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S. 648 AND S. 1911

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

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FIRST SESSION

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S. 648 AND S. 1911

WEDNESDAY, OCTOBER 6, 2021

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

The Committee met, pursuant to notice, at 2:35 p.m. in room 628, Dirksen Senate Office Building, Hon. Brian Schatz, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BRIAN SCHATZ, U.S. SENATOR FROM HAWAII

The CHAIRMAN. Good afternoon. During today's legislative hearing, we will consider two bills, S. 648, Technical Corrections to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act of 2021, and S. 1911, Gros Ventre and the Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement of 2021.

The Federal Government has a special trust responsibility to ensure the general welfare of Native communities. This responsibility includes helping Indian tribes secure access to clean and reliable water.

But as the Committee heard earlier this year, many Native communities still don't have that access and continue to lack basic infrastructure for water delivery to homes and businesses on their lands. That is why Indian water rights settlements are such a critical tool in the planning and management of water resources, particularly in the west. Indian water rights settlements not only resolve disputes among water users, but they also gives tribes the tools to develop much-needed water infrastructure, support their economies, and improve environmental and health conditions on their lands.

Both bills before the Committee relate to Indian water rights settlement, but they represent opposite ends of the settlement process. In Senator Cortez Masto's bill, S. 648, the Committee revisits an Indian water rights settlement Congress already authorized and ratified. As part of the Omnibus Public Lands Management Act of 2009, S. 648 would authorize appropriations for the amount of interest earned on the Shoshone-Paiute Tribes' water settlement trust funds between 2009 and 2016.

With Senator Tester's bill, S. 1911, the Committee will turn its attention to the gratification stage of the Indian water rights settlement process. In 2001, the United States, the Fort Belknap Indian Community and the State of Montana entered into a water

rights compact that settled the tribe's water rights claims. S. 1911 would ratify that settlement, authorize Federal funds to develop water and other infrastructure, and restore certain ancestral lands with historic cultural and sacred value to the tribe.

Before I turn to any members of the Committee, I would like to extend my welcome and thanks to our witnesses for joining us today. I look forward to your testimony and our discussion.

Senator Tester, would you like to make an opening statement?

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

Senator TESTER. I would, Mr. Chairman, and I want to thank you and the Vice Chairman for holding this hearing. I am incredibly pleased to see the Gros Ventre and Assiniboine Tribes' water settlement before this Committee. It has been a long time coming.

The Fort Belknap Indian Community has been working toward this moment for over a century. That has included dozens and dozens of meetings with local elected officials, irrigators, State legislators, Federal agency and other stakeholders to hammer out a fair compromise that honors FBIC's water rights and protects irrigators.

We are lucky enough to have a man who has been leading the way forward on those hard conversations for years in front of us today. It is my pleasure to introduce Andy Werk, of Fort Belknap Indian Community. I want to thank him for making the trek from Montana to here to testify about the importance of this settlement and what it means to the people that he represents.

These are not easy water settlements. We have been here before. It really does take a real leader to hammer out water rights, and it takes a leader to be able to unite a community behind it. We have talked countless times about the need to move this settlement forward. I look forward to this hearing to see what Chairman Werk has to say about the water settlement.

Thank you, Mr. Chairman.

The CHAIRMAN. We will now turn to our witnesses. We have the Honorable Bryan Todd Newland, Assistant Secretary, Indian Affairs, for the Department of the Interior, accompanied by Brent Esplin, Missouri Basin Regional Director of the Bureau of Reclamation, Department of the Interior. We also have, would Senator Cortez Masto like to introduce the chairman? That is a yes. Senator Cortez Masto, we can't hear you.

We will move on to Andrew Werk, whom Senator Tester has already welcomed. I am going to go ahead and introduce the Honorable Brian Thomas, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Reservation, Owyhee, Nevada.

I want to remind our witnesses that your full written testimony will be made part of the official hearing record. Please keep your statements to no more than five minutes.

Assistant Secretary Newland, the Committee's Rule 4(b) requires that if a Federal witness misses the Committee's 48-hour deadline for submission of testimony, that witness must state on the record why the testimony was late. Please be prepared to start your testimony with an explanation of why the department was unable to comply again with the Committee's rule.

Mr. Newland, please provide your testimony.

[Pause.]

The CHAIRMAN. We are having some technical difficulties. Since we have the Honorable Andrew Werk in person, why don't you go ahead and start, Mr. Chairman?

STATEMENT OF HON. ANDREW WERK, PRESIDENT, FORT BELKNAP INDIAN COMMUNITY

Mr. WERK. [Greeting in Native tongue.] I am here to speak to the truth to the Creator.

Good afternoon, Chairman Schatz and members of the Committee. My name is Andrew Werk, Jr. I am the president of the Fort Belknap Indian Community, or the Gros Ventre and Assiniboine Tribe. We are the Aaniih Nakoda people.

I want to thank Chairman Schatz and Vice Chairman Murkowski for having this hearing today. It has been a long time coming.

In 1898, we negotiated with the United States for a permanent homeland on our Fort Belknap Reservation. Our reservation is bordered by the Milk River to the north and the Little Rocky Mountains and Missouri River breaks to the south in Hays, where I live.

The United States asked us to stop hunting buffalo and to become ranchers and farmers. Everyone knew we would need water and irrigation to support this new economy and provide a permanent homeland.

A few years later, Montana was established and became a State, and was open for non-Indian settlement. Upstream from our reservation, Henry Winters went into the Milk River to divert and take our waters. In 1908, the Supreme Court ruled in our favor. It held that when we reserved these lands, we also reserved the waters needed to make a homeland. This is what everyone knows as the Winters Doctrine. It should be known as the Aaniih Nakoda Doctrine.

Our tribes fought for the waters we need to make a homeland. The Supreme Court ruled that you can't have the water without the land.

For more than 100 years, the Winters Doctrine has protected the water rights of all Indian tribes. Now, our water rights need to be protected. We won this important legal victory, but over the next 100 years, the United States failed to protect and support our water rights.

Our bill resolves our claims against the United States and will allow us to move forward in harmony with our neighbors. If we don't work together to reach a settlement, we will go back to court and enforce our senior water rights. There is no question who has the senior water rights in the Milk River. Just ask Henry Winters.

The non-Indian irrigators in our area know this and support our bill. No one wants litigation. This is our future. Our bill will grow our economy and benefit the entire region for future generations.

Our bill does a few important things. It improves our water compact that overwhelming passed the Montana legislature in 2001 on a bipartisan basis. The compact sets out our senior water rights and the compromises we made to allow non-Indians to continue to irrigate their lands.

Our bill also settles litigation claims against the United States. The settlement includes restoring tribal lands and providing critical funding for our infrastructure and economic development.

Our water settlement is an infrastructure bill. You can put our projects into the Senate infrastructure bill and you would never know the difference. More than $200 million will go toward fixing our Federal irrigation project. This is funding for the BIA project in desperate need of repair. Another $40 million will go for reservoirs, flood control, stock watering and other irrigation facilities.

About $123 million will be used for safe drinking water infrastructure, and about $230 million will support economic development, training and operation costs related to water development.

Our bill is a true Indian water rights settlement. It provides Indian water for Indian people using our lands. Almost all of our lands are held in trust, about 97 percent. Agriculture is still the biggest private industry on our reservation. These are Indian ranches and farmers that were left behind. We need the waters that we reserved to make a living and to expand our economy.

Our settlement also provides protections for non-Indian users, non-Indian irrigators across the region. We have written letters of support.

Our water settlement bill will also restore tribal homelands. This includes addressing the impact of allotment and restoring part of the Grinnell Notch that was cut from the Little Rockies on our southern boundary. The Grinnell Notch was taken by fraud and threat of starvation. The United States discovered gold in the Little Rockies. Less than 10 years after we settled on the reservation, the United States sent agents to take more lands. The agents lied. The agents also made threats. They said, I see that some of you people are pretty blind, you can't see far. Two years from now, if you don't make any agreement with the government, you will just have to kill your cattle, then you will have to starve.

This was not true. We already ceded vast lands and resources and had treaties and agreements with the United States protecting these provisions. My great-great-grandfather Lame Bull did not back down. He said, "Look at my hair, it is gray. I say the same thing as I said before. I don't want to sell."

But the United States wanted a gold mine, and cut 60,000 acres from our southern boundary. Now that mine is a Superfund site and drains acid into the water. Some of these groundwaters that flow onto our reservation will be polluted forever. These waters pass by our celebration grounds, our ceremonial grounds where our children swim. It is a perpetual nightmare.

We are not asking for all the Grinnell Notch to be restored, just 14,000 acres we need to manage our headwaters and the watershed in the Little Rockies.

Grinnell was wrong. Our people could see far. The Little Rockies are a place of refuge and worship for the Aaniih Nakoda people, they are sacred. We go to these island mountain homelands to pray, heal, and gather medicines. Cutting the Grinnell Notch out of our reservation scarred our hearts. Our water settlement bill will help us heal this scar.

We ask that the Committee consider our bill and move it forward quickly. Our bill is an infrastructure bill and will promote economic

development on our reservation and for all across central Montana for future generations.

Mr. Chairman, Madam Vice Chairman and members of the Committee, water is life. We are the Winters Reservation. That should mean something. This is about the future of the Aaniih Nakoda people.

Thank you for having this hearing today.

[The prepared statement of Mr. Werk follows:]

PREPARED STATEMENT OF HON. ANDREW WERK, PRESIDENT, FORT BELKNAP INDIAN COMMUNITY

Chairman Schatz, Vice Chairwoman Murkowski, and Members of the Senate Committee on Indian Affairs, my name is Andrew Werk, Jr. I serve as President of the Fort Belknap Indian Community Council. Thank you for the opportunity to testify in support of S. 1911, the "Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021." It was our Tribes who fought for the right to use the water on our Reservation and established the federal law that governs all Indian reserved water rights in the United States. This federal law is known as the *Winters* doctrine. Now, more than a century later, it is time to confirm our historic water rights and approve our Water Rights Settlement, which will provide us the ability to develop and use our water.

In his writings as an Indian law scholar, Department of the Interior Solicitor Robert Anderson recognized the importance of Congressional action to approve Indian water rights settlements. He wrote that:

> The struggle of Indian tribes to maintain their property and survival as distinct communities is revealed by examining the status and treatment of Indian water rights by the federal government. Indian reserved water rights are trust property with legal title held by the United States. They were first recognized in 1908 in *Winters v. United States*. As such, one might expect to find that by now a trustee would have developed an effective system for defining and protecting the trust corpus. [1]

Through a series of treaties and agreements with the United States, we reserved a permanent homeland in 1888, our Fort Belknap Reservation for the Gros Ventre and Assiniboine Tribes. In these negotiations we ceded millions of acres of our ancestral lands and resources. In return, through the Treaty of 1855, the 1888 Congressional Act, and other agreements, the United States promised to provide and support an agricultural economy that would sustain our Tribes on our reserved homelands. Over the next 100 plus years, the United States failed to fulfill many of these commitments, including protecting and preserving our waters, and we now have the highest poverty rate of any tribal reservation in Montana. [2]

We support the renewed commitment of the current Administration to settle tribal disputes. We now ask Congress to acknowledge our many years of negotiations with the United States through our assigned Federal Negotiations Team and the Secretary's Indian Water Rights Office (SIWRO). Our Water Rights Settlement is based on long-standing, historical principles of federal policy and related court decisions on the reserved water rights of Indian people that ensure we will receive the full benefit of the water rights promised to us in treaties and agreements with the United States. These principles include (1) recognition of a reservation of water for reservation homelands and the promise of assistance in establishing an agricultural economy when valuable tribal lands were ceded to the United States; (2) a method of quantifying our Indian water rights based on the practicably irrigable acreage (PIA) of the reservation; and (3) the importance and obligation of the United States to honor its treaty promises and keep its word to assist us with the establishment of a viable agricultural economy in order to create a permanent homeland.

Irrigation began on our Reservation in 1889. Several years later, Congress authorized the Fort Belknap Indian Irrigation Project. Soon, non-Indian, upstream irrigators were depleting our main water supply, the Milk River. The United States, our trustee, protected a portion of our Indian water supplies and went to court to defend them. In 1908, the U.S. Supreme Court concluded that the lands of the Fort Belknap Reservation were "practically valueless without irrigation-a barren waste[,]" *Winters* v. United States, [3] and established what is now the seminal legal doctrine for Indian reserved water rights, known as the "*Winters* Doctrine." The Indian reserved water rights began with our Reservation, and we are the "*Winters* Tribes."

This critical federal Indian law doctrine has stood the test of time.[4] A final settlement of our Indian reserved water rights and claims against the United States for the mismanagement and failure to protect this critical natural resource will reaffirm the *Winters* rights for all tribes. Additionally, as Department Solicitor Robert Anderson has stated:

> Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework.[5]

Settling our Indian reserved water rights claims in a manner that acknowledges the United States' broken treaty promises and trust responsibilities will demonstrate the historical Congressional commitment to protecting tribal treaty rights and tribal natural resources. It will fulfill the federal government's fiduciary trust duties to the Fort Belknap Indian Community that derive from the early Treaty and agreements between our governments. It will bring an end to a 30-year process of negotiations between the United States, Montana, and our Tribes. As stated in Final Report 23 of the Commission on Indian Trust Administration and Reform (2013), the usual zealous Departmental defense in litigation against the United States "should be tempered and informed by the federal-tribal trust."[6] Both Congress and President Biden's Administration, under Secretary Haaland's leadership, have an historic opportunity to demonstrate this approach to Indian reserved water rights settlements for the "*Winters* Tribes" with a fair, monetary settlement that will support the development of our Indian reserved water rights, promote our Tribal self-determination and self-sufficiency, and result in an economically healthy and permanent homeland for our people. Our Water Rights Settlement will be an Indian water settlement for Indian people.

We ask Congress to put the brakes on a disturbing trend in federal Indian water rights policy. There has been a slow but discernable shift away from federal ownership of the centuries of mistreatment and broken promises of the United States toward Indian people as it relates to the promise of assistance in creating a permanent homeland and self-sufficiency with the development of reservation Indian water rights. However, under Congressional leadership, the pendulum can swing back toward courageous, forthright, and fair decisionmaking to settle Indian reserved water rights—in particular, after 30 years of negotiations with the federal government and the State, the Indian water rights and claims of the Fort Belknap Indian Community must now be approved. It is long overdue.

We are not a wealthy Tribal government nor wealthy people; we do not have fancy casinos or vast energy resources. A settlement of our Indian water rights will bring long overdue investments in infrastructure on our Reservation. With a population of 8,150 enrolled members, and a large land base of 625,000 acres, our reservation lands are 97 percent trust lands, held by the United States for the Fort Belknap Indian Community ("FBIC") and our allottees.[7] Similarly, our Fort Belknap Indian Irrigation Project serves primarily the trust lands of Indian people.

In the 1980s, we chose settlement over litigation with the State and Federal governments when we initiated negotiations with the Montana Reserved Water Rights Compact Commission and an assigned Federal Negotiations Team. President George H. Bush established the Secretary's Office of Indian Water Rights Settlements in 1989, and the Department of Interior ("Department") adopted federal regulations promoting Indian water settlements in 1990.[8] This provided the structure and guidance for the negotiations and settlement of claims concerning Indian water resources over litigation, offering a promise to tribes that their right to water would be developed at long last with the support of its trustee.

We came to the bargaining table in good faith that our Federal Negotiations Team was fully participating, not just it is governmental capacity, but also as the trustee over what is our most valuable natural resource-water. We adopted the court-approved principles of practicably irrigable acreage (PIA) to quantify the volume of our Indian reserved water rights,[9] and negotiated the administration of our water. Many hours of negotiations, extensive studies, public meetings across northcentral Montana, and Tribal community meetings took place to reach an agreement, not only on the quantity and administration of our water rights, but also for the mitigation of the impact of the full development of our agreed-upon reserved water rights on non-Indian state water users.

After more than 10 years of negotiations, we reached an agreement with the State and Federal governments-the 2001 "Fort Belknap-Montana Compact, entered into by the State of Montana, the Fort Belknap Indian Community, and the United States of America" ("Water Compact").[10] Our Water Compact easily passed the Montana Legislature with a large bipartisan majority.

Our negotiations and settlement efforts have not been easy. Over the three decades of our negotiations with the federal government related to our damages claims, we have experienced the Department of Interior's shift in the interpretation and implementation of the policy of the Department. [11] Unfortunately, the *Winters* decision did not trigger a renaissance of funding commitment by the federal government to develop reservation water rights. But acknowledgement and recognition of the federal government's trust responsibility and obligations over Indian water rights as held in trust by the United States for the benefit of the Indians can be found in key documents.

We pull a few threads of history to illustrate the shifting policy of the United States and disturbing trend in federal policies and efforts to settle Indian water rights claims. For example, in 1956, Congress enacted the Colorado River Storage Project Act and made a phenomenal statement of its recognition of fiduciary responsibility in the following provision for the Navajo Nation's participation in water infrastructure development:

> [T]he costs allocated to irrigation of Indian-owned tribal or restricted lands within, under, or served by such project, and beyond the capability of such lands to repay, shall be determined, and, in recognition of the fact that assistance to the Navajo Indians is the responsibility of the entire nation, such costs shall be nonreimbursable. [12]

Assistance to the Navajo Indians, of course, was representative of the Government's responsibility to Indian people, generally. But progress in funding the federal support for Indian water rights development has been exceedingly slow while the United States focused on and built western water infrastructure projects for the non-Indians. [13]

After *Arizona v. California* adopted and reinforced the *Winters* doctrine for the recognition of Indian water rights in 1963, and created the practicably irrigable acreage standard for quantifying a tribe's water rights, [14] Congress passed the Indian Self-Determination and Education Assistance Act of 1975. [15] President Nixon signed and introduced it as the "dawn of the self-determination age," and described the following:

"[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force." [16]

This was followed by President Jimmy Carter's adoption of the Federal Water Policy initiative in 1978 to promote Indian water rights settlements over litigation. [17]

Congressional frustration over the slow pace of Indian water settlements by the Department of Interior was evident in 1989 when Senators Mark Hatfield (OR) and James McClure (ID) drilled Interior Secretary Manuel Lujan and asked: "Why can't the administration agree that these settlements are a national obligation now to be funded?" [18]

But by the beginning of the 21st Century, federal policy interpretation was shifting away from the historical recognition of the United States' obligations as the trustee of Indian water rights. In 2008, the Department published revised Federal Regulations governing Federal Indian Irrigation Projects. [19] The Department declared, in its response to "Public Comments" during the rule-making process, that it "does not have a trust obligation to operate and maintain irrigation projects," [20]—shocking many in Indian Country. The single case relied on by the Department to support its blanket conclusion of application to all Federal Indian Irrigation Projects was not justified and can be distinguished from other tribal claims and circumstances characterizing the solemn promises of the United States to develop an agricultural economy for a homeland reservation. This is a striking shift from the declaration that Congress made in 1956, when assistance in the development of Indian irrigation projects was "the responsibility of the entire nation."

