

## Calendar No. 259

111TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ 111-118

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### AUTHORIZING THE CROW TRIBE OF INDIANS WATER RIGHTS SETTLEMENT, AND FOR OTHER PURPOSES

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January 21, 2010.—Ordered to be printed

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Mr. DORGAN, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 375]

The Committee on Indian Affairs, to which was referred the bill, S. 375, to authorize the Crow Tribe of Indians water rights settlement, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

#### PURPOSE

The purpose of S. 375 is to achieve a fair, equitable and final settlement of claims to water rights in the State of Montana by the Crow Tribe and the United States for the benefit of the Tribe and tribal allottees. The bill would ratify the Crow Tribe-Montana Water Rights Compact entered into by the Tribe and the State of Montana on June 22, 1999, direct the Secretary of the Interior to execute the Crow Tribe-Montana Water Rights Compact, and authorize the appropriation of funds necessary for the implementation of the Compact and this bill.

#### BACKGROUND

##### *The Crow Reservation*

The Crow Tribe's Reservation is located in southern Montana along the Montana-Wyoming border. The Reservation is the largest of the seven Indian reservations located in Montana and one of the largest in the United States. The Reservation encompasses approximately 2.3 million acres. The Reservation includes three mountain ranges, rolling upland plains and fertile valleys. Rainfall averages 12 inches per year. Reservation agriculture production consists

mostly of small grains and hay for livestock. Expansive grasslands support herds of cattle, horses and buffalo as well as abundant elk, deer and other wildlife.

The Tribe has two treaties with the United States dealing with the Tribe's lands. The September 17, 1851 Treaty of Fort Laramie recognized and acknowledged a land area of about 38 million acres as the territory of the Crow Tribe, which included within it many valuable water resources including the Bighorn and Yellowstone Rivers. The May 7, 1868 Fort Laramie Treaty reduced the Tribe's territory to a reservation of about 8 million acres, with part of the northern boundary being the mid-channel of the Yellowstone River.

Land cessions in the late 19th and early 20th Centuries further reduced the Reservation acreage, including removal of all lands along the Yellowstone River. The 1904 cession removed approximately the northern third of the existing Reservation. This land is known as the "Ceded Strip." The size of the Ceded Strip is approximately 1.1 million acres. On the Ceded Strip, the Huntley Irrigation Project was developed. The Tribe was never paid for the sale of the lands for the Huntley Irrigation Project, nor was the Tribe able to get back unsold lands, as promised. In 1958 Congress passed another law restoring tribal ownership over a portion of the Ceded Strip. This law restored 15,553 acres of surface ownership and 80,423 acres of subsurface mineral ownership to the Tribe.

The tribal land base within the exterior boundary of the Reservation was also divided by various allotment acts. By 1935, there were 5,507 allotments on the reservation, consisting of 2,054,055 acres. Many allotments passed into fee land status and were alienated from the Tribe or individual Indians to non-Indians. This resulted in non-Indian land ownership and claims of Montana water rights throughout the Reservation. Today, Reservation land is held approximately half in trust and half in fee status.

The primary sources of water on the Reservation are the Bighorn River, the Little Bighorn River, Pryor Creek and several smaller streams. The Bighorn and Little Bighorn Rivers originate in Wyoming and flow north into the Reservation. After flowing through the Reservation, the Little Bighorn enters the Bighorn River just outside the Reservation boundary near the town of Hardin, Montana. The Bighorn River then continues north to become a tributary of the Yellowstone River.

The Reservation is home to approximately 8,000 of the 11,900 enrolled Tribal members. Close to 40 percent of the enrolled Tribal members are below the age of 18. The Reservation has high levels of unemployment and poverty, severe shortages of housing, and serious needs for health care and other basic services. The lack of water infrastructure and opportunities to develop water projects on the Reservation directly contributes to these problems.

In the 110th Congress, at a Committee hearing on the bill, the Tribe's Chairman testified to the importance of water to the Crow people.<sup>1</sup> He stated that water is vital to the Tribe's health and a central part of the Tribe's culture and traditions. The Chairman

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<sup>1</sup>*Hearing on S. 3355, the Crow Tribe Water Rights Settlement Act of 2008: Senate Committee on Indian Affairs*, 110th Congress (Sept. 11, 2008) (testimony of Cedric Black Eagle, Vice-Chairman of the Crow Tribe); *See also, e.g.*, Robert H. Lowie, *The Crow Indians*, at 89 (1956); Edward Curtis, *The North American Indian*, Vol. VI, Johnson Reprint Co., Ltd., at 8, 54-55, 71 (1970); Edward Curtis, *The North American Indian*, Vol. IV, Johnson Reprint Co., Ltd., at 54-56 (1970).

cited the importance of water in the Tribe's creation story, where the land is brought up from the water. He testified that for the Crow people all things of tangible substance, all things that we can touch, feel, smell, see and hear come from water. As an example, he noted that in the Tobacco Dance Crow people repeat the central truth that all things come from water and with water they go. He also testified that tribal ceremonies, such as the sweat lodge, depend upon particular uses of water that are sacred to the Crow people.

