

**TESTIMONY OF COUNCIL MEMBER SHANNON AUGARE, BLACKFEET NATION**

**ON S. 434**

**BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

**MAY 8, 2013**

Chairman Cantwell, Ranking Member Barrasso, and members of the Committee, my name is Shannon Augare. I am a Councilman of the Blackfeet Tribal Business Council. I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement Act. I want to thank the Committee for holding this hearing on S. 434, a bill that is critical to the future of the Blackfeet People. I also want to thank Senator Max Baucus and Senator Jon Tester for their strong support of the Tribe in introducing this bill, and their understanding of the importance of this bill to the Blackfeet Tribe. I also want to thank their staff and the Committee staff for their hard work on this bill.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe. It represents a historical breakthrough in the Tribe's over century long battle to secure and protect its water rights. S. 434 ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the federal government, and most importantly provides the critical resources needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

**The Blackfeet Reservation and the Blackfeet People**

The Blackfeet Reservation was established by treaty in 1855. The Reservation is located along the Rocky Mountains in north central Montana, adjacent to Glacier National Park, Lewis and Clark National Forest and the border with Canada. Our Reservation is renowned for its spectacular mountains, majestic plains and abundant natural resources. The Blackfeet People have occupied this area since time immemorial. As we say: "We know who we are and where we come from. We come from right here. We know, and have always said, that we have forever lived next to the Rocky Mountains."

Our treaty, known as Lame Bull's Treaty, was signed in 1855. Executive orders and statutes followed, each taking large areas of our traditional land. We ended up with the land that was most sacred to us: our present day reservation. In 1896, the Northern Rockies were taken from us because speculators believed there were rich minerals to be had. When mineral riches did not materialize, this most sacred part of our homeland became part of Lewis and Clark National Forest and a portion later became part of Glacier National Park in 1910. To this day, we question the legitimacy of the 1896 transaction. While the Tribe retained hunting, fishing and timbering rights in the area taken, we hope that one day our claims to this area will be resolved.

The present Blackfeet Reservation is about 1.5 million acres. Although the United States had promised our Reservation would never be allotted in the 1896 Agreement by which the Northern Rockies were lost, the federal government went back on its word and allotted lands within the Reservation to individual Tribal members under allotment acts in 1907 and 1919.

The Tribe now has over 17,000 members, about half of whom live on the Reservation. Our people have worked hard to survive in the sometimes harsh climate of the Rocky Mountains, and to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

### **The Critical Importance of Water**

Water is critical to the Blackfeet People. It is central to our culture and our traditions. It is an essential element of our way of life, and is crucial to our continuing survival culturally, traditionally and economically. Six different drainages are encompassed within the Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. These are the veins and arteries of the Reservation and provide life to the Blackfeet People and bind us together as a People. Water is the source of creation to the Blackfeet People. We believe that rivers and lakes hold special power through habitation of Underwater People called the Suyitapis. The Suyitapis are the power source for medicine bundles, painted lodge covers, and other sacred items. Contact with supernatural powers from the sky, water and land is made through visions and dreams and manifests itself in animals or particular objects. The beaver ceremony is one of the oldest and most important religious ceremonies, and beaver bundles have particular significance. The ceremonial importance of water is especially present in the use of sweat lodges as a place to pray, make offerings, cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Water is truly the lifeblood that sustains the Blackfeet people and our way of life. The water resources of the Blackfeet Reservation are essential to make the Reservation a productive and sustainable homeland for the Blackfeet people and for our communities to thrive and prosper. Safe and clean drinking water supplies are vital for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture. The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of abundant fish and wildlife, which depend directly on the water resources of the Reservation to support them and allow them to thrive. Large game animals, including moose, elk, and deer abound. The Reservation provides significant habitat for grizzly bears and other bears, and for other animals such as lynx, pine marten, fisher, mink, wolverine, weasel, beaver, otter, grey wolf, swift fox and others. Numerous bird species are also found on the Reservation including bald eagle, golden eagle, osprey, ferruginous hawk, northern goshawk, harlequin duck, piping plover, whooping crane, and all migratory and shoreline birds, as well as game birds such as the sharptail grouse, ringnecked pheasant, mountain dove, Hungarian partridge and two other species of grouse. The fishery on the Reservation is renowned, and includes the west slope cutthroat trout, northern pike, lake trout, rainbow trout, mountain white fish, lake white fish, brook trout, brown trout, Yellowstone cutthroat trout, walleye, and many others. The threatened bull trout is also be found on the reservation. The habitats of these wildlife and fish species depend directly on the water resources of the Reservation to support them and allow them to thrive.