Subsequently, the Department issued Order No. 3335, "Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries," in 2014. This again caused a stir in Indian Country when the Department relied on another single, judicial decision to limit the scope and narrow the definition of its responsibilities by adopting the conclusion that specific statutes and regulations must establish the fiduciary relationship and define the contours of the United States' fiduciary responsibilities. [21] This position was expressly rejected by the Secretarial Commission on Indian Trust Administration and Reform and by other decisions of the United States Supreme Court. [22]

The Department seemed to ignore judicial guidance to apply a "fair interpretation" rule when analyzing the government's fiduciary duty in tribal treaties, Con-

gressional Acts, and agreements, which "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity [under the Indian Tucker Act]"; it is enough that a statute be reasonably amenable to a reading mandating a right of recovery of damages—"a fair inference will do."[23] The isolated cases that the previous administrations have relied on from time to time to seemingly narrow the scope of the federal government's trust responsibilities to tribes should not form the basis for the Department's carte blanche adoption of such a policy to guide the settlement of our Indian water rights. We urge Congress to also consider this historic trend away from its trust responsibilities to tribes as it relates to Indian water rights and development, and provide the leadership to reverse such a trend in the federal government's policy.

We conclude that the recent decision by the U.S. Supreme Court, in *McGirt v. Oklahoma*,[24] should breathe new life into the federal government's understanding of the importance of the early Treaty promises and obligations the United States made to tribes and the importance of the Government "keeping its word."

The *McGirt* decision was followed by President Biden's promise of a renewed "commitment to fulfilling Federal trust and treaty responsibilities . . . [,]"[25] and the current Administration has declared a policy that will reverse the slide away from the federal obligations promised to tribes. In 2013, the Commission on Indian Trust Administration and Reform expressly rejected the narrow standard for breach of trust damages cases:

> The federal government has rested on this narrow standard from the damages cases to refuse to act to protect tribal resources from prospective harm, and to resist tribal efforts to compel agency action. As one respected commentator noted, "The trust responsibility should play a role in protecting tribal lands and resources, but the trust doctrine stands in potential jeopardy today as courts collapse protective trust requirements into statutory standards."[26]

The Fort Belknap Indian Community has been negotiating our water rights settlement with its trustee for the past 30 years. The pace of negotiations and settlement is excruciatingly slow. During this period of settling our Indian water rights, there seems to have been this silent shift away from the commitments of the 20th Century to protect and preserve Indian water rights.[27] The federal government seems to have backed away from a national commitment to fund Indian water settlements and, in particular, its responsibilities to tribal water projects funded at a level that supports full Tribal water rights' development that will support economic opportunities on reservations such as ours.

We played by the rules. But our effort to complete our water rights settlement with the federal government over the past 2 decades has been stymied by a series of past Administrations who have, without explanation, seemed to take political aim at the PIA-based size and scope of our agreed upon Indian reserved water rights by asserting the need to reduce the Government's trust obligations to us and denying the scope of our damages claim that address the federal government's failure to build the water delivery infrastructure required to protect and preserve our water rights and put them to use—the purpose of which is to create our permanent homeland through the development of a stable agricultural economy. We fear that this recent policy trend seems to focus on an Indian water settlement funding policy that is based on the size of the reservation and tribal population, for which there is no legal basis, instead of a policy based on the PIA quantification standard and Treaty promises.

The promise of a true commitment to tribal sovereignty with economically viable homelands can become our reality. The promise of our early agreements with the United States, when we ceded millions of acres of land, was a permanent, livable homeland and assistance in the development and use of our reserved water rights. The United States has a continuing trust obligation and programmatic responsibility to provide the Fort Belknap Indian Community a permanent and economically sustainable homeland. Congressional approval of our Water Rights Settlement will be the fulfillment of the United States' Treaty promises to the Gros Ventre and Assiniboine Tribes.

Brief History of the Gros Ventre and Assiniboine Tribes

Our Gros Ventre and Assiniboine Tribal members are a resilient people. But certain stark facts about our lives when compared to our non-Indian neighbors supports the conclusion that the United States has failed in its obligation to establish our permanent homeland as a self-sufficient, economically vibrant Reservation and thriving people.

Population, Health, and Economic Hardship. We have 8,150 certified enrolled members in the Gros Ventre and Assiniboine Tribes,[28] half of whom live on the Res-

ervation.[29] Due to a lack of adequate housing, many of our members live in nearby towns or rural areas and drive to the Fort Belknap Reservation each day or throughout the week.[30] About 92 percent of the people living on our Reservation are American Indians.[31] The median age at death of American Indians residing in Montana is 18 years lower than that of white people.[32] Poverty has become the norm fueled by economic depression and high jobless rates, lack of infrastructure, and substandard housing. The Fort Belknap Reservation economic hardship can be broken down as follows: 40 percent poverty rate; 34 percent unemployment rate; $29,566 median household income; and $10,896 per capita income.[33] Our very high unemployment rate can be compared to the much lower unemployment rates in neighboring Blaine County (10.4 percent) and Phillips County (5.1 percent).[34]

Farming Economy. Agriculture remains the mainstay of our Reservation economy and virtually the sole industry. Farms located on the Reservation are largely operated by Tribal members.[35] However, the low level of agricultural productivity is reflected in the low family incomes and standard of living currently experienced by our members.

Conclusion. Increasing the availability of water on our Reservation and supporting the FBIC development of its Indian water rights will give the Tribes the kind of economic opportunity that can improve the social and economic well-being of our people. In a partnership with the Federal government, we can construct, develop, operate, and maintain the infrastructure required to secure the settlement promise of "wet water," develop a sustainable agricultural economy, and provide economic self-sufficiency for our permanent homeland.

FBIC Water Settlement is an Infrastructure Bill

After ceding millions of acres of territory, the Gros Ventre and Assiniboine Tribes reserved the Fort Belknap Reservation in what is now northcentral Montana. These lands were reserved and set apart "as an Indian reservation as and for a permanent home and abiding place."[36] Our Reservation lands have never been broken apart and lost to non-Indians. Our Fort Belknap Indian Irrigation Project is and remains a federal Indian irrigation project. The quantification of our Indian reserved water rights is based on the well-respected and legally adopted principles of Practicably Irrigable Acreage (PIA).[37] During the negotiations of our rights, we successfully demonstrated that we have an adequate water supply with arable soils to support irrigation system infrastructure.

Therefore, the significant purpose of our FBIC Water Rights Settlement is to settle our water-related claims against the United States with sufficient compensation to support the development of our 2001 Water Compact water rights, described in the "Fort Belknap Indian Community Comprehensive Water Development Plan."[38]

In working with the SIWRO and Federal Negotiations Team for several decades, we have responded to the shifting Administration interpretations of the Indian water settlement policy and Administrative preferences. The FBIC Water Settlement Bill has been revised numerous times across this period based on the Administration's feedback and preferences. We ask that Congress give serious consideration to the policy requirement that tribes receive equivalent benefits for rights released as part of a settlement and realize value from confirmed water rights.[39] And with regard to the state cost share requirement of Indian water settlements, we ask Congress to consider the fact that out of 26 settlements enacted by Congress by the end of 2016, as summarized by SIWRO, the following state cost shares were the following: 8 out of 26 settlements had 0 percent cost sharing; 6 settlements had cost shares between 0 percent and 5 percent; and 10 settlements had a cost share between 5 percent and 30 percent. After the 2001 ratification of our Water Compact, the Montana State Legislature approved financial commitments and contributions that will support the State's cost-share to our settlement.

In 1942, the U.S. Supreme Court stated that the United States "has charged itself with moral obligations of the highest responsibility and trust."[40] We ask Congress to consider our historical circumstances, the United States' moral obligation, and the responsibility of the entire nation[41] in providing the costs necessary to develop the projects identified in our Comprehensive Water Development Plan that are designed to allow us to put our Indian water rights to use.

Aaniiih Nakoda Settlement Trust Fund

The vast majority of the funding in our Water Rights Settlement Bill will go toward supporting and developing long overdue human and traditional infrastructure investments that the United States promised to the Gros Ventre and Assiniboine Tribes. The Aaniiih Nakoda Settlement Trust Fund in our Water Rights Settlement Bill, S.1911, includes four funding accounts that will both compensate the FBIC for

damages, described in the following section, and provide for the development of our Indian water rights. These accounts are the following:

Tribal Land and Water, Rehabilitation, Modernization, and Expansion, Account #1 ($240,140,000)

- More than $221.5 million, will go to repairing, expanding, and restoring the BIA's Fort Belknap Indian Irrigation Project, including the Milk River unit, the Southern Tributary Irrigation Project (STIP), and the Peoples Creek Irrigation Project.
- Develop two critical water storage reservoirs needed to stabilize and create a more reliable water supply for irrigation and other purposes.
- Provide for the development of a stock-water distribution system on the Reservation.
- Provide for the purchase of lands within the Project, farm loans, and the repair and re-establishment of wetlands.

Explanation. Ninety-two percent (92 percent) of the funding in this account will benefit the United States' federal property, the Fort Belknap Indian Irrigation Project (FBIIP), which is over 100 years old and generally exists as a long-neglected federal property, in a dilapidated and technologically outdated state with significant deferred maintenance needs. It is in need of major reconstruction (rehabilitation), infrastructure repair, and modernization. This is needed for the FBIIP to function efficiently and effectively and to conserve its water supply. The FBIIP was authorized for construction in 1895, but construction was never completed.[42] Account #1 includes the completion of the FBIIP on the Milk River and restoration, rehabilitation, and modernization of some of the irrigation units that were abandoned by the United States in the 1960s-1970s in the southern portion of the Reservation and on Lower Peoples Creek, largely due to the failure of the federal government to provide storage facilities to stabilize the water supply for irrigation purposes and prevent the flooding of arable lands.

The funding also supports the construction of an off-stream water storage facility on the Milk River that will stabilize the water supply and provide water delivery to the lands in the expanded area of the FBIIP. This storage facility will benefit non-tribal water users downstream due to return flows, timed to provide a contribution to the Milk River water supply during the agricultural season when flows are low. The Water Compact provides for the coordination of operations between Fresno Reservoir, Nelson Reservoir, and the proposed, off-stream Fort Belknap Reservoir that will improve water efficiency and conservation.

This funding account supports the Peoples Creek Irrigation Project that will provide flood control on the Lower Peoples Creek, protecting irrigable trust lands, and the construction of the new Upper Peoples Creek Dam and Reservoir. Finally, the funds will provide for a stock water distribution system and smaller projects to benefit Tribal FBIIP farmers and ranchers.

Account #1 of the Settlement Fund accounts for 40 percent of the total compensation sought by the FBIC. This funding will primarily improve the condition of and complete the FBIIP, prevent continued failure by the United States to fulfill its trust obligations to the FBIC to protect, preserve, and properly manage the FBIC water rights, and contribute to FBIC's ability to realize the full potential of its arable lands and the abundant water supplies available to us.

Water Resources and Water Rights Administration, O&M and Repair, Account #2 ($61,300,000)

- Funds will be used to create a trust fund to provide long-term support for the Tribal Water Resources Department to administer and manage the FBIC's water rights and an Operations and Maintenance Fund to ensure repair and upkeep of the irrigation projects.

Explanation. Account #2 supports the traditional Indian water settlement activities crucial to the establishment of a Tribal Water Resources Department. A Trust Fund will allow the Tribal Department to operate on the annual interest earned on the trust fund and support the costs of the regulation, administration, and enforcement of the FBIC water rights with the development of a Tribal water code, as well as capital projects that will provide the necessary infrastructure, equipment, and data to support the Tribal Department activities. Finally, Account #2 provides funds necessary to establish an Operation and Maintenance Fund for the Tribal agricultural irrigation projects on the Reservation, using annual earned interest to support a portion of the annual operation and maintenance costs—proven to be important for sustaining the agricultural economy on the Reservation. About 97 percent of the irrigable lands are trust lands.

Tribal Community Economic Development, Account #3 ($168,390,000)

- Utilize water resources to develop Tribal natural gas resources within the Reservation and supply energy resources for an 80MW natural gas power plant.
- Using increased agriculture production, develop an Integrated Bio-Refinery producing 20-million-gallon-per-year of ethanol and cattle feed by-products.
- Improve and support the health of the Tribal work force and Tribal communities by updating and expanding community wellness centers to improve health outcomes and provide treatment and prevention for diabetes, hypertension, obesity, mental health, and substance abuse.

Explanation. The economic development account will provide capital start-up funds for Tribal enterprises aimed at increasing Tribal economic self-sufficiency through economic development within the Reservation boundaries. These funds will be used to fund a portion of the large-scale projects that have significant water requirements and are directly related to the FBIC's overall water management. They are intended to provide a base of good paying, stable jobs to Tribal members, with the construction activities and economic growth benefitting other off-reservation, local residents and businesses. The FBIC is well-positioned to develop its potential natural gas reserves for economic gain. Based on a comprehensive feasibility study commissioned by the FBIC, the Integrated Bio-Refinery would directly use irrigated and dryland crop production as input to the plant, as well as support the use of by-product as an excellent feed for cattle, providing a great economic advantage when used in conjunction with a feedlot operation.

The health and wellness of our Tribal members remain a significant concern. Wellness Centers are planned so that the health and well-being of our Tribal work force, and the community in general, can be improved. Wellness Centers are highly effective in combating prevalent tribal health issues, such as diabetes, hypertension, obesity, mental health, and substance abuse. Three centers within the Reservation are planned.

Clean and Safe Domestic Water Supply and Wastewater Systems, Account #4 ($123,280,000)

- Construct and improve access to and the safety of a clean, domestic water supply and wastewater removal systems on the Reservation.
- Develop two new wells at 300-ft deep, and one new well at 480-ft deep to provide water for the communities of the Fort Belknap Agency, Hays, and Lodgepole.
- Develop Homesite wells.
- Construct new water treatment facilities in the Lodge Pole and Hays communities.
- Expand existing tribal domestic water delivery lines.

Explanation. The coronavirus pandemic resulted in an awakening in America of the importance of tribal community access to reliable, clean, and drinkable water-an essential human need. It is the foundation for healthy communities and growing economies. The National Congress of American Indians issued a report in 2017 stating that tribes receive only 75 cents for every $100 needed for drinking water, and estimated an Indian Health Service water sanitation facilities' backlog at about $2.5 billion. On January 27, 2021, President Biden issued Executive Order 14008,[43] which provides that it is the policy of the Biden Administration to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.

FBIC has both drinking water supply issues and water quality concerns. The cost estimates are intended to cover needed improvements to the water facilities at each of the Reservation communities, as well as at individual homes within the rural areas of the Reservation. Renovation of the existing Fort Belknap Agency domestic water system will support the anticipated future growth in domestic water demands on the Reservation.

Damages Claim

The United States has yet to fulfill its promises under the Treaty of 1855, and the 1888 and 1896 Congressional Acts[44] that were to provide a sustainable agricultural economy that can provide economic self-sufficiency for our permanent homeland on the Fort Belknap Reservation. The FBIC has suffered extensive damages resulting from actions, as well as failures to act, of the United States that have denied the FBIC the use of its reserved water rights. The statute of limitations does not bar the FBIC's claims because the claims still have not accrued: among other

reasons, the FBIC's reserved water rights have never been fully adjudicated, and the FBIC only began to research the agricultural potential of the reservation starting in the mid-1990s. Thus, the nature and extent of the FBIC's property rights in water have not been sufficiently determined to invoke the statute of limitations; the extent of the FBIC's reserved water rights is what would be litigated if these settlement negotiations fail. Although these facts were not fully known by the FBIC, the valuable interests of the FBIC were known to the United States and should have been vigilantly asserted and protected by the federal government, as trustee of the reserved water rights. Instead, the Government intensively developed the watershed for the benefit of non-Indians, without regard for the plain economic and social needs of the members of the Tribes and the FBIC.

The FBIC has determined an estimate of the amount of damages that it has incurred with respect to its reserved water rights and resources. The FBIC's Water Rights Settlement Act would settle approximately $730 million in claims against the United States by providing a total of $593,110,000 in damages to the FBIC, and includes the return of some ancestral and Reservation homelands that will be transferred back to the FBIC. When these damage claims are settled as part of the settlement of our reserved water rights, such claims will be relinquished.

Explanation of Damage Claims. The FBIC claims both historical and future monetary damages as a result of the United States' past and continued failure to protect the Reservation's water supply on behalf of the FBIC ("U.S. Failure"). The damages are determined for each of six claims and based on estimates of the income for irrigated farming that the Tribes could have realized in the past and would be expected to realize in the future had the U.S. Failure not occurred ("Lost Income").

There are two types of damage claims alleged by the FBIC. The first type consists of damages due to the alleged taking of water from the Reservation when the Canadian Boundary Water Treaty was signed, and the alleged taking of tribal property when Dodson Dam was built in 1908. The second type of damages claims arises from breach of trust responsibilities and obligations due to the failure of the United States to protect FBIC water rights, including against non-Indians, to complete and properly operate and maintain the BIA Fort Belknap Indian Irrigation Project, and to fulfill the expressed purposes of the Fort Belknap Reservation by adequately developing our water supply, including with irrigation systems and storage facilities, pursuant to the Tribal Treaty and Congressional Acts, and the *Winters* decision,[45] which would support the promised, permanent homeland for the FBIC and its Tribal members. The following are the summary descriptions of each of the claims:

A. "Taking" of Milk River water in signing the 1909 Boundary Waters Treaty. The Boundary Waters Treaty with Canada[46] deprived the Reservation of irrigation water. The highest and best use of water that was taken from our Reservation would have been irrigated agriculture. Natural Resources Consulting Engineers, Inc., the FBIC's water resources experts, estimates that the water given to Canada in the Treaty was sufficient to irrigate 9,400 acres of Reservation lands beginning in 1909. Damages: $266,321,121.

B. "Taking" of land for Dodson Dam. When Dodson Dam was constructed in 1908, Tribal land was taken both for the Dam itself and for the use of a canal. In addition, seepage from the canal waterlogged nearby land, rendering it unsuitable for irrigation. The total irrigable land taken from the Tribe was 2,587 acres. Damages: $74,640,836.

C. Breach of trust on land taken for Dodson Dam. Even prior to the Dodson Dam's construction, the United States breached its trust responsibility by not assisting the Tribes in developing its land for irrigation. This claim is made for the same 2,587 acres as in the above paragraph, but for the period 1900–1908, prior to the Dam. Damages: $4,595,747.

D. Breach of trust on land that could have been flood-irrigated from the Milk River. The United States failed to develop irrigation works to use the water that was available on the Reservation, which diminished the amount of irrigation that actually occurred on the Reservation. The United States built a tribal project that irrigated approximately 10,000 acres. However, 13,027 acres could have been irrigated given contemporary technology. This claim is based on the difference between historical actual acres irrigated and the potential irrigation of 13,027 acres. Damages: $90,976,421.

