

TO: BLACKFEET TRIBAL BUSINESS COUNCIL

FROM: Dawn Gray, Attorney

DATE: January 16, 2024

RE: Blackfeet Land Purchases Under the Blackfeet Water Settlement

Council, this memorandum is to provide information to the Blackfeet Tribal Business Council regarding the recent land purchases by the Blackfeet Tribe from funds under the Water Settlement. This memo is considered *attorney-client privilege*, to which you as Council hold the privilege and are authorized to release this information if you decide to do so. Further, any numbers referenced in this report shall not be cited as a basis for any future calculations or reports.

PAST PROBLEM LAND PURCHASES

The following past problems are land acquisitions encountered by the Blackfeet Tribe. They are for illustrative purposes to improve practices in regard to land purchase.

In 2018, the Blackfeet Tribal Business Council received an offer to purchase fee lands and properties from a non-Indian Fee landowner, known as "North Fork," at 14 million. North Fork is in the northwestern area within the Blackfeet Reservation, covering approximately 20,000 acres.

In 2019, the BTBC began the process of accessing the Water Settlement Funds to cover the purchase. The Blackfeet Water Settlement provides for land purchases under the Water, Storage, and Development Projects, Trust Fund, more explained in the referenced DOWL HKM reports. At the time, the Blackfeet Tribe did not have professional practice of land purchase established.

For large land deals like North Fork, the Blackfeet Tribal Business Council acknowledged that due diligence had to be completed on evaluating the potential purchase of North Fork. Due to the Tribe not responding to the seller, the land was lost due to another buyer having beat Blackfeet with a timely buy-sell agreement. The Blackfeet Tribe attempted to hire a real estate agency out of Bozeman to assist at the last minute, but the timing was too late. It was later found out that the properties were acquired by the Chicago Cubs owner listed as Grizzly Ridge Bison Ranch, LLC, who has recently offered the North Fork back to the Blackfeet Tribe for \$70 million. In previous years, it was reported that the North Fork was offered at approximately \$2.5 million in the 1990s.

This was and continues to be a great loss to the Blackfeet Tribe. Non-Indian ownership of North Fork and has created a huge infringement on the Blackfeet Tribe's northern pristine lands and wildlife migratory route. The owners of North Fork continue to violate Tribal Fish and Wildlife laws and continue to affect local Tribal-member ranchers to effectively run their operations as well.

In 2019, I was presented with the property known as the Po'Ka' Ranch (Formerly Weter Property) which was also being assessed taxes. I found out that the Tribe entered into a contract

for deed with a clouded title. The Tribe was further being asked by the seller to pay an additional \$50K, to which the sellers had no legal right to collect on. For reasons unknown, the Land Department was ready to pay the \$50K check. The Tribe stopped the payment, and I instituted litigation to clear the title for the Blackfeet Tribe in the Ninth Judicial District Court. The Tribe prevailed, and now the Tribe owns that property in full and is in the process of going into trust.

In 2017 Blackfeet Tribe entered into a contract for deed for fee land to which annual payments including payments on the taxes would be made until 2027. The contract for deed did not require an appraisal. The Blackfeet Legal Department did not participate in negotiations of the contract for deed, resulting in a contract with seller-favored terms. In 2021, the seller threatened to take back the land due to the Tribe having allegedly failed the terms of the contract. Based upon the potential loss of the property, the Blackfeet Tribe paid off the amount owed. The Blackfeet Tribe now has the deed and is in the process of being put into trust.

Another trust land offer was made to the Tribe. That land was appraised by the Appraisal Valuation Services Office "AVSO", an agency under the Department of Interior. The Tribe bought the land according to the AVSO appraisal provided to the Tribe. It was found out later that AVSO provided the wrong appraisal amount, and the Tribe lost a substantial amount of its land purchase funds.

In another trust land offer, AVSO had appraised trust land where commercial property was situated on. The Tribe hired an independent appraiser to appraise the land as well. The Tribe's independent appraiser based his values from comparable off-Reservation fee land. The AVSO's appraisal came in higher than the Tribe's appraisal. Not sure how this occurred but it demonstrated a problem of appraisals for trust lands.

Two (2) land purchases have been waiting to be purchased over the last few years. This is due mostly in part to the lawyers wrangling language to the point of the agreement being stalled. The buy-sell agreements were eventually redone by the Tribe's real estate agent and are finally submitted to the BIA.

In the early nineties, the Tribe decided not to renew recreational leases held by non-Indians on St. Mary's Lake. The Canadians were given time to either sell their property to Tribal members or move their cabins. Many decided to sell the cabins. Those sales were brokered out of the Land Department by a Land Employee acting as an agent of the Sherburne Agency. The employee and agency received compensation, acting on behalf of the Canadians. The legal opinion by Attorney McKay said that this outside employment was okay and not a violation of personnel policies, and because it was at his direction. In fact, this employee was encouraged to obtain training to become a real estate agent. I have attached that opinion to this memorandum for your review. The faulty advice here permits the Tribe to hire a professional agency and Tribal not as the agent for the Tribe or its members as buyers, but for the sellers. Who on the side of the Tribe was able to evaluate whether the price was "reasonable".

There are a number of other land purchases or potential purchases that went wayward due to the lack of professional service which I can list. There are many Blackfeet members older than me

that have been in the Tribal system or as a Tribal member that know more than I do about the deficiencies of Tribal land purchase throughout the years. I am sure the list goes on and on.

LAND ACQUISITION LAW

In 2019, the Council passed the Land Acquisition Ordinance. This law was a response in part to the issue of the land purchased without an appraisal. This Ordinance directs that all land purchases follow the required steps to effectuate an informed decision by the Council. The Ordinance requires the following: 1. Buy-Sell contract to be approved by Resolution; 2. inspection by a licensed and insured inspector; 3. appraisal by a licensed and insured appraiser; 3. title work to be performed to ensure the title is clear by the time the Tribe acquires the land; a closing statement to be approved by Resolution. It also requires delivery of the lands by warranty deed. Since that time, all land purchases have been conducted through the best practices of the Ordinance.

LAND PURCHASE UNDER THE 2019 LAND ACQUISITION ORDINANCE

In 2021, a non-Indian Fee landowner contacted the Blackfeet Tribe and requested whether or not the Tribe would be buying his land. The non-Indian advised that the offer for the land was with the Tribe for over two (2) years and no response was given. They advised that the Hutterites were ready to purchase if the Tribe did not. The land encompasses 4,000+ acres of prime farm and ranch lands, including three homes, outbuildings, and farming equipment. This land also includes vast wilderness with state-based water rights including substantial access to Birch Creek. At this time there was no service being provided in the Land Department for fee purchases.

