AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–678

S. 3128, S. 3355, AND S. 3381

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

S. 3128, THE WHITE MOUNTAIN APACHE TRIBE RURAL WATER SYSTEM LOAN AUTHORIZATION ACT, WHICH AUTHORIZES A LOAN TO CONSTRUCT A COMMUNITY WATER SUPPLY

S. 3355, THE CROW TRIBE WATER RIGHTS SETTLEMENT ACT OF 2008, WHICH SETTLES THE TRIBE'S WATER RIGHTS AND PROVIDES SUPPORT FOR ECONOMIC DEVELOPMENT

S. 3381, A BILL TO AUTHORIZE THE SECRETARY OF THE INTERIOR, ACTING THROUGH THE COMMISSIONER OF RECLAMATION, TO DEVELOP WATER INFRASTRUCTURE IN THE RIO GRANDE BASIN, AND TO APPROVE THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE PUEBLOS OF NAMBE, POJOAQUE, SAN ILDEFONSO, TESUQUE, AND TAOS

SEPTEMBER 11, 2008

Printed for the use of the Committee on Indian Affairs

U.S. GOVERNMENT PRINTING OFFICE

45–807 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON INDIAN AFFAIRS

BYRON L. DORGAN, North Dakota, *Chairman*
LISA MURKOWSKI, Alaska, *Vice Chairman*

DANIEL K. INOUYE, Hawaii
KENT CONRAD, North Dakota
DANIEL K. AKAKA, Hawaii
TIM JOHNSON, South Dakota
MARIA CANTWELL, Washington
CLAIRE MCCASKILL, Missouri
JON TESTER, Montana

JOHN MCCAIN, Arizona
TOM COBURN, M.D., Oklahoma
JOHN BARRASSO, Wyoming
PETE V. DOMENICI, New Mexico
GORDON H. SMITH, Oregon
RICHARD BURR, North Carolina

ALLISON C. BINNEY, *Majority Staff Director and Chief Counsel*
DAVID A. MULLON JR., *Minority Staff Director and Chief Counsel*

CONTENTS

	Page
Hearing held on September 11, 2008	1
Statement of Senator Barrasso	11
Statement of Senator Domenici	4
Prepared statement	5
Statement of Senator Dorgan	1
Statement of Senator Murkowski	3
Statement of Senator Tester	5

WITNESSES

Bingaman, Hon. Jeff, U.S. Senator from New Mexico	6
Prepared statement	6
Black Eagle, Hon. Cedric, Vice Chairman, Crow Nation	43
Prepared statement	45
Bogert, Michael, Counselor to the Secretary, U.S. Department of the Interior	20
Prepared statement	22
Dorame, Hon. Charles J., Chairman, Northern Pueblos Tributary Water Rights Association	55
Prepared statement	57
Kyl, Hon. Jon, U.S. Senator from Arizona	7
Prepared statement	9
Lupe, Hon. Ronnie, Chairman, White Mountain Apache Tribe	33
Prepared statement	36
Polly, Kris, Deputy Assistant Secretary for Water and Science, U.S. Department of the Interior	13
Prepared statement	15
Suazo, Sr., Hon. Gilbert, Councilman, Taos Pueblo Tribe	60
Prepared statement	62
Sullivan, John F., Associate General Manager, Water Group, Salt River Project	40
Prepared statement	41
Tweeten, Chris D., Chief Civil Counsel, Office of the Attorney General, State of Montana	50
Prepared statement	52

APPENDIX

Correspondence between Wyoming and Montana during the Crow Compact negotiations, submitted by Senator Barrasso	75
D'Antonio, Jr., John R., P.E., State Engineer, New Mexico, prepared statement	172
Letters submitted by:	
Darren Cordova, Mayor Pro Tem, Town of Taos	179
David Coss, Mayor, City of Santa Fe	180
Dave Freudenthal, Governor, State of Wyoming	184
Telesfor R. Gonzales, Chairman, El Prado Water and Sanitation District	181
Mark Humphrey, Attorney, 12 Taos Valley Mutual Domestic Water Consumer Associations	187
Keith B. Nelson, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice	188
George Pettit, Manager, Town of Gilbert, AZ	183
Ivan D. Posey, Chairman, Eastern Shoshone Business Council	182
Bill Richardson, Governor of New Mexico	178
Susan Bitter Smith, President, Board of Directors, Central Arizona Water Conservation District	186

Page

Martinez, Palemon, President, Taos Valley Acequia Association, prepared statement 177
Montoya, Harry B., County Commissioner, Santa Fe, prepared statement 170
Response to written questions submitted by Hon. John Barrasso to Hon. Dirk Kempthorne 201
Response to written questions submitted by Hon. Pete V. Domenici to Hon. Dirk Kempthorne 203
Response to written questions submitted by Hon. Byron L. Dorgan to:
Hon. Charles J. Dorame 190
Hon. Dirk Kempthorne 199
Hon. Gilbert Suazo, Sr. 197
Chris D. Tweeten 192
Hon. Carl E. Venne 195
Response to written questions submitted by Hon. Jon Tester to:
Hon. Dirk Kempthorne 201
Chris D. Tweeten 193
Hon. Carl E. Venne 196
Rivera, George, Governor, Pueblo of Pojoaque, prepared statement 166
Roybal, Leon, Governor, Pueblo de San Ildefonso, prepared statement with attachment 160
Supplementary information submitted by:
Hon. Charles J. Dorame 156
Chris D. Tweeten 86

S. 3128, S. 3355, AND S. 3381

THURSDAY, SEPTEMBER 11, 2008

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

The Committee met, pursuant to notice, at 10:30 a.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. We are going to call the hearing to order today just a minute or two early. This is a hearing of the Indian Affairs Committee of the United States Senate. We welcome all of you.

This Committee is holding a hearing in this room, SD–628, which has now been assigned to the Indian Affairs Committee. Previously, we were meeting in the Russell Building for a good many years. This Committee will now convene in this room and in future hearings.

We have, as had been the case with the previous room over in Russell so many years ago when it was first used for the Indian Affairs room, we had a blessing for the room. We have today with us the Vice Chairman of the Crow Tribe, Cedric Black Eagle, who is with us today and is willing to give an opening blessing. The blessing has included an activity this morning in which Cedric Black Eagle has smudged the room with smoke from coal and cedar, which is a tradition of their tribe. We appreciate very much the Vice Chairman of the Crow Tribe being with us.

If you will all stand with me, we will invite Cedric Black Eagle to give us the blessing.

Mr. BLACK EAGLE. Thank you, Chairman Dorgan. Thank you for giving me this honor to pray this morning. Just very briefly, I talked to the members that were present earlier that in the Crow mission, whenever we have a new home or new tipi as our traditional home, we say a prayer, and all our doorways are facing east as the new day and the new things that come into our homes, things that are good, things that are of goodwill in nature is how we believe.

I did that because primarily over 500 tribes eventually at some point in time will walk through these doors and sit down and talk with you about their issues and the things that they are concerned about. I prayed about that, and prayed for you, as well as the members of this Committee, the staff, that you remain in good health

and that you have strong minds and healthy bodies to fulfill the things that you were elected to do in terms of this Congress.

With that, I will say an opening prayer.

[Prayer in native tongue.]

Mr. BLACK EAGLE. Thank you.

The CHAIRMAN. Mr. Chairman, thank you for being with us. We appreciate the blessing and respect the cultural significance of that blessing. I perhaps should have called on our colleague, Senator Tester from Montana, to give a proper introduction of a member of the Crow Tribe.

Senator TESTER. That is perfectly all right, Mr. Chairman. Cedric, I don't need to tell anybody that knows him this, but Cedric is a very fine man, very soft-spoken, but when he speaks people listen. I really appreciate not only his blessing of this room and the scent of sweetgrass that we can still smell, but also for your prayer, Cedric. We appreciate that, appreciate it very much. It is one of the keys for us to do good work. So thank you.

The CHAIRMAN. Senator Tester, thank you very much.

I had the pleasure and the honor of visiting the Crow Nation with our colleague, Senator Tester, and I appreciate very much your being here.

The Committee, this morning, will have a hearing on S. 3128, S. 3355 and S. 3381. I think at all hearings today, it is perhaps important to acknowledge this is a very important day, September 11, which today is the seventh anniversary of a tragic day in our Nation's history. We remember, as all committees I am sure will remember, the memory of those who lost their lives on that day.

But the business of America continues, and this hearing is being called today to hear the views on three bills related to Indian water matters. The first, S. 3128, is the White Mountain Apache Tribal Rural Water System Loan Authorization Act, which authorizes a loan to construct a community water supply. The second is S. 3355, the Crow Tribe Water Rights Settlement Act of 2008, which settles the Tribe's water rights and provides support for economic development. And the final one is S. 3381, a bill authorizing the Secretary of the Interior to develop water infrastructure in the Rio Grande basin, and to approve the settlement of water rights claims of five Indian Pueblos.

These bills are important to the tribes, to the States, and to non-Indian water users in the western United States. The bills will secure water supplies and settle claims against the United States for compromising tribal water rights.

Furthermore, the bills try to rectify the failing Federal irrigation projects serving reservation residents. Water supplies must be secured to provide drinking water and to allow communities to develop their resources.

The bills will provide certainty to Indian and non-Indian communities alike. I acknowledge today the efforts of these communities to come together and resolve very longstanding and difficult issues regarding water use.

So today, we will hear from the sponsors of the bills, including Senators Bingaman and Kyl, who are joining us today. Welcome, Senators Kyl and Bingaman, and I know that Senator Domenici is a sponsor of one of the bills as well.

We will also hear the views of the Department of the Interior, Indian tribes and others involved with the bills. I welcome the witnesses. I know that many of you have traveled long distances to be with us, and we appreciate your willingness to testify.

We do have a full agenda, and I ask that you limit your oral testimony to five minutes and your full written testimony will be put in the record as submitted in its entirety. I encourage any other interested parties to join us with submitted written comments to the Committee which will be part of the hearing record. The hearing record will remain open for two weeks.

Senator Murkowski?

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

Senator MURKOWSKI. Thank you, Mr. Chairman.

I want to thank you, Chairman, for your words this morning, your blessings upon this room and those across this Nation that guide our Country, not only those of us here in the United States Senate, but all the tribal leaders and those that are making a difference across this Nation.

I do want to commend you, Mr. Chairman. I think the room looks pretty great. We are out of the dungeon and into the light, and I think it is a fine job and a good place to be doing our business here. I think it is auspicious on this first Committee hearing that we are having in this room that we are joined by two of our colleagues from the West, Senator Kyl from Arizona, Senator Bingaman from New Mexico, both leaders and advocates on Indian issues, including the measures that we have before us today.

I suspect that many of us probably more so those from east of the Mississippi, don't completely understand the critical importance of water to communities in the American west, where we know that the supply is inevitably outstripped by the competing demands. I doubt, though, that anyone understands this basic tenet of life better than the Indian people living on the reservation communities in the American west.

Many of our Indian tribes have longstanding senior water rights that have never been developed or transformed from a right into a real or the wet water. I do appreciate the very significant efforts that have been undertaken to bring several of the parties together to resolve the water issues out in the West. When I was chairman of the Subcommittee on Water and Power in the Energy Committee, I had an opportunity to work with so many of my colleagues on these very thorny issues as they relate to water issues and water rights.

We know that the litigation can span generations. The Aamodt case involved in one of these bills, we certainly see that. We recognize the cost, the cost to the parties, millions upon millions of dollars in attorneys and expert witness fees. So resolving these disputes by agreement rather than litigation brings not only certainty and finality, but provides an opportunity for creativity and solutions that the courts simply can't provide.

I do hope that the Committee will expeditiously consider these matters, and I appreciate you, Mr. Chairman, bringing them forward today.

The CHAIRMAN. Senator Murkowski, thank you very much.

I would just observe that my small contribution to the resistance is to insist on opening the drapes in hearing rooms. Most politicians here walk around with a gray pallor, never having seen the sun or the sky because our hearing rooms are all clouded in deep-colored drapes that are shut.

We are told we don't look as good on camera, apparently, because of the light, but we all feel better.

[Laughter.]

Senator DOMENICI. You have to get some people to wash the windows.

The CHAIRMAN. That is right. We will wash the windows.

Do other members of the Committee have comments? Senator Domenici?

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman. It is good to have Senator Bingaman here testifying on the measures before the Committee. I thank you for holding the hearing.

The two bills before us are very important to New Mexicans: S. 3381, the Aamodt and Taos Pueblo Indian Water Rights Settlement, and the Taos Indian Settlement Act of 2008. This legislation will resolve longstanding Indian water rights claims within New Mexico and authorize a Federal funding source.

The Aamodt litigation in New Mexico was filed, believe it or not, Mr. Chairman, and I say this for the benefit of the distinguished Senator from Arizona also, in 1966, the longest-standing litigation in the Federal judiciary system. The resolution of these claims will not only improve the lives of many within the communities by providing a safe and reliable water supply, but will also improve the ability of New Mexico to effectively undertake water rights planning.

The parties to this case were docketed back in 1966. They have made real agreements. They have sat down and discussed and changed their views over the years and have come to some real understandings that we can't let fall between the cracks now. Not only should we authorize it today, but this United States Congress has to find a way to pay for this. Aamodt is not a very elaborate settlement in terms of dollars, but nonetheless we don't have the resources and we ought to find out from the Federal agency why it is so difficult to get these funded when so many other Indian settlements have been funded by the United States Government.

Mr. Chairman, as you might know, cases of this duration have many, many participants. I would like to just, with your permission, indicate who is present here. I am sure that Senator Bingaman would agree that we ought to recognize Governor Mora of Tesuque is here. Thank you, Governor. And Governor Roybal of San Ildefonso is here. Thank you, Governor.

Governor Rivera, George Rivera of Pojoaque, and Lieutenant Governor Diaz of Pojoaque, and Governor Paul Martinez of Taos, and War Chief Luis Romero from Taos. Is the War Chief here? Frank Marcus from Taos and Nelson Cordova from Taos. Thank you for coming. Arthur Coca from Taos Valley Acequia Association.

Thank you, sir, and Gael Minton of Taos Valley Acequia Association, thank you.

Thank you, Mr. Chairman. I will have questions of the Federal witnesses, and I again thank you for this hearing.

Senator Bingaman, thank you for all the work you have done in trying to get these cases resolved.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Mr. Chairman, thank you for holding this hearing today. Over the last several years an enormous amount of time has been spent on these settlements and other New Mexico Indian water rights settlements. I am pleased to see many of the settlement parties from New Mexico with us here today. They deserve an enormous amount of credit for their years of hard work to make this legislation possible. Rather than spend countless hours in litigation, these groups have sat down and worked through these issues in a very productive manner.

As a result, we have before us today, S. 3381—the Aamodt and Taos Pueblo Indian Water Rights Settlement Act of 2008. This legislation will resolve these longstanding Indian water rights claims within New Mexico and authorize a source of Federal funding to resolve them.

The Aamodt litigation in New Mexico was filed in 1966, and is the longest standing litigation in the Federal judiciary system. The resolution of these claims will not only improve the lives of many within these communities by providing a safe and reliable water supply, but will also improve the ability of New Mexico to effectively undertake water rights planning in the near and long-term future.

As I have stated before, the costs of not settling these claims in New Mexico are dire. The legislation before us will ensure that our obligations to these communities are met and that they will have safe and reliable water systems.

I would like to welcome our witnesses here today and look forward to their testimony.

Thank you Mr. Chairman.

The CHAIRMAN. Senator Domenici, thank you.

Senator Tester?

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

Senator TESTER. Thank you, Mr. Chairman.

I also want to echo Senator Domenici's comments on the hearing. I appreciate your holding these in such quick fashion.

I am going to limit my talking to the Crow Water settlement. In 1999 when I was in my first year in the Montana State Senate, we voted on this water settlement. It is now nearly 10 years later and we have it in front of us now. Hopefully, we can get this acted upon and passed because water is critically important all over the West, as Senator Murkowski said, but also in areas that are economically challenged like Indian Country in the West. So if we can provide self-sufficiency to them through self-determination, I think it helps everybody.

I, too, want to thank Cedric for being here absolutely, and Chris Tweeten for being here. They have done a lot of work for the last, goodness knows, decade and longer to try to get these Indian water settlements to come to fruition.

So thank you, Mr. Chairman, once again, and I look forward to the hearing.

The Chairman. Senator Tester, thank you very much.

Senator Bingaman, welcome to our Committee. You may proceed.

STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much, Mr. Chairman. I appreciate your having this hearing and considering particularly the bill that Senator Domenici and I have been most involved with, which is S. 3381. As he described, first he introduced all of our distinguished visitors who are the individuals that really did make this possible because of their willingness to negotiate a settlement of these two cases.

One of the cases involves litigation that is over 40 years old, as Senator Domenici pointed out. It was a pending case when I was sworn into the bar in New Mexico, and it is still a pending case. The other case is not quite 40 years old, but it is getting close.

So it is very important we get these settlements agreed to. The settlements have been agreed to, but get the legislation enacted to implement the settlements. That is what this legislation would try to do.

We believe it is fair to all involved, not just the Pueblos, but the other water rights holders in these areas. We believe it is a good resolution of the issues. The State of New Mexico deserves special recognition for actively pursuing these settlements. Governor Richardson has made this a priority and deserves credit for that.

I am disappointed that the Administration is not going to be testifying in support of the bill as introduced. However, I do not believe the Administration's position should impede this Committee from proceeding with the bill. I hope that there is a chance for the Committee to act favorably upon it so that some action can be completed by the full Senate before this year is out.

Let me just say that if we can accomplish the enactment of this legislation, as Senator Domenici and I have proposed it here, I think it will put a lot of lawyers out of work in our State. Many of the lawyers that I know quite intimately in Santa Fe and other parts of the State have made a good living litigating these cases for a long time. It would be very good if we could urge them to pursue other litigation and get these resolved.

So thank you for having the hearing. I hope your Committee is able to act favorably upon this bill before it concludes its work.

[The prepared statement of Senator Bingaman follows:]

PREPARED STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Chairman Dorgan and Vice-Chairman Murkowski—thank you for holding today's hearing. I appreciate the opportunity to address the Committee in support of S. 3381, a bill that I am sponsoring with Senator Domenici. This bill is the product of years of negotiation and is long overdue. If enacted, it will end contentious disputes over water rights claims in two separate stream adjudications in northern New Mexico. Before getting into the details, I'd like to take a moment to recognize the large number of New Mexicans who are here today in support of S. 3381. Charlie Dorame of Tesuque Pueblo, will be representing the views of the four Pueblos involved the Rio Pojoaque adjudication, otherwise known as the *Aamodt* case. He is accompanied by Governor Mora of Tesuque; Governor Roybal of San Ildefonso Pueblo; and Governor Rivera and Lt. Governor Diaz of Pojoaque Pueblo. Councilman Gil Suazo of Taos Pueblo will address the benefits of the Taos settlement. Gil is accompanied by Governor Martinez and several other leaders of Taos Pueblo. Representatives of the Taos Valley Acequia Association have also traveled here to express support for S. 3381.

As I noted, S. 3381 would authorize two Indian water rights settlements. The first is a settlement involving the claims of Nambe, Pojoaque, San Ildefonso, and

Tesuque Pueblos in the Rio Pojoaque, which is north of Santa Fe. It's my understanding that the *Aamodt* case is the longest active Federal court proceeding in the country. The case began in 1966 and has been actively litigated before the district court in New Mexico and the Tenth Circuit Court of Appeals. Forty years of litigation resolved very little, certainly not what the parties accomplished by engaging directly with each other. The *Aamodt Litigation Settlement Act* represents an agreement by the parties that will (1) secure water to meet the present and future needs of the four Pueblos; (2) protect the interests and rights of long-standing water users; and (3) ensure that water is available for municipal and domestic needs for all residents in the Pojoaque basin. Negotiation of this agreement was a lengthy process and the parties had to renegotiate several issues to address local, state, and Federal policy concerns. In the end, however, their commitment to solving the water supply issues in the basin prevailed.

The Rio Pueblo de Taos adjudication is a dispute that is almost 40 years old. Similar to *Aamodt*, little has been resolved by the pending litigation. The parties have been in settlement discussions for well over a decade but it was not until the last five years that the discussions took on the sense of urgency needed to resolve the issues at hand. The settlement will fulfill the rights of the Pueblo consistent with the Federal trust responsibility, while continuing the practice of sharing the water necessary to protect our traditional agricultural communities. The Town of Taos and other local entities are also secure in their ability to access the water necessary to meet municipal and domestic needs. The *Taos Pueblo Indian Water Rights Settlement Act* represents a common-sense set of solutions that all parties to the adjudication have a stake in implementing.

Both settlements are widely supported in their respective communities. The State of New Mexico, under Governor Richardson's leadership, deserves special recognition for actively pursuing settlements in both of these matters and committing significant resources so that the Federal government does not have to bear the entire cost of these settlements.

I am disappointed that the Administration is not supporting our bill as introduced. However, I don't believe the Administration's position should impede the bill from proceeding, and I hope there is a chance for Committee approval before we adjourn. As set forth in the testimony provided by Chairman Dorame and Councilman Suazo, we believe the settlements are consistent with the Administration's *Criteria and Procedures for Indian Water Rights Settlements.* Moreover, the U.S. Supreme Court once characterized the Federal Government's responsibilities to Indian tribes as "moral obligation of the highest responsibility and trust." This bill is an attempt to ensure that the government lives up to that standard, and does so in a manner that also addresses the needs of the Pueblos' neighbors.

Thank you again for the opportunity to make these remarks. I am committed to working closely with the Committee to try and move S. 3381 towards enactment.

The CHAIRMAN. Senator Bingaman, thank you very much.

I neglected to call on Senator Barrasso. That was my mistake. Senator Barrasso?

Senator BARRASSO. Oh, thank you very much, Mr. Chairman. I am happy to wait until after Senator Kyl.

The CHAIRMAN. Let me call on Senator Kyl, after which I will call on Senator Barrasso.

Senator Kyl, thank you for coming to the Committee. You may proceed.

STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Senator KYL. Mr. Chairman, thank you. Thank you for holding this hearing. There is really kind of a little emergency out in Arizona, and your willingness to do this quickly is very, very much appreciated.

This is a bill that will precede the full settlements bill which we are filing today to settle claims of the White Mountain Apache Tribe in Arizona, East Central Arizona. East Central Arizona has some mountains and it gets a lot of snow and rain on a portion of those mountains, but it has virtually no groundwater. Up to now,

the White Mountain Apache Tribe has relied solely on groundwater for the supply of water for its people. We are not talking projects or irrigation or anything of that sort, just the needs of the communities of White River and Cibecue and the other communities in which the White Mountain Apaches live.

That water is running out so quickly that in fact we won't have time to get this project built and in operation before it runs out. So there is a small interim project that actually is being put in place to tide them over. But as a result of an agreement by the tribe and all of the non-Indian parties in Arizona, and I believe the Federal Government agrees that this is the only solution to the municipal water needs of the White Mountain Apache Tribe, there is an agreed settlement of all of the claims which part of is for the Miner Flat Reservoir.

The legislation that we are asking support for today is simply to provide a loan from the Federal Government to get the engineering and planning and design of the Miner Flat Reservoir started now. If we wait until the settlement is finally passed by Congress, perhaps next year, since the repayment of the loan can't start until the year 2013 under the Arizona Water Settlement Act that was passed a couple of years ago, and because of the lag time, it will cost about $5 million to $7 million a year more if the project isn't started then. And there is uncertainty as to whether this interim supply of water is going to be adequate in any event.

So the point here is to get a loan to start the planning, construction and design of the Miner Flat Reservoir, which will be the ultimate source of water for the White Mountain Apache Tribe. That loan will be repaid. We have an amendment on our bill which solves a pay-go problem, but when the settlement legislation is adopted, then the payment will come out of the Arizona Water Settlement Fund, which has already been legislated into law by the Congress.

I want to thank the really enlightened leadership of the White Mountain Apache Tribe. Its tribal council, led by Chairman Ronnie Lupe, who is right behind me, has come to every one of the meetings. They have been very constructive in their approach. The non-Indian parties, represented here today by John Sullivan of the Salt River Project, have also been very cooperative.

This has been one of the best water settlements for me to participate in because there is simply no disagreement. Everybody is cooperating. But I think one of the reasons is everybody knows that the clock is ticking, and the White Mountain Apache Tribe is simply going to run out of water for its people if we don't get this project going.

So I really appreciate the Committee's acting on this quickly, in view of what is in effect an emergency that can be solved by this legislation.

I thank the Committee.

[The prepared statement of Senator Kyl follows:]

PREPARED STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Mr. Chairman, Vice Chairman Murkowski, and members of the Committee, thank you for holding this hearing on S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act. Representative Pastor has introduced the companion bill in the House.

I introduced this legislation in June 2008 to provide a federal loan to the White Mountain Apache Tribe for the planning, engineering, and design of a dam and reservoir, which will be used to provide drinking water to the tribe.

The White Mountain Apache Tribe, which is located on the Fort Apache Indian Reservation in eastern Arizona, has approximately 15,000 members. A relatively small well field currently serves the drinking water needs of the majority of the residents on the reservation, but production from the wells has declined significantly over the last few years. As a result, the tribe has experienced summer drinking water shortages.

The tribe is planning to construct a small Rural Development funded diversion project on the North Fork of the White River on its reservation this year. The tribe indicates that when the project is completed it will replace most of the lost production from the existing well field, but will not produce enough water to meet the demand of the tribe's growing population. Consequently, in order to meet the basic drinking water needs of the tribe, a longer-term solution is needed. The most likely and best solution is a relatively small dam and reservoir located on the tribe's reservation – the Miner Flat Dam.

S. 3128 would authorize the Secretary of Interior to provide a federal loan to the tribe for the planning, engineering, and design of the Miner Flat Project. Funding for the actual construction of the Project will be an essential piece of a comprehensive White Mountain Apache water settlement, which is nearly finalized.

The legislation confirming the settlement, which I will discuss in a moment, would pay for a significant percentage of the Project's costs out of a portion of the funds set aside in the Arizona Water Settlements Act for future Arizona Indian water settlements. This money, however, will not be available until 2013. If the tribe were forced to wait

until then to access these funds, the cost of Miner Flat Dam would increase $5 million to $7 million a year. Therefore, providing a loan to the tribe to expedite the planning of the dam would ultimately decrease the project's costs.

Under the current version of S. 3128, the loan would be repaid from the funds set aside in the Arizona Water Settlements Act for future Indian water settlements. I intend to offer an amendment that would make the loan repayable over a term of 25 years and strike the repayment provision relating to the funding in the Arizona Water Settlements Act. Moving forward in this manner will allow us more time to work through a potential PAYGO issue while at the same time allowing the planning of the project to move forward.

Within the last few days, the representatives of the non-federal water settlement parties have indicated that a White Mountain Apache settlement is nearly finalized. The parties' representatives have expressed written support for the settlement and have indicated that they will be submitting the settlement to their respective governing bodies for review and action. The comprehensive settlement would permanently quantify the water rights of the tribe and provide a waiver and release of the tribe's claims.

In light of the parties' representations, I am introducing legislation today to authorize and confirm the settlement. The legislation would also provide federal funding for the Miner Flat Project, repay the loan authorized in S. 3128 with funds set aside in the Arizona Water Settlements Act, and authorize appropriations for other water-related projects on the tribe's reservation. The settlement and accompanying legislation would provide certainty to water users in the State of Arizona regarding their future water supplies and provide the tribe with a long-term reliable source of drinking water.

In summary, S. 3128 will help advance the planning of the much-needed Miner Flat Project as well as control its costs. Given the importance of S. 3128 and its bipartisan nature, I hope the Committee will work with me in securing its swift passage in the remaining days of the 110th Congress.

The CHAIRMAN. Senator Kyl, thank you very much. We will see if there are questions in a moment.

Senator Kyl, do you know the Administration's position on this? I know that they are testifying in opposition to the bill that Senator Bingaman described.

Senator KYL. Mr. Chairman, they will be testifying here. I don't want to characterize it, except to say that I think it is soft opposition, or not support for the moment, until the water settlement is finalized. The settlement has been finalized. It has been agreed to by all parties. It will be embodied in the legislation that we are introducing today.

But the Interior Department naturally wanted to make sure that that was done because, as with most of these projects, the Interior Department correctly takes the position that they should all be part of a comprehensive settlement. This will be. But we didn't want to wait to file the legislation for this emergency loan, in effect, because we didn't know quite how long it would take to get the legislation done. It now, obviously, is done, but this will enable us to go forward with the loan and deal with this emergency, but it will be repaid out of the settlement which will be adopted later.

The CHAIRMAN. Well, I understand how difficult it is to get all of the parties together and reach kind of a global settlement on these issues. I know you and so many others in Arizona have

worked hard on these matters. I am sure you feel good about having reached a point where you can move forward.

Any other questions? Any questions on the Committee?

Senator DOMENICI. I only want to say I wish we had soft support from the Administration also. I have difficulty describing it.

[Laughter.]

Senator BINGAMAN. I was going to say that the support we have is every bit as soft as the support that he has.

[Laughter.]

Senator KYL. Let me just say "soft non-opposition," and let the Interior Department representative characterize their view. But it did primarily have to do with the fact that the settlement hadn't been completed when we introduced the legislation. It now has been. So I think most of that should go away.

The CHAIRMAN. Well, I was going to say that most testimony on these kinds of projects before the Committee has not seen a lot of support from the Administration, so soft or medium or hard, whatever the case. I should also indicate that Senator Bingaman, you and Senator Domenici and a lot of folks in the State of New Mexico have similarly worked diligently for a long period of time to try to reach settlements. Having some of them in North Dakota, these are very wrenching, very difficult, and take a long, long time to get done. Some of them never get done, but we appreciate the work that both of you have done. We appreciate your coming to the Committee.

Senator Barrasso?

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

Senator BARRASSO. Thank you, Mr. Chairman.

My comments have to do with S. 3355, which is commonly called the Crow Compact. It is a very important piece of legislation, Mr. Chairman. It recognizes the efforts being made by the Crow Nation to make a better future for their people.

We in Wyoming want to support these efforts. We also want to make sure that there are no unintended consequences from this legislation. As written, this bill would have tangible impacts on Wyoming. This Committee must carefully consider all of those impacts.

I know that Senator Tester and the Crow Tribe's leaders approach this issue just as I do. If we have a practical problem, we need a practical solution. So this hearing is a good opportunity to start working and flush out the issues related to water rights on the Bighorn River and its drainages. But I hope we all understand that there is still a lot of work that needs to be done.

To give a background information, Mr. Chairman, for the benefit of our colleagues, the Bighorn River runs north from Wyoming into Montana, and there it joins the Yellowstone River and then proceeds into North Dakota. Montana's and Wyoming's water rights on the Bighorn are defined by the Yellowstone Compact. Montana is granted 20 percent of the water. Wyoming has rights to 80 percent of the water. We are blessed with a bounty of resources in this region, and they sometimes bring with them a bounty of issues. We are dealing with those now.

The upstream water users in Wyoming include both the Northern Arapaho and the Eastern Shoshone Tribes. It includes irrigation districts at Buffalo Bill and Boysen Reservoir. It includes many communities in the Bighorn Basin of Wyoming. The Yellowtail Dam alters the flow of the Bighorn River immediately preceding the Crow Reservation.

The dam in Montana created Bighorn Lake, which lies mostly south of the State border in Wyoming. Bighorn Lake is a central feature of Bighorn Canyon National Recreation Area. It is a breathtaking natural feature that offers unparalleled recreation opportunities for visitors to Wyoming and residents of Wyoming. I was there just last week.

Multiple federal agencies, state agencies, tribes, local governments and individual water users have important interests here that may be impacted by this legislation. So my primary concern, Mr. Chairman, is how do we protect the upstream users in Wyoming from unintended consequences? And how do we maintain the fragile balance of interests at Yellowtail Dam?

I think it is important that we clarify that Wyoming was not part of the compact. We are not a signatory party. We were allowed to comment on the negotiations, but many of our requests went unfulfilled. So I would like to include in the record correspondence between Wyoming and Montana during the Crow Compact negotiations.* These records make clear that significant concerns do remain. We will seek a protection clause for Wyoming water rights as explained in the documents.

In addition, the compact includes a management plan for Yellowtail Dam that excludes everyone except for the Crow Tribe and the State of Montana. So this was done without the State of Wyoming as well. We want to maintain the fragile balance of uses of Bighorn Lake by amending the plan. We ask the Crow Tribe and Senator Tester's staff to consider these issues, and I am optimistic that we can work with you, Mr. Chairman, to bring all interests to the table to accomplish our goals.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso, thank you very much. Again, I apologize for not calling on you earlier. I appreciate your comments.

We have eight witnesses to hear from today. I do want to emphasize that you have traveled a long ways, many of you, to be here. We want to hear you in full detail, but we hope you will summarize your prepared statement.

We will hear from the Administration first. We will ask Mr. Kris Polly, Deputy Assistant Secretary for Water and Science from the U.S. Department of Interior to come forward, and Mr. Michael Bogert, the Counselor to the Secretary, U.S. Department of Interior.

Mr. Polly and Mr. Bogert, thank you for being with us. Mr. Polly, are you to go first? Why don't you proceed, and then we will hear from Mr. Bogert.

---

*The information referred to is printed in the Appendix.

STATEMENT OF KRIS POLLY, DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE, U.S. DEPARTMENT OF THE INTERIOR

Mr. POLLY. Thank you, Mr. Chairman.

The CHAIRMAN. I would note that the Committee has your prepared statement as well in its entirety.

Mr. POLLY. Thank you, sir.

Per Senator Kyl's suggestion, I will see if we can come up with a different scale for describing our positions in the future.

The CHAIRMAN. All right.

Mr. POLLY. That said, it is a personal honor to be here, sir, especially since you have dedicated so much of your professional life to solving western water problems. I appreciate it.

Mr. Chairman and members of the Committee, my name is Kris Polly and I am Deputy Assistant Secretary for Water and Science. I am pleased to provide the Department of the Interior's views on S. 3128 and S. 3355. The Department's formal review of these bills has been submitted in writing, and my statement today will summarize these testimonies.

The Administration does not support S. 3128, the White Mountain Apache Rural Water System Loan Authorization Act. Basically, the Department's concerns boil down to three distinct areas: Number one, financing for the loan authorized in the bill; two, the settlement process and the government's liability; and three, the technical review of the rural water system in the bill.

I will summarize these concerns today, and if the Committee has detailed questions, we are happy to respond to those in writing for the record.

S. 3128 requires the Federal Government to provide the Apache Tribe with funding of $9.8 million. As such, an up-front appropriation for the full amount of the proposed feasibility level study from Reclamation's budget would be needed. Although S. 3128 authorized $9.8 million for planning, engineering and design of the tribe's proposed project, it is the first step towards a settlement under the United States which would be asked to provide an additional $100 million in Federal funding.

S. 3128 cannot be considered in a vacuum, and the future settlement that is intended to fund the tribe's proposed project must be taken into consideration.

Since 2004, the Department of the Interior has been participating in negotiations with the tribe, the State of Arizona, Salt River Project, and other water users regarding the water rights of the tribe. The parties have made progress in resolving many disputed issues, including the total amount and source of water to be provided under a settlement, but a final settlement has not been agreed to by the United States.

In negotiating Indian water rights settlements, the Administration follows a legal process called the criteria and procedures for the participation of the Federal Government in negotiations for the settlement of Indian water rights claims. Interior and the Department of Justice are in the process of analyzing the tribe's water rights claims and have requested the tribe to provide information on its views of potential liability the United States may have with respect to those claims and other water-related claims. Until that

analysis is completed, it is not possible for the Administration to determine whether paying for some or all of the construction of the proposed project is an appropriate Federal settlement contribution. As such, the Administration believes S. 3128 is premature.

Finally, the key component of the settlement being negotiated by the parties is the construction of the White Mountain Apache Tribe Rural Water System, which will provide a 100-year water supply for the reservation through the construction of Miner Flat Dam on the north fork of the White River. The need for reliable and safe drinking water for the reservation is not in question, and it may be that the project proposed by the tribe is the best way to address the need. However, more analysis needs to be done.

The tribe estimates the cost of the proposed project at approximately $128 million in today's dollars. This estimate has not been verified by the Bureau of Reclamation, nor has Reclamation completed a feasibility-level study for it. Therefore, we cannot provide assurance that the project can actually be constructed within this estimate.

Within the next year, Reclamation intends to review the cost estimate prepared by the parties to provide a higher level of assurance. This review may provide some important information to the tribe to assist in the planning, engineering and design that they propose to undertake pursuant to S. 3128.

In closing, the Administration cannot support this bill, but is committed to continuing work with the tribe and other settlement parties to reach a fair settlement of the tribe's water rights claims.

The Department also cannot support S. 3355, the Crow Tribe Water Rights Settlement Act. The Crow Reservation was established by the Treaty of Fort Laramie in 1868 and it currently encompasses approximately 2.2 million acres, 66 percent of which is held in trust for the tribe and individual Indians. Tribal enrollment is approximately 11,500 and the reservation economy is principally agricultural, farming and ranching and some coal-mining.

In 1985, the United States, the tribe and the State of Montana entered into negotiations aimed at settling the tribe's water rights claims. In 1999, the Crow and the State reached an agreement on a compact providing for an allocation of water for the tribe. The Federal Government was not a signatory to this agreement.

However, the Department of the Interior's support for negotiated settlements as an approach to resolving this and other Indian water rights claims is strong. The Administration has not agreed to the compact that S. 3355 would approve, and we have serious concerns about the settlement as introduced, especially about the high cost of the settlement and the lack of supporting analysis showing that the infrastructure projects mandated under the settlement are a cost-effective approach to accomplishing the goals of the settling parties.

The Administration has concerns that the waivers and releases in the bill do not sufficiently protect the United States from future claims by the tribe.

For these reasons and others described in my written statement, the Administration cannot support S. 3355 as introduced. We would like time to continue our ongoing work with all parties con-

cerned in developing a settlement that the Administration can support.

Thank you. This concludes my statement.

[The prepared statement of Mr. Polly follows:]

PREPARED STATEMENT OF KRIS POLLY, DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE, U.S. DEPARTMENT OF THE INTERIOR

S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act

Mr. Chairman and members of the Committee, my name is Kris Polly, Deputy Assistant Secretary for Water and Science. I am pleased to provide the Department of the Interior's views on S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act. The Administration does not support S. 3128.

S. 3128 would require the Secretary of Interior, within 90 days of the legislation's enactment, to provide funding in the amount of $9.8 million to the White Mountain Apache Tribe (Tribe) to initiate the planning, engineering, and design of a rural water system (known as the "Minor Flat Project") that is intended to be the centerpiece of a future settlement of the Tribe's water rights claims in Arizona. Until a final settlement of the Tribe's claims has been reached and enacted by Congress, we do not support the Federal government providing consideration for, or a contribution to a possible future litigation settlement. S. 3128 requires the Federal government to provide the Apache Tribe with $9.8 million, but does not require the Tribe to reimburse the Federal government. As such, an upfront appropriation for the full amount of the proposed feasibility-level study from the Bureau of Reclamation's budget would be needed. In addition, this would essentially authorize loan forgiveness as no non-Federal contributions would be repaid to the United States Treasury.

The White Mountain Apache Reservation lies within the Salt River sub basin which provides the Phoenix metropolitan area with much of its water supply. Since 2004, the Department of Interior has been participating in negotiations with the White Mountain Apache Tribe (Tribe), the State of Arizona, the Salt River Project, various Arizona cities and irrigation districts, Freeport McMoran Copper & Gold, Inc, the Central Arizona Water Conservation District, and other water users in the Salt River basin regarding the water rights of the Tribe. The parties have made significant progress in resolving numerous disputed issues, including the total amount and source of settlement water to be provided under a settlement, but a final settlement has not been agreed to by all of the settlement parties. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

The key component of the settlement being negotiated by the parties is the construction of the "White Mountain Apache Tribe Rural Water System," which would provide a 100-year water supply for the Reservation through the construction of Miner Flat Dam on the North Fork of the White River and related water delivery infrastructure. This project would provide replace and expand the current water delivery system on the Reservation, which relies on a diminishing groundwater source and is quickly becoming insufficient to meet the needs of the Reservation population. The need for reliable and safe drinking water on the Reservation is not in question and it may be that the project proposed by the Tribe is the best way to address the need. However, more analysis needs to be done to determine the best course of action. As such, the Administration believes S. 3128 is premature.

Although S. 3128 authorizes only $9.8 million for planning, engineering, and design of the Tribe's proposed project, it is the first step toward a settlement under which the settling parties are likely to request that the United States provide at least another $100 million in federal funding. S. 3128 cannot be considered in a vacuum and the settlement that is intended to fund the Tribe's proposed project must be taken into consideration. The Tribe estimates the cost of the proposed project at approximately $128 million in today's dollars. This estimate has not been verified by the Bureau of Reclamation nor has it completed a feasibility level study which would be typical before Reclamation would request funding and authority to construct such a project. Therefore, Reclamation cannot provide assurance that the project can actually be constructed within this estimate. Within the next year, Reclamation intends to initiate its own review of the cost estimate prepared by the parties to provide a higher level of assurance. This review would not involve the engineering work proposed under S. 3128, but may provide some important information

to the Tribe to assist in the planning, engineering and design that they propose to undertake pursuant to S. 3128.

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria")* (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

The Administration is in the process of analyzing the factors set forth in the *Criteria* in order to determine the appropriate federal financial contribution that could be recommended to Congress as consideration for settling the Tribe's water rights claims. The Department of the Interior and the Department of Justice are in the process of analyzing the Tribe's water rights claims and have requested the Tribe to provide information on its views on potential liability the United States may have with respect to those claims and other water related claims. Until that analysis is completed, it is not possible for the Administration to determine whether paying for some or all of the construction of the proposed project is an appropriate Federal settlement contribution. Until those decisions are made, it is premature to begin design and engineering of the proposed project. The legislation is ambiguous as to whether the Department is required to carry out a feasibility study for the planning, engineering, and design of the Miner Flat Project.

As currently drafted S. 3128 provides that funding made available to the Tribe will not be repaid by the Tribe, but will be repaid out of a subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act "for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of [the Arizona Water Rights Settlements Act]. . . ." We understand that the bill is likely to be amended to delete repayment from this source. We recommend such an amendment to S. 3128 because the use of this subaccount to fund an activity absent a water rights settlement enacted by Congress is not consistent with the authorized uses of the subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act.

The Administration is concerned about the potential budgetary impact the $9.8 million loan, as authorized under S. 3128, would have on the Bureau of Reclamation's existing programs and commitments, and has concerns with the mechanisms and sources of funding. Although the repayment is provided from Federal Funding in Section 3, budget authority for the full $9.8 million would be required up front. Section 5 of S. 3128 authorizes appropriations, but Section 3 provides that the funds to repay the loan would be made available from the Colorado Lower River Development Fund starting in 2013. The Administration also remains concerned that, as S. 3128 provides for no reimbursement by non-Federal parties, the Federal government would be the primary source of funding for this feasibility (planning, engineering, and design) study.

The Administration does not support this bill but 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.

S. 3355—The Crow Tribe Water Rights Settlement Act of 2008

I appreciate the opportunity to appear today to present the Administration's views on S. 3355, the "Crow Tribe Water Rights Settlement Act of 2008." The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has not agreed to the compact that S. 3355 would approve. Moreover, the Administration has serious concerns about the settlement as introduced, especially about the high cost of this settlement and the lack of supporting analysis showing that the infrastructure projects mandated under this settlement are a cost effective approach to accom-

plishing the goals of the settling parties. Further, the Administration has concerns that the waivers and releases in the bill do not sufficiently protect the United States from future claims by the Tribe. For these reasons and others described in this statement, the Administration opposes S. 3355 as introduced. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

The Crow Reservation located in south central and southeastern Montana is home to the Crow Tribe. The Reservation was established by the Treaty of Fort Laramie in 1868 and it currently encompasses approximately 2,282,000 acres, 66 percent of which is held in trust for the Tribe and individual Indians. Tribal enrollment is approximately 11,500. Unemployment is roughly 54 percent and the Reservation economy is principally agricultural: farming and ranching. Coal mining and timber production also contribute to the Tribal economy.

Litigation concerning water rights on the Reservation began in 1975. In 1985, the United States, the Tribe and the State of Montana entered into negotiations aimed at settling the Tribe's water rights claims. In 1999, the Crow and the State reached an agreement on a Compact providing for an allocation of water for the Tribe, subordination of that right to existing state based water uses, water rights administration, water marketing, and dispute resolution mechanisms. The Federal government was not a signatory to this agreement.

S. 3355 would approve the Compact contained in section 85–20–901 of the Montana Code Annotated (2007) (including any exhibit or part of or amendment to the Compact) and authorize appropriations for a number of settlement benefits. It would settle all of the Crow Tribe's claims to water in the State of Montana and recognize a tribal water right to 500,000 acre-feet per year of water from the flow of the Bighorn River, as well as up to 300,000 acre-feet of water from Bighorn Lake (150,000 acre-feet in all years and an additional 150,000 acre-feet in dry years when natural flow is short). The Tribe's natural flow right will be subject to shortage sharing with non-Indians, which is a major concession by the Crow Tribe, who would otherwise have a senior priority water right. This bill also requires the Bureau of Reclamation to design and construct two major infrastructure projects: (1) to restore and improve the Crow Irrigation Project to deliver water to farmland on the Crow Reservation; and (2) a municipal water system to deliver clean water to communities and businesses in most parts of the Crow Reservation. Finally, S. 3355 would establish the Crow Settlement Fund to hold Federal funding authorized under this bill, which includes funding for a number of trust funds that will benefit the Tribe. Two of these trust funds are designated to offset the costs to the Crow Tribe for the operation, maintenance, and repair of Yellowtail Dam (the dam that created Bighorn Lake) and the Crow Irrigation Project.

The Department has been working constructively with the Crow Tribe in negotiations to quantify their water right and settle claims for many years, and Department officials have visited the Reservation and met with negotiators in an effort to craft a settlement that we could support. This process has involved the Crow Tribe, the State of Montana, local water users and other affected parties. The parties have made significant progress in resolving many issues, but the Administration believes that there are more issues that need to be comprehensively addressed. Primary concerns of the Administration are the very high costs of the infrastructure projects mandated in the bill and the inadequate local and State cost share given the benefits that the State and its water users would receive under the proposed settlement, as well as the waivers in the bill, which do not protect the United States adequately from future claims by the Tribe.

We also have a number of other concerns outlined below.

My statement will begin with some background on the Department's settlements process, and then move on to a more specific discussion of the concerns that the Administration has about S. 3355.

The Role of the Criteria and Procedures

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria")* (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

Monetary Concerns Regarding S. 3355

S. 3355 as introduced would cost the Federal Government more than one half billion dollars in federal appropriations ($527.2 million). Under this legislation, the Crow Tribe would also benefit from not being required to repay the capital costs associated with its storage allocation from Bighorn Lake and from being granted the right to develop power at Yellowtail Afterbay Dam, an authority that is currently held by the Bureau of Reclamation. The Administration is in the process of analyzing the factors set forth in the *Criteria* in order to determine the appropriate federal financial contribution that could be recommended to Congress. While this analysis is not yet complete, the review accomplished to date does not indicate that a Federal contribution even approaching one half of a billion dollars provided for under this Act is justified. We are also unclear on how this bill interfaces with S. 3213, Title X, Subtitle B, Part II, which proposes the establishment of a Reclamation Water Settlement Fund.

Adding to our concern, the two major infrastructure projects required by this bill are both mandated to essentially conform to studies prepared by a private consulting engineering firm hired by the Crow Tribe. Both of these studies were not prepared in final form until July 2008. Given that these studies were not completed until July 2008, the Department has not had sufficient time to analyze them to determine whether the work that they propose is a cost effective and feasible approach to providing the services that the Crow Tribe is seeking. It is possible that there are alternate and more efficient means to satisfy the needs of the Tribe than those set forth in the Tribal consultant's study. More time is needed to examine the proposed work and consider whether other approaches could be utilized to obtain most or all of the goals of this settlement, as well assess as the adequacy of the engineering work and cost estimates.

Moreover, the breadth of the many benefits that would flow to the Crow Tribe under the settlement at almost exclusive federal cost, such as the rehabilitation and improvement of the Crow Irrigation Project, the design and construction of water diversion and delivery systems to serve vast geographic areas of the Crow Reservation, and significant funding for unspecified and open-ended water and economic development projects, raise serious concerns because of the precedent that such settlement benefits could set for future Indian water rights settlements. Rising tribal and State expectations about the magnitude of federal contributions to Indian water rights settlements are already impairing the Administration's ability to negotiate Indian water rights settlements on the basis of common goals and acceptance of the need for cost-sharing among all settlement beneficiaries. Enactment of this bill will make it very difficult in the future for Federal negotiators participating in settlement negotiations to set realistic expectations and convincingly hold the line on settlement costs. There are many needs in Indian country and Indian water rights settlements cannot and should not be the major vehicle to address those needs. In this instance, a Federal contribution of this order of magnitude is not appropriate. As the Administration has stated in previous Indian water right settlements water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers. The Administration was not included in or a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal government enter into this Agreement.

Also, consistent with the *Criteria and Procedures,* the non-Federal cost-share should be proportionate to benefits received. This settlement lacks adequate cost-sharing, leaving the Federal government as the primary source of funding for one of the largest Indian water rights settlements to date. In addition, the *Criteria and Procedures* provide that settlements should promote economic efficiency. The Administration is concerned that the projects that would be authorized under this proposed settlement do not meet this criterion. The *Criteria and Procedures* also provide that the Federal government shall not participate in economically unjustified irrigation investment.

Non-Monetary Concerns Regarding S. 3355

Overall cost is not the only concern that the Administration has with the bill. There are a number of provisions and issues that we stand ready to work and resolve with the settlement parties and sponsors of S. 3355. We would like to draw the Committee's attention to the following major issues.

First, as currently drafted, the provisions of the bill dealing with allottee water rights do not adequately protect the rights to which allottees are entitled under federal law. The Crow Reservation is heavily allotted and 46 percent of the Reservation land base is held in trust by the United States for individual Indians. The bill, however, fails to safeguard allottees' water rights. The United States owes a trust obligation directly to these individuals in addition to the obligations owed to the Tribe. The Department of the Interior and the Department of Justice have confronted this important issue in several recent Indian water rights settlement in an effort to avoid any claims of unconstitutional takings of property interests. We would like to work with the Tribe and the sponsors of the bill to rectify shortcomings in the language of the bill as drafted.

Second, the waiver provisions of this bill are also of serious concern to the Administration. We note that the Department of Justice does not believe that the bill's waiver provisions are correctly drafted. The waivers set forth do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that a federal contribution of more than one half a billion dollars should afford. Again, we stand ready to work with the Tribe and sponsors on this issue.

Third, we would like to work with Congress and the settlement proponents on developing more specific language that delineates precisely the extent of United States responsibility for delivering the 300,000 acre-foot allocation from Bighorn Lake provided for under section 8. The legislation as introduced provides that this water will be held in trust by the United States. Congress should establish clear parameters for Federal responsibility to avoid future litigation over this issue.

Also, related to the Bighorn Lake allocation is the issue of capital cost reimbursability. The bill as drafted relieves the Tribe of these costs, but is silent about whether the costs will be spread among other project beneficiaries, such as power users.

Fourth, we note that this legislation sets up a trust fund to partially cover Operation, Maintenance, and Replacement costs for the Crow Irrigation Project and Yellowtail Dam that would otherwise be charged to the Crow Tribe. Although the Administration understands that the settlement framers were trying to ensure the viability of the facilities to be renovated and built under this settlement by providing for these trust funds, the *Criteria* provide that operation and maintenance costs of infrastructure should not be funded using settlement dollars.

Fifth, there is potential inconsistency between the processes outlined in section 11(d)(4) under which the Crow Tribe is able to withdraw money from the Crow Settlement Fund and the requirements for the Secretary to disburse funds from the Crow Settlement Fund under section 11(d)(3). It is not clear whether the Secretary is able to make the expenditures as provided under section 11(d)(3) without the Tribe having submitted either a tribal management plan or an expenditure plan under section 11(d)(4). The processes described in section 11(d)(4) are consistent with the Trust Fund Reform Act, and it would make sense in S. 3355 to amend subsection 11(d)(3) to clarify that these processes apply.

Sixth, there is some ambiguity surrounding the right granted to the Crow Tribe in section 12(b) of S. 3355 to "develop and market power generation as a water development project on the Yellowtail Afterbay Dam." It is unclear if this language is intended to preclude the United States from developing power in its own right or if it is intended to give the Tribe an exclusive right to enter into the sort of contract (Lease of Power Privilege (LOPP)) that can be issued to a non-Federal entity to utilize water power head and storage from Reclamation projects.

Seventh, and of extraordinary concern to the Administration, is the fact that the appendices that are referenced in the Crow Tribe-Montana Compact have not yet been prepared. Of particular concern is the fact that Appendices 1 and 3 of the Crow Tribe-Montana Compact are not available for review. In the words of the Compact (Article III A.6.b), Appendix 3 is supposed to be a "list of existing water rights as currently claimed and permits and reservations issued" in the Bighorn River Basin. This list is of utmost importance to the water rights of the Crow Tribe that are recognized under the Compact and would be recognized by S. 3355 because the Compact provides (in Article III.A.6.a(1) and (2)) that the Tribal Water Right shall be exercised as junior in priority to any water rights listed in Appendix 3 to the Compact. Appendix 1 is supposed to be a proposed decree to be issued by the Montana Water Court. According to section 4 of S. 3355, this legislation would ratify the

Crow Tribe-Montana Compact, and the term Compact is defined in section 3 of S. 3355 as including any exhibit or part of or amendment to the Compact. Therefore, this bill seeks Congressional approval of the Compact as a whole, including the Appendices, which are critical to the terms of the settlement, and future amendments to the Compact, that the United States has not reviewed and that may not even have been drafted. The Administration strongly urges against the enactment of legislation that would provide United States approval of documents when the United States has not received these documents for review.

This list is not comprehensive. We would appreciate the opportunity to work with the Committee and the Montana delegation to revise the bill to address these and other issues that could prevent this bill from achieving its intended purpose of achieving a final settlement of the water rights claims of the Crow Tribe in Montana.

Conclusion

For the aforementioned reasons we have mentioned in this testimony, we oppose S. 3355.

The settlement is the product of a great deal of effort by many parties and reflects a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. However, as I stated at the outset of this testimony, the Administration does not have adequate information at this time to determine that the projects called for in this bill are consistent with our programmatic objectives and our responsibility to American taxpayers as well as our responsibility to protect the Crow Tribe. The Administration believes that it is necessary for there to be a full discussion on all aspects of the settlement, including the specific goals of the Crow Tribe and the State of Montana for the settlement of these claims and whether these goals can be met by alternative, less expensive means.

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. A clean, reliable water supply is of utmost importance to the members of the Crow Tribe, as it is to all Americans, and the United States is committed to working towards achieving it. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be concluded in the next year.

Mr. Chairman, this concludes my written statement.

The CHAIRMAN. Mr. Polly, thank you very much for your testimony.

Next, we will hear from Mr. Michael Bogert.

STATEMENT OF MICHAEL BOGERT, COUNSELOR TO THE SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Mr. BOGERT. Mr. Chairman, thank you for the opportunity to appear before you today.

A few observations from the Secretary's Indian Water Rights Office on process. Senator Domenici, when the Secretary was confirmed, you and Senator Bingaman asked him to actively engage in the New Mexico water settlements. You challenged the Secretary to dedicate the level of energy and engagement that we had in Idaho with our settlement.

Senator, I can assure you that I have had moments in this job where I believe Albuquerque and New Mexico have become our second home in terms of our level of engagement and the active participation by the Secretary in moving along and energizing with great enthusiasm the progress of these settlements.

We are very mindful at the Department that today marks a process, a milestone and a process. While the members of the Committee can describe our level of support, soft support, I can tell you, Senator, that we strongly support the process that got us to this point.

To the degree that the New Mexico settlements that my testimony will cover involve a process that began in the mid-1960s, we have heard from your constituents. We have heard from Indian Country how long these cases have languished and the issues that are attempting to be solved by these settlements. Mr. Chairman, Senator Domenici, I can assure you that the Secretary has brought the energy that you have asked of him and asked of all of us. He has directed all of us to thoroughly engage in moving these settlements along.

With that having said, Mr. Chairman and other members of the Committee, we bring before you the views of the Administration, which of course includes not only the Department of the Interior, but the Office of Management and Budget, as well as the Justice Department. Mr. Polly spoke about some legal issues that revolve around these settlements.

Before discussing the Administration's significant concerns with S. 3381, I would like to acknowledge that the Department has been working constructively with all of the parties to both the Aamodt and Taos settlements for many years.

Mr. Chairman, for me personally, I cannot describe with the amount of respect and affection that I have for Governor Suazo and Governor Dorame and other tribal leaders that have been so much a part of our lives over the last couple of years since we have been engaged with them. I can tell you that the opportunity to work with this great leadership in Indian Country has been a professional opportunity that I know we on our team will never forget.

But this process has also included the State of New Mexico, Santa Fe County, the City of Santa Fe, the Town of Taos and numerous local water users, in addition to the Pueblos of Tesuque, Nambe, Pojoaque, San Ildefonso, and Taos. While there remain significant issues on which we disagree and have yet to achieve alignment, especially the question of whether there is an appropriate Federal contribution and whether the waiver is adequate to protect the United States from future claims, our working relationship with the parties has been constructive. Mr. Chairman and members, we know that that will continue after this hearing.

Mr. Polly has discussed a little bit about the criteria and procedures. We know that members of this Committee understand that there has been a controversy about how the Administration uses the criteria and procedures by which to judge the Federal contribution and its calibration of support for these settlements.

To the extent that this bill has followed the process set forth in the criteria and procedures and analyzed the Aamodt settlement and has concluded that the calculable legal exposure plus costs related to Federal trust or programmatic responsibilities—at this point, Mr. Chairman and members—we don't believe that it justifies the Federal contribution of $162.3 million for the Aamodt settlement. This amount is not consistent with the criteria and procedures and is substantially above the appropriate Federal contribution, and it is not proportionate to the benefits received.

As the Administration has stated in previous Indian water rights settlements, water rights settlements must be designed to ensure finality and protect the interests of all the tribes and the American taxpayers.

With respect to the Aamodt settlement, the waiver provisions of this bill are of significant concern to the Administration. The Department of Justice has concerns that the waivers set forth in the bill do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that the proposed Federal contributions should afford.

Again, we stand ready to work with the settlement parties and the Committee and the sponsors to resolve this issue. Indeed, I believe we have significant productive conversations with the parties on this.

With respect to the Taos settlement, the Administration again has followed the process set forth in the criteria and procedures in analyzing the Taos settlement and has concluded that the calculable legal exposure plus costs related to the Federal trust or programmatic responsibilities do not justify a Federal financial contribution of $113 million.

The number in the bill is not consistent with the criteria and procedures. In addition to costs, again our testimony describes some concerns we have with the waivers, the finality of the settlement with respect to the ending of the claims, and the exposure by the United States.

