

**S. 3290,
The Blackfoot Water Rights Settlement Act of 2010**

**Testimony of John E. Bloomquist
on behalf of the
Pondera County Canal and Reservoir Company**

United States Senate Committee on Indian Affairs

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Mr. Chairman and Committee Members, my name is John E. Bloomquist and I am an attorney from Helena, Montana and I am appearing before you today on behalf of the Pondera County Canal and Reservoir Company. On behalf of the Pondera County Canal and Reservoir Company, I wish to express our thanks for the invitation to testify on S.3290, a bill which is critical to the water users of the Pondera County Canal and Reservoir Company and to a very large region of north central Montana. I also wish to express our thanks to Senators Max Baucus and Jon Tester, and their staffs for their hard work on this bill and in particular the provisions of the bill which relate to Birch Creek water supplies.

I. INTRODUCTION AND OVERVIEW

The Pondera County Canal and Reservoir Company (“PCCRC” or the “Company”) is a non-profit corporation located in Valier, Montana which owns and operates, for the benefit of its users, an irrigation and water supply project situated in north-central Montana. PCCRC supplies water to approximately 450 water users for irrigation and stock watering purposes as well as providing municipal water to the citizens of the City of Conrad in Pondera County, Montana.

Water associated with the PCCRC project is supplied to PCCRC’s users via an extensive system of canals and storage reservoirs which were developed by the Company’s predecessors beginning in the mid to late 1880’s. The major source of water for the project is known as “Birch Creek,” which is located along the southern boundary of the Blackfeet Indian Reservation in north-central Montana.

PCCRC is the successor to water rights developed and appropriated from Birch Creek for use within the Company’s water supply project. The waters of Birch Creek are also stored in two major reservoirs owned by PCCRC (Swift Dam and Lake Frances) for distribution to the Company’s water users for irrigation and municipal purposes. In addition, Lake Frances is

utilized by recreationalists and anglers in this region of Montana for the fishing and recreational opportunities provided by the reservoir.

Because of the critical importance of Birch Creek to PCCRC's water supply, the Company has been actively involved in following negotiations among the State of Montana, the Blackfeet Tribe, and the United States in the efforts to quantify the Blackfeet Tribe's reserved water rights for Birch Creek and other water sources. PCCRC has actively monitored and commented on in the negotiations conducted by the Montana Reserved Water Rights Compact Commission ("RWRC"), the Blackfeet Tribe, and the United States for approximately 20 years.

The negotiations of the Tribal Water Right ("TWR") for Birch Creek have been closely followed by PCCRC due to the critical nature of Birch Creek as the major water source for the Company's water users. Over the years, PCCRC and its representatives have closely monitored the various proposals discussed by the state, tribal, and federal negotiation teams regarding the quantification and use of the TWR for Birch Creek.

Throughout the negotiation process, the chief issue for PCCRC, on behalf of its water users, has been to evaluate the impact on the Company's water supply of any Birch Creek TWR which would ultimately be negotiated by the state and the Tribe. PCCRC's main issue throughout the process has been to make sure the Company's water supply is not adversely affected by the quantification and ultimate development of the TWR for Birch Creek.

In negotiations for the Birch Creek TWR, PCCRC has consistently advocated various proposals which recognize the existence of a substantial Birch Creek TWR for use and development by the Blackfeet Tribe while also recognizing the importance of the Company's Birch Creek water supply for its users. In this vein, PCCRC has been very active in suggesting

proposals for mitigation of impacts on PCCRC's water supply by the development of the TWR on Birch Creek. Mitigation, and the concept of developing and implementing various measures to protect water users who may be affected by the development of tribal water rights, has been an effective mechanism in Montana in achieving a variety of water settlements between the State of Montana and various Indian Tribes in Montana.

The concept of mitigation of impacts of the Birch Creek TWR has been recognized by the State of Montana and the Blackfoot Tribe. Mitigation, in the context of the Montana-Blackfoot Compact, includes two important components. The first component involves the development and construction of additional water storage opportunities within the Blackfoot Indian Reservation associated with the Four Horns Dam and Reservoir. Four Horns Dam and Reservoir, and the development and betterment of the dam, reservoir, and associated water delivery systems represent a viable opportunity to improve water storage capabilities on the Blackfoot Indian Reservation for the benefit of the Blackfoot Tribe, while also providing a viable source of mitigation water which could be available to Birch Creek to offset the impacts to PCCRC's water supply by development of the negotiated Birch Creek TWR. PCCRC believes the provisions included in S.3290 concerning improvements to the Four Horns Dam, reservoir, and water delivery system is a critical component of the Montana-Blackfoot Tribe water rights compact and strongly supports congressional approval and authorization of these projects on the Blackfoot Reservation.