Based upon the Tribe's desire to purchase this non-Indian Fee land with available Water Rights Settlement Funds, the Blackfeet Tribe procured the services of a local real estate agency employing a Blackfeet Tribal member real estate agent. The Tribe did not want to suffer another devastating loss of important lands or botched land purchase again. The agency assisted the Tribe with the purchase of seven (7) properties. Three (3) other properties were handled as follows: One (1) property was handled by another real estate agency with a second Tribal-member licensed agent; one (1) property-the 2017 contract for deed was paid off; and one (1) property was started by an attorney and finished by a real estate agent.

All of the properties with the exception of the 2017 contract for deed property were completed with the requirements under the Land Acquisition Ordinance. All ten (10) properties are owned by the Tribe in full under warranty deeds and are in the process of moving into trust.

Pursuant to the buy-sell contracts, each seller had the option to turn down the deal if the appraisal did not meet the buy-sell price. Conversely, the Land Acquisition Ordinance requires the purchase price to be at the appraisal mark and may not exceed an additional 10% of the appraisal. The exception to this cap is where the purchase can demonstrate a tribal benefit.

With the exception of one (1) property, all properties were purchased below the asking prices of the sellers. That property was accepted above the appraisal indicator because of the Peigan Canal running through the land which also includes the historical site for the Starvation Winter. The Council also seen this particular land as a benefit to all adjacent or contiguous Tribal members to benefit from the water, potential irrigation improvement and so on. Further the

transfer of the State Water Right running through this property was important to ensure delivery of water to downstream Tribal member water users. These factors do not come into consideration in appraisals. The Tribe made the decision to provide a permanent restoration of those lands to the Tribe accordingly as a benefit to the Tribe, pursuant to Land Acquisition Ordinance. A certified appraisal is an estimated measure of a market value, which does not consider the value of the Blackfeet Tribe's historical and traditional lands. Such a value is held more highly by the Tribe than what can be captured in an appraisal.

Three (3) properties fell significantly below the buy-sell price due to appraisal findings, resulting in significant savings to the Tribe.

After reviewing all the appraisals, the 2017 contract for deed land was examined. It appears that the price paid for that property fell into the range of the other nine (9) properties purchased under the Water Settlement.

The total Blackfeet Water Settlement funds expended for these lands is \$36,843,911.83 with a savings of 8,172,338.20, due to the requirements of the appraisal law. The total acreage of prime agricultural fee lands back to the Tribe is approximately 27,206.92 acres. Given that lands may be different such as irrigated, dry, pastureland, CRP, conservation, or mixed, this report gives an overall median estimate of \$1,354 per acre.

The appraisals provide indicators that fee land prices are affected by increased commodity prices in the capitalization rate. It was also noted that several large landowners other than the Blackfeet Tribe in the area had started purchasing land in the area. Finally future impacts from the drought are predicted to increase land values, especially irrigable lands. However, during the purchase of the ten (10) properties, the prices were not affected by the drought indicator yet. I have not included a breakdown in the appraisals as to irrigated, dry, or pastureland as I believe this can be done more professionally by an appraiser hired by the Tribe.

Last year, I attended a meeting with the Water Department Director, Deputy and Water Attorney to Billings Area Office to present the land purchase book to the BIA. The BIA responded that the work done under the new Land Acquisition Ordinance was outstanding. The Blackfeet's Land Purchase program was lauded as the model for other Tribes to follow. We were pleased to receive this feedback. During that same meeting, we were further advised that some good news was to come forward regarding the fee-to-trust process for the Blackfeet as well (which is discussed later in this report).

In further meetings with the BIA and Bureau of Reclamation, the Tribe's land purchase program demonstrated to the federal officials that the necessary steps were taken to ensure due diligence was done on all the land purchases.

DOWL HKM LAND PURCHASE ESTIMATES FROM 2012

The following is an excerpt from the DOWL Report, Circa January 2012. The Blackfeet Land Department provided a simple valuation as follows:

LAND ACQUISITION COSTS

Contact was made with the Blackfeet Land Department Director Mark Magee to obtain current costs of acquisition and leasing for lands within the Blackfeet Indian Reservation. These values do not include the cost of acquisition of the major improvements (houses, barns, horse facilities, etc. Values are summarized below.

1. Average quality irrigated land—\$500 to \$800/acre
2. High quality irrigated land—\$1000/acre
3. Dry land farming—\$400 to \$500/acre
4. Rangeland—\$120 to \$150/acre
5. Developed Rangeland Economic Unit—\$250/acre
6. Lease of rangeland—\$4.50/acre
7. Lease of dry land farming—\$15.00/acre
8. Lease of irrigated lands—\$30.00/acre

Previous land acquisition assessments relative to Indian settlements and major federal projects in the Milk River basin establish that the economic unit that needs to be purchased is not just irrigated lands but associated dry land and rangeland acreage. See Exhibits 1 and 2. The conclusion is that, in order to purchase irrigated lands, the Tribe will have to buy entire operations, including large areas of rangeland plus major improvements. Exhibits 1 and 2 demonstrate that these acquisitions could, on average, involve an overall land base 10 to 16 times or more of the irrigated acreage.

The Tribal rates by the Land Department do not explain the formulations as an appraiser would do. There are significant factors which determine land value based upon land status, existing encumbrances, rights-of-way, existing agreements such as CRPs, conservation easements, improvements, soil composition, types of crops, Irrigated/Dry/Pastureland values, water access, and sophistication in irrigation systems. An appraisal of land assists the Tribe with information on gauging land values.

Taking this into perspective, Tribal Rates in 2012 valued North Fork at \$6,875,000.00. The asking price in 2010 was \$8.5 Million. The DOWL HKM Report predicted that the sale price would be reduced over time due to economic conditions and that the Tribe would assert its direct flow rights in the Milk River basin within a decade of having the Compact ratified. The report further contemplated that based upon its major improvements, an irrigated acre could be valued at \$5,000. For North Fork's 2500 irrigated acres, the price was expected to be at \$12,500,000. The total cost estimate for the entire property was predicted at \$19,375,000. The report indicates a difference in prediction in land value from the Tribal Rate of \$1,000 per acre to \$5,000 per acre.

The St. Mary Land Acquisition portion of the Report contemplates the Blackfeet Tribe to purchase "entire non-Indian properties which have lands within proposed new Blackfeet Tribal Irrigation areas along the St. Mary Canal". It assumed \$3,500 per proposed irrigated acre in March of 2013.

The takeaway from the difference of the Tribal rate vs the predicted rate shows that land values with fee lands are a lot higher which are typically listed on the open competitive market.

