

TESTIMONY OF JAY WEINER
REPRESENTING THE STATE OF MONTANA
ON ADDRESSING THE NEEDS OF NATIVE COMMUNITIES THROUGH INDIAN
WATER RIGHTS SETTLEMENTS
BEFORE THE SENATE COMMITTEE ON
INDIAN AFFAIRS
UNITED STATES SENATE

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Chairman Barrasso, Vice Chairman Tester, Senator Daines and other 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 an assistant Attorney General with the Montana Attorney General's Office. I have spent over a decade negotiating and working to secure the ratification and implementation of Indian water rights settlements in Montana.

Montana has been remarkably successful in resolving Indian water rights claims through settlement negotiations. We concluded our first settlement in 1985 with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, and in the recently concluded session, the Montana legislature approved a water rights settlement with the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation, marking the seventh and last settlement the State has approved with the Indian nations whose reservations are located in Montana. In between, Montana reached settlements with the Northern Cheyenne Tribe in 1991, the Chippewa Cree Tribe of the Rocky Boys Reservation in 1997, the Crow Tribe in 1999, the Fort Belknap Indian Community in 2001 and the Blackfeet Tribe in 2009. Congress approved the Northern Cheyenne Tribe-Montana settlement in 1992, the Chippewa Cree Tribe-Montana settlement in 1999, and the Crow Tribe-Montana settlement in 2010. The Blackfeet Tribe-Montana settlement was recently re-introduced in Congress by Senators Tester and Daines as S. 1125, and we are hopeful of securing final congressional approval of that settlement during this Congress. We anticipate that the CSKT-Montana and Fort Belknap-Montana settlements will also be brought before Congress for ratification when appropriate federal legislation is ready, and we look forward to those settlements being finally approved as well. These settlements were each the product of significant negotiation and compromise on the part of all of the negotiating parties – the respective Tribe, the State of Montana and the United States – and provide, through their resolution of the Tribes' legal claims to water rights, their administrative provisions, and the funding for tribal development of those rights, huge benefits to all Montanans, Indian and non-Indian, and to the United States as a whole.

The process of arriving at these water rights settlements is never an easy one. Montana, like most of our sister western states, subscribes to the prior appropriation doctrine to govern the allocation and use of our water resources. Under that doctrine, which is often described as "first in time is first in right," the first user of water on a source has a superior claim to that water over all subsequent water users. That is, a senior – or earlier – user is entitled to the last drop of water he or she needs before the next, junior user is entitled to drop one. Because of the significant

advantages conferred by seniority, Montana – again, like other prior appropriation states – limits the size of a water right to the quantity that the appropriator actually puts to beneficial use.

Indian water rights sit in awkward tension with these basic state water law principles as a consequence of the reserved water rights doctrine first announced by the United States Supreme Court in the 1908 decision *Winters v. United States*, 207 U.S. 564, which involved a dispute over the water rights of the Fort Belknap Indian Community in north-central Montana. This doctrine is grounded in the principle that in ceding millions of acres of land to the United States, tribes in no way intended to relinquish their ability to use water for the benefit of their homelands and reservations. In this way, *Winters* builds on a 1905 United States Supreme Court case, *United States v. Winans*, 198 U.S. 371, that recognized that the Indian treaties that led to the creation of many of today's reservations were grants of rights *from* Indian to the United States, not grants of rights *to* Indians from the United States. Under the *Winters* doctrine, tribal water rights are generally entitled to priority dates based not on when water was first put to beneficial use but rather on the date on which the particular Indian reservation was created. In the case of the Blackfeet Tribe, for example, that priority date is October 17, 1855, which is when the Blackfeet Tribe entered into a treaty with the United States at Fort Benton, Montana. That is a very senior date for a water right in Montana. Moreover, the *Winters* doctrine holds that the quantity of water entitled to that priority date is measured not by actual beneficial use, as with other water rights in Montana, but rather is the amount necessary to satisfy the purpose or purposes for which the reservation was created. That is a very nebulous standard, which is a significant reason why quantifying these water rights is a major challenge for states, tribes and the United States. But without quantification, tribes are hampered in their ability to make productive use of their water and non-Indian water right holders operate under the cloud cast by these very senior but otherwise unquantified Indian water rights which could potentially disrupt long-standing but legally junior uses of water if and when a tribe obtains the ability to develop its water. States are also constrained in their ability to administer and enforce water rights if large, senior tribal claims remain adjudicated. A failure to account for tribal claims in state adjudications also raises problems for states' compliance with the McCarran Amendment, 43 U.S.C. § 666, which waived federal and tribal sovereign immunity to allow for the adjudication and administration of federal and Indian rights in state courts. All of these are potential sources of considerable conflict and acrimony. Montana has therefore long deemed it imperative to have these tribal rights quantified as quickly and efficiently as possible.

