pechanga people into the future.

This settlement has been decades in the making and stems from a 1951 Federal District Court case known as *United States v. Fallbrook Public Utilities District.* It also involves my tribe, Pechanga, Ramona and Cahuilla, two other tribes in the upper watershed, in which the court determined that each of the tribes had a prima facie entitlement to water in the Santa Margarita River watershed, without specifying the actual amount of each tribe's water right.

Until recently, we had sought to avoid litigation and instead worked with those entities around Pechanga to develop mutual private agreements for sharing the limited water resources in our basin. These efforts at negotiated management of water resources were successful and they resulted in two agreements: in 2006, the Groundwater Management Agreement with Rancho California Water District, RCWD; and in 2007, the Recycled Water Agreement with Eastern Municipal Water District. Both of these agreements have been successfully implemented and are in effect today.

Significantly, though successful, neither of these agreements soght to address the scope or settlement of the Band's overall water rights to the Santa Margarita River watershed. However, when the other two tribes in our basin, Ramona and Cahuilla, initiated litigation in the Fallbrook case, we began serious negotiation efforts with RCWD, EMWD and the United States to reach a settlement with these parties rather than litigate our claims.

The bill before you today is a result of hard work and compromise by all the parties involved. The Band's written testimony provides an in-depth description of the Pechanga Settlement Agreement. But today I would briefly like to outline the provisions of the settlement that are particularly important to the Band.

First, the Pechanga Settlement Agreement recognizes Pechanga's Federal reserve right to water in the Santa Margarita River watershed under the Fallbrook decree as 4,900 acre feet per year.

Second, the settlement agreement allocates 75 percent of the groundwater in the Wolf Valley Basin to Pechanga and 25 percent to Rancho California Water District. This equates to 1,575 acre feet per year to Pechanga, and 525 acre feet per year to Ranch California Water District.

Third, the settlement agreement extends our existing recycled water agreement with Eastern Municipal Water District up to 90

years. It allows Rancho California Water District to use a portion of that water which was a key provision for the settlement to work.

Fourth, the settlement agreement extends Metropolitan Water District's existing service area onto the Pechanga Reservation to a greater portion of the reservation, so that Pechanga becomes a Metropolitan Water District customer with the ability to receive imported water to fulfill our tribal water rights.

Finally, the settlement provides funding for necessary infrastructure for Pechanga to receive that Metropolitan Water District Water to pay the connection fees to Metropolitan and Eastern Municipal Water Districts and provide a subsidy to bring down the cost of the extremely expensive Met Water.

All the elements of the settlement were carefully constructed to create a settlement that is beneficial to all parties involved. During our negotiations Pechanga was very aware of the fact that there are limited water resources in the state of California, and on top of that, we are in difficult economic times. That being said, the United States must fulfill its trust responsibilities and programmatic responsibilities to Pechanga.

We are open to being convinced by the United States otherwise, but we feel that this is a fair and cost-effective water settlement, and we believe that the Federal contribution of approximately $50 million is justified by Pechanga's waivers against the United States and in recognition of the United States' programmatic responsibility to the Band.

I want to thank you again for the opportunity for our water bill to be heard. I am happy to answer any questions that you may have with respect to the Pechanga water settlement. Thank you.

[The prepared of Mr. Macarro follows:]

PREPARED STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF LUISEÑO INDIANS

Good morning Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee. Thank you for scheduling a hearing on S. 2956 and the opportunity to provide testimony on behalf of the Pechanga Band of Luiseño Mission Indians.

I first want to thank Senator Boxer, along with co-sponsor Senator Feinstein, for their introduction and strong support of this important piece of legislation.

This water settlement has been decades in the making. It will settle once and for all the Band's longstanding water claims in the Santa Margarita River Watershed and provide the resources to meet the Band's current and future water needs. Not only does the settlement provide certainty as to the Band's water rights but it also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation.

I. BACKGROUND

A. Background on the Pechanga Band

The Pechanga Band of Luiseño Mission Indians (the "Band" or "Pechanga") is a federally recognized Indian tribe with a reservation of over 6,000 acres located northeast of San Diego, California, near the city of Temecula.[1] Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Pechanga Reservation.

The Band has called the Temecula Valley home for more than 10,000 years. Ten thousand years from now tribal elders will share with tribal youth, as they do today, the story of the Band's creation in this place. Since time immemorial, through periods of plenty, scarcity and adversity, the Pechanga people have governed ourselves and cared for our lands.

The history of the Band begins with our ancestral home village of Temeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the court granted in 1873. In 1875 the sheriff of San Diego County began three days of evictions. The Luiseño people were taken into the hills south of the Temecula River.

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[1] *See* Map of Pechanga Reservation (attached as Exhibit 1).

Being strong of spirit, most of our dispossessed ancestors moved upstream to a small, secluded valley, where they built new homes and re-established their lives. A spring located two miles upstream in a canyon provided them with water; the spring we have always called Pechaa'a (from pechaq = to drip). This spring is the namesake for Pechaa'anga or Pechaanga, which means "at Pechaa'a, at the place where water drips."

On June 27, 1882, seven years after being evicted, the President of the United States issued an Executive Order establishing the Pechanga Indian Reservation.[2] Several subsequent trust acquisitions were made in 1893,[3] 1907,[4] 1931,[5] 1971,[6]1988,[7] and 2008,[8] each one increasing the size of the reservation. At present, the total land area of the Pechanga Reservation is 6,724 acres.

Water is central to who we are as a people. Today, our tribal government operations, such as our environmental monitoring and natural resource management programs, exist to fully honor and protect the land and our culture upon it. In particular, we are concerned about watershed and wellhead protection for our surface and ground water resources and the availability of water for our community. Accordingly, it is of utmost importance to the Band that our water rights are federally recognized in order to protect our water in the basin and ensure that the basin will continue to provide for generations of Pechanga people in the future.

B. History of Pechanga's Efforts to Protect its Water Rights

The Band has been engaged in a struggle for recognition and protection of our federally reserved water rights for decades. In 1951, the United States initiated litigation over water rights in the Santa Margarita River Watershed known as *United States v. Fallbrook*.[9] The *Fallbrook* litigation eventually expanded to include all water users within the Santa Margarita Watershed, including three Indian Tribes – Pechanga, Ramona Band of Cahuilla Indians ("Ramona"), and Cahuilla Band of Indians ("Cahuilla").

The United States, as trustee, represented all three Tribes before the *Fallbrook* Court. In a series of Interlocutory Judgments that were eventually wrapped into the Court's Modified Final Judgment and Decree,[10] the Court examined and established water rights for various water users

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[2] Executive Order (June 27, 1882).

[3] Trust Patent (Aug. 29, 1893).

[4] Executive Order (Jan. 9, 1907) and Little Temecula Grant, Lot E (Mar. 11, 1907)(commonly referred to as the Kelsey Tract).

[5] Trust Patent (May 25, 1931).

[6] Trust Patent (Aug. 12, 1971).

[7] Southern California Indian Land Transfer Act, P.L. 110-581 (Nov. 1, 1988).

[8] Pechanga Band of Luiseno Mission Indians Land Transfer Act, P.L. 110-383 (Oct. 10, 2008).

[9] *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.).

[10] Modified Final Judgment and Decree, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Apr. 6, 1966).

involved in the case. In Interlocutory Judgment 41 ("IJ 41"),[11] the Court concluded that each of the three Tribes has a recognized federally reserved water right without specifying the amount of each of the Tribe's water right. Although the Court did examine some facts in IJ 41 and developed "prima facie" findings with respect to each of the Tribes' quantifiable water rights, final quantified rights were never established as a matter of law. As a result of IJ 41, all three Tribes have "Decreed" but "unquantified" federally reserved water rights.[12]

In 1974, Pechanga filed a motion with the *Fallbrook* Court to intervene as a plaintiff-intervenor and a party to the proceeding on its own behalf. In 1975 the Court granted Pechanga's Motion and Pechanga filed a complaint to enjoin certain defendants from using more than their respective entitlements under the *Fallbrook* Decree. This complaint was subsequently resolved and the Band has remained a party to the *Fallbrook* proceedings ever since. Pechanga has not filed a motion to finally quantify its federally reserved water rights.

Until recently, we sought to avoid litigation and instead work with those entities around Pechanga to develop mutual private agreements for sharing the limited water resources in our basin. Specifically, in an effort to collaboratively develop a means of providing assured water supplies and cooperative management of a common water basin, the Band adopted an approach of negotiation and reconciliation with the primary water users in its portion of the Santa Margarita River Watershed, primarily the Rancho California Water District ("RCWD") and the Eastern Municipal Water District ("EMWD").

These efforts at negotiated management of water resources were successful and resulted in the Groundwater Management Agreement between the Band and RCWD in 2006, and a Recycled Water Agreement between EMWD and the Band in 2007, with the recycled water being delivered to the Band by RCWD. Both of these agreements have been successfully implemented and are in effect today. Significantly, though successful, neither of these agreements sought to address the scope of the Band's overall water rights to the Santa Margarita River Watershed or settle its various claims related to the *Fallbrook* Decree.

Beginning in 2006 and continuing throughout 2007, the other two tribes in the Santa Margarita River Watershed, Ramona Band of Cahuilla Indians and Cahuilla Band of Indians sought to intervene in the *Fallbrook* case to, among other things, quantify their respective water rights to the Santa Margarita River Watershed.[13] These efforts intersected the Band's otherwise successful efforts at negotiated management of joint water supplies and forced the Band to address in *Fallbrook* the scope of its own claims to water or risk being injured by the actions of the other two Tribes.[14]

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[11] Interlocutory Judgment 41, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Nov. 8, 1962) (attached as Exhibit 2).

[12] The Court in *Fallbrook* fixed the quantity of Pechanga's federally reserved right at 4,994 AFY, on a prima facie basis.

[13] Ramona and Cahuilla are located within the Anza-Cahuilla Sub-Basin of the Santa Margarita River Watershed while Pechanga is located within the Wolf Valley Sub-Basin of the Santa Margarita River Watershed.

[14] Pechanga periodically filed status reports with the *Fallbrook* court apprising the Court of its progress towards reaching settlement. Pechanga also filed documents with the Court requesting that Pechanga be afforded

In addition to participating as a litigant in the proceedings initiated by Ramona and Cahuilla, the Band also immediately started efforts to reach a settlement of its claims to water and claims for injuries to water rights relating to the Santa Margarita River Watershed. As part of its efforts to seek settlement of its claims to water, on March 13, 2008, Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through the formation of a Federal Negotiation Team under the Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.[15] The Secretary agreed to form a Federal Negotiation Team on August 1, 2008.

Since that time Pechanga has been working closely with the Federal Negotiation Team to effectively negotiate the terms of the settlement with the other parties and to resolve its claims against the United States in connection with the development and protection of Pechanga's water rights. Pechanga and the Federal Negotiation Team carefully examined the overarching Settlement Agreement, along with the exhibits, and have continued to have a productive dialogue to resolve questions and concerns that the Federal Negotiation Team raised. The Federal Negotiation Team has presented its assessment report to the Administration Working Group, comprised of policy members from the Administration. Pechanga has also met with members of the Administration Working Group to discuss the Administration's outstanding concerns. In Pechanga's perspective, all of these meetings with the Federal Negotiation Team and the Administration Working Group have been extremely productive. Pechanga is committed to continuing these discussions with the Administration to resolve, if possible, any remaining Administration's concerns.

This settlement legislation before the Committee is the result of the Band's settlement efforts. Pechanga continues to meet with Magistrate Judge Brooks, who was assigned by the *Fallbrook* Court to oversee the settlement negotiations among Pechanga, RCWD and the United States. Most recently, at the request of the court, Pechanga filed a proposed process for approval of the Pechanga Settlement Agreement, as the court will eventually need to approve the settlement as approved by Congress. The court is carefully and actively supervising the settlement process and is very supportive of approving the Pechanga settlement in the near future.

C. Legislative History

On December 11, 2009, Congresswoman Bono Mack (R-CA), along with co-sponsors Congressman Calvert (R-CA), Congressman Issa (R-CA), Congresswoman Richardson (D-CA), Congressman Grijalva (D-AZ) and Congressman Baca (D-CA) introduced H.R. 4285 in the House. As the Committee is aware, on January 26, 2010, Senator Boxer (D-CA), along with co-sponsor Senator Feinstein (D-CA) introduced an identical bill in the Senate, S. 2956, which is now before the Committee. Subsequently, the bill was reintroduced in the House (H.R. 5413) by Congressman Baca, along with co-sponsors Congressman Boren (D-OK), Congressman Grijalva,

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the opportunity to weigh in when the Court considered issues of law and legal interpretations of IJ 41 with respect to Ramona and Cahuilla.

[15] 55 Fed. Reg. 9223.

Congressman Honda (D-CA), Congressman Kildee (D-MI), Congressman Lujan (D-NM) and Congresswoman Richardson in an effort to resolve some of the issues that the Administration raised with the legislation.

II. STRUCTURE OF SETTLEMENT

The Pechanga Settlement Agreement is a comprehensive settlement agreement among the United States, RCWD and EMWD, that incorporates a number of agreements as exhibits to the overarching settlement agreement. The Pechanga Settlement Agreement includes the following agreements as exhibits:

A. Amended and Restated Groundwater Management Agreement ("Amended GMA");

B. Recycled Water Agreement and Amendment No. 1 to the Recycled Water Agreement;

C. Recycled Water Transfer Agreement;

D. Recycled Water Scheduling Agreement;

E. Recycled Water Infrastructure Agreement;

F. Extension of Service Area Agreement;

G. ESAA Capacity Agreement; and

H. ESAA Water Delivery Agreement.

Together, the Pechanga Settlement Agreement and corresponding exhibits provide the necessary agreements to resolve Pechanga's longstanding claims to water rights in the Santa Margarita River Watershed, secure necessary water supplies to meet Pechanga's current and future water needs and provide sufficient terms to make the settlement work for RCWD and its customers. S. 2956 approves the Pechanga Settlement Agreement, including all its exhibits.

A. Recognition of Tribal Water Right

A critical element of the settlement is recognition of the Band's federal reserved right to water (the "Tribal Water Right"). Both the Pechanga Settlement Agreement and this federal legislation recognize the Band's Tribal Water Right as being the same as it was established on a "prima facie" basis in the original *Fallbrook* Decree in 1965, which is equal to 4,994 acre feet of water per year for the benefit of the Band and allottees that may be used for any purpose on the Pechanga Reservation.[16]

The Tribal Water Right is broken down by priority date as follows:

[16] The Band's analysis revealed that its water right claims for its existing reservation exceed 4,994 acre-feet, analysis challenged by RCWD, among others. The Band's settlement fixes its water rights entitlements in the Santa Margarita River Basin at 4,994 acre-feet per year in recognition of the fact that this amount is judicially established on a prima facie basis and therefore a number that could form the basis for ready agreement by all parties to the settlement.

1) the priority date for 3,019 AFY of the Tribal Water Right shall be June 27, 1882;
2) the priority date for 182 AFY of the Tribal Water Right shall be August 29, 1893;
3) the priority date for 729 AFY of the Tribal Water Right shall be January 9, 1907;
4) the priority date for 563 AFY of the Tribal Water Right shall be March 11, 1907; and
5) the priority date for 501 AFY of the Tribal Water Right shall be May 25, 1931.

The United States has analyzed the water rights for the Pechanga Reservation on at least two occasions. First, in 1958, the Bureau of Indian Affairs provided a water rights study of the Pechanga Indian Reservation within the Santa Margarita River Watershed.[17] Second, in 1997, the United States' hydrological expert provided a report summarizing his findings of a Practicably Irrigable Acreage ("PIA") study (irrigation water claim) for the Pechanga Reservation.[18] Both reports support a prima facie claim of 4,994 AFY for the Pechanga Reservation and further support the need for supplementary water supplies in addition to groundwater on the Pechanga Reservation.

The Tribal Water Right will also be adopted and confirmed by decree by the *Fallbrook* federal district court. This is especially important for the Band as it constitutes the full recognition of its water entitlements under the *Fallbrook* Decree.

B. Protection of Allottee Rights

During negotiations, Pechanga worked closely with the Federal Negotiation Team to ensure that the allottee rights on the Pechanga Reservation were accurately protected in S. 2956. First, pursuant to Section 5(a) of S. 2956, allottees will receive benefits that are equivalent to or exceed the benefits they currently possess.[19] Furthermore, in accordance with Section 5(d) of S. 2956, 25 U.S.C. 381 (governing use of water for irrigation purposes) shall specifically apply to the allottees' rights. Under S. 2956, the Tribal Water Code also provides protections for allottees—the Tribal Water Code must provide that:

- tribal allocations of water to allottees shall be satisfied with water from the Tribal Water Right;
- charges for delivery of water for irrigation purposes for allottees be assessed on a just and equitable basis;
- there is a process for an allottee to request that the Band provide water for irrigation use to the allottee;

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[17] *See* 1958 Bureau of Indian Affairs Water Rights Studies, October 28, 1958 (attached as Exhibit 3).
The information referred to has been retained in Committee files

[18] The PIA study findings are confidential.

[19] *See* Sec. 5(a).

- there is a due process system for the Band to consider a request by an allottee (appeal and adjudication of any denied or disputed distribution of water and resolution of any contested administrative decision).[20]

The inclusion of these provisions reflects the United States' most recent allottee language as was included in other recent Indian water settlements. As a result, the allottee language is consistent with other Indian water settlements pending before Congress, and provides allottees with the same protections provided to other tribal allottees.

C. Contractual Acceptance of Guaranteed Water Sources to Fulfill the Tribal Water Right

Unfortunately, there is insufficient groundwater within the Santa Margarita River Watershed to fulfill the entire Tribal Water Right.[21] To account for the limited water sources within the Santa Margarita River Watershed, additional water sources are needed to fulfill the Tribal Water Right. Accordingly, pursuant to the Pechanga Settlement Agreement and the corresponding exhibits, though the Tribal Water Right is confirmed and decreed, the Band's actual water needs will be fulfilled through a number of contractual agreements. The Band further agrees that it shall not enforce its Tribal Water Right so long as it receives its water in accordance with these various contractual arrangements.

There are three major components of the settlement:

1. Amended Groundwater Management Agreement ("Amended GMA")

The Amended GMA , between Pechanga and RCWD, is an integral part of the Pechanga Settlement Agreement, as it sets forth the terms and conditions governing the parties' joint management of groundwater pumping from the Wolf Valley Basin and establishes an allocation of the safe yield of the basin. As part of the Amended GMA, the parties established, through technical review, that the safe yield of the Wolf Valley Basin is 2,100 AFY. The parties agreed that Pechanga is entitled to 75% (1575 AFY) of the basin and RCWD is entitled to 25% (525 AFY) of the basin. Additionally, in an effort to raise the level of water in the Wolf Valley Basin and provide storage water in years of water shortage, the Amended GMA establishes a Carryover Account between Pechanga and RCWD that provides for use of the Wolf Valley Basin as a storage aquifer for a defined amount of water to be used in shortage years. Thus, the Amended GMA not only satisfies 1575 acre feet of water per year of the Tribal Water Right, but it also provides benefits to the entire region by improving the water levels in the Wolf Valley Basin.

2. Recycled Water Agreements

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[20] *See* Sec. 5(f).

[21] The need to import water to the Reservation is a fact that has been recognized by the federal team for a long period of time. Over pumping in the basin has significantly reduced water levels over time, which is one cause for the insufficient groundwater to satisfy the Band's federally reserved water rights. One important aspect of the settlement is the establishment of groundwater pumping limits to protect the basin now and in the future.

Another essential element of the Pechanga Settlement Agreement is RCWD's ability to use Pechanga's recycled water in partial consideration for their surrender of a portion of their current potable water supply as pumped from the Wolf Valley Basin. In particular, Amendment No. 1 to Pechanga's Recycled Water Agreement[22] allows RCWD to utilize the unused portion of the entitlement Pechanga currently has pursuant to the Recycled Water Agreement and provides an extension of the term of the Recycled Water Agreement for 50 years with 2 additional 20 year extensions.

In conjunction with Amendment No. 1, the Pechanga Settlement Agreement incorporates the Recycled Water Transfer Agreement, the Recycled Water Scheduling Agreement and the Recycled Water Infrastructure Agreement. Together, these three agreements provide for the mechanisms and infrastructure necessary to provide RCWD with the ability to utilize Pechanga's unused portion of recycled water. More specifically, the Recycled Water Transfer Agreement provides that Pechanga agrees to transfer a portion (not less than 300 AFY, and not more than 475 AFY) of the EMWD recycled water Pechanga is entitled to RCWD. The Recycled Water Infrastructure Agreement provides for the development and construction of a Storage Pond and Demineralization and Brine Disposal Project, both of which are necessary for RCWD to utilize the recycled water allocated to it pursuant to the settlement. Lastly, the Recycled Water Scheduling Agreement provides the protocol for ordering and delivering the portion of Pechanga's allocation of EMWD recycled water to RCWD.

3. Imported Water Agreements

Because the water supplies in the Band's portion of the Santa Margarita Basin are either too depleted to fulfill the Band's entire water needs in the medium to long term or are being used by other parties (primarily RCWD), the Band has agreed to not enforce its Tribal Water Right against other water users and instead use replacement water for the majority of its water uses in future. Accordingly, another significant component of the Pechanga Settlement Agreement is comprised of the agreements necessary to provide MWD imported potable water to Pechanga to provide for the Band's water needs on a permanent basis. The Extension of Service Area Agreement ("ESAA"), is the primary agreement for providing MWD water to be used on the Reservation. The ESAA is a contractual agreement among Pechanga, EMWD and MWD that extends MWD's existing service area within the Band's Reservation to a larger portion of the Reservation, such that Pechanga will receive MWD water to augment its local pumped supplies.

In order to implement the ESAA, two additional agreements were necessary—the ESAA Capacity Agreement and the ESAA Water Delivery Agreement. The ESAA Capacity Agreement establishes the terms and conditions for RCWD to provide water delivery capacity of the ESAA water to Pechanga. The ESAA Water Delivery Agreement addresses service issues and billing issues related to the delivery of ESAA water to Pechanga.

III. JUSTIFICATION OF FEDERAL CONTRIBUTION

[22] The Recycled Water Agreement, between Pechanga and EMWD, was executed on January 8, 2007 and provides Pechanga with 1,000 AFY of recycled water from EMWD.

Pechanga recognizes that the United States is always concerned in Indian water settlements with the overall cost of an Indian water rights settlement, and more specifically, the Federal contribution to such settlements. The Band further recognizes that Federal funds are limited and that we are living in extremely difficult economic times. Accordingly, Pechanga has worked very hard to ensure that the Federal contribution to the Pechanga Settlement Agreement is justified and properly reflects the United States' liability and programmatic responsibility to the Band.

A. Federal Programmatic Responsibility to the Band

The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria and Procedures") provides that Federal contributions to a settlement may include costs related to the Federal trust or programmatic responsibilities.[23] The United States argued in the *Fallbrook* proceedings that Pechanga has an entitlement to 4,994 acre feet per year in the Santa Margarita River Watershed, and the court adopted the United States' position on a prima facie basis. Moreover, as recognized by the United States, local water supplies, both on the Reservation and in adjacent areas were adequate and capable of being developed in an economically feasible manner to fulfill at least the 4,994 acre-feet per year that the United States had argued for in the *Fallbrook* proceedings in 1958.

As discussed above, the Band must obtain some imported water from MWD as a replacement for its entitlement to local water from the Santa Margarita River Watershed. In accordance with the Criteria and Procedures the United States has a programmatic responsibility to ensure that the Band's federally reserved water right entitlement is fulfilled through replacement water if existing water on or near the Pechanga Reservation is not currently available. The United States must also ensure that there is sufficient infrastructure for the Band to receive the replacement water. The primary source of replacement water in this case is water from the MWD pursuant to the ESAA.

In order for the Band to receive replacement water, the parties must enhance the capacity for delivery of ESAA Water (water from MWD) through infrastructure development as necessary to allow for deliveries to the Band. The parties negotiated a number of agreements, the various components of which achieve this goal.

Accordingly, the Pechanga Water Settlement Act provides funding for the necessary infrastructure to fulfill the United States' trust and programmatic responsibility to deliver adequate replacement water to the Band to fulfill its entitlement. The Pechanga Water Settlement Act also provides for a subsidy fund that will bring down somewhat the cost of the expensive ESAA Water, which is an element that is consistent with the United States' contribution to most other Indian water rights settlements.

B. Potential Federal Liability to the Band

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[23] *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

In addition to its programmatic responsibilities, the federal government has an obligation to every federally recognized Indian tribe to protect its land and water resources. Indeed, a core principle of Federal Indian law is that when the United States sets aside and reserves land for Indian tribes, such reservation includes all the water necessary to make their reservations livable as permanent homelands.[24] The United States in turn holds these reserved water rights in trust for an Indian Tribe.[25]

Congress has expressly found that "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources."[26] The Department of Interior has similarly found that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."[27] Courts have also recognized the federal trust responsibility for Indian water rights.[28]

Accordingly, a tribe may recover substantial monetary damages from the United States if it can be shown that the tribe suffered a loss of water or water rights.[29]

Since establishing the Pechanga Reservation, the United States has systematically failed to protect and adequately manage the Band's water resources. This failure has resulted in the loss of Tribal water use and other Reservation resources, and has prevented the Band from fulfilling the purposes of the Reservation. In addition to this general overarching claim, which has the potential on its own, of reaching into the tens of millions of dollars, the Band also has numerous, very specific claims that it is waiving, with an estimated potential value for each, that, in combination with the United States' programmatic responsibility to the Tribe as outlined above, provides substantial justification for the overall Federal contribution.

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[24] *See generally, Winters v. United States*, 207 U.S. 564 (1908); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source ("Gila V")*, 35 P.3d 68 (Ariz. 2001).

[25] *Id.*

[26] *See e.g.* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4695 (codified by reference at 43 U.S.C. § 371 (2000)).

[27] *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

[28] *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972).

[29] *See e.g. N. Paiute Nation v. United States*, 30 Ind. Cl. Comm'n. 210, 215-217 (1973); *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n. 256 (1975); *see also*, Cohen's Handbook of Federal Indian Law § 19.06, at 1225 n. 400. For instance, in *Pyramid Lake Paiute Tribe*, the court held that the Secretary of Interior was obligated to fulfill its trust responsibility to the tribe in allocating the excess waters of the Truckee River between the federal reclamation project and the reservation and not to reconcile competing claims to water. In *Gila River Pima-Maricopa Indian Community v. United States*, the tribe was able to establish its right to relief based on the federal government's failure to take action when upstream diversions interfered with the water supply to the Gila River Reservation. The Claims Court specifically held that "the actions taken by the United States in establishing the reservation in 1859 and in enlarging it thereafter, together with repeated recognition of the need to preserve or restore the water supply utilized by the Pimas and Maricopas in maintaining their commendable self-sufficient status, are consistent only with the existence of a special relationship between these Indians and the United States concerning the protection of their lands and the water supply they utilized on these lands."

We discuss these claims and the potential monetary liability of the Federal Government below.

1. The Band's claims for mismanagement and failure to protect and promote the Band's water resources

In *Fallbrook*, the court held in IJ 41, that the United States "intended to reserve, and did reserve rights to the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Pechanga Indian Reservation, including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by the Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the Reservation by Patent on that date; and May 25, 1931, for those lands added to the Reservation by Patent of that date."[30] Based on IJ 41, the United States recognized reserved water rights for the Pechanga. Similar to the *Gila River* case,[31] the federal government has a compensable fiduciary duty to Pechanga with respect to the Band's water rights.

Indeed, although the government has failed to satisfy this obligation, its actions indicate that it has recognized this duty. For instance, the United States through the Bureau of Indian Affairs ("BIA") recognized that Pechanga had a paramount right to water which impacted BIA's actions on behalf of the Band.[32] Further, as part of this special relationship, Pechanga requested on numerous occasions for the BIA to conduct water supply studies and take other action in order to protect the Band's water rights and water supply.[33]

In the face of the Band's requests however, the United States Government took no action to protect the Band's water rights or if they did finally take action, it was delayed to the point where the action was ineffective. For instance, in response to the Band's resolution with respect to Rancho California's pumping activities, the Interior Department officially requested the Justice Department to advise Rancho California that its pumping activities were in violation of a 1940 Stipulated Agreement.[34] The Justice Department however declined to advise Rancho

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[30] *Supra* note 11 at 13-14 .

[31] *Id.*

[32] *See* Pechanga Summary at 41 (Letter from BIA Sacramento Area Director to Regional Director which protested that the Regional Director's Report on the Santa Margarita Project of 1970 "did not recognize the rights of Indian reservations to underground water supplies that had been established in Winters v. United States, 1908, 207 US 564 and confirmed in several subsequent cases....and that the Indians had a paramount right.").

[33] For example, on November 18, 1969, the Pechanga Band passed a resolution calling upon the BIA to conduct an economic development and land use study of the reservation, to inform RCWD that it was not permitted, under the terms of the 1940 Stipulated Agreement to pump water from the Temecula Murrieta ground water basin, and that the Band would oppose any modification of that Judgment until the Band's water rights and water supply were at least as well protected as under that judgment and the Band was provided with the means to make beneficial use of the water needed to fulfill its economic and land use goals. *See* Pechanga Summary at 38-39.

[34] On December 26, 1940, a judgment was rendered in the Superior Court of the State of California on a case between Rancho Santa Margarita, a corporation, *Plaintiff v. N.R. Vail et al.* (Vail family descendants), Defendants, with Guy Bogart et al, (individuals with riparian rights to Santa Margarita River waters), as Intervenors. The court found that defendants, plaintiffs, and intervenors had rights to the waters of the Temecula-Santa Margarita

California of its unlawful action because of an objection by the United States Navy. Furthermore, the Bureau of Reclamation's plans for construction of the Santa Margarita Project on the Santa Margarita River to benefit the Fallbrook Public Utility District and Camp Pendleton included an allowance of only 1,000 acre feet of water from the Murrieta-Temecula groundwater basin for Pechanga Reservation, despite the BIA's estimation that the reservation would need 5,000 acre feet.[35]

In response to the Santa Margarita Project's failure to adequately account for the Pechanga's water rights, the Band passed two resolutions with respect to their water supply. The first requested that the Secretary of Interior "withhold approval of the Santa Margarita Project until adequate provision has been made for protection and development of the Pechanga Band's *Winters* Doctrine rights."[36] The second asked the United States Attorney General to reopen *United States v. Fallbrook* "to restructure the decree in accordance with the instructions from the Ninth Circuit of Appeal to the end that the decree may become, as it was intended, an instrument for the protection of the Winters Doctrine rights of the Pechanga Band."[37]

The BIA Sacramento Area Director agreed with the Band.[38] He recommended that "the Secretary demand Justice to stop all pumping of the groundwater now in violation of the existing decree and stipulation until such time as the Pechanga Band and the Secretary have documentary evidence that the pumping by Rancho California is not affecting the groundwater rights of the Pechanga Band. The United States as trustee for these water rights has no alternative!"[39] In response to the BIA Area Director's recommendation, the Solicitor's Office stated that "[t]he Department of Justice points out that where the Department of Defense is the beneficial holder of the right and refuses to have that right interfered with that the Untied States can bring the action only if we can demonstrate that the reserved right of the Indians is being jeopardized."[40] Again, the Sacramento Area Director recommended that the Secretary of Interior demand that the Justice Department stop groundwater pumping until it was proved that the pumping had not affected the groundwater rights of the Indians.[41] It was not until January 26, 1973 that funds were finally made available for United States Geological Services to undertake a water resources study of Pechanga Reservation.[42]

Given this clear history of the U.S. Government's failure to protect the Band's water rights, the Pechanga Band, and several other California tribes in similar circumstances, successfully sued the federal government in the Indian Claims Commission for, among other

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and its tributaries. It spelled out the rights of each, and provided that a number of gaging stations and meters be set up to measure the flow of water. *See* Pechanga Water Summary at 29.

[35] *Id.* at 45.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 47 ("We are in complete agreement with the Band.").

[39] *Id.*

[40] *Id.*

[41] *Id.* at 49 ("Why does the burden of proof rest with the Indian people when it is the trustee's obligation to protect these rights?").

[42] *Id.* at 52.

things, its failure to protect and preserve the plaintiffs' reserved water rights from non-Indian interference, failure to provide or maintain necessary reservation irrigation systems, and the improper taking of aboriginal water rights. The case was settled in 1993 when six of the Tribes, including Pechanga, accepted $7,500,000.00 in settlement of the pending claims. Notwithstanding the payment of this claim in satisfaction of these breaches of trust, since 1993, the government has continued to breach its trust obligation to the Band by failing to protect and preserve the plaintiffs' reserved water rights from non-Indian interference and by failing to provide necessary water to the Pechanga Reservation. In other words, the government has not protected the Band's water rights despite its admitted failure to do so.

This failure has now been compounded by the fact that since 1993, there has been tremendous population growth in the area. Accordingly, significant additional non-Indian diversions and groundwater pumping from the Band's water resources has damaged the primary aquifer that would otherwise help serve the water needs of the Reservation. In particular, continuous over-pumping beyond the yearly safe yield by non-Indian parties has damaged the aquifer and severely limited the amount of water the Band can now pump itself to serve the purposes of the Reservation. As a result, the Band has had to enter into a series of agreements on its own, without the assistance of the United States, to secure an adequate water supply for the Pechanga homeland but is still short of fulfilling the purposes of the Reservation.[43]

The aggregate sum of the potential exposure and liability of the United States stretches into the hundreds of millions for these claims. Nevertheless, the Band conservatively estimates that these claims would likely result in a potential recovery of $72 million.

2. Trust Accounting Claim Pending in the United States District Court for the District of Columbia

On December 26, 2006, Pechanga filed a general trust accounting claim against the United States in the District Court for the District of Columbia. *See* Docket No. 06-2206, U.S. District Court for the District of Columbia, Dec. 26, 2006. In its amended complaint, the Band added more details regarding its claims for trust accounting, including reference to the judgment it received in Docket 80-A-2. In addition to its claims for general trust fund and property mismanagement, which are substantial, the Band alleged that the government breached its fiduciary duties by failing to properly invest the funds it received in the ICC judgment for Docket 80-A-2. *See First Amended Complaint,* Docket No. 06-2206, Feb. 12, 2008, at 12.

While the Band is not seeking money damages in this action, the potential liability of the government is substantial and would likely set the stage for a large monetary award, either as equitable relief in the District Court, or as part of a separate action in the Court of Federal Claims. Wherever a recovery is had, the Band conservatively estimates that the Government's

[43] For instance, in 2006, the Band entered into the Groundwater Management Agreement with Rancho California Water District to provide for management of the Wolf Valley Water Basin and in 2007 the Band entered into the Recycled Water Agreement with Eastern Municipal Water District to provide for 1,000 AFY of recycled water to the Band.

liability would stretch into the millions. In particular, the original ICC judgment fund of $439,420.00, properly managed and invested, should be over $4,000,000.00. Instead, there is only approximately $700,000 in the account at present. Thus, liability for this mismanagement is at least $3,300,000 at present and will continue to grow as the government continues to resist the Band's efforts to reform its trust fund management system.

Moreover, the general trust and property mismanagement claims will likely prove even more costly to the government given the pervasive history of mismanagement, especially with the damage to the aquifer sustained since 1993.

3. A claim for the water the Band is giving up under the *Fallbrook* adjudication decree

Despite the government's failure to adequately represent the Band's interest in the *Fallbrook* adjudication and its failure to fully quantify and deliver water to the Pechanga Reservation, the Band has "paper" water rights under the final *Fallbrook* Decree. In IJ 41 (November, 8 1962), which became part of the final decree, the court held that Pechanga, and other nearby Tribes, had a federally reserved water right on their respective reservations. Specifically, the Court decreed that Pechanga had a "prima facie" entitlement to approximately 4,994 acre-feet of water per year for the Pechanga Reservation. Despite this legal entitlement, the Band has not received their entitlement in the form of actual water.

