

**STATEMENT OF
BRYAN NEWLAND
ASSISTANT SECRETARY FOR INDIAN AFFAIRS,
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

July 12, 2023

Aanii (Hello)! Good afternoon, Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee. My name is Bryan Newland. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony regarding S. 1987, Fort Belknap Indian Community Water Rights Settlement Act of 2023. The Department supports S. 1987 and suggests some technical changes to aid in its implementation.

Introduction

The United States acts as a trustee for the land and water rights of Tribes, American Indians, and Alaska Natives. The United States has a trust responsibility to Indian Tribes and Indian people and consistent with that has charged itself with moral obligations of the highest responsibility and trust. These obligations are at their greatest when it comes to protecting the ability of Tribes, and their citizens, to maintain their existence on lands the United States holds in trust for their benefit.

The Biden Administration recognizes that water is essential for people to lead healthy, safe, and fulfilling lives on Tribal lands. Water is among the most sacred and valuable resources for Tribal nations.

The Administration further recognizes that long-standing water crises continue to undermine public health and economic development in Indian Country. The Administration strongly supports the resolution of Indian reserved water rights claims through negotiated settlements. Indian water settlements protect the senior water rights reserved by Tribal Nations and help ensure that the citizens of these Nations have reliable and safe water for drinking, cooking, and sanitation; improve the public health and environment on reservations; enable economic growth; promote Tribal sovereignty and self-sufficiency; and help fulfill the United States' trust responsibility to Tribes.

At the same time, water rights settlements have the potential to end decades of conflict and contention among Tribal Nations and neighboring communities and promote cooperation in the management of water resources.

Congress plays an important role by enacting legislation to ratify Indian water rights settlements. We stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements and uphold our sacred trust obligations to Indian country.

We have a clear charge from the President and Secretary Haaland to protect Tribal reserved water rights and improve water access and water quality on Tribal lands. To that end, the Biden Administration's policy on negotiated Indian water settlements continues to be based on the

following principles: the United States will participate in settlements consistent with its trust responsibilities to Tribal Nations; Tribes should receive equivalent benefits for rights which they, and the United States as trustee, may release as part of the settlement; Tribes should realize value from confirmed water rights resulting from a settlement; and settlements should contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. In addition, settlements should provide finality and certainty to all parties involved.

I. S. 1987

S. 1987, Fort Belknap Indian Community Water Rights Settlement Act of 2023 would approve and provide authorizations to carry out the settlement of the Tribes' water rights in the State of Montana (State). The Department supports resolving the Tribes' water rights claims through a comprehensive settlement.

a. Reservation and Historical Background

Congress established the Fort Belknap Indian Reservation (Reservation) in 1888 to secure a homeland for what are now the Assiniboine (Nakoda) and Gros Ventre (Aaniiih) Tribes (the Tribes). This homeland in Montana is just a small portion of the Tribes' ancestral homelands.

Not long after the Reservation was established, the Federal Government filed a lawsuit to protect the Tribes' right to water on its homelands. That lawsuit eventually reached the Supreme Court in 1908. The Supreme Court determined that the establishment of the Reservation included the senior right to water on the Reservation. *Winters v. United States*, 207 U.S. 564. In its opinion, the Court explained that the Reservation would be inadequate to fulfill the needs of the Tribes and the policy goals of the United States "without a change of conditions." The Court also noted, [t]he lands were arid and, without irrigation, were practically valueless."

The *Winters* case has had far-reaching and long-lasting consequences for all of Indian country. It stands for the principle that the establishment of a reservation for a Tribe includes the reservation of waters necessary to make the reservation a livable homeland. The *Winters* doctrine protects Tribal rights and homelands, safeguarding the rights and interests of Tribes across the United States. Despite their legal victory in the *Winters* case, Tribes of the Fort Belknap Indian Reservation have not been able to fully put their reserved water rights to use.

Today, the Reservation is comprised of approximately 605,338 acres, including lands held in Trust for the Tribes and allotments held in trust for individual Indians, situated mainly in the Milk River Basin in north central Montana. The Milk River forms the Reservation's northern boundary. The southern boundary is from 25 to 35 miles south of the Milk River, extending on either side of the northern crest of the Little Rocky Mountains.