#### *Yellowtail Dam*

The Yellowtail Dam, located on the Bighorn River, was authorized by Congress in 1944, and construction began in 1961. Yellowtail Dam reservoir, known as the Bighorn Lake, has a total storage capacity of 1,328,360 acre-feet and extends south from the dam, across the Montana-Wyoming state line, and about 20 miles into the State of Wyoming. The dam and reservoir are operated by the United States Bureau of Reclamation. Authorization to construct the dam also included authority to condemn tribal lands necessary for construction of the dam.<sup>2</sup> Prior to this federal action, the Tribe had sought to maintain the right to develop its own power and water projects for at least fifty years.<sup>3</sup>

Section 12 of S. 375 provides the Tribe shall have the exclusive right to develop and market power generation as a water development project on the Yellowtail Afterbay Dam. The Bureau of Reclamation (BOR) generally has the ability, pursuant to a federal project's authorizing legislation, to enter into a lease of power privilege agreement with third parties to develop power on any or all features of a federal project. In entering into these agreements, BOR normally designates that the lessee is responsible for an appropriate portion of the operation and maintenance costs associated with its facilities. While the authorization set forth in S. 375 is not technically a lease of power privilege, the Tribe intends to work with BOR to appropriately allocate the development, operation and maintenance costs associated with a Tribal power project on the Yellowtail Afterbay Dam developed pursuant to S. 375.

#### *Municipal, rural, and industrial water system*

The Bureau of Indian Affairs currently operates and maintains an on-reservation water system that is inadequate to meet the needs of the Reservation. As a result, tribal members must haul their water from other sources or buy bottled water. The use of large plastic containers by tribal members to store drinking water is common on the Reservation. Tribal members often make trips to haul their water from springs in the mountains during the summer and buy bottled water in the winter. Meeting this basic domestic water need can have a significant impact on an impoverished Reservation population.<sup>4</sup>

<sup>2</sup> Lands submerged by the reservoir and its surrounding area on the Wyoming side of the state line were condemned as well.

<sup>3</sup> *Opening of the Crow (Montana) Indian Reservation: Hearing Before the S. Comm. on Indian Affairs*, Part III, 64th Cong. 22 (1916) (letter from Crow Tribe Council to S. Comm. on Indian Affairs).

<sup>4</sup> Approximately 41% of Crow tribal members living on Reservation live below the poverty line. See, LAO Environmental, Crow Indian Reservation: Natural, Socio-Economic, And Cultural Re-

Moreover, the limited supply of water that is available is often not fit for human use. Boiled water orders are a part of the way of life on the Reservation. There is also high likelihood that treated water from the Crow Agency water treatment plant contains a parasite known as cryptosporidium, which the Environmental Protection Agency (EPA) classifies as a risk to human health,<sup>5</sup> and can cause mild to severe diarrhea, dehydration, stomach cramps, and fevers.<sup>6</sup>

In 2006, EPA promulgated a final Federal rule requiring public water systems to test for the presence of *E. coli* in untreated water from the lake or river that supplies the system's drinking water.<sup>7</sup> EPA issued the final rule because an annual average of 50 colonies of *E. coli* per 100 milliliters of untreated water is a strong indicator that a parasite known as cryptosporidium is also in the untreated water.<sup>8</sup> EPA decided to require *E. coli* testing because these tests are 10% of the cost of testing for cryptosporidium.<sup>9</sup>

Under the Federal rule, a public water system like the Crow Agency water treatment plant must either test the untreated water twice a month for one year, or once a month for two years.<sup>10</sup> The BIA began testing for *E. coli* in January of 2008 and, in consultation with EPA, decided by July of 2008 to stop testing the untreated water because, with only half of the data collected, officials knew the annual average of *E. coli* colonies in the water would never be below 50 colonies per 100 milliliters.<sup>11</sup> The sample with the highest level of *E. coli* contained 7,179 colonies of *E. coli* in 100 milliliters of water.<sup>12</sup>

While the Crow Agency water treatment facility can treat water infused with the *E. coli* bacteria, the facility is not equipped to eliminate cryptosporidium and is in need of maintenance and repair.<sup>13</sup> Thus, the Crow Agency water treatment plant must either institute the next phase under EPA's rules, which is to test for cryptosporidium, on a monthly basis for at least a year, or must upgrade their water system to treat cryptosporidium.<sup>14</sup> In the meantime, tribal members living on the Crow Reservation consume and bathe in water that is likely contaminated with cryptosporidium.

