

TESTIMONY OF JAY WEINER
REPRESENTING THE STATE OF MONTANA
ON S. 434
BEFORE THE SENATE COMMITTEE ON
INDIAN AFFAIRS
UNITED STATES SENATE

May 8, 2013

Chairwoman Cantwell and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Jay Weiner, and I am staff attorney for the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of Governor Steve Bullock and Chris Tweeten, the Chairman of the Montana Reserved Water Rights Compact Commission, in support of Senate Bill 434, the Blackfeet Water Rights Settlement Act of 2013, and to urge your approval of this bill.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the State of Montana. The Compact Commission was established as an alternative to litigation as part of the statewide water adjudication. It is charged with concluding compacts “for the equitable division and apportionment of waters between the State and its people and the several Indian tribes” and the federal government. (Mont. Code Ann. § 85-2-702 (2011).) To become fully effective, each of these Compacts must be ratified by the Montana legislature and the other signatory parties, and then the water rights being recognized must be issued as a final decree by the Montana Water Court.

Montana has been remarkably successful in resolving both Indian and federal reserved water rights claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne, and Rocky Boy’s Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne, Rocky Boy’s, and Crow Compacts. The Northern Cheyenne and Rocky Boy’s Compacts are substantially implemented, and both tribes have seen substantial economic and social benefits from the completed settlements. We expect similar economic and social benefits to follow full implementation of the Crow Compact, which was ratified by Congress in 2010, by the Crow Tribe in 2011 and is presently in the decree phase before the Montana Water Court. In addition, the Montana Legislature has ratified a Compact with the tribes of the Fort Belknap Reservation, a bill to ratify which was introduced during the last session of Congress as S. 3209. The Compact Commission has also reached a Compact with the Confederated Salish and Kootenai Tribes that has not yet been ratified by the Montana Legislature. The Blackfeet Tribe–Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. § 85-20-1501 (2011)), and is now before Congress for ratification pursuant to S. 434, after having been introduced in

different forms during the two previous sessions of Congress, first as S. 3290 (2010) and then as S. 399 (2011). It is now time to enact this bill and ratify the Blackfeet Tribe-Montana Compact so the Tribe, the State and the United States, and all our citizens, may realize the benefits contained in this settlement.

Some background is in order. Concurrent with the initiation of the Montana general stream adjudication and the establishment of the Compact Commission in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Blackfeet Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in State court. Should the negotiated settlement of the Blackfeet Tribe's water right claims fail to be approved, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Blackfeet Tribe has always had the senior water rights in the basins that are the subject of the settlement embodied in S. 434—this Compact does not create those rights, it simply quantifies them.

The Blackfeet Indian Reservation is located in north-central Montana, bounded by Glacier National Park and the Lewis and Clark National Forest to the west, Canada to the north and prairies and farmland to the east and south. The Reservation encompasses 1.5 million acres (roughly one and a half times the size of Rhode Island), making it one of the largest in the United States. The Reservation is home to approximately half of the 17,000 enrolled Tribal members. Unemployment on the Reservation is estimated at being up to 70%. The region is arid, with approximately 13 inches of average annual precipitation. Ranching and farming are the major uses of land on the Reservation, with the principal crops being wheat, barley and hay.

The primary sources of water on the Blackfeet Indian Reservation are the St. Mary River, the Milk River, the Two Medicine River, and Badger, Birch and Cut Bank Creeks. (See Attachment A.) Collectively, these watercourses discharge approximately 1.5 million acre-feet per year (AFY) of water, with the St. Mary River alone accounting for roughly one-third of that total. The St. Mary River originates in the mountains of Glacier National Park and flows north and east across the Reservation before crossing into Canada. The Two Medicine River and Badger and Birch Creeks originate in the mountains to the west of the Reservation and flow east, ultimately uniting to form the Marias River just east of the Reservation. The Milk River and Cut Bank Creek are prairie streams. The Milk River flows from the Reservation northeast into Canada before re-entering the United States just west of Havre, Montana, while Cut Bank Creek flows south and east until it joins the Marias River. The St. Mary and Milk Rivers are both subject to an apportionment agreed to between the United States and Canada in the 1909 Boundary Waters Treaty (BWT), and implemented by a 1921 Order of the International Joint Commission that was established by the BWT. Indian water rights were not considered during the negotiation or implementation of the BWT. The Bureau of Indian Affairs (BIA) manages the Blackfeet Irrigation Project on the Reservation. The Blackfeet Irrigation Project serves land in the Birch Creek, Badger Creek, Two Medicine River and Cut Bank Creek drainages.