Under the proposed settlement, the Band will be waiving all of the claims described above against the United States to the lands described in IJ 41. The Band is also waiving claims for additional acreage that was not part of the Reservation at the time of IJ 41. As a result, the Band is giving up the right to adjudicate its water rights for the additional land, rights that would equate to a similar "prima facie" entitlement as IJ 41. Accordingly, the Tribal Water Right could potentially be more than twice the 4,994 AFY for which the Band is settling under the proposed settlement. The Band estimates that the value of these claims to water rights for the additional land being included in the Settlement is $45-50 million.

C. The Band's Waivers against the United States

As part of the settlement, and subject to the retention of claims, the Pechanga Settlement Agreement and the legislation provide that the parties agree to waive their respective claims to water rights, claims to injuries to water rights, and claims to subsidence damage.

The Pechanga Settlement Agreement further provides that the Band will not seek enforcement of the Tribal Water Right as long as the Pechanga Settlement Agreement, including any of its Exhibits, remains in force and effect. With respect to its claims against the United States, subject to the retention of rights, the Band is waiving the following claims:

(1) all claims against the United States, its agencies, or employees relating to claims for water rights in or water of the Santa Margarita River Watershed or any other river systems outside of the Santa Margarita River Watershed that the United States acting in its capacity as trustee for the Band

asserted, or could have asserted, in any proceeding, including but not limited to *Fallbrook*;

(2) all claims against the United States, its agencies, or employees relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including but not limited to damages, losses or injuries to hunting, fishing, gathering or cultural rights due to loss of water or water rights; claims relating to interference with, diversion or taking of water or water rights; or claims relating to failure to protect, acquire, replace, or develop water, water rights or water infrastructure) in the Santa Margarita River Watershed that first accrued at any time up to and including June 30, 2009;

(3) all claims against the United States, its agencies, or employees encompassed within the case *Pechanga Band of Luiseño Indians v. Salazar*, Civ. No. 1:06-cv-02206 (D.D.C.);

(4) all claims against the United States, its agencies, or employees relating to the pending litigation of claims relating to the Band's water rights in *Fallbrook*; and

(5) all claims against the United States, its agencies, or employees relating to the negotiation, execution or the adoption of the Pechanga Settlement Agreement, exhibits thereto, or the Act.

Thus, in exchange for the benefits received in the Pechanga Settlement Agreement and the Pechanga Water Rights Settlement Act, the Pechanga Settlement Agreement represents a complete replacement of, substitution for, and full satisfaction of, all the claims by Pechanga and the United States on behalf of Pechanga and allotees as set forth above.

In recent discussions with the Administration Working Group, the Department raised issues with the content of the waivers. Pechanga is willing to further engage in these discussions regarding revising the waiver package if the United States is able to demonstrate that as a result, the scope of the waivers more accurately corresponds to the Federal contribution.

D. Breakdown of Federal Contribution

In exchange for the Band's waivers against the United States and in recognition of the United States programmatic responsibility to the Band, the total Federal contribution as authorized by the S. 2956 is $50,242,000. The Federal contribution is comprised of 3 major components:

1. Pechanga Recycled Water Infrastructure--$6,960,000.

Section 11(a)(1) and Section 8(c) provide that funds from the Pechanga Recycled Water Infrastructure Account will be used to pay for the Storage Pond ($2,500,000) and the Demineralization and Brine Disposal Project ($4,460,000), as are required under the Recycled

Water Infrastructure Agreement to fulfill Pechanga's obligations to provide RCWD with a share of Pechanga's recycled water which Pechanga receives pursuant to the Recycled Water Agreement with EMWD.

2. Pechanga ESAA Delivery Capacity--$17,900.000.

Section 11(a)(2) and Section 8(d) provide that funds from the Pechanga ESAA Delivery Capacity Account will be used to pay for Interim Capacity ($1,000,000) and Permanent Capacity ($16,900,000) in accordance with the ESAA Capacity Agreement in order for RCWD to provide the requisite capacity to deliver groundwater and ESAA water to Pechanga.

To fulfill Pechanga's full entitlement of 4,994 AFY, Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley ground water and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity.

3. Pechanga Water Fund--$25,382,000.

Section 11(a)(3) of the Act authorizes an appropriation of $25,382,000 for deposit in the Pechanga Water Fund Account. In accordance with Section 9(d)(3)(D) of the Act, the Pechanga Water Fund Account will be used for: (1) payment of the EMWD Connection Fee (approximately $332,000); (2) payment of the MWD Connection Fee (approximately $1,900,000); and (3) any expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement.

In order to receive MWD water there are certain fees associated with connection to EMWD and MWD, in addition to the cost of the expensive MWD water. Hence, the Pechanga Water Fund Account provides the funds necessary for Pechanga to receive MWD water. Those fees are as follows:

a. EMWD Connection Fee

The EMWD Connection Fee, approximately $332,000, will be paid to EMWD as an in-lieu payment instead of standby charges which normally would be collected on an annual basis through the owner's property tax bill. Rather than have any fees that could be considered a tax on Pechanga, EMWD has agreed to a one-time payment by Pechanga for connection to EMWD.

b. MWD Connection Fee

Similar to the EMWD Connection Fee, MWD normally provides extension of their service through annexations. Rather than go through a normal annexation because of tribal

sovereignty concerns, however, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD but that additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities. Under the ESAA Pechanga has agreed to pay a one-time connection fee that amounts to approximately $1,900,000.

c. Expenses, Fees, and Charges Associated with MWD Replacement Water

As discussed above, as a result of the depletion of the Santa Margarita Basin water supply, Pechanga must obtain imported water from MWD as a replacement for its water from the Santa Margarita Basin. The United States has a programmatic responsibility to ensure that Pechanga's entitlement is fulfilled through replacement water, such as the MWD imported water, if existing water is unavailable.[44] The Pechanga Water Fund provides a subsidy to bring down the cost of the expensive MWD imported water. The Pechanga Water Fund will provide funds to cover 25% of the cost of MWD water. This percentage is much less than that provided in other Tribal water settlements. In comparison, the Arizona Water Settlement Tribes receive 58-60% of the cost for Central Arizona Project water, their alternate water supply. Further, while the absolute cost of MWD water is significantly higher than that in neighboring states, the percentage to be provided by the Pechanga Water Fund is significantly lower than comparable settlements in further recognition of the unique economic times we are experiencing.

IV. NON-FEDERAL CONTRIBUTION

Pechanga is cognizant that in addition to the Federal contribution, the non-Federal contribution to an Indian water settlement should be proportionate to the benefits received by the non-Federal parties under the settlement. The Band has insisted on such non-Federal contribution from non-Indian parties throughout the negotiations for this settlement and successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

For purposes of the Committee's understanding, we outline each of the non-Federal contributions to the settlement, including Pechanga's own contribution to the settlement.

A. RCWD Contribution

As discussed above, the Pechanga Settlement Agreement is a carefully structured settlement with the United States, RCWD and EMWD. Substantial efforts were made by all

[44] For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. 108-451) included the Lower Colorado River Basin Development Fund that provided for a payment "to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(i) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlement Act)". *See* Sec. 107 (a)(2)(A).

parties in order to reach settlement. One of the largest issues of contention during negotiations was the allocation of the groundwater in the Wolf Valley Basin. The previous Groundwater Management Agreement allocated 50% of the water to each party. For Pechanga, it was absolutely critical that the Settlement Agreement provide the Band with the majority of the safe yield. Thus, RCWD agreed to allocate an additional 25% of the Wolf Valley Basin to Pechanga as part of the settlement. Additionally, RCWD will wheel the MWD water under the ESAA to Pechanga in perpetuity and RCWD agrees to provide desalination and brine disposal for water utilized in the Wolf Valley, which will improve groundwater quality in the Wolf Valley Basin for both RCWD and Pechanga. RCWD's contribution to the Pechanga Settlement Agreement, therefore, involves more than a foregoing of its assertion of water rights, but, rather, involves the implementation of a partnership to utilize, convey and improve the quality of both local and imported water for both RCWD and Pechanga.

The monetary quantification of RCWD's contribution, measured exclusively upon its agreement to forego the right to 25% of groundwater in the Wolf Valley Basin, has been calculated at $33,630,332. This calculation assumes that 25% of the Wolf Valley Basin equals 525 acre feet per year, one-fourth of the agreed upon amount of the safe yield in the Wolf Valley Basin. It further assumes that RCWD's contribution will be equal to the rate it must pay for MWD water (as replacement for its share of groundwater from the Wolf Valley Basin), inflated at 3% per year, and an effective earnings rate on the amount expended of 3.5%. Utilizing these assumptions, the present value of RCWD's contribution is $33,630,332.

B. Pechanga Contribution

As with many other Indian water rights settlements, the Pechanga Water Fund Account provides for a subsidy payment that partially fulfills the United States' programmatic responsibility to provide Pechanga with replacement water.

The Pechanga Water Fund Account amount was developed using the following financial assumptions:

- The Account is to be used to partially subsidize the cost of MWD water to reduce the cost of the water using interest earned by the account.
- The Account will pay twenty-five percent (25%) of the cost of the water and Pechanga will pay seventy-five percent (75%).
- The cost of MWD water was projected based on the published rates for an acre-foot of MWD Tier 2 Treated Water plus the EMWD charge of $127.80 in 2010, escalated at four percent (4%) per year thereafter.
- The Account is projected to accrue interest at an average four percent (4%) rate of return.
- The amount of MWD water to be purchased each year was based on a general estimate of the projected water use in the proposed MWD service area (*i.e.*, commercial enterprises in the service area such as the Casino/Hotel complex,

administrative facilities, golf course potable water needs, and cultural, educational, and recreational facilities that lie within the proposed MWD service area) that cannot be met from other sources.

While most subsidy funds for Tribes provide funds that will bring the cost of the imported water in line with local water, the Pechanga Water Settlement only seeks to subsidize 25% of MWD water such that Pechanga is bearing 75% of the cost of imported water.

C. EMWD Contribution

While the Band has not completely calculated EMWD's contribution to the Settlement, EMWD's contribution is certainly proportionate to the benefits it will receive from the Settlement. Namely, the ESAA with MWD and EMWD is an absolutely critical component of the Settlement, without which it would be impossible to fulfill the Band's water entitlements. Moreover, EMWD agreed to extend the term of the Recycled Water Agreement with Pechanga and allow Pechanga to sell its unused portion of recycled water to RCWD, both of which were necessary to effectively settle with RCWD. In return for these contributions, EMWD will receive $332,000 as Pechanga's connection fee to EMWD (discussed in further detail above). This benefit to EMWD is proportionate to the efforts EMWD has made in securing the ESAA with MWD and the amendments to the Recycled Water Agreement.

D. MWD Contribution

Although MWD is not a party to the actual Settlement Agreement, MWD is a party to the ESAA, which as discussed above, is an exhibit to the Settlement Agreement. The ESAA is essentially the contractual equivalent of an annexation to MWD and EMWD, with the Band's sovereignty issues protected by contract in the ESAA. In 2009, Governor Schwarzenegger issued a State of Emergency for the State of California's drought situation. In response, MWD issued a press release recognizing the severe water supply challenges in California. MWD's press release further stated that MWD has taken a number of critical steps to address the drought, including the reduction of water supplies to member agencies and mandatory water conservation. As a result of California's drought and MWD's efforts to address these problems it is unlikely that MWD will be approving any annexations in the near future.

Accordingly, the ESAA with MWD and EMWD, which has already been approved in principle by the MWD Board is extremely important, without such agreement it would be nearly impossible for Pechanga to "annex" to MWD and receive water supplies to fulfill the Band's water entitlements. Moreover, under the ESAA, Pechanga will become a customer of MWD just like any other customer, such that Pechanga will be able to acquire water from MWD for its future water needs as those needs change. Therefore, as part of the Settlement and in order to fulfill the ESAA, MWD will receive $1,900,000 as a connection fee from Pechanga to MWD. The value of becoming part of MWD's service area capable of receiving MWD water is invaluable and undoubtedly represents a proportionate contribution to the benefit, if any, MWD will receive.

V. Conclusion

As outlined above, the Band is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of "wet" water in replacement for its "paper" water rights. The Federal contribution is commensurate with the Federal government's unfulfilled responsibilities with respect to the Band's water rights and its liabilities relating to the same.

Chairman Dorgan and members of this Committee, in closing, I would like to thank the Committee for holding a hearing on this important piece of legislation.

Exhibit 1

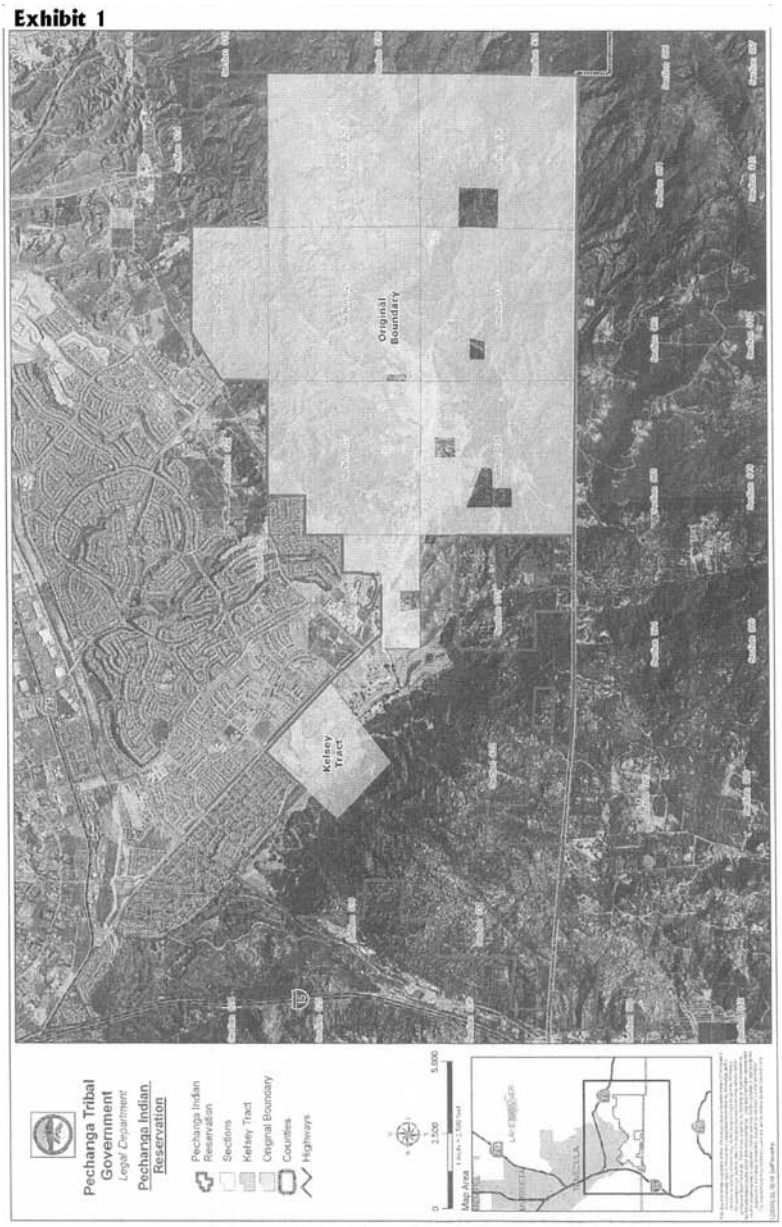
Pechanga Tribal Government
Legal Department
Pechanga Indian Reservation
Pechanga Indian Reservation
Sections
Kelsey Tract
Original Boundary
Counties
Highways
Kelsey Tract
Original Boundary
0
2,500
5,000
Map Area

Exhibit. 2

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By DEPUTY

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CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

IN THE UNITED STATES DISTRICT

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ENTERED

NOV - 1962

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By Deputy Clerk

UNITED STATES OF AMERICA, Plaintiff, vs. FALLBROOK PUBLIC UTILITY DISTRICT, et al., Defendants.	No. 1247-SD-C FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERLOCUTORY JUDGMENT NO. 41 CONCERNING THE RIGHTS TO THE USE OF WATERS OF SANTA MARGARITA RIVER STREAM SYSTEM HELD IN TRUST BY THE U.S.A. IN CONNECTION WITH THE RAMONA, CAHUILLA AND PECHANGA INDIAN RESERVATIONS.

FINDINGS OF FACT

RAMONA INDIAN RESERVATION

1.

The Ramona Indian Reservation was established by Executive Order dated December 29, 1891, and is situated in Riverside County, State of California and comprised of lands described as follows:

> North Half of the Southwest Quarter (N½ of SW¼), Southeast Quarter of the Southwest Quarter (SE¼ of SW¼), and the South Half of the Southeast Quarter (S½ of SE¼) of Section Thirty-two (32); the Southwest Quarter of the Southwest Quarter (SW¼ of SW¼) of Section Thirty-three (33) all in Township Six (6) South, Range Three (3) East, San Bernardino Base & Meridian.

Northwest Quarter of the Northwest Quarter (NW¼ of NW¼) of Section Four (4); Northeast Quarter of the Northeast Quarter (NE¼ of NE¼) of Section Five (5); all in Township Seven (7) South, Range Three (3) East, San Bernardino Base & Meridian.

2.

The Ramona Indian Reservation is located in the most northeasterly portion of the Santa Margarita River watershed and in fact the Santa Margarita River watershed line traverses the Ramona Indian Reservation roughly on a line extending diagonally from the southwest to the northeast across the North Half (N½) of the Southwest Quarter (SW¼) of Section 32, Township 6 South, Range 3 East, S.B.B.M.

3.

The lands of the Ramona Indian Reservation within the Santa Margarita River watershed are as follows: Those lands within the North Half (N½) of the Southwest Quarter (SW¼) of Section Thirty-two (32) lying south and west of the watershed line as above described; the Southeast Quarter of the Southwest Quarter (SE¼ of SW¼) of Section Thirty-two (32); Southwest Quarter of the Southwest Quarter (SW¼ of SW¼) of Section Thirty-three (33), all in Township 6 South, Range 3 East, S.B.B.M.; Northwest Quarter of the Northwest Quarter (NW¼ of NW¼), Section 4; Northeast Quarter of Northeast Quarter (NE¼ of NE¼) of Section 5, all in Township 7 South, Range 3 East, S.B.B.M.

4.

The Ramona Indian Reservation consists of approximately 560 acres of which approximately 321 acres lie within the Santa Margarita River watershed.

5.

Within the Santa Margarita River watershed there are approximately 104 acres of irrigable land within the Ramona Indian Reservation.

At the present time no Indians reside on the Ramona Indian Reservation, but Indians of the Cahuilla Indian Reservation are using said lands for stock raising purposes.

7.

All the lands of the Ramona Indian Reservation within the watershed of the Santa Margarita River with the exception of the area of basement complex in the Southwest Quarter of Section 33, Township 6 South, Range 3 East, overlie the shallow aquifer of the Anza Ground Water Basin as discussed more fully in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33. All ground waters contained in the older alluvial deposits on the Ramona Indian Reservation within the Santa Margarita River watershed are a part of the shallow aquifer of the Anza Ground Water Basin, and do in fact add to, contribute to and support the Santa Margarita River stream system.

8.

All ground waters contained within the deposits of basement complex in the Southwest Quarter (SW¼) of Section 33 Township 6 South, Range 3 East and within the Ramona Reservation are vagrant, local, percolating waters, not a part of the Santa Margarita River stream system, and said ground waters do not add to, contribute to nor support the Santa Margarita River or any tributary thereto.

9.

There is a spring situated in the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 4, Township 7 South, Range 3 East.

10.

Climate in the Ramona Indian Reservation is semi-arid, with warm to hot, dry summers and generally moist winters.

Rainfall usually occurs duing the period from November 1 to April 1. Freezing temperatures or below freezing temperatures may be expected during that period.

11.

The amount of surface waters which flow over and upon the Ramona Indian Reservation within the Santa Margarita River watershed is extremely limited in that such surface waters only exist during or immediately after periods of substantial rainfall.

12.

The United States of America when it established said Ramona Indian Reservation on December 29, 1891, intended to reserve rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Ramona Reservation, including rights to the use of ground waters, sufficient for the present or future needs of the Indians residing thereon.

There is no issue presently presented which requires this Court to make findings of fact, conclusions of law or interlocutory judgment provisions concerned with the amount of water required for the Indians' use, the rights of any future assignees or successors in interest to said lands, and other related factors. As this Court will keep continuing jurisdiction of this cause, this Court can, if the occasion should arise in the future, make such findings and judgment provisions as may then be required on these issues.

CAHUILLA INDIAN RESERVATION

13.

The Cahuilla Indian Reservation was established pursuant to Executive Order dated December 27, 1875, and is situated in Riverside County, State of California, and

comprised of the following described lands:

Section Twenty-five (25), Section Twenty-six (26), Section Twenty-seven (27), Section Twenty-eight (28), Section Thirty-three (33), Section Thirty-four (34), Section Thirty-five (35) and Section Thirty-six (36), all in Township Seven (7) South, Range Two (2) East, SBBM;

Section Twenty-six (26), Section Twenty-seven (27), Section Twenty-eight (28), Section Twenty-nine (29), Section Thirty (30), Section Thirty-one (31), Section Thirty-two (32), Section Thirty-three (33), Section Thirty-four (34) and Section Thirty-five (35), all in Township 7 South, Range Three (3) East, SBBM;

Section One (1), Section Two (2), Section Three (3) and Section Four (4) all in Township Eight (8) South, Range Two (2) East, SBBM;

Section Two (2), Section Three (3), Section Four (4), Section Five (5), Section Six (6), all in Township Eight (8) South, Range Three (3) East, SBBM.

In addition to the above-described lands there was added to the Cahuilla Indian Reservation by Executive Order dated March 14, 1887, the following lands:

Section 23, Township 7 South, Range 2 East.

On December 29, 1891, by Executive Order there was likewise added to the Cahuilla Indian Reservation the South Half (S½) of Section 14, Township 7 South, Range 2 East.

On or about January 25, 1927, the North Half (N½) of Lot 3, in Section 8, Township 8 South, Range 3 East, S.B.B.M. was acquired by the Secretary of Interior by deed, and added to the Cahuilla Indian Reservation. Said deed is recorded in Book 703 of Deeds, page 133, Riverside County, California.

14.

By Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33 the nature and extent of the shallow and deep aquifers of the Anza Ground Water Basin have been determined. Said Anza Ground Water Basin consists of the younger and older alluvial deposits within Anza Valley upstream from a line which is drawn on U. S. Exhibit 278 in Section 29,

Township 7 South, Range 3 East. The surface extent of said younger and older alluvial deposits which comprise the Anza Ground Water Basin is depicted on said U. S. Exhibit 278 incorporated herein by reference.

As determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33 the ground waters contained within the shallow aquifer of the Anza Ground Water Basin are percolating waters and add to, contribute to and support theSanta Margarita River stream system. To the extent that any lands of the Cahuilla Indian Reservation consist of the younger or older alluvial deposits of the shallow aquifer of the Anza Ground Water Basin as determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33 said lands are a part of the shallow aquifer of the Anza Ground Water Basin.

16.

Those lands of the Cahuilla Indian Reservation which overlie the deep aquifer of the Anza Ground Water Basin as determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33 do in fact contain ground waters which are a part of the deep aquifer of the Anza Ground Water Basin. Said lands of the Cahuilla Indian Reservation which do in fact overlie the deep aquifer of the Anza Ground Water Basin are located in the Northeast Quarter of Section 28, and the West One-Half (W½) of the Northwest Quarter (NW¼) of Section 27, Township 7 South, Range 3 East, S.B.B.M. and are depicted on U. S. Exhibit 278.

17.

All ground waters contained within the deep aquifer of the Anza Ground Water Basin and within the Cahuilla Indian Reservation are not a part of the Santa Margarita River stream

system nor do said ground waters add to, contribute to or support the Santa Margarita River or any tributary thereto.

18.

Cahuilla Creek does flow over lands which comprise a portion of the Cahuilla Indian Reservation and there is a perennial flow of Cahuilla Creek in the Southwest Quarter (SW¼) of Sections 23 and 27, Township 7 South, Range 2 East. All surface waters of Cahuilla Creek and its tributaries within the Cahuilla Reservation are a part of the Santa Margarita River stream system.

19.

There are a total of 18,292 acres in the Cahuilla Indian Reservation of which 17,312 acres are within the watershed of the Santa Margarita River. Of these, 12,998 acres are under present conditions irrigable.

20.

At present the waters contained upon or within the lands which comprise the Cahuilla Indian Reservation are primarily used for limited domestic use and livestock purposes. There are at the present time approximately 94 Indians in the Cahuilla Tribe of which 32 are now residing on the Cahuilla Indian Reservation.

21.

There is situated in the Southwest Quarter of the Southwest Quarter (SW¼ of SW¼) of Section 14, Township 7 South, Range 3 East, sixteen (16) acres which overlie the Cahuilla Ground Water Basin and which have been irrigated with waters from a spring situated slightly north and east of the irrigated land.

22.

There are within the Cahuilla Indian Reservation in

the North Half of the Northwest Quarter (N½ of NW¼) of Section 26, Township 7 South, Range 2 East, thirty-five (35) acres of land which have been irrigated. The waters for this irrigation come from a spring located slightly north and east of the irrigated lands and both the lands irrigated and the spring are located in the Cahuilla Ground Water Basin as said basin is defined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33.

23.

In the East Half of the Northeast Quarter (E½ of NE¼) of Section 6, Township 8 South, Range 3 East, within the Cahuilla Indian Reservation approximately 20 acres of lands have been irrigated with waters from a spring situated near the West Quarter corner of Section 5 Township 8 South, Range 3 East

24.

Climate in the Cahuilla Indian Reservation is similar to that which exists in the Ramona Indian Reservation, and except where springs or perennial flow of surface waters exist as found hereinabove, surface water is apparent only during or immediately after periods of rainfall.

25.

That a portion of the lands which comprise the Cahuilla Indian Reservation overlie the Cahuilla Ground Water Basin as said basin has been determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33; said ground water basin and said Indian Reservation are depicted on U. S. Exhibit 278 incorporated herein by reference. All ground waters contained within the lands of the Cahuilla Indian Reservation which are a part of the Cahuilla Ground Water Basin add to, contribute to and support the Santa Margarita River stream system.

The United States of America, when it created the Cahuilla Indian Reservation by Executive Orders dated December 27, 1875, March 14, 1887, and December 29, 1891, intended to reserve rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Indian Reservation, including rights to the use of the ground waters, sufficient for the present or future needs of the Indians residing thereon. There is no issue presently presented which requires this Court to make findings of fact, conclusions of law or judgment provisions concerning the amount of water required for the Indians' use on said lands or the rights of any future assignees or successors in interest to said lands. As this Court will keep continuing jurisdiction of this cause, this Court can, if the occasion should arise in the future, make such findings of fact, conclusions of law and interlocutory judgment provisions as may be required on those issues.

PECHANGA INDIAN RESERVATION

27.

In the Executive Orders and related documents establishing the Pechanga Indian Reservation, the reservation is sometimes referred to as the Temecula Indian Reservation and the Indians residing thereon referred to as the Temecula Indian Missian Band.

28.

The Pechanga Indian Reservation was established by an Executive Order, dated June 27, 1882. The lands which presently comprise that Reservation are situated in Riverside County, State of California, described as follows:

Section Twenty-six (26), Section Twenty-seven (27) except for the Northwest Quarter of the Northwest Quarter (NW¼ of NW¼). Section Thirty-Four (34)

except for Lot 16, Section Thirty-five (35), Lot 7 and Southeast Quarter of the Southwest Quarter (SE¼ of SW¼) of Section Twenty-eight (28), all in Township Eight (8) South, Range Two (2) West, SBBM.

29.

There was added to the Pechanga Indian Reservation:

Section Twenty-five (25), Township Eight (8) South, Range Two (2) West, SBBM,

by Executive Order dated January 9, 1907, of the Secretary of the Interior.

30.

In addition to the lands comprising the Pechanga Indian Reservation as above described, there was added on August 29, 1893, to that Reservation by an unnumbered Patent:

The North Half of the Northwest Quarter (N½ of NW¼), Southeast of the Northwest Quarter (SE¼ of NW¼), Northwest Quarter of the Northeast Quarter (NW¼ of NE¼) of Section Thirty-six (36), Township Eight (8) South, Range Two (2) West, SBBM.

There was likewise added to the Pechanga Indian Reservation

Southwest Quarter of the Northeast Quarter (SW¼ of NE¼), East Half of the Northeast Quarter (E½ of NE¼), South Half (S½) of Section Thirty-six (36), Township Eight (8) South, Range Two (2) West, SBBM,

by a patent dated May 25, 1931.

Also added to the Pechanga Indian Reservation is the so-called Kelsey Tract, Lot E of the Little Temecula Grant, by a deed dated March 11, 1907.

31.

<u>Pechanga Creek</u>

Pechanga Creek is an intermittent stream which rises in the Cleveland National Forest, Section 30, Township 8 South, Range 1 West, SBBM. It proceeds in a generally northwesterly direction, entering the Pechanga Indian Reservation in the

Northeast Quarter (NE¼) of Section 25, Township 8 South, Range 2 West SBBM, and leaves the Reservation near the Northwest corner of the Southeast Quarter of the Southwest Quarter (SE¼ of SW¼) of Section 28, Township 8 South, Range 2 West, SBBM. Continuing its general course as above described, the stream proceeds across lands in private ownership for a distance of approximately one-half (1/2) mile where it enters the so-called Kelsey Tract, described as Lot E of the Little Temecula Rancho, which is part of the Pechanga Reservation. Proceeding across that tract of Reservation Land, the stream continues its course to the point where it enters Temecula Creek approximately one (1) mile east from where the stream last mentioned joins Murrieta Creek to form the Santa Margarita River. Said Pechanga Creek is a tributary to Temecula Creek one of the two principal tributaries of the Santa Margarita River. Pechanga Creek is intermittent and flows only during and immediately after periods of rainfall.

Murrieta-Temecula Ground Water Area

The exterior boundaries of the Murrieta-Temecula Ground Water Area was established by the Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 30, entered the 8th day of March, 1962.

33.

The following described lands situated within the Pechanga Indian Reservation are part of the Murrieta-Temecula Ground Water Area and those lands have been found to overlie ground waters within that area:

> All of Section Twenty-six (26) all of Section Thirty-five (35); North Half of the South Half (N½ of S½), North Half (N½) of Section Thirty-four (34), all of Section Twenty-seven (27), within Pechanga Indian Reservation, all of Section Twenty-eight (28) within Pechanga Indian Reservation, and Lot E of Little Temecula Rancho within Pechanga Indian Reservation.

34.

Geology of Murrieta-Temecula Ground Water Area Within Pechanga Indian Reservation

The lands within the Pechanga Indian Reservation above described which are part of the Murrieta-Temecula Ground Water Area are comprised of older continental alluvium and conform generally to the description of the ground water area which is more fully described in the Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 30 and entered March 8, 1962. In the general area through which Pechanga Creek has its course, the older continental alluvium is overlain with a thin layer of younger alluvium. The younger alluvium is the erosion from and redistribution of the older alluvium as well as erosion from the surrounding basement complex.

35.

There is a complex of faults through the Pechanga Indian Reservation intersecting and traversing the alluvial fill above described. Result of that faulting has been to control in some but undetermined degree the movement of the ground water within the Reservation. Generally, however, it is found that those grand waters are moving towards the mouth of Temecula Canyon through which flows the Santa Margarita River.

36.

Ground waters, if any, found in the basement complex or weathered basement complex within the Pechanga Indian Reservation are vagrant, local and percolating, not a part of the Santa Margarita River streamsystem. Said deposits of basement complex or weathered basement complex are depicted on U. S. Exhibit 15L.

37.

Climate, Crops, Duty of Water, Irrigable Acreage Within Pechanga Indian Reservation

Climate in the Pechanga Indian Reservation is semi-arid, with warm to hot, dry summers, and cool and generally moist winters. Rainfall usually occurs during the period from the first of November to the first of April. There are occasional rain showers during the irrigation season which is roughly from April to October. As a consequence, the period of the greatest demand for water is the period of shortest supply, whereas the period of greatest supply occurs when the demands are very slight. The irrigable portions of the Pechanga Indian Reservation are subject to frost damage.

38.

There are a total of 3787 acres of land in the Pechanga Indian Reservation within Santa Margarita River watershed. Of these 3787 acres, 1694 acres are irrigable. Of these 1694 acres, 559 are Class VI lands which are not suitable for cultivation but because of their other characteristics are suitable for irrigated but non-cultivated crops.

39.

At the present time, the waters contained in the Pechanga Indian Reservation are used largely for stock raising and domestic purposes and the extent of the water use is negligible in that there are at the present time only approximately six (6) Indians residing on the Reservation. The Pechanga Indian Tribe consists of 194 Indians.

40.

The United States of America when it withdrew the Indian Lands above described to form the Pechanga Indian Reservation, intended to reserve rights to the use of the

waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Indian Reservation, including rights to the use of ground waters sufficient for the present or future needs of the Indians residing thereon. There is no issue presently presented which requires this Court to make findings of fact, conclusions of law and interlocutory judgment provisions concerned with the amount of water required for the Indians' use or the rights of any future assignees or successors in interest to said lands. As this Court will keep continuing jurisdiction of this cause this Court can, if the occasion should arise in the future, make such findings of fact, conclusions of law and interlocutory judgment provisions as may be required on those issues.

41.

Water Duty

Under present conditions and generally on the Ramona, Cahuilla and Pechanga Indian Reservations and throughout this area a reasonable water duty for crops is as follows:

	Irrigation Requirements Acre-Feet Per Acre Per Year
Row Crops	4.00
Irrigated Pasture	3.83
Alfalfa	3.00
Deciduous Fruit	1.07
Small Grains	1.75
Avocados	2.35
Citrus	1.86

To the irrigation requirements shown above, there should be added 10% for delivery losses. That type of loss occurs between the point of supply and the point of use.

This Court finds that the above set forth general water duty requirements and all findings herein concerned with irrigable acreage are supported by the evidence in this case.

However, in this case there was no issue of apportionment presented and such findings concerning water duty and irrigable acreage as set forth in these findings shall be prima facie evidence as to these facts in any future proceedings wherein the question of water duty or irrigable acreage is relevant. As used herein, prima facie evidence shall mean that which suffices for the proof of a particular fact until contradicted or overcome by other evidence.

42.

That no use of any surface waters which flow over and upon any of the lands within the Santa Margarita River watershed and within the Ramona, Cahuilla and Pechanga Indian Reservations has been open, notorious or adverse, and there are no prescriptive rights to the use of any waters of the Santa Margarita River stream system on any lands which comprise said Indian Reservations

43.

That no appropriative rights exist to the use of the waters of the Santa Margarita River stream system or waters which add to and support said Santa Margarita River stream system on any of the lands which comprise the Ramona, Cahuilla and Pechanga Indian Reservations.

44.

That except as expressly provided hereinabove there are no rights to the use of the waters of the Santa Margarita River and its tributaries or waters which add to and support said River and its tributaries owned or held by the United States of America in trust for the Indians or in trust as to said Indian Reservations

CONCLUSIONS OF LAW

RAMONA INDIAN RESERVATION

1.

The United States of America when it established the Ramona Indian Reservation intended to reserve, and did reserve, rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be available on the Ramona Indian Reservation, including rights to the use of ground waters, sufficient for the present and future needs of the Indians residing thereon with a priority date of December 29, 1891.

2.