E. Breach of trust on land that could have been sprinkler-irrigated from the Milk River. By the end of World War II, the United States had developed a large capacity for making aluminum, largely used during the war to build aircraft. Following the war, this industrial capacity was available for peacetime uses, including making the aluminum pipe that made widespread sprinkler irrigation practical. The first postwar shipment of aluminum pipe for use in sprinkler irrigation was in 1946, and

from then sprinkler irrigation grew rapidly. The United States failed to utilize this new technology to support the promised agriculture economy on our Reservation. Damages: $222,384,416.

F. Breach of trust on land that could have been irrigated within the Southern Tributary Irrigation Projects ("STIP"). In the early 1960s through 1970 the United States failed to adequately maintain, and effectively abandoned, the irrigation water delivery systems serving a total of 8,313 acres of STIP lands. The responsibility for the irrigation of 6,828 acres of this land was formally transferred by the U.S. to landowner organizations, transferring all of the right, title, and interest of the U.S. in the irrigation systems. The irrigation delivery systems were in complete disrepair, were no longer functional, and the United States did not provide any associated management training to the landowners. Five other irrigation units consisted of 1,485 acres. No evidence has been identified to support a conclusion that these units were officially transferred to the water users, and the Federal government has failed to maintain them in an operable condition. The operation and maintenance responsibility of these units has remained with the Federal government to this day. Damages: $69,711,463.

Explanation. The approach taken to estimate both types of damages, D and E, above, was to reconstruct an agricultural economy that reasonably could have been supported by the land and water resources of the Fort Belknap Reservation. The income available from dry farming or from grazing and the difference was used to determine the damages due to a lack of a developed water supply. One difference in approach in valuing the takings claims as opposed to the breach of trust claim is the treatment of accumulated interest on historical damages. Interest is applied to damages in the takings claims, but not for the breach of trust claims. Historical damages have been restated in today's dollars in order to maintain the purchasing power of the foregone income. The cost of settlement is fully justified by the needs of the Reservation and the FBIC potential claims against the United States.

Land Transfers. The Bill also provides for the transfer of 58,553 acres of lands to restore FBIC's homelands and provide for the following:

- Tribal management of the headwaters of streams that are part of our Indian water rights, but currently below the southern boundary of our Reservation. The land transfer includes only 14,495 acres of the more than 60,000 acres in the Little Rockies that were removed from our Reservation barely 7 years after it was established, and include our sacred sites that support the traditional spiritual and cultural practices of our Tribal members.

Shortly after our Reservation homeland was established, the Indian Commissioners returned to secure a portion of our new 1888 homeland because gold was discovered on our Reservation. They threatened us with starvation if we did not agree. Our Tribal leaders were told that if we did not sell more of our land, that "there would be no way to get beef, cattle, flour, wagons, or anything else . . . and your women and babies [will be] crying for something to eat. . . ."[47] In other words, that the United States would abandon us-in spite of its promises-and we would starve to death.

As an agent of the United States, Commissioner Grinnell said to us, "I see that some of you people are pretty blind. You can't see far. Two years from now, if you don't make any agreement with the government, you will just have to kill your cattle and then you will have to starve."[48] My great-great grandfather, Lame Bull did not back down from these threats. He retorted, "Look at my hair. It is grey. I say the same thing as I said before. I don't want to sell." Grinnell was wrong.our Tribal leaders could see far into the future.

A leading scholar on Indian history offered the following description from Indian people over their land losses: "This is where we worshipped-we prayed-where we got our spiritual sustenance and went to commune with the Creator, who protected us."[49] But, as this historian explained, the Indian agents and the leaders of the new country never understood the spiritual shock that the Indian people suffered when their lands were stolen. But the Gros Ventre and Assiniboine people were in a state of extreme destitution when these lands were removed, and they still grieve over the loss of these sacred lands.

Additionally, although our Tribal Leaders were told that the portion of our Reservation that would be taken by the federal government would be 40,000 acres, the subsequent land survey included 60,000 acres there were removed from the southern boundary of our Reservation. But monetary compensation to the FBIC was only provided for 40,000 acres.

Finally, the Indian agents told our Tribal Leaders that our water rights would not in any way be impaired by this land removal. Now the waters used by the miners south of our Reservation are polluted and are part of a Super Fund to clean up the

damages. The lands we are requesting be returned to us, however, are north of this area of environmental pollution.

- Consolidation of Tribal lands both on and off the Reservation (including the submarginal land area adjacent to the western boundary of the current Reservation) for improved administration; and
- Better management of forested lands by our experienced land management department and fire response team, and the restoration and protection of the FBIC's cultural resources.

These lands include state trust lands (27,709 acres), and federal lands (30,844 acres) (i.e., lands held by the Bureau of Land Management, Bureau of Reclamation, and Department of Agriculture).

Mitigation for State Water Users

After our long-time cooperation and compromises with our non-Indian neighbors, Congressional support of the agreed-upon mitigation activities in our negotiated FBIC-State-Federal Water Compact will create harmony at a time when water wars between water users are increasing. In fact, Montana is in a severe drought this year. Mitigation activities will stabilize the water supply, conserve water, and improve water use efficiency. Consistent with the Federal government's policy to resolve Indian water rights disputes through negotiated settlements,[50] our Water Compact (a) is an agreement to which the federal government is a signatory party; and (b) will create long-term harmony and continued cooperation among the interested parties by respecting the sovereignty of the State and FBIC in our respective jurisdictions.[51]

The Montana Reserved Water Rights Compact Commission ("Commission") was created by the State legislature to negotiate tribal water settlements with tribes and the federal government.[52] Negotiations among our Parties were conducted in earnest throughout the 1990s. The Commission conducted no fewer than 20 meetings between 1997–2000 throughout our region, known as the Hi-Line area of northcentral Montana, for public information and input on the proposed Water Compact. The Commission documented over 18 negotiating sessions with the FBIC and Federal government between 1990–2000. In addition, substantial public information and drafts of the Water Compact were distributed through numerous public and FBIC outlets.[53] This extensive public and tribal information effort led to the overwhelming approval of our 2001 Water Compact by the State Legislature (94 percent approval in the House and 87.5 percent in the Senate). The FBIC Council also approved the Water Compact.

As described in the Fort Belknap-Montana Water Compact, the Parties plan improvements in the operating capabilities of the Milk River Project, where the Milk River is the FBIC's largest source of our Indian water rights and forms the northern boundary of our Reservation. These improvements will mitigate the impact of the FBIC's future water development on Milk River Project and tributary water users. The Water Compact also provides that the FBIC will subordinate its senior water rights in the Upper Peoples Creek to upstream non-Indian irrigation water users so that they will be able to continue their historical irrigation water use.

Milk River Basin. The water diverted from the Milk River by the FBIC is the most senior water right on the river. All water users in this basin will benefit from the mitigation activities the Parties agreed to in the Water Compact. Water Compact Article VI.B., Mitigation of Impacts on the Milk River Project, provides the following:

> The Parties agree that, as a result of development and use of the Tribal Water Rights and protection of water use on tributaries, the Milk River Project and its water users will, at times, be adversely affected if no change is made to the Milk River System. . . . to the level of 35,000 Acre-Feet Per Year. . . .

Improvements in the Milk River Project will mitigate the impact of the development and future use of our Tribal Water Rights in the Milk River and provide protection of water use on upstream tributaries. With the approval of the Water Compact, the Parties committed to working together for the Congressional approval of the Water Compact. However, because the improvements to the Milk River Project and the protection for tributary water users will mitigate the impact of the development of our Tribal Water Right, the mitigation measures were essential to the State's agreement to the Compact. The State reserved the right to withdraw as a party if "Congress does not authorize and appropriate the federal share of funding for the modification to the Milk River Project or other alternatives necessary to mitigate the impact of development on the Tribal Water Right."[54]

Extensive studies were conducted by each of the negotiating Parties to analyze the impact of FBIC's water development and use on the Milk River, and potential projects were identified by the "Fort Belknap Technical Team," a Technical Team that consisted of Federal, State, and FBIC technical experts. Projects were identified that would provide mitigation of 35,000 acre-feet per year for the Milk River Project and tributary water users. Studies continued to be conducted after the approval of the Water Compact. After years of study, and a recent agreement between the State and FBIC on the preferred mitigation measures, the Bureau of Reclamation is now proposing a mitigation measure that was not selected as part of the most promising mitigation measures identified by the Fort Belknap Technical Team. The Bureau of Reclamation is taking the position that additional studies are now needed to consider its mitigation preference before finalizing the agreements between the federal government and the State that are necessary to comply with this important Water Compact. The FBIC does not agree that more studies will be fruitful in advancing completion of these required negotiations. It is our position that further studies of the relevant issues are unnecessary.

Upper Peoples Creek. The second mitigation-related agreement of the Parties to the Water Compact is provided at Art. VI.C.:

> The Parties agree, that, as a result of the protections provided to the Upper Peoples Creek [non-Indian] water users in the Compact and the variable natural water supply in the Peoples Creek Basin, the water supply available for development of the Tribal Water Right in the Peoples Creek may be limited. The Parties agree that such impacts can and shall be mitigated. . . through the construction of a dam and reservoir . . . and to seek appropriations . . . for the benefit of the Tribes.

During the Water Compact negotiations, non-Indian, state irrigators who have historically farmed on Upper Peoples Creek, upstream of the western boundary of the Reservation, sought protection from the FBIC's agreed-to Indian water rights quantification, development, and use in the Upper Peoples Creek. Additionally, the Peoples Creek Basin has a highly variable natural water supply, resulting in limitations in the development and use of the Tribal Water Rights in Peoples Creek.

Therefore, the FBIC agreed to allow the current irrigation of lands in Upper Peoples Creek by the non-Indian irrigators, subordinating the FBIC's senior reserved water rights. In exchange for the FBIC agreement with these state water users, the State and Federal governments agreed to mitigate the impact on the FBIC water use by constructing a dam and reservoir for the benefit of the FBIC in the Upper Peoples Creek. The dam and reservoir will significantly improve the reliability, availability, and use of the FBIC water rights from Peoples Creek on the Reservation.

Montana Water Court Adjudication

In the 1970s, the State started a general stream adjudication of all water rights through the Montana Water Court.[55] The Legislature set up a process that would allow tribes to negotiate their water rights with the State instead of litigating them through the Water Court. The negotiations process was carried out through the Reserved Water Rights Compact Commission ("Commission"). In 1981, the FBIC Council chose to negotiate and settle its Indian water rights with the State and United States. In 1990, the FBIC stipulated to stay proceedings in pending lawsuits in the federal court of Montana and the pending adjudication in the Montana Water Courts.

However, the State Legislature terminated the activities of the Commission in 2013 and set a deadline for all remaining Indian reserved water rights claims to be filed with the Water Court by June 30, 2015. The United States, as our trustee, filed the FBIC water claims on behalf of the FBIC. Our water rights claims, therefore, are before the Montana Water Court, and it is currently uncertain when the Court will initiate the adjudication of our claims. However, an adjudication of these claims after decades of negotiations, an agreed-upon Water Compact, and a proposed Water Rights Settlement Bill before the Senate would be tragic for all Parties at this point in time-resulting only in a "paper water right" for the FBIC, with no ability to develop and benefit from our Indian water. Therefore, time for Congressional approval of our Water Rights Settlement is of the essence.

The FBIC should not be required to litigate its claims after good faith bargaining with the Federal government. Yet, our Indian water rights claims have been filed, as required under federal and state law, with the Montana Water Court and its adjudication could proceed at any time. We agree with Master Rifkind who observed in his 1963 *Arizona v. Colorado* report that "Indian water rights litigation turns into sporting matches and endurance contests[,]" and is followed by dozens of years of

"a platoon of lawyers at work, committed to either sustaining or destroying its result." [56] The United States is too far into our settlement effort, which can now result in fair monetary compensation that will support the FBIC's development of its agreed-upon Indian reserved water rights. The United States should see that litigating the FBIC water rights claims is no longer an option and should be avoided.

In short, litigation of Indian water rights is a lengthy and costly process, with an uncertain outcome-for everyone. We are seeking a settlement that provides us with "wet water," with sufficient funding to settle our damage claims and allow for the development and use of our Indian water rights. That is the promise of settlement over litigation.

Conclusion

With the passage of our Water Rights Settlement Bill, Congress has an opportunity to address more than 100 years of neglect and failure of the United States to fulfill its commitments made in treaties and agreements with the Gros Ventre and Assiniboine Tribes. Indian water rights are one "of the four critical elements necessary for tribal sovereignty." [57] Our Water Rights Settlement provides "the end of the trail" [58] to recognition and enforceability of our reserved water rights, self-sufficiency, and economic success-and supports the permanent, livable homeland for our people that was promised to us by the United States. Our Water Rights Settlement will confirm our negotiated Indian water rights, is designed to provide us with the ability to realize value from our confirmed water rights, will resolve our water-related claims, and achieve finality on these claims. [59]

The United States' "role in all stages of the settlement process serves as a way to fulfill its trust responsibility to the tribes to secure, protect, and manage the tribes' water rights." [60] It provides funding that will assist us in establishing a viable agricultural economy and justifies desperately needed expenditures for programmatic responsibilities, including for the federal Fort Belknap Indian Irrigation Project. [61] Rehabilitation, modernization, expansion, and restoration of this Project will prevent continued accrual of damages against the United States.

Our Indian water settlement is structured to promote economic efficiency on our Reservation and our Tribal self-sufficiency. [62] It is an agricultural infrastructure plan; includes the development of clean and safe drinking water; provides for the FBIC to administer, manage, and enforce its reserved water rights; with additional economic projects that will allow us to develop our Indian reserved water rights and improve the poor economic condition of our members on the Reservation.

Approval of our Water Rights Settlement is an historic event-we are the *Winters* Tribes with a recognized Indian reserved water right since 1908, and we are the last tribes in Montana to achieve our water settlement with the United States.

Approval of our Water Rights Settlement will also remove the cloud over the non-Indian water rights holders from the uncertainty that exists from a failure to approve our Water Compact.

In the promise of a permanent, livable homeland, the United States promised an investment in community-a principal reason for justifying reservation water projects where some doubt its cost-benefit.

Indian policy is a classic example of the recognition that there is a community value [in water projects] and that subsidy can be an investment in the community. . . . And community value is a reason to support [Indian water] projects. [63]

This may require the United States to look beyond the strict scrutiny of a cost-savings lens to settle our Indian reserved water rights. The West was built on expansive water projects for the non-Indian settlers, [64] which has been called a period of disregard for Indians while the United States subsidized water projects for non-Indians rather than Indians. [65]

We have negotiated in good faith with our Federal Trustee, through the SIWRO. We proceeded under the assumption that the United States was also negotiating in good faith. Through transfer of federal power across the decades-at the Federal, State. and Tribal levels-we have persevered.

We urge the United States not to abandon the PIA standard for determining our Tribes' Indian reserved water rights, and to provide us with a fair settlement that allows us to develop our water rights to account for nearly a century-and-a-half of failure to provide the water delivery infrastructure needed for both our agricultural economy, promised with the creation of the Fort Belknap Reservation and our vast land cessions, and for other purposes that make our Reservation a permanent homeland.

If Congress fails to support the FBIC water rights settlement after three decades of negotiations with the United States, including agreement with the quantification and administration of its Indian reserved water rights in 2001, the FBIC will continue to be stripped of its most valuable property right and tribal asset-water. We

have compromised with the state water users, and the Federal government agreed to fund mitigation activities for non-Indian water users.

We ask that Congress support our urgency to pass our Water Rights Settlement now. Demonstrate the United States' fiduciary responsibility to the FBIC, as was done in another recent Congressional tribal water settlement.

We ask that Congress support of our proposed Water Rights Settlement and reaffirm the *Winters* Doctrine and PIA standards for Indian water rights settlements. Why? In the end, perhaps, Charles F. Wilkinson explained it the most eloquently in 1993:

"[I]t has been the role of morality that has touched my mind and my heart. It is a morality that comes from a sense of community, a sense of homeland, a sense of history, and a sense of promises. It is fascinating the way an abstraction such as morality can be so intensely practical. Without that morality, there would be no *Winters* doctrine and no water settlements, because it is a sense of morality that drives Indian policy. Tribal leaders are able to express this morality in an evocative and fair way, explaining the history, the promises, and the period of neglect, explaining the importance of homelands and other values that none of us fully comprehend. This morality has carried these Indian water settlements and other aspects of Indian policy. Morality matters profoundly because it is the backdrop for all the technical matters contained in these settlements." [66]

There is a fear in Indian country that the tide may continue to move against us with a shift in judicial policy starting at the top. The water wars are starting. But, with the passage of our Water Rights Settlement Bill, Congress can reaffirm the historic Federal tribal relations and understandings [that] have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been omitted. [67]

The continued policy of tribal self-determination and self-sufficiency must include the use of our water, our most important natural resource. [68] Under the current policy of the Department, one criteria under the framework for negotiating settlements is that "Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement." [69]

Our Water Rights Settlement Act is carefully balanced between our claims and the development of our negotiated Indian reserved water rights. Our Water Rights Settlement can support a renewed effort to develop our agricultural economy, provide for economic development that ensures the survival of our Tribes and people, and raise the standard of living and social wellbeing of our people to a level comparable to the non-Indian society. [70] We respectfully ask for your support in making our long journey complete. It is long overdue.

ENDNOTES

1 Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, Natural Resources Journal, 46:399–400 (Spring 2006), citing *Winters v. United States*, 207 U.S. 564 (1908). [Hereinafter "2006 Anderson Paper"]

2 U.S. Census Bureau, My Tribal Area, *https://www.census.gov/tribal/?aianihh-1150* (last visited May 12, 2019).

3 *Winters v. United States,* 207 U.S. 564 (1908).

4 See, e.g., *Arizona v. California*, 439 U.S. 419, 421 (1979); State ex rel. *Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 768 (Mont. 1985); In re General Adjudication of All Water Rights to Use Water in the Gila River System, 35 P.3d 68,76 (Ariz. 2001).

5 2006 Anderson Paper at 429.

6 2013 DOI Commission.

7 Montana Budget & Policy Center, Policy Basics: Taxes in Indian Country Part 2: Tribal Governments (November 2017), quoting Tribal Nations in Montana: A Handbook for Legislators, 2016.

8 1990 Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223–9225, Mar. 12, 1990 [Hereinafter "1990 Criteria"]; see also Tracy Goodluck, former Deputy Director of the Secretary's Indian Water Rights Office (currently, policy advisor to the White House domestic policy council), Presentation at the April 11, 2019, FBA Indian Law Conference, Albuquerque, New Mexico. [Hereinafter "Goodluck 2019 FBA Presentation"]

9 *Arizona v. California*, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964) (quantifying the tribes' *Winters* water rights on the basis of practicably irrigable acreage (PIA), holding that PIA is the only fair and feasible way to determine the measure of an Indian reservation water right.); See also, e.g., Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, Natural Resources Jour-

nal, 46:399–400, 429 (Spring 2006) ("Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework."; *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985); and In re General Adjudication of All Rights to Use Water in Big Horn River System, 753 P.2d 76 (Wyo. 1988); aff'd by equally divided court per curium, *Wyoming v. United States*, 492 U.S. 406 (1989), cert. denied, *Shoshone Tribe v. Wyoming*, 109 S.C. 3265 (1989).