The provisions in S. 434 will recognize and quantify water rights as well as off-Reservation storage allocations that will allow the Blackfeet Tribe to provide for its growing population and to develop its natural resources. The State of Montana and the Blackfeet Tribal Business Council agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to

develop a productive and sustainable homeland for the Blackfeet People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. This settlement is the product of over two decades of negotiations among the parties, which included an intensive process of public involvement.

The Blackfeet Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Tribal Water Right for the St. Mary River drainage within the Reservation is 50,000 AFY, not including the flows of Lee and Willow Creeks. It is worth noting that this quantified amount of 50,000 AFY is almost exactly what the United States claimed for the Tribe in its November 14, 1997, More Definite Statement of Claim filed in the Montana Water Court. (See Attachment B.) The Tribe's water right is subject to the limitation that its exercise may not adversely affect the water rights held by the Bureau of Reclamation's Milk River Project (MRP). The MRP diverts almost the entire United States' BWT share of the St. Mary River into the Milk River for use by MRP irrigators in northern Montana approximately 200 miles downstream of the Reservation. The balance between tribal rights and MRP needs, and the protection of these off-Reservation water users, was a critical aspect of the negotiations of this settlement. The Tribe is also entitled to groundwater in the St. Mary drainage that is not subject to the BWT's apportionment, as well as the entire United States' share under the BWT of the natural flow of Lee and Willow Creeks (which are located in the St. Mary River drainage), except for the water in those streams that is subject to existing water rights under State law. The Tribe has agreed to afford protections for those existing water rights under State law through the inclusion of a no-call provision.

The Blackfeet Tribal Water Right in the Milk River is quantified as the entire United States' share under the BWT of the Milk River on the Reservation, as well as all non-BWT groundwater in the Milk River drainage on the Reservation, except for the water that is subject to existing water rights under State law. In addition, the Tribe has agreed to afford protections for those existing water rights under State law, including a no-call provision for uses other than irrigation, and a 10 year phase-in for new development of tribal irrigation. The tribes of the Ft. Belknap Indian Community (FBIC) also claim water rights in the Milk River downstream of the point at which the Milk River re-enters the United States from Canada, and the FBIC-Montana Compact that was approved by the State legislature in 2001 (Mont. Code Ann. § 85-20-1001 (2011)) recognizes significant Milk River water rights for the FBIC. Staff for the Compact Commission has evaluated the potential of competing demands on the Milk River between the Blackfeet Tribe and the FBIC and has concluded that the possibility of actual conflict is, as a matter of hydrology, exceedingly remote. Nevertheless, the Blackfeet Tribe, the FBIC and the United States have worked to identify a mechanism for the resolution of any conflicts that might arise, which is reflected in S. 434. The State strongly supports this effort.

The Blackfeet Tribal Water Right in Cut Bank Creek is quantified as all of the water (both surface and underground) in that drainage within the Reservation, except for the water that is subject to existing water rights under State law. The Tribe has also agreed to afford existing water rights under State law in the Cut Bank Creek drainage the same protections as are provided for in the Milk River drainage. The quantifications of the Tribal Water Right in the Two Medicine River and Badger Creek drainages are done in the same fashion as the Cut Bank Creek

quantification, though the protections accorded by the Tribe to existing water rights under State law in these two drainages, as on the streams in the St. Mary drainage, extend the no-call protection to all existing water rights under State law, not just non-irrigation water rights.

The Tribe's water rights in Birch Creek, whose midpoint marks the southern of the Blackfeet Reservation, were judicially recognized as early as the 1908 Ninth Circuit Court of Appeals decision in the Conrad Investment Company case (161 F. 829 (9th Cir.1908)), which was decided very shortly after the United States Supreme Court ruled in the seminal Indian water rights case Winters v. United States, 207 U.S. 564 (1908). The Blackfeet Irrigation Project diverts water from Birch Creek for project water users on the Reservation, but historically the Tribe has taken far less water from Birch Creek than it was legally entitled to take. There is also extensive non-Tribal water resource development immediately to the south of Birch Creek, where roughly 80,000 irrigated acres, as well as several municipalities, are served by the facilities of the Pondera County Canal and Reservoir Company (PCCRC), a privately owned irrigation company. PCCRC also operates Swift Dam, which abuts the southwest corner of the Reservation. During the irrigation season, PCCRC's use diverts nearly all of the water available in Birch Creek. Since the unconstrained development of the Tribe's Birch Creek water right recognized in this settlement has the potential to cause significant impacts to existing users, the balance between tribal and off-Reservation water use from Birch Creek was a major component of the negotiations.