The low rainfall on most of the Reservation severely limits what can be grown without irrigation. Not surprisingly, the major water use on the Reservation is the Fort Belknap Indian Irrigation Project (FBIIP). The BIA owns the FBIIP, which diverts water from the Milk River and two tributaries, Threemile Creek and White Bear Creek, and includes a 634 acre-foot (af) reservoir on Threemile Creek. The FBIIP serves 10,475 assessed acres, 92 percent of which are held in trust by the United States for the benefit of the Tribes or allottees. Groundwater wells on the Reservation are primarily used for domestic and municipal purposes and, to a lesser extent, stock watering.

According to Bureau of Indian Affairs (BIA) and Tribal data, 3,351 Tribal members currently live on the Reservation. The total Tribal membership in August 2021, including members living off the Reservation, was 8,609. Most on-Reservation residents reside in three main towns: Fort Belknap Agency on the northern boundary of the Reservation, and Lodge Pole and Hays on the southern portion of the Reservation.

The primary sources of employment on the Reservation are Tribal and Federal government services. The main industry is agriculture, consisting of cattle ranches, raising alfalfa hay for feed, and larger dryland farms. The unemployment rate on the Reservation is nearly 50%, according to a 2019 Montana State University study.

b. Proposed Fort Belknap Indian Community Settlement Legislation

In its role as Trustee, the United States filed water rights claims for Reservation lands in the Milk River and Missouri River basins in the ongoing statewide water rights adjudication. Since 1990, the Tribes, State, and United States have engaged in negotiations to resolve the Tribes' and allottees' water rights within the State. In 2001, the Montana legislature approved the Montana-Fort Belknap Indian Community Water Rights Compact (Compact). Congressional approval is necessary before the United States may join in the Compact.

S. 1987 would authorize, ratify, and confirm the Compact to the extent it is consistent with S. 1987. This would resolve the Tribes' water rights claims in Montana by recognizing the Tribal Water Right, which is defined by and established in the Compact. The Tribal Water Right entitles the Tribes to over 446,000 acre-feet per year (afy) of surface water, plus groundwater. Consistent with Federal law, S. 1987 protects the rights of allottees to use a portion of the Tribal Water Right for agricultural, domestic, and related uses on their allotments. In addition to the Tribal Water Rights provided by the Compact, S. 1987 includes a 20,000 afy allocation of storage from Lake Elwell, a Bureau of Reclamation (Reclamation) facility on the Marias River, also known as Tiber Reservoir. S. 1987 would also authorize funds to implement the provisions of the Compact and S. 1987.

S. 1987 authorizes \$1.17 billion in Federal appropriations for three general purposes: rehabilitation of the Fort Belknap Indian Irrigation Project; administration and development of the Tribes' water rights; and mitigation for the impacts on water users outside the Reservation. S. 1987 is a mixed project- and fund-based settlement.

S. 1987 includes two specific projects that the Department is charged with planning, designing, and constructing: (1) the rehabilitation, modernization, and expansion of the existing FBIIP; and (2) the rehabilitation and expansion of certain Milk River Project facilities to satisfy the Compact required mitigation negotiated by the Tribes and the State.

S. 1987 authorizes the appropriation of up to \$415.8 million for the rehabilitation, modernization, and expansion of the FBIIP. The Department supports rehabilitating and expanding the FBIIP to serve additional lands susceptible of sustained and economically viable irrigation. Without a feasibility level study, however, the costs of such a project cannot be reliably determined. The Tribes believe that the requested authorization will cover the costs. S. 1987 contains a provision providing that the Secretary's obligations to rehabilitate, modernize, and expand the FBIIP will be deemed satisfied if despite diligent efforts, the project cannot be completed as contemplated due

solely to the authorized appropriation being insufficient. S. 1987 identifies the Bureau of Indian Affairs (BIA) as the lead agency for the rehabilitation, modernization, and expansion of FBIIP, while providing the Tribes the opportunity to perform these activities through self-determination contracts. The identification of BIA as the lead agency for the rehabilitation, modernization, and expansion of FBIIP is unusual.

