

**Statement of Letty Belin  
Counselor to the Deputy Secretary  
U.S. Department of the Interior  
Before the  
Committee on Indian Affairs  
U.S. Senate  
On  
S. 3013, Salish and Kootenai Water Rights Settlement Act of 2016  
  
June 29, 2016**

Chairman Barrasso, Vice Chairman Tester and members of the Committee, I am Letty Belin, Counselor to the Deputy Secretary at the Department of the Interior (Department). I am here today to provide the Department's position on S. 3013, the Salish and Kootenai Water Rights Settlement Act of 2016, which would approve and provide authorizations to carry out, a settlement of the water right claims of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana (Tribes). We have not completed the necessary review of the legislation, and we have significant concerns about the Federal costs of the settlement, which total approximately \$2.3 billion. Therefore, the Department cannot support S. 3013 as introduced.

**I. Introduction**

The Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefitting from the settlement. I want to affirm the Administration's support for settling Indian water rights where possible.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are tangible barriers to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy

promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for nearly 30 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that negotiated Indian water rights settlements are preferable to the protracted litigation over Indian water rights claims.

The Confederated Salish and Kootenai Tribes have long been leaders in water and natural resources management. They have restored the ecosystem function of miles of streams and, with the State of Montana, co-manage the fishery on Flathead Lake, the largest freshwater body west of the Continental Divide. Most recently, the Tribes acquired ownership of Kerr Dam (now known as the Selis Ksanka Qlispe Dam) near the outlet of Flathead Lake, becoming the first tribe to hold exclusively a federal license for and operate a major hydroelectric dam. The State of Montana should also be commended for its efforts to resolve Tribal and Federal reserved water rights through the State's unique and highly successful Reserved Water Rights Compact Commission. The Tribes and the State brought these leadership qualities to this tribal water negotiation, and the Department recognizes the substantial effort that they have made in negotiating a resolution of the Tribes' water right claims; the issues surrounding these claims have been among the most contentious to be addressed to date in a tribal water settlement.

## **II. Historical Context**

### **A. 1855 Hellgate Treaty**

The aboriginal homeland of the Salish, Kootenai and Pend d' Oreille Tribes is located in present-day western Montana, northern Idaho and north into Canada. In 1855, these Tribes negotiated with the United States and entered into what is known as the Hellgate Treaty. Under the treaty, the Tribes ceded to the United States a significant portion of their aboriginal territory and reserved to themselves the Flathead Indian Reservation (Reservation) in northwestern Montana.

The Hellgate Treaty is one of a series of similar Indian treaties entered into between the United States, represented by Washington Territory Governor Isaac Stevens, and numerous tribes in the Pacific Northwest. A common attribute of these "Stevens treaties" is the express reservation of tribal aboriginal hunting, fishing and gathering rights on- and off-reservations. In the Hellgate Treaty, the Tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to fish at usual and accustomed fishing sites off the Reservation "in common" with non-Indian settlers. These and similar terms found in Indian treaties, discussed more below, have been found by state and federal courts to support reserved instream flow water rights for Tribal fisheries.

In addition, there are extensive Tribal lands within the Reservation that are economically viable agricultural lands when irrigated. Articles four and five of the Hellgate Treaty address the commitment of the United States to provide the necessary materials, equipment, and other support to convert the Tribes to an agrarian society. Under the *Winters* Indian reserved water

rights doctrine, these lands would be entitled to substantial reserved water rights for irrigation as part of the homeland purpose of the Reservation.

### **B. Water Resource Development and Conflict on the Flathead Reservation**

There have been extensive and bitter disputes over the Tribes' water rights and resources dating back a century. These longstanding conflicts can be traced directly to Congressional actions in the early 20<sup>th</sup> Century. From 1855 to 1904 the Tribes enjoyed the exclusive use of the Flathead Reservation. This included the initiation of irrigated farming by Tribal members. Pressures for non-tribal settlement of lands within the Reservation began to mount, however, and in the 1904 Flathead Allotment Act, Congress, over the objections of the Tribes, directed the allotment of Tribal land to individual Indians and authorized the disposal of additional "surplus" unallotted Tribal land for non-Indian homestead entry.