Some tribal members living on the Reservation use wells on their property as a source of running water for their homes, but these tribal members do not drink the rancid water. Initial results from

sources Assessment and Conditions Report 31 (2002) *included in* U.S. Dep't of the Interior, Bureau of Land Mgmt., Final Statewide Oil and Gas Envtl. Impact Statement and Proposed Amendment of the Powder River and Billings Resource Mgmt. Plans (2003).

<sup>5</sup> Office of Science and Tech. & Office of Water, U.S. Envtl. Prot. Agency, EPA-822-R-01-009, Cryptosporidium: Drinking Water Health Advisory (2001).

<sup>6</sup> 71 Fed. Reg. 654, 660 (Jan. 5, 2006).

<sup>7</sup> 71 Fed. Reg. 654 (Jan. 5, 2006).

<sup>8</sup> 71 Fed. Reg. 654, 657 (Jan. 5, 2006).

<sup>9</sup> Letter from Barbara Burkland, U.S. Envtl. Prot. Agency, Region 8 at 2 (Sept. 17, 2009).

<sup>10</sup> 71 Fed. Reg. 654, 664-65 (Jan. 5, 2006).

<sup>11</sup> Letter from Barbara Burkland, U.S. Envtl. Prot. Agency, Region 8 at 2 (Sept. 17, 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* See also, LAO Environmental, Crow Indian Reservation: Natural, Socio-Economic, and Cultural Resources Assessment and Conditions Report 102 (2002) *included in* U.S. Dep't of the Interior, Bureau of Land Mgmt., Final Statewide Oil and Gas Envtl. Impact Statement and Proposed Amendment of the Powder River and Billings Resource Mgmt. Plans (2003) (noting that "The quality of water on the Crow Indian Reservation is concern. The water and wastewater systems at Crow Agency are severely overworked and in need of maintenance.").

<sup>14</sup> Letter from Barbara Burkland, U.S. Envtl. Prot. Agency, Region 8 at 2 (Sept. 17, 2009).

an ongoing study conducted<sup>15</sup> by Little Big Horn College of well water within the Reservation found that seventy to eighty percent of the wells tested were contaminated with coliform bacteria<sup>16</sup> at levels that made the water a health hazard. Of the remaining wells not contaminated with coliform bacteria, sixty percent contained dissolved solids that made the water undrinkable.

Section 6 of the bill provides authorization for the construction of a new municipal, residential, and industrial system (“MR&I System”) to meet this basic need that most take for granted. Section 6(f) provides that at the request of the Tribe, the Secretary will enter into an agreement for the design and construction of the MR&I System. The Committee has been informed informally that the Tribe and the Secretary of Interior intend to work cooperatively in the negotiation of this agreement for construction of the MR&I System to ensure that the System is constructed in a cost-effective manner. The Committee has also been informally informed that, as the lead agency, the BOR will provide oversight over the agreement to ensure cost efficiency as the MR&I System is constructed. Finally, pursuant to section 6(g) the components of this system will pass from the United States to the Tribe upon the completion of each of the components.

#### *Crow Irrigation Project*

The first general authorization for the construction of the Crow Irrigation Project on the Reservation was in an agreement between the Tribe and the United States entered into on December 8, 1890, and ratified by Section 31 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989. Subsequent acts provided for continued construction and development to date. Nearly all of the irrigation facilities were completed before 1940. Operation and maintenance of the Crow Irrigation Project are currently performed by the Bureau of Indian Affairs Office located in Crow Agency, Montana.

The Project has nine diversion dams, one storage dam with a capacity of about 23,000 acre-feet, nine canal systems including roughly 320 miles of canals, five drainage systems running over 45 miles, and more than 2,300 irrigation structures. The primary source of water for the Project originates on tribal lands in the Big-horn Mountains which border the west side of the Reservation. Essentially all irrigation is supplied by surface water sources. In 2006, the Project served approximately 1,118 water users. The primary irrigated crops are hay and alfalfa, irrigated pasture, sugar beets and grains.

Engineering studies completed for the rehabilitation of the Crow Irrigation Project show that the Project’s irrigated area currently consists of 63,365 acres. The Project lands are located along the Big Horn and the Little Big Horn Rivers, Pryor Creek, and Lodge Grass Creek, all tributaries to the Yellowstone River. There are eleven Project-Operated Units in the Crow Irrigation Project scat-

<sup>15</sup>This study is funded by the U.S. Evtl. Prot. Agency to Margaret Eggers, a graduate student at Montana State University, and in conjunction with the Little Big Horn College. See <http://cfpub2.epa.gov/ncer/abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/8260> (last visited Sept. 18, 2009), see also <http://bricc.lbhc.edu/?page=research/water-quality> (last visited Sept. 18, 2009).