The second component of mitigation of impacts of the Birch Creek TWR involves adequate funding to assure that mitigation projects become a reality, and that mitigation from the development of the Birch Creek TWR provides long-term solutions, not only for the Tribe but for other Birch Creek water users as well.

Regarding mitigation funding, PCCRC has actively worked with the State of Montana and the Blackfeet Tribe to secure state funding for deferment of implementation of the Birch Creek TWR for a period of years, as well as assuring the delivery of water from an improved Four Horns Dam and Reservoir system to PCCRC's water delivery system from Birch Creek. As set forth in the Birch Creek Agreement which accompanies the Montana-Blackfeet Compact, the Tribe has agreed to defer development of its Birch Creek TWR above historic use for a period of 15 years. In addition, the Tribe has agreed to deliver to Birch Creek approximately 15,000 Acre-Feet ("AF") per year from an improved Four Horns Dam and Reservoir until the 25th anniversary of the Birch Creek Agreement.

In the spring of 2009, the State of Montana and the Blackfeet Tribe amended the Birch Creek Agreement to further support the components of successful mitigation for a period beyond the 25-year term set forth in the Birch Creek Agreement. On February 13, 2009, the state and the Blackfeet Tribe agreed that the Four Horns project improvements be included in federal legislation which would ratify the Montana-Blackfeet Water Compact, and that additional funding may be required to mitigate impacts of development of the Birch Creek TWR after the expiration of the Birch Creek Agreement. In the amendment to the Birch Creek Agreement, both the state and the Blackfeet Tribe agreed to support federal funding for this purpose.

Based upon the amendment to the Birch Creek Agreement, as set forth above, PCCRC supported the Montana-Blackfeet Compact as the compact was presented to the 2009 Montana legislature. PCCRC's support for the compact was grounded upon the recognition by both the State of Montana and the Blackfeet Tribe that development of the Birch Creek TWR would at times adversely affect PCCRC's Birch Creek water supply, and that the Four Horns Dam and Reservoir improvements and additional mitigation funding were viable opportunities to mitigate

impacts on PCCRC's Birch Creek water supplies from development of the TWR. The 2009 Montana Legislature passed the Montana-Blackfeet Compact, setting the stage for this historic agreement to be presented to the United States Congress for ratification.

S.3290 contains provisions which recognize the necessity of improving the Four Horns dam, reservoir, and delivery facilities so that water stored in Four Horns may be delivered to PCCRC's water system from Birch Creek. In addition, S.3290 includes provisions which authorize the establishment of a Birch Creek Mitigation Fund to be used to mitigate impacts from development of the Birch Creek TWR on the water supplies of PCCRC. These provisions contained within S.3290 are integral to the long-term success of the Montana-Blackfeet Tribe water rights settlement and provide the necessary framework for a successful compact which meets the needs of the State of Montana, the Blackfeet Tribe, and the water users of PCCRC who depend upon Birch Creek water supplies.

II. BACKGROUND OF THE PCCRC PROJECT AND RATIONALE FOR S.3290 BIRCH CREEK MITIGATION PROVISIONS

A. History of PCCRC and Use of Water by PCCRC Water Users.

1. PCCRC History.

The history of PCCRC and the associated development and use of the PCCRC water supply dates back over 124 years. Water right appropriations and the associated delivery systems of the present day PCCRC were developed in accordance with various state and federal laws designed to encourage irrigation and reclamation of the arid west for agricultural purposes. In the early days of settlement, homesteaders appropriated water from Birch Creek and Dupuyer Creek for irrigation purposes on homestead lands, and public domain lands, at the behest and encouragement of Congress. In fact, several of PCCRC's water rights for these sources pre-date Montana statehood.

In addition to water rights appropriated by settlers in the region under the Homestead laws, PCCRC also has its origin grounded in a substantial part under the federal Carey Land Act of 1894, wherein, Congress authorized grants of public domain lands to certain western states to encourage settlement and reclamation of those arid lands. Although lands were granted to the states by the federal government under the Carey Land Act, it was expected that private enterprise would finance and develop the actual reclamation and associated water supply and distribution systems associated with irrigation of the lands provided to the states with ultimate disposition of the lands to the settlers. PCCRC's development as a Carey Land Act project began in about 1909. As part of the early development of the PCCRC water supply system, the federal government assessed the available water supply from Birch Creek for the project and deemed the water supply to be sufficient to authorize development of the project under the Carey Land Act. A major portion of PCCRC's irrigated acres and development of the water storage and distribution supply serving these lands has as its origin the development of the project under the federal Carey Land Act.

