

**TESTIMONY**  
**CHAIRMAN CEDRIC BLACK EAGLE**  
**CROW TRIBE**  
HOUSE COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON WATER AND POWER  
**H.R. 3563, THE CROW TRIBE WATER RIGHTS SETTLEMENT ACT**  
**SEPTEMBER 22, 2009**

Good afternoon, Chairwoman Napolitano, Ranking Member McClintock, and members of the Subcommittee.

My name is Cedric Black Eagle. I am the Chairman of the Crow Tribe. I am honored to be here on behalf of the Crow Tribe of Indians. This water settlement has been decades in the making. Since 1998 I have been significantly involved in water negotiations for the Crow Tribe, so I am quite familiar with the history and terms of the Crow-Montana Water Compact and this legislation.

I first want to thank our Congressman from Montana, Denny Rehberg, for his staunch support of the Tribe in its efforts to introduce and move our water settlement bill. Without his strong and active support, we would not be here today.

I also want to thank this Subcommittee for holding a hearing on H.R. 3563 -- legislation to ratify the Crow-Montana water compact and to settle the Tribe's claims against the United States related to the Federal government's systematic failure to protect and adequately manage the Tribe's water resources. Enactment of this legislation is a critical step towards improving the quality of life on the Crow Reservation and making our Reservation a viable homeland for the Crow people. In addition to the Tribe finally obtaining recognition of its senior water rights on the Bighorn River and its tributaries, the bill rectifies significant injuries the Tribe has suffered in connection with its water rights, providing, among other things, for the rehabilitation of the dilapidated Crow Irrigation Project, as well as providing, for the first time, a source of clean drinking water for a significant portion of our Reservation.

I will first address the need for this settlement and its importance to the Crow Tribe. I will then provide some background on the long settlement process the Tribe pursued and the settlement that was ultimately reached. Finally, I will address the substantial improvements made to the bill since it was first introduced last year in order to address various concerns that have been raised by both the Administration and the State of Wyoming.

At this point, we believe we have addressed all of the concerns of the State of Wyoming and nearly all of the various concerns raised by the Administration, both in their testimony from last year and in direct discussions with the Administration since the bill was reintroduced this year. The process has been long and arduous for the Tribe, but I believe the bill you have now before you represents a fair settlement for all the parties involved and we are hopeful that the Subcommittee will help us take the next steps necessary to finally achieve a long overdue resolution of our water rights issues.

## **I. BACKGROUND ON CROW TRIBE AND IMPORTANCE OF WATER SETTLEMENT**

### **A. Background on Crow Tribe.**

The Crow Nation (Apsáalooke) has a membership of approximately 12,000, of whom 7,900 reside on the Crow Indian Reservation. As indicated in the attached map,<sup>1</sup> the Crow Indian Reservation is located in south central Montana. It is the largest of Montana's seven reservations comprising approximately 2.3 million acres. The current reservation was established by the Treaty of Ft. Laramie with the United States dated May 7, 1868. At the time of its establishment, the Reservation comprised nearly 5.9 million acres in both Wyoming and Montana. However, over time the Reservation was reduced by nearly 3.6 million acres.<sup>2</sup> The last cession of Crow land, in 1904, included what came to be known as the Ceded Strip, 1 million acres on the north side of the Reservation.<sup>3</sup>

There are a number of large streams that flow through the Crow Indian Reservation, including the Bighorn River and its tributaries, one of which is the Little Bighorn River. Another significant stream on the western portion of the Crow Indian Reservation is Pryor Creek and its tributaries.<sup>4</sup>

#### **1. Water is Critical to Crow People.**

Water is profoundly important to the Crow people. It is vital to our health and a central part of our culture and traditions. As one of our teachers wrote in her book on Crow Indian recipes and medicines, "Water has always been the main drink of the Crow people. Elders tell us that rivers are like the veins of the world. They teach us to respect the waterways and to be thankful to the Creator every time we take a drink."<sup>5</sup> Those who are ill are invited to drink pure water to thin their blood and restore their health. Tribal ceremonies such as those of the sweat lodge depend upon particular uses of waters in places that are sacred to the Crow people.

The Crow people respect the beings that live in the rivers and pay appropriate tribute to the waters. In our creation story, the land is brought up from the water and in many of our other traditional stories water is central. We believe that all things of tangible substance, all things that we can touch, feel, smell, see and hear come from water. In the Tobacco Dance, a central

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<sup>1</sup> Exhibit 1: Map of Crow Indian Reservation.

<sup>2</sup> Exhibit 4: Megan Benson, *The Fight for Crow Water, Part I, The Early Reservation Years through the Indian New Deal*, Montana Magazine, Winter 2007 at 27.

<sup>3</sup> Exhibit 2: Map of Crow Indian Reservation and Ceded Strip.

<sup>4</sup> Exhibit 1: Map of Crow Indian Reservation.

<sup>5</sup> Alma Hogan Snell, *A Taste of Heritage: Crow Indian Recipes & Herbal Medicines*, Ed. Lisa Castle; Foreword Kelly Kindscher; University of Nebraska Press; Lincoln & London, 2006 at 59.

ceremony of our tribe, we repeat this central truth that all things come from water and with water they go.

## **2. Lack of Clean Drinking Water on Reservation.**

As with other settlements considered by this Subcommittee and enacted by Congress, one of the most significant parts of the legislation, on which the Tribe has been working for over a decade, is the design and construction of a system to deliver to Crow tribal members what most Americans take for granted – safe drinking water.

Congress enacted the Safe Drinking Water Act<sup>6</sup> “to assure that water supply systems serving the public meet minimum national standards for protection of public health”<sup>7</sup> because “safe drinking water is essential to the protection of public health.”<sup>8</sup> The Safe Drinking Water Act was originally enacted in 1974, yet the promise of this Act has yet to reach the Crow Reservation. Thus, consistent with principles of self-government and self-determination, the Crow Tribe has decided to take over this responsibility from the Federal government, by utilizing a portion of the consideration for the settlement of our claims, and including as part of our water settlement with the United States, the means to build a water delivery system so that – for the first time – a significant portion of the Reservation will have safe drinking water. This water system will also meet the current and future domestic, commercial, institutional and industrial water needs on the Crow Reservation. Once this water system is constructed, title to the system will transfer from the Federal government to the Tribe.

The current system is woefully inadequate. It does not supply enough water to fulfill the basic human needs of tribal members living on the Reservation, and the water that is delivered is not drinkable or usable.

The deficiencies with the current system are too numerous to count but have been documented, in part, by a 1999 study by HKM Engineering and by the Indian Health Services’ Sanitation Deficiency System (SDS). Since 1999 no significant improvements have been made to the system, and the deficiencies continue to exist and affect the delivery of water. To fulfill the basic human water needs, the Crow Agency’s water capacity should be at 690 gallons per minute, but the current capacity is limited to approximately 86 gallons per minute.<sup>9</sup> This means, of course, that people on the Reservation simply do not receive water. As a result, many of our people resort to hauling water for their daily domestic use.<sup>10</sup>

Moreover, the limited supply of water that is available is often not fit for human use. Boil water orders are a part of the way of life on Reservation. There is also high likelihood that

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<sup>6</sup> 42 U.S.C. § 201 *et seq.*

<sup>7</sup> House Report No. 93-1185 (1974).

<sup>8</sup> House Conf. Report No. 104-741 (1996).

<sup>9</sup> Exhibit 16: Excerpt from HKM 1999 Engineering Report at 49 (1999).

