

Fort Belknap Indian Community



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Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
(Elected to administer the affairs of the community and
to represent the Assiniboine and the Gros Ventre
Tribes of the Fort Belknap Indian Reservation)

TESTIMONY OF FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

LEGISLATIVE HEARING ON S. 1911, THE GROS VENTRE AND ASSINIBOINE TRIBES OF THE FORT BELKNAP INDIAN COMMUNITY WATER RIGHTS SETTLEMENT ACT OF 2021

OCTOBER 6, 2021

Chairman Schatz, Vice Chairwoman Murkowski, and Members of the Senate Committee on Indian Affairs, my name is Andrew Werk, Jr. I serve as President of the Fort Belknap Indian Community Council. Thank you for the opportunity to testify in support of S. 1911, the “Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2021.” It was our Tribes who fought for the right to use the water on our Reservation and established the federal law that governs all Indian reserved water rights in the United States. This federal law is known as the *Winters* doctrine. Now, more than a century later, it is time to confirm our historic water rights and approve our Water Rights Settlement, which will provide us the ability to develop and use our water.

In his writings as an Indian law scholar, Department of the Interior Solicitor Robert Anderson recognized the importance of Congressional action to approve Indian water rights settlements. He wrote that:

The struggle of Indian tribes to maintain their property and survival as distinct communities is revealed by examining the status and treatment of Indian water rights by the federal government. Indian reserved water rights are trust property with legal title held by the United States. They were first recognized in 1908 in *Winters v. United States*. As such, one might expect to find that by now a trustee would have developed an effective system for defining and protecting the trust corpus.¹

Through a series of treaties and agreements with the United States, we reserved a permanent homeland in 1888, our Fort Belknap Reservation for the Gros Ventre and Assiniboine Tribes. In these negotiations we ceded millions of acres of our ancestral lands and resources. In return, through the Treaty of 1855, the 1888 Congressional Act, and other agreements, the United States promised to provide and support an agricultural economy that would sustain our Tribes on our reserved homelands. Over the next 100 plus years, the United States failed to

fulfill many of these commitments, including protecting and preserving our waters, and we now have the highest poverty rate of any tribal reservation in Montana.²

We support the renewed commitment of the current Administration to settle tribal disputes. We now ask Congress to acknowledge our many years of negotiations with the United States through our assigned Federal Negotiations Team and the Secretary's Indian Water Rights Office ("SIWRO"). Our Water Rights Settlement is based on long-standing, historical principles of federal policy and related court decisions on the reserved water rights of Indian people that ensure we will receive the full benefit of the water rights promised to us in treaties and agreements with the United States. These principles include (1) recognition of a reservation of water for reservation homelands and the promise of assistance in establishing an agricultural economy when valuable tribal lands were ceded to the United States; (2) a method of quantifying our Indian water rights based on the practicably irrigable acreage (PIA) of the reservation; and (3) the importance and obligation of the United States to honor its treaty promises and keep its word to assist us with the establishment of a viable agricultural economy in order to create a permanent homeland.

Irrigation began on our Reservation in 1889. Several years later, Congress authorized the Fort Belknap Indian Irrigation Project. Soon, non-Indian, upstream irrigators were depleting our main water supply, the Milk River. The United States, our trustee, protected a portion of our Indian water supplies and went to court to defend them. In 1908, the U.S. Supreme Court concluded that the lands of the Fort Belknap Reservation were "practically valueless without irrigation—a barren waste[.]" *Winters v. United States*,³ and established what is now the seminal legal doctrine for Indian reserved water rights, known as the "*Winters Doctrine*." The Indian reserved water rights began with our Reservation, and we are the "*Winters Tribes*."

This critical federal Indian law doctrine has stood the test of time.⁴ A final settlement of our Indian reserved water rights and claims against the United States for the mismanagement and failure to protect this critical natural resource will reaffirm the *Winters* rights for all tribes. Additionally, as Department Solicitor Robert Anderson has stated:

Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework.⁵

Settling our Indian reserved water rights claims in a manner that acknowledges the United States' broken treaty promises and trust responsibilities will demonstrate the historical Congressional commitment to protecting tribal treaty rights and tribal natural resources. It will fulfill the federal government's fiduciary trust duties to the Fort Belknap Indian Community that derive from the early Treaty and agreements between our governments. It will bring an end to a 30-year process of negotiations between the United States, Montana, and our Tribes. As stated in Final Report 23 of the Commission on Indian Trust Administration and Reform (2013), the usual zealous Departmental defense in litigation against the United States "should be tempered and informed by the federal-tribal trust."⁶ Both Congress and President Biden's Administration, under Secretary Haaland's leadership, have an historic opportunity to demonstrate this approach

to Indian reserved water rights settlements for the “*Winters Tribes*” with a fair, monetary settlement that will support the development of our Indian reserved water rights, promote our Tribal self-determination and self-sufficiency, and result in an economically healthy and permanent homeland for our people. Our Water Rights Settlement will be an Indian water settlement for Indian people.

We ask Congress to put the brakes on a disturbing trend in federal Indian water rights policy. There has been a slow but discernable shift away from federal ownership of the centuries of mistreatment and broken promises of the United States toward Indian people as it relates to the promise of assistance in creating a permanent homeland and self-sufficiency with the development of reservation Indian water rights. However, under Congressional leadership, the pendulum can swing back toward courageous, forthright, and fair decision-making to settle Indian reserved water rights—in particular, after 30 years of negotiations with the federal government and the State, the Indian water rights and claims of the Fort Belknap Indian Community must now be approved. It is long overdue.

We are not a wealthy Tribal government nor wealthy people; we do not have fancy casinos or vast energy resources. A settlement of our Indian water rights will bring long overdue investments in infrastructure on our Reservation. With a population of 8,150 enrolled members, and a large land base of 625,000 acres, our reservation lands are 97% trust lands, held by the United States for the Fort Belknap Indian Community (“FBIC”) and our allottees.⁷ Similarly, our Fort Belknap Indian Irrigation Project serves primarily the trust lands of Indian people.

In the 1980s, we chose settlement over litigation with the State and Federal governments when we initiated negotiations with the Montana Reserved Water Rights Compact Commission and an assigned Federal Negotiations Team. President George H. Bush established the Secretary’s Office of Indian Water Rights Settlements in 1989, and the Department of Interior (“Department”) adopted federal regulations promoting Indian water settlements in 1990.⁸ This provided the structure and guidance for the negotiations and settlement of claims concerning Indian water resources over litigation, offering a promise to tribes that their right to water would be developed at long last with the support of its trustee.

We came to the bargaining table in good faith that our Federal Negotiations Team was fully participating, not just in its governmental capacity, but also as the trustee over what is our most valuable natural resource—water. We adopted the court-approved principles of practicably irrigable acreage (PIA) to quantify the volume of our Indian reserved water rights,⁹ and negotiated the administration of our water. Many hours of negotiations, extensive studies, public meetings across northcentral Montana, and Tribal community meetings took place to reach an agreement, not only on the quantity and administration of our water rights, but also for the mitigation of the impact of the full development of our agreed-upon reserved water rights on non-Indian state water users.

After more than 10 years of negotiations, we reached an agreement with the State and Federal governments—the 2001 “Fort Belknap-Montana Compact, entered into by the State of Montana, the Fort Belknap Indian Community, and the United States of America” (“Water

Compact”).¹⁰ Our Water Compact easily passed the Montana Legislature with a large bipartisan majority.