FEE LAND VALUES AND TRUST LAND VALUES

There are factors that cause trust land values and fee land values to be significantly different. For example, trust land is held in trust by the United States for the benefit of the Tribe or Indians. Alienation of those lands can be timely and difficult. Those lands are also subject to the right of first refusal by the Tribe. Pursuant to existing Supreme Court cases, the right of first refusal is not secured with the Tribe for fee lands. (Other Tribal laws may come into effect if such fee

lands are adjacent to Tribal lands within the exterior boundaries of the Reservation, which may reduce non-Indian buyer motivation). As such, non-Indian fee lands within the Reservation are subject to listing on the open market. This creates competition between the Tribe and non-Indians. Further, comparable fee land values are utilized from self-disclosed sellers and buyers of non-Indian Fee lands as Montana is a non-disclosure state.

One of the significant factors I observed was that AVSO appraisers were not from Montana and utilized comparisons from out of state. They also have difficulty in obtaining information about fee land sales on Indian Reservations.

For trust land sales offered to the Tribe, the appraisal to be ordered is the responsibility of the BIA. The Tribe does not own or automatically become privy to the appraisal. The Tribe would only be provided with an amount at the behest of the seller. As such, the Tribe should be suspect of the indicators used for formulating the AVSO appraisals. Further, the outside use of AVSO appraisals for fee land comparisons is non-existent.

Back in 2022, I was asked by an AVSO Appraiser to allow him the information on the Tribe fee land appraisals, so he could figure that into the trust land appraisals. He stated “[w]e use fee land sales to establish land values for trust land because we feel that the transactions have more negotiation involved and are ‘arms length’ insuring current market value to the allottee.” He also noted that due to COVID-19, their sales database had become outdated for a total of 6 Tribes in Montana and Wyoming. He also requested values of personal property on these lands. To my understanding, AVSO appraisals are only for land. I advised that this information is proprietary to the Tribe, and I could not release the information without Council approval.

My legal opinion to the Council at that time was not to share the fee land appraisals because the information could be used against the Tribe or against the trust landowners seeking to sell their lands. The differences in fee and trust lands are not similar enough to be used in a comparative manner as they are composed of different market variables.

This was further bolstered by recent comment from the Blackfeet Tribe to the Secretary of Interior regarding the new leasing regulations:

The regulations should also adjust to the current circumstances impacting our Tribal reservation, specifically the cost appraisal process. Comparative appraisals of non-Tribal land adjacent to, or nearby, Tribal agriculturally leased lands should be prohibited in the process. **The legal and regulatory circumstances of fee land inside a Tribal jurisdiction do not reflect those of Trust lands.** This is even more relevant when appraisals compare non-reservation lands with those inside the reservation. Comparison of lands with legally dissimilar dispositions results in skewed appraisal outcomes.

It is my recommendation that trust land and fee land appraisals remain separate for the reasons set forth in this report.

EXPANSION OF THE TRIBAL WATER RIGHT AND LAND BASE THROUGH PURCHASE OF NON-INDIAN FEE AGRICULTURAL LANDS

In 2011, the Principal Deputy Assistant Secretary for Indian Affairs provided testimony to the Senate Committee on Indian Affairs opposing the Blackfeet Water Settlement Act S. 399. The Principal Deputy advised that the Blackfeet Tribe was giving up too much water and the Settlement was going to substantially benefit the non-Indians, amongst other problems with S. 399. I have attached that opinion to this report.

The updated language as provided in the DOWL HKM Reports (2012 and 2013) was then approved and incorporated into Blackfeet Water Rights Settlement Act (Pub L. No. 114-322) (2016), Title III, Subtitle G (2016). Land purchase costs-circa 2010-2012 and parameters for land purchase from a prediction standpoint from the updated Reports.

Under the DOWL HKM Reports, the Blackfeet Tribe is empowered to expand the Tribal Water Right and land base through land purchase. Section 3713 provides the Blackfeet Tribe with funds to acquire lands held by non-Indians to accomplish this purpose set forth under the Report. Many of the lands that impede the Tribe's expansion of the Tribal Water Right and land base are fee lands owned by Non-Indians on the Blackfeet Reservation. This fact also creates barriers for water under the Tribal Water Right to be delivered to other Tribal lands in need of water.

In order to effectuate expansion of the Tribal land base and Tribal Water Right, the Reports further provide for the purchase of non-irrigated lands such as dry land and rangeland consistent with the Act. From a practical standpoint, the Report has notably observed that lands cannot be bought in sections restricted to whether they are irrigable. It is more practical to purchase "entire operations". This is described as the "economic unit" which the non-Indian Fee lands are likely to encompass irrigated, dry land and rangeland acreage. The economic unit approach offers an overall benefit to the Blackfeet Tribe by increasing Tribal land base and the Tribal Water Right, while providing for opportunity for increased economic benefit. It is also important to note that the land offers with state-based water rights were made priority by the Blackfeet Tribe as key land under the Blackfeet Tribe's Land Acquisition Ordinance and consistency with the Act. The Tribe also included Indian fee irrigated lands as key lands, consistent with the Act.

The Report also supports the development of water on newly acquired lands as well as diverting and delivering water to lands without water rights. The consolidation and uniform use of Tribal lands and expanding the Tribal Water Right for the benefit of the Tribe administered under the Tribal Water Code is the overall goal.

The Settlement Act also provides the Tribe with the ability to modify the scope of the projects described in the DOWL, HKM report, March 2013, if it is similar to the proposed project and consistent with the act and approved by the Secretary.

From the original land purchase list, six (6) properties were identified for purchase. From that original list, one (1) property was purchased, four (4) are pending, and one (1) withdrew. That list was updated by a number of Tribal resolutions to reflect qualified updated offers during the

last three (3) years in accordance with Act. As of today's date, ten (10) properties were purchased, four (4) from the original list are still pending.

FEE LAND VALUES IN MONTANA

Since fee lands are on the open market it is important that the Tribe be cognizant of economic factors affecting land sales in Montana. One source that should be reviewed is the 2023 USDA Report. In 2023, Montana's Irrigated acre averaged \$3,550.00; and non-irrigated at \$920 per acre. All cropland estimate is at \$1,170.00 per acre. Pasture value is at \$800 per acre. These values exclude American Indian Reservation Land. Non-Indian Fee Farm and Ranches on or near Reservations typically are valued this way, because of the lack of information from the Bureau of Indian Affairs.

Another source that also provides information on these fee lands is Montana Land Source. The Blackfeet Reservation falls in the West (green) category. The following table represents overall acre land value:



*Mtlandsource.com

There are a number of factors that changed the predictions from the DOWL Reports of 2012 and 2013. COVID-19 was one factor that increased sales and decreased inventory statewide. There are also indications that values for all agricultural lands went up due to the drought and other economic factors.

There were also a lot of people from out of state buying agricultural fee lands around the Valier area. The increased migration of people from outside of Montana was the factor in driving inventory down.

