

**S. 434, THE BLACKFEET WATER RIGHTS  
SETTLEMENT ACT OF 2013 AND S. 611, THE  
SANDIA PUEBLO SETTLEMENT TECHNICAL  
AMENDMENT ACT**

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**HEARING**

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE**

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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MAY 8, 2013  
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**S. 434, THE BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2013 AND S. 611, THE SANDIA PUEBLO SETTLEMENT TECHNICAL AMENDMENT ACT**

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**WEDNESDAY, MAY 8, 2013**

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:38 p.m. in room 628, Dirksen Senate Office Building, Hon. Maria Cantwell, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

The CHAIRWOMAN. The Senate Committee on Indian Affairs will come to order.

We are having a hearing today on S. 434, the Blackfeet Water Rights Settlement Act of 2013 and S. 611, the Sandia Pueblo Settlement Technical Amendment Act.

This afternoon, we will be hearing from a variety of witnesses within the Administration and various tribes. Obviously at the core principle of these issues today is tribal self-governance and self-determination, and the ability of tribes to exercise jurisdiction over their lands and their resources.

Often legislation is necessary to ensure the tribes can exercise those rights and this is a story that we all know in the Northwest because during my time in the Senate, we have passed several transfer bills for the Hoh and the Quileute Tribes so that they could move out of either tsunami or flood zone areas.

We are currently working on legislation for the Spokane Tribe that has passed the Senate and the House several times which was a land issue in coordination with the Grand Coulee Dam.

I am well aware of the importance of these settlement disputes with tribes and the positive impacts they can have when the settlements come into effect.

S. 434, the Blackfeet Water Rights Settlement Act would settle a longstanding water dispute between the Blackfeet Tribe and the State of Montana and would ratify an agreement that the two parties have reached. Today, the Committee will hear from both the tribe and the State on how they came to this agreement and what it means for the State, the tribe and the surrounding communities.

We will also hear from Kevin Washburn, Assistant Secretary of Indian Affairs, Department of the Interior. The Department will play an integral role in the negotiation and implementation of these water rights settlements.

This bill was introduced by Senator Baucus and Senator Tester, a member of our Committee. I applaud both of them for their hard work on this important legislation and their work with the tribe and the State Department. Hopefully, we will get this signed into law.

I look forward to working with both of my colleagues as we move forward on this legislation.

The second bill, S. 611, also deals with a tribal settlement, the Sandia Pueblo Settlement Technical Amendment Act, introduced by Senators Udall and Heinrich. It is a very straightforward bill with only one purpose, to finally accomplish the transfer of 700 acres of land to the Pueblo of Sandia, New Mexico intended to happen when Congress passed the original Act in 2013.

The Act directed the United States Forest Service to transfer 700 acres of land of the Sandia Mountain to the Pueblo of Sandia in exchange for other land and compensation. These Sandia Mountains are of great cultural significance to the Pueblo of Sandia and unfortunately, despite the original Act and clarifying amendment in 2009, after ten years, the land transfer has still not been completed.

Obviously passage of S. 611 will finally accomplish what Congress intended ten years ago by clarifying how these lands will be valued and ensuring the land transfer will occur within 90 days of this passage.

Today, we will hear from the Sandia Pueblo on this bill and also the U.S. Forest Service. I hope today's testimony will allow us to move forward.

I would like to now turn to Vice Chairman Barrasso for any opening statement he would like to make.

**STATEMENT OF HON. JOHN BARRASSO,  
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you, Madam Chairwoman, for holding this hearing. I will keep my statement brief.

These bills are very important to the people of the Blackfeet Tribe and the Sandia Pueblo and deserve our careful consideration. We have a panel of witnesses ready to share their insight with us on these bills and I appreciate their assistance. I am also looking forward to hearing from Senator Baucus and his comments on the Blackfeet bill.

I would say this if Senator Baucus was here but additionally, I want to thank him on the record for all the work he has done in terms of Indian country. The people of the State of Montana will be losing a great advocate when he retires. He has served all of them and the rest of our country very, very well for almost 40 years, first in the House of Representatives and since 1978 in the United States Senate. His service will certainly be missed.

Thank you, Madam Chairman.

The CHAIRWOMAN. I am sure he will appreciate those kind remarks.

Senator Tester, did you want to make a statement?

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. I will be very quick.

First of all, thank you, Madam Chair and Ranking Member, for holding this hearing. I want to thank everyone from Blackfeet country for being here and the folks from the Interior.

The water compact process is a tough one. Water is incredibly valuable, maybe our most valuable resource. I think everyone in this room understands it is better to negotiate than to litigate. That is what this is about. We need to make sure those negotiations are all in good faith and that we come to a conclusion because, quite frankly, time is of the essence.

I am going to approach Senator Baucus from a different angle than the Ranking Member did. He will have been in this body for 36 years. The passage of the Blackfeet compact while he is here would be an incredible asset. When he is gone, it is a jump ball and we do not know what we are going to get.

I think it is incredibly important that we work, both the Department and the Tribe, to make sure we come to an agreement sooner rather than later.

Thank you.

The CHAIRWOMAN. Thank you, Senator Tester. Thank you for your leadership on this legislation. We know you will continue working on all of that Montana tradition here in the U.S. Senate.

While we are waiting on Senator Baucus, I would like to turn to our colleague and member of the Committee, Senator Udall, to make a statement on S. 611.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you very much, Madam Chair.

I first want to thank Chairwoman Cantwell and Vice Chairman Barrasso for holding this hearing and including S. 611, the bill to make technical amendments to the T'uf Shur Bien Preservation Trust Area Act.

I would also like to welcome to the Committee Stuart Paisano, Councilman, from the Pueblo of Sandia, who will be testifying on behalf of the Pueblo. I know the completion of this land exchange is very important to the Pueblo and I thank Councilman Paisano for coming to share the views of the Pueblo on this legislation.

It is important that the Committee hear the perspective of the Pueblo and understand the impact the delays and finalizing this land exchange have had on the Pueblo.

The original T'uf Shur Bien settlement passed in the 108th resolved the Pueblo of Sandia's land claims. In addition to the large land settlement, the Act directed the Forest Service to prepare and offer a separate land exchange to the Pueblo. For this land exchange, the Pueblo has been seeking 700 acres of Forest Service land in return for transferring 70 acres to the Forest Service and agreeing to a conservation easement and right-of-way on another 160 acre parcel.

S. 611 would clarify the intent of Congress to complete the long awaited land exchange between Sandia Pueblo and the Forest Service. Dispute over how the exchange should be carried out has festered for years, despite repeated efforts by Congress to make clear its intent on how the Pueblo and the Forest Service land should be valued in the exchange.

While I am frustrated, I know the Pueblo is frustrated that this issue has not been resolved administratively, I am glad to be moving forward on this legislation which will finally make the long-awaited land exchange complete.

I know the Forest Service would like to further discuss some aspects of the bill and I hope we can get more clarification from Mr. Joyner on some of the issues in his written testimony.

First, the Forest Service testimony estimates the cost of the appraisal of the land at \$200,000. I understand Sandia Pueblo has had an appraisal of these lands done by a Forest Service-approved appraiser in 2005. I also understand the appraisal cost \$12,000, nowhere close to \$200,000. I hope Mr. Joyner can clarify to the Committee why they had estimated the cost of the appraisal to be so high.

Second, the Forest Service testimony expresses some concern about the 90-day time limit. I would like to point out that this land exchange has been mandated for almost 11 years now. There is a real trust issue here. Clearly the Forest Service needs a deadline to get this exchange done.

I would like for Mr. Joyner to share with the Committee what kind of assurances the Service can give to the Pueblo that the exchange will be completed.

Third, the Forest Service has expressed interest in a mandate that the Pueblo would be responsible for sealing the open mine added on the La Luz Tract. It is my understanding that the Forest Service is experienced in locating and sealing mine adits. I would ask that Mr. Joyner explain why the Pueblo should be accountable for something the Forest Service is much more experienced in doing.

I look forward to working on this bill with the Committee, Sandia Pueblo and the Forest Service to ensure this exchange can finally be completed.

With that, Madam Chair, it is a pleasure being here. That completes my testimony.

The CHAIRWOMAN. Thank you, Senator Udall. I know you have to be at another hearing that you also have to chair. Thank you so much.

Looking at the history, the Preservation Act is the T'uf Shur Bien. When that was first implemented in the transfer, do you think this was all a dispute about valuation and that S. 611 fixes that valuation issue?

Senator UDALL. Absolutely. We have had a lot of disputes in terms of valuation. I think this is the best way to go at this. We looked at several ways and it seemed the way to do it was to do S. 611. Then the Forest Service can come in and talk about their point of view.

I felt the original land exchange that was passed was enough but we have had real problems, as I said, for over 11 years getting this



done. I think the technical amendment does get it done. It is really a valuation issue.

The CHAIRWOMAN. We will certainly have a chance to ask Mr. Joyner about that issue, about the clarity and the valuation and hear from the Forest Service in general about this. We understand how important it is to the tribe.

Does the Ranking Member have comments or questions?

Senator BARRASSO. No.

Senator UDALL. Madam Chair, I just want to say that I am going to try to make it back here and do everything I can. My chairman wants me over there to chair the subcommittee, so I will do everything I can to get back.

Thank you.

The CHAIRWOMAN. Thank you for being here.

We will now ask the other panel witnesses to come forward. If you could leave the middle one open for Senator Baucus for the moment. We are hoping he might show up here shortly.

I want to welcome all our witnesses today: the Honorable Kevin Washburn, Assistant Secretary for Indian Affairs; the Honorable Shannon Augare, Councilman, Blackfeet Nation from Browning, Montana; the Honorable Jay Weiner, Assistant Attorney General, State of Montana; Mr. Cal Joyner, Associate Deputy Chief, U.S. Forest Service; and the Honorable Stuart Paisano, Councilman, Pueblo of Sandia.

Thank you all for being here. Mr. Weiner, I am going to make you the designee if Senator Baucus shows up. I will ask you to step back. Mr. Washburn, proceed.

**STATEMENT OF HON. KEVIN K. WASHBURN, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR**

Mr. WASHBURN. Thank you, Madam Chairwoman, Vice Chairman and Senator Tester. It is good to be back. I was here not long ago and I think I have had homework from all of you over the last week or so. It has been a pleasure to work on those issues.

Let me say, the Administration is very proud of the four water rights settlements that it achieved with Congress in 2010 benefiting seven different tribes and feels very good about those settlements. Water rights settlements continue to be a very strong priority of the Administration.

These are important to tribes for a myriad of reasons, not the least of which is they have to have water to preserve their own lands and economic development is also very important. We remain committed to working with Congress to achieve more water rights settlements.

