

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

November 14, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x5-8331)

Markup: **H.R. 5633 (Rep. Ryan Zinke, R-MT)**, To authorize and implement the water rights compact among the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and the United States, and for other purposes.
November 15-16, 2016; 1324 Longworth House Office Building

H.R. 5633 (Rep. Ryan Zinke, R-MT), “Blackfeet Water Rights Settlement Act”

Bill Summary:

H.R. 5633 implements federal actions and authorizations related to a water rights settlement between the Blackfeet Tribe and the State of Montana.

Background:

The bill is the result of a new congressional process to receive more information from the Executive Branch before the House considers Indian water rights settlements. Under this process, the Administration worked with the Natural Resources Committee Majority through correspondence to affirm that the proposed Blackfeet Settlement Agreement (Settlement Agreement) represents a “net benefit” to the American taxpayer. Another Indian water rights settlement, the “Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act” (H.R. 5984) passed the Natural Resources Committee by unanimous consent in September 2016.

The Winters Doctrine, Indian Water Rights and Current Protocols for Legislative Consideration

The 1908 Supreme Court decision in *Winters v. United States*¹ (Winters Doctrine) held that the federal government implicitly reserved water rights sufficient to fulfill the purposes of an Indian reservation.² As a result, some tribal communities have sought federally reserved water rights claims under the Winters Doctrine. These rights, while implicitly reserved and generally senior to other rights, can be controversial given western water scarcity and existing junior water

¹Winters v. United States, 207 U.S. 564, 575-77 (1908).

² Id

rights. In addition, such Winters Doctrine rights are often not quantified.³ Since they are federally reserved water rights, and in light of the federal trust responsibility to tribes, the federal government can be a party to tribal Winters claims.⁴ These claims can also be filed against the United States and non-federal parties and are often filed in different court venues.⁵

Some of these claims have been resolved through negotiation. Congress has authorized, and the President approved, the vast majority of these settlements.⁶ Since 1978, there have been 29 Indian water rights settlements that have been approved by Congress. While most have involved federal funding, recent settlements have not involved federal authorization of appropriations.⁷

While many prior settlements involved federal funding as a way to help resolve disputes and finance tribal water infrastructure, there have been questions over the level of how much or whether federal funding should be allocated towards specific settlements. For example, in November 2010, former Natural Resources Committee Chairman Doc Hastings (R-WA) expressed the need for such settlements, but indicated that "...at a time of record deficit spending and record federal debt, it is the duty of Congress to ask questions to ensure these settlements are in the best interest of taxpayers."⁸

In light of these and other questions, current Natural Resources Committee Chairman Bishop sent a [letter](#) in February 2015 to Secretary of the Interior Sally Jewell and former Attorney General Eric Holder outlining the process the Natural Resources Committee intends to follow when considering future Indian water rights legislation.⁹ The letter stipulated that the Administration must convey support for a specific settlement, forward the settlement and the proposed authorizing language, specifically including federal spending levels and claims being resolved, before any Committee consideration can take place.¹⁰

One of the letter's requests that the Administration specifically affirms that a settlement meets longstanding Federal *Criteria and Procedures* "to ensure that the American taxpayer is deriving benefits from any such settlement prior to Committee consideration."¹¹ One of these

³ Congressional Research Service "Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview" Cynthia Brougher, Legislative Attorney, June 8, 2011; p. 4

⁴ <http://www.bia.gov/FAQs/>

⁵ Congressional Research Service "Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview" Cynthia Brougher, Legislative Attorney, June 8, 2011; p. 6

⁶ "The Importance of Indian Water Rights Settlement Funding" by the Western States Water Council and the Native American Rights Fund; p. 2

⁷ Congressional Research Service. Indian Water Rights Settlements. (R44148, September 18, 2015), by Charles V. Stern. Web. <<http://www.crs.gov/reports/pdf/R44148>>; p. 5

⁸ <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=215938>

⁹ Letter from Chairman Bishop to the Department of the Interior and the Department of Justice in regards to Indian Water Rights Settlements dates February 26, 2015. Web. <http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf>

