

TESTIMONY OF
THE BLACKFEET TRIBE of the BLACKFEET INDIAN RESERVATION, MONTANA
Shannon Augare, Member, Blackfeet Tribal Business Council
Senate Indian Affairs Committee
S. 3290, BLACKFEET WATER RIGHTS SETTLEMENT ACT
July 22, 2010

Mr. Chairman, and members of the Committee, my name is Shannon Augare. I am a member 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 am very familiar with this matter, having worked on the ratification of the Blackfeet water rights compact as a member of the Montana Legislature.

I want to thank the Committee for holding this hearing on S. 3290, 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 staffs 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 and many other people, including those who are testifying here today. It represents an historical breakthrough in the Tribe's over century long battle to secure and protect its waters rights. S. 3290 ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the Federal Government and most importantly establishes the critical infrastructure 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 People have occupied the area where the Blackfeet Reservation is located 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 first treaty, known as Lame Bull's Treaty, was signed in 1855. Executive orders and statutes would follow, each taking huge chunks of our traditional land. In the end, as a small grace, we ended up with the land that was most sacred to us: our present day reservation. But this was not due to any good intentions. The simple fact is that the land we wanted most was the land they wanted least.

In 1896 we had the Northern Rockies taken from us because speculators believed there were rich minerals to be had. When mineral riches didn't pan out, this most sacred part of our homeland became Glacier National Park in 1910. To this day we question the legitimacy of the 1896 transaction. But thereafter, the modern-day reservation boundaries were set. The present 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 lands within the reservation were allotted to individual Tribal members under allotment acts in 1907 and 1919.

The Tribe now has over 16,000 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 have attempted to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

Water is the Essential Element that Binds Us Together

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 it 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. 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 and cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Various species of plants also have great importance and are culturally and religiously significant to the Tribe and Tribal members. Particular species of plants are essential for religious ceremonies and for their healing and medicinal effects. Both water quantity and quality are critical to the survival of these plant species, and to the central role of the plant species in the continuing religious and cultural practices of Tribal members.

Pristine water quality is also essential to the cultural and religious practices of the Tribe. Preservation of a high level of water quality is therefore integrally related to tribal members' ability to continue religious, spiritual and cultural practices.

Water is the lifeblood that not only sustains the Blackfeet people but our way of life. The water resources of the Blackfeet Reservation are essential to the lives of tribal members, the economic, cultural and spiritual well being of the Tribe, and the continuing viability of the Reservation as a homeland to the Blackfeet people.

The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of spectacular mountain scenery and abundant fish and wildlife. 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 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 species and fish depend directly on the water resources of the Reservation to support them and allow them to thrive.

At the same time, water is vital for our communities to thrive and prosper. Safe and clean drinking water supplies are essential for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture.

The Reservation also possesses significant timber, and oil and gas resources and other 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. 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.

The Water Wars

In 1909, the United States entered in to the Boundary Water Treaty with Canada. Although the treaty divided the Milk River and St Mary River between the two countries, not a word was mentioned about the Blackfeet, or the fact that these streams arise on or near the Blackfeet Reservation, and that the Blackfeet have rights to them.

Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Reservation under the 1902 Reclamation Act, and began construction of the St. Mary

facilities that would divert most of the United States' share of the St. Mary River off the Reservation for use by the Milk River Project over a hundred miles away, notwithstanding that there was an equally feasible project on the Blackfeet Reservation to which 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 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.

At the same time that the St. Mary diversion was taking place, there was a concerted effort by water users just south of the Reservation to appropriate for themselves the waters of Birch Creek, the southern boundary of the Reservation. The situation eventually led to litigation in a case brought by the United States contemporaneously with the *Winters* case. The case sought the removal of the Conrad Investment Company's dam on Birch Creek which was intended to send water to irrigators adjacent to the southern boundary of 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 development of 80,000 acres of irrigation immediately adjacent to the Reservation.

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 later 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). These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding that in the 1896 Agreement by which the Northern Rockies were lost to the Tribe, the Federal Government agreed that there would be no allotment of the Reservation. See Art. V of the Agreement of September 26, 1895, ratified by the Act of June 10, 1896, 29 Stat 321, 353.