Mr. Chairman and members, let me conclude my remarks by saying we look forward to working with all of the settlement parties, as we have since being directed by the Secretary to do so, and we look forward to questions that the Committee may have.

[The prepared statement of Mr. Bogert follows:]

PREPARED STATEMENT OF MICHAEL BOGERT, COUNSELOR TO THE SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear today to present the Administration's views on S. 3381, containing two titles, the "Aamodt Litigation Settlement Act" and the "Taos Pueblo Indian Water Rights Settlement Act." The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, does not support S. 3381 as introduced and has serious concerns with the costs of these proposed settlements. We would like to work with Congress and all parties concerned in developing settlements that the Administration can support.

Before discussing the Administration's significant concerns with S. 3381, I would like to acknowledge that the Department has been working constructively with the all of the parties to both the Aamodt and Taos settlements for many years. This process has included the State of New Mexico, Santa Fe County, the City of Santa Fe, the Town of Taos and numerous local water users in addition to the Pueblos of Tesuque, Nambe, Pojoaque, San Ildefonso, and Taos. While there remain significant issues on which we disagree, especially the questions of the appropriate federal financial contribution and whether the waivers adequately protect the United States from future claims, our working relationship with the parties has been constructive.

My statement will begin with some background on the Department's Indian water rights settlement process and then move on to a more specific discussion of the concerns that the Administration has about S. 3381.

The Role of the Criteria and Procedures

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria and Procedures")* (55 Fed. Reg. 9223 (1990)). Among other things, the Criteria and Procedures provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria and Procedures* call for settlements to contain non-Federal cost-share propor-

tionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria and Procedures* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria and Procedures* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria and Procedures* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

The Aamodt Litigation Settlement Act

The Aamodt litigation (titled *State of New Mexico, ex rel. State Engineer and United States of America, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, and Pueblo de Tesuque v. R. Lee Aamodt)* has been on-going since 1966 and is often described as one of the longest running cases in the federal court system. It involves the water rights of four Pueblos (Pojoaque, Tesuque, San Ildefonso, and Nambe) and involves over 2,500 defendants. The case seeks to adjudicate and quantify water rights in the Rio Pojoaque basin, immediately north of Santa Fe, New Mexico, which is the homeland of the Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso. The basin is water short. The average annual surface water yield of the watershed is approximately 12,000 acre-feet per year, but claimed irrigated acreage call for the diversion of 16,200 acre-feet per year. Deficits have been addressed by using groundwater with the result that those resources are now threatened.

Negotiations to resolve the Pueblos' water rights in the basin have a long history but in recent years, the parties intensified their efforts to settle. The Department of the Interior and the Department of Justice have participated in these settlement efforts. The United States did not execute the Agreement and does not support it in its current form, as we continue to disagree with the nonfederal parties on several issues. The goal of the parties has been to prevent impacts on surface water flows from excessive groundwater development as well as controlling groundwater extractions. In order to allow junior state based water right holders to continue to use water while still allowing the Pueblos the right to use and further develop their senior water rights, the nonfederal parties agreed on a settlement centered on a regional water system that will utilize water imported from the Rio Grande to serve needs of the Pueblos and other water users in the basin. In May 2006, the Pueblos and many other settlement parties executed a Settlement Agreement which requires the construction of the regional water system to deliver treated water to Pueblos and non-Pueblo water users. It also requires the United States to provide 2,500 acre feet per year of imported water for Pueblo use through the regional water system.

S. 3381 approves the settlement, authorizes the planning, design and construction of the regional system, and provides the Pueblos with a trust fund to subsidize the operations, maintenance, and replacement (OM&R) costs of the system and to rehabilitate, improve, operate and maintain water related infrastructure other than the regional system facilities. The bill also requires the United States to acquire water for Pueblo use in the regional water system by allocating to the Pueblos remaining available Bureau of Reclamation San Juan Chama water and purchasing other water. The total cost of the settlement is estimated to be at least $279.2 million, with a Federal contribution of $162.3 million, and State and local contributions of $116.9 million.

The Administration has followed the process set forth in the *Criteria and Procedures* in analyzing the Aamodt settlement and has concluded that calculable legal exposure plus costs related to Federal trust or programmatic responsibilities do not justify a federal financial contribution of $162.3 million. This amount is not consistent with the *Criteria and Procedures;* is substantially above the appropriate Federal contribution; and is not proportionate to the benefits received. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

In addition, the Administration was not a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal Government enter into this Agreement. The *Criteria and Procedures* provide that settlements should promote economic efficiency. The Administration is concerned

that the projects that would be authorized under this proposed settlement do not meet this criterion.

Moreover, the Administration is concerned about the validity of the cost estimates that the settlement parties are relying on for the regional water system. The parties rely on an engineering report dated June 2007 that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. Much of the cost information contained in the engineering report was arrived at three years ago, none of the costs have been indexed, and the total project cost cannot be relied upon. These additional costs would become the responsibility of the United States under S. 3381. Also, multiple site-specific cost issues remain that can not be resolved until final project design is completed, not the least of which is access limitations at the diversion point for the system on the Rio Grande. The costs associated with NEPA and EIS compliance along with the costs to acquire unspecified easements (including possible condemnation expenses) have not been adequately studied. This uncertainty may serve to drive the overall settlement's costs and the corresponding Federal commitment much higher than anticipated.

Overall cost is not the only concern that the Administration has with the bill. There are a number of other provisions and issues that need to be addressed and resolved. We stand ready to address these with the settlement parties and sponsors of S. 3381. We would like to draw the Committee's attention to the following major issues.

First, the waiver provisions of this bill are of significant concern to the Administration. The Department of Justice has concerns that the waivers set forth in the bill do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that the proposed federal contribution should afford. Again, we stand ready to work with the settlement parties and sponsors on this issue.

Second, we would like to work with Congress and the settlement proponents on developing more specific language that delineates precisely the extent of United States responsibility for delivering the San Juan Chama project allocation provided for under section 113. The legislation as introduced provides that this water supply will be held in trust by the United States. Congress should establish clear parameters for Federal responsibility in order to avoid future litigation over this issue.

Third, although the Administration understands that the settlement framers were trying to ensure the viability of the facilities provided for under this settlement by establishing a trust fund to subsidize OM&R, the *Criteria* provide that operation and maintenance costs of infrastructure should not be funded using settlement dollars.

This list is not comprehensive. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

The Taos Pueblo Indian Water Rights Settlement Act

Taos Pueblo is located in north-central New Mexico, approximately 70 miles north of Santa Fe. It is the northernmost of 19 New Mexico Pueblos and its village is recognized as being one of the longest continuously occupied locations in the United States. The Pueblo consists of approximately 95,341 acres of land and includes the headwaters of the Rio Pueblo de Taos and the Rio Lucero.

In 1969 the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed, entitled *State of New Mexico ex rel. State Engineer, et al. v. Abeyta and State of New Mexico ex rel. State Engineer v. Arellano et al.* (consolidated).

In 1989 Taos Pueblo began settlement negotiations with the local water users. The Federal Team was established in 1990 to represent the United States in the negotiation. Negotiations were not productive until a technical understanding of the hydrology of Taos Valley, including preparation of surface and groundwater models, was completed in the late 1990s. Negotiations intensified in 2003 when a mediator was retained and an aggressive settlement meeting schedule was established. The parties' dedicated efforts resulted in a Settlement Agreement that was signed in May of 2006 by all of the major non-federal parties, including the State of New Mexico, Taos Pueblo, the Town of Taos, the Taos Valley Acequia Association (representing 55 community ditch associations) and several water districts. The United States did not sign the Settlement Agreement and does not support it in its current form.

Under the terms of the Settlement Agreement, the Taos Pueblo has a recognized right to 12,152.71 acre-feet per year (AFY) of depletion, of which 7,474.05 AFY of depletion would be available for immediate use. The Pueblo has agreed to forebear from using 4,678.66 AFY in order to allow non-Indian water uses to continue. The Pueblo would, over time, reacquire the forborne water rights through purchase from

willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to reacquire the forborne water rights.

A central feature of the settlement is funding for the protection and restoration of the Pueblo's Buffalo Pasture, a culturally sensitive and sacred wetland that is being impacted by non-Indian groundwater production. Under the settlement, the non-Indian municipal water suppliers have agreed to limit their use of existing wells in the vicinity of the Buffalo Pasture in exchange for new wells located further away from the Buffalo Pasture.

Title II of S. 3381 approves the Settlement Agreement reached by the settlement parties and authorizes a Federal contribution of $113,000,000. Of this total, $80,000,000 is authorized to be deposited into two trust accounts for the Pueblo's use. An additional $33,000,000 is authorized to fund 75 percent of the construction cost of various projects that have been identified as mutually beneficial to Pueblo and non-pueblo parties. The State and local share of the settlement is a 25 percent cost-share for construction of the mutual benefit projects ($11,000,000). The Settlement Agreement provides that the State will contribute additional funds for the acquisition of water rights for the non-Indians and payment of operation, maintenance and replacement costs associated with the mutual benefits projects. The Administration believes that this cost-share is disproportionate to the settlement benefits received by the State and local parties. A Federal contribution of this order of magnitude is not appropriate. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

The Administration was not a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal government enter into this Agreement. Also, consistent with the *Criteria and Procedures,* the non-Federal cost-share should be proportionate to benefits received. This settlement lacks adequate cost-sharing. In addition, the Criteria and Procedures provide that settlements should promote economic efficiency. The Administration is concerned that the projects that would be authorized do not meet this criterion.

Under this legislation, the Pueblo would receive an allocation of 2,215 acre-feet per annum of San Juan-Chama Project water which it will be allowed to use or market. The Pueblo would also benefit from not being required to repay the capital costs associated with this allocation of water.

An unusual provision of the legislation would allow the Pueblo to expend $25 million for the protection and restoration of the Buffalo Pasture and acquisition of water rights before the settlement is final and fully enforceable. Indian water rights settlement funds are not usually made available to a tribe until the settlement is final and enforceable so that all settlement benefits flow at the same time and no entity benefits if the settlement fails. We question whether such a departure from settlement protocol would be appropriate. Although the Administration understands the Pueblo's need for immediate access to funds, we remain concerned about the precedent that settlement money could be spent without a settlement becoming final.

The Administration has followed the process set for in the *Criteria and Procedures* in analyzing the Taos settlement and has concluded that calculable legal exposure plus costs related to Federal trust or programmatic responsibilities do not justify a federal financial contribution of $113 million. This is not consistent with the *Criteria and Procedures;* is substantially above the appropriate Federal contribution; and is not proportionate to the benefits received.

Cost is not the only concern that the Administration has with the bill. There are several other provisions that raise concerns. We stand ready to work to address these concerns with the settlement parties and sponsors of S. 3381. We would like to draw the Committee's attention to the following issues.

First, the waiver provisions of this bill are of serious concern to the Administration. We note that the Department of Justice has concerns that the waivers set forth in the bill do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that the Federal contribution contained in the bill should afford.

In addition, Title II of S. 3381 fails to provide finality on the issue of how the settlement is to be enforced. The bill leaves unresolved the question of which court retains jurisdiction over an action brought to enforce the Settlement Agreement. This ambiguity may result in needless litigation. The Department of Justice and the Department of the Interior believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

This list is not comprehensive. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

Conclusion

This settlement is the product of a great deal of effort by many parties and reflects a desire by the people of State of New Mexico, Indian and non-Indian, to settle their differences through negotiation rather than litigation.

The Administration is committed to working with the settlement parties to reach final and fair settlements of Pueblo water rights claims.

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

The CHAIRMAN. Mr. Bogert, Mr. Polly, thank you very much for your testimony. I have had a chance to review it before the hearing. I don't have any questions. I appreciate your laying out for the Committee the views of the Administration, Interior and OMB, which is always in the dark background of these statements.

Do other members of the Committee have questions?

Senator MURKOWSKI. Mr. Chairman?

The CHAIRMAN. Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

Just a question about the criteria for evaluating water settlements in general, not any one of the specifics here. You have kind of spoken to that. I understand that these criteria for evaluation of the settlements are guidelines. They address a number of factors, including the appropriate level of the non-Federal cost-sharing, among other things. But we have heard complaints from various non-Federal parties that these guidelines allow for a great deal of variability, if you will, swings in the evaluation results depending on who is applying them. Do you think that this is a fair criticism? If so, is there a need to reevaluate these criteria or these guidelines?

Mr. BOGERT. Mr. Chairman, Madam Vice Chair, we have been under great discussion at the Department as to whether or not the criteria and procedures reflect the modern era of Indian water rights settlements. To the degree that our direction within the Administration is that we will—and I think you rightly identify the criteria and procedures as guidelines. We have never said and our position has never been that they are inflexible, carved in stone, and incapable of reasoned discussion and flexibility.

To the degree that we have had conversations with the settlement parties and our partners in Indian Country about using that as a model for advocacy, we have had some productive discussions with them. We have asked them to help us think through the components that we know OMB and the Justice Department will ask of us at Interior to adequately provide our views on the viability of these settlements.

Senator, the short answer to your question is we think we can always evaluate these settlements better. To the extent that that is the direction for the remainder of this Administration, we look forward to having a conversation about whether or not they need to be update, whether or not they reflect the modern era, as I said, of the negotiations, and whether or not they are reflective of ultimately all of our joint goals and objectives, which is self-sufficiency in Indian Country. We think that is a reasonable conversation.

Senator MURKOWSKI. Thank you, Mr. Chairman. I will let my colleagues speak who have more direct questions on these bills.

The CHAIRMAN. Senator Tester?

Senator TESTER. Yes, thank you, Mr. Chairman.

I want to thank the witnesses.

Senator Barrasso, I fully intend to work with your colleague and Senator Baucus who is a cosponsor of this bill, and we will try to get the concerns ironed out, as we have in the past. So thank you for your comments.

I have a few questions for Mr. Polly. I appreciate you guys being here. You stated in your testimony that the waivers weren't strong enough. Can you tell me, have you offered any language to strengthen those waivers?

Mr. POLLY. Senator, thank you for that question. It is my understanding we have not offered any language to strengthen those waivers. However, we are very happy to work with you and your office, and we can provide those.

Senator TESTER. How about working directly with the Crow? Are you happy to do that, too?

Mr. POLLY. Absolutely.

Senator TESTER. Because that could be an opportunity, since Cedric Black Eagle is here, it may be an opportunity to get down to brass tacks without us. I mean, I like to be part of the process—make no mistake about it, and we will be—but you can meet one-on-one and try to get that squared away.

You said "lack of supporting infrastructure." I assume what you are saying is that you don't agree with how the money is to be spent on infrastructure projects? I don't want to put words in your mouth, but maybe explain what you are saying.

Mr. POLLY. Reclamation has not come up with the estimates, so we would have to get back to you and the tribe as far as what we would believe an accurate estimate would be.

Senator TESTER. As far as the amount of money invested in the infrastructure, or what kind of projects the money should be going for, or what are we talking about more specifically?

Mr. POLLY. Well, specifically, both things, sir.

Senator TESTER. Okay. You talked about the cost being too high. Did you guys have a figure in mind?

Mr. POLLY. No, sir, we do not have a figure in mind, but again the figures are not Reclamation figures. So we would have to do our own studies and so forth to come up with the figures that we would present.

Senator TESTER. Okay. As I said in my opening statement, we have been at this for 10 years. I mean, I have been at this for 10 years. Chris Tweeten has been at it a lot longer than that, and so has Cedric, and so are the people in the tribe. How long does it take to come up with a figure? And by the way, from my perspective, the value of water is never going to be any cheaper than it is today.

Mr. POLLY. That is correct.

Senator TESTER. So how long is it going to take to come up with a number?

Mr. POLLY. Well, as you said, the price of water only increases with time, sir. To give you an accurate answer, we would have to do a feasibility study. I am told feasibility studies generally they can range from six months to five years. I know that is not the amount of time that you were looking for.

Senator TESTER. You know, I have only been here for a year and a half, but I can tell you in the last six months, and this isn't your particular watch, I have watched the Administration drop $27 billion on Bear Stearns in two days. Here about a month ago, I watched them drop $1 billion on Georgia, and it is not the Georgia in the southeastern corner of this Country. It is the Georgia in Eastern Europe, drop $1 billion in less than a week. And we are talking something that has been going on for 10 years, and you are telling me potentially it could take another 15 years, and then we could start negotiations?

Mr. POLLY. No, sir, six months to five years.

Senator TESTER. Okay. Yes, but five years, the way it tends to work, it is usually longer, rather than shorter. Is there any way that we can speed this process up to get folks to come up with—five years from now, this is going to be a $1 billion settlement. No doubt in my mind. It is going to be double. Is there any way we can speed this process up?

Mr. POLLY. Well, Senator, as Commissioner Johnson often says, and I firmly believe, we are happy to work with you and all the parties involved to speed this up as quickly as possible. So we will go back. We will take a hard look at this and we will get back to all the parties.

Senator TESTER. Hopefully, we can approach it with the same sort of urgency that we have approached other projects and dropped a hell of a lot more money.

Mr. POLLY. Yes, sir.

Senator TESTER. Thank you.

Mr. BOGERT. Senator Tester, we have had several discussions with representatives of the tribe, and we have committed to several follow-up meetings on the issue of waivers. We have some language that we are willing to provide the representatives of the nation. We are absolutely committed to follow-up meetings as soon as next week.

Senator TESTER. Good. Just one final thing. Because of a previous employment, I have worked with who we are going to hear from next for 10 years. There is no doubt in my mind that these guys want to get this done. We will talk to Chris Tweeten about what the ramifications are if we don't get it done soon. But the impacts to the State of Montana, as well as the Federal Government, I think they are going to be disastrous if we don't get this done. And it can't be a situation, well, we are going to have to do another study, or we are going to have to do this, or we are going to have to do that. Let's figure out a way to streamline the process to get it done.

Because quite honestly, if you walk onto the Crow Reservation—and maybe you have—it is in dire need of economic development. The only way we can get sustainability so we don't have to keep cutting these guys a check from this end of the deal, and Chairman Venne will tell you the same thing, the chairman of the Crow Tribe, until we get to a point where these guys can become economically stable, we are going to be continuing to cut checks from the general fund, and they don't want them. I want them to be independent. Okay?

The CHAIRMAN. Senator Domenici?

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

Well, let me say, Mr. Bogert, I am very happy that the meeting that we had on confirmation hearing yielded the results that you have just described to us. However, I am not very happy that after all the negotiations and all of the giving and taking that occurred—and this is one where when you read all of the different entities that participated, they really made some changes and decided they would do things different to arrive at a settlement. In other words, there was some real give and take in the settlement that has been agreed to. And you agree that there has been?

Mr. BOGERT. Senator, I couldn't agree further. We were actively involved in the negotiations that ultimately achieved the legislation that is before the Committee this morning.

Senator DOMENICI. And frankly, I want to say publicly, I was absolutely amazed in a positive sense when I met two times with a group representing these different parties. They came to be with me in Santa Fe. I was absolutely amazed. No Espanol, excuse me.

The Indian leaders themselves, while they have lawyers, they participated and there are a few of them that could get a law degree in water law without going to school. They have already been at it for so long, they talk better water law than I do.

Now, having put forth all the accolades that sound like I am happy, I want to tell you that I am not very happy at all. It seems to me we got all this work done. You have described it, all these settlements, all this give and take, and what we have essentially is testimony that this it too much money. The settlement will cost the government too much money.

Now, I don't believe that is your decision. I don't ask you to comment. I believe you ought to carry—next time we ask you to participate and you do it, we ought to tell the President of the United States to send OMB along to ride on your back and go through the process so they can understand what you have done. Because this is not your desire that this settlement not be arrived at. It is somebody else in the Executive Branch that is looking at money. They look at our money for Indian settlements with far more scrutiny than they look at a lot of other money that is being spent, in my opinion.

I am not one that doesn't understand the Federal budget. I did that work, as my Senator will attest to, for 20-some years. Frankly, I think that this Indian settlement is being dealt with improperly by the Federal Government in terms of concern. Any settlement requires that some parties don't get everything, and parties give and take. The government doesn't want to pay for the solutions the way we are solving them. But the cost-share in this case is 40 percent local, and they are going to pay that. That is a very high cost-share, is it not, as these cases go?

Mr. BOGERT. Senator, that is a significant non-Federal contribution to the settlement.

Senator DOMENICI. It's $116 million.

I want to ask you just a couple of questions. Have our New Mexico settlements been evaluated differently than other water settlements? In that regard, I am asking you to comment on the way Snake River and the Colorado Project was evaluated for settlement purposes.

Mr. BOGERT. Senator, I can speak to that in two ways. I can candidly tell you before the Committee that while we were working back home on our settlement in Idaho, we were never asked to justify the Snake River settlement in terms of alignment with the criteria and procedures. But that having been said, Senator, the Secretary got here as soon as we could to engage in your settlements in the direction that we received across the Administration. We talked to both the Aamodt and the Taos parties about the criteria and procedures to gain their advice and counsel on how to align their settlements under the criteria and procedures.

Senator Domenici, that is the position of the Administration that we will evaluate these settlements under the guidelines.

Senator DOMENICI. Did the Administration support these settlements in Arizona and Idaho without reference to a criteria and procedure? Didn't you just say that?

Mr. BOGERT. I can't speak to Arizona, Senator. I can follow up with you and your staff to get you a response to that.

Senator DOMENICI. All right. How about Snake River?

Mr. BOGERT. I don't know. I will look back on the Snake River Act and the Committee report and the means by which the United States looked at the framework of that settlement as well, and I would be happy to follow up with you and your staff and the Committee.

Senator DOMENICI. In terms of cost, were these settlements in Arizona and Idaho more expensive than the New Mexico settlements?

Mr. BOGERT. Point of clarification, Senator. Would you include the Navajo-Gallup bill in this? Or shall we just talk about both Aamodt and Taos?

Senator DOMENICI. Leave out Navajo.

Mr. BOGERT. Okay. I think, Senator, that at least—and again, I can speak only to the Snake River Act, our settlement from Idaho—I believe our settlement was ultimately less expensive, I believe. I will double-check on that, Senator. If I am incorrect, I will follow up with you.

Senator DOMENICI. Have the waivers such as those contained in this settlement bill been previously enacted in other settlements with the support of the Administration? Well, I guess you are not going to know the answer.

Mr. BOGERT. Well, Senator, I can tell you that the policy justification for, if you will, some recent thinking around the waiver issues is, again to be candid, the waiver issues prior to, if you will, the explosion of all of the Indian water rights settlements that are now up here on Capitol Hill, I believe the custom and practice was to deal with the waivers almost on an individual basis. We have no abandoned that.

The advice and counsel that we are receiving from the Justice Department with so many settlements that are now ripe for review and ripe for ultimate blessing by the Administration and by Capitol Hill are such that the interest of seeking finality amongst all of the settlements at relatively the same time through, means, Senator, that no one tribe will receive any different benefit in terms of their waivers. This is the policy that we are trying to advance. We think

we are in good, vibrant, healthy conversations with our tribal partners on this issue and with the Justice Department.

Again, Senator, I don't believe we are inflexible. We are willing to have a good, healthy conversation about this.

Senator DOMENICI. Well, let me say, and let me say this especially to our Chairman, I say this to you and to our Chairman. Mr. Chairman, I believe these settlements ought to be approved by our Committee. I am going to ask that we do it in spite of the opposition of the Administration. I don't believe we are going to be able to negotiate anything for a lesser amount of money. It is a very reasonable resolution. You don't have all the latitude in the world to settle. You have parameters, of substituting something for what is going on now, and that substitution costs X amount of money, and you go on up and down and solve it.

So I want to thank them for helping put together the language that has brought the compromise, but I do believe the position of the Federal Government that they will not comment positively about the settlement costs is wrong in this case, and it is not going to get any better. More cases are coming, and nobody up here is going to sit around and take OMB's evaluation of these things, when they know less about what is going on than most of us.

I can tell you, you can't say it, but I can, and I have had to go to the President on items of significance for this Country when OMB didn't care what the situation was, and it didn't take the President five minutes to decide they were wrong. I can't go running up there on every Indian settlement, but I tell you, they are making some bad mistakes of judgment in terms of their recommendations, and this is one of them.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Domenici, I assume that message will get to OMB from this hearing.

Senator Barrasso?

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

I want to thank Senator Tester for his kind comments on how we can work together to solve these issues.

Mr. Polly, the Bureau of Reclamation has really I think done a great job of working to cultivate a stakeholder working group for the Yellowtail Dam. There are many users of this dam, is that correct?

Mr. POLLY. Yes, sir, and we can get you a list.

Senator BARRASSO. A list of all the different users, so the stakeholder team really has more than just the two members who are part of the compact that has been developed between the Crow Nation and the State of Montana?

Mr. POLLY. That is correct.

Senator BARRASSO. Looking at this and the Bureau's efforts, is it possible that perhaps some of the others should be included in making these decisions as we take a look at this whole process?

Mr. POLLY. Well, sir, this is a very complex issue. We will have to get back to you as to what our official policy has been on similar things. But there are a number of stakeholders involved, yes.

Senator BARRASSO. The Department's testimony implies that there is a problem with the water allocation included in the com-

pact and the legislation. Can you elaborate on that? And maybe Mr. Bogert, you may want to jump in as well.

Mr. POLLY. With regard to the legislation, sir?

Senator BARRASSO. Yes.

Mr. POLLY. Well, I believe the Administration's position is we are concerned about possible litigation. But when you talk about water in the West, it is impossible to not talk about litigation as well.

Senator BARRASSO. Your testimony also expresses concern that the standard criteria and the procedures for this kind of agreement have not been completed. Would you comment a little bit more about that and what the shortcomings there may be?

Mr. BOGERT. Mr. Chairman, Senator Barrasso, part of the evaluation that the Administration undertakes with respect to water rights settlements involves an assessment by the Department of Justice as to the exposure of the United States if the claims were to ultimately be litigated.

My understanding is the Justice Department is, if it hasn't already, it is going to be shortly finishing up its litigation analysis and will be providing that to all of the Federal agencies that are involved in trying to put together what the Administration's position is. A fundamental component of the criteria and procedures is the exposure of the United States in the a settlement environment. To the extent that that is sort of plugged in as a part of the formula under the criteria and procedures, I believe, Senator, that is being finished up by the Justice Department.

Senator BARRASSO. Because your testimony expresses some concern over the ambiguity in the Bureau of Reclamation's responsibility for water delivery. Is that part of the litigation issue?

Mr. BOGERT. It also goes to the policy issues. To the extent that the United States takes its trust obligations very seriously, and views these settlements as a means by which we fully discharge our obligations, to the extent that precision in the settlement environment as to the Bureau of Reclamations obligations to discharge the trust obligations, in terms of delivery, it is important that we want to continue to work through and discuss some of the potential issues that could arise so that we can seek a little bit more precision in terms of the direction.

Senator BARRASSO. Well, I want see how all the stakeholders can be made part of establishing the bureau's responsibility. That is my vision of how we can include all of the stakeholders in establishing the bureau's responsibilities.

Mr. BOGERT. I think, Senator, that this is part and parcel of the collaborative process that exists in these settlements. If there are those, and certainly our obligations are to the tribes first and foremost to ensure that—while we are at arms length and working with their leadership on what their view should be of their settlement, so too we have a facilitation role. If there are those, Senator, that you and others believe are not at the table, that is part of the role that we play at the Department of the Interior with the Secretary's Indian Water Rights Office.

Senator BARRASSO. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso, thank you very much.

I thank both of our witnesses. We may be submitting additional questions for you and we appreciate very much your testimony today.

Mr. BOGERT. Thank you, Mr. Chairman.

Mr. POLLY. Thank you.

The CHAIRMAN. We have six additional witnesses. We have about an hour remaining before other matters and events will intervene in our schedule. Many of you have come from a long, long distance. We want to hear fully from you and have you participate fully in this Committee hearing. We thank you very much for your willingness to be a part of it.

I want to call forward to the witness table the Honorable Ronnie Lupe, the Chairman of the White Mountain Apache Tribe in Whiteriver, Arizona; Mr. John Sullivan, Associate General Manager of the Salt River Project in Phoenix, Arizona; the Honorable Cedric Black Eagle, Vice Chairman of the Crow Tribe of Montana, the Crow Agency in Montana; Mr. Chris Tweeten, the Chief Civil Counsel, Legal Services Division, Office of the Attorney General, State of Montana; the Honorable Charles Dorame, Chairman of the Northern Pueblos Tributary Water Rights Association in Albuquerque; and the Honorable Gilbert Suazo, Senior, Councilman, Taos Pueblo in Taos, New Mexico.

I thank all of you for traveling to Washington, D.C. Those who aren't testifying also have traveled here. We appreciate very much your attendance.

Senator Tester?

Senator TESTER. Yes, Mr. Chairman. Thank you. I am going to have to go preside here shortly, so I am not going to be able to ask questions to particularly Chris and Cedric. Just in your testimony, if you could talk about what the impacts are if we do nothing again. That is all my few questions are going to revolve around anyway.

I appreciate your good work. Thank you both.

The CHAIRMAN. Senator Tester, thank you. I thank you for your participation in this Committee and in a very aggressive way, and the same to my colleagues.

Let me say to the witnesses that your entire prepared statements will be part of the record. We would ask that you summarize in no more than five minutes.

Let us begin first with the Honorable Ronnie Lupe, the Chairman of the White Mountain Apache Tribe, Whiteriver, Arizona. Mr. Chairman?

STATEMENT OF HON. RONNIE LUPE, CHAIRMAN, WHITE MOUNTAIN APACHE TRIBE

Mr. LUPE. Thank you, Mr. Chairman, members of the Committee, and the Vice Chair also. Thank you for inviting us as White Mountain Apache Tribe to testify in support of S. 3128.

I have been coming before this Committee here in Washington, D.C. testifying before various committees, and I consider this as our strongest link to the United States Congress and the sort of government-to-government relationship we have with the United States. I appreciate coming here again on behalf of our tribe.

For centuries, we have fought for our land, first from the Spanish, then the Mexicans and the Americans. We as Apaches, of course, and today we are proud to be Americans. We defend our sacred land and the people in the land of this great Country against terrorism and other enemies, joining the United States armed forces in high numbers. We have lived here in the United States on our land for many centuries. It is now known as Fort Apache Indian Reservation.

For almost 100 years, we have fought to keep our reserve water rights. Hostility used to be the tone of our relationship with the downstream water users. Now, it is a peaceful relationship we have with the Phoenix downstream water users. About four years ago, after not talking for more than 50 years, we invited the SRP and the Phoenix Valley citizens to our land to visit our secret springs. I told them that our springs have built many skyscrapers below in the Phoenix Valley, some 200 miles downstream from us.

They came. They listened. We listened to them. We are important to the downstream water users. My reservation is 1.66 million acres of the most beautiful land you will ever see, highlighted by the high rise of mountain ranges from east to west, north to south, pine trees, meadows, cienegas, with many types of animals on our reservations. We have many streams come together forming Whiteriver and Blackriver. They merge and become Salt River and flow down to Phoenix Valley cities. They depend on the water downstream as much as we depend on the streams on our land.

After the SRP and the valley cities came to our land, we sat down at the table and talked. Of course, we talked peacefully. We talked respectfully about the dignified, honorable and equitable settlement of my tribe's reserve water rights. A lot of horse-trading took place. It went on, hundreds and hundreds of pages of exhibits, water studies, et cetera, et cetera, and with all the people from the Phoenix Valley and different organizations and companies, and even the northern boundary in the Little Colorado River Basin.

After three years of horse-trading, we have reached a water rights quantification and a settlement agreement with the downstream parties. The final touches are being put to the quantification settlement agreement as I speak. The cornerstone of our water rights settlement agreement, if you will, and the White Mountain Apache Water Quantification Act of 2008, is a rural water drinking system from our reservation. Almost the entire population of 15,000 tribal members and residents on our reservation are served by a well field. This well field is failing by over 50 percent in five years. There is no real groundwater on our land. All of the water is our springs and streams.

We call the Miner Flat Reservoir Project the only needed project that we need to survive on our reservation. There are many rivers, North Fork, Bonito Creek and all the others, Black River, Salt River, that runs all the way down to the Phoenix area. We rely upon these water supplies, water reservoirs. We cannot grow economically or develop our land if we do not have this water. Our culture would die out.

The White Mountain Apache Water Right Consultation of 2008 will provide funding to construct the drinking water system on our reservation. Without a drinking water storage reservoir, there can

be no settlement of our reserve water rights. This is a deal we made with the valley water users downstream.

S. 3128 will provide a Federal loan to my tribe for planning, design, engineering, environmental compliance for the Miner Flat Storage Reservoir and reservation water drinking water system. This system of development will serve us for the next 100 years to live. Without it, we cannot. We cannot survive.

We have been in discussion of these water rights with many of our people from Phoenix down in the valley. We have become friends. We have talked for so many years now, the last four years, and we have finally arrived at an understanding that we have finally approved and have nearly succeeded in an equitable, honorable water settlement with our friends down in the Phoenix area.

We have still more to go yet after the development of our water rights with S. 3128. There are many projects that need to be done. A lot of work has to be done—a stretch of a pipeline all the way down to Cibecue, which is 50 miles away from Whiteriver and the North Fork drainage, and then on beyond into all the other areas on our reservation. We cannot survive without the completion of the S. 3128. We need it so bad.

That is the reason why I brought four members of the government body here with me. They are sitting in the audience right now. And the other members of the government body are also busy elsewhere on our reservation. One is in New York City for another area. We represent our people as best as we can, knowing that the heart of the manner of where we live and what we do on our reservation depends on the Federal Government in most cases, with our objective of the survival of our people.

This is where we end up in all respect to the United States Government, to this Committee. We hope and pray that we will be successfully finally after so many years, so many years struggling on our reservation, to somehow develop our waters on our land. We very much depend on S. 3128 to be it.

Otherwise, if we do not secure this, S. 3128, the costs again would go up on our reservation. And then we go on into years and years of negotiation again. We think in the area of human respect for the people down in the valley also, and also the other people on our reservation who come to visit us, that we do need water. We do have housing project programs going on on our reservation. We cannot build any more houses because our water just isn't there. We cannot even progress anymore. We can't even build more houses in Whiteriver, Arizona, the headquarters of the White Mountain Apache Tribe, because of this water. We don't have it. We don't have groundwater.

The only way that we will survive for the next 100 years is for this project to continue as is, as are requested. And we have all agreed with the downstream water users. This will be a quantification. This will be the final quantification of our water rights with the downstream water users. We hope that it will happen very soon. We hope that it will be here with us today, and we respectfully request the Committee to see it as it is.

We need your help.

[The prepared statement of Mr. Lupe follows:]

PREPARED STATEMENT OF HON. RONNIE LUPE, CHAIRMAN, WHITE MOUNTAIN APACHE TRIBE

Introduction

The White Mountain Apache Tribe and its Tribal Council thank Senator Dorgan for the invitation to appear and testify today before the Senate Committee on Indian Affairs in support of S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act.

Tribe's Winters Doctrine Water Rights

The White Mountain Apache Tribe has beneficial title to 1.66 million acres of land in the east central highlands of the State of Arizona. The Tribe's Fort Apache Indian Reservation was established by Executive Order in 1871, from the aboriginal lands of our ancestors. We have retained actual, exclusive, use and occupancy of our aboriginal lands, within the boundaries designated by the Executive Orders dated November 9, 1871 and December 14, 1872, without exception, reservation, or limitation since time immemorial. The Tribe's vested property rights, including its aboriginal and other federal reserved rights to the use of water, often referred to as Winters Doctrine Water Rights, that underlie, border and traverse its lands, have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Gila River drainage, of which the Salt River is a major source.

The Tribe's Reservation—Source of Salt River and its Tributaries

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually the entire Reservation drains to the Salt River. The headwaters and tributaries of the Salt River arise on the Tribe's Reservation. *See attached General Overview Map.* The Salt River tributaries that arise on our reservation are the principal sources of water for the Tribe, the downstream Cities of Avondale, Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale and Tempe; the Salt River Project and the Roosevelt Water Conservation District, among other parties to the Gila River and Little Colorado Adjudication Proceedings.

Gila River and Little Colorado River Adjudication Proceedings

The United States in its capacity as the Tribe's Trustee, filed a claim in 1985, in the name of the White Mountain Apache Tribe for approximately 175,000 acre feet of Salt River water in the Gila River Adjudication Proceedings now pending in the Maricopa County Superior Court, State of Arizona. It also filed claims for the Tribe in its capacity as trustee in the Little Colorado River Adjudication Proceedings now pending in the Apache County Superior Court, State of Arizona.

The United States amended its water rights filings for the Tribe in the Little Colorado River and the Gila River General Stream Adjudications in September 2000, to assert the Tribe's aboriginal and priority federal reserved rights to the transbasin aquifer sources necessary to sustain the base flow of the springs and streams on the Tribe's Reservation.

The claims filed by the United States as Trustee specifically recognize the Tribe's unbroken chain of aboriginal title and time immemorial priority rights to the base flow of the springs and streams as well as surface water contributed by rainfall and snowfall runoff on the Tribe's Reservation.

Quantification and Settlement Agreement

For decades, the White Mountain Apache Tribe has asserted its rights to preserve, protect, and develop its aboriginal and federally reserved water rights. As late as the 1950s, a physical confrontation became imminent when the Tribe began to develop outdoor recreation lakes on its Reservation trust lands by utilizing water from streams on the Reservation. This activity was considered a threat to water supplies in the Salt River system by downstream water users in the Phoenix Valley and was vigorously opposed. This is just one example of a litany of water right controversies involving the White Mountain Apache Tribe and the Salt River Valley water users from 1898 throughout the 20th century, but that is all the past.

More recently, with the appointment of a Federal Negotiating Team by the Secretary of the Interior in 2004, we have met and negotiated in good faith with the downstream water users and claimants in both the Gila River and Little Colorado River Adjudication Proceedings to reach an honorable and equitable quantification and settlement of our Tribe's reserved water rights.

I am pleased to report to the Senate Committee on Indian Affairs that a water rights quantification agreement, which was respectfully negotiated amongst all parties, has been virtually concluded and is only awaiting formal approval by the parties' respective governing bodies.

Quantification of Water Rights Establishes Certainty

The Tribe's sizable and senior water rights claims in the pending Gila River and Little Colorado River Adjudication Proceedings have generated considerable uncertainty regarding the availability of Salt River water supplies currently used by the downstream Salt River Project, which serves the Phoenix Valley Communities. As many as 3.5 million people depend in large part upon the water sources that arise on the Fort Apache Indian Reservation to which the White Mountain Apache Tribe claims sufficient water to meet present and future needs. The WMAT Water Quantification Act and Settlement Agreement will resolve uncertainties among all of the parties and claimants in both the Gila River and Little Colorado River Basins.

Drinking Water Shortages Threaten Health, Safety and Welfare of Reservation Residents

The Tribe and Reservation residents are in great need of a long-term solution to meet drinking water requirements. Currently the Tribe is served by the Miner Flat Well Field. Well production has fallen sharply and is in irreversible decline. Over the last 8 years, well production has fallen by 50 percent, and replacement wells draw from the same source aquifer that is being exhausted. The Tribe experiences chronic summer drinking water shortages. There is no prospect for groundwater recovery. The quality of the existing sources threatens the health of our membership and other Reservation residents, including the IHS Regional Hospital and State and BIA schools. The only viable solution is replacement of failing groundwater with surface water from the North Fork of the White River and implementation of the WMAT Rural Water System.

Cornerstone of WMAT Quantification Act and Settlement Agreement

The WMAT Rural Water System, including the Miner Flat Dam Storage Facility, water treatment plant, and pipeline to our principal communities is the cornerstone of the WMAT Water Rights Quantification Act and Settlement Agreement. The Quantification Act and Settlement Agreement will confirm the Tribe's and other settling parties' water rights without prolonged, protracted and expensive litigation that could last for decades. The Miner Flat Project will replace the failing well system and enable the Tribe to construct a secure, safe and dependable drinking water supply for the current 15,000 White Mountain Apache Tribal members and residents living on our Reservation and will meet our drinking water needs for decades to come. *See attached Miner Flat Reservoir and Pipeline Location Map.*

S. 3128—An Important Step Forward

The White Mountain Apache Tribe Rural Water System Loan Authorization Act (S. 3128), conceived and sponsored by Senator Kyl, is an important and essential step. The introduction and implementation of the WMAT Water Rights Quantification Act and the Settlement Agreement between the White Mountain Apache Tribe and downstream parties will soon follow.

S. 3128 provides for a $9.8 million federal loan to the Tribe for preconstruction planning, design and engineering, and environmental compliance for the White Mountain Apache Rural Water System, including regulation of water supplies on the North Fork of the White River. As provided in S. 3128, the loan is to be repaid by the Tribe.

Funding for planning, design and engineering now will save millions of dollars in construction inflation costs by allowing the Tribe to commence construction following ratification by Congress of the larger WMAT Water Rights Quantification Act and Settlement Agreement. The Quantification Act will authorize the construction funding and the means to repay our loan. It will permit a construction start as many as two years ahead of any timetable that does not provide for advance planning and design.

The White Mountain Apache Tribe appreciates this Hearing and support by this Committee of S. 3128, and the commitment of Senator Kyl to advance this bill and the Quantification Act to the Congress in its current session.

COCONINO
NAVAJO
APACHE
YAVAPAI
MARICOPA
GILA
GRAHAM
PINAL
Horseshoe Reservoir
Bartlett Reservoir
Verde River
Theodore Roosevelt Lake
Saguaro Lake
Apache Lake
Salt River
Cibecue Creek
Carrizo Creek
Canyon Creek
Cibecue
Carrizo
Cedar Creek
North Fork White River
East Fork White River
Whiteriver
Fort Apache
Canyon Day
East Fork
Bonito Creek
Black River
Arizona Canal
Fountain Hills Lake
Peoria
Glendale
Scottsdale
Phoenix
Tempe
Mesa
Gilbert
Chandler
Roosevelt Canal
Buckeye Canal
Grand Canal
Firebird Lake
Eastern Canal
Gila River
Miles
0 5 10 20 30 40
Map Legend
Arizona State Boundary
Reservation Boundary
County Boundary
Canal
Salt River Project Service Area
Lake
Stream
City (Population 50,000+)
Towns (Reservation)
N
W
E
S
GREAT SEAL
WHITE MOUNTAIN APACHE TRIBE
REGIONAL STREAMFLOW SCHEMATIC
WHITE MOUNTAIN APACHE TRIBE

FIGURE 1

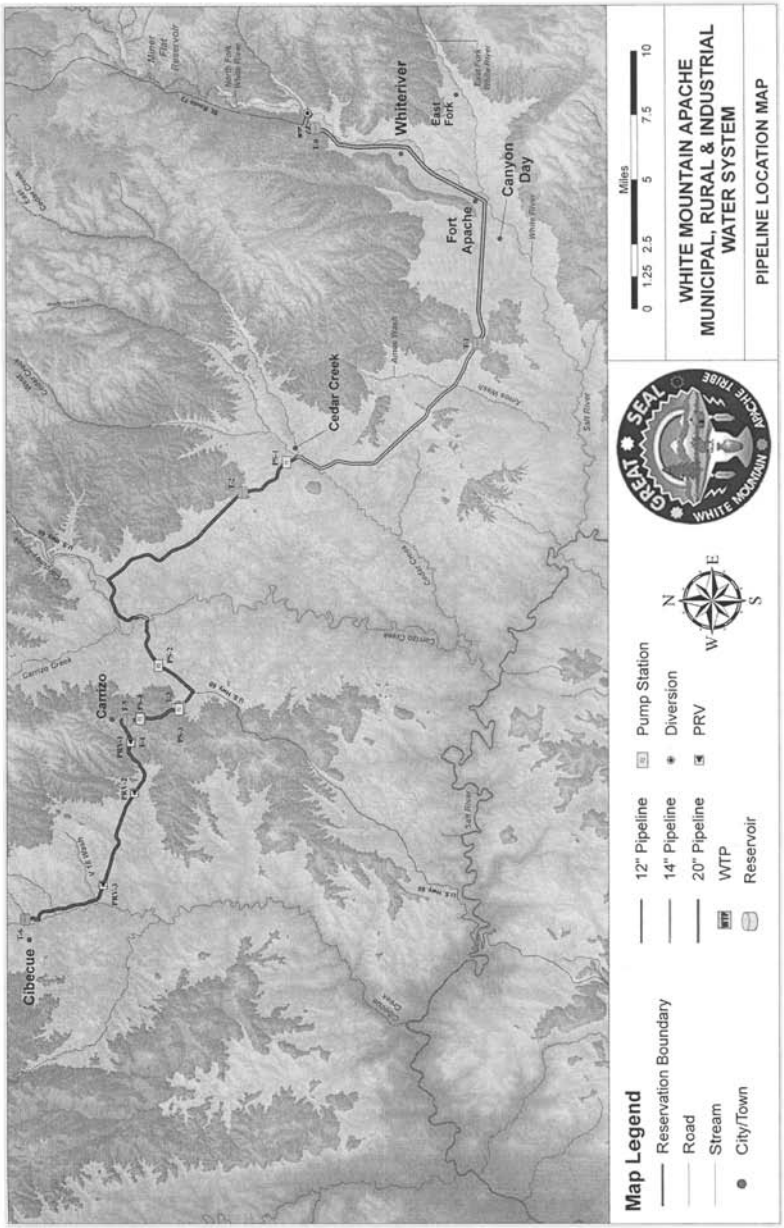


FIGURE 2

The CHAIRMAN. Mr. Chairman, thank you very much for your testimony and your passion, and the substantial amount of work that you have done. We appreciate your traveling here for that purpose today.

Next, we will hear from Mr. John Sullivan. Mr. John Sullivan is Associate General Manager of the Salt River Project in Phoenix, Arizona.

Mr. Sullivan, you may proceed.

STATEMENT OF JOHN F. SULLIVAN, ASSOCIATE GENERAL MANAGER, WATER GROUP, SALT RIVER PROJECT

Mr. SULLIVAN. Thank you, Chairman Dorgan, Vice Chairman Murkowski, other members of the Committee. I want to thank you for the opportunity to testify in support of S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act.

I am responsible for all things water at the Salt River Project, including negotiating with various Indian tribes over the years' settlements. We operate seven dams and reservoirs, along with numerous electrical generating facilities and deliver water and electricity to customers and shareholders in the Phoenix metropolitan area.

SRP has a history of negotiating and settling Indian water rights disputes in Arizona. Over the past four decades, we have worked with numerous tribes and stakeholders to resolve conflicts in a manner that benefits both the Indian communities and their non-Indian neighbors. Among the multiple benefits of settling water disputes are water supply certainty for all of the settling parties and the level of trust that allows for more improved water management.

Over the past several years, as you have heard, SRP and other interested stakeholders have engaged in water rights settlement negotiations with the White Mountain Apache Tribe, which is located on the Fort Apache Reservation in Eastern Arizona, and encompasses the headwaters of the Salt River. About 42 percent of the water delivered by SRP originates on the Fort Apache Reservation, and is stored in four reservoirs on the Salt River downstream.

The United States, acting on behalf of the tribe, asserted claims on water from the Salt River Basin. Today, these claims represent the largest remaining unsettled water dispute on SRP's watershed. We have reached a point where the settlement agreement is near final, and the negotiating parties are seeking approvals from their various governing bodies.

A critical component, as the Chairman just mentioned, of this settlement is the Miner Flat Dam and pipeline project, which will provide reliable water to the tribe and its members. The tribe's existing system relies on an aquifer that is very limited and insufficient to meet the needs today of the tribe, nonetheless future needs.

As an interim measure, the tribe is constructing a small temporary diversion system on the White River, but that is only short term. The Miner Flat project is a desperately needed, long-term solution that will meet the water needs of the reservation for the next 100 years.

S. 3128 provides a $9.8 million loan to the White Mountain Apache Tribe to conduct planning, design and engineering work for the Miner Flat Dam project. Beginning on the planning, design and engineering for the Miner Flat project is important so that con-

struction can begin immediately upon completion of a full settlement, including approval by the Congress.

This loan is critical to ensuring the tribe's water supplies are provided in a timely and cost-effective manner, and as Senator Kyl mentioned, actually provides an opportunity to save money in the overall costs of the project. This bill has wide support among the settling parties, and I believe many have sent letters of support to this Committee.

Although it is not our intention to continue pursuing the funding absent a settlement, I think you heard today from Senator Kyl that he has introduced a bill for the full settlement at this point. We do believe we are very close to being at that point. It is important to give the tribe the ability to begin preliminary work on this project.

Chairman Dorgan, Vice Chairman Murkowski, we look forward to working with the Committee on the White Mountain Apache Tribe Rural Water System Loan Authorization Act, and soon, very soon, we hope, a full settlement bill. Thank you once again for this opportunity to testify before you today, and I would be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF JOHN F. SULLIVAN, ASSOCIATE GENERAL MANAGER, WATER GROUP, SALT RIVER PROJECT

Chairman Dorgan, Vice Chairman Murkowski and members of the Committee,

Thank you for the opportunity to testify in support of S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act. My name is John F. Sullivan. I am the Associate General Manager, Water Group, of the Salt River Project ("SRP"), a large multi-purpose federal reclamation project embracing the Phoenix, Arizona metropolitan area. SRP has a history of negotiating and settling Indian water rights disputes in Arizona. Over the past four decades, SRP has worked with numerous tribes and stakeholders to resolve Indian water rights disputes in a manner that benefits both Indian communities and their non-Indian neighbors. Most important among the benefits is water supply certainty, which is a fundamental outcome of any water rights settlement.

SRP is composed of the Salt River Valley Water Users' Association ("Association") and the Salt River Project Agricultural Improvement and Power District ("District"). Under contract with the Federal Government, the Association, a private corporation authorized under the laws of the Territory of Arizona, and the District, a political subdivision of the State of Arizona, provide water from the Salt and Verde Rivers to approximately 250,000 acres of land in the greater Phoenix area. Over the past century, most of these lands have been converted from agricultural to urban uses and now comprise the core of metropolitan Phoenix.

The Association was organized in 1903 by landowners in the Salt River Valley to contract with the Federal Government for the building of Theodore Roosevelt Dam, located some 80 miles northeast of Phoenix, and other components of the Salt River Federal Reclamation Project. SRP was the first multipurpose project approved under the Reclamation Act of 1902. In exchange for pledging their land as collateral for the federal loans to construct Roosevelt Dam, loans which have long since been fully repaid, landowners in the Salt River Valley received the right to water stored behind the dam.

In 1905, in connection with the formation of the Association, a lawsuit entitled *Hurley v. Abbott, et al.,* was filed in the District Court of the Territory of Arizona. The purpose of this lawsuit was to determine the priority and ownership of water rights in the Salt River Valley and to provide for their orderly administration. The decree entered by Judge Edward Kent in 1910 adjudicated those water rights and, in addition, paved the way for the construction of additional water storage reservoirs by SRP on the Salt and Verde Rivers in Central Arizona.

Today, SRP operates six dams and reservoirs on the Salt and Verde Rivers in the Gila River Basin, one dam and reservoir on East Clear Creek in the Little Colorado River Basin, and 1,300 miles of canals, laterals, ditches and pipelines, groundwater

wells, as well as numerous electrical generating, transmission and distribution facilities. The seven SRP reservoirs impound runoff from multiple watersheds, which is delivered via SRP canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area. SRP also operates approximately 250 deep well pumps to supplement surface water supplies available to the Phoenix area during times of drought. In addition, SRP provides power to nearly 900,000 consumers in the Phoenix area, as well as other rural areas of the State.

SRP holds the rights to water stored in these reservoirs, and for the downstream uses they supply, pursuant to the state law doctrine of prior appropriation, as well as federal law. Much of the water used in the Phoenix metropolitan area is supplied by these reservoirs.

The White Mountain Apache Tribe is located on the Fort Apache Reservation in eastern Arizona, established by Executive Order in 1871. The headwaters of the Salt River originate on the Fort Apache Reservation. Four of the seven reservoirs operated by SRP are located on the Salt River downstream of the Fort Apache Reservation, and approximately 42 percent of the water delivered by SRP to Phoenix metropolitan area customers originates on the Reservation. The United States, acting on behalf of the Tribe, has asserted claims in the pending Gila River Adjudication to the depletion of 179,000 acre-feet of water from these headwaters. These claims are based on the federal reservation of rights doctrine and largely encompass potential future uses of water by the Tribe on its Reservation.

Over the past several years, SRP and other interested stakeholders have engaged in water rights settlement negotiations with the White Mountain Apache Tribe. These negotiations are almost completed, and we anticipate that an agreement among the parties will be finalized in the next few weeks. Once agreement is reached, the settling parties will pursue Congressional approval through a larger settlement bill, but the White Mountain Apache Tribe Rural Water System Loan Authorization Act is a crucial initial step that will help implement the final agreement.

A critical component of the parties' efforts to settle the White Mountain Apache Tribe's water rights is the provision of an adequate water storage and distribution system for the Tribe and its members. The Tribe's existing system is supported by a wellfield, but the aquifer's supply is limited and insufficient to serve the reservation's needs. As an interim measure, the Tribe is constructing a small temporary water diversion system along the White River. However, this is only a short-term solution. The Tribe has determined that construction and operation of the Miner Flat Dam Project would best address the Tribe's growing municipal, rural and industrial water diversion, storage and delivery demands. The Project will comply with Federal environmental laws, and is estimated to cost approximately $128 million in today's dollars. Project features include a dam and pipeline for water distribution within the Reservation's boundaries including to the growing communities of White River, Cedar Creek, Carrizo, and Cibecue.

S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act, provides $9.8 million in the form of a loan to the White Mountain Apache Tribe to be repaid beginning in 2013. This legislation would allow the Tribe to conduct planning, design, and engineering work for the Miner Flat Dam Project once the Tribe and the Secretary execute a cooperative agreement. Without this legislation, funds would not be available to the Tribe to begin the design and engineering, which would likely delay construction and increase project costs by an estimated $15 million or more due to inflation. This loan is critical to ensuring the Tribe's water supplies are provided in a timely and cost effective manner.

Although it was not the parties' intention to pursue this funding absent a settlement, we believe that we are very close to agreeing upon a comprehensive settlement with the White Mountain Apache Tribe and intend to introduce comprehensive settlement legislation in the near future. S. 3128 would lay the groundwork to begin project construction once full settlement is complete and passed. As a result of this legislation, millions of dollars could be saved and a secure water supply for the Tribe can be online more quickly.

As is evident from the numerous letters to Chairman Dorgan and Vice Chairman Murkowski, included in this hearing record, S. 3128 has the strong support of the settlement parties, including the Arizona Department of Water Resources, the Cities of Phoenix and Tempe and numerous water users in the Little Colorado River Basin. We look forward to working with the Committee on this bill and, soon, a full settlement bill. We urge you to bring the settlement one step closer by approving S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act.

Chairman Dorgan, Vice Chairman Murkowski and members of the Committee, thank you for the opportunity to testify before you today and for considering our views. I would be happy to answer any questions you may have for me.

The CHAIRMAN. Mr. Sullivan, thank you very much for your testimony. We appreciate your being here.

Next, we will hear from the Honorable Cedric Black Eagle, Vice Chairman of the Crow Tribe of Montana.

Mr. Black Eagle, you may proceed.

STATEMENT OF HON. CEDRIC BLACK EAGLE, VICE CHAIRMAN, CROW NATION

Mr. BLACK EAGLE. Good morning, Chairman Dorgan, Vice Chair Murkowski, Senator Barrasso. Thank you for your continued good work for Indian people, and thank you for holding this hearing on S. 3355, the Federal legislation ratifying the Crow/Montana water compact.

At the outset, I would like to take this opportunity to say that we will take Mr. Bogert's offer to meet next week, from the Department of Interior.

Also for the record, my name is Cedric Black Eagle. I am Vice Chairman of the Crow Nation. The Crow Nation (Apsáalooke) has the largest, or is the largest of Montana's seven reservations. It is approximately 2.3 million acres. It is located in south-central Montana. We have a membership of approximately 12,000 members, of whom 7,900 reside on the Crow Indian Reservation. I am delighted to be here on behalf of Chairman Venne and the Crow Tribe of Indians.

Since 1998, I have been involved in the negotiations at Crow as a member or lead negotiator of the Crow, so I am quite familiar with the history and the terms of the agreement, the compact between the Crow and Montana. I have a few brief remarks, then I am also submitting extensive written comments as well.

I would like to thank the many people that have worked to bring this historic agreement to this stage, including all of those who have negotiated on behalf of the tribe, the State, and the United States over the years. In particular, I would like to thank Senator Tester for his hard work on behalf of, and for sponsoring the Federal legislation, along with Senator Baucus.

Water has been profoundly important to the Crow people. It is vital to our health and a central part of our culture and traditions. As most Native American people, we hold water sacred and the traditions that we follow from time immemorial, we have followed those traditions and kept the great respect of nature, particularly the resources in water.

The Montana Reserve Water Right Compact Commission has worked since the 1970s to settle tribal and Federal claims to water within the geographical area of Montana. As Senator Tester knows, because he was serving there in 1999, the Montana legislature ratified the compact we negotiated with the State of Montana. By entering into a compact, we settled our claims and avoided costly lengthy litigation. In addition, the compact settled our coal severance tax with Montana. The compact strikes a good balance, we believe, between the Indian and non-Indian users in our area.

Details of the compact are included in my written testimony, but the basic features of the Montana/Crow compact establish a tribal priority date and set aside 500,000 acre feet yearly from the natural flow of the Bighorn River for tribal uses, and 300,000 acre feet of storage in the Bighorn Lake for the tribe, of which 150,000 acre feet may be put to use, while the remaining 150,000 is primarily for supplementing the natural flow in times of shortage.

The compact fulfills the goals of agreed-upon usages and certainly for all users. It protects both Indian and non-Indian users and will allow the tribe to use its waters appropriately. The Montana Reserve Water Rights Commission is scheduled to sunset in June of 2009. If it sunsets before our compact is approved by Congress and signed into law, all existing State claims will go back to court. As such, we are under the gun to get the Congressional action before this expiration date.

S. 3355 provides Federal ratification for the Crow/Montana water compact, and authorizes Federal contributions for overall settlement of $527 million. It will go primarily towards remediating the Crow irrigation project and constructing a municipal rural water industrial water system throughout the reservation. This system will provide clean, potable water for the Crow people. In my written testimony, I included a complete explanation of this project.

While this is a significant sum, the tribe, in turn, waives its water right claims against the United States and other claims it has related to the United States, failure to establish an appropriate water system, as it was charged to do by Federal law. Most of the bill's text deals with these waivers. Please note that the Federal litigation appropriately contends with other key concerns as well.

The settlement will allow us to complete the water infrastructure needed on our reservation to fulfill the purpose of the homeland of our people. It will support other economic development to be sure that even something as basic as housing, our chronic reservation housing shortage cannot be cured without water infrastructure, and those houses that we will need.

A settlement will put the Crow irrigation project in good repair for the first time in history, which will benefit the project users and provide the tribe with some economic and other benefits in which to contend. After this bill is ratified, it returns to the tribe for a vote of the Crow people.

