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**TESTIMONY OF CHRIS TWEETEN REPRESENTING
THE STATE OF MONTANA ON S. 438
THE "CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION
INDIAN RESERVED WATER RIGHTS SETTLEMENT ACT OF 1999"
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE**

JUNE 30, 1999

Chairman Nighthorse-Campbell and members of the Committee, my name is Chris Tweeten. I am the Chief Counsel to the Montana Attorney General and the Chairman of the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of the State of Montana and Governor Marc Racicot in support of Senate Bill 438, the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999, and to urge your approval of the Act. The purposes of the Act are to: ratify the Compact which settles the quantification of the Tribe's water rights in Montana; provide the necessary authorization for implementation of the Compact; and to settle federal liability regarding the Tribe's water resources by authorizing appropriations for their development. My testimony will focus on the Compact and the importance of negotiated settlements to the State of Montana.

The unquantified and open ended nature of reserved water rights places a cloud over the certainty regarding investment in private water development throughout the west. The Compact Commission was established by the Montana Legislature in 1979 to act on behalf of the Governor to negotiate the settlement of reserved water rights as part of the state-wide general stream adjudication. The policy of the State of Montana in favor of negotiated solutions to quantification of tribal water rights recognizes the need for individual, site specific solutions to water supply and water allocation problems. It allows consideration of the fact that each tribe is unique in its culture, history, water needs and potential for conflict over water use with its neighbors, and that every basin has unique avenues for enhancement of water supply. We have found through years of experience that the best approach to resolving that uncertainty is through negotiated settlements that allow tailoring of solutions on a site specific basis. In Montana, we have successfully settled the water rights claims of three Indian reservations, five National Park units, three Fish and Wildlife refuges and two wild and scenic rivers. In each of these settlements we have protected existing water use while meeting the needs of the particular reservation.

Resolution 98-029 of the Western Governors Association expressing a preference for negotiated settlement of reserved water rights is attached to my testimony. If you look closely at the west, it is not difficult to see why we favor negotiation, an approach that provides an avenue for use of the uncertainty in the law to craft unique solutions tailored to a specific location. Westerners are not one people. We are influenced by our landscape to a degree not found in the east, and that landscape is diverse. Our climate, even in agricultural areas, varies from desert to rain forest. The portion of the Rocky Boy's Reservation suitable to agriculture receives an average of 12 inches of rain per year. Our growing season is as short as 45 days in the Centennial Valley of

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Montana. Water, valued as high as \$1000 per acre foot by urban areas in the southwest, cannot be sold in agricultural areas of Montana when priced at \$10.50 per acre foot.

The Compact before you for ratification is uniquely tailored to meet the needs of the citizens of Montana. The State of Montana concurs with the Chippewa Cree Tribe and the Administration that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a sustainable economy while protecting existing investments in water use by off-Reservation ranchers who rely on state-based water rights. We appreciate the efforts of both the Tribe and the Administration to work with us in reaching this agreement and, in doing so, to listen to and address the concerns of water users off the Reservation.

The Tribal Water Right created by the Compact and the Act is a settlement right and its attributes should not be considered to represent a legal interpretation of how the rights of the Tribe would be interpreted should they be litigated in court. Negotiation differs from litigation. The focus in negotiation is on finding a compromise that meets the needs of the Tribe and can therefore be approved by its Council, while, at the same time, protecting investment in state-based water rights. The following paragraphs will briefly describe some of the unique aspects of the agreement and their relation to water use on private land in Montana. A summary of the Compact and the authorizations for appropriations in the Settlement Act is attached to my testimony.

The Rocky Boy's Reservation is one of four Indian Reservations with land and water right claims in the Milk River Basin. The Milk River has its headwaters in Glacier National Park, then flows onto the Blackfeet Reservation where it receives water from another basin as part of one of the United States' first Reclamation Projects - the Milk River Project. The Milk River, with its enhanced water supply, then flows into Canada where it cuts through the Provinces of Alberta and Saskatchewan before re-entering the United States. It is downstream from this point of re-entry that the Milk River serves seven irrigation districts as part of the Milk River Project. Considerably downstream from its beginning, the Milk River forms boundaries to both the Fort Belknap and Fort Peck Indian Reservations. It is one of the most heavily used and re-used rivers in the United States, and is estimated to be water-short in as many as 5 out of 10 years.