<sup>10</sup> Exhibit 20: Pictures of the water storage containers used by Crow tribal members living on the Reservation (2009).

treated water from the Crow Agency water treatment plant contains a parasite known as cryptosporidium, which EPA classifies as a risk to human health,<sup>11</sup> and can cause mild to severe diarrhea, dehydration, stomach cramps, and fevers.<sup>12</sup>

In 2006, EPA promulgated a final Federal rule requiring public water systems to test for the presence of *E. coli* in untreated water from the lake or river that supplies the system's drinking water.<sup>13</sup> EPA issued the final rule because an annual average of 50 colonies of *E. coli* per 100 milliliters of untreated water is a strong indicator that a parasite known as cryptosporidium is also in the untreated water.<sup>14</sup> EPA decided to require *E. coli* testing because these tests are 10% of the cost of testing for cryptosporidium.<sup>15</sup>

Under the Federal rule, a public water system like the Crow Agency water treatment plant must either test the untreated water twice a month for one year, or once a month for two years.<sup>16</sup> The BIA began testing for *E. coli* in January of 2008 and, in consultation with EPA, decided by July of 2008 to stop testing the untreated water because, with only half of the data collected, officials knew the annual average of *E. coli* colonies in the water would never be below 50 colonies per 100 milliliters.<sup>17</sup> The sample with the highest level of *E. coli* contained 7,179 colonies of *E. coli* in 100 milliliters of water.<sup>18</sup>

While the Crow Agency water treatment facility can treat water infused with the *E. coli* bacteria, the facility is not equipped to eliminate cryptosporidium and is in need of maintenance and repair.<sup>19</sup> Thus, the Crow Agency water treatment plant must either institute the next phase under EPA's rules, which is to test for cryptosporidium, on a monthly basis for at least a year, or must upgrade their water system to treat cryptosporidium.<sup>20</sup> In the meantime, tribal members living on the Crow Reservation will continue consuming water and bathing in water that is likely contaminated with cryptosporidium.

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<sup>11</sup> <http://www.epa.gov/waterscience/criteria/humanhealth/microbial/cryptohta.pdf> (last visited Sept. 17, 2009).

<sup>12</sup> 71 Fed. Reg. 654, 660 (Jan. 5, 2006).

<sup>13</sup> 71 Fed. Reg. 654 (Jan. 5, 2006).

<sup>14</sup> 71 Fed. Reg. 654, 657 (Jan. 5, 2006).

<sup>15</sup> Exhibit 17: Letter from Barbara Burklan, U.S. Environmental Protection Agency, Region 8 at 2 (Sept. 17, 2009).

<sup>16</sup> 71 Fed. Reg. 654, 664-65 (Jan. 5, 2006).

<sup>17</sup> Exhibit 17: Letter from Barbara Burklan, U.S. Environmental Protection Agency, Region 8 at 2 (Sept. 17, 2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* See also Exhibit 18: Crow Indian Reservation: Natural, Socio-Economic, and Cultural Resources Assessment and Conditions Report, Facilities and Services Chapter, excerpts found at [www.blm.gov](http://www.blm.gov) (2002) (noting that "The quality of water on the Crow Indian Reservation is concern. The water and wastewater systems at Crow Agency are severely overworked and in need of maintenance."), at 102.

<sup>20</sup> Exhibit 17: Letter from Barbara Burklan, U.S. Environmental Protection Agency, Region 8 at 2 (Sept. 17, 2009).

Some tribal members living on the Reservation use wells on their property as a source of running water for their homes, but these tribal members do not drink the rancid water.<sup>21</sup> Initial results from an ongoing study conducted<sup>22</sup> by Little Big Horn College of well water within the Reservation found that seventy to eighty percent of the wells tested were contaminated with coliform bacteria<sup>23</sup> at levels that made the water a health hazard. Of the remaining wells not contaminated with coliform bacteria, sixty percent contained dissolved solids that made the water undrinkable.

Like many Indian people living on reservations, from the young to old, many tribal members must haul their water from other sources or buy bottled water. But not everyone can afford bottled water year round.<sup>24</sup> A common sight on the Reservation are large plastic containers that tribal members use to store safe drinking water that they haul.<sup>25</sup> Many tribal members make frequent trips to haul their water from springs in the mountains during the summer and buy bottled water in the winter. For example, one tribal member must travel twenty miles each way, for a total of forty miles, to access the spring he uses. In the winter, he has to buy his water because he cannot get to the spring. He buys five gallons to last three days, but now his granddaughter and great-grandchild are living with him. The five gallons no longer last three days.

A reliable and safe supply of drinking water is critical to the health of tribal members and necessary to the Tribe's economic development plans. This is a human need so fundamental that most Americans take it for granted. Our tribal members will never prosper if their tap water can make them sick, and/or they must struggle to obtain a source of clean drinking water.

### **3. Tragic History of Tribe's Water Rights.**

From the time of the 1868 Treaty of Laramie, the Tribe's land and water rights have been continually reduced and abused. I will not recount here the long history of our struggles for both our land and water rights. Instead, I am attaching as additional background for the Subcommittee, a scholarly article recently published in *Montana Magazine* in which the author,

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<sup>21</sup> Exhibit 19: Pictures from the home of a Crow tribal member; she and her family live near Lodge Grass, Montana (2009).

<sup>22</sup> This study is funded by the U.S. Environmental Protection Agency to Margaret Eggers, a graduate student at Montana State University, and in conjunction with the Little Big Horn College. See [http://cfpub2.epa.gov/ncer\\_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/8260](http://cfpub2.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/8260) (last visited Sept. 18, 2009), see also <http://bricc.lbhc.edu/?page=research/water-quality> (last visited Sept. 18, 2009).

<sup>23</sup> The presence of coliform in the water is an indicator that an organism of fecal origin may also be in the water. See <http://www.epa.gov/safewater/contaminants/ecoli.html> (last visited September 17, 2009).

<sup>24</sup> Approximately 41% of Crow tribal members living on Reservation live below the poverty line. See Exhibit 18: Crow Indian Reservation: Natural, Socio-Economic, and Cultural Resources Assessment and Conditions Report, Socio-Economics Chapter, excerpts found at [www.blm.gov](http://www.blm.gov) (2002).

<sup>25</sup> Exhibit 20: Pictures of the water storage containers used by Crow tribal members living on the Reservation (2009).

Ms. Megan Benson, systematically recounts this tragic history as it relates specifically to our water rights.<sup>26</sup>

In the article, which synthesizes her doctoral thesis, Ms. Benson details the history of the Federal authorization for irrigation projects on the Crow Indian Reservation, including the Crow Irrigation Project and the Huntley Project, all of which were ostensibly for the benefit of the Crow people. As was often the case with Indian irrigation projects, however, the projects ended up primarily benefitting only non-Indians seeking to take the resources and land of the Tribe. As Ms. Benson concludes at one point in the article:

Looking at the history of Crow water development, one thing seems clear: the federal government, at a high cost to the Crow trust fund, ensured success to many non-Indian cash-crop farmers, land speculators, and corporations on the reservation.<sup>27</sup>

As time went on, the Crow people attempted to fight for their rights. After the enactment of the Crow Allotment Act of 1920, the Crow Indian Reservation was once again opened to non-Indian settlement. This intensified the fight for the Tribe's water rights, which was further exacerbated by the United States' focus over the next 40 years on the construction of a massive dam, despite the Tribe's vociferous objections, on the Bighorn River.<sup>28</sup>

Eventually, the Federal government was able to force condemnation of the land in the 1950s, taking over 5500 acres of tribal land, and Yellowtail Dam was built creating what is now known as Big Horn Lake.<sup>29</sup> Compensation for the tribal land was eventually set by Congress at \$2.5 million<sup>30</sup> which the Tribe challenged in District Court seeking an additional \$10 million but only won an additional \$2 million, plus interest for the period from 1958 to 1964.<sup>31</sup> Of those amounts, only the original \$2.5 million authorized by Congress in Public Law Number 85-523 was ever paid to the Tribe.<sup>32</sup>

This marked a nadir for the Tribe in its defense of its water rights. Not only was its land taken, without just compensation in the Tribe's view, but also the flow of the water, all for the

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<sup>26</sup> Exhibits 4,5: Megan Benson, *The Fight for Crow Water, Part I, The Early Reservation Years through the Indian New Deal*, Montana Magazine, Winter 2007; Megan Benson, *The Fight for Crow Water, Part II, Damming the Bighorn*, Montana Magazine, Spring 2008 . These articles were derived from Ms. Benson's doctoral thesis on the same subject.

