

**Statement of Jeanne S. Whiteing
on behalf of
the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana**

**Before the
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives**

**Oversight Hearing On Indian Water Rights Settlements
April 16, 2007**

On behalf of the Blackfeet Tribe, I would like to thank the Subcommittee on Water and Power for holding this Oversight Hearing on Indian Water Rights Settlements, and for inviting the Blackfeet Tribe to present testimony. My name is Jeanne Whiteing, and I serve as Legal Counsel to the Blackfeet Tribe in its water rights negotiations. I am also a member of the Tribe.

The Blackfeet Tribe has been involved in negotiations to resolve its water rights with the State of Montana and the United States for almost two decades. In the last two years, significant progress has been made and I am pleased to report that a water rights compact has been completed with the Montana Reserved Water Rights Compact Commission, subject to the approval of the Blackfeet membership, the Montana Legislature and Congress.

Water is the most important resource issue for the Blackfeet Tribe today, and the Tribe welcomes the opportunity to provide comment on the settlement process and the funding of settlements. In order to put these issues in context, I would first like to provide some background on the Blackfeet Reservation, the water resources of the Reservation, and the water rights issues faced by the Tribe.

The Blackfeet Reservation

The Blackfeet Tribe is a sovereign Indian Nation residing on the Blackfeet Indian Reservation in Montana and exercising jurisdiction and regulatory control within the Reservation. The Reservation was formally established by Treaty with the United States on October 17, 1855 . As originally set aside, the Blackfeet Reservation encompassed most of the western and northern part of what is now the State of Montana. It was gradually reduced to the present 1.5 million acre Reservation through various executive orders, agreements and an act of Congress. The Reservation is bordered on the north by Canada.

The Reservation was allotted under two separate allotment acts in 1907 and 1919. With the advent of allotment, land ownership within the Reservation was irrevocably altered. Currently, approximately 65% of the Reservation is owned by the Tribe or individual Tribal members, the remainder being held by non-Indians. There are 15,200 enrolled members of the

Blackfeet Tribe, about half of whom reside on the Reservation. Water is critical to Reservation communities for drinking water supplies, for commercial and industrial purposes, and for the maintenance and development of local economies

The Blackfeet Economy

The Blackfeet economy is heavily dependent on agriculture and stock raising. A large percentage of land on the Reservation is utilized for agricultural purposes, both irrigated agriculture and dry land farming. The Tribe and tribal members own large numbers of cattle, and regularly lease land to pasture cattle for others. Stock raising and agriculture provide the mainstay of the economy, and both are directly dependent on water in order to be viable activities. The reservation also contains significant oil and gas reserves and timber resources that substantially contribute to the tribal economy. Notwithstanding its significant resources, unemployment on the Reservation regularly runs over 60%.

Water Resources and Water Rights

Under the Winters Doctrine, the Blackfeet Tribe has reserved rights to the water resources of the Reservation with a treaty priority date of 1855. These rights are held by the United States in trust of the Tribe, and they are tribal trust resources subject to the trust responsibility of the United States.

Several watersheds are encompassed within the Reservation, including St. Mary River, Milk River, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. The St. Mary River is part of the Hudson Bay drainage; all other streams on the Reservation are part of the Missouri River Basin. The average annual water supply on the Reservation is approximately 1.1 million acre feet.

Adjudication/Negotiation of Blackfeet Rights

In April 1979, the State of Montana enacted a statewide water rights adjudication system sometimes referred to as Senate Bill 76. In the same month and year, the United States filed a case on behalf of the Blackfeet Tribe in the Federal Court in Montana to adjudicate the Tribe's water rights. The Blackfeet case was one of several federal court cases filed by the United States on behalf of Montana tribes. The jurisdictional conflict that ensued between the state adjudication and the federal cases was ultimately decided in favor of state court adjudication in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

In enacting its adjudication system, the Montana Legislature uniquely indicated its intent that federal water rights, including Indian water rights, should be resolved through negotiated compacts, MCA 85-2-701, and established the Montana Reserved Water Rights Compact Commission to negotiate such compacts, MCA 2-15-212.

The Blackfeet Tribe initiated negotiations with the Compact Commission in 1989. The negotiations proceeded in fits and starts until about three years ago when the negotiations gained significant momentum. The Tribe and the Compact Commission agreed to a compact last fall for presentation for approval by Congress, the Montana Legislature and the Blackfeet membership.