The Rocky Boy's Reservation is located in the Bearpaw Mountains on two tributaries to the Milk River: Big Sandy and Beaver Creeks. The Reservation is home to over 3500 Tribal members who are also citizens of Montana. The Reservation has an estimated 70% unemployment rate. The Reservation is located in an area of scarce water supply. The drinking water system on the Reservation is currently inadequate, providing only 60 gallons per capita per day to households served, compared to a Montana average of 170. Not all households on the Reservation share in even this inadequate supply. Because groundwater is of poor quality and low yield in this region of Montana, many of the surrounding communities and ranches rely on treated surface water for their drinking water supply. The Reservation lags behind the region in the development and treatment of surface water for domestic purposes.

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The Compact provides a settlement quantification of 20,000 acre-feet per year. Unlike the farmland irrigated by the Milk River Project along the bottomland of the mainstem, tributary water use is associated primarily with cattle grazing and growing of hay. Without storage, streamflow on the tributaries is intermittent with large spring floods and late summer drought. The provisions in the Settlement Act providing for on-Reservation storage and development will allow the Tribe to maximize the utility of this limited water supply by providing a reliable supply of irrigation water for approximately 2500 acres of Reservation land. On-Reservation water development authorized by S. 438 involves enlargement of existing storage on the two dominant drainages on the Reservation, Beaver Creek and Box Elder Creek (a tributary to Big Sandy Creek).

The Rocky Boy's Reservation shares Big Sandy Creek with approximately 8500 acres of irrigated private land located off the Reservation. On Beaver Creek, there are approximately 3600 acres of off-Reservation private irrigation. The growing season is short. Small scale storage projects that will capture some spring run-off, such as those authorized on the Reservation by this bill, are the best way to enhance water supply. To prevent impact by those projects on water use on private land, the State has funded local improvements in conveyance and diversion structures and is promoting improved management of existing storage. Description of the specific measures taken to prevent impact on private water use by development of water on the Reservation follows.

The enlargement of the Tribe's Bonneau Reservoir on Box Elder Creek will enhance stream flow during late summer, but will reduce spring flow that is generally relied on by irrigators downstream on Big Sandy Creek. A State grant will be used to improve conveyance and diversion structures off the Reservation so that water users may operate on the lower spring flows anticipated once the Tribe enlarges existing storage on the Reservation. In addition, a 240 acre-foot pool of water will be held in Bonneau Reservoir to be released during late summer to maintain water quality for stockwatering that might otherwise be impaired by low quality irrigation return flow.

Increased storage and diversion from Beaver Creek on the Reservation could impact downstream irrigators with a senior right to divert from natural stream flow. Coordinated use of reservoirs on and off Reservation will mitigate impacts on downstream senior water rights. However, release of water from the small reservoir on the Reservation for irrigators with operations over fifteen miles downstream would be highly inefficient due to conveyance loss, and would prevent realization of the Tribe's development plan. Lower Beaver Creek Reservoir, owned by Hill County and located downstream from the Reservation, had contract water available for sale when contracts were renewed in 1996. Pursuant to the Compact, the State entered an Option to Purchase contract water for release to mitigate impacts from development of the Tribe's right. In effect, this transfers any "call" for water by senior water users from the Tribe's diversions to Lower Beaver Creek Reservoir.

Beaver Creek Park is owned and operated by Hill County, and is located immediately downstream

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from the Reservation on Beaver Creek. It is a natural park with camping and an important brook trout fishery. A minimum instream flow is necessary to maintain a viable fishery. The Compact includes provisions for release of water from the Tribe's enlarged East Fork Reservoir to maintain a minimum flow. In addition, the Compact includes an agreement by the State and the Tribe to jointly study the streamflow and the needs of the fishery to more precisely define the minimum flow.

In addition to protection of state-based rights, Montana has strongly asserted that in negotiating water allocation solutions, it will not pit tribe against tribe. In settling, we considered the rights of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation located downstream from the Rocky Boy's Reservation on the Milk River. As a practical matter, the impact from use of water on tributaries to the Milk River by the Chippewa Cree Tribe will not have a measurable impact on the flow of the Milk River. Furthermore, release of the water purchased from Lower Beaver Creek Reservoir by the State will help prevent impact on the Milk River on which Fort Belknap relies.