In closing, I would like to say that in all aspects of what this will provide the tribe, the tribal membership or the tribe has 12 billion tons of coal that we want to utilize, and water plays a big part in that. We will become economically self-sufficient if this comes to fruition and if our water rights claims through Congress is passed, we would no longer be here to request or ask the Federal Government for money to help us for all the lands that we have given up for the creation of a portion of Wyoming and a portion of Montana.

In closing, this will be very economically self-sufficient for our tribe as a whole.

Thank you.

[The prepared statement of Mr. Black Eagle follows:]

PREPARED STATEMENT OF CEDRIC BLACK EAGLE, VICE CHAIRMAN, CROW NATION

Good Morning Chairman Dorgan, Vice Chair Murkowski, and members of the Committee. Thank you for the good work you continue to do for Indian people. Also, thank you for holding a hearing on Senate Bill 3355—the federal legislation that ratifies the Crow/Montana water compact and authorizes the federal contribution to the overall settlement.

My name is Cedric Black Eagle. I am Vice Chairman of the Crow Nation. The Crow Nation (Apsμalooke), the largest of Montana's seven reservations, is approximately 2.3 million acres. It is located in south-central Montana. We have a membership of approximately 11,000, of whom 7,900 reside on the Crow Indian Reservation. I am delighted to be here on behalf of Chairman Venne and the Crow Tribe of Indians.

Since 1998, I have been involved in water negotiations at Crow as a member of or the lead negotiator for the Crow, so I am quite familiar with the history and terms of this agreement.

I would like to thank the many people who have worked to bring this historic agreement to this stage, including all of those who have negotiated on behalf of the Tribe, the State, and the United States over the years. In particular, I would like to thank Senator Tester for his hard work on our behalf and for sponsoring this federal legislation, along with Senator Baucus.

1. Water is Critical to Crow People

Water is profoundly important to the Crow people. It is vital to our health and a central part of our culture and traditions. As one of our teachers wrote in her book on Crow Indian recipes and medicines, "Water has always been the main drink of the Crow people. Elders tell us that rivers are like the veins of the world. They teach us to respect the waterways and to be thankful to the Creator every time we take a drink."[1] Those who are ill are invited to drink pure water to thin their blood and restore their health. Tribal ceremonies such as those of the sweat lodge depend upon particular uses of waters in places that are sacred to the Crow people.

According to Dale Old Horn, an ex officio member of the tribe's culture committee and the Tribal Historic Preservation Officer, water is one of the primary elements through which the Creator gives us the ability to sustain our lives. When Crows have anything spiritual and become disenfranchised from it, it causes great injury. But the Crow will say, even grass once downtrodden will revive and rejuvenate when water touches it. Today we are asking you to help us to rejuvenate our culture.

The Crow people respect the beings that live in the rivers and pay appropriate tribute to the waters. In our creation story, the land is brought up from the water and in many of our other traditional stories water is central as well. We believe that all things of tangible substance, all things that we can touch, feel, smell, see and hear come from water. In the Tobacco Dance, a central ceremony of our tribe, we repeat this central truth that all things come from water and with water it goes.

2. Crow Tribe and Montana Entered Into a Compact

The Montana Reserved Water Rights Compact Commission was established by the Montana legislature in 1979 for purposes of concluding compacts for the equitable division and apportionment of waters between the State and its peoples and the Indian Tribes claiming reserved water rights within the state. As Senator Tester knows—because he was serving there—in 1999, Montana's state legislature ratified a Compact we negotiated with the State of Montana.[2] By entering into a compact, we settled our claims and avoided costly and lengthy litigation. In addition, the compact settled our coal severance tax dispute with Montana. This Compact strikes a good balance between Indian and non-Indian users.

The basic features of the Montana/Crow Compact include the following:

- 500,000 AFY from the natural flow of the Bighorn River for tribal use.
- Agreements to protect the stream flow in the Bighorn for the benefit of the fishery there.
- Tribal priority date of May 7, 1868.
- Protection of state and tribal existing uses as of 1999.
- No new state claims after 1999.

---

[1] Alma Hogan Snell, *A Taste of Heritage: Crow Indian Recipes & Herbal Medicines,* Ed. Lisa Castle; Foreword Kelly Kindscher; University of Nebraska Press; Lincoln & London, at 59 (2006).

[2] Tribal State Compact, MCA 85–20–201 (1999).

- Exempt claims for both state and tribal users of small wells and stock uses.
- 300,000 AFY of storage in Bighorn Lake for the Tribe, of which 150,000 AFY may be put to use and 150,000 AFY is primarily to supplement the natural flow right in times of shortage.
- In the accompanying Streamflow and Lake Level Management Plan, Optimum, Standard, and Minimum Instream Flow targets for the Bighorn.
- Tribe has rights to all surface flow, groundwater and storage in other basins on the Reservation, still protecting existing users.
- Tribe waives other water rights claims within Montana.
- $15 million contributed by Montana to settle the coal severance tax dispute between Crow and Montana and provide a state cost share for the settlement.
- 50,000 AFY of the Tribal Water Right may be marketed off-reservation. In addition, 47,000 AFY may be used on the Ceded Strip.
- Disputes between tribal and state users will be heard by a joint commission, while disputes between tribal users or between state users will be heard by the tribe or the state.

It is important to note the Compact is an agreement born of compromise, but is fair. Also, by entering into this Compact we avoid a chaos of litigation that will harm all users, and in particular, preclude the Tribe from developing its domestic, agricultural, and industrial uses.

3. Crow Tribe and State of Montana Seek Federal Ratification and Settlement of Federal Issues

On July 29, 2008, Senators Tester and Baucus introduced Senate Bill S. 3355, a bill to provide federal ratification for the Crow/Montana Water Compact and to provide the federal contribution to the overall settlement. Major features of this bill are:

- S. 3355 provides for federal ratification and returns the Compact to the Tribe for approval or disapproval in a vote of the Crow people.
- The bill protects allottee rights to a just and equitable allocation of water for irrigation purposes and provides for the pursuit of allottee relief through tribal law, section 7 of the Act of February 8, 1887 (25 U.S.C. 381), or other applicable law.
- Appropriations (approximately $527 million) are authorized, primarily to remediate the Crow Irrigation Project and to construct a Municipal, Rural, and Industrial Water System throughout the Reservation: other funds are to be used for trust funds to fund future OM&R for these systems and to provide for an economic development fund.
- The Tribe shall have the right to develop and market power generation as a water development project on the Yellowtail Afterbay Dam.
- The Tribe waives water rights claims against the United States but retains the right to assert claims for Compact enforcement, enforcement of water rights acquired after the enactment of the Act, water quality, objections under State law proceedings, and other claims not specifically waived and released.
- The Tribe will implement its Tribal Water Code and administer its own water rights.

The United States has many obligations to provide resources for this settlement. For example, the United States has liabilities related to unlawful condemnation of Crow lands and its failure to adequately complete and maintain the Crow Irrigation Project that was first authorized by Congress in 1890 including breach of its fiduciary duty to the Tribe to protect and develop the Tribe's water rights. In consideration of the federal contribution, which finally fulfills the United States trust obligation to the Tribe, section ten of S. 3355 waives significant claims against the United States.

Description of the Costs

The Crow Tribe Water Rights Settlement Act costs are broken down into eight (8) sections, which include the following: (1) Rehabilitation and Improvement of Crow Irrigation Project; (2) Design and Construction of MR&I System; (3) Tribal Compact Administration; (4) Economic Development Projects; (5) Water Development Projects; (6) MR&I System OM&R; (7) Yellowtail Dam OM&R; and (8) CIP OM&R.

The Crow Tribe retained HKM Engineering Inc. to prepare an engineering report for a Municipal, Rural and Industrial (MR&I) water system that would meet the

current and future domestic, commercial, institutional water needs on the Crow Indian Reservation. The Tribe also retained HKM Engineering Inc. to prepare the Crow Irrigation Project Betterment Evaluation Report, which depicts the existing conditions of the Crow Irrigation Project and estimated costs associated with rehabilitating the Crow Irrigation Project. Together, these two reports provide the basis for the costs included in S. 3355.

i. Rehabilitation and Improvement of Crow Irrigation Project

The Crow Irrigation Project is located in south-central Montana, on the Crow Indian Reservation. The first general authorization for the construction of the irrigation project on the Crow Reservation was contained in an agreement between the Crow Tribe and the United States, entered into on December 8, 1890, and ratified by Section 31 of the Indian Appropriation Act of March 3, 1891. Subsequent Acts provided for continued construction and development to date. Designs, surveys, and construction for the Project were performed by the United States Reclamation Service, now the United States Bureau of Reclamation, for the BIA Affairs until 1922. Construction continued intermittently on various aspects of the Project into the 1920's. Further construction was performed by the BIA after 1922. Nearly all of the irrigation facilities were completed before 1940.

The Crow Irrigation Project consists of eleven units with a total area of 63,365 acres. There are nine diversion dams, one storage dam, nine canal systems and five drainage systems.

The Crow Irrigation Project has been operated and maintained by the BIA, with a majority of the O&M budget weighted towards personnel costs and deferred maintenance. As a result, there are extensive deficiencies within the Project. HKM evaluated the Crow Irrigation Project and identified the nature and extent of the existing deficiencies within the Project and provided cost estimates for rehabilitating the system such that it can function as originally designed.[3] Lack of adequate water measurement was identified as a key operational deficiency of the Crow Irrigation Project. Additionally, automated gate controls at key diversion points would allow for more efficient water management throughout the Project.

Based on the deficiencies within the Project, the total costs involved with rehabilitating and improving the Crow Irrigation Project equal $160,653,000.

ii. Design and Construction of MR&I System

There are numerous compelling needs for the Crow MR&I System. There are multiple documented deficiencies with the existing water systems serving communities on the Crow Indian Reservation. These deficiencies have been documented in at least one previous study (HKM 1999) and by the Indian Health Service's Sanitation Deficiency System (SDS). Additionally, there are large areas of the Reservation that are uninhabitable without a reliable source of high quality water due to the low quality or quantity of groundwater. HKM examined several options for providing a comprehensive water system to service the population of the Crow Indian Reservation. The selected system would provide a reliable supply of safe drinking water to the majority of the population of the Crow Indian Reservation and would include capacity for existing and future economic development.

To determine the volume of water that is needed on an average day the reasonable rates of use were multiplied by the population projections for the year 2050 to determine what a reasonable range of capacities may be. Additional water needs for livestock and future economic development were also included. This resulted in a peak day system with a diversion capacity of 12.7 cubic feet per second (cfs) capable of treating 7.43 million gallons per day and delivering 3.3331 acre-feet per year to the service area.

The system has been planned using design criteria appropriate for the area and type of system. Some of the more important design criteria include a peak day factor of 2.5 times the average day rate of flow in gallons per minute (gpm) and a peak hour factor of three times the average day rate of flow. A "fire flow" of 1000 gpm for two hours is also provided for the towns of Pryor, Crow Agency, and Lodge Grass.

An estimate of the probable cost to plan, design, and construct the system was based on a variety of data including bid tabs and manufacturers' quotes. Costs were estimated for major items (i.e. intake, treatment plant, etc.) and a series of multi-

[3] The HKM report initially recommended replacement of significant portions of the Crow Irrigation Project. In an effort to contain costs associated with this settlement, the Tribe requested that HKM use a rehabilitation approach to the fulfillment of the federal obligation to the Tribe with respect to the Crow Irrigation Project. This resulted in a very significant reduction in the overall federal contribution to this settlement.

pliers, including a contingency, were applied to establish the field cost and project cost. The major cost items include the following system components: surface water diversion and raw water pump station, water treatment plant, pipelines, pump stations, storage tanks, pressure reducing/control valves, service connections, livestock connections, and the SCADA System. The estimated cost of the system is $200,840,000.

iii. Tribal Compact Administration

As required by the Compact between Montana and the Crow Tribe, the Crow Tribal Water Resources Department (TWRD) must be established two years after the Effective Date (U.S. Congress, State of Montana, and Crow Tribal Council ratification) of the Compact. The TWRD will administer and enforce the Tribal Water Right pursuant to a Tribal Water Code. The TWRD will also provide Montana Department Natural Resource and Conservation with an annual report listing all current uses and new development of the Tribal Water Right.

The estimated cost to establish the TWRD Office totals $4,000,000 over a 10-year period. At a 3 percent inflation rate, the annual cost of the TWRD Office would be about $470,000. This annual funding level would provide a TWRD staff of four consisting of an Office Head and three Water Rights Specialists. The TWRD Office annual funding also includes office rent, office supplies and equipment, employee benefits and salaries, utilities, and general overhead costs.

iv. Economic Development Projects

The Tribe has considered a number of economic development projects that would involve water on the Reservation. The Tribe envisions that S. 3355 will play a central role in any and all energy development within the Reservation. The Tribe desires to develop its mineral resources in an economically sound, environmentally responsible manner that is consistent with Crow culture and beliefs. One of the major economic development projects that would assist the Tribe with these efforts is a proposed coal-to-liquids project. For any large scale energy development, the Tribe anticipates that its energy partners will need certainty and predictability to be able to use water for development without fear of litigation or uncertainties. With that in mind, the costs involved with Economic Development Projects total $40,000,000.

v. Water Development Projects

In addition to rehabilitating the Crow Irrigation Project and designing/constructing the MR&I System, the Tribe anticipates that it will have additional water development projects to undertake. Namely, the Tribe may choose to extend the MR&I System to the Pryor Creek drainage. Thus, the costs involved with Water Development Projects total $37,594,000.

vi. MR&I System OM&R

All water systems require operation and maintenance in order to deliver a reliable supply of water. Even though the facilities proposed for the Crow MR&I System would involve a high level of automation through the SCADA system, human effort and adequate funding are still essential for successful operation and maintenance. For instance, operation and maintenance costs for the pump stations and pipelines are primarily included within labor and equipment cost. Excluding labor and equipment however, there is still a materials element necessary to keep these components functional.

The useful life for each of the MR&I System components was estimated and the replacement costs included for those components with useful lives less than 50 years. The replacement costs for these components were included to ensure an efficient and operational system through the 50-year life of the project. The life-cycle analysis was undertaken to estimate the cost of operation, maintenance and replacement over the course of 50 years. The costs involved with MR&I System OM&R total $40,513,000.

vii. Yellowtail Dam OM&R

The Crow Irrigation Project could utilize 150,000 acre-feet/year of irrigation storage water from the Yellowtail Dam/Bighorn Reservoir for irrigation purposes under average precipitation conditions and another 150,000 acre-feet/year of irrigation storage water under drought conditions. If the Crow Tribe were to utilize 150,000 acre-feet/year of irrigation storage from Yellowtail Dam/Bighorn Reservoir, then the average cost would approximate $8.00/acre-foot through a Water Service Contract with the Bureau of Reclamation. The total annual cost would be $1,200,000 for 150,000 acre-feet/year irrigation use. If 100 percent of the annual cost of the 150,000 acre-feet of irrigation storage water from Yellowtail Dam/Bighorn Reservoir were subsidized through a trust fund to the Crow Tribe, then the amount required at a

3 percent inflation rate for 50 years would cost $30,876,000. This would produce an annual subsidy of about $1,200,000 for the 150,000 acre-feet of irrigation storage water from Yellowtail Dam/Bighorn Reservoir to the Crow Tribe.

viii. CIP OM&R

As discussed above, the rehabilitation costs for the Crow Irrigation Project will cost $23, 365,647. This amount is a significant reduction in the irrigation infrastructure full replacement value for the Crow Irrigation Project which would cost $45,638,497. The Tribe plans to subsidize the Indian-owned land (55 percent trust land) at 100 percent of the current irrigation assessment of $20.50/acre, which results in the Indian trust land portion of the annual OM&R assessment rate decreasing to $0.00/acre. A trust fund for the Crow Irrigation Project for replacement of irrigation structures for Indian-owned land benefits only would be set at $495,000/year at a 3 percent inflation rate for 50 years. Thus, the total trust fund for the Crow Irrigation Project OM&R would total $12,736,000. The irrigation assessment rate would stay at $20.50/acre during the construction period of the Crow Irrigation Project Rehabilitation and Betterment. After the Crow Irrigation Project Rehabilitation and Betterment is completed, then the irrigation assessment rate to all water users should decrease to near the Montana OM&R average assessment of $15/acre in 2008 dollars.

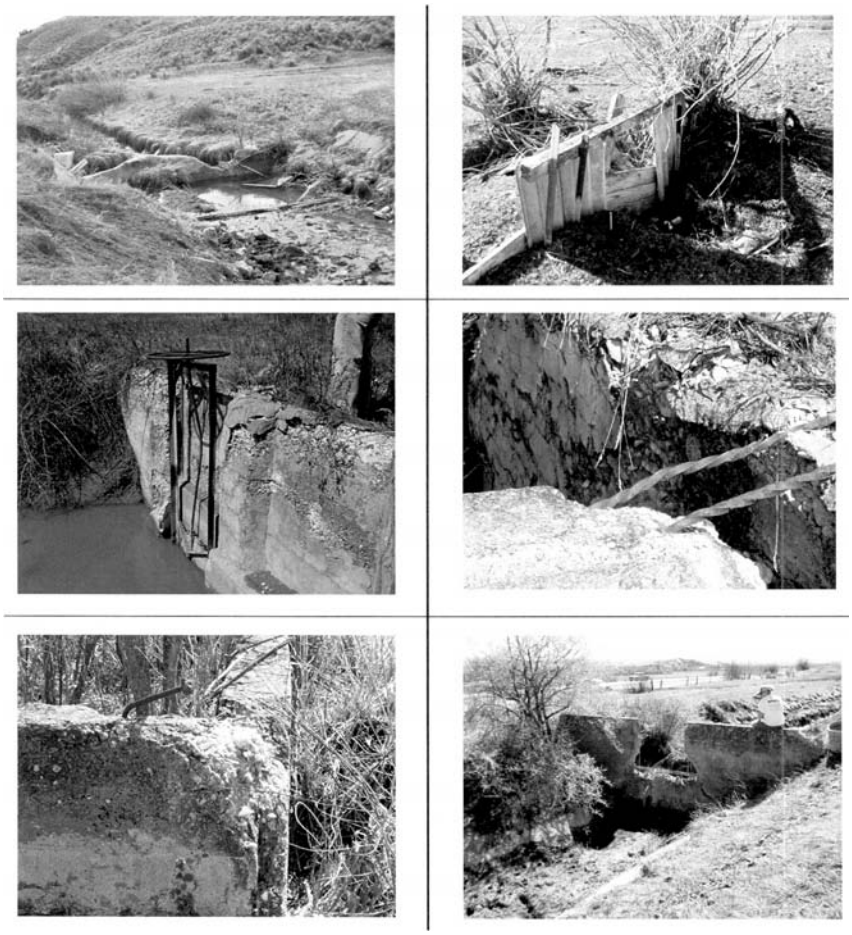
Conclusion

The Montana Reserved Water Rights Compact Commission is scheduled to sunset in June, 2009. If it sunsets before our compact is approved by Congress and signed into law, all existing state claims will go back to court. As such, we are "under the gun" to get congressional action before this expiration date.

This settlement will allow us to complete the water infrastructure needed for our reservation to fulfill its purpose as a homeland for our people. One vital need on our reservation is infrastructure to support housing construction. The settlement will put the Crow Irrigation Project into good repair for the first time in its history, which will benefit all Project users and provide the Tribe with some of the economic and other benefits for which it was intended.

We have worked hard to resolve all remaining issues with the federal team and continue to have fruitful dialogue with it. We ask you to help us pass this piece of legislation and return our compact to the Crow people for their ratification. We look forward to your questions and suggestions and remain grateful for your attention to this issue critical to the Crow Nation and all the people who inhabit our reservation. We also want to thank your staff for their attention to S. 3355.

CROW IRRIGATION PROJECT: CURRENT CONDITION



The CHAIRMAN. Thank you very much, Mr. Chairman. We appreciate your being here.

Next, we will hear from Mr. Chris Tweeten, Chief Civil Counsel, Legal Services Division, the Office of the Attorney General in the State of Montana.

Mr. Tweeten?

STATEMENT OF CHRIS D. TWEETEN, CHIEF CIVIL COUNSEL, OFFICE OF THE ATTORNEY GENERAL, STATE OF MONTANA

Mr. TWEETEN. Thank you, Mr. Chairman and members of the Committee.

For the record, my name is Chris Tweeten. I am the Chairman of the Montana Reserve Water Rights Compact Commission. I also serve as the Chief Civil Deputy in the office of the Montana Attorney General.

I am very pleased to be here today on behalf of Governor Brian Schweitzer and the State of Montana to testify in strong support of S. 3355, the Crow Water Rights Settlement bill. I consider it, in addition to being a great privilege for me to sit at this table with Mr. Sullivan and the distinguished tribal leaders here who share my professional interest and personal passion over the idea of settling these claims, getting them over with, and getting water onto our reservations for use for the benefit of our tribal people in Montana.

The other witnesses before me have talked about the benefits that come from settling these water issues between State and tribal water users. I don't feel the need to reiterate those benefits. I do want to talk briefly about the process that we follow in Montana, and then I want to respond to Senator Tester's concerns regarding the risks that we run if these settlements don't ultimately come to fruition.

Our legislature created the Compact Commission to negotiate government-to-government with the tribal governments in Montana in an effort to settle all of our tribal reserve water rights claims so they wouldn't have to go to court and be the subject of lengthy and expensive litigation. Our process is extraordinarily open. I suspect more open than any other water negotiations that take place anywhere else in the West.

Montana has one of the strongest open meeting and public participation laws in the United States. Pursuant to those laws, all of our negotiating sessions, and it goes without saying the public meetings, have been open to the public. They have been the subject of extensive notice both up- and downstream from the Crow Reservation. We extended a specific invitation to the State Engineer of Wyoming to participate in our discussions, which he did.

I would emphasize that since our discussions, government-to-government, we talked at the table with the representatives of the tribe in the United States, but all of the interested water users, and those include water users within the State of Wyoming, are welcome to come to our meetings, express their concerns, make suggestions as to how our compacts can be improved. In fact, the Water Engineer in Wyoming did exactly that and we made substantial changes in our compact in response to the State Engineer office's suggestions.

I want to spend the rest of my time discussing the responses to Senator Tester's concerns regarding the need to get these issues settled and the risks we run if we don't accomplish that. The history of litigating over Federal reserve water rights claims for Indian tribes in the West doesn't paint a very pretty picture. Those litigation processes are tremendously expensive. They go on for decades. Probably most seriously, even after all of that expenditure of time and effort, those litigation processes result in a declaration of the amount of water that the tribe is entitled to and what the priority date of that water is. They provide no opportunity to put in place any sort of a settlement or discussion about how that water is to be put to use. These are the classic attributes of a paper water right.

Our negotiations, on the other hand, seek to provide wet water for the tribes. In order to do that, it is necessary not only to talk

about amounts of water and dates, but also to talk about the way in which the tribe's water right is to be administered and how that administration is going to interlock with the administration system that exists in the State outside the reservation.

We, I think with the help of the United States and with the tremendous engagement of the Crow Tribal Council and the attorneys for the tribe, worked very hard to come up with an administration scheme that dovetails well with Montana and provides a superior opportunity for the tribe to put their water to use for the economic benefit of their people.

In the process of doing that, in response to concerns expressed by the Wyoming State Engineer's office, we made provisions in the compact that provide substantial guarantees to the irrigators upstream in the Bighorn Basin, that their water rights and the water rights of the Crow Tribe and the downstream users are not going to conflict. Again, I want to emphasize the Wyoming State Engineer's office was extensively involved in those discussions and provided suggestions to us which we adopted to satisfy those problems.

Mr. Chairman, I appreciate the opportunity to be here to testify this morning. I look forward to answering your questions.

[The prepared statement of Mr. Tweeten follows:]

PREPARED STATEMENT OF CHRIS D. TWEETEN, CHIEF CIVIL COUNSEL, OFFICE OF THE ATTORNEY GENERAL, STATE OF MONTANA

Chairman Dorgan and distinguished members of the Senate Indian Affairs Committee, I thank you for the opportunity to provide written testimony on this important matter. My name is Chris D. Tweeten, and I am the Chief Civil Counsel to the Montana Attorney General and Chairman of the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of the State of Montana and Governor Brian Schweitzer in support of Senate Bill 3355, the Crow Tribe Water Rights Settlement Act of 2008, and to urge your approval of the Act.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the state of Montana. The Compact Commission was established as an alternative to litigation as part of the state wide water adjudication and is charged with concluding compacts "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes" and the Federal Government. (Mont. Code Ann. § 85–2–702 (2007).)

Montana has been remarkably successful in resolving both Indian and federal reserved water right claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne and Rocky Boy's Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne and the Rocky Boy's Compacts, and both tribes have seen substantial economic and social benefits from the completed settlements. In addition, we have reached Compact agreements with the tribes of the Crow, Blackfeet, and Fort Belknap Reservations that are in the process of approval. The Crow Tribe-Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. § 85–20–901 (2007)), and is now before Congress for ratification pursuant to Senate Bill 3355.

The Crow Indian Reservation is the largest of the 7 Indian reservations located in Montana. The Reservation encompasses 2.28 million acres (roughly twice the size of Delaware), making the Crow Indian Reservation one of the largest in the United States. The Reservation has three mountain ranges, rolling upland plains and fertile valleys. Rainfall averages 12 inches per year and agriculture consists mostly of small grains and hay for livestock. Expansive grasslands support herds of cattle, horses and buffalo as well as abundant elk, deer and other wildlife.

The Crow Indian Reservation is home to approximately 8,000 of the 11,000 enrolled Tribal members. Close to 40 percent of the enrolled Tribal members are below

the age of 18. Providing safe drinking water supplies to support existing populations and future growth is a major concern on the Crow Indian Reservation. One of the nation's richest deposits of strippable low sulfur coal lies within the Reservation as well as several oil and gas fields. Despite the presence of significant natural resources within the Crow Indian Reservation, unemployment is over 50 percent. Development of these natural resources requires adequate and dependable sources of water.

The provisions in this Act will recognize and quantify water rights and on-Reservation storage allocations that will allow the Crow Tribe to provide for its growing population and develop its natural resources. The State of Montana and the Crow Tribal Administration agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a productive and sustainable home for the Crow People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. The State of Montana would also like to express appreciation for the effort of the State of Wyoming and the Office of the Wyoming State Engineer in consulting with the Compact Commission and providing comments and testimony during the negotiation and State approval process to make sure Wyoming's concerns were addressed. A representative from the State Engineer's Office attended every negotiating session and most public meetings. Continued concerns express by the Wyoming State Engineer with language in the Compact resulted in language clarification in S. 3355. This was a huge commitment of time and effort by the State of Wyoming and we believe that the rights of both states are protected to the extent possible under this agreement while also meeting the rights of the Crow Tribe.

The Crow Indian Reservation is located in south central Montana along the Montana–Wyoming border. The primary sources of water on the Reservation are the Bighorn River, the Little Bighorn River, Pryor Creek and several smaller streams. The Bighorn and Little Bighorn Rivers originate in Wyoming and flow north onto the Reservation. The Little Bighorn enters the Bighorn River just off the Reservation near the town of Hardin, Montana. The Bighorn River is a tributary of the Yellowstone River. All of the Reservation water sources are within the Yellowstone River system that is governed the Yellowstone River Compact among Wyoming, Montana and North Dakota. The Yellowstone River Compact was ratified by the Congress and approved by all the states by 1951. The Yellowstone River Compact expressly states that it does not adversely affect any Indian Tribe's rights in the Yellowstone River system. (Article VI, Yellowstone River Compact.) Yellowtail Dam, located on the Crow Indian Reservation, was authorized by Congress in 1944 and construction began in 1961. Yellowtail Dam and Bighorn Lake (the associated reservoir of 1,328,360 acre-feet total capacity) are operated and managed by the United States Bureau of Reclamation (BOR). The Bureau of Indian Affairs (BIA) also manages irrigation projects within the Reservation.

On May 7, 1868, the United States entered into a treaty with the Crow Tribe establishing the Crow Indian Reservation. This is the most senior water right priority date in the entire Yellowstone River drainage basin. The original Crow Indian Reservation was much larger than the present day Reservation. A 1904 Congressional statute confirms the cession of one portion of the Crow Indian Reservation to the Federal Government. The land involved in this particular cession is what is referred to as the "Ceded Strip." The size of the Ceded Strip is approximately 1.1 million acres. In 1958 Congress restored 15,553 acres of surface ownership and 80,423 acres of subsurface mineral ownership to the Tribe. The 9th Circuit Federal Court of Appeals has ruled that the land and minerals associated with the ownership interests of the Tribe in the Ceded Strip are components of the Reservation. Therefore, the Compact recognizes a separate water right for the use of land and minerals owned by the Crow Tribe in the Ceded Strip off the Reservation.

Concurrent with the initiation of the Montana general stream adjudication in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Crow Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in state court. Should the negotiated settlement of the Crow Tribe's water right claims fail to be approved, then the claims of the Crow Tribe will be litigated before the Montana Water Court. The Crow Tribe has always had the senior water right in these basins—this Compact does not create that right, it simply quantifies it.

In the fall of 1998, the Crow Tribe approached the Governor and the Attorney General with a proposal to settle the Crow Tribe's claims to water as well as a lawsuit between the Crow Tribe and the State of Montana concerning a coal severance tax previously collected by the State on coal mined in the Ceded Strip. The Crow Tribe, by separate legislation, also seeks to settle land issues by repurchasing land

it contends was illegally transferred out of trust. The stated goal of the Crow Tribe's package proposal was to reconsolidate the land within the Reservation, to insure sufficient, reliable water to serve those lands and the people who live on them, and to foster economic development by the Tribe on the Reservation and the Ceded Strip. What followed the Tribal proposal was a period of intense negotiations and public involvement. The State of Montana convened a special session of the Montana legislature to ratify the Compact that is now before you.

The Crow Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Bighorn River enters the Crow Indian Reservation from Wyoming. The Tribal Water Right for the Bighorn drainage within the Reservation is 500,000 acre-feet per year (AFY) of the natural flow of the River including groundwater for all existing and future Tribal uses. The Yellowstone River Compact specifically addresses the Bighorn River by recognizing all pre–1950 water rights and allocating future uses from unappropriated and unused waters, 80 percent to Wyoming and 20 percent to Montana. Because the Crow Indian Reservation has an 1868 priority date, Montana's position is that the Tribal Water Rights is a pre–1950 right. Wyoming has stated that since portions of the Tribal Water Right were not developed prior to 1950, exercising this right is a post–1950 development that must come out of Montana's share under the Yellowstone River Compact. While how the tribes fit within the Yellowstone River Compact is an unsettled legal issue, Montana chose to work with Wyoming, without conceding the legal point, to negotiate a quantification that met the needs of the Tribe and avoided a dispute with Wyoming. The Bighorn quantification of the Tribal Water Right is within Wyoming's definition of Montana's 20 percent post–1950 allocation under the Yellowstone River Compact (even though a substantial portion of the Tribal Water Right was developed prior to 1950) and the Bighorn River both on the Reservation and off the Reservation is closed to new appropriation under Montana law. For any land reacquired by the Tribe that has water rights associated with it, the water rights will become part of the 500,000 AFY and will not be added to that cap.

Under S. 3355 the United States will allocate 300,000 AFY of water stored in Bighorn Lake. The 300,000 AFY storage allocation is split into two 150,000 AFY components. The first 150,000 AFY is available to the Tribe for new development on the Reservation. A portion of this allocation, up to 50,000 AFY, may be marketed off the Reservation if the Tribe so chooses. The second 150,000 AFY may only be used to supplement the natural flow of the Bighorn River in times of natural flow shortage. Supplemental water is used to replace the natural flow if the natural flow water supply of the Bighorn River is inadequate to fully satisfy the Tribal Water Right. Any deficit in the natural flow coming into Bighorn Lake would be made up from release of stored water at Yellowtail Dam to meet the full volume of 500,000 AFY under the Compact. The supplemental storage component was structured to address concerns expressed by Wyoming that the Tribe would place a call on upstream water users if natural flow was unavailable to the Tribe. Supplemental storage water will ensure that the natural flow volume of water is available to the Tribe in all but the most extreme years and will virtually eliminate complicated enforcement and administration issues. No additional contracts for stored water from Bighorn Lake will be issued.

The presence of Yellowtail Dam also creates recreational opportunities and economic benefits. Bighorn Lake is a lovely flatwater lake in the Bighorn Canyon and is bordered by a National Recreation Area. The stretch of the Bighorn River below Yellowtail Dam is a world-class trout fishery. The Tribe, the State and the United States have entered into a Streamflow and Lake Level Management Plan that is part of the Compact. This Plan acknowledges the BOR's continued authority to manage Yellowtail Dam and Bighorn Lake, and sets up specific goals for water releases to maintain a healthy fishery. The Plan does require consultation with the Tribe and the State concerning management and it structures the Tribe's use of the natural flow right in the Bighorn River to protect the fishery.

The Little Bighorn River flows from Wyoming onto the Reservation. Allocation for future uses from unappropriated and unused waters of the Little Bighorn River are not included in the Yellowstone River Compact. The Crow Tribal Water Right in the Little Bighorn River is quantified as the entire flow of the River (including groundwater and storage) with protection for existing water rights under state law and a shared shortage, if necessary, between non-Indian water right holders and Tribal uses actually using water as of the date of the Compact. The basin is closed to new appropriation under Montana law. Water rights under state law will become part of the Tribal Water Right if the Tribe reacquires the land and the water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

The Crow Tribal Water Right in Pryor Creek is quantified in the same fashion as the Little Bighorn and the entire Pryor Creek drainage on and off the Reservation is closed to new appropriations under Montana law. The other smaller drainages use this same structure, with new appropriations under Montana law prohibited on the Reservation. Certain provisions apply to Rosebud Creek to protect aspects of the Northern Cheyenne Compact. In all cases, both under Tribal Code and State law, small domestic and stock uses are not precluded by the basin closures.

The Tribal Water Right for lands and interest held in trust in the Ceded Strip is recognized as 47,000 AFY from any source, including the Yellowstone River and groundwater. If water is taken out of the Bighorn River drainage, then the amount of water used must be deducted from the 500,000 AFY total quantification from the Bighorn River. No more than 7,000 AFY can be used in one month.

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

The State of Montana has established an escrow account to pay 15 million dollars as State contribution to this settlement. This contribution, along with an agreement to pass-through certain state taxes on the extraction of Crow coal, covers both the state cost-share for the water rights agreement and settlement of the coal severance tax lawsuit. The escrow account has been fully funded and is currently worth approximately 18 million dollars. The principle and interest in the escrow account will be paid to the Crow Tribe for economic development and water and sewer infrastructure at the completion of the ratification and court approval process. The Tribal testimony covers the federal contribution to settlement and the essential projects that those monies will fund.

The Compact will recognize and protect the Crow Tribe's water rights and provides for the development of municipal and agricultural water systems. The Compact promotes development for the benefit of the Crow People while protecting other water uses. The Compact is the full and final settlement of all water right within the State of Montana and the Tribe waives any claims to water rights not contained in the Compact. We urge your support in ratifying the Compact by passage of this Act.

The CHAIRMAN. Mr. Tweeten, thank you very much for being here.

Next, we will hear from the Honorable Charles Dorame, Chairman of the Northern Pueblos Tributary Water Rights Association in Albuquerque, New Mexico.

Mr. Dorame, you may proceed. Did I pronounce your name correctly?

Mr. DORAME. I wasn't paying attention. I was wondering which button to press.

[Laughter.]

The CHAIRMAN. Well, then let's assume I have.

Mr. DORAME. Okay.

[Laughter.]

Mr. DORAME. And you will forgive me if I don't pronounce your name correctly?

[Laughter.]

The CHAIRMAN. You may proceed.

STATEMENT OF CHARLES J. DORAME, CHAIRMAN, NORTHERN PUEBLOS TRIBUTARY WATER RIGHTS ASSOCIATION

Mr. DORAME. Mr. Chairman Dorgan and Committee members, Senator Barrasso, thank you very much for having this hearing

today. We were looking forward to coming here before your next recess to get our thoughts on paper here. We do have written testimony that has been provided to the Committee.

I am here to kind of show-and-tell, but before I do that, out of respect for my leadership, I have to reintroduce our governors because, well, I am not fearful anymore that they will throw me in the river because there is no water in the river right now. But I will go ahead and introduce them: My governor, Governor Robert Mora from the Pueblo of Tesuque; Governor George Rivera from the Pueblo of Pojoaque; Governor Leon Roybal from the Pueblo of San Ildefonso; Lieutenant Governor Linda Diaz from the Pueblo of Pojoaque. And also joining us here today is our commissioner from Santa Fe County, Santa Fe County Commissioner Mr. Harry Montoya. I just wanted to thank him for making the effort to be here to show support for the Pueblos and also his testimony is in the report.

The CHAIRMAN. Let me indicate that we weren't able to have all of the witnesses that wished to be witnesses at the table today, but Commissioner Montoya I know has done a lot of work on this and has submitted testimony, and we deeply appreciate that.

Commissioner, welcome.

Mr. Dorame, you may proceed.

Mr. DORAME. Yes. My name is Charlie Dorame. I am a former Governor from the Pueblo of Tusuque. I am also the Chairman of the Northern Pueblos Tributary Water Rights Association, NPTWRA. I had to practice that before I came.

But I would like to have a little bit of show-and-tell here. To the right of me, I do have some props that show the area where our villages are located. They are located within a 15-mile radius of the City of Santa Fe, if you are familiar with the area that I am referring to. It also shows the water basin that we are going to be discussing today, the Pojoaque Water Basin, where the problems have been addressed.

Again, I am here today to support on behalf of the Pueblos, S. 3381. I would urge the Committee that they do their utmost to try to get it passed and get it back to us as soon as possible. We still have a lot of work to do on it, and we would like to continue the work.

It was mentioned earlier that this suit began in 1966, but I have proof that it happened even before that. I am talking about probably around 1924, when the Pueblo Lands Act was passed. My tribe has been fighting that long, along with the other tribes in New Mexico, probably because it involved my grandfather, who was the Chairman of the All-Indian Pueblo Council.

When this suit was filed in 1966, just to give you an example, I was 17 years old. I was a junior in high school, but I remember the many meetings that he used to have at home, not only with our tribal members, but other tribes, because they came to visit. They didn't have too many offices at the time.

Also, I have some other props here that show a young man who happens to be the Governor's brother, trying to get across the arroyo. That was 40 years ago, so there was some water that was in the arroyo. The next prop that I have shows the same riverbed where he was trying to get across, and that was taken just this

past Monday. So there is very little water there right now. We have had an abundance of snow, and I believe it is raining as we speak, but that is because of the Ike-effect that we are having in that area.

We also have a third prop that shows the Pojoaque riverbed from their highway. Pojoaque is our neighbor and they are about three miles away from us downriver. So as you can see, their sand is a lot nicer than ours. It has more kind of a beach-look to it, but it would be great if they had water in there also.

So I do have, again, I don't want to read from my testimony. You already have that. But I do want to say that the city of Santa Fe, through Mayor Coss, has been very helpful. Again, I want to mention Commissioner Montoya for his efforts in trying to get us here today. Also, Governor Richardson has provided a letter to this Committee showing support for S. 3381. I just want to thank all of them for helping us out here today.

The settlement addresses a number of things for tribes in that area, namely economic uses, and of course ceremonial uses. We had a situation where when we have our ceremonies, we require that the river be flowing. During this particular time, the river was not flowing. We had to go to our upstream non-Pueblo users to ask them for permission to let the water flow through so that we had water during our ceremony. That took about a week, but because of their kindness toward us, they went ahead and allowed that water to flow through, which we really appreciate. These are the circumstances that we Pueblos have to deal with on a daily basis.

I don't really have anything else to say other than I want to thank Mr. Michael Bogert also for his hard work, and Senator Domenici and Senator Bingaman for their hard work in getting this bill done, along with all their staff. I do see some staff members behind you, Mr. Chairman, that I want to thank also, for showing their commitment to this effort also.

The concerns that Mr. Bogert had, you know, he has a hard job, I must admit. But we also have some engineering reports that were provided to him that we feel that their objective analysis of the costs of this project, so that we are justifying that effort. Also, the criteria and procedures that we had to deal with are really, it is the closest fit. I want to take some language out of my excerpt here. It says that the criteria and procedures of the Aamodt settlement agreement is as close to a neat fit as it likely to come before Congress. I just wanted to pull those excerpts out.

Mr. Chairman, thank you for giving me this opportunity today.

[The prepared statement of Mr. Dorame follows:]

PREPARED STATEMENT OF HON. CHARLES J. DORAME, CHAIRMAN, NORTHERN PUEBLOS TRIBUTARY WATER RIGHTS ASSOCIATION

Introduction

Good morning Chairman Dorgan, Vice Chairman Murkowski, and Members of the Committee. First, I want to thank you for convening this important hearing on S. 3381, legislation to ratify the settlement in *State of New Mexico v. Aamodt.*

I also want to thank Senators Domenici and Bingaman for the outstanding leadership they have shown in working with all the settlement parties and in introducing the legislation before the Committee today.

I would be remiss if I failed to thank the Committee staff and the staff of the New Mexico delegation for their work in getting the bill introduced and organizing this hearing.

Last, I would like to commend our settlement partners: the State of New Mexico, the City of Santa Fe, the County of Santa Fe, and others for the many years of hard work and good faith negotiation that ultimately lead to this settlement and the accompanying legislation.

My name is Charlie Dorame. I am the former Governor of the Pueblo of Tesuque and am now the Chairman of the Northern Pueblos Tributary Water Rights Association (NPTWRA). The NPTWRA is comprised of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque. At stake in this settlement are the water rights of these four distinct Pueblos, each with its own land base, economy, community, and vision of the future.

Filed in 1966, the Aamodt litigation is one of the longest-running Indian water rights case in the history of the United States. I was 17 years old when the case was filed and in the years since then I have watched as the case went on and on, seemingly without end.

Of course, water is essential to our People for basic needs and our survival, but also for its sacred role in Pueblo culture. For example, at Tesuque Pueblo, we require that water from the Rio Tesuque be used during traditional ceremonies. Our ability to maintain and practice our traditional ways is dependent on a quantity of water flowing through our lands. The sensitivity and nature of our traditions prevents me from openly discussing how we use these water resources in ceremonial settings.

About seven years ago, we were faced with a crisis when the creek went dry. We were forced to ask the upstream non-Indian users to refrain from using the water for at least a week so that we could have enough water flowing through our land during our ceremonies. Fortunately, they were kind enough to agree to our request. In some cases we do not have the luxury of giving advance notice because the need for water may happen in an instant.

I have lived on my reservation all my life and I have seen the Rio Tesuque go dry many times either before it reaches our village or immediately after it passed our village.

Water is also essential to our livelihood and our traditional methods of farming, which we have practiced for thousands of years. As we have done for generations, we have annual ditch cleanings performed by the men of our village so that water can be channeled from the creek to farm lands close to the village. This requires that enough water is flowing and gravity feed forces the water to these farm lands. We also have a few artesian wells that supplement water flow for traditional activities and farming. I have seen these wells go dry with obvious consequences for the farmers and their families.

As children growing up on our lands we knew where wells were located and in those days the wells had enough water to nourish us when we went exploring. Now we have to tell our children to carry water and not venture too far from home without an adequate supply to drink.

Background on the Settlement and Its Terms

In the Pojoaque River Basin (the Basin), a tributary of the Rio Grande in northern New Mexico, conflicts over scarce water resources have resulted in four decades of litigation. The Aamodt case was filed in 1966 by the State of New Mexico against all water right claimants in the Basin to determine the nature and extent of their water rights. Forty years later, in January 2006, a comprehensive Settlement Agreement was reached between the following parties:

- The Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque; and
- The State of New Mexico, Santa Fe County, and the City of Santa Fe.

Once approved by Congress, the Settlement Agreement will:

(1) Secure water to meet the current and future needs of the four Pueblos;

(2) Protect the long-standing water uses and resources that make the Basin unique;

(3) Preserve the centuries-old non-Pueblo irrigation in the Basin; and

(4) Provide water for current and future uses by all of the Basin's residents.

Regional Water System is Foundation of the Settlement

The foundation of the Settlement Agreement is a proposed Regional Water System (RWS) for the Basin. The RWS will have the capacity to deliver 2,500 acre feet per year of water from the Rio Grande to the four Pueblos.

The RWS will also have the capacity to deliver 1,500 acre feet per year to the Santa Fe County Water Utility to serve future water users in the Basin, as well as to present domestic well owners who connect to the system. The source of the

water has been identified with the assistance of the State of New Mexico, the County, the U.S. Department of the Interior, and the settling parties. The RWS's provision of water to non-Pueblo water users is important to the Pueblos because it will reduce stress on the groundwater resources of the Basin. Without the construction of the RWS and related systems, the litigation cannot be settled and scarce water resources will continue to dwindle for all of the Basin users.

Settlement Agreement Terms and Project Costs

The Settlement Agreement resolves all outstanding water rights claims and achieves finality with regard to the claims of the four Pueblos in the Basin.

The Settlement Agreement also establishes a process whereby Pueblo and non-Pueblo water rights will be administered post-settlement in a way that is conducive to long-term regional harmony and cooperation or what Department of Interior Counselor Michael Bogert has in the past referred to as "Peace in the Valley".

The RWS will allow for (1) An additional water supply for the Pueblos from outside the water-short basin; and (2) Non-Pueblo Water Users to be served by a renewable surface supply *in lieu* of use of individual wells whose proliferation has impaired, and would continue to impair, the exercise of Pueblo rights. The RWS will also promote cooperative conservation between all parties.

The total project cost of the settlement is $309 million, which would be used to construct the Pueblo and County combined water system and the county connections, to create the Pueblo Water Acquisition Fund and the Pueblo Conservation Fund, and to create the Pueblo O.M.&R. Fund.

The Federal investment in the Settlement Agreement is $170 million which will forestall continued Federal involvement in water rights litigation, ensure finality, provide certainty with regard to all claims, and promote tribal economic development and self-sufficiency.

The State of New Mexico, Santa Fe County and the City of Santa Fe are prepared to contribute in excess of $130 million to the proposed settlement.

As the Committee knows, the Administration evaluates this and all Indian land and water settlements based on the "Criteria and Procedures" that were first issued in 1990. While no proposed settlement is perfect in terms of meeting every aspect of the Criteria and Procedures, the Aamodt Settlement Agreement is as close to a neat fit as is likely to come before the Congress.

The settlement satisfies the material conditions of the Criteria and Procedures because:

1. It will resolve the Pueblo claims with finality after 42 years, and will prevent another 40 years of litigation;
2. It ensures efficient conservation of scarce water resources;
3. It promotes long-term cooperation between the Pueblo and non-Pueblo governments and communities;
4. The total cost of the settlement to all parties does not exceed the value of the existing claims;
5. The non-Federal cost share—at 38 percent—is significant; and
6. It promotes economic efficiency and tribal self-sufficiency.

The United States' historic failure to protect the Pueblos' lands and water rights adequately for more than 150 years lead directly to today's conflict over scarce water resources. Once enacted, this legislation will conserve the shared resource responsibly and bring the all-important "Peace in the Valley"—to all the parties.

Most important to the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque, this legislation will fulfill the United States trust responsibility and ensure that our children, and their children, can continue our traditions for generations to come.

Conclusion

Mr. Chairman and Madam Vice-Chairman, this concludes my statement and I would be happy to answer any questions you might have at this time.

The CHAIRMAN. Mr. Dorame, thank you very much. We appreciate your testimony.

Finally, we will hear from the Honorable Gilbert Suazo, Sr., a Councilman at the Taos Pueblo Tribe in Taos, New Mexico.

Mr. Suazo, thank you for being with us.

STATEMENT OF HON. GILBERT SUAZO, SR., COUNCILMAN, TAOS PUEBLO TRIBE

Mr. SUAZO. Thank you.

Good morning. My name is Gilbert Suazo, Sr. I am here on behalf of Taos Pueblo to testify on S. 3381, Title II. My Taos Pueblo Indian Name, Kalquina, translates to "Standing Wolf." I am a tribal Councilman and served as Governor for Taos Pueblo in 2007.

For the past 20 years, tribal Councilman and former Governor Nelson Cordova, who is here, and I have served as co-spokesmen for the Pueblo's water rights adjudication and settlement negotiation. I am here with my tribal leadership, 2008 Governor Paul Martinez, Council Secretary Frank Marcus, and Councilman Cordova. Also with me are water rights attorney Susan Jordan of the Nordhaus Law Firm, and Ron Billstein of DOWL–HKM Engineering, one of our technical consultants.

I would also like to recognize the other local parties to the Taos Pueblo water rights settlement. These are the Taos Valley Acequia Association, representing 55 community ditch associations; the Town of Taos; El Prado Water and Sanitation District; 12 Taos-area mutual domestic water consumers' associations; and the State of New Mexico.

Because of the short notice, some of the party representatives could not arrange to travel in time. We do have here two acequia commissioners: Arthur Coca and Gael Minton. They are seated back here, and are members of the TVAA Board of Directors.

We also have letters supporting this settlement from TVAA, El Prado Water and Sanitation District, and the Mutual Domestic Associations. We also have a letter from New Mexico Governor Bill Richardson provided today by Tony Martinez, Director of the New Mexico Washington, D.C. office. Let me also recognize Counselor Michael Bogert with whom we have forged good work relations, while confronting difficult policy issues over this settlement.

Thirty-eight years ago, I had the privilege to testify as a representative of the younger generation of Taos Pueblo in this same Committee for legislation to return Blue Lake to Taos Pueblo, a land of great cultural importance. Today, my testimony for Title II of S. 3381, the Taos Pueblo Indian Water Rights Settlement Act, is about water—the life-blood of the Pueblo is spiritual, physical, and cultural sustenance. I dedicate this testimony to the memory of our elders who have passed on without seeing completion of this settlement.

I also had the privilege as Governor in February of 2007 to testify before you, Chairman Dorgan, at this Committee's listening conference in Albuquerque, where I spoke about our water rights settlement.

Because of time limitations, I will summarize what is in our written testimony that we have submitted to the Committee.

This legislation will authorize settlement of an adjudication pending in U.S. District Court since 1969 that involves three tributaries of the Rio Grande: the Rio Pueblo, Rio Lucero, and Rio Hondo. In our Tiwa language, these are Tuatah Bah-ah-nah, Bah bah til Bah ah nah, and Too-hoo Bah ah Nah. We have used these waters from time immemorial.

Taos Pueblo, Tau-Tah, the place of the Red Willows, is located in northern New Mexico. It is a National Historic Landmark and a World Heritage Site. I call your attention to a photograph of Taos Pueblo on page two of our submitted testimony. Our people, Tauh tah Dainah, have occupied the Taos Valley since time immemorial. Our farmlands have been irrigated in prehistoric and historic times through a complex ditch irrigation system. I call your attention to a current-day photograph of our enduring agricultural heritage on page three.

When the first Spanish explorers arrived in the valley in the 1500s, they called it the breadbasket of the region. As the non-Indian population grew, the demand for water increased, resulting in hundreds of years of conflict between Taos Pueblo and its non-Indian neighbors. After 18 years of negotiations that were very difficult over the Abeyta adjudication, we were able to reach agreement in 2006 that provides the basis for management of the Pueblo's water resources into the future.

This settlement will secure to the Pueblo specific quantities of water for irrigation, stock ponds, and for municipal, industrial and domestic uses, including San Juan-Chama Project water under a contract. The town of Taos and El Prado will also receive contracts for San Juan-Chama water. These contracts will ensure that the Pueblo will have water to serve its present and future needs, and allow for sustainable and less-disrupted growth in the Taos Valley.

By comparison with other Indian water settlements, the total Federal funding of $113 million for this settlement is modest. There are no huge expensive projects, but removing any single component in this settlement could unravel the settlement. Our $80 million figure is a compromise from the $100 million Pueblo fund in the draft settlement agreement that we signed in 2006. In exchange for this funding, we will waive our right to bring certain enormous damage claims against the U.S. on vast portions of our water rights claims. We will forbear on the exercise of about half of our senior water rights for historically irrigated acreage.

In the interest of time, let me jump ahead and explain how this settlement meets the United States' policy goals for settlement of Indian water rights cases as embodied in the criteria and procedures.

First, this settlement avoids the direct and indirect costs of continued litigation because it resolves the claims of Taos Pueblo and the United States in its trustee capacity as set forth more specifically in the waivers and releases of claims. The direct cost of continued litigation of this nearly 40-year-old adjudication will be avoided, and precious resources such as the Pueblo's Buffalo Pasture will be protected. There is a photo of the Buffalo Pasture on page nine.

Second, this settlement meets the goal of resolving potential damage claims the tribe may bring against the U.S. for failure to protect trust resources and against private parties for interference with the use of these resources. It resolves our claims against the U.S. as set forth in these waivers and releases of claims, and minimizes the potential for future conflict between the Pueblo and our neighbors.

Third, this settlement is consistent with the Federal trust responsibility because it addresses the trust responsibility not only by protecting our exercise of our rights, but by providing funding for the Pueblo to accomplish water-related infrastructure improvements and enable the Pueblo to implement its settlement responsibilities, including the management and administration of its water resources.

And then finally, this settlement avoids the costs associated with senior Indian water rights displacing non-Indian water users. At the core of the settlement is our forbearance in the exercise of approximately half of our senior water rights for historically irrigated acreage and the mechanism for us to increase our exercise of these rights over time.

This creative approach avoids displacing non-Indian irrigators and does so in a manner that respects local traditions. I call your attention to a photo on page 12. We took great care in crafting innovative solutions to bring peace in the valley with this settlement after long years of hard work. This settlement will benefit Taos Pueblo and the Taos Valley, and the State of New Mexico and the United States. I strongly urge this Committee to take favorable action on this settlement act. Its passage and appropriation of necessary funds will pay off many-fold in cooperative use of water resources in the Taos Valley, including for future generations to come.

I thank you, Chairman Dorgan, members of the Senate Indian Affairs Committee, and our New Mexico Senators Pete Domenici and Jeff Bingaman, for the honor and privilege to provide this testimony. I would also like to thank Counselor Michael Bogert for his personal support for this settlement, and for the work by his colleagues, particularly Pam Williams and John Peterson, and members of the Federal negotiation team.

I also give thanks for the spiritual guidance that I received in preparation for this testimony, and the support and advice of our tribal leadership present here today, and those that are at home waiting to hear about this Committee's action. We ask that you be spiritually guided to make the right decision on this bill and others that affect the lives and future of our people and our neighbors.

With that, I thank you very much, Mr. Chairman and members of the Committee.

[The prepared statement of Mr. Suazo follows:]

PREPARED STATEMENT OF HON. GILBERT SUAZO, SR., COUNCILMAN, TAOS PUEBLO TRIBE

Mr. Chairman and Honorable Members of the Committee:

Good morning. My name is Gilbert Suazo, Sr. My Taos Pueblo Indian name translates to "Standing Wolf." I am a Tribal Councilman and served as Governor for Taos Pueblo in 2007. For the past 20 years, Tribal Councilman and former Governor Nelson J. Cordova and I have served as co-spokesmen for the Pueblo's water rights adjudication and settlement negotiation, and we presently serve as Water Rights Coordinator and Water Resources Specialist, respectively.

I am here with my tribal leadership, Governor Paul Martinez, War Chief Luis Romero, Tribal Council Secretary Frank Marcus, and Councilman Cordova. Also with me are our water rights attorney Susan Jordan of the Nordhaus Law Firm and Ronald Billstein of DOWL–HKM Engineering, one of our technical consultants. I would also like to recognize the other local parties to the Taos Pueblo Water Rights Settlement: the Taos Valley Acequia Association representing 55 community ditch associations ("TVAA"), the Town of Taos, El Prado Water and Sanitation District

("EPWSD"), 12 Taos-area Mutual Domestic Water Consumers' Associations, and the State of New Mexico.

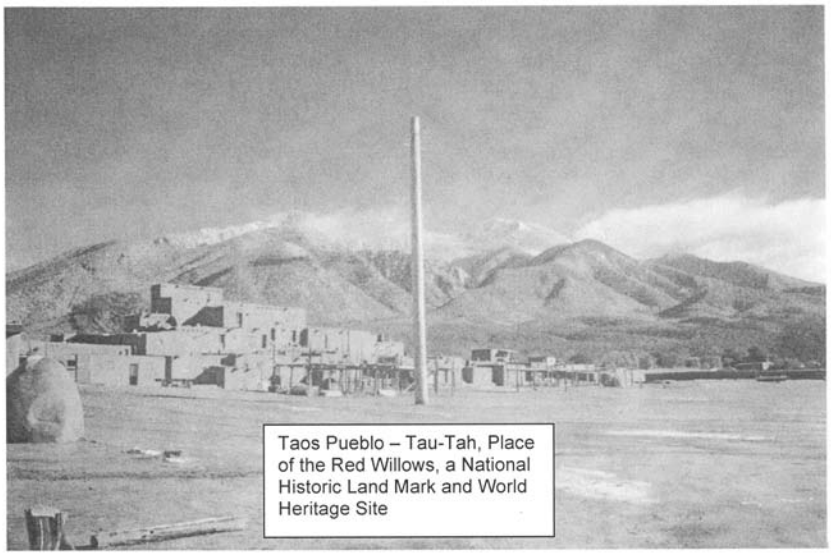
Thirty-eight years ago, I had the privilege to testify as a representative of the younger generation of Taos Pueblo in this same committee for legislation to return to Taos Pueblo what is now known as the Blue Lake Wilderness Area (Public Law 91–550). The Blue Lake settlement in 1970 was about land of cultural and traditional importance to Taos Pueblo. Today my testimony as a tribal leader and elder for Title II of S. 3381, the Taos Pueblo Indian Water Rights Settlement Act, is about water, the lifeblood for the Pueblo's spiritual, physical and cultural sustenance. Many of our elders have passed on without seeing completion of this settlement. I dedicate this testimony to their memory.

The Waters Involved in this Adjudication

The passage of this legislation will authorize a settlement of the general adjudication of the waters of the Taos Valley, entitled *State of New Mexico ex rel. State Engineer v. Abeyta and State of New Mexico ex rel State Engineer v. Arrellano,* which was consolidated with *Abeyta.* This adjudication has been pending in the United States District Court for the District of New Mexico since 1969. The adjudication includes three tributaries of the Rio Grande in northern New Mexico, namely the Rio Pueblo, Rio Lucero and Rio Hondo, or in our Tiwa language, the *Tuatah Bah-ah-nah, Bah bah til Bah ah nah, and Too-hoo Bah ah nah.* These stream systems together produce average annual flows before diversions in excess of 90,000 acre-feet per year ("afy"). This is not much water when compared with streams elsewhere in the United States, so you can appreciate the stress on this resource and the conflicts that arise in the face of its limitations.