Our negotiations and settlement efforts have not been easy. Over the three decades of our negotiations with the federal government related to our damages claims, we have experienced the Department of Interior’s shift in the interpretation and implementation of the policy of the Department.¹¹ Unfortunately, the *Winters* decision did not trigger a renaissance of funding commitment by the federal government to develop reservation water rights. But acknowledgement and recognition of the federal government’s trust responsibility and obligations over Indian water rights as held in trust by the United States for the benefit of the Indians can be found in key documents.

We pull a few threads of history to illustrate the shifting policy of the United States and disturbing trend in federal policies and efforts to settle Indian water rights claims. For example, in 1956, Congress enacted the Colorado River Storage Project Act and made a phenomenal statement of its recognition of fiduciary responsibility in the following provision for the Navajo Nation’s participation in water infrastructure development:

[T]he costs allocated to irrigation of Indian-owned tribal or restricted lands within, under, or served by such project, and beyond the capability of such lands to repay, shall be determined, and, *in recognition of the fact that assistance to the Navajo Indians is the responsibility of the entire nation, such costs shall be nonreimbursable.*¹²

Assistance to the Navajo Indians, of course, was representative of the Government’s responsibility to Indian people, generally. But progress in funding the federal support for Indian water rights development has been exceedingly slow while the United States focused on and built western water infrastructure projects for the non-Indians.¹³

After *Arizona v. California* adopted and reinforced the *Winters* doctrine for the recognition of Indian water rights in 1963, and created the practicably irrigable acreage standard for quantifying a tribe’s water rights,¹⁴ Congress passed the Indian Self-Determination and Education Assistance Act of 1975.¹⁵ President Nixon signed and introduced it as the “dawn of the self-determination age,” and described the following:

“[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force.”¹⁶

This was followed by President Jimmy Carter’s adoption of the Federal Water Policy initiative in 1978 to promote Indian water rights settlements over litigation.¹⁷

Congressional frustration over the slow pace of Indian water settlements by the Department of Interior was evident in 1989 when Senators Mark Hatfield (OR) and James

McClure (ID) drilled Interior Secretary Manuel Lujan and asked: “Why can’t the administration agree that these settlements are a national obligation now to be funded?”¹⁸

But by the beginning of the 21st Century, federal policy interpretation was shifting away from the historical recognition of the United States’ obligations as the trustee of Indian water rights. In 2008, the Department published revised Federal Regulations governing Federal Indian Irrigation Projects.¹⁹ The Department declared, in its response to “Public Comments” during the rule-making process, that it “does not have a trust obligation to operate and maintain irrigation projects,”²⁰—shocking many in Indian Country. The single case relied on by the Department to support its blanket conclusion of application to all Federal Indian Irrigation Projects was not justified and can be distinguished from other tribal claims and circumstances characterizing the solemn promises of the United States to develop an agricultural economy for a homeland reservation. This is a striking shift from the declaration that Congress made in 1956, when assistance in the development of Indian irrigation projects was “the responsibility of the entire nation.”

Subsequently, the Department issued Order No. 3335, “Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries,” in 2014. This again caused a stir in Indian Country when the Department relied on another single, judicial decision to limit the scope and narrow the definition of its responsibilities by adopting the conclusion that specific statutes and regulations must establish the fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.²¹ This position was expressly rejected by the Secretarial Commission on Indian Trust Administration and Reform and by other decisions of the United States Supreme Court.²²

The Department seemed to ignore judicial guidance to apply a “fair interpretation” rule when analyzing the government’s fiduciary duty in tribal treaties, Congressional Acts, and agreements, which “demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity [under the Indian Tucker Act]”; it is enough that a statute be reasonably amenable to a reading mandating a right of recovery of damages—“a fair inference will do.”²³ The isolated cases that the previous administrations have relied on from time to time to seemingly narrow the scope of the federal government’s trust responsibilities to tribes should not form the basis for the Department’s *carte blanche* adoption of such a policy to guide the settlement of our Indian water rights. We urge Congress to also consider this historic trend away from its trust responsibilities to tribes as it relates to Indian water rights and development, and provide the leadership to reverse such a trend in the federal government’s policy.

We conclude that the recent decision by the U.S. Supreme Court, in *McGirt v. Oklahoma*,²⁴ should breathe new life into the federal government’s understanding of the importance of the early Treaty promises and obligations the United States made to tribes and the importance of the Government “keeping its word.”

The *McGirt* decision was followed by President Biden’s promise of a renewed “commitment to fulfilling Federal trust and treaty responsibilities . . . [.]”²⁵ and the current Administration has declared a policy that will reverse the slide away from the federal obligations

promised to tribes. In 2013, the Commission on Indian Trust Administration and Reform expressly rejected the narrow standard for breach of trust damages cases:

The federal government has rested on this narrow standard from the damages cases to refuse to act to protect tribal resources from prospective harm, and to resist tribal efforts to compel agency action. As one respected commentator noted, “The trust responsibility should play a role in protecting tribal lands and resources, but the trust doctrine stands in potential jeopardy today as courts collapse protective trust requirements into statutory standards.”²⁶

The Fort Belknap Indian Community has been negotiating our water rights settlement with its trustee for the past 30 years. The pace of negotiations and settlement is excruciatingly slow. During this period of settling our Indian water rights, there seems to have been this silent shift away from the commitments of the 20th Century to protect and preserve Indian water rights.²⁷ The federal government seems to have backed away from a national commitment to fund Indian water settlements and, in particular, its responsibilities to tribal water projects funded at a level that supports full Tribal water rights’ development that will support economic opportunities on reservations such as ours.

We played by the rules. But our effort to complete our water rights settlement with the federal government over the past 2 decades has been stymied by a series of past Administrations who have, without explanation, seemed to take political aim at the PIA-based size and scope of our agreed upon Indian reserved water rights by asserting the need to reduce the Government’s trust obligations to us and denying the scope of our damages claim that address the federal government’s failure to build the water delivery infrastructure required to protect and preserve our water rights and put them to use—the purpose of which is to create our permanent homeland through the development of a stable agricultural economy. We fear that this recent policy trend seems to focus on an Indian water settlement funding policy that is based on the size of the reservation and tribal population, for which there is no legal basis, instead of a policy based on the PIA quantification standard and Treaty promises.

The promise of a true commitment to tribal sovereignty with economically viable homelands can become our reality. The promise of our early agreements with the United States, when we ceded millions of acres of land, was a permanent, livable homeland and assistance in the development and use of our reserved water rights. The United States has a continuing trust obligation and programmatic responsibility to provide the Fort Belknap Indian Community a permanent and economically sustainable homeland. Congressional approval of our Water Rights Settlement will be the fulfillment of the United States’ Treaty promises to the Gros Ventre and Assiniboine Tribes.

Brief History of the Gros Ventre and Assiniboine Tribes

Our Gros Ventre and Assiniboine Tribal members are a resilient people. But certain stark facts about our lives when compared to our non-Indian neighbors supports the conclusion that

the United States has failed in its obligation to establish our permanent homeland as a self-sufficient, economically vibrant Reservation and thriving people.