The settlement quantifies a substantial Tribal Water Right in Birch Creek. The quantification consists of a senior irrigation right of 100 cubic feet per second (cfs) of Birch Creek natural flow, a seasonably variable in-stream flow right (25 cfs from October 1 to March 31, and 15 cfs from April 1 to September 30), and all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek. In addition, the Tribe is entitled to the remainder of the water in Birch Creek after full satisfaction of existing uses under state law. As part of the protection of existing water rights under state law for which the State bargained, the Tribe agreed in the Compact to limit the development of its Birch Creek irrigation right to the Upper Birch Creek Drainage. There are also very specific administration provisions in the Compact concerning the manner in which the Tribe may change the use of its Birch Creek irrigation right to other beneficial purposes. In addition, a Birch Creek Management Plan (Attachment C) has been appended to the Compact, which commits the Tribe, the BIA and the operators at PCCRC to meet prior to each irrigation season to develop management plans to maximize the beneficial use of Birch Creek for all water users, and to adapt those plans as conditions warrant during the course of each irrigation season.

When the Compact Commission initially presented this proposed settlement framework at public meetings south of the Reservation, the response was overwhelmingly negative, as stakeholders believed that the risks posed to their livelihoods by full tribal development of its Birch Creek water rights were insufficiently mitigated. Consequently, the parties returned to the negotiating table and entered into an Agreement Regarding Birch Creek Water Use (the Birch Creek Agreement) on January 31, 2008. The Birch Creek Agreement (Attachment D) is a critical component of the overall settlement. Under the Birch Creek Agreement, the State agreed to put \$14.5 million into an escrow fund payable to the Tribe after final approval of the Compact by the Montana Water Court. (In anticipation of settlement, the 2007 session of the Montana legislature

fully funded this amount.) In the interim, the Tribe is entitled to receive the interest from that fund, up to \$650,000 per year. In exchange for these payments, the Tribe agreed to defer any development of its Birch Creek water rights beyond their current use for a period of 15 years from the effective date of the Birch Creek Agreement. In addition, the Tribe agreed to prioritize in this settlement authorization and funding for the Four Horns Project.

The Four Horns Project involves the repair and improvement of the Four Horns Dam and Reservoir and associated infrastructure, features of the Blackfeet Irrigation Project located on the Reservation in the Badger Creek drainage. This Project is a critical component of the settlement because it is intended to increase the water supply available to Birch Creek water users, one of the essential mitigation benefits secured by the State in exchange for the financial and other commitments made in the Birch Creek Agreement. Specifically, as part of that Agreement, the Tribe committed to deliver 15,000 AFY of water from Four Horns Reservoir to Birch Creek, for the benefit of Birch Creek water users, from the time construction is completed on the facilities necessary to make such deliveries possible until a date 25 years from the effective date of the Birch Creek Agreement. This provision of supplemental water is expected to offset the impacts of the Tribe's development of its Birch Creek water rights after the expiration of the 15 year deferral period. In addition, the existence of infrastructure capable of bringing Four Horns water across to Birch Creek provides the Tribe with a significant potential market for surplus water from Four Horns into the future. This is an important benefit to the Tribe, as it enhances the Tribe's ability to realize economic benefits from the water rights contained in this settlement. With the Birch Creek Agreement in place, PCCRC and other off-Reservation stakeholders supported ratification of the Compact by the Montana legislature in 2009.

The Tribe and the State initially envisioned a significant enlargement of the Four Horns Reservoir. Preliminary engineering studies, funded by a \$500,000 appropriation from the State legislature, indicated that the storage capacity of the reservoir could be substantially increased in a cost effective fashion, and that a delivery system could be constructed economically to move excess water from the reservoir across to Birch Creek for the benefit of all Birch Creek water users. The State committed to spend \$20 million toward the construction of this Project, a commitment which was been fully funded by the Montana legislature in the form of a \$4 million cash appropriation in 2009, and \$16 million of bonding authority approved by the Legislature during its 2011 session. In its testimony before this Committee when the S. 399 was heard in 2011, however, the United States asserted that the State's contribution was inadequate, as the United States construed the benefits of this Project as not flowing to the Tribe. The State took great issue with this position, both because it misconstrued the true benefits this Project has for both the Tribe and off-Reservation water users, and because the State's proposed \$35 million contribution to the Blackfeet settlement marked one of the largest contributions any state has ever made to an Indian water rights settlement, and the largest Montana had ever agreed to make.

Montana has always been extremely proactive in contributing to Indian water rights settlements. In the early 1990s, the State spent \$21.8 million as part of the Northern Cheyenne settlement. The State spent \$550,000 as part of the smaller Rocky Boys settlement, and \$15 million as part of the Crow Tribe settlement. The State has also made—and fully funded—its commitment of \$17.5 million for the FBIC-Montana Compact that has been ratified by the Montana legislature but not yet approved by Congress. This amount is made up of \$4 million in cash (including \$3

million that was appropriated in the just-concluded legislative session), \$9.5 million in bonding authority and \$4 million of in-kind contributions in the form of modeling and other hydrology work that has already been conducted. Moreover, as will be discussed immediately below, Montana has now agreed to – and has fully funded – a contribution to the Blackfeet settlement in the amount of \$49 million. The additional \$14 million was appropriated by the 2013 session of the Montana Legislature.