<sup>16</sup>The presence of coliform in the water is an indicator that an organism of fecal origin may also be in the water. See <http://www.epa.gov/safewater/contaminants/ecoli.html> (last visited Sept. 17, 2009).

tered over an area 50 miles long and 60 miles wide, all within the Reservation. In 1999, approximately 61 percent of Crow Irrigation Project irrigated lands were held in trust by the United States for the benefit of individual Indian landowners and for the Crow Tribe.

The Crow Irrigation Project serves Indian and non-Indian land owners. Non-Indian landowners in the three irrigation districts and private ditch companies in the Crow Irrigation Project are organized under Montana statutes and are legal entities. The Irrigation District Boards, chartered under state law, represent only owners of fee lands.

In a 2006 report on Indian Irrigation Projects, the Government Accountability Office found that Crow Irrigation Project fees were insufficient to cover the project's operations as well as maintenance costs. The Bureau of Indian Affairs reported to GAO that deferred construction and maintenance costs were more than \$54 million. Project financing problems have been long known. In 1916, Edgar Merritt, Assistant Commissioner of Indian Affairs, testified before the United States Senate Committee on Indian Affairs that the economics of the Crow Irrigation Project had been a "hopeless failure."<sup>17</sup> In addition to the project falling into disrepair, upgrades are needed. There is a lack of adequate water measurement, and there is a need for automated gate controls at key diversion points, as well as installation of motorized gate controls.

Section 5 of S. 375 authorizes the rehabilitation and betterment of the Crow Irrigation Project so that all Project lands can be efficiently utilized for farming and irrigation projects in order to maximize the Tribe's economic development opportunities. Section 5 provides that BOR shall be the lead agency for the rehabilitation and betterment of the Crow Irrigation Project. The Committee was informally informed that the BOR, in its lead agency capacity intends to assess the Crow Irrigation Project Betterment Evaluation prepared by HKM Engineering, dated July 31, 2008, to review the benefits it provides to allottees.

#### *Crow Tribe water rights*

In 1975, the United States, on behalf of the Crow Tribe, brought suit in U.S. District Court for the District of Montana to obtain a final determination of the Tribe's water rights.<sup>18</sup> In 1979, the State of Montana initiated a general stream adjudication and created the Montana Reserved Water Rights Compact Commission 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 state-wide water adjudication and 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.<sup>19</sup> Pending the outcome of Compact Commission proceedings, the litigation in the U.S. District Court was stayed in 1983.<sup>20</sup>

<sup>17</sup> *Opening of the Crow (Montana) Indian Reservation: Hearing Before the S. Comm. on Indian Affairs*, Part IV, 64th Cong. 22 (1916) (testimony of Edgar B. Merritt, Commissioner on Indian Affairs).

<sup>18</sup> *See, U.S. v. Big Horn Low Line Canal Company, et al.*, No. CIV-75-34-BLG (filed April 17, 1975).

<sup>19</sup> Mont. Code Ann. § 85-2-702

<sup>20</sup> *See, Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187, 1189 (9th Cir. 1983).

The Crow Tribe and the Compact Commission successfully negotiated a settlement of the Tribe's water rights claims. The Crow Tribe-Montana Compact was approved by the Montana legislature in 1999.<sup>21</sup> Once approved by S. 375, and ratified by the Tribe's membership, the Compact is the full and final settlement of the Tribe's water rights within the State of Montana and the Tribe waives any claims to Montana water rights not contained in the Compact.

Generally speaking, S. 375 and the Compact provide for a May 7, 1868 priority date for the tribal water rights, not including the Bighorn Lake storage allocation portion of the tribal water rights which is given a priority date of the water right held by the BOR.<sup>22</sup> Existing state uses are protected from the assertion of seniority by the Tribe, and new development of the tribal water rights will be junior in priority to existing uses. In every basin except the Bighorn River Basin, the Tribe may also purchase state water rights. The State of Montana will issue no new water rights within the basins of the Compact.

The Committee was informally informed that one of the documents being developed for purposes of implementation of the tribal water rights under Compact is a list of the tribal water uses developed as of the date the Compact was ratified by the Montana legislature, June 22, 1999. It was explained to the Committee that this list is significant for a number of reasons relating to administration of the tribal water rights. For example, tribal water uses developed as of June 22, 1999, include water uses developed by allottees using the tribal water rights as of that date. The Committee was informally informed that the United States has an interest in reviewing this list to confirm that the list includes all such allottee water uses. The Committee was also informally informed that the Tribe also acknowledges and agrees that tribal water uses developed as of June 22, 1999, includes water uses developed by allottees, and that the United States shall review the list as developed to confirm that the list includes all such allottee water uses.