The Reservation also possesses significant timber, oil and gas resources and other natural resources. Oil and gas production has occurred on the Reservation since the 1930s, and the Tribe has recently experienced a significantly increased interest in new development on the Reservation. The Tribe has also been working hard to develop wind energy and the hydroelectric potential on the Reservation. All of these activities are dependent on adequate supplies of water.

Fortunately, we are blessed with an abundant supply of water. Over 518 miles of stream and 180 water bodies, including eight large lakes, are located on the reservation. More than 1.5 million acre-feet of water arise on, or flow through, the Blackfeet Reservation on an annual basis - the St. Mary River alone contributing over one-third of the total supply. Despite the significant water supply, or maybe because of it, historically, others have sought to appropriate it for themselves, and water has become a precious resource in more modern times.

### **Historical Water Conflicts**

In 1909, just a year after the historic Winters decision involving the Milk River, the United States entered into the Boundary Water Treaty with Canada, which, among other things, divided the Milk River and St. Mary River between the two countries. However, not a word in the Treaty, or the negotiations leading to it, mention the Blackfeet, that these streams arise on or near the Blackfeet Reservation, or that the Blackfeet have rights to water in these streams. Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Blackfeet Reservation under the 1902 Reclamation Act, and began construction of the St. Mary facilities to divert most of the United States' share of the St. Mary River off the Reservation for use by the Bureau of Reclamation Milk River Project over a hundred miles away. The United States pursued this course notwithstanding that there was an equally feasible project on the Blackfeet Reservation where the water could have been brought. The diversion is accomplished through facilities on the Reservation, including Sherburne Dam, and a twenty-nine mile canal through the Reservation that eventually empties into the Milk River. The Milk River flows north into Canada and then back into the United States near Havre, Montana, where it is heavily utilized by the Milk River Project and by the Fort Belknap Reservation.

There are few historical acts, other than loss of land, that have engendered more passion and outrage than this wholesale transfer of Reservation water to serve non-Indians far downstream, without a word about, or any consideration of, the Blackfeet Tribe's water rights or the Blackfeet water needs. The Tribe is left not only with no access to and no benefit from, its own water, but a tangled web of confusing and non-existent rights of way and easements for the St. Mary Diversion facilities on the Reservation. Plans to rehabilitate the hundred year-old St. Mary Diversion facilities so that the diversion of water off the reservation can continue and perhaps increase, have further raised water right concerns, and have emphasized the need for a final resolution of the Tribe's water rights.

At the same time that the St. Mary diversion was taking place, non-Indian water users south of the Reservation built a dam on Birch Creek, the southern boundary of the Reservation, which was intended to appropriate Birch Creek water for use by the non-Indian water users off the Reservation. In *Conrad Investment Company v. United States*, decided by the Ninth Circuit in 1908, the same year as the *Winters* case, the court upheld the Tribe's prior and paramount right to the water. But the court did not award the full amount of water necessary to irrigate all of the Tribe's irrigable lands, leaving it open for the Tribe to claim additional water in the future. *United States v. Conrad Investment Company*, 156 Fed. 123 (D. Mont. 1907), *aff'd Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir. 1908). In the meantime, Birch Creek has been fully appropriated through non-Indian development of 80,000 acres of irrigation immediately off and adjacent to the Reservation.

Allotment brought the third serious conflict between the Tribe and non-Indian water users. In an attempt to control the water through the land, the *Conrad Investment* case served as the springboard to the first

Blackfeet Allotment Act in 1907. Over a span of two congresses, the Blackfeet Allotment Act moved forward with various water rights provisions intended to make Blackfeet water rights subject to state law, to enjoin the United States from prosecuting any further suits against water users, and to give preference to settlers on surplus lands to appropriate water on the Reservation. *See*, John Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s–1930s* (University of Oklahoma Press, 2000), Chapter 6. These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding the promise that the Reservation would never be allotted. *See* Agreement of September 26, 1895, ratified June 10, 1896, 29 Stat 321, 353, Art. V. With allotment, many of the prime irrigation lands on the Reservation quickly went out of trust, and the Tribe’s water rights have gone unprotected from the use of water by non-Indian development on the former allotments. Numerous disputes have arisen over the years of varying severity, and the need to resolve the Tribe’s water rights has increasingly become critical.

The 1907 Allotment Act also authorized the Blackfeet Irrigation Project. However, from the outset, the BIA built the Blackfeet Irrigation Project with undersized and inadequate delivery systems and storage facilities, thereby ensuring that the economic promise of the Project would be unfulfilled for the Tribe and Tribal members. Project lands continue to have problems in receiving a full supply of water because of the early BIA decisions to undersize the Project. Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but increased shortages during the late irrigation season, and the dilapidated condition of the Blackfeet Irrigation Project, have become serious impediments to water use within the Reservation.