This additional amount came about as part of the efforts the State and the Tribe have made to address the concerns raised by the United States with the structure of the federal ratification legislation. In light of the Administration’s 2011 testimony, the Tribe’s technical consultant identified an alternate design for the Four Horns Project, one that would bring fewer overall benefits in terms of enhancing the water supply but one that was nevertheless capable of ensuring continued deliveries of water to irrigators on the BIA’s Blackfeet Irrigation project as well as of delivering the 15,000 AFY of water to Birch Creek that the State bargained for as part of the Birch Creek Agreement. The State continues to believe that the benefits to the Tribe that flow from this Project warrant federal as well as State contributions. But in the interest of ensuring the construction of the water delivery system to Birch Creek, which is so critical to the successful implementation of this settlement, the State agreed to fund the full incremental costs associated with the Birch Creek delivery system. S. 434 reflects that commitment.

S. 434 also contains some language regarding the Four Horns Project that is very problematic for the State. Specifically, Section 10(c)(3)(A) flatly states that none of the costs of the Birch Creek portion of the Four Horns Project (S. 434 calls it the “Birch Creek Mitigation Project”) shall be paid by the United States. Yet S. 434 also provides that it will be the United States – through the Bureau of Reclamation – that will oversee the construction of this Project. The difficulty with the current language in Section 10(c)(3)(A) is that it hands the State the entire financial risk of cost overruns or other unforeseen construction-related expenses with no ability to manage the Project to ensure that such overruns do not occur. The State is not seeking such responsibility, but does want to ensure that the United States is properly focused on managing the construction project diligently to ensure that the \$34 million budget is not exceeded. Without a change to the current language, the United States has no meaningful incentive to ensure that construction costs are minimized and that overruns do not occur. The State asks that the language in Section 10(c)(3)(A) be deleted as this bill goes through mark-up.

The settlement also includes provisions allowing the Tribe to lease to water users off the Reservation those portions of its water rights that it has stored or directly used. The Tribe must offer water users on Birch Creek, Cut Bank Creek, the Milk River and the St. Mary River, respectively, a right of first refusal on water leased from those drainages to users downstream. The Tribe may lease water from Birch Creek, Cut Bank Creek and the Milk River, all of which are within the Missouri River Basin, but only for use at other locations within the Missouri River Basin.

In addition, under S. 434, the United States will allocate to the Tribe a portion of the water in the Bureau of Reclamation’s storage facility on Lake Elwell, located along the Marias River in central Montana. The FBIC-Montana Compact also contemplates an allocation to the FBIC from Lake Elwell, and S. 434 does nothing to impair that allocation from occurring at such time as

Congress ratifies the FBIC-Montana Compact. S. 434 further provides that nothing in this allocation to the Blackfeet Tribe requires the United States to provide any facility for the transportation of the Tribe's allocation from Lake Elwell to any point, and also that nothing in this allocation to the Blackfeet Tribe diminishes the allocation from Lake Elwell that was made to the Chippewa Cree Tribe of the Rocky Boys Reservation as part of the Rocky Boys water rights settlement which was ratified by Congress in 1999. S. 434 authorizes the Blackfeet Tribe to lease water from its Lake Elwell allocation so long as it is for use within the Missouri River Basin.

The Blackfeet water rights settlement also closes all of the on-Reservation basins to new appropriation under Montana law. In all cases, both under a Tribal Water Code and State law, the development of small wells and stock uses are not precluded by the basin closures. For all on-Reservation basins, water rights under State law will become part of the Tribal Water Right if the Tribe reacquires the land and the appurtenant water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

The Tribe will administer the Tribal Water Right. The State will administer water rights recognized under State law. The Blackfeet Irrigation Project will use part of the Tribal Water Right and will continue to be administered by the BIA under applicable federal law. The Blackfeet Tribe will enact a Tribal Water Code to provide for administration of the Tribal Water Right in conformance with the Compact, this Act, and applicable federal law. In the event a dispute arises, the Compact provides for an initial effort between the water resources departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board to hear disputes. Decisions of the Compact Board may be appealed to a court of competent jurisdiction.

The Compact will recognize and protect the Blackfeet Tribe's water rights and provides for the improvement of agricultural water systems and tribal economic development. The Compact promotes development for the benefit of the Blackfeet Nation while protecting other water uses. The Compact is the full and final settlement of all of the Tribe's water rights claims within the Blackfeet Reservation and the Tribe waives any claims to water rights not contained or reserved in the Compact. We urge your support in ratifying the Compact by passage of this Act.