As mentioned above, under the Carey Land Act, both the federal government and state of Montana assessed the water supply for the project, and after confirming water supplies were sufficient, encouraged PCCRC's predecessors to construct and finance much of the water supply and distribution systems which serve PCCRC's shareholders today. Under the auspices of both state and federal statutes, corporations were established to construct the water supply systems which eventually provided water to settlers who acquired lands served by the project. PCCRC itself is the successor "operating company" to its predecessor "construction company" which financed and developed the system which serves irrigators and communities in the Valier and Conrad areas of north central Montana.

As a result of the development of a major portion of the water supply system under the terms of the Carey Land Act, PCCRC is owned and controlled by shareholders of the Company who are the successors of the original homesteaders and settlers who reclaimed arid lands using the project water supply. PCCRC holds the water rights used by its shareholders from Birch Creek, Dupuyer Creek, and other area sources for the benefit of its water users. PCCRC also operates Swift Reservoir on Birch Creek and Lake Frances near the town of Valier, the two major storage reservoirs associated the project, as major components of the Company's Birch Creek water delivery system. As also required under the Carey Land Act, PCCRC's predecessors developed and constructed over 500 miles of canals and laterals to serve the acres irrigated by the project.

As a result of development of the project under the Federal Carey Land Act, PCCRC supplies water to approximately 450 shareholders for agricultural purposes, as well as supplying the city of Conrad with its municipal water supply. PCCRC is responsible for managing the water supply and distribution works which supplies water to over 80,000 acres of irrigated lands in the area. These 80,000 acres of irrigated lands provide the foundation of the local and regional agricultural economy of this area of Montana.

B. PCCRC Water Supply System.

1. Birch Creek.

Birch Creek provides PCCRC shareholders with approximately eighty-five percent (85%) of the water used in the Company's storage and distribution system. Near the headwaters of Birch Creek, PCCRC owns and operates Swift Reservoir which was constructed in about 1912 and reconstructed after a catastrophic flood in 1964 to store and regulate a portion of the Company's water supply. The construction of Swift Reservoir was done by PCCRC's

predecessors as part of the Carey Land Act obligations of the Company. Swift Reservoir can store over 30,000 acre-feet of Birch Creek water which the Company can regulate and release from Birch Creek to the Company's main Birch Creek diversion system, known as the "B Canal." From Birch Creek, via the B Canal, the Company diverts water to its main storage facility known as "Lake Frances" situated near the town of Valier, Montana. Lake Frances has a storage capacity of approximately 115,000 acre-feet and was constructed in 1909, also as part of the Company's predecessors Carey Land Act obligations. Lake Frances, in addition to being the project's main storage and distribution reservoir, also serves as a popular recreation site for anglers and recreationalists in this region of Montana.

2. Dupuyer Creek.

Dupuyer Creek also serves as source of PCCRC's water supply which is stored and distributed to its shareholders. Although an important source of water, Dupuyer Creek supplies the Company with approximately fifteen percent (15%) of PCCRC's water supply requirements, substantially less than the Company's reliance on Birch Creek.

PCCRC holds several water rights for the waters of Dupuyer Creek which are diverted from the creek via the Company's "D Canal" and delivered to the distribution and storage system. Although Dupuyer Creek is an important source of the Company's water supply, Birch Creek, and water supplied by Birch Creek at the Company's B Canal diversion, is the predominant source of supply for the users of the PCCRC water supply system.

C. Historic Water Distribution from Birch Creek Supplies.

In addition to PCCRC using water from Birch Creek, the Blackfeet Irrigation Project ("BIP") operated by the U.S. Bureau of Indian Affairs ("BIA"), also diverts water from Birch

Creek for irrigation purposes on the Blackfeet Reservation.¹ Pursuant to the decree in United States v. Conrad Investment Co., 156 F. 123 (D. Mont. 1907), *aff'd*. 161 F. 829 (9th Cir. 1908), diversions from Birch Creek for the BIP have historically varied from approximately 11 cubic feet per second (“c.f.s.”) to 50 c.f.s. during the irrigation season, or as expressed volumetrically, from approximately 1,495 AF to 7,450 AF/year, based on available Company records.