<sup>27</sup> Exhibit 4: Megan Benson, *The Fight for Crow Water, Part I* at 33.

<sup>28</sup> *Id.* at 40.

<sup>29</sup> See *U.S. v. 5,677.94 Acres of Land, More or Less, of the Crow Reservation, State of Mont.*, 152 F. Supp. 861 (D. Mont. 1957).

<sup>30</sup> Exhibit 6: Pub.L. No. 85-523, 72 Stat. 361 (July 15, 1958).

<sup>31</sup> Exhibit 7: Opinion and Order, *The Crow Tribe of Indians of Montana v. U.S.*, Case No. 214 (D. of Mont Jan 3, 1964) (J. Jameson).

<sup>32</sup> Exhibit 4: Megan Benson, *The Fight for Crow Water Part I*.

operation of a dam to benefit non-Indians encroaching on the Tribe. The Tribe also lost jurisdiction over the river stream itself,<sup>33</sup> losing valuable fishing and development rights.

Despite the tremendous hurdles we faced, the fight for our water rights continued and eventually led to claims being filed by the Tribe and the United States, for water rights that we estimate exceed 1.7 million acre feet of water per year (“AFY”).<sup>34</sup> We ultimately entered into negotiations with the State of Montana for a settlement of our claims to water, as well as other claims we had against the State at the time. These negotiations finally resulted in the 1999 Compact that is the basis of the settlement bill before you today.

## **II. Crow Tribe and Montana entered into a settlement Compact in 1999.**

The Montana Reserved Water Rights Compact Commission was established by the Montana legislature in 1979 for purposes of concluding compacts for the equitable division and apportionment of waters between the State and its peoples and the Indian Tribes claiming reserved water rights within the State. Montana’s state legislature ratified the Compact we negotiated with the State of Montana in 1999.<sup>35</sup> By entering into this Compact, we settled our claims with the State and avoided costly and lengthy litigation. In addition, the Compact settled our coal severance tax dispute with Montana.<sup>36</sup> We believe that this Compact strikes a balance between Indian and non-Indian users within the State.

The basic features of the Montana/Crow Compact include the following:

- Tribal water rights recognized
  - 500,000 AFY from the natural flow of the Bighorn River for tribal use, with a priority date of May 7, 1868 (the date of the Treaty of Ft. Laramie).<sup>37</sup>
  - An allocation of 150,000 AFY of the stored water behind Yellowtail Dam (which is contingent on congressional ratification of the Compact as it is a Federal water source – *see* Section 8 of H.R. 3563).<sup>38</sup>
  - 47,000 AFY from the natural flow of Sarpy Creek and other sources for use on tribal interests in the Ceded Strip.<sup>39</sup>
  - Recognition of the tribal right to the entire flow of various named streams and drainages in the Compact (Little Big Horn River, Pryor Creek, Rosebud Creek, various drainages as set forth in Article III.E of the Compact).

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<sup>33</sup> *See The Crow Tribe of Indians v. Montana*, Civ. NO. 214 (D. Mont. 1963).

<sup>34</sup> *U.S. v. Big Horn Low Line Canal Company, et al.*, Case No. CIV-75-34-BLG (filed April 17, 1975).

<sup>35</sup> Exhibit 8: Crow Tribe-Montana Compact, Mont. Code Ann. 85-20-201 (1999).

<sup>36</sup> *Id.* at 30.

<sup>37</sup> *Id.* at 5 (Art. III (A)(1)(a)).

<sup>38</sup> *Id.* at 5-6 (Art. III (A)(1)(b)).

<sup>39</sup> *Id.* at 16 (Art. III (F)).

- Additional allocation of stored water for low flow periods
  - In addition to the allocation of 150,000 AFY of the stored water behind Yellowtail Dam indicated above, there is an additional allocation of 150,000 AFY of stored water that can only be used in periods of low flow on the Big Horn River, or when there is excess water.<sup>40</sup>
- State protections for tribal water rights
  - As part of the Compact, the State agreed to close the entire Bighorn Basin to any new state recognized water uses after 1999, thereby providing future protections to the Tribe's water rights as recognized under the Compact, and also helping to ensure that the Compact would not affect the Yellowstone Compact allocations.<sup>41</sup>
- Off-reservation use of stored water
  - The Compact, and H.R. 3563, specifically limit the off-reservation use of the tribe's allocation of stored water to just 50,000 AFY of the total stored water allocation of 150,000 AFY.<sup>42</sup>
- Tribal commitments under settlement
  - In consideration of the rights confirmed to the Tribe in the Compact, and the performance of the State of Montana and the United States of all actions required by the Compact and H.R. 3563, the Tribe waives, releases and relinquishes all claims to water rights or to the use of water within the State of Montana.<sup>43</sup>
  - The Tribe agrees to not exercise its senior priority rights to water against any water right recognized under Montana state law that has a priority date that is prior to 1999.<sup>44</sup>
  - The Tribe agrees to enter into the Streamflow and Lake Level Management Plan among the Tribe, the State of Montana and the Bureau of Reclamation, pursuant to which the Tribe agrees to dedicate 250,000 AFY of its entitlement to the

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<sup>40</sup> *Id.* at 5-6 (Art III (A)(1)(b)).

<sup>41</sup> Exhibit 9: *Crow Tribe-Montana Water Compact: Hearings before the Montana Legislature Natural Resources Committees*, at 2, June 15 & 16, 1999 (testimony of Gordon W. Fassett, Wyoming State Engineer).

<sup>42</sup> Exhibit 8: *Crow Montana Compact*, Mont. Code Ann. § 85-20-201 (1999) at 6 (Art. III (A)(1)(b)).

<sup>43</sup> *Id.* at 35 (Art. VII (E)(1)).

<sup>44</sup> *Id.* at 6 (Art III (A)(6)).



natural flow of the Bighorn River to instream flow between Yellowtail Dam and Two Leggings, a point 30 miles downstream.<sup>45</sup>

- State contributions to settlement
  - \$15 million contributed by Montana to provide a state cost share for the settlement, plus interest from 1999 to date, for a total of \$18.6 million.<sup>46</sup>
  - A commitment from the State not to challenge the Tribe's right to collect severance and other taxes on coal mined on Reservation (with a value estimated by the Tribe of over \$42 million).<sup>47</sup>
- Dispute resolution
  - Disputes between tribal and state users will be heard by a joint commission, while disputes between tribal users or between state users will be heard by the Tribe or the State.<sup>48</sup>

It is important to note the Compact is an agreement born of compromise, but is fair to both the Tribe and the State. Also, by entering into this Compact we avoid the chaos of litigation that will harm all users, and in particular, preclude the Tribe, to the detriment of itself and its members, from developing its domestic, agricultural, and industrial uses for decades.

### **III. Legislative History of the Crow Tribe Water Rights Settlement Act.**

The Crow Tribe Water Rights Settlement Act was first introduced in the last Congress in the Senate. In addition to authorizing, ratifying and confirming the Compact and the Tribe's water rights as set forth therein, the bill also included, among other things, significant waivers from the Tribe as to its claims against the United States relating to the United States failure to protect, develop and maintain the Tribe's water rights.

The Senate Committee on Indian Affairs held a hearing on the bill September 11, 2008. At the hearing, the Committee heard testimony from the Tribe, the State of Montana, and the Administration. During and following the hearing, the State of Wyoming raised certain concerns with the bill.

The Senate Committee on Indian Affairs held a Business Meeting on September 25, 2008 in which S. 3355 was ordered to be reported out of Committee without amendment. However,

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<sup>45</sup> *Id.* at 7 (Art. III (A)(7)).

<sup>46</sup> *Id.* at 31 (Art. VI (A)(1)).

<sup>47</sup> *Id.* at 31 (Art. VI (A)(4)).

<sup>48</sup> *Id.* at 27 (Art. IV).

Chairman Dorgan acknowledged that further discussions between the Tribe, the State of Montana and the State of Wyoming were necessary before ultimate passage of the bill could occur. The last Congress ended without further action on the bill.