All lands of the Ramona Indian Reservation within the watershed of the Santa Margarita River with the exception of an area of basement complex in the Southwest Quarter (SW¼) of Section 33, Township 6 South, Range 3 East, overlie the shallow aquifer of the Anza Ground Water Basin and the ground waters contained within said lands add to, contribute to and support the Santa Margarita River stream system.

3.

All ground waters contained within the deposits of basement complex in the Southwest Quarter (SW¼) of Section 33, Township 6 South, Range 3 East, and within the Ramona Indian Reservation are vagrant, local, percolating waters not a part of the Santa Margarita River stream system and said ground waters do not add to, contribute to nor support the Santa Margarita River or any tributary thereto.

CAHUILLA INDIAN RESERVATION

4.

The United States of America intended to reserve, and did reserve, rights to the use of the waters of the Santa

Margarita River stream system which under natural conditions would be physically available on the Cahuilla Indian Reservation including rights to the use of the ground waters, sufficient for the present and future needs of the Indians residing thereon with priority dates of December 27, 1875, for lands transferred by the Executive Order of that date; March 14, 1887, for lands transferred by Executive Order of that date; December 29, 1891, for lands transferred by Executive Order of that date

5.

Ground waters contained within the lands of Cahuilla Indian Reservation and within the younger or older alluvial deposits which are a part of the shallow aquifer of the Anza Ground Water Basin are percolating waters and add to, contribute to and support the Santa Margarita River stream system.

6.

Ground waters contained within the deep aquifer of the Anza Ground Water Basin in the Northeast Quarter (NE¼) of Section 28, and the West One-half (W½) of the Northwest Quarter (NW¼) of Section 27, Township 7 South, Range 3 East, and within the Cahuilla Indian Reservation, are a part of the deep aquifer of the Anza Ground Water Basin, and said ground waters do not add to, support nor contribute to the Santa Margarita River stream system.

7.

Ground waters contained within the lands of the Cahuilla Indian Reservation which were determined to be a part of the Cahuilla Ground Water Basin in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33 add to, support and contribute to the Santa Margarita River stream system.

PECHANGA INDIAN RESERVATION

8.

United States of America intended to reserve and did reserve rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be available on the Pechanga Indian Reservation including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the reservation by Patent on that date; May 25, 1931, for those lands added to the reservation by Patent of that date.

9.

That those lands specifically described in Findings of Fact No. 33 are within the Murrieta-Temecula Ground Water Area as said ground water area has been determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 30, and ground waters contained therein, add to, contribute to and support the Santa Margarita River stream system.

10.

That all surface waters which flow over and upon any of the lands within the Santa Margarita River watershed and which are a part of the Ramona, Cahuilla and Pechange Indian Reservations are a part of the Santa Margarita River stream system.

11.

That there are no prescriptive rights to the use of the waters of the Santa Margarita River and its tributaries or to

- - -

the use of the waters which add to and support said River and its tributaries owned or held in trust by the United States for the Indians' use or in trust as to said Indian Reservations.

12.

That there are no appropriative rights to the use of the waters of the Santa Margarita River and its tributaries or to the use of the waters which add to and support said River and its tributaries owned or held in trust by the United States of America for the Indians' use or in trust as to said Reservations.

13.

That except as provided in Findings of Fact 12, 26, and 40 herein, there are no rights to the use of the Santa Margarita River or its tributaries or waters which add to and support said River and its tributaries owned by the United States in trust for the Indians' use or in trust for use upon the said Indian Reservations.

INTERLOCUTORY JUDGMENT

1.

IT IS ORDERED, ADJUDGED AND DECREED that the United States of America when it established the Ramona Indian Reservation intended to reserve and did reserve rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Ramona Reservation, including rights to the use of ground waters, sufficient for the present and future needs of the Indians residing thereon with a priority date of December 29, 1891.

2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all lands of the Ramona Indian Reservation within the watershed of the Santa Margarita River with the exception of the area of basement complex in the Southwest Quarter (SW¼)

of Section 33, Township 6 South, Range 3 East, which is depicted on U. S. Exhibit 278 incorporated herein by reference, overlie the shallow aquifer of the Anza Ground Water Basin as determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No. 33, and the ground waters contained therein add to, contribute to and support the Santa Margarita River stream system.

CAHUILLA INDIAN RESERVATION

3.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America intended to reserve and did reserve rights to the use of the waters of the Santa Margarita River which under natural conditions would be physically available on the Cahuilla Indian Reservation, including rights to the use of ground waters, sufficient for the present and future needs of the Indians residing thereon with priority dates of December 27, 1875, for lands transferred by the Executive Order of that date; March 14, 1887, for lands transferred by the Executive Order of that date; December 29, 1891 for lands transferred by the Executive Order of that date.

4.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ground waters contained within the lands of the Cahuilla Indian Reservation and within the younger or older alluvial deposits which are a part of the shallow aquifer of the Anza Ground Water Area are percolating waters and add to, contribute to and support the Santa Margarita River stream system.

5.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ground waters contained within the deep aquifer of the Anza Ground Water Basin, in the Northeast Quarter (NE¼) of

Section 28 and the West One-half (W½) of the Northwest Quarter (NW¼) of Section 27, Township 7 South, Range 3 East, and within the Cahuilla Indian Reservation, are a part of the deep aquifer of the Anza Ground Water Basin and said ground waters do not add to, support nor contribute to the Santa Margarita River stream system.

6.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ground waters contained within the lands of the Cahuilla Indian Reservation which are a part of the Cahuilla Ground Water Basin add to, contribute to and support the Santa Margarita River stream system.

PECHANGA INDIAN RESERVATION

7.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America intended to reserve, and did reserve, rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Pechanga Indian Reservation, including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by the Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the Reservation by Patent on that date; and May 25, 1931, for those lands added to the Reservation by Patent of that date.

8.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that those lands specifically described in Findings of Fact No.33 are within the Murrieta-Temecula Ground Water Area as said

ground water area has been determined in Findings of Fact, Conclusions of Law and Interlocutory Judgment No.30.

9.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That all surface waters which flow over and upon any of the lands within the Santa Margarita River watershed and which are a part of the Ramona, Cahuilla and Pechanga Indian Reservations are a part of the Santa Margarita River stream system.

10

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the use of any waters, surface or ground, by the Indians on the Ramona, Cahuilla and Pechanga Reservations is subject to the continuing jurisdiction of this Court.

11.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all ground waters contained within deposits of basement complex or weathered basement complex and within the Santa Margarita River watershed and within the Ramona, Cahuilla and Pechanga Indian Reservations as said deposits are depicted on U. S. Exhibit 278 and U. S. Exhibit 15L are vagrant, local, percolating waters not a part of the Santa Margarita River or any tributary thereto. It is further ordered, adjudged and decreed that the rights of the United States of America as the owner in trust of said lands are forever quieted against all parties claiming rights to the waters of the Santa Margarita River and/or its tributaries. It is further ordered, adjudged and decreed that the United States of America as owner in trust of said lands is forever restrained from asserting rights in or to the waters of the Santa Margarita River or its tributaries concerning said lands excepting rights to surface waters which flow over and upon said lands.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there are no prescriptive rights owned by the United States of America in trust for the Indians or Indian lands to the use of the waters of the Santa Margarita River or its tributaries or waters which add to and support said River and its tributaries.

13.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there are no appropriative rights owned by the United States of America in trust for the Indians or Indian lands to the use of the waters of the Santa Margarita River or its tributaries or waters which add to and support said River and its tributaries

14.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that except as expressly provided in Paragraphs 1, 4 and 7 of this Interlocutory Judgment there are no rights to the use of the waters of the Santa Margarita River and its tributaries or to the waters which add to and support said River and its tributaries owned by the United States of America in trust for the Indians or Indian lands on the Ramona, Cahuilla and Pechanga Reservations.

15.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that based upon the decision of the United States Court of Appeal, Ninth Circuit, California v. United States, 235 Fed.2d 647 that this is not a final decree but is interlocutory in nature and by reason of the order by this Court that all parties are adverse one to the other, thus dispensing with cross pleadings, all parties to this proceeding may object to

these findings of fact, conclusions of law and interlocutory judgments and will be given full opportunity upon due notice to interpose their objections to these findings of fact, conclusions of law and interlocutory judgments prior to the entry of final judgment in this case.

16

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no issue presently presented which requires this Court to make findings of fact, conclusions of law or interlocutory judgment provisions concerned with the amount of water required for the Indians use, the rights of any future assignees or successors in interest to said lands, and other related factors. Jurisdiction is reserved by this Court to make such findings of fact, conclusions of law and judgment provisions in the future should the need occur.

17

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Interlocutory Judgment is not appealable, is not final and shall not be operative until made a part of the final judgment in this case, and this Court expressly reserves jurisdiction to modify or vacate it either upon its own motion or upon motion of any party to this proceeding until such time as final judgment in this cause is entered.

Dated:

11.8.62

James M. Carter

JUDGE

EXHIBIT 3

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

WATER RIGHTS STUDIES

PECHANGA INDIAN RESERVATION

Within Watershed of

Santa Margarita River, California

SACRAMENTO AREA OFFICE
Leonard M. Hill, Area Director
October 28, 1958

WATER RIGHTS STUDY

PECHANGA INDIAN RESERVATION

Reservation History

On August 29, 1893, an unnumbered Trust Patent was issued to the Pechanga Band of Mission Indians conveying 2840 acres.

On August 31, 1897, allotments were made and Trust Patents were issued to individual members of the band for 1324 acres of the reservation area.

On January 9, 1907, the Secretary of the Interior ordered the withdrawal of an additional 640 acres for the use of the Pechanga Band.

Additional purchases and patents were added to the reservation until 1928, when the total area of the reservation 4155 acres was reached.

Trust restrictions have been removed from two of the allotments totaling about 30 acres, making the present reservation area about 4125 acres.

The following is an excerpt from the Smiley Commission Report". 1/

"Temecula

"This Reservation, as created by executive order, comprised Sections twenty-six (26), twenty-seven (27), twenty-eight (28), thirty-four (34) and thirty-five (35),

1/ Report to the Secretary of the Interior, File No. 34993-1908 Rec. May 25, 1908. The Smiley Commission was authorized by the Congress under the provisions of the Act of January 12, 1891 (26 Stat. 712) to recommend the setting aside of lands or reservations for the various bands of Mission Indians. The report and recommendations of the Commission were approved Dec. 29, 1891.

in Township eight (8) South, Range two (2) West, S.B.M. Owing to an almost entire lack of water the land is suitable only for dry farming, and can be utilized alone for such grains as barley and wheat, which are made by the winter rains.

"The Indians, being unwilling to remove, the Commission recommends the setting apart of these Sections as a permanent Reservation for them, believing that, with such crops as they will be able to raise, and the wages they can earn as laborers on the adjoining ranches, they can make a comfortable living. The little water they have has its rise on Section thirty-six one hundred and sixty acres of which ought to be added to the selections the Commission has made. The former Agency Clerk and Physician, Dr. Ferrebee, purchased this land from the State, that it might be held for this purpose, and is willing to sell it to the Government for what it cost him including taxes and interest, and the Commission recommends that it be purchased and added to the Reservation

) Purchased.
) See deed
) Miss. rec.
) Book #3
) Page 191

"This land is described as follows:

"The north half (1/2) of the North-west quarter (1/4); the South-east quarter (1/4) of the North-west quarter (1/4); and the South-west quarter (1/4) of the North-east quarter (1/4) of Section thirty-six (36), Township eight (8) South, Range two (2) West, S. B. M. This purchase can be made, we believe, for a sum not exceeding Five Hundred Dollars.

"There are, at this place, about one hundred and sixty Indians, being a remnant of those who were ejected from the Temecula Valley some years ago.

"The Commission recommends that the government pipe the water from the above mentioned quarter sections to the schoolhouse, and to a central point of the village, under the supervision of the Indian Agent, at an estimated cost of Two Thousand Dollars."

Irrigation History

Apparently there has been little or no irrigation development on the Pechanga Reservation. One spring has been developed but produces

sufficient water for domestic purposes only. Several small wells have been drilled in the past. Some were dry holes and some produced low yield. As much as 160 acres of farming in 1927 were reported but mostly under dry framing practices, including grain and small areas of grapes and fruit trees.

Population

The Pechanga Indian population as reported on the Bureau of Indian Affairs records shows a decline since 1929. However, the number of Indians that might claim an interest in the reservation is still unknown. Following is the population as listed in the files of the Bureau of Indian Affairs:

Year	Number of Indians
1914	212 1/
1917	212 1/
1929	219 2/
1940	218 2/
1950	194 2/
1958	175 2/

Land Classification

The lands of the Pechanga Indian Reservation were mapped and classified according to recognized standards used by Federal and State agencies. The soil classifications were determined in the field and detailed on aerial photographs of the reservation. The attached map indicates those areas within the Santa Margarita watershed which are susceptible to agricultural development by irrigation. The following

1/ From Annual Irrigation Reports, BIA.
2/ From Census Rolls kept by the Riverside Area Field Office, BIA.

table and the attached map indicate the various areas of the entire reservation:

Area	Acres		
Susceptible to Irrigation	Cl. I-IV	Cl. VI	Total
Area "A"	984	528	1512
Area "B"	151	31	182
Subtotal			1694
Non-Irrigable Lands			
Inside of the Watershed			
Area "A"			2040
Area "B"			53
Outside of Watershed			338
Total Reservation			4125

The Pechanga Indian Reservation is in two separate parts. Area "A" is the main or larger part of the reservation. Area "B" is that part known as the Kelsey Tract.

The standards used for land classification do not always allow for special crops and practices, that are possible and often used, found in some of the more intensely farmed areas. These exceptions include the growing of high value crops such as citrus and avocados under suitable climatic conditions. For instance, land slopes on which such crops are grown often exceed 30 percent, and stony lands are successfully used.

The gross area of 1694 acres of Pechanga Indian Reservation lands considered susceptible to irrigation includes all Class I through Class

IV lands and includes Class VI lands which do not have rock outcropping or soils less than 20 inches in depth.

The decision to include these Class VI lands followed the study of existing avocado and citrus groves in the general vicinity and their plotting on U.S.G.S. quadrangle sheets of the area. Elevations, exposures, and air drainage were given consideration. From this study, it was concluded that such crops could be grown on portions of the reservation lands with special practices.

It is recognized that irrigation water for these lands will be expensive. Successful farming of the area will require high-value crops.

Net Irrigation Area

Not all lands within an area susceptible to irrigation can be cropped. There must be service roads, farmsteads, ditches, drains, and other land uses, which eliminates the possibility of their being farmed. For the Pechanga Indian Reservation, it is estimated that about 3% of the gross susceptible area will be needed for incidental non-agricultural purposes. This percentage, although lower than generally used in other areas, is considered reasonable because of the large percentage of the area classified as not suitable for farming. It is expected that many of the non-agricultural uses will be on the lands not suitable for farming.

Three percent of the gross area amounts to 54 acres. Of this, 49 acres will be deducted from Area "A", and 5 acres will be deducted from Area "B". Thus the potential net irrigation areas are 1463 acres for Area "A" and 177 acres for Area "B", which total 1640 acres.

Water Supply

Available surface water for irrigating lands of the Pechanga Reservation may be estimated by standard hydrologic methods. Available records of stream flow have been published in Vol. 1 of State of California Department of Water Resources Report No. 57. The average annual per acre runoff above the gauging station in the Santa Margarita River at Temecula is 0.55" for the 592 square miles of the drainage area. This equals 17,000 acre feet. Deduct from this total the runoff above the Temecula Creek gauging station at Temecula, which is 0.42 inches for the 319 square miles, or 8670 acre feet, and the runoff above the Murrietta Creek gauging station at Temecula, which is 0.64 inches for the 220 square miles, or 7490 acre feet, and the remainder is 840 acre feet which can only come from Pechanga Creek. This remainder amounts to 0.3" depth runoff for the approximate 53 square miles of drainage area.

The watershed of Pechanga Creek, including Area "A" of the reservation and the area to the east, approximates 12 square miles. At the rate of 0.3" per acre, annual runoff from this area will be about 200 acre feet. Precipitation records on the Pechanga Reservation indicate an average annual rainfall of 18.5 inches. From this, we might expect about 1.5 inches runoff as either surface or underground flow. This rate of runoff from 12 square miles would amount to about 900 acre feet per annum. Since the surface runoff approximates 200 acre feet, the annual underground recharge might approximate 700 acre feet.

From available geological data, it is indicated that no appreciable ground water basin exists under Area "A" of the Pechanga

Reservation. The Kelsey Tract, or Area "B", does appear to be a part of the area which overlies the underground basin at the junction of the Pechanga Creek and Temecula River. It appears that all of the water required thereon may be extracted from this underground basin. For Area "A" it appears that only the non-agricultural water requirements as incidated can be supplied from wells and natural springs which appear on the reservation. Irrigation water requirements for Area "A" will need to be met by an imported supply.

Irrigation Water Requirements

Irrigation development on the main portion of the Pechanga Indian Reservation is believed to be largely dependent upon the importation of expensive water, probably from the proposed Barona Aquaduct, and the lifting of this water as much as 1000 feet or more above the aquaduct. Under these conditions, any permanent irrigation agriculture will be dependent upon the production of high value crops. Water for the Kelsey tract may be obtained by pumping from ground water underlying the tract.

From an analysis of cropping practices in areas surrounding this reservation, it appears that, from a climatic standpoint, avocados can be grown on areas of the reservation lying between 1500 and 2400 feet in elevation. The citrus belt in this basin appears to be between 1200 and 1600 feet elevation. Deciduous fruits, vegetables, and other crops can be raised on the lower slopes and the valley bottom lands.

Because of the water costs involved and the climatic conditions, water requirements are based on the areas that appear to be suitable

for the three above mentioned crop groups and their unit requirements.

Precipitation on the Pechanga Reservation averages about 18.5 inches per annum. The maximum probably reaches 25 inches in the southeast corner, and the minimum is about 16 inches at the west boundary. This rainfall is largely absorbed into the soil and supports a fairly heavy cover of trees and shrubs with little surface runoff. This indicates that the amount of effective rainfall available for crop use is relatively high.

Irrigation water requirements have been studied by the Department of Agriculture, the Bureau of Reclamation and the State of California. Such studies were considered in compiling the requirements for this area. These requirements were computed by the Blaney-Criddle method. The computations are shown in Table I.

Table II compares the water requirements for these lands as computed by the BIA with the requirements assumed by the Marine Corps and with certain measurements by the U. S. Department of Agriculture which are taken from the California Division of Water Resources Bulletin No. 57.

Cropping Pattern

From an analysis of the land classification map, topographic maps, and crop patterns on surrounding lands, it appears that the following crops and acreages can be planned for on the Pechanga Indian Reservation:

Crop	Acreage	Diversion Water Requirements Acre Feet per acre 1/	Acre Feet
Avocados	300	3.10	930
Citrus	880	2.84	2499
Deciduous Orchard	100	3.10	310
Truck & Miscellaneous	360	2.72 2/	979
Total	1640		4718

Total Water Requirements

In order to fully irrigate the 1640 acres of net irrigable land, using the computed average use rate of 2.88 acre feet per acre for the above cropping pattern, approximately 4718 acre feet per annum will be required. Area "A" will require about 4222 acre feet, and Area "B" will require about 496 acre feet. In addition to the water required for irrigation purposes, an amount is essential for the non-agricultural uses. This is estimated to be 2% of that required for agriculture, or 94 acre feet per annum. These non-agricultural requirements for both areas "A" and "B" can probably be obtained from the underground supply and existing springs. Therefore, the total water requirements for Area "A" will be 4306 acre feet and for Area "B", 506 acre feet; the total will be 4812 acre feet per annum. Reference is made to the attached Table No. III.

1/ Consumptive use as computed by the Blaney-Criddle method using climatic data from Escondido with an overall efficiency of 67 per cent.

2/ Assumes double cropping on all truck lands.

Annotations

The United States Navy aerial photographs of the Pechanga Indian Reservation, on which are shown the classifications of the reservation lands both within and outside of the Santa Margarita watershed, were used in this study.

The soil surveys and land classifications were made by a team headed by Everett Randall, Soil Scientist, Bureau of Indian Affairs. The surveys and classifications were checked by Lt. Col. A. C. Bowen, United States Marine Corps, Camp Pendleton, California.

The water requirements were computed by Wayne D. Criddle, Consultant, Bureau of Indian Affairs.

The location maps and engineering surveys were provided by Milton A. Logsdon, Irrigation Engineer, Bureau of Indian Affairs.

The narration and overall supervision of the study were by Lyle F. Warnock, General Engineer, Bureau of Indian Affairs.

TABLE NO. 1

W. B. Station: Escondido County: San Diego State: California

Sta. No.: 2871 Elevation: 750 Feet Latitude: 33° 09' North

Approximate Frost-free period: March 9 to November 25

OBSERVED MONTHLY TEMPERATURES, PRECIPITATION, PERCENT OF DAYLIGHT HOURS AND CALCULATED CONSUMPTIVE USE FACTOR

Month	t	p	f	R	Full season 4/1 - 10/31*		Growing season: 4 months 4/1-7/31		Growing season: 3 months 4/1-6/30		Growing season: 2 months to	
					f	R	f	R	f	R	f	R
	F°	%		Inches		Inches		Inches		Inches		Inches
Jan.	51.0	7.14	3.65	3.43								
Feb.	52.6	6.94	3.64	3.54								
Mar.	55.2	8.36	4.50	2.77								
Apr.	58.3	8.78	5.12	0.80	5.12	0.80	5.12	0.80	5.12	0.80		
May	62.6	9.68	6.05	0.60	6.05	0.60	6.05	0.60	6.05	0.60		
June	67.2	9.66	6.50	0.09	6.50	0.09	6.50	0.09	6.50	0.09		
July	71.9	9.83	7.07	0.03	7.07	0.03	7.07	0.03				
Aug.	72.2	9.37	6.76	0.13	6.76	0.13						
Sept.	69.0	8.36	5.78	0.16	5.78	0.16						
Oct.	63.1	9.87	4.97	0.79	4.97	0.79						
Nov.	57.3	6.96	4.00	1.15								
Dec.	52.2	6.98	3.65	2.83								
Total	61.0			16.32	42.25	2.60	24.74	1.52	17.67	1.49		

*Note: Growing season for perennial crops is somewhat longer but winter precipitation meets water needs

COMPUTED CONSUMPTIVE WATER REQUIREMENT

Use	K	Total F.	C. U.	R	C.U. minus R	
Irrigated crops:			Inches	Inches	Inches	Feet
Alfalfa or clover	0.85	42.25	35.9	2.60	33.3	2.78
Beans	0.65	24.74	16.1	1.52	14.6	1.22
Corn						
Grains, small	0.75	17.67	13.3	1.49	11.8	0.98
Grass hay or pasture	0.90	42.25	38.1	2.60	35.5	2.96
Orchard	0.65	42.25	27.5	2.60	24.9	2.08
Peas						
Potatoes	0.70	24.74	17.3	1.52	15.8	1.32
Small truck crops	0.70	17.67	12.4	1.49	10.9	0.91
Sugar beets						
Avocadoes	0.65	42.25	27.5	2.60	24.9	2.08
Citrus	0.60	42.25	25.4	2.60	22.8	1.90

t = Mean monthly temperatures
p = Monthly percent of annual daytime hours
f = t x p = monthly use factor
R = Mean monthly precipitation
K = Consumptive use coefficient
C.U. = Crop consumptive use for season

TABLE II

Water Requirements for Pechanga Indian

Reservation Lands, Santa Margarita River

Basin, California

Crops	Computed water requirements 1/				Assumed 2/ Water Requirements		Measured Consumptive use of water by USDA 3/	
	Consumptive Use 4/		Diversion Requirements					
	Total	Net	67% Effic.	75% Effic.	Farm Head-gate	Diver sion	Total Cons. Use	Location
Alfalfa	2.99	2.78	4.15	3.70	3.00	3.33	2.91 2.29 2.90	Temecula Murrieta Aguanga
Avocados	2.29	2.08	3.10	2.77	2.35	2.61	2.01	Fallbrook
Beans	1.34	1.22	1.82	1.63				
Citrus	2.12	1.90	2.84	2.53	1.86	2.07		
Grains, small	1.11	0.98	1.46	1.30	1.75	1.94		
Grass, pasture	3.18	2.96	4.42	3.95	3.83	4.25	3.12 2.94	Anza Murrieta
Orchard, Decid.	2.29	2.08	3.10	2.77	1.07	1.14		
Potatoes	1.44	1.32	1.97	1.76	2.00	2.22		
Small Truck	1.03	0.91	1.36	1.28	1.67	1.86		

1/ Computed by BIA.
2/ Assumed and used by US Marine Corps in overall valley studies
3/ Reported in Calif. Div. of Water Resources Bul. No. 57, p. C-47 to C-55, Vol. II
4/ See computations on Table I.

The CHAIRMAN. Mr. Chairman, thank you very much for the testimony.

Lands Susceptible to Irrigation
and
Computed Irrigation Water Requirements
for Indian Lands within
Santa Margarita Watershed

TABLE NO. 3

Location	Gross Areas Mapped 1/	Net Agricultural Areas	Average Unit Consumptive Use 2/	Average Unit Diversion Reqm'ts 3/	Normal Project Diversion Requirements 4/	Probable Max. Unit Diversion Reqm'ts 5/
	Acres	Acres	Ac.ft./Ac	Ac.ft/ac	Acre feet	Ac.ft./Ac
Coahuilla Reservation	17292	12400	1.74	2.61	(324) 32688	4.2
Ramona Reservation	321	104	1.74	2.61	(3) 274	4.2
Pechanga Reservation						
Area "A"	3552	1463	1.94	2.89	(84) 4306	4.2
Area "B"	235	177	1.88	2.80	(10) 506	4.2
Public Domain Allotment	40	21	2.71	4.0	(1) 85	4.2
Totals	21440	14165	--	--	(422) 37859	4.2

1/ From Soils Survey Field Sheets
2/ Based upon diversified cropping pattern
3/ Area efficiency - 67%
4/ Total includes non-agricultural uses of 1% except for Pechanga Reservation where 2% was included
5/ Suggested uniform maximum unit diversion rate.

Next we will hear from Mr. Matt Stone, who is the General Manager of the Ranch California Water District in Temecula, California. Mr. Stone, you may proceed.

STATEMENT OF MATTHEW G. STONE, GENERAL MANAGER, RANCHO CALIFORNIA WATER DISTRICT

Mr. STONE. Good morning, Chairman Dorgan, and good morning Senator Tester. My name is Matthew Stone. I am the General Manager of Rancho California Water District, also known as RCWD, in Riverside County, California.

I appreciate very much the opportunity to be here on behalf of RCWD to present testimony regarding S. 2956, the Water Rights Settlement between Pechanga, RCWD, Eastern Municipal and the United States.

First, I would like to thank you, Mr. Chairman, and the other Committee members, for scheduling, preparing and holding this hearing. We recognize this is a busy time for the Committee and for the Senate. Therefore, we appreciate you and your staff making this possible. Mr. Rollie Wilson of your staff has been extremely helpful for us in preparing for this hearing this morning.

We would also like to give special thanks to the bill's sponsor, Senator Barbara Boxer, and her staff for their continued support, as well as the bill's co-sponsor, Senator Diane Feinstein. We would like to acknowledge also that Congressman Joe Baca has introduced a companion bill in the House, which currently has six co-sponsors.

I would also like to personally acknowledge Chairman Macarro this morning, who is here representing Pechanga. We have been through a lot over the last few years. It has been a journey to try to put this puzzle together. We have had a little adventure along the way, including a blizzard in Las Vegas. I think that is a testament to, we obviously have to advocate for our respective interests and sides, but we both are trying to work toward a settlement.

I have prepared and submitted to the Committee my written testimony. So this morning I just want to take a few minutes to provide you with some background related to Ranch California and the Santa Margarita watershed, including a brief description of the water rights disputes and how the parties found their way here with a proposed solution.

While RCWD is supportive of the settlement, I can't over-emphasize that the proposal is a compromise by all parties, which resolves uncertainty and creates a platform for future cooperation and partnering. While RCWD believed it had a strong basis for defending the challenge to its rights, as I am sure Pechanga did as well, there is a cost in terms of money, time, and lost opportunity during an extended litigation process. So the outcome on that path is not certain.

A little history regarding Rancho California Water District. The district was formed in 1965 to provide a continuing and reliable supply to the community as it has now developed into the city of Temecula, portions of the city of Murietta and Southwest Riverside County. We provide supply and wastewater collection and treatment and recycling services to over 130,000 people in an area encompassing 160 square miles and over 40,000 service connections.

We deliver approximately 80,000 acre feet of water per year to our customers for domestic, agriculture, commercial and industrial uses. The sources of our water include local water, imported water and reclaimed water. A substantial portion of our water supply comes from the Santa Margarita watershed, and much of the history of this watershed is written in courts and in conflict. The unresolved nature of Pechanga's water rights claims creates uncertainty for RCWD and its 130,000 residents.

The watershed also faces significant supply issues and challenges which are common throughout Southern California, including population and demand growth, reliance on imported water, periodic drought and water quality issues that arise over time from inputs of nutrients and salts from a variety sources, including agriculture, municipal wastewater discharge, urban runoff, septic systems and other sources. In response to these challenges, RCWD is in the process of implementing its water reclamation project as envisioned in our integrated resource plan, which would substantially expand the use of recycled water and better integrate the storage of raw, imported water in our service area.

The water reclamation project involves an initial phase to construct a pipeline to allow RCWD to store imported water in its existing Vail Lake facility for use during dry periods. This pipeline is under construction as we speak. Subsequent phases of the project are proposed to develop a delivery system for recycled water as well as a recycled water demineralization facility and brine disposal project. These components of our project will significantly improve supply reliability and salinity management in our watershed.

We have recently completed an updated feasibility study for the remaining components of the project.

As has been pointed out, the water rights in the Santa Margarita watershed have been under some form of court jurisdiction going back to 1928. In 1951, the U.S. initiated litigation in the *U.S. v. Fallbrook* case. And as again noted by the Chairman's testimony today, part of that was the finding in interlocutory judgment 41 that there are unquantified rights.

Based on the prima facie evidence in that proceeding, the Pechanga believe they have 4,994 acre feet of reserved water rights. Part of the effort, then, in working through the Federal negotiating team process was to develop a solution to provide adequate supply.

I think we have provided an overview of the settlement in our testimony, so I won't repeat that here this morning. I would just like to in closing thank you, Mr. Chairman and members of the Committee, for the opportunity to testify. I want to reiterate that we think the settlement is beneficial for all parties. We have worked hard to get here. And we look forward to concluding this settlement, hopefully this year, and fostering regional cooperation for many, many years to come.

Thank you very much.

[The prepared statement of Mr. Stone follows:]

PREPARED STATEMENT OF MATTHEW G. STONE, GENERAL MANAGER, RANCHO CALIFORNIA WATER DISTRICT

Good morning Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee. My name is Matthew Stone and I am the General Manager of Rancho California Water District (RCWD) in Riverside County, California. I appreciate the opportunity to appear on behalf of RCWD to present testimony regarding S. 2956 on the Pechanga Band of Luiseño Mission Indians Water Rights Settlement (Settlement) between Pechanga, RCWD, Eastern Municipal Water District (EMWD), and the United States.

Thank you, Mr. Chairman, and Committee members, Rollie Wilson, and other members of your staff for your assistance in scheduling and preparing for this hearing. And special thanks to the bill's sponsor, Senator Barbara Boxer, and her staff for their continued support, as well as the bill's co-sponsor Senator Dianne Feinstein.[1]

My testimony provides background information and an overview of the terms of the Settlement and its benefits.

I. BACKGROUND

RCWD is a "special district" organized and operated pursuant to the California Water Code and is governed by a seven-member Board of Directors that is elected by the voters of the region. RCWD serves the area known as Temecula/Rancho California, which includes the City of Temecula, portions of the City of Murrieta, and unincorporated areas of southwest Riverside County, California.

RCWD provides water supply, wastewater collection and treatment, and water recycling services to over 130,000 people in an area encompassing 160 square miles. RCWD has an infrastructure network to serve its service area. The District has 940 miles of water mains, 36 storage reservoirs, one surface reservoir (Vail Lake), 47 groundwater wells, and over 40,000 service connections. RCWD receives its imported water (treated and untreated) through six Metropolitan Water District of Southern California (MWD) water turnouts (three in EMWD's service area and three in Western Municipal Water District's (WMWD) service area).

RCWD currently delivers 80,000 acre feet per year (AFY) for domestic, commercial, agricultural and landscape uses. RCWD's customer profile includes a significant agricultural industry that produces avocados, citrus and wine grape products, which add significantly to the local and regional economy. In addition, RCWD services residential, business and manufacturing customers in Temecula and Murrieta. Larger employers in the service area include Abbott Vascular, International Rectifier, and Professional Hospital Supply. There is a wide range of local businesses that thrive on tourism in our wine region, historic old town, and Pechanga's casino. But the region has suffered from the impacts of the housing downturn, as Riverside was once the third fastest growing county in the nation.

RCWD's existing water supplies include: Groundwater—Temecula and Pauba groundwater basins; Imported Water—MWD's Colorado River Aqueduct and the State Water Project; Recycled Water—Santa Rosa Water Reclamation Facility operated by RCWD, and the Temecula Valley Regional Water Reclamation Facility operated by EMWD. RCWD also manages the water storage rights in Vail Lake, which was created through the construction of the Vail Dam in 1949. Storm runoff stored in Vail Lake is released during the subsequent months into groundwater recharge basins.

RCWD operates mostly within the Santa Margarita Watershed, as depicted in the attached map, which encompasses an area of approximately 750 square miles (475,000 acres) in southwestern Riverside and northern San Diego Counties in southern California. Drainage in the basin is provided by the Santa Margarita River with flows from Temecula and Murrieta Creeks in the upper watershed. Major tributaries of Temecula Creek include Pechanga Creek and Wilson Creek via Vail Lake. Major tributaries of Murrieta Creek include Saint Gertrudis, Tucalota (via Lake Skinner), and Warm Springs Creeks. After the convergence of Temecula and Murrieta Creeks other major tributaries to the River include De Luz, Sandia, Rainbow, and Fallbrook Creeks. Major lakes in the watershed include Skinner, Vail, Diamond Valley, and O'Neil Lakes. A coastal lagoon lies at the mouth of the River on U.S. Marine Corps (USMC) Camp Pendleton.

Multiple studies have indicated that the Santa Margarita Watershed is the largest and best example of a riparian and estuarine system in southern California. The watershed contains a variety of nearly undisturbed natural habitats, including chap-

[1] The companion bill to S. 2956 is H.R. 5413 sponsored by Joe Baca (D–CA) and co-sponsored by six additional members.

arral-covered hillsides, riparian woodlands, and coastal marshes, drained by the Santa Margarita River, which is formed near the City of Temecula at the confluence of the Temecula and Murrieta Creek systems. Upstream, the Temecula and Murrieta Creeks are fed by a number of smaller tributaries. Downstream, the Santa Margarita River flows into San Diego County and through the USMC base at Camp Pendleton, emptying into the ocean at the Santa Margarita lagoon.

The watershed currently faces significant water supply issues and challenges that are common throughout southern California, including rapid population and water demand growth; significant reliance on imported water supply; and water quality issues arising from excessive inputs of nutrients from a variety of sources including agriculture, nursery operations, municipal wastewater discharges, urban runoff, septic systems, and golf course operations. Surface waters and groundwater supporting surface water in the Santa Margarita Watershed have been under some form of court jurisdiction since 1928. A Watermaster has been assigned by the United States District Court for the Southern District of California to oversee all water uses within the Santa Margarita Watershed. Specific water rights in the watershed have not been adjudicated. However, the Stipulated Judgment assigns two-thirds of all natural waters to the United States of America (Camp Pendleton) and the remaining one-third to RCWD.

