

**STATEMENT OF  
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UNITED STATES DEPARTMENT OF THE INTERIOR  
BEFORE THE  
COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE**

**October 6, 2021**

Aanii (Hello)! Good afternoon Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee. My name is Bryan Newland. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony regarding S. 648, the Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act of 2021, and S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021.

**Introduction**

The Biden Administration recognizes that water is a sacred and valuable resource for Tribal Nations and that long-standing water crises continue to undermine public health and economic development in Indian Country. This Administration strongly supports the resolution of Indian water rights claims through negotiated settlements. Indian water settlements help ensure that Tribal Nations have safe, reliable water supplies; improve environmental and health concerns on reservations; enable economic growth; promote Tribal sovereignty and self-sufficiency; and help fulfill the United States' trust responsibility to Tribes. At the same time, water rights settlements have the potential to end decades of controversy and contention among Tribal Nations and neighboring communities and promote cooperation in the management of water resources. Congress plays an important role in approving Indian water rights settlements and we stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements.

Indian water rights settlements play a pivotal role in this Administration's commitment to putting equity at the center of everything we do and building back better to improve the lives of everyday people—including Tribal Nations. We have a clear charge from the President and Secretary Haaland to improve water access and water quality on Tribal lands. Access to water is fundamental to human existence, economic development, and the future of communities—especially Tribal communities. To that end, the Biden Administration's policy on negotiated Indian water settlements continues to be based on the following principles: the United States will participate in settlements consistent with its legal and moral trust responsibilities to Tribal

Nations; Tribes should receive equivalent benefits for rights which they, and the United States as trustee, may release as part of the settlement; Tribes should realize value from confirmed water rights resulting from a settlement; and settlements should contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. In addition, settlements should provide finality and certainty to all parties involved.

## **I. S. 648**

S. 648 would amend the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act to authorize funding equivalent to interest payments that would have been earned between October 1, 2009 and January 25, 2016 if the Department had then had the authority to invest the funds. The Department supports S. 648.

### **a. Background**

The Duck Valley Reservation, home to the Shoshone-Paiute Tribes (Tribes), straddles the Idaho-Nevada border along the Owyhee River, a tributary to the Snake River. The Reservation was established by Executive Order on April 16, 1877 and expanded by Executive Orders on May 4, 1886 and July 1, 1910. The State of Idaho initiated the Snake River Basin Adjudication (SRBA) in 1987. Soon thereafter, the State of Nevada reopened its adjudication of the Owyhee River, a tributary to the Snake River, an adjudication originally initiated in 1924. Both of these adjudications involve the water rights of the Tribes. The United States filed claims in Idaho's SRBA and Nevada's Owyhee River adjudication on behalf of the Tribes.

At the request of the Parties, a Federal Negotiation Team was formed, and a settlement was reached. In 2009, Congress enacted the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement as part of the Omnibus Lands Act of 2009 (Duck Valley Settlement Act). The legislation authorized \$60 million across two Trust Funds to rehabilitate the Duck Valley Indian Irrigation Project, which is owned by the Bureau of Indian Affairs and operated by the Tribes under a Self-Governance compact, and for other activities. Under the legislation, the Trust Funds could only be invested and earn interest on the "enforceability" date which is the date that the Secretary published a statement in the Federal Register finding that all conditions for full effectiveness and enforceability of the settlement had occurred. The deadline to publish the statement of findings was March 31, 2016, and the Secretary published it on January 25, 2016.

Under the Duck Valley Settlement Act, the Secretary had no authority to invest the Trust Funds until January 25, 2016. However, the Department began investing funds as they were appropriated and transferred to the Department. The Department's Solicitor's Office determined that the amounts earned prior to January 25, 2016 were contrary to the Antideficiency Act and, in

accordance with 31 U.S.C. § 3302, must be returned to the Federal Treasury. Accordingly, the Department returned to the Treasury all interest accrued before January 25, 2016.

S. 648 would authorize the appropriation of the interest that would have accrued on balances in the Trust Funds during the period beginning on October 1, 2009 (when the funds were initially appropriated), and ending on January 25, 2016 (the enforceability date), for deposit into the Trust Funds.

#### **b. Department's Views**

The provision in the Duck Valley Settlement Act prohibiting investment until an enforceability date is reached is not common in Indian water rights settlements. It appears in the Duck Valley settlement and other settlements enacted in 2009-2010, including the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291; the Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111-291; the Aamodt Litigation Settlement Act, Pub. L. No. 111-291; and the Navajo-Gallup Water Supply Project and Navajo Nation Water Rights, Pub. L. No. 111-11. In each of these settlements, funds were inadvertently invested and were returned to Treasury. In total for the five settlements, over \$11 million was returned to the Federal Treasury. The Department supports S. 648 and, as a matter of equity, would support similar legislation to resolve this same issue in the four other Indian water rights settlements approved by Congress in 2009 and 2010.