During the period between Congresses, the Crow Tribe, the State of Montana, the Administration, and the State of Wyoming all worked together to address the various concerns raised, particularly those from the State of Wyoming and the Administration. These efforts resulted in a number of changes and improvements to the bill, which were incorporated in an amendment in the nature of a substitute that was reported unanimously out of the Senate Committee on Indian Affairs on September 10, 2009.

Congressman Rehberg reintroduced the Senate amendment in the nature of a substitute in the House on Tuesday, September 15, 2009, as H.R. 3563. All of the numerous changes and improvements that were previously agreed to are all incorporated in the bill that is now under your consideration, H.R. 3563. I will now focus my testimony on changes to the legislation that have been made to address the various concerns raised to date.

#### **IV. Resolution of Wyoming Issues.**

Upon introduction of S. 3355 in 2008, Senator Barrasso voiced concerns from water users in the State of Wyoming about potential interstate effects of the settlement. The Tribe, the Montana Senate delegation, Senator Barrasso's office and the Senate Committee on Indian Affairs (both Majority and Minority staff) worked to find ways to address Wyoming's concerns with the bill without harming the Tribe's water rights. After difficult and extended negotiations, and a multitude of proposals, the parties agreed upon mutually acceptable legislative language which is now incorporated in H.R. 3563. I describe these changes below.

##### **A. Equal Treatment for Fisheries and Recreation under Streamflow and Lake Level Management Plan**

One of Wyoming's primary concerns was that the Bureau of Reclamation should treat Bighorn River fisheries and lake levels equally under the Streamflow and Lake Level Management Plan.<sup>49</sup> Wyoming felt that, while the Streamflow and Lake Level Management Plan recognizes the Bureau of Reclamation's statutory discretion in this regard, additional language should be added to the legislation to reflect the Bureau's discretion to make decisions on when to release water from Bighorn Lake into the river below the dam. Accordingly, Section 12(a) of the bill was amended to clarify that neither the Compact nor the Streamflow and Lake Level Management Plan limit the Secretary's discretion under section 4F of the Streamflow and Lake Level Management Plan and further ensures that the Secretary is not required to give priority to any of the factors enumerated in section 4F of the Streamflow and Lake Level Management Plan.

##### **B. No Effect on Pending Litigation Regarding the Yellowstone River Compact.**

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<sup>49</sup> Exhibit 10: Streamflow and Lake Level Management Plan at 5.

Wyoming also raised a concern that the bill could potentially affect the existing Yellowstone River Compact litigation<sup>50</sup> or future litigation regarding the interpretation or application of the Yellowstone River Compact. To address Wyoming's concern, the Tribe and the State of Montana agreed to include language offered by Senator Barrasso's office. Section 13(f) was added to the bill to expressly provide that nothing in the bill or the Compact affects the Yellowstone River Compact generally or the current litigation (or future litigation) in particular.

**C. Elimination of Unnecessary Retention of Claims Language.**

The State of Wyoming raised an issue with Section 10(c)(3) of H.R. 885, which provided the Tribe with a reservation of claims for damages for injuries to water rights arising outside the State of Montana. The Tribe agreed to remove this section because the tribal waivers in the bill are limited to the Tribe's claims to water rights in the State of Montana and thus a retention of claims outside the State of Montana was unnecessary.

**D. Definition of "Dedication of Instream Flow" Pursuant to the Streamflow and Lake Level Management Plan.**

Water users in the State of Wyoming raised concerns that, because the plan is expressly referred to in Section 12 of H.R. 885 and in the Compact, the provisions in the Streamflow and Lake Level Management Plan requiring the Tribe to "dedicate" a portion or quantity of the tribal water rights to instream flow between two points of the Bighorn River<sup>51</sup> might be interpreted as creating, confirming or ratifying a water "use" which might be interpreted to create a new or additional water delivery obligation that the State of Wyoming and/or water users in Wyoming would be obligated to fulfill. The Tribe and the State of Montana agreed to address this concern by amending Section 12(a). The amendment to Section 12(a) addresses this concern by clarifying that the Tribe's "dedication" of a quantity of its tribal water rights to instream flow under the Plan is not a use or commitment of water that creates any new or additional upstream or interstate obligations.

**E. Applicability of Provisions of Section 12(a) to Any Possible Future Amendments to the Streamflow and Lake Level Management Plan.**

The State of Wyoming addressed concerns that the provisions in Section 12(a), with respect to the interpretation and application of the Streamflow and Lake Level Management Plan, should apply to any future amendments to the Compact or the Streamflow and Lake Level Management Plan. Accordingly, the State of Montana and the Tribe agreed to insert this new provision to clarify that the provisions of Section 12(a) expressly apply to future amendments to the Compact and the Streamflow and Lake Level Management Plan.

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<sup>50</sup> See *Wyoming v. Montana and North Dakota*, 129 S.Ct. 480 (2008) (Montana filed suit against Wyoming arguing that Wyoming is violating the Yellowstone River Compact by depleting two tributaries to the Yellowstone River - the Tongue and Powder Rivers - and taking water Montana is legally entitled to under the Compact).

<sup>51</sup> Exhibit 10: Streamflow and Lake Level Management Plan at 2.

**F. No Effect on Interpretation or Application of Yellowstone River Compact.**

The State of Wyoming wanted additional language to address Wyoming's issues regarding the interpretation and application of the Yellowstone River Compact. The additional language added to Section 13(f)(1) of the bill makes clear that the Act, the Compact, Section 13(f)(2) of the bill and the Streamflow and Lake Level Management Plan do not affect the Yellowstone River Compact.

**G. No Effect of Tribe's Agreement to Provide Protections to Montana Water Users on Water Users Located in the State of Wyoming.**

Lastly, the State of Wyoming expressed concerns that arise from provisions in the Compact<sup>52</sup> that state that, with certain exceptions, water rights recognized under Montana state law in the Bighorn River Basin within Montana that have a priority date before the Compact was ratified by the Montana legislature in June of 1999 "are protected from an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date" of such ratification as well as from "new development of the Tribal Water Right after the date" of such ratification. Because these protections are part of a compact that is being ratified by an act of Congress, water interests in the State of Wyoming expressed concern that the protections from the Tribe's senior water right afforded under the Compact to junior Montana water rights might be interpreted to cause harm or somehow increase the risk to upstream water users in the State of Wyoming.

Accordingly, to preclude any such interpretation of the Act or the Compact, the Tribe and the State of Montana agreed to include an amendment that added a new paragraph to Section 13(f) that states that the Compact provisions that afford these protections to certain water rights recognized under the laws of Montana "do not limit or otherwise affect existing or future water rights (including the exercise of any such rights) outside of that State."

The process towards finding acceptable language to address the State of Wyoming's concerns and protect the Tribe's water rights has been long and difficult, but as a result of the hard work on all sides of the negotiating table, we believe we have achieved mutually acceptable language and are ready to move forward towards passage.

**V. Resolution of Federal Concerns.**

At the September 11, 2008 hearing before the Senate Committee on Indian Affairs regarding S. 3355, the Department of Interior articulated various Federal concerns with the bill. While the Federal testimony referenced a few overarching policy concerns, it became clear upon meeting with Federal representatives that there were specific concerns that were Federal priorities. During the 110<sup>th</sup> Congress, the Tribe and the Federal government worked diligently to

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<sup>52</sup> See Exhibit 8: Article III (A)(6)(a)(1) and (2), (B)(6)(a)(1) and (2), (E)(6)(a)(1) and (2), and (F)(6)(a)(1) and (2).

settle all substantive concerns that were raised in the Federal testimony, which were then incorporated into H.R. 845, the Crow Tribe Water Rights Settlement Act of 2009.

Upon introduction of H.R. 845, the Federal government voiced additional concerns with the bill. Again, the Tribe worked diligently to settle all stated Federal concerns. As of August 25, 2009, when the Tribe met with Federal representatives to discuss any outstanding Federal issues, the Federal representatives acknowledged that the Tribe had resolved all known outstanding issues except for the overall concern of the cost of the bill and the concern that the project costs are underestimated. The amendments to address the Federal concerns are incorporated into H.R. 3563.