Congressional approval of S. 375 and the Compact is needed to resolve the claims of the Tribe against the United States and releases the United States from liability. Without legislation, the Tribe, the United States, and other parties would be forced to engage in lengthy and costly water rights litigation to settle the rights of water users.

#### LEGISLATIVE HISTORY

In the 110th Congress, Senator Tester introduced a bill to settle the Crow Tribe's water rights with Senator Baucus as an original co-sponsor.<sup>23</sup> The bill was referred to the Committee on Indian Affairs. On September 11, 2008, the Committee held a hearing on this bill. At an open business meeting on September 25, 2008, the Committee approved the bill by a voice vote, but the bill was not reported to the full Senate pending resolution of Senator Barrasso's concerns. The 110th Congress expired without the bill being considered on the Senate floor.

<sup>21</sup> Mont. Code Ann. § 85-20-901.

<sup>22</sup> See, Article III of the Compact for specifics of the priority dates.

<sup>23</sup> In the 110th Congress the bill was numbered S. 3355.

In the 111th Congress, Senator Tester introduced S. 375, the Crow Tribe Water Rights Settlement Act of 2009, on February 4, 2009, and the bill was referred to the Committee. Senator Baucus is an original cosponsor. S. 375 is substantially similar to the bill introduced in the 110th Congress. At an open business meeting on September 10, 2009, the Committee approved S. 375, with an amendment in the nature of a substitute.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

*Amendments addressing Wyoming concerns*

On September 10, 2009, the Committee held a business meeting on the bill and at that meeting approved a substitute amendment that addressed a number of issues, including specific issues raised by stakeholders in the State of Wyoming who were concerned that the bill, as introduced, might be interpreted to affect their rights or the interests of the State of Wyoming.

The Committee begins with the observations that the Compact was negotiated by representatives of the Crow Tribe, the State of Montana and the United States in the late 1990s and that the parties to the Compact, once it has been approved by Congress, will consist of the Crow Tribe, the State of Montana, and the United States—not the State of Wyoming or water users within the State of Wyoming. Further, under the terms of the Compact itself, within 180 days after the Compact has been ratified by the last of the three parties, the State of Montana, the Tribe, and the United States must file a joint motion to approve a proposed decree in a general stream adjudication case that is pending in the Water Court of the State of Montana. In that adjudication case, the water court is only adjudicating water rights located in the State of Montana, and the State of Wyoming and users of Wyoming water rights are not parties to the case.

Water users in Wyoming raised concerns about the Compact because (i) the Bighorn River runs northward out of Wyoming across the Wyoming-Montana state line and flows directly into the Crow Indian Reservation in south central Montana, (ii) the Bighorn River is a significant interstate tributary of another interstate stream, the Yellowstone River, which is the subject of the Yellowstone River Compact approved by the States of Montana, North Dakota and Wyoming on December 8, 1950, pursuant to the Act of June 2, 1949 (P.L. 81-83), and (iii) the tribal-state Compact is being ratified through legislation of the United States Congress. The substitute amendment adopted at the Committee's business meeting on September 10, 2009, addresses these concerns.

*Amendments to Section 10*

Section 10(c)(3) of the bill sets forth a provision whereby the Tribe reserves certain claims for damages or injuries to water rights arising outside of the State of Montana. The substitute amendment strikes this paragraph. The Committee notes that the waivers and releases authorized in the bill are all limited to the Tribe's "water rights within the State of Montana" or to events that have occurred in the State of Montana. Accordingly, a reservation of rights for damages or injuries arising outside of the State of Montana is unnecessary.



*Amendments to Section 12*

The substitute makes an amendment to Section 12(a) of the bill (by adding a new paragraph to the end of that subsection) to clarify the meaning and intent of certain provisions of the “Streamflow and Lake Level Management Plan,” an instrument that was negotiated separately among the Tribe, the State of Montana, and the Bureau of Reclamation (the “Plan”). Section 1 of the Plan defines the term “Instream Flow” for the purposes of the Plan as “the water flowing in the Bighorn River Released from the Yellowtail Afterbay Dam and maintained throughout the reach” from that dam to a certain point downstream “to maintain the fisheries resource.” Section 2 of the Plan includes several provisions that require the Tribe to “dedicate” a specified quantity of the tribal water rights to “Instream Flow” in the Bighorn River.

The Committee notes that the Streamflow and Lake Level Management Plan is a plan that was entered into among the Tribe, the State of Montana, and the Department of the Interior to achieve a variety of water management objectives. The plan is not an instrument transferring or creating water rights; rather, as the amendment to Section 12(a) states—

[A]ny requirement in that plan that the Crow Tribe dedicate a specified percentage, portion, or number of acre feet of water per year of the tribal water rights to instream flow means, and is limited in its meaning and effect to, an obligation on the part of the Crow Tribe to withhold from development or otherwise refrain from diverting or removing from the Bighorn River the specified quantity of water for the duration, at the locations, and under the conditions set forth in the applicable requirement.