Population, Health, and Economic Hardship. We have 8,150 certified enrolled members in the Gros Ventre and Assiniboine Tribes,²⁸ half of whom live on the Reservation.²⁹ Due to a lack of adequate housing, many of our members live in nearby towns or rural areas and drive to the Fort Belknap Reservation each day or throughout the week.³⁰ About 92% of the people living on our Reservation are American Indians.³¹ The median age at death of American Indians residing in Montana is 18 years lower than that of white people.³² Poverty has become the norm fueled by economic depression and high jobless rates, lack of infrastructure, and substandard housing. The Fort Belknap Reservation economic hardship can be broken down as follows: 40% poverty rate; 34% unemployment rate; \$29,566 median household income; and \$10,896 per capita income.³³ Our very high unemployment rate can be compared to the much lower unemployment rates in neighboring Blaine County (10.4%) and Phillips County (5.1%).³⁴

Farming Economy. Agriculture remains the mainstay of our Reservation economy and virtually the sole industry. Farms located on the Reservation are largely operated by Tribal members.³⁵ However, the low level of agricultural productivity is reflected in the low family incomes and standard of living currently experienced by our members.

Conclusion. Increasing the availability of water on our Reservation and supporting the FBIC development of its Indian water rights will give the Tribes the kind of economic opportunity that can improve the social and economic well-being of our people. In a partnership with the Federal government, we can construct, develop, operate, and maintain the infrastructure required to secure the settlement promise of “wet water,” develop a sustainable agricultural economy, and provide economic self-sufficiency for our permanent homeland.

FBIC Water Settlement is an Infrastructure Bill

After ceding millions of acres of territory, the Gros Ventre and Assiniboine Tribes reserved the Fort Belknap Reservation in what is now northcentral Montana. These lands were reserved and set apart “as an Indian reservation as and for a permanent home and abiding place.”³⁶ Our Reservation lands have never been broken apart and lost to non-Indians. Our Fort Belknap Indian Irrigation Project is and remains a federal *Indian* irrigation project. The quantification of our Indian reserved water rights is based on the well-respected and legally adopted principles of Practicably Irrigable Acreage (PIA).³⁷ During the negotiations of our rights, we successfully demonstrated that we have an adequate water supply with arable soils to support irrigation system infrastructure.

Therefore, the significant purpose of our FBIC Water Rights Settlement is to settle our water-related claims against the United States with sufficient compensation to support the development of our 2001 Water Compact water rights, described in the “Fort Belknap Indian Community Comprehensive Water Development Plan.”³⁸

In working with the SIWRO and Federal Negotiations Team for several decades, we have responded to the shifting Administration interpretations of the Indian water settlement policy and Administrative preferences. The FBIC Water Settlement Bill has been revised numerous times across this period based on the Administration's feedback and preferences. We ask that Congress give serious consideration to the policy requirement that tribes receive equivalent benefits for rights released as part of a settlement and realize value from confirmed water rights.³⁹ And with regard to the state cost share requirement of Indian water settlements, we ask Congress to consider the fact that out of 26 settlements enacted by Congress by the end of 2016, as summarized by SIWRO, the following state cost shares were the following: 8 out of 26 settlements had 0% cost sharing; 6 settlements had cost shares between 0% and 5%; and 10 settlements had a cost share between 5% and 30%. After the 2001 ratification of our Water Compact, the Montana State Legislature approved financial commitments and contributions that will support the State's cost-share to our settlement.

In 1942, the U.S. Supreme Court stated that the United States "has charged itself with moral obligations of the highest responsibility and trust."⁴⁰ We ask Congress to consider our historical circumstances, the United States' moral obligation, and the responsibility of the entire nation⁴¹ in providing the costs necessary to develop the projects identified in our Comprehensive Water Development Plan that are designed to allow us to put our Indian water rights to use.

Aaniiih Nakoda Settlement Trust Fund

The vast majority of the funding in our Water Rights Settlement Bill will go toward supporting and developing long overdue human and traditional infrastructure investments that the United States promised to the Gros Ventre and Assiniboine Tribes. The Aaniiih Nakoda Settlement Trust Fund in our Water Rights Settlement Bill, S.1911, includes four funding accounts that will both compensate the FBIC for damages, described in the following section, and provide for the development of our Indian water rights. These accounts are the following:

Tribal Land and Water, Rehabilitation, Modernization, and Expansion, Account #1 (\$240,140,000)

- More than \$221.5 million, will go to repairing, expanding, and restoring the BIA's Fort Belknap Indian Irrigation Project, including the Milk River unit, the Southern Tributary Irrigation Project ("STIP"), and the Peoples Creek Irrigation Project.
- Develop two critical water storage reservoirs needed to stabilize and create a more reliable water supply for irrigation and other purposes.
- Provide for the development of a stock-water distribution system on the Reservation.
- Provide for the purchase of lands within the Project, farm loans, and the repair and re-establishment of wetlands.

Explanation. Ninety-two percent (92%) of the funding in this account will benefit the United States' federal property, the Fort Belknap Indian Irrigation Project (FBIIP), which is over 100 years old and generally exists as a long-neglected federal property, in a dilapidated and technologically outdated state with significant deferred maintenance needs. It is in need of major

reconstruction (rehabilitation), infrastructure repair, and modernization. This is needed for the FBIIP to function efficiently and effectively and to conserve its water supply. The FBIIP was authorized for construction in 1895, but construction was never completed.⁴² Account #1 includes the completion of the FBIIP on the Milk River and restoration, rehabilitation, and modernization of some of the irrigation units that were abandoned by the United States in the 1960s-1970s in the southern portion of the Reservation and on Lower Peoples Creek, largely due to the failure of the federal government to provide storage facilities to stabilize the water supply for irrigation purposes and prevent the flooding of arable lands.

The funding also supports the construction of an off-stream water storage facility on the Milk River that will stabilize the water supply and provide water delivery to the lands in the expanded area of the FBIIP. This storage facility will benefit non-tribal water users downstream due to return flows, timed to provide a contribution to the Milk River water supply during the agricultural season when flows are low. The Water Compact provides for the coordination of operations between Fresno Reservoir, Nelson Reservoir, and the proposed, off-stream Fort Belknap Reservoir that will improve water efficiency and conservation.

This funding account supports the Peoples Creek Irrigation Project that will provide flood control on the Lower Peoples Creek, protecting irrigable trust lands, and the construction of the new Upper Peoples Creek Dam and Reservoir. Finally, the funds will provide for a stock water distribution system and smaller projects to benefit Tribal FBIIP farmers and ranchers.

Account #1 of the Settlement Fund accounts for 40% of the total compensation sought by the FBIC. This funding will primarily improve the condition of and complete the FBIIP, prevent continued failure by the United States to fulfill its trust obligations to the FBIC to protect, preserve, and properly manage the FBIC water rights, and contribute to FBIC's ability to realize the full potential of its arable lands and the abundant water supplies available to us.

Water Resources and Water Rights Administration, O&M and Repair, Account #2 (\$61,300,000)

- Funds will be used to create a trust fund to provide long-term support for the Tribal Water Resources Department to administer and manage the FBIC's water rights and an Operations and Maintenance Fund to ensure repair and upkeep of the irrigation projects.

Explanation. Account #2 supports the traditional Indian water settlement activities crucial to the establishment of a Tribal Water Resources Department. A Trust Fund will allow the Tribal Department to operate on the annual interest earned on the trust fund and support the costs of the regulation, administration, and enforcement of the FBIC water rights with the development of a Tribal water code, as well as capital projects that will provide the necessary infrastructure, equipment, and data to support the Tribal Department activities. Finally, Account #2 provides funds necessary to establish an Operation and Maintenance Fund for the Tribal agricultural irrigation projects on the Reservation, using annual earned interest to support a portion of the annual operation and maintenance costs—proven to be important for sustaining the agricultural economy on the Reservation. About 97% of the irrigable lands are trust lands.