Described below is a summary of the Federal concerns resolved and incorporated in H.R. 845, as introduced, and a summary of the Federal concerns resolved that are included in H.R. 3563, as introduced on September 15, 2009. We then address briefly the remaining known unresolved concerns from the United States, based on our discussions with them to date.<sup>53</sup>

**A. Resolved Federal Concerns.**

**1. Resolved Federal concerns incorporated into H.R. 845 as introduced.**

As noted above, between September 2008 and January 2009, the Tribe worked diligently with the Department of Interior, and the Department of Justice, to address the numerous concerns raised by the United States at that time.

**a. Protection of allottee rights.**

First, the United States was concerned that the legislation did not adequately protect allottee water rights to the extent provided under Federal law because the bill did not explicitly state that 25 U.S.C. § 381 applies. While the bill referenced 25 U.S.C. § 381 in various provisions in Section 7, the Federal government felt it was necessary to include an explicit provision providing for its application. Consequently, the Tribe agreed to amend Section 7 of the bill such that there is now a provision that more clearly protects allottee water rights by expressly stating that 25 U.S.C. § 381 applies to allottee water rights. This has resolved the expressed Federal concern on this point.

**b. Revisions to and significant extension of scope of waivers.**

The United States expressed concern that the waivers in H.R. 845 were not completely consistent with the language included in other pending Indian water rights settlements. The United States also expressed concern that the waivers the Tribe provided to the United States in consideration for the Federal contribution were not sufficiently broad enough to justify the

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<sup>53</sup> Our discussions with the United States are ongoing. As part of its ongoing review, the United States has recently raised certain new issues and concerns, and the Tribe and the United States are working cooperatively to address them. As of the date of this testimony, there were certain concerns that may be identified in the United States' testimony that the Tribe and the United States will be attempting to address through agreed upon report language.

proposed Federal contribution. In response to these concerns, the Tribe agreed to revise the waivers in Section 10 of the bill so that the language reflects as closely as possible the standard Federal waiver language that the United States requires in all tribal water settlement bills. There are, of course, unique provisions that the Crow Tribe has that other tribal water settlements will not have in their legislation. Again, the Tribe and the Federal representatives worked together to include waivers in the legislation that adequately protected the Tribe's rights while at the same time protected the United States from future liability.

Significantly, the Tribe also agreed during these discussions to include new additional waivers that addressed areas of potential liability in relation to the Tribe's water rights that had not previously been included in H.R. 845. These significant new waivers addressed potential liability for the United States stemming from:

- The taking of land associated with Yellowtail Dam (*see* Section 10(a)(3)(F) of H.R. 3563);
- The construction and operation of Yellowtail Dam and the management of Big Horn Lake (*see* Section 10(a)(3)(G) of H.R. 3563);
- The failure to recognize or enforce the Tribe's claim of title to lands that are created by the movement of the Bighorn River, as well as the failure to make productive use of those lands (*see* Section 10(a)(3)(E) of H.R. 3563).

In addition to these very significant new waivers, in exchange for the authorization of the CIP OM&R Account set forth in Section 14(h) of H.R. 3563, which establishes a trust fund in the amount of \$15,207,000 for the payment on behalf of the portion of the operation, maintenance and repair costs for the Crow Irrigation Project for which the Federal government would otherwise have been responsible in the future, the Tribe agreed to include a provision in the bill that would absolve the United States from any future tribal claims with respect to any failure by the Federal government to appropriate enough funds to rehabilitate, expand, improve, repair, operate, or maintain the Crow Irrigation Project. (*See* Section 9(b)(1) of H.R. 3563). This constitutes a very significant *future* waiver of potential claims provided by the Tribe through this amendment that was done in exchange for the authorization referenced above. The future waiver is, of course, not effective unless the United States actually appropriates the funds so authorized.

**c. Improvements to operation of Crow Settlement Fund.**

Federal representatives expressed concerns that certain provisions of the Crow Settlement Fund were not consistent and would not function as intended. In response to this concern, the Tribe agreed to amend language to reconcile potential inconsistencies with the process by which the Tribe could withdraw money from the Crow Settlement Fund, and the requirements for the Secretary to disburse funds from the Crow Settlement Fund, thereby fully resolving the Federal concern on this point.

**d. Clarification of power generation provision**

Federal representatives expressed concern with a section of the legislation that grants the Crow Tribe the right to “develop and market power generation as a water development project on the Yellowtail Afterbay Dam.” (See Section 12(b) of H.R. 3563). The Federal representatives believed the provision was unclear as to whether it intends to preclude the United States from developing power in its own right or if it is intended to give the Tribe an exclusive right to develop power on the Yellowtail Afterbay Dam on its own. The language was clarified so that the Tribe’s exclusive right to develop and market power generation as a water development project on the Yellowtail Afterbay Dam shall be with the cooperation of the Bureau of Reclamation and that any hydroelectric power generated under the provision shall be used or marketed by the Tribe.

**e. Clarification of authorization of amendments to Compact.**

Finally, following the September hearing and during the numerous meetings the Crow Tribe had with the Department of Justice, the Department raised a concern about a sentence in Section 4(b), which provided that Congress authorized, ratified and confirmed amendments to the Compact that were consistent with the Act. The Department was concerned that this might result in congressional ratification of amendments that were never presented to or considered by Congress. In conjunction with the State of Montana, the Tribe resolved this concern by replacing the language of the concern with language that Congress had previously enacted in a previous water settlement (the Arizona Water Settlements Act of 2004), along with clarifying language that nothing in the Act was intended to preclude amendments or revisions to the Compact being made that did not require specific congressional authorization to be effective. All parties were satisfied with this result, and the Department’s concern has now been completely resolved.

**2. Resolved Federal concerns incorporated into H.R. 3563, the bill now before this Subcommittee.**

Subsequent to the introduction of H.R. 845 earlier this year, the United States continued to review and analyze the bill and identified certain new concerns that they raised with the Tribe for its consideration and resolution. The Tribe continued its efforts to resolve the concerns raised by the Administration and this resulted in numerous additional revisions to H.R. 845, all of which are now incorporated into the bill you now have before you, H.R. 3563.

**a. Ownership of MR&I System.**

As introduced, H.R. 845 did not provide that following completion of construction of the MR&I System, the Bureau of Reclamation would transfer ownership and operation of the MR&I System to the Crow Tribe. However, during discussions with the Administration subsequent to the introduction of H.R. 845, the Federal team voiced its concern that it believed title to water systems constructed pursuant to Indian water rights settlements should be transferred to tribes or other project users once construction is complete. In effect, such transfer eliminates future Federal responsibility for such a project, which is otherwise a trust responsibility of the United States.

To meet this concern, in exchange for the establishment of the MR&I OM&R Account, authorized in Section 14(f) of H.R. 3563, the Tribe agreed to insert a new provision in Section 6(g) of the bill that provides for transfer of title of the MR&I System to the Tribe once the MR&I System's construction is complete. The MR&I OM&R Account will be used to fund a portion of the Federal trust responsibility for OM&R for this project in the future, with the balance of such costs to be borne by the Tribe. The immediate transfer of title from the Federal government to the Tribe eliminates any future liability for the United States for this system, and constitutes a form of consideration for the MR&I OMR Account authorization.

**b. Timing for vesting of waivers.**

The Department of Interior raised concerns that the Federal waivers would vest before all the requisite funds were deposited in the Crow Settlement Fund, as part of the enforceability date requirements. The Tribe addressed this Federal concern by agreeing to amend Section 10(e) of the bill to require that all of the authorized funds for the Crow Settlement Fund have been deposited in the fund before the enforceability date occurs.

**c. Early availability of funds from Crow Settlement Fund.**

The Department of the Interior also raised a concern that Section 11(e) of H.R. 845 would allow the Tribe to access the funds set aside in the Crow Settlement Fund from the date the tribal members ratified the Compact and settlement legislation. To address this concern about "early availability of funds," the Tribe agreed to revise Section 11(e) in H.R. 3563 such that, with the exception of very limited funds necessary to effectively begin to implement the settlement (\$4,776,000 for the Tribal Compact Administration Account), none of the funds deposited into the Crow Settlement Fund shall be available to the Tribe until the enforceability date of the settlement occurs, the conditions for which are set forth in Section 10(e) of the bill.