Rights to utilize the water and groundwater stored in Vail Lake are defined in the 1940 Stipulated Judgment in the case of Santa Margarita versus Vail and Appropriations Permit 7032 issued by the State Water Resources Control Board. RCWD stores local runoff in Vail Lake, which was created in 1949 through construction of Vail Dam on Temecula Creek. RCWD has a surface water storage permit in Vail Lake for up to 40,000 AF from November 1 to April 30. During these months, RCWD releases available water from Vail Lake to the Valle de los Caballos spreading basins, about 1.5 miles downstream, for groundwater recharge. From May through October, existing State permits prohibit storage and require inflow to pass through Vail Lake to Temecula Creek and ultimately to the lower watershed. RCWD must meet Gorge flow requirements as set by the Cooperative Water Resource Management Agreement between the United States on behalf of Camp Pendleton and RCWD. RCWD currently meets this requirement by discharging untreated water from MWD into Murrieta Creek.

Eight sub-basins within the Temecula and Pauba Basins provide RCWD with groundwater. The amount of groundwater produced annually from these basins varies depending on rainfall, recharge, and the amount and location of pumping. However, besides RCWD, others pump from the eight sub-basins, including: WMWD, Pechanga Indian Reservation, and other private pumpers. Groundwater extractions are under court oversight in the watershed. Groundwater basins in the upper watershed are not adjudicated.

RCWD continually faces increasing water demands, variability in water supplies due to successive years of drought and imported water shortages, and water quality challenges necessitating more creative and innovative solutions to meet the water needs of its customers. In response to such challenges, RCWD is in the process of implementing its Water Reclamation Project, which will substantially expand the use of recycled and raw water in Riverside County in order to meet local water demands through 2050. The Water Reclamation Project involves the construction of a pipeline to transport raw water from MWD's aqueduct system to Vail Lake during low demand and high supply winter periods, a delivery system for recycled water to RCWD's agricultural users, and the construction of a demineralization/desalination plant. The Project is funded in part under the Title XVI Water Reclamation and Reuse Program administered by the United States Department of the Interior Bureau of Reclamation. (43 U.S.C. § 390h–32.)[2]

II. OVERVIEW OF SETTLEMENT

The Settlement would assist in the resolution of decades of litigation initiated in 1951 by the United States regarding water rights in the Santa Margarita River Watershed (*United States v. Fallbrook Public Utility District* et al., Civ No. 3:51–cv–01247 (S.D.C.A)). The *Fallbrook* litigation eventually expanded to include all water users within the Santa Margarita Watershed, including three Indian Tribes (the Pechanga Band of Luiseño Mission Indians, the Ramona Band of Cahuilla Indians, and Cahuilla Band of Indians). The United States, as trustee, represents all three Tribes before the *Fallbrook* Court.

[2] The purpose and intent of the Title XVI funds that RCWD is entitled to receive for the Water Reclamation Project is separate from the federal contribution under the Settlement; indeed, the interim and permanent capacity funds are not tied to a specific project and the remaining funds serve as Pechanga's share of the recycled water infrastructure costs.

In Interlocutory Judgment 41, the Court concluded that each of the three Tribes have a recognized federally reserved water right without specifying the amount of each of the Tribe's water right. However, the Court developed "prima facie" findings with respect to each of the Tribe's quantifiable water rights. The prima facie evidence established the reserved right and set forth the number of acres to which the reserved water right applied. Pechanga believes that, based on the prima facie evidence established in Interlocutory Judgment 41, Pechanga's reserved water rights are at least 4,994 AFY. Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through a Federal Negotiation Team formed in August 2008. Consistent with the United States' policy to resolve Indian water rights settlements expeditiously whenever possible, in less than two years the parties have managed to reconcile their disagreement over Pechanga's water rights claims.

Under the terms of the Settlement, RCWD has agreed to allocate an additional 25 percent of the Wolf Valley Groundwater Basin to Pechanga. Additionally, RCWD will wheel imported water made available to Pechanga under an Extension of Service Area Agreement (ESAA) with MWD in perpetuity. And RCWD agrees to provide desalination and brine disposal for recycled water utilized in the Wolf Valley Basin, which will improve groundwater quality in the basin for both RCWD and Pechanga. Thus, RCWD's contribution to the Settlement involves more than a foregoing of its assertion of water rights but instead involves implementation of a partnership to utilize, convey and improve the quality of local and imported water. In summary, the Settlement will:

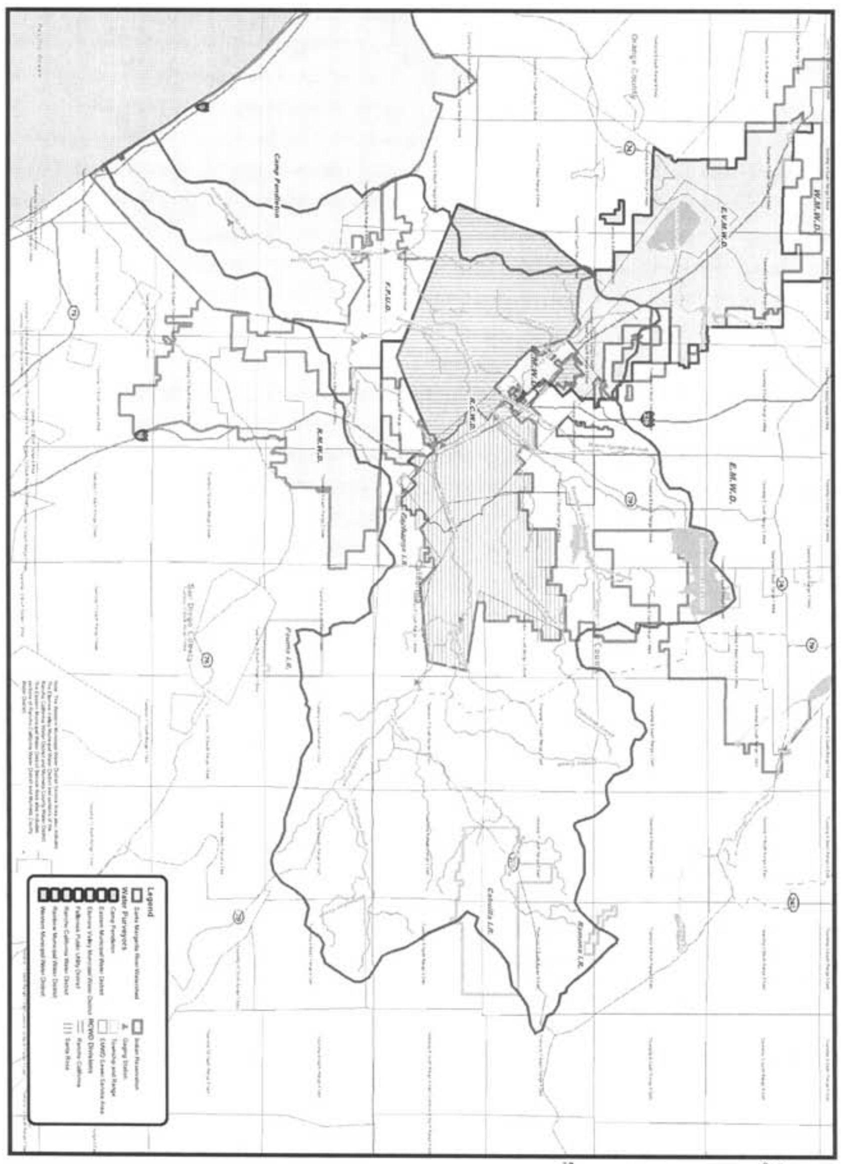
1) Establish an initial safe yield of 2100 AFY in the Wolf Valley Groundwater Basin (of which Pechanga would receive 75 percent and RCWD would receive 25 percent) and a means for ongoing management and determination of the safe yield;
2) Facilitate the provision of interim and permanent capacity for delivery of imported water from MWD to its member agency EMWD and then through RCWD's distribution system to Pechanga in exchange for a federal contribution of $17.9 million;
3) Allow RCWD to purchase between 300 and 475 AFY of recycled water that Pechanga is currently entitled to purchase from EMWD, depending on availability;
4) Provide for Pechanga's share of the costs in the amount of $2.5 million for RCWD to design and construct an additional recycled water pond to increase seasonable storage capacity in its existing recycled water system necessary to accommodate the EMWD recycled water received by RCWD under the Settlement;
5) Provide for Pechanga's share of the costs in the amount of $4.46 million for RCWD's design and construction of a demineralization and brine disposal project to lower the salinity of recycled water received by Pechanga from EMWD (or, if such facilities are not constructed, for availability of funds to Pechanga for an alternative salinity management solution); and
6) Provide for mutual waivers of claims for water rights in the Santa Margarita River Watershed to prevent future disputes between the parties over Pechanga's water rights claims.

The Settlement is beneficial for all parties involved in that it promotes a reliable water supply for Pechanga by incorporating it into RCWD's water distribution system, improves the quality and reliability of recycled and groundwater supplies for RCWD, and fosters a regional solution to Pechanga's water rights claims by incorporating EMWD and MWD. The federal monetary contribution of $50 million to the Settlement is relatively modest compared to other recent Indian water rights settlements. The Settlement would also avoid many additional years of litigation at great expense to the parties and the uncertainty concerning the availability of scarce water supplies in the region.

III. CONCLUSION

Thank you again, Mr. Chairman and other Members of the Committee for the opportunity to present this important Indian water rights settlement, which will significantly improve the reliability and quality of local water supplies for RCWD and Pechanga. RCWD would greatly appreciate your support of S. 2956 to move the bill one step closer to approval.

Attachment



Major Water Purveyors

Santa Margarita River Watershed Watermaster

The CHAIRMAN. Mr. Stone, thank you very much for your testimony.

Let me ask a question about the actual water that Pechanga Band could use. I know you are interested in real water, in actual water. The water supplies in California I know, just by reading,

that those water supplies are relatively scarce. So can you elaborate on how the water supply, the actual water supply will be provided, and will it have impact on other uses in California?

Mr. MACARRO. How much time do we have?

[Laughter.]

Mr. MACARRO. We are completely dependent on aquifer water, water underneath our reservation. So all references to the basin basically are the sole source currently of water to the tribe.

For the Band's water, our most productive well happens to be a well that is closest to Rancho California's water wells in the Wolf Valley portion of the basin. I think over the decades there has been this, from our perspective, apparent competition for water. There have been hydrologic studies and various degrees of linkages to, or hydrologic links between the basins that they pump from and we pump from.

So I think a key part of this agreement shows that we recognize that we impact each other's water resource. And the best long-term policy is to come up with a policy that manages the resource for both of us, all of us that live in the valley.

So what we tried to do then is part of the protection of that resource is to not over-pump it. We have come up with some, I think some paradigms that work for us that describe safe yield, so that we don't destroy the aquifer that we pump from; we don't over-pump it. We manage it. Of course, it becomes more critical in drought years and when less is available. The aquifer, the basins, are recharged through rain events. The more rain we have, the more water we have.

So when we put this together, it quickly became apparent that to meet everybody's needs, over the long term, over the next few decades, and looking out 50 to 100 years, that some imported water was going to have to be made available. Part of those calculations were going to come from other water districts and primarily Metropolitan Water District as well.

So we looked for ways to use existing infrastructure, we looked for ways to be as efficient. And I think in the end, this settlement represents I think the best nexus of efficiency and cost and just overall conservation. So what we end up with is an end product that provides, I think rather than impacting water, taking away water from other places, I think we are looking at moving water through an aggregate system of Metropolitan Water District that might otherwise be coming to our area and delivering it both to the tribe and to Rancho California Water District as those needs, not until those needs are there. That is also a critical element of this settlement.

In other words, we are not going to be getting water that we don't need right now. It won't be until the need is necessary, that it is made known and present some time down the road.

The CHAIRMAN. Mr. Chairman, my understanding, I would ask Mr. Stone this as well, the settlement settles the rights of individual allottee landowners on the reservation. Is that correct?

Mr. MACARRO. That is correct. I wasn't able to address that in my oral remarks. It is substantially addressed in our written testimony, and I will say that the proposed statute confirms existing statutory protections for allottees, and includes new ones.

A key feature is that the statute requires us to develop a water code that protects allottee water rights. And then that water code has to be approved by the Secretary. Finally, these protections are the same as those provided to allottees in all other pending water rights settlements. So it is essentially similar language, if you have seen this language already in recent water bills, the language is similar.

The CHAIRMAN. All right. And one final question. The other primary water users sharing the water resource is testifying today. Are there other local governments or commercial users that support this settlement?

Mr. MACARRO. I believe that, well, the answer is yes. Because of who they serve water to, I think it is fair to say, and I will let Mr. Stone address that as well, but I think it is fair to say that everybody that they provide water to, residents, commercial interests, agricultural interests, is also supportive of this. Because it takes an unknown and creates a known quantity out of it. That is a critical element to planning for the future for all of us.

The CHAIRMAN. Mr. Stone?

Mr. STONE. Yes, I think one of the historical features at Rancho California Water District is that we have a responsibility as an agent to represent water rights holders in the groundwater basin which we overlie. That is a legal construction that was developed by the former landowner as the district was created. The board takes that trust responsibility very seriously and has deliberated the pros and cons of settling or litigating.

But they are the representation of those underlying landowners, and water rights holders in our service area.

The CHAIRMAN. Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman.

A couple questions for Chairman Macarro. You spoke of Federal contribution of about $50 million. In your testimony, it is broken down into a recycled water infrastructure of 6.96. What exactly does that entail?

Mr. MACARRO. The 6.96?

Senator TESTER. Yes. What exactly is the recycled water infrastructure? What are we talking about?

Mr. MACARRO. Those are share of costs that go to storage ponds and to brine facilities, about $2.5 or so million toward storage ponds, about $4.7 million to the brine facility, desalination facility.

Senator TESTER. Okay. And there is almost $18 million for delivery capacity. I assume that is water, pipes?

Mr. MACARRO. Transmission, yes.

Senator TESTER. And then there is a water fund, and it is broken down from there, but it is a little over $25 million. Can you just kind of explain the thought around the water fund and how it was set up and its adequacy going into the future?

Mr. MACARRO. Yes. That involves, part of the trust responsibility here is the guarantee of water to the tribe into the long-term future. The way we anticipate that working is that it has to happen

with Metropolitan Water District being part of the equation, Met being the large wholesaler in California for water.

So those dollars paid initial connection fees and they also paid the ongoing annual fees as a Met customer to the tribe. And so that is, I think that is, and it is a critical part of those whole settlement. So le me say that most of the Federal contribution is directed toward programmatic responsibilities that ensure that our Tribe is able to use its reserved right entitlement. So it is a critical part of the wet water equation.

Senator TESTER. Where is the Governor in support of this bill?

Mr. MACARRO. The Governor?

Senator TESTER. Yes.

Mr. MACARRO. He is very supportive, I am sure.

[Laughter.]

Senator TESTER. Not that you are speaking for the Governor, but just curious. Has he played a role in this?

Mr. MACARRO. I don't think he has played a role. But I can't say that for certain. I know he has been very busy with the economy in the State.

Senator TESTER. Right. Administration, you had talked about the Administration, you met with the Administration a couple of days ago.

Mr. MACARRO. And on an ongoing basis, yes.

Senator TESTER. That is good. And they had expressed some concerns, is that what I gathered from it? Could you give me an idea what those concerns revolve around?

Mr. MACARRO. Costs. Generally costs. What does the $50 million involve? Everything that you have asked. We have looked at this, we have broken it down into four components. The $18 million for the pipeline, $2.5 million for the ponds, $4.7 million from the desal facility and then the Federal contribution to the subsidy fund.

Senator TESTER. Thank you very much. Appreciate both your testimonies. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester, thank you.

We thank both of you for your testimony. We would hope you would be available for written questions that we wish to submit to you.

Mr. MACARRO. We would.

The CHAIRMAN. We will then take this under further consideration. As I indicated, Senator Boxer had requested that we hold this hearing. Senator Feinstein is a co-sponsor of the legislation. It will be helpful if you also will submit, or if you will solicit letters from other interests in your region and perhaps the Governor as well, to see if we can get some letters of support from them as we consider this.

Mr. MACARRO. Can I add something, actually not related to this?

The CHAIRMAN. Yes.

Mr. MACARRO. But given the timing, I just want to thank you personally, certainly on behalf of my Tribe for the critical role you played chairing this Committee, as well as the entire Committee, for making the priorities you have of the legislation for reauthorization of Indian Health Care and certainly Tribal Law and Order. I remember in particular when you came in front of NIGA two

years ago, and you stated flatly and clearly these were your priorities. And here we are today with both of these things passed, a tremendous watershed for Indian Country.

And I want to thank you, Senator Tester, Chairman Dorgan, it was amazing to see it happen. Thank you.

The CHAIRMAN. I appreciate that a lot. We have a great staff, bipartisan staff on this Committee. We have worked very hard on these issues to complete them. We still have the special diabetes fund that we have to reauthorize, there are a number of things yet to do between now and the end of the year. But I think we have made substantial progress.

Certainly in holding hearings on water issues, they are not the most exciting issues around, because many of them have languished for years and years and years trying to be resolved. But they are very important in the life of tribal governments, to quantify these water rights and try to address these issues. So we appreciate your being here and appreciate both of you taking the time to travel to Washington for this hearing.

Thank you very much.

Next we are going to have the second panel. And the Energy Committee is now meeting on the third floor, so I have to be at the Energy Committee markup at 11 o'clock. Senator Tester has agreed to Chair. Senator Tester, if you don't mind, I will depart to go to the Energy Committee. And if you want to take the Chair and introduce the next panel, I would appreciate that.

Senator TESTER. [Presiding.] I want to thank the witnesses for being here today for the Blackfeet Water Settlement, S. 3290. And I want to thank you all for making this trip on such short notice. You had one week and you are here. Since I go back to Montana every weekend, I know that it truly is a sacrifice to come here during the summer, where you step into a sauna when you step off the airplane.

But we certainly appreciate your being here, Shannon Augare, who is a Blackfeet tribal member, who is soon to be State Senator. I want to congratulate you on the primary victory, and since you have no general election appointment, you are in. Jay Weiner, State of Montana Water Rights Compact Commission. Jay has done great work for a long, long time on water rights issues in the State of Montana through that commission. And we very much appreciate that. John Bloomquist, Attorney for the Pondera County Canal and Reservoir Company. John is somebody that I have known for quite a while now, and a very good attorney, especially when it comes to water rights issues. And we appreciate you being here too.

We are here to discuss S. 3290, the Blackfeet Water Rights Settlement Act of 2010. Senator Baucus and I, Senator Baucus may show up here at some point in time, if he does, I will defer to him. We introduced that legislation back in April of this year. It is an important piece of legislation, because water is the foundation of life, particularly in rural communities. It is critically important for domestic and municipal users, for irrigation, livestock and for economic development on the whole.

It has been the policy in Montana and the United States to negotiate rather than litigate water rights. So negotiation is important,

because our diverse communities have many competing interests. Nobody gets everything they want. It is important that as communities, we work together to solve our problems rather than fighting with one another.

That is why I am proud of the way these folks have worked together over the years. The negotiation started some 20 years ago. During that time, tribal, State, Federal Government and non-Indian water users have negotiated in good faith to craft a settlement in way that works for the entire community. They did such a good job that the State legislature ratified this compact in 2009, when they last met.

The bill we are considering today will ratify the compact at the Federal level. It will resolve claims against the United States and authorize funding to improve the reservoir water infrastructure. The bill we are talking about today is a good bill, it is a good start. It is not perfect. But over the coming months, I do look forward to working with you, each and every one of you sitting at the table today, and the Administration. I doubt that it will be perfect for everybody, but I think that we can work to get a bill that everybody can live with and will work for the people of North Central Montana that are impacted by this water settlement.

So by working together, we will get it done. Again, I want to thank you all for being here on short notice. I know you are busy, it is summer time, and you always have things to do. But we appreciate your commitment to this piece of legislation and to the people you represent.

With that, Shannon, I will start out with you. You can testify, same rules apply, if you can keep it to five minutes, it will be great. Your entire written testimony will be a part of the record.

STATEMENT OF HON. SHANNON AUGARE, MEMBER, BLACKFEET TRIBAL BUSINESS COUNCIL

Mr. AUGARE. Thank you, Mr. Chairman, members of the Committee. My name is Shannon Augare. I am a member of the Blackfeet Tribal Business Council and I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement.

I am very familiar with this matter, as you mentioned, Mr. Chairman, having worked on the ratification of the Blackfeet Water Rights Compact as a member of the Montana House of Representatives. I want to thank the Committee for holding this hearing on Senate Bill 3290, a bill that I believe is critical to the future of the Blackfeet people. I also want to thank and acknowledge my colleagues, the distinguished Vice Chairman of our Tribe, Rusty Tatsey, and councilman Jay St. Goddard for being here.

Today, we together thank you and Senator Baucus for your leadership and for your strong support of the Tribe in introducing this bill, and for your understanding of the importance of this bill to Blackfeet Country. I also want to thank your staff and the Committee staff for their hard work on this incredibly important bill.

The Blackfeet Water Rights Settlement is a culmination of over two decades of work by the Tribe, State and Federal Government. And I know that is a lot of time and a lot of work. I am only 30 years old, that is two-thirds of my life. It represents a historical

breakthrough in the Tribe's over a century long battle to secure and protect its water rights. S. 3290 ratifies the Blackfeet Montana Water Rights Compact, resolves significant water-related claims against the Federal Government, and most importantly establishes the critical infrastructure needed for the development of a self-sustaining economy on the Blackfeet Reservation, and of course, a permanent homeland for our Blackfeet people.

The Blackfeet Reservation was established by treaty in 1855. The Reservation originally encompassed much of the State of Montana but has been reduced in size by various Federal actions and reservation. It is now about 1.5 million acres. It is located along the Rocky Mountain front in North Central Montana adjacent to the ever-beautiful Glacier National Park. The Reservation is renowned for its spectacular mountain scenery, majestic plains and abundant fish and wildlife. The Tribe has over 16,000 members, about half of whom live on the Reservation.

Six separate drainages are encompassed within the Reservation: St. Mary, the Milk, Cut Bank Creek, Two Medicine, Badger Creek and Birch Creek. The annual water supply is approximately 1.5 million acre feet, nearly a third of which is in the St. Mary River. Water is critical to the continuing survival of our Blackfeet people, culturally and economically, and has become increasingly critical as development and competition for water occurs around us, and as supplies become shorter. We understand that scientists have predicted that our glaciers in Glacier Park will soon disappear in a matter of decades. Safe and clean drinking waters are essential for the growing population on our Reservation. And water is critical to our economy, which is heavily dependent on stock raising and agriculture.

Unemployment on the Reservation can run as high as 70 to 80 percent. Water has historically been a contentious issue on the Reservation. In the 1909 Boundary Waters Treaty, the United States and Canada divided up the St. Mary and Milk Rivers on the Reservation without any consideration or mention of the Blackfeet water rights. The bulk of the United States' share of the St. Mary River, some 180,000 acre feet of water annually, has been diverted off-reservation over 100 years by means of various facilities built on the Reservation, including a 29-mile canal, which carries the water to Milk River, then carries it downstream to serve the Federal Milk River project.

The southern boundary stream, Birch Creek, was the subject of early conflicts resulting in a 1908 Federal court decree in a case brought by the Federal Government at the time, at the same time as the *Winters* case. While the paramount right of the Tribe was recognized, the Tribe was awarded only a portion of the water necessary to irrigate its irrigable lands, leaving it open for the Tribe to seek additional water in the future.

Since then, Birch Creek has become fully utilized through 80,000 acres irrigated adjacent to the Reservation, making it difficult as a practical matter for additional water to be made available to the Tribe. Allotment of the Reservation has brought further water conflicts between the Tribe and the purchasers of the allotment. Given the historical water rights issues of the Reservation, the Blackfeet Water Rights Compact is truly a milestone, achieved after nearly

two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and representatives of the Federal Government. The compact approved the Montana legislature in April of 2009. Tribal approval is also required through a vote of our tribal membership.

The project costs have been developed by the Tribe's technical consultants and projects are currently being reviewed by the Bureau of Reclamation DEC Team, which will issue its report shortly. The Tribes believe that the costs are fully justified under the trust obligations of the Federal Government and by the Tribe's water-related claims against the United States.

The State has committed to a $20 million contribution to the settlement, $4 million of which has already been appropriated. In addition, in the 2007 legislature, they appropriated $15 million for the Birch Creek agreement, for a total State contribution of $35 million. The Tribe is fully prepared to address any Federal questions or concerns that may be identified by the Administration. Of course, the Federal Government was involved in our negotiations from the beginning, and we have met with Federal Representatives on a number of occasions throughout the negotiation process.

We have also initiated discussion on the bill's provisions which we expect to continue. And we too hope that we can see some quick action on this bill this year.

I want to thank you, Mr. Chairman and members of the Committee. I look forward to responding to any questions you may have.

[The prepared statement of Mr. Augare follows:]

PREPARED STATEMENT OF HON. SHANNON AUGARE, MEMBER, BLACKFEET TRIBAL BUSINESS COUNCIL

Mr. Chairman, and members of the Committee, my name is Shannon Augare. I am a member of the Blackfeet Tribal Business Council. I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement Act. I am very familiar with this matter, having worked on the ratification of the Blackfeet water rights compact as a member of the Montana Legislature.

I want to thank the Committee for holding this hearing on S. 3290, a bill that is critical to the future of the Blackfeet People. I also want to thank Senator Max Baucus and Senator Jon Tester for their strong support of the Tribe in introducing this bill, and their understanding of the importance of this bill to the Blackfeet Tribe. I also want to thank their staffs and the Committee staff for their hard work on this bill.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe and many other people, including those who are testifying here today. It represents an historical breakthrough in the Tribe's over century long battle to secure and protect its waters rights. S. 3290 ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the Federal Government and most importantly establishes the critical infrastructure needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

The Blackfeet Reservation and the Blackfeet People

The Blackfeet People have occupied the area where the Blackfeet Reservation is located since time immemorial. As we say: "We know who we are and where we come from. We come from right here. We know, and have always said, that we have forever lived next to the Rocky Mountains."

Our first treaty, known as Lame Bull's Treaty, was signed in 1855. Executive orders and statutes would follow, each taking huge chunks of our traditional land. In the end, as a small grace, we ended up with the land that was most sacred to us: our present day reservation. But this was not due to any good intentions. The simple fact is that the land we wanted most was the land they wanted least.

In 1896 we had the Northern Rockies taken from us because speculators believed there were rich minerals to be had. When mineral riches didn't pan out, this most sacred part of our homeland became Glacier National Park in 1910. To this day we question the legitimacy of the 1896 transaction. But thereafter, the modern-day reservation boundaries were set. The present Reservation is about 1.5 million acres. Although the United States had promised our reservation would never be allotted in the 1896 Agreement by which the Northern Rockies were lost, the Federal Government went back on its word and lands within the reservation were allotted to individual Tribal members under allotment acts in 1907 and 1919.

The Tribe now has over 16,000 members, about half of whom live on the Reservation. Our people have worked hard to survive in the sometimes harsh climate of the Rocky Mountains, and have attempted to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

Water is the Essential Element that Binds Us Together

Water is critical to the Blackfeet People. It is central to our culture and our traditions. It is an essential element of our way of life, and it is crucial to our continuing survival culturally, traditionally and economically. Six different drainages are encompassed within the Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. These are the veins and arteries of the Reservation and provide life to the Blackfeet People and bind us together as a People.

Water is the source of creation. We believe that rivers and lakes hold special power through habitation of Underwater People called the Suyitapis. The Suyitapis are the power source for medicine bundles, painted lodge covers, and other sacred items. Contact with supernatural powers from the sky, water and land is made through visions and dreams and manifests itself in animals or particular objects. The beaver ceremony is one of the oldest and most important religious ceremonies, and beaver bundles have particular significance. The ceremonial importance of water is especially present in the use of sweat lodges as a place to pray, make offerings and cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Various species of plants also have great importance and are culturally and religiously significant to the Tribe and Tribal members. Particular species of plants are essential for religious ceremonies and for their healing and medicinal effects. Both water quantity and quality are critical to the survival of these plant species, and to the central role of the plant species in the continuing religious and cultural practices of Tribal members.

Pristine water quality is also essential to the cultural and religious practices of the Tribe. Preservation of a high level of water quality is therefore integrally related to tribal members' ability to continue religious, spiritual and cultural practices.

Water is the lifeblood that not only sustains the Blackfeet people but our way of life. The water resources of the Blackfeet Reservation are essential to the lives of tribal members, the economic, cultural and spiritual well being of the Tribe, and the continuing viability of the Reservation as a homeland to the Blackfeet people.

The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of spectacular mountain scenery and abundant fish and wildlife. Large game animals, including moose, elk, and deer abound. The Reservation provides significant habitat for grizzly bears and other bears, and for other animals such as lynx, pine marten, fisher, mink, wolverine, weasel, beaver, otter, grey wolf, swift fox and others. Numerous bird species are also found on the Reservation including bald eagle, golden eagle, osprey, ferruginous hawk, northern goshhawk, harlequin duck, piping plover, whooping crane, and all migratory and shoreline birds, as well as game birds such as the sharptail grouse, ringnecked pheasant, mountain dove, Hungarian partridge and two species of grouse. The fishery on the Reservation is renowned, and includes the west slope cutthroat trout, northern pike, lake trout, rainbow trout, mountain white fish, lake white fish, brook trout, brown trout, Yellowstone cutthroat trout, walleye, and many others. The threatened bull trout is also be found on the reservation. The habitats of these wildlife species and fish depend directly on the water resources of the Reservation to support them and allow them to thrive.

At the same time, water is vital for our communities to thrive and prosper. Safe and clean drinking water supplies are essential for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture.

The Reservation also possesses significant timber, and oil and gas resources and other resources. Oil and gas production has occurred on the Reservation since the 1930s, and the Tribe has recently experienced a significantly increased interest in

new development on the Reservation. The Tribe has also been working hard to develop wind energy and the hydroelectric potential on the Reservation. All of these activities are dependent on adequate supplies of water.

Fortunately, we are blessed with an abundant supply of water. Over 518 miles of stream and 180 water bodies, including eight large lakes, are located on the reservation. More than 1.5 million acre-feet of water arise on or flow through the Blackfeet Reservation on an annual basis. Despite the significant water supply, or maybe because of it, historically others have sought to appropriate it for themselves, and water has become a precious resource in more modern times.

The Water Wars

In 1909, the United States entered in to the Boundary Water Treaty with Canada. Although the treaty divided the Milk River and St Mary River between the two countries, not a word was mentioned about the Blackfeet, or the fact that these streams arise on or near the Blackfeet Reservation, and that the Blackfeet have rights to them.

Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Reservation under the 1902 Reclamation Act, and began construction of the St. Mary facilities that would divert most of the United States' share of the St. Mary River off the Reservation for use by the Milk River Project over a hundred miles away, notwithstanding that there was an equally feasible project on the Blackfeet Reservation to which the water could have been brought. The diversion is accomplished through facilities on the Reservation, including Sherburne Dam, and a twenty-nine mile canal through the Reservation that eventually empties into the Milk River. The Milk River flows north into Canada and then back into the United States near Havre, Montana, where it is heavily utilized by the Milk River Project and by the Fort Belknap Reservation. There are few historical acts, other than loss of land, that have engendered more passion and outrage than this wholesale transfer of Reservation water to serve non-Indians far downstream, without a word about or any consideration of Blackfeet Tribe's water rights or the Blackfeet water needs. The Tribe is left not only with no access to and no benefit from its own water, but a tangled web of confusing and non-existent rights of way and easements for the St. Mary Diversion facilities on the Reservation.

At the same time that the St. Mary diversion was taking place, there was a concerted effort by water users just south of the Reservation to appropriate for themselves the waters of Birch Creek, the southern boundary of the Reservation. The situation eventually led to litigation in a case brought by the United States contemporaneously with the *Winters* case. The case sought the removal of the Conrad Investment Company's dam on Birch Creek which was intended to send water to irrigators adjacent to the southern boundary of the Reservation. In *Conrad Investment Company v. United States*, decided by the Ninth Circuit in 1908, the same year as the Winters case, the court upheld the Tribe's prior and paramount right to the water. But the court did not award the full amount of water necessary to irrigate all of the Tribe's irrigable lands, leaving it open for the Tribe to claim additional water in the future. *United States v. Conrad Investment Company*, 156 Fed. 123 (D. Mont. 1907), aff'd *Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir. 1908). In the meantime, Birch Creek has been fully appropriated through development of 80,000 acres of irrigation immediately adjacent to the Reservation.

In an attempt to control the water through the land, the *Conrad Investment* case served as the springboard to the first Blackfeet allotment act in 1907. Over a span of two congresses, the Blackfeet allotment act moved forward with various water rights provisions intended to make Blackfeet water rights subject to state law, to enjoin the United States from prosecuting any further suits against water users, and later to give preference to settlers on surplus lands to appropriate water on the Reservation. *See, John Shurts, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s–1930s* (University of Oklahoma Press, 2000). These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding that in the 1896 Agreement by which the Northern Rockies were lost to the Tribe, the Federal Government agreed that there would be no allotment of the Reservation. See Art. V of the Agreement of September 26, 1895, ratified by the Act of June 10, 1896, 29 Stat 321, 353.

Allotment brought the third serious dispute between the Tribe and non-Indian water users. The Bureau of Indian Affairs Blackfeet Irrigation Project was authorized in the 1907 Allotment Act. However, many of the prime irrigation lands both within the Project and in other areas of the Reservation on Cut Bank Creek and the Milk River quickly went out of trust. The Tribe's water rights have gone unprotected from the use of water by non-Indian development on former allotments. Nu-

merous disputes have arisen over the years of varying severity, and the need to resolve the Tribe's water rights has increasingly become critical.

Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but more recent years have brought shortages during the late irrigation season in both the Milk and Cut Bank Creek, and the dilapidated condition of the Blackfeet Irrigation Project has become a serious impediment to water use within the Project. Plans to rehabilitate the hundred year old St. Mary Diversion facilities have further raised water right concerns, and the need for the Tribe to finally achieve some benefit from those facilities.

Water Rights Compact

Given the historical water rights issues on the Reservation, the Blackfeet Water Rights Compact is truly a milestone achievement after nearly two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and the Federal Government. The Compact was complete in December 2007. It was approved by the Montana Legislature in April, 2009 (85–20–1501 MCA), and it is now before this Committee for ratification in the Blackfeet Water Rights Settlement Act. It will further require approval of the Tribe through a vote of the Tribal membership. In general, the Compact:

- Establishes the Tribe's water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages (Milk River, Cut Bank Creek, Two Medicine River and Badger Creek) except for the St. Mary River and Birch Creek.
- Establishes a St. Mary water right of 50,000 acre-feet, and requires the parties to identify how the water will be provided to fulfill the Tribe's water right in a manner that does injure the Milk River Project.
- Establishes a Birch Creek water right of 100 cfs, plus 25 cfs for in stream flow during the summer and 15 cfs during the winter.
- Protects non-irrigation use and some irrigation uses through "no-call" provisions.
- Provides for water leasing off the Reservation.
- Closes on-reservation streams to new water appropriations under state law.
- Provides for Tribal administration of the Tribal water, and State administration of state law water rights, and creates a Compact Board to resolve disputes.
- Provides for an allocation of water stored in Tiber Reservoir (in an amount to be determined by Congress).
- Mitigates the impacts of the Tribe's water rights on Birch Creek water users through a separate Birch Creek Agreement by which the Tribe defers new development on Birch Creek for 15 years and provides 15,000 acre-feet of water per year to Birch Creek water users from Four Horns Reservoir, the total agreement not to exceed 25 years.

For obvious historical reasons, the St. Mary River and Birch Creek proved to be the most difficult issues for the parties to resolve.