Today, I am happy to be here to tell you we have made serious progress on a water settlement for the Blackfeet Tribe of western Montana. The major beneficiary of this settlement would be the Blackfeet Tribe. The tribe has negotiated very aggressively for a fair settlement but the State has been exceedingly responsive and committed to the settlement as well. The parties have really worked hard and we have a lot of progress to show for that.

As drafted, the settlement would clearly establish a right to more than 744,000 acre feet of water per year for the Blackfeet Tribe.

I think I can speak for Stuart Paisano and other New Mexicans and say we would like to have that much water in New Mexico. I am sure Senator Udall would vouch for that if he were here.

Water is indeed sacred to all of us. As we confront a very serious drought in New Mexico, I can tell you I know the importance of this.

I am pleased to report today that substantial progress has been made. The last time we were here testifying, about 18 months ago, my predecessor testified on this bill and raised five significant issues with the settlement. In the time since then, three of those major concerns have largely been settled.

The number one concern 18 months ago was the cost of the Federal contribution. The fiscal scenario has only worsened since that time but the parties have worked to reach a Federal contribution that the Administration now believes is an appropriate amount. It is about \$400 million. Again, the Administration believes this is a fair Federal contribution to the settlement.

The second identified concern 18 months ago was the State's contribution was not enough. I am pleased to report that the State of Montana has really stepped up to the plate here as well. They have increased their contribution by \$14 million for a grand total of nearly \$50 million.

The third major Federal concern identified 18 months ago was the vagueness of how the Federal contribution would be spent. The Administration likes clear deliverables in these projects so that it can show the taxpayer how their money is being spent. The settlement now has very clearly identified projects and a lot of them are spread around to benefit many of the communities within the reservation.

These include water storage, on farm improvements, recreation and fisheries development and development and rehabilitation of irrigation efforts. There remains tremendous flexibility within the Settlement Act to allow the tribe to change these purposes if needed once the Act has been signed.

There are a couple other concerns that remain outstanding. One includes an authorization to funding for non-Indian entities, something the Administration generally does not like because the Administration believes the Federal Trust responsibility is to Indian tribes, not to non-Indian entities. We are looking at that.

We are told by the community this is a very unusual circumstance, so we are happy to consider that. That is one issue that still gives us some concern.

The other issue is a dispute between the Blackfeet Tribe and the Gros Ventre and Assiniboine Tribe of Fort Belknap. This remains a serious concern to us. We have a trust responsibility to both tribes and have to ensure that both tribes are treated fairly. Finality is a very important part of water rights settlements. When we get this settled, we want it to be settled for all time. We need to resolve all the disputes pending within it.

We will insist on either resolving these claims or at least developing some sort of mechanism through which they can be resolved in fairly short order so that we know by a date certain that it will be resolved.

There are a handful of other issues but they are not nearly as material as the amount of water or the Federal contribution. I feel we are getting close. I know we have a lot of leadership here, Senator Baucus and Senator Tester, and I know that time is of the essence. We are committed to moving forward to try to get this one done.

Let me end on a very important note about jobs. Our economic analysis of this settlement shows that the bill would create 650 jobs during the five year construction period and 150 permanent jobs all while resolving an important water rights dispute. In an area of significant unemployment, anything we can do to create jobs is important. That should be an added bonus for this sort of settlement.

Thank you for giving me the opportunity to appear before you today. I will defer to you as to how to proceed.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN K. WASHBURN, ASSISTANT SECRETARY FOR  
INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon Madam Chairwoman, Vice-Chairman Barrasso and Members of the Committee. My name is Kevin Washburn. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's position on S. 434, the Blackfeet Water Rights Settlement Act of 2013, which would provide approval for, and authorizations to carry out, a settlement of all water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. At this point, we are unable to support S. 434 as introduced. However, based on the progress by the parties to date, the Administration is committed to achieving a settlement that can be supported by all parties.

**I. Introduction**

The Obama Administration recognizes that water is a sacred and valuable resource for Indian people and supports the resolution of Indian water rights claims through negotiated settlements whenever possible. Indian water settlements ensure that Indian people have safe, reliable water supplies and help fulfill the United States' trust responsibility to tribes. At the same time, Indian water settlements end decades of controversy and contention among tribes and neighboring communities and promote cooperation in the management of water resources. The Obama 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 Indians; Indian tribes should receive equivalent benefits for rights which they, and the United States as trustee, may release as part of the settlement; Indian 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 benefitting from the settlement.

These principles guided this Administration's support for the four settlements enacted into law in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010), benefitting seven tribes in three different states at a total Federal cost of more than \$1 billion: White Mountain Apache Tribe in Arizona, the Crow Tribe in Montana and the Pueblo of Taos, Pueblo of Nambe, Pueblo of Pojoaque, Pueblo of San Ildefonso, and Pueblo of Tesuque in New Mexico. Our support for these settlements demonstrates that settling Indian water rights disputes is a high priority for this Administration and confirms that we would support Indian water settlements that result from negotiations with all stakeholders including the Federal government, and that include an appropriate Federal contribution and appropriate cost share contributions from states and other benefitting parties. Secretary Jewell continues to make the negotiation and implementation of Indian water rights settlements a high priority for the Department. She understands that Indian water rights and related resources are trust assets of tribes, and water rights settlements enable the Federal Government to protect and enhance those assets. When Congress enacts an Indian water right settlement it is not approving an earmark: it is fulfilling Congress' unique obligation to Indian tribes. Indian water rights settlements can produce critical benefits for tribes and bring communities together to face water challenges in a collaborative, transparent, and inclusive way. The Department will

continue to work with the Blackfeet Tribe (Tribe), the State of Montana, the local parties, and the sponsors to craft a Blackfeet water rights settlement that can be supported by all parties.

We have been working closely with the Tribe and with the State since we testified on October 20, 2011 on S. 399, an earlier version of the Blackfeet water rights settlement legislation that was introduced in the 112th Congress. We are pleased to report that the parties have made significant progress and we view S. 434 as a substantial improvement over S. 399. The parties have made substantial progress in defining the scope and cost of infrastructure projects that a settlement could provide, although we are continuing to clarify details concerning the administration of settlement funds. While the approximately \$400 million total proposed Federal contribution provided in S. 434 presents a challenge in these difficult fiscal times, it is approximately two-thirds of the cost proposed in S. 399 and reflects progress by the settlement parties. Funding challenges aside, the Federal contribution is appropriate when compared to other Indian water rights settlements.

While the parties have made substantial progress and we are committed to working to achieve a settlement that satisfies all parties, we are unable to support S. 434 as introduced. We do believe that there is a path forward, but it will take some additional negotiations. As with S.399, we remain concerned with the requirement in S. 434 that the United States establish a mitigation fund to benefit non-Indian water users. Additionally, we have been unable to reach agreement with the Tribe on contentious water management issues involving the Tribe's water rights in the St. Mary River and Milk River Basin, including the relative rights of the Tribe and the Fort Belknap Indian Community. Before we address remaining concerns with S. 434 in additional detail, it is important to put the Blackfeet water rights settlement in context by setting forth the background on the negotiations.

## **II. Background on Negotiation**

Our October 20, 2011, testimony on S. 399 contains a summary of the history of the Blackfeet Reservation and the relationship between the Tribe and the United States. We will not repeat that summary here but will focus on the efforts to resolve the Tribes water rights claims. In April 1979, the State of Montana enacted a state-wide water rights adjudication system and filed an action in State court to quantify the Tribe's water rights. At the same time, the United States filed a case in Federal Court in Montana to adjudicate the Tribe's water rights claims. The question of jurisdiction that arose as a result of the two lawsuits was decided in 1983 by the United State Supreme Court, which held that state court was the appropriate forum to adjudicate the Tribe's water rights. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Both the Montana adjudication and the Federal adjudication of the Blackfeet water rights claims have been stayed pending negotiation of a settlement of the Tribe's claims through Montana's Reserved Water Rights Compact Commission. The Tribe initiated negotiations with the Compact Commission in 1989 and in 1990, the Department appointed a Federal Negotiation Team to support the negotiations, which proceeded on and off until 2007, when the State and the Tribe reached an agreement in the form of the Compact. The United States was not a party to that agreement. If Congress does not approve the Compact, the Tribe's water rights claims will be litigated in the Montana Water Court. As stated previously, this Administration prefers to resolve Indian water rights claims through negotiated settlements, consistent with the United States' trust responsibility and with our policy promoting Indian self-determination and economic self-sufficiency. The Department has been working closely with the Tribe, the State and the sponsors to achieve a settlement of the Blackfeet water rights claims. S. 434 reflects the efforts of all of the parties toward this goal.

## **III. Blackfeet Montana Water Rights Compact and Proposed Legislation**

S. 434 would approve a Compact entered into by the Blackfeet Tribe and the State of Montana to settle all the Tribe's water rights claims in Montana. As introduced, the legislation specifically authorizes funding of \$399.8 million. However, there is also a requirement in S. 434 that the United States establish a mitigation fund composed of "such sums as may be necessary" for the use of non-Indian water users in Birch Creek. This fund does not benefit the Tribe or further the United States trust responsibilities. Nor are specific amounts or limiting factors identified for this fund, therefore it is difficult to comment on additional costs that could be associated with the bill. Nonetheless, the Department is working with the sponsors of the bill toward a resolution on this issue.

The settlement would recognize a tribal water right to approximately 750,000 acre-feet per year of surface water from the flow of several rivers on the Reservation, including the St. Mary River, the Milk River, Cut Bank Creek, Two Medicine

River, Badger Creek and Birch Creek. Citizens of the State of Montana would benefit under the settlement as non-irrigation State based water rights are protected under the Compact in each of these basins, while irrigation State based water rights are protected for a period of ten years in the Cut Bank Creek and Milk River Basins and are then subject to a call by the Tribe. In Birch Creek, the Tribe's total right would increase to 125 cubic feet per second (CFS) during the irrigation season, an increase of 83 CFS. Non-Indian water users south of the Reservation would be protected under the Birch Creek Deferral Agreement, a separate agreement that would be approved by S. 434. Thus, the legislation considers the need to secure wet water for the Tribe as well as the interests of surrounding non-Indian communities. The remainder of this testimony will summarize a number of concerns regarding S. 434 as introduced.

#### **IV. Federal Concerns**

##### *A. Federal Cost*

S. 434 includes definite improvements over S. 399 in terms of a Federal contribution. In addition, the bill adds flexibility that will allow the Tribe to work with the Department to further refine its approach to various projects as they are implemented over time. For example, S. 434 includes funding for a regional water system for Municipal, Rural, and Industrial (MR&I) purposes, providing safe drinking water to Blackfeet communities across the Reservation, many of whom have had to live under boil orders or with school closures because of water quality deficiencies. The Tribe worked closely with the Department to extend and improve coverage of the proposed improvements to the MR&I system and to build appropriate flexibility into the legislation. The improvements and flexibility in S. 434 will ensure that the projects constructed are meaningful and cost effective.