Previously enacted Indian water rights settlements that have required the Secretary to plan, design, and construct major infrastructure have identified Reclamation as the lead agency for such purposes. Reclamation has the staffing and expertise and a demonstrated history of success in planning, designing, and constructing infrastructure. For these reasons and to ensure successful implementation of S. 1987, the Department suggests that Reclamation is better suited to lead the rehabilitation, modernization, and expansion of the FBIIP as well as the Milk River Project rehabilitation and expansion discussed below.

S. 1987 authorizes the appropriation of up to \$300 million to rehabilitate and expand certain Milk River Project facilities to implement the mitigation measures required by the Compact. S. 1987 identifies Reclamation as the lead agency to implement these mitigation projects. The Department testified in the 117th Congress about practical concerns regarding its ability to satisfy Compact provisions requiring mitigation of impacts on junior non-Indian and Milk River Project water users caused by the development of the Tribal Water Right. However, since the time of that testimony, Reclamation completed modeling that identifies viable alternatives to satisfy the Compact's mitigation requirement. Based on Reclamation's modeling, the Department determined that rehabilitation of the St. Mary Canal and the expansion of the Dodson South Canal will provide the 35,000 afy of mitigation required by the Compact. Again, without a feasibility level study, reliable costs of such a project cannot be determined. In an effort to avoid cost gap issues, S. 1987 provides that the Secretary's obligations to complete Milk River Project mitigation projects will be deemed satisfied if despite diligent efforts, the projects cannot be completed as contemplated due solely to the authorized appropriations being insufficient.

Because the St. Mary Canal is located on the Blackfoot Reservation, S. 1987 requires Reclamation to complete the canal's rehabilitation in coordination with the Blackfoot Tribe.

In addition to the project-based components described above, S. 1987 establishes a \$454 million trust fund for the Tribes to be used for various purposes. Some of these purposes, such as the development of domestic water infrastructure and establishment of a Tribal water resources department to administer the Tribal Water Right, are commonplace in Indian water rights settlements. S. 1987 specifically would authorize the Tribes to use their trust fund to plan, design, and construct a pipeline to transport Lake Elwell water from an off-Reservation point of diversion on the Missouri River to the southern portion of the Reservation. The Department understands that the Tribes would be required to comply with all applicable Federal and State laws when implementing this and all other provisions in the settlement.

Finally, S. 1987 transfers 10,322.58 acres of federal land and 3,519.3 acres of land currently owned by the Tribes into trust for the Tribes as part of the Reservation. In addition, S. 1987 directs the Secretary of the Interior and the Secretary of Agriculture to negotiate with the State to exchange certain State lands within the boundaries of the Reservation for federal lands elsewhere in the State.

c. Conclusion

The Department recognizes that the Tribes and State of Montana have worked hard to negotiate this settlement. The Department believes that this legislation is consistent with the Administration's priorities of protecting Tribal homelands and meeting our trust responsibility. It would also bring meaning to the legal victory the Tribes and the United States secured more than a century ago in the *Winters* case. We support S. 1987, but note that the Department still needs to conduct additional analysis of this settlement agreement. We also note that we recommend some technical changes to aid in its implementation.

Thank you again for the opportunity to appear before this Committee to provide the Department's views on S. 1987. We look forward to continuing working with the Committee in support of Indian water rights settlements.

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S. 1898, a bill to amend the Northwestern New Mexico Rural Water Project Act to make improvements to the Act, and for other purposes

Background

The 2009 Act, which was part of the Omnibus Public Land Management Act of 2009, approved settlement of the Navajo Nation's water rights claims in the San Juan River Basin in New Mexico and, as the cornerstone of the settlement, directed the Secretary (acting through the Bureau of Reclamation (Reclamation)) to design, construct, operate, and maintain the Navajo Gallup Water Project (Project). When completed, the Project will provide a reliable and sustainable domestic, municipal, and industrial water supply from the San Juan River to 43 Chapters of the Navajo Nation, including the Nation's capital of Window Rock, Arizona; the city of Gallup, New Mexico; and the southwest portion of the Jicarilla Apache Reservation. All of these entities are currently relying on a shrinking supply of groundwater that is of poor quality and is inadequate to meet present domestic water needs, let alone projected needs.