The 1904 Flathead Allotment Act authorized limited irrigation facilities for Indian use as part of allotting lands to individual Indians. In 1908, Congress amended the 1904 Act and authorized the construction of a greatly-expanded irrigation system to serve extensive irrigable lands on the Reservation, both Indian and non-Indian. This irrigation system became known as the Flathead Indian Irrigation Project (Project). Over the next few decades, the Project was constructed to irrigate approximately 130,000 acres. By the 1930s, most of the lands allotted to individual Tribal members within the Project were no longer in Indian ownership, and currently nearly 90 percent of the lands irrigated by the Project are owned by non-Indians.

### **C. Court Confirmation of Tribal Reserved Water Rights for Instream Flows**

Much of the irrigation water supply for the Project is diverted directly from several streams which also support the Tribes' reserved fisheries. By the 1980s, these diversions had significantly impacted the natural flows and the fisheries on the Reservation. In a series of interrelated lawsuits filed in the 1980s by the Tribes and others, federal courts conclusively confirmed that the Tribes, by the terms of the 1855 Hellgate Treaty, are entitled to on-Reservation instream flows water rights sufficient to support fishery resources. The courts further found that these reserved instream flow rights have a priority date of time immemorial and thus are senior to the irrigation water rights for the Project.

After these rulings, the Tribes agreed to accept lower "interim" flows until the instream flow rights could be fully quantified in the Montana water court or through negotiations. Since the 1980s, the situation on the Flathead Reservation between flows and irrigation demands essentially has been at an impasse. The Bureau of Indian Affairs (BIA) continues to operate the Project, but is on record stating that the existing minimum flow protections are not adequate. Population growth on and near the Reservation over the past few decades has increased the demand for water resources.

Montana is in the process of adjudicating water rights throughout the state. It was clear to Montana representatives and most water users on the Reservation that at the end of a long and expensive process, the non-Indian rights would be junior to the Tribes and their water supplies could be shut off to meet the Tribes' instream flow rights. The Tribes also had a number of senior water rights claims throughout Montana that created uncertainty about future water uses.

### **III. Salish and Kootenai Water Rights Compact and Proposed Legislation**

#### **A. Negotiations**

Seeking to avoid costly litigation, provide certainty for all water users, and meet the Tribes' needs, the State of Montana, the Tribes and the United States have made a number of attempts since the early 1990s to negotiate the Tribes' instream flow and other water right claims. These negotiations became more active and focused in 2007, when the Tribes submitted a set of key negotiation principles. First, the Tribes committed to negotiate toward a settlement in which all verified existing water uses on the Reservation – Tribal and non-Tribal – would be protected. This included a commitment that the water supply for the Project would be protected to the full amount needed to meet existing net irrigation requirements. Second, rather than exercise the full extent of the Tribes' instream flow rights (which are senior in priority to and would reduce water available for irrigation water rights), the Tribes agreed instead that flow protections for fish would be met by dedicating water saved through conservation practices and Project improvements. Third, all waters on the Reservation would be jointly administered by the Tribes and the State to reflect the principle that water on the Reservation is a unitary resource.

#### **B. Compact**

The Salish and Kootenai Tribal water compact as negotiated and as approved by the Montana legislature in 2015 represents a comprehensive resolution of all of the Tribes' water right claims in concert with the negotiating principles discussed above. Among other things, the Compact includes a set of Tribal irrigation, domestic, instream flow and other water rights to meet the Tribes' current and future water needs on the Reservation. The Compact entitles the Tribes to additional water sources from the Flathead River and from the federal Hungry Horse Project (a large dam and reservoir on the South Fork of the Flathead River under the jurisdiction of the U.S. Bureau of Reclamation). Off-reservation water right claims are also resolved under the Compact, which provides for Tribal water rights and other flow protections in key streams throughout the Clarks Fork and Kootenai River basins in western Montana.