Taos Pueblo's Use of These Waters from Time Immemorial

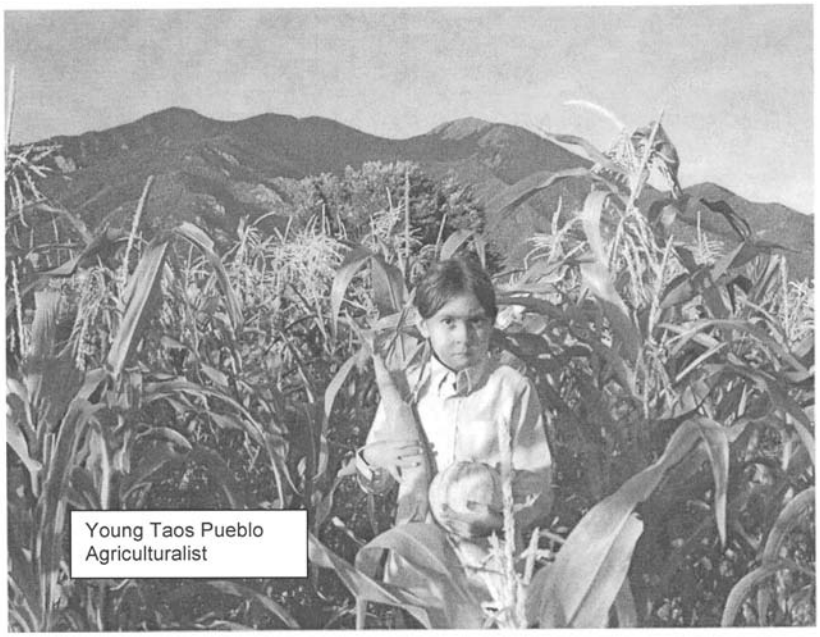
Taos Pueblo, *Tau-Tah,* the place of the Red Willows, is located in North-Central New Mexico. The total enrollment for Taos Pueblo is 2,458 members. Taos Pueblo's land base is roughly 100,000 acres, including semi-arid lands bordering the Rio Grande, irrigated farmlands, and mountain lands with peaks reaching up to nearly 13,000 feet. The Blue Lake Wilderness Area is a major part of the watershed for the streams under adjudication that feed the Taos Valley. At the foot of the mountains are thousands of acres of Taos Pueblo farmlands that have been irrigated in pre-historic and historic times through a complex ditch irrigation system. Taos Pueblo itself is a National Historic Landmark and a World Heritage Site in recognition of its enduring living culture.



Taos Pueblo – Tau-Tah, Place of the Red Willows, a National Historic Land Mark and World Heritage Site

Prehistorically, the culture for Taos Pueblo has been, and is still, based on agriculture with the raising of corn, squash and beans, supplemented by abundant wild food crops and meat from deer, elk, buffalo and other game hunted in the mountains and Great Plains. In historic times, Taos Pueblo adapted well to growing introduced

crops such as wheat, oats, barley and alfalfa for its own use and as barter for other needed items and implements. Our people, Tauh tah Dainah, have occupied the Taos Valley since time immemorial and as the first user of the Valley's water resources, constructed irrigation systems that are still in use today.



Centuries of Conflict

When the first Spanish explorers arrived in the valley in the 1500s, they found a thriving agricultural community with an abundance of food crops. They called it the bread basket of the region. The Spanish people colonized the region and began their own agricultural tradition in the Valley. As the non-Indian population grew, the demand for water increased, resulting in hundreds of years of conflict between Taos Pueblo and its non-Indian neighbors.

One of the oldest disputes over water in the Valley heard in a formal legal proceeding resulted in the Mexican-era *ayuntamiento* of 1823 recognizing Taos Pueblo's time immemorial rights to waters of the Rio de Lucero. However, the ruling did not end conflicts over the right to use the Rio Lucero, and non-Pueblo settlers obtained a decree in 1893 that ordered a new division of the stream flow. In the *Abeyta* adjudication, the Pueblo and the United States have disputed this territorial era decision. Thus, the *Abeyta* settlement will resolve a dispute under litigation in three centuries.

Nearly Two Decades of Negotiations

You can imagine how these longstanding, bitter water conflicts have bred generations of distrust and hindered the ability of the Pueblo and its neighbors to live together and prosper. Against this background of conflicts going back several hundred years, a groundbreaking moment came in 1989 when the Pueblo and the Taos Valley Acequia Association decided to try negotiation. The negotiations grew to include each of the major water rights owning parties in the Taos Valley, the State of New Mexico, and the United States. Over time, each of the local parties came to recognize and respect our mutual need for water resources for the survival of our agricultural traditions and for the future growth of our communities.

Through 18 years of difficult negotiations, the parties were able to reach an agreement in 2006 that we could all live with. The settlement agreement allocates water resources amongst the parties, protects existing supplies, protects the Pueblo's cultural resources and provides the basis for management of the Valley's water resources in the future.

After we reached local agreement, the parties came to Washington seeking legislation in unity, to the amazement of our congressional delegation and administration officials who usually do not see this kind of cooperation between Indian tribes and non-Indians. The Taos News in an editorial on April 6, 2006, heralded the settlement as a "gift of understanding" by all involved in its negotiation.

Water Rights Secured by This Settlement

The settlement authorized by this legislation will secure to the Pueblo the right to deplete 11,927.51 afy of water. This quantity includes 7,883,44 afy for Historically Irrigated Acreage ("HIA"), 114.35 afy for stock ponds, 14.72 afy for stock wells, 300 afy for municipal, industrial and domestic use (representing current diversions), 1,300 afy of additional groundwater, 100 afy in Rio Grande depletion credit, and 2,215 afy of San Juan-Chama Project ("SJCP") water under a contract.

A total of 2,621 afy of SJCP water will be contracted under this settlement. In addition to the contract to the Pueblo, the Town of Taos and EPWSD will receive contracts for 366 afy and 40 afy, respectively. These contracts are essential to the settlement to ensure that the Pueblo will have water to serve its present and future needs and to allow for more sustainable and less disruptive growth in the Taos Valley.

Funding Necessary for This Settlement

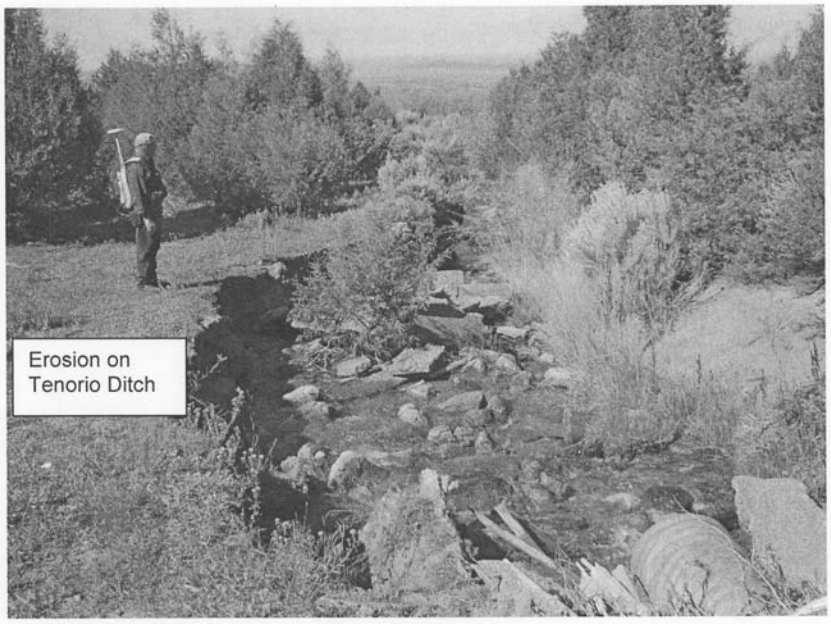
The bill includes authorization of $50 million in appropriations to the Taos Pueblo Water Development Fund, $30 million in appropriations to the Taos Pueblo Infrastructure and Watershed Fund through the Secretary of Interior, and $33 million in appropriations for projects that will mutually benefit the Pueblo and non-Indian parties, for a total of $113 million in federal funding. The State of New Mexico will contribute additional settlement funding toward the mutual benefit projects and for certain water rights acquisitions by non-Indian parties under the settlement agreement.

By comparison with other Indian water settlements, this total funding is modest. There are no huge expensive projects in this settlement. Rather, there are small projects designed to mitigate the impacts of competing water uses; funding for Pueblo infrastructure improvements; funding for a mechanism to accommodate junior irrigation uses and decrease the Pueblo's forbearance of its senior irrigation rights over time; and funding for the Pueblo's settlement administration responsibilities. All of these elements are necessary to make this unique, cooperation-based settlement work and are tied together as a result of compromise. Removing any single component would unravel the settlement.

Modest Funding for Vast Claims Compromised and Further Conflict Avoided

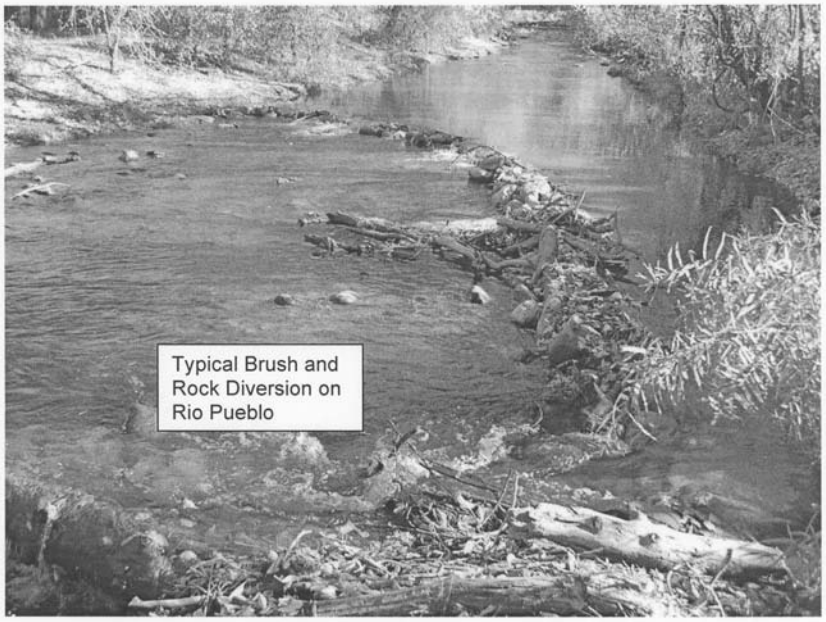
Why is there $80 million in funding for Taos Pueblo, and $33 million for mutual benefit projects? What are we going to do with that funding? Before I describe the purposes for this funding, let me say right off that the Pueblo's $80 million figure is a compromise from the $100 million Pueblo fund in the Draft Settlement Agreement that we signed in 2006. Importantly, the Pueblo is accepting this funding amount in exchange for waiving its right to bring certain enormous damage claims against the United States, waiving vast portions of senior water rights claims, and forbearing on the exercise of about half of its senior water rights for historically irrigated acreage.

Our potential damages claim against the United States for breach of its trust duty relating to the Pueblo's senior water rights involved in this adjudication greatly exceeds the funding amount called for in the settlement. From the beginning of the American period, the United States failed to pursue legal action to protect the Pueblo's enjoyment of its rights in the Rio Pueblo de Taos, the Rio Lucero and the Rio Hondo. This approach by the Federal Government has injured the Pueblo and prolonged conflict in the Taos Valley.



Likewise, the Federal Government has failed to take the necessary steps to manage the Pueblo's water rights and facilitate water use. The Federal Government did, finally, expend some funds to construct new head gates and to rehabilitate certain ditch works at the Pueblo. However, that limited assistance came late in the period of American sovereignty and guardianship, in the midst of the pre-World War II economic depression, and the funding remained insufficient. Worse yet, the non-traditional construction materials and practices introduced by the Federal Government made it difficult for the Pueblo to maintain and repair the infrastructure with traditional techniques. In 2000, a joint investigation report by the Bureau of Indian Affairs and the Bureau of Reclamation identified a serious need for the rehabilitation and repair of Pueblo irrigation infrastructure, based heavily on investigation of infrastructure on Taos Pueblo.

Although the problems have long been known and documented, repairs and rehabilitation under the Bureau of Indian Affairs Northern Pueblos Agency responsibility were not being done due to funding cutbacks. Funding in small amounts has been secured from the Bureau of Reclamation in recent years for drought relief projects, such as a well for stock water, and head gate fabrication. However, these funds have been grossly insufficient.



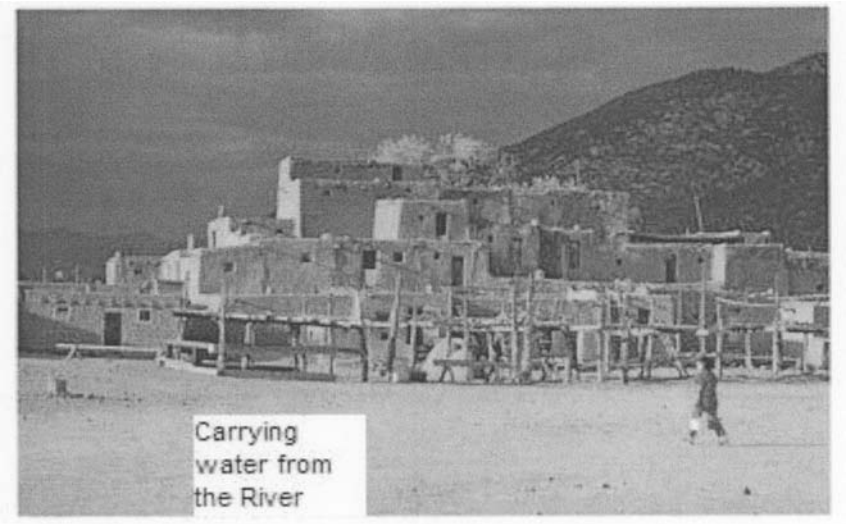
The foregoing is a small slice of the history of federal neglect and mismanagement, but illustrates how our relevant damage claims against the Federal Government greatly exceed the settlement funding. Likewise, Taos Pueblo's claims for aboriginal irrigation water rights in the litigation are substantially greater than the water quantities we will receive in settlement. We also agree to forbear exercising substantial amounts of our senior historically irrigated acreage rights, and I will discuss that more in a moment.

It was extremely difficult for Taos Pueblo to put a monetary value on the claims we are conceding. So instead of evaluating the funding purely in terms of compensation that would never be enough, we focused on the amount of funding that will enable us, with careful management, to correct years of neglect of our water-related infrastructure by the United States and to implement each of the other settlement mechanisms designed to protect our water rights while enabling our neighbors to enjoy theirs.

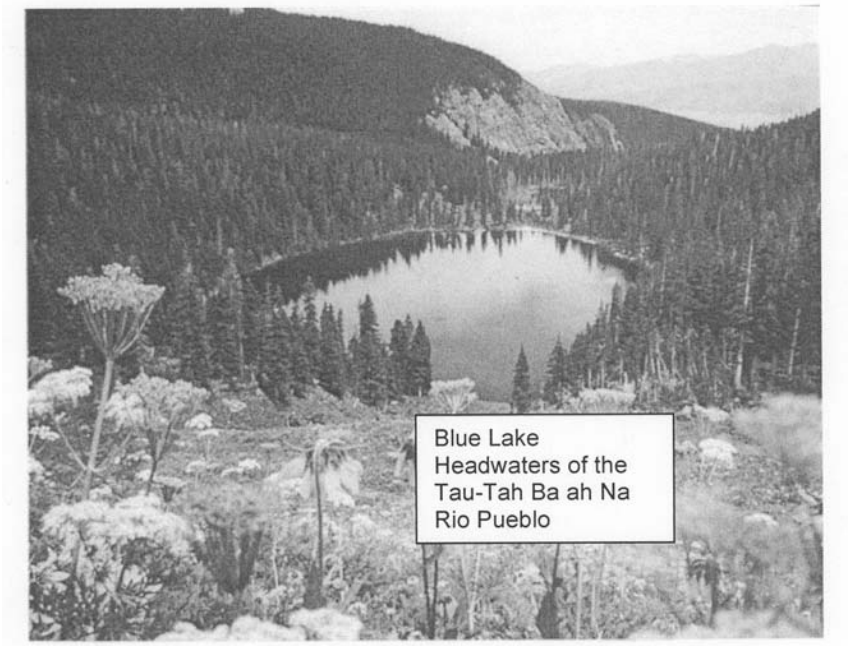
Water Rights Forbearance Requires Funding to Acquire and Retire Junior Rights: Under the settlement, the non-Indian parties agreed to recognize the Pueblo's right to deplete 7,883.44 afy for its Historically Irrigated Acreage or HIA totaling 5,712.78 acres. In turn, the Pueblo agreed to initially forbear exercising its right to irrigate 3,390.33 acres of this total HIA. This forbearance will decrease over time as junior irrigation rights are acquired on a willing seller basis and retired by the Pueblo, or are abandoned or forfeited under state law, or (with certain exceptions) are transferred to a non-irrigation use or out of the Taos Valley and curtailed through the exercise and enforcement of the Pueblo's aboriginal priority date. This mechanism is necessary because the Pueblo's full exercise of its HIA would otherwise disrupt non-Indian irrigation. The initial forbearance is a major concession made by Taos Pueblo to make the settlement work. Funding sufficient to acquire and retire junior rights in a quantity over time that will allow full exercise of the Pueblo's senior HIA rights is a linchpin of the settlement.

Address Federal Neglect of Pueblo Irrigation Infrastructure: As I have explained, our centuries-old irrigation infrastructure and the Twentieth Century federal improvements are in grave disrepair. As a result, only 2,322.45 acres are currently irrigated, and much more farm lands are laying idle because there is no way to get water to them without extensive repair and rehabilitation to our infrastructure. BIA has not done any repairs of significance in decades. Settlement funding will allow the Pueblo to rehabilitate and replace the dilapidated system and construct improvements. This will enable the Pueblo to recover from the long history of federal neglect of Pueblo irrigation systems and to revitalize its agricultural heritage.

Address Lack of Running Water and Wastewater System Access: Many of our people do not have the convenience of running water in their homes and connection to a wastewater system because the existing system does not extend to their homes. Some of our people still get their water for domestic use directly from the streams and irrigation ditches and from springs. This may sound quaint and appealing, but in freezing winter weather it creates a hardship that should not be acceptable in this day and age. A recent fire in the watershed contaminated the surface water supply and our people who rely on that water supply had to haul water from an alternative source. Settlement funding will help us to improve and expand our community water and wastewater system to better serve our people.



Watershed Protection, Support of Agriculture and Water-Related Pueblo Community Welfare and Economic Development. While our need for irrigation infrastructure repair is critical, support of agriculture requires more than ditch rehabilitation. The Pueblo needs to enhance its ability to support the efforts of farmers and engage in tribal agriculture efforts to maintain our traditional way of life. At the same time, water infrastructure to support economic development will enable the Pueblo to become more self-sufficient. As I have noted, a large portion of water involved in the settlement originates within the watersheds on Taos Pueblo land, and establishing a Pueblo watershed protection program will protect this resource.



Protection of the Pueblo's Sacred Buffalo Pasture from Groundwater Pumping: The Buffalo Pasture is a culturally important wetland for the Pueblo that supports herbs, plants, clays, wildlife and waterfowl that are of essential ceremonial use to the Pueblo. This wetland is also a reliable source of irrigation water for both the Pueblo and non-Indians, and it is the start of a unique greenbelt that extends through the Valley. In the past 50 to 60 years, significant deterioration of the wetland has occurred. The Pueblo and neighboring municipal and sanitation district water providers whose wells are close to the Buffalo Pasture fought to the point of gridlock over the impacts of the groundwater pumping on the Buffalo Pasture. All of the settlement parties agreed early in the negotiations that the protection and preservation of this unique resource was crucial. The Buffalo Pasture Recharge Project to be constructed under the settlement will be designed to restore water levels to this sacred wetland.

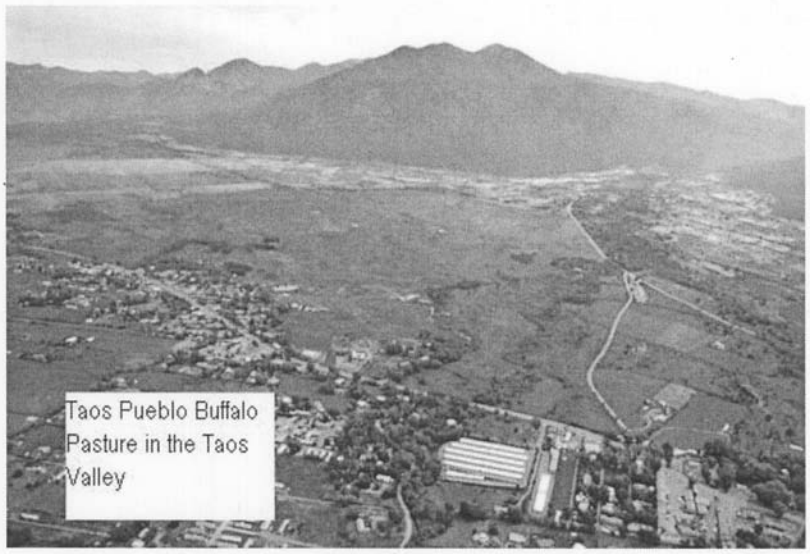


Photo Courtesy of Rick Romancito, Taos News

Water Management, Administration and Costs related to the Negotiation, Authorization and Implementation of the Settlement: This settlement is necessarily complex and places substantial policy and administrative responsibilities on Taos Pueblo. The Pueblo will be required to manage and administer its water rights to carry out the provisions of the settlement. An important task will be to upgrade and expand the Pueblo's Water Code to ensure consistent implementation and monitoring of the settlement provisions as required. Professional management of water resources, in a manner that incorporates traditional and contemporary water management practices, will be necessary. The settlement authorizes the Pueblo to lease its water, and we will need to establish a system to administer water leases. Financial assistance from the Federal Government for the Pueblo's participation in the negotiation process has never been sufficient, and the Pueblo has therefore incurred expenses far beyond its financial resources. The settlement will provide funding for these purposes.

Funding Available on Appropriation: The bill provides for the Pueblo to receive $15 million of the Taos Pueblo Water Development Fund upon appropriation for the acquisition and retirement of junior water rights in an amount sufficient to enable the Pueblo to irrigate an additional 700 acres of our historically-irrigated acreage as of the settlement enforcement date, to begin the Buffalo Pasture Recharge Project, to begin design work on other eligible infrastructure projects, to put in place our water management and administration system for implementation of the settlement, or to pay costs related to the negotiation, authorization and implementation of the settlement. In addition, $10 million of the Pueblo Water Infrastructure and Watershed Enhancement Fund will be made available early through the Secretary for specific eligible settlement projects. This early funding will allow the Pueblo to begin important watershed protection work and to commence the most urgently needed water infrastructure projects.

Mutual Benefit Projects: The settlement parties devised a series of small mutual benefits projects that are tailored to resolve complicated disputes over specific water use issues. A Mitigation Well System will pump groundwater from deep aquifers to offset surface water depletion effects resulting from the parties' future groundwater development, thereby alleviating competition among the parties for the acquisition of acequia water rights. The Arroyo Seco Arriba storage project will enable an acequia community to store non-irrigation season flows for retrieval when needed as part of the resolution of the centuries-old Pueblo-Acequia dispute over allocation of the Rio Lucero, and funding of the Acequia Madre del Prado stream gage will facilitate implementation and enforcement of surface water sharing provisions. The Town of Taos' present water supply wellfield is largely located in the immediate vi-

cinity of the Pueblo's sacred Buffalo Pasture. As part of the settlement, the Town will discontinue use of those wells in closest proximity to the Buffalo Pasture, limit use from the wellfield overall, and develop water for its growing needs from a new well field located farther away from the Pueblo and its resources. EPWSD has also agreed to limit or cease production from its wells located in closest proximity to the Pueblo's sacred Buffalo Pasture and to locate its new production wells farther away from the Pueblo and its resources. These wells funded under the settlement are designed to replace production capacity lost or restricted by the limits that the settlement imposes on existing wells.

Criteria and Procedures for Indian Water Rights Settlements

It should be abundantly clear from my testimony so far that the Taos Pueblo Water Rights Settlement meets the United States policy for settlement of Indian water rights cases as embodied in the Criteria and Procedures for Indian Water Rights Settlements published by the Department of the Interior on March 12, 1990 (55 Fed. Reg. 9223). These criteria often stated in terms of the four policy goals set out below. Under each, I briefly recap how this settlement meets the goal.

(1) Avoid the direct and indirect costs of continued litigation: This settlement resolves the claims of Taos Pueblo, and the United States in its trustee capacity, as set forth more specifically in the waivers and releases of claims. As a result, the direct costs of continued litigation of this nearly forty-year old adjudication will be avoided. Importantly, indirect costs to the United States, the Pueblo, and other parties associated with conflicts over surface water use and groundwater withdrawals will also be avoided through the settlement's interconnected mechanisms for enabling the major water owning parties in the Taos Valley to move forward with water diversions in a manner that respects one another's water uses and other precious resources, such as the Pueblo's sacred Buffalo Pasture.

(2) Resolve potential damage claims the tribes may bring against the United States for failure to protect trust resources, or against private parties for interference with the use of those resources: This settlement resolves the claims of Taos Pueblo against the United States as set forth more specifically in the waivers and releases of claims. The settlement also minimizes the potential for future conflicts between the Pueblo and our neighbors over their groundwater withdrawals and surface water diversions. The parties carefully tailored the set of modest mutual benefit projects and other necessary settlement components, such as the Pueblo's forbearance combined with acquisition of junior rights, to accomplish this purpose cost effectively. The State's contributions to these mutual benefit projects are proportionate to the benefits received by the local parties.

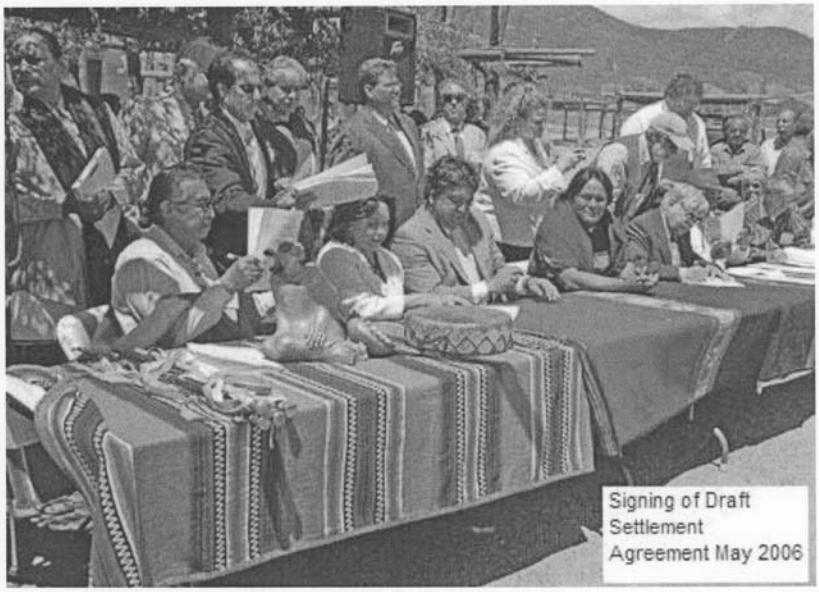
(3) Act consistently with the federal trust responsibility to tribes: The settlement addresses the trust responsibility not only by protecting the Pueblo's exercise of its rights, but also by providing funding for the Pueblo to accomplish water-related infrastructure improvements necessitated by years of federal neglect and by providing funding to enable the Pueblo to implement its responsibilities under the settlement, including the management and administration of its water resources program. These items are not being funded through the normal federal budget process. The settlement structure, by providing the mechanisms for the tribe to develop and manage its water itself and in harmony with its neighbors, ensures that the federal funding will meet the federal criteria to promote economic efficiency on reservations and tribal self-sufficiency.

(4) Avoid the costs associated with senior Indian water rights displacing non-Indian water users: At the core of the settlement is Taos Pueblo's forbearance on the exercise of approximately half of its senior water rights for historically irrigated acreage and the mechanism for the Pueblo to increase its exercise of these rights over time. This creative approach avoids displacing non-Indian irrigators, and does so in a manner that respects local traditions. Thus, the settlement meets the federal criteria to be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the states and tribes in their respective jurisdictions.

Peace in the Valley

As you can see, the parties took great care in crafting innovative solutions to bring "peace in the Valley" with this settlement. In view of the long years of hard work and expense by Taos Pueblo and its neighbors to negotiate this settlement, and in recognition of its benefits to the residents of Taos Pueblo, the Taos Valley, the State of New Mexico and the United States Government, I strongly urge the Committee to take favorable action on the Taos Pueblo Indian Water Rights Settlement Act. Passage of this legislation and appropriation of the necessary funds will

pay off manyfold in cooperative use of water resources in the Taos Valley by the parties and future generations to come.



I thank Chairman Dorgan, members of the Senate Indian Affairs Committee, and our New Mexico Senators Pete Domenici and Jeff Bingaman, for the honor and privilege to provide this testimony. I also give thanks for the spiritual guidance I have received, and the support and advice of our tribal leadership present here today and those at home who await this Committee's action. We ask that you be spiritually guided to make the right decisions on this bill and others that affect the lives and future of our people and our neighbors.

A8
April 6-12, 2006 THE TAOS NEWS

EDITORIAL

Negotiations result in gift of understanding

■ Therein lies the beauty of their gift: Representatives of the many groups that comprise Taos Valley realized during the process that none is an island in the stream, to borrow a phrase from Hemingway.

The possibility of permanent adjudication of Taos Pueblo Tribe's claims to Taos Valley water comes with a hefty measure of irony. All waters of Taos Valley were once theirs, after all.

That point aside, we applaud the tenacity of those negotiators who have worked for 17 years to reach the point they have. In the process of writing a draft settlement, they have given all of us a gift we hope to acknowledge here.

Sadly, not everyone who began the negotiating process lived to see the draft settlement agreement announced Friday. Negotiators who shared thoughts with reporters and answered questions remembered those who have "passed on" — Bill Schabb, who helped the tribe in its Blue Lake negotiations, Paul Bernal, Alejandro Lujan, Ralph Reyna, Delfino Reyna, Johnny Sandoval, Teresino Giron, Patricio Romero, Eduardo Lavadie and Geoff Bryce.

Negotiators compared themselves to a stream, and the obstacles they encountered along the way to rocks, explaining that they figured out how to flow around the rocks during their 17 years of work.

They called their relationship symbiotic. Never was a four-letter word uttered in the negotiations, but they didn't rule out that some might have been said privately.

They couldn't give a dollar amount on their work to write a draft agreement — but they talked a lot about cost in human terms.

To negotiators, money paled in comparison to the social consequences, the toll of legal wrangling on those involved, their personal growth during the process and its resulting benefit to local interpersonal relationships.

Therein lies the beauty of their gift: Representatives of the many groups that comprise Taos Valley realized during the process that none is an island in the stream, to borrow a phrase from Hemingway.

Instead, all combined to become the water that flowed around the rocks, learning individually and as a group that past grudges and arguments cannot dictate future growth and change.

Hurt, grudges, loss and resentment — all are part of Taos Valley's history. It's no different here than in other places where people were colonized or conquered. They were forced by history to change.

To survive, you must change and adapt - after all, isn't that how we've all arrived at the present.

The realization that no one in Taos Valley can go forward alone is the hallmark of this negotiating group, and we hope that's how it's remembered. The details of the agreement almost pale in comparison to such an accomplishment.

Treasure it. In it lies hope for the future.

Although U.S. Sen. Jeff Bingaman expressed doubt to the Associated Press that federal approval would come this year, negotiators felt otherwise. The cost to the federal government, they said, is "not huge, and this is a tenacious bunch."

We hope that a final local settlement is signed May 15 and that the federal government doesn't balk at releasing the funds necessary to enact it. Allowing our investment in Iraq to derail this agreement would be a tragedy. We are convinced this tenacious group will prevail in its efforts.

Never forget the gift they've given Taos Valley.

The CHAIRMAN. Chairman Suazo, thank you very much.

We don't often have colored photographs embedded in the testimony, and we appreciate that. I think the photograph on page 72 is probably reflective of a lot of work. I was thinking as you described that photograph of the success of the negotiations. I think at least two of the witnesses have described circumstances where their grandfather began this process and the grandson is providing testimony. That in itself, while interesting, I think describes failure of our government to come to grips with and address these issues.

Water rights issues are very important. Water is the life-blood of the economy and opportunities for many of the tribes that are here today and across the Country.

You have noticed that some of my colleagues have left. We have an Energy Committee markup that started at 12 o'clock and they are members of the Energy Committee, as am I. We will be voting in the Energy Committee downstairs on the third floor, I am sure about now. I am going to have to go to that markup in a few moments.

We have a good number of questions that we wish to submit to the witnesses. Senators Tester, Barrasso and Domenici have indicated they have questions they would like to submit to the witnesses. I would like to ask if we could get a reasonably quick turnaround. The question is, what will we now do? We have had this hearing. We will have a discussion with our staffs and with members of the Committee to decide how to proceed.

I know many of you have expressed impatience that this has gone on for a long, long period in many cases, and most anxious to get some resolution of these issues. We appreciate the fact that you traveled to Washington, D.C. to present testimony today in support and in furtherance of trying to get these issues finally resolved.

With that, I am going to adjourn the Committee. We will, again as I indicated, submit the questions, and I ask you to respond to them. I do also want to say that we will keep the hearing record open for two weeks and ask others who wish to submit supplemental or additional testimony on these issues to do so within that two-week period.

Thank you for being here.

This hearing is adjourned.

[Whereupon, at 12:20 p.m., the Committee was adjourned, to reconvene at the call of the Chair.]

A P P E N D I X

RESERVED WATER RIGHTS COMPACT COMMISSION

MARC RACICOT, GOVERNOR

CHRIS D. TWESTEN, CHAIRMAN

STATE OF MONTANA

Tim DePuy
Rep. Antoinette R. Hagener
Rep. John "Sam" Kean
Sen. Chuck Swysgood

Bob Theft, Vice-Chairman
Gene Birkett
Sen. Ben McCarthy
Jack Salmond

May 12, 1999

Gordon W. Fassett
Wyoming State Engineer
Herschler Building, 4-E
Cheyenne, Wyoming 82002

Dear Mr. Fassett:

Thank you for taking the time and effort to attend all of the negotiating sessions the State of Montana has had with the Crow Tribe, meet with the Tribe and the State, work with the Compact Commission staff throughout the process, and to submit written comments to the draft Compact. This letter is in response to the written comments from Wyoming dated March 31, 1999. Your staff and staff from the Wyoming Attorney General's office also submitted a revised version of a previous draft of the Compact, and some of those comments will be included in this response.

The following paragraphs are in response to your comments of March 31, 1999 (the comment is repeated, followed by a response):

1. *Article II definitions (p.3): 4. Bighorn River Basin definition should be changed to include only the portion of the basin in Montana, deleting the reference to the Greybull River and add beginning at the Wyoming-Montana stateline.*

Each basin involved was defined using the Montana Water Court's definitions for that basin. The Compact Commission contacted the Montana Water Court to discuss this comment and potential confusion with the definition of the Bighorn River Basin. Chief Judge Loble agreed that the definition should be changed. The definition of the Bighorn River Basin in the Compact has been revised to read: "4. "Bighorn River Basin" means Water Court Basin 43P, the mainstem of the Bighorn River and its tributaries (exclusive of the Little Bighorn River and its tributaries) within Montana to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2."

Susan Cottingham, Program Manager, 1625 Eleventh Avenue, PO Box 201601, Helena, Montana 59620-1601, (406) 444-6841, Telfax (406) 444-6721

The definitions for the Bighorn River Basin and the other basins under the Compact conforms with the Water Court's definitions for ease of incorporation of the Compact into Water Court decrees in our adjudication process. Of course, this Compact definition does not alter or amend use and definition of the Bighorn River Basin or other basins under the terms of the Yellowstone Compact.

2. *Article III A.1.b.(1)(b) Storage in Bighorn Lake (p.7): The language in this sub-paragraph is not clear. It is our understanding that this 150,000 acre feet of storage is not in addition to the natural flow right, but the storage space is to be utilized during time of ample water supply to then make releases in lieu of natural flow during drought years. The language as it currently stands does not say this. The language in previous draft of:*

(a) to supplement the natural flow in times of shortages,

(b) to use in lieu of the natural flow

seems to better describe the intended use for this storage space.

You are correct that this second 150,000 acre-feet per year (AFY) is not in addition to the natural flow right. The total for Tribal use and development as part of the Tribal Water Right is 650,000 AFY: 500,000 from Natural Flow, and not more than 150,000 from storage in Bighorn Lake.

Allocation of the second 150,000 AFY of storage from Bighorn Lake is intended to serve two distinct functions. In times of low flow, this allocation will be managed as a release from storage to maintain instream flows, meet water demands of state-based water uses protected under the Compact, provide security for use and development of the Tribal Water Right from storage and to augment Natural Flows in the Bighorn River. This storage allocation will provide management flexibility. Conversely, in times of high flows, where excess Natural Flows and excess storage exists above all demands on the Bighorn River the Tribe may use its storage allocation for development such as groundwater recharge or additional off-stream storage. This high flow water use would be allowed only if excess water was available and would not be an enforceable right against other water users.

The wording for several provisions of the Bighorn quantification changed from the draft you referred to as the parties worked through to final agreement. Basin closure for new state-based appropriations in the Bighorn River Basin within Montana both on and off the Reservation was also added.

Article III A.6.b.(p. 8): The last sentence states that release may be made from Bighorn Lake to prevent Adverse Affect. It should be defined from which account (i.e. which 150,000 AF of space) these releases would be made.

The answer to this question would be fact dependent. Depending on the use and location, the release could come from either account.

Article III A.7. Stream Flow and Lake Management Plan (p.9): Wyoming has an interest in maintaining the levels of Bighorn Lake during the recreation season such that the marina and other facilities at Horseshoe Bend are functional, and Wyoming is interest in playing a role in the development of the management plan and its impacts on Bighorn Lake storage amounts and timing. Wyoming requests the ability to participate in the development of this management plan, perhaps through the Wyoming Game and Fish Department.

The Montana Department of Fish, Wildlife and Parks along with the Crow Tribe and the United States will be setting out a process for involvement of all interested persons and entities in developing and approving the Streamflow and Lake Level Management Plan. We have forwarded a copy of your comments to the Department of Fish, Wildlife and Parks. They are in the process of organizing a negotiating team and technical staff. Should the Compact be passed, work on the Management Plan would start soon.

Article III E. Other Basins (p.16): There are a few existing Wyoming water rights on the drainages listed that flow into Wyoming. Language recognizing these existing Wyoming water rights should be added.

Montana's compacting process is part of the ongoing state-wide adjudication of water rights within Montana. Protections for Wyoming water users on small drainages is more appropriately handled through another method with the Crow Tribe. It is our understanding that the Tribe is open to these discussions with Wyoming and your office should contact the Tribe directly.

Other Comments.

Wyoming also sent comments in the form of a revised draft dated March 22, 1999. It is clear that much thought and effort went into this revised draft and some of the proposed changes were added to the Compact. Many of the proposed changes fall into the following categories:

Effect of Yellowstone River Compact. The Yellowstone River Compact is acknowledged in the Crow-Montana Compact. Wyoming's revised draft proposed adding language concerning the Yellowstone River Compact in several places. Based on your comments the parties revised and expanded the language in the Compact. The Crow-Montana Compact now specifically states that nothing in the

Compact will be construed or interpreted to "alter or amend any provision or to adopt or preclude any interpretation of the Yellowstone River Compact, Act of October 10, 1951, ch. 629, 65 State. 663 (1951)." Section B.13., of Article V.

Since the Yellowstone River Compact is recognized but no interpretation of how or when that Compact applies is set forth, comments contained in your revised draft that provide a specific interpretation of provisions and applicability of the Yellowstone River Compact were not incorporated.

Wyoming Water Rights. As pointed out previously, the Compact Commission was created as part of the state-wide adjudication process. Tribal Compacts are eventually incorporated in Water Court decrees along with the decreed state-based water rights. Of course, the Montana Water Court does not decree Wyoming water rights, and the Compact Commission feels that language you suggested concerning protection of Wyoming water rights from exercise of the Tribal Water Right should appropriately be addressed in a different agreement or forum.

Quantification of Existing Uses in the Bighorn Basin. Wyoming's revised draft accurately points out that the quantification for the Tribal Water Right for natural flows in the Bighorn River includes existing water uses regardless of land ownership or status that the parties have estimated to be 150,000 AFY. The specific number for the estimated volume of water for existing uses was not included in the Compact for two reasons. First, the number used was only an estimate. The Compact now provides that all current uses of the Tribal Water Right will be listed by the United States and Tribe and must be approved by the Montana Department of Natural Resources and Conservation within a year and a half after the Compact has been ratified by the Montana legislature. This should provide accurate and specific information on existing uses.

Second, many non-Indians filed water rights with the Water Court claiming state-based water rights even within the BIA projects. The Compact does not prejudge the issue of the validity of these claims which will ultimately be decided by the Water Court. Therefore, specifying an amount of water for existing uses would have required an assumption of how these claims would be resolved. However, if these claims are ruled valid, the Compact provides that these water rights will not be double counted as existing water uses. When land is reacquired by the Tribe the appurtenant water right becomes part of the Tribal Water Right but the water is not in addition to the quantification of the Tribal Water Right. Section G.1., of Article III.

We greatly appreciate the active involvement of Wyoming in the process of negotiations with the Crow Tribe and the United States. Public meetings before two legislative interim committees and the Compact Commission will be held in

Crow Agency and Billings on May 18,1999. A copy of the notice is enclosed. If a special session of the legislature is called for June 16, 1999, we anticipate that there will also be legislative committee hearings the day before.

If you have any further questions, please let me know.

Sincerely,

Chris Tweeten
Compact Commission Chair

Testimony provided to the
Montana Legislature's Senate and House
Natural Resources Committees
June 15 & 16, 1999
by
State of Wyoming
Wyoming State Engineer's Office
Gordon W. Fassett, State Engineer
Cheyenne, WY

The State of Wyoming appreciates this opportunity to provide comments to the Montana Legislature as you consider and act on the Crow Water Rights Settlement Compact. Wyoming, through the Wyoming State Engineer's Office, also appreciated the invitation to many of the public negotiating sessions and for the opportunity to provide input and participate to some degree with the State of Montana, the Federal negotiating team, and the Crow Tribe representatives. While considerable effort was made by the staff at the Montana Reserved Water Rights Compact Commission to involve Wyoming and keep us up to date, the fast pace of the negotiations made it difficult to keep abreast of the many concept and language changes that had been agreed upon by the parties. While some of Wyoming's concerns were addressed by the participants, it was always apparent that Wyoming was not a formal negotiating partner and that the decision making process was driven by the formal parties and the fast track deadlines. Some important matters were left open or addressed with seemingly vague language which will require clarification or may be the source of future court interpretations.

Wyoming at this time neither supports or opposes your ratification of the compact. We see this Compact as a negotiated resolution to a complex set of topics, including the Crow Tribe's water rights. Negotiated settlements such as this are not identical to a legal court determination or adjudication of these complicated and sophisticated legal and technical matters. Nor do they set a

precedent in establishing legal entitlements beyond what may be allowed by law. As a negotiated accommodation between Montana, the Tribe and the Federal government, Wyoming, simply stated, believes this Compact should not have any adverse impact upon the water allocations and rights appropriated in Wyoming under State and Federal law, including the Yellowstone River Compact, nor should it provide the legal right to any party to impinge upon the water resources held as the constitutional property of the State of Wyoming. Wyoming and Montana have worked together as good neighbors for nearly 50 years under the Yellowstone River Compact and we do not want controversies arising from this new arrangement to disrupt this relationship. While we truly commend Montana's desires to seek a settlement of these often difficult and contentious issues based on our own litigation history, we also desire to support your settlement, if that resolution does not affect Wyoming's interests.

We were pleased with several provisions of this Compact. First, Wyoming's position with regard to the Bighorn River was that the volume of the allocations made to the Crow Tribe should be equal to or less than Montana's share of the Bighorn River under the Yellowstone River Compact. Based on information from the Federal negotiating team our analysis shows that, in average water years, the allocations made to the Tribe from the Bighorn River should be met with Montana's compact share. However, the ramifications of this compact in the Little Bighorn River and its tributaries are not as clear cut. We do recognize the accommodation in the Compact of leaving open the question of further appropriations of the Little Bighorn in Wyoming and will pursue this issue, among others, as this compact moves to Congress for ratification.

One difficulty in analyzing the potential long term implications of this settlement was the separation of the items over which Montana has jurisdiction from the "federal" issues. Topics such as the Section 2 matters and the transfer of hydropower revenues generated from Yellowtail Dam operations to the Crow Tribe may be of significant interest to Wyoming. However, since these federal issues were severed from the issues negotiated in this Compact, a total package impact was impossible to evaluate. The fast-tracked process of approval by the

Montana Reserved Water Rights Compact Commission, coupled with the fact that no changes to the exact wording could be made after the Commission's approval, led to final determinations being made by the parties, in what Wyoming felt was still early in the negotiating process. Many language, paragraph and definition changes were made, often without an explanation as to the reason for such additions or deletions. For example, written responses from Montana to questions raised by Wyoming often more clearly described the understanding of the parties than does the plain reading of the language in the Compact.

It appears that this next year, after your ratification, will include many important follow-up activities, such as the development of the river/reservoir management plan. We understand from the Commission staff that Wyoming will be specifically mentioned as a party to involve as the public participation process moves forward for this plan. We appreciate being included at this stage as a portion of Bighorn Reservoir lies in Wyoming and provides significant recreation benefits to that part of our state. Other details of the Compact provisions and operation of the stream system with the newly established water rights will hopefully be fully addressed since time was so short during the negotiations.

Wyoming will be working closely with its Congressional delegation to assure that her rights and entitlements to the water resources of the basin are not impacted, as this ratification process moves forward to Congress.

We appreciate your allowing Wyoming to provide our comments for the record as you deliberate the ratification of this settlement compact. If you have questions, or would like more information about Wyoming's position, I can be reached at 307-777-6150, Wyoming State Engineer's Office, Herschler Bldg, 4E, Cheyenne, WY 82002.

Office of the Attorney General

Governor
Jim Geringer

Attorney General
Gay Woodhouse

Water & Natural Resources Division
123 Capitol Building
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Deputy Attorney General
Thomas J. Davidson

VIA FAX TRANSMISSION ONLY
Ms. Faye Bergan
Reserved Water Rights Compact Commission
State of Montana
1625 Eleventh Avenue
Helena, MT 59620
Fax: (406) 444-3549

Mr. John C. Chaffin
U.S. Department of the Interior
Office of the Solicitor
U.S. Courthouse and Federal Building
Room 3004
316 North 16th Street
Billings, MT 59107-1394
Fax: (406) 247-7587

Mr. Robert S. Pelcyger
Fredericks, Pelcyger, Hester & White, LLC.
Attorneys at Law
Christopher Plaza
1075 South Boulder Road, Suite 305
Louisville, CO 80027
Fax: (303) 673-9839

Dear Madam and Gentlemen:

Thank you for e-mailing me the March 18, 1999 draft of the proposed compact. I received the e-mail on Thursday evening. Since that time, I have striken-out" language Wyoming is opposed to, inserted several notes in highlighted print, and added some language in bold print that is essential if the parties expect the Wyoming to not oppose ratification of the compact. **These edits are merely Wyoming's first attempt to put its thoughts on paper and**

are not intended to be exhaustive. As other issues crop up, we will submit additional comments and propose more language.

Wyoming's edits speak for themselves. However, it is probably worthwhile to explain some of the proposed additions and address some of Wyoming's most serious concerns.

A. From the outset of our discussions, Wyoming has maintained that it is not interested in interjecting itself into this process or becoming a party to this compact. Wyoming has merely requested that the parties provide certain assurances that it will not be impacted in any way by the proposed compact and that the proposed compact will not have any deleterious affects on Wyoming's rights or allocations under the Yellowstone River Compact. Although the parties orally assured Wyoming's representatives that it will not be affected by the proposed compact language, the **written** language has never been as clear as the **oral** assurances. **Bottom line:** if you can speak it – write it.

For example, the language related to the Tribal Water Right in the Big Horn River Basin is infected with ambiguity and does not square with what Mr. Aldrich proposed in his blackboard session on March 15, 1999. I do not doubt that sincere efforts were made to make the written language consistent with Mr. Aldrich's proposal, but it still needs work. The currently proposed language can easily be interpreted to not protect Wyoming's interests and is subject to future misinterpretation if the language is not clarified. In light of this, Wyoming preliminarily proposes adding several provisions in Article II, B and throughout the text of the proposed compact which address the following issues:

1. The Yellowstone River Compact is the law of the river and nothing in the proposed compact shall be used in any way to interpret, supersede, supplant, interpret, or clarify any of the language contained in the Yellowstone River Compact. See Article II, B.

2. The proposed compact has been negotiated between the parties with the State of Wyoming to assure Wyoming that it will not be affected by the proposed language. Those assurances have been based upon engineering data supplied by Mr. Gordon Aycock with the Bureau of Reclamation and they are not merely random numbers chosen as a matter of compromise. See Article II, B.

3. All of the parties and Wyoming are willing to avoid a current fight over the interpretation of the Yellowstone River Compact language relating to the compact's applicability to Indian Tribes' water rights and how Indian water rights factor into Montana's 20% allocation of Big Horn River water. However, nothing in the proposed compact should be construed to give the Tribe a right to water that causes Montana's 20% allocation to be exceeded when combined with all of Montana's other uses of its 20% allocation under the Yellowstone River

Compact. Many of Wyoming's proposed edits are intended to prevent the use of water in Montana from exceeding the amounts Montana is entitled to use under the Yellowstone River Compact. (See eg., provisions relating to storage space, the "one-fill" rule, changing the water year to one traditionally used in agricultural areas, extra protections on waters which form the boundary between the ceded strip and undisputably Montana lands and all drainages tributary thereto, an unquantified use of water for religions reasons, Tribe's agreement to defend and indemnify Montana, overlap cancellations, and others.)

4. Wyoming proposes adding language stating that the Tribes agree not to look upstream and across the Wyoming state border for water to satisfy what it perceives to be its entitlement under the proposed compact or any other applicable law. See page Article II, B and several edits throughout the text.

B. Notwithstanding the above, even though the State of Wyoming is not a party to the proposed compact, Wyoming proposes adding language which would explicitly acknowledge that it may file suit to protect its interests and enforce the new proposed compact as a third-party beneficiary. In an effort to gain support from Wyoming to increase the likelihood of Montana's State Legislature approving the compact and the United States Congress ratifying the compact, Montana, the United States, and the Crow Tribes have made a number of oral representations to the State of Wyoming to assure that Wyoming's interests will not be adversely affected by the proposed compact. Simply put, if the parties make promises to Wyoming in 1999 to garner support for the compact, they should not be uncomfortable with being asked to keep their promises and to allow Wyoming to enforce the compact provisions in the year 2000 and thereafter. It is not unreasonable to ask the parties to keep their promises. The only way to ensure promises are kept is to allow Wyoming the ability to enforce the compact as a third-party beneficiary and to spell out explicitly what those protections are. See Article II, B.

C. With respect to the Little Big Horn River, Wyoming's proposal is sufficiently set forth in its proposed changes. In essence, Wyoming would propose that all existing water rights within the basin in Wyoming be allocated water under the Compact, except that permits for large storage projects would not be included within Wyoming's if the permit holders fail to exercise due diligence and put their water right to use before the year 2010.

D. Inter-basin Transfers. The Yellowstone River Compact provides for how inter-basin transfers of water need to be handled and Wyoming expects the parties to continue to honor those Compact provisions.

E. The State of Wyoming has been careful in its review of the proposed compact not to view it from the perspective of how Wyoming would address certain issues if we were Montana. Rather, Wyoming has approached this from the perspective of trying to

determine whether the parties proposal will injure Wyoming's rights and interests within the Yellowstone River Basin. In short, Wyoming has no problem with Montana settling with the Crow Tribe so long as it does so using only the water Montana is entitled to under the Yellowstone River Compact.

Notwithstanding the above, Wyoming is compelled to admonish the parties to use extreme caution in reinventing the applicable water and real estate laws and agreeing that body of law which has not even been written yet is the applicable law. For example, Under Montana law, it is clear that recreationalists enjoy an easement to enter upon lands adjacent to Montana's waters up to high water mark. The Big Horn River receives a significant amount of use from non-tribal sportsmen. The question arises: is Montana comfortable with how this issue will be addressed under the new tribal code? Does Montana know how it will be addressed? Similarly, although Montana has agreed that the water rights currently serving irrigated lands on the reservation will not be appurtenant to any particular lands, is it clear whether the right to use canals, ditches, and other such conveyance systems are appurtenant to those lands? Does agreeing to allow the tribe to govern lands under a tribal code that has not yet been written, the provisions of which may be contrary to current Montana laws, amount to a taking of a real property right? Although these issues are not of great concern to the State of Wyoming, we feel compelled to point out the risks inherent in allowing Montana citizens to be subjected to tribal jurisdiction and be bound by laws that are not yet written.

There are several other less contentious issues which both concerned Wyoming that are addressed by the changes proposed by Wyoming. I suspect that a conference call will be necessary in order to discuss Wyoming's proposed changes to the compact. Please contact Jeff and me to coordinate schedules and set up a conference call if desired. Also, if you have any questions regarding the proposed language, please do not hesitate to contact both Jeff and me.

Truly yours,

b

Brian C. Shuck
Assistant Attorney General

BCS:jh

cc: Tom Davidson
Jeff Fassett

SUPPLEMENTARY INFORMATION SUBMITTED BY CHRIS D. TWEETEN, CHIEF CIVIL COUNSEL, OFFICE OF THE ATTORNEY GENERAL, STATE OF MONTANA

Chairman Dorgan and distinguished members of the Senate Indian Affairs Committee, I thank you for the opportunity to provide supplemental written testimony on Senate Bill 3355, the Crow Tribe Water Rights Settlement Act of 2008. Again, my name is Chris D. Tweeten, and I am the Chief Civil Counsel to the Montana Attorney General and Chairman of the Montana Reserved Water Rights Compact Commission. I testified before the Committee on behalf of the State of Montana and Governor Brian Schweitzer in support of Senate Bill 3355, the Crow Tribe Water Rights Settlement Act of 2008 and continue to urge your approval of the Act. I would like to respond to some of the issues raised by the Federal government and concerns expressed by Senator Barrasso from Wyoming.

Administration

First, we want to respond to the written testimony submitted by Kris Polly, Deputy Assistant Secretary for Water and Science, United States Department of the Interior. The Crow Tribe may also be submitting supplemental testimony to cover many of the points raised by the Federal government especially those dealing with

certain aspects of funding and funding structure, so we will limit our response to those points primarily relevant to the State of Montana.

The Crow Tribe-Montana Compact was passed in 1999 by the Montana legislature. As part of the negotiating process that led to the Compact, the Federal Government appointed a formal Federal Negotiating Team composed of members of various agencies including the Solicitor's Office of the Department of the Interior and the Department of Justice. The Montana process for negotiations is set out in statute and is a government-to-government negotiation. As such, the State, the Tribe, and the United States each had a negotiating team and represented their respective governments in the negotiation of the Crow Tribe-Montana Compact. The Federal Team was fully engaged and "at the table" as a party in these negotiations. The Federal Team participated in every negotiation session, every legal and technical meeting, every joint public meeting, put forth proposals, prepared technical work, participated in marathon drafting sessions, and in every sense helped craft this agreement as trustee for the Crow Tribe. The Federal Negotiating Team devoted extraordinary time and effort to the negotiations. The United States was actively involved in every single phase of the process, including drafting and/or reviewing S. 3355. Thus, the characterization in the Federal testimony that the Administration's representatives "met with the negotiators" during this intensive and extensive process misleadingly understates the extent of federal participation in the development of the Compact and S. 3355.

As indicated during the hearing, the Indian Affairs Committee is quite familiar with the inadequacies of the "Criteria and Procedures" used by the Administration as guidelines in evaluating Indian water right settlements. The State of Montana will not belabor the points raised by multitudes of others. However, it is hard to comprehend why supplying potable drinking water to Tribal members and repairing a century-old BIA irrigation project is not related to trust or programmatic responsibilities of the Federal Government.

The Administration testimony as to the monetary concerns relates generally to the cost of the projects that are authorized under S. 3355 and the State's cost-share of the settlement. The Administration indicated it has not yet completed its analysis of what an appropriate federal financial contribution should be under the "Criteria and Procedures." They have had *10 years* to do it. The Administration stated at the hearing that feasibility studies would need to be conducted to evaluate the cost of the projects and that it would take up to five years to do the studies. These projects address water needs that have been on the table since day one. They have had *10 years* to do them. In the absence of Administration support, the Tribe took it upon itself to have plans and cost estimates developed by a well-respected engineering firm in Montana. Based on our experiences with Bureau of Reclamation feasibility studies funded by Congress for the Milk River, the State of Montana believes that the Tribe's reports listed in S. 3355 give more accurate and detailed information and lower and more realistic calculated costs than one that would be done by Bureau of Reclamation.

In the Administration's written testimony, Mr. Polly states that: "There are many needs in Indian country and Indian water rights settlement cannot and should not be the major vehicle to address those needs." The Crow Tribe Water Rights Settlement Act of 2008 seeks to quantify the Tribal Water Right and to provide funding to put those water rights to beneficial use. The proposed projects would provide potable drinking water and repair of dilapidated irrigation projects on a Reservation primarily supported by agriculture. These are appropriate "wet water" needs. They certainly do not address every need on the Crow Indian Reservation.

The State of Montana's cost-share was also raised as an issue in the Administration's testimony. The cost-share of the State of Montana under the Crow Tribe-Montana Compact has two components (1) a payment to the Crow Tribe of $15,000,000 plus interest, and (2) authorization for a pass-through agreement where certain taxes are collected by the State on the extraction and production of Crow coal. The first component of the States' cost-share is cash money currently totaling $18,000,000, which is being held in an escrow fund for delivery to the Tribe when the Compact becomes effective. The cost-share money is not for a project that benefits both Indians and non-Indians as most cost-share agreements provide. This is money paid *directly* to the Tribe to use for economic development or infrastructure needs. Montana is aware of no other Indian water rights settlement in which a state cost-share has included such a funded state cash contribution.

The second component of the State cost-share is authorization for a pass-through agreement, where the proceeds of any production taxes levied by the State on severance or production of coal owned by the United States in trust for the Crow Tribe will be paid to the Tribe. Given the vast coal resources underlying the Crow Indian Reservation and the ceded strip, this tax pass-through could be worth millions and

millions of dollars. In addition to the sizable monetary contribution, this pass-through agreement will also provide taxing certainty to developers making production of Crow coal more marketable.

The United States' "Criteria & Procedures" call for state cost-share to be proportional to the benefits received by non-Federal parties. This is not a comparison of the federal dollars and the state dollars, but a federal contribution to meet its obligations as trustee to the Tribe and a state contribution to off-set impacts to the Tribe from the agreement. Montana has a population of less than one million people. This is a rural area, huge distances away from any major metropolitan center. The value of land and water reflects those facts. Water rights settlements are always a combination of concessions made and benefits received by all parties, and the Crow Tribe-Montana Compact is no different. The Administration blanketly states that the State cost-share is inadequate to cover the benefits Montana receives under the Compact without providing any rationale or factual information to support this statement. We do not agree. An evaluation of the net benefits to the State and water users under state law would reveal that the state-cost share is more than adequate.