The Compact includes a Birch Creek Management Agreement as an Appendix to the Compact that requires the Tribe and the Pondera County Canal and Reservoir Company to develop annual water management plans, to meet annually, along with the Bureau of Indian Affairs, and to otherwise cooperatively manage their water uses.

In addition, in the separate Birch Creek Agreement, which is mentioned above, the Tribe has committed to enlarge the Four Horns Reservoir on the Reservation, a storage facility of the Blackfeet Irrigation Project, to provide mitigation water to Birch Creek water users. The Tribe will defer new development of Birch Creek water for a fifteen year period, during which the enlargement will occur. When the enlargement of Four Horns is complete, the Tribe will provide 15,000 acre-feet of water to Birch Creek water users, for a total agreement term of 25 years. Given that Birch Creek is currently a fully utilized stream without taking into account an increased Blackfeet water right, mitigation measures were the only reasonable and feasible way to reach agreement there.

As to the St. Mary River, additional identification and study of alternatives to provide the Tribe's water right will be necessary and are included as part of the legislation. A substantial portion of the United States' share of the St. Mary River is diverted to the Bureau of Reclamation's Milk River Project, as described above. Therefore it will be necessary to identify alternatives to provide the Tribe's water right. In the meantime, S. 3290 provides that the Tribe will receive it water right through an allocation of Sherburne Dam, the Milk River Project storage facility on

the Blackfeet Reservation. The Tribe will lease back the water to the Project, until a permanent water supply is identified and implemented for the Tribe. Such an arrangement is the only way to ensure that the water rights of both the Tribe and the Milk River Project are fulfilled.

Upon completion of the Compact, a separate concern was raised by the Fort Belknap Indian Community relating to the Milk River, and the potential for conflict between the Blackfeet and Fort Belknap Milk River water rights. While the Blackfeet Tribe believes that the potential for conflict is very low, the two tribes have met on a number of occasions to resolve any possible conflict. Language was agreed upon to be inserted in our respective settlement legislation. The language was included in an agreement signed by the Blackfeet Tribe, but not yet signed by Fort Belknap. The language appears in the Blackfeet legislation in Sec. 11, and we believe it fully protects Fort Belknap. The provision requires the Secretary to insure that the water rights of both tribes are fulfilled. This is a particular federal responsibility due to the United States trust responsibility to both tribes, and particularly because the Federal Government was party to the negotiations of both tribes.

State Approval and State Contribution

As described above, the Blackfeet water rights compact was approved by the State Legislature in April 2009. The State of Montana has committed to contribute $20 million to the Compact. Along with the approval of the Compact in 2009, the State legislature appropriated $4 million toward the $20 million state contribution, and has committed to appropriate the remaining amount in the 2011 legislature. In 2007, the Montana Legislature also appropriated $15 million for Birch Creek mitigation. Of these funds, $14.5 million has been placed in an escrow fund for the Tribe as part of the Birch Creek Agreement (to which the Tribe currently has access to the interest), and $500,000 was used for engineering studies for the Four Horns enlargement. Therefore, the State has committed to a $35 million contribution to the Blackfeet settlement. This is very major contribution on the part of the State, one of the larger, if not the largest contribution, for an Indian water rights settlement in Montana.

Blackfeet Water Rights Settlement Act

S. 3290, the Blackfeet Water Rights Settlement Act, carries forth the terms of the Blackfeet water rights compact, and addresses the issues of particular federal responsibility and federal concern. The bill would do the following:

- Approves and ratifies the Compact and the Birch Creek Agreement.
- Provides for an allocation of Tiber Dam water.
- Provides 50,000 acre feet of Sherburne Dam water to the Tribe in fulfillment of the Tribe's St. Mary water right, to be leased to the Milk River Project until a permanent alternative(s) to provide the St. Mary right is identified and implemented. Authorizes funding to undertake the necessary investigation and studies, planning, design and construction to provide the St. Mary water right to the Tribe.
- Requires resolution of all rights of way issues related to the Milk River Project facilities, involving tribal lands and allotted land.
- Authorizes the rehabilitation and improvement of the Blackfeet Irrigation Project, including the enlargement of Four Horns Reservoir.
- Establishes a Blackfeet Water Settlement Fund and authorizes $125M for the Blackfeet Irrigation Project and $93.2 for each of five years for other water projects and water related projects.
- Provides for a waiver of water related claims against the Federal Government.
- Establishes a tribal water right in Lewis and Clark National Forest in the amount claimed by the United States on behalf of the Tribe.
- Reserves a claim to water in Glacier National Park for the Tribe's hunting, fishing and timbering rights reserved in the 1895 Agreement.
- Requires the Secretary to resolve any conflict involving Milk River water between the Tribe and Ft. Belknap.

The Tribe has identified a number of projects that are critical to the implementing the Tribe's water right under the Compact. The projects include rehabilitation and build-out of the Blackfeet Irrigation Project, including the Four Horns enlargement, irrigation development on the Milk River, Cut Bank Creek and Birch Creek, and a regional water system to provide a long term municipal water supply to several communities on the Reservation, including East Glacier, Browning, Starr School, and Seville, and a separate water supply for the Town of Babb.

Badger/Fisher Unit-Water Supply Augmentation and Irrigation Project Rehabilitation & Betterment (including Four Horns Enlargement)

The components for this project include an enlarged & rehabilitated feeder canal from Badger Creek to an off-stream dam & reservoir, Four Horns Dam, an enlarged Four Horns Dam from about 20,000 AF to 70,000 AF (actually a new dam just downstream from the existing dam), an enlarged and rehabilitated main canal from the dam to the Badger-Fisher Unit of the Blackfeet Irrigation Project, irrigation unit rehabilitation and betterment, including some on-farm improvements, and a water supply pipeline (gravity) from Four Horns Dam to off-reservation water users. The Four Horns enlargement is critical to the implementation of the Compact as set forth above.

The rehabilitation and betterment of the Blackfeet Irrigation Project is essential to continuing irrigation in this hundred year old project. The Project was authorized by the 1907 allotment, as part of the Indian Appropriations in the Act of May 1, 1907, 34 Stat. 1035. Currently, nearly 30,000 acres of land are included in the project, but the Project has never been completed. In addition, the current dilapidated state of the project severely limits full irrigation to lands in the project.

Two Medicine River Irrigation Development

This project includes selective betterment and on-farm improvements on the Two Medicine Unit of the Blackfeet Irrigation Project and a major enlargement of Mission Lake with pumping facilities.

Birch Creek Irrigation Development

This project includes selective betterment and on-farm improvements on the Birch Creek Unit of the Blackfeet Irrigation Project.

Milk River Irrigation Development

Much of the economically developable run-of-the-river irrigation (no storage facilities) has been already developed on the Milk River by non-Indians within the Reservation. New irrigated acreage will require new storage. This project may include the purchase and rehabilitation of existing irrigated lands, and development of new Tribal irrigated lands, including the construction of new storage and irrigation water delivery systems. This project will allow the Tribe to establish its own irrigation in the Milk River drainage, something it has not been able to do without storage given the existing non-Indian irrigation.

Cut Bank Creek Irrigation Development

Much of the economically developable run-of-the-river irrigation (no storage facilities) has been already developed on Cut Bank Creek by non-Indians within the Reservation. New irrigated acreage will require new storage. This project may include purchase and rehabilitation of existing irrigated lands, and developing new Tribal irrigated lands, including the construction of new storage and major water delivery systems. Like the Milk River Project, this project will allow the Tribe to establish irrigation in the Cut Bank Creek Drainage which it has been unable to do without storage given the existing non-Indian irrigation.

Regional Water System

The Blackfeet Tribe, Indian Health Service (IHS) and other entities have designed and are currently constructing a Phase 1 regional water system within the Reservation. The source is at Lower Two Medicine Lake, with an associated water treatment plant, with water service pipelines going to the towns of East Glacier and Browning. The current project focuses on current needs. The proposed project would provide a 50 year water long-term community water supply and would include enlarging the treatment plant and Phase 1 pipelines and extending the pipeline from Browning to serve Indian communities to the eastern boundary of the Reservation, including the Star School and Seville areas.

For many years, East Glacier has been under a boil order issued by EPA. The Town of Browning has had frequent problems with its current water supply which is provided by groundwater wells. These wells have experienced supply and quality problems that have affected a continuous water supply for Browning. The Seville water supply is currently provided through an agreement with the City of Cut Bank. However, the ability of Cut Bank to continue to provide water to this reservation community given the City's own water supply problems is in doubt. Therefore, it is critical for another supply for Seville to be provided.

It is also critical to establish a long term supply of water to Reservation communities. The Tribe has continually had to address community water supply problems by cobbling together short term fixes. At the same time, the Reservation population has significantly increased, and projections are that such increases will continue. A

long term supply will provide the necessary stability that will allow for long term community growth.

St. Mary River Water Development

Components of this project include enlarging Lower St. Mary's Lake and Spider Lake and other potential off-stream storage facilities and improvements. These projects may serve as potential projects to supply the Tribe's St. Mary water right. A municipal water system for the Town of Babb is also included. Like other Reservation communities, Babb now relies on an inadequate and problematic well system. A potential 500-acre irrigation project has further been identified that will allow the Tribe some irrigation benefits which now accrue only to the Bureau of Reclamation's Milk River Project.

Blackfeet Stock Water and Irrigation Developments

This project would include individual stock water and irrigation developments scattered throughout the Reservation. The project would allow individual Indian allotment holders that are not within any irrigation project to develop small irrigation developments and also stock water development for their cattle.

Compact Administration

A permanent Blackfeet Water Rights/Water Resource Office would be responsible for implementing the water rights compact, developing a revised water code, administering water rights on the Reservation, developing a water management plan and implementing the water rights settlement projects.

The Cost of Settlement

The Tribe's technical consultant, DOWL HKM of Billings, Montana, has assisted the Tribe in the development of the above projects and has prepared reports on each of the projects and the associated costs. Separate costs have been developed for each of the projects. $125 million has been provided for in the legislation for the Four Horns enlargement which is required to fulfill the commitment to provide mitigation water to Birch Creek water users, and is set out separately in the legislation. The cost of the remaining projects will potentially exceed the remaining $466 million. The Tribe proposes to construct the most critical projects within the funds provided for in the legislation. Much of the cost is associated with the rehabilitation and betterment of the Badger-Fisher, Two Medicine and Birch Creek units of the Blackfeet Irrigation Project. The Regional Water System is estimated to cost $107,481,500. All of the projects are currently being reviewed by a Bureau of Reclamation DEC Team (design, engineering and construction), and the DEC Team's report will be issued shortly.

The costs of settlement are fully justified by the needs of the Reservation and the potential Tribal claims against the United States associated with the St. Mary Diversion, the environmental and resource damages caused by the diversion facilities, claims relating to the 1909 Boundary Water Treaty, the failure of the United States to properly operate and maintain the Blackfeet Irrigation Project, and the failure of the United States to protect the Tribe's water right from development by others.

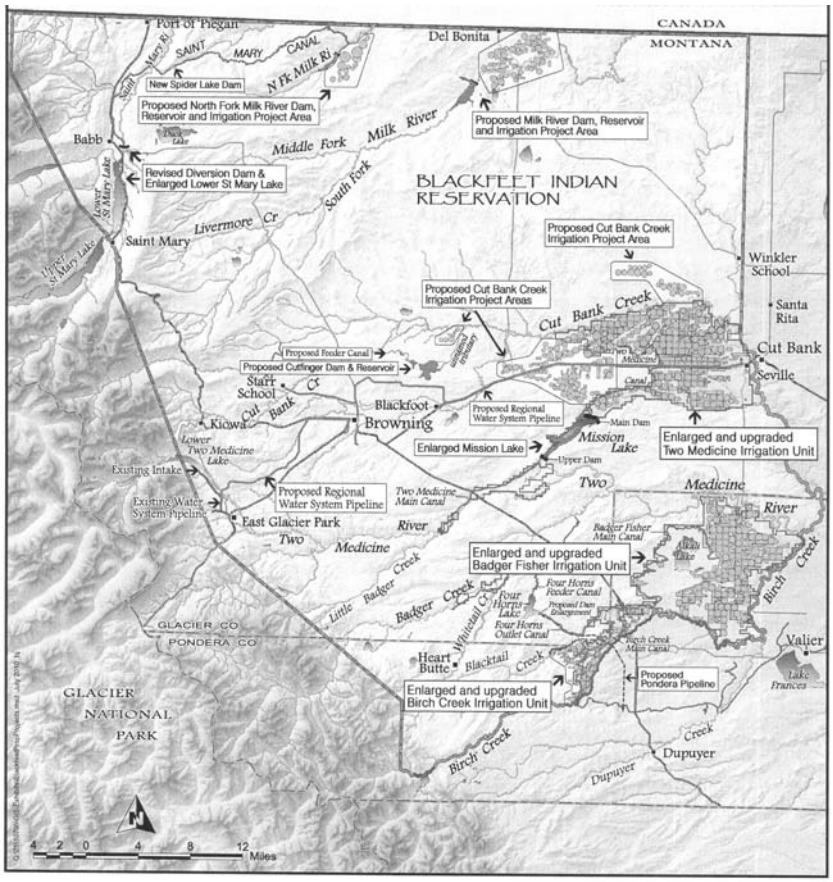
Conclusion

The Blackfeet Water Rights Settlement represents the hard work of many people. The settlement has critical importance to the future of the Blackfeet people. The legislation will secure the water rights of the Tribe through ratification of the Tribe's water rights compact, and will also provide the necessary funding for the development of vital reservation water projects, including drinking water projects, water storage projects and irrigation and stock development. The settlement will significantly contribute to the development of a strong Reservation economy and a better life for the Blackfeet people.

The Tribe is prepared to address any federal concerns that may be identified, and has initiated contact with the Administration for this purpose.

We thank the Committee and Committee staff and look forward to responding to any questions you may have.

Attachment



DOWL HKM

Blackfeet Indian Reservation
Proposed Settlement Projects

Senator TESTER. Thank you, Shannon.

Jay Weiner?

STATEMENT OF JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA; LEGAL COUNSEL, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Mr. WEINER. Thank you, Senator Tester.

My name is Jay Weiner, I am an Assistant Attorney General with the State of Montana and legal counsel to the Montana Reserved Water Rights Compact Commission. It is my privilege and honor to be here today to testify in support of S. 3290, ratifying the Blackfeet Tribe's water rights settlement.

As you have heard, this settlement is a long time in coming. I am a little bit older than Shannon, but the 20 years that this has been in negotiation reflects about half of my life.

This is the product of truly significant hard work by the Tribe, by the State of Montana. We appreciate the participation of the

United States in our process as well. I want to thank the Tribe for the leadership they have shown. I would also be remiss today if I did not make mention of Susan Cottingham, the program director of the Compact Commission, who is retiring at the end of this month. The work that she has put in over the years has been invaluable in the success that Montana has had in the numerous water rights settlements that we have concluded.

My written testimony expands at some length about the specifics of the settlement. So what I just want to touch on today is what we believe is the critical balance that was struck in the settlement. And you heard a little bit of that from the prior panel as well, that to make these negotiated settlements work, a balance needs to be struck between recognizing the legitimate, significant senior water rights claims of a tribe with the reliance on that water that non-Indian users have come to have over the 150 or so years that there has been settlement in Montana. Roughly 15 percent of Montana's agricultural economy depends on water that is involved in the Blackfeet Water Rights Settlement. It was certainly a priority of the State during these negotiations to ensure that we could meet those two goals. I believe the settlement has faithfully done that.

One of the critical ways that we did that, and Shannon made mention of this as well, is that the State has contributed and continues to contribute $35 million to mitigate the impact of the Tribe's Birch Creek water right on non-Indian irrigators who also take water out of Birch Creek, which is the Reservation's southern boundary stream. The centerpiece of that plan is the rehabilitation and enlargement of the Four Horns Reservoir, which is a storage facility on the Badger Creek drainage to the north of Birch Creek.

The State contributed half a million dollars out of the 2007 legislative session to preliminary engineering studies. And we believe that those studies show that it is both cost-effective and reasonable to significantly enlarge the Four Horns Reservoir to make it capable of serving its current users as well as bringing additional water over to Birch Creek, which is a critical part of making the settlement work.

As I said, the State has put $35 million into that, $19 million of which has already been appropriated. We expect to see the additional $16 million in the Governor's budget that will be submitted to the 2011 session of the Montana legislature that will convene this January.

I should also note that the Blackfeet Water Rights Settlement is important for the United States being able to recognize and utilize the full share of its entitlements out of both the St. Mary and the Milk River which are subject to the 1909 Boundary Waters Treaty with Canada. That is a treaty that apportioned significant cross-boundary streams. Our feeling in Montana is that we were an after-thought to some extent and the Canadians got a very good deal and we did not get such a good deal.

But this settlement is critical to making sure that what we do get from that treaty we are able to make benefit of for all of us who live south of the 49th parallel. That is a critical portion of this settlement as well.

Finally, I know that a representative from the Fort Belknap Tribe was invited to be here today. Unfortunately, he could not at-

tend. I know that he has submitted written testimony, and I would like to say, because the Compact Commission negotiated the settlement with the Fort Belknap Tribes as well as the Blackfeet Tribe, that we believe our technical analysis indicates that the possibility of actual conflict on the Milk River, which is a stream that originates on the Blackfeet Reservation, runs up into Canada and then back down into Montana and runs across the Fort Belknap Reservation, the possibility of conflict between the two tribes based on what we are proposing to quantify in their respective settlements is extraordinarily remote. We believe there is really no practical likelihood of any actual conflict arising.

That said, the Blackfeet Tribe and the Fort Belknap Tribes recognizing the possibility of theoretical conflict had negotiated for a memorandum of understanding which empowered the Secretary to effectively mediate between the two tribes in the event that in the future a conflict were to arise. That provision is embodied in S. 3290. So we do not believe there is any meaningful prospect of inter-tribal conflict that would result from the approval of this settlement.

And I see that my time is running short, so I will conclude my remarks. I again express my gratitude for the hard work, Senator Tester, that you and your staff have put in, that Senator Baucus and his staff have put in. We are very appreciative of all of the work that you have done on all the Indian water rights settlements that have come up from Montana. We look forward to continuing to work with both your offices, with the Committee, with our partners, the Blackfeet Tribe, and with the United States, to get this settlement into shape that it can be ratified hopefully this year.

Thank you very much for the opportunity to be here.

Senator TESTER. As do we, Jay. Thank you.

[The prepared statement of Mr. Weiner follows:]

PREPARED STATEMENT OF JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA; LEGAL COUNSEL, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Chairman Dorgan and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Jay Weiner, and I am a Montana Assistant Attorney General and staff attorney for the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of Chris Tweeten, the Chairman of the Montana Reserved Water Rights Compact Commission, the State of Montana and Governor Brian Schweitzer, in support of S. 3290, the Blackfeet Water Rights Settlement Act of 2010, and to urge your approval of this bill.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the state of Montana. The Compact Commission was established as an alternative to litigation as part of the statewide water adjudication and is charged with concluding compacts "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes" and the Federal Government. (Mont. Code Ann. § 85–2–702 (2009).)

Montana has been remarkably successful in resolving both Indian and federal reserved water rights claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne and Rocky Boy's Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne and the Rocky Boy's Compacts, and both tribes have seen substantial economic and social benefits from the com-

pleted settlements. In addition, we have reached Compact agreements with the tribes of the Blackfeet, Crow and Fort Belknap Reservations that are in the process of approval. Earlier this year, this Committee recommended to the full Senate a "do pass" on Senate Bill 375, as amended, ratifying the Crow Water Rights Settlement. The Blackfeet Tribe-Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. § 85–20–1501 (2009)), and is now before Congress for ratification pursuant to S. 3290.

Concurrent with the initiation of the Montana general stream adjudication and the establishment of the Compact Commission in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Blackfeet Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in state court. Should the negotiated settlement of the Blackfeet Tribe's water right claims fail to be approved, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Blackfeet Tribe has always had the senior water rights in the basins that are the subject of the settlement embodied in S. 3290—this Compact does not create those rights, it simply quantifies them.

The Blackfeet Indian Reservation is located in north-central Montana, bounded by Glacier National Park and the Lewis and Clark National Forest to the west, Canada to the north and prairies to the east and south. The Reservation encompasses 1.5 million acres (roughly one and a half times the size of Rhode Island), making the Reservation one of the largest in the United States. The Reservation is home to approximately half of the 16,000 enrolled Tribal members. Unemployment on the Reservation is estimated at being up to 70 percent. The region is arid, with approximately 13 inches of average annual precipitation. Ranching and farming comprise the major uses of land on the Reservation, with the principal crops being wheat, barley and hay.

The provisions in S. 3290 will recognize and quantify water rights as well as off-Reservation storage allocations that will allow the Blackfeet Tribe to provide for its growing population and to develop its natural resources. The State of Montana and the Blackfeet Tribal Business Council agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a productive and sustainable homeland for the Blackfeet People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. This settlement is the product of over two decades of negotiations among the parties, which included an intensive process of public involvement.

The primary sources of water on the Blackfeet Indian Reservation are the St. Mary River, the Milk River, the Two Medicine River, and Badger, Birch and Cut Bank Creeks. (See Attachment A.) Collectively, these watercourses contain approximately 1.5 million acre-feet per year (AFY) of water, with the St. Mary River alone accounting for roughly one-third of that total. The St. Mary River originates in the mountains of Glacier National Park and flows north and east across the Reservation before crossing into Canada. The Two Medicine River and Badger and Birch Creeks originate in the mountains to the west of the Reservation and flow east, ultimately uniting to form the Marias River just east of the Reservation. Birch Creek delineates the Reservation's southern boundary. The Milk River and Cut Bank Creek are prairie streams. The Milk River flows northeast into Canada before re-entering the United States just west of Havre, Montana, while Cut Bank Creek flows south and east until it joins the Marias River. The St. Mary and Milk Rivers are both subject to an apportionment agreed to between the United States and Canada in the 1909 Boundary Waters Treaty (BWT), and implemented by a 1921 Order of the International Joint Commission that was established by the BWT. Indian water rights were not considered during the negotiation or implementation of the BWT. The Bureau of Indian Affairs (BIA) manages the Blackfeet Irrigation Project on the Reservation. The Blackfeet Irrigation Project serves land in the Birch Creek, Badger Creek, Two Medicine River and Cut Bank Creek drainages.

The Blackfeet Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Tribal Water Right for the St. Mary River drainage within the Reservation is 50,000 AFY, not including the flows of Lee and Willow Creeks. This water right is subject to the limitation that its exercise may not adversely impact the water rights held by the Bureau of Reclamation's Milk River Project (MRP), which diverts almost the entire United States' share under the BWT of the St. Mary River into the Milk River for use by MRP irrigators in northern Montana approximately 200 miles downstream of the Reservation. The balance between tribal rights and MRP needs, and the protection of these off-Reservation water users, was a critical aspect of the negotiations of this settlement.

In 1902, when Congress authorized, and the Bureau of Reclamation began to develop, the MRP, insufficient attention was given to the senior water rights of the Blackfeet Tribe. Historically, the Tribe has received neither benefits from nor compensation for the St. Mary River water used by the MRP, which can account for up to 90 percent of the MRP's water supply in dry years. At the same time, water users in this federal project have for generations depended on the St. Mary River water delivered to Project facilities for their livelihoods. This settlement addresses these two factors by providing for an interim allocation to the Tribe of 50,000 AFY of St. Mary River Water stored in Sherburne Reservoir, which is located contiguous to the Reservation and just inside Glacier National Park. That water is to be leased by the Tribe back to the Bureau of Reclamation for use by the MRP, at a rate to be negotiated between the Tribe and the United States, while studies are conducted to identify a permanent solution capable of satisfying the Tribe's water rights while keeping the MRP whole. The Tribe is also entitled to groundwater in the St. Mary drainage that is not subject to the BWT's apportionment, as well as the entire United States' share under the BWT of the natural flow of Lee and Willow Creeks (which are located in the St. Mary River drainage), except for the water in those streams that is subject to existing water rights under state law.

The Blackfeet Tribal Water Right in the Milk River is quantified as the entire United States' share under the BWT of the Milk River, as well as all non-BWT groundwater in the Milk River drainage on the Reservation, except for the water that is subject to existing water rights under state law. In addition, the Tribe has agreed to afford protections for those existing water rights under state law, including a no-call provision for uses other than irrigation, and a 10 year phase-in for new development of tribal irrigation. The tribes of the Ft. Belknap Indian Community also claim water rights in the Milk River downstream of the point at which the Milk River re-enters the United States from Canada. Staff for the Compact Commission, which also negotiated a settlement of the water rights of the Ft. Belknap Indian Community that was approved by the State legislature in 2001 (Mont. Code Ann. § 85–20–1001 (2009)), has evaluated the potential of competing demands on the Milk River between the Blackfeet Tribe and the Ft. Belknap Indian Community and has concluded that the possibility of actual conflict is exceedingly remote. Nevertheless, the Blackfeet Tribe and the Ft. Belknap Indian Community have negotiated a memorandum of understanding over Milk River water uses pursuant to their respective settlements, which contemplates that the Secretary of the Interior shall, with the consent of the tribal governments, identify and implement alternatives to resolve any such conflict that might someday arise. This provision is included in S. 3290 as well.

The Blackfeet Tribal Water Right in Cut Bank Creek is quantified as all of the water (both surface and underground) in that drainage within the Reservation, except for the water that is subject to existing water rights under state law. The Tribe has also agreed to afford existing water rights under state law in the Cut Bank Creek drainage the same protections as are provided for in the Milk River drainage. The quantifications of the Tribal Water Right in the Two Medicine River and Badger Creek drainages are done in the same fashion as the Cut Bank Creek quantification, though the protections accorded by the Tribe to existing water rights under state law in these two drainages extend the no-call protection to all existing water rights under state law, not just non-irrigation water rights. (This more expansive no-call protection also extends to existing water rights in the St. Mary River drainage.)

The quantification of the Tribal Water Right in Birch Creek was a major component of the negotiations. The Tribe's water rights in Birch Creek were judicially recognized as early as the 1908 Ninth Circuit Court of Appeals decision in the *Conrad Investment Company* case (161 F. 829 (9th Cir.1908)), which was decided very shortly after the United States Supreme Court ruled in the seminal Indian water rights case *Winters v. United States* (207 U.S. 564 (1908)). The Blackfeet Irrigation Project diverts water from Birch Creek for project water users on the Reservation, but historically the Tribe has taken far less water from Birch Creek than that to which it was legally entitled. There is also extensive water resource development immediately to the south of Birch Creek, where roughly 80,000 irrigated acres, as well as municipalities, are served by the facilities of the Pondera County Canal and Reservoir Company (PCCRC). PCCRC also operates Swift Dam, which abuts the southwest corner of the Reservation. During the irrigation season, PCCRC's use diverts nearly all of the water available in Birch Creek. As the unconstrained development of the Tribe's Birch Creek water right recognized in this settlement has the potential to cause significant impacts to existing users, the balance between tribal and off-Reservation water use from Birch Creek was a major component of the negotiations.

The settlement quantifies a substantial Tribal Water Right in Birch Creek. The quantification consists of a senior irrigation right of 100 cubic feet per second (cfs) of Birch Creek natural flow, as well as a seasonably variable in-stream flow right (25 cfs from October 1 to March 31, and 15 cfs from April 1 to September 30), and all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek. In addition, the Tribe is entitled to the remainder of the water in Birch Creek after full satisfaction of existing uses under state law. As part of the protection of existing water rights under state law for which the State bargained, the Tribe agreed in the Compact to limit the development of its Birch Creek irrigation right to the Upper Birch Creek Drainage. There are also very specific administration provisions in the Compact concerning the manner in which the Tribe may change the use of its Birch Creek irrigation right to other beneficial purposes. In addition, a Birch Creek Management Plan (Attachment B) has been appended to the Compact, which commits the Tribe, the BIA and the operators at PCCRC to meet prior to each irrigation season to develop management plans to maximize the beneficial use of Birch Creek for all water users, and to adapt those plans as conditions warrant during the course of each irrigation season.

When the Compact Commission initially presented this proposed settlement framework at public meetings south of the Reservation, the response was overwhelmingly negative, as stakeholders believed that the risks posed to their livelihoods by full tribal development of its Birch Creek water rights were insufficiently mitigated. Consequently, the parties returned to the negotiating table and entered into an Agreement Regarding Birch Creek Water Use (the Birch Creek Agreement) on January 31, 2008. The Birch Creek Agreement (Attachment C) is a critical component of the overall settlement. Under the Birch Creek Agreement, the State agreed to put $14.5 million into an escrow fund payable to the Tribe after final approval of the Compact by the Montana Water Court. (In anticipation of settlement, the 2007 session of the Montana legislature fully funded this amount.) In the interim, the Tribe is entitled to receive the interest from that fund, up to $650,000 per year. In exchange for these payments, the Tribe agreed to defer any development of its Birch Creek water rights beyond their current use for a period of 15 years from the effective date of the Birch Creek Agreement. In addition, the Tribe agreed to prioritize in this settlement authorization and funding for the Four Horns Project.

The Four Horns Project involves the repair and improvement of the Four Horns Dam and Reservoir and associated infrastructure, features of the Blackfeet Irrigation Project located on the Reservation in the Badger Creek drainage. Preliminary engineering studies, funded by a $500,000 appropriation from the State, indicate that the storage capacity of the reservoir can be substantially increased in a cost effective fashion, and that a delivery system can be constructed economically to move excess water from the reservoir across to Birch Creek for the benefit of all Birch Creek water users. The studies suggest that this can be accomplished without reducing the access of Badger Creek water users, including those within the Blackfeet Irrigation Project, to the quantity of water currently stored in Four Horns that they use. The State has committed to spend $20 million toward the construction of this Four Horns Project, $4 million of which has already been appropriated.

One of the essential mitigation benefits secured by the State in exchange for the financial and other commitments made in the Birch Creek Agreement is the Tribe's agreement to deliver 15,000 AFY of water from Four Horns to Birch Creek, for the benefit of Birch Creek water users, from the time construction is completed on the facilities necessary to make such deliveries possible until a date 25 years from the effective date of the Birch Creek Agreement. This provision of supplemental water is expected to offset the impacts of the Tribe's development of its Birch Creek water rights after the expiration of the 15 year deferral period. In addition, the existence of infrastructure capable of bringing Four Horns water across to Birch Creek provides the Tribe with a potential market for surplus water from Four Horns into the future. With the Birch Creek Agreement in place, PCCRC and other off-Reservation stakeholders supported ratification of the Compact by the Montana legislature in 2009.

The settlement also includes provisions allowing the Tribe to lease to water users off the Reservation those portions of its water rights that it has stored or directly used. The Tribe must offer water users on Birch Creek, Cut Bank Creek, the Milk River and the St. Mary River, respectively, a right of first refusal on water leased from those drainages to users downstream. Water from Birch Creek, Cut Bank Creek and the Milk River, all of which are within the Missouri River Basin, may only be leased for use at other locations within the Missouri River Basin.

In addition, under S. 3290, the United States will allocate to the Tribe a portion of the water in the Bureau of Reclamation's storage facility on Lake Elwell, located

along the Marias River in central Montana. The bill provides for the Tribe's allocation to be all water not yet allocated from that storage facility, less the quantity of water agreed to by the Tribe and the Ft. Belknap Indian Community that may be allocated to Ft. Belknap in the future pursuant to its own water rights settlement. The bill further provides that nothing in this allocation to the Blackfeet Tribe requires the United States to provide any facility for the transportation of the Tribe's allocation from Lake Elwell to any point. The Tribe may lease water from this Lake Elwell allocation so long as it is for use within the Missouri River Basin.

The settlement also closes all of the on-Reservation basins to new appropriation under Montana law. In all cases, both under Tribal Code and State law, the development of new small domestic and stock uses are not precluded by the basin closures. For all on-Reservation basins, water rights under state law will become part of the Tribal Water Right if the Tribe reacquires the land and the appurtenant water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

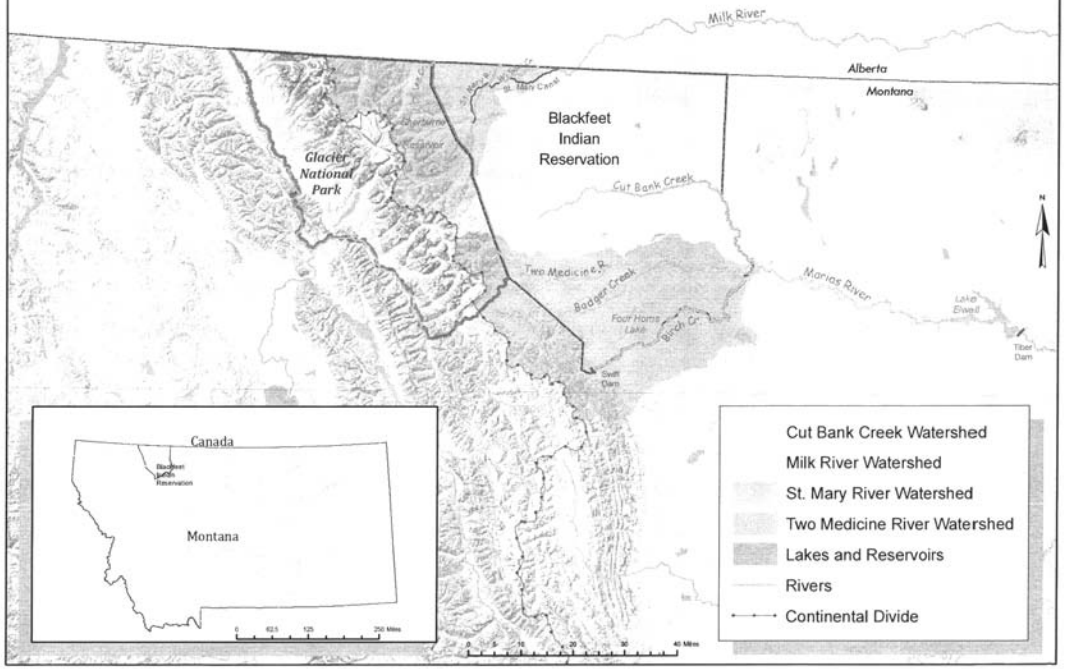
The Tribe will administer the Tribal Water Right. The State will administer water rights recognized under state law. The Blackfeet Irrigation Project will use part of the Tribal Water Right and will continue to be administered by the BIA under applicable federal law. The Blackfeet Tribe will enact a Tribal Water Code to provide for administration of the Tribal Water Right in conformance with the Compact, this Act, and applicable federal law. In the event a dispute arises, the Compact provides for an initial effort between the water resources departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board to hear disputes. Decisions of the Compact Board may be appealed to a court of competent jurisdiction.

The Compact will recognize and protect the Blackfeet Tribe's water rights and provides for the improvement of agricultural water systems and tribal economic development. The Compact promotes development for the benefit of the Blackfeet People while protecting other water uses. The Compact is the full and final settlement of all of the Tribe's water rights claims within the Blackfeet Reservation and the Tribe waives any claims to water rights not contained or reserved in the Compact. We urge your support in ratifying the Compact by passage of this Act.

Attachments

Attachment A

Blackfeet Indian Reservation Watersheds



BIRCH CREEK MANAGEMENT PLAN

This Birch Creek Management Plan is entered into by and among the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana (Tribe), the State of Montana (State), the United States Bureau of Indian Affairs (BIA) and the Pondera County Canal and Reservoir Company, or any successor entity (PCCRC) (collectively the "Parties"). This Plan shall not be effective until the Water Rights Compact ("Compact") among the Tribe, the State and the United States has been approved by the Montana Legislature, the Congress, and the Tribe, and the Montana Water Court has entered an Order approving the Compact and entered as a Final Judgment a Decree that confirms the Tribal Water Right as recognized in the Compact.