Water users in the State of Wyoming raised concerns that, because the plan is expressly referred to in Section 12 of the bill and in the Compact, the provisions in the Plan requiring the Tribe to “dedicate” a portion or quantity of the tribal water rights to instream flow between two points of the Bighorn River might be interpreted as creating, confirming or ratifying a water “use” which might be interpreted to create a new or additional water delivery obligation that the State of Wyoming and/or water users in Wyoming would be obligated to fulfill. The amendment to Section 12(a) addresses this concern, by clarifying that the Tribe’s “dedication” of a quantity of its tribal water rights to instream flow under the Plan is not a use or commitment of water that creates any new or additional upstream or interstate obligations.

This clarification in the amendment to Section 12(a) is consistent with existing provisions in that subsection of the bill, in particular paragraph (1) of subsection (a). Section 12(a)(1) of the bill states that “[n]othing in the Compact or [the Plan] . . . limits the discretion of the Secretary under section 4F of that [P]lan”—which sets forth a list of 6 factors or criteria for making decisions relating to instream flow in the Bighorn River and desired lake levels in the Bighorn Lake—or “requires the Secretary to give priority to any factor described in section 4F of the plan over any other factor described in that section.”

The purpose of Section 12(a) is to make it clear that, notwithstanding the Compact or Plan, the Bureau retains its discretion in

balancing the interests of the various stakeholders—including Montana, Wyoming, and Federal interests—in managing the lake levels in Bighorn Lake. The bill, the Compact and the Plan do not alter or limit the Secretary’s authority or discretion in balancing these interests in its management decisions for Bighorn Lake.

*Amendments to Section 13*

The substitute also includes amendments to Section 13 that address, for the most part,<sup>24</sup> concerns that arise from provisions in the Compact<sup>25</sup> that state that, with certain exceptions, water rights recognized under Montana state law in the Bighorn River Basin within Montana that have a priority date before the Compact was ratified by the Montana legislature in June of 1999 “are protected from an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date” of such ratification as well as from “new development of the Tribal Water Right after the date” of such ratification. Because these protections are part of a compact that is being ratified by an act of Congress, water interests in the State of Wyoming have expressed concern that the protections from the Tribe’s senior water right afforded under the Compact to junior Montana water rights might be interpreted to cause harm or somehow increase the risk to upstream water users in the State of Wyoming.

Accordingly, to preclude any such interpretation of the Act or the Compact, the amendment approved by the Committee would add a new paragraph to Section 13(f) that states that the Compact provisions that afford these protections to certain water rights recognized under the laws of Montana “do not limit or otherwise affect existing or future water rights (including the exercise of any such rights) outside of that State.”

This particular amendment, added as a new paragraph to the end of subsection (f), is consistent with other provisions in subsection (f) of Section 13 which generally relate to the 1950 Yellowstone River Compact between Wyoming, Montana, and North Dakota. Subsection (f) of Section 13 makes it clear that the bill, the Compact and the Plan have no effect on the meaning, interpretation, implementation, application or effect of the 1950 interstate water compact, or on any of the rights, requirements, obligations, allocations of water, or any present or future claim, defense or other position asserted in a legal, administrative or other proceeding relating to that interstate water compact.

Subsection (f) of Section 13 also makes it clear that the bill, the Compact and the Plan do not: (i) make an allocation or apportionment of water between states, (ii) address or imply whether, how, or to what extent, if any, the tribal water rights or any portion of the tribal water rights should be accounted for as part of or otherwise charged against any allocation of water made to a State under the provisions of the Yellowstone River Compact; or (iii) whether, how, or to what extent, if any, the Yellowstone River Compact includes or does not include the tribal water rights or the water right

<sup>24</sup> Some minor or technical amendments were made to Section 13 for clarification purposes only. The substantive amendments to Section 13 relate to the Compact provisions set forth in footnote 24.

<sup>25</sup> See Article III (A)(6)(a)(1) and (2), (B)(6)(a)(1) and (2), (E)(6)(a)(1) and (2), and (F)(6)(a)(1) and (2) of the Compact.

of any Indian tribe as part of any allocation or other disposition of water under that compact.

In short, subsection (f) of Section 13, as amended, was included in the bill to clarify that the bill and the Compact that it approves are not intended to tip the balance, directly or indirectly, that was struck between the signatory states to the 1950 Yellowstone River Compact or to make an allocation or apportionment of water between any of those states independent of the 1950 Yellowstone River Compact.

