



The Honorable Rob Bishop
Chairman, Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We write to provide our views on the *Blackfeet Water Rights Settlement Act of 2016* (Blackfeet Water Settlement). The Administration is supportive of the Blackfeet Water Settlement if amended to conform to the attached redline of S. 1125 as reported out of the Senate Committee on Indian Affairs on February 3, 2016. Although settlement of the Blackfeet Tribe's water rights claims in Montana will fulfill important Federal trust obligations and provide important benefits to the American taxpayer, Office of Management and Budget advises that it is still assessing and evaluating the information necessary for it to definitively conclude whether the proposed settlement meets all of the *Criteria and Procedures*.¹

As you are aware, Congress and the Executive Branch have a long history of working together to secure and protect tribal water rights by supporting negotiated settlement of Indian water rights disputes and avoiding protracted and costly litigation where possible. We look forward to working closely with you in the months ahead to enact a Blackfeet Water Settlement and other Indian water rights settlements that adhere to the *Criteria and Procedures*, fulfill the Federal trust responsibility to Indian tribes, promote sound water management, and benefit and protect American taxpayers.

1. Background.

The Blackfeet Indian Reservation (Reservation) is set up against the Rocky Mountains and possesses some of the most spectacular scenery in the United States. It provides significant habitat for countless wildlife and fish species, including many protected species. Reservation fisheries are world renowned. Yet the Reservation struggles with high unemployment, extreme poverty, and a lack of employment opportunities. The Reservation ranks as the 5th poorest reservation in the United States. The American Community Survey of 2014 calculates the poverty rate on the Reservation at nearly 40 percent, with unemployment at more than 20 percent, and the percent of the population that did not work in the previous 12 months is even higher, at 39.1 percent. In addition to these bleak statistics, at least 30 percent of Reservation

¹ *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (Criteria and Procedures)* (55 FR 9223, March 12, 1990).

households live in housing that lacks complete plumbing or kitchen facilities and more than 80 percent of school age children are eligible for free or reduced school lunches.

The Blackfeet Tribe's (Tribe) water rights have been fought over for more than 100 years, as reflected in approximately 14 court cases and congressional proceedings addressing directly or indirectly the use and control of the Reservation's water resources.² Modern efforts to quantify the Tribe's reserved water rights began in 1979 when the State of Montana (State) filed suit in State court as part of the statewide water rights adjudication proceeding. At the same time, the United States filed a case in Federal court in Montana to adjudicate the Tribe's reserved water rights claims. The question of jurisdiction that arose as a result of the two lawsuits was decided in 1983 by the United States Supreme Court, which held that state court was the appropriate forum to adjudicate tribal reserved water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666.³

In 1989, the Tribe initiated negotiations with the Montana Compact Commission and in 1990 the Department of the Interior appointed a Federal Negotiation Team to assist in achieving a negotiated settlement of the Tribe's reserved water rights claims. The State and the Tribe reached an agreement in 2007, in the form of a Compact, which the Montana Legislature approved in 2009. Federal legislation to authorize the Compact was first introduced in 2010. Since then the Administration has been negotiating with the Tribe and the State to resolve important Federal concerns relating to cost, cost sharing, Federal interests, and Federal responsibilities. Those negotiations lowered the Federal cost of the settlement by approximately \$230 million.

2. Consistency with the *Criteria and Procedures* including *Criteria 4 and 5(a) and (b)*.

The Blackfeet Water Settlement is consistent with the United States' responsibility as trustee to Indians and will secure to the Tribe the right to use and obtain benefits from Reservation water resources, thus ensuring the Tribe will receive equivalent benefits for claims it will waive as part of the settlement.⁴ The settlement resolves all outstanding Blackfeet water claims, quantifies a tribal water right to more than 750,000 acre-feet of surface water and nearly all groundwater on the Reservation, and funds the construction and rehabilitation of water related infrastructure on the Reservation for the benefit of the tribal community.⁵ Federal settlement funding will provide lasting benefits for the Tribe and its members, by protecting public health and creating substantial numbers of temporary and permanent employment opportunities on the Reservation, including opportunities in the construction, water management, renewable energy, agricultural, recreation, and tourism industries.⁶ The settlement also will resolve decades old disputes among the Tribe, its neighbors, the State, and the Federal Government, and will encourage long-term harmony and cooperation among all parties.⁷ The settlement includes a process that will enable the Blackfeet

² A detailed listing of the cases and congressional hearings touching on the Tribe's water rights is attached as Exhibit A.

³ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The Federal Court action has been stayed since 1983 pending the outcome of the State adjudication.

⁴ *Criteria and Procedures*, Preamble.

⁵ *Criteria and Procedures*, No. 3.

⁶ *Criteria and Procedures*, No. 7.

⁷ *Criteria and Procedures*, No. 10.

Tribe and the Fort Belknap Indian Community to resolve a conflict that exists between them over relative rights to use the Milk River. The settlement process is fair and provides funding to support the Tribes' efforts to reach a resolution. The settlement authorizes the Secretary to establish criteria to provide for such an arrangement if the Tribes do not reach a successful sharing arrangement. This settlement is a crucial and long-awaited step towards achieving the permanent tribal homeland promised to the Blackfoot Tribe in the treaties and agreements ratified by Congress between 1855 and 1896 that serve as the foundation of the relationship between the Tribe and the United States.⁸

The Administration and the Tribe worked collaboratively to target funding for initiatives that will allow the Tribe to manage Reservation water resources and promote economic self-sufficiency on the Reservation.

Settlement funding focuses primarily on Federal programmatic responsibilities, including funding for dam safety repairs and deferred maintenance for Bureau of Indian Affairs facilities on the Reservation;⁹ increasing water storage capacity for irrigation and other economic activities on the Reservation;¹⁰ construction, rehabilitation, and expansion of the Blackfoot Regional Water System to provide safe, clean drinking water to all of the Reservation's major population centers;¹¹ improving tribal irrigation projects with on-farm improvements for tribal trust lands;¹² and establishing the Blackfoot Tribal Water and Energy Office to support self-determination and enhance the Tribe's capacity to manage its trust resources.

Specifically, the improvements to irrigation infrastructure on the Reservation will have a major impact on the tribal economy as the economy on the Reservation is a rural economy dependent on farming and ranching and many tribal members make their living through ranching operations and associated hay and alfalfa farming operations. The funding to construct, rehabilitate, and expand the Tribe's municipal water system will ensure all major population centers on the Reservation have reliable and safe drinking water supply for fifty years into the future. Currently, the Tribe experiences school closures and business disruptions because of the unreliability of municipal water systems, and has had to operate under a "boil order" for more than a decade in a major population center until the Tribe was able to cobble together grants, loans, and its own funds to update part of its system.

The Blackfoot Water Settlement funding will add significant temporary and permanent job opportunities for tribal members on the Reservation. These benefits will derive from Federal spending on important water related infrastructure projects and improvements.

⁸ *Treaty with the Blackfeet*, 1855, Oct. 17, 1855, 11 Stat., 657, Ratified Apr. 15, 1856, Proclaimed Apr. 25, 1856, *Act of April 15, 1874* (18 Stat. 28, chapter 96), *Agreement of 1888*, ratified by the Act approved May 1, 1888 (25 Stat. 113), *Agreement of 1895*, dated September 26, 1895, ratified by the Act approved June 10, 1896 (29 Stat. 321, 353), *Criteria and Procedures*, No. 10.

⁹ Indian Dam Safety Act of 1994, 25 U.S.C. § 3801 et seq.

¹⁰ 25 U.S.C. § 13, "the Secretary of the Interior . . . shall expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians . . . for development of water supplies." (Emphasis supplied).

¹¹ It is "the policy of the United States that all Indian communities and Indian homes, new and existing be provided with safe and adequate water supply systems...as soon as possible." 25 U.S.C. § 1632(a)(5).

¹² 1907 Blackfoot Allotment Act

Settlement funding will also provide vital improvements for the Tribe's own farming and ranching activities, including the significant bison herds maintained by the Tribe. Such activities are an important source of tribal revenues and an important source of jobs for tribal members. Settlement funds will also support improvements to tribal lakes and fisheries, providing important habitat improvements as well as recreational and economic development opportunities that take advantage of the natural environment. Such activities will contribute to increased tribal revenues and allow the Tribe to provide better and more comprehensive services to Tribal members.

