

**Statement of Michael L. Connor, Commissioner  
Bureau of Reclamation  
U.S. Department of the Interior  
Before the  
Committee on Natural Resources  
Subcommittee on Water and Power**

**H.R. 3563  
September 22, 2009**

Madam Chairwoman and members of the Subcommittee, my name is Mike Connor and I am Commissioner of the Bureau of Reclamation (Reclamation). I am pleased to provide the Department of the Interior's (Department) views on H.R. 3563, the "Crow Tribe Water Rights Settlement Act of 2009."

At the outset, I want to stress that this Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. We recognize that substantial refinements have been made to this settlement by the parties and the Montana delegation and those refinements have improved the legislation. However, as I will discuss later, while the Administration appreciates that much good work has gone into this proposed settlement and is committed to working with the Tribe and other settlement parties to reach a final and fair settlement, we have a number of concerns that we want to work through with the Tribe, the sponsors, and the other parties so that we would be able to support this settlement.

**Negotiated Indian Water Rights Settlements**

As we have recently testified in our statements before this Subcommittee on other pending Indian water right settlements, settlements improve water management by providing certainty not just as to the quantification of a tribe's water rights but also as to the rights of all water users. That certainty provides opportunities for economic development for Indians and non-Indians alike. Whereas unquantified Indian water rights are often a source of tension and conflict between tribes and their neighbors, the best settlements replace this tension with mutual interdependence and trust. In addition, Indian water rights settlements are consistent with the Federal trust responsibility to Native Americans and with a policy of promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

However, our general policy of support for negotiations cannot translate into support for every proposed settlement. In order to assess the merits of a settlement and the appropriateness of the proposed federal contribution, it is necessary to conduct a thorough analysis of the costs entailed and the benefits to be received by all parties to the settlement.

In 2008, at the end of the previous Administration, the Department was in the process of analyzing this settlement in light of the factors that have traditionally been used to evaluate the appropriateness of proposed Federal financial contribution to settlement of Indian water rights claims. With the change in Administration, this process was unavoidably slowed and has only recently regained pace. Because of the complexity and size of the settlement approved by H.R. 3563 and the precedent it almost certainly will set, it is especially important for this Administration to take an independent, detailed and careful look at every aspect of the settlement. This Administration must consider the immediate and long-term water needs of the Crow Tribe, the merits of all legal claims, the value of water, federal trust responsibilities, economic efficiency measures, cost-sharing and the overall promotion of good public policy. This is not a task that can or should be hastily completed. Nevertheless, now that a majority of the new Administration officials at the Department are now in place, we are committed to completing our review as quickly as possible.

### **Overview of the Proposed Settlement**

H.R. 3563 would approve a Compact entered into by the Crow Tribe and the State of Montana to settle all the Tribe's water rights claims in Montana. The settlement would 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 per year 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 would be subject to shortage sharing with non-Indians, which is a major concession by the Crow Tribe, since it would otherwise have a senior priority water right. H.R. 3563 also authorizes approximately \$559.4 million in appropriations for a number of settlement benefits and requires the Bureau of Reclamation to design and construct two major infrastructure projects: (1) rehabilitation, expansion and improvement of the Crow Irrigation Project to deliver water to farmland on the Crow Reservation; and (2) a municipal, rural and industrial (MR&I) water system to deliver clean water to communities and businesses in most parts of the Crow Reservation. Finally, H.R. 3563 would establish the Crow Settlement Fund which would be used by the Tribe for various purposes including Compact administration, economic development, water development projects other than the MR&I system, and operation, maintenance and repair (OM &R) funds that would be used for off-setting the costs of OM&R of Yellowtail Dam (the dam that created Bighorn Lake), the municipal water systems to be constructed under this legislation, and the Crow Irrigation Project.

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% of which is held in trust for the Tribe and individual Indians. Tribal enrollment is approximately 11,500. Unemployment is substantially higher than the national average 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 Tribe 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 did not approve or sign the Compact.

The Department has worked with the Crow Tribe for a number of years in an effort to reach agreement on Federal legislation that would approve the Compact and provide funds for the Tribe to put its water rights to use. This process has involved the Crow Tribe, the State of Montana, local water users and other affected parties. After a hearing on a predecessor bill (S. 3555 in the 110<sup>th</sup> Congress) at which the last Administration raised a number of monetary and non-monetary concerns with the bill, both the Tribe and the State worked cooperatively with the Department to address many of these issues. We believe that this cooperative endeavor has resulted in significant progress. A number of positive changes were made in this legislation between the time that it was introduced and now, including important progress on the issue of waivers. The Administration notes with approval a change in section 6 dealing with the future ownership and management of the MR&I system that is to be constructed pursuant to this settlement. Section 6(g) of H.R 3563 requires that title to this system will be conveyed to the Tribe after construction is complete. This is consistent with other recently enacted water rights settlements. The Administration believes that transferring title to infrastructure is consistent with concepts of self-determination and tribal sovereignty.

The Administration also notes that changes were made in section 13 to address concerns raised by the State of Wyoming about the impact of this legislation on the Yellowstone River Compact. We appreciate the efforts of the Tribe and the states of Wyoming and Montana to work together to resolve these issues. It appears that this language is consistent with the rights of the Tribe as set forth in the Compact and confirmed in this legislation.