Finally, once it is fully executed, the Compact provides a unique and carefully crafted framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or Law of Administration). It describes the process to 1) register existing uses of water; 2) change water rights; and 3) provide for new water

development. The Compact also establishes a Water Management Board to administer the Compact and Ordinance on the Reservation.

The Department's federal negotiating team participated in water related compromises contained in the Compact as required by the Department's many federal responsibilities with respect to the disputed water rights and resources on the Flathead Indian Reservation, its ownership and operation of the Project, and its ownership and operation of Hungry Horse Reservoir located above Flathead Lake. Finally, the Department has worked with the U.S. Department of Justice to develop and file extensive claims for water on and off the Reservation in the Montana water court as part of the Montana general stream adjudication. These claims have been stayed by the Montana water court until February 2017 while the parties seek federal and other approvals of the Compact.

### **C. S. 3013**

Among other things, S. 3013 would “authorize, ratify, confirm, and provide funding” for the Salish and Kootenai Tribal water compact; would ratify the tribal water right set forth in the Compact and make “any use of the tribal water right ... subject to the terms and conditions of the Compact and [S. 3013]”; and, in conformance with the Compact, would direct the Secretary to “allocate to the Tribes 90,000 acre-feet” of storage water in the federal Hungry Horse Reservoir “for use by the Tribes for any beneficial purpose on or off the Reservation.” Section 7 addresses future hydropower development on the Reservation by (a) directing that the Commissioner of the Bureau of Reclamation would have exclusive jurisdiction to authorize the development of any hydroelectric power generation project within the Reservation and (b) providing that the Tribes “shall have the exclusive right to develop and market hydropower on water bodies within the Reservation.” Section 8 would provide several authorities to rehabilitate, modernize and mitigate the impacts of the federal Project.

S. 3013 would authorize approximately \$2.3 billion of federal funds and provide for the waiver of CSKT water and damages claims. The following accounts would be established:

- Selis-QLispe Ksanka (Tribal) Settlement Trust Fund (Section 9)
  - Agriculture Development Account - \$365,207,225
  - Economic Development Account - \$93,633,566
  - Community Development Account - \$233,361,200
- Salish and Kootenai Compact Fund (Section 10)
  - Compact Implementation Account - \$116,209,294
  - Flathead Indian Irrigation Project Account - \$1,519,408,000

With the Project-related fund, CSKT is seeking funding through S. 3013 to rehabilitate and modernize the Project so that the water savings can be used to meet instream flow requirements.

#### **IV. Department of the Interior Positions on S. 3013**

While the Department has a record of strong support for Indian water rights settlements and the Compact is similar to many other water rights settlements that Congress has approved, the Department is unable to support S. 3013 as introduced. Additional time is needed for the Department to complete its review of the legislation. The Department has serious concerns about and cannot support the approximately \$2.3 billion in federal appropriations that S. 3013 calls for. The proposed amounts and the legislative language contain little information regarding the purposes for which the proposed funds and accounts would be put to use. The Department has made clear to the Tribes that a more realistic level of funding is required before the Department will be able to support S. 3013.

We are also concerned about the magnitude of the increased cost of this settlement compared to enacted Indian water rights settlements. While we recognize that this proposed settlement would seek to resolve longstanding and intense conflicts, we would also note that the size of the proposed Federal funding obligation created under S. 3013 in relation to the Department's budget presents significant challenges. As an example, the Bureau of Reclamation currently has a backlog of more than \$1 billion in authorized, but unfunded, Indian Water Rights Settlements.

#### **V. Conclusion**

S. 3013 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana - Indian and non-Indian - to settle their differences through negotiation rather than litigation. This Administration shares that goal, and hopes to be able to support ratifying legislation for the Confederated Salish and Kootenai Tribes after a full and robust analysis and discussion of all aspects and ramifications of this substantial settlement.

The Administration is committed to working with the Tribes and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims. The Administration is committed to working with Congress and all parties concerned in developing settlement legislation that the Administration can fully support.

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