### **Water Rights Compact**

Given the historical water rights issues on the Reservation, the Blackfeet Water Rights Compact is truly a milestone achievement after nearly two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and the Federal Government. The Compact was completed in December 2007. The Montana Legislature approved it in April 2009 (85–20–1501 MCA), and it is now before Congress for ratification in the Blackfeet Water Rights Settlement Act. It will further require approval of the Tribe through a vote of the Tribal membership.

In general, the Compact confirms the Tribe’s water rights to all streams on the Reservation. It brings certainty to the Tribe’s water rights and protects the Tribe’s use of the water for the Tribe’s growing population and need to make the Reservation a productive and sustainable homeland. The Compact:

- Establishes the Tribe’s water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages except for the St. Mary River and Birch Creek;
- Establishes a St. Mary water right of 50,000 acre-feet, and requires the parties to identify how the water will be provided to fulfill the Tribe’s water right;
- Establishes a Birch Creek water right of 100 cfs, plus 25 cfs for in stream flow during the summer and 15 cfs during the winter;
- Protects state water right non-irrigation use and some irrigation uses through “no-call” provisions;
- Provides for water leasing off the Reservation;
- Closes on-reservation streams to new water appropriations under state law;
- Provides for Tribal administration of the Tribal water and State administration of state law water rights and creates a Compact Board to resolve disputes between Tribal and State water rights;
- Provides for an allocation of water stored in Tiber Reservoir; and

- Mitigates the impacts of the Tribe's water rights on Birch Creek water users through a separate Birch Creek Agreement by which the Tribe defers new development on Birch Creek for 15 years over and above the current Conrad Investment decree, and provides 15,000 acre-feet of water per year to Birch Creek water users from Four Horns Reservoir, the total agreement not to exceed 25 years.

### **State Approval and State Contribution**

As part of the State approval of the Compact, the State committed to contribute \$20 million to the Compact. These funds were fully authorized and are available when the Compact becomes final. In 2007, the Montana Legislature also appropriated \$15 million for Birch Creek mitigation. Of these funds, \$14.5 million has been placed in an escrow fund for the Tribe as part of the Birch Creek Agreement, and \$500,000 was used for engineering studies for the Four Horns enlargement. In the recent 2013 Legislature, the State also committed an additional \$14 million to the Blackfeet settlement, bringing the total State contribution to \$49 million. This is a very major contribution on the part of the State, and the largest for an Indian water rights settlement in Montana.

### **Blackfeet Water Rights Settlement Act**

The Blackfeet Water Rights Settlement Act will: (1) ratify the Tribe's water compact with the State of Montana; (2) resolve the Blackfeet Tribe's water-related claims against the United States; and (3) provide the necessary resources needed for the Tribe to put its water to use and to develop a self-sustaining economy on the Blackfeet Reservation.

Specifically, the bill:

- Ratifies the Compact and authorizes the Secretary to sign it;
- Requires the Secretary to enter into contracts with the Tribe for the delivery of (1) 5,000 acre-feet per year of St. Mary River water through the Milk River Project facilities to the Tribe and (2) any additional available St. Mary water that is identified;
- Compensates the Tribe for deferring its St. Mary River Water Right;
- Expressly provides for the Milk River Project purposes;
- Requires the Secretary to implement the Swift Current Bank Stabilization Project;
- Provides the Tribe with the exclusive right to develop and market hydroelectric power from the St. Mary Storage Unit of the Milk River Project;
- Directs the Secretary to allocate to the Tribe 56,000 acre-feet per year of water stored in Lake Elwell and authorizes the Tribe to enter into leases or other agreements for the use of that water for any beneficial purpose subject to certain conditions;
- Requires the Secretary, acting through the Commissioner of Reclamation, to:
  - carry out deferred maintenance and Four Horns Dam safety improvements relating to the Blackfeet Irrigation Project;
  - carry out the Birch Creek Mitigation Project to provide water from Four Horns Reservoir to state water rights users on Birch Creek;
  - plan, design, and construct the Municipal Rural and Industrial water system (involving water intake, treatment, pumping, storage, and pipeline facilities); and
  - construct the Blackfeet Water, Storage, and Development Projects.
- Establishes the Birch Creek Mitigation Fund to mitigate the impacts of development of the Birch Creek tribal water right on the Birch Creek water supplies of the Pondera County Canal and Reservoir Company Project;
- Authorizes federal funding for the water-related projects authorized in the legislation;

- Confirms the Tribe's instream water rights in the Lewis and Clark National Forest;
- Requires the Blackfeet Tribe to work with the Fort Belknap Indian Community on resolving any conflict between their respective Milk River water rights, and directs the Secretary of the Interior to resolve such conflict if the Tribe and Community are unable to do so provided certain conditions are met;
- Provides for the waiver and release by the Tribe of water rights claims against Montana and the United States in return for recognition of the tribal water rights and other benefits provided under the Compact and this Act.