The Administration raised several non-monetary issues regarding S. 3355. The first one that the Administration raises concerning allottees is the most alarming to the State of Montana. Specifically, the Administration testimony states:

> First, as currently drafted, the provisions of the bill dealing with allottee water rights do not adequately protect the rights to which allottees are entitled under federal law. The Crow Reservation is heavily allotted and 46 percent of the Reservation land base is held in trust by the United States for individual Indians. The bill, however, fails to safeguard allottees' water rights. The United States owes a trust obligation directly to these individuals in addition to the obligations owed to the Tribe. The Department of the Interior and the Department of Justice have confronted this important issue in several recent Indian water rights settlement[sic] in an effort to avoid any claims of unconstitutional takings of property interests. We would like to work with the Tribe and the sponsors of the bill to rectify shortcomings in the language of the bill as drafted.

From the language changes suggested by the Administration, their concerns are drafting clarifications with the allottee language in S. 3355 and not that the structure of the Crow Tribe-Montana Compact ratified by S. 3355 is at issue. The testimony submitted by the Administration should be specific to only those clarifications needed.

By way of background, the Tribe stated at the onset of the negotiations that a major goal of the Tribe was reconsolidation of both land and water resources within the Reservation. The State sought subordination of the Tribal Water Right for non-Indian water users until such time as the land was reacquired. Under the Compact, as land is reacquired, any appurtenant water rights will transfer to the Tribe and become part of the Tribal Water Right with a May 7, 1868 priority date. Issues with this approach were raised by the few off-project Indian irrigators contending that this structure would impact their current operation. The Compact Commission went out to the field to meet with the irrigators and found that if there is a year that water is short there is already an informal practice in place (for most areas) to share water between irrigators both Indian and non-Indian alike. Thus, the Compact is structured to preserve the status quo as of 1999 with flexibility to allow the Tribe to move into the future through reacquisition. Water users, both Indian and non-Indian, actually using water in 1999 will share shortages based on the portion of Tribal water uses and non-Tribal water uses.

The current Indian uses (not historic uses or assessments but actual current uses) are included in a Listing of Current Uses of the Tribal Water Right which is part of and an exhibit to the Compact. Non-Indian water uses recognized under state law will be as adjudicated by the Montana Water Court. New uses of the Tribal Water Right will be exercised in a manner that protects these uses. Over time, as non-Indian land and any appurtenant water right are acquired, that water will be available to the Tribe and the impacts to non-tribal users from the proportional shared shortage will become more pronounced. This structure certainly does not offer the protection for state water users on the Reservation that subordination would have, but as a policy decision the State supported the protection of both Tribal and non-Tribal water users working the land in 1999 and agreed to the shared shortage. This was obviously a finely-tuned balance of interests negotiated by the parties, including the United States.

The specific language that addresses allottee rights is a federal–tribal issue as long as it is not inconsistent with the structure of the Compact. The Administra-

tion's concerns should be discarded until their testimony accurately reflects the specific language concerns of the Administration.

Waiver language in S. 3355 was taken straight from recent water right settlements passed by Congress. This again is a federal–tribal issue as long as it does not affect the State. But comments on the waiver language seem unnecessary and untimely.

The Administration testimony raises an issue about the federal responsibility for delivery of the 300,000 AFY allocation in Bighorn Lake to the Crow Tribe. This is not new storage, but an allocation of available water from an existing Bureau of Reclamation facility. The storage allocation to the Tribe has the same priority date as the Bureau of Reclamation's water right, so water should be stored in priority within the basin. We worked with the Bureau of Reclamation to arrive at storage volumes from active storage not yet contracted or allocated. S. 3355 provides that no new contracts from Bighorn Lake will be issued.

At the request of the Administration we added language to S. 3355 to provide that if facilities at Yellowtail Dam are significantly reduced or anticipated to be significantly reduced, the Tribe will have the same storage rights as other storage contractors. S. 3355 also provides that the Tribe and the Secretary of the Interior enter into an allocation agreement to establish terms and conditions of the allocation. It is difficult to respond to vague concerns that this allocation somehow would trigger future litigation. Storage allocations from Federal facilities have been a component of most of our compacts. Concerns that an allocation would result in litigation has never been raised by the Administration during the Congressional approval process of those Compacts and no litigation concerning the allocations has resulted. Yellowtail Dam is located on the Crow Indian Reservation, with 40 miles of the reservoir (Bighorn Lake) within or bordering the Reservation. It is only fair that the Crow Tribe should benefit from this federal storage facility.

The Administration testimony stated that the Administration had "extraordinary" concerns that the Appendices to the Compact were not prepared. There are five Appendices to the Compact, all of which are now before the Committee.

Appendix 1 is a proposed decree of the Tribal Water Right to be submitted to the Montana Water Court as part of judicial approval of the Compact and incorporation of the Tribal Water Right into decrees as part of our general stream adjudication. A proposed decree had not been prepared in advance of the Court proceeding for our other compacts ratified by Congress or approved by the Secretary of the Interior. A proposed decree is a straightforward document usually drafted by the Department of Justice. However, since this is such a concern to the Administration, Appendix 1 has been drafted and submitted by the Tribe to the Committee.

Appendix 2 is a map showing the Water Court hydrologic basins used in the general stream adjudication. It was prepared and submitted to the Montana legislature in 1999. Appendix 2 was attached to my previous written testimony.

Appendix 3 is a listing of existing rights, permits and state reservations for all basins that have a portion of land within the Crow Indian Reservation, whether the water uses are affected by the Compact or not. To address the Administration's concerns, the Tribe has submitted Appendix 3 to the Committee. At this time, Appendix 3 is a list of existing water rights as currently claimed and permits and reservations issued under state law as of September 15, 2008. The list is from the data base maintained by the Department of Natural Resources and Conservation (and available on the internet).* We need to point out that the existing water rights as currently claimed are pre–1973 water right claims that are being adjudicated by the Montana Water Court. To date, none of the pre–1973 claims listed have gone through the adjudication. The adjudication process will include a factual examination of each claim, a notice, objection and hearing process, and a final appealable decree will be issued. The Tribe and the United States retain the right to object to claims in the adjudication process. Under the Compact, Appendix 3 shall be modified by decrees resolving claims for each affected basin. Therefore, we anticipate that once the adjudication process is complete, Appendix 3 will be very different than the list submitted to the Committee. Appendix 3, as modified, will be the basis for implementing the Compact.

Appendix 4 is a map showing the Crow Indian Reservation. It was prepared and submitted to the Montana legislature in 1999. Appendix 4 was attached to my previous written testimony.

Appendix 5 is a map showing the ceded strip. It was prepared and submitted to the Montana legislature in 1999. Appendix 5 was attached to my previous written testimony.

---

*The information referred to has been retained in Committee files.

The Administration testimony states that the Administration may have other issues concerning this bill. What are these issues? To date, the State and the Tribe have addressed each and every issue the Administration raised both before and after the Compact was passed by the Montana legislature in 1999. Federal issues were addressed by incorporating the proposed language, crafting language to address verbal concerns raised, or by specifically explaining why a change was not warranted. After a decade of working with the Administration, we now see testimony that suggests that they have "other issues" that must be addressed before they can support legislation. The Administration states that it supports negotiated settlements. Their testimony—that after ten years of participation in the negotiations the Administration *still* cannot articulate all of its concerns—indicates that is simply not the case.

The Administration's opposition boils down to spending money. This is an issue for Congress to decide, and more time will not change that fact.

Wyoming

The State of Montana appreciates the comments made by Senator Barrasso from the State of Wyoming. We would like to supplement our written testimony to provide additional facts and additional information to address some of the issues the Senator alluded to.

The Bighorn River basin is a shared resource between Wyoming and Montana. We were ever mindful of that fact in negotiating the Crow Tribe-Montana Compact.

The adjudication of the Crow Tribe's water right is a quantification of rights established by treaty in 1868. These are not newly established rights. The Crow Tribe's water rights will be quantified either by settlement or by litigation. One way or another, the Crow Tribe's water rights will be recognized and quantified. One way or another, the Crow Tribe will have a very substantial water right with a very senior priority date to serve the land and interests held in trust for the Tribe by the United States.

Settlement allows the flexibility to address issues such as mitigating impacts of tribal development and administration which is an advantage over litigation. While Wyoming could not be a party in the negotiations since this is a settlement of water right claims in Montana, we worked closely with Wyoming because we share the water resources of the Bighorn River. The Crow Tribe-Montana Compact and S. 3355 incorporated many of suggested changes by Wyoming, either from suggested language or language developed based on discussions with Wyoming.

The definitions in the Compact include definitions of the various drainage basins used by the Montana Water Court in conducting the adjudication. Wyoming commented that some of the drainage basin descriptions were confusing and made the drainages seem as if they included lands in Wyoming. The State of Montana contacted the Montana Water Court, and the Water Court agreed that the description of those drainages should be changed to clarify that only drainages or portions of drainages within Montana are included in the Compact.

Wyoming had raised concerns about whether funding for the federal contribution to settlement would come from revenue based on hydropower production at Yellowtail Dam (as discussed at one point by the parties), and if such a funding mechanism was established how it would impact power costs under the Pick-Sloan program. The Tribe agreed to drop this proposal prior to introduction of S. 3355.

The State of Wyoming asked the parties repeatedly, both before and after the passage of the Compact by the Montana legislature, to fix language that it found confusing concerning the Tribe's storage allocation in Bighorn Lake. As a result, the Tribe agreed to clarify the language in S. 3355. The Tribe has agreed to remove the storage allocation for excess flow, in order to address Wyoming's concerns. The storage language is now very clear and more restrictive than the language in the Compact and more restrictive than the language proposed by Wyoming.

Disclaimer language was added to the Compact at the request of Wyoming stating that nothing in the Compact amends or alters any provision of the Yellowstone River Compact. Similar language has been added to S. 3355.

The Yellowstone River Compact addresses only rights granted under the authority of the respective states. Under the terms of the Yellowstone River Compact, the Yellowstone River Compact cannot be construed or interpreted as to affect adversely the rights of any Indian tribe. However, Wyoming made it clear that it had no problem with Montana settling with the Crow Tribe so long as it did so using only water Montana is entitled to under the Yellowstone River Compact (pursuant to Wyoming's interpretation).

We disagree with Wyoming's interpretation of the treatment of tribal rights under the Yellowstone River Compact, but we took a practical approach and sought to work within Wyoming's interpretation for the purposes of settlement only. The Trib-

al quantification under the agreement is within the parameters of what could be recognized by the Water Court if we went to litigation. Since this amount and the relatively few post–1950 water rights claimed in Montana fell well within Montana's 20 percent post–1950 allocation under Wyoming's interpretation of the Yellowstone River Compact, it was possible to meet all concerns.

The Bighorn River basin in Montana is now closed to new non-excepted appropriations under State law in an agreement ratified by Congress. Testimony submitted to the Montana legislature by the Wyoming State Engineer confirms that that Wyoming was satisfied that the quantification of the Crow Tribe's water right fell within Wyoming's interpretation of the Yellowstone River Compact. This appropriately leaves final resolution of any issues between Montana and Wyoming as to interpretation of the Yellowstone River Compact for resolution in another forum. It is important to note that this was a concession made by the State of Montana based on Wyoming's concerns, and not a concession made by the Crow Tribe.

Over 95 percent of the Bighorn River basin off the Crow Indian Reservation is located in Wyoming. Off-Reservation protections to state-based water users in Montana under the Compact have little practical impact for our water right holders on the Bighorn River since water demands downstream from the Reservation are met by return flows, and this is likely to be the case in the future. Obviously, the factual situation is much different upstream where development can continue. During meetings with the Wyoming State Engineer, there were general concerns raised about meeting the Tribe's 500,000 AFY natural flow right in periods of natural flow shortage. To address the concerns raised by Wyoming, the Compact was structured to provide a block of storage in Bighorn Lake to supplement (be released from the reservoir) in periods of water shortage where Tribal water demands exceed the natural flow in the Bighorn River. Wyoming was part of the discussion in how to fashion this upstream mitigation, even though they were not a party to the agreement and did not provide any consideration for this protection.

Water users on the Crow Indian Reservation currently divert an estimated 150,000 AFY from the Bighorn River. These uses were in place many years before 1950 and are pre–1950 uses under the Yellowstone River Compact under either state's interpretation. The natural flow right of 500,000 AFY recognized in the settlement includes all existing uses. Therefore, approximately 350,000 AFY of the natural flow right is not currently developed.

Of the 350,000 AFY for development, 150,000 AFY is allocated from storage to supplement the natural flow to meet Tribal demands if water is short. That leaves 200,000 AFY of new demand from a River that currently provides an average of more than 10 times that amount. Risk to Wyoming is low. But the Tribe should not be the one to bear that risk. The Crow Tribe has the number one priority date in the Bighorn River basin. If this settlement is rejected and this issue goes to litigation it is certainly possible that the Crow Tribe's water right will be quantified as more than 200,000 AFY for future use. Wyoming need only examine the quantification for Indian reserved water rights in its own state to evaluate this assertion. Without the settlement the Bighorn River basin in Montana will also be reopened to new appropriations under State law. Undeniably, the water users in Wyoming are better protected with this agreement than without it.

The Streamflow and Lake Level Management Plan ("Management Plan") is part of the Compact and an exhibit to the Compact. The State of Montana, the Crow Tribe, and the United States are the only signators to the Management Plan as they are the parties to the Compact.

The Management Plan recognizes that the objectives of management of Yellowtail Dam and Bighorn Lake are to provide adequate and reliable instream flows in the Bighorn River for the river fisheries and to maintain lake levels for recreation and lake fisheries, consistent with the need to provide water to meet existing and future needs of the Crow Tribe. Nothing in the Management Plan limits or directs the Bureau of Reclamation's discretion under Federal law to manage Yellowtail Dam or Bighorn Lake. Nothing in the Management Plan requires releases of water from Yellowtail Dam.

The Management Plan sets out operating criteria for water releases for optimum, standard and minimum instream flows for the stretch of River downstream from the Yellowtail Afterbay Dam. The numbers for instream flow needs in the Management Plan are not hard targets that the Bureau of Reclamation must meet, but identified needs of the river fishery resource and management goals. The Bureau of Reclamation has used these necessary fishery flows in past decision-making. It was important to Montana that these needs be documented in the Management Plan and be publicly available.

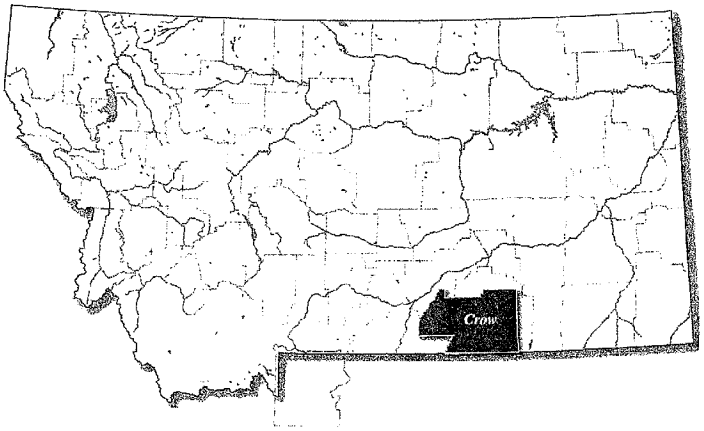
Criteria for similar fishery and recreation needs for Bighorn Lake are also specified as operating criteria. Flood control is another operating criteria. Nothing in the

Management Plan changes Federal law or the federal activities pursuant to federal law, as the Management Plan and S. 3355 both specify. Nor does the Management Plan or S. 3355 change any federal requirements for consulting with interested persons, including the state of Wyoming and any user groups. The Management Plan does not give any greater rights to Montana in comparison to the rights of Wyoming in the operations of Yellowtail Dam.

The Management Plan describes how and where the Tribe can divert the Tribal Water Right. Under the Management Plan the Tribe dedicates 250,000 AFY of water to instream flow. The instream flow stretch as defined by the Management Plan is the blue-ribbon trout fishery stretch of the Bighorn River. The fishery is of significant interest to Montana and others interested in this nationally renowned trout stream. The Tribe presently seeks greater economic benefit from this fishery. After the downstream measuring point of the instream flow stretch, the Tribe may use this water for development. The area below the blue-ribbon stretch is the most logical point for withdrawals for development based on topography. The Tribe can develop its remaining water right upstream from the downstream measuring point, with some provisions for mitigating the impacts of construction. Instream flow is a beneficial use in Montana. A litigated quantification of the Tribe's water right will not change this result.

The ability to mitigate impacts on water uses in the Little Bighorn River in Wyoming was not possible in the context of a water rights agreement in Montana. The Crow Tribe's representatives met with the Wyoming State Engineer's Office to discuss protection of current uses under Wyoming law, which is a better protection than Montana water users received. The issue at that time was a permit application that the Crow Tribe was unwilling to recognize. We understand that the objectionable application has since been withdrawn. As far as we know, the Crow Tribe's offer to meet with Wyoming concerning the Little Bighorn remains on the table.

CROW TRIBE – MONTANA COMPACT



85-20-901. Crow Tribe-Montana compact ratified. The compact entered into by the State of Montana and the Crow Tribe and filed with the Secretary of State of the State of Montana under the provisions of 85-2-702 on June 22, 1999, is ratified. The compact is as follows:

WATER RIGHTS COMPACT ENTERED INTO BY
THE STATE OF MONTANA,
THE CROW TRIBE,
AND THE UNITED STATES OF AMERICA

This Compact is entered into by and among the State of Montana, the Crow Tribe, and the United States of America for the purpose of settling any and all existing water rights claims of or on behalf of the Crow Tribe of Indians in the State of Montana.

ARTICLE I - RECITALS

WHEREAS, in 1975, the United States, on behalf of the Crow Tribe, brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights, see, U.S. v. Big Horn Low Line Canal Company, et al., No. CIV-75-34-BLG (filed April 17, 1975); and

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for the Tribe; see, "the McCarran Amendment", 43 U.S.C. §666(a)(1)(1952); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Crow tribal water rights; and

WHEREAS, the United States has filed claims on behalf of the Crow Tribe in the general stream adjudication initiated by the State of Montana; and

WHEREAS, the lands and waters constituting the Crow Indian Reservation and Tribal Interests in the Ceded Strip were part of the area recognized as the territory of the Crow Indians under the Treaty of Fort Laramie of September 17, 1851 and also were part of the area set apart for the Crow Tribe under the Treaty of Fort Laramie of May 7, 1868; and

WHEREAS, for the purposes of this Compact, the priority date for the Tribal Water recognized is May 7, 1868, which is the senior water right on the water sources covered by this Compact; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see, Northern

Cheyenne Tribe v. Adsit, 721 F.2d 1187, 1189 (9th Cir. 1983); and

WHEREAS, the adjudication of Crow tribal water rights in the state court proceedings has been suspended while negotiations are proceeding to conclude a compact resolving all water rights claims of the Crow Tribe within the State of Montana; and

WHEREAS, the Crow Tribal Council, or its duly designated representatives, have authority to negotiate this Compact pursuant to Resolution No. 99-33; and

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. Sections 516-17 (1993); and

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute this Compact on behalf of the United States Department of the Interior pursuant to 43 U.S.C. Section 1457 (1986, Supp. 1992), inter alia; and

WHEREAS, the Crow Tribe, the State of Montana, and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of all the Tribe's water rights claims within the State of Montana; and

WHEREAS, it is in the best interest of all Parties that the water rights claims of the Crow Tribe be settled through agreement between and among the Tribe, the State of Montana, and the United States; and

WHEREAS, in settling the water rights claims of the Crow Tribe the Parties do not intend to alter or amend or to adopt or preclude any interpretation of the Yellowstone River Compact (Act of October 10, 1951, ch. 629, 65 Stat.663 (1951));

NOW THEREFORE, the Parties agree to enter into this Compact for the purpose of settling the water rights claims of the Crow Tribe within the State of Montana.

ARTICLE II - DEFINITIONS

The following definitions shall apply for purposes of this Compact:

1. "Acre-foot" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet.

2. "Acre Feet Per Year" or "AFY" means the quantity of water to which the Tribe has a right each year measured in acre feet over a period of a year.

3. "Adverse Affect" or "Adversely Affect" means interference with or to interfere with the reasonable exercise of a water right.

4. "Bighorn River Basin" means Water Court Basin 43P, the mainstem of the Bighorn River and its tributaries (exclusive of the Little Bighorn River and its tributaries) within Montana to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.

5. "Bighorn Lake" means the body of water impounded on the Bighorn River by Yellowtail Dam, Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri Program, Montana.

6. "Board" means the Crow - Montana Compact Board established by Section F, of Article IV of this Compact.

7. "Ceded Strip" means the area covered by Article III of the Act of April 27, 1904 (33 Stat.352), as depicted on the map attached as Appendix 5.

8. "Change in Use" as applied to the Tribal Water Right, means a change in the point of diversion, the place of use, the purpose of use, or the place or the means of storage.

9. "Clarks Fork Yellowstone River Basin" means Water Court Basin 43D, the mainstem of the Clarks Fork Yellowstone River and its tributaries from the Montana-Wyoming border to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.

10. "Crow Irrigation Project" means the irrigation project authorized by the Act of March 3, 1891 (26 Stat. 989, 1040) managed by the United States, Department of the Interior, Bureau of Indian Affairs, as of the date this Compact has been ratified by the Montana legislature, consisting of the following project units: Agency, Big Horn, Forty Mile, Lodge Grass #1, Lodge Grass #2, Pryor, Reno, Soap Creek, and Upper Little Horn; and including land held in trust by the United States for the Tribe or a Tribal member within the Bozeman Trail and Two Leggins districts which are managed by private irrigation associations as of the date this Compact has been ratified by the Montana legislature.

11. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.

12. "Effective Date" means the date on which the Compact is ratified by the Crow Tribal Council, by the Montana legislature, and by the Congress of the United States, whichever date is latest.

13. "Groundwater" means any water that is beneath the ground surface.

14. "Little Bighorn River Basin" means Water Court Basin 43O, the mainstem of the Little Bighorn River and its tributaries from the Montana-Wyoming border to its confluence with the Bighorn River, as depicted on the map attached as Appendix 2.

15. "Natural Flow" means water that would exist in the Bighorn River and its tributaries in the absence of human intervention.

16. "Parties" means the Tribe, the State, and the United States.

17. "Person" means an individual or any other entity, public or private, including the State, the Tribe, and the United States and all officers, agents, and departments of each of the above.

18. "Pryor Creek Basin" means Water Court Basin 43E, the mainstem of Pryor Creek and its tributaries from its headwaters to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.

19. "Recognized Under State Law" when referring to a water right, means a water right arising under Montana law or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member.

20. "Release" means to discharge water from storage, or the discharge of water from storage.

21. "Reservation" means the Crow Indian Reservation consisting of the area as presently set apart for the Crow Tribe pursuant to the following Treaty and laws: Article 2 of the Fort Laramie Treaty of May 7, 1868 (15 Stat. 649); the Act of April 11, 1882 (22 Stat. 42); the Act of March 3, 1891 (26 Stat. 989); the Act of April 27, 1904 (33 Stat.352); the Act of August 31, 1937 (50 Stat. 884); and, the Act of November 2, 1994 (108 Stat. 4636), as depicted on the map attached as Appendix 4.

22. "Rosebud Creek Basin" means Water Court Basin 42A, the mainstem of Rosebud Creek and its tributaries from its headwaters to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.

23. "Secretary" means the Secretary of the United States Department of the Interior, or his or her duly authorized representative.

24. "Shoshone River Basin" means Water Court Basin 43N, the mainstem of the Shoshone River and its tributaries within Montana, as depicted on the map attached as Appendix 2.

25. "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof.

26. "Tongue River Basin" means Water Court Basin 42B, the mainstem of the Tongue River and its tributaries from the Montana-Wyoming border to above and including Hanging Woman Creek, as depicted on the map attached as Appendix 2.

27. "Transfer" as applied to the Tribal Water Right, means to authorize a person to use all or any part of the Tribal Water Right through a service contract, lease, or other similar agreement of limited duration.

28. "Tribal Water Resources Department" or "TWRD" means the Crow Tribal Water Resources Department, or any successor agency.

29. "Tribal Interests in the Ceded Strip" means all present and acquired interests in real property, including mineral interests, held in trust by the United States for the Tribe or Tribal members within the Ceded Strip, consisting of: Crow Indian allotments held in trust by the United States for the Tribe or Tribal members; interests restored to the Tribe pursuant to the Act of May 19, 1958 (72 Stat. 121), as modified by the Act of August 14, 1958 (72 Stat. 575); and other interests held in trust by the United States for the Tribe or Tribal members.

30. "Tribal Water Right" means the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of this Compact.

31. "Tribe" means the Crow Tribe and all officers, agents, and departments thereof.

32. "United States" means the federal government and all officers, agencies, and departments thereof.

33. "Yellowstone River Basin between Bighorn River and Tongue River" means Water Court Basin 42KJ, the mainstem of the Yellowstone River and its tributaries between Bighorn River and Tongue River, as depicted on the map attached as Appendix 2.

34. "Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River" means Water Court Basin 43Q, the mainstem of the Yellowstone River and its tributaries between Clarks Fork Yellowstone River and Bighorn River, as depicted on the map attached as Appendix 2.

ARTICLE III - TRIBAL WATER RIGHT

A. Basin 43P: Bighorn River.

1. Quantification - Source - Volume.

   a. Natural Flow. The Tribe has a quantified water right to the Natural Flow of the Bighorn River for current uses developed as of the date this Compact

has been ratified by the Montana legislature and new development within the Reservation of 500,000 AFY. The use of this right is subject to Sections A.6. and A.8.a., of Article III, and the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III.

(1) The Tribe has a right to divert or use or to authorize the diversion or use of water from the Natural Flow of the Bighorn River within the Reservation, subject to the terms and conditions in Section C., of Article IV.

(2) The Tribe may change the source of water from the Natural Flow of the Bighorn River to surface flow or storage of any tributary within the Bighorn River Basin within the Reservation or to Groundwater within the Bighorn River Basin within the Reservation, subject to the terms and conditions in Section C.2.a., of Article IV.

(3) The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water from the Bighorn River as part of that project is a use of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III, in the Bighorn River Basin, and the use of this water shall be subject to federal law.

b. Storage in Bighorn Lake.

(1) Subject to the approval of, and any terms and conditions specified by, Congress and to the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III, the Tribe shall be entitled to an allocation of 300,000 AFY of water stored in Bighorn Lake. The Tribe and the State agree to seek as a part of that allocation the following:

(a) not more than 150,000 AFY of the allocation provided in Section A.1.b.(1)., of Article III may be used or diverted as authorized by the Tribe, subject to the terms and conditions in Section C., of Article IV; provided that, not more than 50,000 AFY may be used outside the Reservation subject to the terms and conditions in Section C.2.c., of Article IV. This storage allocation is in addition to the Natural Flow Tribal Water Right provided in Section A.1.a., of Article III.

(b) not less than 150,000 AFY of the allocation provided in Section A.1.b.(1) of Article III shall only be:

(i) managed so as to be available as a Release during low flow periods pursuant to streamflow and lake level management plan agreed to under Section A.7., of Article III; or

(ii) used for beneficial purposes including diversions for consumptive uses in years of excess Natural Flows and excess storage, if any, when unappropriated or unallocated water is available, and subject to the terms and conditions in Section C., of Article IV.

(2) All other water stored in Bighorn Lake, except for the 6,000 AFY currently allocated by contract to the Montana Power Company, or its successor-in-interest, and the 30,000 AFY allocated by Congress

to the Northern Cheyenne Tribe, shall be used only for flood control, production of power, maintenance of instream flows, maintenance of lake levels and carryover storage, consistent with Section A.7., of Article III and federal law.

2. Priority Date.
   a. Natural Flow. The priority date of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III shall be May 7, 1868.
   b. Storage. The priority date of the Tribal Water Right to waters stored in Bighorn Lake set forth in Section A.1.b.(1)., of Article III shall be the priority date of the water right held by the Bureau of Reclamation as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA.
3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.
4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, and except for the 50,000 AFY that may be used outside the Reservation as provided in Section A.1.b.(1).(a)., of Article III, the Tribe may divert or permit the diversion of this water right from any place and by any means within the Reservation for use within the Reservation, provided that, any diversion structure of the Tribal Water Right upstream of the Two Leggins diversion on the Bighorn River will be constructed to bypass streamflows established or modified pursuant to Section A.7., of Article III.
5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.
6. Protection of Water Rights Recognized Under State Law.
   a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:
      (1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.
      (2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.
   b. The protection of water rights Recognized Under State Law set forth in Sections A.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC

(except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV. Measures to prevent Adverse Affect may include Release of water from Bighorn Lake.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Streamflow and Lake Level Management Plan. Pursuant to this Compact, the Tribe, the Secretary, and the State shall develop a streamflow and lake level management plan for the Bighorn River, from the Yellowtail Afterbay Dam to a point immediately upstream of the Two Leggins diversion, and for Bighorn Lake. The streamflow and lake level management plan shall be agreed to within one (1) year after this Compact has been ratified by the Montana legislature. If the streamflow and lake level management plan is not agreed to by the Tribe, the Secretary, or the State the provisions of Section A.4.d., of Article VII apply. The streamflow and lake level management plan is not required to be implemented until the Effective Date of this Compact. The streamflow and lake level management plan may be modified at any time with the consent of the Tribe, the Secretary, and the State. The Montana legislature intends that the streamflow management plan should provide enforceable mechanisms that protect the long-term biological viability of the blue ribbon wild trout fishery on the Bighorn River from the Yellowtail Afterbay Dam to the Two Leggins diversion.

8. Basin Closure within the Bighorn River Basin.

a. In the Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana

legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, the DNRC may issue a certificate of water right or permit for use on fee land for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

B. Basin 43O: Little Bighorn River.

1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Little Bighorn River Basin, except as provided for in Sections B.6., and B.7.a., of Article III, and except for water apportioned to Wyoming, if any, as determined by a court of competent jurisdiction or Congress. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water in the Little Bighorn River Basin as part of that project is a use of the Tribal Water Right set forth in Section B.1.a., of Article III, and the use of this water shall be subject to federal law. Water stored in Willow Creek Reservoir also is a use of the Tribal Water Right.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section B.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Little Bighorn River Basin within the Reservation for use within the Reservation or in connection with Tribal Interests in the Ceded Strip subject to the terms and conditions in Section F., of Article III and Section C.2.b., of Article IV.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.
6. Protection of Water Rights Recognized Under State Law.
   a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:
      (1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.
      (2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Little Bighorn Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.
   b. The protection of water rights Recognized Under State Law set forth in Sections B.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.
   c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.
   d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Little Bighorn River Basin.

a. In the Little Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

C. Basin 43E: Pryor Creek.

1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Pryor Creek Basin within the Reservation, except as provided for in Sections C.6. and C.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water in the Pryor Creek Basin as part of that project is a use of the Tribal Water Right set forth in Section C.1.a., of Article III, and the use of this water shall be subject to federal law.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section C.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Pryor Creek Basin within the Reservation for use within the Reservation.
5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.
6. Protection of Water Rights Recognized Under State Law.
   a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:
      (1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.
      (2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.
   b. The protection of water rights Recognized Under State Law set forth in Sections C.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.
   c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.
   d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact

has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Pryor Creek Basin.

a. In the Pryor Creek Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

D. Basin 42A: Rosebud Creek.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Rosebud Creek Basin within the Reservation, except as provided for in Sections D.6. and D.7., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section D.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Rosebud Creek Basin for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.
6. Protection of Water Rights Recognized Under State Law.
   a. Within the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:
      (1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.
      (2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Rosebud Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.
   b. The protection of water rights Recognized Under State Law set forth in Sections D.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued within the Reservation is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.
   c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.
   d. Outside the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin outside the Reservation are protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right to the same extent provided in the Northern Cheyenne - Montana Compact, Sections A.3.c.i. and ii., of Article II, 85-20-301, MCA. Protection from an assertion of senior

priority in the exercise of the Crow Tribal Water Right for the Northern Cheyenne Tribal Water Right shall only be as provided in Section D.7., of Article III.

e. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, or outside the Reservation to the same extent provided in the Northern Cheyenne - Montana Compact, Section A.3.c.i. and ii., of Article II, 85-20-301, MCA.

f. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

7. Protection of Northern Cheyenne Tribal Water Rights within the Northern Cheyenne Reservation.

a. Except as provided in Section G.2., of Article III, the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA, is protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right.

b. New development, Change in Use, or Transfer of the Crow Tribal Water Right shall not Adversely Affect the exercise of the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA.

8. Basin Closure within the Rosebud Creek Basin within the Reservation.

a. In the Rosebud Creek Basin upstream from the point that Rosebud Creek or any tributary of Rosebud Creek leaves the Reservation, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

E. Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Reservation within Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River, except as provided in Sections E.6. and E.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., Article IV.
2. Priority Date. The priority date of the Tribal Water Right set forth in Section E.1., of Article III shall be May 7, 1868.
3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.
4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe divert or permit the diversion of the Tribal Water Right from any place and by any means within the drainages listed in Section E.1., of Article III within the Reservation for use within the Reservation.
5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.
6. Protection of Water Rights Recognized Under State Law.
   a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections E.6.a.(1). and (2)., of Article III extends only to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in each drainage listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

7. <u>Basin Closure within the Reservation.</u>

a. In the drainages listed in Section E.l., of Article III, upstream from the point that each stream or its tributaries leaves the Reservation, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in

accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

F. Tribal Water Right in the Ceded Strip.

1. Quantification - Source - Volume.

a. Tribal Interests in the Ceded Strip. As part of the Tribal Water Right, the Tribe has a right to divert a total of 47,000 AFY from surface flow, Groundwater, or storage within the Ceded Strip from portions of the Sarpy Creek drainage and Yellowstone River within Yellowstone River Basin between Bighorn River and Tongue River; Fly Creek drainage and Yellowstone River within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River; Pryor Creek Basin; and Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip; and, water imported to the Ceded Strip from the Little Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip. Diversion and use shall be subject to the terms and conditions in Sections C.1.c. and C.1.d., of Article IV.

(1) This 47,000 AFY is in addition to the Tribal Water Right set forth in Sections A.1., B.1., C.1., and E.1., of Article III, except that any diversion of this right from surface flow, Groundwater, or storage within the Bighorn River Basin shall be deducted from the Tribal Water Right as set forth in Section A.1., of Article III.

(2) No more than 47,000 AFY may be diverted and used in connection with Tribal Interests in the Ceded Strip from all water sources, provided that:

(a) no more than 2,500 AFY from all water sources including the Yellowstone River may be diverted upstream from the confluence of the Bighorn River and the Yellowstone River.

(b) no more than 7,000 AF may be diverted from all sources including the Yellowstone River in any month, provided that, aggregate uses from all sources not exceed 47,000 AFY.

b. Use limited to within the Ceded Strip. The Tribal Water Right of 47,000 AFY for use in connection with Tribal Interests in the Ceded Strip shall be used only within the Ceded Strip and shall not be considered a Change in Use or Transfer outside the Reservation for purposes of Section C.2.c., of Article IV.

c. Any portion of the 50,000 AFY set forth in Section A.1.b.(1).(a)., of Article III which may be used outside the Reservation may also be used in connection with Tribal Interests in the Ceded Strip in addition to the Tribal Water Right of 47,000 AFY set forth in Section F.1.a., of Article III.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section F.1.a., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means for use in connection with Tribal Interests in the Ceded Strip within the Ceded Strip.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip may be used for beneficial purposes allowed by Tribal, federal and state law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law affected by the exercise of the Tribal Water Right in the Ceded Strip with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections F.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to

85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation Nos. 1781-r and 10006-r); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

d. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

G. Additional Rights to Water. As part of the water rights specifically set forth in Sections A., B., C., D., E., and F., of Article III, the Tribe has a right to water from the following sources:

1. Appurtenant Water Rights. For land within the Reservation acquired after the Effective Date of this Compact, the Tribe has the right to the use of any water right acquired as an appurtenance to the land. At such time that the acquired land is transferred to trust status, the water right appurtenant to the land acquired shall become part of and not in addition to the Tribal Water Right quantified in this Compact with a May 7, 1868 priority date, provided that, the acquired water right shall retain any protections set forth in this Compact. The Tribe shall notify DNRC of any acquisition of water in the Tribe's annual report and shall identify the water right acquired, as set forth in Section E.1., of Article IV. Any water right acquired shall be added as decreed by the Montana Water Court to the list of current uses of the Tribal Water Right as provided in Section E.2., of Article IV.

2. Exempt Rights.

   a. Religious or cultural uses of the Tribal Water Right by Crow Tribal members within the Reservation in de minimis amounts shall be allowed without prior review by DNRC.

   b. In accordance with the terms and conditions in Section C.1., of Article IV, TWRD may authorize development of the Tribal Water Right for:

(1) an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3) temporary emergency appropriations necessary to protect lives or property.

c. Uses of the Tribal Water Right provided for in Sections G.2.a. and G.2.b., of Article III, are not subject to protection of water rights Recognized Under State Law provided in Sections A.6., B.6., C.6., D.6., D.7., E.6., and F.6., of Article III, or streamflows established or modified pursuant to Section A.7., of Article III.

H. Proposed Decree. For purposes of entry in the Montana Water Court, the proposed decree of the Tribal Water Right set forth in Article III is attached as Appendix 1. If there are differences between Appendix 1 and the Final Decree, the Final Decree shall control.

ARTICLE IV - IMPLEMENTATION OF TRIBAL WATER RIGHT

A. General Provisions.

1. Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States.

2. Tribal Water Right: Administration.

a. Subject to the limitations imposed by this Compact and federal law, the use of the Tribal Water Right shall be administered by the Tribe through TWRD within the Reservation, in the Ceded Strip, and outside the Reservation. Disputes, not within the jurisdiction of the Compact Board set forth in F.4., of Article IV, concerning use of the Tribal Water Right in the Ceded Strip and outside the Reservation which raise issues concerning the application of state or federal law shall be resolved in a court of competent jurisdiction. Those disputes concerning use of the Tribal Water Right in the Ceded Strip and outside the Reservation which do not raise issues concerning the application of state or federal law shall be within the exclusive jurisdiction of the Tribe. Subject to the limitations imposed by this Compact, the Tribe shall have the final and exclusive jurisdiction to resolve all disputes concerning the Tribal Water Right between holders of water rights under the Tribal Water Right. TWRD shall develop policies and procedures for monitoring water use, diversions, and maintaining records of water use and development consistent with this Compact. The current water use and diversions and new development shall be identified by location and quantity.

b. Administration and enforcement of the Tribal Water Right shall be pursuant to a Tribal water code, which shall be developed and adopted by the Tribe within two (2) years following the Effective Date of this Compact pursuant to any requirements set forth in the Constitution of the Crow Tribe. Pending the adoption of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

c. The Tribe shall not administer any water right Recognized Under State Law.

d. Administration, operation and maintenance, and delivery of the Tribal Water Right on the Crow Irrigation Project shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs, in accordance with applicable federal laws. Portions of the Project within the Bozeman Trail and Two Leggins Districts shall be administered in accordance with applicable law.

3. Water Rights Recognized Under State Law: Administration.

a. The State shall administer and enforce all water rights Recognized Under State Law to the use of surface flows, Groundwater, and storage within or outside the Reservation. The State shall have the final and exclusive jurisdiction to resolve all disputes between holders of water rights Recognized Under State Law.

b. The State shall not administer or enforce any part of the Tribal Water Right.

c. For water rights Recognized Under State Law, if any, utilizing water delivered by the Crow Irrigation Project, administration and distribution of such water shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs, in accordance with applicable federal laws.

4. Distribution of Water Between the Parties. When water availability is insufficient to satisfy all water rights under the Tribal Water Right and all water rights Recognized Under State Law within the Reservation, administration and distribution shall be as follows:

a. distribution between the water administered by the Tribe and the United States for current uses of the Tribal Water Right within the Reservation developed as of the date this Compact has been ratified by the Montana legislature and the water for water rights Recognized Under State Law within the Reservation with a priority date before this Compact has been ratified by the Montana legislature shall be on an equitable basis in proportion to the amount of water required for Tribal water use as listed pursuant to Section E.2., of Article IV, and the amount of water required for water rights Recognized Under State Law, provided that, the Parties recognize that distribution may not be on a precise proportional basis due to the need to take into account the physical constraints of water delivery. Administration and distribution by the Tribe, the United States, and the State within their proportional shares shall be pursuant to Tribal,

federal, and state law respectively, and shall be coordinated as necessary. This distribution shall not modify the right of a holder of a water right Recognized Under State Law to seek enforcement of such water right against other water rights Recognized Under State Law in priority without the agreement of the water right holder.

b. future development of the Tribal Water Right after this Compact has been ratified by the Montana legislature shall be enforced as junior in priority to the water rights subject to a proportional distribution as set forth in Section A.4.a., of Article IV.

c. nothing in Section A.4.a., of Article IV shall prevent water users from agreeing to an alternative water distribution plan on the basis of individual water rights pursuant to applicable state, Tribal, or federal law.

5. Subsequent Federal or State Law. Administration under Sections A.2.d., A.3.a. and A.3.c., of Article IV shall be as set forth in this Compact except as may otherwise be determined by a court of competent jurisdiction or established by Congress.

B. Use of the Tribal Water Right.

1. Persons Entitled to Use the Tribal Water Right. The Tribal Water Right may be used by the Tribe, Tribal members, or Persons authorized by the Tribe, provided that, the Tribe may not limit or deprive Indians residing on the Reservation or in the Ceded Strip of any right, pursuant to 25 U.S.C. . 381, to a just and equal portion of the Tribal Water Right set forth in Article III.

2. Effect of Non-Use of the Tribal Water Right. State law doctrines relating to the use of water rights, including but not limited to relinquishment, forfeiture or abandonment, do not apply to the Tribal Water Right. Thus, non-use of all or any of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture or abandonment of such rights.

C. Tribal Water Right: New Development, Change in Use, or Transfer.

1. New Development of Surface Flow, Groundwater, or Storage of the Tribal Water Right.

a. New Development of Surface Flow, Groundwater, or Storage Within the Reservation. After the Effective Date of this Compact, the Tribe may develop or authorize new development of surface flow, Groundwater, or storage of the Tribal Water Right within the Reservation; provided that, such development shall not Adversely Affect a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. Prerequisite Administrative Procedure within the Reservation. The following procedure for determining whether new development of surface flow, Groundwater, or storage of the Tribal Water Right within the Reservation will have an Adverse Affect on water rights Recognized Under State Law shall be followed prior to seeking relief from the Compact Board:

(1) Application for new development of a surface flow, Groundwater, or storage use within the Reservation shall be made to TWRD.

(2) TWRD shall review the application and make a determination of whether the new development will have an Adverse Affect on water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV. Upon request by TWRD, DNRC shall provide information on state water rights as recorded in the DNRC database to TWRD.

(3) If TWRD determines that the new development will have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, TWRD shall deny the application. If TWRD determines that the new development will not have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, TWRD shall forward the application with its determination to DNRC.

(4) If, based upon the evidence, DNRC agrees with TWRD's determination, DNRC shall notify TWRD. If, however, based upon the evidence, DNRC cannot agree with TWRD's determination, DNRC shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any holder of a water right Recognized Under State Law who, according to the records of the DNRC, has a water right with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, and may be affected by the proposed development. DNRC shall notify TWRD within ninety (90) days of DNRC's determination.

(5) DNRC and TWRD should attempt to resolve any disagreement on TWRD's determination of no Adverse Affect on a cooperative basis. If DNRC or a holder of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, disagree with the determination of no Adverse Affect, DNRC or the water right holder may seek relief from the Compact Board.

(6) In any proceeding concerning the effect of new Groundwater development of the Tribal Water Right within the Reservation either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a) Wells Less than 100 Feet: For new Groundwater wells to be completed at a depth beneath the surface of less than 100 feet, the applicant shall bear the burden of showing no Adverse Affect to a water right

Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

(b) 100 Feet or Deeper Wells: For new Groundwater wells to be completed at a depth beneath the surface of 100 feet or deeper, the owner of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, shall bear the burden of showing Adverse Affect to the water right.

(7) In any proceeding concerning the effect of new storage development of the Tribal Water Right within the Reservation either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a) Storage Over 50 AF: For new storage facilities with a planned constructed capacity of more than 50 AF, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

(b) Storage 50 AF or Less: For new storage facilities with a planned constructed capacity of 50 AF or less, the owner of the water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, shall bear the burden of showing Adverse Affect to the water right.

c. New Development of Surface Flow, Groundwater, or Storage for Use in Connection with Tribal Interests in the Ceded Strip. After the Effective Date of this Compact, the Tribe may develop or authorize new development, from surface flow, Groundwater, or storage, of the Tribal Water Right as set forth in Section F., of Article III and subject to the terms and conditions in Section F.1., of Article III for use in connection with Tribal Interests in the Ceded Strip; provided that, such development shall not Adversely Affect a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

d. Prerequisite Administrative Procedure within the Ceded Strip. The following procedure for determining whether new development of surface flow, Groundwater, or storage of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip will have an Adverse Affect on water rights Recognized Under State Law shall be followed prior to seeking relief from the Compact Board:

(1) Application for new development of surface flow, Groundwater, or storage of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip shall be made to TWRD.

(2) TWRD shall review the application and make a determination of whether the new development will have an Adverse Affect on water

rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA. Upon request by TWRD, DNRC shall provide information on state water rights as recorded in the DNRC database to TWRD.

(3) If TWRD determines that the new development will have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, TWRD shall deny the application. If TWRD determines that the new development will not have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, TWRD shall forward the application with its determination to DNRC.

(4) If, based upon the evidence, DNRC agrees with TWRD's determination, DNRC shall notify TWRD. If, however, based upon the evidence, DNRC cannot agree with TWRD's determination, DNRC shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any holder of a water right Recognized Under State Law who, according to the records of the department, has a water right with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, and may be affected by the proposed development. DNRC shall notify TWRD within ninety (90) days of DNRC's determination.

(5) DNRC and TWRD should attempt to resolve any disagreement on TWRD's determination of no Adverse Affect on a cooperative basis. If DNRC or a holder of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, disagree with the determination of no Adverse Affect, DNRC or the water right holder may seek relief from the Compact Board.

(6) In any proceeding concerning the effect of new Groundwater development of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a) Wells Less than 100 Feet: For new Groundwater wells to be completed at a depth beneath the surface of less than 100 feet, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact

has been ratified by the Montana legislature or exempt rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA.

(b) 100 Feet or Deeper Wells: For new Groundwater wells to be completed at a depth beneath the surface of 100 feet or deeper, the owner of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, shall bear the burden of showing Adverse Affect to the water right.

(7) In any proceeding concerning the effect of new storage development of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a) Storage Over 50 AF: For new storage facilities with a planned constructed capacity of more than 50 AF, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA.

(b) Storage 50 AF or Less: For new storage facilities with a planned constructed capacity of 50 AF or less, the owner of the water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, shall bear the burden of showing Adverse Affect to the water right.

e. Groundwater Development of the Tribal Water Right Exempt from the Showing of No Adverse Affect. The following wells are exempt from the requirement of showing no Adverse Affect:

(1) Wells developed as of the date this Compact has been ratified by the Montana legislature are exempt from the burden to show no Adverse Affect. These wells may be replaced, repaired or rehabilitated to the original constructed capacity. A comprehensive list of wells developed as of the date this Compact has been ratified by the Montana legislature shall be kept on file in TWRD offices as part of the requirement to list current uses of the Tribal Water Right in Section E.2., of Article IV.

(2) An authorized use of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

f. Storage Development of the Tribal Water Right Exempt from the Showing of No Adverse Affect. The following storage facilities are exempt from the requirement of showing no Adverse Affect:

(1) Facilities storing the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature are exempt from the burden to show no Adverse Affect. These storage facilities may be replaced, repaired or rehabilitated to the original constructed capacity. A comprehensive list of storage facilities developed as of the date this Compact has been ratified by the Montana legislature shall be kept on file in TWRD offices as part of the requirement to list current uses of the Tribal Water Right in Section E.2., of Article IV.

(2) An authorized use of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

2. Change in Use or Transfer of the Tribal Water Right.

a. Change in Use or Transfer of the Tribal Water Right Within the Reservation. Unless otherwise stated in this Compact, the Tribe may make or authorize a Change in Use or Transfer of a water right set forth in Article III of this Compact within the Reservation; provided that, such Change in Use or Transfer shall not Adversely Affect a water right Recognized Under State Law with a priority date before the date of the Change in Use or Transfer. Determination of Adverse Affect shall be made following the same procedure used for review of new surface flow, Groundwater, or storage development of the Tribal Water Right set forth in Sections C.1.a. and C.1.b., of Article IV.

b. Change in Use or Transfer of the Tribal Water Right Within the Ceded Strip. Unless otherwise stated in this Compact, the Tribe may make or authorize a Change in Use or Transfer of the Tribal Water Right set forth in Section F.1.a., of Article III within the Ceded Strip; provided that, such Change in Use or Transfer shall not Adversely Affect a water right Recognized Under State Law with a priority date before the date of the Change in Use or Transfer. Determination of Adverse Affect shall be made following the same procedure used for review of new surface flow, Groundwater, or storage development of the Tribal Water Right within the Ceded Strip set forth in Sections C.1.c. and C.1.d., of Article IV.

c. Change in Use or Transfer of the Tribal Water Right Outside the Reservation. Except as otherwise provided in this Compact, the Tribe, pursuant to federal law, may make or authorize a Change in Use or a Transfer of the Tribal Water Right for up to 50,000 acre-feet of water as provided in Section A.1.b.(1).(a)., of Article III, for use outside the Reservation; provided that, any Transfer shall be for a term not to exceed 100 years, and may include provisions authorizing renewal for an additional term not to exceed 100 years; and provided that, no such Transfer shall be a permanent alienation of the water Transferred. Any Change in Use or Transfer of any such water right involving a point of diversion or place of use located outside the Reservation shall be considered a use outside the Reservation, except as provided in Section F., of Article III and Section

C.2.b., of Article IV; and, further provided that, any use of Tribal water rights described in this Compact outside the Reservation shall not be deemed to convert such rights to rights arising under state law, and non-use of such rights outside the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the rights. The Tribe may change the point of diversion or purpose or place of use of the Tribal Water Right back to the Reservation without reduction in the amount of water provided in the Compact.

(1) Applicable Law. No person may initiate a use, Change in Use, or Transfer of a Tribal water right set forth in this Compact outside the Reservation without first complying with applicable state law. Approval of an application for a use, Change in Use, or Transfer outside the Reservation by the State shall be conditioned on a valid Tribal authorization for such use, Change in Use, or Transfer by the Tribe. The applicant shall provide DNRC with proof of a valid Tribal authorization prior to initiating the use, Change in Use, or Transfer.

(2) Diversion Facilities. With respect to diversion or transportation facilities located outside the Reservation which are to be used in connection with the exercise of a water right set forth in this Compact, the Tribe or Persons using such water right shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of such water right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

D. Water Rights Recognized Under State Law: New Development, Change in Use, or Transfer.

1. Limit on New Development. DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature within the Reservation, and outside the Reservation in Bighorn River Basin and in Pryor Creek Basin, provided that, the Department may issue certificates of water right or permits for use on fee land for:

   a. An appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

   b. An appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

   c. Temporary emergency appropriations as provided in 85-2-113(3), MCA.

2. Change in Use or Transfer of Water Rights Recognized Under State Law within the Reservation. The State may authorize a change in use or transfer of a water right Recognized Under State Law within the Reservation in accordance with state law, provided that, such change or transfer shall not Adversely Affect a use of the Tribal Water Right existing at the time of the application for change in use or transfer.
   a. Prerequisite Administrative Procedure. The following procedure for determining whether a change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on an existing water right developed or authorized prior to the date of application for change of use or transfer under the Tribal Water Right shall be followed prior to seeking relief from the Compact Board:
      (1) Application for a change in use or transfer of a water right Recognized Under State Law within the Reservation shall be made to DNRC.
      (2) DNRC shall review the application and make a determination of whether the change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on a water right developed or authorized under the Tribal Water Right. Upon request by DNRC, TWRD shall provide information on developed and authorized Tribal Water Rights as recorded by TWRD to DNRC.
      (3) If DNRC determines that the change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on a water right developed or authorized under the Tribal Water Right, DNRC shall deny the application. If DNRC determines that the change in use or transfer of a water right Recognized Under State Law within the Reservation will not have an Adverse Affect on a water right developed or authorized under the Tribal Water Right, DNRC shall forward the application with its determination to TWRD.
      (4) If, based upon the evidence, TWRD agrees with DNRC's determination, TWRD shall notify DNRC. If, however, based upon the evidence, TWRD cannot agree with DNRC's determination, TWRD shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any Tribal Water Right holder who, according to the records of TWRD, has a water right developed or authorized before the application date and may be affected by the proposed change in use or transfer of a water right Recognized Under State Law within the Reservation. TWRD shall notify DNRC within ninety (90) days of TWRD's determination.
      (5) TWRD and DNRC should attempt to resolve any disagreement on DNRC's determination of no Adverse Affect on a cooperative basis. If TWRD or a holder of a water right developed or authorized under the Tribal Water Right disagree with the determination of no Adverse

Affect, TWRD or the Tribal Water Right holder may seek relief from the Compact Board.

E. Reporting Requirements.

1. On an annual basis DNRC shall provide the Tribe and the United States with a listing of all uses of surface flow, Groundwater, or storage for which a certificate of water right or permit has been issued or a change in use or transfer has been approved by DNRC within the Reservation, in the Ceded Strip, and in drainages affected by this Compact.
2. Within one (1) year after this Compact has been ratified by the Montana legislature, the TWRD and the United States shall provide the DNRC with a report listing all current uses of the Tribal Water Right, including uses by Tribal members, existing as of the date this Compact has been ratified by the Montana legislature. DNRC may request additional information from TWRD or the United States to assist in reviewing the report. DNRC must approve or disapprove of the listing of all current uses of the Tribal Water Right within six (6) months after receipt of the report.
3. On an annual basis TWRD shall provide the DNRC and the United States with a listing of all new development of the Tribal Water Right described in this Compact within the Reservation, in the Ceded Strip, and outside the Reservation, and of all Changes in Use or Transfers of water rights within and outside the reservation since the last report.
4. TWRD, DNRC, and the United States may agree to modify the reporting requirements set forth in Sections D.1. and D.3., of Article IV. Such modification is pursuant to, and shall not be deemed a modification of, this Compact.
5. All reporting to the United States under this subsection shall be made to the Billings Area Office of the Bureau of Indian Affairs.

F. Enforcement: Crow-Montana Compact Board.

1. Establishment of Board. There is hereby established the Crow-Montana Compact Board. The Board shall consist of three members: one member selected by the Governor of the State of Montana; one member appointed by the Crow Tribal Chairman; and one member selected by the other two members. All members shall be appointed within six (6) months of the Effective Date of this Compact and within thirty (30) days of the date any vacancy occurs. If an appointment is not timely made by the Governor, the Director of DNRC or his/her designee shall fill the State's position. If an appointment is not timely made by the Crow Tribal Chairman, the Director of TWRD or his/her designee shall fill the Tribe's position. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. Expenses of the members appointed by the State and the Tribe shall be borne by the entity appointing the member. The expenses of the third member and all other expenses shall be borne equally by the Tribe and the State, subject to the availability of funds.
2. Membership. Should the two appointed members fail to agree on the selection of a third member within sixty (60) days of the date of appointment of the second

member, or within thirty (30) days after any vacancy occurs, the following procedure shall be utilized:

a. Within five (5) days thereafter each member shall nominate three persons to serve as a member of the Board;
b. Within fifteen (15) days thereafter each member shall reject two of the persons nominated by the other member;
c. Within five (5) days thereafter, the remaining two nominees shall be submitted to the Dean of the University of Montana School of Law who shall select the third member from the two nominees.

3. Quorum and Vote Required. Two members of the Board shall constitute a quorum if reasonable notice of the time, place, and purpose of the meeting, hearing, or other proceeding has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board, and on the Parties to this Compact.
4. Jurisdiction of the Board. The Crow-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water as between the Parties or holders of water rights developed or authorized under the Tribal Water Right and holders of water rights Recognized Under State Law. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact.
5. Prerequisite Administrative Procedures.
   a. Any holder of a water right Recognized Under State Law concerned that a new development, Change in Use, or Transfer of the Tribal Water Right is inconsistent with the Compact shall first contact the Billings Regional Office of DNRC. If DNRC and TWRD are unable to resolve the issue in a manner acceptable to the water right holder within a reasonable time through discussion, DNRC or the water right holder may seek relief through the Compact Board. The Tribe agrees to allow DNRC reasonable access onto Tribal land or to assist DNRC in obtaining reasonable access onto the land of the Tribal Water Right holder to observe the challenged new development, Change in Use, or Transfer.
   b. Any Tribal Water Right holder concerned that a new development, change in use, or transfer of water by a holder of a water right Recognized Under State Law is inconsistent with the Compact shall first contact TWRD. If TWRD and DNRC are unable to resolve the issue in a manner acceptable to the Tribal Water Right holder within a reasonable time through discussion, TWRD or the Tribal Water Right holder may seek relief through the Compact Board. DNRC agrees to assist TWRD in obtaining reasonable access onto the land of the holder of the water right Recognized Under State Law to observe the challenged development, change in use, or transfer.
   c. TWRD and DNRC may jointly develop supplemental procedures as necessary or appropriate. Such supplemental procedures are pursuant to, and shall not be deemed a modification of, this Compact.

6. Powers and Duties. The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribe and the State shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The parties to the controversy may present evidence and cross examine any witnesses. The Board shall determine the controversy and grant any appropriate relief, including a temporary order; provided that, the Board shall have no power to award money damages, costs, or attorneys' fees. All decisions of the Board shall be by majority vote and in writing. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six (6) months after its first meeting. All records of the Board shall be open to public inspection, except as otherwise ordered by the Board.
7. Review and Enforcement of Board Decisions.
   a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Unless otherwise provided by Congress, only the United States and parties to the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty (30) days of such decision. The hearing on appeal shall be a trial de novo. The notice of appeal shall be filed with the Board and served personally or by registered mail upon all parties to the proceeding before the Board.
   b. Unless an appeal is filed within thirty (30) days of a final decision of the Board, as provided in Section F.7.a., of Article IV, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition of the Board, or any party before the Board in the proceeding in which the decision was made.
   c. A court of competent jurisdiction in which a timely appeal is filed pursuant to Section F.7.a., of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section F.7.b., of Article IV, may order such temporary or permanent relief as it considers just and proper.
   d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Section f.7.a., of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section F.7.b., of Article IV, in the manner and to the same extent as from orders or judgments of the court in a civil action.
   e. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board within sixty (60) days of filing of a notice of appeal.
8. Waiver of Immunity. The Tribe and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Crow-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided

herein, except that such waivers of sovereign immunity by the Tribe or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Compact Board shall be as provided by Congress.