Tribal Community Economic Development, Account #3 (\$168,390,000)

- Utilize water resources to develop Tribal natural gas resources within the Reservation and supply energy resources for an 80MW natural gas power plant.
- Using increased agriculture production, develop an Integrated Bio-Refinery producing 20-million-gallon-per-year of ethanol and cattle feed by-products.
- Improve and support the health of the Tribal work force and Tribal communities by updating and expanding community wellness centers to improve health outcomes and provide treatment and prevention for diabetes, hypertension, obesity, mental health, and substance abuse.

Explanation. The economic development account will provide capital start-up funds for Tribal enterprises aimed at increasing Tribal economic self-sufficiency through economic development within the Reservation boundaries. These funds will be used to fund a portion of the large-scale projects that have significant water requirements and are directly related to the FBIC's overall water management. They are intended to provide a base of good paying, stable jobs to Tribal members, with the construction activities and economic growth benefitting other off-reservation, local residents and businesses. The FBIC is well-positioned to develop its potential natural gas reserves for economic gain. Based on a comprehensive feasibility study commissioned by the FBIC, the Integrated Bio-Refinery would directly use irrigated and dryland crop production as input to the plant, as well as support the use of by-product as an excellent feed for cattle, providing a great economic advantage when used in conjunction with a feedlot operation.

The health and wellness of our Tribal members remain a significant concern. Wellness Centers are planned so that the health and well-being of our Tribal work force, and the community in general, can be improved. Wellness Centers are highly effective in combating prevalent tribal health issues, such as diabetes, hypertension, obesity, mental health, and substance abuse. Three centers within the Reservation are planned.

Clean and Safe Domestic Water Supply and Wastewater Systems, Account #4 (\$123,280,000)

- Construct and improve access to and the safety of a clean, domestic water supply and wastewater removal systems on the Reservation.
- Develop two new wells at 300-ft deep, and one new well at 480-ft deep to provide water for the communities of the Fort Belknap Agency, Hays, and Lodgepole.
- Develop Homesite wells.
- Construct new water treatment facilities in the Lodge Pole and Hays communities.
- Expand existing tribal domestic water delivery lines.

Explanation. The coronavirus pandemic resulted in an awakening in America of the importance of tribal community access to reliable, clean, and drinkable water—an essential human need. It is the foundation for healthy communities and growing economies. The

National Congress of American Indians issued a report in 2017 stating that tribes receive only 75 cents for every \$100 needed for drinking water, and estimated an Indian Health Service water sanitation facilities' backlog at about \$2.5 billion. On January 27, 2021, President Biden issued Executive Order 14008,⁴³ which provides that it is the policy of the Biden Administration to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.

FBIC has both drinking water supply issues and water quality concerns. The cost estimates are intended to cover needed improvements to the water facilities at each of the Reservation communities, as well as at individual homes within the rural areas of the Reservation. Renovation of the existing Fort Belknap Agency domestic water system will support the anticipated future growth in domestic water demands on the Reservation.

Damages Claim

The United States has yet to fulfill its promises under the Treaty of 1855, and the 1888 and 1896 Congressional Acts⁴⁴ that were to provide a sustainable agricultural economy that can provide economic self-sufficiency for our permanent homeland on the Fort Belknap Reservation. The FBIC has suffered extensive damages resulting from actions, as well as failures to act, of the United States that have denied the FBIC the use of its reserved water rights. The statute of limitations does not bar the FBIC's claims because the claims still have not accrued: among other reasons, the FBIC's reserved water rights have never been fully adjudicated, and the FBIC only began to research the agricultural potential of the reservation starting in the mid-1990s. Thus, the nature and extent of the FBIC's property rights in water have not been sufficiently determined to invoke the statute of limitations; the extent of the FBIC's reserved water rights is what would be litigated if these settlement negotiations fail. Although these facts were not fully known by the FBIC, the valuable interests of the FBIC were known to the United States and should have been vigilantly asserted and protected by the federal government, as trustee of the reserved water rights. Instead, the Government intensively developed the watershed for the benefit of non-Indians, without regard for the plain economic and social needs of the members of the Tribes and the FBIC.

The FBIC has determined an estimate of the amount of damages that it has incurred with respect to its reserved water rights and resources. The FBIC's Water Rights Settlement Act would settle approximately \$730 million in claims against the United States by providing a total of \$593,110,000 in damages to the FBIC, and includes the return of some ancestral and Reservation homelands that will be transferred back to the FBIC. When these damage claims are settled as part of the settlement of our reserved water rights, such claims will be relinquished.

Explanation of Damage Claims. The FBIC claims both historical and future monetary damages as a result of the United States' past and continued failure to protect the Reservation's water supply on behalf of the FBIC ("U.S. Failure"). The damages are determined for each of six claims and based on estimates of the income for irrigated farming that the Tribes could have

realized in the past and would be expected to realize in the future had the U.S. Failure not occurred (“Lost Income”).

There are two types of damage claims alleged by the FBIC. The first type consists of damages due to the alleged *taking* of water from the Reservation when the Canadian Boundary Water Treaty was signed, and the alleged *taking* of tribal property when Dodson Dam was built in 1908. The second type of damages claims arises from breach of trust responsibilities and obligations due to the failure of the United States to protect FBIC water rights, including against non-Indians, to complete and properly operate and maintain the BIA Fort Belknap Indian Irrigation Project, and to fulfill the expressed purposes of the Fort Belknap Reservation by adequately developing our water supply, including with irrigation systems and storage facilities, pursuant to the Tribal Treaty and Congressional Acts, and the *Winters* decision,⁴⁵ which would support the promised, permanent homeland for the FBIC and its Tribal members. The following are the summary descriptions of each of the claims:

- A. **“Taking” of Milk River water in signing the 1909 Boundary Waters Treaty.** The Boundary Waters Treaty with Canada⁴⁶ deprived the Reservation of irrigation water. The highest and best use of water that was taken from our Reservation would have been irrigated agriculture. Natural Resources Consulting Engineers, Inc., the FBIC’s water resources experts, estimates that the water given to Canada in the Treaty was sufficient to irrigate 9,400 acres of Reservation lands beginning in 1909. Damages: \$266,321,121.
- B. **“Taking” of land for Dodson Dam.** When Dodson Dam was constructed in 1908, Tribal land was taken both for the Dam itself and for the use of a canal. In addition, seepage from the canal waterlogged nearby land, rendering it unsuitable for irrigation. The total irrigable land taken from the Tribe was 2,587 acres. Damages: \$74,640,836.
- C. **Breach of trust on land taken for Dodson Dam.** Even prior to the Dodson Dam’s construction, the United States breached its trust responsibility by not assisting the Tribes in developing its land for irrigation. This claim is made for the same 2,587 acres as in the above paragraph, but for the period 1900-1908, prior to the Dam. Damages: \$4,595,747.
- D. **Breach of trust on land that could have been flood-irrigated from the Milk River.** The United States failed to develop irrigation works to use the water that was available on the Reservation, which diminished the amount of irrigation that actually occurred on the Reservation. The United States built a tribal project that irrigated approximately 10,000 acres. However, 13,027 acres could have been irrigated given contemporary technology. This claim is based on the difference between historical actual acres irrigated and the potential irrigation of 13,027 acres. Damages: \$90,976,421.
- E. **Breach of trust on land that could have been sprinkler-irrigated from the Milk River.** By the end of World War II, the United States had developed a large capacity for making aluminum, largely used during the war to build aircraft. Following the war, this industrial capacity was available for peacetime uses, including making the aluminum pipe that made widespread sprinkler irrigation practical. The first post-war shipment of aluminum pipe for use

in sprinkler irrigation was in 1946, and from then sprinkler irrigation grew rapidly. The United States failed to utilize this new technology to support the promised agriculture economy on our Reservation. Damages: \$222,384,416.