**d. Imputed interest on amounts in the Crow Settlement Fund.**

To address concerns with budget scoring raised by the Congressional Budget Office and the Office of Management and Budget in the last Congress, the Tribe had included in H.R. 845 a provision that allowed for the authorization of imputed interest on funds placed into the Crow Settlement Fund prior to the enforceability date of the settlement. Federal representatives raised a concern that this created some difficulties for the Departmental budgeting on a fiscal year basis. To address this concern, the Tribe agreed to delete Sections 14(l) & (m) of H.R. 845, and rather than authorize appropriations for imputed interest that accrued from enactment through the enforceability date on funds in the Crow Settlement Fund, the interest was estimated and added to the six Crow Settlement Fund accounts (Section 14(c)-(h)) as part of the bill. This addressed the Federal concern raised.

**B. Remaining Federal Concerns.**

As indicated by the summary above, the Tribe and the United States have worked diligently throughout this process to address and resolve each and every non-monetary concern



raised by the United States to date.<sup>54</sup> As indicated above, the Tribe has also sought to address the monetary concerns of the United States by: (i) scaling back the scope of the projects authorized under the settlement; (ii) significantly expanding the scope of its waivers to include significant claims against the United States; (iii) agreeing to waive future claims with respect to the operation, maintenance and repair of the Crow Irrigation Project in exchange for the authorization of a CIP OM&R account; and (iv) agreeing to the immediate transfer of the MR&I System upon completion in consideration for the authorization of the MR&I OM&R Account.

Nevertheless, as has become typical for Indian water rights settlements, the United States continues to have monetary concerns with this bill.<sup>55</sup> There is no question that this is a large bill as other Indian water settlements have been. However, one must not forget or minimize the Federal government's liabilities and responsibilities with respect to the Crow Tribe's water rights. In comparison, the bill is commensurate with those liabilities and broken responsibilities. Like the Navajo Water Settlement, we have worked in earnest to find ways to minimize the impact of the cost of the bill by stretching out appropriations over time and finding alternative funding sources. I would also like to note that despite the justifiable cost of the bill, we have continued to diligently work with the Federal representatives to address their concerns. Each of these is discussed below.

## **1. Estimated Cost of Projects.**

Federal representatives have expressed concern that the estimated cost of the projects in the Crow Water Rights Settlement Act may be underestimated. The Federal team has not proposed any language or proposed a solution to this concern at this time and therefore the Tribe has not been able to effectively find a way to satisfy the United States on this issue. It remains, therefore, a stated concern with no solution proposed. The Tribe has, however, been diligent in its own efforts to confirm for itself that the estimated costs of both the Crow Irrigation Project rehabilitation and the construction of the MR&I System are appropriately estimated.

In 2005, the Crow Tribe retained HKM Engineering Inc. to prepare two reports. These reports were first completed in 2007. The Tribe then had HKM review and update the reports to

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<sup>54</sup> However, *see supra* note 53 (noting that the United States has only very recently raised certain additional concerns that the Tribe is seeking to resolve through agreed upon report language).

<sup>55</sup> Written testimony of Michael L. Connor, Commissioner Bureau of Reclamation, U.S. Department of the Interior, Hearing on H.R. 3254, the Taos Pueblo Indian Water Rights Settlement Act of 2009 and H.R. 3342, legislation to settle the water rights claims of the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque: Subcommittee on Water and Power, House Natural Resources Committee, 111th Congress (Sept. 9, 2009) (for both bills, Commissioner Connor made identical statement, stating "We would like to continue to work with the parties and the sponsors to address certain concerns, including those discussed in this statement (such as appropriate non-Federal cost share), that could make this a settlement that the Administration could wholeheartedly support."); Written testimony of Michael L. Connor, Commissioner Bureau of Reclamation, U.S. Department of the Interior, Hearing on H.R. 1065, the White Mountain Apache Tribe Water Rights Quantification Act of 2009: Subcommittee on Water and Power, House Natural Resources Committee, 111th Congress (July 21, 2009) ("Before the Administration can support a settlement, there must be a thorough analysis of the costs it would entail and the benefits to be received in order to assess the appropriateness of the proposed federal contribution. As I will discuss later, while the Administration appreciates that much good work has gone into this proposed settlement, we are unable to support it at this time.").

ensure the estimates contained therein were accurate and up to date. One other element of this review in 2008 was a scaling back in the scope of each project in an effort to address the United States' overall concern with the cost of the settlement.

The first report is an engineering report for a Municipal, Rural and Industrial (MR&I) water system that would meet the current and future domestic, commercial, institutional water needs on the Crow Indian Reservation.<sup>56</sup> The second report is the Crow Irrigation Project Betterment Evaluation Report, which evaluated the Crow Irrigation Project and identified the nature and extent of the existing deficiencies within the Project, and provided cost estimates for rehabilitating the system, so that it can function as originally intended. Together, these two reports provide the basis for the costs authorized for the projects in H.R. 3563. Copies of these reports are included as exhibits to this testimony for inclusion in the record.

The Tribe appreciates the Federal government's concern that the cost may be underestimated. But the Tribe does not believe they are underestimated. If, however, the costs are underestimated, because the costs for each project are specifically capped, the concern is one for the Tribe, not the Federal government. Thus, in the Tribe's view, this concern is addressed by the authorization limits already set forth in the bill.

## **2. Size of the Federal contribution to the settlement.**

The second, and more significant remaining concern of the United States is with the overall cost of the Federal authorizations associated with it. The Tribe has already worked with the United States throughout this legislative process to address this concern. The Tribe has scaled back the size and scope of the MR&I System. The Tribe has opted for rehabilitation of the Crow Irrigation Project rather than replacement, substantially reducing the costs associated with that portion of the settlement.<sup>57</sup> Significantly, the Tribe has agreed to take over ownership of the MR&I System upon completion, rather than after 10 years,<sup>58</sup> thereby completely eliminating the potential costs and liability associated with Federal trust ownership of this asset. The Tribe has also agreed to eliminate future liability of the United States for the Crow Irrigation Project.<sup>59</sup> And, finally, the Tribe has agreed to substantial new waivers at the request of the Federal team.

At this point, there is no more that the Tribe can reasonably be expected to do, other than provide a more complete explanation of the rationale for this substantial Federal contribution, which includes bargained for elements, elements of Federal programmatic responsibilities, as

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<sup>56</sup> Exhibit 11: Excerpts from Crow Indian Reservation Municipal, Rural and Industrial (MR&I) Water System Engineering Report (July 2008)(HKM Engineering).

<sup>57</sup> Exhibit 12: Excerpts from Crow Irrigation Project Betterment Evaluation (July 2008)(HKM Engineering).

<sup>58</sup> Compare to the White Mountain Apache Water Settlement, whereby at the urging of the United States, the White Mountain Apache Tribe agreed to take over ownership of a similar system 10 years after completion. *See* S. 313 (Reported out of the Senate Committee on Indian Affairs with an amendment in the nature of a substitute)(Sept. 10, 2009).

<sup>59</sup> *See* H.R. 3563 § 6(g).

well as very substantial potential liability that the United States might face in the event a settlement is not reached.

**(a) Summary of Federal Contribution**

Set forth below is a brief summary of the Federal contribution, and the rationale for its inclusion in this legislation.