The Tribe significantly modified its approach for rehabilitating and enhancing irrigation facilities on the Reservation and developed targeted plans for on-farm improvements and water storage and development that will help the Tribe achieve the promise of the Reservation as a tribal homeland for its people. The Tribe and the State worked collaboratively to address Federal concerns with the Four Horns Dam proposal and agreed to a more cost-effective approach to solving the water use issues that exist between the Tribe and its neighbors south of Birch Creek, at the southern boundary of the Reservation. In addition, the State is proposing to contribute an additional \$14 million to address Federal concerns with cost share, bringing its total contribution to the settlement to \$49 million. The Tribe revamped its infrastructure projects and with its experts worked closely with the United States to develop the information we needed to evaluate the Tribe's estimated costs.

A Federally funded mitigation fund for non-Indian water users in Birch Creek remains in S. 434. We testified about our concern with this mitigation fund in October 2011 and the issue remains a significant concern for the Department. However, as I stated earlier, the Department is working with the sponsors of the bill toward a resolution on this issue.

##### *B. Lack of Resolution of Contentious Issues in the St. Mary and Milk River Basins*

S. 434 also leaves important water rights management issues unsettled in the St. Mary River and Milk River Basins. As we previously testified, leaving these matters unsettled will create significant obstacles to the ability of the United States to carry out its water rights administration duties in the basins. Our main concern are the proposal to provide the Tribe with a firm supply of 50,000 acre feet per year on a permanent basis from the St. Mary River and the inherent conflict that exists between the water rights of the Blackfeet Tribe and the Ft. Belknap Indian Community in the Milk River Basin as set forth in their respective Water Rights Compacts with Montana. Although the areas of dispute on this issue have narrowed considerably since October 2011, as the Department previously testified we would support a legislative settlement that resolves this issue. We remain committed to continue working with the Tribe and the other settlement parties to reach a final and fair settlement of the Tribe's water rights claims in the St. Mary and Milk River Basins. We are actively engaged with the Blackfeet Tribe and the Ft. Belknap Indian Community on developing a solution to the Milk River conflict consistent with the Federal trust responsibility that the United States has to both tribes.

##### *C. Title to Infrastructure*

Section 14 of S. 434 provides a proposed mechanism to transfer title from the United States to the Tribe of specified project infrastructure, including the Blackfeet Indian Irrigation Project, the Blackfeet Regional Water System, and various miscellaneous projects included as "Blackfeet Water Storage, Developments and Projects." This Administration, as we stated in our November 15, 2010, letter of sup-

port for the White Mountain Apache Tribe Water Rights Quantification Act to Senator Dorgan, believes that the transfer of infrastructure into tribal ownership is consistent with tribal self-determination and sovereignty and that title to such infrastructure provides tribes with assets and opportunities they can then manage as reservation economies and conditions evolve. However, we are keenly aware that a “one size fits all” approach to transfer of title to such a variety of projects is not appropriate. Some of the projects authorized to be transferred are currently held by the United States while title to other infrastructure is held directly by the Tribe. Some of the infrastructure involved provides services to non-Indians as well as Tribal members and transfer processes must take this into account where applicable. We would like to work with the Tribe and bill sponsors on more tailored title transfer language that will accomplish the tribal goals of self-sufficiency and autonomy in a way that is practical and can be implemented by the stakeholders working together.

#### *D. Water Marketing*

Like many other Indian water rights settlements, including those in Montana, S. 434 contains a variety of provisions authorizing the Tribe to temporarily lease, contract, exchange, or enter into other water marketing arrangements. However, unlike other Indian water settlements, under S. 434 the Department would play little or no role in approving these transfers of trust assets. Rather than abdicating all responsibility with respect to these assets, the Department would like to work with the Tribe to set up water marketing provisions that parallel the recent HEARTH Act, Pub. L. No. 112–151 (July 30, 2012), provisions dealing with tribal land. We believe that the HEARTH Act provides for the exercise of tribal sovereignty while still addressing important Federal interests such as environmental review of proposed transactions.

#### *E. Federal Fund Management*

S. 434 would authorize establishing in the Treasury a number of funds that are intended for use to carry out the provisions of the settlement, which involve actions to be taken by various agencies within the Department. The language establishing these funds must be drafted carefully to ensure that the funding is managed and used as the parties intend. For example, funds needed for Federal construction obligations must be available to the Department and not subject to withdrawal by the Tribe. The Department believes it has recently made significant strides in identifying appropriate legislative language to address fund management issues. We would like to continue to work with the Tribe and the sponsors of bill on these issues.

#### *F. Other Federal Concerns*

We have made significant progress with the Tribe in addressing Federal concerns and are hopeful of reaching agreement with the Tribe on other issues raised by S. 434, such as the waivers that are part of every Indian water rights settlement, and the language needed to fully protect allottees’ rights under the settlement. We are hopeful also that we are close to agreement on solutions to the concerns of the National Park Service and United States Forest Service on the interplay between the Blackfeet water rights claims and the water rights the agencies have in place under their approved compacts with the State of Montana. Other issues to be resolved include the Lake Elwell allocation, the extent of any tribal preference for developing hydropower on the St. Mary Canal Drops, the resolution of longstanding issues concerning rights of way, and a more realistic enforceability date must be resolved.

### **V. Conclusion**

Many provisions contained in the bill are the result of a meaningful and productive dialogue among the Department, the Tribe, other settlement parties and the bill’s sponsors. While we are unable to support S. 434 as introduced, based on the progress by the parties to date, the Administration is committed to achieving a settlement that can be supported by all parties. By continuing to work with the Blackfeet Tribe, the State of Montana, and the sponsors we can achieve a settlement that satisfies Federal concerns and lays the groundwork for a better future for the Blackfeet Tribe and other parties to this settlement.

The CHAIRWOMAN. Thank you, Assistant Secretary Washburn.

I want to welcome our colleague, Senator Baucus, and thank him for being here today for such an important hearing about an issue very important to Montana.

Before you arrived, you were lauded by Committee members for your hard work on behalf of the State of Montana and by our Vice Chairman on all your hard work. I want to make sure we pass that on to you.

I certainly appreciate you coming before the Committee today to talk about this very important issue to the State of Montana.

**STATEMENT OF HON. MAX BAUCUS,  
U.S. SENATOR FROM MONTANA**

Senator BAUCUS. Thank you, Chairwoman Cantwell.

Let me say at the outset I am not seeking reelection for another term. That enables me to double down on matters of extreme importance to Montana and to the country. I will no longer have to take time campaigning and will have a lot more time to devote to this issue, the water compact, as well as others.

If you have any questions, just let us know or let me know what has to be done so I and my colleague, Senator Tester, can work with you to get solutions. This is an energizing opportunity to get results.

The Blackfeet Water Rights Settlement, for us and the tribe, is really a critical step over two decades of negotiations between the Blackfeet Nation, the State of Montana and the United States of America. It has been a long time.

This bill confirms that the United States is a nation that honors its commitments to all citizens. As President Teddy Roosevelt said, this applies not only to his time but to our time, "Rhetoric is a poor substitute for action and we have trusted only to rhetoric. If we are really to be a great nation, we must not merely talk, but we must act and act big." I hope our talk leads to a greater nation.

Water is the critical resource that makes the high plains habitable. You probably note, Madam Chairwoman, that it doesn't rain very much in our part of the world. I like to say sometimes if you draw a line down the 100th meridian, it rains east towards the East Coast, Washington, D.C. gets 40 some inches of precipitation a year, but west of the 100th meridian until you get to the Cascades, to Washington, our annual precipitation is only about 16 inches a year. We need water. Water is really, really critical. It makes our plains habitable.

The creation of the Blackfeet Reservation implied a commitment on the part of the United States to reserve sufficient water to satisfy both present and future needs of the tribe. Over a century and a half, the United States, as a nation, has failed to fulfill that responsibility, in this case, especially to the Blackfeet Nation.

This hearing is the second in 18 months on this settlement. Parenthetically, I think we are making great strides with the Administration and making a lot of headway, especially of late. We are taking the next step in the slow march toward fulfilling our commitment with respect to the 1.5 million acre-feet of water that flows on or through the Blackfeet Reservation.

A settlement ratified by Congress is far preferable to any litigation over an acknowledged breach of trust. It is a no brainer. By enacting this bill, Congress will both establish a Federal reserve water rights for the tribe and authorize funds to construct the infrastructure necessary to make water available for use.

Madam Chairwoman, if you were to visit some of this infrastructure, you would think to yourself, oh, my God, this thing is a sieve, this thing needs repair, it is going to collapse. It is that dramatic.

The tribe will benefit from municipal irrigation and water storage improvements. These improvements translate to more jobs and better lives. The bill also strikes a balance to leave the current non-tribal water users as whole as possible.

The Blackfeet Water Compact has already been ratified by the State of Montana. As this Committee well knows, the obligation is now on Congress to complete this settlement. Shannon Augare was very instrumental in getting the State of Montana to approve their part of the deal.

I look forward to resolving any remaining issues. There are a couple. One is the Federal responsibility for the use of water in Birch Creek and also the terms under which the Blackfeet may market their water.

I am also confident that overlapping claims to this bill with the Gros Ventres and the Assiniboine Tribes' Milk River allocation are resolvable.

I look forward to cooperating immediately with the Obama Administration, the tribe, the State and other stakeholders to strengthen the bill for mark-up. We will do what it takes to make sure it is a good, clean mark-up. We are committed to make this thing work.

Thank you, Madam Chairwoman, thank you for holding this hearing. It means a lot to all of us. This has been going on for a long time. Now is the time to resolve it and get the legislation passed.

The CHAIRWOMAN. Thank you, Senator Baucus. Thank you for being here.

It is very clear to the Committee that the Montana delegation is very interested in seeing this legislation pass as soon as possible. We appreciate that very much. We will certainly follow up with both of your offices after this hearing if there are any outstanding issues.

Are there any questions from our Committee members? If not, thank you very much.

Senator BAUCUS. Thank you very much. I appreciate your taking the time and my apologies to my friends in taking their time from testifying.

The CHAIRWOMAN. We will resume with our second panel, Mr. Shannon Augare from the Blackfeet Nation. Thank you for being here.

**STATEMENT OF HON. SHANNON AUGARE, COUNCILMAN,  
BLACKFEET NATION**

Mr. AUGARE. Thank you, Chairman Cantwell, Vice Chairman Barrasso and Senator Tester.