*Other amendments*

*Amendment to Section 6*

The amendment added a new subsection (g) to Section 6, which conveys title of MR&I System (as defined in S. 375) facilities to the Tribe after completion of the facility or section. This amendment was included to address the Administration's concern. In exchange for taking over title to the MR&I system and facilities, Section 14(f) was also amended to include the establishment of the MR&I OM&R Account. The MR&I OM&R Account will be used to fund a portion of the Federal trust responsibility for OM&R for this project in the future, with the balance of such costs to be borne by the Tribe. The immediate transfer of title from the Federal government to the Tribe eliminates any future liability for the United States for this system, and constitutes a form of consideration for the MR&I OMR Account authorization.

*Amendment to Section 11*

To address the Administration's concern about the "early availability of funds," Section 11(e) in S. 375 was amended to provide that, with the exception of very limited funds necessary to effectively begin to implement the settlement (\$4,776,000 for the Tribal Compact Administration Account), none of the funds deposited into the Crow Settlement Fund shall be available to the Tribe until the enforceability date of the settlement occurs, the conditions for which are set forth in Section 10(e) of the bill.

*Amendments to Section 14*

Sections 14(l) & (m) authorizing of imputed interest on funds placed into the Crow Settlement Fund prior to the enforceability date of the settlement were deleted. These changes were in response to Administration concerns that these provisions created some difficulties for budgeting on a fiscal year basis. Rather than authorize appropriations for imputed interest that accrued from enactment through the enforceability date on funds in the Crow Settlement Fund, the interest was estimated and added to the six Crow Settlement Fund accounts (Section 14(c)–(h)) as part of the bill.

SECTION-BY-SECTION ANALYSIS OF S. 375, AS AMENDED

*Section 1. Short title*

Section 1 provides the short title of S. 375 as the "Crow Tribe Water Rights Settlement Act of 2009."

### *Section 2. Purposes*

This section states that S. 375 achieves a fair, equitable, and final settlement of claims to water rights in the State of Montana for the Crow Tribe and the United States for the benefit of the Tribe and allottees. The section also states that S. 375 authorizes and ratifies the Crow Tribe-Montana Water Rights Compact entered into by the Tribe and the State on June 22, 1999. The section further states that S. 375 will require the Secretary of the Interior to execute the Compact, to perform all actions necessary to carry out the Compact, and to appropriate funds necessary for the implementation of the Compact and this bill.

### *Section 3. Definitions*

This section defines important terms used in S. 375.

### *Section 4. Ratification of Compact*

This section ratifies the entire Compact, except as modified by S. 375, and also ratifies any executed amendments to the Compact that are consistent with S. 375. To the extent that the Compact does not conflict with S. 375, this section also directs the Secretary of the Interior to promptly execute the Compact, including all exhibits to or parts of the Compact requiring the signature of the Secretary, and to carry out all Federal compliance necessary to implement the Compact, including compliance with all applicable environmental acts and regulations.

### *Section 5. Rehabilitation and improvement of the Crow Irrigation Project*

This section requires the Secretary, acting through the Commissioner of Reclamation, to carry out all activities necessary to improve the water diversion and delivery features of the Crow Irrigation Project, in accordance with an agreement to be negotiated between the Secretary and the Tribe. This section provides that the scope of the Project's improvement will be as described in the "Engineering Evaluation of Existing Conditions, Crow Agency Rehabilitation Study" prepared by HKM Engineering, Inc. and dated July 2008. This section also states that the federal government will not seek reimbursement for costs incurred in support of the Project from users of the tribal water right.

This section provides that the Secretary's obligation will not exceed \$160,653,000, except that the total amount of \$160,653,000 will be increased or decreased, as appropriate, based on ordinary fluctuations from May 1, 2008, in construction cost indices applicable to the types of construction involved in the rehabilitation and improvement.

This section also states that at the Tribe's request, the Secretary will enter into an agreement with the Tribe to implement the provisions of this section by which the Tribe will plan, design, and construct any or all of the rehabilitation and improvement required by this section.

### *Section 6. Design and construction of MR&I System*

This section requires the Secretary, acting through the Commissioner of Reclamation, to carry out such activities as are necessary to design and construct the water diversion and delivery features

of the MR&I System (as defined in S. 375), in accordance with an agreement to be negotiated between the Secretary and the Tribe. The design and construction the MR&I System will be as described in the "Crow Indian Reservation Municipal, Rural and Industrial Water System Engineering Report" prepared by HKM Engineering, Inc. and dated July 2008. This section also states that the federal government will not seek reimbursement for costs incurred in support of the MR&I System for costs allocated to the Tribe.

This section provides that the Secretary's obligation will not exceed \$200,840,000, except that the total amount of \$200,840,000 will be increased or decreased, as appropriate, based on ordinary fluctuations from May 1, 2008, in construction cost indices applicable to the types of construction involved in the design and construction.