F. Breach of trust on land that could have been irrigated within the Southern Tributary Irrigation Projects (“STIP”). In the early 1960s through 1970 the United States failed to adequately maintain, and effectively abandoned, the irrigation water delivery systems serving a total of 8,313 acres of STIP lands. The responsibility for the irrigation of 6,828 acres of this land was formally transferred by the U.S. to landowner organizations, transferring all of the right, title, and interest of the U.S. in the irrigation systems. The irrigation delivery systems were in complete disrepair, were no longer functional, and the United States did not provide any associated management training to the landowners. Five other irrigation units consisted of 1,485 acres. No evidence has been identified to support a conclusion that these units were officially transferred to the water users, and the Federal government has failed to maintain them in an operable condition. The operation and maintenance responsibility of these units has remained with the Federal government to this day. Damages: \$69,711,463.

Explanation. The approach taken to estimate both types of damages, D and E, above, was to reconstruct an agricultural economy that reasonably could have been supported by the land and water resources of the Fort Belknap Reservation. The income available from dry farming or from grazing and the difference was used to determine the damages due to a lack of a developed water supply. One difference in approach in valuing the takings claims as opposed to the breach of trust claim is the treatment of accumulated interest on historical damages. Interest is applied to damages in the takings claims, but not for the breach of trust claims. Historical damages have been restated in today’s dollars in order to maintain the purchasing power of the foregone income. The cost of settlement is fully justified by the needs of the Reservation and the FBIC potential claims against the United States.

Land Transfers. The Bill also provides for the transfer of 58,553 acres of lands to restore FBIC’s homelands and provide for the following:

- Tribal management of the headwaters of streams that are part of our Indian water rights, but currently below the southern boundary of our Reservation. The land transfer includes only 14,495 acres of the more than 60,000 acres in the Little Rockies that were removed from our Reservation barely 7 years after it was established, and include our sacred sites that support the traditional spiritual and cultural practices of our Tribal members.

Shortly after our Reservation homeland was established, the Indian Commissioners returned to secure a portion of our new 1888 homeland because gold was discovered on our Reservation. They threatened us with starvation if we did not agree. Our Tribal leaders were told that if we did not sell more of our land, that “there would be no way to get beef, cattle, flour, wagons, or anything else . . . and your women and babies [will be] crying for something to eat. . . .”⁴⁷ In other words, that the United States would abandon us—in spite of its promises—and we would starve to death.

As an agent of the United States, Commissioner Grinnell said to us, “I see that some of you people are pretty blind. You can’t see far. Two years from now, if you don’t make any agreement with the government, you will just have to kill your cattle and then you will have to starve.”⁴⁸ My great-great grandfather, Lame Bull did not back down from these threats. He retorted, “Look at my hair. It is grey. I say the same thing as I said before. I don’t want to sell.” Grinnell was wrong...our Tribal leaders could see far into the future.

A leading scholar on Indian history offered the following description from Indian people over their land losses: “This is where we worshipped—we prayed—where we got our spiritual sustenance and went to commune with the Creator, who protected us.”⁴⁹ But, as this historian explained, the Indian agents and the leaders of the new country never understood the spiritual shock that the Indian people suffered when their lands were stolen. But the Gros Ventre and Assiniboine people were in a state of extreme destitution when these lands were removed, and they still grieve over the loss of these sacred lands.

Additionally, although our Tribal Leaders were told that the portion of our Reservation that would be taken by the federal government would be 40,000 acres, the subsequent land survey included 60,000 acres there were removed from the southern boundary of our Reservation. But monetary compensation to the FBIC was only provided for 40,000 acres.

Finally, the Indian agents told our Tribal Leaders that our water rights would not in any way be impaired by this land removal. Now the waters used by the miners south of our Reservation are polluted and are part of a Super Fund to clean up the damages. The lands we are requesting be returned to us, however, are north of this area of environmental pollution.

- Consolidation of Tribal lands both on and off the Reservation (including the submarginal land area adjacent to the western boundary of the current Reservation) for improved administration; and
- Better management of forested lands by our experienced land management department and fire response team, and the restoration and protection of the FBIC’s cultural resources.

These lands include state trust lands (27,709 acres), and federal lands (30,844 acres) (i.e., lands held by the Bureau of Land Management, Bureau of Reclamation, and Department of Agriculture).

Mitigation for State Water Users

After our long-time cooperation and compromises with our non-Indian neighbors, Congressional support of the agreed-upon mitigation activities in our negotiated FBIC-State-Federal Water Compact will create harmony at a time when water wars between water users are increasing. In fact, Montana is in a severe drought this year. Mitigation activities will stabilize the water supply, conserve water, and improve water use efficiency. Consistent with the Federal government’s policy to resolve Indian water rights disputes through negotiated settlements,⁵⁰ our Water Compact (a) is an agreement to which the federal government is a signatory party; and (b)

will create long-term harmony and continued cooperation among the interested parties by respecting the sovereignty of the State and FBIC in our respective jurisdictions.⁵¹

The Montana Reserved Water Rights Compact Commission (“Commission”) was created by the State legislature to negotiate tribal water settlements with tribes and the federal government.⁵² Negotiations among our Parties were conducted in earnest throughout the 1990s. The Commission conducted no fewer than 20 meetings between 1997-2000 throughout our region, known as the Hi-Line area of northcentral Montana, for public information and input on the proposed Water Compact. The Commission documented over 18 negotiating sessions with the FBIC and Federal government between 1990-2000. In addition, substantial public information and drafts of the Water Compact were distributed through numerous public and FBIC outlets.⁵³ This extensive public and tribal information effort led to the overwhelming approval of our 2001 Water Compact by the State Legislature (94% approval in the House and 87.5% in the Senate). The FBIC Council also approved the Water Compact.

As described in the Fort Belknap-Montana Water Compact, the Parties plan improvements in the operating capabilities of the Milk River Project, where the Milk River is the FBIC’s largest source of our Indian water rights and forms the northern boundary of our Reservation. These improvements will mitigate the impact of the FBIC’s future water development on Milk River Project and tributary water users. The Water Compact also provides that the FBIC will subordinate its senior water rights in the Upper Peoples Creek to upstream non-Indian irrigation water users so that they will be able to continue their historical irrigation water use.

Milk River Basin. The water diverted from the Milk River by the FBIC is the most senior water right on the river. All water users in this basin will benefit from the mitigation activities the Parties agreed to in the Water Compact. Water Compact Article VI.B., Mitigation of Impacts on the Milk River Project, provides the following:

The Parties agree that, as a result of development and use of the Tribal Water Rights and protection of water use on tributaries, the Milk River Project and its water users will, at times, be adversely affected if no change is made to the Milk River System. . . . to the level of 35,000 Acre-Feet Per Year. . . .

