

**TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 434, BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2013
MAY 8, 2013**

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

I. Introduction

The Obama Administration recognizes that water is a sacred and valuable resource for Indian people and supports the resolution of Indian water rights claims through negotiated settlements whenever possible. Indian water settlements ensure that Indian people have safe, reliable water supplies and help fulfill the United States' trust responsibility to tribes. At the same time, Indian water settlements end decades of controversy and contention among tribes and neighboring communities and promote cooperation in the management of water resources. The Obama Administration's policy on negotiated Indian water settlements continues to be based on the following principles: the United States will participate in settlements consistent with its trust responsibilities to Indians; Indian tribes should receive equivalent benefits for rights which they, and the United States as trustee, may release as part of the settlement; Indian tribes should realize value from confirmed water rights resulting from a settlement; and settlements should contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement.

These principles guided this Administration's support for the four settlements enacted into law in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010), benefitting seven tribes in three different states at a total Federal cost of more than \$1 billion: White Mountain Apache Tribe in Arizona, the Crow Tribe in Montana and the Pueblo of Taos, Pueblo of Nambe, Pueblo of Pojoaque, Pueblo of San Ildefonso, and Pueblo of Tesuque in New Mexico. Our support for these settlements demonstrates that settling Indian water rights disputes is a high priority for this Administration and confirms that we would support Indian water settlements that result from negotiations with all stakeholders including the Federal government, and that include an appropriate Federal contribution and appropriate cost share contributions from states and other

benefitting parties. Secretary Jewell continues to make the negotiation and implementation of Indian water rights settlements a high priority for the Department. She understands that Indian water rights and related resources are trust assets of tribes, and water rights settlements enable the Federal government to protect and enhance those assets. When Congress enacts an Indian water right settlement it is not approving an earmark: it is fulfilling Congress' unique obligation to Indian tribes. Indian water rights settlements can produce critical benefits for tribes and bring communities together to face water challenges in a collaborative, transparent, and inclusive way. The Department will continue to work with the Blackfeet Tribe (Tribe), the State of Montana, the local parties, and the sponsors to craft a Blackfeet water rights settlement that can be supported by all parties.

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

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

II. Background on Negotiation

Our October 20, 2011, testimony on S. 399 contains a summary of the history of the Blackfeet Reservation and the relationship between the Tribe and the United States. We will not repeat that summary here but will focus on the efforts to resolve the Tribes water rights claims. In April 1979, the State of Montana enacted a statewide water rights adjudication system and filed an action in State court to quantify the Tribe's water rights. At the same time, the United States filed a case in Federal Court in Montana to adjudicate the Tribe's water rights claims. The question of jurisdiction that arose as a result of the two lawsuits was decided in 1983 by the United State Supreme Court, which held that state court was the appropriate forum to adjudicate the Tribe's water rights. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Both the Montana adjudication and the Federal adjudication of the Blackfeet water rights claims have

been stayed pending negotiation of a settlement of the Tribe's claims through Montana's Reserved Water Rights Compact Commission. The Tribe initiated negotiations with the Compact Commission in 1989 and in 1990, the Department appointed a Federal Negotiation Team to support the negotiations, which proceeded on and off until 2007, when the State and the Tribe reached an agreement in the form of the Compact. The United States was not a party to that agreement. If Congress does not approve the Compact, the Tribe's water rights claims will be litigated in the Montana Water Court. As stated previously, this Administration prefers to resolve Indian water rights claims through negotiated settlements, consistent with the United States' trust responsibility and with our policy promoting Indian self-determination and economic self-sufficiency. The Department has been working closely with the Tribe, the State and the sponsors to achieve a settlement of the Blackfeet water rights claims. S. 434 reflects the efforts of all of the parties toward this goal.

III. Blackfeet Montana Water Rights Compact and Proposed Legislation

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

The settlement would recognize a tribal water right to approximately 750,000 acre-feet per year of surface water from the flow of several rivers on the Reservation, including the St. Mary River, the Milk River, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. Citizens of the State of Montana would benefit under the settlement as non-irrigation State based water rights are protected under the Compact in each of these basins, while irrigation State based water rights are protected for a period of ten years in the Cut Bank Creek and Milk River Basins and are then subject to a call by the Tribe. In Birch Creek, the Tribe's total right would increase to 125 cubic feet per second (CFS) during the irrigation season, an increase of 83 CFS. Non-Indian water users south of the Reservation would be protected under the Birch Creek Deferral Agreement, a separate agreement that would be approved by S. 434. Thus, the legislation considers the need to secure wet water for the Tribe as well as the interests of surrounding non-Indian communities. The remainder of this testimony will summarize a number of concerns regarding S. 434 as introduced

IV. Federal Concerns

A. Federal Cost

S. 434 includes definite improvements over S. 399 in terms of a Federal contribution. In addition, the bill adds flexibility that will allow the Tribe to work with the Department to further refine its approach to various projects as they are implemented over time. For example, S. 434

includes funding for a regional water system for Municipal, Rural, and Industrial (MR&I) purposes, providing safe drinking water to Blackfeet communities across the Reservation, many of whom have had to live under boil orders or with school closures because of water quality deficiencies. The Tribe worked closely with the Department to extend and improve coverage of the proposed improvements to the MR&I system and to build appropriate flexibility into the legislation. The improvements and flexibility in S. 434 will ensure that the projects constructed are meaningful and cost effective.

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

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

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

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

C. Title to Infrastructure

Section 14 of S. 434 provides a proposed mechanism to transfer title from the United States to the Tribe of specified project infrastructure, including the Blackfeet Indian Irrigation Project, the

Blackfeet Regional Water System, and various miscellaneous projects included as “Blackfeet Water Storage, Developments and Projects.” This Administration, as we stated in our November 15, 2010, letter of support for the White Mountain Apache Tribe Water Rights Quantification Act to Senator Dorgan, believes that the transfer of infrastructure into tribal ownership is consistent with tribal self-determination and sovereignty and that title to such infrastructure provides tribes with assets and opportunities they can then manage as reservation economies and conditions evolve. However, we are keenly aware that a “one size fits all” approach to transfer of title to such a variety of projects is not appropriate. Some of the projects authorized to be transferred are currently held by the United States while title to other infrastructure is held directly by the Tribe. Some of the infrastructure involved provides services to non-Indians as well as Tribal members and transfer processes must take this into account where applicable. We would like to work with the Tribe and bill sponsors on more tailored title transfer language that will accomplish the tribal goals of self-sufficiency and autonomy in a way that is practical and can be implemented by the stakeholders working together.

D. Water Marketing

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

E. Federal Fund Management

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

F. Other Federal Concerns

We have made significant progress with the Tribe in addressing Federal concerns and are hopeful of reaching agreement with the Tribe on other issues raised by S. 434, such as the waivers that are part of every Indian water rights settlement, and the language needed to fully protect allottees’ rights under the settlement. We are hopeful also that we are close to agreement on solutions to the concerns of the National Park Service and United States Forest Service on the interplay between the Blackfeet water rights claims and the water rights the agencies have in place under their approved compacts with the State of Montana. Other issues to be resolved

include the Lake Elwell allocation, the extent of any tribal preference for developing hydropower on the St. Mary Canal Drops, the resolution of longstanding issues concerning rights of way, and a more realistic enforceability date must be resolved.

V. Conclusion

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