The 2009 Act authorized an appropriation of \$870 million (2007 price level), adjusted annually using engineering cost indices, to plan, design, and construct the Project, which includes construction of two water transmission laterals—the Cutter and San Juan Laterals. The Department, through Reclamation, has been implementing the 2009 Act with significant success. In October 2021, Reclamation declared substantial completion of the Cutter Lateral, the smaller of the two laterals, and it transferred operation, maintenance, and replacement responsibilities for the Cutter Lateral to the Navajo Nation in June 2022. As of May 2021, the completed segments of the Project have facilitated delivery of drinking water to 6,000 people (1,500 households) in eight Navajo chapters. Reclamation has also made significant progress on the San Juan Lateral and has completed over 50 percent of the features on the lateral. Reclamation and their partners have completed or are currently constructing 285 of the 300 miles of Project water transmission pipelines. Recently, Reclamation acquired the San Juan Generating Station water system facilities that will provide both construction and operation and maintenance savings, increased operational flexibility, and reduced risks to operations for the Project.

S. 1898 Provisions and Positions of the Department of the Interior

S. 1898 would amend the Act in several ways:

Increase the authorized Project cost ceiling. S. 1898 provides an additional authorization of \$725.7 million to complete the Project. This is comprised of \$689.45 million to address a cost/funding cost gap, \$30 million for Navajo community connections to the Project water transmission line, and \$6.25 million for renewable energy features.

The 2009 Act's appropriation ceiling was based on a preliminary, 2007 appraisal-level design estimate rather than a feasibility level design estimate, which is the level of estimation that Reclamation recommends for reliability. As final design and construction of the Project progressed, the difference between the 2009 Act's appropriation ceiling and the costs estimated to complete the Project (Working Cost Estimate) became apparent. The most recent indexed authorized appropriation ceiling is \$1,413.7 million (October 2022 price level) but the Project Working Cost Estimate is \$2,138.4 million (October 2022 price level). After accounting for non-Federal funding contributions from the Project beneficiaries received through the Contributed Funds Act, Reclamation estimates the cost/funding gap is \$689.45 million. The cost increases are based on more reliable cost estimate updates, primarily associated with the two water treatment plants and the San Juan Lateral intake. Moreover, the latest Working Cost Estimate reflects the significant inflation and market volatility, at levels not seen in 40 years, which have far outpaced projected indexing used in updating the appropriation ceiling.

The Department supports the additional authorization contained in S. 1898. The additional authorization will enable Reclamation to complete the Project in accordance with requirements of the 2009 Act and is reflective of Project participant's needs and the reality of construction costs in this remote area of New Mexico. The additional authorization of \$6.25 million for renewable energy development will enable Reclamation to construct lower cost and alternative power generation for areas on the project (notably the Cutter Lateral) where Colorado River Storage Project (CRSP) power is not available. This provision also provides up to \$1.25 million of the \$6.25 million to develop small hydropower generation for Project facilities to help offset a portion of the Project's pumping costs. The additional authorization of \$30 million for community connections is critical to the Project's success and will ensure that water deliveries are made to all Navajo communities within the original Project service area. The Navajo Nation has agreed to provide an additional \$60 million, approximately, of its own funding to cover the full costs of connecting all existing Navajo communities to the San Juan Lateral.

Operation, Maintenance, and Replacement (OM&R) Waiver. S. 1898 provides for a \$250 million OM&R trust fund for the Navajo Nation and up to a \$10 million OM&R trust fund for the Jicarilla Apache Nation, the latter conditioned on an ability to pay analysis. The 2009 Act includes a provision allowing the Secretary to waive, for a period of not more than 10 years, the OM&R costs allocable to the Navajo Nation when the

Secretary determines those costs exceed the Nation's ability to pay. Reclamation conducted an ability to pay analysis in 2020, following Reclamation practice for evaluating the enduser's ability to pay for municipal and industrial water systems, that concluded the Navajo Nation did not have the ability to pay.