ARTICLE V - DISCLAIMERS AND RESERVATIONS

A. No Effect on Other Tribal Rights or Other Federal Reserved Water Rights.

1. Except as provided in Sections A.1.b.(2). and D.7., of Article III, the relationship between the Tribal Water Right described herein and any rights to water of any other Indian Tribe or its members, or of the United States on behalf of such Tribe or its members shall be determined by the rule of priority.
2. Nothing in this Compact may be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribes or their members outside of the Crow Reservation.
3. Nothing in this Compact is otherwise intended to affect or abrogate a right or claim of an Indian Tribe other than the Crow Tribe.
4. Except as otherwise provided herein and authorized by Congress, nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the reserved rights to water of any other federal agency or of any other federal lands. Such reserved rights will be subject to the rule of priority in their use.

B. General Disclaimer. Nothing in this Compact shall be so construed or interpreted:

1. As a precedent for the litigation of reserved water rights or the interpretation or administration of future compacts between the United States and the State, or the United States and any other state;
2. To preclude the acquisition or exercise of a right Recognized Under State Law to the use of water by any member of the Tribe outside the Reservation by purchase of such right or by acquisition of land, or by application to the State;
3. To determine the relative rights inter sese of Persons using water under the authority of the State or the Tribe;
4. To limit in any way the rights of the Parties or any other person to litigate any issues or questions not resolved by this Compact;
5. To authorize the taking of a water right which is vested under state or federal law;
6. To create or deny substantive rights through headings or captions used in this Compact;
7. To address or prejudge whether or how, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State;
8. To prohibit the Tribe, or the United States on behalf of the Tribe, from objecting in any general stream adjudication in Montana Water Court to any claims to water rights;

9. To constitute a waiver of sovereign immunity by the Tribe, State, or United States, except as is expressly set forth in this Compact;
10. Unless otherwise provided by Congress, to prevent the United States, as trustee for the Tribe or Tribal members, or the Tribe itself, from filing an action in any court of competent jurisdiction, to prevent any party from interfering with the enjoyment of the Tribal Water Right;
11. To impair, amend, or alter rights under existing state or federal law;
12. To affect or determine the applicability of any state or federal law, including, without limitation, environmental and public safety laws, on activities of the Tribe or Tribal members within the Reservation or in connection with Tribal Interests in the Ceded Strip;
13. To alter or amend any provision or to adopt or preclude any interpretation of the Yellowstone River Compact, Act of October 10, 1951, ch. 629, 65 Stat. 663 (1951);
14. To alter or abridge any right reserved to the Crow Tribe of Indians under Article 4 of the May 7, 1868 Treaty of Fort Laramie; or
15. To prejudice any right that Tribal members may have to secure a portion of the Tribal Water Right from the Tribe.

C. Rights Reserved. The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact.

D. Obligations of United States Contingent.

1. Notwithstanding any other language in this Compact, except as authorized under other provisions of federal law, the obligations of the United States under this Compact shall be contingent on authorization by Congress.
2. The State and the Tribe recognize that this Compact has not been reviewed and approved by the United States or any agency thereof and ratification by the Montana legislature or ratification by the Tribal Council in no manner binds or restricts the discretion of the United States in the negotiation of all related matters, including but not limited to, coal severance tax, Section 2 of the Crow Allotment Act (41 Stat. 751), water rights, and State and Federal contribution or cost share.

E. Expenditures of Money Contingent. The expenditure or advance of any money or the performance of any work by the United States or the Tribe pursuant to this Compact which may require appropriation of money by Congress or allotment of funds shall be contingent on such appropriation or allotment being made.

ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

A. State Contribution to Settlement.

1. The State agrees to contribute the sum of $15 million, in equal annual installments for a period of no more than fifteen years beginning July 1, 1999, to a fund for the use and benefit of the Tribe.
2. Payment of the State's contributions for the benefit of the Tribe is contingent on the final approval of this Compact by the Tribe and Congress, the final inclusion of the rights set forth in the Compact in decrees by the Montana Water Court and the expiration of the time for appeal from all orders effecting such inclusion

or the affirmance of the decrees or orders on appeal, the provision of releases of claims as provided in Section A.4., of Article VI, and the fulfillment of any other conditions to the effectiveness of the Compact.

3. Until all conditions for payment are fulfilled, the State and the Tribe agree that any payments due shall be paid into an interest-bearing escrow account, to be held without distribution of principal or interest until all conditions for payment to the Tribe are satisfied.
4. The Tribe agrees that the State's contribution will be dedicated to economic development and water and sewer infrastructure within the Crow Reservation. The Tribe further agrees that the State's contributions as set forth in Section A.1., of Article VI and any other agreements that may be set forth in a separate coal severance tax settlement agreement between the State and Tribe should be considered as fully satisfying any cost-share obligation on the part of the State for this Compact. The Tribe further agrees that the State's contributions and agreements herein are full and adequate consideration for the Tribe's agreements as set forth in this Compact, and that the State's contributions, together with any other agreements that may be set forth in a separate coal severance tax settlement agreement between the State and the Tribe, are full and adequate consideration for the release of all claims by the Tribe and the United States in the civil action captioned Crow Tribe of Indians v. State of Montana, Cause No. CV-78-110-BLG-JDS (D. Mont.). The Tribe further agrees that in consideration of the State's contributions and other agreements set forth in a separate coal severance tax settlement agreement, the Tribe will provide releases of all claims, including any pleadings or proposed orders necessary to implement or otherwise give effect to the releases, in that action in a form acceptable to the Attorney General of the State.

B. Federal Legislation. The Tribe and the State agree to support federal legislation ratifying this Compact that will accomplish the following:

1. Bighorn Lake Water Supply. The State and the Tribe agree to support federal legislation that will provide an allocation of storage water in Bighorn Lake, as described in Section A.1.b., of Article III and which will reallocate the water in Bighorn Lake as set forth in Section A.1.b.(1).(b).(i)., of Article III. The priority date for the allocation shall be the date of the water right held by the Bureau of Reclamation as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA. This allocation shall be held in trust for the Tribe by the United States and will be part of the Tribal Water Right.
2. Right to Participate in Future Projects to Import Water. The Tribe shall have the right to initiate or participate in any project to augment the water supply in the Basins listed in Sections B., C., D. and E., of Article III, by transferring water from another drainage, and to have any such augmentation project deliver any entitlement of the Tribe to water to a point within the Reservation designated by the Tribe.
3. Federal Court Jurisdiction. That the federal courts shall have jurisdiction to enforce the provisions of this Compact and to hear appeals from and enforce decisions of the Compact Board in accordance with Section F.7., of Article IV.

C. Federal Contributions to Settlement. Federal contributions to settlement shall be as provided by Congress.

ARTICLE VII - FINALITY, SETTLEMENT OF CLAIMS,

EFFECTIVENESS OF COMPACT, AND WAIVER OF CLAIMS

A. Ratification and Effectiveness of Compact.

1. This Compact shall become Effective on the date it is ratified by the Tribe, by the State, and by the Congress of the United States, whichever date is latest. Upon ratification of this Compact by the Tribe and by the State, whichever is later, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of both the Tribe and the State. Once ratified by Congress, the Tribe, and the State, the Compact may not be modified without the consent of the Tribe, the State, and the United States.
2. Notwithstanding any other provision in this Compact, the Tribe reserves the right to withdraw as a Party to this Compact:
   a. If Congress has not ratified this Compact within four (4) years from the date the Compact is ratified by the State;
   b. If appropriations are not authorized by Congress within four (4) years of the date the Compact is ratified by the Tribe;
   c. If the Tribe and the United States do not reach agreement on the federal contribution to settlement;
   d. If appropriations are not made in the manner contemplated by the federal legislation ratifying the Compact; or
   e. If the Tribe and the United States do not reach agreement on settlement of issues regarding Section 2 of the Crow Allotment Act (41 Stat.751).
3. The Tribe may exercise its right to withdraw by sending to the Governor of the State of Montana and to the Secretary of the Interior by certified mail a resolution of the Crow Tribal Council stating the Tribe's intent to withdraw and specifying a withdrawal date not sooner than thirty (30) days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Crow Tribe and entry of a decree in a court of competent jurisdiction.
4. Notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a Party to this Compact:

a. If the Tribe and Congress have not ratified this Compact within five (5) years from the date the Compact is ratified by the State;

   b. If Congress requires a state contribution to settlement that exceeds the contributions described in Section A., of Article VI;
   c. If Congress resolves issues under Section 2 of the Crow Allotment Act (41 Stat. 751) in a manner Adversely Affecting water rights Recognized Under State Law;

d. If a streamflow and lake level management plan pursuant to Section A.7., of Article III is not agreed to within one (1) year after this Compact has been ratified by the Montana legislature or any extended deadline agreed to by the State, or if federal legislation is inconsistent with the streamflow and lake level management plan; or

e. If the Department of Natural Resources and Conservation does not approve the list of current uses of the Tribal Water Right pursuant to Section E.2., of Article IV.

5. The State may exercise its right to withdraw by sending to the Crow Tribal Chairman and to the Secretary of the Interior a letter delivered by certified mail from the Governor of the State of Montana stating the State's intent to withdraw and specifying a withdrawal date not sooner than thirty (30) days from the date of the letter. On the date designated in the letter for State withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Crow Tribe and entry of a decree in a court of competent jurisdiction.

6. Notwithstanding any other provision in this Compact, the Department of the Interior reserves the right to refuse to support federal legislation ratifying this Compact.

7. The Parties understand and accept that federal financial contributions to the Compact may not be budgeted until October of the year following the year of enactment of the Compact.

B. Incorporation Into Decrees and Disposition of Federal Suit.

1. The Tribe, the State, and the United States agree to defend the provisions and purposes of this Compact including the quantification set forth in Article III, from all challenges and attacks in all proceedings pursuant to this Section B., of Article VII.

2. Within one hundred eighty (180) days of the date this Compact is ratified by the Crow Tribal Council, the State of Montana, and Congress, whichever is latest, the Tribe, the State, or the United States shall file, in the general stream adjudication initiated by the State of Montana, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix 1 as the decree of the water rights held by the United States in trust for the Crow Tribe. If the Montana Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribe. If the Montana Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the Montana Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribe. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The Parties understand and agree that the submission of this Compact to a state court or courts, as provided for in this Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the state court or expand in any manner the waiver of sovereign immunity of the

United States in the McCarran Amendment, 43 U.S.C. §666, or other provision of federal law.

3. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, and Appendix 1, and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III as displayed in Appendix 1, and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.
4. Upon the issuance of a final decree by the Montana Water Court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in U.S. v. Big Horn Low Line Canal Company, et al., No. CIV-75-34-BLG (filed April 17, 1975) (hereinafter referred to as "Low Line Canal") and such claims may only be refiled if the Tribe exercises its option to withdraw as a Party to the Compact pursuant to Section A.3., of Article VII. This Compact shall be filed as a consent decree in Low Line Canal only if, prior to the dismissal of Low Line Canal as provided in Section B., of Article VII, it is finally determined in a judgment binding upon the State of Montana that the state courts lack jurisdiction over, or that the state court proceedings are inadequate to adjudicate, some or all of the water rights asserted in Low Line Canal.

C. Settlement of Water Right Claims. The water rights and other rights confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on Winters v. United States, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, and of performance by the State of Montana and the United States of all actions required by this Compact, including entry of a final order issuing the decree of the reserved water rights of the Tribe held in trust by the United States as quantified in the Compact and displayed in Appendix 1, the Tribe and the United States as trustee for the Tribe and Tribal members hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the State of Montana existing on the date this Compact is ratified by the State, the Tribe, and Congress and conditional upon a final decree, whichever date is later.

D. Binding Effect. After the Effective Date of this Compact, its terms shall be binding:

1. Upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana; provided that, the validity of consent, ratification, or authorization by the State is to be determined by Montana law;

2. Upon the Tribe, Tribal members, and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the Tribe's water right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe or a Tribal member, or any right arising under tribal law; provided that, the validity of consent, ratification or authorization by the Tribe is to be determined by tribal law; and

3. Upon the United States and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State of Montana; provided that, the validity of consent, ratification or authorization by the United States is to be determined by federal law.

E. Waiver of Claims or Objections.

1. After the Effective Date of this Compact, the Tribe, any individual claiming a right to use water based on or derived from the Tribe, and the United States on behalf of the Tribe or a Tribal member, shall be prohibited from objecting to, or bringing a claim against, the claim or holder of a right to use water based on the laws of the State of Montana, and any carriage, storage, or delivery facilities and rights of way associated therewith, based on the assertion that such right is invalid because 85-2-301(4), MCA, is invalid as applied to such right, or that such right is inconsistent with or otherwise impairs any right reserved by the Tribe under Article 4 of the May 7, 1868 Treaty of Fort Laramie. If and to the extent necessary to effectuate the intent of this paragraph the Tribe, any individual claiming a right to use water based on or derived from the Tribe, and the United States on behalf of the Tribe shall be deemed to have waived and relinquished any claims or objections they may have against a holder of a right to use water based on the laws of the State of Montana, and any carriage, storage, or delivery facilities and rights of way associated therewith, based on the aforementioned law and Treaty.

2. Waiver of claims by the Tribe against the United States shall be as provided by Congress.

ARTICLE VIII - LEGISLATION

The State and Tribe agree to seek enactment of any legislation necessary to effectuate the provisions and purposes of this Compact, and to defend the provisions and purposes of this Compact from all challenges and attacks; provided that, no provision of the Compact shall be modified as to substance except as may be provided herein.

IN WITNESS WHEREOF the representatives of the State of Montana, the Crow Tribe, and the United States have signed this Compact on the ____ day of____, 19____.

History: En. Sec. 1, Ch. 3, Sp. L. June 1999.

85-20-902. Findings and purpose. (1) It is the policy of the state of Montana to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7.

(2) Pursuant to this policy, the commission commenced negotiations with the Crow Tribe regarding the Tribe's water rights claims on November 12, 1981.

(3) A water rights compact has been agreed to between the commission and the elected representatives of the government of the Crow Tribe that, among other things, provides an allocation of water to the Crow Tribe and provides protection for certain water rights recognized under state law in Montana.

(4) As consideration for the Crow Tribe's agreement to protect certain water rights recognized under state law in Montana and to release certain legal claims asserted against the state, the state of Montana has undertaken an obligation to make certain payments for the benefit of the Crow Tribe and has agreed that any future production taxes collected by the state on production of coal owned by the United States in trust for the Crow Tribe will be paid to the Crow Tribe.

(5) The commission's agreement to the compact and the state's obligation to make payments to the Crow Tribe thereunder is conditioned, among other things, upon the final approval of the compact as set forth in the compact and as required by state, federal, and tribal law and upon the execution and delivery by the Crow Tribe of sufficient releases for the legal claims that the Crow Tribe has agreed to release.

(6) The purposes of 85-20-902 through 85-20-905 are to provide for the implementation of the compact, to provide a mechanism for settlement of certain claims against the state, and to provide a means to fund the state's financial obligations for the upcoming biennium under its water rights compact with the Crow Tribe.

History: En. Sec. 1, Ch. 1, Sp. L. June 1999.

85-20-903. Definitions. As used in 85-20-902 through 85-20-905, the following definitions apply:

(1) "Commission" means the reserved water rights compact commission.

(2) "Compact" means the Crow-Montana water rights compact as approved by the legislature in 85-20-901.

(3) "Department" means the department of natural resources and conservation.

History: En. Sec. 2, Ch. 1, Sp. L. June 1999.

85-20-904. Payment of settlement funds into escrow -- requirements for escrow agreement -- notice from attorney general. (1) The department shall enter into an agreement with the Crow Tribe and, if necessary under federal or tribal law, the United States, selecting an escrow agent to hold any funds paid by the state prior to the time they become payable to the Crow Tribe under this section. When an escrow agent has been selected, the department shall negotiate the terms of an escrow agreement with the Crow Tribe, the escrow agent, and if necessary under federal or tribal law, the United States. The terms of the agreement must govern the holding of the funds paid pursuant to the settlement. The escrow agreement must provide that any costs and fees payable for the management of the escrow fund will be borne by the fund, that the funds placed in the escrow account will be invested and held at interest in trust for the Crow Tribe, and that the contents of the fund will become payable to the order of the Crow Tribe only upon the occurrence of all of the following conditions:

(a) the compact has been approved by the Congress of the United States in a form satisfactory to the commission;

(b) the compact has been approved by the Crow Tribe in the manner provided by federal and tribal law, including approval of any tribal referendum presently or later required by federal or tribal law;

(c) the compact has been approved by the Montana water court for inclusion in the final decrees in all affected basins, and the order of approval has been affirmed on appeal or the time for appeal from the water court's approval has expired; and

(d) the Crow Tribe and the United States have furnished releases, pleadings, and proposed orders, in forms acceptable to the attorney general, with respect to all claims, including but not limited to claims for costs and attorney fees, asserted in the civil action captioned Crow Tribe of Indians v. State of Montana et al., Cause No. CV-78-110-BLG-JDS (D. Mont.), or any appeal pending in that action.

(2) Within 20 days after all conditions set forth in subsections (1)(a) through (1)(d) have been satisfied, the attorney general shall provide written notice of the satisfaction of the conditions to the escrow agent. The escrow agreement must provide that upon receipt of the written notice provided in this section, the escrow agent shall pay the funds in escrow to the order of the Crow Tribe. This section does not preclude the Crow Tribe from entering into an agreement with the escrow agent or any other entity for the holding of the funds in trust for the Crow Tribe for a period in excess of that provided in this section.

(3) The escrow agreement must provide that in the event the conditions set forth in subsection (1) do not occur within any time limits set in the compact, as those limits may be extended pursuant to the compact by agreement of the parties and the approval of the legislature, or if any party to the compact terminates the compact as provided in the compact prior to payment of the funds to the Crow Tribe as provided in subsection (2), the contents of the escrow fund, including funds paid into the escrow fund by the state and any interest earned on the escrow fund, will revert to the state.

History: En. Sec. 3, Ch. 1, Sp. L. June 1999.

85-20-905. Settlement of litigation -- disposition of production taxes collected on coal owned in trust for Crow Tribe. (1) The governor and attorney general may enter into an agreement with the Crow Tribe and the United States for the settlement of the civil action captioned Crow Tribe of Indians v. State of Montana et al., Cause No. CV-78-110-BLG-JDS (D. Mont.), or any appeal pending in that action.

(2) The agreement may:

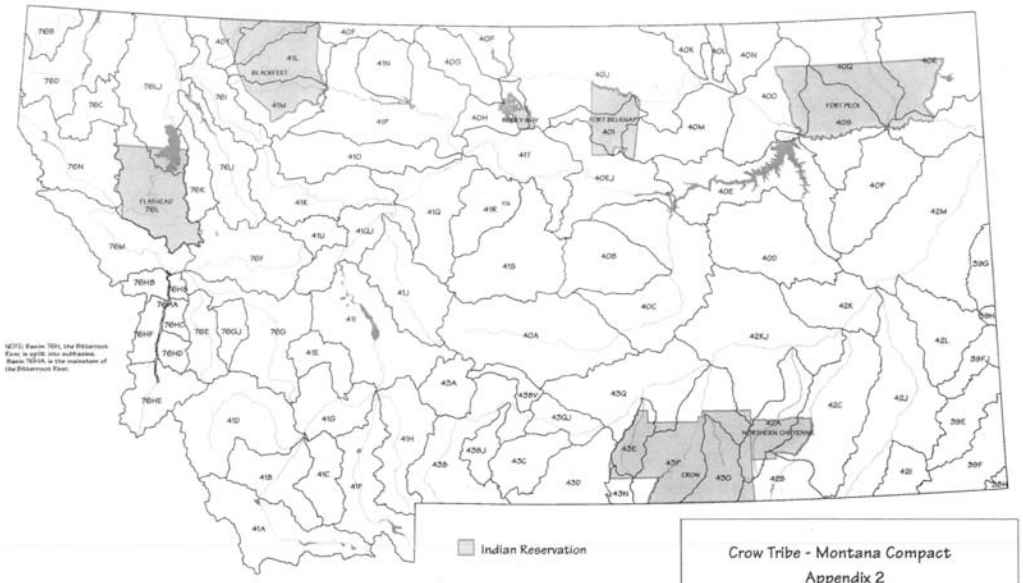
(a) include a release of all claims asserted by the Crow Tribe and the United States in the action, including but not limited to claims for costs and attorney fees;

(b) provide payments as authorized in the compact and 85-20-902 through 85-20-905; and

(c) include an agreement by which the proceeds of any production taxes levied under Montana law on the severance or production of coal owned by the United States in trust for the Crow Tribe are to be paid to the Crow Tribe.

History: En. Sec. 4, Ch. 1, Sp. L. June 1999.

Water Court Basins
in Montana



Crow Tribe - Montana Compact
Appendix 2

IN THE WATER COURT OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING AND RESERVED RIGHTS TO THE USE OF WATER OF THE CROW TRIBE RESERVATION, WITHIN THE STATE OF MONTANA	)))))	CASE NO. WC-**** PROPOSED DECREE

THIS MATTER is before the court on the joint motion of the State of Montana ("State"), the Crow Tribe of Indians ("Tribe"), and the United States of America ("United States") for the entry of a decree confirming the Tribal Water Right as recognized in the State of Montana – Crow Tribe Water Rights Compact of 1999 ("Compact"). Upon hearing the motion, objections thereto, the evidence, the claims of the United States on behalf of the Tribe, arguments of counsel, and being otherwise fully advised in the premises, the Court has determined that the motion should be GRANTED and it is hereby ORDERED, ADJUDGED AND DECREED that:

I. Name and Mailing Address of Holder of Right

The name and mailing address of the holder of the right is:

The United States of America in trust for the Crow Tribe of Indians, c/o Regional Director, Bureau of Indian Affairs, Rocky Mountain Regional Office, Federal Building, 316 North 26th Avenue, Billings, Montana, 59101.

II. Tribal Water Right

The following provisions are from Article III of the Compact, without change.

A. Basin 43P: Bighorn River.

1. Quantification - Source - Volume.

a. Natural Flow. The Tribe has a quantified water right to the Natural Flow of the Bighorn River for current uses developed as of the date this Compact has been ratified by the Montana legislature and new development within the Reservation of 500,000 AFY. The use of this right is subject to Sections A.6. and A.8.a., of Article III, and the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III.

(1). The Tribe has a right to divert or use or to authorize the diversion or use of water from the Natural Flow of the Bighorn River within the Reservation, subject to the terms and conditions in Section C., of Article IV.

(2). The Tribe may change the source of water from the Natural Flow of the Bighorn River to surface flow or storage of any tributary within the Bighorn River Basin within the Reservation or to Groundwater within the Bighorn River Basin within the Reservation, subject to the terms and conditions in Section C.2.a., of Article IV.

(3). The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water from the Bighorn River as part of that project is a use of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III, in the Bighorn River Basin, and the use of this water shall be subject to federal law.

b. Storage in Bighorn Lake.

(1). Subject to the approval of, and any terms and conditions specified by, Congress and to the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III, the Tribe shall be entitled to an allocation of 300,000 AFY of water stored in Bighorn Lake. The Tribe and the State agree to seek as a part of that allocation the following:

(a). not more than 150,000 AFY of the allocation provided in Section A.1.b.(1)., of Article III may be used or diverted as authorized by the Tribe, subject to the terms and conditions in Section C., of Article IV; provided that, not more than 50,000 AFY may be used outside the Reservation subject to the terms and conditions in Section C.2.c., of Article IV. This storage allocation is in addition to the Natural Flow Tribal Water Right provided in Section A.1.a., of Article III.

(b). not less than 150,000 AFY of the allocation provided in Section A.1.b.(1) of Article III shall only be:

(i) managed so as to be available as a Release during low flow periods pursuant to streamflow and lake level management plan agreed to under Section A.7., of Article III; or

(ii) used for beneficial purposes including diversions for consumptive uses in years of excess Natural Flows and excess storage, if any, when unappropriated or unallocated water is available, and subject to the terms and conditions in Section C., of Article IV.

(2). All other water stored in Bighorn Lake, except for the 6,000 AFY currently allocated by contract to the Montana Power Company, or its successor-in-interest, and the 30,000 AFY allocated by Congress to the Northern Cheyenne Tribe, shall be used only for flood control, production of power, maintenance of instream flows, maintenance of lake levels and carryover storage, consistent with Section A.7., of Article III and federal law.

2. Priority Date.

a. Natural Flow. The priority date of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III shall be May 7, 1868.

b. Storage. The priority date of the Tribal Water Right to waters stored in Bighorn Lake set forth in Section A.1.b.(1)., of Article III shall be the priority date of the water right held by the Bureau of Reclamation as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, and except for the 50,000 AFY that may be used outside the Reservation as provided in Section A.1.b.(1).(a)., of Article III, the Tribe may divert or permit the diversion of this water right from any place and by any means within the Reservation for use within the Reservation, provided that, any diversion structure of the Tribal Water Right upstream of the Two Leggins diversion on the Bighorn River will be constructed to bypass streamflows established or modified pursuant to Section A.7., of Article III.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections A.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV. Measures to prevent Adverse Affect may include Release of water from Bighorn Lake.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may

allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Streamflow and Lake Level Management Plan. Pursuant to this Compact, the Tribe, the Secretary, and the State shall develop a streamflow and lake level management plan for the Bighorn River, from the Yellowtail Afterbay Dam to a point immediately upstream of the Two Leggins diversion, and for Bighorn Lake. The streamflow and lake level management plan shall be agreed to within one (1) year after this Compact has been ratified by the Montana legislature. If the streamflow and lake level management plan is not agreed to by the Tribe, the Secretary, or the State the provisions of Section A.4.d., of Article VII apply. The streamflow and lake level management plan is not required to be implemented until the Effective Date of this Compact. The streamflow and lake level management plan may be modified at any time with the consent of the Tribe, the Secretary, and the State. The Montana legislature intends that the streamflow management plan should provide enforceable mechanisms that protect the long-term biological viability of the blue ribbon wild trout fishery on the Bighorn River from the Yellowtail Afterbay Dam to the Two Leggins diversion.

8. Basin Closure within the Bighorn River Basin.

a. In the Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, the DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

B. Basin 43O: Little Bighorn River.

1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Little Bighorn River Basin, except as provided for in Sections B.6., and B.7.a., of Article III, and except for water apportioned to Wyoming, if any, as determined by a court of competent jurisdiction or Congress. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water

in the Little Bighorn River Basin as part of that project is a use of the Tribal Water Right set forth in Section B.1.a., of Article III, and the use of this water shall be subject to federal law. Water stored in Willow Creek Reservoir also is a use of the Tribal Water Right.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section B.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Little Bighorn River Basin within the Reservation for use within the Reservation or in connection with Tribal Interests in the Ceded Strip subject to the terms and conditions in Section F., of Article III and Section C.2.b., of Article IV.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Little Bighorn Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections B.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation

shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Little Bighorn River Basin.

a. In the Little Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

C. Basin 43E: Pryor Creek.

1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Pryor Creek Basin within the Reservation, except as provided for in Sections C.6. and C.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water in the Pryor Creek Basin as part of that project is a use of the Tribal Water Right set forth in Section C.1.a., of Article III, and the use of this water shall be subject to federal law.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section C.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Pryor Creek Basin within the Reservation for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections C.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Pryor Creek Basin.

a. In the Pryor Creek Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

D. Basin 42A: Rosebud Creek.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Rosebud Creek Basin within the Reservation, except as provided for in Sections D.6. and D.7., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section D.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Rosebud Creek Basin for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Within the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Rosebud Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections D.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued within the Reservation is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. Outside the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin outside the Reservation are protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right to the same extent provided in the Northern Cheyenne - Montana Compact, Sections A.3.c.i. and ii., of Article II, 85-20-301, MCA. Protection from an assertion of senior priority in the exercise of the Crow Tribal Water Right for the Northern Cheyenne Tribal Water Right shall only be as provided in Section D.7., of Article III.

e. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, or outside the Reservation to the same extent provided in the Northern Cheyenne - Montana Compact, Section A.3.c.i. and ii., of Article II, 85-20-301, MCA.

f. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

7. Protection of Northern Cheyenne Tribal Water Rights within the Northern Cheyenne Reservation.

a. Except as provided in Section G.2., of Article III, the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA, is protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right.

b. New development, Change in Use, or Transfer of the Crow Tribal Water Right shall not Adversely Affect the exercise of the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA.

8. Basin Closure within the Rosebud Creek Basin within the Reservation.

a. In the Rosebud Creek Basin upstream from the point that Rosebud Creek or any tributary of Rosebud Creek leaves the Reservation, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

E. Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Reservation within Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River, except as provided in Sections E.6. and E.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., Article IV.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section E.1., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the drainages listed in Section E.1., of Article III within the Reservation for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections E.6.a.(1). and (2)., of Article III extends only to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in each drainage listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Reservation.

a. In the drainages listed in Section E.1., of Article III, upstream from the point that each stream or its tributaries leaves the Reservation, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

F. Tribal Water Right in the Ceded Strip.

1. Quantification - Source - Volume.

a. Tribal Interests in the Ceded Strip. As part of the Tribal Water Right, the Tribe has a right to divert a total of 47,000 AFY from surface flow, Groundwater, or storage within the Ceded Strip from portions of the Sarpy Creek drainage and Yellowstone River within Yellowstone River Basin between Bighorn River and Tongue River; Fly Creek drainage and Yellowstone River within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River; Pryor Creek Basin; and Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip; and, water imported to the Ceded Strip from the Little Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip. Diversion and use shall be subject to the terms and conditions in Sections C.1.c. and C.1.d., of Article IV.

(1). This 47,000 AFY is in addition to the Tribal Water Right set forth in Sections A.1., B.1., C.1., and E.1., of Article III, except that any diversion of this right from surface flow, Groundwater, or storage within the Bighorn River Basin shall be deducted from the Tribal Water Right as set forth in Section A.1., of Article III.

(2). No more than 47,000 AFY may be diverted and used in connection with Tribal Interests in the Ceded Strip from all water sources, provided that:

(a). no more than 2,500 AFY from all water sources including the Yellowstone River may be diverted upstream from the confluence of the Bighorn River and the Yellowstone River.

(b). no more than 7,000 AF may be diverted from all sources including the Yellowstone River in any month, provided that, aggregate uses from all sources not exceed 47,000 AFY.

b. Use limited to within the Ceded Strip. The Tribal Water Right of 47,000 AFY for use in connection with Tribal Interests in the Ceded Strip shall be used only within the Ceded Strip and shall not be considered a Change in Use or Transfer outside the Reservation for purposes of Section C.2.c., of Article IV.

c. Any portion of the 50,000 AFY set forth in Section A.1.b.(1).(a)., of Article III which may be used outside the Reservation may also be used in connection with Tribal Interests in the Ceded Strip in addition to the Tribal Water Right of 47,000 AFY set forth in Section F.1.a., of Article III.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section F.1.a., of Article III shall be May 7, 1868.

3. Period of Use. The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means for use in connection with Tribal Interests in the Ceded Strip within the Ceded Strip.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip may be used for beneficial purposes allowed by Tribal, federal and state law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law affected by the exercise of the Tribal Water Right in the Ceded Strip with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections F.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation Nos. 1781-r and 10006-r); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and

reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

d. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

G. Additional Rights to Water. As part of the water rights specifically set forth in Sections A., B., C., D., E., and F., of Article III, the Tribe has a right to water from the following sources:

1. Appurtenant Water Rights. For land within the Reservation acquired after the Effective Date of this Compact, the Tribe has the right to the use of any water right acquired as an appurtenance to the land. At such time that the acquired land is transferred to trust status, the water right appurtenant to the land acquired shall become part of and not in addition to the Tribal Water Right quantified in this Compact with a May 7, 1868 priority date, provided that, the acquired water right shall retain any protections set forth in this Compact. The Tribe shall notify DNRC of any acquisition of water in the Tribe's annual report and shall identify the water right acquired, as set forth in Section E.1., of Article IV. Any water right acquired shall be added as decreed by the Montana Water Court to the list of current uses of the Tribal Water Right as provided in Section E.2., of Article IV.

2. Exempt Rights.

a. Religious or cultural uses of the Tribal Water Right by Crow Tribal members within the Reservation in de minimis amounts shall be allowed without prior review by DNRC.

b. In accordance with the terms and conditions in Section C.1., of Article IV, TWRD may authorize development of the Tribal Water Right for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations necessary to protect lives or property.

c. Uses of the Tribal Water Right provided for in Sections G.2.a. and G.2.b., of Article III, are not subject to protection of water rights Recognized Under State Law provided in Sections A.6., B.6., C.6., D.6., D.7., E.6., and F.6., of Article III, or streamflows established or modified pursuant to Section A.7., of Article III.

H. Proposed Decree. For purposes of entry in the Montana Water Court, the proposed decree of the Tribal Water Right set forth in Article III is attached as Appendix 1. If there are differences between Appendix 1 and the Final Decree, the Final Decree shall control.

III. Distribution of Water Between the Parties.

The following provisions, taken from Article IV, Section A.4. of the Compact, are renumbered but otherwise unchanged:

When water availability is insufficient to satisfy all water rights under the Tribal Water Right and all water rights Recognized Under State Law within the Reservation, administration and distribution shall be as follows:

1. distribution between the water administered by the Tribe and the United States for current uses of the Tribal Water Right within the Reservation developed as of the date this Compact has been ratified by the Montana legislature and the water for water rights Recognized Under State Law within the Reservation with a priority date before this Compact has been ratified by the Montana legislature shall be on an equitable basis in proportion to the amount of water required for Tribal water use as listed pursuant to Section E.2., of Article IV, and the amount of water required for water rights Recognized Under State Law, provided that, the Parties recognize that distribution may not be on a precise proportional basis due to the need to take into account the physical constraints of water delivery. Administration and distribution by the Tribe, the United States, and the State within their proportional shares shall be pursuant to Tribal, federal, and state law respectively, and shall be coordinated as necessary. This distribution shall not modify the right of a holder of a water right Recognized Under State Law to seek enforcement of such water right against other water rights Recognized Under State Law in priority without the agreement of the water right holder.

2. Future development of the Tribal Water Right after this Compact has been ratified by the Montana legislature shall be enforced as junior in priority to the water rights subject to a proportional distribution as set forth in Section A.4.a., of Article IV.

3. nothing in Section A.4.a., of Article IV shall prevent water users from agreeing to an alternative water distribution plan on the basis of individual water rights pursuant to applicable state, Tribal, or federal law.

IV. Change in Use or Transfer of the Tribal Water Right Outside the Reservation.

The following provisions, taken from Article IV, Section C.2.c. of the Compact, are renumbered but otherwise unchanged:

1. Except as otherwise provided in this Compact, the Tribe, pursuant to federal law, may make or authorize a Change in Use or a Transfer of the Tribal Water Right for up to 50,000 acre-feet of water as provided in Section A.1.b.(1).(a)., of Article III, for use outside the Reservation; provided that, any Transfer shall be for a term not to exceed 100 years, and may include provisions authorizing renewal for an additional term not to exceed 100 years; and provided that, no such Transfer shall be a permanent alienation of the water Transferred. Any Change in Use or Transfer of any such water right involving a point of diversion or place of use located outside the Reservation shall be considered a use outside the Reservation, except as provided in Section F., of Article III and Section C.2.b., of Article IV; and, further provided that, any use of Tribal water rights described in this Compact outside the Reservation shall not be deemed to convert such rights to rights arising under state law, and non-use of such rights outside the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the rights. The Tribe may change the point of diversion or purpose or place of use of the Tribal Water Right back to the Reservation without reduction in the amount of water provided in the Compact.

(a). Applicable Law. No person may initiate a use, Change in Use, or Transfer of a Tribal water right set forth in this Compact outside the Reservation without first complying with applicable state law. Approval of an application for a use, Change in Use, or Transfer outside the Reservation by the State shall be conditioned on a valid Tribal authorization for such use, Change in Use, or Transfer by the Tribe. The applicant shall provide DNRC with proof of a valid Tribal authorization prior to initiating the use, Change in Use, or Transfer.

(b). Diversion Facilities. With respect to diversion or transportation facilities located outside the Reservation which are to be used in connection with the exercise of a water right set forth in this Compact, the Tribe or Persons using such water right shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of such water right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

V. Relationship with Compact

This decree is based upon the Compact, and by this reference incorporates the definitions contained therein. The Tribal Water Right confirmed in this decree is subject to all conditions upon use and administration set forth in the Compact. Nothing in this decree is intended to modify, alter, or amend the terms and provisions of the Compact.

CROW TRIBE-MONTANA WATER RIGHTS SETTLEMENT—MONTANA CODE ANNOTATED—§ 85–2–901 (2007)

Background of the Settlement

In the fall of 1998, officials from the Crow Tribe approached the Montana Governor and Attorney General with a proposal for a settlement of three important issues that had gone unresolved for decades: tribal water rights, coal severance tax litigation, and "Section 2" land ownership.

The Montana Reserved Water Rights Compact Commission and the Crow worked closely with the negotiating team for the United States and engaged in intensive negotiations and public involvement on the water rights issues. In April, 1999, the Tribe and Compact Commission finalized a compact which recognizes a significant water right for the Tribe while protecting the rights of existing water users. At the same time, the Governor and Attorney General negotiated a final settlement of the contentious coal tax litigation. These two agreements were ratified by the Montana Legislature in special session on June 16, 1999. The remaining approval process for the Crow Tribe water rights settlement includes Congressional ratification, a Crow Tribal vote and approval by the Montana Water Court. The "Section 2" issue is addressed by the Tribe and the United States in separate Congressional legislation.

Crow Water Rights Compact

In general, the Crow water rights compact:

- provides water from surface flow, groundwater and storage for the Crow Tribe for existing and future Tribal water needs (Article III)
- provides protection for all state and Tribal current water uses in the affected water basins from the Tribe's future exercise of its water rights; also protects the local conservation districts' right to future water use. (Article III)
- "closes" certain basins and sub-basins to new water appropriations under State law; small domestic and stock uses, as well as changes and transfers of water rights, can continue. (Article III)
- creates an administrative process for resolution of any future disputes between Tribal and non-Tribal water users. (Article IV)
- Authorizes the State to pay the Tribe the $15 million plus interest in escrow in consideration for the Tribe's dismissal of the coal severance lawsuit and for the State's "cost-share" for the water rights settlement and also authorizes the Governor and Attorney General to agree that any future State production taxes on the Tribe's coal will be paid to the Tribe. (Article VI)

Crow Tribal Water Right

Bighorn River

- 500,000 AFY of natural flow of the River including groundwater for existing and future Tribal uses.
- The United States will allocate 300,000 AFY of storage in Bighorn Lake to the Tribe.
  - 150,000 AFY of the 300,000 AFY used for Tribal development,
    - not more than 50,000 AFY from this 150,000 AFY for use off-Reservation.
  - 150,000 AFY of the 300,000 used only to supplement the natural flow right.
- All of the rights listed for future Tribal development can be developed only if there is no adverse effect on current Tribal and non-Tribal water uses.
- The State will not issue any new appropriations on this River, down to the confluence of the Yellowstone River, however, new small domestic and stock uses as well as changes and transfers can continue. Local conservation districts can also develop their water reservations.
- A management plan was developed by the Tribe, State and United States for instream flows and lake levels.

Little Bighorn River and Pryor Creek

- The Tribe may use all available surface and groundwater on the Reservation not needed to satisfy current water uses.
- In both basins the State will not issue any new appropriations, however, new small domestic and stock uses as well as changes and transfers can continue.

Rosebud Creek

- The Tribe may use all available surface and groundwater on the Reservation not needed to satisfy all current downstream uses provided for in the Northern Cheyenne Compact and certain portions of the Northern Cheyenne Tribal Water Right are protected.
- The basin is closed to new appropriations under State law on the Reservation, however, new small domestic and stock uses as well as changes and transfers can continue.

Bitter Creek, Blue Creek, Bluewater Creek, Cottonwood Creek, Dry Creeks (Tongue River Basin and Yellowstone Basin) Five Mile Creek, Fly Creek, Sage Creek, Sarpy Creek, Squirrel Creek, Tanner Creek and Young's Creek

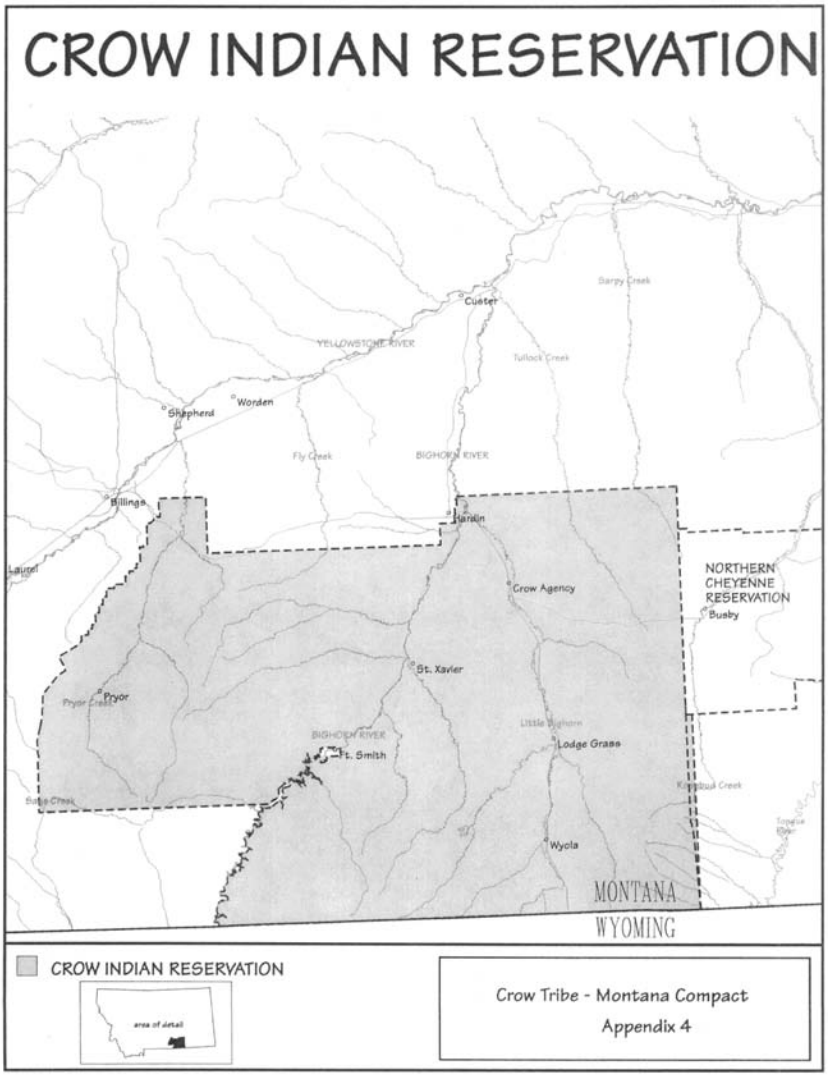
- The Tribe may use all available surface and groundwater on the Reservation not needed to satisfy current water users.
- The portion of these drainages on the Crow Reservation is closed to new appropriations under State law, however, new small domestic and stock uses as well as changes and transfers can continue.

Ceded Strip

- The Crow Tribe will have the right to use 47,000 AFY from any water source on lands or interests on the Ceded Strip which the Congress restored to the Tribe or on any lands acquired and held in trust for the Tribe. If the water source is the Bighorn River, the amount developed shall be deducted from the on-Reservation water allocated to the Tribe from the Bighorn River. No more than 7,000 AFY can be diverted in any one month.

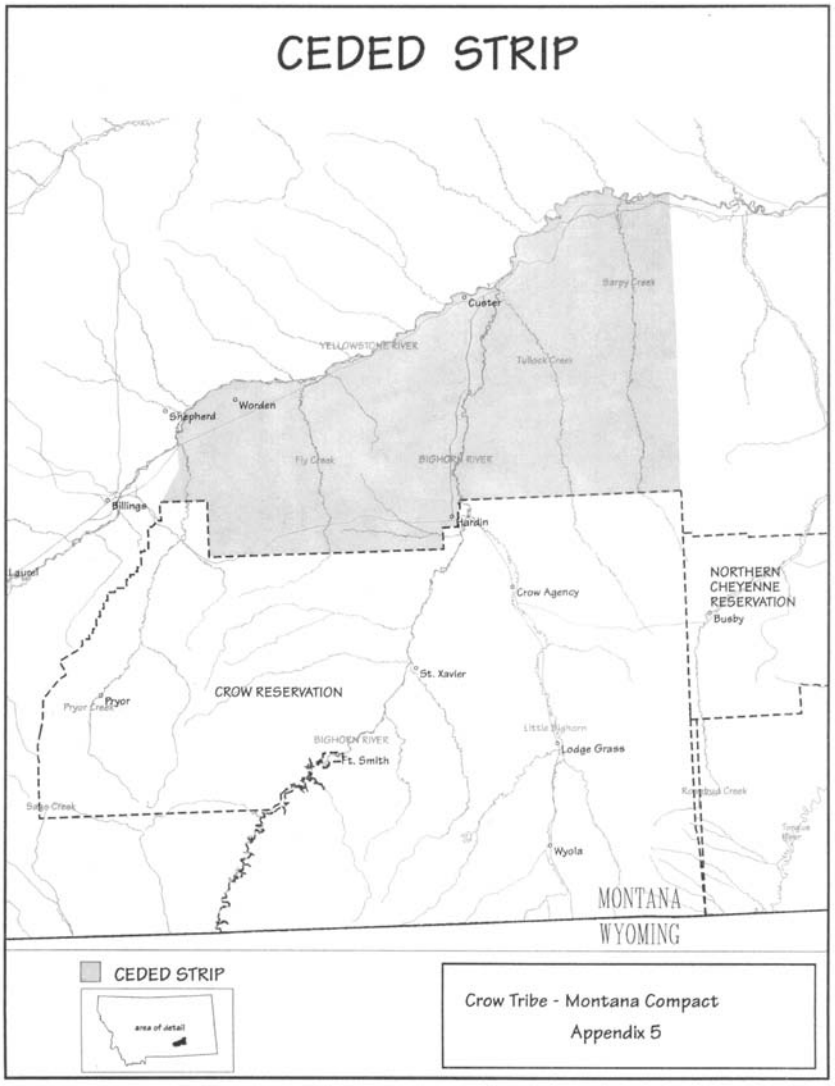
Administration/Dispute Resolution

- The Tribe will administer the Tribal water right. The State will administer water rights recognized under State law. The BIA Project will use part of the Tribal water right and will continue to be administered by the BIA under applicable federal law.
- All Tribal development, either on the Reservation or the Ceded Strip, will be reviewed by the Tribe and the Montana Department of Natural Resources and Conservation to determine if it will impact any current water users. Any unresolved disputes will be referred to the Crow-Montana Compact Board.



CROW INDIAN RESERVATION

Crow Tribe - Montana Compact
Appendix 4



SUPPLEMENTARY INFORMATION SUBMITTED BY CHARLES J. DORAME, CHAIRMAN, NORTHERN PUEBLOS TRIBUTARY WATER RIGHTS ASSOCIATION

Following the Committee hearing on S. 3381 held September 11, 2008, Chairman Dorgan left the record open for two weeks in order to receive supplemental statements to include in the written record. The following statement is intended to supplement testimony both written and oral previously provided as well as issues raised in the written statement by Michael Bogert, Chairman of the Working Group on Indian Water Settlements and Counselor to the Secretary of the Interior, presented on behalf of the Administration.

The Administration raised several points of concern in its spoken testimony: cost of this settlement and the waiver provisions of this bill. We will address them, and clarify other points in this supplemental statement.

1. *The Role of the Criteria and Procedures.* Mr. Bogert told Senator Domenici, the Criteria and Procedures are "guidelines." He testified "the Criteria and Procedures address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties." The Aamodt Litigation Settlement Act satisfies all of these goals.

The settlement of the water rights claims of the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque as reflected in S. 3381 satisfies the primary requirements and intent of the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims,* 55 F.R. 9223 (Mar. 12, 1990). The settlement as codified in S. 3381 is a necessary and worthy federal investment. It will halt escalating federal costs that result from inadequate, economically inefficient and outdated water infrastructure at the Pueblos. The settlement also will address long-term water planning and water administration needs in a desert environment where continued, uncontrolled groundwater mining by the non-Indian population would run counter to federal interests. Solving these problems, as proposed in S. 3381, while finally and fully quantifying the water rights of the four Pueblos and resolving one of the oldest pending federal court cases in the country is a sound and essential federal investment. It will promote economic efficiency and tribal self-sufficiency going forward by establishing a Regional Water System which will supply much-needed water into a water short basin. The Regional Water System will honor the individual governmental authority of the five participating entities, the four Pueblos and Santa Fe County, while providing for a unified and economically efficient approach to water supply.

2. *Unified System.* The settlement and attendant Regional Water System promotes economic efficiency because the Regional Water System will be a unified system operated jointly by the four Pueblos and Santa Fe County through an Operating Agreement required by S. 3381. Rather than request the Bureau of Indian Affairs to operate the project for the Pueblos, the Pueblos are willing to assume significant risk and substantial burden by participating in the Regional Water Authority as independent governments. The settlement therefore embodies not only economic efficiency, but also tribal self-sufficiency and self-determination, consistent with longstanding Department of Interior policy. Local control of the project will also ensure economic efficiency.

Without explanation, the Administration expressed the concern that the Aamodt Litigation Settlement Act would not "promote economic efficiency." The settlement requires a Regional Water System as an essential element of this settlement to serve the four Pueblos and non-Indians residing in Santa Fe County, New Mexico. With the encouragement of the Administration and the New Mexico congressional delegation, all five governments agreed that the Regional Water System would be administered through a Regional Water Authority ("RWA") as a unified system both as to infrastructure and operation. Our Cost-Sharing and System Integration Agreement starts with a unified operation of the Regional Water System including all distribution lines. While an individual government could "opt-out" and operate its distribution system pursuant to contract with the RWA, there will be economic consequences to be specified in the Operating Agreement for the RWA, and the system itself remains an integrated system. The majority of the system will be operated by the RWA in any event.

Our engineering consultants confirm that the unified approach is more economically efficient than having separate smaller community water systems for each of the four Pueblos, and one serving the many non-Indians living in and around the Pueblos. The Pueblo Lands Act history submitted by the Pueblos of San Ildefonso and Pojoaque explain how hundreds of non-Indian land owners came to own property within Pueblo grant boundaries. Given the crowded nature of the Pojoaque River Basin, the unified system both in the infrastructure and operational dimensions is certainly more economically efficient than several smaller ones.

3. *Validity of Cost Estimates.* Mr. Bogert notes that we rely on an Engineering Report dated June 2007 "that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to ensure reliability." The Bureau of Reclamation ("BoR") provided funding to the NPTWRA through a Pub.L. 93–638 contract in order to have significant amounts of engineering work done in connection with the settlement study regarding the regional water system for this settlement that BoR published in 2004. After our congressional delegation asked for more detailed cost estimates, the BoR provided additional funding through the 638 contract to the NPTWRA which resulted in the Engineering Report dated June 2007

prepared by HKM Engineering, Inc.* The costs in that report are best estimates as of October 2006. The legislation calls for those costs to be indexed. See Section 117(a)(3) ADJUSTMENT. This section calls for annual adjustment to the construction costs for the regional water system "to account for increases in construction costs since October 1, 2006, as determined using applicable engineering cost indices." The Bureau of Reclamation maintains such indices.

HKM Engineering has experience in planning, designing, cost estimating, and constructing regional water systems planned or under construction at federal expense in several states. The HKM cost summary at Table 5–1 for the regional water system includes line items for "unlisted items (variable), contract add-ons at 17.5 percent, contingency at 20 percent, and non-contract costs at 29.5 percent–31 percent". These contingencies are reasonable at this stage of planning. We are not at the final design stage yet. This legislation needs to become law in order for that final design to occur.

The Aamodt settlement parties, and especially the four Pueblos in the NPTWRA think we have done the best we can at this point by having a reputable engineering firm give its best estimate for constructing the regional water system, including significant contingencies in the budget.

As Senator Domenici pointed out, the cost for the settlements in S. 3381 can only be expected to increase in the future. The six months to five years which Mr. Bogert said might be required for a Bureau of Reclamation Feasibility Study would not necessarily produce a more accurate estimate, but it certainly would produce a more expensive one.

Mr. Bogert expressed the Administration's concerns about "access limitations at the diversion point for the system on the Rio Grande." We are not certain what this refers to specifically. However, the surface water point of diversion, and the raw water pumping station will be located within San Ildefonso Pueblo where the Rio Grande narrows, near a highway bridge. The federal concern has been specifically addressed with HKM staff, who assure us that they are aware of the various rights of way, pipelines, roadways, and drainage patterns in that area and that the project as planned can be built there in harmony with them. As Mr. Bogert notes, final project design is the time to resolve such issues. We ask the Committee and the Congress to approve this legislation so that we can move on to the final design stage where this issue can be more properly addressed. It is not a reason to hold up action on the bill now.

4. *Operation Maintenance and Replacement.* The bill includes a limited amount of federal funding to supplement the payment of operation, maintenance and replacement costs ("OM&R") for the Pueblo portion of the Regional Water System in the early years of the project. The Regional Water System would serve the Pueblo and non-Pueblo communities in the basin and is the engine that drives this settlement. The project is necessary to meet the long term needs of the basin residents and to preserve the long term health of the underlying aquifer. But while it is clear that the projects and the provision of a reliable water infrastructure will further tribal economic development and self-sufficiency, the financial benefits from the project will not be felt for some time by the Pueblos. As a result, it is necessary to provide assistance to the Pueblos in paying the OM&R costs for the project to ensure the successful implementation of the settlement.

The limited authorization of OM&R funding provided in the bill is focused on the issues associated with the unique circumstances of constructing a federal water supply project as a vital component of a tribal water rights settlement. The first category of funds would provide for the replacement costs during the first fifty years of the project. Given the role of the project in the settlement and the permanent nature of the settlement, the Pueblos believe that it is appropriate for the United States to pay the tribal replacement costs for this time period. Second, funding is provided to assist with the Pueblo transition from their existing systems to the new water system. Third, funding is supplied to pay the operating costs of the hybrid well system to ensure that these features provide the intended benefit in the early years of the project. Fourth, funding is made available for the payment of OM&R during construction. Finally, funding is provided to pay for the "unused Pueblo capacity" before the full Pueblo demand is in place. This category of funds addresses the fact that the use of the project would increase over time. This settlement project was designed to meet the long term needs of the Pueblos with the result that the full demand for the project water supply will take time to develop. Thus, in the short term, there will be fewer users of the projects to bear the OM&R. While that will result in a reduction in the variable costs, the fixed costs for the project will not reflect the reduced usage in the early years.

---

*The information referred to has been retained in Committee files.

5. *Waivers.* The Aamodt Litigation Settlement Act (S. 3381) provides for comprehensive waivers and releases with regards to claims against the Federal Government as to any future liability relating to water rights claims by the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque in the Pojoaque Basin. The waivers and releases contained in the settlement legislation stem from waivers negotiated in the context of court ordered mediations over the course of six years. The United States through the Department of Justice participated fully in those negotiations. The waivers and releases contained in the settlement legislation are consistent with waivers and releases contained in other New Mexico Indian water rights settlement and are designed to provide finality and certainty for all parties as to future liability. Nevertheless, as we have been in the past, the Pueblos continue to engage the Administration on the issue of waivers.

6. *San Juan-Chama Project and Water Supply/San Juan Chama Project Contract.* The Aamodt Litigation Settlement Act (S. 3381) requires the United States to acquire a firm and reliable supply of water for the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque for purposes of supplying water through the Regional Water System. The water will provide a basis for important economic development and future domestic supplies for the Pueblos. The water supply required by the settlement has been identified and secured and the settlement legislation provides the necessary funding for this essential water supply.

Part of the water supply required under the Settlement Agreement will be comprised of water from the San Juan-Chama Project. The remainder will be provided pursuant to a combination of 302 acre-feet of Nambé Pueblo reserved water rights, plus State law water rights acquired by the United States from Santa Fe County. A portion (1,079 acre-feet per annum) of the water supply required under the Settlement Agreement will be made available to the Pueblos through a contract with the Department of Interior for water rights held by the Secretary pursuant to the San Juan-Chama Project. The San Juan-Chama Project was authorized by Congress pursuant to the Act of June 13, 1962 (76 Stat. 96, 97) and pursuant to Section 11 of the Act, the Department of Interior through the Secretary, is authorized to contract for water made available under the Project.

The 1,079 acre-feet per annum of San Juan-Chama Project water which will be made available to the Pueblos pursuant to contract with the Secretary is from two sources of uncontracted San Juan-Chama Project water; 369 acre-feet per annum will be made available from the 2,990 acre-feet per annum remaining unallocated from the firm yield supply of the Project; 710 acre-feet per annum will be made available from San Juan-Project water historically allocated by the Department of Interior to offset evaporative losses in the U.S. Army Corps of Engineers Cochiti Reservoir pursuant to Pub. L. 88–293, 78 Stat. 171 (Mar. 26, 1964). Public Law 88–293 authorizes the use of San Juan-Chama Project water for purposes of offsetting evaporative losses at Cochiti Reservoir but does not allocate or require any specific amount of water for such purpose. Rather, the legislation provides only that the Secretary is authorized to provide "sufficient water annually to offset the evaporation. . . ." The Secretary is given exclusive authority and discretion regarding the allocation of San Juan-Chama Project water vis-à-vis Cochiti Reservoir and the Secretary's obligations under Public Law 88–293 with regard to providing sufficient water to offset evaporative losses.

Historically, the Secretary has allocated (but not contracted) 5,000 acre-feet per annum of San Juan-Chama Project water to offset any evaporative losses in Cochiti Reservoir. Recent analyses by the Department of Interior through the Bureau of Reclamation have demonstrated that 5,000 acre-feet per annum is not necessary for purposes of satisfying evaporative losses in Cochiti Reservoir on an annual basis. Through these analyses the Department of Interior has determined that at least 710 acre-feet per annum of the 5,000 acre-feet per annum historically allocated to Cochiti Reservoir is available for purposes of the settlement. The remainder of the San Juan-Chama Project water the Secretary will make available to the Pueblos pursuant to S. 3381, 369 acre-feet per annum, will come from the remaining 2,990 acre-feet per annum of uncontracted, unallocated water from the firm yield San Juan-Chama Project supply.

The parameters of the United States obligations and responsibility to the Pueblos with regard to the San Juan-Chama Project supply will be addressed in the context of the contract required by the settlement legislation and as required by Section 11 of the San Juan-Chama Project Act.

7. *Summary and Conclusion.* Once again on behalf of the Pueblo of Tesuque, San Ildefonso, Pojoaque and Nambe, We thank the Senate Committee on Indian Affairs for convening the hearing on S. 3381 as promptly as it did. We hope this supplemental Statement assists the Committee and Congress in putting the Administra-

tion's concerns in perspective. We urge mark up on S. 3381 and action by the full Congress as soon as possible.