10 MCA § § 85–20–1001 through 85–20–1008 (ratified on April 16, 2001).

11 Presentation by the Secretary's Indian Water Rights Office ("SIWRO") Consultation on the "Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. reg 9223–9225 (1990)." (2017). The SIWRO presenter acknowledged that, although every Administration since 1990 has followed the Criteria and Procedures for settlement of Indian Water Rights claims, the Administrations implementing them have had differing interpretations of this policy. Also, although the SIWRO at this time emphasized the position of Congressman Rob Bishop, Chairman of the House Natural Resources Committee, sent to the Departments of Justice and Interior (February 2015), the requirements set forth in the letter were immediately withdrawn and revoked as one of Chairman Raul Grijalva's first acts as the new Chairman of the House Natural Resources Committee in 2019.

12 April 11, 1956, ch. 203, § 6, 70 Stat. 109; 43 U.S.C. § 620e, Cost allocations, Indian lands; report to Congress.

13 E.g., see James P. Merchant & David M. Dornbusch, THE IMPORTANCE OF WATER SUPPLY TO INDIAN ECONOMIC DEVELOPMENT (1977), stating that in 1968, 370,000 acres of Indian were irrigated (1 percent of all Indian agricultural lands), contrasted with 5.1 percent of all irrigated agricultural lands in the seventeen western states; Hearing Testimony on S. 2969, Central Utah Completion Act, Committee on Energy and Natural Resources (September 18, 1990), Dennis B. Underwood, Commissioner of the Bureau of Reclamation, testified (p. 161): "The ceiling for CUP increased in 1972 and 1988. In 1990, the total cost of the Colorado River Storage Project, meaning all components, as authorized, is currently $2,938,059,000."; At the 2019 Federal Bar Association Indian Law Conference, Tracy Goodluck, Deputy Director of the Secretary's Indian Water Rights Office, acknowledged what everyone knows, that "in the decades" since the 1908 *Winters* decision, "Federal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West."

14 373 U.S. 546 (1963).

15 Pub. L. No. 93–638 (1975) (codified at 25 U.S.C. § 5301 et seq.).

16 Secretary of the Interior, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (August 20, 2014), quoting "[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the Federal government is the result of solemn obligations which have been entered into by the United States Government . . .[T]he special relationship . . . continues to carry immense moral and legal force." Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

17 "Federal Water Policy, Message to the Congress," Public Papers of the Presidents: Jimmy Carter, 1044–47 (June 6, 1978).

18 Michael J. Clinton, Dealing with the Federal Sovereign, Ch. 16, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), Indian Water in the New West (1993, University of Arizona Press).

19 25 C.F.R. Part 171 (2008).

20 73 Fed. Reg. 11,028, 11,031, citing *Grey v. United States*, 21 Cl. Ct. 285 (1990), aff'd without opinion, 935 F.2d 281 (Fed. Cir. 1991), cert. denied, 502 U.S. 1057 (1992). The FBIC claims can be distinguished from *Grey*, a lawsuit brought by allottees.

21 *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) 131 S. Ct. 2313, 2324–25 (2011), dissent (J. Sotomayor): "We have never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe 'bears the hall marks of a conventional fiduciary relationship,' quoting [United States v.] Navajo [Nation], 556 U.S. [287,] 301 (2009), we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations." 563 U.S. at 202.

22 U.S. Department of the Interior Commission on Indian Trust Administration and Reform, Final Report 23 (Dec. 10, 2013) [Hereinafter "2013 DOI Commission"];

See, also, *United States v. White Mountain Apache*, 537 U.S. 465, 474–76 (2003); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015).

23 White Mountain Apache, 537 U.S. at 472–73 (2003).

24 140 S. Ct. 2452 (2020).

25 President Joe Biden, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021).

26 Mary C. Wood, The Federal Trust Responsibility" Protecting Tribal Lands and Resources Through Claims of Injunctive Relief against Federal Agencies, 39 Tulsa L. Rev. 355 (2003–2004). See, e.g., 2013 DOI Commission.

27 We recognize the recent exception with the water rights settlement of the Confederated Salish & Kootenai Tribes in 2020, the largest single water rights settlement approved by Congress.

28 President Andrew Werk, Jr., President, Fort Belknap Indian Community, letter to Janet Yellen, U.S. Department of Treasury, Washington, D.C. (March 9, 2021). [Hereinafter "Werk 2021 Letter to Yellen"]

29 FORT BELKNAP RESERVATION: DEMOGRAPHIC AND ECONOMIC INFORMATION (Oct. 2013).

30 Werk 2021 Letter to Yellen.

31 U.S. Census Bureau, My Tribal Area, *https://www.census.gov/tribal/?aianihh=1150* (last visited May 12, 2019).

32 Mont. Dept't of Public Health and Human Services, 2016 Mont. Vital Statistics (2018), *https://dphhs.mt.gov/Portals/85/publichealth/documents/Epidemiology/VSU/VSU_2016_Annual Report.pdf.*

33 Werk 2021 Letter to Yellen.

34 U.S. Census Bureau, American FactFinder, *https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited May 12, 2019).]*

35 FORT BELKNAP RESERVATION: DEMOGRAPHIC AND ECONOMIC INFORMATION (Oct. 2013).

36 United States Bill of Complaint, *Winters v. United States*, 207 U.S. 564 (1908).

37 2006 Anderson Paper at 429 (2006).

38 Fort Belknap Indian Community, Natural Resources Consulting Engineers, Inc., Comprehensive Water Development Plan Report (February 2019). Dr. Wold Mesghinna, President of NRCE, and FBIC Water Engineer, assisted in the development of this Plan and is a renowned, well-respected Indian water rights engineer who is fair, measured, and has devoted his career to the protection, preservation, and development of Indian reserved water rights, working both for Indian tribes and the federal government in litigation and negotiated settlements.

39 55 Fed. Reg. 9223–9225, Mar. 12, 1990; See, e.g., Presentation by the Secretary's Indian Water Rights Office ("SIWRO") Consultation on the "Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg 9223–9225 (1990)" (2017).

40 *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

41 43 U.S.C. § 620e, Cost allocations, Indian lands.

42 General Accounting Office Report to the Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. Senate, Indian Irrigation Projects (February 2006).

43 86 Fed. Reg. 7619 (February 1, 2021).

44 11 Stat. 657; Charles J. Kappler, Indian Affairs: Laws and Treaties . . .Vol. II (Treaties), Washington, D.C., 1904, pp.736–739; and Grinnell Agreement (October 9, 1895); 29 Stat. 353 (1896), respectively.

45 *Winters*, 207 U.S. 564 (1908).

46 Treaty of January 11, 1909.

47 See Senate Report No. 117 with transcript, 54th Congress, 1st Session, February 12, 1896.

48 *Id.*

49 Angie Debo, AND STILL THE WATERS RUN, Princeton University Press (1940), also explaining that "[t]he Indians had no conception of the surveyors' numerical descriptions."

50 1990 Criteria.

51 *Id.*

52 Jay Weiner Testimony, Senate Committee on Indian Affairs Hearing on Addressing the Needs of Native Communities through Indian Water Rights Settlements (May 20, 2015).

53 This information is taken from the Montana Water Rights Commission archives, provided by the State.

54 Fort Belknap-Montana Compact, Montana Code Ann., 85–20–1001, Article VII.A.4.c.

55 The following historical information is taken from a Briefing Paper (June 2000) in the Commission archives (author unknown).
56 Teno Roncalio, The Horns of a Dilemma, Ch. 15, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), INDIAN WATER IN THE NEW WEST (1993).
57 City of *Albuquerque v. Browner*, 97 F. 3d 415, 418 (10th Cir. 1996).
58 *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).
59 1990 Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223–9225, Mar. 12, 1990.
60 CRS Report, Indian Water Rights Settlements (April 16, 2019), *https://crsreports.congress.gov*.
61 1990 Criteria.
62 *Id.*
63 Charles Wilkinson, Lessons and Directions, Ch. 17, p. 222, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), INDIAN WATER IN THE NEW WEST (1993). [Hereinafter "Wilkinson Lessons"]
64 See Goodluck 2019 FBA Presentation, stating that "[I]n the decades" since the *Winters* decision, "Federal policy and expenditure supported extensive development of water resources to benefit non-Indian communities across the West."
65 Wilkinson Lessons, at 223 (referencing David Getches, a respected scholar in Indian law).
66 *Id.*
67 Indian Trust Asset Reform Act, Pub. L. No. 114–178, 130 Stat. 432 (Jun. 22, 2016) (codified at 25 U.S.C. § 5601).
68 See Stephen Cornell and Joseph P. Kalt, American Indian Self-Determination: The Political Economy of a Successful Policy, Harvard Kennedy School Faculty Research Working Paper Series (Nov. 2010), 3.
69 1990 Criteria.
70 American Indian Policy Review Commission, Final Report to Congress, (May 17, 1977), 130, *https://files.eric.ed.gov/fulltext/ED164229.pdf*.

The CHAIRMAN. Thank you, sir.

We will now move back to Mr. Bryan Newland, Assistant Secretary for Indian Affairs, the Department of Interior.

STATEMENT OF HON. BRYAN TODD NEWLAND, ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY BRENT ESPLIN, MISSOURI BASIN REGIONAL DIRECTOR, BUREAU OF RECLAMATION

Mr. NEWLAND. Good afternoon, Chairman Schatz, Vice Chair Murkowski, members of the Committee. Can you hear me all right?

The CHAIRMAN. Yes.

Mr. NEWLAND. Great. My name is Bryan Newland. I am the Assistant Secretary for Indian Affairs here at the Department of the Interior. I am joined today by Brent Esplin from the Bureau of Reclamation. I appreciate the opportunity to present testimony on S. 648 and S. 1911.

Mr. Chairman, with respect to the timing of the Department's submission of written testimony, we were still reviewing the testimony through several agencies. I apologize for the untimely submission and we will do better going forward.

We have submitted our full testimony for the record and I will be offering a brief summary of the Department's views.

Water is a sacred and valuable resource for tribal nations. Longstanding water crises continue to undermine public health and economic development in Indian Country. This Administration strongly supports resolving Indian water rights claims through negotiated settlements. Indian water settlements help ensure that tribal nations have safe, reliable water supplies. They also improve environmental and health concerns on reservations, enable economic

growth, promote tribal sovereignty and self-sufficiency, and help fulfill the United States' solemn trust obligation to Indian tribes.

Water rights settlements also have the potential to end decades of controversy and contention among tribal nations and neighboring communities and they promote cooperation in the management of water resources. We are here to work with the Committee and members of Congress to advance Indian water rights settlements.

Water rights settlements also play a pivotal role in this Administration's commitment to putting equity at the center of everything we do. We have a clear charge from the President and Secretary Haaland to improve water access and quality on tribal lands.

Access to water is fundamental to human existence, economic development, and the future of communities, especially Tribal communities. To that end, the Biden Administration's policy on negotiated Indian water settlements continues to be based on the following priorities: the United States will participate in settlements consistent with its legal and moral trust responsibilities to tribal nations; tribes should receive equivalent benefits for they rights which they, and the United States as trustee, may release as part of a settlement; tribes should realize value from confirmed water rights resulting from a settlement; and settlements should contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Lastly, settlements should provide finality and certainty to all parties involved.

S. 648 would amend the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act to authorize funding equivalent to interest payments that would have been earned between October 1st, 2009 and January 25th, 2016 if the Department had then had the authority to invest those funds. A provision in the Duck Valley Settlement Act prohibiting investment until an enforceability date was reached is not common in Indian water rights settlements. Five settlements enacted between 2009 and 2010 included this provision: Duck Valley Settlement, the Crow settlement, the Taos Pueblo Settlement, the Aamodt Settlement, and the Navajo-Gallup Settlement.

In each of these settlements, funds were inadvertently invested and then returned to Treasury. In total, over $11 million was returned to the Federal Treasury.

The Department supports S. 648 and would support similar legislation to resolve this same issue in four other similarly situated Indian water rights settlements.

S. 1911 would approve and authorize funding to carry out the water rights settlement negotiated between the Gros Ventre and Assiniboine Tribes of Fort Belknap Indian Community in the State of Montana. The Fort Belknap Reservation is the birthplace of Federal Indian reserved water rights doctrine. Yet despite the passage of more than a century since that doctrine was established, the reservation's water rights haven't been quantified.

The Department supports the goals of S. 1911, but does have a number of concerns with the bill as introduced. Key among them is the importance of achieving certainty in settlement. S. 1911 as introduced leaves important issues unresolved, including the overall Federal cost of settlement and the potential ongoing liabilities

to the United States. As the Department has done in previous settlement negotiations, we are committed to working with the Fort Belknap Indian Community, the State, and the bill's sponsors to craft a bill that all parties, including the Administration, can support. Work toward consensus has already started, and we are fully committed to negotiating a language we can wholeheartedly support.

I want to thank the Committee once again for the opportunity to present our views. I am happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Newland follows:]

PREPARED STATEMENT OF HON. BRYAN TODD NEWLAND, ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Aanii (Hello)! Good afternoon Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee. My name is Bryan Newland. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony regarding S. 648, the Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act of 2021, and S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021.

Introduction

The Biden Administration recognizes that water is a sacred and valuable resource for Tribal Nations and that long-standing water crises continue to undermine public health and economic development in Indian Country. This Administration strongly supports the resolution of Indian water rights claims through negotiated settlements. Indian water settlements help ensure that Tribal Nations have safe, reliable water supplies; improve environmental and health concerns on reservations; enable economic growth; promote Tribal sovereignty and self-sufficiency; and help fulfill the United States' trust responsibility to Tribes. At the same time, water rights settlements have the potential to end decades of controversy and contention among Tribal Nations and neighboring communities and promote cooperation in the management of water resources. Congress plays an important role in approving Indian water rights settlements and we stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements.

Indian water rights settlements play a pivotal role in this Administration's commitment to putting equity at the center of everything we do and building back better to improve the lives of everyday people—including Tribal Nations. We have a clear charge from the President and Secretary Haaland to improve water access and water quality on Tribal lands. Access to water is fundamental to human existence, economic development, and the future of communities—especially Tribal communities. To that end, the Biden Administration's policy on negotiated Indian water settlements continues to be based on the following principles: the United States will participate in settlements consistent with its legal and moral trust responsibilities to Tribal Nations; Tribes should receive equivalent benefits for rights which they, and the United States as trustee, may release as part of the settlement; Tribes should realize value from confirmed water rights resulting from a settlement; and settlements should contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. In addition, settlements should provide finality and certainty to all parties involved.

I. S. 648

S. 648 would amend the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act to authorize funding equivalent to interest payments that would have been earned between October 1, 2009 and January 25, 2016 if the Department had then had the authority to invest the funds. The Department supports S. 648.

a. Background

The Duck Valley Reservation, home to the Shoshone-Paiute Tribes (Tribes), straddles the Idaho-Nevada border along the Owyhee River, a tributary to the Snake River. The Reservation was established by Executive Order on April 16, 1877 and expanded by Executive Orders on May 4, 1886 and July 1, 1910. The State of Idaho initiated the Snake River Basin Adjudication (SRBA) in 1987. Soon thereafter, the

State of Nevada reopened its adjudication of the Owyhee River, a tributary to the Snake River, an adjudication originally initiated in 1924. Both of these adjudications involve the water rights of the Tribes. The United States filed claims in Idaho's SRBA and Nevada's Owyhee River adjudication on behalf of the Tribes.

At the request of the Parties, a Federal Negotiation Team was formed, and a settlement was reached. In 2009, Congress enacted the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement as part of the Omnibus Lands Act of 2009 (Duck Valley Settlement Act). The legislation authorized $60 million across two Trust Funds to rehabilitate the Duck Valley Indian Irrigation Project, which is owned by the Bureau of Indian Affairs and operated by the Tribes under a Self-Governance compact, and for other activities. Under the legislation, the Trust Funds could only be invested and earn interest on the "enforceability" date which is the date that the Secretary published a statement in the Federal Register finding that all conditions for full effectiveness and enforceability of the settlement had occurred. The deadline to publish the statement of findings was March 31, 2016, and the Secretary published it on January 25, 2016.

Under the Duck Valley Settlement Act, the Secretary had no authority to invest the Trust Funds until January 25, 2016. However, the Department began investing funds as they were appropriated and transferred to the Department. The Department's Solicitor's Office determined that the amounts earned prior to January 25, 2016 were contrary to the Antideficiency Act and, in accordance with 31 U.S.C. § 3302, must be returned to the Federal Treasury. Accordingly, the Department returned to the Treasury all interest accrued before January 25, 2016.

S. 648 would authorize the appropriation of the interest that would have accrued on balances in the Trust Funds during the period beginning on October 1, 2009 (when the funds were initially appropriated), and ending on January 25, 2016 (the enforceability date), for deposit into the Trust Funds.

b. Department's Views

The provision in the Duck Valley Settlement Act prohibiting investment until an enforceability date is reached is not common in Indian water rights settlements. It appears in the Duck Valley settlement and other settlements enacted in 2009–2010, including the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111–291; the Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111–291; the Aamodt Litigation Settlement Act, Pub. L. No. 111–291; and the Navajo-Gallup Water Supply Project and Navajo Nation Water Rights, Pub. L. No. 111–11. In each of these settlements, funds were inadvertently invested and were returned to Treasury. In total for the five settlements, over $11 million was returned to the Federal Treasury. The Department supports S. 648 and, as a matter of equity, would support similar legislation to resolve this same issue in the four other Indian water rights settlements approved by Congress in 2009 and 2010.

II. S. 1911

S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021 would approve and provide authorizations to carry out the settlement of the Tribes' water rights in the State of Montana (State). The Department strongly supports resolving the Tribes' water rights claims through a comprehensive settlement, but we have concerns about a number of provisions in S.1911 as introduced. The Administration is committed to working with the Tribes and the bill's sponsors regarding those provisions and reaching consensus on legislation to approve the Compact entered into between the Tribes and the State.

a. Reservation and Historical Background

The Fort Belknap Indian Reservation (Reservation) was created by the Act of Congress of May 1, 1888 out of much larger area in northern Montana previously reserved by the President in 1874 for joint use by the "Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and . . . other Indians" located upon it. Today, the Reservation is comprised of approximately 605,338 acres situated mainly in the Milk River Basin in north central Montana. The Milk River forms the Reservation's northern boundary. The southern boundary is from 25 to 35 miles south of the Milk River, extending on either side of the northern crest of the Little Rocky Mountains. The United States holds the Reservation in trust for the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana (Tribes).

According to Bureau of Indian Affairs (BIA) and Tribal data, 3,820 Tribal members currently live on the Reservation. The total Tribal membership in August 2021, including members living off the Reservation, was 8,314. The majority of on-Reservation residents reside in three main towns: Fort Belknap Agency on the northern boundary of the Reservation, and Lodge Pole and Hays on the southern portion of the Reservation.