## **II. S. 1911**

S. 1911, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021 would approve and provide authorizations to carry out the settlement of the Tribes' water rights in the State of Montana (State). The Department strongly supports resolving the Tribes' water rights claims through a comprehensive settlement, but we have concerns about a number of provisions in S.1911 as introduced. The Administration is committed to working with the Tribes and the bill's sponsors regarding those provisions and reaching consensus on legislation to approve the Compact entered into between the Tribes and the State.

#### **a. Reservation and Historical Background**

The Fort Belknap Indian Reservation (Reservation) was created by the Act of Congress of May 1, 1888 out of much larger area in northern Montana previously reserved by the President in 1874 for joint use by the "Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and . . . other Indians" located upon it. Today, the Reservation is comprised of approximately 605,338 acres situated mainly in the Milk River Basin in north central Montana. The Milk River forms the

Reservation's northern boundary. The southern boundary is from 25 to 35 miles south of the Milk River, extending on either side of the northern crest of the Little Rocky Mountains. The United States holds the Reservation in trust for the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana (Tribes).

According to Bureau of Indian Affairs (BIA) and Tribal data, 3,820 Tribal members currently live on the Reservation. The total Tribal membership in August 2021, including members living off the Reservation, was 8,314. The majority of on-Reservation residents reside in three main towns: Fort Belknap Agency on the northern boundary of the Reservation, and Lodge Pole and Hays on the southern portion of the Reservation.

The primary sources of employment on the Reservation are Tribal and Federal government services. The BIA, Indian Health Service, and the Tribes are the major employers. The Inland Mountain Development Group serves as the Tribes' economic arm and employs approximately 120 tribal members. The Tribes are working to develop tourism on the Reservation. They manage a 700-head buffalo herd on 23,000 acres. World class guided hunting is available on the Reservation. The main industry is agriculture, consisting of cattle ranches, raising alfalfa hay for feed, and larger dry land farms. Unemployment is around 48.2% based on a 2019 Montana State University study.

The low rain fall on most of the Reservation severely limits what can be grown without irrigation. Not surprisingly, the major water use on the Reservation is the Fort Belknap Indian Irrigation Project (FBIIP). The BIA owns the FBIIP, which diverts water from the Milk River and two tributaries, Threemile Creek and White Bear Creek, and includes a 634 acre-feet (af) reservoir on Threemile Creek. The FBIIP serves 10,475 assessed acres. Groundwater wells on the Reservation are primarily used for domestic and municipal purposes and, to a lesser extent, stock watering.

The Reservation is the birthplace of the federal Indian reserved water rights doctrine. In 1908, the United States Supreme Court resolved a water rights dispute on the Reservation and issued its seminal decision in *Winters v. United States*, 207 U.S. 564, thereby recognizing for the first time the implied water rights of Indian reservations. Despite the passage of over a century since the *Winters* decision, the Reservation's water rights have not been finally quantified. Worse still, because of extensive deferred maintenance, the FBIIP is unable to deliver even the minimum flows protected in *Winters*.

#### **b. Proposed Fort Belknap Indian Community Settlement Legislation**

The United States as trustee of the Tribes has filed water rights claims in the Milk River and Missouri River basins in the ongoing statewide water rights adjudication. Since 1990, the

Tribes, State, and United States have engaged in negotiations to resolve the Tribes' water rights within the State. The initial goal of the negotiations was the development of a reserved water rights Compact between the Tribes and Montana. In 2001, the Montana legislature approved the Montana-Fort Belknap Indian Community Water Rights Compact (Compact).

S. 1911 would authorize, ratify, and confirm the Compact to the extent it is consistent with S. 1911, thereby resolving the Tribes' water rights claims in Montana by recognizing the Tribal Water Right established in the Compact. The Tribal Water Right entitles the Tribes to over 446,000 acre-feet per year (afy) of surface water, plus groundwater. In addition to the Tribal Water Rights provided by the Compact, S. 1911 includes a 20,000 afy allocation of storage from Lake Elwell, a Bureau of Reclamation facility. In addition, S. 1911 would authorize funds to implement the provisions of the Compact and S. 1911.

S. 1911 authorizes at least \$693.11 million in Federal appropriations for a wide range of purposes including design and construction of water projects that would benefit the Tribes but also including projects unrelated to water development and projects that solely benefit non-Indian state-based water rights users. Moreover, S. 1911 contains open-ended appropriations for some projects, along with a number of unfunded mandates.