The Issues for Negotiation

While the actual resolution of Indian water rights is a straightforward process of determining quantity, purpose and priority date, the process for reaching that point is anything but straightforward. The parties to a negotiation must engage in a delicate balance of compromise of water rights, utilization of existing water supplies and creation of additional water supplies to satisfy rights and mitigate impacts, and other creative alternatives. As is the case for many other tribes, the process at Blackfeet is further complicated by the fact that the critical disputes and controversies that must be resolved through the negotiations are, for the most part, the result of actions and inactions of the Federal Government. A description of the primary issues at Blackfeet illustrates this.

Boundary Waters Treaty and the Milk River Project. The St. Mary and Milk Rivers are allocated between the United States and Canada under the 1909 Boundary Waters Treaty.. Prior to entering into the Boundary Waters Treaty, the Bureau of Reclamation's predecessor, the Reclamation Service, had begun plans for an irrigation project utilizing St. Mary River water in order to justify an allocation under the Treaty. The Project was authorized in 1902, and soon after the completion of the Boundary Waters Treaty, the Reclamation Service, constructed the Milk River Project which diverts the United States' share of the St. Mary River off the Reservation to serve water users on the Milk River over two hundred miles downstream from the Reservation.

Although the Winters case had been decided in 1908, before the Boundary Water Treaty was completed and the Milk River Project was constructed, and although the Winters case involved the Milk River, the United States never consulted with the Blackfeet Tribe and never considered the effect of the Treaty or the Project on the water rights of the Tribe. In the 1896 negotiations leading to the relinquishment of the Tribe's western lands, the Tribe was promised that it would benefit from the Project, but no benefit has ever materialized and no Reservation lands are served by the Project. Early Milk River Project documents show that as part of the planning process, a Reservation project had been identified as feasible, but the Reclamation Service rejected the Reservation project in favor of the downstream non-Indian project.

For nearly a hundred years, the United States' share of the St. Mary River has been diverted off the Reservation by the Bureau of Reclamation for use by the Milk River Project. St. Mary water is diverted into a 29 mile canal on the Reservation before it discharges into the North Fork of the Milk River. The water then flows into Canada for 216 miles before it returns to the United States and is stored in Fresno Reservoir to serve the 121,000 acres of the Milk River Project.

Although the Tribe has never received any benefit from the Milk River Project, the Project facilities utilize Tribal lands and the Tribe has suffered the environmental consequences of the facilities, including frequent flooding, the silting in of the pristine alpine St. Mary's Lake, and impacts to Reservation fisheries particularly in Swiftcurrent Creek and St. Mary Lake. Various problems also result from the seepage of the canal and other aging structures. Presently, the Milk River Project facilities on the Reservation include Lake Sherburne, Swiftcurrent Dike, St. Mary Diversion Dam, and the 29 mile St. Mary Canal, which includes two large sets of siphons and a series of five large concrete drop structures near the lower end of the canal. In the Water Resources Development Act of 2007 (WRDA), Congress authorized \$153 million for the rehabilitation of the diversion facilities located on the Reservation.

Other Issues. In the 100 years since the Winters decision, significant non-Indian development has occurred on and off the Blackfeet Reservation to the detriment of the Blackfeet Tribe, but without any answer from the United States as trustee for the Blackfeet Tribe, with the exception of the 1908 Conrad Investment case affecting Birch Creek. The result is that negotiation of Blackfeet water rights in the face of such non-Indian uses is substantially more difficult, and in some cases requires mitigation measures for such users in order for settlement to occur. On Birch Creek, the Tribe and the State have had to negotiate a separate agreement to mitigate impacts to the local water users who now irrigate 70-80,000 acres directly off the Reservation.

The Blackfeet Irrigation Project. The BIA Blackfeet Irrigation Project was authorized in the 1907 Blackfeet allotment act. The Project has 38,300 assessed acres in three units that presently include both Indian lands (65%) and non-Indian lands (35%). Like most other BIA irrigation projects, the Blackfeet project has major condition problems. A low estimate of deferred maintenance costs for the project is \$29,130,222. GAO, Report on Indian Irrigation Projects (February 2006). In addition, the project remains uncompleted a hundred years after it was authorized.

