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Testimony of Steven G. Hickok

H.R. 1753, the Spokane Tribe of Indians of the Spokane

Reservation Grand Coulee Dam Equitable Compensation Settlement Act

October 2, 2003

Mr. Chairman, my name is Steven G. Hickok. I am the Deputy Administrator of the Bonneville Power Administration (Bonneville). It is my pleasure to appear before the House Resources Committee, Subcommittee on Water and Power. Bonneville appreciates the opportunity to comment on H.R. 1753, the Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act.

My testimony today will focus on the discussions Bonneville has had with the Spokane Tribe and the proposal the prior Administration made to the Spokane Tribe in response to its request for compensation related to the construction of Grand Coulee Dam. I will also compare that proposal to what would result for the Spokane Tribe if H.R. 1753 were enacted. Finally, I will address the present Administration's concerns with the proposed legislation. Although the Administration is committed to appropriate compensation for the Spokane Tribe, it is unable to support the legislation.

First, let me set out the factual background that gave rise to the Spokane Tribe's request for compensation, which affects our view of the current situation.

Factual Background

This matter arose out of representations made by Federal officials to the Spokane Tribe and the Confederated Tribes of the Colville Reservation when Grand Coulee Dam was under construction in the 1930s. Approximately 2,500 acres of land within the Spokane Reservation and 6,900 acres of land within the Colville Reservation were taken for use in the Grand Coulee Project. Originally, the State of Washington planned to develop a hydroelectric project at Grand Coulee. An agency of the state obtained a preliminary permit under the Federal Power Act to develop the site. Had the state built the project, a license issued under the Federal Power Act would have provided the Spokane Tribe and the Colville Tribes compensation for use of their lands in the Grand Coulee Project. In 1933, however, Congress authorized Federal construction of Grand Coulee Dam as part of the Columbia Basin Project, to be developed and administered by the U.S. Bureau of Reclamation. Federal projects are not subject to licensing under the Federal Power Act.

That same year, Secretary of the Interior Harold Ickes approved two letters from the Department of the Interior--one to the Supervising Engineer of the Grand Coulee Project and one to the Commissioner of Reclamation--indicating that, because Spokane and Colville Tribal land would be taken for the project, each of the Tribes should receive a share of the revenue from the sale of power produced by the dam. The following year, the Assistant Director of Irrigation wrote the Commissioner of Indian Affairs, proposing that the Tribes be paid an appropriate percentage of the "profits" of the project based on the amount of Reservation land beneath the dam and the reservoir. He proposed that half of the value of the project be ascribed to the dam and half to the reservoir, and that the Spokane Tribe participate in proportion to the Reservation's contact with the reservoir only, as the Spokane Tribe had no land under the dam.

The Government did not act on this proposal, nor did it determine what might be an appropriate share of revenues for either Tribe. In 1946 Congress passed the Indian Claims Commission Act (ICC), creating a five-year window in which Indian tribes could sue the United States for past harms. The Colville Tribes brought suit under the Act for a share of the power revenues of Grand Coulee Dam. Although the Spokane Tribe brought suit against the Government under the Act for other claims, it did not bring a suit for a share of Grand Coulee's revenues prior to settling its ICC claim.

Settlement With the Colville Tribes

Bonneville has marketed the power from Grand Coulee Dam since the dam began operations in 1942. Therefore, although Bonneville was not a named party to the Colville Tribes litigation, Bonneville understood that the power function - among the other, multiple functions of Grand Coulee - and its users (the Bonneville ratepayers) would likely be expected to bear a share of any judgment in the case. Together with the

Department of Justice, Bonneville entered into discussions with the Colville Tribes to settle the Colvilles' lawsuit. The parties reached agreement in 1993, and legislation was passed in 1994 approving the settlement and directing payment of the settlement amounts to the Colville Tribes.

The settlement value was based largely on a formula that had been used to compensate the Flathead Indian Tribe when the Tribe's land was taken by a private entity for the development of Kerr Dam. It also included a litigation risk premium in recognition of the financial risk to the Government in proceeding to trial if the case did not settle. The settlement payments included two elements. First, the Colville Tribes in total were paid a lump sum of \$53 million from the Judgment Fund (a fund available to pay certain court judgments against the United States, and any Justice Department settlements of litigation) to compensate them for use of their land from 1942, when Grand Coulee began operations, to the time of settlement. Bonneville was not obligated to reimburse the Judgment Fund for any of this amount.

Second, Bonneville agreed to make annual payments to the Colville Tribes going forward. These payments represent a share of the revenue from the sale of the power from the dam. The first payment was for \$15.25 million for fiscal year 1995. Subsequent payments have been governed by a formula based on the annual value of power produced by Grand Coulee. Under the 1994 legislation enacting the settlement and a subsequent 1996 amendment, Bonneville receives an annual credit for its repayment to the Treasury that covers a portion of Bonneville's payment to the Colville Tribes. The credit was \$15.86 million in fiscal year 1997, and increased annually until fiscal year 2001, when it was \$18.55 million. Since fiscal year 2001 the credit has been fixed at \$4.6 million, and Bonneville will receive an annual credit of \$4.6 million as long as it continues making payments to the Colville Tribes. Therefore, the percentage of the Bonneville payment that the credit covers is changing through time. These credits, together with the amount paid by the Judgment Fund, achieve the contribution of the U.S. taxpayers to the settlement--30 percent of the settlement's value. Bonneville's ratepayers are contributing 70 percent of the value of approximately \$570 million.