1. Purpose. The purpose of this Birch Creek Management Plan is to maximize the use of Birch Creek water for the benefit of all water users.

2. Tribal Annual Water Management Plan. The Tribe, in consultation with the BIA, shall develop an annual water management plan for the use of its Birch Creek water right as defined in Article III.C.1.a and b. of the Compact taking into account reasonable efficiencies based on the conditions of facilities of the Blackfeet Irrigation Project. The annual water management plan shall consider water supply and demand conditions, and shall be provided to the other Parties two weeks prior to the Annual Water Allocation Plan Meeting provided for in paragraph 4.

3. PCCRC Annual Water Management Plan. PCCRC shall develop an annual water management plan for its Birch Creek water diversions taking into account reasonable efficiencies based on the conditions of facilities of the PCCRC. The annual water management plan shall consider water supply and irrigation demand conditions, and shall be provided to the other Parties two weeks prior to the Annual Water Management Plan Meeting provided for in paragraph 4.

4. Annual Water Management Plan Meeting. PCCRC, the Tribe, and the BIA will meet no later than March 31st each year to share data on current water supply conditions and to agree collectively upon a master water management plan for the coming irrigation season. Upon promulgation, copies of the master water management plan will be provided to all Parties.

5. Changes to Annual Water Management Plans. Changes to any water management plan promulgated pursuant to paragraphs 2-4 may be made at any time with two days notice to the other Parties, provided by mail, email or telephone. If notice is provided by telephone, it shall also be provided by mail. Provided, however, that no changes to that portion of any water management plan involving the exercise of the portion of the Tribal Water Right set forth in Article III.C.1.b.i of the Compact may be made between April 1 and September 30 of each year.

6. Calculation of Natural Flow. The PCCRC shall calculate weekly the natural flow of Birch Creek at PCCRC's Canal B diversion dam (Canal B). The natural flow shall be calculated as the sum of: a) the measured release from Swift dam; b) the change in storage in Swift reservoir; c) calculated evaporation losses from Swift reservoir; and d) inflows downstream from Swift dam and above Canal B. PCCRC shall implement and maintain a comprehensive gauging measurement program to calculate the natural flow, shall maintain permanent records of all such gauging data and shall make these records available to the Parties upon request and without cost

7. Management of PCCRC Reservoir and Diversion Dams. PCCRC shall manage Swift Reservoir and any diversion dams owned and/or operated by it, and shall manage all diversions at such diversion dams.

8. Gauging of In-stream Flow. The Tribe shall establish and maintain two stream flow gauges to verify in-stream flows. The gauges shall be located on Birch Creek near U.S. Highway 89 and U.S. Highway 358. The Tribe shall maintain permanent records of all gauging data and shall make these records available to the Parties, upon request and without cost.

9. Measurement of Diversions. The Tribe and the State respectively shall implement procedures to measure all diversions from Birch Creek made under their authority. The Tribe and the State shall each maintain permanent records of the uses authorized under their authority and shall make these records available to the Parties, upon request and without cost.

10. Release and Bypass. PCCRC shall release at Swift Dam and bypass at Canal B water necessary to satisfy the Tribe's senior in-stream flow right and any additional natural flow as needed to maintain the in-stream flow right at the Birch Creek stream flow gauges maintained by the Tribe under paragraph 8. PCCRC shall also bypass at Canal B the Tribal call for its senior direct flow right of up to 100 cfs, less the amount of any authorized Tribal diversion(s) taken out above Canal B. The Tribe shall bypass at its diversion or diversions on Birch Creek water necessary to satisfy the Tribe's senior in-stream flow right, any additional natural flow released by PCCRC as needed to maintain the in-stream flow at the Birch Creek stream flow gauges maintained by the Tribe under paragraph 8, and such Natural Flow as may be released by PCCRC to satisfy downstream Water Rights Arising Under State Law.

11. Channel Maintenance Flows. If the natural flows of Birch Creek are insufficient to provide an adequate volume of water for regular channel maintenance, PCCRC, in a manner agreed upon, after consultation with appropriate fish and wildlife agencies, by the Tribe, the BIA, and PCCRC in consultation with other affected water users, shall provide up to 10,000 acre-feet of stored water to ensure that a channel maintenance flow is obtained no fewer than three times every 12 years, and as often as practicable, under hydrologic conditions as shall be agreed upon by the Tribe, the BIA and the PCCRC.

The Tribe, the BIA and PCCRC may also agree to modify the channel maintenance schedule as hydrologic conditions warrant.

12. Amendments to Management Plan. This Birch Creek Management Plan may be amended at any time by the mutual written agreement of the Parties.

13. Dispute Resolution. Any disputes over the interpretation or implementation of this Birch Creek Management Plan, including but not limited to disputes over the promulgation of and changes to the annual management plans contemplated by paragraphs 2-5 and the channel maintenance flow regime contemplated by paragraph 11 of this Birch Creek Management Plan, shall be resolved by the Compact Board pursuant to Article IV.J of the Compact.

Blackfeet Tribe

By_____
Dated_____

Pondera County Canal and Reservoir Company

By_____
Dated_____

The State of Montana

By_____
Dated_____

Bureau of Indian Affairs

By_____
Dated_____

AGREEMENT BETWEEN
THE BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION
AND
THE STATE OF MONTANA
REGARDING BIRCH CREEK WATER USE

THIS AGREEMENT is made and entered into this 31st day of January, 2008, by and between the BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, MONTANA ("Blackfeet Tribe" or "Tribe"), acting through the Blackfeet Tribal Business Council, and the STATE OF MONTANA ("State"), acting through the Montana Reserved Water Rights Compact Commission ("Compact Commission"). The Tribe and the State are also referred to herein as the "Parties."

AUTHORITY

The Blackfeet Tribe has authority to enter into this Agreement pursuant to the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation, Article. VI, Section 1(a).

The State has authority to enter into this Agreement pursuant to Montana Code Ann. §§ 85-2-702 and 703 and 85-20-1504, MCA.

WITNESSETH:

WHEREAS, the Parties are currently negotiating a Compact to resolve the water rights of the Tribe, and expect to complete the Compact in the near future; and

WHEREAS, the Compact will not be final until approved by the Montana Legislature, the Congress and the Tribe, and entered as a decree by the Montana Water Court; and

WHEREAS, the Parties expect the Compact to resolve, among other things, the water

rights of the Tribe in Birch Creek in the amount of: a) 100 cubic feet per second (cfs) for irrigation use in the Upper Birch Creek Drainage from Swift Dam to the confluence of Blacktail Creek; b) 15 cfs from October 1 to March 31 and 25 cfs from April 1 to September 30 of each year for instream flow; c) the remainder of the natural flow in Birch Creek measured at the State Highway Bridge 358 crossing Birch Creek and any gaining flows available from the same bridge crossing to Birch Creek's confluence with the Two Medicine River after satisfaction of Water Rights Arising Under State Law; and d) all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek; and

WHEREAS, the Parties agree that full use of the Tribe's Birch Creek water right under the Compact should be implemented over a period of years in order to provide sufficient time to develop other water supplies that may be used to mitigate impacts to holders of Water Rights Arising Under State Law in Birch Creek; and

WHEREAS, the Parties desire to set out the terms and conditions under which full implementation of the Tribe's Birch Creek water right under the Compact will occur;

NOW THEREFORE, the Parties agree as follows:

1. With the exception of the terms "Parties" and "Effective Date", which are specifically defined herein, the definitions contained in Article II of the Compact are hereby incorporated by reference to the extent they are used herein.

2. For the fifteen (15) year period beginning from the Effective Date of this Agreement, the Tribe shall defer any use, including authorization of any use by others, of Birch Creek water over and above the amount currently used by the Tribe pursuant to the decree in *Conrad*

Investment Co. v. United States, 156 F. 123 (D. Mt. 1907), *affirmed* 161 F. 829 (9th Cir. 1908). The amount of water currently used by the Tribe under the *Conrad Investment* decree is: a) up to 36 Cfs and 8810 acre-feet annually for irrigation purposes during the irrigation season; and b) 6 Cfs for instream flow during the irrigation season. In addition to use of 6 Cfs for instream flow; the Tribe may continue its current practice of using up to 8810 acre-feet of its *Conrad Investment* irrigation right to irrigate acres within the Birch Creek Unit of the Bureau of Indian Affairs' Blackfeet Irrigation Project or may irrigate additional or different lands within the Upper Birch Creek Drainage so long as the Tribe's total diversions from Birch Creek do not exceed 36 Cfs or 8810 acre-feet and so long as any change in the place of use causes no adverse effect to any holder of Water Rights Arising Under State Law.

3. In any federal legislation approving the Compact, the Tribe and the State will jointly seek authorization and all necessary funding from Congress for the rehabilitation, betterment, enlargement, improvement and/or construction of certain facilities of the Badger-Fisher Irrigation Unit of the Bureau of Indian Affairs' Blackfeet Irrigation Project and other related facilities (collectively the "Four Horns Project" or "Project"). The Parties agree to seek authorization and funding from Congress for the Four Horns Project including : a) rehabilitation and betterment of the Four Horns Feeder Canal system up to at least 300 cfs in capacity; b) enlargement of the existing off-stream Four Horns Dam and Reservoir to its maximum practical capacity; c) construction of facilities to deliver a minimum of 15,000 acre-feet of water per year from the enlarged Four Horns Dam to a point on Birch Creek to be designated by the Parties; d) rehabilitation and betterment of the outlet canal delivery system from Four Horns Dam to

Blacktail Creek; e) rehabilitation and betterment of the Badger-Fisher Main Canal; and f) measures to enhance on-farm efficiency in the Badger-Fisher Irrigation Unit of the Blackfeet Irrigation Project.

4. As part of the planning and feasibility studies relating to the facilities described in paragraph 3, the Tribe, the State and the entity authorized by Congress shall identify those structures or portions of structures that will be constructed, rehabilitated or bettered primarily for the purpose of delivering water to holders of Water Rights Arising Under State Law in Birch Creek under this Agreement, and shall agree on the ownership, operation, maintenance and replacement obligations relating to those facilities, provided that the Tribe and the State will jointly seek provisions in any federal legislation approving the Compact ensuring that the Blackfeet Irrigation Project water users and the holders of Water Rights Arising Under State Law in Birch Creek shall have no obligation for operation, maintenance or replacement costs of structures or portions of structures identified under this paragraph as being constructed, rehabilitated or bettered primarily for the purpose of delivery water to holders of Water Rights Arising Under State Law in Birch Creek under this Agreement.

5. The Tribe and the State will cooperate and coordinate with the Bureau of Indian Affairs in the formulation and development of studies, designs, plans and specifications for the construction and/or rehabilitation of any Blackfeet Irrigation Project facilities.

6. As part of the state contribution to the Blackfeet water rights settlement, the State will contribute a portion of the funding for the Project in an amount to be agreed upon by the Parties or as may be established by Congress if the Parties are unable to agree. Such funding shall be

made available to the entity or entities authorized by Congress, on a schedule to be agreed upon by the Parties or established by Congress, but no later than the schedule on which any federal funding is provided, subject to appropriation of such funds by the Montana legislature. The Parties agree that a cooperative agreement or such other agreement required by Congress shall be entered into to provide for the transfer and accounting of the funding under this Paragraph.

7. The Tribe expects to seek authorization for funding from Congress for other projects and for other purposes as part of a comprehensive water rights settlement. The Tribe will give highest priority to the construction and completion of the Four Horns Project among the projects that may be funded by Congress in any federal legislation approving the Compact, so long as other Reservation projects funded in the same legislation may be constructed during the same period of time as the Four Horns Project.

8. At such time as the entity provided by Congress certifies that the Four Horns Project becomes capable of making such deliveries, the Tribe, as provided by Congress, will provide 15,000 acre-feet of water annually, as measured at Four Horns Dam, to a point on Birch Creek agreed to by the Parties for allocation pursuant to water rights under State law. The Tribe, as provided by Congress, will continue to provide 15,000 acre feet to the agreed upon point on Birch Creek annually thereafter through the conclusion of the 25th year after the Effective Date of this Agreement. The Tribe, in coordination with the BIA, and the State shall agree on a reasonable delivery schedule no later than March 1 of each year in which there is a delivery obligation under this Paragraph. If the Project first becomes capable of making such deliveries during the irrigation season (April 1 to September 30 of each year), the Tribe shall provide a

proportionate amount of water consistent with the remaining irrigation season for that year as mutually agreed with the State. Compensation to the Tribe for providing water under this paragraph is included within the compensation provided for in Paragraph 10.

9. In the event that, after the conclusion of the 15 year period set forth in Paragraph 3, water conditions develop during an irrigation season such that the full 15,000 acre-feet set forth in Paragraph 8 is unavailable to be provided to the agreed upon point in Birch Creek as contemplated by Paragraph 8, the Tribe will reduce the exercise of the instream flow right set forth in Article III.C.1.b of the Compact by an amount not to exceed 13 cfs during the portion of the irrigation season in which the shortage is expected to occur. The Tribe and the State, in consultation with the Bureau of Indian Affairs, shall agree on such additional criteria as may be necessary to implement this provision, taking into account the water use by the Blackfeet Irrigation Project, which shall have priority, and the expected amount and duration of any shortage.

10. In consideration for the obligations undertaken by the Tribe in Paragraphs 2-9, and separate and apart from the State's obligation to contribute to the construction of the Four Horns Project as set forth in Paragraph 6 and any other State contribution to a Blackfeet water rights settlement, the State shall pay to the Tribe $14.5 million ($14,500,000.00). Payment to the Tribe shall be made as follows:

a) provided that the total amount of interest disbursed shall not exceed $650,000 annually, as required by §85-20-1504(3)(b), MCA, or such additional interest amount that may be established by the Montana legislature, interest on the $14.5 million described in

this Paragraph shall be made available to the Tribe upon the date this Agreement is executed by the Tribe and the State (the Execution Date) and shall be paid to the Tribe quarterly through a payment arrangement to be established by the Tribe and the State separately from this Agreement; and

b) the principal of $14.5 million shall be paid to the Tribe through a payment arrangement to be established by the Tribe and the State separately from this Agreement within the later of:

(1) 75 days after the entry of a final decree by the Montana Water Court approving the Blackfeet water rights compact if no appeal therefrom is filed; or

(2) 30 days after the entry of judgment of a judicial decision finally resolving any and all appeals taken from such decree.

11. The payments set forth in Paragraph 10 are in full satisfaction of the obligations undertaken by the Tribe in this Agreement. The amount paid to the Tribe under this Agreement is not, and shall not be considered as, a precedent for or a basis to set the market value or price of water for any water marketed by the Tribe.

12. Pursuant to any federal legislation approving the Compact, the Tribe may market any available water stored in Four Horns Reservoir over and above the 15,000 acre feet that the Tribe is obligated to deliver annually under this Agreement, and any available water stored in Four Horns Reservoir after the termination of this Agreement, under such terms and conditions as may be set in the Compact or as may be directed by Congress.

13. The Parties expect the Project to be completed and constructed prior to the end of the

period of deferral in Paragraph 2. However, if completion is delayed due to cataclysmic or catastrophic events caused by events beyond the control of the Parties, such as acts of war or terrorism, or earthquake, flood or fire, or if, despite best efforts, construction is rendered impossible or impracticable due to the unavailability of materials, transportation or manpower, or if Congress otherwise is unable timely to appropriate the necessary funding to complete the Project within 15 years of the Effective Date of this Agreement due to such cataclysmic or catastrophic events, then the period of the deferral set forth in Paragraph 2 shall be extended until completion of the Project under such schedule as may be necessary given the nature of the delay. The Parties understand that the events causing delay contemplated by this Paragraph are only events of extraordinary magnitude and seriousness.

14. Any disputes concerning the meaning of this Agreement or actions to enforce the provisions of this Agreement shall be brought in a court of competent jurisdiction, provided that any disputes over the annual delivery of the 15,000 acre-feet of water required by Paragraph 8 shall be presented first to the Compact Board created by the Compact. The Tribe and the State waive their respective immunities from suit in a court of competent jurisdiction for the sole purpose of obtaining a declaration of the meaning of this Agreement or to enforce its terms, but not for money damages or attorney fees, provided that the Tribe may be awarded interest on any payments under this Agreement that are determined by a court of competent jurisdiction to have been improperly withheld or delayed.

15. Any notice, demand or request required by this Agreement shall be provided to the State to:

Director
Department of Natural Resources and Conservation
1625 11th Avenue
Helena, MT 59620

and to the Tribe to:

Chairman
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

16. This Agreement shall be voidable at the discretion of either Party if either Party exercises its right, as set forth in Article VII.A of the Compact, to withdraw from the Compact, or if the Compact is not entered as a final decree by the Montana Water Court within the time period set forth in Article VII.B of the Compact, except that any interest paid to the Tribe under Paragraph 10 may be retained by the Tribe and shall not be refunded to the State. The Parties commit to use their best efforts to ensure that the Compact is finalized and the necessary approvals are obtained, including federal legislative approval, as soon as possible.

17. The Effective Date of this Agreement shall be the later of the date of execution of this Agreement by the Parties or the date of the issuance of any required approval by the Secretary of the Interior or his authorized representative, or by Congress, if the Secretary determines that congressional approval of this Agreement is necessary.

18. No amendments or modifications of this Agreement, or any provisions contained herein, shall be binding and enforceable unless the same shall be in writing and executed in the same manner as this original Agreement and shall after execution become a part of this Agreement. No amendment or modification of this Agreement shall constitute an amendment or

modification of the Compact.

19. Any waiver or failure to enforce the terms of this Agreement by either Party shall not constitute a waiver by that Party of the right to enforce or compel performance with respect to any continuing or subsequent default hereunder.

20. Neither this Agreement nor any of the rights, duties or obligations hereunder shall be assigned or transferred except with the express written consent of the Parties, provided that upon the sunset of the Compact Commission, any duties of the Compact Commission under this Agreement may be carried out by any designated successor of the Compact Commission.

21. The term of this Agreement shall be for a period commencing on the Execution Date and ending at the conclusion of the 25th year from the Effective Date.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, MONTANA

By Its Chairman

STATE OF MONTANA

By Its Governor

Senator TESTER. John Bloomquist?

STATEMENT OF JOHN E. BLOOMQUIST, ATTORNEY, PONDERA COUNTY CANAL AND RESERVOIR COMPANY

Mr. BLOOMQUIST. Thank you, Senator Tester, members of the Committee and staff. My name is John Bloomquist, I am an attorney from Helena, Montana, and I am testifying on behalf of the Pondera County Canal and Reservoir Company, which I will refer to in my remarks as PCCRC.

PCCRC is a non-profit corporation located in Valier, Montana. Its history dates back more than 124 years to settlement and development under the Carey Land Act and other Federal laws.

Today, PCCRC supplies water to approximately 450 water users for irrigation and stock water purposes, covering over 80,000 acres

of irrigated lands that are the foundation of the regional agricultural economy. PCCRC also supplies municipal water to the citizens of the city of Conrad.

The major source of water for the project is Birch Creek, which is located along the southern boundary of the Blackfeet Indian Reservation. The waters of Birch Creek are also stored in two major reservoirs operated by PCCRC, Swift Dam and Lake Frances.

PCCRC is interested in the compact, primarily because of the potential impact on its water supply. It is estimated that the impact of the Tribal Water Right on Birch Creek will reduce project water supplies by approximately 15,000 acre feet per year. This would affect 22,500 acres of irrigation within the project, reducing producers' revenue by just under $8 million per year, reducing land values by $500 to $600 per acre on affected areas and reducing improvement value by $225 to $300 per acre.

That is why legislation ratifying the compact should include adequate mitigation measures. We are pleased that S. 3290 does so by directing the Secretary to make improvements to the Four Horns Dam, which will assist in providing mitigation water to PCCRC, and by establishing a fund to mitigate long-term impacts on project users.

With that background, let me go to the heart of the matter to explain why it is appropriate for the Federal legislation to establish a fund to mitigate the compact's long-term impacts on PCCRC. The first reason is that the impact is the direct result of Federal policies. The settlement of water rights claims reflects one set of important Federal policies. The PCCRC itself reflects another. The PCCRC project exists in large part as a project developed under the Federal Carey Land Act, which encouraged settlement and development of associated irrigation projects.

We believe both Federal policies should be furthered in the legislation and are in fact furthered by the establishment of the mitigation fund. The second reason for the mitigation fund is, although there is some uncertainty about the precise magnitude of the economic impact on the project, 25 years from now everyone agrees that it will be substantial. In many cases, the impact of the water compact on non-tribal water users is mitigated directly and permanently as this compact does for the Milk River project.

However, with respect to PCCRC, the direct mitigation is temporary with a 10-year deferment period, followed by a 15-year period where 15,000 acre feet of Four Horns water would be delivered to the company. After 25 years, the direct mitigation ends.

For farm families who have been on land for generations, 25 years is not a very long time. Without a mitigation fund, irrigators will have to either pay sharply higher costs or alternatively, get out of farming. In either case, the economic impact will be great, not only to PCCRC and its users, but to the entire regional economy.

We suggest that the most fair and efficient way to address this is by establishing the mitigation fund, which is set forth in the legislation. Initially capitalize the fund at $27 million. That fund would be administered by a Federal agency, and the fund would be available to support appropriate mitigation measures. For example, it may be used to lease water from the Blackfeet Tribe, construct

water savings projects, or if necessary, purchase PCCRC shares for the retirement of irrigation lands.

We would be happy to work with the Committee to provide further details about the appropriate operations of the mitigation fund.

In conclusion, we commend Senator Baucus and you, Senator Tester, for your work on this legislation. We also commend the State of Montana and the Blackfeet Tribe and the Federal officials who have been involved in the long and difficult negotiation of the compact. We particularly appreciate the State's and the Tribe's support for including mitigation provisions in the legislation. We are committed to work with the parties to produce a bill that settles water rights claims and provides economic opportunities to all residents in North Central Montana.

Thank you, Senator.

[The prepared statement of Mr. Bloomquist follows:]

PREPARED STATEMENT OF JOHN E. BLOOMQUIST, ATTORNEY, PONDERA COUNTY CANAL AND RESERVOIR COMPANY

Mr. Chairman and Committee Members, my name is John E. Bloomquist and I am an attorney from Helena, Montana and I am appearing before you today on behalf of the Pondera County Canal and Reservoir Company. On behalf of the Pondera County Canal and Reservoir Company, I wish to express our thanks for the invitation to testify on S. 3290, a bill which is critical to the water users of the Pondera County Canal and Reservoir Company and to a very large region of north central Montana. I also wish to express our thanks to Senators Max Baucus and Jon Tester, and their staffs for their hard work on this bill and in particular the provisions of the bill which relate to Birch Creek water supplies.

I. Introduction and Overview

The Pondera County Canal and Reservoir Company ("PCCRC" or the "Company") is a non-profit corporation located in Valier, Montana which owns and operates, for the benefit of its users, an irrigation and water supply project situated in north-central Montana. PCCRC supplies water to approximately 450 water users for irrigation and stock watering purposes as well as providing municipal water to the citizens of the City of Conrad in Pondera County, Montana.

Water associated with the PCCRC project is supplied to PCCRC's users via an extensive system of canals and storage reservoirs which were developed by the Company's predecessors beginning in the mid to late 1880's. The major source of water for the project is known as "Birch Creek," which is located along the southern boundary of the Blackfeet Indian Reservation in north-central Montana.

PCCRC is the successor to water rights developed and appropriated from Birch Creek for use within the Company's water supply project. The waters of Birch Creek are also stored in two major reservoirs owned by PCCRC (Swift Dam and Lake Frances) for distribution to the Company's water users for irrigation and municipal purposes. In addition, Lake Frances is utilized by recreationalists and anglers in this region of Montana for the fishing and recreational opportunities provided by the reservoir.

Because of the critical importance of Birch Creek to PCCRC's water supply, the Company has been actively involved in following negotiations among the State of Montana, the Blackfeet Tribe, and the United States in the efforts to quantify the Blackfeet Tribe's reserved water rights for Birch Creek and other water sources. PCCRC has actively monitored and commented on in the negotiations conducted by the Montana Reserved Water Rights Compact Commission (RWRCC), the Blackfeet Tribe, and the United States for approximately 20 years.

The negotiations of the Tribal Water Right (TWR) for Birch Creek have been closely followed by PCCRC due to the critical nature of Birch Creek as the major water source for the Company's water users. Over the years, PCCRC and its representatives have closely monitored the various proposals discussed by the state, tribal, and federal negotiation teams regarding the quantification and use of the TWR for Birch Creek.

Throughout the negotiation process, the chief issue for PCCRC, on behalf of its water users, has been to evaluate the impact on the Company's water supply of any

Birch Creek TWR which would ultimately be negotiated by the state and the Tribe. PCCRC's main issue throughout the process has been to make sure the Company's water supply is not adversely affected by the quantification and ultimate development of the TWR for Birch Creek.

In negotiations for the Birch Creek TWR, PCCRC has consistently advocated various proposals which recognize the existence of a substantial Birch Creek TWR for use and development by the Blackfeet Tribe while also recognizing the importance of the Company's Birch Creek water supply for its users. In this vein, PCCRC has been very active in suggesting proposals for mitigation of impacts on PCCRC's water supply by the development of the TWR on Birch Creek. Mitigation, and the concept of developing and implementing various measures to protect water users who may be affected by the development of tribal water rights, has been an effective mechanism in Montana in achieving a variety of water settlements between the State of Montana and various Indian Tribes in Montana.

The concept of mitigation of impacts of the Birch Creek TWR has been recognized by the State of Montana and the Blackfeet Tribe. Mitigation, in the context of the Montana-Blackfeet Compact, includes two important components. The first component involves the development and construction of additional water storage opportunities within the Blackfeet Indian Reservation associated with the Four Horns Dam and Reservoir. Four Horns Dam and Reservoir, and the development and betterment of the dam, reservoir, and associated water delivery systems represent a viable opportunity to improve water storage capabilities on the Blackfeet Indian Reservation for the benefit of the Blackfeet Tribe, while also providing a viable source of mitigation water which could be available to Birch Creek to offset the impacts to PCCRC's water supply by development of the negotiated Birch Creek TWR. PCCRC believes the provisions included in S. 3290 concerning improvements to the Four Horns Dam, reservoir, and water delivery system is a critical component of the Montana-Blackfeet Tribe water rights compact and strongly supports congressional approval and authorization of these projects on the Blackfeet Reservation.

The second component of mitigation of impacts of the Birch Creek TWR involves adequate funding to assure that mitigation projects become a reality, and that mitigation from the development of the Birch Creek TWR provides long-term solutions, not only for the Tribe but for other Birch Creek water users as well.

Regarding mitigation funding, PCCRC has actively worked with the State of Montana and the Blackfeet Tribe to secure state funding for deferment of implementation of the Birch Creek TWR for a period of years, as well as assuring the delivery of water from an improved Four Horns Dam and Reservoir system to PCCRC's water delivery system from Birch Creek. As set forth in the Birch Creek Agreement which accompanies the Montana-Blackfeet Compact, the Tribe has agreed to defer development of its Birch Creek TWR above historic use for a period of 15 years. In addition, the Tribe has agreed to deliver to Birch Creek approximately 15,000 Acre-Feet ("AF") per year from an improved Four Horns Dam and Reservoir until the 25th anniversary of the Birch Creek Agreement.

In the spring of 2009, the State of Montana and the Blackfeet Tribe amended the Birch Creek Agreement to further support the components of successful mitigation for a period beyond the 25-year term set forth in the Birch Creek Agreement. On February 13, 2009, the state and the Blackfeet Tribe agreed that the Four Horns project improvements be included in federal legislation which would ratify the Montana-Blackfeet Water Compact, and that additional funding may be required to mitigate impacts of development of the Birch Creek TWR after the expiration of the Birch Creek Agreement. In the amendment to the Birch Creek Agreement, both the state and the Blackfeet Tribe agreed to support federal funding for this purpose.

Based upon the amendment to the Birch Creek Agreement, as set forth above, PCCRC supported the Montana-Blackfeet Compact as the compact was presented to the 2009 Montana legislature. PCCRC's support for the compact was grounded upon the recognition by both the State of Montana and the Blackfeet Tribe that development of the Birch Creek TWR would at times adversely affect PCCRC's Birch Creek water supply, and that the Four Horns Dam and Reservoir improvements and additional mitigation funding were viable opportunities to mitigate impacts on PCCRC's Birch Creek water supplies from development of the TWR. The 2009 Montana Legislature passed the Montana-Blackfeet Compact, setting the stage for this historic agreement to be presented to the United States Congress for ratification.

S. 3290 contains provisions which recognize the necessity of improving the Four Horns dam, reservoir, and delivery facilities so that water stored in Four Horns may be delivered to PCCRC's water system from Birch Creek. In addition, S. 3290 includes provisions which authorize the establishment of a Birch Creek Mitigation Fund to be used to mitigate impacts from development of the Birch Creek TWR on the water supplies of PCCRC. These provisions contained within S. 3290 are inte-

gral to the long-term success of the Montana-Blackfeet Tribe water rights settlement and provide the necessary framework for a successful compact which meets the needs of the State of Montana, the Blackfeet Tribe, and the water users of PCCRC who depend upon Birch Creek water supplies.

II. Background of the PCCRC Project and Rationale for S. 3290 Birch Creek Mitigation Provisions

A. History of PCCRC and Use of Water by PCCRC Water Users

1. PCCRC History

The history of PCCRC and the associated development and use of the PCCRC water supply dates back over 124 years. Water right appropriations and the associated delivery systems of the present day PCCRC were developed in accordance with various state and federal laws designed to encourage irrigation and reclamation of the arid west for agricultural purposes. In the early days of settlement, homesteaders appropriated water from Birch Creek and Dupuyer Creek for irrigation purposes on homestead lands, and public domain lands, at the behest and encouragement of Congress. In fact, several of PCCRC's water rights for these sources predate Montana statehood.

In addition to water rights appropriated by settlers in the region under the Homestead laws, PCCRC also has its origin grounded in a substantial part under the federal Carey Land Act of 1894, wherein, Congress authorized grants of public domain lands to certain western states to encourage settlement and reclamation of those arid lands. Although lands were granted to the states by the Federal Government under the Carey Land Act, it was expected that private enterprise would finance and develop the actual reclamation and associated water supply and distribution systems associated with irrigation of the lands provided to the states with ultimate disposition of the lands to the settlers. PCCRC's development as a Carey Land Act project began in about 1909. As part of the early development of the PCCRC water supply system, the Federal Government assessed the available water supply from Birch Creek for the project and deemed the water supply to be sufficient to authorize development of the project under the Carey Land Act. A major portion of PCCRC's irrigated acres and development of the water storage and distribution supply serving these lands has as its origin the development of the project under the federal Carey Land Act.

As mentioned above, under the Carey Land Act, both the Federal Government and state of Montana assessed the water supply for the project, and after confirming water supplies were sufficient, encouraged PCCRC's predecessors to construct and finance much of the water supply and distribution systems which serve PCCRC's shareholders today. Under the auspices of both state and federal statutes, corporations were established to construct the water supply systems which eventually provided water to settlers who acquired lands served by the project. PCCRC itself is the successor "operating company" to it predecessor "construction company" which financed and developed the system which serves irrigators and communities in the Valier and Conrad areas of north central Montana.

As a result of the development of a major portion of the water supply system under the terms of the Carey Land Act, PCCRC is owned and controlled by shareholders of the Company who are the successors of the original homesteaders and settlers who reclaimed arid lands using the project water supply. PCCRC holds the water rights used by its shareholders from Birch Creek, Dupuyer Creek, and other area sources for the benefit of its water users. PCCRC also operates Swift Reservoir on Birch Creek and Lake Frances near the town of Valier, the two major storage reservoirs associated the project, as major components of the Company's Birch Creek water delivery system. As also required under the Carey Land Act, PCCRC's predecessors developed and constructed over 500 miles of canals and laterals to serve the acres irrigated by the project.

As a result of development of the project under the Federal Carey Land Act, PCCRC supplies water to approximately 450 shareholders for agricultural purposes, as well as supplying the city of Conrad with its municipal water supply. PCCRC is responsible for managing the water supply and distribution works which supplies water to over 80,000 acres of irrigated lands in the area. These 80,000 acres of irrigated lands provide the foundation of the local and regional agricultural economy of this area of Montana.

B. PCCRC Water Supply System

1. Birch Creek

Birch Creek provides PCCRC shareholders with approximately eighty-five percent (85 percent) of the water used in the Company's storage and distribution system.

Near the headwaters of Birch Creek, PCCRC owns and operates Swift Reservoir which was constructed in about 1912 and reconstructed after a catastrophic flood in 1964 to store and regulate a portion of the Company's water supply. The construction of Swift Reservoir was done by PCCRC's predecessors as part of the Carey Land Act obligations of the Company. Swift Reservoir can store over 30,000 acre-feet of Birch Creek water which the Company can regulate and release from Birch Creek to the Company's main Birch Creek diversion system, known as the "B Canal." From Birch Creek, via the B Canal, the Company diverts water to its main storage facility known as "Lake Frances" situated near the town of Valier, Montana. Lake Frances has a storage capacity of approximately 115,000 acre-feet and was constructed in 1909, also as part of the Company's predecessors Carey Land Act obligations. Lake Frances, in addition to being the project's main storage and distribution reservoir, also serves as a popular recreation site for anglers and recreationalists in this region of Montana.

2. Dupuyer Creek

Dupuyer Creek also serves as source of PCCRC's water supply which is stored and distributed to its shareholders. Although an important source of water, Dupuyer Creek supplies the Company with approximately fifteen percent (15 percent) of PCCRC's water supply requirements, substantially less than the Company's reliance on Birch Creek.

PCCRC holds several water rights for the waters of Dupuyer Creek which are diverted from the creek via the Company's "D Canal" and delivered to the distribution and storage system. Although Dupuyer Creek is an important source of the Company's water supply, Birch Creek, and water supplied by Birch Creek at the Company's B Canal diversion, is the predominant source of supply for the users of the PCCRC water supply system.

C. Historic Water Distribution from Birch Creek Supplies

In addition to PCCRC using water from Birch Creek, the Blackfeet Irrigation Project (BIP) operated by the U.S. Bureau of Indian Affairs (BIA), also diverts water from Birch Creek for irrigation purposes on the Blackfeet Reservation.[1] Pursuant to the decree in *United States v. Conrad Investment Co.*, 156 F. 123 (D. Mont. 1907), *aff'd.* 161 F. 829 (9th Cir. 1908), diversions from Birch Creek for the BIP have historically varied from approximately 11 cubic feet per second ("c.f.s.") to 50 c.f.s. during the irrigation season, or as expressed volumetrically, from approximately 1,495 AF to 7,450 AF/year, based on available Company records.

In addition to use of Birch Creek water by the Blackfeet Tribe for irrigation purposes, PCCRC has worked with the Tribe and allowed on average approximately 6 c.f.s to flow past the B Canal diversion for instream flow purposes. The volume of water associated with the 6 c.f.s. bypassing the B Canal on Birch Creek over the course of a year results in approximately 4,380 AF/year of Birch Creek water for instream use by the Tribe. Under the Montana-Blackfeet Compact, the Blackfeet Tribe's water right on Birch Creek has been quantified at levels that exceed historic demands of the Tribe for the water of Birch Creek.