The primary sources of employment on the Reservation are Tribal and Federal government services. The BIA, Indian Health Service, and the Tribes are the major employers. The Inland Mountain Development Group serves as the Tribes' economic arm and employs approximately 120 tribal members. The Tribes are working to develop tourism on the Reservation. They manage a 700-head buffalo herd on 23,000 acres. World class guided hunting is available on the Reservation. The main industry is agriculture, consisting of cattle ranches, raising alfalfa hay for feed, and larger dry land farms. Unemployment is around 48.2 percent based on a 2019 Montana State University study.

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

The Reservation is the birthplace of the federal Indian reserved water rights doctrine. In 1908, the United States Supreme Court resolved a water rights dispute on the Reservation and issued its seminal decision in *Winters v. United States*, 207 U.S. 564, thereby recognizing for the first time the implied water rights of Indian reservations. Despite the passage of over a century since the *Winters* decision, the Reservation's water rights have not been finally quantified. Worse still, because of extensive deferred maintenance, the FBIIP is unable to deliver even the minimum flows protected in *Winters*.

b. Proposed Fort Belknap Indian Community Settlement Legislation

The United States as trustee of the Tribes has filed water rights claims in the Milk River and Missouri River basins in the ongoing statewide water rights adjudication. Since 1990, the Tribes, State, and United States have engaged in negotiations to resolve the Tribes' water rights within the State. The initial goal of the negotiations was the development of a reserved water rights Compact between the Tribes and Montana. In 2001, the Montana legislature approved the Montana-Fort Belknap Indian Community Water Rights Compact (Compact).

S. 1911 would authorize, ratify, and confirm the Compact to the extent it is consistent with S. 1911, thereby resolving the Tribes' water rights claims in Montana by recognizing the Tribal Water Right established in the Compact. The Tribal Water Right entitles the Tribes to over 446,000 acre-feet per year (afy) of surface water, plus groundwater. In addition to the Tribal Water Rights provided by the Compact, S. 1911 includes a 20,000 afy allocation of storage from Lake Elwell, a Bureau of Reclamation facility. In addition, S. 1911 would authorize funds to implement the provisions of the Compact and S. 1911.

S. 1911 authorizes at least $693.11 million in Federal appropriations for a wide range of purposes including design and construction of water projects that would benefit the Tribes but also including projects unrelated to water development and projects that solely benefit non-Indian state-based water rights users. Moreover, S. 1911 contains open-ended appropriations for some projects, along with a number of unfunded mandates.

c. Department's Views

The Department supports the goals of S. 1911 but has a number of important concerns with the bill as introduced. As the Department has done in previous settlement negotiations, we are committed to working with the Fort Belknap Indian Community, the State, and the bill's sponsors to craft a bill that all parties, including the Administration, can support.

While we will not enumerate all of the concerns with S. 1911 in this testimony, we will highlight a few major items. The Department is concerned about the ability of the Tribes to unilaterally modify the authorized uses of the $593.11M Trust Fund established by the bill. Section 1911 provides that the Tribes are authorized to use the Trust Fund for any purpose described in the Tribes' Comprehensive Water Development Plan (Plan), including any amendment to that Plan. The Department believes that the uses of the Trust Fund should be governed by statutory provisions, as has been the case in other Indian water rights settlements, and that funds should be targeted to developing water resources and expanding access to water on the Reservation.

The Department is also particularly concerned with the open-ended funding authorized for the mitigation of impacts to junior non-Indian and Milk River Project water users, including the construction of a proposed dam and reservoir on Peoples

Creek. These provisions open the door to unknown Federal obligations, leaving the Department with no certainty regarding the cost of this settlement.

In addition, S. 1911 includes in it several unfunded mandates that have the potential to impact the budgets of several Departmental bureaus. The Department believes that if the enacting legislation requires it to complete surveys, studies, and other actions, then it should also provide funding to cover those Federal responsibilities.

The Department also has practical concerns regarding its ability to satisfy Compact provisions requiring mitigation of impacts on junior non-Indian and Milk River Project water users caused by the development of the Tribal Water Right. The Compact mandates mitigation totaling at least 35,000 afy and authorizes the State to withdraw from the Compact if impacts from the development of the Tribal Water Rights are not adequately mitigated. Section 8(c) of S. 1911 incorporates the Compact's mitigation mandate. The Bureau of Reclamation does not have confidence that this level of mitigation is technically feasible based on hydrologic and operations modeling. Furthermore, Section 8(c) essentially authorizes such sums as are necessary to accomplish the mandated level of mitigation. The actual mitigation cost will depend on how it is accomplished and many of the alternatives included in the Compact require significant infrastructure projects on the Milk River and its tributaries. Some alternatives are impractical or could cost hundreds of millions of dollars to complete. Impacts of full development and the benefits of mitigation are based on outdated studies that must be updated to take into consideration both current basin conditions and potential impacts of climate change.

The Department recognizes that, as reflected in the Compact, there are significant relationships between this Compact and the Blackfeet Tribe's water rights settlement, which Congress enacted in 2016. Because of this, finding solutions to the Compact—required mitigation obligation while fulfilling our obligations under the Blackfeet Tribe's settlement will require more discussion with both the Blackfeet Tribe and the Fort Belknap Indian Community. Further adding to this concern, in article VII of the Compact, the State reserves the unilateral right to withdraw from the Compact if the 35,000 afy mitigation requirement is not satisfied. Given uncertainty regarding how mitigation is to be accomplished and the ultimate cost associated with that mitigation, the State's right to withdraw is especially concerning.

Another significant concern for the Department is section 11(k) of S.1911, which would require that the United States hold in trust the FBIIP. This requirement would arguably create open-ended money-mandating trust obligations and undermines the finality and certainty sought in Indian water rights settlement. Section 11(k) would impose on the United States, and specifically on the Department, significant liability moving forward. Similar language has been proposed but ultimately not included in other Indian water rights settlements.

Additionally, the Department is concerned that neither the Compact nor S. 1911 establish an obligation for the State to contribute funding for the settlement, leaving such an obligation for future negotiation. The Proposed settlement provides significant benefits to the State and the State's non-Indian water users, and that value must be reflected in the State contribution.

As a final matter, the Department is concerned about changes that S. 1911 would make to the Reclamation Water Settlements Funds (RWSF) and funding priorities established in Pub. L. No. 111–11. The Department is aware that there is pending legislation to amend the RWSF and any proposed changes should be part of a broader dialogue.

Conclusion

The Department appreciates this Committee's efforts to resolve these issues for the Tribes. With regard to S. 648, the Department would like to work with Congress to similarly resolve the investment issue for all other tribes with water rights settlements enacted in 2009 and 2010. Additionally, while the Department supports the goals of S. 1911, we have significant concerns with a number of the provisions as introduced. The Department is committed to working with the Tribes and the State regarding our concerns with the bill and to reaching a final and fair settlement of the Tribes' water rights claims.

Thank you again for the opportunity to appear before this Committee to provide the Department's views on S. 648 and S. 1911. We look forward to continuing working with the Committee in support of Indian water rights settlements.

The CHAIRMAN. Thank you. We will now introduce the Honorable Brian Thomas, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Reservation in Owyhee, Nevada.

STATEMENT OF HON. BRIAN THOMAS, CHAIRMAN, SHOSHONE–PAIUTE, DUCK VALLEY RESERVATION

Mr. THOMAS. [Greeting in Native tongue.] I want to thank you, water is life, it is how we have been given life. I want to thank the Committee Chairman Schatz and Vice Chairman Murkowski.

My name is Brian Thomas and I am the Chairman of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation. Thank you for inviting me to testify on S. 648, Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation Water Rights Settlement Act of 2021.

I would like to also to thank Senator Cortez Masto for her leadership and Senator Rosen, Senator Crapo, and Senator Risch for championing this legislation.

In 2009, Congress enacted the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement. The Settlement Act ratified the Nevada agreement quantifying the Federal reserved water rights of the Shoshone Paiute Tribes. A separate consent decree was entered into in Idaho. The Act further directed the United States to establish and fund two trust funds, a $45 million development fund, and a $15 million maintenance fund.

The Secretary of Interior, through the Office of Special Trustee, invested these trust funds from the time they were deposited in the tribes' accounts and regularly consulted with the tribes and provided periodic statements to the tribes concerning the investment income in the accounts. The tribes' understanding and expectation was that all investment income from these funds would accrue to the tribes in order to help the settlement to maintain its value, despite inflation during the slow framework for finishing the funding of the settlement.

The settlement's effective date occurred in January 2016, when the Secretary of Interior published a notice in the Federal Register stating that all requirements for the settlement had been fulfilled. Despite the tribes' objections, the Department of Interior took the position that any interest earned in the tribes' accounts before the effective date could not be retained in the tribes' accounts because the settlement act explicitly authorized investment of the funds on the effective date of the settlement but was silent on investment. Income before the effective date, the actual interest earned on the tribes' trust funds during this period, was removed from the tribes' accounts and was remitted to the Treasury rather than to the tribes because of the Department of Interior's position.

S. 648 would amend the 2009 Settlement Act to authorize the United States to appropriate the amount of interest income, approximately $5 million, that was earned in the tribes' trust account before the settlement effective date and deposit it back to the tribes' trust funds created by the Settlement Act. This amendment is needed to fulfill the promise of the Settlement Act for the tribes, which is to be able to make use of their water rights to fulfill economic potential of the Duck Valley Reservation.

As a result of the Department of Interior's position on the settlement act's investment of interest income, the United States Treasury, and not the tribes, profited from the tribal trust funds. This is not acceptable. As trustee, the United States should interpret ambiguous provisions in favor of tribes.

Moreover, in the practical sense, the slow timeframe for appropriating monies needed for this settlement and the lack of interest earnings before the effective date eroded the value of the trust fund due to inflation. This bill is consistent with the Federal trust responsibility. Enacting this bill is an important step to fulfilling the economic potential of the Duck Valley Reservation.

Thank you again for considering my testimony. I would be pleased to answer any questions the members of the Committee may have regarding the legislation and the underlying settlement act. Thank you.

[The prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF HON. BRIAN THOMAS, CHAIRMAN, SHOSHONE-PAIUTE, DUCK VALLEY RESERVATION

Committee Chairman Schatz and Vice Chairman Murkowski, my name is Brian Thomas and I am the Chairman of the Shoshone-Paiute Tribes of the Duck Valley Reservation. Thank you for inviting me to testify on S. 648, Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act of 2021. I would also like to thank Senator Cortez Masto for her leadership and Senator Rosen, Senator Crapo, and Senator Risch for championing this legislation.

Purpose of Technical Amendment

In 2009, Congress enacted the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act, P.L. 111–11, § 10801–10809 ("Settlement Act"). The Settlement Act ratified the Nevada agreement quantifying the federal reserved water rights of the Shoshone Paiute Tribes ("Tribes"). (A separate consent decree was entered in Idaho.) The Act further provided that the United States would deposit $45 million for the rehabilitation of the Bureau of Indian Affair's (BIA's) Duck Valley Irrigation Project and other water-related projects in a Development Fund and $15 million for operation and maintenance of the projects be deposited in a Maintenance Fund. Pursuant to the Settlement Act, the Development Fund and Maintenance Fund are held in trust by the Federal Government for the benefit of the Tribe.

S. 648 would amend the 2009 Settlement Act to transfer interest income earned through the investment of Settlement Act trust funds during the five-year period of appropriation—back to the tribal trust funds created by the Settlement Act. The amendment is necessary to comport with the Tribes' understanding and expectation regarding the availability of investment income before the settlement's effective date. To this end, S. 648 authorizes funds to be appropriated of approximately $5 million based on the amount of interest the trust funds are estimated to have earned in the Tribes' accounts during the five years before the effective date. The actual interest earned on the Tribes' trust funds during this period was returned to Treasury and removed from the Tribes' accounts because of the Department of the Interior's interpretation of Settlement Act.

Background on Duck Valley Water Rights Settlement

The Duck Valley Reservation is the homeland of the Tribes and encompasses 290,000 acres of remote land on the border between the States of Nevada and Idaho. Although the reservation has significant land suitable for agriculture and agriculture is the primary economic activity on the Reservation, the Reservation has lacked sufficient infrastructure necessary to provide dependable water supplies for irrigation and drinking water. The lack of access to dependable water supplies has been a chronic problem for the Tribes since the reservation was established in 1877.

Inconsistent natural flows and non-Indian settlement south of the Reservation in Nevada, and north of the Reservation in Idaho and Oregon have led to chronic water stress and conflict. In addition, since the 1930s, the downstream Owyhee Project—a Bureau of Reclamation Project that irrigates more than 100,000 acres of land in eastern Oregon and western Idaho—has blocked anadromous fish passage and ended a once valuable on-reservation fishery. When, in 1938, the Bureau of Indian Affairs completed construction of Wild Horse Reservoir (the storage facility for the BIA Duck Valley Irrigation Project) to provide critical storage water for the reservation, the relief to the Tribe was far from complete. Wild Horse Reservoir is located nearly 15 miles south of the Reservation. This location failed to capture the

full amount of water available to the Tribes and set up the potential for serious conflict with water users between the Reservoir and the Reservation, thereby affecting the number of acres the Tribes could cultivate and inhibiting reservation development.

The Settlement Act put an end to decades of tension over water rights between the Tribes and their non-Indian neighbors. In addition to providing certainty regarding the Tribes' water right, the Act resolved tribal claims against the United States for its failure to protect the Tribes' water rights and natural resources, claims which the Tribe estimated could lead to the federal government having to pay significantly more than the $60 million federal contribution authorized in the 2009 Settlement Act. Due to the settlement, both Indian and non-Indian farmers and ranchers in the area around the reservation now have certainty regarding water allocations available to them for crops and grazing, and the Tribes have much-needed funds to provide long-term economic benefit to the Duck Valley Reservation.

The Settlement Act funds go toward assisting the Tribes in their ongoing work to accomplish the goals of the Settlement Act, which include rehabilitation of the Duck Valley Indian Irrigation Project, provision of a municipal water supplies, and other critical water related projects.

Statement of Need for the Amendment

An amendment is necessary because the Department of the Interior interpreted the Settlement Act's silence on investment before the settlement's effective date as precluding federal authority to invest the settlement funds for the Tribe before that date. As a result, all trust fund investment earnings prior to the effective date—approximately $5 million—were withdrawn from the Tribes' accounts and remitted to the Treasury. When legislation authorizing this water rights settlement was enacted as part of the Omnibus Public Lands Management Act of 2009, P.L. 111–11, the Settlement Act explicitly authorized investment of the trust funds starting on the date the waivers authorized under the settlement became effective ("effective date"). The effective date under the Settlement Act occurred when the Secretary of the Interior published a Federal Register notice stating that all of the actions required had been accomplished. Among the required actions was the establishment and funding of two trust funds, the Development Fund and the Maintenance Fund, and full appropriation of the $60 million settlement trust funds.

Over a five-year period beginning in fiscal year 2010 and ending in fiscal year 2014, $45 million were appropriated to the Development Fund and $15 million were appropriated to the Maintenance Fund, as required under the terms of the Settlement Act. During this time, the Office of Special Trustee (now the Bureau of Trust Funds Administration), invested the Tribes' funds as they were appropriated. The Secretary published the required notice in the federal register of findings related to the implementation of the Settlement Act and underlying Settlement on January 25, 2016. 81 Fed. Reg. 4063. This date of publication was the effective date under the terms of the Settlement Act.

As noted above, section 10807(e) of the Settlement Act required the Secretary of the Interior to invest amounts in these Funds after the effective date. However, the Act was silent with respect to pre-effective date investment, and the Department of the Interior, through the Office of the Special Trustee, invested trust fund monies prior to this date for the Tribes and regularly consulted with the Tribes and provided periodic statements to the Tribe concerning the investment income.

In 2016, after the effective date and full appropriation of the settlement funds, the Department of the Interior expressed the position that the Tribe may not be entitled to the investment funds earned in their accounts prior to the effective date. The Tribes immediately inquired about the investment income earned by the trust funds. In a letter dated February 29, 2016, from the Tribe to the Department of the Interior, the Tribe informed then Acting Assistant Secretary—Indian Affairs, Larry Roberts, that "[w]e have been counting on the investment revenues as part of the overall settlement funds available to the Tribes, and such funds are essential to the settlement projects that we undertake." (See attachment 1, a letter from the Tribes to the Department of the Interior dated Feb. 29, 2016).

In response to this and one other letter from Tribe, the Department of the Interior explained the agency's position that "any interest the Fund generated pre-effective date may not be used in connection with the implementation of the Act and underlying Settlement" and accordingly, the Department withdrew the investment funds from the Tribe's accounts and remitted the funds to the general fund of the Treasury (See attachment 2, a letter to the Honorable Lindsey Manning, Chairman of the Tribes, dated October 6, 2016). By enacting this bill, Congress will confirm for the Bureau of Trust Funds Administration that any ambiguity in the Settlement Act regarding investment of the settlement funds must be interpreted in the way most

favorable to the Tribes, consistent with the federal trust responsibility to Tribes, and the funds returned to the Tribe.

Conclusion

As a result of the Department of the Interior's position on the Settlement Act's investment of interest income, the United States Treasury, and not the Tribe, profited from tribal trust funds. As trustee, the United States should interpret ambiguous provisions in favor of tribes. Moreover, the slow timeframe for settlement and lack of interest earnings before the effectiveness date eroded the value of the trust funds due to inflation.

This amendment appropriates the amount of money that the trust funds earned during the five-year period of appropriation, before the January 25, 2016 effective date, and authorizes the amount to be returned to the Tribes' trust funds. This will restore the value of the trust funds provided to the Tribes to the level intended by Congress and enable the Tribes to fulfill the promise of the Settlement Act: to be able to make use of their water right to fulfill the economic potential of the Duck Valley Reservation.

Attachment 1

Dear Mr. Roberts,

I am writing to provide you additional information concerning the investment revenue issue relating to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement funds. Vice Chairman Buster Gibson and Councilmembers Cristi Walker and Rudy Blossom raised this issue when they met with you on February 24, 2016.

The Shoshone-Paiute Tribe of the Duck Valley Reservation Water Right Settlement Act, Pub. L. 111–11, Title X, Subtitle C (Mar. 30, 2009), became final on January 25, 2016, with the publication of the Secretary of the Interior's findings. 81 Fed. Reg. 4063 (January 25, 2016). At that point the waivers became final and the settlement funds became available to the Tribes. The settlement funds consist of $45 million in development funds and $15 million in operation and maintenance funds. The funds were appropriated over a five year period beginning in 2010, and all funds are now in the Tribes' Treasury accounts. As the funds were appropriated, they were deposited in the Tribes' development and O&M accounts, and OST began investing the funds. Regular account reports were provided to the Tribes, including the investment amounts. And, OST consulted with the Tribes concerning appropriate investments for the funds. There is now approximately $5.5 million in investment revenue in the accounts.

At some point approximately a year and a half to two years ago—after the majority of the funds had been appropriated, deposited in the Tribes' accounts and invested—OST questioned whether the Settlement Act authorized investment of the funds before the Secretary published the final findings in the Federal Register. OST therefore stopped investing the funds—without notice to the Tribes—apparently in reliance on the following language in section 10806 (e) of the Settlement Act:

> (e) Administration of Funds.—Upon completion of the actions described in section 10808(d) (publication of the findings), the Secretary, in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.) shall manage the Funds, including investing amounts from the Funds. . .