### **Waivers/Funding:**

The Tribe has water-related claims against the federal government in excess of the funds authorized in the legislation for, among other things: (1) the diversion of St. Mary water off the Blackfeet Reservation to the Milk River Project for approximately 100 years; (2) the environmental and resource damage caused by the St. Mary diversion facilities; (3) claims relating to the 1909 Boundary Waters Treaty; (4) the United States' unfulfilled promise to construct a new storage facility on Two Medicine River after a catastrophic flood in the 1960s; and (5) the failure of the United States to protect the Tribe's water rights from development by others, particularly on Birch Creek, Cut Bank Creek and the Milk River.

S. 434 authorizes the Tribe to waive these claims in consideration for approximately \$400 million in federal funding for the vital drinking water projects, water storage projects, and irrigation and stock development on the Reservation. Importantly, since 2012, the Tribe has agreed to reduce the amount of the funding authorized in the legislation by more than \$190 million to address concerns raised by the Department of the Interior. Moreover, the State is contributing \$49 million towards the Blackfeet Settlement, the largest contribution the State has made to any Montana water settlement to date.

The Tribe's technical consultant, DOWL HKM of Billings, Montana, has assisted the Tribe in the development of the above projects and has prepared reports on each of the projects and the associated costs. Separate costs have been developed for each of the projects.

### **Critical Tribal Need for Water Supply Infrastructure**

The water projects authorized in the legislation include a regional water system to provide a long term municipal water supply to Reservation communities, funding for the United States' deferred maintenance obligations and safety of dams obligations associated with the Bureau of Indian Affairs' Blackfeet Irrigation Project, putting new lands outside the Project into production through new irrigation facilities and small water storage projects, stock water and domestic water developments, lake and fishery improvements and enhancements, and energy development projects. Settlement funds would also fund the implementation of the Compact and the administration of the Tribal water right through the Tribal Water Code.

In particular, it is critical to establish a long-term supply of water to Reservation communities. The Tribe has continually had to address community water supply problems by cobbling together short term fixes. At the same time, the Reservation population has significantly increased, and projections are that such increases will continue. A long term supply will provide the necessary stability that will allow for long term community growth.

At the time the Reservation was established, it was acknowledged that “[t]here is an abundant supply of water arising on or near the Blackfeet Reservation,” but much of that water is now diverted off the Reservation. Along with the lack of storage capacity for on-Reservation use and a dilapidated BIA irrigation project, numerous barriers are created for the Tribe in its efforts to protect and put to use its valuable water resources. These challenges in part account for the high unemployment and devastating poverty rate that has plagued the Reservation for generations. Unemployment runs as high as 70% and more half of the employed are below the poverty level. Securing control of and actively managing Reservation water resources would be an important step towards improving economic conditions on the Reservation and creating the homeland envisioned in the numerous treaties and agreements that serve as the foundation of the United States and Blackfeet Tribe’s relationship.

### **Litigation Will Continue if S. 434 Does Not Become Law**

In 1979, the United States filed suit in federal court seeking to quantify the Blackfeet Tribe’s water rights. In 1983, the federal district court litigation was stayed pending the outcome of the Montana State court water adjudication proceedings. The adjudication of the Blackfeet tribal water rights in the State court proceedings have been stayed pending finalization of the Compact and the Blackfeet settlement legislation. Should the negotiated settlement of the Blackfeet Tribe’s water right claims fail to be ratified by Congress, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. Moreover, if the settlement fails, the Tribe will pursue its monetary claims described above against the United States, resulting in years of litigation and potentially a judgment against the United States that exceeds the funding authorized in the legislation.

### **Conclusion**

The Blackfeet Water Rights Settlement has critical importance to the future of the Blackfeet people and represents decades of hard work by many people. The legislation will secure the water rights of the Tribe through ratification of the Tribe’s water rights compact, and will also provide the necessary funding for the Tribe to develop its water rights for the benefit of the Tribe and its members. The settlement will significantly contribute to the development of a strong Reservation economy, jobs for Tribal members, and a better life for the Blackfeet people.

Finally, although the Department of the Interior was involved in our negotiations every step of the way in the decades long process, and was intimately involved in the drafting of the Compact, the Administration has raised a number of issues relating to S. 434. We are engaged in discussions with the Department of the Interior to address these concerns, and expect most of the concerns will be resolved in a satisfactory manner to both parties.

We thank the Committee and Committee staff and look forward to responding to any questions you may have.