

TESTIMONY OF CHRIS D. TWEETEN
REPRESENTING THE STATE OF MONTANA
ON S. 3355
BEFORE THE SENATE COMMITTEE ON
INDIAN AFFAIRS
UNITED STATES SENATE

September 11, 2008

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% 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%. 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 expressed 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 by 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% to Wyoming and 20% 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% 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.