In addition to use of Birch Creek water by the Blackfeet Tribe for irrigation purposes, PCCRC has worked with the Tribe and allowed on average approximately 6 c.f.s to flow past the B Canal diversion for instream flow purposes. The volume of water associated with the 6 c.f.s. bypassing the B Canal on Birch Creek over the course of a year results in approximately 4,380 AF/year of Birch Creek water for instream use by the Tribe. Under the Montana-Blackfeet Compact, the Blackfeet Tribe’s water right on Birch Creek has been quantified at levels that exceed historic demands of the Tribe for the water of Birch Creek.

D. Birch Creek Tribal Water Right as Established in Montana-Blackfeet Compact.

1. Article III, Section C., Birch Creek Tribal Water Right.

Under the Montana-Blackfeet Compact, the components of the Birch Creek TWR may be summarized as follows:²

- a. Irrigation – 100 c.f.s. Direct Use water right of the natural flow of Birch Creek for use in the Upper Birch Creek Drainage;
- b. Instream Flow – a natural flow right in Birch Creek of 15 c.f.s. from October 1 to March 31; and 25 c.f.s. from April 1 to September 30 of each year;

¹ Establishment of the BIP by Congress occurred in 1907. *See*, 34 Stat. 1035-1036.

² As provided herein, the TWR is summarized for purposes of this written testimony. Articles II, III, and IV of the Compact should be reviewed together and in conjunction with the two (2) Birch Creek agreements, in order to properly examine the extent and potential effect of the Birch Creek TWR.

- c. Additional Flow Right – after satisfaction of all state-based water rights, Tribe may divert or authorize use of all natural flow in Birch Creek as measured at State Highway 358 bridge;
- d. Groundwater Right – all groundwater not hydrologically connected to Birch Creek;
- e. Priority Date – October 17, 1855;
- f. Period of Use – b., c., and d. above year round and a. above April to October 1 of each year;
- g. Points/Mean of Diversion – as authorized by Tribal Water Code;
- h. Call Protection – other than rights from Birch Creek, all other sources in Basin 41M protected from call for water under the instream flow TWR;
- i. Birch Creek Management Plan – TWR for irrigation also governed by Birch Creek Management Plan Agreement; and
- j. Commencement of Development – TWR for irrigation and instream flow subject to Agreement on Birch Creek Water Use.

2. Impact of Birch Creek TWR on PCCRC Water Supply.

Under the Montana-Blackfeet Compact, the TWR on Birch Creek does not have a volumetric cap or limit. As such, the compact does not establish a readily identifiable block of Birch Creek water from which to assess firm impacts on the PCCRC Birch Creek supply. However, based upon PCCRC water use records, and based upon the terms of the TWR as set forth in the compact, and the ancillary agreements, estimates have been presented by state and tribal representatives which calculate the impact on PCCRC water supplies to be approximately 15,000 AF/year.

Assuming an average delivery of irrigation water by PCCRC to its water users of 8 inches per acre, an impact of a loss of 15,000 AF/year to PCCRC will affect 22,500 acres of irrigation within the PCCRC project. Given this potential substantial impact on PCCRC water users and acres served under the PCCRC project, PCCRC has actively participated with state and tribal representatives in examining a variety of mitigation measures in an attempt to lessen effects from development of the compacted Birch Creek TWR and to achieve long-term security for the Company's water supply.

Because PCCRC is a very efficient user of water for irrigation purposes, PCCRC has been able to serve project shareholders and acres under the project with water within the Company's historic diversion and distribution patterns. However, any additional loss of water supply as a result of development of the Birch Creek TWR could have serious adverse effects on PCCRC's water users and the local and regional economy.

E. Proposals to Mitigate Impacts of the Birch Creek TWR on PCCRC Water Users.

The State of Montana, the Blackfeet Tribe, and PCCRC have identified various alternatives to help mitigate full development of the proposed TWR on Birch Creek. These alternatives include proposals for projects which would provide additional water to Birch Creek as well as proposals for state-based water users to lease water from the Blackfeet Tribe, or to otherwise mitigate a loss of Birch Creek water supplies on the PCCRC project. S. 3290 includes important provisions in this regard.