Allotment brought the third serious dispute between the Tribe and non-Indian water users. The Bureau of Indian Affairs Blackfeet Irrigation Project was authorized in the 1907 Allotment Act. However, many of the prime irrigation lands both within the Project and in other areas of the Reservation on Cut Bank Creek and the Milk River quickly went out of trust. The

Tribe's water rights have gone unprotected from the use of water by non-Indian development on 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.

Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but more recent years have brought shortages during the late irrigation season in both the Milk and Cut Bank Creek, and the dilapidated condition of the Blackfeet Irrigation Project has become a serious impediment to water use within the Project. Plans to rehabilitate the hundred year old St. Mary Diversion facilities have further raised water right concerns, and the need for the Tribe to finally achieve some benefit from those facilities.

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 complete in December 2007. It was approved by the Montana Legislature in April, 2009 (85-20-1501 MCA), and it is now before this Committee 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:

- Establishes the Tribe's water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages (Milk River, Cut Bank Creek, Two Medicine River and Badger Creek) 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 in a manner that does injure the Milk River Project.
- 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 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
- Provides for an allocation of water stored in Tiber Reservoir (in an amount to be determined by Congress)

- 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 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.

For obvious historical reasons, the St. Mary River and Birch Creek proved to be the most difficult issues for the parties to resolve.

The Compact includes a Birch Creek Management Agreement as an Appendix to the Compact that requires the Tribe and the Pondera County Canal and Reservoir Company to develop annual water management plans, to meet annually, along with the Bureau of Indian Affairs, and to otherwise cooperatively manage their water uses.

In addition, in the separate Birch Creek Agreement, which is mentioned above, the Tribe has committed to enlarge the Four Horns Reservoir on the Reservation, a storage facility of the Blackfeet Irrigation Project, to provide mitigation water to Birch Creek water users. The Tribe will defer new development of Birch Creek water for a fifteen year period, during which the enlargement will occur. When the enlargement of Four Horns is complete, the Tribe will provide 15,000 acre-feet of water to Birch Creek water users, for a total agreement term of 25 years. Given that Birch Creek is currently a fully utilized stream without taking into account an increased Blackfeet water right, mitigation measures were the only reasonable and feasible way to reach agreement there.

As to the St. Mary River, additional identification and study of alternatives to provide the Tribe's water right will be necessary and are included as part of the legislation. A substantial portion of the United States' share of the St. Mary River is diverted to the Bureau of Reclamation's Milk River Project, as described above. Therefore it will be necessary to identify alternatives to provide the Tribe's water right. In the meantime, S. 3290 provides that the Tribe will receive its water right through an allocation of Sherburne Dam, the Milk River Project storage facility on the Blackfeet Reservation. The Tribe will lease back the water to the Project, until a permanent water supply is identified and implemented for the Tribe. Such an arrangement is the only way to ensure that the water rights of both the Tribe and the Milk River Project are fulfilled.

Upon completion of the Compact, a separate concern was raised by the Fort Belknap Indian Community relating to the Milk River, and the potential for conflict between the Blackfeet and Fort Belknap Milk River water rights. While the Blackfeet Tribe believes that the potential for conflict is very low, the two tribes have met on a number of occasions to resolve any possible conflict. Language was agreed upon to be inserted in our respective settlement legislation. The language was included in an agreement signed by the Blackfeet Tribe, but not yet signed by Fort Belknap. The language appears in the Blackfeet legislation in Sec. 11, and we believe it fully protects Fort Belknap. The provision requires the Secretary to insure that the water rights of both tribes are fulfilled. This is a particular federal responsibility due to the United States trust responsibility to both tribes, and particularly because the Federal Government was party to the negotiations of both tribes.

State Approval and State Contribution

As described above, the Blackfeet water rights compact was approved by the State Legislature in April 2009. The State of Montana has committed to contribute \$20 million to the Compact. Along with the approval of the Compact in 2009, the State legislature appropriated \$4 million toward the \$20 million state contribution, and has committed to appropriate the remaining amount in the 2011 legislature. 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 (to which the Tribe currently has access to the interest), and \$500,000 was used for engineering studies for the Four Horns enlargement. Therefore, the State has committed to a \$35 million contribution to the Blackfeet settlement. This is very major contribution on the part of the State, one of the larger, if not the largest contribution, for an Indian water rights settlement in Montana.