The Compact also contains provisions on administration that should reduce the potential for future conflict between the Tribe and its neighbors. First, the Compact addresses transfers of the Tribal Water Right. Under State law, water users may market appropriate water rights. Consistent with that attribute of water rights arising under State law, the Compact provides that the Tribal Water Right may be transferred off the Reservation. However, off-Reservation use of the Tribal Water Right subjects it to full compliance with State law. Thus, pursuant to Article IV.A.4.b. of the Compact any off-Reservation use or transfer of any portion of the Tribal Water Rights must comply with state law for both water use and diversion facilities. In addition to state law protections, the Compact limits marketing of the Tribal Water Right to the Missouri River basin and gives water users on the water-short Milk River a right of first refusal for any marketing of tribal water. Article IV.A.4.b.

Second, to avoid daily administration between the Reservation and off-Reservation water users in dry years, water is allocated as a block for each tributary on which there is both private and Reservation land. Montana, as with most western states, allocates water in times of shortage in order of priority of the date of development. In dry years, junior priority water users must curtail or cease water use so that senior rights are satisfied. This requires close monitoring of stream flow and coordination of diversion. The Compact eliminates priority administration between the Tribe and other water users. Provided the Tribe is using water within its allocation, water users off the Reservation agreed not to assert priority over the Tribe's water. Similarly, provided water users off the Reservation are using water within the amount of their right, the Tribe agreed not to assert priority over state-based rights. To give effect to the allocation by preventing further demands on a short water supply, the drainages are closed to new permits for water use under state law. This approach minimizes the interaction necessary and, therefore, the potential interference with the jurisdiction of each sovereign to manage its water.

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Third, in the event a dispute does arise, the Compact provides for an initial effort between the water resource departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board with both Tribal and off-Reservation representation to hear disputes. Decisions may be appealed to a court of competent jurisdiction.

The Compact provides finality for the State by settling all claims of the Chippewa Cree of the Rocky Boy's Reservation to water within the State of Montana. The Compact includes a release of all claims stating:

“The parties intend that the water rights and other rights confirmed to the Tribe in this Compact Are in full satisfaction of the Tribe's water rights claims, including federal reserved water rights claims based on Winters v. United States, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, . . . the Tribe and the United States as trustee for the Tribe hereby relinquish any and all claims to water rights of the Chippewa Cree Tribe within the State of Montana existing on the date this Compact is ratified by the State and the Tribe, whichever date is later.

The Compact has the full support of local ranchers, farmers, and elected officials. Arriving at these unique solutions involved the most intensive process of public involvement undertaken by the Commission to date. Because both the timing and volume of stream flow on the two drainages shared with the Reservation is so constrained, it was essential for the Commission to understand the water needs of each rancher and to engage them in the process of designing solutions. Public involvement began in 1992 with a public meeting in which over 200 citizens attended. Following that meeting the Commission began a five year process of kitchen table meetings with individuals ranch-by-ranch. Out of this process, trust and mutual respect developed. Many of the solutions suggested by ranchers are now found in the Compact. The same ranchers who expressed concern in 1992 testified in support of the Compact during legislative hearings in 1997. The Compact received overwhelming support in the Montana Legislature. The Compact also received the support of local county commissioners who were instrumental in providing ideas for resolution of issues. The level of support reflects the fact that this is truly a settlement that addresses the needs of all those affected. The Compact was ratified by the Montana Legislature without opposition and is codified in the Montana statutes at 85-20-601, MCA.

I appreciate the opportunity to testify on behalf of the State of Montana in support of the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999, and urge your timely approval of the Act. The settlement has the full support of the State, the Tribe, ranchers, surrounding communities, and local officials in the area. Because it relies on enlargement of existing storage and mitigation of impacts of new development through efficiency improvements, it has no environmental opposition. No endangered species are known to be involved. We know of no opposition to this settlement. On behalf of Montana I urge you

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to pass this bill and thereby signal to western states that the United States, after a long hiatus, is once again prepared to help us move toward finality on resolving these federal claims in our adjudications, rather than opening these issues to further uncertainty and protracted debate. Passage of this Act will help us bring this long process of settlement to closure. I would be happy to answer any questions by members of the Committee.