The settlement will also provide water supplies and increased water storage capacity which will help the Tribe establish better economic conditions to support a viable homeland for its members. Federal funding also will address important obligations of the Bureau of Reclamation on the Reservation and provide compensation to the Tribe for deferring water use. As originally proposed to this Administration, the Blackfeet Water Settlement included Federal funding of more than \$650 million. The Administration scrutinized every Federal dollar in the original proposal, and worked closely with the Tribe and the State to reduce the overall cost of the settlement by well over \$200 million and increase State cost share. The State's direct contribution to the Blackfeet Water Settlement is now \$49 million, a substantial and appropriate direct state cost share.¹³ While the current Blackfeet Water Settlement authorizes substantial Federal funding requirements through fiscal year 2025, we have confirmed that this level of funding is necessary in order for the Tribe to develop its capacity to manage and develop its water resources.

Federal funding for the Blackfeet Water Settlement also must be considered in its historical context. The 1.5 million acre Blackfeet Reservation has a significant supply of water arising on or near the Reservation. Despite the availability of water on the Reservation, for more than 100 years senior priority tribal water has been diverted off of the Reservation for the benefit of off-reservation, junior, non-Indian water users. The Boundary Waters Treaty of 1909, unfortunately, did not protect Blackfeet's water rights. The construction and operation of the Milk River Project, similarly, did not account for the Tribe's water and property rights. While the United States funded and enabled non-Indians to use tribal water from the Reservation, it failed to do so for the Tribe or its members. Those actions and inactions by the United States created the circumstances that have necessitated this settlement to fulfill the Tribe's senior water rights without harming the non-Indians who have for many generations relied on the Tribe's water.

The Blackfeet Water Settlement also provides important benefits to American taxpayers and the State of Montana. The final quantification of the Tribe's reserved water rights will bring stability for all water users within the State and will provide the certainty and reliability necessary to sustain the economy of the State without disruption. Important Federal proprietary interests in Glacier National Park (Park), the Lewis and Clark National Forest (Forest), the Bowdoin National Wildlife Refuge, and the Milk River Project will be protected by the settlement. The Park and Forest will enjoy protection of important instream flows with early priority dates.

Notably, the Settlement will resolve or provide a process for resolving disputes and any Federal liability regarding the Milk River Project. Reclamation's use and occupancy of Reservation

¹³ Criteria and Procedures, No. 6.

lands for the St. Mary Canal and other features of the Milk River Project has been disputed by the Tribe for more than 100 years. Under the process described in section 7 of the Settlement Act, the dispute will be resolved, and the parties' legitimate interests will be protected going forward on a permanent basis. Additionally, the Tribe has filed objections to the Milk River Project water rights claims that are pending in the Montana general stream adjudication. The Tribe will withdraw its objections in certain basins at the request of the United States. The United States will realize tremendous value from the resolution of these two disputes in addition to the consideration from the Tribe's waivers of legal claims for damages relating to its water rights and water resources. Avoidance of these potential money damage awards against the United States represents additional and very significant benefits for the Federal Government and the American taxpayer. Finally, the settlement will deliver immeasurable benefits to the Nation as a whole as Congress resolutely fulfills solemn promises made to the Blackfeet people generations ago.

3. Approval in writing of Settlement Agreement and draft Amendment.

The Blackfeet-Montana Water Compact was first agreed to in 2007 by the State's Reserved Water Rights Compact Commission and the Blackfeet Tribal Business Council pursuant to Montana's compact process. The Compact was enacted into State law in 2009. When Federal legislation is enacted that ratifies and modifies the Compact, the settlement act and the Compact will be submitted to a referendum by the tribal membership. Upon certification of a favorable vote, the Compact will be ready for signing by the Secretary, the Tribe, and the State. Following that, the Tribe, the United States, and the State will move the Montana Water Court to enter the Settlement. Once entered, the Settlement will become final and enforceable upon the enforceability date, a date described in the settlement legislation. The State, acting through the State Attorney General's Office and its congressional delegation, the Tribe, acting through the Tribal Business Council, and the Administration have reviewed and support the legislation in the attached form of amendments to S. 1125.

4. Conveyance to court of Settlement Agreement and draft Amendment.

The State of Montana's process for achieving Indian water settlements is unique. The Montana Attorney General and the settling parties do not report to the Montana Water Court until after the settlement has been enacted and ratified by the tribal membership. At that point, the parties will submit a proposed final water decree to the Court for approval. This process has been followed for other Montana Indian water settlements. Currently, there is a stay of proceedings in place for the adjudication of the Tribe's Federal reserved water rights to allow time for Congress to enact authorizing legislation. The stay expires in January 2017.