TAXES AND FEE TO TRUST

In recent years, the Tribe's fee lands were being taxed by the State, in violation of the 1987 Tax Settlement Agreement with Montana. That settlement provided that Montana would never tax the fee lands of the Blackfeet Tribe, unless by act of Congress. That agreement was not honored based upon a later Supreme Court rulings and the tax rolls began again on Tribal Fees lands. It was decided that the Blackfeet Tribe continue to place the Tribal Fee lands into trust for their protection against taxes and to enhance Tribal uses of the fee properties.

In 2021, I inquired about the Tribe's fee-to-trust function and found that two (2) Tribal employees were being paid insufficiently to do the work as there was no budget to support their job duties. A lot of their expenses were being paid out of their personal funds to complete the enormous fee to trust tasks. I reported this to the Council, and the Council appropriately funded this Department so that the Fee-to-Trust process for the Tribal Fee lands be completed. Since that time, several Tribal Fee lands have been returned to Trust and applications continue to be processed. This Department should be commended for the huge progress they have made on behalf of the Blackfeet Tribe.

Last year, the Blackfeet Tribe sent a letter to the Secretary of Interior to place into trust-all the Tribal Fee lands encumbered by taxes from the State of Montana, based upon the 1987 tax agreement. In response to this request, the Department of Interior agreed to do so. As a result, regardless of whether taxes are assessed on Tribal fee lands, BIA will continue to place those lands in trust. Pursuant to the Constitution and By-laws of the Blackfeet Tribe and this fee to trust process, this process further assures these lands will not go into non-Indian ownership. This is considered a big win for the Blackfeet Tribe.

On another note, the new regulations for Fee-to-Trust have been published. Key changes relevant to the Blackfeet Tribe include:

1. Reducing average time of applications from 985 days to 120 days.
2. The definition of "Tribal consolidation area" was revised to cover any acquisitions in such area.
3. The ability to include climate change-related acquisitions and cultural practices in land acquisitions.
4. The reduction in number of environmental assessments down to a maximum of two (2) during the timeframe, if there is a need for the second assessment.
5. Not requiring a Preliminary Title Report when a title company declines to provide one to an applicant, upon evidence of the declination.
6. Taxes owed on fee lands will be considered to be taken into trust. Key here are those lands that are located within the exterior boundaries of the Reservation.

These and other changes can be reviewed at 25 CFR Part 151.

UTILIZING PROFESSIONAL LICENSED SERVICES FOR BLACKFEET LAND PURCHASE

Importance of Real Estate Experience within the Tribe. The inclusion of professional real estate expertise within the Blackfeet Tribe is crucial for effective land acquisition and management. A real estate agent's role involves strategic planning, market analysis, and negotiation, which are vital in ensuring the Tribe's interests are protected and maximized in any land deal. Further, the real estate agent was tasked with resolving issues which arose in the title and/or inspections. Pertinent to Tribal transactions, these agents had the specific knowledge to also navigate the transaction through the Tribal systems.

The opportunity of the Blackfeet Tribe to regain historical and prime lands with rich economic benefit, increasing the power of the Tribal Water Right from non-Indian control and ownership through land purchase was and is the vision. Based upon the history of failed or lost opportunities in key lands, the Council decided that the Tribe needed a professional realtor to ensure the lands were procured without problem.

The Blackfeet Tribal Business Council also did not have a budget to hire a full-time licensed realtor or other professional services including the appraiser, inspector or title professionals under the Land Department budget. Since time was of the essence and COVID-19 was impacting Tribal business, it was decided that the realtor would be able to be compensated from the proceeds of the final price established from the negotiations as directed by the appraisal law and inspection findings. If the property was not procured, there would be no compensation.

The Tribe hired a local Blackfeet Tribal Member Veteran, who holds a Real Estate license. The real estate agent, by law, was required to be under a local professional real estate agency and agricultural broker. The real estate agency holds all applicable licenses and insurance for the land purchases it assisted with the Blackfeet Tribe.

Benefits of Commission-Based Compensation for Real Estate Agents. Commission-based compensation aligns the real estate agent's interests with those of the Blackfeet Tribe. This model promotes efficiency and result-oriented work, as the agent is incentivized to achieve the best outcomes for the Tribe. Realtor businesses have been developed from decades of refined practices in land acquisitions, to which the Tribe is able to contract this valuable service.

Commission compensation is not a standard rate and varies based upon a negotiated rate for each transaction. Further, the compensation is not 100% due to the real estate agent. It is typically a three-way split between the broker, business and real estate agent. Thereafter, the real estate agent's compensation is further cut by 1/3 deduction for federal taxes and additional state taxes. Since the real estate agent is an independent contractor, the realtor uses the compensation to maintain licensure and insurance for the transactions. This results in the less impact on the Tribe's insurance and human resources. It is best practice that all independent contractors provide their own professional business, insurance and licensure governed by disciplinary

authorities with their earned compensation. Any errors or omissions from the transactions fall solely on the contractor.

A cost benefit analysis helps demonstrate how this works. For example, in one of the land purchases, the seller was unable to cover the Tribe's Real estate commission fees. One of the reasons is that the appraisal indicator fell significantly lower than the initial purchase price of the buy-sell agreement. The seller needed the proceeds from the sale to purchase new property in another state. This is typically done under a 1031 exchange wherein sellers are not impacted by taxes from the proceeds of the sale as income. As a result, the difference between the seller's asking amount and the appraisal indicators was to the tune of \$5.1 Million, in favor of the Tribe. So, while the Tribe ended up paying the commission, the savings tremendously outweighed the overall Tribal costs of this transaction.

Of the ten purchases, one real estate agency was compensated out of the seller's proceeds for four properties at no cost to the Tribe; and three other properties out of the buyer's costs. The other real estate agency for the Tribe was compensated for one land purchase out of the seller's proceeds, at no cost to the Tribe. The remaining two purchases included the payoff of the 2017 contract for deed and the other was started by an attorney and completed by two other attorneys.

Fiduciary Responsibility of Real Estate Agents. Real estate agents have a fiduciary duty to their clients, including loyalty, confidentiality, accountability, and diligence. This duty is especially significant when serving the Blackfeet Tribe, as agents must prioritize the Tribe's best interests in all transactions. This includes the responsibility to notify the client, the broker and licensure authorities of nefarious activity that may arise in land transactions. The result is transparency, which allows problems to be corrected before damage occurs. This is an effective use of checks and balances for transactions.

Further, agents are prohibited by law from negotiating sales upward to increase commission compensation. The penalty is loss of license and lawsuit against the real estate agent.

Professional Real Estate Services and Tribal Advancement. The lack of professional real estate services in past land transactions has led to suboptimal outcomes. The Tribe's investment in educating its youth in professional skills, including real estate, is crucial for self-sufficiency and empowerment. Fully utilizing the expertise of educated tribal members in key roles is aligned with the Tribe's vision.