The Federal Negotiation Process

Since 1989, it has been the policy of the Administration that Indian water rights should be resolved through negotiated settlements. In 1990, the Department of the Interior, therefore, established a Working Group on Indian Water Rights settlements and published criteria and procedures for Department involvement in negotiations. Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (March 12, 1990). These Criteria and Procedures have remained the policy of the Administration since their publication.

A Blackfeet Federal Negotiating Team was appointed in 1990. The Team includes representatives from Bureau of Indian Affairs, Interior Solicitor's office, Department of Justice, Bureau of Reclamation, Fish and Wildlife Service, and the Forest Service. The Team, along with the Tribe and the State, has put in countless hours in the Blackfeet negotiations, and has

worked on settlement in complete good faith. The appointment of Michael Bogert, Counselor to the Secretary, has brought a welcome interest to the Blackfeet settlement, and the Tribe is especially pleased that Mr. Bogert paid a visit to the Reservation to express the Department's interest. Nevertheless, the process that the Team has been required to follow has presented a number of problems that have made the negotiations difficult, and have, at times, impeded the negotiations. As a result, we have not reached final agreement with the Department.

This situation is not unusual among Indian water settlements. Of the approximately twenty Indian water rights settlements enacted to date by Congress, only a small number of them have been supported by the Administration. We have identified a number of reasons for why this is so at Blackfeet.

1. The Narrow Role of the United States in the Process

First and foremost, the Department of the Interior (Interior) views its role in settlements very narrowly. Rather than taking a broad problem solving approach to settlement that seeks to find and sustain a full and lasting resolution, the United States takes a narrow view of its role that focuses on minimizing its responsibility and involvement. Fundamentally, it is an approach that seeks to deny any responsibility for the problems or any responsibility for fixing them, even though the disputes and conflicts involved are often the making of the Federal Government. The Department's approach is to require the Tribe, the State and the water users to resolve the issues with little input and few resources from the Department.

Thus, the Federal Team is involved in the negotiations but is not authorized to take any positions. In effect, the Federal Team is a mere observer to the process. While the Team can and does identify issues or concerns of the Federal Government, the Team rarely identifies solutions or make proposals because it has no authority to do so. This means that no real negotiation takes place with the Federal Government, and it is often not until the settlement is completed by the other parties, that an Administration position is formulated.

The Department's narrow approach to settlement makes the negotiation particularly difficult if, as in the case at Blackfeet, the issues to be resolved are fundamentally federal issues. As described above, the fundamental water disputes and conflicts that require resolution through the settlement process are disputes and conflicts that trace to the actions and inactions of the Federal government. It is exactly these conflicts that present the most significant challenge to reaching a settlement of the Tribe's water rights. Without full participation of the Department and a willingness to fully engage in the process, and without some acceptance of responsibility in the matter, there is little prospect of negotiating a settlement that is likely to meet with the approval of the Administration.

2. The Liability Approach to Funding Settlements

Almost all settlements include a federal contribution to settlement, and the criteria and procedures focus in large part on the manner in which such contributions will be considered and

calculated. Under the criteria and procedures, the federal contribution is limited to “calculable legal exposure” and “costs related to Federal trust or programmatic responsibilities,” provided that the latter cannot be funded through normal budget process. Few settlements have met these criteria, and this has been the most significant factor in the lack of Administration support for settlements when they reach Congress.

Over the years, the Administration’s interpretation of the funding criteria has varied. In more recent years, any consideration of trust or programmatic responsibilities has been de-emphasized or eliminated in favor of an analysis of the United States’ narrow legal liability, unless the trust or programmatic responsibilities can be funded through the normal budget process. More recently, it now appears that even trust or programmatic items must be justified by a showing of legal liability. This has created large discrepancies between settlement costs proposed by the parties and the Department’s calculation of its legal liability. This discrepancy has hindered the prospect of reaching final agreement with the Administration, and has resulted in strong Administration opposition to settlements rather than a mere lack of support.

Further, many of the potential claims are historic claims, and the Administration frequently concludes that the claims are barred by the statute of limitations or other limitations. Therefore liability is significantly discounted or denied altogether.