		<b>Non-Indian</b>	<b>Future Waiver</b>	<b>Future Ownership</b>	<b>Federal Trust Responsibility</b>	<b>Remainder</b>
CIP Rehab	\$ 160,653,000	\$ (72,294,000)			\$ (88,359,000)	\$ -
MRI Construction	\$ 200,840,000				\$ (200,840,000)	\$ -
Tribal Compact Admin	\$ 4,776,000					\$ 4,776,000
Econ Dev Fund	\$ 47,762,000					\$ 47,762,000
Water Dev Projects	\$ 44,889,000				\$ (44,889,000)	\$ -
MRI OMR	\$ 72,256,000			\$ (72,256,000)		\$ -
YTD OMR	\$ 12,987,000					\$ 12,987,000
CIP OMR	\$ 15,207,000		\$ (15,207,000)			\$ -
<b>Total</b>	<b>\$ 559,370,000</b>			<b>\$ (87,463,000)</b>	<b>\$ (334,088,000)</b>	<b>\$ 65,525,000</b>

As demonstrated above: (i) a portion of the cost of the settlement is attributable to the benefit of non-Indian water users of the Crow Irrigation Project; (ii) another substantial portion is attributable either to future waivers or immediate tribal ownership of the MR&I System which were the result of direct discussions with the United States, and (iii) a very significant portion of the cost of H.R. 3563 is justified by the United States trust and programmatic responsibility to provide clean water and an irrigation system for the Crow Tribe, as it has done for numerous other tribes, including, for example, the Navajo Nation earlier this year. The critical importance of the clean water system for our Reservation cannot be overstated. As Chairman Bingaman stated in support of the Navajo Water Settlement “At the heart of today’s hearing, and hopefully not lost in the discussion, are the people who will be affected by this legislation and project. For too long, a large percentage of Navajo people have gone without readily accessible drinking water supplies. That’s a convenience that other Americans take for granted.”<sup>60</sup> The Crow people are no less deserving of a safe and clean drinking water supply than the Navajo people.<sup>61</sup> This is why the Tribe has taken the initiative to plan such a system and include it as a fundamental

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<sup>60</sup> Senate Hearing on S 110-148 before the Committee on Energy and Natrual Resources, Navajo Nation’s Water Rights and Miscellaneous Water Supply Issues (June 27, 2007), at 2.

<sup>61</sup> Exhibit 19: Pictures from the home of a Crow tribal member; she and her family live near Lodge Grass, Montana (2009).

element of our settlement of our claims against the United States. The failure of the United States in its responsibility to the Tribe and its members on such a fundamental need is appalling and we cannot allow it to continue.

In addition to allowing for the appropriate fulfillment of the United States' fundamental programmatic responsibilities to the Tribe and its members, as its trustee, the Tribe will be relinquishing extremely large claims against the United States as a result of this settlement, well in excess of the value of the entire Federal contribution set forth above.

**(b) Outline of potential Federal liability to the Crow Tribe.**

A firmly-rooted principle in Federal Indian law is that when the United States sets aside and reserves land for Indian tribes, such reservation includes all the water necessary to make their reservations livable as permanent homelands.<sup>62</sup> The United States holds these reserved water rights in trust for an Indian Tribe.<sup>63</sup>

Since establishing the Crow Tribe's reservation in 1868,<sup>64</sup> the United States has systematically failed to protect and adequately manage the Tribe's water resources.<sup>65</sup> This failure has resulted in the loss of Tribal water use and other Reservation resources, and has prevented the Crow Tribe from fulfilling the purposes of the Reservation. In addition to this general overarching claim, which has the potential on its own, of reaching into the hundreds of millions of dollars, the Tribe also has numerous, very specific claims that it is waiving, with an estimated potential value for each, that provides substantial justification for the overall Federal contribution.

**i. Failure to adequately develop CIP acreage**

Section 31 of the Indian Appropriation Act of March 3, 1891, and subsequent Acts<sup>66</sup> establish a Federal obligation for the construction, operation and maintenance of the Crow Irrigation Project. Despite its statutory obligations, the United States has systematically failed to adequately maintain and fully develop the Crow Irrigation Project to the detriment of the Tribe.<sup>67</sup> The Tribe estimates that at least 11,000 acres of irrigable tribal lands have been undeveloped for over 80 years as a result of the United States failure in this regard.<sup>68</sup>

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<sup>62</sup> See generally, *Winters v. United States*, 207 U.S. 564 (1908); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* ("Gila V"), 35 P.3d 68 (Ariz. 2001).

<sup>63</sup> *Id.*

<sup>64</sup> Treaty of Fort Laramie, 15 Stat. 649 (May 7, 1868).

<sup>65</sup> See generally, Exhibits 4,5: Megan Benson, The Fight for Crow Water Parts I & II, Montana Magazine, Winter 2007.

<sup>66</sup> E.g., Act of April 27, 1904, at 353.

<sup>67</sup> Exhibit 21: Pictures of the Crow Irrigation Project conditions (2009).

<sup>68</sup> Exhibit 13: DOI, BOR Region 6, Yellowtail Unit, Montana-Wyoming Lower Bighorn Division, Missouri Basin Project (June 1962), at 8.

One methodology for valuing this claim would be to determine the number of acres that were undeveloped for the benefit of the Tribe or tribal members, determine the number of years of lost value for such undeveloped land, and an appropriate interest calculation, and cumulate to date. Based on the preliminary numbers available to the Tribe at this time, without the benefit of discovery or expert analysis, the value of this claim could be in excess of \$130,000,000.

ii. Failure to develop Hardin Bench acreage

One of the principal justifications for the construction of Yellowtail Dam was that it would allow for the development of additional on-Reservation irrigation acreage in an area known as the Hardin Bench (or Unit).<sup>69</sup> The total amount of acreage that is currently undeveloped on tribal lands is approximately 28,000 acres. This acreage has never been developed and the Tribe has a potential claim that it is waiving for the United States' failure to do so.<sup>70</sup> Using the same methodology described above, based on the preliminary numbers available to the Tribe at this time, without the benefit of discovery or expert analysis, the value of this claim could be in excess of \$167,000,000.

iii. Compensation for lands taken in connection with Yellowtail Dam

In 1958, the Crow Tribe received \$2,500,000 as compensation for takings related to the Yellowtail Dam in Public Law 85-523, subject to a three year right to appeal the award.<sup>71</sup> The Tribe appealed the award and received an additional \$2,000,000 judgment with an interest rate of 5% per annum from July 15, 1958 until January 3, 1964, by the Federal District Court of Montana.<sup>72</sup> This amount was to compensate the Tribe for the added power generation value of the land taken by the United States for the construction and operation of the Yellowtail Dam.<sup>73</sup> The Tribe has claims against the United States for failure to pay the principal amount due pursuant to the Judgment and interest for the period 1958-1964. Additionally, the Tribe has a claim for compounded interest for the period 1964-2009.<sup>74</sup> A preliminary valuation of this claim would put it at more than \$71,000,000 today.

iv. Compensation for mineral interests for lands inundated by Yellowtail Dam

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<sup>69</sup> Exhibit 14: BOR Website Excerpt, [www.usbr.gov/Projects/project.jsp/?prog-name=Yellowtail+unit+project](http://www.usbr.gov/Projects/project.jsp/?prog-name=Yellowtail+unit+project).

<sup>70</sup> H.R. 3563 § 10(a)(3)(B).

<sup>71</sup> Exhibit 6: Pub. L. No. 85-523, 72 Stat. 361 (July 15, 1958).

<sup>72</sup> Exhibit 7: Opinion and Order, *The Crow Tribe of Indians of Montana v. U.S.*, Case No. 214 (D. Mont. Jan. 3 1964) (J. Jameson).

<sup>73</sup> *Id.*

<sup>74</sup> See *Osage Tribe of Indians of Okla. v. United States*, 75 Fed. Cl. 462 (2007).