D. Birch Creek Tribal Water Right as Established in Montana-Blackfeet Compact

1. Article III, Section C., Birch Creek Tribal Water Right

Under the Montana-Blackfeet Compact, the components of the Birch Creek TWR may be summarized as follows:[2]

a. Irrigation—100 c.f.s. Direct Use water right of the natural flow of Birch Creek for use in the Upper Birch Creek Drainage;

b. Instream Flow—a natural flow right in Birch Creek of 15 c.f.s. from October 1 to March 31; and 25 c.f.s. from April 1 to September 30 of each year;

c. Additional Flow Right—after satisfaction of all state-based water rights, Tribe may divert or authorize use of all natural flow in Birch Creek as measured at State Highway 358 bridge;

d. Groundwater Right—all groundwater not hydrologically connected to Birch Creek;

e. Priority Date—October 17, 1855;

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[1] Establishment of the BIP by Congress occurred in 1907. *See,* 34 Stat. 1035–1036.

[2] As provided herein, the TWR is summarized for purposes of this written testimony. Articles II, III, and IV of the Compact should be reviewed together and in conjunction with the two (2) Birch Creek agreements, in order to properly examine the extent and potential effect of the Birch Creek TWR.

f. Period of Use—b., c., and d. above year round and a. above April to October 1 of each year;

g. Points/Means of Diversion—as authorized by Tribal Water Code;

h. Call Protection—other than rights from Birch Creek, all other sources in Basin 41M protected from call for water under the instream flow TWR;

i. Birch Creek Management Plan—TWR for irrigation also governed by Birch Creek Management Plan Agreement; and

j. Commencement of Development—TWR for irrigation and instream flow subject to Agreement on Birch Creek Water Use.

2. Impact of Birch Creek TWR on PCCRC Water Supply

Under the Montana-Blackfeet Compact, the TWR on Birch Creek does not have a volumetric cap or limit. As such, the compact does not establish a readily identifiable block of Birch Creek water from which to assess firm impacts on the PCCRC Birch Creek supply. However, based upon PCCRC water use records, and based upon the terms of the TWR as set forth in the compact, and the ancillary agreements, estimates have been presented by state and tribal representatives which calculate the impact on PCCRC water supplies to be approximately 15,000 AF/year.

Assuming an average delivery of irrigation water by PCCRC to its water users of 8 inches per acre, an impact of a loss of 15,000 AF/year to PCCRC will affect 22,500 acres of irrigation within the PCCRC project. Given this potential substantial impact on PCCRC water users and acres served under the PCCRC project, PCCRC has actively participated with state and tribal representatives in examining a variety of mitigation measures in an attempt to lessen effects from development of the compacted Birch Creek TWR and to achieve long-term security for the Company's water supply.

Because PCCRC is a very efficient user of water for irrigation purposes, PCCRC has been able to serve project shareholders and acres under the project with water within the Company's historic diversion and distribution patterns. However, any additional loss of water supply as a result of development of the Birch Creek TWR could have serious adverse effects on PCCRC's water users and the local and regional economy.

E. Proposals to Mitigate Impacts of the Birch Creek TWR on PCCRC Water Users

The State of Montana, the Blackfeet Tribe, and PCCRC have identified various alternatives to help mitigate full development of the proposed TWR on Birch Creek. These alternatives include proposals for projects which would provide additional water to Birch Creek as well as proposals for state-based water users to lease water from the Blackfeet Tribe, or to otherwise mitigate a loss of Birch Creek water supplies on the PCCRC project. S. 3290 includes important provisions in this regard.

1. Blackfeet/Montana Agreement Regarding Birch Creek Water Use

Due to impacts of the Birch Creek TWR on PCCRC's Birch Creek water supplies, the state and the Tribe have negotiated the "Agreement on Birch Creek Water Use" as part of the TWR for Birch Creek. Under the agreement, which is a collateral agreement to the compact, the Tribe has agreed to defer any additional use of the negotiated TWR on Birch Creek, over and above a set level of use for irrigation and instream flow purposes, for a period of 15 years. In addition, the Tribe and the state agreed that they would jointly seek federal funding authorization in any federal legislation for the betterment and improvement of Four Horns Dam and Reservoir on the Blackfeet Reservation, including construction of facilities to deliver a minimum of 15,000 AF/year of water from an enlarged Four Horns to PCCRC's Birch Creek water delivery system. Under the Birch Creek Agreement, the Tribe has agreed to deliver water from an improved Four Horns Dam and Reservoir to Birch Creek for an additional ten-year period. As such, under the Birch Creek Agreement, PCCRC's water supplies should remain relatively secure for approximately 25 years.

2. Birch Creek Agreement Amendment

In February 2009, the state and the Blackfeet Tribe amended the Birch Creek Agreement. The amendment was largely a result of concerns expressed by PCCRC that the long-term security of the Company's Birch Creek water supply was placed at risk. Under the February 2009 amendment, the state and the Tribe agreed that mitigation of impacts of development of the Birch Creek TWR is necessary to avoid adverse effects to PCCRC's water supply and that those impacts can be mitigated by improvements to the Four Horns Project situated on the Blackfeet Indian Reservation. Under the amendment, the state and Tribe agreed that improvements to the Four Horns Project would be included in the federal legislation and further agreed that additional funding would be required to mitigate impacts of develop-

ment of the Birch Creek TWR beyond the 25-year term set forth in the Birch Creek Agreement. Both the state and Tribe agreed to support federal funding for this purpose.

As a result of the Birch Creek Agreement and the amendment to the Birch Creek Agreement, PCCRC supported passage of the Montana-Blackfeet Compact by the 2009 Montana Legislature. Based upon these agreements and upon inclusion of provisions within S. 3290 that recognize mitigation for Birch Creek, PCCRC has supported introduction of this important federal legislation.

3. Provisions of S. 3290 to Mitigate Development of the TWR

S. 3290 includes important provisions to implement the mitigation measures contemplated by the Birch Creek Agreement and amendment. Provisions included within S. 3290 addressing the need to fully develop the Four Horns Dam and Reservoir; to construct facilities to deliver not less than 15,000 acre-feet of water per year for delivery to PCCRC's water delivery system under the Birch Creek Agreement; the ability to lease water from an improved Four Horns Dam and Reservoir system; and the establishment of a Birch Creek mitigation fund are all provisions of the federal legislation which are necessary to achieve mitigation of impacts on PCCRC's water supply associated with the development of the Birch Creek TWR. See, Sections 5 and 11, S. 3290. PCCRC believes these provisions of S. 3290 are critical to the long-term success of the Compact and its ancillary agreements. PCCRC believes these provisions provide the necessary framework for the historic agreements made by the State of Montana and the Blackfeet Tribe to be successful for both Tribal and non-tribal water users on Birch Creek.

PCCRC believes the mitigation provisions of S. 3290 for Birch Creek are essential to the long-term success of the Compact. While PCCRC understands certain aspects of mitigation and the provisions in this regard in S. 3290 may need further refinement, PCCRC believes mitigation provisions will assure the development of beneficial improvements for Four Horns Dam and Reservoir, as well as securing the benefits of these improvements for the Blackfeet Tribe. PCCRC also believes the mitigation provisions of S. 3290 are important to avoid unnecessary adverse effects on PCCRC's water supplies on Birch Creek associated with development of the Birch Creek TWR. By securing a long-term solution to water supplies on Birch Creek, S. 3290 will assure that the Blackfeet Tribe benefits from implementation of the Montana-Blackfeet Compact and that PCCRC's water users will continue to have access to necessary water supplies upon which the project was historically developed.

III. Conclusion

PCCRC commends the hard work of all involved with the complexities of the Montana-Blackfeet Compact. PCCRC remains committed to continue working with the State of Montana, the Blackfeet Tribe, and the Administration in securing federal legislation to ratify the compact and the ancillary agreements on Birch Creek. PCCRC is ready to address any concerns which may be identified with the federal legislation in an effort to assure the successful implementation of the compact for all water users on Birch Creek.

On behalf of PCCRC, we thank the Committee and the Committee's staff for the opportunity to provide PCCRC's view of S. 3290 and look forward to continued input on this important legislation.

Senator TESTER. I want to thank you for being here, too, John. I appreciate the testimony of all three of you. It is unfortunate Tracy could not make it, Tracy King, President of the Fort Belknap. We will encourage him to get that written testimony in, so it can all be a part of the record.

I also want to recognize Rusty Tatsey and Jay St. Goddard, and Jeannie Whiting for being here from the Tribe. We very much appreciate you guys making the trip also.

I am going to start with Shannon. I have a few questions for you. The Blackfeet Tribe, is their support for the bill solid? Is it weak? Are there concerns? Give me an idea of the lay of the land as far as support for this bill in Blackfeet Country.

Mr. AUGARE. The Blackfeet Tribe, I believe, needs to have an understanding of what State and Federal Government is proposing to them. The State of Montana has already pulled together their ap-

propriations package. We are waiting on Federal Government to act so we can take a vote of the people.

So we are waiting on your work, Senator.

Senator TESTER. So there needs to be an education process?

Mr. AUGARE. Right.

Senator TESTER. Assuming we get this bill through sooner rather than later, do you have a plan to educate folks on what this bill does?

Mr. AUGARE. We have begun a discussion around what a media market campaign might look like. But again, we are waiting for the final package that Federal Government will produce.

Senator TESTER. Okay. On Fort Belknap, it was touched on a bit by Jay, I have been told that there are some concerns there. Are you aware of the concerns? Do you feel as solid as Jay does about the fact that you think there is very, very little chance of it becoming a problem?

Mr. AUGARE. Good question. We have been committed to the idea of holding open dialogues with the Fort Belknap Tribal Business Council. We remain committed to that open dialogue. We do want to address their concerns. So we are very openly engaged about that process with them.

Senator TESTER. Has dialogue occurred up to now?

Mr. AUGARE. Yes, I believe so. Yes. And there is a provision in the bill that allows for further discussions to occur. So their concerns are addressed in an appropriate manner.

Senator TESTER. A difficult question, too bad Tracy isn't here, like I said. But he got waylaid in the flight. Is your relationship good with them? Is there animosity there, or are folks sympathetic to get the thing done?

Mr. AUGARE. I believe we all want to resolve our water rights issues in an expeditious manner. From my understanding, their water right compact has been in process since 2000. We have completed ours in 2007. We look at our relationship with the Fort Belknap community tribal business council as a positive one. But we are not wanting to delay this action any further. We want to complete the process.

Senator TESTER. All right. The bill authorizes an appropriation for the Blackfeet land and water development fund. What kinds of projects do you envision occurring from this fund?

Mr. AUGARE. We have a number of projects identified. We are right now waiting for the DEC review to be completed. We will be providing your office and other interested parties, of course, with that report once it is issued.

Senator TESTER. Okay, and my last question for you, how does the Tribe feel about the mitigation measures that John Bloomquist explained that the Pondera Canal Company is proposing?

Mr. AUGARE. We remain supportive, so long as it, I will emphasize repeatedly, does not delay our compact. We want to meet an agreement soon. But we are supportive.

Senator TESTER. Before I get to you, Jay, I see Senator Baucus has entered the house. Did you have anything you would like to say, Max?

Senator BAUCUS. At the appropriate time.

Senator TESTER. We are asking questions, but you are busy.

Senator BAUCUS. We are all busy.

Senator TESTER. Okay, good enough. We will keep going.

Jay, in other water compacts we have considered this year, the Department of Interior was always concerned about non-Federal cost share. Montana is contributing $35 million to this process. Do you think that is fair?

Mr. WEINER. Senator Tester, $35 million is more than Montana has ever been asked to contribute before. We contributed $15 million to the Crow Settlement that this Committee has heard. Thirty-five million dollars, we believe, reflects the benefits that we have sought and that we believe is a fair amount, yes.

Senator TESTER. Good. Are there other things that they have contributed or could contribute that are non-monetary?

Mr. WEINER. Certainly. The State has put extensive resources over the two decades of negotiation into technical analyses that will assist the Blackfeet Tribe as they develop their water code to help both the Tribe and the State understand the water resources on the Reservation. The State has put significant technical resources into looking at water use of the Bureau of Reclamation's Milk River project, which diverts almost the entire United States share of the St. Mary River across the Blackfeet Reservation and down to Milk River project lands, 200 miles off the Reservation. And the technical work the State has done in relation to both the Blackfeet and the Fort Belknap settlements we believe are of significant value directly to the United States in their operation of their Milk River project.

Senator TESTER. Okay. Mitigation measures that the Pondera Canal Company is providing, does Montana support those?

Mr. WEINER. Montana has the same position as the Blackfeet Tribe, which is that we do support Pondera's request, but we would like this bill to move as soon as possible.

Senator TESTER. Okay. When you started your testimony, you said this has been going on for about half your life. You have been in the business of water for a while. Are you aware of the Federal Government providing any similar mitigation funds, mitigation measures, for non-Indian water users off-reservation?

Mr. WEINER. I am not familiar with the Federal Government providing funds directly to a private irrigation company, but I am certainly familiar with the Federal Government working with non-Indians off the reservation both in and outside of Bureau of Reclamation projects.

Senator TESTER. Thank you. Thank you for your testimony and your answers.

John, once again, good to have you here. The Pondera Canal Company, what is their support on this bill?

Mr. BLOOMQUIST. Senator, thank you again for the invitation as well. Our support for the bill, we certainly supported the introduction of the bill and movement of the bill with mitigation. We view the mitigation as a necessary component of a successful compact. That mitigation, taking the two forms that are presented in the bill, which is the improvement, development of the Four Horns project, which we believe provides the necessary mitigation water to offset impacts of development of the tribal water right on Birch Creek, and two, the mitigation fund, which provides long-term se-

curity. Those two components, we believe, are necessary for a successful compact, and we support the bill wholeheartedly with those.

As far as the mitigation fund goes, and I understand their issues, perhaps the Administration or Interior on that fund, we plan on meeting with them later today to start to identify some of those issues. But again, we believe that Federal monies here are appropriate, given the underlying Federal policies that are involved here. I think actually Senator Dorgan hit it on the head during the last bill when he talked about these very old conflicts and settlements that have languished for years and years and years. In this era of water rights settlements, or to achieve these water rights settlements in this era, we are going to have to have the necessary tools. Mitigation is not only in this compact a critical tool, but in others as well, and I think will be a necessary tool.

So we are supportive of this measure. We need the mitigation to be in place, both the wet water, if you will, and the fund.

Senator TESTER. I just want to refresh my memory on some things that you brought up in your testimony. Swift Dam and Lake Frances, do they supply the irrigators with water at this point in time, the irrigation district with water? They do?

Mr. BLOOMQUIST. Yes, Senator. Swift, just for edification, Swift Dam is a storage reservoir on Birch Creek in the headwaters area, which is a regulating reservoir, developed in about 1912 with construction of the project. Lake Frances is the primary storage reservoir offstream from Birch Creek and stores about 112,000 acre feet. Those are linked to the entire system.

Senator TESTER. So those two, just help me out with this, John, those two supply 80 percent of the water supply for the irrigated land?

Mr. BLOOMQUIST. Senator Tester, Birch Creek supplies approximately 85 percent of the water for the project.

Senator TESTER. Where does the other 15 percent come from?

Mr. BLOOMQUIST. We have some from Dupuyer Creek, which is just south, and then a very small amount from the Dry Fork, Marias River.

Senator TESTER. And also for my memory, the Four Horns Reservoir, its renovation will come out of the State dollars?

Mr. BLOOMQUIST. The renovation of Four Horns, the State has contributed $20 million, pledged $20 million to mitigation of the Four Horns project. The balance is going to be necessary from this legislation.

Senator TESTER. The compact just went through the State legislature in 2009. I will assume that you were a part of that discussion? Was there support from the Canal company?

Mr. BLOOMQUIST. Senator Tester, we did support the bill and the passage of the compact in the Montana legislature. And that support came as a result of the state and the Tribe putting an amendment to the Birch Creek agreement, which we felt gave the commitments to long-term mitigation as well as seeking Federal monies for that purpose.

Senator TESTER. And you had said earlier you are going to meet with Interior tomorrow?

Mr. BLOOMQUIST. Today actually. This afternoon we have our first meeting.

Senator TESTER. We would love to know how those discussions go, as you move forward. I am sure that you all will probably be a part of that.

Thank you all. I appreciate your testimony, appreciate your answers, your questions.

Senator Baucus, if you would like.

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman, Senator Tester, John.

It is good to see other friends here, Councilman Augare, Jay Weiner and John Bloomquist. Good to see you all here too. This is a good testament of our working together to pass this legislation.

Just to review, this Act ratifies the water rights compact with the Blackfeet Nation. The legislation will bring clean water to reservation families, support tribal agriculture and provide long-term economic development. When the United States and the Blackfeet people signed a treaty 150 years ago, the Blackfeet Reservation was on a tract of land the size of the State of Delaware abutting Glacier National Park and the Canadian border. Over 100 years ago, the U.S. Supreme Court ruled that such treaties imply a commitment, a commitment to reserve sufficient water to satisfy both present and future needs of a tribe.

This legislation is a product of over 10 years of negotiation between diverse groups of users in the area. The State of Montana legislature has already appropriated $19 million in support of its work to implement the compact to satisfy that Supreme Court ruling, obligation that our Country has to the tribes.

As you can see from our witnesses at the table, and I can tell from the questions you asked and the answers given, the parties are dedicated to working together. And we all very much appreciate that.

And also working with the Committee to move this water compact through Congress. I very much look forward to working with the whole group here. We are close. Let's get it passed. A little wrinkle left, but we are all on the same track. It is just a matter of getting this wrinkle out so we can get this done to the mutual satisfaction of everyone here. I think we can. We have an obligation to do that, now that we are so close. I just want to thank everybody very much for the effort that they have undertaken, especially you, Mr. Chairman, all your efforts to help get this put together.

Senator TESTER. Thank you, Senator Baucus. I would be remiss if I didn't say thank you for your leadership on a number of things, including this. We very, very much appreciate it. And thanks for taking time out of your schedule to come in and talk about this important piece of legislation.

Senator BAUCUS. You bet. It really makes a difference. Seeing is believing. We all go out there and look at the leaks and the problems, how important water is down the road for a lot of different people. It just underlines the urgency that we pass this very quickly.

Senator TESTER. Well, I want to repeat, thank you, thank you to the folks who testified today. I very much appreciate your coming

today. It made this hearing possible. I want to thank the members of the Council for coming up today, too, I very much appreciate Rusty and Jay for you guys coming up, and Jeannie.

With that, we will adjourn. Thank you all.

[Whereupon, at 11:37 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF TRACY KING, PRESIDENT, FORT BELKNAP COMMUNITY COUNCIL

I am the President of the Fort Belknap Community Council and as a representative of the Fort Belknap Indian Community Council, I would like to present this statement on behalf of the six thousand plus members of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community. The Fort Belknap Indian Community (FBIC) has serious concerns about the current form of the proposed Blackfeet Water Rights Settlement Act of 2010 ("Act" or "Settlement Act") and the potential adverse impacts suffered by FBIC should the Blackfeet Tribe fully exercise the water rights purportedly acknowledged in the Settlement Act. While FBIC acknowledges that the Blackfeet Tribe does possess water rights, FBIC challenges the amount of those water rights set forth in the Settlement Act. Although disappointed with the Blackfeet Settlement Act, FBIC remains committed to cooperative discussions with all interested parties, including the Blackfeet Tribe, the State of Montana, and the United States, to collectively resolve areas of disagreement and mitigate negative impacts caused by exercising Settlement Act rights of the Tribes.

FBIC recognizes that the Blackfeet Tribe is entitled to water rights, and specifically rights in the Milk River. In fact, the Blackfeet Tribe's entitlement to such rights derives from the same treaty of October 17, 1855, that reserved water rights in the Milk River for FBIC. Accordingly, these reserved rights of the Blackfeet Tribe and FBIC are of equal priority.

The proposed Blackfeet Settlement Act takes the position that the Blackfeet Tribe has a superior claim to these water rights to the detriment of FBIC. This false assumption appears to be the basis for granting all the natural flow of the Milk River above the Western Crossing without regard for the water rights granted to the FBIC in our Water Compact. Rather than a shared priority as provided in the recognized treaty, the Settlement Act describes the Blackfeet Tribe's right to be senior in priority, and if fully executed, would deprive FBIC of the full benefit of its recognized water rights.

Unlike the proposed Blackfeet Settlement Act, the FBIC Compact recognizes the shared interest and expressly provides for a mechanism to allow for consideration of the water needs of the Blackfeet Tribe. This provision authorizes a process by which the two tribes can reach a compromised settlement on the allocation of their water rights to the Milk River, and to account for such a settlement in future operations of the Milk River. This provision of the FBIC Compact that allows for the incorporation of an agreement with the Blackfeet Tribe and was negotiated with the understanding that the Blackfeet's claim to water would be based upon a reasonable calculation of the Tribe's needs as determined by their amount of practicably irrigable acreage (PIA) within the Milk River on trust lands above the Western Crossing. To say that the United States and FBIC had agreed to give the Blackfeet Tribe all of the natural flow to the Milk River within the Blackfeet Reservation at the time the FBIC Compact had been negotiated is unreasonable and totally without merit.

This cooperative measure does not subordinate FBIC's water rights, nor does it mandate FBIC to compromise its fundamental rights. It is simply a confirmation of FBIC's desire to work amicably with the Bureau of Indian Affairs to resolve conflicts that may develop as each Tribe exercises their mutually shared water rights. Importantly, this provision is in no way an acknowledgement that the Blackfeet Tribe possesses a superior right to FBIC, which is a position that FBIC strongly refutes and rejects.

Because of the shared right and equal priority, FBIC further challenges the quantity of water and the appropriate measure for determining the quantity of water that should be made available to the Blackfeet Tribe. With equal priority, one Tribe could potentially only acquire a larger quantity of water than the other Tribe based on demonstrating a higher amount of practicably irrigable acreage, or upon a court's decree allocating more water to a specific tribe. However, given limitations on the

amount of tribal and allotted irrigable lands on the Milk River within the Blackfeet reservation, it is not at all clear that the Blackfeet Tribe would successfully be able to claim all of the natural flow of the Milk River and as a result some of the natural flow would remain available for use by the FBIC to meet their water needs and rights.

Significantly, the Blackfeet Settlement Act seeks to preserve a set amount of water for the Blackfeet Tribe based on a standard of quantification that is quite different from the standard utilized to quantify FBIC's water rights. The proposed Settlement Act claims all the natural flow and merely agrees to hold existing State water users harmless. FBIC is unaware of any justification for the sweeping extent of this water claim. It is the opinion of our water use experts, Natural Resources Consulting Engineers, Inc. (NRCE), that the Blackfeet Tribe's true claim to water in the Milk River is extremely limited because of limited amounts of PIA lands and the short growing seasons that would make irrigation not feasible.

Unlike the FBIC Compact, the proposed Blackfeet Settlement Act incorporates non-agriculture water use in the quantification of the Blackfeet Tribe's water rights. The potential impacts on FBIC's water supply are significant in that the Blackfeet Settlement Act seems to indicate that the Blackfeet Tribe is claiming their right to water based on quantification that does not involve agricultural uses as required under "reserved rights doctrine" that serves as a basis for Indian Water Rights. The use of another standard becomes problematic in that it disrupts the rights under the FBIC Compact, where rights to water have been quantified utilizing agriculture water use and the PIA standard.

FBIC's water rights claim has been quantified based primarily on agricultural water uses and FBIC expects that the proposed Blackfeet Settlement Act would do likewise. Analyses of past Blackfeet Tribe irrigation-based claims had shown that the potential impacts to FBIC were less than under the presently proposed Blackfeet Settlement Act. Based on what was understood with the previously anticipated smaller impacts, FBIC had been willing to reach a compromised settlement to the previously proposed Blackfeet Tribe water claims based on PIA Standard.

The Blackfeet Settlement Act, as currently proposed, is not based on any specific type of water use, agricultural or otherwise. Instead, the current proposed Settlement Act attempts to lay a senior claim to virtually the entire U.S. share of the natural flow of the Milk River basin within the Blackfeet Reservation. Furthermore, the proposed Settlement Act allows use of the water for any purpose any time of the year. FBIC could no longer count on agricultural return flows or on any other practical limitations to the Blackfeet Tribe's use of the natural flow of the Milk River located within the Blackfeet Reservation.

Under a worst case scenario, if the Blackfeet Tribe was to fully consume its claimed Milk River water right, denying the availability of this water to any other parties in the Milk River system, significant impacts will occur with regard to FBIC's water supply in some years. The average annual impact would be approximately 9 percent. However, this impact is variable; in many years, it would be zero, and in the worst 10 percent of all years, it would average about 39 percent, a severe impact on FBIC's water right.

Moreover, NRCE also concludes that the quantity specified in the proposed Settlement Act would have a significant impact on the Milk River Project as well as the FBIC water right. All other existing Milk River users, including the Milk River Project, would be impacted by the proposed Settlement Act. NRCE's technical analysis concluded that the impact on the Milk River Project would average 13,600 acre-feet per year. Additionally, during the 10 percent of years in which the impacts are most severe, the average impact would be 54,500 acre-feet per year. The full extent of these consequential harms and impacts that would result from the exercise of the Blackfeet Tribe's water right as set forth in the proposed Settlement Act must be fully considered. While such impacts may be negligible in the St. Mary River basin, the impacts are much more severe in the Milk River basin.

It is recognized that it may not be feasible or practical now or in the near future for these impacts to physically materialize. However, should the proposed Settlement Act come into effect, the mere presence of such a large-scale Blackfeet water right to Milk River flows would be a continuing cause for concern to FBIC. The Fort Belknap Indian Community is therefore seeking to have their rights protected by limiting the Blackfeet Tribes use of water in the Milk River to an amount that could be claimed under the PIA standard and other domestic agricultural uses.

Compounding the problem of the adverse impact that would be sustained by FBIC is the fact that with water settlements negotiated through compacts, federal legislation is required for implementation. Any subsequent issue that may arise with a provision set forth in the underlying compact itself becomes very difficult to correct because any corrections would also require amending a federal statute.

Here, FBIC's agreement to include a provision in our Compact to accommodate the Blackfeet Tribe's right to water in the Milk River becomes even more disadvantageous to FBIC's interest in that the Compact negotiations with the Blackfeet Tribe did not apply the same PIA standard for quantifying the Blackfeet Tribe's water right. Once the Settlement Act has been approved by Congress, any subsequent amendment or additional provision needed to address an unresolved issue with the Blackfeet Settlement Act would require going back to Congress and seeking amending legislation, which would be a very costly and a time consuming process for the FBIC. Therefore, it is incumbent upon all the parties to work diligently to resolve the impacts caused by the proposed Blackfeet Settlement Act on the water rights confirmed to the FBIC in their Compact.

These issues cause a potentially disrupting and limiting impact on the FBIC's water projects and uses, which are based on the use of water for agriculture and other purposes. The FBIC wishes to resolve these issues with the Blackfeet Tribe in order to further the water rights settlement negotiations between the United States, the FBIC and the State of Montana so that their respective Compacts can become effective.

While this is an issue of heightened concern for the FBIC, what is equally concerning is the response of the Montana Reserved Water Rights Compact Commission in addressing this issue. In response to our request that the Commission assist the Tribes in formulating a resolution of this matter, we were advised that the Commission would not intervene or assume an active role in effectively resolving a dispute that was characterized as "a fight between the two tribes." This is not an "Indian vs. Indian" issue, rather, it is a dispute that has come to develop as a direct consequence of the Compact Commission's erroneous assumption that the water rights of the Blackfeet Tribe are senior in priority to FBIC and an incorrect quantification standard being applied to Blackfeet Tribe's water right causing a substantial allocation over and above what is properly deserved under the PIA standard.

The Tribe feels that under these circumstances, this issue can hardly be characterized as an inter-tribal dispute, and that the State Compact Commission, in light of its governing mandate, cannot so easily discount its role and obligation to resolve this matter. It is FBIC's position that the Compact Commission has both a legal and an ethical obligation to affirmatively seek a compromised solution that protects the interests of all affected parties. This is evidenced by the Commission's governing mandate. The Reserved Water Rights Compact Commission was established by the Montana legislature to conclude compacts for the equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the state. The mandate of the Compact Commission is to settle water rights disputes within the state, not to create new ones. Any determination of reserved water rights on the Blackfeet Reservation necessarily requires the Montana Reserved Water Rights Compact Commission to reach an understanding with the FBIC where such a determination directly impacts the rights of FBIC or its members. By authorizing a tribal compact that wholly undermines the very basis of another Tribe's previously negotiated water rights, the Commission will have acted in violation of the terms and provisions of its governing mandate. We request that Congress take affirmative steps to ensure that the rights that have been negotiated on behalf of FBIC as set forth in the FBIC Compact are not eclipsed by the terms of another Tribe's Settlement Act.

FBIC does desire to reach a compromised solution with the Blackfeet Tribe to be incorporated into a modified Compact that accommodates the interests of both Tribes, the State of Montana, and the United States as trustee, and better clarifies future tribal operations so as to avoid future litigation that would potentially jeopardize the interests of all affected parties.

We propose that the following language be added to the proposed Blackfeet Settlement Act:

> Article III§ F
> § 7. *Mitigation of Impacts*
> In the unlikely event that the water right conferred upon the Blackfeet Tribe in basin 40 F impacts the water rights of the Fort Belknap Indian Community, then such impacts will be mitigated out of Project Water from the Milk River Project.

Our proposal represents the best efforts of FBIC to resolve the potential problems that are likely to occur in the future between FBIC and the Blackfeet Tribe in the development and implementation of our equal water rights claims. The proposal was written under the assumption that the problem at hand is not only FBIC's problem, but rather is a problem that directly impacts each of the four major parties involved,

and consequently, is a problem that should be solved by all the parties, including the Blackfeet Tribe, FBIC, the United States, and the State of Montana.

We recognize that that the interests of the two Tribes in this matter certainly are not diametrically opposed and that a workable solution to this issue can be reached. However, it should be noted that unless significant revisions to the terms of the Settlement Act are instituted, FBIC will continue our objections to the passage of the Settlement Act. The FBIC's objection would be based on the fact that while the proposed Settlement Act allows for the full and final settlement of the federal reserved water rights on the Blackfeet Indian Reservation, it dramatically impacts and limits the same rights on the Fort Belknap Reservation in the process. It should be pointed out that under the terms of the Montana Code relating to the water settlement process, no compact is effective and binding unless it is approved and ratified by "any affected tribal governing body," and that because the interests and rights of FBIC would be adversely effected by the implementation of the proposed Settlement Act, FBIC would refuse to approve it in its current form.

FBIC believes it is necessary that the Blackfeet Settlement Act seek to balance an equitable recognition of the Blackfeet's rights with sufficient protections for water users at Fort Belknap who have an equal recognized claim. Any determination of a federal reserved water right on the Blackfeet Reservation necessarily requires the Montana Reserved Water Rights Compact Commission to reach an understanding with FBIC where such a determination directly impacts the rights of the Tribe or tribal members. We believe that it is of paramount importance that the State assist the Tribes and work collaboratively with them in seeking solutions to this complex problem, especially as the only alternative is to litigate this matter in court, an outcome that would obviously be disadvantageous to the interests of all affected parties.

Thank you for your consideration of this matter.

Attachment

Resolution No. 77-2010

Fort Belknap Indian Community

WHEREAS, the Fort Belknap Indian Community Council is the governing body of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community, Fort Belknap Indian Reservation, Montana, by the authority of the Constitution and By-Laws of the Fort Belknap Tribes approved on the 13 day of December 1935, and

WHEREAS, under the Constitution and By-Laws of the Fort Belknap Indian Community, the Community Council is charged with the duty of protecting the health, security and general welfare of the Fort Belknap Indian Community, and

WHEREAS, the Fort Belknap Indian Community Council is responsible, under the Constitution, Bylaws and Charter of the Gros Ventre and Assiniboine Tribes of Fort Belknap, for managing the affairs of the Tribes, and

WHEREAS, the Fort Belknap Indian Community Council has reviewed Senate Bill 3290, the Blackfeet Water Rights Settlement Act of 2010, and has evaluated the impact of this legislation on water rights of the Tribes of Fort Belknap, and have drafted the attached testimony for presentation by the President of the Council to Congress at a U.S. Senate Indian Affairs Committee hearing on July 22, 2010, and

WHEREAS, the Council has reviewed alternatives for going forward with the Gros Ventre and Assiniboine Tribes of Fort Belknap Water Rights Compact approved by the Council and the State of Montana in 2001, and has concluded that proceeding concurrently with the Blackfeet Tribe and its efforts with Congress is the most efficient means of proceeding towards Congressional ratification of the completed compacts of the Tribes, especially since each seek significant allocations of Milk River drainage water,

NOW, THEREFORE BE IT RESOLVED, that the Fort Belknap Indian Community Council does hereby approve the attached testimony for presentation by the President of the Council at an Indian Affairs Committee hearing on July 22, 2010, and

BE IT FURTHER RESOLVED, that the Council hereby approves and directs action of the Officers and staff to proceed concurrently with the Blackfeet Tribe in its efforts, to obtain approval of the Gros Ventre and Assiniboine Tribes of Fort Belknap's Water Rights Compact, and

BE IT FINALLY RESOLVED, that the Council Officers are hereby delegated the authority and responsibility to sign all documents necessary to effect this action.

ATTEST:

for TRACY KING, President
Fort Belknap Indian Community Council

JUDY KING, Secretary-Treasurer
Fort Belknap Indian Community Council

CERTIFICATION

I, the undersigned, as Secretary of the Fort Belknap Community Council of the Fort Belknap Indian Reservation, Montana, do hereby certify that the Fort Belknap Community Council is composed of 10 members, of whom 9 members, constituting a quorum were present at a meeting thereof, duly and regularly called, noticed, convened and held this 21 day of July, 2010; and that the foregoing Resolution of the Fort Belknap Community Council was duly adopted and approved by the affirmative vote of 9 for; 0 opposed; 0 not voting; 0 temporary absent; 1 absent; and that the said Resolution has not been rescinded in any way.

DATE: July 21, 2010

JUDY KING, Secretary-Treasurer
Fort Belknap Community Council

THE FORT BELKNAP INDIAN COMMUNITY
Tribal Government

FORT BELKNAP AGENCY, HARLEM, MT.
Address

PREPARED STATEMENT OF THE BLACKFEET TRIBE

The Blackfeet Tribe is a sovereign Indian Nation residing on the Blackfeet Indian Reservation in Montana and exercising jurisdiction and regulatory control within the Reservation. Water is the most critical resource issue for the Tribe today. It is vital to the treaty promise of a permanent self-sustaining homeland for the Blackfeet people.

The Blackfeet Reservation

The Blackfeet Reservation was formally established by Treaty with the United States on October 17, 1855 (11 Stat. 657). Located along the eastern slopes of the Rocky Mountains, the Reservation is bordered on the north by Canada and on the west by Glacier National Park and Lewis and Clark National Forest. Birch Creek forms the southern border, and the eastern border is partially formed by Cut Bank Creek and Birch Creek as they merge to form the Marias River. The Rocky Mountains, and the streams and rivers that flow from the mountains, have long been one of the most culturally and religiously significant area to the Blackfeet People, and they are a critical part of the oral history and cultural and religious customs of the Tribe.

The present reservation is only a small part of the historical aboriginal territory of the Blackfeet Tribe that encompassed much of the present State of Montana, and a large area north into Canada. It was gradually reduced to the present 1.5 million acres through various executive orders, an act of Congress, and two congressionally ratified agreements in 1888 and 1895. The Reservation was allotted in 1907 (34 Stat. 1035) and 1919 (41 Stat. 3). The current land ownership is approximately 65 percent Indian and 35 percent non-Indian. The Tribe has an active land acquisition program, and the amount of Indian lands increases regularly.

Oil and gas, timber resources, and grazing make up a significant portion of the Tribe's revenue base. The Tribe also has a Class II gaming casino in Browning, and operates several other smaller enterprises.

There are 16,000 enrolled members of the Blackfeet Tribe, about half of whom reside on the Reservation. The Tribe is the largest employer, and unemployment ranges as high as 67 percent or more. Ranching and irrigation are the mainstay of the Reservation economy, and the BIA's Blackfeet Irrigation Project is a critical part of the ranching/irrigation economy.