Improvements in the Milk River Project will mitigate the impact of the development and future use of our Tribal Water Rights in the Milk River and provide protection of water use on upstream tributaries. With the approval of the Water Compact, the Parties committed to working together for the Congressional approval of the Water Compact. However, because the improvements to the Milk River Project and the protection for tributary water users will mitigate the impact of the development of our Tribal Water Right, the mitigation measures were essential to the State’s agreement to the Compact. The State reserved the right to withdraw as a party if “Congress does not authorize and appropriate the federal share of funding for the modification to the Milk River Project or other alternatives necessary to mitigate the impact of development on the Tribal Water Right.”⁵⁴

Extensive studies were conducted by each of the negotiating Parties to analyze the impact of FBIC's water development and use on the Milk River, and potential projects were identified by the "Fort Belknap Technical Team," a Technical Team that consisted of Federal, State, and FBIC technical experts. Projects were identified that would provide mitigation of 35,000 acre-feet per year for the Milk River Project and tributary water users. Studies continued to be conducted after the approval of the Water Compact. After years of study, and a recent agreement between the State and FBIC on the preferred mitigation measures, the Bureau of Reclamation is now proposing a mitigation measure that was not selected as part of the most promising mitigation measures identified by the Fort Belknap Technical Team. The Bureau of Reclamation is taking the position that additional studies are now needed to consider its mitigation preference before finalizing the agreements between the federal government and the State that are necessary to comply with this important Water Compact. The FBIC does not agree that more studies will be fruitful in advancing completion of these required negotiations. It is our position that further studies of the relevant issues are unnecessary.

Upper Peoples Creek. The second mitigation-related agreement of the Parties to the Water Compact is provided at Art. VI.C.:

The Parties agree, that, as a result of the protections provided to the Upper Peoples Creek [non-Indian] water users in the Compact and the variable natural water supply in the Peoples Creek Basin, the water supply available for development of the Tribal Water Right in the Peoples Creek may be limited. The Parties agree that such impacts can and shall be mitigated. . . through the construction of a dam and reservoir . . . and to seek appropriations . . . for the benefit of the Tribes.

During the Water Compact negotiations, non-Indian, state irrigators who have historically farmed on Upper Peoples Creek, upstream of the western boundary of the Reservation, sought protection from the FBIC's agreed-to Indian water rights quantification, development, and use in the Upper Peoples Creek. Additionally, the Peoples Creek Basin has a highly variable natural water supply, resulting in limitations in the development and use of the Tribal Water Rights in Peoples Creek.

Therefore, the FBIC agreed to allow the current irrigation of lands in Upper Peoples Creek by the non-Indian irrigators, subordinating the FBIC's senior reserved water rights. In exchange for the FBIC agreement with these state water users, the State and Federal governments agreed to mitigate the impact on the FBIC water use by constructing a dam and reservoir for the benefit of the FBIC in the Upper Peoples Creek. The dam and reservoir will significantly improve the reliability, availability, and use of the FBIC water rights from Peoples Creek on the Reservation.

Montana Water Court Adjudication

In the 1970s, the State started a general stream adjudication of all water rights through the Montana Water Court.⁵⁵ The Legislature set up a process that would allow tribes to negotiate their water rights with the State instead of litigating them through the Water Court. The

negotiations process was carried out through the Reserved Water Rights Compact Commission (“Commission”). In 1981, the FBIC Council chose to negotiate and settle its Indian water rights with the State and United States. In 1990, the FBIC stipulated to stay proceedings in pending lawsuits in the federal court of Montana and the pending adjudication in the Montana Water Courts.

However, the State Legislature terminated the activities of the Commission in 2013 and set a deadline for all remaining Indian reserved water rights claims to be filed with the Water Court by June 30, 2015. The United States, as our trustee, filed the FBIC water claims on behalf of the FBIC. Our water rights claims, therefore, are before the Montana Water Court, and it is currently uncertain when the Court will initiate the adjudication of our claims. However, an adjudication of these claims after decades of negotiations, an agreed-upon Water Compact, and a proposed Water Rights Settlement Bill before the Senate would be tragic for all Parties at this point in time—resulting only in a “paper water right” for the FBIC, with no ability to develop and benefit from our Indian water. Therefore, time for Congressional approval of our Water Rights Settlement is of the essence.

The FBIC should not be required to litigate its claims after good faith bargaining with the Federal government. Yet, our Indian water rights claims have been filed, as required under federal and state law, with the Montana Water Court and its adjudication could proceed at any time. We agree with Master Rifkind who observed in his 1963 *Arizona v. Colorado* report that “Indian water rights litigation turns into sporting matches and endurance contests[,]” and is followed by dozens of years of “a platoon of lawyers at work, committed to either sustaining or destroying its result.”⁵⁶ The United States is too far into our settlement effort, which can now result in fair monetary compensation that will support the FBIC’s development of its agreed-upon Indian reserved water rights. The United States should see that litigating the FBIC water rights claims is no longer an option and should be avoided.

In short, litigation of Indian water rights is a lengthy and costly process, with an uncertain outcome—for everyone. We are seeking a settlement that provides us with “wet water,” with sufficient funding to settle our damage claims and allow for the development and use of our Indian water rights. That is the promise of settlement over litigation.

Conclusion

With the passage of our Water Rights Settlement Bill, Congress has an opportunity to address more than 100 years of neglect and failure of the United States to fulfill its commitments made in treaties and agreements with the Gros Ventre and Assiniboine Tribes. Indian water rights are one “of the four critical elements necessary for tribal sovereignty.”⁵⁷ Our Water Rights Settlement provides “the end of the trail”⁵⁸ to recognition and enforceability of our reserved water rights, self-sufficiency, and economic success—and supports the permanent, livable homeland for our people that was promised to us by the United States. Our Water Rights Settlement will confirm our negotiated Indian water rights, is designed to provide us with the ability to realize value from our confirmed water rights, will resolve our water-related claims, and achieve finality on these claims.⁵⁹

The United States' "role in all stages of the settlement process serves as a way to fulfill its trust responsibility to the tribes to secure, protect, and manage the tribes' water rights."⁶⁰ It provides funding that will assist us in establishing a viable agricultural economy and justifies desperately needed expenditures for programmatic responsibilities, including for the federal Fort Belknap Indian Irrigation Project.⁶¹ Rehabilitation, modernization, expansion, and restoration of this Project will prevent continued accrual of damages against the United States.

Our Indian water settlement is structured to promote economic efficiency on our Reservation and our Tribal self-sufficiency.⁶² It is an agricultural infrastructure plan; includes the development of clean and safe drinking water; provides for the FBIC to administer, manage, and enforce its reserved water rights; with additional economic projects that will allow us to develop our Indian reserved water rights and improve the poor economic condition of our members on the Reservation.

Approval of our Water Rights Settlement is an historic event—we are the *Winters* Tribes with a recognized Indian reserved water right since 1908, and we are the last tribes in Montana to achieve our water settlement with the United States.

Approval of our Water Rights Settlement will also remove the cloud over the non-Indian water rights holders from the uncertainty that exists from a failure to approve our Water Compact.

In the promise of a permanent, livable homeland, the United States promised an investment in community—a principal reason for justifying reservation water projects where some doubt its cost-benefit.

