

TESTIMONY OF
**VERNON FINLEY, CHAIRMAN, TRIBAL COUNCIL OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION**

SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS

LEGISLATIVE HEARING

**S. 3013 - SALISH AND KOOTENAI TRIBAL WATER RIGHTS SETTLEMENT
ACT OF 2016**

JUNE 29, 2016

Chairman Barrasso, Vice Chairman Tester and members of the Committee, the Confederated Salish and Kootenai Tribes of the Flathead Reservation are very pleased to appear before you in strong support of this legislation which begins a process to heal the wounds to our people caused directly by over a century of destructive federal policies and failures by the United States to protect our federally reserved water rights, fishing rights and natural resources on our Reservation. This bill resolves existing and potential litigation involving thousands of litigants, settles costly claims by the Tribes against the federal government and water users across roughly two-thirds of Montana, and provides future certainty for all Montanans and, indeed, all Americans. It also makes federal investments that will

rehabilitate and modernize decaying infrastructure in order to provide water to our Tribal members as promised by Congress over a century ago, will restore natural resources and fisheries within our Reservation, and will provide an overall savings to the taxpayers. The value of the Tribes' waived claims under this bill is over 14 times higher than the total cost of the proposed settlement, according to nationally-recognized engineers, hydrologists, scientists and economists.

No natural resource is more vital to our *Séliš*, *Ksanka* and *Qlispé* people than water – the importance of water to our people is woven into all aspects of our lives. We are a fishing people. For thousands of years, the Bitterroot Salish, Kootenai and Upper Pend d'Oreille, thrived in our aboriginal homeland situated in what is now Montana, Idaho, British Columbia and Wyoming, subsisting off of healthy native fisheries, plants, and wildlife. But over the course of the last one hundred fifty years, federal policy endeavored to sever our relationship with water and failed utterly to protect our federally reserved water rights – instead diverting that water and seizing our resources for the benefit of non-Indians.

Our Reservation is located in northwestern Montana, west of the continental divide. Under the Treaty of Hellgate of July 16, 1855, the Confederated Salish and Kootenai Tribes (“Tribes”), which includes the

Upper Pend d'Oreille, ceded over 20 million acres of land in return for a permanent homeland on the 1.3 million-acre Flathead Reservation. And, in the Hellgate Treaty, the United States guaranteed the Tribes that the Flathead Reservation would be set-aside for our “exclusive use and benefit.” “[T]he Reservation was a natural paradise for hunting and fishing.” *Conf. Salish and Kootenai Tribes v. United States*, 437 F.2d 458, 478 (Ct. Cl. 1971).

In that Treaty, the Tribes also reserved “the exclusive right of taking fish in all the streams running through or bordering said reservation,” and “the right of taking fish at all usual and accustomed places” Ours is the only treaty in Montana reserving off-reservation fishing rights – a more common practice in treaties with tribes in Washington and Oregon –rights that have been repeatedly upheld by the United States Supreme Court.

However, in the century after the promises made in the Hellgate Treaty, the United States broke its word and diminished the tribal land holdings to less than one-fifth of the 1.3 million-acre Reservation that had been reserved under the Treaty. In 1904, over the Tribes’ strenuous objection, Congress enacted a statute that opened much of the Reservation to non-Indian settlement, and promised to use the proceeds from the sale of reservation lands to develop an irrigation project “for the benefit of said

Indians.” But, in fact, in a blatantly transparent breach of its trust responsibility to the Tribes, the United States constructed the Flathead Indian Irrigation Project to provide water to, almost exclusively, the non-Indian homesteaders. The measure of damages sustained by the Tribes and its resources caused by this breach of trust is approximately \$4 billion.

For over 100 years the operation of the Project created – and still creates – an environmental catastrophe on our Reservation. It diverts water from most mountain streams on our Reservation – like Mill and Sullivan Creek that flow into the Little Bitterroot River – dewatering them and destroying the native fisheries and fish habitat. For example, the diversion of streams and creeks for the Project has led to complete dewatering of streams in some places, erosion and elimination of natural wetlands throughout the Reservation well beyond the actual footprint of the Project. The Project’s inefficiencies and polluted return flows have created severe water quality issues that threaten endangered species. Fish native to the Reservation like westslope cutthroat trout have been evaluated for listing under the Endangered Species Act, and others, like bull trout, have been listed as threatened.

These federal actions had and continue to have disastrous impacts on our Tribal people that this legislation will finally begin to correct. The

Tribes decided to negotiate the Water Compact – that this legislation will approve – rather than litigate our federally reserved water rights because we think no good can come from decades-long litigation, with millions of dollars in legal costs for the Tribes, non-Indians and the federal government. Protracted litigation would only serve to cloud title to and likely place significant limitations on water availability and usage throughout two-thirds of Montana. So for the last two decades, the Tribes negotiated this settlement with the Montana Reserved Water Rights Compact Commission, an entity created by the State Legislature in 1979 to negotiate federally reserved water rights claims throughout the state.

In 2015, the Montana Legislature enacted Senate Bill 262, ratifying the Water Rights Compact between the Tribes, the State of Montana and the United States. The Compact has strong bipartisan support and Governor Steve Bullock signed it into law on April 24, 2015. Recognizing the benefits, and the time-sensitive nature of the Compact, the State of Montana has already begun appropriating its share of the funding. Once fully appropriated, Montana's \$55 million contribution to the Tribes' settlement will be the largest of state contribution to any Indian water settlement in the Nation. Approval of the Compact through this bill will secure the Tribes' water right while protecting existing non-Indian water uses, and allow

parties to develop and implement water using homegrown creative solutions based on local knowledge and values.