As Senator Baucus mentioned, I am Montana State Senator Shannon Augare. I also serve as Councilman of the Blackfeet Tribal Nation in Montana.

I am honored to be here on behalf of the Blackfeet Nation 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 Senators Baucus and Tester, and their respective staffs, for their leadership and strong support of this legislation.

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.

In the 112th Congress, Senators Baucus and Tester introduced Blackfeet Water Settlement legislation. The current bill, S. 434, ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water claims against the Federal Government and most importantly, provides 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 Tribe resides on the Blackfeet Indian Reservation in north central Montana. The reservation is located along the eastern Rocky Mountains, borders Glacier National Park, Lewis and Clark National Forest and the U.S.-Canadian border. The reservation was established by treaty with the United States in 1855. The present reservation is approximately 1.5 million acres and there are currently 17,000 enrolled members, about half of whom reside on the reservation.

Six different drainages are encompassed within the Blackfeet Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. The St. Mary River and the Milk River are allocated between the United States and Canada by the 1909 Boundary Waters Treaty. As a result, any tribal claim against the system creates a great deal of uncertainty among Montana users.

In December of 2007, after nearly two decades of negotiation to resolve the Blackfeet Tribe's water rights, the tribe completed a water rights compact with the Montana Reserved Water Rights Compact Commission. The compact was approved by the Montana State Legislature in April 2009.

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. The Blackfeet Water Rights Settlement Act would ratify the tribe's water rights compact with the State of Montana. It resolves the Blackfeet Tribe's water-related claims against the United States and provides the necessary resources needed for the tribe to put its water to use and develop a self sustaining economy on our reservation.

In consideration of the tribe waiving its claim against the United States, the legislation authorizes Federal funding for vital drinking water projects, water storage projects and irrigation and stock development on the reservation.

It is important to note that the tribe has water-related claims, as described in more detail in my prepared written statement, against the Federal Government in excess of funds authorized in the legislation. Notably, since 2012, the tribe has agreed to reduce the amount of funding authorized in the legislation by more than

\$190 million to address concerns raised by the Department of Interior.

Moreover, the State is contributing \$49 million toward the Blackfeet settlement, the largest contribution the State has made to any Montana water settlement to date. Ultimately, if this legislation does not pass, the settlement will not become effective and the tribe's water rights claims will be litigated. If the settlement fails, the tribe will also pursue its monetary claims 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.

In conclusion, Madam Chairwoman, 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, will provide necessary funding for the tribe to develop its water rights and provide a benefit to the tribe and our members.

The settlement will significantly contribute to development of a strong reservation economy, jobs for tribal members and a better life for Blackfeet people.

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

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

[The prepared statement of Mr. Augare follows:]

PREPARED STATEMENT OF HON. SHANNON AUGARE, COUNCILMAN, BLACKFEET NATION

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 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 percent 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.

The CHAIRWOMAN. Thank you very much.

Now I will turn to you, Mr. Weiner. Thank you so much for your help and coordination. We look forward to your testimony.

#### **STATEMENT OF HON. JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA**

Mr. WEINER. Thank you very much, Madam Chairwoman.

I am an Assistant Attorney General with the State of Montana and I serve as a staff attorney to the Montana Reserve Water

Rights Compact Commission. I am here today to testify on behalf of Governor Steve Bullock and Chris Tweeten, Chairman of the Commission.

I want to extend my thanks to the Committee for this hearing, to Senators Tester and Baucus for the leadership they have shown on this issue and to the hard work that the tribe and the United States have put in along with the State of Montana to bring the bill to this point today, which we believe is very close to where this bill needs to be so that it can be enacted to ratify this very important settlement.

As you heard from Senator Baucus and Assistant Secretary Washburn, this is a jobs bill, this is a jobs and livelihood bill. Fifteen percent of Montana's agricultural economy depends on the water implicated by this settlement, including the water rights held by the United States Bureau of Reclamation for the Milk River Project.

This is an incredibly important settlement to the State of Montana. The State has demonstrated that commitment to this settlement through the hard work we have put in over the decades in negotiations and particularly in identifying the State's contribution to the settlement which, as you have heard, is the largest contribution to settlement that the State has ever made and I believe one of the largest, if not the largest monetary contribution a State has ever made to an Indian water rights settlement.

The bulk of that contribution is dedicated to the construction of what is known as the Four Horns Project, a critical piece of infrastructure to this settlement. As you heard from Assistant Secretary Washburn, it was also the subject of some of the concerns that the United States raised in their testimony 18 months ago.

Since that time, the tribe and the State, in an effort to address those concerns, went back to the table, the tribe's engineer looked at a redesign of the project and we were able to reduce the cost of that project by a full \$90 million in a way that while it reduced the overall benefits from the project, continued to provide important benefits to the Blackfoot Tribe and also to water users south of the Blackfoot Reservation out of Birch Creek.

To make that project work, the State originally proposed to contribute \$35 million. In the course of the negotiations over the last 18 months, the State has agreed, and I am pleased to report that this Monday, Governor Bullock signed House Bill 6 which appropriated the additional \$14 million to bring the total contribution to the settlement to \$49 million, all of which has been appropriated or authorized in the form of bonds by the State of Montana and is ready to be put to work so we can make the settlement implementable.

The Four Horns Project provides important benefits to those south of the reservation water users. It also provides important benefits to the tribe by bringing about infrastructure that helps the tribe realize economic development and monetary benefits from their water resources, which are a critical part of policy in reaching Indian water rights settlement.

The State has been troubled in the past that the United States has been unwilling to recognize that benefit. We are very encouraged by the testimony that Assistant Secretary Washburn deliv-



ered today and the discussions that have occurred with the United States more recently that indicate movement is possible on that point. We greatly appreciate that effort and look forward to resolving this issue to a successful conclusion. We believe we are very close on that point.

Two other issues raised in Assistant Secretary Washburn's testimony today that we continue to work on are the request made by the Pondera County Canal and Reservoir Company for a mitigation fund. The Pondera County Canal and Reservoir Company is the successor to a Kerry Land Act project.

That Act creates an interesting set of historic responsibilities that may exist. The State of Montana supports the Canal Company in their request but remain committed to working with the United States, the Canal Company, the Blackfeet Tribe and our congressional delegation to try to come to resolution on that issue as well so that does not become an impediment to the implementation of this bill.

The other issue I wanted to touch on that Assistant Secretary Washburn mentioned is the need to have a mechanism for resolving conflicts between the Blackfeet and the Ft. Belknap Tribes over their water rights on the Milk River, which arises on the Blackfeet Reservation, goes into Canada, comes back down in north central Montana and then flows across the Ft. Belknap Reservation.

The State of Montana has negotiated compacts with both the Blackfeet and the Fort Belknap Tribes. We were certainly aware of the issue at the time we negotiated those settlements. In our assessment and based on the technical work the State has done, we believe the prospect of actual wet water conflict between the tribes of those two reservations is exceedingly remote.

Nevertheless, we recognize there are concerns about the theoretical possibility of such conflicts and therefore, we support the efforts being made by the Administration, the Blackfeet and the Fort Belknap Tribes to implement a mechanism to resolve such conflicts in the extremely unlikely event they were actually to occur.

I want to extend my thanks to the Committee for this hearing. We appreciate it. This is an incredibly important bill for the State of Montana. Thank you very much for your time.

[The prepared statement of Mr. Weiner follows:]

PREPARED STATEMENT OF HON. JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA

Chairwoman Cantwell and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Jay Weiner, and I am staff attorney for the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of Governor Steve Bullock and Chris Tweeten, the Chairman of the Montana Reserved Water Rights Compact Commission, in support of Senate Bill 434, the Blackfeet Water Rights Settlement Act of 2013, and to urge your approval of this bill.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the State of Montana. The Compact Commission was established as an alternative to litigation as part of the statewide water adjudication. It is charged with concluding compacts "for the equitable division and apportionment of waters between the State and its people and the several Indian tribes" and the federal government. (Mont. Code Ann. § 85-2-702 (2011).) To become fully effective, each of these Compacts must be ratified by the Montana legislature and the other signatory parties,

and then the water rights being recognized must be issued as a final decree by the Montana Water Court.

Montana has been remarkably successful in resolving both Indian and federal reserved water rights claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne, and Rocky Boy's Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne, Rocky Boy's, and Crow Compacts. The Northern Cheyenne and Rocky Boy's Compacts are substantially implemented, and both tribes have seen substantial economic and social benefits from the completed settlements. We expect similar economic and social benefits to follow full implementation of the Crow Compact, which was ratified by Congress in 2010, by the Crow Tribe in 2011 and is presently in the decree phase before the Montana Water Court. In addition, the Montana Legislature has ratified a Compact with the tribes of the Fort Belknap Reservation, a bill to ratify which was introduced during the last session of Congress as S. 3209. The Compact Commission has also reached a Compact with the Confederated Salish and Kootenai Tribes that has not yet been ratified by the Montana Legislature. The Blackfeet Tribe-Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. §85-20-1501 (2011)), and is now before Congress for ratification pursuant to S. 434, after having been introduced in different forms during the two previous sessions of Congress, first as S. 3290 (2010) and then as S. 399 (2011). It is now time to enact this bill and ratify the Blackfeet Tribe-Montana Compact so the Tribe, the State and the United States, and all our citizens, may realize the benefits contained in this settlement.

Some background is in order. Concurrent with the initiation of the Montana general stream adjudication and the establishment of the Compact Commission in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Blackfeet Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in State court. Should the negotiated settlement of the Blackfeet Tribe's water right claims fail to be approved, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Blackfeet Tribe has always had the senior water rights in the basins that are the subject of the settlement embodied in S. 434—this Compact does not create those rights, it simply quantifies them.

The Blackfeet Indian Reservation is located in north-central Montana, bounded by Glacier National Park and the Lewis and Clark National Forest to the west, Canada to the north and prairies and farmland to the east and south. The Reservation encompasses 1.5 million acres (roughly one and a half times the size of Rhode Island), making it one of the largest in the United States. The Reservation is home to approximately half of the 17,000 enrolled Tribal members. Unemployment on the Reservation is estimated at being up to 70 percent. The region is arid, with approximately 13 inches of average annual precipitation. Ranching and farming are the major uses of land on the Reservation, with the principal crops being wheat, barley and hay.