### **Concerns Related to Cost**

Notwithstanding significant improvement in the legislation, the high costs of the infrastructure projects and other benefits called for in the bill and the large disparity between the local and State cost share and the Federal settlement contribution are of concern. H.R. 3563 as introduced authorizes more than one half billion dollars in federal appropriations, making the settlement one of the largest to date. As a practical matter, the size of the Federal obligation created under H.R. 3563 in relation to the Bureau of Reclamation's budget presents significant challenges.

Currently, Reclamation has a backlog of more than \$2 billion in authorized rural water projects, many of which have a significant tribal component. Moreover, the breadth of the many benefits that would flow to the Crow Tribe under the settlement at almost exclusively 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 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 enactment of such a large settlement could set for future Indian water rights settlements. In particular, an area which needs more analysis is

the potential for a non-Federal contribution to the irrigation and M&I projects based on any non-Indian benefits received.

Although all settlements are unique, each enacted settlement sets a benchmark that influences the course of ongoing settlement negotiations with other tribes. Enacting settlements without considering Federal assessment of the fairness of proposed settlement costs will make it difficult for Federal negotiators to participate meaningfully in future settlement negotiations. Negotiators have difficulty holding the line on settlement costs when tribal, state, and local parties to the settlement have much higher expectations regarding the expected Federal contribution than Federal negotiators are able to discuss. There are currently 19 Federal negotiation teams that have been established to support settlement negotiations; we have 7 outstanding requests for new teams and believe that more requests will be forthcoming.

The cost estimates for the work on the Crow Irrigation Project and the rural water system and subsystems authorized in this settlement legislation rely on an engineering report by a private consultant, HKM Engineering, Inc., dated July 2008. These cost estimates have not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. It is likely that the actual costs of construction would be higher than the settlement parties have estimated. We look forward to working with the Tribe, the State and the sponsors of the bill to discuss our completed analysis and ways in which to address concerns about cost, funding sources and other issues.

### **Non-Monetary Concerns**

In addition to concerns about overall cost, we want to highlight several other issues of particular concern. The financial structure and timing of the waivers as proposed in this settlement raise serious concerns for the Administration. The final effectiveness and enforceability of this settlement could occur as soon as the United States has appropriated only the funds authorized for the Crow Settlement Fund, which is about half of the total benefits called for in the settlement; the legislation provides no parameters establishing when the other aspects of the settlement are to be fulfilled. Under this settlement structure, the waivers by the Tribe and the United States of further claims for the Tribe's federal reserved water rights are uncoupled from final receipt by the Tribe of the central settlement benefits (rehabilitation and expansion of the Crow Irrigation Project and construction of a MR&I system for the reservation). The State of Montana and its water users will receive their most important settlement benefit – waivers – far in advance of the Tribe receiving its full settlement benefits. The Department of the Interior has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties at the same time. In this way, no entity benefits disproportionately in the event that all the major settlement benefits are not realized.

The legislation mandates that certain engineering reports be used to define the scope of the significant infrastructure development authorized in the settlement. These reports are not at the appropriate level of detail to be used as a mandate. The Administration is in the process of analyzing the reports but we are not certain at this time exactly what infrastructure could be constructed, or that the work proposed is the most cost effective way to use the sizeable funds authorized in H.R. 3563. Moreover, further analysis is needed with respect to the rights of

allottees vis a vis the priorities for the rehabilitation and expansion of the Crow Irrigation Project. H.R. 3563 would waive federal rights held by the allottees in exchange for outlined settlement benefits. The Administration has an obligation to allottees to assure the waivers and substitute benefits are of equivalent value. We are also interested in further discussions with Montana regarding economies of scale that could be obtained through different configurations of the proposed rural water system. We would look forward to the opportunity to discuss this issue further with Congress and the settlement proponents to ensure that the infrastructure priorities identified in this settlement are the most appropriate for the situation on the Crow Reservation. We recommend that H.R. 3563 be amended to allow the proposed infrastructure projects to be modified to ensure that allottees are receiving fair benefits and as a result of further studies of potentially more cost effective alternatives to the proposed work using the funds authorized in this legislation.

Section 12(b) of H.R. 3563 grants the Crow Tribe the exclusive right to develop power at the Yellowtail Afterbay Dam, a component of the Yellowtail Unit, Pick-Sloan Missouri Basin (PSMB) project. We are looking closely at the implications of this provision and whether it provides for consistency of cost allocation for other PSMB beneficiaries.

Finally, several key Compact documents remain incomplete or at issue, including the list of existing water uses on trust land. If the parties do not wish to complete all the documents at this point, they can be negotiated after the legislation is enacted, but the bill should not ratify documents that have yet to be negotiated. Moreover, this list of existing uses is important for determining shortage sharing and priority rights. Past Indian water rights settlements that were approved by Congress in an incomplete status have been very difficult to implement, causing lengthy delays and, in some cases, the need to come back to Congress. The Administration believes the better course is to complete all aspects of the settlement agreement in advance of congressional approval.

## **Conclusion**

H.R. 3563 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This Administration shares that goal, and hopes to be able to support the settlement after a full and robust analysis and discussion of all aspects and ramifications of this large settlement.

The Administration is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims. This settlement, when completed, will provide certainty to the State of Montana and non-Indian users and will enable the Crow Tribe to put its water rights to use for the economic benefit of the Crow Reservation and its residents. 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 reached that will contribute to long-term harmony and cooperation among the parties.

Madam Chairwoman, this concludes my written statement. I would be pleased to answer any questions the Subcommittee may have.