The Administration’s policy of basing settlement funding strictly on a finding of legal liability for claims against the Federal Government leads to inequitable results, and does not allow for realistic solutions to significant water rights and water related problems. It is particularly disturbing that this policy is applied even to matters that are within the programmatic obligations of the Department and within the Department’s trust responsibility to Tribes.

Application of a strict legal liability standard appears to be confined to Indian water rights settlements. Where other issues and concerns are involved, the Administration appears to be willing to take a more flexible approach, and a strict legal liability approach is rarely applied to other kinds of project such as the recent authorization in the 2007 WRDA legislation of \$153 million for the rehabilitation of the St. Mary diversion facilities for the Milk River Project.

3. The Inconsistent Application of the Criteria

The above discussion illustrates a third point we would like to make, and that is, the Department is not consistent in the manner in which it approaches settlement or the manner in which it applies the criteria and procedures to the federal contribution to settlement. One additional area of inconsistency we would mention relates to how the Department requires or determines a state or local contribution bears comment as well. In some settlements, no state contribution has been required; in others, the state contribution has been determined by the Department to be inadequate. There does not appear to be a consistent application of the requirement of a state contribution, or any consistent method for determining the amount of an appropriate state contribution. The Department’s consideration of the state contribution issue

also fails to take into account the circumstances of a settlement, i.e. whether the issues to be resolved are primarily federal because they are the result of the actions and inactions of the Federal Government.

We are not clear why the Administration strictly applies the criteria and procedures to some settlements, but not others. Such inconsistency is inequitable, and often results in a broad rejection of the criteria and procedures by those engaged in settlement.

4. Conflicts Among Federal Water Rights

One matter that is not addressed in the criteria and procedures is the manner in which conflicts between or among federal water rights will be resolved. This matter has particular significance at Blackfeet, and we are concerned that there is not a clear process for considering and resolving such conflicts.

Blackfeet is affected by water rights compacts that have been negotiated and finalized for Glacier National Park and Lewis and Clark National Forest, which are immediately adjacent to and upstream from the Blackfeet Tribe. The Department has also participated in the Fort Belknap Compact which involves a separate Tribe on the Milk River, a stream that arises on and flows through the Blackfeet Reservation. The United States also holds state water rights for the Bureau of Reclamation Milk River Project and the Bureau of Reclamation Tiber Dam, a large storage facility immediately downstream from the Blackfeet Reservation. The Department also filed separate state water right claims for the BIA Blackfeet Irrigation Project.

There is no clear process for resolving potential conflicts among federal rights. In some instances, the Blackfeet Tribe has received considerable pressure from the Department to subordinate its water rights to the water rights of other Federal entities. And, in some cases, the attorneys for other Federal entities have become involved in the negotiations outside of the Federal Team process. These conflicts have seriously impacted the Blackfeet negotiations.

5. Funding for Tribal Participation in Settlement

The Bureau of Indian Affairs funds tribes to participate in water rights negotiations, and provides funds for tribal technical experts. Such funding is critical to the process. The Blackfeet Tribe would be unable to participate in the process without such funding. And, because the Department does not provide technical experts for the Blackfeet negotiations, the Tribe's technical experts are essential to the settlement process.

Funding has varied significantly from year to year, and in some cases no funds have been made available. Inconsistent funding has significantly delayed the process. The Blackfeet Tribe believes that when negotiations have reached the stage when settlement is more likely than not, the Department should shift funds that it currently expends on litigation to settlement.

6. Lack of a Clear Funding Mechanism for Settlements

Last, but certainly not least, the lack of a clear mechanism for funding Indian water rights settlements has been and continues to be a major impediment to Administration approval and congressional approval of settlements. The problem has substantially increased as the number of pending settlements has increased in the last several years.

It has been suggested that Indian water settlements be funded through Indian programmatic budgets, for example, community water systems should be funded by the Indian Health Service, etc. However, such budgets are inadequate or non-existent to begin with and are getting smaller, while competition among tribes for such funds has increased. Requiring all of Indian country to bear the burden of the costs of Indian water settlements is no solution when such budgets are already grossly inadequate.

We know that others witnesses are focusing on this issue, but we want to emphasize the importance of this issue to the Blackfeet Tribe.

Thank you for the opportunity to present testimony on this very important issue. We deeply appreciate the Chairman Grace Napolitano's interest in these issues, and look forward to assisting the Subcommittee in addressing these issues.