Discussions With The Spokane Tribe

On August 4, 1994, the Senate Indian Affairs Committee and the Senate Energy and Natural Resources Committee held a joint hearing on S. 2259, a bill that endorsed the settlement agreement with the Colville Tribes. A representative of the Spokane Tribe testified at the hearing, seeking an amendment to the bill to address the Spokane Tribe's claims of damage from the project.

During full Senate consideration of the bill, which took place during the prior Administration, Senators Daniel Inouye, Bill Bradley, John McCain, and Patty Murray engaged in a colloquy urging the Department of the Interior and other relevant Federal agencies to enter into negotiations with the Spokane Tribe to conclude a fair and equitable settlement of the Tribe's claims. On August 5, 1994, Interior Solicitor John Leshy wrote Senator Bill Bradley, indicating that the Department of the Interior was reviewing information submitted by the Spokane Tribe and would continue its examination. Subsequently, representatives of the Department of the Interior and the Spokane Tribe met on a number of occasions to discuss the Spokane Tribe's claims.

Bonneville then entered into discussions with the Spokane Tribe. In 1998 Bonneville representatives traveled to the Spokane Reservation to explain the formula used in the Colville Tribal settlement and how it might be applied to the Spokane Tribe's compensation request. In doing this, Bonneville recognized the Spokane Tribe's current and future contributions to the value of the project (from the continuing use of former Reservation lands), but, because of the absence of a claim and the lack of access to the Judgment Fund, indicated that it would not address any past contributions.

Since 1998 Bonneville and the Spokane Tribe have met a number of times to discuss appropriate compensation. Unfortunately, the two have been unable to reach agreement. In the end the Spokane Tribe was not satisfied with the going-forward payments that resulted when the formula used to compensate the Colville Tribes was applied, and was unhappy with the Administration's resistance to paying past damages.

On May 2, 2000, Bonneville Administrator Judi Johansen reiterated the prior Administration's position on compensation in a letter to Senator Murray. In the letter, Ms. Johansen underscored that the then Administration did not support payments for any past periods, but was prepared to discuss again the possibility of prospective annual payments of a share of Grand Coulee power revenues, based on the methodology employed in the Colville Tribes' settlement. She added that it would also be reasonable to discount these payments because, unlike the Colville Tribes, the Spokane Tribe had no legal claim. Finally, she stated that it was the Administration's position that, consistent with the cost-sharing arrangement between ratepayers and taxpayers adopted in the Colville Tribes legislation, 70 percent of the value of any compensation to the Tribe should come from Bonneville ratepayers and 30 percent from U. S. taxpayers.

If enacted, H.R. 1753 would compensate the Spokane Tribe at a level that appears to be substantially in excess of the amount that the prior Administration considered in previous negotiations. The bill would establish in the Treasury an interest-bearing account called the Spokane Tribe of Indians Settlement Fund Account. Section 5(b)(1) of the bill would require the Secretary of the Treasury to deposit into this account

an amount equal to 39.4 percent of the lump sum paid to the Colville Tribes, adjusted for inflation, to compensate the Spokane Tribe for use of its land from June 29, 1940, to November 2, 1994.

The bill also would require the Administrator of the Bonneville Power Administration to make two series of payments. First, section 5(b)(2) would require the Bonneville Administrator to deposit into the account each year for six years an amount equal to 7.88 percent of the total annual payments made to the Colville Tribes from 1996 (when the first annual payment was made to the Colville Tribes) through the end of the fiscal year during which H.R. 1753 is enacted, adjusted for inflation. Second, section 5(c) of the bill would require the Bonneville Administrator to pay the Spokane Tribe on an annual basis, an amount equal to 39.4 percent of each annual payment that Bonneville is making to the Colville Tribes in fiscal years after the date of enactment of the Act.

Section 7 of the bill would require the Bonneville Administrator to deduct from interest payable each fiscal year to the Secretary of the Treasury, a percentage of each annual payment made to the Spokane Tribe for the preceding fiscal year. The percentage deducted would be calculated and adjusted to ensure that the Bonneville Power Administration receives a deduction comparable to the deduction it receives for payments made to the Colville Tribes under the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act.

Finally, Section 9 of the bill would authorize an appropriation of such sums as are necessary to carry out the Act.

In contrast to the payments that would be provided the Spokane Tribe under H.R. 1753's provisions, Bonneville's estimate of going-forward payments to the Spokane Tribe - based on the methodology employed in the Colville Tribes settlement and taking into account the difference between the amount of acreage taken from the Colville Reservation and the amount taken from the Spokane Reservation - is about 19 percent of those provided to the Colville Tribes. During most of our discussions with the Spokane Tribe we have also assumed that this number should be discounted to reflect the lack of any claim filed under the ICC.

More Discussions With the Spokane Tribe

During the Bush Administration and Administrator Steve Wright's tenure, Bonneville continued discussions with the Spokane Tribe. Bonneville advanced a number of its own proposals to the Spokane Tribe that were outside the framework approved by the prior Administration in the hope that these proposals could bring prompt resolution of this issue. None of these proposals were embraced by the Spokane Tribe as acceptable for settlement, and so Bonneville has not pursued approval of them in the present Administration. None of these proposals remain on the table. We advanced them in a spirit of reaching closure promptly. Bonneville did not advance them as proposals the Spokane Tribe could accept as a starting point and then build on to pursue additional compensation. Without agreement by all the Federal and non-Federal parties, the Administration is without a proposal for an appropriate settlement. The Administration is willing to resume working with the tribe to reach a fair settlement. At the appropriate time, the Administration would want to discuss the potential funding mechanisms.

Conclusion

Mr. Chairman, in closing I want to reiterate that the Bush Administration is supportive of reaching a fair and final settlement with the Spokane Tribe. I stand ready to answer any questions you may have.

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