PREPARED STATEMENT OF LEON ROYBAL, GOVERNOR, PUEBLO DE SAN ILDEFONSO

My name is Leon Roybal, and I serve as Governor of the Pueblo de San Ildefonso. This is my first year as Governor. I follow the footsteps of previous governors and tribal councils, as well as direction of our community which resulted in our Pueblo joining the Water Right Settlement for the Rio Grande Tributary which enters that river at San Ildefonso. Some call it the Pojoaque River Basin which is the area affected by the Aamodt Litigation settlement Act, Title I of S. 3381, when enacted, approves that settlement, directs the United States to join the settlement, and authorizes the federal funding needed to implement the settlement.

First, we want to thank Senator Bingaman and Senator Domenici for introducing S. 3381, especially Title I, the Aamodt Litigation Settlement Act. On behalf of our Pueblo, we thank the committee for scheduling S. 3381 for today's hearing. We appreciate the committee and the Congress for its history of supporting negotiated Indian water rights settlements, and urge approval of S. 3381 as soon as possible to extend that commitment and support for the 5 pueblos appearing before the committee today. The Pueblo de San Ildefonso is one of 4 Pueblos that have been cooperating together since 1974 through the Northern Pueblos Tributary Water Rights Association ("NPTWRA" or "Association"). In the interest of time, our NPTWRA Chairman speaks to the committee on behalf of the 4 Pueblos affected by the Aamodt Litigation Settlement Act. Attached to my statement is the Pueblo de San Ildefonso historical summary of water rights in the Pojoaque River Basin, New Mexico which are being protected by the Aamodt Litigation Settlement Act. The Pueblos want Congress to be aware of prior federal actions which give rise to the need for this federal legislation to protect Pueblo Indian Water Rights east of the Rio Grande in the Pojoaque River Basin.

Passage of the Aamodt Litigation Settlement Act and federal funding for the U.S. to (a) acquire water for the Pueblos, and (b) build the portion of the regional water system required by the settlement to serve the Pueblos, and the (c) provide funds contained in the act, are needed to accomplish complete settlement of the Pueblo Indian Water Rights involved in this case.

The Pueblos made significant compromises to achieve this settlement. However, the benefits to our Pueblos justify the support provided by our past leaders and our community. The settlement which will be approved by this legislation achieves several vital goals for our Pueblo.

1. *Water Rights Secured.* The settlement quantifies water rights to meet present and future needs for each of the 4 Pueblos, including our first priority rights.

2. *New Community Water System.* Our Pueblo has an aging water system that was mostly constructed by the Indian Health Service many years ago. Funds provided by this settlement will give us a unified community water system, while delivering safe drinking water for our community and its future growth. The settlement requires the U.S. to provide 2,500 acre-feet yearly (afy) for Pueblo use through a Regional Water System. The bill authorizes the U.S to fund the portion of that System to serve each of the Four Pueblos.

3. *Strengthen Irrigation.* Pueblo Indians have been farming since time and immemorial. Part of the work authorized by S. 3381 will allow our Pueblo to take better advantage of limited surface water supplies which are needed to allow our Pueblo people to continue irrigation in the future.

4. *Regional Water System and Water Supply.* The settlement calls for the United States through the Bureau of Reclamation to construct a Regional Water System ("RWS") to serve the 4 Pueblos and many non-Indians and the Pojoaque River Basin. This will be administered by an entity established by the 4 Pueblos and Santa Fe County. The Water Administration provisions in this settlement respect tribal sovereignty while providing a means for the seven non-Federal Governments involved in the settlement to work cooperatively to meet the needs of our respective communities.

The settlement requires the U.S. to provide 2,500 afy for Pueblo use. Those rights have been identified by the Department of Interior, but will need to be secured by contract and transferred to the RWS point of diversion at San Ildefonso Pueblo.

5. *Economic Value Increased.* With the quantification of Pueblo Indian Water Rights, securing and transferring 2,550 afy of the water rights, construction of a Regional Water System and provision of the funds in the bill, our Pueblo will have infrastructure to support future economic development. It will allow us to better uti-

lize our water rights, and obtain significantly more economic value from them than we have been able to until now.

Federal Funding Required. The bill has written authorized the Bureau of Reclamation to construct the Regional water system with federal funding covering the portion needed to rebuild the safe drinking water systems at each of the 4 Pueblos. It also authorizes support for Operation, Maintenance, and Replacement ("OM&R") for a transition from our current situation until we are able to utilize the full amount of our pipe line water.

The Settlement Agreement calls for the U.S. to work with the State to develop a new administrative model for the area affecting the Pojoaque River Basin—The U.S. must also work on a historic water supply study. It must also negotiate contracts with the 4 Pueblos and transfer those 2,550 afy of water rights to the diversion at San Ildefonso Pueblo.

Amendment Requested. After S. 3381 the department of Interior staff informed the Aamodt Litigation Settlement parties that the federal funding commitment by the Bureau of Indian Affairs ("BIA") maintained continuously since 1974 to provide independent technical and legal services and tribal consultation needed for independent Pueblo representation in the Aamodt case may dry up very soon. Since the settlement agreement will not be complete until 2016, and may take until 2021, we request that congress authorize and direct continue federal funding for independent Pueblo participation in the process.

The computer modeling historic supply study, and transfer of 2,550 afy of water rights, including negotiating a contract for San Juan Chama water project will be costly. Please amend S. 3381 in mark-up to require the Bureau of Reclamation to make funds available for those purposes, and to continue funding independent Pueblo involvement to make sure the settlement is well done.

The NPTWRA provided proposed language to our congressional sponsors that will accomplish this, and ask the committee to address this need at mark-up. Additional funds for the technical work needed to implement the water supply and administration of the settlement will be costly. Independent Pueblo technical support, representation, and oversight to assure successful implementation of the settlement is a small fraction of the total federal funds needed to implement the Aamodt Litigation Settlement Act, however, it is very important to our small Pueblos. San Ildefonso currently has very limited economic resources. Continuing the federal funding commitment until the settlement is complete is needed to accomplish the goals approved by the 10th Circuit Court of Appeals in 1976, and confirmed by the comptroller general later that year.

Conclusion. Passage of the Aamodt Litigation Settlement Act, including provision of a relatively small additional amount of federal funding to accomplish complete implementation of this settlement will give San Ildefonso and the 4 Pueblos, as well as our non-Indian neighbors in the Pojoaque River Basin, infrastructure that will help protect our environment, conserve scarce water resources provide safe drinking water and secure the Pueblo's federally protected and quantified water rights. With that infrastructure and protection, the Pueblos will be able to develop our Tribal economies in peaceful cooperation with our neighbors in the Pojoaque River Basin.

On behalf of the Pueblo de San Ildefonso, we urge this committee, as well as the Congress as a whole, to approve the Aamodt Litigation Settlement Act as soon as possible. Additional appropriations will be need in future years to accomplish the purpose of this Act. However, enacting the Aamodt Litigation Settlement Act now provides the foundation for the Federal Government to fulfill its trust responsibility to protect the ability of San Ildefonso and each of the 4 Pueblos to use water to meet our present and future needs.

Thank you for the opportunity to provide this statement on S. 3381.

Attachment

THE PUEBLO DE SAN ILDEFONSO HISTORICAL SUMMARY OF WATER RIGHTS IN THE POJOAQUE RIVER BASIN, NEW MEXICO WHICH ARE BEING PROTECTED BY THE *Aamodt* Litigation Settlement Act—September 8, 2008

I. Purpose

The purpose of this bill is to approve the settlement, *State ex re. State Engineer v. Aamodt* (D.N.M. No. 66cv6639), an adjudication of the federally recognized water rights of the Pueblos of Nambe, Tesuque, Pojoaque and San Ildefonso. When the United States succeeded Mexico as sovereign over the territory of New Mexico, the Pueblos' water rights were extensive. In 1985 these rights were described by a federal court as "a prior and paramount right to a sufficient quantity to meet their present and future needs." 618 F.Supp. 993, 998 (D.N.M. 1985). The Court stated

those rights are based on unextinguished aboriginal rights, except as modified by the Pueblo Lands Act of 1924. Id. at 1009–1010. Articles 8 and 9 of the Treaty of Guadalupe- Hidalgo (ratified May 30, 1848) proclaimed July 4, 1848, required the United States to recognize and protect these rights recognized under both Spanish and Mexican law. 9 Stat. 922, 929–930. The United States did not protect the Pueblos' water rights from encroachment, and the effect was to destroy the economic base of the Pueblos' previously prosperous agricultural economy. Enacting this bill is an essential milestone that will commit the Federal Government to building infrastructure for our 21st century Pueblo economy.

II. Pueblo Land and Water Tenure Under U.S. Sovereignty

A. The Pueblo Lands Act

The Pueblos of New Mexico look to the Pueblo Lands Act of 1924 as amended and the 1933 Pueblo Compensation Act to define their rights to lands and water within the exterior boundaries of the area recognized as each Pueblo's Spanish land grant. As some of the oldest communities in the United States, Pueblo land tenure and water rights are grounded in its aboriginal title, as modified by the Spanish and Mexican governments prior to U.S. sovereignty in 1848. The purpose of the Pueblo Lands Act of 1924, as amended, was (1) to provide redress to the Pueblos for damages due to the negligence of the United States in protecting the land and water resources of the Pueblos; and (2) to clear up land title problems attributable to that negligence.

As the oldest communities in the Southwest, the Pueblos held the best agricultural lands in New Mexico. Also, as desert agriculturalists, the Pueblos had access to the best water supplies for agriculture. With the nearby Spanish capital at Santa Fe, the Four Pueblos in *Aamodt* were surrounded by Spanish colonists not long after the Spanish entrada. Spanish and Mexican law provided protection for Pueblo lands and waters, preventing encroachment, and initially the United States took the same position, applying the Non-Intercourse Act to the Pueblos in 1851. This was not enough to protect the Pueblos' lands and water. The best agricultural lands served by ditches were taken from the Pueblos between 1848 to the enactment of the Pueblo Lands Act in 1924 through all kinds of actions, from squatting on the land to outright fraud.

Despite the fact that the territory of New Mexico deemed the Pueblo Indians to be incapable of voting in one of the first territorial laws, Act of February 16, 1854, Section 70, the New Mexico territorial courts ruled that the Non-Intercourse Act did not apply to the Pueblo Indians, primarily because they appeared to be too civilized. This decision was affirmed by the U.S. Supreme Court in *United States v. Joseph,* 94 U.S. 614 (1876). ("They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof."). It took almost four decades for the U.S. Supreme Court to overrule the *Joseph* decision in *United States v. Sandoval,* 231 U.S. 28, 48 (1913). For that period from the end of Mexican rule until the *Sandoval* decision, there was no protection for the Pueblos from encroachment on their lands and waters.

The actions of the United States' Courts and the failure of Congress to address the matter had the effect of taking the land and water necessary for the Pueblos' agricultural economy. After the *Sandoval* decision, the United States attempted to stop the taking of Pueblo land and water. In 1920 Special Attorney for the Pueblo Indians Richard H. Hanna filed five ejectment suits in federal court against all non-Indians on Pueblo lands. One of the five suits *United States v. Pedro Garcia,* Cause no. 604, proceeded to trial but no decision was issued because the lawsuits were withdrawn at the request of the Attorney General. The Department of the Interior had decided to introduce legislation to resolve the question of non-Indian title to Pueblo lands.

In 1921 Senator Holm O. Bursum of New Mexico introduced two bills to settle the Pueblo land issue. These bills evoked substantial opposition due to the extreme favoritism shown non-Indian claimants and were withdrawn. Ralph Twitchell was appointed Special Assistant to the Attorney General to investigate title problems on Pueblo lands and to make recommendations on possible legislation. Twitchell drafted his own bill in 1922 and met with attorneys for non-Indian claimants to attempt a compromise. The resulting draft was called the Bursum Bill. In general, the bill confirmed non-Indian possession in accordance with New Mexico territorial and state law without any compensation to the Pueblos. It also contained a very controversial provision that attempted to subject the Pueblos' water rights to state law. This bill did not succeed as supporters of the Pueblos generated a public outcry that the bill was confiscating Pueblo land. An alternative measure was introduced that included a three-person court to adjudicate titles. The bill included an authorization

of Nine Hundred Five Thousand dollars ($905,000) for irrigation and drainage projects on the Pueblos. Ultimately Chairman Lenroot of the Senate Committee sponsored compromise legislation known as the "Lenroot Substitute." It was approved by the Senate in 1923 but failed to get the approval of the U.S. House of Representatives.

Unable to justify further delay, in July of 1923, the Attorney General and Special Assistant Twitchell filed a lawsuit to determine the water rights of the four Pueblos and non-Indians in the Pojoaque-Tesuque watershed known as the "Exon suit." In support of that litigation, a report from the Indian Irrigation Service described the extent of lands taken from Pueblo control. It reported for the Four Pueblos: "It appears that approximately five thousand (5,000) acres of land in the area under discussion was [in 1920s] under ditch, about four thousand one hundred and fifty (4,150) acres of which was non-Indian and nine hundred (900) acres Indian land." See, Report No. 2 of the Pueblo Lands Board for San Ildefonso Pueblo: Report Concerning Pueblo Titles Extinguished, p. 12. The loss was 83 percent of the irrigated lands of the Pueblos of Nambe, Tesuque, Pojoaque and San Ildefonso. San Ildefonso Pueblo is the farthest downstream in the watershed. The situation there was worse; over 90 percent of the Pueblo's irrigable lands were taken and on the remaining lands, there was only sufficient water available for from 100 to 150 acres. Id., at p. 24. If the United States could not recover some of the water supply of the river for San Ildefonso, "the only way out" was to move most of the Pueblo across the Rio Grande, thereby giving up the use of all their irrigated lands in the watershed. Id. at p. 25.

The Exon lawsuit brought pressure to bear on the situation in Congress. A final compromise bill was introduced in March of 1924 and it became law on June 7, 1924. The Pueblo Lands Act was a legislative means of addressing the issue that prevented wholesale eviction of the non-Indians by the United States' Attorney. It was "an act of grace" for non-Indians, who otherwise had no rights to Pueblo lands. *Garcia v. United States,* 43 F.2d 873, 878 (10th Cir. 1930); *United States v. Herrerra,* No. 1720 Equity (D.N.M. May 25, 1928), cited favorably in *United States v. Wooten,* 40 F.2d 882, 886 (10th Cir. 1930), and printed at *Survey of Conditions of the Indians of the United States, Part 20: Hearing Before a Subcommittee of the Senate Committee on Indian Affairs,* 71st Congress, 2nd Session at 10772 (1932).

The basic plan of the Act was that a specially created Board was empowered to hold hearings and make findings on a variety of subjects. Where a non-Indian claimant established title by adverse possession for long periods of time as defined in the Act, the Board recommended that the non-Indian's title be recognized even if located within the exterior boundaries of a Pueblo's federally recognized Grant. The Pueblo was supposed to be paid damages for the loss of the land and water rights. The monies paid as damages were to be used by the United States and the Pueblo to replace the Pueblos' economic base—the lands and water lost to the Pueblos. In a perfect world each Pueblo would be made whole with the replacement of all that was taken. This elegant, simple plan was never fulfilled. Hearings were held, titles to land were quieted in the non-Indians who met the requirements of the Act through related suits in federal court, but nothing was done to replace all the lost lands or to get water to the Pueblos.

B. Actions of the Pueblo Lands Board

1. Introduction

The Pueblo Lands Act established the Pueblo Lands Board. It was given the duty of determining (1) the exterior boundaries of lands granted or confirmed to each Pueblo; (2) the status of the lands within the exterior boundaries; (3) the fair market value of lands and improvements. Non-Indian claimants who were not successful in their land claims under the act were paid for improvements. The fair market value of the lands where non-Indian claimants were successful made up the damages payable to the Pueblos.

2. Pueblo Water Rights

Many New Mexicans hoped that the Pueblo Lands Board would resolve all issues about the extent of Pueblo water rights vis-á-vis other water users in a watershed. The *Exon* lawsuit was dismissed in 1926 based upon that view of the Act. Section 6 of the Act gave the Pueblo Lands Board the duty to report on the extent, source and character of the water rights of the non-Indians. The Board tried to do this and could not, believing that under any application of the prior appropriation doctrine, the Pueblos should have the first, or senior-most right. No non-Indian right should be satisfied until the Pueblos' needs were met, and the United States had a duty to enforce the Pueblos' senior rights. The Board set out its position in a list of principles:

> *First:* That the Indians are the earliest appropriators of all the water in the Pojoaque-Tesuque-Nambe water-shed, and that they still have a prior right to the water from the Tesuque and Pojoaque streams, and their tributaries, including all flood waters flowing into these streams, and to all springs or seeps which feed them.
>
> *Second:* That no non-Indian users have any right to these waters until the needs of the Indians' lands on this watershed are provided for.
>
> *Third:* That the Indian use of the waters has been continuous and beneficial from a time long ante-dating the advent into the country of any Spanish, Mexican or American settlers.
>
> *Fourth:* That the award of lands by the Lands Board to non-Indians under the provisions of the Act of June 7, 1924 does not imply the allocation to such lands so awarded of any water at all; but, on the contrary, that these non-Indian lands so awarded are entitled to only so much water as is not needed by the Indians for their needs when put to beneficial use. The matter of priorities as between non-Indians is quite a different matter from that of priorities between Indians and non-Indians.
>
> *Fifth:* That it is the duty of the United States as guardian of these Pueblo Indians, to assert and define these principles and to take such action, legal or otherwise, as will prevent the use of the waters of these streams by others than the Indians to any greater extent than is consistent with such principles so announced.
>
> *Sixth:* That the temporary or permanent development of water by or for the Indians by the opening up or development of springs or under-surface accumulations in or near the beds of the streams, in no way prejudices the priority rights of the Indians to the whole surface flow of these streams, but is merely a method of recovering a part of the water to which they are entitled until the Government may or does recover all of the water needed by the Indians.
>
> *Seventh:* That no action should be taken or approved by the Government for the purchase of water or of lands with alleged water rights from non-Indians within or without the outside boundaries of the Pueblo Grants which could, in any way, be interpreted to mean that the United States has abandoned any of the priorities of the Indians or conceded any specific or associated rights for water to any non-Indians tracts on the watershed.

The Board's approach to the Pueblos' water rights was not raised in any subsequent court proceedings required by the Act. The issue was raised when Congress acted to increase the compensation paid to the Pueblos, Act of May 31, 1933, 48 Stat. 108, but only in the inclusion of Section 9 which states:

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective Pueblos for domestic, stockwater and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands remain in the Indians.

48 Stat. 111. On paper, the Pueblos' senior water rights to the water they needed were protected. In reality, though, the Pueblo Lands Act has yet to increase the actual water available for Pueblo use. Prior to the filing of the *Aamodt* lawsuit in 1966, the United States did not act to assert, define or protect the *Aamodt* Pueblos' senior priority rights, even as junior uses increased in the watershed.

3. Land

As a result of the Pueblo Lands Act, each of the Pueblos lost large amounts of acreage and most of this was irrigable land. While the Board may have concluded that their senior priority water rights were not affected in theory, in reality there was not any more water in the system to be used by the Pueblos without enforcement of that senior right, and the non-Indians remaining on the lands continued to use the water to the detriment of the Pueblos.

C. The United States' Failure to Follow Through on the Replacement Purposes of the Pueblo Lands Act

Congress did provide in the 1924 Act that the Pueblos were to receive compensation for their damages as a result of the United States' failure to seasonably protect Pueblo lands and water. Money damages, though, was not the ultimate goal. Section 19 of the 1924 Act states:

> That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, *shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost* to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians.

43 Stat. 636, 642 (emphasis added). Section 1 of the Act of May 31, 1933 is almost identical. Congress did appropriate funds to pay the damages awarded to the Pueblos; Nambe Pueblo received a total of $85,784.53; Pojoaque received a total of $125,086.82; San Ildefonso Pueblo received $67,646.45 and Tesuque Pueblo received $29,301.20. These amounts, however, were totally insufficient to replace what the Pueblos had lost, much less any damages for the denial of water for several decades. San Ildefonso Pueblo is a good example of how ineffective the plan for replacement of water rights was for the Pueblo. 90 percent of the agricultural land of San Ildefonso Pueblo had been taken over by non-Indian squatters, approximately 1,505 acres which is roughly equivalent to the loss of 1,850 acre feet of water yearly (afy). With additional upstream diversions, the Pueblo was only able to cultivate 8 acres of farm land in 1899. The next year the harvest consisted of only 20 bushels of corn and 20 bushels of wheat. With the award to the Pueblo, the United States was only able to reacquire for the Pueblo's uses 263 acres of irrigated farmland, roughly equivalent to regaining 485 acre feet of water per year. *State ex rel. State Engineer v. Aamodt,* D.N.M. No. 66cv6639, *Memorandum to the Special Master on Replacement Rights of the Pueblos After Court's Order of April 14, 2000,* p. 8, filed by the Pueblos and the United States July 31, 2000.

D. Conclusion

While it cannot be disputed that Congress intended to provide actual usable water to the Pueblos through operation of the 1924 Act, to this day, the losses of the Pueblos have not been replaced. With the Aamodt Litigation Settlement Act, the Pueblos are promised not only enough water to meet present and future needs, but also a Regional Water System to provide essential infrastructure so that water can be used. For the first time since before 1900 the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque will have Congressional approval of a Settlement Agreement which quantifies the water rights of each Pueblo, and authorizes a regional water system designed to deliver sufficient water to meet Pueblo needs, now and into the future. Passage of the Aamodt Litigation Settlement Act is an essential requirement for implementation of the Settlement Agreement signed by the Four Pueblos, the State of New Mexico, the County and City of Santa Fe. Additionally, federal legislation appropriating funding authorized by this Act will be needed, after Congress in this Act directs the United States to join the Settlement and build the Regional Water System it requires. After that, the Federal Government will have fulfilled its trust responsibility to protect the ability of the Four Pueblos to use water in the Pojoaque River Basin to meet present and future needs.

PREPARED STATEMENT OF GEORGE RIVERA, GOVERNOR, PUEBLO OF POJOAQUE

My name is George Rivera and I am the Governor of the Pueblo of Pojoaque ("Pojoaque"). I have had the honor of being an elected official of the Pueblo for 17 years. For those unfamiliar with northern New Mexico, the Pueblo is located 12 miles north of Santa Fe, New Mexico.

First, I want to thank Senator Domenici and Senator Bingaman for introducing S.3381, the *Aamodt and Taos Settlement Act of 2008*. I want to thank Chairman Dorgan for agreeing to hold today's hearing. I also want to thank the Committee for its long history of support for negotiated Indian

water settlements such as S.3381. S.3381 is a comprehensive water settlement negotiated by the four northern Pueblos, the State of New Mexico, and the County and City of Santa Fe. We now look forward to a secure source of water, a fully funded settlement and a fully built water delivery system.

The Pueblo of Pojoaque is dedicated to self-sufficiency and tribal sovereignty. We cannot maintain self-sufficiency and sovereignty without economic freedom. We cannot have economic freedom without a secure source of water.

For over a century, the Pueblo and its people have been plagued by economic stagnation and a material standard of living that lagged far behind our non-Indian neighbors. The Pueblo is now beginning to move forward. Our move forward is grounded in the policies of Indian self- determination, economic self-sufficiency and tribal sovereignty. Many Indian Tribes are experiencing a simple but profound truth – self-determination and the exercise of tribal sovereignty cannot be achieved without economic freedom.

This Committee entertains the full gamut of Indian issues including health care, housing, education, natural resources, and a host of others. Resolving problems in Indian country often requires a keen understanding of the history of Federal-tribal relations and the neglect by the United States

government.

In this regard, I want the Committee to understand one thing very clearly: We come before you not to correct past wrongs, but to look to the future with a constructive and positive perspective. The United States has already admitted its fault and in the opinion of the Pueblo and its leaders it is time to move on.

As you may know, Congress passed the Pueblo Lands Act in 1924 and conceded that the Federal government neglected to protect the Pueblos. Pojoaque was almost extinct because of the federal neglect. So many settlers came onto Pueblo land that there was little water, or irrigable land, left for us. As a result, the Pueblo people simply could not sustain themselves. Most of Pojoaque was forced off its land in 1913. However, in 1932, my great-grandfather returned to Pojoaque with 14 members and rebuilt the Pueblo.

We come before you today to make sure that what happened in 1913 never happens again. In the years since 1924, Congress has assured the Pueblo and its people that our water rights would be restored and protected. The simple fact is that our water rights have not been restored or protected. We have worked with Congress, we have filed lawsuits, and we have defended lawsuits, but we still do not know what water we have or where it

will come from. This settlement identifies the source of water and the amount due the Pueblos. This settlement solves the dispute.

By 1943, the water situation in our area had worsened and the Pueblos were obliged to come back to Washington D.C. to fight a plan to dam portions of the Rio Grande. The hearings on the legislation, H.R.323, were held by the Committee on Indian Affairs in the House of Representatives. One proposed dam would have completely flooded the lands of the Pueblo of San Ildefonso. The same dam would have resulted in a forced relocation of most of the people of the Pueblo of Santa Clara. We fear the type of thinking that leads to these type of dam solutions to the Pueblos' water problems.

With all this history, whenever there are problems with water in our part of the world, New Mexico and the Federal government approach the Pueblos and ask us to share the water with other communities.

In S.3381, you have before you the best efforts of the Pueblos, the State of New Mexico, local governments, Federal agencies, and the Bush Administration in tackling the tough issues and resolving the water problems in northern New Mexico.

With this legislation we have tried to make sure that we know the quantity of water to be delivered and, just as important, how the water will

be delivered to our communities. The legislation is thoughtful and comprehensive and will end the *New Mexico v. Aamodt* litigation first filed in 1966. For decades Congress has promised to provide the Pueblo communities with the water we need and that was first denied us because of Federal neglect. We plan to keep you to that promise.

To get us to this point of settlement literally involved generations of tribal leaders. Some of you knew my uncle --- Jacob Viarrial --- who was no stranger to this Committee, fought for his Country in Vietnam, worked to bring life-sustaining water to the Pueblos and worked for Pojoaque's economic independence.

If this Committee and this Congress fulfills the promise made to the Pueblo, I can assure you that the Pueblo will continue to take care of our own land and our own people and provide economic and social opportunities to Pueblo and non-Pueblo people in our region. Thank you for the opportunity to provide this statement on S.3381.

We recognize the committee's dedication to solving the problems facing Native Americans. We appreciate the value the committee places on tribal sovereignty.

PREPARED STATEMENT OF HARRY B. MONTOYA, COUNTY COMMISSIONER, SANTA FE

Mr. Chairman and committee members, I am Harry B. Montoya. I am in my second term on the Board of County Commissioners of Santa Fe County and I am pleased to offer this testimony on behalf of Santa Fe County. The Pojoaque stream system is located within my district and it is also where I grew up and have spent most of my life. When the Aamodt litigation was filed I was six years old. Forty-two years later, I am very gratified the parties have reached a settlement of this divisive litigation, which is the oldest running lawsuit in the federal court system. With your help, the settlement will provide a reliable water supply to the four Pueblos, as well as to other county residents in the Pojoaque basin.

I appreciate very much the opportunity to provide testimony in support of the Aamodt Litigation Settlement Act, Title I of S. 3381. I especially want to thank the New Mexico congressional delegation for enabling us to achieve this settlement. After years of what appeared to be intractable and interminable litigation involving

thousands of water users, Senator Domenici, Senator Bingaman and Congressman Udall have provided the leadership and the guidance that will allow the fighting to end and will pave the way to a better future for the Pojoaque basin.

Overview of Settlement

The parties reached this settlement after six years of intensive settlement talks ordered by the federal court. In 2006, along with other settling parties, the County, the four Pueblos, the City of Santa Fe and the State of New Mexico signed the Aamodt settlement agreement. The settlement will resolve longstanding water issues between the Pueblos, the State of New Mexico and numerous water rights claimants to the limited supplies of the Pojoaque basin. Now the settling parties, including the seven governmental entities, urge the United States to join us as signatories to the settlement agreement.

This legislation will authorize the Secretary of the Interior to execute the settlement agreement. And it will authorize construction of an important regional water system for the benefit of Pueblo members and other County residents.

Although Santa Fe County does not have water rights at issue in the main Aamodt case, the County agreed to become a party to the settlement and is willing to make a substantial local contribution to help implement it. The County believes the settlement is highly desirable for two reasons. First, the settlement achieves a fair and equitable resolution of the competing claims to water in one of the most water-short areas of the west. Second, the centerpiece of the settlement is a regional water system that will greatly alleviate water shortages and water quality problems in the basin.

I would like to briefly discuss both of these settlement benefits.

Fair and Equitable Resolution

For the last 150 years the Pojoaque basin has been plagued by land and water disputes, pitting neighbor against neighbor and Pueblo member versus non-Pueblo people. Two U.S. Supreme Court cases and an Act of Congress failed to settle the issues, and the Aamodt water rights adjudication has done no better. The settlement is the only hope for ending the divisions and allowing for harmony in the basin.

The settlement is a compromise. Rather than defining winners and losers, the settlement protects existing uses and allows for future growth by careful management of available water resources. At the same time, it recognizes and safeguards time immemorial and senior use priorities of Pueblos and early Spanish acequias. The settlement also creates a reliable supply to more recent domestic and commercial uses, and is flexible enough to account for changing uses in the future.

The agreement contains provisions that protect the basin from groundwater pumping in the adjoining and much more populous Santa Fe basin. Both the County and the City of Santa Fe have agreed in the proposed settlement to mechanisms to offset effects on basin surface waters from County and City groundwater withdrawals in the neighboring basin. In order to preserve groundwater supplies, the County and the City have also agreed to meet their demands from surface water sources to the maximum extent feasible in order to minimize the effects on ground and surface supplies of the Pojoaque basin.

Regional Water System

A vital component of the settlement is a regional water system serving the Pojoaque basin. Because the basin is chronically short of water, the foundation of our agreement is construction and operation of a joint water utility that will divert up to 4,000 acre-feet of water per year from the Rio Grande. Of that amount, the regional water system will treat and deliver 2,500 acre-feet to the four Pueblos and the remaining 1,500 acre-feet to non-Pueblo customers of the County water utility.

The regional water system bestows many benefits. Most obvious is its importance in delivering a substantial amount of water to meet the future needs of the Pueblos. Less obvious, but perhaps as important to the Pueblos, the water system provides water to non-Pueblo water users who otherwise would continue to divert basin groundwater and deplete surface flows needed for traditional irrigation and other uses. The settlement contains incentives and provisions for settling non-Pueblo parties to connect to the system and requires new users in the future to connect. Finally, the system directly benefits connecting non-Pueblo customers by providing a clean and reliable water supply.

The regional water system will be governed by a board made up of the Pueblos and the County. By cooperating basin-wide, these five governmental partners will reduce tensions over water distribution and will gain greater efficiencies in system operation and maintenance. I strongly believe our agreement for regional coopera-

tion will be a model for other communities that find themselves needing to band together to secure water beyond their individual jurisdictions.

The County believes that the regional water system is not only a good deal for the Federal Government and the Pueblos but is also a good deal for the County. And that is why the County will invest substantial local funds in the system. Including its share of construction costs and its responsibility for operational costs, the County is contributing over $60 million. When combined with financial contributions from the State and City, the non-federal contribution is approximately $117 million or 42 percent of the total settlement costs. This is noteworthy, especially when the percentage of water allocated from the regional water system to non-Pueblo customers is proportionately less.

In conclusion, I want to thank the Chairman and the committee members for hearing this matter. S. 3381 has been carefully crafted to address the difficult water supply needs within the Pojoaque basin. We have waited a long time to get to this point. We are hopeful, with your help, our time is now.

PREPARED STATEMENT OF JOHN R. D'ANTONIO JR., P.E., STATE ENGINEER, NEW MEXICO

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present the views of my office on S.3381, consisting of the "Aamodt Litigation Settlement Act" (Title I) and the "Taos Pueblo Indian Water Rights Settlement Act" (Title II). I have previously (September 9, 2008) submitted to the Committee a letter on this subject and I am submitting testimony to the House Committee on Natural Resources, Subcommittee on Water and Power, regarding H.R. 6768, the companion bill to S. 3381, which is identical to my comments here. I share with Governor Richardson the conclusion that passage of S. 3381 will result in a fair and long-overdue settlement of the water rights claims of five New Mexico Pueblos and is highly deserving of Congressional support. I wish here to set forth for you some of the main reasons for that conclusion and then offer some remarks in response to specific comments made before the your Committee on September 11, 2008 by the Administration's spokesman, Mr. Michael Bogert. I hope that those comments will provide this Committee with a fuller understanding of the substance and context of the issues raised by him.

Why the State of New Mexico Strongly Supports this Legislation

First, all New Mexicans, not just these litigants, have suffered the costs of the protracted litigation over the water rights claims of these five Pueblos. The Taos-area general stream adjudication suits and the *Aamodt* suit were filed some 40 years ago, with active litigation in *Aamodt* for the first thirty-three years, followed six years of ultimately successful negotiation to reach a settlement agreement. The situation has been similar for the Taos-area litigants. Litigation costs, direct and indirect, particularly for the State and the United States, have been enormous. The communities have borne the heavy costs of continued strife and conflict over water between Pueblos & non-Pueblos, senior and junior users, in the highly polarizing environment of litigation. The regions have incurred the economic costs of lost opportunities for economic development, the inability to grow businesses or communities when the supply of the most fundamental resource -

waters - is uncertain. The settlements reached by the parties, as implemented by S. 3381, will directly address all of these issues, by ending the unending stream of litigation costs and instead investing in these two settlements, both of which finally achieve judicial determinations of Pueblo water rights and both of which lay foundations for Pueblo economic development and self-sufficiency.

Second, the proposed settlements are fair. They recognize large first-priority water rights in the Pueblos commensurate with the acreage historically irrigated by them: depletions of more 8,000 acre-feet per year for Taos Pueblo, and more than 3,600 acre-feet annually for the *Aamodt* Pueblos. But these settlements also contain their own unique locally-suited mechanisms whereby centuries-old non-Indian uses will be allowed to continue as well as the Pueblo uses. In addition, water for Pueblo economic development will be imported or purchased in both settlements - about 2300 acre-feet per year in each - with the last remaining uncontracted water from New Mexico's San Juan Chama Project, developed by the United States, going to its Indian beneficiaries. Finally, infrastructure locally appropriate to each settlement, with substantial state and local cost share, will be provided to meet specific Pueblo health, safety and economic development needs.

A Response to the Administrations' Comments

On September 11, 2008, before the Senate Indian Affairs Committee, Mr. Bogert provided the Administration's views on S. 3381, making several claims that deserve response. First was the claim that these settlements would cost "too much," with arguments citing Interior's Criteria and Procedures ("C&Ps"). While Mr. Bogert did recognize that more factors than the calculated legal exposure to the United States are to be considered under the C&Ps , he did fail to mention or value the prominent C&Ps "goal of long-term harmony and cooperation among all parties." That is a significant omission, because exactly that "long-term harmony and cooperation among all parties" is what both of these settlements have gone to extraordinary lengths to achieve, and it is from all perspectives - personal, local, and regional - one of the biggest goals and benefits of these settlements. Both settlements create complex and tightly interwoven water use and sharing agreements, with sophisticated technological tools and mechanisms for administration. And in each the Pueblo and non-Pueblo water users are dependent upon shared water systems - for domestic and irrigation water supply in the *Aamodt* settlement and for delivery of water to streams to allow groundwater development in the Taos settlement. These parties have truly committed themselves to a water future based on harmony and cooperation and any fair evaluation of the cost of these settlements should not neglect this factor.

Second, the Administration objected to the form of the waivers included in the two Titles. Granted that the form of the language may not be optimal from the standpoint of the United States, it is my understanding that the negotiation parties to both settlements sought the active participation of the United States on this and other questions literally for years before these settlements were finalized, but received no substantive guidance. In fact, I am informed that the United States' proposed waivers for these settlements were

only received last week. But the waivers in S. 3381 closely track the waivers in the settlement agreements, because that's what the parties bargained for; to start over with the waivers to satisfy United States demands is to set all parties back and reopen settled tradeoffs. In fairness, the time for consideration of the proposed United States waivers was during settlement negotiations, not years after the settlement agreements were finalized, and the correct use of the proposed United States waiver terms is for consideration of their inclusion in other, not-yet-final negotiations, where the United States can actively participate and pursue its preferred language. Finally, I do not agree that the present waiver language of S. 3381 is materially deficient in achieving finality or in protecting the United States from unwaived claims. Rather, I would describe the United States proposed waiver terms as essentially unnecessary, some because it technically adds nothing and some because it would only cover very highly speculative and unlikely events.

Nevertheless, the State is willing to consider such of the proposed United States modifications as seem genuinely necessary (and not merely redundant) to correct real (not speculative) threats, to the extent that these may exist and to the extent that time is available to us given the practical limitations of obtaining widespread agreement on changes from widely separated parties.

Third, the Administration recommends that Congress spell out the United States' responsibility re San Juan - Chama Project (SJCP) water. New Mexico agrees with the Administration on this point. As Mr. Bogert noted, both Titles provide that Pueblo contract rights to SJCP water developed by the United States will be held in trust by the United States for the respective Pueblos. The United States also holds other Pueblo or Tribal contract rights to SJCP water in trust - e.g., those for the Jicarilla Apache Tribe. New Mexico believes that the SJCP water supply, which is crucial to its Rio Grande cities, must be administered without discrimination among contractors, with strict applicability of all statutory and contract terms, regardless of whether the United States happens to be holding a particular contract delivery right in trust for a Tribe or Pueblo. Any suggestion that the United States either could or should show any preference for its Indian beneficiaries in allocating shortages among contractors would be wholly incompatible with the needs of the municipal users of this water for certainty of supply and reliance on the contract terms that are bases of their bargains.

Use of the SJCP infrastructure on a basis of non-discrimination between Indians and others was the essence of Section 12 of the 1962 SJCP authorizing act:

> "None of the project works or structures authorized by this Act shall be so operated as to create, implement, or satisfy any preferential right in the United States or any Indian tribe to the waters impounded, diverted or used by means of such project works or structures, other than contained in those rights to the uses of water granted to the States of NM or AZ pursuant to the provisions of the Upper Colorado River Basin compact."

The present concern of the State, however, is not with a possible preferential use of project works, which is addressed by Section 12, but with the unaddressed question of whether, and to what extent, a contract delivery right held in trust by the United States on behalf of a Tribe might, for that reason, be entitled to some preference in administration or otherwise acquire some characteristics not possessed by other SJCP water delivery contract rights. One way to handle this issue would be for Congress to prohibit the United States from taking these SJCP Tribal contract rights into trust. That approach seems possible but perhaps not necessary. New Mexico believes a better approach would be to impose no restriction on the ability of the United States to take these rights into trust, but to explicitly provide that no discriminatory treatment could arise as a result. Specifically, we would propose that H.R. 6768 contain an additional section amending the 1962 Act which would read as follows:

> Section 12 of the 1962 Act (P.L. 87-483 (76 Stat. 96)) is hereby amended:
>
> (c) The Secretary of the Interior shall deliver, distribute and administer water pursuant to this Act without preference to any Indian tribe and without regard to any tribal trust responsibility of the United States."

Such a provision would accomplish the goals stated, but it would not interfere in any way with the ability of the United States and Congress to recognize and implement financial preferences for Tribes, such as waivers of all or portions of construction or OM&R costs. We recommend this approach to the Committee and are prepared to provide any further comments you may wish on the subject.

The fourth claim of the Administration that needs a response is the that the non-Indian parties of both settlements would receive disproportionate benefits. Certainly in the *Aamodt* settlement, the very numbers cited by Mr. Bogert belie the claim: all non-Pueblo benefits are to be paid for by the state and local parties, in the extraordinary amount of $117 million. That is about 43% of the project cost for 40% of the project water, which is demonstrably not disproportionate.

In the Taos settlement, the Administration fundamental misapprehends the nature of the mutual-benefit projects. In the case of the replacement wells project, for example, the United States appears to believe that the primary beneficiaries of the replacement wells to be provided for the Town of Taos and the El Prado Water and Sanitation District are the Town and District, but in fact the true beneficiary is Taos Pueblo, whose Buffalo Pasture wetlands will be protected by moving this municipal pumping miles away. The United States may also think that the Town and District are getting the primary benefits because it imagines that a judicially recognized water right for the Pueblo would automatically force shutdown of these municipal suppliers to protect these wetlands. More likely is that years, and perhaps decades of litigation are being avoided by moving these wells. The State has agreed to pay 25% of the costs of this project designed to benefit the Pueblo's Buffalo Pasture. The United States also seems to miss the fact that another significant project, the mitigation well system, is for all GW users, including the

Pueblo. The mitigation well system provides a technological solution whereby all groundwater developers, one of which is the Pueblo, can make the required stream offsets on the Rio Grande. This system will allow the Pueblo to make real and flexible use of its water rights.

A fifth Administration claim is that the Taos settlement lacks finality regarding decree enforcement. The short answer is that the settlement and legislation explicitly preserve the status quo in this respect and that the settlement relies on a highly detailed set of provisions, supported by an agreed hydrological model, to reduce water administration disputes to an absolute minimum. Those provisions cover in detail such subjects as Pueblo water court procedures Pueblo water rights transfers, Pueblo depletion offset procedures, and loss of forebearance by non-Pueblo rights so that Pueblo rights can be exercised in their place. This is the practical Taos settlement approach to administration, designed to work even if the all the parties cannot reach agreement the arcane subject of judicial post-decree enforcement. The United States appears to demand that all others accept its position regarding this fundamentally important and contentious issue of water rights administration, and that no settlement should go forward that does not do so. The State disagrees with that premise and that conclusion, which actually shows the wisdom of approach of the present bill which explicitly does not adopt any position or modify the status quo in any way. A meritorious Indian water rights settlement should not be rejected simply because the parties could not agree with the United States position on a difficult aspect of post-decree water rights. Each settlement is inevitably unique: the Taos settlement parties, including the state, have judged that the benefits of their settlement far outweigh the costs and compromises that all have undertaken. The Taos settlement does, as noted above, contain perhaps the most important practical element for administration - an agreed basin hydrological model - which is likely to make a far larger contribution to solving real-life disputes than pursuing an agreement delineating which court or courts might have jurisdiction to hear what sorts of claims between disputants who are parties to the Taos settlement agreement. With that agreed model, we judge that the Taos settlement approach is likely, through its use as provided in the settlement agreement, to substantially reduce the risk of litigation over administration of basin water rights.

Sixth, Mr. Bogert emphasized that the United States has been working constructively with the settlement parties and wants to work with parties and Congress to develop settlements the Administration can support. While Department of Interior representation at negotiation meetings and communication with them has improved under Mr. Bogert's watch, that improvement did not occur until these settlement agreements were fully negotiated and signed by all the parties, including the governmental parties except the US. As a result, the parties during negotiations had frustratingly little participation or guidance from the US, despite oft-repeated requests. Because the legislation strictly implements the terms of the settlement agreements, it is very difficult for the parties to now entertain United States demands for legislative changes that revise the

fundamental bargain of the settlement and fairly should have been raised years ago. Further, without a specific proposal, I continue to be skeptical that anything short of drastic revisions, completely impossible to accomplish in the near term, would make these settlements acceptable to this Administration. Nevertheless, my staff has engaged the United States in a good faith discussion on the extent to which our legislative waivers can be made to confirm more closely to the United States' desired model. However, I also believe that the non-monetary concerns raised by the United States are the product of misunderstanding or are adequately addressed by the present bill, I therefore strongly support passage of H.R. 6768 in its present form, without delay.

PREPARED STATEMENT OF PALEMON MARTINEZ, PRESIDENT, TAOS VALLEY ACEQUIA ASSOCIATION

Chairman Dorgan and Honorable Committee Members:

I am writing to you on behalf of the Taos Valley Acequia Association (TVAA) and its 55 member Acequias. The TVAA and Acequias are parties to the settlement agreement with Taos Pueblo. Acequias are also known as community ditch associations. They have existed in the Taos Valley of north-central New Mexico since the area was settled by Spanish settlers over 400 years ago. Acequias have diverted surface and spring water from seven tributaries of the Rio Grande, which are the Rio Hondo, Rio Lucero, Rio Arroyo Seco, Rio Pueblo, Rio Fernando, Rio Chiquito, and Rio Grande del Rancho. These Acequias continue to provide water for domestic uses, livestock watering, and the irrigation of over 12,000 acres. Today our acequias have over 7,600 individual members, many of whom irrigate small fields, to raise a few head of livestock, and gardens, in order to feed their families. In the Taos Valley the Acequias are truly the lifeblood of the community. Our traditional rural lifestyle and culture are sustained by the acequias.

Many of the acequias flow through Taos Pueblo land. Non-Indian Acequia members and Taos Pueblo members interact on a daily basis. They are neighbors who have been sharing the water resources of the Taos Valley for centuries. Of course during that long history, there have been disputes over the water, especially during droughts and periodic water shortages.

This settlement addresses not only the water rights of Taos Pueblo but the resolution of competing claims of the Acequias' water rights which were established under the laws and customs of Spain and Mexico and are protected by the United States under the 1848 Treaty of Guadalupe Hidalgo. The United States owes not only a federal trust obligation to Taos Pueblo, but an obligation under the Treaty and established constitutional and international legal principles to protect the water rights of the Acequias and their members.

The Taos Pueblo Indian Water Rights Settlement Act, S. 3381, Title II, is an opportunity to finally resolve all water sharing disputes between the Acequias and Taos Pueblo. Because water is so vital to the survival and prosperity of all parties in the Taos Valley, we have been involved in negotiations since 1989. This Settlement Act represents a compromise and a guarantee of future allocations that costly litigation could never achieve.

Most importantly the settlement secures future centuries of mutual existence and sharing of water for the Acequias and Taos Pueblo. The settlement of course defines and secures the nature and extent of Taos Pueblo's water rights. It also secures the rights of acequia members and protects them from challenges to their water rights by other parties. The settlement provides for the continuance of specific water sharing customs and traditions rather than the imposition of priority administration of water. It allows for the sustenance of the traditional and rural lifestyle and culture of Acequia members. The settlement balances the needs of all parties in the Taos Valley, now and in the future. This includes municipal water providers and thousands of domestic well owners.

The financial obligations of the United States are not only to Taos Pueblo, which certainly has substantial claims against the United States. This settlement will also resolve Acequias long-standing claims against the United States with the construction of the Arroyo Seco Arriba storage project and Acequia Madre del Prado stream gage.

The benefits of the Settlement Act far outweigh any financial analysis however. You cannot put a price of the social benefits of peace and harmony between neighbors. Long-simmering disputes over water will finally be put to rest. This settlement will avoid contentious litigation that could only cause future mistrust and conflict throughout the Taos area.

The TVAA urges Congress to take this rare opportunity to support a local solution to past, present, and future water allocation challenges. We urge passage of the Taos Pueblo Indian Water Rights Settlement Act, S. 3881, Title II. The TVAA thanks Chairman Dorgan and members of the Senate Indian Affairs Committee, for your time and consideration of this vitally important matter of water for our future. We also thank New Mexico Senators Pete Domenici and Jeff Bingaman for their unwavering support of our settlement.

State of New Mexico

Office of the Governor

Bill Richardson
Governor

September 9, 2008

The Honorable Byron I. Dorgan, Chairman

Senator Lisa Murkowski, Vice Chairman

U.S. Senate Committee on Indian Affairs
838 Hart Office Building
Washington, DC 20510-0001

Via FAX: (202) 228-2589

Dear Senators:

As Governor of New Mexico, I write to inform you of the strong support in New Mexico for S.3381, the Aamodt/Taos settlement bill. This bill would settle fairly and honorably the Indian water rights of the Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso (Aamodt), and of Taos Pueblo (Abeyta).

First filed in 1966, the Aamodt lawsuit is believed to be the oldest in the federal court system. Adjudication suits for the Rio Pueblo de Taos and the Rio Hondo were filed shortly thereafter, in 1969, and were later consolidated into the Abeyta suit, which settles Taos Pueblo's water rights.

Both the executive and the legislative branches of New Mexico government support these settlements, having combined to lay aside $10 million as a down payment on the state portion of the cost of Indian water rights settlements. I strongly support them personally, having had the privilege to sign both settlements on behalf of the state.

Enactment of this legislation and implementation of the settlement will favorably resolve a long battle by these New Mexico Pueblos to obtain recognition and protection of their rights to water. Additionally, the passage of this legislation and the completion of these settlements will clarify the rights of all users of water in the stream systems serving these pueblos.

On behalf of all New Mexicans, Indian and non-Indian alike, I commend S.3381 to your attention and urge its swift approval in committee, and in Congress.

Sincerely,

Bill Richardson
Governor of New Mexico

Bobby F. Duran, Mayor

Council Members:
Darren M. Cordova
Rudy C. Abeyta
A. Eugene Sanchez
Amy Quintana

Daniel Miera, Town Manager
Abigail Adame, Assistant Town Manager

Taos Municipal Building
400 Camino de la Placita

Taos, New Mexico 87571

(505) 751-2000
Fax (505) 751-2026

Visit us on our Website at:
www.taosgov.com

September 10, 2008

Senate Indian Affairs Committee
Byron L. Dorgan, Chairman
United States Senate
Washington, D.C.

Re: Taos Pueblo Indian Water Rights Settlement Act, S. 3381, Title II

Dear Mr. Chairman and Members of the Committee,

The purpose of this letter is to express the Town of Taos' support of the Taos Pueblo Indian Water Rights Settlement Act, S. 3381, Title II. The Town was hoping to send a representative to the September 11, 2008 hearing to testify in person, however, we were informed that testimony would be limited to a single member of the Taos Pueblo. We hope to meet with the members of the committee in person at a more convenient time.

The Settlement Act will lay to rest the long fought dispute over water rights in the Taos area. The dispute arose in the 1960s and has continuously impacted the ability of the communities affected to harmoniously interact. The communities involved in the settlement agreement, including the Town of Taos, have been in negotiations on this matter since the late 1980s and are excited that the many parties involved are finally able to reach a unanimous agreement.

The Settlement Act represents the best efforts of each party to establish a workable agreement acceptable to all parties involved. It will provide each party with desperately needed water rights, including the Town of Taos. As the product of heavy negotiations among all parties, this Settlement Act is the best solution and is the preferred method of resolving this matter. We therefore strongly encourage you to support the Settlement Act.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Darren Cordova
Mayor Pro Tem

City of Santa Fe, New Mexico

200 Lincoln Avenue, P.O. Box 909, Santa Fe, N.M. 87504-0909

David Coss, *Mayor*

Councilors:
Rebecca Wurzburger, Mayor Pro Tem, Dist. 2
Patti J. Bushee, Dist. 1
Chris Calvert, Dist. 1
Rosemary Romero, Dist. 2
Miguel M. Chavez, Dist. 3
Carmichael A. Dominguez, Dist. 3
Matthew E. Ortiz, Dist. 4
Ronald S. Trujillo, Dist. 4

September 9, 2008

Honorable Jeff Bingaman
Attn: Mike Conner
United States Senate
703 Hart Senate Office Building
Washington, DC 20510

Honorable Pete V. Domenici
Attn: Ed Hild
United States Senate
328 Hart Senate Office Building
Washington, DC 20510

RE: The Aamodt Litigation Settlement Act, Title I of S. 3381

Dear Senators Bingaman and Domenici:

The City of Santa Fe appreciates your hard work, support and leadership in helping to resolve the longstanding water right issues in the Nambe, Pojoaque and Tesuque basins, called the *Aamodt* case.

I understand that the Committee on Indian Affairs will hold a hearing on September 11, 2008 on S. 3381.

The City Santa Fe is pleased to join the Pueblos of Tesuque, Nambe, San Ildefonso and Pojoaque, the State of New Mexico, and Santa Fe County in urging the United States to join the Aamodt Settlement Agreement.

Thank you for your efforts and we hope for enactment of the legislation in this current session of Congress.

Sincerely,

David Coss
Mayor

Telesfor R. Gonzales, Chairman
Cris J. Cisneros, Vice Chairman
Elaine Trujillo, Secretary/Treasurer
John S. Painter, Member
Carol Minton, Member

El Prado Water and Sanitation District
P.O. Box 1110
El Prado, NM 87529

September 9, 2008

Honorable Byron L. Dorgan
Chairman
United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6450

Re: S.3381, Title II – The Taos Pueblo Indian Water Rights Settlement Act

Mr. Chairman and Honorable Members of the Committee:

The El Prado Water and Sanitation District ("EPWSD") is a party to the Taos Pueblo Water Rights Settlement. EPWSD provides municipal and domestic potable water and wastewater treatment services to a large semi-rural area north of the Town of Taos. Because of the short notice, we were not able to attend the hearing on S.3381 scheduled for September 11, 2008 before your Committee on Indian Affairs.

On behalf of EPWSD, I would strongly request the Committee's support of Title II of S.3381, the Taos Pueblo Indian Water Rights Settlement Act. After many years of difficult and complicated negotiations among all of the major water using parties in the Taos Valley, the parties were able to resolve past disputes, present water allocation issues, and set a framework for future cooperation and harmony among various water using groups in the Taos Valley with diverse interests. The settlement is in EPWSD's and the Taos Valley's best interest.

Thank you.

Sincerely,

Telesfor R. Gonzales

Telesfor R. Gonzales
Chairman

RECEIVED NOV 2 5 2008

Eastern Shoshone Business Council
P.O. Box 538
Fort Washakie, WY 82514
(307) 332-3532/4932
Fax: (307) 332-3055

November 13, 2008

Chairman Dorgan
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510

Vice Chairwoman Murkowski
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510

Re: Support Letter of S. 3355 Crow Water Settlement Act

Dear Chairman Dorgan and Vice Chairwoman Murkowski:

This letter extends and expresses our support of Senators Tester and Baucus' Senate Bill S. 3355 ("S. 3355"), the Crow Water Settlement Act ("CWSA"). Senator Barrasso, member of the Senate Committee on Indian Affairs, raised concerns relating to the Bill and its impact on the Wind River Reservation Tribes' water rights, as well as those of the State of Wyoming. Pursuant to Senator Barrasso's concern, the Eastern Shoshone Tribe ("EST") met with the Crow Nation, along with the Northern Arapaho Tribe, to discuss the CWSA's impact on the Wind River reserved water rights, reserved water-right administration, as well as the impact of CWSA on the Big Horn river and Yellowstone river compacts.

Through our meeting and subsequent analysis, EST maintains a strong understanding that S. 3355 will not adversely effect Eastern Shoshone Tribe's reserved water rights. Therefore, EST supports the Crow Nation as a fellow sovereign and land owner, in its water settlement act S. 3355, and encourages the Senate to approve S.3355's immediate passage.

Thank you for your support of these critical Tribal issues.

Sincerely,

Ivan D. Posey, Chairman
Eastern Shoshone Business Council

xc: Cedric Black Eagle, Vice Chairman, Crow Nation
Sen. John Barrasso

GILBERT
ARIZONA

RECEIVED
SEP 26 2008

September 25, 2008

Senator Byron Dorgan, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
Facsimile: (202) 224-1193

Senator Lisa Murkowski, Vice Chairman
Senate Committee on Indian Affairs
838 Senate hart Office Building
Washington, DC 20510
Facsimile: (202) 224-5301

RE: S. 3128

Dear Chairman Dorgan and Vice Chairman Murkowski:

I am writing in support of S. 3128, legislation to authorize a loan to the White Mountain Apache Tribe for use in planning, engineering and designing a water project for the Tribe. This project is the key infrastructure component of a comprehensive settlement of the water rights claims of the Tribe.

Gilbert is a rapidly urbanizing community located in the eastern portion of the Phoenix metropolitan area. Gilbert has participated in all the major water settlement agreements with Indian communities in and around the Phoenix metropolitan area. Gilbert has diligently worked with the White Mountain Apache Tribe to reach a comprehensive settlement of the Tribe's water rights, and we anticipate that the authorizing legislation for the settlement will be brought forth in the near future.

S.3128 will allow the Tribe access to the funding needed to begin the engineering and development of water infrastructure critical to the settlement. By supporting S.3128, the settlement parties will avoid continued increases in construction and engineering costs of the infrastructure project and can begin work immediately.

Gilbert asks for your support of this important legislation. Thank you for your consideration.

Sincerely,

George Pettit
Manager

cc: Senator Jon Kyl

DAVE FREUDENTHAL
GOVERNOR

THE STATE OF WYOMING

RECEIVED NOV 24 2008

Ben
Dennis

STATE CAPITOL
CHEYENNE, WY 82002

Allsop
DR

Office of the Governor

November 13, 2008

Honorable Byron Dorgan
Chairman
U.S. Senate Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510

Honorable Lisa Murkowski
Vice Chairman
U.S. Senate Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510

Dear Senators Dorgan and Murkowski:

Your disposition of the bill to ratify the Crow Tribe-Montana Water Compact (S. 3355) at the September 25, 2008 Indian Affairs Committee hearing is greatly appreciated. Agreeing to hold the bill from full Senate consideration pending efforts by the Crow Tribe, Montana and Wyoming to resolve critical issues will hopefully allow those parties to craft language that will protect Wyoming water right holders from being adversely impacted by the Compact. Your actions during the Committee hearing functionally preserve the western axiom that water issues are best resolved with everyone at the table. Any departure from this approach is a mistake and should be carefully guarded against.

Nearly ten years ago the Crow Tribe and Montana negotiated the Compact to establish the Tribe's reserved right. In addition to creating rights for irrigation, domestic and stock water, as well as exempting Montana state rights from any effects, loose language in the Streamflow and Lake Level Management Plan accompanying the Compact could be misinterpreted to allocate at least 250,000 acre-feet to the Tribe for the purpose of instream flow. In the absence of a compact, no court would recognize a tribal reserved right for instream flow purposes as the reservation was established as an agricultural homeland. The Crow Tribe did not historically support itself through fishing.

Without further refinement of the problematic sections of S. 3355, the Compact's unintended creation of such an instream flow right, in derogation of the common law of reserved rights, could unfairly expose Wyoming water rights holders to an interstate call. In a significant drought, the Tribe could attempt to force a Wyoming water right holder with an 1890 priority date to cease diverting while a Montana water right holder with a 1995 priority date would be allowed to continue diverting due to the explicit exemption of Montana state rights in the Compact's language.

Interestingly, it is not the Tribe that would be the primary beneficiary of such a call since most of the benefit of maintaining stream flow in the Big Horn River below Yellowtail Dam inures to non-tribal interests. This leads to the further irony that without statutory protection for Wyoming, the Compact could result in Montana receiving the benefit of instream flow even though Montana could not make such a claim directly against Wyoming under its 1950 Yellowstone River Compact with Wyoming. This instream flow claim is in addition to the Montana windfall derived from the exemption of all of its other state rights from effects due to the Crow Compact.

Wyoming does not object to the Crow Tribe establishing, by compact, a reserved water right for irrigation, domestic, municipal and stock watering uses. Wyoming also does not object to the Tribe and Montana providing for the treatment of instream flows as between each other. However, Wyoming seeks protection for its water rights holders against the inadvertent creation of reserved rights based on instream flow purposes. In short, Wyoming simply seeks statutory protection that prevents its water users from being worse off than they would have been if the Tribe had established its reserved right in court through a correct application of the Winters Doctrine.