This bill will also have a positive impact on Tribal members, the Reservation, and indeed all of Western Montana, addressing the many needs of the decrepit, century-old BIA irrigation project. This includes upgrading the federal facility to comply with the Endangered Species Act. If the Tribes could rewrite history, this Project would have never been constructed.

However, we cannot rewrite history. We can only go forward. And the only way that we can undo the damage that this Project has caused to our lands and resources, is to repair this federal facility in order to halt and reverse the destruction that it has caused. This will also result in benefits to the agricultural economy within the Reservation by improving water use efficiency, and will ultimately restore our natural resources by improving instream flows for fisheries -- helping farmers, ranchers, and both recreational and subsistence fishermen. The alternative is to leave this federal facility as it is and let it continue to degrade our lands and our resources leading to eventual and complete destruction of our fisheries and way of life. This is entirely unacceptable to us.

By ratifying the Compact, which quantifies the Tribes' reserved and aboriginal water rights, this legislation will bring certainty to stakeholders in

the region regarding their water rights. Further, in recognizing the federal government's neglect and mismanagement of the Tribes' resources, this legislation is an effort to move forward in a constructive way and bring a positive change to the Reservation to protect our Treaty rights and resources. The positive change that will be realized by our Tribes through approval of S. 3013, falls into five categories. First, the legislation will provide necessary funding to implement the Compact. For example, funding will be provided to register, monitor and enforce the Tribes' water rights, support fisheries programs, and carry out water measurement activities for the Flathead Indian Irrigation Project.

Second, the legislation will rehabilitate and modernize the dilapidated Flathead Indian Irrigation Project and remediate Tribal natural resources within the Reservation that have been devastated by the Project. These activities will ensure future responsible management of federal infrastructure by applying modern technology to improve efficiency for the advancement of agriculture and industry. At the same time this work will restore severe damages sustained to the Reservation's ecosystem and habitat by restoring wetlands, addressing noxious weeds and erosion issues across the Reservation, and revitalize and restore important in-stream flows for the restoration of a healthy native fishery.

Third, the bill will sustain the Tribal agricultural economy into the future by investing in Tribal agricultural resources and infrastructure commensurate with past investments to non-Indian agriculture in order to promote the advancement of the region's economy. The primary focus will be on strengthening the sustainability of tribal agricultural projects, which is key to contributing to Tribal economic development and the creation of jobs, while ensuring protection of the Reservation's ecosystem.

Fourth, the legislation will ensure safe, reliable drinking water and wastewater systems on the Reservation, thereby promoting economic development throughout the Reservation. Through the implementation of the Tribal water right, drinking water and wastewater systems will be improved and brought to modern standards ensuring the protection of the quality of Reservation surface and ground water.

Finally, a critical component of the bill invests in the Tribes' endeavor to repair and rebuild Tribal culture and language decimated by misguided federal water policies of the past. Because we are fishing people, the destruction of our waters and fishery has had an enormous impact on our language and culture. As we start to rehabilitate and restore our waterways and natural resources we must also have the resources to teach traditional

ways and language to our members, adults and children alike. This will ensure true Tribal self-determination and self-sufficiency for generations.

The Compact also contains new and creative concepts such as the Unitary Management Ordinance for the practical administration of non-Indian and Indian water rights within the Reservation, which includes the establishment of the independent Flathead Reservation Water Management Board. Meandering streams know no political boundaries, so instead of having water rights disputes dispersed to various courts based on land status, approval of the Compact will allow for unitary management by the management board with a cross section of non-Indian and Indian stakeholders serving on it. The Compact includes provisions assuring that irrigators remain entitled to the right to the verified use of water that they have historically put to beneficial use.

During the nearly ten years of negotiations at the state level, many compromises were made in order to reach consensus. This resulted in a compact that ultimately reflects a win-win situation for the Tribes, the State of Montana and the United States, as trustee for the Tribes, regarding the ownership, use and management of much of the water in Northwest Montana. The Compact reflects what can happen when stakeholders work

in earnest to seek resolution that can bring a true measure of justice and satisfaction to the parties involved.

The federal settlement presented in S. 3013 provides an opportunity for the federal government to authorize a contribution to this settlement, both in its capacity as trustee and as the entity most responsible for causing the damages that have resulted from the past and current federal policies. In addition, S. 3013 allows the United States to finally honor its obligations to the Tribes and our members.

While non-Indians, and the larger non-Indian society, benefitted from the taking of Confederated Salish and Kootenai Tribal lands and waters, Tribal members bore – and continue to bear– the brunt of the costs and damages. Approval of S. 3013 will bring peace in a part of Montana, where there has been controversy for over 100 years, and will be a win-win for all parties.

We are grateful to this Committee and its leadership for working so hard to find mechanisms to fund Indian water settlements and operational, maintenance, and modernization costs of both existing and new water and irrigation projects. We thank Chairman Barrasso for his leadership on these matters and are grateful to our Senator, Vice Chairman Tester, for introducing this historic legislation. I will be happy to answer any questions

you may have and hope the Committee will report this legislation favorably to the Senate.