

**TESTIMONY BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
JUNE 12, 2024
ON S. 4442, THE CROW WATER SETTLEMENT AMENDMENTS ACT
PRESENTED BY FRANK WHITECLAY, CHAIRMAN
CROW NATION**

Good Afternoon, Honorable Members of the Senate Committee on Indian Affairs. I am Frank Whiteclay, Chairman of the Crow Nation of Montana, and I am honored to present this testimony in support of the Crow Water Settlement Amendments Act, Senate Bill 4442. I would like to thank Senator Tester and Senator Daines for their co-sponsorship of this important legislation for the Crow Nation.

The Crow Tribe proposed these amendments to the Crow Water Rights Settlement Act of 2010 to amend the Act from a project specific Act to a fund based settlement Act that is consistent with more recent Indian water rights settlements and provides flexibility for clean water delivery systems.

BACKGROUND

The Crow Reservation, formally established pursuant to the Fort Laramie Treaty of 1868, is located in southeast Montana, and currently encompasses 2.3 million acres with three mountain ranges, significant range lands, dry farm and irrigated lands with numerous water sources originating on and off the reservation. Approximately 7500 Crow Tribal members reside on the Reservation and approximately 1500 non-Indian residents possess state-adjudicated water rights throughout the reservation with the majority along the Big Horn River.

The Bureau of Indian Affairs constructed the Crow Irrigation System in the early 1900's to enhance agricultural efforts on the Crow Reservation through irrigation of farmlands along the Big Horn River, Little Bighorn River, Pryor Creek and Lodge Grass Creek. A significant portion of lands along the irrigation systems are in non-Indian fee ownership.

The Crow Tribe negotiated a Water Compact with the State of Montana Reserved Water Rights Compact Commission that was ratified by the Montana Legislature in a special session in June 1999. The Compact:

- provides water from surface flow, groundwater and storage for the Crow Tribe for existing and future Tribal water needs.
- Provides protection for all state and Tribal current water uses in the affected water basins from the Tribe's future exercise of its water rights; also protects the local conservation districts' right to future water use.
- Creates an administrative process for resolution of any future disputes between Tribal and non-Tribal water users.

CROW TRIBE WATER RIGHTS SETTLEMENT ACT OF 2010

The Crow Tribe Water Rights Settlement Act of 2010 ratifies, authorizes, and confirms the water rights 1999 Compact between the Crow Tribe and the state of Montana and provides for: 1) the Tribe to rehabilitate and improve the Crow Irrigation Project; and 2) the Tribe and Reclamation to construct the municipal, rural, and industrial water system; 3) provides tribal water rights for the tribe and allottees; 4) provides for leasing and selling of water with federal approval; 5) identifies 300,000 acre-feet per year of water stored in Bighorn Lake, Yellowtail Unit, Lower Bighorn Division, Pick Sloan Missouri Basin Program, for the Tribe in addition to the allocation of 500,000 acre-feet per year in the Big Horn and all groundwater on the Crow Reservation; and 6) provides the exclusive right of the Tribe to develop and market power generation on the Yellowtail Afterbay Dam.

The Crow Tribe proposed Amendments to the Crow Tribe Water Rights Settlement Act of 2010 to create a fund for water delivery purposes and related uses, to revise the management of the funds allocated for the Crow Irrigation Improvement Projects, and to extend the deadline for right to develop and market power generation at the Yellowtail Afterbay Dam.

MUNICIPAL, RURAL, AND INDUSTRIAL WATER SYSTEM

The Crow Tribe Water Rights Settlement Act of 2010 (Act) ratified and confirmed the 1999 Crow Tribe/State of Montana Water Rights Compact and directed the Secretary, through the Bureau of Reclamation, to design and construct a Municipal, Rural, and Industrial (MRI) water system through an agreement with the Tribe. Section 403 of the Act specifically described the MRI system as “raw water intake, water treatment plant, pipelines, storage tanks, pumping stations, pressure reducing valves, electrical transmission facility and other items.” The Tribe has spent the last 10 years designing the pipeline project as specifically described in the Act.

In 2022, 10 years after the enforcement date of the Water Settlement, engineering work for the MRI system water intake unit at the Yellowtail afterbay was completed and the project was advertised for bids. However, no bids were received due to the complexity of the project and the requirement for specialized divers for underwater construction. Following this setback, the Tribe reviewed the overall MRI project plan and identified the following concerns with the MRI project as specifically described in the Water Settlement Act of 2010.

- The pipeline construction timeframe was approximately 20 years at a cost of \$400 million plus with an expectation that estimated construction costs will rise, likely resulting in a shortfall to complete construction. Pipeline construction would be daunting with the size of the reservation and the varying geographic features.
- The pipeline construction timeframe would result in a lengthy delay of water delivery for reservation communities and some communities would wait many years for clear drinking water.