The primary sources of water on the Blackfeet Indian Reservation are the St. Mary River, the Milk River, the Two Medicine River, and Badger, Birch and Cut Bank Creeks. Collectively, these watercourses discharge approximately 1.5 million acre-feet per year (AFY) of water, with the St. Mary River alone accounting for roughly one-third of that total. The St. Mary River originates in the mountains of Glacier National Park and flows north and east across the Reservation before crossing into Canada. The Two Medicine River and Badger and Birch Creeks originate in the mountains to the west of the Reservation and flow east, ultimately uniting to form the Marias River just east of the Reservation. The Milk River and Cut Bank Creek are prairie streams. The Milk River flows from the Reservation northeast into Canada before re-entering the United States just west of Havre, Montana, while Cut Bank Creek flows south and east until it joins the Marias River. The St. Mary and Milk Rivers are both subject to an apportionment agreed to between the United States and Canada in the 1909 Boundary Waters Treaty (BWT), and implemented by a 1921 Order of the International Joint Commission that was established by the BWT. Indian water rights were not considered during the negotiation or implementation of the BWT. The Bureau of Indian Affairs (BIA) manages the Blackfeet Irrigation Project on the Reservation. The Blackfeet Irrigation Project serves land in the Birch Creek, Badger Creek, Two Medicine River and Cut Bank Creek drainages.

The provisions in S. 434 will recognize and quantify water rights as well as off-Reservation storage allocations that will allow the Blackfeet Tribe to provide for its growing population and to develop its natural resources. The State of Montana and

the Blackfeet Tribal Business Council agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a productive and sustainable homeland for the Blackfeet People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. This settlement is the product of over two decades of negotiations among the parties, which included an intensive process of public involvement.

The Blackfeet Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Tribal Water Right for the St. Mary River drainage within the Reservation is 50,000 AFY, not including the flows of Lee and Willow Creeks. It is worth noting that this quantified amount of 50,000 AFY is almost exactly what the United States claimed for the Tribe in its November 14, 1997, More Definite Statement of Claim filed in the Montana Water Court. The Tribe's water right is subject to the limitation that its exercise may not adversely affect the water rights held by the Bureau of Reclamation's Milk River Project (MRP). The MRP diverts almost the entire United States' BWT's share of the St. Mary River into the Milk River for use by MRP irrigators in northern Montana approximately 200 miles downstream of the Reservation. The balance between tribal rights and MRP needs, and the protection of these off-Reservation water users, was a critical aspect of the negotiations of this settlement. The Tribe is also entitled to groundwater in the St. Mary drainage that is not subject to the BWT's apportionment, as well as the entire United States' share under the BWT of the natural flow of Lee and Willow Creeks (which are located in the St. Mary River drainage), except for the water in those streams that is subject to existing water rights under State law. The Tribe has agreed to afford protections for those existing water rights under State law through the inclusion of a no-call provision.

The Blackfeet Tribal Water Right in the Milk River is quantified as the entire United States' share under the BWT of the Milk River on the Reservation, as well as all non-BWT groundwater in the Milk River drainage on the Reservation, except for the water that is subject to existing water rights under State law. In addition, the Tribe has agreed to afford protections for those existing water rights under State law, including a no-call provision for uses other than irrigation, and a 10 year phase-in for new development of tribal irrigation. The tribes of the Ft. Belknap Indian Community (FBIC) also claim water rights in the Milk River downstream of the point at which the Milk River re-enters the United States from Canada, and the FBIC-Montana Compact that was approved by the State legislature in 2001 (Mont. Code Ann. §85-20-1001 (2011)) recognizes significant Milk River water rights for the FBIC. Staff for the Compact Commission has evaluated the potential of competing demands on the Milk River between the Blackfeet Tribe and the FBIC and has concluded that the possibility of actual conflict is, as a matter of hydrology, exceedingly remote. Nevertheless, the Blackfeet Tribe, the FBIC and the United States have worked to identify a mechanism for the resolution of any conflicts that might arise, which is reflected in S. 434. The State strongly supports this effort.

The Blackfeet Tribal Water Right in Cut Bank Creek is quantified as all of the water (both surface and underground) in that drainage within the Reservation, except for the water that is subject to existing water rights under State law. The Tribe has also agreed to afford existing water rights under State law in the Cut Bank Creek drainage the same protections as are provided for in the Milk River drainage. The quantifications of the Tribal Water Right in the Two Medicine River and Badger Creek drainages are done in the same fashion as the Cut Bank Creek quantification, though the protections accorded by the Tribe to existing water rights under State law in these two drainages, as on the streams in the St. Mary drainage, extend the no-call protection to all existing water rights under State law, not just non-irrigation water rights.

The Tribe's water rights in Birch Creek, whose midpoint marks the southern of the Blackfeet Reservation, were judicially recognized as early as the 1908 Ninth Circuit Court of Appeals decision in the *Conrad Investment Company case* (161 F. 829 (9th Cir.1908)), which was decided very shortly after the United States Supreme Court ruled in the seminal Indian water rights case *Winters v. United States*, 207 U.S. 564 (1908). The Blackfeet Irrigation Project diverts water from Birch Creek for project water users on the Reservation, but historically the Tribe has taken far less water from Birch Creek than it was legally entitled to take. There is also extensive non-Tribal water resource development immediately to the south of Birch Creek, where roughly 80,000 irrigated acres, as well as several municipalities, are served by the facilities of the Pondera County Canal and Reservoir Company (PCCRC), a privately owned irrigation company. PCCRC also operates Swift Dam, which abuts the southwest corner of the Reservation. During the irrigation season, PCCRC's use

diverts nearly all of the water available in Birch Creek. Since the unconstrained development of the Tribe's Birch Creek water right recognized in this settlement has the potential to cause significant impacts to existing users, the balance between tribal and off-Reservation water use from Birch Creek was a major component of the negotiations.

The settlement quantifies a substantial Tribal Water Right in Birch Creek. The quantification consists of a senior irrigation right of 100 cubic feet per second (cfs) of Birch Creek natural flow, a seasonably variable in-stream flow right (25 cfs from October 1 to March 31, and 15 cfs from April 1 to September 30), and all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek. In addition, the Tribe is entitled to the remainder of the water in Birch Creek after full satisfaction of existing uses under state law. As part of the protection of existing water rights under state law for which the State bargained, the Tribe agreed in the Compact to limit the development of its Birch Creek irrigation right to the Upper Birch Creek Drainage. There are also very specific administration provisions in the Compact concerning the manner in which the Tribe may change the use of its Birch Creek irrigation right to other beneficial purposes. In addition, a Birch Creek Management Plan has been appended to the Compact, which commits the Tribe, the BIA and the operators at PCCRC to meet prior to each irrigation season to develop management plans to maximize the beneficial use of Birch Creek for all water users, and to adapt those plans as conditions warrant during the course of each irrigation season.

When the Compact Commission initially presented this proposed settlement framework at public meetings south of the Reservation, the response was overwhelmingly negative, as stakeholders believed that the risks posed to their livelihoods by full tribal development of its Birch Creek water rights were insufficiently mitigated. Consequently, the parties returned to the negotiating table and entered into an Agreement Regarding Birch Creek Water Use (the Birch Creek Agreement) on January 31, 2008. The Birch Creek Agreement is a critical component of the overall settlement. Under the Birch Creek Agreement, the State agreed to put \$14.5 million into an escrow fund payable to the Tribe after final approval of the Compact by the Montana Water Court. (In anticipation of settlement, the 2007 session of the Montana legislature fully funded this amount.) In the interim, the Tribe is entitled to receive the interest from that fund, up to \$650,000 per year. In exchange for these payments, the Tribe agreed to defer any development of its Birch Creek water rights beyond their current use for a period of 15 years from the effective date of the Birch Creek Agreement. In addition, the Tribe agreed to prioritize in this settlement authorization and funding for the Four Horns Project.

The Four Horns Project involves the repair and improvement of the Four Horns Dam and Reservoir and associated infrastructure, features of the Blackfeet Irrigation Project located on the Reservation in the Badger Creek drainage. This Project is a critical component of the settlement because it is intended to increase the water supply available to Birch Creek water users, one of the essential mitigation benefits secured by the State in exchange for the financial and other commitments made in the Birch Creek Agreement. Specifically, as part of that Agreement, the Tribe committed to deliver 15,000 AFY of water from Four Horns Reservoir to Birch Creek, for the benefit of Birch Creek water users, from the time construction is completed on the facilities necessary to make such deliveries possible until a date 25 years from the effective date of the Birch Creek Agreement. This provision of supplemental water is expected to offset the impacts of the Tribe's development of its Birch Creek water rights after the expiration of the 15 year deferral period. In addition, the existence of infrastructure capable of bringing Four Horns water across to Birch Creek provides the Tribe with a significant potential market for surplus water from Four Horns into the future. This is an important benefit to the Tribe, as it enhances the Tribe's ability to realize economic benefits from the water rights contained in this settlement. With the Birch Creek Agreement in place, PCCRC and other off-Reservation stakeholders supported ratification of the Compact by the Montana legislature in 2009.

The Tribe and the State initially envisioned a significant enlargement of the Four Horns Reservoir. Preliminary engineering studies, funded by a \$500,000 appropriation from the State legislature, indicated that the storage capacity of the reservoir could be substantially increased in a cost effective fashion, and that a delivery system could be constructed economically to move excess water from the reservoir across to Birch Creek for the benefit of all Birch Creek water users. The State committed to spend \$20 million toward the construction of this Project, a commitment which was fully funded by the Montana legislature in the form of a \$4 million cash appropriation in 2009, and \$16 million of bonding authority approved by the Legislature during its 2011 session. In its testimony before this Committee when

the S. 399 was heard in 2011, however, the United States asserted that the State's contribution was inadequate, as the United States construed the benefits of this Project as not flowing to the Tribe. The State took great issue with this position, both because it misconstrued the true benefits this Project has for both the Tribe and off-Reservation water users, and because the State's proposed \$35 million contribution to the Blackfeet settlement marked one of the largest contributions any state has ever made to an Indian water rights settlement, and the largest Montana had ever agreed to make.

Montana has always been extremely proactive in contributing to Indian water rights settlements. In the early 1990s, the State spent \$21.8 million as part of the Northern Cheyenne settlement. The State spent \$550,000 as part of the smaller Rocky Boys settlement, and \$15 million as part of the Crow Tribe settlement. The State has also made—and fully funded—its commitment of \$17.5 million for the FBIC-Montana Compact that has been ratified by the Montana legislature but not yet approved by Congress. This amount is made up of \$4 million in cash (including \$3 million that was appropriated in the just-concluded legislative session), \$9.5 million in bonding authority and \$4 million of in-kind contributions in the form of modeling and other hydrology work that has already been conducted. Moreover, as will be discussed immediately below, Montana has now agreed to—and has fully funded—a contribution to the Blackfeet settlement in the amount of \$49 million. The additional \$14 million was appropriated by the 2013 session of the Montana Legislature.