I can affirm that leaving this huge task to the lawyers, the Land Department and the Treasurer has not worked in the past. While each of these positions will be involved, these are full-time jobs.

Tribal members are encouraged to go and get their education and/or serve in the military with the desire to return to the Blackfeet Reservation to provide a standard of professionalism in the Tribal Government. The Tribe is in need of title inspectors, certified inspectors, certified appraisers, certified realtors, certified surveyors, and ROW specialists. Since the business of land acquisition is a serious matter for the Tribe, those functions should be held to the same standards

as lawyers, doctors, CPAs and Architects. There is no room for error when the sovereignty of the Blackfeet Tribe is at stake.

One particular model that the Blackfeet Tribe is likely to benefit from is owning a real estate franchise. In this case, income can increase significantly while providing substantial revenue streams and employment opportunities for tribal members, with minimal cost to the Tribe. The franchise model can leverage the Tribe's assets and position in the market, offering a sustainable and profitable enterprise. Included with this model are other services offered such as all types of insurance, mortgage assistance and other related disciplines not only for the Tribe but its members. This model works best as a business-arm of the Tribe. It is highly recommended the Blackfeet Tribe investigate this model for the advancement of these services.

AMENDMENT TO THE BLACKFEET WATER SETTLEMENT ACT

The Blackfeet Tribe is currently seeking an amendment to the Blackfeet Water Settlement. Based upon the updated rules for Indian Water Settlements, wastewater systems are now allowed to be included in Indian Water Settlements. As a practical matter, it makes no sense to improve water systems for the delivery of water to public water systems when the wastewater infrastructure was not taken into consideration.

THE ULTIMATE DELIVERABLE-STRENGTHENING TRIBAL SOVEREIGNTY

In conclusion, the Blackfeet Tribe got what it paid for. **27,206.92** acres of pristine agricultural lands were returned to the Blackfeet Tribe. The lands include a vast number of improvements, residential homes, barns, corrals, irrigation systems, income producing crop, pristine hunting and fishing areas, wetlands, and including the return of the Tribe's lands of the Starvation Winter area. State-based water rights were also converted to the Tribal Water Right as governed under the Blackfeet Water Code.

The Water Settlement funds provided the Blackfeet with the opportunity to turn back the pages of ill-gotten policies under the federal government like the Dawes Act and its aftermath of causing Tribal land base to be owned by non-Indians through the Allotment period. Subsequent to the Indian Reorganization Act, there has never been a time in history to which the Blackfeet Tribe was able to regain a vast ownership of its historical lands. The land purchases completed under the Water Settlement Act are a celebrated chapter for the Blackfeet. These lands will never go outside the ownership of the Blackfeet Tribe again.

All the people involved with these land acquisitions made certain that the ultimate deliverable was met. There is nothing more valuable in land transactions than the permanent return of our prime historic Tribal lands to the Blackfeet. Land base and control of our water is the strongest aspect of Blackfeet sovereignty. The Tribe should celebrate this success. It is time to now realize the economic benefit of these lands as envisioned by the Blackfeet people through the Blackfeet Water Settlement. As promised to the Blackfeet People, the economic benefit from the Blackfeet Water Settlement is to employ Blackfeet Tribal members in professions for the advancement of the objectives of the Water Settlement.

March 28, 1996

TO: [REDACTED]

FR: Joe J. McKay

Joe McKay
(JW)

RE: [REDACTED]

[REDACTED] I have
decided that it is incumbent upon me to provide the
information which I have in relation to this matter.

From this point on, I would prefer not to be involved
in this particular issue.

From July of 1992 until July of 1994, I served as
Landboard Chairman for the Blackfeet Tribe. As such, I was
considered the Supervisor of various department activities.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To the best of my knowledge, there are no regulations requiring that every tract of land be offered in a public advertising to all members of the Tribe. The Tribal Constitution merely requires that tribal land not be leased to a nonmember unless there are no tribal members willing to lease the same.

[REDACTED]

My own experience in four years on the Tribal council was that it was those type of actions that created long-term conflict.

The Tribal Council could have ordered the land at issue put up for public advertising at any point in the process. It did not.

[REDACTED] I do however, have some comments on the [REDACTED] the Realty Business.

I will start with the realty business. As Land Board Chairman, I authorized [REDACTED] to attend training as a real estate agent. The training was sort of a compromise between not being able to give anyone a raise and not being able to fill a position (which would have meant a raise) that had been left vacant by death of an employee. [REDACTED] had also indicated a long-term intent of being able to leave tribal employment (a thought that I am sure most tribal employees have entertained at one time or another).

In the meantime, the Tribal Council, at my instigation, refused to renew the leases to the non-Indians at St. Mary Lake. As part of the final compromise with the Canadian lessees, the Tribe agreed to give them a period of time within which to either sell their cabins and improvements to Tribal members, remove the cabin and improvements or forfeit the cabin and improvements to the Tribe under the lease.

After a brief challenge, the Canadians gave up the fight to hold on to the leases, and began efforts to sell their improvements. Some sales were made privately. [REDACTED], acting as a single business, offered to act as a real estate agent to facilitate the sale of the Canadian lessee interests.

I was aware of [REDACTED] activities, and approved the same. [REDACTED] made me aware of her involvement in the sale of the cabins from the outset. In so doing [REDACTED] complied with Chapter 4, Sec. 4 of the Policies and Procedures Manual regarding outside employment.

It was also my view that [REDACTED] was not using her office or position "unethically" to advance [REDACTED] personal interests. To the best of my knowledge, the [REDACTED] Real Estate Agency [REDACTED] are the only Indian real estate agents on the Reservation. I saw nothing unethical about [REDACTED] attempting to sell the Canadian cabins to local members for a reasonable price, and in so doing earn a small income.

Nothing in the land office gave [REDACTED] an advantage over anyone else in acting as the real estate agent for the Canadians. The Canadians did not have to do business with [REDACTED]; there was no requirement to this effect.

Thus I did not see the sale of the cabins as a conflict of interest because [REDACTED] was not able to use [REDACTED] job or position to gain unfair advantage over anyone else. Indeed, there is no requirement as far as I know, that anyone be licensed as a real estate agent on the Blackfeet Reservation, and thus anyone could have acted as agent for the Canadians and collected the fee.

[REDACTED]

Thus again, my own conclusion was there is and was no conflict of interest or unethical use of office or position.

My own opinion is that most of these matters are now stale, i.e. they occurred long ago and through proper channels. It is some what disconcerting to know that many other employees who work for the Tribe have outside employment and apparent conflicts of interest, yet none to my knowledge have been put to individual scrutiny by the Tribe. Immediately in mind is [REDACTED] who owns [REDACTED] yet works for revenue and tax. Many others exist, including myself.