The Act authorizing just compensation to the Tribe for takings relating to the Yellowtail Dam expressly excluded takings of mineral interests beneath the surface of the inundation area for the project.<sup>75</sup> The exclusion of these rights, however, proved illusory because construction of the dam precludes development of the Tribe's mineral interests because such development would create safety concerns with respect to the Dam and is practically impossible. Therefore, in effect, the Tribe has been deprived, without just compensation, of its mineral interests beneath the inundated area created by the Dam. Various minerals have been positively identified in the area of the dam, including uranium, bentonite, gold, and of course, coal.<sup>76</sup> A preliminary valuation of these claims by the Tribe for the taking of mineral interests, without the benefit of discovery or expert analysis, show that the claims could exceed \$92,000,000.

v. Compensation for failure of the United States to enforce title to accreted lands along the Bighorn River

The Tribe has substantial claims against the United States for failure to enforce the Tribe's claims and title to additional lands due to the movement (accretion) of the Big Horn River.<sup>77</sup> The estimated value of the annual lease of lost land over time plus compounded interest, without the benefit of discovery or expert analysis, is estimated to exceed \$26,000,000.

vi. Compensation for failure to prosecute Tribe's water rights claims

As trustee of the Crow Tribe, the United States has a fiduciary responsibility to protect and prosecute the Tribe's water rights claims.<sup>78</sup> The United States failed to adequately enforce and protect the Tribe's rights in the Big Horn Low Line Canal Water Adjudication and even alleged water rights in contradiction of the Tribe's right.<sup>79</sup> In essence the Tribe was forced to accept as the quantity of its water entitlement the amount of water that was left under the Yellowstone Compact allocation to Montana after non-Indians' claims were taken into account. The fact that the United States not only failed to protect the Tribe's rights to water but actively

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<sup>75</sup> Exhibit 6: Pub. L. No. 85-523, 72 Stat. 362.

<sup>76</sup> Exhibit 13: DOI, BOR Region 6, Yellowtail Unit, Montana Wyoming Lower Bighorn Division, Missouri Basin Project (June 1962) at 27.

<sup>77</sup> See *New Orleans v. United States*, 35 U.S. 662, 717 (1836) (explaining that under the doctrine of accretion when a river changes its course gradually over time the person whose boundary is the middle of the river gains additional lands acquired as a result of river movement).

<sup>78</sup> See Cohen's Handbook of Federal Indian Law, § 19.06 at 1220-1221 (2005 ed.) (also citing 55 Fed Reg. 9223 (1990) and Indian Policy of Bureau of Reclamation); Chris Tweeten, Chief Civil Counsel, Office of the Attorney General, State of Montana, Senate Committee on Indian Affairs hearing at 192, S. Hrng. 110-678 (Sept. 11, 2008) ("In litigation, we can reasonable expect the United States to put forward substantial claims for federal Indian reserved water rights for the Crow Tribe, for both the Crow Indian Reservation and the ceded strip. Claims for the Crow Tribe will encompass all of the Bighorn River basin that lies within Montana. The Crow Tribe will have a very substantial water right with a very senior priority date to serve the land and interests held in trust for the Tribe by the United States.").

<sup>79</sup> Exhibit 15: *Compare* Amended Compl. of United States, *United States v. Big Horn Low Line Canal*, Case No. CV-75-34 (filed Aug. 29, 1975) at 47a, with Compl. of Intervenor-Plaintiff, the Crow Tribe, *United States v. Big Horn Low Line Canal*, Case No. CV-75-34 (filed June 18, 1976) at 76a.

participated in its transfer to non-Indians makes the United States' culpability in this claim particularly egregious. The value of the water rights lost to the Tribe due to the United States' failure is enormous. Using very conservative estimates, and based on the information currently available to the Tribe, without discovery or the benefit of expert analysis, the value of this claim would easily exceed \$317,000,000.

vii. Compensation for loss of hunting and fishing license revenues

In addition to the damage inflicted on the Tribe by its trustee in forcing the illegal condemnation of lands in connection with Yellowtail Dam, the United States failed to take any account of the Tribe's hunting and fishing rights along the Bighorn. In a sharp reversal of policy in 1954, in a blatant effort to "justify" the condemnation of tribal lands for purposes of Yellowtail Dam, the United States not only allowed for condemnation but introduced and pursued a course against the Tribe that effectively caused the transfer of all jurisdiction along the Bighorn River and its tributaries from the Tribe to the Federal government and thence to the State of Montana.<sup>80</sup> This transfer of jurisdiction allowed the State to collect substantial revenues from fishing and hunting licenses along the Bighorn River. As noted by Ms. Benson in her thesis, "[t]he resulting loss to Crow coffers was high; to the Crows' sense of who they were as a people, immeasurable."<sup>81</sup> Based on the preliminary information available to it, and without the benefit of discovery or expert analysis, the Tribe estimates that this potential claim has a value in excess of \$177,500,000.

viii. Summary of potential liability to United States for claims waived by Tribe pursuant to H.R. 3563

i. Failure to fully develop CIP			\$ 130,000,000
ii. Failure to develop Hardin Bench			\$ 167,000,000
iii. Yellowtail Dam taking			\$ 71,000,000
iv. Mineral interest taking			\$ 92,000,000
v. Accreted lands			\$ 26,000,000
vi. Failure to protect water rights			\$317,000,000
vii. Loss of hunting and fishing license revenues			\$ 177,500,000
viii. Other			\$ 32,000,000
Total			\$1,012,500,000.00

<sup>80</sup> See *Montana v. U.S.*, 450 U.S. 544 (1981)(holding that because Bighorn River was navigable the riverbed passed to the State upon entry into the Union thereby precluding the Crow Tribe from regulating hunting and fishing of non-members on Reservation on land owned by non-members).

<sup>81</sup> Exhibit 5: Megan Benson, *The Fight for Crow Water, Part II* at 13.

### **3. State of Montana's Proportionate Contribution to the Settlement.**

Pursuant to the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria"), the State of Montana's contribution to the Crow Indian Tribe Water Rights Settlement should be proportionate to the benefits received by the State of Montana.<sup>82</sup> Though the State is in the best position to describe the benefits it receives under the settlement, the Tribe views the State contribution as one that meets this standard, particularly by comparison to other Indian water rights settlements previously considered and approved by this Subcommittee. It is perhaps not the largest State contribution provided to such a settlement, but it also by no means the smallest.

The Crow-Montana Compact negotiated between the Tribe, the State of Montana and the United States provides a significant contribution from the State of Montana that satisfies the Federal requirement under the Criteria for the following reasons.

As discussed above, as part of the settlement, the Tribe will receive \$15 million from the State of Montana as the State's cost share of the settlement, plus interest from 1999 to date, for a total of \$18.6 million.<sup>83</sup> In addition to the cash contribution, in order to settle a long-standing lawsuit over the Tribe's and the State's coal severance tax authority,<sup>84</sup> the settlement included a commitment from the State of Montana that if it were ever to impose its own coal severance tax on coal mined within the Reservation, the State would pass the proceeds of such tax on to the Tribe. This commitment, set forth in State statute and a separate Coal Severance Tax Agreement, was an integral part of the deal struck with the State at the time of the water settlement and a portion of the value of such commitment is directly attributable to the State's overall contribution to this water settlement.

After estimating the potential value of the commitment overall over a 100 year period, discounting such value for appropriate litigation risks and net present value, and allocating only a small portion of the value of the commitment as being attributable to the value of the water settlement and not to the overall settlement of the coal tax issue, the Tribe estimates that the value of this portion of the State contribution is over \$42 million.

Taken together, by the Tribe's analysis, the State of Montana's cash and non-monetary commitment to the Crow water settlement is over \$60 million. Thus, the State of Montana's contribution, while not as large as some (Aamodt), is certainly commensurate with other state contributions in Indian water settlements (*e.g.* Navajo and White Mountain Apache) such that it satisfies the Criteria for Indian water settlements.

### **III. Conclusion**

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<sup>82</sup> See Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims 55 Fed. Reg. 9223 (Mar. 12, 1990), at 3.

<sup>83</sup> Exhibit 22: Current status of State contribution escrow account.

<sup>84</sup> See *Crow Tribe vs. State of Montana*, 819 F.2d 895 (9th Cir. 1987).



Madam Chairwoman and members of this Subcommittee, in closing, I would like to thank the many people who have worked to bring this historic agreement to this stage, including all of those who have negotiated on behalf of the Tribe, the State, and the United States over the years. In particular, I would like to thank Congressman Rehberg again for his hard work on our behalf and for sponsoring this Federal legislation.

Thank you.