### **c. Department's Views**

The Department supports the goals of S. 1911 but has a number of important concerns with the bill as introduced. As the Department has done in previous settlement negotiations, we are committed to working with the Fort Belknap Indian Community, the State, and the bill's sponsors to craft a bill that all parties, including the Administration, can support.

While we will not enumerate all of the concerns with S. 1911 in this testimony, we will highlight a few major items. The Department is concerned about the ability of the Tribes to unilaterally modify the authorized uses of the \$593.11M Trust Fund established by the bill. Section 1911 provides that the Tribes are authorized to use the Trust Fund for any purpose described in the Tribes' Comprehensive Water Development Plan (Plan), including any amendment to that Plan. The Department believes that the uses of the Trust Fund should be governed by statutory provisions, as has been the case in other Indian water rights settlements, and that funds should be targeted to developing water resources and expanding access to water on the Reservation.

The Department is also particularly concerned with the open-ended funding authorized for the mitigation of impacts to junior non-Indian and Milk River Project water users, including the construction of a proposed dam and reservoir on Peoples Creek. These provisions open the door to unknown Federal obligations, leaving the Department with no certainty regarding the cost of this settlement.

In addition, S. 1911 includes in it several unfunded mandates that have the potential to impact the budgets of several Departmental bureaus. The Department believes that if the enacting legislation requires it to complete surveys, studies, and other actions, then it should also provide funding to cover those Federal responsibilities.

The Department also has practical concerns regarding its ability to satisfy Compact provisions requiring mitigation of impacts on junior non-Indian and Milk River Project water users caused by the development of the Tribal Water Right. The Compact mandates mitigation totaling at least 35,000 afy and authorizes the State to withdraw from the Compact if impacts from the development of the Tribal Water Rights are not adequately mitigated. Section 8(c) of S. 1911 incorporates the Compact's mitigation mandate. The Bureau of Reclamation does not have confidence that this level of mitigation is technically feasible based on hydrologic and operations modeling. Furthermore, Section 8(c) essentially authorizes such sums as are necessary to accomplish the mandated level of mitigation. The actual mitigation cost will depend on how it is accomplished and many of the alternatives included in the Compact require significant infrastructure projects on the Milk River and its tributaries. Some alternatives are impractical or could cost hundreds of millions of dollars to complete. Impacts of full development and the benefits of mitigation are based on outdated studies that must be updated to take into consideration both current basin conditions and potential impacts of climate change.

The Department recognizes that, as reflected in the Compact, there are significant relationships between this Compact and the Blackfeet Tribe's water rights settlement, which Congress enacted in 2016. Because of this, finding solutions to the Compact-required mitigation obligation while fulfilling our obligations under the Blackfeet Tribe's settlement will require more discussion with both the Blackfeet Tribe and the Fort Belknap Indian Community. Further adding to this concern, in article VII of the Compact, the State reserves the unilateral right to withdraw from the Compact if the 35,000 afy mitigation requirement is not satisfied. Given uncertainty regarding how mitigation is to be accomplished and the ultimate cost associated with that mitigation, the State's right to withdraw is especially concerning.

Another significant concern for the Department is section 11(k) of S.1911, which would require that the United States hold in trust the FBIIP. This requirement would arguably create open-ended money-mandating trust obligations and undermines the finality and certainty sought in Indian water rights settlement. Section 11(k) would impose on the United States, and specifically on the Department, significant liability moving forward. Similar language has been proposed but ultimately not included in other Indian water rights settlements.

Additionally, the Department is concerned that neither the Compact nor S. 1911 establish an obligation for the State to contribute funding for the settlement, leaving such an obligation for

future negotiation. The Proposed settlement provides significant benefits to the State and the State's non-Indian water users, and that value must be reflected in the State contribution.

As a final matter, the Department is concerned about changes that S. 1911 would make to the Reclamation Water Settlements Funds (RWSF) and funding priorities established in Pub. L. No. 111-11. The Department is aware that there is pending legislation to amend the RWSF and any proposed changes should be part of a broader dialogue.

## **Conclusion**

The Department appreciates this Committee's efforts to resolve these issues for the Tribes. With regard to S. 648, the Department would like to work with Congress to similarly resolve the investment issue for all other tribes with water rights settlements enacted in 2009 and 2010. Additionally, while the Department supports the goals of S. 1911, we have significant concerns with a number of the provisions as introduced. The Department is committed to working with the Tribes and the State regarding our concerns with the bill and to reaching a final and fair settlement of the Tribes' water rights claims.

Thank you again for the opportunity to appear before this Committee to provide the Department's views on S. 648 and S. 1911. We look forward to continuing working with the Committee in support of Indian water rights settlements.