The Department supports establishing a \$250 million OM&R trust fund for the Navajo Nation because it will assist the Nation in paying OM&R during the time needed to increase the customer base and economic development necessary to support full OM&R payments. While the 2009 Act did not provide OM&R assistance to the Jicarilla Apache Nation, the Department supports up to a \$10 million OM&R trust fund if the allocable OM&R costs are in excess of the Jicarilla Apache Nation's ability-to-pay.

Expand the Project service area. S. 1898 would also expand the Project to serve the Navajo Nation's four chapters in the Rio San Jose Basin (RSJB) in New Mexico and the Lupton community in Arizona to help the Navajo Nation increase the customer base and potentially lower OM&R costs. The proposed amendments do not include funding that would be needed to increase the capacity of the Crownpoint Lateral, nor additional improvements necessary to supply the RSJB.

The Department supports the expansion of the Project service area.

Cap the City of Gallup's Repayment Obligation. S. 1898 would cap the City of Gallup's (City) repayment obligation at 25% of its allocated construction costs, not to exceed \$76 million. Under the 2009 Act, the City is responsible for paying between 25% to 35% of its allocable costs, based on its ability to pay. Reclamation estimates that this provision would reduce the City's repayment obligation by approximately \$33 million.

The Department does not oppose the cap on the City's repayment obligation.

Project Lands Transfer. S. 1898 would transfer Navajo fee lands and Bureau of Land Management lands, upon which easements have been acquired for Project purposes, to the Navajo Nation in trust with the condition that Reclamation would retain easements for Project construction, operation, and maintenance. S. 1898 also transfers ownership of land underlying the recently acquired San Juan Generating Station water conveyance and storage facilities to the Navajo Nation in trust. S. 1898 provides for an easement for Reclamation to continue to carry out construction, operation, and maintenance necessary to incorporate those facilities into the Project until title transfer under section 10602(f) of the 2009 Act.

The Department supports the land transfer provisions of S.1898, which would take land into trust, exclusive of Project facilities. We would like to make technical changes to the Bill to clarify that Reclamation would retain ownership of Project facilities and infrastructure on the land until transferred to the Navajo Nation under section 10602(f) of the 2009 Act.

Deferred Construction. S. 1898 would authorize establishment of a Deferred Construction Fund and execution of a deferred construction agreement under which the Navajo Nation would acknowledge that full capacity of several Project features will not be needed until future demands materialize. The Navajo Nation would be able to use the Deferred Construction Fund to construct or expand facilities as higher demand requires over time.

The Department supports establishing a Deferred Construction Fund because it will allow Reclamation to first construct those water treatment and storage facilities needed to satisfy anticipated demand over the next 20-plus years, rather than immediately beginning work on the larger facilities that will not be needed until demand increases substantially. This provision is fiscally conscious and minimizes OM&R costs that would otherwise be spent on un-used Project facilities in the first years of water deliveries while providing for the later development of facilities to meet the Project's full build-out demand.

Extend Completion Deadline to December 31, 2029. S. 1898 extends the date by which the Project must be completed to December 31, 2029.

The Department supports extending the Project completion deadline. Necessary design changes, including incorporating San Juan Generating Station water system facilities into the Project, have created delays in construction and a deadline extension is necessary to allow remaining Project features to be completed.

Eliminate Double Taxation. S. 1898 would allow taxation by either the Navajo Nation or the State of New Mexico depending on the ownership of land underlying Project facilities. Currently, both the State of New Mexico and the Navajo Nation have been taxing Federal contractors on construction activities on Navajo Tribal lands.

The Department supports eliminating the double taxation that is an additional and unnecessary cost to the Project. Reclamation estimates that this provision will save approximately \$50 million.

Conclusion

The Department appreciates the dedication of all parties, including the Navajo Nation, the Jicarilla Apache Nation, the City of Gallup, and the State of New Mexico in developing S. 1898 and the willingness of all the parties to reach consensus on contentious issues. The Department supports S. 1898, as it will allow the Department to fulfill the commitments made in the 2009 Act to deliver clean drinking water to the Navajo Nation and other Project beneficiaries.