Indian policy is a classic example of the recognition that there is a community value [in water projects] and that subsidy can be an investment in the community. . . . And community value is a reason to support [Indian water] projects.⁶³

This may require the United States to look beyond the strict scrutiny of a cost-savings lens to settle our Indian reserved water rights. The West was built on expansive water projects for the non-Indian settlers,⁶⁴ which has been called a period of disregard for Indians while the United States subsidized water projects for non-Indians rather than Indians.⁶⁵

We have negotiated in good faith with our Federal Trustee, through the SIWRO. We proceeded under the assumption that the United States was also negotiating in good faith. Through transfer of federal power across the decades—at the Federal, State, and Tribal levels—we have persevered.

We urge the United States not to abandon the PIA standard for determining our Tribes' Indian reserved water rights, and to provide us with a fair settlement that allows us to develop our water rights to account for nearly a century-and-a-half of failure to provide the water delivery infrastructure needed for both our agricultural economy, promised with the creation of

the Fort Belknap Reservation and our vast land cessions, and for other purposes that make our Reservation a permanent homeland.

If Congress fails to support the FBIC water rights settlement after three decades of negotiations with the United States, including agreement with the quantification and administration of its Indian reserved water rights in 2001, the FBIC will continue to be stripped of its most valuable property right and tribal asset—water. We have compromised with the state water users, and the Federal government agreed to fund mitigation activities for non-Indian water users.

We ask that Congress support our urgency to pass our Water Rights Settlement now. Demonstrate the United States' fiduciary responsibility to the FBIC, as was done in another recent Congressional tribal water settlement.

We ask that Congress support of our proposed Water Rights Settlement and reaffirm the *Winters* Doctrine and PIA standards for Indian water rights settlements. Why? In the end, perhaps, Charles F. Wilkinson explained it the most eloquently in 1993:

“[I]t has been the role of morality that has touched my mind and my heart. It is a morality that comes from a sense of community, a sense of homeland, a sense of history, and a sense of promises. It is fascinating the way an abstraction such as morality can be so intensely practical. Without that morality, there would be no *Winters* doctrine and no water settlements, because it is a sense of morality that drives Indian policy. Tribal leaders are able to express this morality in an evocative and fair way, explaining the history, the promises, and the period of neglect, explaining the importance of homelands and other values that none of us fully comprehend. This morality has carried these Indian water settlements and other aspects of Indian policy. Morality matters profoundly because it is the backdrop for all the technical matters contained in these settlements.”⁶⁶

There is a fear in Indian country that the tide may continue to move against us with a shift in judicial policy starting at the top. The water wars are starting. But, with the passage of our Water Rights Settlement Bill, Congress can reaffirm the

historic Federal tribal relations and understandings [that] have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been omitted.⁶⁷

The continued policy of tribal self-determination and self-sufficiency must include the use of our water, our most important natural resource.⁶⁸ Under the current policy of the Department, one criteria under the framework for negotiating settlements is that “Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement.”⁶⁹

Our Water Rights Settlement Act is carefully balanced between our claims and the development of our negotiated Indian reserved water rights. Our Water Rights Settlement can support a renewed effort to develop our agricultural economy, provide for economic development that ensures the survival of our Tribes and people, and raise the standard of living and social wellbeing of our people to a level comparable to the non-Indian society.⁷⁰ We respectfully ask for your support in making our long journey complete. It is long overdue.

¹ Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, Natural Resources Journal, 46:399-400 (Spring 2006), citing *Winters v. United States*, 207 U.S. 564 (1908). [Hereinafter “2006 Anderson Paper”]

² U.S. Census Bureau, My Tribal Area, <https://www.census.gov/tribal/?aianihh-1150> (last visited May 12, 2019).

³ *Winters v. United States*, 207 U.S. 564 (1908).

⁴ See, e.g., *Arizona v. California*, 439 U.S. 419, 421 (1979); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 768 (Mont. 1985); *In re General Adjudication of All Water Rights to Use Water in the Gila River System*, 35 P.3d 68,76 (Ariz. 2001).

⁵ 2006 Anderson Paper at 429.

⁶ 2013 DOI Commission.

⁷ Montana Budget & Policy Center, Policy Basics: Taxes in Indian Country Part 2: Tribal Governments (November 2017), quoting *Tribal Nations in Montana: A Handbook for Legislators*, 2016.

⁸ 1990 Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223-9225, Mar. 12, 1990 [Hereinafter “1990 Criteria”]; see also Tracy Goodluck, former Deputy Director of the Secretary’s Indian Water Rights Office (currently, policy advisor to the White House domestic policy council), Presentation at the April 11, 2019, FBA Indian Law Conference, Albuquerque, New Mexico. [Hereinafter “Goodluck 2019 FBA Presentation”]

⁹ *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964) (quantifying the tribes’ *Winters* water rights on the basis of practicably irrigable acreage (PIA), holding that PIA is the only fair and feasible way to determine the measure of an Indian reservation water right.); See also, e.g., Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, Natural Resources Journal, 46:399-400, 429 (Spring 2006) (“Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework.”); *Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985); and *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988); *aff’d by equally divided court per curiam, Wyoming v. United States*, 492 U.S. 406 (1989), *cert. denied, Shoshone Tribe v. Wyoming*, 109 S.C. 3265 (1989).

¹⁰ MCA §§ 85-20-1001 through 85-20-1008 (ratified on April 16, 2001).

¹¹ Presentation by the Secretary’s Indian Water Rights Office (“SIWRO”) Consultation on the “Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. reg 9223-9225 (1990).” (2017). The SIWRO presenter acknowledged that, although every Administration since 1990 has followed the Criteria and Procedures for settlement of Indian Water Rights claims, the Administrations implementing them have had differing interpretations of this policy. Also, although the SIWRO at this time emphasized the position of Congressman Rob Bishop, Chairman of the House Natural Resources Committee, sent to the Departments of Justice and Interior (February 2015), the requirements set forth in the letter were immediately withdrawn and revoked as one of Chairman Raul Grijalva’s first acts as the new Chairman of the House Natural Resources Committee in 2019.

¹² April 11, 1956, ch. 203, § 6, 70 Stat. 109; 43 U.S.C. § 620e, Cost allocations, Indian lands; report to Congress.

¹³ E.g., see James P. Merchant & David M. Dornbusch, THE IMPORTANCE OF WATER SUPPLY TO INDIAN ECONOMIC DEVELOPMENT (1977), stating that in 1968, 370,000 acres of Indian were irrigated (1% of all Indian agricultural lands), contrasted with 5.1 percent of all irrigated agricultural lands in the seventeen western states; Hearing Testimony on S. 2969, Central Utah Completion Act, Committee on Energy and Natural Resources (September 18, 1990), Dennis B. Underwood, Commissioner of the Bureau of Reclamation, testified (p. 161): “The ceiling for CUP increased in 1972 and 1988. In 1990, the total cost of the Colorado River Storage Project, meaning all components, as authorized, is currently \$2,938,059,000.”; At the 2019 Federal Bar Association Indian Law Conference, Tracy Goodluck, Deputy Director of the Secretary’s Indian Water Rights Office, acknowledged what everyone knows, that “in the decades” since the 1908

Winters decision, “Federal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West.”

¹⁴ 373 U.S. 546 (1963).

¹⁵ Pub. L. No. 93-638 (1975) (codified at 25 U.S.C. § 5301 *et seq.*).