5. List of claims being settled.

1. **Federal/Tribal claims.** All claims for water rights within the State that the Tribe, its members and allottees, or the United States acting as trustee for the Tribe and the allottees, asserted or could have asserted in any proceeding, including a State stream adjudication, on or before the enforceability date, except to the extent that such rights are recognized in the Compact and Settlement legislation;
2. **Trust claims against the United States for water quantity.** All claims against the United States (including the agencies and employees of the United States) relating to

claims for water rights within the State that the United States, acting as trustee for the Tribe, asserted or could have asserted in any proceeding, including a stream adjudication in the State, except to the extent that such rights are recognized as Tribal water rights under the Settlement legislation;

3. **Trust claims against the United States for damages.** All claims against the United States (including the agencies and employees of the United States) relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights, claims relating to interference with, diversion, or taking of water, or claims relating to failure to protect, acquire, replace, or develop water, water rights, or water infrastructure) within the State that first accrued at any time prior to and including the enforceability date;
4. **Milk River Project Objections.** The Tribe will withdraw its objections to the water rights claims filed by the United States for the benefit of the Milk River Project in Basins 40 T and 40 F;
5. **Takings Claims.** All claims against the United States (including the agencies and employees of the United States) that first accrued at any time on or before the enforceability date arising from the taking or acquisition of the land of the Tribe or resources for the construction of the features of the St. Mary Unit of the Milk River Project;
6. **Operational claims.** All claims against the United States (including the agencies and employees of the United States) that first accrued at any time on or before the enforceability date relating to the construction, operation, and maintenance of the St. Mary Unit of the Milk River Project including Sherburne Dam, St. Mary Diversion Dam, St. Mary Canal and associated infrastructure and the management of flows in Swiftcurrent Creek, including the diversion of Swiftcurrent Creek into Lower St. Mary Lake;
7. **Failure to provide adequate water.** All claims against the United States (including the agencies and employees of the United States) relating to the failure to establish or provide a municipal rural or industrial water delivery system on the Reservation;
8. **Deferred maintenance claims.** All claims against the United States (including the agencies and employees of the United States) relating to failure to provide for, operate, or maintain, or to deferral of maintenance for, the Blackfeet Irrigation Project or any other irrigation system or irrigation project on the Reservation;
9. **State water right claims.** All claims against the United States (including the agencies and employees of the United States) relating to the litigation of the water rights of the Tribe in the State;
10. **Compact claims.** All claims against the United States (including the agencies and employees of the United States) relating to the negotiation, execution, or the adoption of the Compact (including exhibits) and the Settlement legislation;
11. **Specific legal case resolved.** All claims against the United States (including the agencies and employees of the United States) reserved in subsections (b) through (d) of section 6 of the settlement for the case styled *Blackfeet Tribe v. United States*, No. 02–127L (Fed. Cl. 2012);
12. **Dam safety claims.** All claims against the United States (including the agencies and employees of the United States) that first accrued at any time on or before the enforceability date relating to the construction, operation, and management of Lower

Two Medicine Dam and Reservoir and Four Horns Dam and Reservoir, including any claims relating to the failure to provide dam safety improvements for Four Horns Reservoir; and

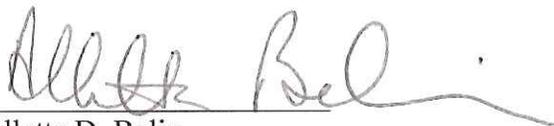
13. **International Boundary Waters Treaty claims.** All claims against the United States (including the agencies and employees of the United States) that first accrued at any time on or before the enforceability date relating to the allocation of waters of the Milk River and St. Mary River (including tributaries) between the United States and Canada pursuant to the International Boundary Waters Treaty of 1909 (36 Stat. 2448).

6. The settlement and proposed legislation do not include financial authorizations for claims already settled by Congress or claims that have no legal basis.

The claims that will be settled as part of this settlement have a legal basis, have not been previously settled by Congress, and were not settled in prior cases against the United States.¹⁴ The Tribe has brought claims against the United States in the U.S. Court of Federal Claims and the Indian Claims Commission but none of those claims is included in the claims that the Tribe would waive in consideration for enactment of the Blackfeet Water Settlement.

We look forward to working with you and the Committee to complete this settlement.