1. Blackfeet/Montana Agreement Regarding Birch Creek Water Use.

Due to impacts of the Birch Creek TWR on PCCRC's Birch Creek water supplies, the state and the Tribe have negotiated the "Agreement on Birch Creek Water Use" as part of the

TWR for Birch Creek. Under the agreement, which is a collateral agreement to the compact, the Tribe has agreed to defer any additional use of the negotiated TWR on Birch Creek, over and above a set level of use for irrigation and instream flow purposes, for a period of 15 years. In addition, the Tribe and the state agreed that they would jointly seek federal funding authorization in any federal legislation for the betterment and improvement of Four Horns Dam and Reservoir on the Blackfeet Reservation, including construction of facilities to deliver a minimum of 15,000 AF/year of water from an enlarged Four Horns to PCCRC's Birch Creek water delivery system. Under the Birch Creek Agreement, the Tribe has agreed to deliver water from an improved Four Horns Dam and Reservoir to Birch Creek for an additional ten-year period. As such, under the Birch Creek Agreement, PCCRC's water supplies should remain relatively secure for approximately 25 years.

2. Birch Creek Agreement Amendment.

In February 2009, the state and the Blackfeet Tribe amended the Birch Creek Agreement. The amendment was largely a result of concerns expressed by PCCRC that the long-term security of the Company's Birch Creek water supply was placed at risk. Under the February 2009 amendment, the state and the Tribe agreed that mitigation of impacts of development of the Birch Creek TWR is necessary to avoid adverse effects to PCCRC's water supply and that those impacts can be mitigated by improvements to the Four Horns Project situated on the Blackfeet Indian Reservation. Under the amendment, the state and Tribe agreed that improvements to the Four Horns Project would be included in the federal legislation and further agreed that additional funding would be required to mitigate impacts of development of the Birch Creek TWR beyond the 25-year term set forth in the Birch Creek Agreement. Both the state and Tribe agreed to support federal funding for this purpose.

As a result of the Birch Creek Agreement and the amendment to the Birch Creek Agreement, PCCRC supported passage of the Montana-Blackfeet Compact by the 2009 Montana Legislature. Based upon these agreements and upon inclusion of provisions within S. 3290 that recognize mitigation for Birch Creek, PCCRC has supported introduction of this important federal legislation.

3. Provisions of S.3290 to Mitigate Development of the TWR.

S. 3290 includes important provisions to implement the mitigation measures contemplated by the Birch Creek Agreement and amendment. Provisions included within S. 3290 addressing the need to fully develop the Four Horns Dam and Reservoir; to construct facilities to deliver not less than 15,000 acre-feet of water per year for delivery to PCCRC's water delivery system under the Birch Creek Agreement; the ability to lease water from an improved Four Horns Dam and Reservoir system; and the establishment of a Birch Creek mitigation fund are all provisions of the federal legislation which are necessary to achieve mitigation of impacts on PCCRC's water supply associated with the development of the Birch Creek TWR. *See*, Sections 5 and 11, S.3290. PCCRC believes these provisions of S.3290 are critical to the long-term success of the Compact and its ancillary agreements. PCCRC believes these provisions provide the necessary framework for the historic agreements made by the State of Montana and the Blackfeet Tribe to be successful for both Tribal and non-tribal water users on Birch Creek.

PCCRC believes the mitigation provisions of S.3290 for Birch Creek are essential to the long-term success of the Compact. While PCCRC understands certain aspects of mitigation and the provisions in this regard in S.3290 may need further refinement, PCCRC believes mitigation provisions will assure the development of beneficial improvements for Four Horns Dam and

Reservoir, as well as securing the benefits of these improvements for the Blackfoot Tribe. PCCRC also believes the mitigation provisions of S. 3290 are important to avoid unnecessary adverse effects on PCCRC's water supplies on Birch Creek associated with development of the Birch Creek TWR. By securing a long-term solution to water supplies on Birch Creek, S.3290 will assure that the Blackfoot Tribe benefits from implementation of the Montana-Blackfoot Compact and that PCCRC's water users will continue to have access to necessary water supplies upon which the project was historically developed.

III. CONCLUSION

PCCRC commends the hard work of all involved with the complexities of the Montana-Blackfoot Compact. PCCRC remains committed to continue working with the State of Montana, the Blackfoot Tribe, and the Administration in securing federal legislation to ratify the compact and the ancillary agreements on Birch Creek. PCCRC is ready to address any concerns which may be identified with the federal legislation in an effort to assure the successful implementation of the compact for all water users on Birch Creek.

On behalf of PCCRC, we thank the Committee and the Committee's staff for the opportunity to provide PCCRC's view of S.3290 and look forward to continued input on this important legislation.