There are two ways to resolve Indian water rights claims: litigation or negotiation. Litigation is costly, divisive, zero-sum, and protracted. While litigation is sometimes nevertheless necessary, Montana made the choice when setting up our state-wide stream adjudication in 1979 to attempt to resolve these claims by negotiation whenever possible. To that end, our Legislature created the Montana Reserved Water Rights Compact Commission, a state agency specifically tasked with negotiating settlements with Indian Tribes (and federal agencies) claiming federal reserved water rights in the State of Montana. (I served the Compact Commission as a staff attorney for nine years.) To become fully effective, each of the settlements the Compact Commission negotiates must be ratified by the Montana Legislature, the respective Tribe and the United States, and then the water rights being recognized must be issued as a final decree by the Montana Water Court so that they are included as part of our state-wide stream adjudication. We are very proud that we have now successfully negotiated settlements with all of the tribes in

Montana. Should any of those settlements fail to obtain federal approval, however, the tribal claims would need to be litigated before the Montana Water Court. This would be a long and costly process, fraught with uncertainty for the State, the Tribes and the United States. This is particularly true since the federal legislation approving these settlements also provide for the waiver of each tribe's claims for damages against the federal government related to the United States' failure to protect and develop the tribe's water resources. This avoids litigation exposure on the part of the United States, and is another crucial component of the finality that these settlements provide. The federal contribution to each settlement is in part consideration for the waiver of these claims.

The negotiating process is rarely simple, however. These are complex resource allocation issues that touch on some of the most sensitive areas of tribal-state relations. Not infrequently, there are historical grievances, and significant legacies of mistrust between tribes and states, and between tribes and their non-Indian neighbors, that must be overcome. Litigation often serves to deepen these divisions, while a successful settlement can help heal them –by reducing the potential for actual conflict over water resources and allowing for a more collaborative future, and by improving lines of communication and fostering a climate of better mutual understanding. The negotiating process itself also presents significant technical challenges, as the negotiating parties must develop and share tools and information that allow for a shared assessment of water budgets, existing and potential future water uses, soil conditions, the feasibility of water delivery projects and other technical data that provide the foundation for a successful negotiated settlement. Some of this same data development process is necessary for litigation, but in litigation, the parties assemble their own data to prepare for a battle of the experts in court. In settlement negotiations, the parties' technical resources can be deployed to better practical effect (as well as more cost-effectively), creating the basis for successful settlement implementation and administration.

The Blackfeet settlement process provides a good illustration of these dynamics. There are six major streams on the Blackfeet Reservation, which meant that a great deal of technical work was required before the negotiating parties were able to engage in substantive negotiations over the optimal allocation of those water resources. Moreover, many of these sources were also sites of longstanding conflict between the Blackfeet Tribe and other water users. One of those streams, Birch Creek, which forms the southern boundary of the Blackfeet Reservation, is the primary source of supply for the Pondera County Canal and Reservoir Company (PCCRC), a large private irrigation company that serves nearly 80,000 acres and provides municipal water to communities just south of the Blackfeet Reservation, whose roots trace back to the federal Carey Land Act of 1894 (also known as the Desert Land Act) and which is a significant economic driver for that region of Montana. Birch Creek is also an important source of supply for thousands of acres of the on-reservation Bureau of Indian Affairs (BIA)-owned and -operated Blackfeet Irrigation Project. This stream was the focus of an early federal court case involving Indian water rights called *Conrad Investment Co. v. United States*, 161 F. 829, which was decided by the Ninth Circuit Court of Appeals in 1908 shortly after the *Winters* decision was issued. *Conrad Investment* decreed part but not all of the Blackfeet Tribe's rights in Birch Creek, and that stream remained a source of contention thereafter. In addition, the Bureau of Reclamation (BOR) diverts water from the St. Mary River – which originates in Glacier National Park before flowing northeast across the Blackfeet Reservation and into Canada – into the Milk

River – which also originates on the Reservation before flowing into Canada and then back into Montana further downstream – for use of its Milk River Project in north-central Montana, a project whose irrigators contribute approximately 10% of Montana’s agricultural economy. The Milk River Project is one of the original four reclamation projects authorized under the 1902 Reclamation Act, and has long been a source of grievance for the Blackfoot Tribe and its members since they have watched the BOR divert large quantities of water off their reservation for over a century without the Tribe or its members receiving any direct benefits from the project. The St. Mary and Milk Rivers are also governed by the 1909 Boundary Waters Treaty between the United States and Canada, an agreement that was negotiated without consultation with or consideration of the needs of the Blackfoot Tribe. This was another source of controversy and consternation that informed the negotiations.

Addressing all of these issues and dynamics required nearly two decades of negotiations, which included an intensive process of public involvement to identify and address key stakeholder concerns and to build the political support necessary to advance the settlement through the legislative approval process at the state, federal and tribal levels. The State and the Tribe are pleased that this settlement recognizes the Blackfoot Tribe’s water rights while also ensuring the protection of state law-based water users, including PCCRC and Milk River Project irrigators. It also sets forth administrative provisions to govern the use of water by the Tribe and by state law-based water users on and adjacent to the Blackfoot Reservation, and a process to resolve disputes over the administration of those water rights. These are critical tools that allow both tribal and state water managers to plan for drought and other contingencies, and are precisely the sort of practical tools that litigation does not provide. (Additional information about the specifics of the Blackfoot settlement may be found in the testimony I presented to this Committee on May 8, 2013, when it heard S. 434, the legislation introduced in the 113th Congress to ratify the Blackfoot Tribe-Montana settlement. That testimony is attached hereto as Exhibit A. S. 1125 obviates the State’s concern with S. 434 that I identified on page 6 of that testimony, and the State strongly supports the enactment of S. 1125.)