¹⁶ Secretary of the Interior, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (August 20, 2014), *quoting* “[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force.” Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

¹⁷ “Federal Water Policy, Message to the Congress,” Public Papers of the Presidents: Jimmy Carter, 1044-47 (June 6, 1978).

¹⁸ Michael J. Clinton, *Dealing with the Federal Sovereign*, Ch. 16, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), *Indian Water in the New West* (1993, University of Arizona Press).

¹⁹ 25 C.F.R. Part 171 (2008).

²⁰ 73 Fed. Reg. 11,028, 11,031, *citing Grey v. United States*, 21 Cl. Ct. 285 (1990), *aff’d* without opinion, 935 F.2d 281 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992). The FBIC claims can be distinguished from *Grey*, a lawsuit brought by allottees.

²¹ *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) 131 S. Ct. 2313, 2324-25 (2011), *dissent* (J. Sotomayor): “We have never held that all of the Government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe ‘bears the hall marks of a conventional fiduciary relationship,’ *quoting* [*United States v.*] *Navajo [Nation]*, 556 U.S. [287,] 301 (2009), we have consistently looked to general trust principles to flesh out the Government’s fiduciary obligations.” 563 U.S. at 202.

²² U.S. Department of the Interior Commission on Indian Trust Administration and Reform, Final Report 23 (Dec. 10, 2013) [Hereinafter “2013 DOI Commission”]; *See, also, United States v. White Mountain Apache*, 537 U.S. 465, 474-76 (2003); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015).

²³ *White Mountain Apache*, 537 U.S. at 472-73 (2003).

²⁴ 140 S. Ct. 2452 (2020).

²⁵ President Joe Biden, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (January 26, 2021).

²⁶ Mary C. Wood, *The Federal Trust Responsibility” Protecting Tribal Lands and Resources Through Claims of Injunctive Relief against Federal Agencies*, 39 Tulsa L. Rev. 355 (2003-2004). *See, e.g.*, 2013 DOI Commission.

²⁷ We recognize the recent exception with the water rights settlement of the Confederated Salish & Kootenai Tribes in 2020, the largest single water rights settlement approved by Congress.

²⁸ President Andrew Werk, Jr., President, Fort Belknap Indian Community, letter to Janet Yellen, U.S. Department of Treasury, Washington, D.C. (March 9, 2021). [Hereinafter “Werk 2021 Letter to Yellen”]

²⁹ FORT BELKNAP RESERVATION: DEMOGRAPHIC AND ECONOMIC INFORMATION (Oct. 2013).

³⁰ Werk 2021 Letter to Yellen.

³¹ U.S. Census Bureau, *My Tribal Area*, <https://www.census.gov/tribal/?aianihh=1150> (last visited May 12, 2019).

³² Mont. Dept’t of Public Health and Human Services, 2016 Mont. Vital Statistics (2018), https://dphhs.mt.gov/Portals/85/publichealth/documents/Epidemiology/VSU/VSU_2016_Annual_Report.pdf.

³³ Werk 2021 Letter to Yellen.

³⁴ U.S. Census Bureau, American FactFinder, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited May 12, 2019).]

³⁵ FORT BELKNAP RESERVATION: DEMOGRAPHIC AND ECONOMIC INFORMATION (Oct. 2013).

³⁶ *United States Bill of Complaint, Winters v. United States*, 207 U.S. 564 (1908).

³⁷ 2006 Anderson Paper at 429 (2006).

³⁸ Fort Belknap Indian Community, Natural Resources Consulting Engineers, Inc., *Comprehensive Water Development Plan Report* (February 2019). Dr. Wold Mesghinna, President of NRCE, and FBIC Water Engineer, assisted in the development of this Plan and is a renowned, well-respected Indian water rights engineer who is fair, measured, and has devoted his career to the protection, preservation, and development of Indian reserved water rights, working both for Indian tribes and the federal government in litigation and negotiated settlements.

³⁹ 55 Fed. Reg. 9223-9225, Mar. 12, 1990; *See, e.g.*, Presentation by the Secretary’s Indian Water Rights Office (“SIWRO”) Consultation on the “Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg 9223-9225 (1990)” (2017).

⁴⁰ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

⁴¹ 43 U.S.C. § 620e, Cost allocations, Indian lands.

⁴² General Accounting Office Report to the Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. Senate, *Indian Irrigation Projects (February 2006)*.

⁴³ 86 Fed. Reg. 7619 (February 1, 2021).

⁴⁴ 11 Stat. 657; Charles J. Kappler, *Indian Affairs: Laws and Treaties . . . Vol. II (Treaties)*, Washington, D.C., 1904, pp.736-739; and Grinnell Agreement (October 9, 1895); 29 Stat. 353 (1896), respectively.

⁴⁵ *Winters*, 207 U.S. 564 (1908).

⁴⁶ Treaty of January 11, 1909.

⁴⁷ *See* Senate Report No. 117 with transcript, 54th Congress, 1st Session, February 12, 1896.

⁴⁸ *Id.*

⁴⁹ Angie Debo, *AND STILL THE WATERS RUN*, Princeton University Press (1940), also explaining that “[t]he Indians had no conception of the surveyors’ numerical descriptions.”

⁵⁰ 1990 Criteria.

⁵¹ *Id.*

⁵² Jay Weiner Testimony, Senate Committee on Indian Affairs Hearing on Addressing the Needs of Native Communities through Indian Water Rights Settlements (May 20, 2015).

⁵³ This information is taken from the Montana Water Rights Commission archives, provided by the State.

⁵⁴ Fort Belknap-Montana Compact, Montana Code Ann., 85-20-1001, Article VII.A.4.c.

⁵⁵ The following historical information is taken from a Briefing Paper (June 2000) in the Commission archives (author unknown).

⁵⁶ Teno Roncalio, *The Horns of a Dilemma*, Ch. 15, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), *INDIAN WATER IN THE NEW WEST* (1993).

⁵⁷ *City of Albuquerque v. Browner*, 97 F. 3d 415, 418 (10th Cir. 1996).

⁵⁸ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

⁵⁹ 1990 Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223-9225, Mar. 12, 1990.

⁶⁰ CRS Report, *Indian Water Rights Settlements* (April 16, 2019), <https://crsreports.congress.gov>.

⁶¹ 1990 Criteria.

⁶² *Id.*

⁶³ Charles Wilkinson, *Lessons and Directions*, Ch. 17, p. 222, Thomas R. McGuire, William B. Lord, and Mary G. Wallace (Eds.), *INDIAN WATER IN THE NEW WEST* (1993). [Hereinafter “Wilkinson Lessons”]

⁶⁴ *See* Goodluck 2019 FBA Presentation, stating that “[I]n the decades” since the *Winters* decision, “Federal policy and expenditure supported extensive development of water resources to benefit non-Indian communities across the West.”

⁶⁵ Wilkinson Lessons, at 223 (referencing David Getches, a respected scholar in Indian law).

⁶⁶ *Id.*

⁶⁷ Indian Trust Asset Reform Act, Pub. L. No. 114-178, 130 Stat. 432 (Jun. 22, 2016) (codified at 25 U.S.C. § 5601).

⁶⁸ *See* Stephen Cornell and Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy*, Harvard Kennedy School Faculty Research Working Paper Series (Nov. 2010), 3.

⁶⁹ 1990 Criteria.

⁷⁰ American Indian Policy Review Commission, *Final Report to Congress*, (May 17, 1977), 130, <https://files.eric.ed.gov/fulltext/ED164229.pdf>.