

TESTIMONY OF
THE BLACKFEET TRIBE of the BLACKFEET INDIAN RESERVATION, MONTANA
Terry J. (T.J.) Show, Chairman, Blackfeet Tribal Business Council
Senate Indian Affairs Committee
S. 399, BLACKFEET WATER RIGHTS SETTLEMENT ACT
October 20, 2011

Mr. Chairman, and members of the Committee, my name is T.J. Show. I am Chairman of the Blackfeet Tribal Business Council. I am honored to be here on behalf of the Blackfeet Tribe in support of the Blackfeet Water Rights Settlement Act.

I want to thank the Committee for holding this hearing on S. 399, a bill that is critical to the future of the Blackfeet People. I also want to thank Senator Max Baucus and Senator Jon Tester for their strong support of the Tribe in introducing this bill, and their understanding of the importance of this bill to the Blackfeet Tribe. I also want to thank their staffs and the Committee staff for their hard work on this bill.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe. It represents an historical breakthrough in the Tribe's over century long battle to secure and protect its waters rights. S. 399 ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the Federal Government and most importantly provides the critical resources needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

The Blackfeet Reservation and the Blackfeet People

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

Our treaty, known as Lame Bull's Treaty, was signed in 1855. Executive orders and statutes followed, each taking large areas of our traditional land. In the end, we ended up with the land that was most sacred to us: our present day reservation

In 1896, the Northern Rockies were taken from us because speculators believed there were rich minerals to be had. When mineral riches did not materialize, this most sacred part of our homeland became part of Lewis and Clark National Forest and a portion later became part of

Glacier National Park in 1910. To this day we question the legitimacy of the 1896 transaction. While the Tribe retained hunting, fishing and timbering rights in the area taken, we hope that one day our claims to this area will be resolved.

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

The Tribe now has over 16,000 members, about half of whom live on the Reservation. Our people have worked hard to survive in the sometimes harsh climate of the Rocky Mountains, and to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

The Critical Importance of Water

Water is critical to the Blackfeet People. It is central to our culture and our traditions. It is an essential element of our way of life, and is crucial to our continuing survival culturally, traditionally and economically. Six different drainages are encompassed within the Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. These are the veins and arteries of the Reservation and provide life to the Blackfeet People and bind us together as a People.

Water is the source of creation to the Blackfeet People. We believe that rivers and lakes hold special power through habitation of Underwater People called the *Suyitapis*. The *Suyitapis* are the power source for medicine bundles, painted lodge covers, and other sacred items. Contact with supernatural powers from the sky, water and land is made through visions and dreams and manifests itself in animals or particular objects. The beaver ceremony is one of the oldest and most important religious ceremonies, and beaver bundles have particular significance. The ceremonial importance of water is especially present in the use of sweat lodges as a place to pray, make offerings and cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Water is truly the lifeblood that sustains the Blackfeet people and our way of life. The water resources of the Blackfeet Reservation are essential to make the Reservation a productive and sustainable homeland for the Blackfeet people and for our communities to thrive and prosper. Safe and clean drinking water supplies are vital for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture.

The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of abundant fish and wildlife, which depend directly on the water resources of the Reservation to support them and allow them to thrive. Large game animals, including moose, elk, and deer abound. The Reservation provides significant habitat for grizzly bears and other bears, and for other animals such as lynx, pine marten, fisher, mink, wolverine, weasel, beaver, otter, grey wolf, swift fox and others. Numerous bird species are also found on the Reservation including bald eagle, golden eagle, osprey, ferruginous hawk, northern goshawk, harlequin duck, piping plover,

whooping crane, and all migratory and shoreline birds, as well as game birds such as the sharptail grouse, ringnecked pheasant, mountain dove, Hungarian partridge and two species of grouse. The fishery on the Reservation is renowned, and includes the west slope cutthroat trout, northern pike, lake trout, rainbow trout, mountain white fish, lake white fish, brook trout, brown trout, Yellowstone cutthroat trout, walleye, and many others. The threatened bull trout is also be found on the reservation. The habitats of these wildlife and fish species depend directly on the water resources of the Reservation to support them and allow them to thrive.

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

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

Historical Water Conflicts

In 1909, the United States entered in to the Boundary Water Treaty with Canada, which among other things, divided the Milk River and St. Mary River between the two countries. However, not a word in the Treaty, or the negotiations leading to it, mention the Blackfeet, that these streams arise on or near the Blackfeet Reservation, or that the Blackfeet have rights to water in these streams.

Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Blackfeet Reservation under the 1902 Reclamation Act, and began construction of the St. Mary facilities that would divert most of the United States' share of the St. Mary River off the Reservation for use by the Milk River Project over a hundred miles away, notwithstanding that there was an equally feasible project on the Blackfeet Reservation to which the water could have been brought. The diversion is accomplished through facilities on the Reservation, including Sherburne Dam, and a twenty-nine mile canal through the Reservation that eventually empties into the Milk River. The Milk River flows north into Canada and then back into the United States near Havre, Montana, where it is heavily utilized by the Milk River Project and by the Fort Belknap Reservation. There are few historical acts, other than loss of land, that have engendered more passion and outrage than this wholesale transfer of Reservation water to serve non-Indians far downstream, without a word about or any consideration of Blackfeet Tribe's water rights or the Blackfeet water needs. The Tribe is left not only with no access to and no

benefit from its own water, but a tangled web of confusing and non-existent rights of way and easements for the St. Mary Diversion facilities on the Reservation.

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

In an attempt to control the water through the land, the *Conrad Investment* case served as the springboard to the first Blackfeet allotment act in 1907. Over a span of two congresses, the Blackfeet allotment act moved forward with various water rights provisions intended to make Blackfeet water rights subject to state law, to enjoin the United States from prosecuting any further suits against water users, and to give preference to settlers on surplus lands to appropriate water on the Reservation. See, *John Shurts, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s* (University of Oklahoma Press, 2000). These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding the promise that the Reservation would never be allotted. See Agreement of September 26, 1895, ratified June 10, 1896, 29 Stat 321, 353, Art. V.

Allotment brought the third serious conflict between the Tribe and non-Indian water users. The Bureau of Indian Affairs Blackfeet Irrigation Project was authorized in the 1907 Allotment Act. However, many of the prime irrigation lands both within the Project and in other areas of the Reservation on Cut Bank Creek and the Milk River quickly went out of trust. The Tribe's water rights have gone unprotected from the use of water by non-Indian development on former allotments. Numerous disputes have arisen over the years of varying severity, and the need to resolve the Tribe's water rights has increasingly become critical. At the same time, the BIA built the Blackfeet Irrigation Project with undersized and inadequate delivery systems and storage facilities, thereby ensuring that the economic promise of the Project would be unfulfilled for the Tribe and Tribal members.

Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but increased shortages during the late irrigation season in both the Milk and Cut Bank Creek, and the dilapidated condition of the Blackfeet Irrigation Project have become serious impediments to water use within the Reservation. Plans to rehabilitate the hundred year old St. Mary Diversion facilities have further raised water right concerns, and have emphasized the need for the Tribe to finally resolve its water rights.

Water Rights Compact

Given the historical water rights issues on the Reservation, the Blackfeet Water Rights Compact is truly a milestone achievement after nearly two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and the Federal Government. The Compact was complete in December 2008. It was approved by the Montana Legislature in April, 2009 (85-20-1501 MCA), and it is now before this Committee for ratification in the Blackfeet Water Rights Settlement Act. It will further require approval of the Tribe through a vote of the Tribal membership. In general, the Compact confirms the Tribe's water rights to all streams on the Reservation, bringing certainty to the Tribe's water rights and the ability to protect and use the water for the Tribe's growing population and needs to make the Reservation a productive and sustainable homeland. The Compact:

- Establishes the Tribe's water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages except for the St. Mary River and Birch Creek.
- Establishes a St. Mary water right of 50,000 acre-feet, and requires the parties to identify how the water will be provided to fulfill the Tribe's water right
- Establishes a Birch Creek water right of 100 cfs, plus 25 cfs for in stream flow during the summer and 15 cfs during the winter.
- Protects state water right non-irrigation use and some irrigation uses through "no-call" provisions.
- Provides for water leasing off the Reservation.
- Closes on-reservation streams to new water appropriations under state law.
- Provides for Tribal administration of the Tribal water, and State administration of state law water rights, and creates a Compact Board to resolve disputes
- Provides for an allocation of water stored in Tiber Reservoir (in an amount to be determined by Congress)
- Mitigates the impacts of the Tribe's water rights on Birch Creek water users through a separate Birch Creek Agreement by which the Tribe defers new development on Birch Creek for 15 years and provides 15,000 acre-feet of water per year to Birch Creek water users from Four Horns Reservoir, the total agreement not to exceed 25 years.

Additional identification and study of alternatives to provide the Tribe's St. Mary water right will be necessary and are included as part of the legislation. As described above, nearly the entire United States' share of the St. Mary River is diverted off the Reservation to the Bureau of Reclamation's Milk River Project. In the meantime, S. 399 provides that the Tribe will receive its water right through an allocation of Sherburne Dam, the Milk River Project storage facility on

the Blackfeet Reservation. The Tribe will lease back the water to the Project, until a permanent water supply is identified and implemented for the Tribe. Such an arrangement is the only way to ensure that the water rights of both the Tribe and the Milk River Project are fulfilled.