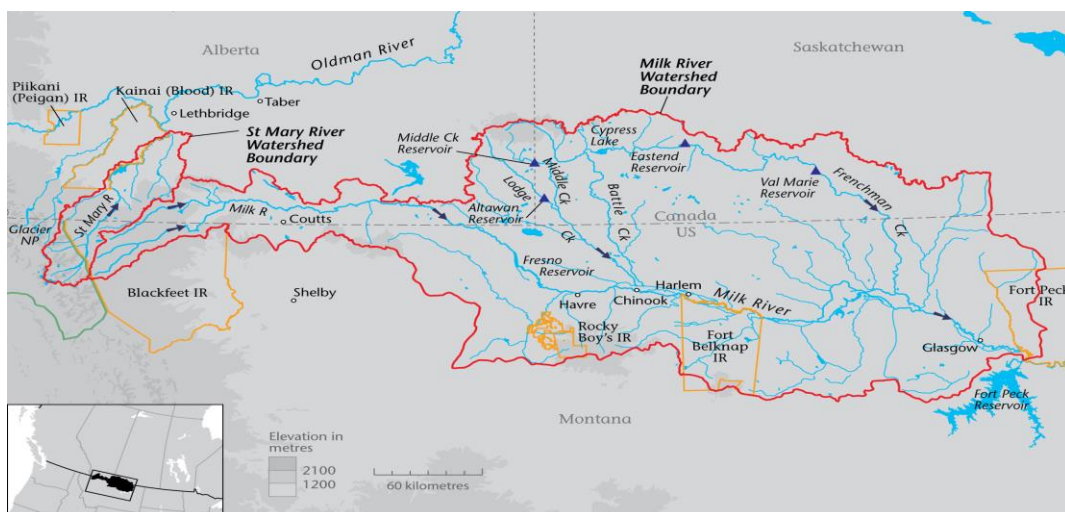
¹⁰ *Id.*

¹¹ Letter from Chairman Bishop to the Department of the Interior and the Department of Justice in regards to Indian Water Rights Settlements dates February 26, 2015. Web. ; http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf>

criteria states 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”.¹²

Settlement History

The Blackfeet Reservation (Reservation), bordered on the north by Canada and on the west by Glacier National Park in northwestern Montana (see Map 1), sits on 1.5 million acres and consists of over 17,000 members of the Blackfeet tribe.¹³ The Reservation was established by Treaty with the United States on October 17, 1855.¹⁴ In 1873 and 1874, the southern boundary of the Reservation was moved 200 miles north through Presidential orders and Congressional Acts,¹⁵ and in 1888 the Reservation was divided into three separate and smaller reservations: the Fort Belknap Reservation, the Fort Peck Reservation and the Blackfeet Reservation.¹⁶ The Blackfeet Reservation encompasses over 518 miles of streams and 180 bodies of water, including eight large lakes, with more than 1.5 million acre-feet of water that either originates on or flows through the Reservation on an annual basis.¹⁷ The St. Mary River, which originates near Glacier National Park and accounts for over one-third of the Reservation’s water supply, flows onto the Reservation and then north into Canada.¹⁸ The Milk River, which originates on the Reservation, flows northeasterly through the Reservation into Canada and then back into the United States.¹⁹



Map 1: St. Mary River in the United States and Montana. **Source:** University of British Columbia

¹² Id, p. 3

¹³ http://www.montanatribes.org/links_&_resources/tribes/blackfeet.pdf, p. 10.

¹⁴ 11 Stat. 657

¹⁵ http://www.montanatribes.org/links_&_resources/tribes/blackfeet.pdf, p. 11.

¹⁶ Prepared Testimony of Mr. Donald Laverdure, Principal Deputy Assistant Secretary of Indian Affairs, Department of the Interior, U.S. Senate Committee on Indian Affairs, 112th Congress, Legislative Hearing, October 20, 2011.

¹⁷ Prepared Testimony of the Honorable Terry J. Show, Chairman, Blackfeet Nation, 112th Congress, Legislative Hearing, October 20, 2011.

¹⁸ Id.

¹⁹ http://www.usbr.gov/projects/ImageServer?imgName=Doc_1305122758540.pdf; p. 2

In 1895, the Tribe ceded 800,000 acres of land along the western boundary of the Reservation to the United States while reserving its rights to hunt, fish, cut wood and remove timber on these lands so long as they remained public lands of the United States (1895 Agreement).²⁰ Issues involving diversion of waters from the Reservation to non-tribal federal water projects precipitated the need to negotiate a settlement to fulfill the Tribe's senior water rights while also protecting the non-tribal entities which rely on the Tribe's water.²¹