Blackfeet Water Rights Settlement Act

S. 3290, the Blackfeet Water Rights Settlement Act, carries forth the terms of the Blackfeet water rights compact, and addresses the issues of particular federal responsibility and federal concern. The bill would do the following:

- Approves and ratifies the Compact and the Birch Creek Agreement.
- Provides for an allocation of Tiber Dam water.
- Provides 50,000 acre feet of Sherburne Dam water to the Tribe in fulfillment of the Tribe's St. Mary water right, to be leased to the Milk River Project until a permanent alternative(s) to provide the St. Mary right is identified and implemented. Authorizes funding to undertake the necessary investigation and studies, planning, design and construction to provide the St. Mary water right to the Tribe.
- Requires resolution of all rights of way issues related to the Milk River Project facilities, involving tribal lands and allotted land.
- Authorizes the rehabilitation and improvement of the Blackfeet Irrigation Project, including the enlargement of Four Horns Reservoir.
- Establishes a Blackfeet Water Settlement Fund and authorizes \$125M for the Blackfeet Irrigation Project and \$93.2 for each of five years for other water projects and water related projects.
- Provides for a waiver of water related claims against the Federal Government.
- Establishes a tribal water right in Lewis and Clark National Forest in the amount claimed by the United States on behalf of the Tribe.

- Reserves a claim to water in Glacier National Park for the Tribe's hunting, fishing and timbering rights reserved in the 1895 Agreement.
- Requires the Secretary to resolve any conflict involving Milk River water between the Tribe and Ft. Belknap.

The Tribe has identified a number of projects that are critical to the implementing the Tribe's water right under the Compact. The projects include rehabilitation and build-out of the Blackfeet Irrigation Project, including the Four Horns enlargement, irrigation development on the Milk River, Cut Bank Creek and Birch Creek, and a regional water system to provide a long term municipal water supply to several communities on the Reservation, including East Glacier, Browning, Starr School, and Seville, and a separate water supply for the Town of Babb.

Badger/Fisher Unit-Water Supply Augmentation and Irrigation Project Rehabilitation & Betterment (including Four Horns Enlargement)

The components for this project include an enlarged & rehabilitated feeder canal from Badger Creek to an off-stream dam & reservoir, Four Horns Dam, an enlarged Four Horns Dam from about 20,000 AF to 70,000 AF (actually a new dam just downstream from the existing dam), an enlarged and rehabilitated main canal from the dam to the Badger-Fisher Unit of the Blackfeet Irrigation Project, irrigation unit rehabilitation and betterment, including some on-farm improvements, and a water supply pipeline (gravity) from Four Horns Dam to off-reservation water users. The Four Horns enlargement is critical to the implementation of the Compact as set forth above.

The rehabilitation and betterment of the Blackfeet Irrigation Project is essential to continuing irrigation in this hundred year old project. The Project was authorized by the 1907 allotment, as part of the Indian Appropriations in the Act of May 1, 1907, 34 Stat. 1035. Currently, nearly 30,000 acres of land are included in the project, but the Project has never been completed. In addition, the current dilapidated state of the project severely limits full irrigation to lands in the project.

Two Medicine River Irrigation Development

This project includes selective betterment and on-farm improvements on the Two Medicine Unit of the Blackfeet Irrigation Project and a major enlargement of Mission Lake with pumping facilities.

Birch Creek Irrigation Development

This project includes selective betterment and on-farm improvements on the Birch Creek Unit of the Blackfeet Irrigation Project.

Milk River Irrigation Development

Much of the economically developable run-of-the-river irrigation (no storage facilities) has been already developed on the Milk River by non-Indians within the Reservation. New irrigated acreage will require new storage. This project may include the purchase and rehabilitation of existing irrigated lands, and development of new Tribal irrigated lands, including the construction of new storage and irrigation water delivery systems. This project will allow the Tribe to establish its own irrigation in the Milk River drainage, something it has not been able to do without storage given the existing non-Indian irrigation.