We understand the Solicitor's office has been looking at this issue and may issue an opinion concluding that there was no authority to invest for the period before publication of the findings. Upon issuance of the opinion, we understand the investment funds of over $5.5 million may be returned to the Treasury.

We are seeking your assistance in making sure that the investment revenues are not returned to the Treasury and that an administrative or legislative solution be identified to insure that the investment funds are paid to the Tibes. We are hopeful that an administrative solution is possible since we understand that legislation will take some time and is likely to be difficult.

This matter is of critical importance to the Tribes as we begin the process of implementing our water rights settlement and spending the settlement funds on crucial Reservation projects, including vital rehabilitation activities at the BIA's Duck Valley Irrigation Project. We have been counting on the investment revenues as a part of the overall settlement funds available to the Tribes, and such funds are essential to the settlement projects that we expect to undertake. We ask that you work with others within the Department of the Interior to find a way to make sure these critical funds are paid to the Tribes.

We very much appreciate your interest and willingness to look into this matter and look forward to a favorable outcome.

Attachment 2

Dear Chairman Manning:

I am writing in response to your inquiry to Larry Roberts, Principal Deputy Assistant Secretary—Indian Affairs, concerning the investment revenue issue related the Duck Valley Reservation Water Rights Settlement (Settlement) and the related appropriated monies (Fund). Specifically, you have requested that any revenue generated by the investment of the Fund prior to January 25, 2016, be paid to the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation (Tribes). For the reasons discussed below, this is to inform you that the Department of the Interior (Department) lacks the legal authority to comply with your request. Moreover, the Department has a legal obligation to remit any amounts generated by any investment of the Fund prior to January 25, 2016, to the general fund of the Treasury and has therefore, acted accordingly.

As you are aware, under the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation Water Rights Settlement Act, P.L. 111–11, § 10807 (2009) (the Act), the Settlement became effective on January 25, 2016, upon the publication in the Federal Register of the Secretary of the Interior's (Secretary) findings related to the implementation of the Act and underlying Settlement. 81 Fed. Reg. 4063 (January 25, 2016). In addition to approving and ratifying the Settlement, the Act provided for the creation of two funds, the development fund and the maintenance fund, and autl1orized appropriation of monies to be deposited into the respective funds. The Fund consists of $45,000,000 in development funds and $15,000,000 in maintenance funds. The Fund was appropriated over a 5 year period beginning in fiscal year 2010 and ending in fiscal year 2014.

Neither the Act nor the Settlement provides authority for the Fund to be invested or to earn interest prior to the effective date of the Settlement, January 25, 2016. Notably, upon publication of the Secretary's findings, the Act directs the Secretary to "manage the funds, including by investing amounts from the Funds in accordance with [25 U.S.C § 161 and 25 U.S.C. § 162a]." Pub. L. 111–11 § 10807(e) (2009). Congress's specific directive to the Secretary to invest appropriated amounts post-effective date undercuts any argunient that Congress—without specifically authorizing investment—intended the Fund earn interest pre-effective date. This notwithstanding, the Fund was inadvertently invested and earned interest for a period of time prior to January 25, 2016.

While it is true that following the effective date, the Act requires the Fund to be managed as a trust fund and that will bear interest in accordance with 25 U.S.C. § 161a, the Fund, prior to the effective date of January 25, 2016, did not constitute a trust fund. Rather, money held in the Fund prior to the effective date remained the property of the United States set aside for the as-of -then unconsummated Settlement. Therefore, since there is no explicit language in the Act or the Settlement identifying interest as a source of the Fund nor directing the payment of interest from the Fund pre-effective date, it is the Department's position that it lacks the authority to expend any interest generated by the investment of the Fund prior to January 25, 2016. In conclusion, any interest the Fund generated pre-effective date may not be used in connection with the implementation of the Act and underlying Settlement. Accordingly, the interest generated by investment of the Fund prior to January 25, 2016, has been remitted to the general fund of the Treasury in accordance with 31 U.S.C. § 3302(b).

The CHAIRMAN. Thank you very much.

Senator Tester?

Senator TESTER. Thank you, Mr. Chairman. I appreciate the flexibility. I appreciate everybody who is testifying here today.

I want to start with President Werk. The heart of this settlement lives up to the trust responsibilities we have in this Nation. Without this settlement, as with all settlements, and by the way, this is the last settlement in Montana, as with all settlements, there is going to be a lot of lawsuits. Nobody wins when there are lawsuits, especially not the Federal Government with over $700 million in liability on the line.

But we have an opportunity to invest in tribal infrastructure. We have an opportunity to invest in economic development. And we have the opportunity to make sure these water rights claims don't go to court.

So, President Werk, from your perspective as a tribal president and somebody who lives in Hays, Montana, can you tell me what it will mean if the tribe, for the tribe, for the tribe, if your water settlement claims go to adjudication and we don't get this water settlement over the finish line?

Mr. WERK. First of all, it is a win-win for everyone. Water, unlike land, it flows, and we have to share. All the work that we have put into this, it is a win-win for the tribes first on what we are proposing. And it is a good argument, when you think about Winters, you think about PIA, and like I said, Indian people using Indian water. It is justified.

The monetary amount that we are asking for goes way beyond, is well beneath our claims that we are settling. We want finality, we want certainty. Like I said, as far as water flows, and Montana has been very progressive with its water compacts, like you say, we are the last one. We want to settle. We don't want a paper water right, we want a wet one for our future, to be able to develop and use our water for our people.

On the flip side to that, if we are forced to litigate, the courts, like they did in 1908, they are going to uphold and they are going to enforce our senior water rights, and we are all going to lose. That is not going to be good for anyone. It is certainly not going to be good for the Aaniih Nakoda people. But it is not going to be good for all the compromises that we have made and all the work that we have done over the years, and the agreement that we made in 2001 with the State of Montana and the United States. There are protections in there for everyone.

So that is all I will say about it, Senator. Thank you.

Senator TESTER. Okay. Thank you. Look, I think you have gone out of your way to make sure this settlement doesn't put folks in a rough spot, on or off the reservation. Can you speak briefly about the mitigation measures that you have for irrigators who might be concerned with the tribes developing their water rights?

Mr. WERK. We put a lot of work into that also. Especially recently, mitigation is very important, I will say again, as far as water flowing. There are protections in place. There are a lot of compromises that the tribes have made over the years, whether it is working with Congress or the Federal Government, the Administration or prior Administrations, the State and local stakeholders.

In one example, Upper Peoples Creek, which flows onto the reservation, the tribes subordinated its water rights then, in 2001. You don't see tribes doing that. But that was a part of a compromise back then, so we could continue to move forward with an agreement and putting in protections forever, especially the Aaniih Nakoda people first.

Our water rights, we are protecting about 115,000 acre-feet of water outside of the reservation for people that have been benefiting from the use of our water.

Senator TESTER. I appreciate that. Really quickly, I just want to ask about the Grinnell Notch. The Grinnell Notch predates the

Winters Doctrine, I believe, correct? The agreement on Grinnell Notch? Is that correct?

Mr. WERK. Yes.

Senator TESTER. Can you very quickly, there is just about 20 seconds left, very quickly talk about what was promised in that Grinnell Notch agreement?

Mr. WERK. Well, I would encourage everybody that is in the room or listening to read the Grinnell Agreement of 1895. The commissioners that met with the council back then, they gave their word to the Secretary of the Interior and to Congress that by ceding that land, the tribal people ceding that land, that their water rights would be protected. It talks about the headwaters in there, no irreparable harm. Now there is a mine out there that is creating perpetual, it is a perpetual nightmare, like I said, it needs perpetual treatment.

All we are asking for is 14,500 acres on our side of the mountain where we have senior water rights to where our tributaries flow onto the reservation. But Grinnell, the Grinnell agreement, it preceded Winters. That was in 1895. It went into the record in 1896, but Winters was in 1908.

Senator TESTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Members on both sides of the aisle are going to be in caucus meetings right now. So we will recess until approximately 4:00 p.m. We appreciate your patience and forbearance. We apologize for the inconvenience.

[Whereupon, at 3:05 p.m., the Committee recessed, to reconvene at a later time.][4:18 p.m.]

The CHAIRMAN. We will call the Committee back to order, and thank everybody for their patience and participation.

Senator Daines?

STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM MONTANA

Senator DAINES. Chairman Schatz, thank you, and I want to extend a heartfelt thanks to our witnesses for being here today.

I especially want to thank President Werk for joining us at this most important hearing. It is always a pleasure to see some familiar faces back here in Washington, D.C.

I am committed to settling the long and very overdue water rights of the Fort Belknap Indian Community. As you all know, I was proud to get the Montana Water Rights Protection Act over the finish line to settle the CSKT's water claims. I want to see the same for Fort Belknap. It is so important that we work together to accomplish this most important task. We need support from the tribes, local communities, and both State and Federal governments to ensure that we are doing right by the people of Fort Belknap.

Before I dive into questions, I would like to enter a statement from Governor Gianforte into the record.

The CHAIRMAN. Without objection.

Senator DAINES. I agree with everyone's assessment that we need a settlement rather than litigation. I hope to get a better understanding of what amount of work is left to get everyone behind such a settlement.

President Werk, have you been in negotiations with local county commissioners and other tribes on the high line regarding this settlement?

Mr. WERK. Yes.

Senator DAINES. Thank you. I know you have had a lot of long discussions. I appreciate your continued dialogue with tribe and local communities.

Mr. WERK. Can I expand on that?

Senator DAINES. Yes, you can expand on that.

Mr. WERK. Yes, we have. It has been, like I explained earlier, it has been a long time. It has been 2001 since our water compact was passed, and it is a good compact, like I said. It was passed with overwhelming support by the State of Montana. So in Fort Belknap, we have continued to, obviously there have been different administrations, with Governor Gianforte now, we look forward to having continued meetings with him and folks over at DNRCs, Jay Warner. Jay Warner has been there a long time. He is on point for that.

We are the last ones. But also, it has been our council's position that we will meet with anyone as far as a discussion about water. We are very transparent about that, about meeting with folks along the high line, commissioners, other tribes, to come up with solutions and to work together. As I was talking about earlier, we have to share. Water is getting more and more scarce, especially out in Montana with the drought year.

Those meetings have been good meetings. We just try to keep working together to come up with solutions so we can get this thing done.

Senator DAINES. President Werk, thank you. Thanks for making the long journey out here. There is no easy way to get from Fort Belknap to Washington, D.C. I appreciate that.

For the Administration, I have a question for Assistant Secretary Newland. Does this bill adequately close all existing Federal liabilities?

Mr. NEWLAND. Thank you, Senator Daines. It is great to see you again, and I appreciate the opportunity to be here.

We feel like there is more work to be done on the provisions in this proposed settlement to get us across the finish line. We have expressed some concerns here at the department in our testimony about the lack of certainty or finality, rather, in the current legislation. Overall, we are committed to getting there.

So to go back to your question, Senator, about does this provide that finality in its current proposal, I think there is more work to be done.

Senator DAINES. Thank you. That is something that is very important, of course, in a settlement, is to make sure we close all the existing Federal liabilities. I don't want to put words in your mouth, but you said there is more work to be done. So I guess the answer is, no, there is more work to be done. Is that an accurate assessment, Secretary Newland?

Mr. NEWLAND. Yes.

Senator DAINES. Thank you.

Senate Bill 1911 calls the United States and the State of Montana to enter into a cost share agreement regarding the costs of

mitigation within one year of the date of enactment of this act. Secretary Newland, a couple of questions, is that a reasonable deadline from the Administration's perspective?

Mr. NEWLAND. I am sorry, Senator, the deadline of one year to negotiate the details of mitigation? Is that what you are referring to?

Senator DAINES. Correct. So the bill calls the United States and the State of Montana to enter into a cost share agreement regarding the costs of mitigation within one year of the date of enactment of the act. So the question is, is that a reasonable deadline from the Administration's perspective?

Mr. NEWLAND. Ideally, Senator, we would button these things up as part of the legislation. We have, as I said, we have some more work to be done with the tribe. We are committed to having those conversations to get that, to get all of this sewn up so that there is finality once this settlement is approved by Congress.

Senator DAINES. Maybe getting into a little more specifics, do you know, has the United States Federal Government begun negotiations with the State over a cost share agreement?

Mr. NEWLAND. Senator, I will have to follow up with you and the Committee on that one if the Committee holds the record open.

Senator DAINES. Thanks. Well, we need to be sure the Administration stays in communication with the State and the Tribe over the practical implications of any settlement.

My last question, as you know, Senate Bill 1911 provides for an allocation of water to the tribes from Lake Elwell behind Tiber Dam. It also includes a series of conditions and sideboards related to the use of and accounting for that allocation. Both the Montana Blackfeet Compact and the Chippewa Cree Tribe of Montana Compact also included Tiber, Lake Elwell allocations to those tribes.

My question is, has the Administration reviewed the sideboards on Senate Bill 1911 and the conditions for computability with the allocations made to the other tribes? And what is the Administration's position on these conditions and sideboards?

Mr. NEWLAND. Thank you, Senator Daines, for that question. This is a particularly complex settlement because of the interconnection between what is on the table or what is being discussed at this hearing and some of the other water settlements in Montana. We want to make sure that, to the extent there are impacts on other tribes and other settlements, which I think we all agree the goal is to provide finality, so we don't have to revisit them, that everybody is at the table and has an opportunity to weigh in.

IF there are specific technical provisions that you want to ask about on that one, Senator, I would invite Brent Esplin here, who is from the Bureau of Reclamation, to answer any technical questions you have about that. But for the bigger picture, we want to make sure that if this settlement and this legislation affect other tribes that we are sitting down and talking things out.

Senator DAINES. Mr. Newland, thank you. And just another thanks to you and your help in getting the CSKT settlement across the finish line and signed. I appreciate working with you on that.

And to President Werk and the other tribal leaders here today, again, a warm welcome. Thank you for making the long trek. We are glad to have you here today.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Murkowski, Vice Chair Murkowski.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate the hearing. Sorry that things have been a little disjointed, but that is what happens around here.

The CHAIRMAN. Welcome to the Senate.

[Laughter.]

Senator MURKOWSKI. Unfortunately.

But it has been said, and it is certainly important to repeat, that Indian water rights are vested property rights. They are resources for which the United States does have trust responsibility here. We fulfill that responsibility by assisting tribes with their water rights claims through litigation and negotiation and implementation. So these are some of the things that are being considered here today.

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Thank you, Chairman Schatz.

Good afternoon. Today, we will hear two Indian Water Settlement bills introduced by our colleagues on this Committee, Senators Cortez Masto and Tester.

But before I talk about these bills, I have to take a moment and remind Assistant Secretary Newland of our Committee Rules regarding submission of written testimony. Testimony is required to be submitted at least two business days prior to the hearing. We did not receive the Department's testimony on time. Not even close. This makes prep and engagement at this hearing very difficult for members, myself included.

Water is a valuable resource for Tribes. It is fundamental for Tribal public health and economic development on Indian reservations, particularly in the West. So it is important that we understand the role Indian water settlements play in tribal selfdetermination and why the federal government is involved in these settlements.

Federal statutes and treaties reserved lands for Indian reservations, but they did not typically address the water needs of these reservations. This oversight by the federal government has given rise to questions and legal disputes related to Indian water rights.

Indian water rights are vested property rights and resources for which the United States has a trust responsibility. The United States fulfills its trust responsibility by assisting Tribes with their water rights claims through litigation and negotiation and implementation of water settlements.

Negotiated settlements, rather than protracted litigation, has become the preferred approach to resolving Indian water rights disputes particularly because they result in not just a paper right but wet water. These settlements typically have multiparty agreement, to include states, holders of local water rights, such as agriculture irrigation districts, Tribes and the Federal government.

When such an agreement is reached, the parties typically seek Federal approval in the form of legislation. These settlements quantify a Tribe's water rights, provide funding for water infrastructure and economic development and provide water certainty to all water users.

So with that background, let's turn to the legislation.

S. 648, Senator Cortez Masto's bill for the Duck Valley Reservation, would make a technical correction to the Tribe's existing water settlement. It allows for the interest on the trust funds that had been collected prior to the effective date of the settlement be paid to the Tribe. I understand that these settlements usually authorize this to occur but this one did not.

I would suggest that my colleague work with me on an amendment to the bill to include the actual dollar amount of the interest payment, which I believe is $5 million as we look to advance this bill to a future markup.

S. 1911, Senator Tester's bill for the Fort Belknap Indian Community, would ratify the Fort Belknap Indian Community's 2001 water compact with the State of Montana, provide approximately $593 million in funding for water infrastructure

and economic development, and transfer and exchange over 58,000 acres of public lands into federal trust for the Community.

As I understand it, this water settlement does not yet have the broad support of all the parties nor the entire Montana delegation. I am hopeful that this hearing will help bring all of the parties together, along with the federal government, to improve this settlement legislation so that it can gain the full support necessary to advance in this Committee.

Right now, the cost of this settlement seems too high and the land transfers and exchanges need to be fully vetted and understood.

I look forward to working with both my friends, Senator Tester and Senator Daines, on this settlement going forward.

Thanks to all the witnesses for being here today. I look forward to hearing all of the testimony.

Senator MURKOWSKI. I want to ask Assistant Secretary Newland, the Department is generally guided in settlement negotiations by the criteria and procedures for the participation of the Federal Government in negotiation for the settlement of Indian water rights claims. Those are the criteria and procedures. So, under these, the Administration carries out an analysis of the appropriateness of the cost of an Indian water rights settlement.

So the question to you this afternoon is whether the department has applied these criteria and procedures to the Fort Belknap settlement as structured in the legislation that has been introduced? And if so, what did the department conclude regarding the cost of the settlement? If you can speak to that this afternoon, I would appreciate it.

Mr. NEWLAND. Thank you, Vice Chairman Murkowski. It is great to see you again as well. I appreciate your question.

The Administration still, like prior Administrations, follows the 1990 criteria and procedures. We have applied those criteria to this instance as well.

I think it is important to note that when it comes to the cost, we look at a number of factors. In addition to liability, there are so many other things that go into deciding whether the cost of the bill or the cost of the settlement is worth supporting here. We applied those factors. As President Werk has indicated in his testimony, and his answers here, there are so many complexities with this that are unique to Fort Belknap that have gone to our evaluation of the settlement.

Senator MURKOWSKI. So let me ask on that, we do understand that there is a unique aspect to Indian water claims that do requires whether it is some level of tailoring or what it is. But there is also, I would imagine, a matter of equity, a matter of fairness that requires a settlement process that is somewhat uniform with certain criteria that are applied consistently across the board to all settlements.

So this is probably a broader question, and again to you, Assistant Secretary Newland, is how the settlement for the Fort Belknap Indian Community compares to other settlements that the department has been involved in in settling? Perhaps more specifically, how does it compare to those other settlements in terms of the Federal contribution, the non-Federal contribution, and any waivers that might be applied?