In 1979, the Montana legislature created "The Reserved Water Rights Compact Commission" (Compact Commission) to negotiate settlements with the federal government and Indian tribes claiming federal reserved water rights within the State.²² In the same year, two cases were filed to quantify and adjudicate the Tribe's water rights claims: one in state court and the other in federal court. This jurisdictional uncertainty was resolved in 1983 by the United States Supreme Court case *Arizona v. San Carlos Apache Tribe*, which held that the state court was the appropriate venue for these water rights claims.²³ Both the state and federal cases were stayed pending settlement negotiations with the Compact Commission.²⁴ The stay expires in January 2017.²⁵ The Tribe began negotiations with the Compact Commission in 1989, and the United States appointed a Federal Negotiation Team one year later to support the negotiations. The negotiations culminated in December 2007 with the Blackfeet Water Rights Compact (Compact).²⁶ In April 2009, the Montana State Legislature approved the Compact.²⁷ Federal legislation to authorize the Compact was first introduced in 2010, but there have been concerns with its cost and delineation of Federal interests and responsibilities.²⁸

Correspondence and Settlement Benefits (according to the letter)

In response to Chairman Bishop's February 2015 Letter, the Administration transmitted a [letter](#) (May 2016 Letter) and the proposed "Blackfeet Water Rights Settlement Act of 2016" (Settlement Act).²⁹ Although many of Chairman Bishop's requests were answered, the letter specifically stated:

²⁰ Id.

²¹ <http://blackfeetnation.com/watercompact/faqs/>

²² <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/history>

²³ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983)

²⁴ *Northern Cheyenne v. Adsit*, 721 F.2d 1187 (9th Cir., 1983)

²⁵ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfeet Water Rights Settlement Act of 2016 dated May 16, 2016 ; p. 5.

²⁶ <http://leg.mt.gov/bills/mca/85/20/85-20-1501.htm>

²⁷ [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20091&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=161&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20091&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=161&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=)

²⁸ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfeet Water Rights Settlement Act of 2016 dated May 16, 2016; p. 2.

²⁹ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfeet Water Rights Settlement Act of 2016 dated May 16, 2016

“Although settlement of the Blackfoot 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*.”³⁰

According to the May 2016 letter, the Settlement Act:

- Ratifies and affirms the Blackfoot Water Rights Compact and establishes the Tribe’s federally reserved water right to more than 750,000 acre-feet of surface water and nearly all of the Reservation’s groundwater.³¹
- Establishes a process to resolve a longstanding dispute between the Blackfoot Tribe and the Fort Belknap Indian Community over their rights to use the Milk River, and authorizes the Secretary of the Interior (Secretary) to facilitate an agreement if they are unable to reach one within three years.³²
- The Tribe agrees to waive all water-related claims against the United States for claims such as the diversion of St. Mary water off the Blackfoot Reservation for the Milk River Project; the environmental and resource damage caused by the St. Mary diversion facilities; claims relating to the 1909 Boundary Waters Treaty; unfulfilled promises to construct a new storage facility on the Two Medicine River; failure of the United States to properly operate and maintain the Blackfoot Irrigation Project; and the failure of the United States to protect the Tribe’s water rights from development by others.³³
- In consideration for the Tribe waiving its claims against the United States, approximately \$420 million in federal funding is authorized for the Tribe for the construction and rehabilitation of water related infrastructure. This includes funding for drinking water, storage, and irrigation and stock development projects. Montana will contribute \$49 million to the Settlement.³⁴

On May 24, 2016, the House Water, Power and Oceans Subcommittee (Subcommittee) held a legislative hearing on a discussion draft of the proposed Settlement Agreement. At the conclusion of the hearing some questions were left unanswered. As a result, on July 1, 2016,

³⁰ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfoot Water Rights Settlement Act of 2016 dated May 16, 2016; p. 1.

³¹ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfoot Water Rights Settlement Act of 2016 dated May 16, 2016; p. 2.

³² *Id.*

³³ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Blackfoot Water Rights Settlement Act of 2016 dated May 16, 2016; pp. 5-7.

³⁴ *Id.*; p. 4.

Chairman Bishop sent a follow-up [letter](#) to the Administration requesting more information in regards to the Settlement Agreement and its net benefits to the American taxpayer. The Administration provided a clarifying response to Chairman Bishop in a July 22, 2016 [letter](#) affirming that the Blackfeet Settlement Agreement represents a “net benefit to the American taxpayer as compared to the consequences and costs of not settling the litigation related to the Tribes’ water rights claims.”³⁵ On July 11, 2016, Rep. Ryan Zinke (MT-At Large) introduced H.R. 5633, which is identical to the discussion draft considered by the Subcommittee at its May 24, 2016 legislative hearing.