Cut Bank Creek Irrigation Development

Much of the economically developable run-of-the-river irrigation (no storage facilities) has been already developed on Cut Bank Creek by non-Indians within the Reservation. New irrigated acreage will require new storage. This project may include purchase and rehabilitation of existing irrigated lands, and developing new Tribal irrigated lands, including the construction of new storage and major water delivery systems. Like the Milk River Project, this project will allow the Tribe to establish irrigation in the Cut Bank Creek Drainage which it has been unable to do without storage given the existing non-Indian irrigation.

Regional Water System

The Blackfeet Tribe, Indian Health Service (IHS) and other entities have designed and are currently constructing a Phase 1 regional water system within the Reservation. The source is at Lower Two Medicine Lake, with an associated water treatment plant, with water service pipelines going to the towns of East Glacier and Browning. The current project focuses on current needs. The proposed project would provide a 50 year water long-term community water supply and would include enlarging the treatment plant and Phase 1 pipelines and extending the pipeline from Browning to serve Indian communities to the eastern boundary of the Reservation, including the Star School and Seville areas.

For many years, East Glacier has been under a boil order issued by EPA. The Town of Browning has had frequent problems with its current water supply which is provided by groundwater wells. These wells have experienced supply and quality problems that have affected a continuous water supply for Browning. The Seville water supply is currently provided through an agreement with the City of Cut Bank. However, the ability of Cut Bank to continue to provide water to this reservation community given the City's own water supply problems is in doubt. Therefore, it is critical for another supply for Seville to be provided.

It is also 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.

St. Mary River Water Development

Components of this project include enlarging Lower St. Mary's Lake and Spider Lake and other potential off-stream storage facilities and improvements. These projects may serve as potential projects to supply the Tribe's St. Mary water right. A municipal water system for the Town of Babb is also included. Like other Reservation communities, Babb now relies on an inadequate and problematic well system. A potential 500-acre irrigation project has further been identified that will allow the Tribe some irrigation benefits which now accrue only to the Bureau of Reclamation's Milk River Project.

Blackfeet Stock Water and Irrigation Developments

This project would include individual stock water and irrigation developments scattered throughout the Reservation. The project would allow individual Indian allotment holders that are not within any irrigation project to develop small irrigation developments and also stock water development for their cattle.

Compact Administration

A permanent Blackfeet Water Rights/Water Resource Office would be responsible for implementing the water rights compact, developing a revised water code, administering water rights on the Reservation, developing a water management plan and implementing the water rights settlement projects.

The Cost of Settlement

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. \$125 million has been provided for in the legislation for the Four Horns enlargement which is required to fulfill the commitment to provide mitigation water to Birch Creek water users, and is set out separately in the legislation. The cost of the remaining projects will potentially exceed the remaining \$466 million. The Tribe proposes to construct the most critical projects within the funds provided for in the legislation. Much of the cost is associated with the rehabilitation and betterment of the Badger-Fisher, Two Medicine and Birch Creek units of the Blackfeet Irrigation Project. The Regional Water System is estimated to cost \$107,481,500. All of the projects are currently being reviewed by a Bureau of Reclamation DEC Team (design, engineering and construction), and the DEC Team's report will be issued shortly.

The costs of settlement are fully justified by the needs of the Reservation and the potential Tribal claims against the United States associated with the St. Mary Diversion, the environmental and resource damages caused by the diversion facilities, claims relating to the 1909 Boundary Water Treaty, the failure of the United States to properly operate and maintain the Blackfeet Irrigation Project, and the failure of the United States to protect the Tribe's water right from development by others.

Conclusion

The Blackfeet Water Rights Settlement represents the hard work of many people. The settlement has critical importance to the future of the Blackfeet 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 development of vital reservation water projects, including drinking water projects, water storage projects and irrigation and stock development. The settlement will significantly contribute to the development of a strong Reservation economy and a better life for the Blackfeet people.

The Tribe is prepared to address any federal concerns that may be identified, and has initiated contact with the Administration for this purpose.

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