Mr. NEWLAND. Thank you, Madam Vice Chair, for that question. I think it is really difficult, so we want to apply these criteria in a consistent way. That has been the department's practice for the

last 30 years. But every settlement is unique. In terms of the Fort Belknap, the legislation we are discussing today, I think there are a lot of ways where we have applied that criteria in a consistent manner to other settlements.

But as President Werk has articulated here, with a lot of the factors unique at Fort Belknap, it is really hard to make that comparison today. If I may, I would appreciate the opportunity to provide the Committee with a follow-up answer to that question if the record remains open.

Senator MURKOWSKI. Sure. I would appreciate that. And I guess as long as you are providing that, what about then with land transfers and exchanges? Are such land transfers and exchanges commonplace in a water settlement? How do any land transfers and exchanges impact the overall cost of a settlement? Is that something that you can provide an answer to today?

Mr. NEWLAND. Yes, sure. Thanks, Madam Vice Chair. The land transfer provisions in the proposed Fort Belknap settlement are unique unto themselves. But including land acquisition and land transfer provisions within a water settlement is not unique. In fact, the recent CSKT water settlement included land transfer provisions in there.

So again, I don't want to sound cliché by saying every one is unique. But it is not unique or it is not out of the realm of the ordinary to include land settlement provisions in a water claim settlement, or land acquisition provisions. Excuse me.

Senator MURKOWSKI. Okay. I will look forward to the information that you can provide us on this, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Vice Chair.

Secretary Newland, it sounds like the Department of Interior supports the technical fix to bring not just Duck Valley but four other similarly situated tribes in line with other Indian water rights settlements. Now Congress just needs to authorize those fixes for each affected tribe.

Is that correct?

Mr. NEWLAND. Yes, Mr. Chairman. There are four other tribal settlements that are implicated here. I can list them again for the record if you would like.

The CHAIRMAN. Yes, go ahead.

Mr. NEWLAND. Sure. It is the Crow Tribe Water Rights Settlement, from 2010, the Taos Pueblo Indian Water Rights Settlement, the Aamodt Litigation Settlement, and the Navajo-Gallup Water Supply Project Act from the last decade.

The CHAIRMAN. Thank you.

Chairman Thomas, thank you for your patience. Can you provide the details on the scope and the impacts of the projects your government has been able to undertake as a result of this settlement?

Mr. THOMAS. The impact our government took, the impact on it?

The CHAIRMAN. Yes.

Mr. THOMAS. The impact the government took on the settlement is that we, our settlement is huge for this small reservation here. It is continuously working for our tribe with the settlement dollars that we received. We are looking at completing the rehab sooner for our tribes on projects, to be completed, which is going to continue to increase.

Because of the increase in price and our remote location, the settlement would be much better with the use of the much-needed funds that are going to continue to help our community. We here on the Duck Valley Reservation are very, very remote, 100 miles north of us and 100 miles south of us is the nearest providing contractors to provide our much-needed irrigation project to be completed.

The CHAIRMAN. Thank you very much, Chairman. And thank you for your patience and thank you for your leadership.

I know I will work with Catherine Cortez Masto and Jackie Rosen to get this bill across the finish line. We very much appreciate it.

If there are no more questions for our witnesses, members may also submit follow-up written questions for the record. The hearing record will be open for two weeks.

I want to thank all of the witnesses and the staff and the members for their time and their testimony.

Mr. Werk, you wanted to say one more thing before we adjourned.

Mr. WERK. If I could, Mr. Chairman.

The CHAIRMAN. Yes.

Mr. WERK. I really appreciate that.

I just want to say how much I appreciate Senator Murkowski's questions. I appreciate Assistant Secretary Newland answering them.

We all know there is well over 500 tribes in this Country. The United States has only settled about 30 some Indian water rights settlements. There is a lot of work that needs to get done.

I have always been a fan of Executive Order 13175 since its inception. President Biden reaffirmed that. And the Administration has been doing a good job doing consultation. We have had some very good consultation with that and Covid.

My point is that I think there is more work to be done when it comes to Indian water rights policy. That needs to start with that Executive Order. We need to go out and have meaningful consultation and negotiated rulemaking with tribes to where we can improve on that.

Now, listening even to the Assistant Secretary, that is very correct, we all know tribes are unique. They are all unique to manage their own affairs with their sovereign status. But there are some things, like with criteria, that should be the same. And one of the big things is Winters and PIA.

So as far as Fort Belknap is concerned, we are unique, like I said. And it is Indian people using Indian water. That is what I meant when I said earlier about justifying our water rights, because we can through Winters, and we can through PIA as far as our claims are concerned and what our asks are.

But that is just some comments. I think what would be helpful is a Senate oversight hearing to have this discussion further, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you. We would welcome any additional comments in writing for the record.

With that, we want to thank everybody. The hearing record will be open for two weeks. I want to thank all the witnesses for their time and their testimony.

This hearing is adjourned.

[Whereupon, at 4:38 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. GREG GIANFORTE, GOVERNOR, STATE OF MONTANA

Thank you for the opportunity to provide a written statement to the Senate Committee on Indian Affairs regarding S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021. As the Governor of the State of Montana, I recognize that finalizing Indian water settlements is preferable to divisive, prolonged, and costly litigation. For decades, Montanans have worked incredibly hard to resolve long-standing claims to water through settlements. Montana has undertaken this endeavor with the understanding that negotiated settlements create certainty, not only for water users, but also for our tribal nations.

S. 1911 requires further discussion and coordination, particularly with the State of Montana. As I witnessed during my time as Montana's sole Congressman, ensuring the full participation of the Department of the Interior, Department of Justice, and the Office of Management and Budget is key in negotiating and securing a settlement. Similarly, the State of Montana must be at the table as part of these ongoing negotiations.

Further, the State would benefit from additional time and coordination with the federal team, as well as stakeholders in Montana, on the proposed legislative settlement and its alignment with the state compact. The Fort Belknap-Montana Compact (MCA§ 85–20–1001) passed the Montana State Legislature and was ratified by the State on April 16, 2001. Much has changed in the decades since this compact was entered into by the State of Montana and the Fort Belknap Indian Community of the Fort Belknap Reservation.

While I generally support and appreciate the long-term benefits Indian water rights settlements offer to Montana, I urge this Committee to allow for ongoing negotiations to occur prior to advancing S. 1911. It is essential that the State have an opportunity to participate in negotiations with the federal team to determine the terms of this settlement.

WILDLIFE MONTANA AND THE WILDERNESS SOCIETY

October 7, 2021

Dear Chairman Schatz, Ranking Member Murkowski, and members of the committee:

On behalf of Wildlife Montana and The Wilderness Society, we write to support S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act, by Senator Tester.

Our organizations are committed to working with Native communities to ensure that America's public lands are managed in an equitable manner. We understand the injustice inflicted upon the Gros Ventre and Assiniboine Tribes by the Federal government in the mismanagement of the tribes' water and the removal of land from the Fort Belknap Indian Reservation.

The proposed water rights settlement will help to address this inequity by resolving tribal water rights, supporting tribal economic development, and restoring certain lands to the reservation. Among the lands to be restored are sacred lands that were removed from the reservation in an indefensible manner. The settlement will protect sacred sites, maintain tribal cultural practices, preserve headwaters for tribal water supply, and enhance tribal economic vitality and self-determination.

We support restoring to the reservation lands that were removed from the tribes by the federal government by placing the tribes under extreme duress and are interested in ensuring that the important values of these lands are maintained.

We look forward to working with the tribes, Senator Tester, and the committee on the management of the restored trust lands and urge the committee to approve S. 1911.

Sincerely,

WILD MONTANA AND THE WILDERNESS SOCIETY

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. ANDREW WERK

Question. In your testimony, you state that the method the United States should apply in quantifying your Indian water rights is the practicably irrigable acreage of the reservation or PIA standard established by the U.S. Supreme Court in *Arizona v. California*. As I understand it, this is not the only standard for quantifying Indian reserve water rights. Another standard that has been applied is the "homeland" standard. (Arizona Supreme Court in *Gila V*). Under this standard, federal Indian reserved water rights are quantified based on the Tribe's past, present, and future water needs, not just those needs tied to agriculture. Please explain why you are urging the United States to apply the PIA standard for determining your Indian reserve water rights?

Answer. We set forth the facts related to the creation of the Fort Belknap Reservation from our historical documents, e.g., treaties and Congressional Acts, the U.S. Supreme Court's holding in *Winters v. United States*, which specifically addressed the adjudication of a portion of the Indian reserved water rights for our Gros Ventre and Assiniboine Tribes, and review the key holdings of *Arizona v. California*, ruling on the quantification of reservation lands established, at least in part, for the development of an agricultural economy as a means for creating a permanent, self-sufficient, and livable homeland. We, then, address the holding and conclusions of the Arizona Supreme Court's decision in the general stream adjudication involving five Arizona tribes in *Gila V*. We conclude that although these two recognized methods for quantification are viable and legally supported, the PIA standard is appropriate for quantifying our Reservation Indian reserved water rights for future use from the Milk River, which forms the northern border of our Reservation.

Creation of the Fort Belknap Reservation. The first tract of land set aside by the United States with the major purpose of creating a self-supporting, agrarian homeland was for the Blackfoot Nation in 1855. Treaty of October 17, 1855, 11 Stat. 657. At that time, our Gros Ventre Tribe was part of the Blackfoot Nation. The federal government's policy included the expectation that the tribes would be confined to and settle permanently within their territorial boundaries where they would abide in permanent houses and obtain their sustenance by agricultural pursuits and stock raising.

In 1888, Congress established the final, permanent homeland, the Fort Belknap Reservation, for the Gros Ventre and Assiniboine Tribes ("Tribes"). Agreement of May 1, 1888, 25 Stat. 8. This Agreement required the relinquishment of most of the tribes' territory and resulted in a significant reduction in the lands that the Tribes could occupy and use. The federal purpose of the 1888 Agreement continued the policy of establishing an agricultural economy for the Tribes. The Agreement expressly stated that the Tribes would "obtain the means to enable them to become self-supporting, as a pastoral and agricultural people[,]"—creating an agricultural Reservation economy. Funds were provided for the purchase of cows, bulls, and other stock, and agricultural implements, among other purchases, and for "undertak[ing] the cultivation of the soil." Agreement at Articles III, V.

By 1898, the Tribal members were irrigating about 30,000 acres on the Milk River for grain, grass, and vegetables. Congress authorized the construction of irrigation systems on the Reservation, now known as the Fort Belknap Indian Irrigation Project. And, based on the promises of the federal government in the 1855 Treaty and 1888 Agreements, the United States initiated a lawsuit for the Tribes to restrain settlers upstream on the Milk River from preventing water from flowing to irrigate the Indian lands on the Reservation due to these non-Indian diversions and depletions. The Fort Belknap Reservation is the birthplace of "Indian reserved water rights."

The Winters Doctrine. The United States Supreme Court first recognized federal, Indian reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908). This case directly involved the Gros Ventre and Assiniboine Tribes on the Fort Belknap Reservation. It was our Tribes who fought for the right to use the water on our Reservation and established the federal law that is the seminal legal authority for all Indian reserved water rights in the United States. The Court analyzed the 1888 Agreement creating the Fort Belknap Reservation and concluded that certain elements of the agreement were "prominent and significant." *Id.* at 575–76. In particular, the Court found that the purpose and intent of this smaller reservation of land was to "enable [the Tribes] to become self-supporting, as a pastoral and agricultural people." The high Court reasoned that "[i]f they should become

such, . . . a smaller tract [of land] would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless." *Id.* at 576. The Court specifically rejected the argument that the Indians deliberately gave up the means of irrigation.

The Court explained that "[t]he Indians had command of the lands and the waters command of all their beneficial use, whether kept for. . . grazing. . . or turned to agriculture and the arts of civilization."*Id.* (The Montana Supreme Court, subsequently, concluded that "acts of civilization" likely include the consumptive uses for industrial purposes.)[1] The Winters Court applied "a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id* Therefore, under the *Winters* doctrine, the Court held that the establishment of the Reservation impliedly reserved the amount of water necessary to irrigate its lands and to provide water for other purposes. *Id.* at 576–77.[2] Finally, the Court also held that these reserved water rights are exempted from appropriation under state law.[3]

The *Winters Doctrine* has stood the test of time and for over a century has been applied to recognize tribal, Indian reserved water rights. In summary, the *Winters* Court created federal, Indian reserved water rights law with the following characteristics: (1) a reservation of water is to be implied when it is required to accomplish the purposes of a Treaty, Congressional Act, or Agreement between the United States and tribes establishing a tribe's reservation oflands with the expressed right to exclusive tribal possession of the land, Id at 575–76; (2) the amount of water must be sufficient for all their beneficial use when the purpose is to allow the Indians to become a "pastoral and civilized people," including the development of an agriculture economy; and (3) Indian reserved water rights are exempted from appropriation under state law.[4]

Agricultural Reservations & PIA. In *Arizona v. California*, 373 U.S. 546 (1963), the United States Supreme Court adjudicated, in part, the water rights of five reservation tribes on the Colorado River mainstream in the Lower Basin to determine the quantity of each tribes' reserved water rights. The Court affirmed the validity of federally reserved Indian water rights under the Winters decision when reservations are created, explaining that such rights also include those reservations established by an Act of Congress or by Executive Order. The Court held that when the reserved water rights are necessary to fulfill the purposes for which it was created, with a new water use that did not exist prior to creation of the Indian reservation, the priority date is the date of establishment of the reservation.[5] *Id.* at 595–601.

The Court concluded that Indians are entitled to sufficient water to develop, preserve, produce, or sustain food and other resources of the reservation in order to make it livable. Id. at 599–600. The Court found that when the United States created the five reservations included in this adjudication, "it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." *Id.* at 596. This is now referred to as "practicably irrigable acreage" or PIA—the standard by which Indian water rights are quantified where the purpose of the reservation includes agricultural pursuits. Under this standard, if land within a reservation can be cultivated through irrigation and if such irrigation is practicable when applying relevant economic measures, then the tribe is entitled to the amount of water necessary for such irrigation. The Court reasoned that "[m]ost of the land in these reservations is and always has been arid, if the water necessary to sustain life is to be had, it must come from the Colorado River." *Id.* 598. The United States was aware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life

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[1] *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76; 712 P.2 754 (1985) (explaining the *Winters* Court holding related to the Fort Belknap Reservation).

[2] The *Winters* Court adjudicated a portion of the Fort Belknap Indians' reserved water rights and issued a decree recognizing an annual diversion from the Milk River for the Fort Belknap Indian Irrigation Project. The FBIC is now seeking a final Congressional settlement of all of its reserved water rights for the Reservation.

[3] The Court relied, in part, on prior cases establishing the Government's power to reserve the waters and exempt them from appropriation under the state laws, citing *United States v. Rio Grande Ditch & Irrigation Col*, 74 U.S. 690, 702–03 (1899); and *United States v Winans*, 198 U.S. 371 (1905).

[4] See also *United States v. Rio Grande Dam & Irrigation Dist.*, 174 U.S. 690, 703 (1899) (holding that the states' power to create water rights is subject to two limitations: (1) a state cannot "destroy the right of the United States, as the owner oflands bordering on a stream, to the continued flow of the waters"; and (2) a state is limited by the federal navigation servitude."

[5] *See* also *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 92; 712 P.2 754 (1985); Cf *United States v. Adair*, 723 F.2d 1394, 1412–15 (9th Cir. 1983) (when water is reserved for a tribe to continue aboriginal uses, such water may have a time immemorial priority date).

of the Indian people and to the animals they hunted and the crops they raised." *Id.* 598–99.

Finally, the Court rejected Arizona's urging that the amount of water be measured by "the reasonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres." *Id.* at 596. The Court reasoned that the quantity of "water was intended to satisfy the future as well as the present needs of the Indian reservations and" [agreed with the Special Master who] "ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." *Id.* at 600. Rejecting the position urged by the State of Arizona, the Court explained that if the quantity of water reserved "is measured by the Indians' 'reasonably foreseeable needs,'" it really means that quantification would be based on the number of Indians—and the number of Indians that there will be in the future "can only be guessed." *Id.* at 600–01. The Court also rejected the application of the equitable apportionment doctrine, explaining that it is "a method of resolving water disputes between States." *Id.* 596–97.

In summary, the *Arizona* Court further defined the characteristics of Indian reserved water rights as follows: (1) water rights are reserved for the Indians effective as of the time the Indian Reservations were created; (2) these Indian reserved water rights are present perfected rights; (3) when a purpose of the reservation includes agricultural use, the method of quantification is the volume of water needed for the practicably irrigable lands,[6] in addition to water needed to support life and create a livable homeland; (4) Indian reserved water rights include future (*i.e.*, uses that would necessarily be needed and continued "through the years,") as well as present water needs, the quantity of which is not determined by the size of the Indian population,[7] or only on current use; (5) once the reserved water rights are quantified, they may be used for any lawful purposes;[8] and (6) reserved water rights are federal water rights and are not dependent on state law water regimes, and cannot be lost because of non-use under state-law concepts such as abandonment and forfeiture.

Gila V. In 2001, the State Supreme Court of Arizona adjudicated the reserved water rights of five tribes in Arizona in the general stream adjudication of the Gila River. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 201 Ariz, 307 (2001) (*Gila V*). In *Gila V*, the State court specifically addressed the following issue: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" *Id.* at 310. This case is recognized as establishing what is known as the "homeland" standard for quantifying federal Indian reserved water rights. The homeland standard is another method for quantifying tribal reserved water rights.

With regard to this particular State water rights adjudication, the court applied certain rules adopted by prior U.S. Supreme Court decisions related to the characteristics of Indian reserved water rights (*e.g.*, quantification includes a tribe's present and future use,[9] and state laws of prior appropriation do not apply), and further articulated the "homeland" standard. In *Gila V*, the court's method of quantification for determining the amount of water reserved with the creation of an Indian reservation did not include "analysis of each of the [five] tribes' treaties and enabling documentation to determine the reservation's individual purpose." *Id.* at 313. The court reasoned that because many Indian reservations were pieced together over time, such at the Gila River Indian Community, such an analysis of"an arbitrary patchwork of water rights would be unworkable and inconsistent with the concept of a permanent, unified homeland."*Id.*

The court also reasoned that when the Indian reserved water rights are implied from the purposes of the historical documents establishing the reservation, and the

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[6] *See* also Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, Natural Resources Journal, 46:399–400, 429 (Spring 2006). The now-Solicitor of the Department of Interior, Mr. Anderson stated that "most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework."

[7] *See* also *United States of America v. Walker River Irrigation District*, Case No. 3:73-cv-00127-MMD-WGC at 8 (Sept. 21, 2021) (explaining that the Arizona I Court determined that the relevant tribes' water rights would be measured by practicably irrigable acres, instead of some other measure such as the tribes' population or their 'reasonably foreseeable needs.')

[8] *Arizona v. California*, 439 U.S. 419,422 (1979) (Arizona II).