Upon completion of the Compact, a separate concern was raised by the Fort Belknap Indian Community relating to the Milk River, and the potential for conflict between the Blackfeet and Fort Belknap Milk River water rights. While the Blackfeet Tribe believes that the potential for conflict is extremely minimal, the two tribes met on a number of occasions to resolve any possible conflict. Language was agreed upon to be inserted in our respective settlement legislation. The language requires the Secretary to insure that the water rights of both tribes are fulfilled. This is a particular federal responsibility due to the United States trust responsibility to both tribes, and particularly because the Federal Government was party to the negotiations of both tribes.

State Approval and State Contribution

As described above, the Blackfeet water rights compact was approved by the State Legislature in April 2009. The State of Montana has committed to contribute \$20 million to the Compact. These funds were fully authorized and are available when the Compact becomes final. In 2007, the Montana Legislature also appropriated \$15 million for Birch Creek mitigation. Of these funds, \$14.5 million has been placed in an escrow fund for the Tribe as part of the Birch Creek Agreement, and \$500,000 was used for engineering studies for the Four Horns enlargement. Therefore, the State has committed to a \$35 million contribution to the Blackfeet settlement. This is very major contribution on the part of the State, and the largest for an Indian water rights settlement in Montana.

Blackfeet Water Rights Settlement Act

S. 399 carries forward the terms of the Blackfeet Water Rights Compact, and addresses issues of particular federal responsibility and federal concern. The bill would do the following:

- Approves and ratifies the Compact and the associated Birch Creek Agreement.
- Authorizes the allocation of Tiber Dam water.
- Provides 50,000 acre feet of Sherburne Dam water to the Tribe in fulfillment of the Tribe's St. Mary water right and authorizes necessary investigation and studies to provide a firm supply to the Tribe.
- Requires resolution of all rights of way issues related to the Milk River Project facilities, involving tribal lands and allotted land.
- Authorizes the rehabilitation and improvement of the Blackfeet Irrigation Project, including the enlargement of Four Horns Reservoir.

- Establishes a Blackfeet Water Settlement Fund and authorizes \$125M for the Blackfeet Irrigation Project and \$93.2 for each of five years for other water projects and water related projects.
- Provides for a waiver of water related claims against the Federal Government.

The Tribe has identified a number of projects that are critical to the implementation of the Tribe's water right under the Compact. These projects include a regional water system to provide a long term municipal water supply to Reservation communities, improvements to irrigation and water storage on the Reservation associated with the Bureau of Indian Affairs' Blackfeet Irrigation Project including enlargement of Four Horns Reservoir as provided for in the Birch Creek Agreement, putting new lands outside the Project into production through new irrigation facilities and small water storage projects, stock water and domestic water developments, energy development projects, and acquisition of lands on the Reservation that have gone out of trust. Settlement funds would also fund the implementation of the Compact and the administration of the Tribal water right through the Tribal Water Code.

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

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

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

The Cost of Settlement

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

The cost of settlement is fully justified by the needs of the Reservation and the potential Tribal claims against the United States associated with 1) the one-hundred year old diversion of St. Mary water off the Reservation to the Milk River Project over a hundred miles away, 2) the environmental and resource damages caused by the St. Mary diversion facilities, 3) claims relating to the 1909 Boundary Waters Treaty, 4) the United States promise to construct a new storage facility on Two Medicine after a catastrophic flood in the 1960's, 5) the failure of the United States to properly operate and maintain the Blackfeet Irrigation Project, and 6) the failure of the United States to protect the Tribe's water right from development by others, particularly on Birch Creek, Cut Bank Creek and Milk River.

Conclusion

The Blackfeet Water Rights Settlement has critical importance to the future of the Blackfeet people and represents decades of hard work by many people. The legislation will secure the water rights of the Tribe through ratification of the Tribe's water rights compact, and will also provide the necessary funding for the development of vital reservation water projects, including drinking water projects, water storage projects and irrigation and stock development. The settlement will significantly contribute to the development of a strong Reservation economy, jobs for Tribal members, and a better life for the Blackfeet people.

Even though the Department of the Interior was involved in our negotiations every step of the way in the decades long process, and was intimately involved in the drafting of the Compact, the Administration has raised a number of issues relating to S. 399. We are engaged in discussions with the Department of the Interior to address these concerns, and expect they will be resolved in a satisfactory manner to both parties.

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