I stand by the comments made herein and if my resignation is desired by anyone, they only need ask. That

is not to say that I am either threatening or offering to resign. I like my work and think that I have done a good job. However, if anyone thinks that my statements here are inappropriate and wants me to resign, I will not resist. I learned long ago that no good end comes of trying to work for someone who no longer needs your services and whose trust you may no longer enjoy.

cc: file

Personnel ✓

[REDACTED]

**TESTIMONY OF
DONALD "DEL" LAVERDURE
PRINCIPAL DEPUTY ASSISTANT SECRETARY INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 399, BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2011
OCTOBER 20, 2011**

Good afternoon Mr. Chairman, Vice-Chairman Barrasso and Members of the Committee. My name is Del Laverdure. I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's position on S. 399, the Blackfeet Water Rights Settlement Act of 2011, which would provide approval for, and authorizations to carry out, a settlement of the water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana.

I. Introduction

This Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. I want to affirm the Administration's support for settling Indian water rights where possible.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are a tangible barrier to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for nearly 30 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

A Blackfeet water settlement would bring an end to Federal and state court litigation that has been ongoing for more than thirty years, and resolve conflicts over water use that began more than 100 years ago. It would open a path forward for the Blackfeet Tribe to manage its water and related natural resources in a manner most beneficial to its members and future generations, and provide certainty to the communities that surround the Reservation. The Department recognizes the substantial work and effort that have been put into negotiating this settlement by the Blackfeet Tribe and the State of Montana. We would like to continue to work with the parties and the sponsors to address certain concerns, including those discussed in this statement (such as appropriate non-Federal cost share) that could make this a settlement that the Administration could support.

As discussed below, however, we cannot support S. 399 as introduced. Our major concerns with this legislation include: (1) the high cost of implementing this bill, including \$591 million of specifically authorized costs and unspecified but significant additional costs from several obligations imposed on the Federal government without specific authorizations of funds; (2) that the settlement does not include a reasonable State cost share to reflect the benefits that would inure to the non-Federal and non-tribal beneficiaries; (3) the lack of information regarding what infrastructure projects the Tribe would pursue under this settlement and the actual costs for such proposed projects; (4) the requirement that the United States establish a mitigation fund to benefit a non-tribal beneficiary; and (5) that the settlement does not achieve finality in resolving contentious water management issues in the relevant basins. We have other concerns with this legislation; only the most significant of our concerns are discussed in this statement. However, before we address our significant concerns it is important to acknowledge the historical background associated with the water rights of the Blackfeet Tribe.

II. Historical Context

The history of the relationship between the Blackfeet Tribe and the United States is not one of which the United States can be proud. The Treaty with the Blackfeet in 1855 encompassed some 27,500 square miles of Blackfeet tribal lands in what was to become Montana. The discovery of gold in the early 1860s brought the first wave of non-Indians into the territory, along with increasing pressure to open the Reservation to non-Indian settlement. A series of executive orders reduced and reconfigured the Reservation and then in 1888, it was divided into three separate and smaller reservations: the Fort Belknap Reservation, the Fort Peck Reservation, and the Blackfeet Reservation. The Blackfeet Reservation was further diminished in 1895 (Agreement of September 19, 1895, ratified on June 10, 1896, 29 Stat. 321, chapter 398, hereafter "1895 Agreement"), when the United States purchased from the Tribe 800,000 acres of land along the western boundary of the Reservation, with the Tribe reserving rights to hunt, fish and cut wood and remove timber on the "ceded lands," so long as they remained "public lands" of the United States. The land was thought to have contained valuable deposits of gold, silver, and copper, but the mineral reserves did not prove out. Instead, a plan to establish a national park on the land moved forward. The rights retained in the ceded lands by the Tribe in the 1895 Agreement almost immediately became an issue between the Tribe and Glacier National Park and have remained so to the present.

In the 1895 Agreement, the United States promised that the Reservation would not be allotted without the consent of the adult men of the Tribe (Article V), and, that if the government were to

build a canal to control the abundant supply of water available seasonally in the St. Mary River, the canal would be constructed to provide irrigation water for the Reservation (Article III and Meeting Minutes). Within just a few years, the Reservation was opened to allotment; construction of a canal to capture the supply of the St. Mary River had begun, which was done in conjunction with land purchases by the Bureau of Reclamation; and the canal was designed and constructed to divert St. Mary water off of the Reservation for the benefit of the Milk River Project, which is located some 200 miles away, and not for the benefit of the Tribe. In 1909, the United States entered into a treaty with Canada apportioning the waters of the St. Mary and Milk Rivers. This Treaty did not specifically address the water rights of the Blackfeet Nation and other Tribes, even though it was concluded just after the United States Supreme Court handed down its 1908 decision in *Winters v. United States* - a case involving the Milk River, which established the doctrine of Federal Indian reserved water rights.

There is an abundant supply of water arising on or near the Blackfeet Reservation, but much of it is diverted off the Reservation, which along with a lack of storage capacity for on-Reservation use and a limited growing season, creates numerous challenges for the Tribe. These challenges in part account for the high unemployment and devastating poverty rate that has plagued the Reservation for generations. Securing control of and actively managing Reservation water resources would be an important step towards improving economic conditions on the Reservation and creating the homeland envisioned in the numerous treaties and agreements that serve as the foundation of the United States and Blackfeet Tribe's relationship.

III. Blackfeet Montana Water Rights Compact and Proposed Legislation

S. 399 would approve a Compact entered into by the Blackfeet Tribe and the State of Montana in an effort to settle all the Tribe's water rights claims in Montana. The legislation specifically authorizes funding of \$591 million, but the actual cost to the United States of implementing S. 399 would be substantially higher because the legislation requires the United States to carry out a number of actions spending "such sums as may be necessary." Major costs would be incurred to carry out the requirements of section 5(a) related to the St. Mary River, section 5(b) related to compensation to the Tribe for Milk River Project Rights-of-Way and easements, and section 11 regarding Milk River water rights. S. 399 as introduced does not even attempt to quantify the amounts that the United States would be required to pay to satisfy the requirements of these sections. Likewise, S. 399 is silent on the amount required for the Birch Creek Mitigation Fund that would be established under section 9.

Of the \$591 million that are specifically authorized, \$466 million are slated for the Blackfeet Land and Water Development Fund established in section 8(a) of S. 399. This trust fund would be used by the Blackfeet Tribe to carry out activities at its option. The list of authorized uses in section 8(a) is extremely broad. \$125 million is authorized for the Secretary of the Interior to carry out rehabilitation and improvement activities for the Blackfeet Irrigation Project and Four Horns Dam and Reservoir. The legislation does not make clear what would happen if \$125 million is not enough to complete the work called for in section 5(d) of the Act, although the Tribe may be able to use funds provided to it through the Land and Water Development Fund to complete the work. As will be discussed further below, this needs to be clarified so that the Secretary does not face open-ended and unfunded mandates and the United States does not face continuing liabilities, instead of finality, despite the expense and breadth of this settlement.