Thank you again for your consideration, and we look forward to participating in negotiating an amicable bill.

Best regards,

Dave Freudenthal
Governor

c: Senator Mike Enzi
Senator John Barrasso
Representative Barbara Cubin
State Representative Elaine Harvey
Big Horn County Commissioner Keith Grant

P.O. Box 43020 • Phoenix, AZ 85080-3020
23636 North Seventh Street • Phoenix, AZ 85024

RECEIVED
SEP 22 2008

September 4, 2008

Senator Byron Dorgan
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510

Senator Lisa Murkowski
Vice Chairman
Senate Committee on Indian Affairs
838 Senate Hart Office Building
Washington, DC 20510

RE: S. 3128

Dear Chairman Dorgan and Vice Chairman Murkowski:

I am President of the Board of Directors of the Central Arizona Water Conservation District (CAWCD). CAWCD is the Arizona political subdivision that operates the Central Arizona Project (CAP). CAWCD has been involved in every Indian water rights settlement in recent memory in Arizona, and CAP water supplies have comprised a significant component of the water budgets for such settlements. I am writing in support of S. 3128, legislation to authorize a loan to the White Mountain Apache Tribe for use in planning, engineering and designing a water project for the Tribe. The project is the key infrastructure component of a comprehensive settlement of the water rights claims of the Tribe. We are among those who have been working diligently on a settlement agreement with the Tribe and the necessary authorizing legislation for that settlement. We fully expect that authorizing legislation for the settlement will be introduced in the very near future. Your support for, and favorable Committee action on, S. 3128 will allow the necessary planning and engineering work for the settlement infrastructure to begin immediately, in anticipation that the settlement itself will soon be brought to fruition. This will spare all who have been involved in the negotiations the significant increases in infrastructure costs that will result if the planning and design work for the infrastructure component is delayed.

Thank you for your consideration of this important bill.

Sincerely,

Susan Bitter Smith, President
Board of Directors of CAWCD

Arroyo Seco MDWCA
Cañon MDWCA
El Salto MDWCA
Llano Quemado MDWCA
Lower Arroyo Hondo MDWCA
Lower Des Montes MDWCA
Ranchos de Taos MDWCA
Talpa MDWCA
Upper Arroyo Hondo MDWCA
Upper Des Montes MDWCA
Upper Ranchitos MDWCA
Valdez MDWCA
c/o HUMPHREY & ODÉ, P.C.
P.O. Box 1574
El Prado, New Mexico 87529
Tel. 505/758-2203

September 9, 2008

The Hon. Byron L. Dorgan
Honorable Committee Members
Senate Indian Affairs Committee
United States Senate
Washington, D.C.

Re: S.3381, Title II
Taos Pueblo Indian Water Rights Settlement Act

Honorable Chair and Members:

I am writing to you on behalf of the twelve Taos Valley Mutual Domestic Water Consumer Associations ("MDWCAs"). The MDWCAs are community public water systems that deliver safe drinking water to the historic villages located outside of the Town of Taos boundaries within the Taos Valley. Collectively, the twelve systems deliver water to more than five thousand people within the Valley. The MDWCAs are proud to be parties to the Taos Pueblo Indian Water Rights Settlement Act.

The Settlement Act is the culmination of several years of intense negotiations and discussions between the parties. Although its main purpose is to fulfill the United State's trust obligations to Taos Pueblo and to secure water rights for Taos Pueblo and its residents, the Act provides an added benefit, without added cost, of resolving centuries-old conflicts and providing a blueprint for how water will be used and shared by the various communities within the Taos Valley. Such a blueprint, in the face of an uncertain water supply, is priceless. The MDWCAs urge you to join our own honorable Senators Jeff Bingaman and Pete Domenici in supporting this vital legislation.

Respectfully submitted
/s/
Mary Humphrey
Attorney for the 12 Taos Valley MDWCAs

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2008

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
U.S. Senate
Washington, DC 20510

Dear Chairman Rahall and Chairman Dorgan:

This is to express the Department of Justice's views on H.R. 6768 and companion legislation S. 3381, which contain two titles, the "Aamodt Litigation Settlement Act" (Title I) and the "Taos Pueblo Indian Water Rights Settlement Act" (Title II). The Department of Justice opposes H.R. 6768 and S. 3381 because the provisions in the bills waiving tribal claims against the United States are not adequate to protect the United States from potential future liability.

We note that the testimony delivered by the Department of the Interior on these bills describes a number of concerns the Administration has with the bills and expresses the Administration's willingness to work with the settlement parties and sponsors of the bills to address Administration concerns. We recently have made efforts to reach out to the parties to seriously engage on these issues but the parties to the Aamodt settlement thus far have not done so. With respect to the Taos Pueblo settlement, although we have had productive negotiations with the parties, final waivers have yet to be agreed upon. Accordingly, the Department of Justice must now voice its opposition to the bills as they currently stand. The Department of Justice has repeatedly raised its substantial concerns with the waiver provisions with all parties but the parties have thus far opted not to accommodate these concerns. We remain willing to work with the parties and the sponsors of the legislation to address these concerns.

As currently drafted, the waivers set forth in the bills do not adequately protect the United States from future liability, do not provide the measure of certainty and finality that the proposed federal contribution should afford, and will engender additional litigation that can and should be avoided by careful drafting. The bills call for the United States to provide $162.3 million to the Aamodt settlement and $113 million to the Taos Pueblo settlement. Even though these amounts substantially exceed our assessment of the potential legal liability of the United States here, the bills would not adequately protect the United States from future litigation regarding these and closely related claims, including breach of trust claims analyzed in assessing what the United States might contribute to the settlement. In Aamodt, for example, the waiver language in the bill does not contain language clearly waiving claims relating to damages to land and other resources caused by past loss of water and off-reservation water rights are not unambiguously included. Ambiguous language regarding the nature of claims waived in past settlements has created problems for the United States, including conflicts over the interpretation and ultimately the implementation of those settlements. We should bring to bear here the lessons learned from conflicts over past settlements in order to avoid potential issues in the future, including litigation over the scope and meaning of the waivers that would defeat the goal of finality.

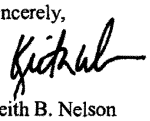
In addition, Title II waives the sovereign immunity of the United States for "interpretation and enforcement of the Settlement Agreement" in "any court of competent jurisdiction." This waiver is unnecessary, as demonstrated by the absence of such a waiver in Title I. More importantly, it will invite more litigation -- and likely in competing state and federal forums -- rather than resolving the underlying adjudication.

Indian water right settlements should comport to the guidelines outlined in the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria")(55 Fed. Reg. 9223 (1990)). Instead, these settlements violate the tenets of the guidelines and potentially expose the Federal government to further litigation. The Administration also remains concerned about the substantial cost that these settlements would require, particularly in light of the fact that not all of the claims that could be asserted against the Federal government will be extinguished.

Again, we stand ready to work with the settlement parties and the sponsors of H.R. 6768 and S. 3188 to resolve our concerns. However, absent substantial changes to the waiver provisions and elimination of the sovereign immunity waiver in section 212, we must oppose the bills.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact this office. The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,



Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Don Young
Ranking Member
Committee on Natural Resources
U.S. House of Representatives

The Honorable Lisa Murkowski
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Grace F. Napolitano
Chairwoman
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives

The Honorable Cathy McMorris Rodgers
Ranking Member
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. CHARLES J. DORAME

Question 1. The Aamodt Pueblos [Nambe Pueblo, Pojoaque Pueblo, San Ildefonso Pueblo, and Tesuque Pueblo] and Taos Pueblo make a strong case that the settlements are consistent with the federal criteria and procedures governing water settlements. How does the Administration differ with your analysis?

Answer. The Criteria and Procedures policy ("C and P") was first published on March 12, 1990 (See 55 Federal Register 9223) and identifies 16 factors to be used by the United States in its evaluation and analysis of Indian water rights settlements. At the request of Michael Bogert, counselor to the Secretary and Chairman of the Department's Working Group on Indian Water Settlements, the four Pueblos submitted two memoranda, one in February 2008 and the other several months later, which analyze the C and P and demonstrate specifically how the Aamodt settlement satisfies the 16 factors. These memoranda have been provided to the Committee as part of my supplemental written testimony. Until the Department of the Interior testified at the September 11, 2008, hearing, it had not responded in writing to our C and P analysis.

When questioned by Senator Pete V. Domenici at the September 11, 2008, hearing Mr. Bogert testified that the C and P are "guidelines," and are to be employed flexibly by the Department given that Indian water settlements vary widely in terms of their history, circumstances, and terms. Mr. Bogert's testimony is consistent with the fact that, since the C and P policy was issued in 1990, no Indian water rights settlement passed by the United States Congress has satisfied all or even most of

its requirements. The four Pueblos have demonstrated that the Aamodt Litigation Settlement Act legislation substantially satisfies the C and P "guidelines."

The United States differs with our analysis on two points. Its first objection is that the cost of the settlement is not proportionate to the liability of the United States. It also questions whether the settlement promotes economic efficiency.

On the first score, the Pueblos have provided substantial documentation that assesses the liability of the United States and we obviously differ with the United States' evaluation of our claims based on that documentation. We are unable to address specific details of the United States' assessment, however, because the United States has not shared it with us. The Committee has also been deprived of the United States' analysis because Mr. Bogert's testimony failed to provide specific facts, analysis, or arguments as to what the Federal Government's assessment is, how it was reached, and the gap between assessment of Federal liability and our own.

On the second issue, the economic efficiency concern is also addressed in my supplemental statement previously provided to the Committee. Though Mr. Bogert's written testimony stated that the Administration was concerned about this issue, it failed to give specific factual or policy analysis to support the statement.

In conclusion, the Aamodt Litigation Settlement Act, S. 3381, Title 1, substantially satisfies the C and P guidelines. As always, we stand ready to work with the Department of the Interior on the objections it has raised on the basis of the C and P guidelines, but we respectfully request that it provide specific factual and policy analysis to support their objections in order to maximize the productivity of our discussions.

Question 2. Are the four Pueblos willing to negotiate with the Administration on revising language in the bill that waives claims against the United States from future liability?

Answer. Yes.

The four Pueblos and the other Aamodt litigation settlement parties have negotiated with the United States for years regarding waiver language. The Settlement Agreement signed in 2006 was negotiated with the United States in the room. The United States voiced no objections regarding the scope of the waiver at that time. In the 2006 Settlement Agreement, claims that the Pueblos were waiving against the other parties were also waived by those parties against the Pueblos. The United States appears to no longer be concerned with such symmetry.

The four Pueblos believe the waiver issue to be a "moving target" created by the Administration. We have had numerous negotiating sessions with them in the context of the Aamodt settlement negotiations earlier this year, as well as separate conversations between the Pueblos and the United States. On July 7, 2008, the United States Department of Justice sent draft language for us to review. We discussed this together with our settlement judge and the other settlement parties on July 8, 2008. After those discussions, our focus understandably shifted to working with congressional staff on waiver language in S.3381, Title 1 so that the bill could be introduced. We understood that the sponsors wanted uniformity across the New Mexico Indian water settlements. We think the language in the bill as introduced achieve that goal. The United States sent the settlement judge another draft on September 18, 2008. The four Pueblos responded to the United States on this draft on September 22, 2008. To-date, the four Pueblos have not received a response.

We heard recently that the Administration prefers to have "uniform" or "model" waivers across the spectrum of Indian water rights settlements. We have reviewed the proposed "model" language, which in our judgment requires the four Pueblos to waive their claims that are far outside the scope, geographically and substantively, of the claims the Pueblos are seeking to settle through the ratification of the 2006 Settlement Agreement. In contrast, the existing waiver language in the 2006 Settlement Agreement and S. 3381, Title 1 clearly waives all the claims against the United States pertaining to water rights within the Pojoaque River Basin, which is the subject and scope of the lawsuit being settled.

Nevertheless, the Pueblos continue to work in good faith with our settlement judge to have the four Pueblos meet with the United States and the settlement judge on October 7, 2008 to once again seek common ground on the waiver issue. We will be glad to inform the committee of the outcome of those discussions.

Mr. Chairman, thank you for the opportunity to appear before the Committee and to provide this supplemental information to assist you in swiftly enacting S. 3381. Please do not hesitate to contact me if you have further questions.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO CHRIS D. TWEETEN

Question 1. Please describe the process by which the State of Wyoming, Indian tribes, other governmental entities, and members of the public can participate in planning and decisions related to the stream flow, management, and operation of Yellowtail Dam.

Answer. The Bureau of Reclamation has an Annual Operating Plan that guides operations for Yellowtail Dam and Bighorn Lake each year. Prior to issuing the Annual Operating Plan the Bureau of Reclamation conducts detailed water availability forecasts and meets with interested persons to discuss operations issues. The operations issues include such topics as: legal requirements for senior water rights; contractual commitments for stored water; power generation at Yellowtail Dam; Bighorn Lake recreation; releases for river fisheries; waterfowl needs; and, flood control. Typically, the annual meeting has included participants from the State of Wyoming, the State of Montana, National Park Service, Western Area Power Administration, the Army Corps of Engineers, the Crow Tribe and others.

Wyoming has the same opportunity for consultation as Montana does. Input from the states, tribes, and members of the public are taken into consideration by the Bureau of Reclamation. Ultimately, however, it is the Bureau of Reclamation that makes the management decisions for Yellowtail Dam and Bighorn Lake.

Nothing in the Compact, the Streamflow and Lake Level Management Plan, or S. 3355 alters the Bureau of Reclamation's decision-making authority; to the contrary, any action taken under the Management Plan is subject to the planning and decision-making authority of the Bureau of Reclamation. Wyoming has the same opportunity as does Montana to participate in and influence the Bureau's planning and management for Bighorn Lake.

Question 2. What happens if S. 3355 does not pass?

Answer. In 1979, the State of Montana initiated a state-wide water rights adjudication. This is a lawsuit commenced by the State of Montana to adjudicate all existing rights to the use of water within the State of Montana, including federal Indian reserved water rights and federal non-Indian reserved water rights, as contemplated by federal law. 43 U.S.C. § 666 (The McCarran Amendment). The Montana legislature created the Montana Water Court to adjudicate claims of existing rights. The Montana legislature suspended the requirement for the United States to file claims for federal Indian reserved water rights and federal non-Indian reserved water rights while negotiations with tribes and federal agencies through the Montana Reserved Water Right Compact Commission were conducted. By statute, if the Crow Tribe has not approved the negotiated Compact by July 1, 2009, the suspension of the requirement to file its claims for federal Indian reserved water rights is lifted and the United States has six months to file the claims on behalf of the Crow Tribe. Mont. Code Ann. § 85–2–217 (2007). The litigation to quantify the Crow Tribe's federal Indian reserved water rights will then proceed. Before the Crow Tribe votes to approve the negotiated Compact, Congress needs to ratify the Compact through passage of S. 3355.

The adjudication of the Crow Tribe's water right is a quantification of rights established by treaty in 1868. These are not newly established rights. As part of the general state-wide water adjudication, the Crow Tribe's water rights must be quantified either by settlement or by litigation. In litigation, we can reasonably expect the United States to put forward substantial claims for federal Indian reserved water rights for the Crow Tribe, for both the Crow Indian Reservation and the ceded strip. Claims for the Crow Tribe will encompass all of the Bighorn River basin that lies within Montana. The Crow Tribe will have a very substantial water right with a very senior priority date to serve the land and interests held in trust for the Tribe by the United States.

Judging from Wyoming's experience litigating the federal reserved rights associated with the Wind River Reservation, this litigation will be costly for the United States, the Tribe, the State of Montana, and individual water users. It is doubtful that the State of Wyoming or any Wyoming water user would have standing to participate as a party in the litigation. At the end of the adjudication phase of the Wyoming litigation, the Court decreed a large water right for the Tribes with a priority date senior to any other Wyoming uses on the Bighorn River. Litigation and settlement talks continue regarding administration of the Tribe's right, a matter which, of course, would have been resolved had Wyoming chosen to compact with the tribes.

Under the situation described in this question, all elements of the Crow Tribe's federal Indian reserved water right would be decided by the Court. No agreements as to mitigation of the exercise of the Tribe's water right would be in place for either

the State of Montana or the State of Wyoming. No administration procedures or alternative dispute resolution would be agreed to. The Bighorn River basin in Montana would be reopened to new appropriations under Montana law. The State contribution to settlement would return to the State treasury. The lawyers and expert witnesses would make a lot of money. But it is the Tribe that would truly pay the price, through loss of potable drinking water for its members and foregone economic development.

Question 3. Please describe how other Indian water rights settlements in Montana have benefited the citizens and tribes located within the state.

Answer. The presence of unquantified Tribal reserved water rights claims creates tremendous uncertainty for all interested parties, Indian and non-Indian alike. It also creates needless friction between Tribes and their non-Indian neighbors. Montana initiated its state-wide water adjudication process to reduce the uncertainty created by rights that have not been decreed, both Tribal and non-Tribal. The response to Question 2 details the financial and less tangible social costs that follow quantification of these rights through litigation.

As the Committee is aware, Tribes and their non-Indian neighbors frequently have difficulty communicating with one another, due in large part to misunderstandings and mistrust between the parties. We have found that in every case in which the Compact Commission and Tribe have successfully negotiated a water compact, the process of working together to achieve a common goal has strengthened that relationship.

Our compacts have also produced tangible benefits for Tribes and their non-Indian neighbors. Tribes have seen substantial economic development as a result of the infrastructure projects that have followed our compacts. The Montana-Rocky Boy's Compact, for example, provided for the enlargement and rehabilitation of two reservoirs on the Reservation. These projects have created needed employment opportunities for tribal members on a Reservation that, like most reservations, has been plagued by extraordinarily high unemployment and other associated social ills.

Both the Rocky Boy's and Fort Peck Compacts have included storage of water in federal reservoirs. In both cases, Tribes are using this stored water to create regional water treatment and delivery systems to deliver clean water to Tribal and non-Indian communities. The Rocky Boy's Reservation in particular suffers from the lack of clean drinking water. In many tribal communities potable water is trucked onto the reservation at substantial cost. Similarly, many communities in the arid Montana plains rely on untreated ground or surface water for their domestic needs. The regional water treatment and delivery systems made possible through our water compacts provide the means to solve these problems. They also will provide employment opportunities for tribal members and important revenue streams that will contribute to making the Tribes economically self-sufficient.

To take another example, the Montana-Northern Cheyenne Compact provided a joint federal-state partnership for the enlargement and improvement of the Tongue River Dam, an unsafe dam located just upstream from the Reservation. This project provided employment opportunities for Tribal members, alleviated a substantial safety issue for Indians and non-Indians alike, and provided the Tribe with a large block of stored water for use in advancing the Tribal economy.

These examples are by no means exhaustive of the benefits Tribes and non-Indians have enjoyed as a result of the amicable settlement of Tribal reserved right claims. In each settlement, specific management and allocation approaches provide benefits that are tailored to the needs of Tribes and provide benefits for the State and all of its citizens.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO CHRIS D. TWEETEN

Question 1. In my experience (Rocky Boy's, Northern Cheyenne, Ft. Peck), these water settlements are vital to both the on- and off-reservation communities they serve. Do you agree? Examples?

Answer. Please see the answer to Senator Dorgan's question number 3.

Question 2. What will happen if Congress does not pass this legislation?

Answer. The Crow Tribe's federal Indian reserved water rights will adjudicated in the Montana Water Court. Please see the answer to Senator Dorgan's question number 2.

Question 3. How will Wyoming be affected if the parties are forced to litigate their rights?

Answer. The adjudication of the Crow Tribe's water right is a quantification of rights established by treaty on May 7, 1868. The Crow Tribe's water rights are federal Indian reserved water rights. As such, it is the purpose of the federal reserve–lands held in trust by the United States for the Crow Tribe and its members and allottees–that define the quantity of water. Tribes are not required to have developed the land in order to have water reserved to serve that land and these water rights cannot be lost through abandonment.

Wyoming is the upstream neighbor to a substantial federal Indian reserved water right. The Crow Tribe's water right is the most senior water right in the entire Bighorn River basin. The Crow Tribe's water right is likely to be very sizable. Once quantified, the Crow Tribe will likely be able to use the water for any reasonable purpose.

The State of Montana cannot accurately predict what unmitigated impacts there would be in Wyoming if the parties are forced to litigate the Tribe's federal Indian reserved water rights, but Wyoming is right to be concerned. The Compact to be ratified in S. 3355 contains important protections added at Wyoming's request to mitigate the effects of the Tribe's rights on upstream Wyoming water users. Without the Compact, none of these mitigation measures will be assured.

As noted above, it is unclear whether Wyoming or its water users would have standing to participate as a party in the Montana adjudication. The Compact may therefore be the only opportunity Wyoming will have had to secure any mitigation for its interest with respect to the Tribe's large early priority rights.

Question 4. What is the primary use for the water Wyoming wants in Bighorn Reservoir? Recreation alone? Irrigation?

Answer. Like every state, Wyoming has several uses for water. Sometimes the demands for water are complementary and sometimes they are in competition. Wyoming must be the one to respond to what is the "primary use" of water in Wyoming. However, based on comments and discussions we have had with representatives from Wyoming, it is clear that Wyoming has an interest in both recreation in Bighorn Lake and present and future irrigation in Wyoming. In order to meet its obligations to Montana and the Crow Tribe, the dual interests in lake levels and irrigation in Wyoming are competing interests.

About 40 percent of the length of Bighorn Lake (the reservoir created by the Yellowtail Dam) lies in Wyoming. The other 60 percent lies in Montana, and it either borders or is within the Crow Indian Reservation. Yellowtail Dam is on the Crow Indian Reservation. Bighorn Lake is a popular boating destination that can be accessed in both Wyoming and Montana.

Yellowtail Dam and Bighorn Lake are Bureau of Reclamation facilities with a May 5, 1961 claimed priority date governed by State law. The Bureau of Reclamation also operates the upstream storage facilities of Buffalo Bill Dam and Boysen Dam (as well as other facilities). The storage facilities operated by the Bureau of Reclamation are part of a basin-wide system that should fill with available water in order of priority and should supply water to the authorized irrigation projects associated with them. The storage facilities operated by the Bureau of Reclamation are multiple use storage facilities. If storage is not filled in order of priority and Wyoming uses water for irrigation that is not released from the associated storage facilities, then the lake levels for recreation in Bighorn Lake within Wyoming (and Montana) will suffer. The Bureau of Reclamation and Wyoming can work together to mitigate reductions of lake levels in Bighorn Lake, without adversely affecting water rights of the Crow Tribe. Wyoming also participated in a state/federal cost share construction of additional storage on Buffalo Bill Dam. Completed in 1993, the project now contains a state water account of 189,965 acre feet of water from which Wyoming water needs in the basin can be satisfied.

Question 5. To what extent was Wyoming involved in compact negotiations?

Answer. The State of Wyoming and the Office of the Wyoming State Engineer consulted with the Compact Commission and provided comments and testimony during the negotiation of the Compact, and the subsequent State approval process, to make sure Wyoming's concerns were addressed. A representative from the State Engineer's Office attended every negotiating session and general public meeting. The parties addressed concerns expressed by the Wyoming State Engineer with language in the Compact that resulted in language clarifications in S. 3355. The State of Wyoming committed substantial time and effort to the negotiations. The State of Montana went to great lengths to ensure Wyoming's involvement and that Wyoming's concerns were addressed in this agreement to the extent possible while also meeting the rights of the Crow Tribe.

Question 6. Do you feel that the compact adequately addressed Wyoming's concerns?

Answer. Yes. Despite our disagreement about the issue, we have negotiated an agreement that, as a practical matter, met Wyoming's fundamental concern–that the Crow Tribe-Montana Compact be consistent with Wyoming's interpretation of the Yellowstone River Compact. The Tribe's natural flow rights for new development and its storage rights for new development under the Crow Tribe-Montana Compact fit within Wyoming's interpretation of the percentage allocated to Montana for post–1950 uses under the Yellowstone River Compact. Again, Montana has vigorously contested and continues to vigorously contest Wyoming's interpretation of the Yellowstone River Compact. The Crow-Montana Compact's approach to the issue preserves the position of both parties with respect to predicted future water availability.

To accomplish this, Montana closed the Bighorn River basin within Montana to new non-excepted appropriations under Montana law. This agreement is at the expense of Montana's future development. No state can be asked to do more.

The State of Montana and the State of Wyoming cannot agree to affect adversely a federal Indian reserved water right created under Federal law. The states cannot agree to do away with the most senior water right on the River system.

The most any state can do is to mitigate the impacts from development of the federal Indian reserved water right through agreement. This Compact mitigates possible impacts to upstream water users in Wyoming on the Bighorn River by restricting new development and providing supplemental storage in Bighorn Lake to meet the Tribe's natural flow water right in all but the most extreme years.

Montana has made more than a good faith effort to address Wyoming's concerns and provide reasonable levels of protection for Wyoming's interests.

Question 7. Is there anything in current law that includes Wyoming in management decisions?

Answer. Please see the answer to Senator Dorgan's question number 1.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. CARL E. VENNE

Question 1. This bill authorizes $527 million as the federal share. Can you provide the Committee a brief explanation of how you determined the federal costs?

Answer. The figures in the bill represent, for the most part, the estimated actual costs of rehabilitating the Crow Irrigation Project and building other water infrastructure in compliance with federal duties. These are federal duties derived from the federal trust responsibility including specific claims related to the Federal Government's failure to adequately provide and maintain the irrigation system authorized by Congress and the failure to provide clean drinkable water for our people.

To assist us in assessing costs, we hired an engineering firm. We've worked hard to get a conservative but equitable number, including moving from a replacement to a rehabilitative model for the irrigation project. Also, we are waiving numerous actual and potential claims against the Federal Government. This significantly reduces the federal liability. For example, the Federal Government condemned Crow land and created the Yellowtail Dam almost 50 years ago. Despite federal laws requiring power revenue to be shared with the Crow Tribe, we have not received any of the $600 million dollars generated by this Dam over this period of time within our reservation and with our water. As such, we strongly believe the federal costs are commensurate with, or even less than, the liability owed by the Federal Government.

Question 2. You testified that you are engaged in an ongoing fruitful dialogue with the Department of the Interior, however, the Department's testimony indicates that it opposes nearly every aspect of the water settlement to date. Can you elaborate on this dialogue? Are full negotiations are still needed?

Answer. Our dialogue with the Federal government has been very good. There have been times when we disagreed and times we wished the federal team moved more quickly. Since the hearing date, we have progressed significantly in responding to outstanding concerns of the administration. Of all the concerns articulated by the Federal government, we only now disagree on waiver language and the appropriate cost of the projects. We are working on finalizing waiver language and may never agree on a final number related to cost.

Question 3. The Bighorn River has many users and originates in Wyoming. Have you been or are you willing to sit down with Wyoming and Wyoming Tribes to discuss upstream concerns?

Answer. Yes, it is true what you say—the Big Horn originates in the state of Wyoming, which is actually part of Crow's original reservation under the 1851 Fort Laramie Treaty.

As the State of Montana can also attest to, we have a long history of meeting with the State of Wyoming, many Big Horn water users from both states, and the Tribes of Wyoming. We had ongoing discussions with these players during the time the Montana Crow Compact was negotiated. In fact, we recently went to the Wind River Reservation for a meeting involving the Wyoming state legislators and the Wyoming Tribes' concerns related to the Big Horn. As you know, our attorneys continue a dialogue with Senator Barrasso's staff regarding his concerns. We are happy to sit down with Wyoming and Wyoming Tribes to continue to discuss our shared concerns.

That being said, it is important to note today that the Crow Nation has the senior priority date on the Big Horn River. Our priority date is May 7, 1868, based upon our agreement with the second Fort Laramie Treaty. The Shoshone and Arapaho Tribes, in the Wind River Reservation, signed a treaty one week later and therefore have a later priority date. The States of Montana and Wyoming have the latest priority dates on the Big Horn River consistent with the dates in which they became states—1889 and 1890, respectively. It is also important to note that the compact being ratified by this federal legislation is between the Crow Nation and the State of Montana.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. CARL E. VENNE

Question 1. What is the process for tribal ratification?

Answer. As described in the bill, after federal ratification the Compact will be returned for a vote by the Crow people. On such a critical issue, everyone deserves a chance to be heard. The plan to conduct Tribal ratification through a simple vote of the people has been in place since the 1999 Crow / Montana Compact was finalized.

Question 2. I received correspondence from the Speaker of the Crow legislature suggesting that the federal process is flawed. What is your view of this process, and where do things stand now?

Answer. We have initiated a series of public meetings to update the Crow tribal membership on the terms and details of the settlement prior to a tribal vote. Seeking federal legislation is the "middle part" of this entire settlement process. We have significant support but some opposition at home and the correspondence you have received is reflective of our local politics in play (3 legislators are running for Chairman of the Executive Branch and 2 of them have sent written letters to your office expressing their concerns, without total Crow legislative agreement). Again, it's important to know that the Crow people have the final say with this legislation.

Question 3. Have you had public meetings or hearings? Do you plan any in the future?

Answer. Vice Chairman Black Eagle and his team frequently give public presentations on the Compact and the federal legislation ratifying it, both locally and at such forums as the Indian Water Working Group meeting in Billings, Montana, and a Wyoming meeting for state legislators at Fort Washakie. Recently, there have been several district meetings on the Crow Reservation as well as presentations at the public sessions of the Crow Legislature. Vice Chairman Black Eagle and his water team will continue to visit the Crow districts to make information available to the people. We will also continue to publish stories about the Compact in the Crow Tribal newspaper and elsewhere (we have published several page summaries in 2 previous editions).

Question 4. We want to make sure that anything we do in Congress truly benefits the Crow people. We don't want to hear 5, 10 or 50 years down the road that something we did today did not help the tribe and wasted taxpayer dollars. Is there anything that can assure us that we are doing what is right for the Crow Nation?

Answer. This settlement will allow us to complete the water infrastructure needed for our reservation to fulfill its purpose as a homeland for our people. The settlement will put the Crow Irrigation Project into good repair for the first time in its history, which will benefit all Project users and provide the Tribe with some of the economic and other benefits for which it was intended. Also, of critical importance, it will aid in providing safe and potable drinking water to all parts of our Reservation.

It is also worth noting that if the compact does not get ratified before the Montana Reserved Water Rights Commission expires, we will be forced to litigate these claims, costing tens of millions of dollars for each government that is part of this legislation. Water rights litigation is very time consuming (decades) and expensive. All parties are better off if the Settlement moves forward.

Question 5. How will this settlement work with the Crow Lands Restoration Act, currently before this Congress?

Answer. The Crow Lands Restoration Act authorizes a loan program of up to 380 million dollars to enable the Tribe to buy back fractionated lands and "Section Two Lands," large parcels that were transferred away from the Tribe in violation of a federal statute meant to protect the Tribe's land base. The appurtenant water rights of fee lands repurchased by the Tribe will become part of the Tribal Water Right. Any such water rights in the Bighorn Basin do not add to the total quantified amounts of Tribal Water there. Two amendments were added to the bill on Senator Barrasso's request that help ensure that there will be no unintended or undue effects on the legal rights of Wyoming users from these transfers. In most cases, these transferred water rights would already be claiming an early priority date, so there would be no effect from the transfer.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. GILBERT SUAZO, SR.

Question 1. Both the Aamodt Pueblos and Taos Pueblo make a strong case that the settlements are consistent with the criteria and procedures. How does the Administration differ with your analysis?

Answer. The Administration contends in its testimony that Abeyta does not meet the federal criteria and procedures for Indian water rights settlements on the grounds that the State cost share is disproportionate to the benefits received by the State and local parties, a federal contribution of the order of magnitude provided in S 3381 is not appropriate because "calculable legal exposure plus costs related to Federal trust or programmatic responsibilities do not justify a federal financial contribution of $113 million," and that the projects authorized do not promote economic efficiency.

The Administration's analysis differs from ours in that the Administration seems not to have considered all of the relevant factors under the criteria and procedures. For instance, the Administration does not acknowledge that the criteria and procedures require consideration of the indirect costs of continued litigation. As explained in my testimony, the settlement mechanisms avoid the indirect costs to the United States, the Pueblo and other parties associated with conflicts over surface water use and groundwater withdrawals. In addition, although the Administration mentions costs related to Federal trust responsibilities, it appears not to have considered the liability for breach of trust that will be avoided for the claims against the United States to be waived by the Pueblo. Similarly, the Administration mentions consideration of programmatic responsibilities, but we believe it has likely overlooked the fact that appropriations for programmatic responsibilities associated with Pueblo water rights and water infrastructure have been woefully inadequate to meet the United States responsibility, and thus those past appropriation levels are not a proper basis for comparison to the federal financial contribution to the settlement.

The Administration does not explain how it believes the State contribution is disproportionate to the benefits received locally, so it is difficult to address how their analysis differs from ours. The explanation for the Administration's conclusion may be that it is incorrectly treating the Mutual Benefit Projects as a 100 percent local non-Pueblo benefit, when in fact those projects were designed to mutually benefit both the Pueblo and other local parties. It bears emphasis that the Abeyta mutual benefit projects are very modest in scale and cost.

The Administration's comment on economic efficiency similarly does not explain how the Administration believes this criterion is not met. The criterion referenced actually requires that a settlement promote economic efficiency on reservations and tribal self-sufficiency. By simply referring to "economic efficiency" in objecting to the magnitude of the cost and the cost sharing, the Administration appears to be misconstruing this criterion as a requirement to reduce the costs to the Federal Government. In fact, this criterion goes to the benefits to the tribe from settlement funding that promotes on-reservation economic efficiency and makes the tribe more self-sufficient. Here, as detailed in my testimony, the projects funded by the settlement will largely be designed, managed and constructed by the Pueblo and will provide improved water infrastructure to support the Pueblo's agricultural, community and

economic development, thereby promoting and enhancing the Pueblo's self-sufficiency and on-reservation economic efficiency.

The Administration also questions in its testimony whether it is appropriate to make funding available for initial water rights acquisition, for instance, to facilitate the settlement before all of the conditions to the enforcement of the settlement are met. The Administration does not cite to the criteria and procedures for its analysis of this early funding. Instead, this concern is based on the Administration's mistaken belief that making funding available upon appropriation is unprecedented. In fact, there are precedents for early funding. For example, the Zuni Indian Tribe Water Rights Settlement Act of 2003 makes funds available for acquisition of water rights and other activities carried out by the Zuni Tribe to facilitate the enforceability of its settlement agreement, including the acquisition of at least 2,350 acre-feet per year of water rights before the deadline for the settlement to become enforceable. See Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108–34, §§ 4(b)(1) and 6(f)(1), 117 Stat. 782, 786, 789 (2003). The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999 makes funds available upon appropriation for certain administration responsibilities assumed by the Tribe. See Chippewa Cree Tribe of The Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106–163, ¶105(a), (d)(3), 113 Stat. 1778, 1786, 1788 (1999).

As explained in my testimony, this early funding will allow the Pueblo to acquire and retire an increment of water rights to partially decrease its forbearance, support Pueblo water administration, and enable the Pueblo to commence the most urgently needed restoration and small water infrastructure improvements on the Pueblo necessitated by federal neglect. In fact, the Administration's testimony acknowledged Taos Pueblo's immediate need for this funding. In the unlikely event that the settlement does not become enforceable, S. 3381 provides the United States the right to set off any of these early funds expended or withdrawn against claims asserted by the Pueblo against the United States relating to water rights in the Taos Valley. Consequently, we do not believe that the Administration's concern on the early money provision is based on a different analysis from the Pueblo under the criteria and procedures, but rather reflects a concern for creating a precedent, which we have addressed.

The Administration raised only two nonmonetary concerns with our settlement. The first is whether the waivers and releases of claims meet the federal criteria of finality and protection of the United States from future liability. In fact, S. 3381 ensures that the goal of finality is met because the waivers authorized by the bill resolve the pending claims of Taos Pueblo, and of the United States in its trustee capacity for the Pueblo, in the adjudication. In addition, S. 3381 adequately protects the United States from future liability through waivers of a range of claims for injuries to water rights that accrued through the settlement Enforcement Date, as detailed in the legislation. The waivers of Pueblo claims against the United States are appropriately scoped to the water rights claims at issue and claims for damages arising from failure to protect or develop water rights that accrued through the Enforcement Date.

We believe that the Administration's primary concern regarding waivers is to avoid any possibility of litigating the meaning of variations in wording of waiver provisions from one settlement to another. The Administration acknowledges that such variation in waivers has been the practice to date. Consequently, changing our waivers language would not accomplish the Administration's desire to eliminate the possibility of litigation over the meaning of wording variations because the variation in wording of waivers in existing legislation authorizing other Indian water settlements will remain. Further, we do not believe that this Administration concern is an issue of whether our settlement meets the criteria of finality because numerous other settlements with varying wording of waivers have passed muster for authorization.

The other nonmonetary concern identified in the Administration's testimony was whether unnecessary litigation over the jurisdiction of a court other than the decree court over actions to enforce the settlement might occur. Here again, we do not believe that this Administration concern is an issue of whether our settlement meets the criteria of finality, or other aspects of the criteria and procedures, because numerous other settlements with varying approaches to post decree enforcement have passed muster for authorization.

Question 2. Are you willing to negotiate with the Administration on waiver language?

Answer. Yes. In fact, the Pueblo and the other local parties have actively engaged in negotiation with the Administration in a cooperative spirit. Upon receiving the

Administration's proposed waiver language specifically for Abeyta on September 19, 2008, Taos Pueblo and the other settlement parties immediately reviewed it and spent many hours on the phone with the Administration the next business day, Monday, September 22, in an effort to work out mutually agreeable language. The Pueblo traveled to Washington, D.C. the following day and met with the Department of the Interior to continue discussion of the waivers language all day on September 24, with other local parties participating in a portion of the discussion by phone. Following the hearing on our settlement legislation in the House Subcommittee on Water and Power on September 25, we returned to Counselor Bogert's office to continue these discussions for the rest of the day, with the Department of Justice participating by phone. Since our return to New Mexico, we have had two formal conference calls with the Administration and all parties.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. DIRK KEMPTHORNE

S. 3128

Question 1. The Administration's written testimony states that the bill would "essentially authorize loan forgiveness" and that the bill does not require the Tribe to reimburse the government. At the hearing Senator Kyl stated that he intended to amend the bill to state that the loan will be repaid over a term of 25 years, beginning on January 1, 2013. Would you still refer to this as authorizing a loan forgiveness?

Answer. Our testimony was based on provisions in S. 3128 as introduced that the loan authorized pursuant to S. 3128 be repaid out of funds from the Lower Colorado River Basin Development Fund. As amended, S. 3128 does not include these provisions. We note, however, that S. 3473, the "White Mountain Apache Tribe Water Rights Quantification Act of 2008," provides that in lieu of direct repayment by the Tribe, the loan as provided for in S. 3128 is to be repaid out of the funds in the Lower Colorado River Basin Development Fund. This is the same as the requirement in S. 3128 as introduced which provides that the Tribe would not be required to repay the funds.

Question 2. In your written testimony, the Administration states that it does not support the bill, in part, because the Administration is still in the process of determining the federal contribution for the upcoming settlement. Yet, this bill only concerns a $9.8 million loan. Does the Administration think that the federal share may be less than $9.8 million? When will you have a recommendation for Congress regarding the Administration's estimate of the federal share?

Answer. S. 3128 authorizes $9.8 million for planning, engineering, and design ofa water supply project that is one element of a proposed settlement of the Tribe's water rights claims. Approval of that water rights settlement is contained in S. 3473. The total federal costs proposed in S. 3473 exceed even the costs of the water supply project that the Tribe estimates at approximately $128 million in today's dollars. The Administration views the planning, engineering and design ofthe facilities described in S. 3128 as merely part of the overall settlement cost of a White Mountain Apache Tribe water rights settlement. We believe the cost of the settlement should be considered in entirety.

As we testified, the process under which the Administration evaluates Indian water rights settlement is set forth in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria")* (55 Fed. Reg. 9223 (1990)). We are in the process of analyzing the factors set forth in the Criteria in order to determine the appropriate federal financial contribution that could be recommended to Congress as consideration for settling the Tribe's water rights claims. We do not expect the analysis to be completed before this Administration leaves office.

Question 3. In your written testimony, the Administration states that S. 3128 cannot be considered in a vacuum and must be done in the context of the larger water rights settlement agreement. Senator Kyl introduced S. 3473, A bill to resolve water rights claims of the White Mountain Apache Tribe in the State of Arizona, and for other purposes, on September 11,2008. Does this change the Administration's view of S. 3128? When will the Administration be able to provide a revised view on S. 3128?

Answer. Please see the answer to question 2.

S. 3355

Question 4. The Administration's written testimony states that more time is needed to evaluate the two major infrastructure projects required by the settlement leg-

islation. The Administration states that it did not receive the proposals until July 2008. How much time does the Administration need to examine the two major infrastructure projects required by the settlement legislation? When will you provide a recommendation to Congress regarding these proposed projects?

Answer. In July 2008, the Federal negotiation team was informed of the existence of the reports describing at least two of the major projects proposed in S. 3355. The Federal Team received the reports on October 29, 2008. The Department is in the process of analyzing the reports to determine whether the work that they propose is a cost effective and feasible approach to providing the services that the Crow Tribe is seeking. While we are proceeding as quickly as possible, it generally takes many months to complete this kind of analysis. Moreover, the Administration must also determine if the number and scope of the proposed settlement benefits can be justified under the Criteria. The proposed benefits include the rehabilitation and improvement of the Crow Irrigation Project, the design and construction of water diversion and delivery systems to serve vast geographic areas of the Crow Reservation, and significant funding for unspecified and open-ended water and economic development projects. The number and cost of these benefits is unprecedented in comparison to existing Indian water rights settlements and, if approved, arguably would make the Crow settlement the most expensive settlement to date with in excess of $500 million authorized for tribal projects.

Question 5. The Administration's written testimony states that it was not included in the proposed settlement. Why wasn't the Administration included in the settlement agreement? Did the Tribe or the State request participation of a federal water rights settlement team? If a team has not yet been committed, when will the Department be ready to commit a federal water rights settlement team? After a team is appointed how long do you anticipate needing to appropriately revise the settlement and reach agreement?

Answer. A Federal negotiation team was appointed in 1991 to work with the Crow Tribe and the State of Montana in resolving the Tribe's water rights claims. The team has diligently worked with the State and the Tribe for many years and was involved in the negotiation of the Compact between the Tribe and the State. The Compact was ratified by the State in 1999 despite concerns expressed by the team. It should be noted that the Compact primarily contains provisions regarding water supply, management and administration. The projects and funding in S. 3355 were not addressed in the Compact and the discussions between the Tribe and the State on these issues have largely moved without consideration of the concerns of the settlement team. The Federal team is continuing to complete the reports required by the *Criteria* and we expect the required reports to be completed early in 2010 for consideration by the next Administration.

Question 6. The Administration's written testimony asserts without specificity that the settlement legislation does not safeguard allottee rights. Please explain specifically how the bill does not safeguard allottee rights.

Answer. The language currently in the bill fails to recognize the property interests held by allottees and authorizes Tribal control over such rights that may result in uncompensated and unconstitutional takings of property rights. The Departments of the Interior and Justice have been working with the Tribe on language that would address these concerns and we are hopeful that we can come to agreement.

Question 7. The Administration's written testimony states that the waivers and releases in the bill do not sufficiently protect the United States from future claims by the Tribe. What changes would you make to the waivers and releases to satisfy the Administration's concerns?

Answer. After the hearing on the bill, the Departments of Interior and Justice discussed proposed waiver language with the Crow Tribe and the State of Montana. The parties accepted some of the proposed waiver language and we are hopeful that we can come to agreement on remaining issues early in 2009.

S. 3381

Question 8. In the written testimony of Chairman Dorame of the Northern Pueblo Tributary Water Rights Association Counselor to the Secretary, Michael Bogert, is quoted as referring to the long-term regional harmony and cooperation associated with the settlement in Title I of S. 3381 as "Peace in the Valley." Yet, Mr. Bogert testified in opposition to the settlement. Please explain these differing views.

Answer. As explained in the Department's testimony, in negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiationsfor the Settlement of Indian Water Rights Claims ("Criteria and Procedures")* (55 Fed. Reg. 9223 (1990)). Among other things, the Criteria and Procedures provide policy

guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. The *Criteria and Procedures* also address other goals, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The "Peace in the Valley" concept, as attributed to Counselor Bogert, is a part of the *Criteria and Procedures* and as such was taken into consideration when the Administration determined the appropriate federal contribution to the Aamodt and Taos settlements.

Question 9. Your testimony states that a federal contribution of $162.3 million is substantially above an appropriate federal contribution to the settlement and is not proportionate to the benefits received. What is the basis for these determinations? What amount would the Administration recommend for the federal share?

Answer. Please see the answer to question 1. The Administration made a federal financial contribution offer of $45 million which was rejected by the parties.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. DIRK KEMPTHORNE

Question 1. Do you recognize the government's trust responsibility and resulting liability to provide adequate water to the Crow Nation?

Answer. The United States has a trust responsibility to protect the Crow Tribe's reserved water rights. In the pending Montana general stream adjudication involving the water rights of the Tribe, the United States has filed appropriate claims for the Tribe in order to protect and confirm its federal Indian reserved water rights. The Federal Team participated in negotiating the water rights quantified in the Crow/Montana Compact and believes the measure of water recognized in the Compact reflects the water rights that the United States would expect to secure in litigation. However, the United States' trust responsibility does not extend to the funding and the construction of water projects on reservations. Such infrastructure development is a discretionary function, dependant on Administration policy and Congressional authorization and funding.

Question 2. Your testimony mentions that the cost of the Crow settlement bill is too high and the waivers not strong enough. Are you suggesting we pay the tribe *less* and, at the same time, make the waivers stronger? Isn't that backwards? Doesn't the government usually pay *more* for stronger waivers?

Answer. As the Administration has stated in testimony on numerous proposed Indian water rights settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

Question 3. You listed at least 7 reasons to oppose my bill. Has the Department been active in negotiating this compact? If yes, what do you mean by the Department not having time to analyze the projects authorized in this bill? How much time will it take?

Answer. Please see the answers to Dorgan's questions 1 and 2.

Question 4. If $527 million is too high, what number do you suggest, in detail please?

Answer. Please see the answers to Dorgan's questions 1 and 2.

Question 5. Are there any off-reservation, off-ceded strip, allotments associated with the Crow settlement? If so, where are they located?

Answer. The Bureau of Indian Affairs has preliminarily identified that there are at least three allotments outside the exterior boundaries of the Crow Reservation and the Ceded Strip. Water rights for these allotments were not negotiated as part of the Crow-Montana Compact. The three allotments that have been identified thus far are located near the cities of Red Lodge and Big Timber, Montana.

Question 5a. If not, why is there no statewide waiver of water claims on behalf of the Crow?

Answer. Section 10 of S. 3355 contemplates a statewide waiver of water claims on behalf of the Crow Tribe.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN BARRASSO TO HON. DIRK KEMPTHORNE

S. 3355

Question 1. Please explain the work of the Bureau of Reclamation to form and maintain the stakeholder working group for Yellowtail Dam. Please include a complete list of the working group's members.

Answer. The Bighorn River System Issues Group was formed by Reclamation in March 2007 to identify, explore, and recommend courses of action to local, Tribal, State, and Federal entities responsible for managing the Bighorn River system resources for their consideration as part of a long-term management strategy.

The group's challenge is to re-examine the uses and needs of the Bighorn River system to find an appropriate balance of public benefits, while recognizing the respective agencies' commitments to authorized project purposes, legal obligations, contemporary needs and public expectations.

Question 2. Please explain how managers of Yellowtail Dam balance the needs of each of the facilities' stakeholders. Please include discussion of what would result if the Bureau favored anyone particular group's interests over the others.

Answer. Operating criteria, part of Reclamation's Standing Operating Procedures for Yellowtail Dam, form the framework for Reclamation's Strategies to balance resource needs and public benefits. Meetings are held annually with Federal, Tribal and State agencies and the public each spring to discuss water supply conditions, resource needs and operation plans for the coming season. Since January 2008, the Bighorn River System Issue Group (formed in March 2007) has been engaged in the task of revisiting fish and wildlife needs of Bighorn Lake and the Bighorn River and the recreation needs identified by the National Park Service. These revised resource needs will be taken into account as Reclamation continues to operate the facility to best balance resource needs and public benefits this coming fall/winter and into the future.

Yellowtail Dam is operated to provide hydropower, irrigation, municipal and industrial, flood control, sediment control, fish, wildlife and recreation benefits. Disproportionate consideration of one benefit would likely have a negative impact on other benefits and the overall goals of the project.

Question 3. The Department's testimony implies that there is a problem with the water allocation included in the Compact and legislation. Please elaborate.

Answer. The United States does not disagree with the water allocations defined in the Crow water rights Compact of 1999 or as stated in S. 3355. The issue raised in the Administration's testimony was how capital costs associated with the 300,000 acre-feet of storage allocated to the Tribe will be paid. We believe that, unless Congress specifies other wise, these costs would be borne by other project beneficiaries such as power users.

Question 4. The Department's testimony expresses concern that the standard criteria and procedures for this kind of agreement have not been completed. What is the effect of that shortcoming? Is it fair to say this bill is premature?

Answer. As we stated in our testimony, the *Criteria and Procedures* provide policy guidance on the appropriate level of Federal contribution to settlements. After completing the process outlined in the *Criteria,* the Administration is able to take a position on the overall cost of a settlement and on what level of non-Federal cost sharing would be proportionate to the benefits received by the non-Federal parties. This bill is premature in the sense that the Administration has not completed the analysis necessary to support any specific level of Federal contribution.

Question 5. The Department's testimony expresses concern over ambiguity in the Bureau of Reclamation's responsibility for water delivery. Please elaborate.

Answer. Please see the answer to Domenici's question 5.

Question 5a. How can all stakeholders be made a part of establishing the Bureau's responsibility?

Answer. Reclamation's authority and responsibility are derived from Federal laws enacted by Congress and implemented in accordance with the water laws of Wyoming and Montana. Reclamation solicits input from stakeholders throughout the year at the annual agency meeting held each spring, at meetings of the Bighorn River System Issues Group, and through telephone conference calls held at times mutually agreed to by the stakeholders. Reclamation posts monthly operations plans on an Internet website designed to inform the public of water supply conditions and anticipated operations.

Question 6. This bill provides benefits of water storage to the Crow Tribe while relieving them of responsibility for reimbursement. Could this require you to pass cost on to other customers?

Answer. Yes. Under the Pick-Sloan Missouri Basin Program, new water users are required to enter into a contract with the Bureau of Reclamation that includes a requirement for proportional repayment ofthe capital (development), operation, maintenance and replacement costs of the particular PSMBP unit. However, under the Leavitt Act, the capital component allocable to Indian irrigation would be deferred as long as reservation lands remain in trust. Also see answer to question 3.

Question 7. Does Section 12B of S. 3355 represent potential foregone power generation revenue to the United States?

Answer. As currently drafted, Section 12B could prevent the United States from developing power or leasing power sites to third parties. Under Section 12(b), the legislation specifies that the Crow Tribe would be able to use or market all the hydroelectric power generated at the dam and it would retain any revenues produced. It appears that potential revenue could be foregone since the United States would no longer have the authority to develop a Federal power facility at the Yellowtail Afterbay Dam, or to enter into a Lease of Power Privilege with a non-federal party which would provide for a revenue stream to the United States for repayment of the Yellowtail Unit's capital, operation, maintenance, and replacement costs.

Question 8. The Department's testimony mentions additional concerns with the legislation and accompanying documents. Please explain those concerns.

Answer. The Departments of the Interior and Justice are in the process of reviewing the appendices to the Montana-Crow Compact that are referenced in our testimony. Once that review is complete, we will be able to identify any specific concerns.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. PETE V. DOMENICI TO HON. DIRK KEMPTHORNE

S. 3381

Question 1. Please describe on what basis the Administration has evaluated the New Mexico settlements in comparison to the enacted, and Administration supported settlements, in Central Arizona and the Snake River in Idaho.

Answer. Each proposed settlement is different, and the Administration evaluates each proposed settlement in its unique context to determine to what extent it is consistent with our programmatic objectives and our responsibility not only to Indian Tribes but also to the American taxpayers. Both of the approved settlements referenced in this question encompassed multiple objectives, providing comprehensive solutions to multi-faceted problems.

In the case of the Arizona Water Rights Settlement Act, which the Administration did not object to, the settlement resolved a dispute over the financial repayment obligation of Arizona water users for the Central Arizona Project (CAP), with significant amounts of money at stake. Federal representatives recognized that the CAP operational flexibility necessary to resolve the dispute could only be granted if sufficient legal and legislative protection was achieved to assure tribal access to, and use of, CAP project water. Enactment of the Indian water rights settlements in that Act was key to resolving larger legal issues involving CAP repayments by Arizona water users.

The Snake River Settlement in Idaho entailed several complex Endangered Species Act components that allowed further water resources development to occur for the Nez Perce Tribe and other water users in a manner that also fulfilled the Department's obligation to protect and recover listed species.

Question 1a. Have these New Mexico settlements been evaluated differently than these other settlements?

Answer. No. As stated above, each proposed settlement is different.

Question 1b. Did the Administration support these settlements in Arizona and Idaho without reference to the criteria and procedures?

Answer. Review of these settlements was subject to the *Criteria and Procedures.* With respect to the Arizona settlement, in our testimony and during negotiations with the parties, we raised numerous concerns about various provisions of that settlement.

Question 1c. In terms of costs, were these settlements in Arizona and Idaho more expensive than the New Mexico settlements?

Answer. The Arizona settlement was more expensive than the settlements contained in S. 3381. The estimated Federal cost of the Idaho settlement, stated at $193 million in our testimony, was similar to the costs of the New Mexico settlements taken individually, but less than the costs currently set forth in S. 3381 as a whole.

Question 2. You have expressed concerns about the waivers in the bill. Have waivers such as those contained in this settlement bill been previously enacted in other settlements with the support of the Administration?

Answer. Many of the provisions proposed by the Administration have been included in past enacted Indian water rights settlements. Other provisions have been

proposed to address problems that have arisen with incomplete or ambiguous waivers used in the past.

Question 2a. Do you have acceptable waiver language that you can provide to the Committee immediately?

Answer. As currently drafted, the waivers set forth in the bill do not adequately protect the United States from future liability, do not provide the measure of certainty and finality that the proposed federal contribution should afford, and could engender additional litigation that can and should be avoided by careful drafting. Ambiguous language regarding the nature of claims waived has created problems for the United States in the past. Specificity and clarity in statutory language can minimize potential future conflicts, including litigation over the scope and meaning of the waivers that would defeat the goal of finality.

The Departments of Interior and Justice have proposed waiver language that has been shared with the parties to the Aamodt and Taos settlements. The Departments attempted to negotiate waivers adapted to each settlement with the respective settlement parties but the discussions broke down when S. 3381 was introduced. When the hearing on the bill was scheduled, the Departments provided the Aamodt and Taos parties with waiver language tailored to each settlement. We have engaged in productive negotiations with the parties in the Taos settlement (Title II) and have come to agreement on waiver language. We have also engaged in numerous discussions with the Aamodt parties but those parties have rejected key concepts that the Departments of Justice and Interior believe are necessary to adequately protect the United States from future liability and provide the measure of certainty and finality that a settlement should provide.

Question 2b. What specifically do you mean in your testimony when you state that the waivers do not provide an appropriate level of certainty and finality?

Answer. There are several elements in the waivers language introduced in S. 3381 that do not provide adequate finality. For example, under the waiver language as introduced, the Pueblos of Tesuque, Nambe, and Pojoaque do not waive claims to off-reservation water sources, such as the Rio Grande. Lack of such waivers means that litigation over potential Pueblo claims may well be included in future adjudications despite the large federal contribution to the Aamodt settlement. In addition, to avoid future litigation based on alleged damages due to loss of water, the Administration believes that both the Aamodt and Taos settlements should include waivers and releases of claims for damages, losses or injuries to hunting, fishing, gathering or cultural rights due to loss of water or water rights. With respect to the Taos settlement, the waiver language in S. 3381 only covers signatory parties to the settlement, rather than all water users in the Taos basin. This likely will result in continued litigation concerning the respective rights of those users and the Pueblo of Taos. As stated above answer 2, the Departments of Interior and Justice have engaged in productive negotiations with the parties to the Taos settlement and have come to agreement on waiver language. We have also engaged in numerous discussions with the Aamodt parties but those parties have rejected key concepts that the Departments of Justice and Interior believe are necessary to adequately protect the United States from future liability and provide the measure of certainty and finality that a settlement should provide.

Question 2c. What remaining water rights-related claims are not addressed?

Answer. Please see the answer to 2b.

Question 3. You state that the criteria and procedures do not allow O&M costs to be paid for with settlement dollars. Please describe the difference in how the settlement in central Arizona and the Snake River in Idaho differ with respect to O&M?

Answer. The Snake River Water Rights Act of 2004 did not provide for settlement money to pay for O&M costs. The Arizona Water Settlements Act of 2004 did include a provision allowing expenditure of money from the settlement on fixed OM&R costs for Indian tribes, including O&M costs for the Gila River Indian Community.

Question 4. Your testimony correctly states that the overall costs of the settlements include a 42% state and local cost share. Are you aware of any other enacted, and supported by the Administration, settlements with this large of a state and local cost share?

Answer. The State and local cost share to the Aamodt settlement is significant. The cost share in the Taos settlement is far more disproportionate. The recently enacted Soboba settlement in California contained a local cost share that exceeded the federal contribution. Although Congress has enacted many Indian water rights settlements under which the federal government has borne the lion's share of the costs, the Administration has stated in testimony on numerous proposed Indian water

rights settlements, that water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers. One of the advantages of the cost sharing requirement under the *Criteria* is that the willingness of settling parties to cost share for a project is a good indicator of how truly invested they are in the proposed solution. It is all too easy to be in favor of a plan that comes at the sole expense of the Federal government and all taxpayers.

Question 5. The United States has long held Indian property rights in trust. Your testimony, however, states that Congress should now establish clear parameters for Federal responsibility over the Tribes' San Juan-Chama project allocations. What clear parameters does the Administration suggest?

Answer. Projects like the San-Juan Chama project are built with limited expected usable lives. At some time in the future, these facilities will either require expensive rehabilitation or will fail as a result of silting up or the inevitable effects of aging on infrastructure. Federal storage reservoirs also confront shifting public demands for the protection of various public resources, which might include endangered species, fisheries, or recreational access.

In certain situations, delivery of project water could be costly or at odds with other important policy goals. To avoid conflict over the extent of the Secretary's responsibility for these project rights, the Administration suggests clarifying statutory language establishing clear parameters on federal responsibility in the project water rights context. Settlements that include project water allocations, but do not anticipate future threats to project water availability, risk conflict and increased litigation in the future. We would like to work with Congress to develop language that will provide answers about what would happen to project allocations that are described as being held in trust under future conditions.

○