This additional amount came about as part of the efforts the State and the Tribe have made to address the concerns raised by the United States with the structure of the federal ratification legislation. In light of the Administration's 2011 testimony, the Tribe's technical consultant identified an alternate design for the Four Horns Project, one that would bring fewer overall benefits in terms of enhancing the water supply but one that was nevertheless capable of ensuring continued deliveries of water to irrigators on the BIA's Blackfeet Irrigation project as well as of delivering the 15,000 AFY of water to Birch Creek that the State bargained for as part of the Birch Creek Agreement. The State continues to believe that the benefits to the Tribe that flow from this Project warrant federal as well as State contributions. But in the interest of ensuring the construction of the water delivery system to Birch Creek, which is so critical to the successful implementation of this settlement, the State agreed to fund the full incremental costs associated with the Birch Creek delivery system. S. 434 reflects that commitment.

S. 434 also contains some language regarding the Four Horns Project that is very problematic for the State. Specifically, Section 10(c)(3)(A) flatly states that none of the costs of the Birch Creek portion of the Four Horns Project (S. 434 calls it the "Birch Creek Mitigation Project") shall be paid by the United States. Yet S. 434 also provides that it will be the United States—through the Bureau of Reclamation—that will oversee the construction of this Project. The difficulty with the current language in Section 10(c)(3)(A) is that it hands the State the entire financial risk of cost overruns or other unforeseen construction-related expenses with no ability to manage the Project to ensure that such overruns do not occur. The State is not seeking such responsibility, but does want to ensure that the United States is properly focused on managing the construction project diligently to ensure that the \$34 million budget is not exceeded. Without a change to the current language, the United States has no meaningful incentive to ensure that construction costs are minimized and that overruns do not occur. The State asks that the language in Section 10(c)(3)(A) be deleted as this bill goes through mark-up.

The settlement also includes provisions allowing the Tribe to lease to water users off the Reservation those portions of its water rights that it has stored or directly used. The Tribe must offer water users on Birch Creek, Cut Bank Creek, the Milk River and the St. Mary River, respectively, a right of first refusal on water leased from those drainages to users downstream. The Tribe may lease water from Birch Creek, Cut Bank Creek and the Milk River, all of which are within the Missouri River Basin, but only for use at other locations within the Missouri River Basin.

In addition, under S. 434, the United States will allocate to the Tribe a portion of the water in the Bureau of Reclamation's storage facility on Lake Elwell, located along the Marias River in central Montana. The FBIC-Montana Compact also contemplates an allocation to the FBIC from Lake Elwell, and S. 434 does nothing to impair that allocation from occurring at such time as Congress ratifies the FBIC-Montana Compact. S. 434 further provides that nothing in this allocation to the Blackfeet Tribe requires the United States to provide any facility for the transportation of the Tribe's allocation from Lake Elwell to any point, and also that nothing in this allocation to the Blackfeet Tribe diminishes the allocation from Lake Elwell that was made to the Chippewa Cree Tribe of the Rocky Boys Reservation as part

of the Rocky Boys water rights settlement which was ratified by Congress in 1999. S. 434 authorizes the Blackfeet Tribe to lease water from its Lake Elwell allocation so long as it is for use within the Missouri River Basin.

The Blackfeet water rights settlement also closes all of the on-Reservation basins to new appropriation under Montana law. In all cases, both under a Tribal Water Code and State law, the development of small wells and stock uses are not precluded by the basin closures. For all on-Reservation basins, water rights under State law will become part of the Tribal Water Right if the Tribe reacquires the land and the appurtenant water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

The Tribe will administer the Tribal Water Right. The State will administer water rights recognized under State law. The Blackfeet Irrigation Project will use part of the Tribal Water Right and will continue to be administered by the BIA under applicable federal law. The Blackfeet Tribe will enact a Tribal Water Code to provide for administration of the Tribal Water Right in conformance with the Compact, this Act, and applicable federal law. In the event a dispute arises, the Compact provides for an initial effort between the water resources departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board to hear disputes. Decisions of the Compact Board may be appealed to a court of competent jurisdiction.

The Compact will recognize and protect the Blackfeet Tribe's water rights and provides for the improvement of agricultural water systems and tribal economic development. The Compact promotes development for the benefit of the Blackfeet Nation while protecting other water uses. The Compact is the full and final settlement of all of the Tribe's water rights claims within the Blackfeet Reservation and the Tribe waives any claims to water rights not contained or reserved in the Compact. We urge your support in ratifying the Compact by passage of this Act.

\*Attachments to this prepared statement have been retained in the Committee files.

The CHAIRWOMAN. Mr. Weiner, thank you very much.

The term you used, wet water conflict, what do you mean by that?

Mr. WEINER. We often speak of wet water as opposed to paper water. Paper water is the water you have a right to that you might have sitting in a decree in courthouse somewhere but there is in the arid west, as you heard from Senator Baucus, oftentimes a significant difference between water you may have a right to and water you can actually use to grow a crop or to have a home.

Practically speaking, we believe the wet water conflict, the practical likelihood of an actual conflict with both the Blackfeet and the Fort Belknap Tribes may have an actual need for water simultaneously is unlikely to arise in a way that would lead to one tribe or the other facing a shortage.

The CHAIRWOMAN. Thank you. I thought I would ask that while you were finishing your testimony.

Now we will turn to Mr. Joyner. Welcome to the Committee. Thank you very much for being here.

**STATEMENT OF CALVIN JOYNER, ASSOCIATE DEPUTY CHIEF,  
NATIONAL FOREST SYSTEM, U.S. FOREST SERVICE, U.S.  
DEPARTMENT OF AGRICULTURE**

Mr. JOYNER. Madam Chairwoman, Ranking Member Barrasso, Senator Tester and other members of the Committee, my name is Cal Joyner. I serve as the Associate Deputy Chief of the National Forest system.

Thank you for inviting me here today to testify on S. 611, the Sandia Pueblo Settlement Technical Amendment Act.

S. 611 is a technical amendment to the T'uf Shur Bien Preservation Trust Area Act that will allow the intended land exchange to

proceed. The bill would change language that would allow the T'uf Shur Bien Preservation Trust Area Act to finally be completed.

We do not oppose the bill and would like to work with the Committee on a few issues to allow the exchange to smoothly proceed.

We would also like to discuss with the Committee the possibility of a different, lower cost approach. This approach would allow a simple interchange to transfer Federal administrative jurisdiction over the subject properties. This would reduce the need for expensive surveys, appraisal and administrative work and would accomplish the same goals by allowing the Bureau of Indian Affairs to hold the property in trust for the Pueblo.

This concludes my statement. I would be pleased to answer any questions.

[The prepared statement of Mr. Joyner follows:]

PREPARED STATEMENT OF CALVIN JOYNER, ASSOCIATE DEPUTY CHIEF, NATIONAL FOREST SYSTEM, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Madame Chairwoman, Ranking Member Barrasso, and members of the Committee, thank you for inviting me here today to testify regarding S. 611, "Sandia Pueblo Settlement Technical Amendment Act".

S. 611 would amend the T'uf Shur Bien Preservation Trust Area Act (Act) by adding paragraph (6) to section 413(b) requiring the Secretary of Agriculture, upon the receipt of certain consideration and at the request of the Sandia Pueblo of New Mexico and the Secretary of the Interior, to transfer certain National Forest System (NFS) land to the Secretary of the Interior to be held in trust for the Pueblo, if a land exchange with the Pueblo currently required by that Act is not completed within 90 days of enactment of the bill.

Last Congress the Committee amended the bill's predecessor (S. 2024) to require the NFS land conveyed to the Pueblo under paragraph (6) be preserved "as open space, with the natural characteristics of the land to be preserved in perpetuity." In exchange for the NFS land, the bill would require the Pueblo to transfer to the Secretary of Agriculture the La Luz tract and an amount equal to the difference between the value of: (1) the NFS land as open space; and (2) the sum of the fair market value of the La Luz tract and the compensation owed to the Pueblo by the Secretary of Agriculture for the right-of-way and conservation easement on its Piedra Lisa tract. The La Luz tract would be valued comparatively higher, appraised according to its highest and best use, as opposed to the NFS land conveyed as open space.

In contrast to the NFS land conveyed to the Pueblo, the bill would not impose deed conditions on the La Luz tract when conveyed to NFS.

We appreciate the efforts of the Committee staff and members' personal staff in bringing these corrections to the revision to a hearing. This bill is important in that it will allow the provisions of the T'uf Shur Bien Preservation Trust Area Act to be completed. We do not oppose the amendment but would like to work with the committee on a few issues.

1. The complexity of the appraisal would require detailed and exacting instructions that could be completed within a year of enactment, but would require more time than the 90 days called for in the Bill.
2. The bill should make clear that the Pueblo is responsible for sealing the open mine adit on the La Luz Tract as part of the conveyance of this tract.
3. The appraisal and administrative processing costs would exceed \$200,000 and impact the currently planned program of work for the Cibola National Forest.

This concludes my testimony and I would be happy to answer any questions that you may have.

The CHAIRWOMAN. Thank you. I am sure we will have questions for you.

Let us hear from Mr. Paisano. Then we can go to questions for the whole panel. Thank you for being here and representing the Pueblo of Sandia.

**STATEMENT OF HON. STUART PAISANO, COUNCILMAN,  
PUEBLO OF SANDIA**

Mr. PAISANO. Good afternoon, Chairwoman Cantwell, Vice Chairman Barrasso and Senator Tester.

My name is Stuart Paisano. I was the Governor of the Pueblo of Sandia for six years from 2000–2006. I am currently a Tribal Council member.

On behalf of Governor Montoya, Lieutenant Governor Gutierrez, our tribal council and the Pueblo of Sandia, we want to sincerely thank this Committee for acting so quickly to schedule a hearing on this technical amendment of the T'uf Shur Bien Preservation Act and for inviting me to testify.

As you know, a similar technical amendment was introduced by Senator Bingaman in 2011 and passed out of this Committee but did not make it to the floor for a vote. The Pueblo hopes that with passage of the technical amendment, the land exchange Congress authorized over 10 years ago in the T'uf Shur Bien Preservation Trust Act will finally happen.

S. 611 provides that if the land exchange directed by the 2003 Settlement Act is not completed within 90 days of its enactment, upon receipt of the consideration provided for in amended section 413(B)(6)(b) of the technical amendment, the Secretary of Agriculture shall transfer approximately 710 acres of the identified National Forest land to the Secretary of the Interior in trust for the Pueblo.

S. 611 also resolves the impasse over valuation of the National Forest land at issue that I will explain in a moment and should finally accomplish a long overdue land exchange directed by the 2003 Act.

To provide some background, the 2003 Act was passed to settle the Pueblo of Sandia's longstanding claim to the ownership of the west face of the Sandia Mountain. The Act places special protections on the mountain's west face, a sacred place to the Pueblo, while retaining it as a part of the Cibola National Forest.