The settlement would recognize a tribal water right to approximately 750,000 acre-feet per year of surface water from the flow of several rivers on the Reservation, including the St. Mary River, the Milk River, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. Citizens of the State of Montana benefit under the settlement as non-irrigation State based water rights are protected under the Compact in each of these basins, while irrigation State based water rights are protected for a period of ten years in the Cut Bank Creek and Milk River Basins and are then subject to a call by the Tribe.

The remainder of this testimony will summarize a number of significant concerns regarding S. 399 as introduced.

IV. Major Concerns

A. Federal Cost

The Department has serious concerns with the amount of the appropriations that would be needed to carry out this settlement. Section 14 authorizes appropriations in the amount of \$591 million plus additional sums as may be necessary to resolve the St. Mary and Milk River conflicts and to implement the Birch Creek Agreement discussed above. Aside from just the sheer magnitude of the cost of this proposed settlement, there is little information regarding the projects the Tribe plans on funding using the trust fund that would be established under legislation. The Department has made it clear to the Tribe that it needs much greater detail and certainty along with a more realistic level of funding before it will be able to support S. 399.

As a practical matter, the size of the Federal obligation created under S. 399 in relation to the Department's budget presents significant challenges. As an example, the Bureau of Reclamation currently has a backlog of more than \$2 billion in authorized but unfunded rural water projects. This is in addition to other authorized but unfunded Reclamation projects. Moreover, the breadth of the many benefits that would flow to the Blackfeet Tribe and the non-tribal beneficiaries under the settlement at almost exclusively Federal cost, such as the rehabilitation and improvement of the Blackfeet Irrigation Project and significant funding for unspecified and open-ended water and economic development projects, raises serious concerns because of the precedent that enactment of such a large settlement could set for future Indian water rights settlements.

B. Non-Federal Cost Share

S. 399, as introduced, authorizes almost \$600 million in Federal appropriations. Significantly, the legislation authorizes \$125 million of this cost for the rehabilitation, improvement, and expansion of the Blackfeet Irrigation Project and Four Horns Dam and Reservoir. Many of the benefits from Four Horns Dam and Reservoir would go to secure a guaranteed water supply for the Birch Creek water users associated with Pondera County Canal and Reservoir Company (PCCRC), a private off-Reservation irrigation company south of the Reservation. Birch Creek forms the southern boundary of the Blackfeet Reservation and was the subject of *Conrad Inv. Co. v. United States*, 161 F. 829, 831 (9th Cir. 1908), where "the paramount rights of the [Blackfeet] Indians" to Birch Creek were decreed. If the Tribe develops the full Birch Creek

water right it negotiated under the Compact with Montana, the water supply available to PCCRC will decrease.

The Birch Creek Agreement between the State and the Tribe attempts to solve this problem by authorizing the construction of a new pipeline to deliver 15,000 AF/yr to PCCRC, water that is made available by the enlargement of Four Horns Dam, a Bureau of Indian Affairs (BIA) irrigation project facility. Though the Tribe's consultant estimates that full implementation of the cost for the Four Horns project will cost as much as \$215 million, S. 399 authorizes only \$125 million for the Secretary to pay for both Four Horns Dam and Reservoir and expansion of the Blackfeet Irrigation Project. Any additional required funding for this project would need to come from the Tribe's water development fund, although this is not clear from the language used in S. 399 and would require clarification. The Administration estimates that about half of the full implementation cost of \$215 million is attributable to non-tribal water users. Montana agreed in the Birch Creek Agreement to pay the Tribe \$14.5 million for its deferral of its Birch Creek water right for a period of up to 15 years during construction of the Four Horns Dam enlargement and associated infrastructure, then for its delivery of 15,000 AF/yr to PCCRC for 25 years. Additionally, the State, during water rights negotiations, paid the Tribe \$500,000 to conduct appraisal level designs of the Four Horns enlargement project. The State also will contribute an additional \$20 million towards construction of the PCCRC pipeline for a total cost share by the State of \$35 million, just 6% of the specifically authorized costs of the settlement and around 33% of the Administration's estimate of the State's share of the capital cost of this project.

Additional benefits to State users in the Compact arise from the Tribe's agreement to protect junior state water rights holders, especially in the St. Mary and Milk River basins. These benefits are substantial although not quantified in the settlement. The Department is confident that settlement benefits, e.g., protecting existing non-Indian water users, securing the Tribe's water rights, and empowering the Tribe to control and manage its water resources, can be achieved at a lower cost than the Birch Creek Agreement contemplates. The United States has engaged experts to identify alternatives, and working in collaboration with the Tribe, is preparing an alternative proposal for consideration by the State. While the Department supports the goal of preserving existing water uses whenever possible, substantial Federal outlays that benefit non-Indian water users are not acceptable.

C. Lack of Information Regarding Proposed Use of Trust Fund and Infrastructure Projects

Section 8 of S. 399 authorizes the Tribe to use a \$466 million Land and Water Development Fund for: (1) the acquisition of land or water rights; (2) water resources planning, development, and construction, including storage and irrigation; (3) agricultural development; (4) restoring or improving fish or wildlife habitat; (5) fish or wildlife production; (6) any other water storage project, land or land-related project, or water or water-related project; (7) cultural preservation; (8) the operation and maintenance of water and water-related projects and environmental compliance related to projects constructed under this Act; (9) development of administrative infrastructure to implement this Act, including development of the tribal water code; (10) design and construction of water supply and sewer systems and related facilities; (11) measures to address environmental conditions on the Reservation; and (12) water-related economic

development projects. The authorized uses of this fund are so broad that it is difficult for the United States to evaluate whether the fund is sized appropriately.

Likewise, the Department does not have sufficient information regarding the infrastructure projects that the Tribe wants to carry out under this settlement. Without this information, we cannot evaluate the Tribe's estimated costs for the proposed projects or determine an appropriate Federal cost share. The \$125 million authorized for the Secretary to carry out infrastructure projects would not be sufficient to complete the actions called for under section 5(d) of S. 399 as introduced. The legislation should clarify the respective responsibilities of the Secretary and the Tribe under the legislation. It is our understanding that the Tribe would be responsible for completing these infrastructure projects using funds provided to the Tribe under this settlement after the Secretary has spent the amount specifically authorized in section 14 for these purposes.