[9] The court distinguished the scope and nature of the Winters ' Indian reserved water rights from the reserved water rights of non-Indian federal reservations, which, the court explained, are more narrow and strictly construed, Id. at 313; *see* also *Cappaert v. U.S.*, 426 U.S. 128 (1976), and *U.S. v. New Mexico*, 438 U.S.zz 10 The FBIC will be the last Indian reservation out of seven in Montana to settle its Indian reserved water rights, through the negotiation process established by the Montana Reserved Water Rights Compact Commission with the participation of a Federal Negotiating Team.

purpose is not clear but focuses "only on the motives of Congress," it does not accurately represent the true reasons for which Indian reservations were created, and an "imputed intent for the purpose of quantifying an extremely valuable right to a scarce resource" is problematic. Id. 314. The court concluded that "[i]t is doubtful that any tribe would have agreed to surrender its freedom and be confined on a reservation without some assurance that sufficient water would be provided for its well-being," id., establishing the "homeland standard" for quantification.

Conclusion

In 1908, the United States Supreme Court affirmed the lower court's decision to award the Gros Ventre and Assiniboine Tribes a portion of our Indian reserved water rights on the Milk River in Montana. Subsequently, the Fort Belknap Indian Community negotiated and reached an agreement with the State of Montana and the Federal Government in 2001 that settles our Indian reserved water rights. The Gros Ventre and Assiniboine Water Rights Settlement Bill before Congress, S.1911, will ratify our 2001 Water Compact, where the quantification of our rights is based, in part, on the principals of "practicably irrigable acreage," and the holdings of the U.S. Supreme Court in the Winters and Arizona decisions. [10]

The purpose of the establishment of our Tribes' final and permanent homeland, the Fort Belknap Reservation, was clear and expressly stated: to create a livable homeland that includes sufficient water for all our present and future beneficial uses and well-being, and to establish an agricultural economy, requiring sufficient water for our present and future irrigated lands. The PIA standard was used to determine the quantification of our future reserved water rights in the Milk River, a major source of our water supply. Agriculture remains the sole economic industry on our Reservation and is significant for our ability to be self-sufficient. However, the FBIC's Indian reserved water rights claims and quantification under the negotiated Water Compact can be considered a hybrid of both the PIA and non-PIA methods of determining our Indian reserve water rights because of negotiations and compromises made between the parties that resulted in our 2001 Water Compact.

Our settlement includes consideration of sufficient water for the creation of a permanent homeland, which is also a part of the Winters doctrine. We acknowledge, however, that the "homeland" standard as articulated in Gila Vis a method of quantifying Indian reserved water rights and supports the application of a general reservation purpose that "provide[s] a home for the Indians, [as] a broad one, that must be liberally construed." [11]

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO HON. ANDREW WERK

(1) According to Assistant Secretary Newland's testimony, the Department of Interior uses the 19990 "Criteria and Procedures for the Participation of the Federal Government in Negotiations for Settlement of Indian Water Rights Claims" [1] ("Criteria and Procedures") as a framework for negotiating Indian water rights settlements. One feature of the Criteria and Procedures is to evaluate the costs for settling or not settling claims.

a) In your testimony you stated that the monetary value of the proposed settlement is less than the Tribes' claims for damages if you were to litigate. You also stated that in 2001 the Tribe subordinated its water rights on the Upper Peoples Creek as part of the negotiation process. Can you elaborate on your testimony, specifically on the issue of Criteria and Procedures metric on costs of settling versus not settling your Tribes' claims?

(2) Please describe the ways in which the Tribe has worked and continues to work with the state of Montana and the federal government to develop a final settlement agreement equitable to all parties. In particular, are there terms being offered to the state that, to your knowledge, other Tribes have not offered to their respective state counterparts?

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[10] The court distinguished the scope and nature of the Winters ' Indian reserved water rights from the reserved water rights of non-Indian federal reservations, which, the court explained, are more narrow and strictly construed, Id. at 313; see also Cappaert v. U.S., 426 U.S. 128 (1976), and U.S. v. New Mexico, 438 U.S.zz 10 The FBIC will be the last Indian reservation out of seven in Montana to settle its Indian reserved water rights, through the negotiation process established by the Montana Reserved Water Rights Compact Commission with the participation of a Federal Negotiating Team.

[11] *Gila Vat* 315, quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981).

[1] 55 Fed. Reg. 9223–9225 (March 12, 1990).

President Jeffrey Stiffarm, FBIC Council President,[2] respectfully responds as follows.

Introduction. Congressional passage of Senate Bill, S. 1911, the Gros Ventre and Assiniboine Tribes Indian Water Rights Settlement, will be a historic moment—both as the culmination of our Tribes' century-long battle to secure, protect, and develop our Indian reserved water rights and as the end of the trail for our Tribes' journey to complete the recognition of our water rights since the United States Supreme Court issued its decision in *Winters v. United States.*[3] Our Fort Belknap Reservation is the birthplace of the *Winters* Doctrine that established federal, Indian reserved water rights for all Indian reservations that are created for the purpose of providing permanent homelands for Indian people. The FBIC will be the last Indian reservation out of the seven reservations in Montana to settle its Indian reserved water rights through the negotiations process established by the Montana Reserved Water Rights Compact Commission, which included the participation of our assigned Federal Negotiating Team.

The Criteria and Procedures developed by the U.S. Department of Interior ("Department") provide guidelines for the Federal Government's participation in the negotiations and settlement of Indian reserved water rights, consistent with the policy of the United States to favor settlement over litigation of such rights.[4] Within the published guidelines, the Department's assigned Federal Negotiating Teams apply the criteria as "a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement."[5]

The criteria articulated in the 1990 Criteria and Procedures regulations include, in part, that the non-Federal cost-sharing be proportionate to the benefits received by the non-Federal parties (#6); that the operating capabilities and various resources of the Federal and non-Federal parties to the claims' negotiations be considered in structuring a settlement (e.g., operating criteria and water conservation in Federal and non-federal projects) (#8); and that federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdictions (#10).

In response to SCIA Chairman Brian Schatz's questions, we set forth the following:

Question 1. What are the costs of settling versus not settling the FBIC reserved water rights claims?

Answer. Settling our water rights through legislation passed by Congress is the most cost-effective strategy for resolving more than 100 years of claims against the United States for its failure to protect FBIC reserved water rights. The costs of failing to settle our water rights are both monetary and non-monetary. In deciding to settle our FBIC claims, we analyzed previous tribal reserved water rights litigation efforts and the negotiations/settlement process established by the Federal Government and the State of Montana, weighing the advantages and disadvantages of our options. We identified significant costs and other disadvantages in not settling our claims.

First, our water rights claims are pending before the Montana Water Court and would be immediately litigated if we do not settle our claims.[6] As trustee of our Indian reserved water rights, the United States is required to represent our interests before the State Water Court under state and federal laws.[7] Adjudication of our Indian reserved water rights in the State Water Court would be very lengthy, time-consuming, and expensive. For example, the Big Horn litigation of the reserved

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[2] On November 2 and December 14, 2021, the Fort Belknap Indian Community (FBIC) held elections for membership on the FBIC Council. Mr. Jeffrey Stiffarm is the current President of the FBIC Council.

[3] 207 U.S. 564 (1908).

[4] 55 Fed. Reg. 9223–9225 (March 12, 1990).

[5] *Id.* at 9223.

[6] In 2013, the Montana Legislature announced that it was suspending negotiations under the Reserved Water Rights Commission for tribes who did not have a Congressionally-approved water rights settlement, requiring such tribes to file their reserved water rights claims with the State Water Court by June 30, 2015. The United States, as trustee, filed our Indian reserved water rights claims, which are currently pending before the Water Court.

[7] 43 U.S.C. 666 (1952) (waiving the sovereign immunity of the United States to involuntary joinder as a party in state court general water rights adjudications).

water rights of the Eastern Shoshone and Northern Arapaho Tribes on the Wind River Reservation in the Wyoming state court began in the 1980s and took 37 years, with 20,000 claimants, at an estimated cost of $60 million. [8]

Furthermore, under the clear precedent of the *Winters* doctrine, we would claim the natural flow of the Milk River with senior priority rights to use the water based on the date of the establishment of our Reservation. [9] This would negatively impact more than 100,000 acres of non-Indian agricultural lands in northcentral Montana-where the Federal Government is responsible for the construction and management of the Milk River Project along the Milk River Basin. This would result in enormous costs to non-Indian irrigators and the agricultural industry in northcentral Montana and beyond.

If the FBIC reserved water rights claims are litigated, individual water users will also be forced to object and litigate these claims in an effort to defend their own rights in the State court. [10] This will result in additional litigation costs. We have been told by non-Indian irrigators on the Milk River that they prefer settlement and do not want to have to litigate against our claims in the State Water Court.

Second, because the State Court cannot resolve our damage claims against the United States, we would also need to initiate litigation against the United States to secure finality of our damages claims. We have identified six specific claims against the United States that include both Constitutional takings claims and breach of trust claims. These claims total more than $730 million and have been documented by a well-respected agricultural economist.

If we are able to settle our water rights through legislation, we are willing to seek only a portion of these damage claims to support the costs of the development of our water through water infrastructure projects. In addition, settling our water rights through federal legislation allows us to satisfy a portion of our claims through the return of ancestral lands and reservation lands currently held by the Federal government. [11]

Third, another positive outcome from choosing the settlement of our reserved water rights and claims against the United States is the infusion of hundreds of millions of dollars into the local and regional economy that will create thousands of jobs over 20–30 years resulting from the rehabilitation and betterment of our federal Fort Belknap Indian Irrigation Project and the construction of our other water infrastructure projects. [12] We rely on non-Indian businesses and contractors in our region and State to assist us with our Reservation construction projects.

Finally, because litigation does not provide for compromises, including those that protect the non-Indian water users who rely on the same water sources, by selecting to settle our claims, we will achieve peace and harmony with our neighbors in northcentral Montana and a significantly less costly resolution than litigation can offer.

Question 2. Are there terms being offered to the state that, to your knowledge, other Tribes have not offered to their respective state counterparts?

Answer. Each water settlement is different. In our compact and proposed water settlement legislation we went to extensive lengths to provide for non-Indian water users in our region. We live in an agricultural region. We all need to work together to ensure that water resources are available to support our tribal economy as well as the regional economy.

First and foremost, the FBIC made significant compromises with the State and regional stakeholders that include protections for the non-Indians' continued irrigation use of the Milk River and Upper Peoples Creek, which are the two significant

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[8] Charles Wilkinson, Introduction to Big Hom General Stream Adjudication Symposium, 15 WYO. L. REV. 233, 234 (2015); Lyophile, 37-year lawsuit over water, tribal rights on Wind-Big Hom examined in UW event (September 1, 2014); *https://wyofile.com/2014/09/01/* (last visited January 3, 2022); Jason A. Robison, Wyoming's Big Hom General Stream Adjudication, 15 WYO. L. REV. 243,309 FN443 (2015), quoting Geoffrey O'Gara, What You See in Clear Water: Indians, Whites, and a Battle over Water in the American West at 174 (2000).

[9] *See also Greely v. Confederated Salish & Kootenai Tribes et al.*, 712 P.2d 754 (1985).

[10] See Montana Department of Natural Resources and Conservation, Proposed Water Rights Compact between the State of Montana and The Confederated Salish and Kootenai Tribes of the Flathead Reservation, explaining the result of failing to approve a tribal Water Compact and relying on the State Water Court to adjudicate it; *http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/cskt/watercompactreport.pdf* (last visited January 3, 2022).

[11] Through negotiations, part of our damages claim will be satisfied through ancestral land transfers back to the FBIC.

[12] Using a simple rule of $92,000 of government spending creates one job-year (or one job for one year), our proposed Water Rights Settlement will create an approximate total of 6,557 job-years, over 300 jobs per year. See The Council of Economic Advisers report titled "Estimates of Job Creation from the American Recovery and Reinvestment Act of 2009."

water sources for the FBIC, bordering and on the Reservation. In particular, during the 1990s' State-Tribe-Federal negotiations of the FBIC Water Compact, our elders urged a solution for our Water Compact that mitigated the development and use of the FBIC's negotiated quantified, reserved water rights on northcentral Montana irrigators in order to maintain peace and harmony with our neighbors. Articles III (Tribal Water Rights) and VI (Contributions to Settlement) of the 2001 Water Compact, MCA§§85–20–1001 through 85–20–1008, articulate the negotiated agreements between the State, FBIC, and Federal Government on the Milk River and Upper Peoples Creek.

In particular, the Commission conducted almost 3 dozen public meetings between 1997 and 2000 to inform stakeholders in northcentral Montana and Tribal members about the Water Compact, solicit comments, and consider local input on the terms and conditions of the FBIC Water Compact.[13] The Commission also disseminated copies of the Water Compact to local libraries, Conservation District offices, County Extension Offices, FBIC Water Resources Office, etc. The result of this extensive public information effort was the overwhelming approval of the State Legislature in 2001 in support of the FBIC Water Compact (95 percent approval).

We have continued our outreach efforts in the region to a variety of stakeholders, including our extensive efforts over the last 3 years that have included environmental and conservation groups, and are working closely with the Secretary's Indian Water Rights Office, the State Administration, and, in particular, the Mille River Joint Board of Control, which is comprised of representatives from the private irrigation companies on the Mille River in northcentral Montana. The parties are currently meeting to finalize the mitigation activities for the non-Indian water users that will occur with the implementation of our settlement and to determine the federal-state cost share agreements, as described at Article VI.B. (Mitigation of Impacts on the Mille River Project) and Article VI.C. (Upper Peoples Creek Dam and Reservoir) of the Water Compact. The mitigation for (1) the Milk River Project will protect the non-Indian irrigators in northcentral Montana to allow them their continued use of the Mille River water supply; and (2) the construction of the Upper Peoples Creek Dam and Reservoir on the Fort Belknap Reservation is intended to improve the Upper Peoples Creek water supply for the Tribes because of the FBIC's agreement to subordinate our senior water rights in the Upper Peoples Creek, upstream of the Reservation, in order to allow continued, historical irrigation by non-Indian families on the Upper Peoples Creek. These mutual agreements and compromises were a significant factor in the approval of our Water Compact.

Second, the State has made, and will make, financial contributions to the Water Compact and FBIC Water Rights Settlement, as it has done for other Montana tribes. As part of its costshare for the Water Compact and settlement, in 2005, 2009, and 2013 the State Legislature authorized $13,670,000, including $4,170,000 in cash and $9,500,000 in general obligation bond authority, and has spent $4,000,000 to date on in-kind services for technical support related to the Water Compact mitigation activities. The State has indicated a commitment of $5 million to the cost of design and construction of the Upper Peoples Creek Dam and Reservoir on the Reservation. The non-Federal monetary contribution to our Water Settlement is within the average range of non-Federal monetary contributions reported by the Department.[14]

Finally, our Water Compact, Article IV, Implementation of Compact, and Settlement provide an agreement on the administration of the Tribal reserved water rights, including the creation of a Milk River Coordinating Committee, which can improve the conditions of water supply, water quality, and habitat in the Milk River basin.

In summary, first, we believe that the advantages of achieving a Congressional settlement of our reserved water rights claims far exceed the disadvantages that come with choosing not to settle. Second, to our knowledge, wc have not offered any terms to the State in our final settlement agreement that have not been offered by other tribes to their respective state counterparts.

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[13] Montana Reserved Water Rights Commission archive.

[14] *See, e.g.,* Presentation of Pam Williams, Director of the Secretary's Indian Water Rights Office, Symposium on Settlement of Indian Water Rights (August 25, 2021).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO HON. BRYAN TODD NEWLAND

Question 1. How does the Department apply the 1990 "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims" to all settlements?

Answer. The Department applies the 1990 Criteria and Procedures on an ongoing basis during the negotiation of Indian water rights settlement. The Department takes into consideration the unique circumstances of each settling Tribe in its evaluation of each criteria.

Question 2. How does the Fort Belknap Water Settlement compare to other Indian water settlements in terms off ederal and non-federal contributions as well as applicable waivers.

Answer. As noted in the Department's written testimony, the Department has concerns regarding the unknown federal cost of this settlement. The non-federal contributions are also unknown and are to be negotiated after the fact. With these costs unknown, it is difficult to say with any certainty how the federal and non-federal contributions to the Fort Belknap Water Settlement compares with other Indian water rights settlement.

Regarding waivers, there are some substantive differences between the waivers and retentions in S. 1911 and the waivers and retention of claims included in previously enacted Indian water rights settlement. The Department remains committed to working with the Tribes to make sure that appropriate waivers are included in any legislation to approve the Fort Belknap Water Settlement.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. BRYAN TODD NEWLAND

Question 1. The Department of the Interior is generally guided in settlement negotiations by the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (55 FR 9223, March 12, 1990) (Criteria and Procedures). Under these Criteria and Procedures, the Administration carries out an analysis of the appropriateness of the costs of an Indian water rights settlement.

In your answer to my question at the hearing you stated that the Department has applied these Criteria and Procedures to the water settlement for the Fort Belknap Indian Community as structured in S. 1911, but that you would have to get back to the Committee with the Department's analysis and conclusions.

What did the Department conclude with respect to the costs of this settlement?

Answer. As noted in the Department's written testimony, the Department has concerns regarding the open-ended nature of the Federal contribution required by S. 1911. We are continuing to work with the Tribes to address that concern. Once addressed, the Department will be able to continue its analysis of the costs and reach a more definitive conclusion regarding the appropriateness of the Federal contribution.

Question 2. At the hearing I asked you how the settlement for the Fort Belknap Indian Community in S. 1911, compares to other settlements the Department has been involved in negotiating, recognizing of course that these settlements require some level of tailoring, but also as a matter of fairness and equity, some uniformity, too, in process. In your response to my question, you stated you would have to get back to the Committee with a more detailed answer. How does the Settlement for the Fort Belknap Indian Community in S. 1911 compare to other settlements the Department has been involved in negotiating?

Answer. Every settlement is unique. This settlement is similar to others in that, among other benefits, it would: resolve the water rights claims of the Fort Belknap Indian Community and of the United States on behalf of the Fort Belknap Indian Community and Allottees; provide funding to address water resources needs on the Reservation; and promote cooperation between the Tribes and the non-Indian community.

Question 2a. Specifically, how does this settlement compare to those other settlements in terms of the federal contribution, the non-federal contribution, and the waivers that are applied?

Answer. See the answer above to question 2 from Chairman Schatz.

Question 2b. This settlement includes a large transfer and exchange that also involves the State of Montana. Are such land transfers and exchanges commonplace in a water settlement? If a land transfer or exchange is included in a water settle-

ment, how do they impact the overall cost of the settlement? (Does it lower the overall cost to the federal government, for example?)

Answer. The inclusion of land transfers in Indian water rights settlement, while not "commonplace," are not unprecedented. For example, the recent Confederated Salish and Kootenai Tribes Settlement included the transfer of U.S. Fish and Wildlife Service land to the Tribes. How the transfer of lands impacts the overall cost of the settlement is something that the Department is still considering. It is possible that the land transfer provisions will have a positive, negative, or even neutral impact on the overall cost of settlement.

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