It also contains a provision which directs that "not later than 180 days after the date of enactment of this Act, after consultation with the Pueblo, the Secretary of Agriculture shall, in accordance with applicable laws, prepare and offer a land exchange of National Forest land outside the area and contiguous to the northern boundary of the Pueblo's reservation for the land owned by the Pueblo in the Evergreen Hills Subdivision in Sandoval County contiguous to National Forest land, and the La Luz Tract in Bernalillo County."

The Act further provides that the land exchanged to the Pueblo "shall remain in its natural state and shall not be subject to commercial development of any kind."

Although the Act provided that the land exchange should take place within 180 days, ten years have now passed without the exchange being completed. While the Forest Service and the Pueblo representatives were quickly able to agree on the National Forest land to be transferred to the Pueblo, progress on the exchange stalled because of disagreement on how this land should be valued.

Specifically, the Forest Service and Agriculture Department officials took the position that despite the Act's restrictions on the use of the land to be transferred to the Pueblo—that it remain in its



natural state and not be commercially developed—the land still had to be appraised as if those restrictions did not exist.

The Department rested its position on the contention that the restrictions on the use of the land to be transferred to the Pueblo did not become effective until after the transfer and the conditions were not expressed as a condition of conveyance.

To address this, Congress passed a technical amendment to the Settlement Act in 2009. The amendment provides that the restrictions on the use of the land to be transferred to the Pueblo are “a condition of conveyance.”

However, after months of apparent internal analysis and discussion, the Agriculture Department officials told the Pueblo that the Department viewed the technical amendment as effectively meaningless and still maintained that the land to be transferred to the Pueblo had to be appraised based on highest and best use, without regard to the statutory prohibition on development of the land.

The current technical amendment removes any doubt. It amends the 2003 Settlement Act to provide that the Forest Service land to be transferred is to be valued “subject to the condition that the land remain in its natural state.”

It also provides for the transfer to the Forest Service of the approximately 30 acres of the La Luz Tract owned by the Pueblo within the Preservation Trust Area that the Forest Service has long wanted to acquire. The La Luz Tract is located on a cliff-face near the top of the crest of Sandia Mountains. It is not susceptible to development.

Finally, the technical amendment requires the Pueblo to pay any difference between the value of the La Luz Tract and the trail right-of-way and conservation easement on the 160-acre Piedra Lisa Tract that the Pueblo will grant to the Forest Service, and the value of the approximately 710 acres of Forest Service land the Pueblo is to receive.

Madam Chairwoman, Vice Chairman and Senator Tester, thank you for hearing the Pueblo’s views on S. 611. I will be happy to try to respond to any questions you or other members of the Committee may have.

[The prepared statement of Mr. Paisano follows:]

PREPARED STATEMENT OF HON. STUART PAISANO, COUNCILMAN, PUEBLO OF SANDIA

Good afternoon, Chairwoman Cantwell, Ranking Member Barrasso, and Committee Members, my name is Stuart Paisano. I was the Governor of Sandia Pueblo for six years, from 2000 to 2006, and am currently a Tribal Council Member. On behalf of the Pueblo, I want to express our sincere thanks to you and the Committee for acting so quickly to schedule a hearing on this technical amendment to the Tuf Shur Bien Preservation Act and for inviting me to testify. As you know, a similar technical amendment was introduced by Senator Bingaman in 2011 and passed out of this Committee, but did not make it to the floor for a vote. The Pueblo hopes that with the passage of this technical amendment, the land exchange that Congress authorized over 10 years ago in the Tuf Shur Bien Preservation Trust Act (hereafter the “2003 Settlement Act” or “2003 Act”) will finally happen.

S. 611 provides that, if the land exchange directed by the 2003 Settlement Act is not completed within 90 days of its enactment, upon receipt of the consideration provided for in amended subsection 413(b)(6)(B) of the technical amendment, the Secretary of Agriculture shall transfer approximately 710 acres of identified National Forest land to the Secretary of the Interior, in trust for the Pueblo. S. 611 also resolves the impasse over valuation of the National Forest land at issue that

I will explain in a moment, and should finally accomplish the long overdue land exchange directed by the 2003 Act.

To provide some background, the 2003 Act was passed to settle the Pueblo of Sandia's longstanding claim to the ownership of the west face of Sandia Mountain. The Act places special protections on the Mountain's west face (the "Area"), a sacred place to the Pueblo, while retaining it as part of the Cibola National Forest. It also contains a provision which directs that "[n]ot later than 180 days after the date of enactment of this Act, after consultation with the Pueblo, the Secretary [of Agriculture] shall, in accordance with applicable laws, prepare and offer a land exchange of National Forest land outside the Area and contiguous to the northern boundary of the Pueblo's Reservation . . . for land owned by the Pueblo in the Evergreen Hills Subdivision in Sandoval County contiguous to National Forest land, and the La Luz tract in Bernalillo County." The Act further provides that land exchanged to the Pueblo "shall remain in its natural state and shall not be subject to commercial development of any kind."

Although the 2003 Act provided that the exchange should take place within 180 days, ten years have now passed without the exchange being completed. While the Forest Service and Pueblo representatives were quickly able to agree on the National Forest land to be transferred to the Pueblo, progress on the exchange stalled because of disagreement on how this land should be valued. Specifically, Forest Service/Agriculture Department officials took the position that, despite the Act's restrictions on the use of the land to be transferred to the Pueblo—that it remain in its natural state and not be commercially developed—the land still had to be appraised as if those restrictions did not exist. The Department rested its position on the contention that the restrictions on the use of the land to be transferred to the Pueblo did not become effective until after the transfer and the conditions were not expressed as a condition of the conveyance.

To address this, Congress passed a technical amendment to the Settlement Act in 2009. The amendment provides that the restrictions on the use of the land to be transferred to the Pueblo are "a condition of conveyance." However, after months of apparent internal analysis and discussion, Agriculture Department officials told the Pueblo that the Department viewed the technical amendment as effectively meaningless and still maintained that the land to be transferred to the Pueblo had to be appraised based on its highest and best use, without regard to the statutory prohibition on development of the land.

The current technical amendment removes any doubt on this score. It amends the 2003 Settlement Act to provide that the Forest Service land to be transferred is to be valued "subject to the condition that the . . . land remain in its natural state." It also provides for the transfer to the Forest Service of the approximately 30-acre La Luz Tract owned by the Pueblo within the Preservation Trust Area that the Forest Service has long wanted to acquire. The La Luz tract is located on a cliff-face near the top of the crest of Sandia Mountain. It is not susceptible to development. Finally, the technical amendment requires the Pueblo to pay any difference between the value of the La Luz tract and the trail right-of-way and conservation easement on the 160-acre Piedra Lisa tract that the Pueblo will grant to the Forest Service, and the value of the approximately 710 acres of Forest Service land the Pueblo is to receive.

Thank you for hearing the Pueblo's views on Senate Bill 611 and I will be happy to try to respond to any questions that you or other members of the Committee may have.

The CHAIRWOMAN. Thank you, Mr. Paisano.

I am going to defer my questions to my colleague, Senator Tester, and let him go first, since it deals with the State of Montana and its ten years of negotiation. Maybe we can get to the bottom of this. Go ahead.

Senator TESTER. Actually 20 years.

Thank you very much, Madam Chair. You are very kind.

Kevin, I have a couple questions for you. Part of it deals with the Four Horns Project. Correct me if I don't have this right.

I believe there is language that states no Federal funds will be used on the Four Horns Project, yet that project will be overseen by the BOR. It will be State funds overseen by the BOR. My concern is, first of all, do you agree with that description?

Mr. WASHBURN. I am not sure that I do. I think certainly the vast majority of the contribution, maybe that is right. The vast majority of the contribution is from the State.

Senator TESTER. What incentive does the BOR have to minimize cost, do it on a timely basis, all those kind of things?

Mr. WASHBURN. Whenever the settlement agreements are put into effect, you all passed the Act and there is an agreement that has to follow. That agreement requires our signature and there are usually mechanisms for enforcement if someone doesn't live up to their responsibilities under the agreement. That is one way we can handle those issues.

Senator TESTER. You would anticipate the BOR would probably have some enforcement provisions in it?

Mr. WASHBURN. We would certainly be willing to talk to them about that.

Senator TESTER. I would rather have you guys do it than us but I guess push come to shove we could do it through appropriations or whatever.

Your predecessor, a fellow we all know and love, Del Laverdure, said basically he was going to do the negotiations, the reason was because a lot of times people negotiate and cannot cut the deal in the end.

You have a great team around you. There is absolutely no downplaying their ability; they are very, very good. In the end, they have to be able to make the call or you have to be able to make the call. The question is, I don't want to have them do the work and then somebody come in, you or above you, and say all right, deals off. Are you personally involved in this, number one, and two, can you make the call on this?

Mr. WASHBURN. Senator, it is a team effort at the Administration, especially when you are dealing with matters of hundreds of millions of dollars. I am very lucky to be working with Pam Williams and many people on our team will tell you, I have enormous respect for the chairman. Jeannie Whiting, chief negotiator for the tribe, and I were water lawyers together in the mid-1990s and I do have a personal interest in this.

Frankly, Senator, every time you and I have met, you have raised this issue with me, so I am personally interested in the issue. I will remain personally involved because I think we can get there. I hear that from everyone at the table.

Senator TESTER. I just wanted to get it on the record too. I think you are a great guy, I think the people working for you are great people. In the end, I really don't want to have this thing hung up by an administrative problem. I want to have the people who are the decision-makers in the room.

Mr. WASHBURN. Senator Tester, I left out Mike Connor, the Commissioner of the Bureau of Reclamation, we were just talking about this last week too, so there are a lot of people engaged at the Administration.

Senator TESTER. Jay, you talked a bit about the Milk River and wet water conflicts. The way I read it, paper or wet, either way you want to go, there is not enough water in the Milk to fulfill both water compacts.

Mr. WEINER. Senator, I would not agree with that characterization as we have looked at it.

Senator TESTER. Good. So you think there is enough water in the Milk to take care of both water compacts?

Mr. WEINER. I think one of the complications about giving you a yes or no answer to that question is that as you know well—this is home country for you—the Milk River is subject to a series of complicated water issues. There are issues that relate to the implementation of the 1909 Boundary Waters Treaty with Canada and the 1921 order under that Treaty that allocates the flows of the St. Mary and the Milk Rivers between the United States and Canada.

There are issues with the rehabilitation of the St. Mary's facilities of the Milk River Project which diverts a significant amount of water from the St. Mary's River over to the Milk.

One of the things that is a challenge and has been a challenge for all of us negotiating the Blackfeet Settlement is there are those other factors that exist out there, there are efforts going on to try to address rehabilitation, efforts going on that the State of Montana has been very involved with to try to reopen that 1921 Order.