The Blackfeet Irrigation Project (Project) was authorized for construction in 1907 at 106,000 acres but only 51,000 acres have been completed. Sixty percent of the Project's land is in trust owned by either the Tribe or individual tribal members and about 40 percent is owned by non-Indians. The BIA estimates the Project's total deferred maintenance costs at over \$29 million. About 38,300 acres are being assessed operation and maintenance fees. Section 5(d)(1) of the legislation calls for full build out of the Project to the authorized acreage. The rehabilitation of the Project includes plans to enlarge Four Horns Reservoir and associated delivery systems, including the Birch Creek portion of the Project discussed above. The legislation lacks specifics with respect to the proposed rehabilitation projects the Tribe plans to undertake. The Department has expressed its concerns about the scope and cost of the proposed rehabilitation of the Project, and the Tribe is working with us to more narrowly focus its plans for rehabilitation. The Tribe is also considering the Department's proposal that after completion of an agreed upon rehabilitation and improvement of the Project, the United States would transfer to the Tribe title to the Project.

Although not specifically referenced in the legislation, it is understood that the Tribe intends to develop a regional drinking water system using funding provided under this settlement. Parts of the Blackfeet Reservation have been under a "boil order" for more than a decade. While the Tribe has been working to develop and construct a regional water supply system, only portions of it are complete. The \$466 million Blackfeet Land and Water Development Fund authorized in this legislation could be used by the Tribe for funding the proposed regional water system, which according to the Tribe's estimates will cost around \$110 million. If the actual costs of construction are higher than that, the Tribe would need to use more of the Fund for this purpose. Assuming that the system would serve over 25,000 users, the \$110 million estimate reflects a cost per person of approximately \$4,300 for the system, which compares favorably with costs associated with other projects in the region. The Tribe is considering how to modify its proposal, however, in view of the Department's concerns about the expense of the project. Our respective technical experts are exploring ways to achieve cost savings through possible redesign of certain elements of the proposed regional water system. We are confident that a better, more efficient design is possible.

D. Mitigation Fund to Benefit non-Indians

The State and the Tribe entered into a side agreement, which the proposed legislation would approve and to which it would bind the United States, to secure a permanent supply of water for the PCCRC, which supplies irrigation water to its members as well as the municipal supply to the City of Conrad. Under this side agreement, the State will pay the Tribe to defer its use of Birch Creek for a period of up to 15 years while infrastructure is built to guarantee delivery of water to the PCCRC. Once the infrastructure is completed, the Tribe will supply 15,000 AF/yr for 25 years to PCCRC. Moreover, Section 9 of this bill requires the United States to establish a fund "to be used to mitigate the impacts of development of the tribal water right ... on the Birch Creek water supplies of the PCCRC Project" and authorizes the appropriations of "such sums as are necessary" for this purpose. The United States strongly opposes this unprecedented inclusion of a fund to benefit non-Indian beneficiaries in a settlement using scarce Federal dollars. While Indian water rights settlements routinely seek to protect existing non-Indian water uses so as not to unduly impact local economies, they have not to date included Federal funds to compensate non-Indian water users if the future exercise of a tribe's established water rights causes an impact on future non-Indian water uses. The United States cannot afford this sort of precedent, and it is unclear what additional potential liabilities this may impose on the United States.

E. Lack of Resolution in the St. Mary and Milk River Basins

The proposed legislation leaves important matters involving the Tribe's water rights in the St. Mary River and Milk River Basin unsettled, imposing upon the Department the obligation to develop solutions to these problems after the settlement is enacted. This guarantees that there will be significant obstacles to ever achieving realistic solutions to these problems. The Department is committed to developing real solutions to the issue of Tribe's water rights in the St. Mary River and the Milk River before a settlement is enacted. The two main concerns of the Department are found in sections 5 and 11 of the Blackfeet legislation, although we have other concerns with the indefiniteness of some of the legislation's provisions as discussed more fully below. Section 5 of the legislation directs the Secretary to allocate to the Tribe 50,000 AF/yr of stored water in Lake Sherburne Reservoir free of any charges and to agree to lease the water back from the Tribe at an undetermined price for an indefinite period of time. The provision's apparent goal is to have the Department find a way to provide the Tribe with a firm supply of 50,000 AF/yr on a permanent basis and use the lease provision as a stop gap measure while the effort to find the additional supply is underway. This requirement is complex and raises difficult issues, including feasibility and future liability. Water rights in the Milk River Basin for both the Blackfeet Tribe and the Ft. Belknap Indian Community are set forth in their respective Water Rights Compacts with Montana and Section 11 directs the Secretary to resolve conflicts that may arise between the two tribes.

Taken together, these issues create real and significant conflicts over water use and water availability and will create difficult problems for the United States and for the communities that are affected by this proposed settlement. They must be resolved before the Administration will be able to lend its support to the Blackfeet water rights settlement. The purpose of a water rights settlement is to create the conditions for harmonious working relationships among the parties, but these goals will not be achieved if a settlement creates significant new liabilities and leaves significant conflicts over water use and water availability unresolved.

F. Additional Concerns

We have other concerns with the proposed legislation, including but not limited to the following. First, the waivers as set forth in section 12 of the legislation are inadequate, particularly given the broad nature of this legislation. The Administration has developed language that we believe is appropriate for waivers in Indian water rights settlements and such language should be followed here. Second, further analysis is needed with respect to the rights of allottees. The Administration has an obligation to protect allottees and the language of Section 7(b) does not contain the certainty that we require so that allottees are fully protected under the settlement. Third, the Department, including the National Park Service (NPS), believes that the water rights (including instream flows) that Glacier National Park had quantified in the 1994 Water Rights Compact with the State of Montana and the water rights that the Tribe seeks to have confirmed in its water rights settlement generally are consistent. The Department is working with the Tribe and the NPS to seek a resolution to several concerns with the legislation, including water rights of the park, potential impacts of the settlement, if any, on park resources, or other issues related to the park.” Lastly, Section 7(f) permits the Tribe to lease “any portion of the tribal water right” for use off the Reservation. While the Department has supported authority for tribal water leasing in several prior settlements, it is concerned with the broad and uncertain aspects of this language.

V. Conclusion

S. 399 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This Administration shares that goal, and hopes to be able to support a settlement for the Blackfeet Tribe after a full and robust analysis and discussion of all aspects and ramifications of this large settlement.

The Administration is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe’s water rights claims. This settlement, when completed, will provide certainty to the State of Montana and non-Indian users and will enable the Blackfeet Tribe to put its water rights to use for the economic benefit of the Blackfeet Reservation and its residents. If the parties continue to negotiate in good faith, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

We believe settlement can be accomplished in a manner that protects the rights of the Tribe and also ensures that the appropriate costs of the settlement are borne proportionately. While we do not support S. 399 as introduced, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support.

Mr. Chairman, this concludes my written statement. I would be pleased to answer any questions the Committee may have.