Major Provisions of H.R. 5633, “Blackfeet Water Rights Settlement Act of 2016”:

Section 1 states that the Act may be cited as the ‘Blackfeet Water Rights Settlement Act of 2016’.

Section 2 discusses the purposes of the Act.

Section 3 defines key terms used throughout the Act.

Section 4 authorizes, ratifies and confirms the Blackfeet Water Rights Compact. This section directs the Secretary to execute the Compact and to comply with the National Environmental Policy Act, the Endangered Species Act and all other applicable federal environmental laws.

Section 5 creates a process to facilitate an agreement between the Blackfeet Tribe and the Ft. Belknap Indian Community in regards to their rights to use the Milk River. If an agreement cannot be reached within three years, the Secretary is authorized to establish criteria to reach an agreement.

Section 6 requires the Secretary to enter into a water delivery contract with the Tribe for the delivery of 5,000 acre-feet per year of St. Mary water from the Milk River Project that is not subject to shortages. In addition, after all water rights under State law for use of St. Mary River water, including Milk River Project water rights, have been satisfied, the Tribe will have the right to use the remaining portion of the share of the United States in the St. Mary River under the Boundary Waters Treaty of 1909 for any authorized tribal use under this Act. The Tribe is authorized to enter into subcontracts for the delivery of water to third parties.

Section 7 requires the Secretary to conduct appraisal and feasibility studies in relation to St. Mary and Milk River water supplies, including alternatives to develop additional St. Mary water for the Tribe. This section also provides for the implementation of an agreement between

³⁵ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act dated July 22, 2016

the Secretary and the Tribe to determine the location of the Milk River Project right-of-way and easement.

Section 8 provides the Tribe the exclusive right to develop and market hydroelectric power from the St. Mary Unit under certain conditions.

Section 9 directs the Secretary to allocate to the Tribe 45,000 acre-feet per year of water stored at Lake Elwell and outlines the conditions for the delivery of this water.

Section 10 directs the Secretary to carry out certain activities for the Blackfeet Irrigation Project regarding deferred maintenance, dam safety improvements for Four Horns Dam and rehabilitation and enhancement of the Four Horns Feeder Canal, Dam and Reservoir.

Sections 11 directs the Secretary to design, plan and construct a Municipal, Rural and Industrial Water System on the Reservation.

Section 12 directs the Secretary to plan, design and construct one or more facilities to store water and support irrigation on the Reservation.

Section 13 provides for the scope of the Blackfeet Water Storage and Development Projects, and affirms that the federal government shall have no obligation to pay for the OM&R of the projects rehabilitated or constructed by this Section.

Section 14 provides that the Tribe shall grant, at no cost to the U.S., any necessary easements or ROW for the construction of the projects authorized in sections 10 and 11.

Section 15 ratifies and confirms Tribe's water rights, and provides that the Tribes water rights will be held in trust by the United States for the use and benefit of the Tribe.

Section 16 establishes a Blackfeet Settlement Trust fund in the U.S. Treasury and establishes how the Secretary will manage the fund.

Section 17 establishes a Blackfeet Water Settlement Implementation fund and establishes how the fund may or may not be used.

Section 18 authorizes funds to be appropriated to the Secretary to carry out the Settlement.

Section 19 confirms the instream flow water rights of the Tribe on land within the Lewis and Clark National Forest and Glacier National Park.

Section 20 provides for waivers and releases of claims by the Tribe and the United States acting in its capacity as trustee for the Tribe, waivers and release of claims by the U.S. acting in its capacity as trustee for the allottees, and waiver and release of claims by the Tribe against the United States.

Section 21 provides that the benefits realized by the Tribe under the Act are in complete replacement of, complete substitution for, and full satisfaction of all claims of the Tribe against the United States that are waived in Section 18(a).

Section 22 contains a number of miscellaneous provisions.

Cost:

The Congressional Budget Office has not completed a cost estimate of this bill at this time.

Administration Position:

The Administration supported the Settlement Agreement in its July 22, 2016 letter to Chairman Bishop and testified in support of the Settlement Agreement and the Discussion Draft in testimony earlier this year before the Water, Power and Oceans Subcommittee.

Anticipated Amendments:

An amendment may be offered to make a number of technical changes.

Effect on Current Law (Ramseyer):

Not Applicable.