In terms of how the water supply plays out in the future, that will have some bearing on some of those hydrologic outcomes as opposed to a straight yes or no. In terms of the historic flow records we have looked at, the technical analysis we have done, I would give you a no.

Senator TESTER. Shannon, real quick, thanks for being here. The Blackfeet Tribe and the Ft. Belknap Tribe have conflicting water rights in the Milk. Both have a priority date of 1855. Correct me if I am wrong on any of this. To address this issue, the bill has language for the two tribes to try to reach an agreement over a ten year period and continue working with the Secretary if an agreement is not reached.

We all want to control our own destiny. I think it is critically important for you and Ft. Belknap to be able to do that. I am concerned about what happens if an agreement is not reached. I guess the question is, if this language stays in and is agreed to as is, which I don't know if you support or not, if you do support it which I assume you do, maybe that is a wrong assumption, and the tribes don't agree on a solution working between yourselves, would you support the Secretary resolving the issue?

Mr. AUGARE. Thank you for the question. We support a dispute resolution process. I want to be clear that the Ft. Belknap Tribe is a great friend and ally of the Blackfeet Nation. We have a long-standing partnership together. We are willing to continue that cooperation to reach a middle of the road, commonsense approach.

The Department of Interior did make a proposal. We are looking at that proposal. I would not necessarily agree it would be a good idea for a future Secretary to perhaps make a decision that would affect two different tribal nations. I think this is something we need more time to spend with each other and discuss thoroughly.

Senator TESTER. I have run over. I want to thank the Chairwoman again. Let me just say this.

I think this is a real critically important point. I trust you. You are right, we are talking about a future Secretary, we don't know who it is and talking about someone in the tribal council and prob-

ably won't be you in that time period either. If there is something you can put in that water compact to force the negotiations on both sides, I think it would be absolutely helpful.

Thank you very much, Madam Chair.

The CHAIRWOMAN. Thank you.

Vice Chairman Barrasso.

Senator BARRASSO. Thank you, Madam Chairwoman.

Secretary Washburn, in the Blackfeet Water Rights Settlement Act, the Federal share of the settlement is roughly \$400 million. Of that, about \$37 million would go to deferred maintenance and dam safety improvements on the irrigation project, the Blackfeet Irrigation Project.

I understand the irrigation project is similar in some respect to what we see in Wyoming in the Wind River Project, including that it suffers from significant deferred maintenance problems. Addressing that problem, to me, seems to be a good feature of this bill.

Some of the BIA irrigation projects, including Wind River, don't really have a water settlement vehicle to get funding for the deferred maintenance. The issue is still out there, so I feel compelled to ask, is the Department working on a plan to address the deferred maintenance problems plaguing Indian irrigation projects like the one in Wyoming, the Wind River? If so, could you please describe what you are working on?

Mr. WASHBURN. Let me tell you that there are some things they don't tell you when you take these jobs. One of them was school construction. No one told me about the deferred school construction problems. Another is the deferred maintenance on these projects.

After our last hearing when you raised this issue with me, I went home and did some homework. I read your hearing transcript from the hearing about two years ago in Riverton. We met with David Mullon, your Staff Director, about this problem.

I cannot tell you that, No, there is not a plan. Honestly, because in difficult fiscal times like this, it would sort of take a magic wand to solve this problem but I am willing to work with you. This is a political question that has existed since around 1930. I think it is fair to say so the solutions are not simple. I would be happy to continue working with you to try to develop some sort of plan for addressing this.

Senator BARRASSO. There were a lot of big promises and plans back then and they all stopped as a result of the Depression, difficult fiscal times, as you say. It just seems there is a lot that still needs to be done.

This bill provides for the transfer of title to certain water project infrastructure to the Blackfeet Tribe, to own and operate and maintain. Evidently some of the folks who use or rely on this infrastructure aren't tribal members. I think we heard that testimony. Your written testimony expresses some concern about this arrangement.

I do want to know—and I wasn't quite sure reading the testimony—are all of the facilities located on the reservation?

Mr. WASHBURN. Senator, I am not sure I know the answer to that. Certainly there are facilities involved with this overall project located off the reservation because parts of this project deliver water almost 200 miles away to Ft. Belknap. I think there are por-

tions of this not on the reservation or portions of the overall project that would benefit.

Certainly, there are non-Indians on the reservation. Much of this project benefits both Indians and non-Indians. We think that is one of the complications of the title issues—who owns what and who is responsible for what. We think we can work out some of those issues with agreements about how we transfer title. Those are some of the difficult but niggling details about this settlement we feel still need some attention.

Senator BARRASSO. That was the curiosity I had. What do you think needs to be done to address the concerns you have regarding the non-Indian stakeholders who might be affected by these proposed transfers? I don't know if you want to go into that now or get back to us on that but I think it is certainly worth your consideration and thought.

Mr. WASHBURN. Thank you.

Senator BARRASSO. Thank you, Madam Chairwoman.

The CHAIRWOMAN. I guess I would like to continue with that. There are several issues you brought up in your testimony, Secretary Washburn, the amount of money and the settlement and why you thought it was in the ballpark.

Mr. WASHBURN. Appropriate.

The CHAIRWOMAN. Appropriate—the non-Indian impacts, the actual cubic feet part of the settlement dealing with Ft. Belknap. Which of these issues are the sticking points and which are, as you said, the smaller things you just need to work out, technical things we need to come to terms with? What do you think is the real sticking point here?

Mr. WASHBURN. Certainly making sure we can fulfill our trust responsibilities to both tribes, the Ft. Belknap and the Blackfoot Tribes are important, so that is probably one of the biggest ones that sticks in my mind.

There are some marketing issues we need to work out, whether the tribe will be able to lease its water rights and how that will be accomplished.

The CHAIRWOMAN. The concern there is?

Mr. WASHBURN. It is a trust resource. We take the position the water rights are held in trust by the United States. Ordinarily, at least with land that is marketed, leased or something like that, there is usually some sort of role for the Federal Government to approve because we are responsible for it.

We treat water in a similar fashion, but we are working to try to be creative with the tribe to give the tribe greater control over that because we believe in self determination and self governance and having the tribe exercise control.

The CHAIRWOMAN. That would be the first time we would have a self-governance issue around water?

Mr. WASHBURN. No. This has been an issue in most of our water rights settlements. I will say usually there is a requirement for Secretary approval. I think the Blackfeet want a little bit more control and we're willing to entertain those ideas because we believe in self governance but we are just trying to figure out what works.

The CHAIRWOMAN. Mr. Weiner, how do you see this issue with Ft. Belknap and the Birch Creek issue?

Mr. WEINER. The Ft. Belknap issue, we certainly support the efforts of the United States to work with the two tribes to try to reach a resolution of them. We certainly think the tribes' idea for a process approach is a wise one because as I have said, we don't really see the practical likelihood of conflict. I think a process, if one is to arise, is a very reasonable approach to us.

On the Birch Creek side of things, on the marketing front, the State strongly supports the tribe's effort to market this water. That is of great benefit both to the tribe in terms of economic development and to the State which has users potentially interested in leasing that water from the tribe. We are strongly supportive of the tribe. We put specific marketing language drawn from prior Indian settlements into the compact itself that was ratified by the State.

We do want to address the Federal concerns, so the State is happy to play whatever constructive role in that we can.

The CHAIRWOMAN. Mr. Augare, do you have any comments on that?

Mr. AUGARE. I would just say for the record that we are in support of the Pondera River Canal Company. It would be an economic benefit to the tribe over time. From that perspective, we very much stand in support of that effort.

The CHAIRWOMAN. Mr. Joyner, let us turn to your testimony. You brought up several issues and so did our colleague who was here earlier, Senator Udall, about the complexity of this appraisal. How do you think we can resolve this issue?

Mr. JOYNER. There are two ways we could resolve this issue. The language as currently written clearly takes care of the valuation issue. We can move forward with the appraisal, very clearly.

The estimate of \$200,000 is based on the cost of the appraisal, the title search, the administrative work and other surveys that might occur. We can move forward and expend those funds. That would be the majority of the Cibola National Forest lands budget for a given year. It would take precedence over their other work but it could be done.

The other option we would like the Committee to consider would be language that would allow the conveyance to be handled as a simple land transfer between the Department of the Interior and the Department of Agriculture in which case the appraisal would not have to be done at all. It would simply be a change of jurisdictions. We could provide that concept language if that is desired.

The CHAIRWOMAN. Is it my recollection that is what we have done in other situations before?

Mr. JOYNER. It has been done simply between agencies, yes.

The CHAIRWOMAN. Between the Forest Service?

Mr. JOYNER. Between the Forest Service and the Park Service.

The CHAIRWOMAN. I think the Hoh was done that way or no?

Mr. JOYNER. I am sorry?

The CHAIRWOMAN. I think the Hoh land settlement in Washington State may have been done that way?

Mr. JOYNER. I believe you are right.

The CHAIRWOMAN. It has been done that way when you have an agreement between organizations?

Mr. JOYNER. Yes.

The CHAIRWOMAN. Mr. Paisano, any comments on different ways to reach this valuation or agreement between agencies?

Mr. PAISANO. On behalf of the Pueblo of Sandia, we think we could agree to this. However, we would like to see some legislation authorizing and directing it. Because of the length of time that has transpired, as Senator Udall indicated in his testimony, there just been a lot of back and forth. There is a lot of frustration that has built up with the Pueblo.

We have an excellent working relationship with the local Forest Service and want to maintain that but again we want to ensure that we have some finalization to this legislation.

The CHAIRWOMAN. Mr. Joyner's possible recommendation of just having the Forest Service and the Park Service make a land transfer would satisfy?

Mr. JOYNER. Yes.

The CHAIRWOMAN. Okay. I have to say I have personally been through these issues in my State as well. It does sometimes seem mysterious why something that could be so simply done isn't done. We will have to find out why that happens.

We have heard everyone's testimony today. I think we have highlighted a few things that we still need to make sure we come to terms on but I would say to everyone on both issues, certainly on the water issues in Montana, these issues are best resolved with people working together.

We chaired a hearing that our colleague, Senator Johnson wanted us to chair in a different committee but it was the San Joaquin Water Settlement after 18 or 20 years of legal battles and people came together.

I think we definitely would prefer to come together and resolve these as opposed to many, many more years of legal battle. It sounds like we have to do a little more work here but hopefully we can get this done. Our colleagues are going to be putting in a lot of work to make sure we do.

I thank everyone for their testimony. We will look forward to hearing more from all of you as we resolve these issues and move forward this year.

We are adjourned.

[Whereupon, at 3:41 p.m., the Committee was adjourned.]