Water Resources

Several drainages are encompassed within the Reservation. To the west, the St. Mary's River originates near the Glacier Park/Reservation border, flows north onto the Reservation and then directly north into Canada. The Milk River originates on the Reservation as the North Fork, South Fork and Middle Fork. The Middle Fork and South Fork merge to form the Milk River proper which flows northeasterly through the Reservation into Canada and then back into the United States at the eastern crossing near Havre, Montana. Cut Bank, Two Medicine, and Badger and Birch all flow easterly through the Reservation and into the Marias River at the eastern boundary of the Reservation. Birch Creek is the southern boundary of the Reservation.

The average annual water supply on the Reservation is nearly 1.5 million acre feet. A significant portion of the water supply is in the St. Mary River (663,800 acre-feet average annual flow). The estimated average annual flow for all other streams is: Milk River—76,100 acre-feet; Cut Bank Creek—137,300 acre-feet; Two Medicine River and Badger Creek—431,400 acre-feet and Birch Creek—129,100 acre-feet.

Water Rights Negotiations

The Tribe's water rights were the subject of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and a Federal Negotiation Team for well over a decade. In December 2007, the Tribe and the State reached a final compact quantifying the Tribe's water rights basin by basin and addressing issues relating to administration and water marketing. The Compact also provides for an allocation of water from the Bureau of Reclamation Lake Elwell (Tiber Dam) downstream from the Reservation on the Marias River, as part of the Tribe's water right.[1] Of critical importance to the Tribe is the 50,000 acre foot allocation of St. Mary River water which must be provided from newly developed St. Mary water or Milk River Project water to be made available through administration of the Milk River Project.

[1] All but a small part of the water impounded in Lake Elwell flows from the Blackfeet Reservation.

The Tribe and the State also entered into an agreement relating to Birch Creek, by which the Tribe will defer additional use of Birch Creek water for fifteen years, and then will provide water to non-Indian Birch Creek water users from an enlarged Four Horns Reservoir, one of the storage facilities of the Blackfeet Irrigation Project. The agreement is conditioned on congressional approval of the Compact, funding for the enlargement, and necessary federal authorization.

Water Related Claims Against the United States

As part of a final settlement of its water rights, the Tribe expects to resolve its water related claims against the United States. With settlement funding, the Tribe will be seeking to rehabilitate and better the Blackfeet Irrigation Project, to construct critical water storage projects, a regional water system serving Reservation communities, and other water related projects. The Tribe will also be seeking a resolution of the environmental damages and problems caused by the Milk River Project facilities through mitigation and environmental restoration projects, and to resolve right of way issues relating to the project.

These projects and other funding are justified by the Tribe's claims against the Federal Government which include, among others:

1) the failure of the United States to protect Blackfeet water rights in the negotiation and completion of the 1909 Boundary Water Treaty with Great Britain allocating the St. Mary and Milk River between the United State and Canada;

2) the failure of the United States to protect Blackfeet water rights or to provide any benefits to Blackfeet in the 1902 authorization and construction of the Bureau of Reclamation Milk River Project;

3) the failure of the United States to mitigate or repair the physical and environmental damages caused by the St. Mary diversion facilities utilized to divert water off the Reservation for the Milk River Project;

4) the failure of the United States to properly maintain rights of way for the St. Mary diversion facilities, and the Project's continuing use of land relinquished to the Tribe from the original land withdrawal for the St. Mary diversion facilities;

5) the failure of the United States to protect Blackfeet water rights against the establishment and utilization of state water rights by non-Indians on the Reservation, which state rights utilize a majority of the available water in Milk River, Cut Bank Creek and Birch Creek;

6) the failure of the United States to complete and properly operate and maintain the BIA Blackfeet Irrigation Project;

7) the failure of the Department of the Interior to provide additional storage to the Tribe in fulfillment of the Tribe's agreement to build a smaller Two Medicine Dam after it failed in the 1960's, no part of which would extend into Glacier National Park; and

8) other water related claims.

Claims Relating to the 1909 Boundary Water Treaty

The 1909 Boundary Waters Treaty allocates the St. Mary River and the Milk River between the United States and Canada. The Treaty was concluded only a year after the seminal Supreme Court's decision in *Winters v. United States* that first defined the federal reserved water rights doctrine applicable to Indian tribes. Notwithstanding that the *Winters* case involved the Milk River, one of the two streams allocated under the Boundary Waters Treaty, Blackfeet water rights are not mentioned and were not taken into consideration in the 1909 Treaty.[2]

Only a few years before the conclusion of the Boundary Water Treaty, the Reclamation Service had identified a feasible Blackfeet Reservation project on the eastern side of the Reservation of up to 100,000 acres utilizing St. Mary water. (Approximately 70,000 acres were on the Reservation and 30,000 acres were off the Reservation.) This was one of three alternatives for use of the United States' St. Mary allocation identified and described in the Reclamation Services Fourth Annual Report to Congress, House Doc. No. 86, 59th Cong., 1st Sess. (1906) at 177–181. The other two projects were: (1) an All American canal that would carry water to the downstream Milk River water users in a canal traversing the Reservation and located entirely within the United State; and (2) the project that finally was built and exists today, diverting St. Mary's water into the Milk, through Canada, and back

[2] A similar case involving Birch Creek on the Blackfeet Reservation had been filed by the same U.S. Attorney that filed the *Winters case* was decided by the Ninth Circuit in the same year. *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908).

to the United States for use by Milk River water users over a hundred miles from the Blackfeet Reservation. The Reclamation Service concluded that both the Reservation project and the downstream project were feasible, but Reclamation chose to build a project serving only non-Indian water users, thereby rejecting any benefit to the Blackfeet Tribe in favor of the non-Indian project.

Based on the identification of a feasible irrigation project on the Blackfeet Reservation by the Reclamation Service in 1906, the United States was obligated to ensure that water for the Reservation project was taken into consideration in the 1909 Boundary Waters Treaty, particularly given the recent decision in the Winters case. Yet, the United States failed to obtain an allocation of water in the Boundary Waters Treaty to satisfy the Tribe's St. Mary Winters claim *and* the Milk River Project.

Claims Relating to the Bureau of Reclamation Milk River Project

For nearly a hundred years, nearly the entire United States' share of the St. Mary's River has been diverted off the Blackfeet Reservation for use by the Bureau of Reclamation's Milk River Project. Water is stored at Lake Sherburne on the Reservation and is diverted trans-basin through a 29 mile canal on the Reservation that discharges into the North Fork of the Milk River. The canal includes two sets of large siphons, and a series of five large concrete drop structures near the lower end of the canal. Upon discharge into the Milk River, the River flows through Canada for 216 miles before it returns to the United States and is stored in Fresno Reservoir northwest of Havre for use by the Milk River Project.

The Milk River Project was authorized in 1902 as one of the first projects under the 1902 Reclamation Act. In large part, the Milk River Project was used to justify the United States share of St. Mary River and the Milk River under the 1909 Boundary Waters Treaty. The Treaty served as the final go ahead for the Milk River Project, and construction of the Project was begun immediately upon completion of the Treaty. The Blackfeet Tribe has significant claims relating to construction of the project.

Water Rights Claims

The St. Mary River arises near the western boundary of the Reservation and flows only on the Reservation. The River flows directly from the Reservation into Canada where it becomes part of the Hudson Bay drainage. The Blackfeet Tribe is the sole entity with a clear and direct right to St. Mary's water. As set forth above, at least as of 1906, the Tribe had an identified Winters right to sufficient water to feasibly irrigate 70,000 acres of Reservation lands. Nevertheless, the Blackfeet Tribe's water rights were completely ignored in the authorization and construction of the Milk River Project. The Milk River Project utilizes nearly the entire U.S. allocation of St. Mary water through the elaborate trans-basin diversion that diverts St. Mary water into the Milk River, carrying it downstream for use by the Project. For over a hundred years, the United States has directly taken and used Blackfeet water for use by the Milk River Project, leaving no available water in the St. Mary River to fulfill the water rights of the Tribe, representing a permanent loss of water to the Blackfeet Tribe. The Boundary Waters Treaty and the Milk River Project have directly facilitated the taking of Blackfeet water and have deprived the Tribe and its members of water that would otherwise be used on the Reservation for the benefit of the Blackfeet Tribe.

Failure to Provide Project Benefits to the Blackfeet Tribe

Since the completion of the Milk River Project in 1917, as much of the United States share of St. Mary's as possible has been diverted from the Reservation for use by the Milk River Project users. The Tribe has not been able to use one drop of the water, and to this day, the Tribe has not benefitted in any manner from the Project, notwithstanding the use of tribal water and Reservation lands by the Project.

The lack of benefit to the Tribe and its members is directly contrary to promises made to the Tribe in exchange for the right of way for Project diversion facilities and canal. As part of the 1895 Agreement between Tribe and the United States, ratified by Congress in the Act of June 10, 1896, 29 Stat. 321, 353, by which the Tribe, under significant pressure, ceded its western lands that are now part of Glacier National Park and Lewis and Clark National Forest, the Tribe was asked to provide a right of way for the Milk River Project canal and facilities on the clear representation that the Project would bring water to Reservation lands. Article VII of the 1895 Agreement provides that a right of way shall be granted for, among other things, canals and irrigating ditches through the Reservation.

As documented in the transcript of the negotiations of the 1895 Agreement, the provision of the right of way was based on the representation that the Tribe would benefit from the Project. As stated to the Tribe:

> In case the Government sees fit to build ditches or canals across the reservation men will be employed and paid the same as when railroads are built. I think it would be a good thing if this canal was built. You might want the water in different places on the reservation where this ditch runs. This is [the] canal running from St. Mary's Lake across to Milk River that I refer to especially. Now, I think you all understand pretty well what is meant.

S. Doc. No. 118, 54th Cong. 1st Sess.(1896) at 20–21. The clear import is that the Tribe would benefit from the Milk River Project facilities if it provided rights of ways for the Project. Such benefit has never materialized.

Over the years, the amount of water diverted from the Reservation has expanded. Municipal water users were added and additional lands have been brought into the Project. There are also other water users who have been able to use Project water because of lack of enforcement by the Bureau of Reclamation or the State. Even a wildlife refuge (Bowdoin) is provided water from the Project, but not the Blackfeet Tribe. In sum, there have been a multitude of entities and individuals who are receiving St. Mary water from the Milk River Project and otherwise benefitting from the Project, except for the very entity that has the most direct claim to the water—the Blackfeet Tribe. On the other hand, the Tribe has suffered significant environmental and property damage as a result of the Project, and it is the Tribe who would be directly impacted by any failure of the Project.

Environmental and Resource Damages

At the same time the Milk River Project facilities utilize tribal lands and have caused serious environmental problems on the Reservation. Water is stored in Sherburne Dam on the Reservation and is released into Swiftcurrent Creek. Swiftcurrent joins with another stream, Boulder Creek, and both are diverted into Lower St. Mary Lake by a dike. St. Mary Diversion Dam then diverts the water into the St. Mary Canal, where it is carried for 29 miles before dumping into the North Fork of the Milk River. Two major sets of siphons and five concrete drops are part of the facilities.

Sherburne Dam

The primary Milk River Project storage facility on the Reservation is Sherburne Dam, completed in 1919. It releases water into Swiftcurrent Creek which is diverted through the St. Mary diversion facilities into St. Mary Lake.. The current outlet structure is unable to pass law flows during the winter months, and as a result Swiftcurrent Creek dries up, causing important wintering habitat for the threatened bull trough to be lost.

Bank Erosion and Flooding

Swiftcurrent Creek and Boulder Creek come together, and both are diverted into Lower St. Mary Lake. The banks of Swiftcurrent Creek have eroded below the confluence of Boulder Creek. Both streams provide critical habitat for the threatened bull trout. Continued erosion also contributes to regular flooding of tribal and individual member lands at the confluence of the two streams. This flooding also affects a tribal graveyard in the area. For years, the Tribe has complained of the annual flooding to the Bureau of Reclamation, but to no avail.

St. Mary Lake

Swiftcurrent Creek Dike, completed in 1915, diverts all flows from Swiftcurrent Creek and Boulder Creek into Lower St. Mary Lake, a beautiful, pristine alpine lake. The combined sediment load of both streams is deposited into the Lake, creating a delta approximately 16 acres in size. The sedimentation has destroyed commercial fishing in the lake, and is destroying recreational and aesthetic values relating to the Lake. The diversion of water into St. Mary Lake also causes the level of the Lake to fluctuate. This affects use of Tribal lake shore property and the value of the lake shore property.

St. Mary Diversion Dam

The St. Mary Diversion Dam and head works were constructed around 1910 and are used to divert water from St. Mary Lake into the 29 mile St. Mary canal. The dam and head works are in poor condition and have a negative impact on the fishery resources. The diversion dam acts as a barrier to fish movement and fish become entrained in the canal through the head gates during the irrigation season. These facilities affect the threatened bull trout and other Reservation fishery resources.

St. Mary Canal

The St. Mary Canal, completed in 1915, is an unlined earthen canal approximately 29 mile in length, and is in poor condition. It has a number of deficiencies, and is responsible for significant seepage. The canal affects surrounding wildlife habitat and contributes to environmental damage along its length.

St. Mary Siphon

The siphon includes two 90-inch steel barrels approximately 3,200 feet in length that traverse the St. Mary Valley. The siphons have had significant leaks, contributing to environmental damage, and represent significant environmental and safety hazards to the Reservation.

Hall Coulee Siphon

The Hall Coulee Siphon consists of two 78 inch steel pipes, approximately 1,404 feet in length. Like the St. Mary Siphon, leaks from the siphon have resulted in environmental damage, and represent significant environmental and safety hazards on the Reservation.

Drop Structures

Water from the St. Mary Canal passes through five concrete drops before the water is dumped into the North Fork of the Milk River. Like the siphons, the drop structures are in deteriorated condition and represent significant environmental and safety hazards on the Reservation.

Babb Community Water System

The town of Babb is the Reservation community in the vicinity of the St. Mary diversion facilities. It is located on Hwy. 89, approximately 10 miles for the Canadian border. Wells serving the north Babb area depend on groundwater recharge being recharged from leakage of the St. Mary Canal. Any fix of the canal must take into consideration the potential impact to the Babb community water system.

The Milk River Project diversion facilities on the Blackfeet Reservation are now nearly one hundred years old. The rehabilitation of the diversion facilities was authorized by the 2007 Water Resources Development Act (WRDA). The St. Mary provision of the WRDA legislation provides that no construction on the St. Mary rehabilitation may take place until the Blackfeet Tribe's water rights compact is approved by Congress or January 1, 2011, whichever comes first.

Claims Against the United States Relating to the St. Mary Diversion Facility Right of Way

In addition to the water rights, property and environmental claims relating to the St. Mary diversion facilities, there are significant ownership issues and right of way issues that have remained unresolved over the years. The Bureau of Reclamation lacks rights of way for portions of the facilities and the canal and lacks flowage easements in critical areas. There are also other ownership issues. The following issues relating to the Bureau of Reclamation facilities on the Reservation require resolution:

- Ownership issues relating to Sherburne Dam.
- Issues relating to ownership of timber and oil and gas in the Dam area.
- Lack of easement or authority to utilize Swiftcurrent Creek.
- Lack of authority to construct dike that diverts water from Swiftcurrent and Boulder Creeks into St. Mary Lake.
- Lack of flowage easement from St. Mary Lake to diversion.
- Lack of ownership/right of way/easements relating to Camp 9.
- Trespass issues relating to Camp 9 and other areas relinquished to the Tribe pursuant to the Act of August 28, 1937.
- Lack of easements/rights of way in Spider Lake area.
- Flooding/inundation issues relating to dam at Spider Lake.
- BOR maintenance roads outside of right of way.
- Lack of flowage easements relating to drops.
- Use of borrow, fill, and sand and gravel without compensation to tribe.
- Ownership issues relating in entire reach of St. Mary Canal.
- Issues relating to BOR leases to private parties on the Reservation.

Claims Relating to the Blackfeet Irrigation Project

The Blackfeet Irrigation Project was authorized in 1907, only five years after the Milk River Project. The Blackfeet project suffers from similar condition problems as the Milk River Project and needs significant rehabilitation. The Project also needs to be finally completed.

The Project is divided into three units: Two Medicine; Badger-Fisher; and Birch Creek. There are currently 38,082 assessed acres in the project. Project completion or build out is approximately 53,000 acres. Rehabilitation and betterment of the project is a major focus of a comprehensive settlement, and is essential to the Birch Creek deferral agreement entered into by the Tribe and the State of Montana, a related agreement to the Compact.

The Bureau of Indian Affairs has failed to complete the Blackfeet Irrigation Project As a result the Project does not provide the full economic benefit to the Tribe and its members that a fully completed project would provide. The BIA has also failed to properly operate and maintain the Project. As a result, the Project is in a significantly dilapidated condition and cannot property deliver water to Project lands, affecting the ability of Project water uses to make a living and to economically benefit from the Project.

Claims Against the U.S. Concerning to the Failure to Protect Tribal Water Rights in Relation to Non-Indian Development

On the Milk River, Cut Bank Creek and Birch Creek, the United States allowed non-Indian development to occur under state water rights without objection and without protecting of the Blackfeet Tribe's water rights. On the Milk River and Cut Bank Creek, substantial non-Indian development was allowed to occur that utilized a significant portion of direct flow water, without regard to the prior rights of the Blackfeet Tribe, making those streams essentially unavailable to the Tribe without the construction of expensive storage.

On Birch Creek, which was subject to a 1908 federal court decree in *Conrad Investment Co. v. United States,* 161 F. 829 (9th Cir. 1908), the court awarded only the amount of water currently being used at the time, but the court provided that the decree could be re-opened when additional water was needed. 161 F. at 835. However, the United States allowed non-Indian development to occur that utilized all remaining water supplies over and above the amount decreed to the Tribe, without regard to future modification of the decree. By allowing non-Indian development to utilize all additional supplies, the United States essentially precluded any additional development by the Tribe as provided for in the decree.

Claims Relating to the Two Medicine Dam

In 1964, a disastrous flood occurred on the Blackfeet Reservation, causing significant loss of life and property damage. Lower Two Medicine Dam on the Two Medicine River, one of the Blackfeet Irrigation storage facilities was destroyed. The Reservation was declared a disaster area and funds were quickly appropriated by Congress to partially repair the damage to Reservation homes, and to begin the process to replace Two Medicine Dam. In rebuilding the Two Medicine Dam, the Tribe was convinced to agree to a smaller facility and lesser storage because of Department of the Interior concerns about the dam backing up water into Glacier National Park. In exchange the Department of the Interior promised that an additional storage facility would be built for the Tribe further downstream on Two Medicine River. This was necessary because the smaller replacement reservoir, unlike the original storage facility, was not sufficient to irrigate all the irrigable lands in the Two Medicine Unit of the Blackfeet Irrigation Project. The Two Medicine Dam was replaced, but a second storage facility has never been constructed as promised.

Claims Relating to Divide Creek

Divide Creek serves as a portion of the western boundary between the Reservation and Glacier National Park. The major eastern entrance to the Park and the start of the well-known Going-to-the-Sun Road is located at Divide Creek. Ranger facilities are located near the Creek, as is a major Park visitor center and other private resort development.

Historically, significant erosion has occurred in Divide Creek, and regular flooding has occurred. At least since the late 1980's, because of the significant development in the area, the Park Service has responded to flood conditions on Divide Creek with stream-clearing and channelization activities using heavy equipment. This has caused a loss of aquatic habitat and adverse water quality impacts. The main bridge over Divide Creek at the entrance to the Park also contributes to flooding problems as debris and other materials are caught under the bridge, creating a logjam and increasing the flooding problem in the area.

Since the early 1990's, the Park Service has indicated that it would adopt a long term plan to address the flood conditions without use of heavy equipment. The Park Service completed a Value Analysis for Divide Creek in 1992, identifying a number of alternatives for a long-term plan. More recently, in connection with plans for a major modification to the Park visitor center and other improvements, it was represented that the required Environmental Assessment would address alternatives to the Divide Creek flooding problems. However, the Park Service subsequently concluded that insufficient funding was available to analyze the issues. Therefore, the flooding and sedimentation problems at Divide Creek, with resulting adverse impacts to fisheries and water quality, continue to occur with no solution presently in sight.

Conclusion

The above discussion set out the primary water related claims of the Blackfeet Tribe against the United States. These claims represent damages of hundreds of millions of dollars due to loss of water, loss of benefits, damages to the environment and Reservation property and failure of the United States trust to carry out its trust responsibility to the Tribe relating to Tribal water rights and use of water. The claims serve as the basis for the federal contribution to the Blackfeet water rights settlement.

PREPARED STATEMENT OF WILLIAM "SNUFFY" MAIN, CHAIRMAN, GROS VENTRE TREATY COMMITTEE

Greetings,

My name is William "Snuffy" Main, an enrolled member of what is commonly referred to as the Gros Ventre Tribe of Montana (Atsina)* an historic tribe. We call ourselves the White Clay People. It is the Gros Ventre Tribe's custom to govern its affairs thru General Membership sometimes referred to as Mass Meetings. I am also a member of the Fort Belknap Indian Community (FBIC) a tribe created under the Indian Reorganization Act on December 13, 1935. The FBIC is governed by a ten member council called the Fort Belknap Community Council (FBCC) comprised of members of the Gros Ventre Tribe, the Fort Belknap Assiniboine Tribe** and the FBIC***. Members of FBCC are elected to two and four year terms.

I am a former FBIC councilman and chairman. Currently I am chairman of the Gros Ventre Treaty Committee (GVTC). The six GVTC members are elected to lifetime terms at duly called and convened General Membership meetings.

With respect to the Blackfeet Water Rights Settlement Act of 2010 the GVTC must respectfully go on record opposing this legislation. While we feel the Blackfeet Tribe as it exists today has the right to negotiate and settle whatever rights it so chooses, however, this legislation contains language specific to the 1855 Treaty with the Blackfeet Nation and also makes reference to the FBIC, a tribe created in 1935.

The majority of Gros Ventres at General Membership meetings do not recognize any authority of the FBIC, a tribe created in 1935, to negotiate or enter into any agreements under the 1855 Treaty with the Blackfeet Nation because the FBIC, a tribe created in 1935, is not a party to that treaty. The Gros Ventre Tribe as a member tribe of the Blackfeet Nation in 1855 is a party to that treaty. That

treaty has been held in the highest regard by the Gros Ventres for generations. As an example the Gros Ventres had language to protect our rights included in Section 7 of the Corporate Charter of the Fort Belknap Indian Community, A Federal Corporation Chartered under the Act of June 18, 1934 ratified August 25, 1937. That section basically recognizes the Gros Ventres sole and exclusive jurisdiction over our property rights and present and future claims just as we had prior to the adoption of the constitution, by-laws and charter of the FBIC.

The Gros Ventre Tribe is the only tribe on the Fort Belknap Indian Reservation that has the authority to negotiate or enter into any agreements under the 1855 Treaty. On issues pertaining to that treaty the Gros Ventre Tribe at General Membership meetings, when necessary delegates the authority to negotiate to individuals or a group of individuals such as the GVTC. Any agreements require final approval of the General Membership at a duly called and convened meeting.

The Gros Ventres have repeatedly requested to stop recognizing FBIC, a tribe created in 1935, as having any rights under the 1855 Treaty. Whenever a Gros Ventre treaty issue arises we ask the parties concerned to utilize the proper channels by going to the GVTC and then on to the Gros Ventre General Membership, however, recently those requests have been ignored. We have also been asking what happens to the rights of the Gros Ventre Tribe if this type of legislation is approved. We do not want to lose our identity, any of our rights or our inherent right to govern ourselves as we have historically.

On another note the Fort Belknap Water Compact is making its way through the process for approval. These same issues have been and will be continue to be raised throughout that process. We ask that the federal government create a forum besides the Bureau of Indian Affairs to sit down with us and address our issues now to avoid possible future problems. Some of our issues have been ongoing since the creation of FBIC and have not been addressed to date.

***There is an unrelated tribe in North Dakota called Gros Ventre (Hidatsa)**
****There are bands of Assiniboine on the Fort Peck Reservation in Montana and on various reserves in Canada but are not recognized at Ft. Belknap**
*****FBIC criteria for enrollment is different than membership in either the Gros Ventre or Assiniboine Tribe, therefore, one person could be a member of the FBIC but not either Gros Ventre or Assiniboine Tribes while another person could be a member of the FBIC and either the Gros Ventre Tribe or the Assiniboine Tribe.**

Chairman Dorgan
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510
Majority Fax: (202) 228.2589
Minority Fax: (202) 224-5429

Via email and facsimile

Re: Opposition to S 2956

Honorable Chairman Dorgan and Committee Members

I am a registered voter and an allottee of the Pechanga Indian Reservation and I submit this letter in opposition to S. 2956 the Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act ("Act"). I am not only an allottee, as the term is defined in Section 3 of the Act, I am also an individual Indian whose rights have been violated by Pechanga tribal officials.

Over the past six (6) plus years, Pechanga officials have disenrolled over 400 previously recognized tribal members. Additionally, hundreds more have been denied membership in the tribe under an illegal moratorium enacted to limit the number of people who benefit from the tribe's economic development ventures.

Those who have been disenrolled and denied membership include many allottees who could be adversely affected by the Act as it provides that the very officials who have stripped or denied my family and I basic rights set forth in tribal and federal law shall be responsible for satisfying my entitlement to water. Moreover, S. 2956 fails to provide adequate protections for allottees against future abuses by Pechanga tribal officials in the settlement and allocation of my rights under the Act.

I also oppose S. 2956 as it fails to provide and protect the rights of the Temecula band or village of Indians, and their descendants. The Act references several priority dates as defining and determining the characteristics of the water rights. Specifically, June 27, 1882 and August 29, 1893, which are mentioned in the Act, are dates on which Executive Orders were enacted setting aside the Reservation for the use and benefit of **the Temecula band or village of Indians.**

According to decisions made by Pechanga tribal officials and tribal documents recording said decisions, Temecula Indians and Pechanga Indians are different people. In fact, Pechanga tribal officials have disenrolled or denied membership to hundreds of individuals who can trace their lineage to the Temecula band or village of Indians for whom the reservation was set aside for on the priority dates listed in the Act. There are other historical inaccuracies listed in the Act on which Pechanga officials claim standing to request Congressional action to settle the tribal water rights.

This is not the first time that misinformation may have been provided to move Congress to act on behalf of the Pechanga band. In regards to a requested Congressional action to protect tribal fee

lands and transfer said lands into trust, Pechanga Chairman Macarro testified to the United States House of Representatives Committee on Natural Resources on April 17, 2002 that:

> "The sole purpose of the (land) acquisition is the preservation and protection of the Luiseno people's natural and cultural resources."

And, when specifically asked if the Pechanga Tribe had "any plans for development of any kind on the Great Oak Ranch property", Chairman Macarro's response was as follows:

> "No, we don't. As stated in our application (to transfer to trust) … there is no change in use in the property,..."

Chairman Macarro was then asked if the Pechanga tribe planned to use the Great Oak Ranch for gaming purposes or any other purposes other than what you have just outlined. His response was, "No, the tribe does not".

Since the transfer of the Great Oak Ranch into trust, the Ranch has been turned into a staging area for on-going construction projects both on the Ranch and associated with the casino complex. The character of the Ranch has been drastically altered and in no way reflects the "no change in use" testified to and used by Pechanga tribal officials in lobbying Congress and federal agencies for its protection and transfer to trust.

Based on the previous actions and testimony of Pechanga tribal officials, there is a need for further due diligence in ascertaining the validity of the Pechanga Band's standing and confirming assertions made to Congress regarding the need for the Act.

Due to the Act's failure to adequately protect the rights of allottees and the other concerns/issues stated above, I re-state my opposition to S. 2956 and respectfully request that your committee delay any action on the bill until such time as the Act is amended. If you will not delay action on the Act, I request that you vote "No" on passage of the Act out of your Committee.

Respectfully submitted,

Tamara Backstrom, St. Hawthorne, CA
Nansi Buenrostro, North Hollywood, CA
Eloise Cornejo-Miller, Anaheim, CA
Robert Corral, Chino Hills, CA
Sandra Cruz, Burbank, CA
Spring Drake, Los Angeles, CA
Patricia Farias, Los Angeles, CA
Lisa Garcia, Long Beach, CA
John Gomez, Jr., Temecula, CA
Judy Ann Hoofe, Los Angeles, CA
Fabian M. Ledesma, San Fernando CA
Janet Logan, West Covina, CA
Renee Lovan, Ontario, CA
Mark Lucero, Riverside, CA
Michael Lucero, San Bernardino, CA
Ric Macaisa, Los Angeles, CA
Michael Madariaga, Temecula, CA
Henry Madariaga, Temecula, CA
Jackie Madariaga, Temecula, CA
Karrie Madariaga, Temecula, CA
Lawrence Madariaga, Temecula, CA
Remy Madariaga, Temecula, CA
Katherine Medina, Alhambra, CA
Regina P. Marquez, Whittier, CA
Stacy Mestaz, Chino Hills, CA
Kelly Morningstar Madariaga, Temecula, CA
Susan Osuna, Los Angeles, CA
Michael A. Rios, Beaumont, CA
Joyce Robins, Fontana, CA
Daniel R. Rodarte, Chino, CA
Debra Lyn Rodarte, Chino, CA

Paul Rodarte, Montebello CA
Darlene Saunders, Chino Hills, CA
Brenda Simon, Rancho Cucamonga, CA
Jessica Solorzano, Ontario, CA
Christopher Ernest Tavizon, La Crescenta, CA
Danielle Jeanne Tavizon, La Crescenta, CA
Janelle Lynn Tavizon, La Crescenta, CA
Yolanda Valadez, South El Monte, CA
Helga M. Walston, Riverside, CA

Name: Manuel R Batta FONTANA CA 92336

Name: Robert Clarke B.F. CA 90706

Name: Daniel J. Rodgers San Diego, CA 92107

Name: Glenn Walston Riverside CA

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Manager

September 20, 2010

Chairman Byron Dorgan
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

Vice Chairman John Barrasso
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

Dear Chairman Dorgan and Vice-Chairman Barrasso:

Please accept this letter as Metropolitan Water District's ("MWD") support of S. 2956, the Pechanga Band of Luiseño Indians Water Rights Settlement Act.

MWD has been engaged in discussions with Pechanga over the past three years in an effort to assist the various parties comes to a resolution of their long-standing disputes by providing MWD water to Pechanga. As you know, on December 17, 2008, Pechanga and Rancho California Water District ("RCWD") first announced that they had reached an agreement, developed with the assistance of MWD and the United States Federal Negotiation Team, to resolve Pechanga's longstanding claims to water rights in the Santa Margarita River Basin. Since that time, Pechanga, RCWD, Eastern Municipal Water District, and the United States worked together to develop the Pechanga Settlement Agreement, which will be authorized and confirmed by S. 2956. Under the Pechanga Settlement Agreement, specifically the Extension of Service Area Agreement (Exhibit F to the Pechanga Settlement Agreement), Pechanga will be able to receive MWD imported potable water to satisfy, in part, Pechanga's tribal water right claims.

MWD is aware of how much hard work and compromise went into the Pechanga Settlement Agreement. MWD strongly supports this important piece of legislation and respectfully requests that S. 2956 proceed through the Senate Committee on Indian Affairs as quickly as possible to facilitate ultimate passage of the bill this Congress.

Please do not hesitate to contact me if you have any questions or if there is any additional information MWD can provide to the Committee.

Sincerely,

Jeffrey Kightlinger
General Manager

700 N. Alameda Street, Los Angeles, California 90012 • Mailing Address: Box 54153, Los Angeles, California 90054-0153

United States Senate

WASHINGTON, DC 20510

September 21, 2010

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, DC 20510

The Honorable John Barrasso
Vice Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, DC 20510

Dear Chairman and Vice Chairman:

I am writing to request that the Committee schedule a markup of S.2956, the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act. This legislation will implement a settlement concerning the water rights of the Pechanga Band of Luiseño Mission Indians, who have been engaged for several decades in a struggle for recognition and protection of their federally reserved groundwater rights.

Since 1951, the Pechanga have been involved in litigation initiated by the United States concerning water rights in the Santa Margarita watershed. The Pechanga's interest has been in protecting their groundwater supplies, which are shared with municipal developments in the San Diego region. Beginning in 2006, the Pechanga worked with local water districts to negotiate a cooperative solution and put an end to their dispute.

The Pechanga Settlement Agreement is a comprehensive agreement negotiated among the Pechanga, the United States on their behalf, and several California water districts, including the Rancho California Water District and Eastern Municipal Water District. The Settlement recognizes the Pechanga's tribal water right to 4994 acre-feet of water per year and outlines a series of measures to guarantee this amount. It is a win-win solution that protects the rights of the Pechanga while ensuring that other communities in Southern California will also have sufficient water supplies.

I have worked with our colleagues in the House, including Representatives Bono Mack, Grijalva, Richardson, Calvert, Baca, and Issa, to craft this legislation.

I would like to thank you for previously holding a hearing in consideration of the bill, and respectfully request that the committee move forward to mark-up the Settlement Act before the October recess.

Thank you for your consideration of this request. If you have any questions about this legislation, please do not hesitate to contact Lynn Abramson or Joaquin Esquivel in my staff at 202-224-3553.

Sincerely,

Barbara Boxer
United States Senator

St. Mary Rehabilitation Working Group

17 Robertson Court, Glasgow, Montana 59230

July 16, 2010

Sen. Byron L. Dorgan
Senate Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

Re.: Support for S. 3290

Dear Chairman Dorgan:

My name is Larry Mires and I am the executive director of the St. Mary Rehabilitation Working Group ("SMRWG"). I write on behalf of the SMRWG in support of S. 3290, the Blackfeet Water Rights Settlement Act of 2010. The SMRWG is made up of 16 volunteer members representing irrigation interests, municipalities, recreation/fisheries groups, economic development entities, and county governments, as well as representatives from the Blackfeet Tribe and the Ft. Belknap Indian Community.

The SMRWG was created in 2003 to craft a workable solution for rehabilitating the St. Mary Facilities before the system suffers catastrophic failure. The St. Mary Facilities are the backbone of the Milk River Project, one of the five original Bureau of Reclamation irrigation projects. The Milk River Project serves over 110,000 irrigated acres of agriculture along Montana's Hi Line. In dry years, nearly 90 percent of the water available to Milk River Project users comes from the St. Mary River, which arises on the Blackfeet Indian Reservation. The SMRWG strongly supports the settlement of the Blackfeet Tribe's federal reserved water rights claims embodied in S. 3290, as that settlement vindicates the historically neglected water rights of the Blackfeet Tribe while protecting the Milk River Project's vital access to St. Mary River water. This carefully crafted balance is a critical element of the settlement, and to assisting the Bureau of Reclamation and the United States in living up to its dual obligations to the Blackfeet Tribe and the Milk River Project.

Thank you for your consideration.

Sincerely,

Larry Mires

Larry Mires
Executive Director
St. Mary Rehabilitation
Working Group

Members: Lt. Gov. John Bohlinger – Co-chair, Randy Reed – Co-chair, Chinook, Dave Peterson – Havre, Dolores Plumage – County Commissioners, Gary Anderson – Chinook, Wes Pankratz – Glasgow, Bruce Hould – Malta, Marko Manoukian – Malta, Matt McCann – Harlem, Jennifer Brandon – MR Jt. Board, Mike Barthel – Recreation, Paul Tuss – Economic Development, Randy Perez – Ft Belknap, Steven Page – Glasgow, Wade Engstrom – Economic Development, Michael DesRosier – Glacier County, Gerald Lunak – Blackfeet Tribe. Staff: Larry Mires – Executive Director, Pam Lemer – Adm. Assistant

SMRWG

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