Sincerely,



Alletta D. Belin
Chair, Working Group on
Indian Water Settlements
Department of the Interior



Peter J. Kadzik
Assistant Attorney General
for Legislative Affairs
Department of Justice

¹⁴ Claims brought by the Tribe against the United States in the past include the following, none of which relate to any of the claims being settled as part of the Blackfeet Water Settlement: *Blackfeet et al., Nations v. United States*, 81 Ct. Cl. 101, 131 (1935); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 2 Ind. Cl. Comm. 302 (1952); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 162 Ct. Cl. 136 (1963); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 15 Ind. Cl. Com. 561 (1965); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 18 Ind. Cl. Com. 348a, 348b, 348c (1967); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 18 Ind. Cl. Com. 241 (1967); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 19 Ind. Cl. Com. 363 (1968); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 32 Ind. Cl. Com. 65 (1973); *Blackfeet and Gros Ventre Tribes of Indians etc. v. United States*, 34 Ind. Cl. Com. 122 (1974); *Blackfeet Tribe v. United States*, No. 02-127L (Fed. Cl. 2012).

Attachment A

Cases

United States v. Conrad Investment Company, 156 Fed. 123 (D. Mont. 1907), *aff'd Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir. 1908) (Tribe's paramount right to use waters of Birch Creek for present and future needs confirmed);

United States v. Ageson, No. CIV-79-21-GF (D. Mont. April 5, 1979) (Federal action to quantify Blackfeet water rights, stayed pending completion of State Court Adjudication),

In re the Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Blackfeet Tribe of the Blackfeet Reservation within the State of Montana, Civ. No. WC-91-1 (Mont. Water Ct. 1979) (State adjudication of Blackfeet Tribe's reserved water rights that would be settled by S. 1125),

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), (state court jurisdiction over tribal water rights in Arizona and Montana, including Blackfeet reserved water rights), *Northern Cheyenne Tribe v. Tongue River Water Users, et al.*, 484 F. Supp. 31 (D. Mont 1979), *Northern Cheyenne v. Adsit, et al.*, 668 F.2d 1080 (9th Cir. 1982); *Northern Cheyenne Tribe v. Adsit, et al.*, 721 F.2d 1187 (9th Cir. 1983) (refusal to dismiss Federal court actions involving certain Montana Tribes' water rights, including Blackfeet Tribe's reserved water rights, pending outcome of state adjudication),

State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754 (Mont. 1985) (determination of adequacy of state adjudication of federal reserved water rights, including Blackfeet Tribe's reserved water rights),

Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646 (D. Mont. 1986).

Congressional Proceedings

Act of March 1, 1907, 34 Stat. 1015, 1035,

Blackfeet Indian Reservation, Serial One: Hearings before the J. Commission of the Cong. of the United States, 63d Cong. (1914),

Surplus Lands, Blackfeet Indian Reservation, Mont., Hearings before the S. Comm. on Indian Affairs on S. 793: A Bill Modifying and Amending the Act Providing For the Disposal of the Surplus Unallotted Lands within the Blackfeet Indian Reservation, Mont., Part 2, 64th Cong. (1916),

Montana Water Rights, Hearings before the Select S. Comm. on Indian Affairs: First Sess. on Oversight of Litigation Involving Water Rights in Montana, 96th Cong. (1979),

Disbursement of BIA Funds for Study of Blackfeet Reservation Irrigable Land, Hearing before the Select S. Comm. on Indian Affairs: First Sess. on the Oversight of Disbursement of Funds by the Bureau of Indian Affairs to Do a Study of the Irrigable Acres on the Blackfeet Indian Reservation in Montana, 98th Cong. (1983),

*S. 2956, the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act, and S. 3290, the **Blackfeet Water Rights Settlement Act of 2010**, Hearing before the S. Comm. on Indian Affairs, Second Sess., 111th Cong. (2010); S. 134, S. 399, S. 1327, and S. 1345,*

Hearing before the S. Comm. on Indian Affairs, First Sess.: S. 399, the Blackfeet Water Rights Settlement Act of 2011, 112th Cong. (2011),

S. 434, the Blackfeet Water Rights Settlement Act of 2013 and S. 611, the Sandia Pueblo Settlement Technical Amendment Act, Hearing before the S. Comm. on Indian Affairs, First Sess., 113th Cong. (2013).