The Blackfoot settlement was approved by the Montana Legislature in 2009 and since that time the State and the Tribe have been working with the Administration and the Congress to secure federal ratification as well. This has been an arduous process. While the United States was represented by a federal negotiating team during the entire negotiation process, the limited nature of the resources the Department of the Interior has to devote to all of the Indian water right negotiations underway west-wide meant that we received sustained and detailed policy review from the United States only when the Blackfoot settlement arrived in Washington, DC. This dynamic bespeaks the critical importance of the Congress providing adequate funding for the Department of the Interior to engage meaningfully in settlement negotiations as early in the process as possible.

In these negotiations with the Administration over the last five years, the Tribe and the State have both agreed to modify the settlement in ways that reduce federal costs and that address other policy issues that the Department of the Interior and the Office of Management and Budget have identified. The Administration’s evaluation of settlements are guided by the Criteria and Procedures (C&P), a document first promulgated in the early 1990s, ostensibly as a tool for ensuring some degree of longitudinal consistency across administrations for the evaluation of

Indian water rights settlements. Although the C&P were developed without any meaningful consultation with tribes or states, we have learned to work with them over the years. Through this process with the Administration, the cost of the federal settlement legislation has been reduced by over \$170 million, and the State has agreed to increase its contribution by 40%, from \$35 million to \$49 million, one of the largest cash contributions to an Indian water rights settlement any state has ever made.

This \$49 million contribution, which has not only been authorized but fully funded by the Montana Legislature to support the Blackfeet settlement, is of a piece with Montana's longstanding commitment to contributing to Indian water rights settlements. In the early 1990s, the State spent \$21.8 million as part of the Northern Cheyenne settlement, which included the repair and enlargement of a failing state-owned dam, the additional capacity of which was used to make additional water available to the Northern Cheyenne Tribe as part of that settlement. The State spent \$550,000 as part of the smaller Chippewa Cree settlement and contributed \$15 million to the Crow Tribe settlement. The State has also committed to – and fully funded – a contribution of \$17.5 million for the Fort Belknap-Montana settlement that has been ratified by the Montana legislature but not yet approved by Congress. In approving the CSKT compact in its recently concluded legislative session, Montana also agreed to contribute \$55 million to that settlement, and appropriated the first \$3 million of that amount.

These are significant amounts of money for a state like Montana, and reflect the depth of Montana's commitment to the settlement process and investment in the benefits that settlements provide. Beyond the important benefits previously described, these include projects that make material differences in the lives of reservation residents and surrounding communities. These settlements commonly include funding for the rehabilitation of the often dilapidated infrastructure of on-reservation BIA irrigation projects, and fund or pave the way for the construction of systems to provide safe, potable drinking water to communities that for too long have struggled without. S. 1125, for example, provides funds to build a regional drinking water system for the Blackfeet Reservation and to rehabilitate portions of the Blackfeet Irrigation Project for which there is a significant backlog of deferred maintenance. It also, in conjunction with the State's contribution, provides funds to construct a pipeline to bring water from the Four Horns Reservoir on Badger Creek one drainage south to Birch Creek to help alleviate the water conflicts there. This infrastructure also helps the Tribe enhance the economic benefit it can make from its water resources. This is a further example of the sorts of creative solutions that enable settlements to work.

The difference in cost between a settlement like Chippewa Cree and one like CSKT reflects both the significantly different nature of the size and scope of the issues the settlement needs to resolve, but also the fact that settlement costs tend to increase over time as needs become ever more acute and things like construction costs rise. Delay in reaching, approving and implementing settlements should be avoided. Not only does it increase settlement costs, but it can jeopardize the very viability of the settlement itself as governmental actors change and the rationale behind how a settlement was structured and what compromises and trade-offs were agreed to fades from institutional memories. It is in part for this reason that Montana continues to appreciate that, as made clear by the 2012 colloquy between then-Senator Kyl and Senator Toomey (a copy of which is attached hereto as Exhibit B), the Senate does not consider funding

for Indian water rights settlements to be congressionally directed spending because of the important national benefits these settlements supply. We are also encouraged by the letter issued in late February by House Natural Resources Committee chairman Rob Bishop (a copy of which is attached hereto as Exhibit C), which provides a pathway for navigating the earmark issue in the House, which has been an impediment to moving these settlements forward for the last few years. I personally look forward to the opportunity to work with this Committee and its staff on securing passage of S. 1125 during the 114th Congress and the CSKT and Fort Belknap settlements as they become ripe for congressional consideration.

Thank you again for the opportunity to provide testimony on this important matter. I would be happy to answer any questions the Committee or its staff might have and to provide any additional information that would be helpful.