- The water settlement included a finite amount of \$47 million for Operation, Maintenance and Replacement costs which was projected to cover approximately eight years of costs, without unforeseen breaks or interruptions, following project completion.
- The Water Settlement Act did not include mandatory hook-up for households along the pipeline leaving the number of actual customers unknown. However, if every Tribal household was hooked up to the pipeline, monthly consumer costs to cover operational costs would be approximately \$120 per month in today's dollars which will be a burden to impoverished reservation households.
- Private landowners were unwilling to grant temporary permits to cross lands for water sampling and testing for placement of the water intake unit closer to reservation communities which resulted in moving the intake to Tribal lands at the Yellowtail afterbay, a location much further from the reservation's larger communities.
- The Environmental Protection Agency expressed concerns to the Bureau of Reclamation, in a letter dated October 31, 2022, with the location of the intake unit resulting in a water age concern for most customers and the proposed use of complex chemicals for treatment that would necessitate operators with advanced certification requirements.
- Despite years of attempting to secure rights of way for the pipeline from the Yellowtail afterbay intake to the first reservation community, across approximately 50 fee and trust tracts, and expending \$4 million, no rights of way were perfected.

Upon re-assessment of the feasibility of the pipeline MRI system, the Tribe reviewed an alternative water delivery system that would utilize regional water plants in each reservation community that would be more cost-effective and deliver clean water within 2 to 4 years. Additionally, the Tribe proposed improvement of existing water wells for rural households as the majority of wells are shallow with compromised water quality.

The Bureau of Indian Affairs provided funds for a water study to support the proposed regional water plants and rural well concept. The water study indicated a vast supply of available water in two major aquifers below the Crow Reservation, the Judith River and Parkman formations which are currently largely untapped. Thus, use of water in the existing aquifers would not interfere with or compromise existing water rights in the Big Horn river or Little Big Horn river.

The water study further revealed that over 50% of Crow Reservations households have contaminated water due to inefficient water treatment and shallow wells. This fact created greater incentive to pursue a water delivery system that could be operational in a short number of years to best serve the population.

The amendments would move the MRI funds from a private bank into a trust fund for clean water deliver and related projects that would be managed pursuant to the 1994 Trust Reform Act that requires submission of an annual expenditure plan and a budget to DOI for review and approval before release for funds to the Tribe. The Tribe agrees with this management process.

CROW IRRIGATION IMPROVEMENT

The Crow Water Settlement Act of 2010 directs the Secretary, through the Bureau of Reclamation, to improve the Crow Irrigation Project (CIP) in accordance with an agreement with the Crow Tribe. Implementation of projects was preceded by in-depth studies to modernize the dilapidated 100-year-old system and allocate funds for the various components of the system. The proposed amendments do not revise the current project implementation plans and co-management of the irrigation improvement projects by the Tribe and the Bureau of Reclamation. However, the Amendment Act would move the CIP funds from a private bank to federal treasury in a non-trust interest bearing account that would maintain the joint Tribe and BOR management. This move reduces the costs of managing funds but still complies with the original Settlement Act mandate for indexing of funds.

ENERGY DEVELOPMENT PROJECT

The Crow Water Settlement Act of 2010 provided an exclusive right for the Crow Tribe to develop hydro power in the Yellowtail Afterbay that would expire in 2025 and provided a lump sum to cover a portion of the costs. The Crow Tribe delayed pursuit of the project due to the initial engineering design plan prospectively interfering with Yellowtail Dam operations and, later, the on-set of the COVID pandemic. The Tribe has now engaged a hydro plant developer, revised the site and engineering concerns, and intends to start construction prior to the December 2025 deadline. The Tribe has proposed a five-year extension of the deadline to complete the project to accommodate any unexpected or unforeseen complications that may arise.

CONCLUSION

On behalf of the Crow Tribal membership, I am hopeful that the Crow Water Settlement Amendments Act will be adopted this Congressional session. At present, without the Amendments, the Tribe is unable to proceed with clean water delivery projects as the specifically mandated pipeline construction is not feasible. Clean water has become critical for the Crow Reservation as many studies indicate that the high cancer rates of the Crow people is likely attributable to contaminated water.

The Amendments the Tribe seeks are at no new costs to the United States and do not impact the other provisions of the Crow Tribe/State of Montana Water Compact that protects all existing water users on Crow Reservation. Further, the Amendments do not revise the on-going Crow Irrigation Project improvements or the specific allocation of funds for those projects. Finally, the return of funds to federal oversight will avoid costs for the Crow Tribe and ensure protection of water settlement funds for future generations of the Crow Tribe.

Thank you for your consideration of this important legislation and please contact me directly with any questions at frank.whiteclay@crow-nsn.gov or Majel Russell, legal counsel, at mrussell@elkriverlaw.com.