This section also states that at the Tribe's request, the Secretary will enter into an agreement with the Tribe to implement the provisions of this section by which the Tribe will plan, design, and construct any or all of the design and construction required by this section.

This section provides that the Secretary shall transfer title of each MR&I System facility or section to the Tribe upon completion of the construction each facility or section of the MR&I System that is operating and delivering water.

This section provides that after title to the MR&I System is transferred to the Tribe the United States may not be held liable for any act, omission, or occurrence related to the land, buildings, or facilities conveyed other than damages caused by acts of negligence committed by the United States, or employees or agents of the United States.

After title to the MR&I System is transferred to the Tribe and amounts are deposited in the MR&I System OM&R account (as defined in S. 375), this section states that the federal government is not obligated to pay for the operation, maintenance and replacement costs of the MR&I System.

#### *Section 7. Tribal water rights*

Section 7(a) provides that it is the intent of Congress to provide each allottee with benefits that are equivalent to or exceed the benefits allottees currently possess, taking into account certain considerations. Section 7(b) states that the tribal water rights are ratified, confirmed, and declared to be valid, with use of the tribal water rights subject to the Compact's terms and conditions. Section 7(c) requires that the tribal water rights will be held in trust by the United States for the use and benefit of the Tribe and the allottees.

Section 7(d) provides that any entitlement to water of an allottee will be satisfied from the tribal water rights and that allottees are entitled to a just and equitable allocation of water for irrigation purposes. Section 7(d) further states that the water rights and other benefits granted by this bill will be considered full satisfaction of any claim of an allottee waived pursuant to section 10(a)(2).

Section 7(d) also provides that once remedies under the tribal water code or other applicable tribal law have been exhausted, an allottee may seek relief under section 7 of the Act of February 8, 1887, or other applicable law. Section 7(d) also states that the Sec-

retary has the authority to protect allottees' rights as provided in this section.

Section 7(e) states that, once the Secretary has approved the tribal water code pursuant to Section 7(f)(3)(B), and except as provided in paragraph (2), the Tribe maintains the sole authority to allocate, distribute, and lease the tribal water rights in accordance with the Compact. Section 7(e) also provides that, subject to the tribal water code and applicable tribal and Federal law, an allottee may, pursuant to the tribal water code, lease any interest in land held by the allottee, together with any water right determined to be appurtenant to the interest in land.

Section 7(f) provides that within three years after the Crow tribal members ratify the Compact, the Tribe will enact a tribal water code that provides for the management, regulation and governance of all uses of the tribal water rights in accordance with the Compact. The Tribe's water code must be approved by the Secretary and must recognize allottee interests in water.

#### *Section 8. Storage allocation from Bighorn Lake*

This section directs the Secretary to allocate to the Tribe 300,000 acre-feet per year of water stored in Bighorn Lake and specifies its usage. As a condition of receiving an allocation under this section, this section directs the Tribe to enter into an allocation agreement with the Secretary to establish the terms and conditions of the allocation. This section also permits the Tribe to enter into a service contract, lease, exchange, or other agreement providing for the temporary delivery, use or transfer of not more than 50,000 acre-feet per year of water for use off the Reservation.

#### *Section 9. Satisfaction of claims*

This section states that the benefits to the Tribe and the allottees under the Compact and the Act shall be considered to completely satisfy all claims of the Tribe and the allottees.

#### *Section 10. Waivers and releases of claims*

Section 10(a)(1) waives claims for water rights by the Tribe on behalf of itself and its members (but not its members in their capacity as allottees) and by the United States on behalf of the Tribe and its members (but not members in their capacities as allottees).

Section 10(a)(2) describes the waiver of claims for water rights by the United States on behalf of the allottees.

Section 10(a)(3) describes the Tribe's waiver and release of claims against the United States.

Section 10(b) states that the waivers and releases of claims become effective on the enforceability date, which is also described in this section.

Section 10(c) describes the rights retained by the Tribe and the United States.

Subsection 10(d) provides that the Compact and the Act have no effect on certain federal laws, or on the authority of the United States to carry out activity as a trustee for any Indian tribe other than the Tribe, or confers state jurisdiction to interpret certain federal laws.

Section 10(e)(1) describes the enforceability date. Section 10(e)(1)(B) provides that all of the authorized funds for the Crow

Settlement Fund shall be deposited before the enforceability date occurs.

Subsection 10(f) describes the process for tolling claims.

*Section 11. Crow Settlement Fund*

Section 11 establishes the Crow Settlement Fund that will have the following accounts: the Tribal Compact Administration account; the Economic Development account; the Water Development Projects account; the MR&I System OM&R account; the Yellowtail Dam OM&R account; and the Crow Irrigation Project OM&R account. This section describes how deposits are made to the Settlement Fund, and how the Secretary is to manage, invest, and distribute the monies in the accounts. This section also describes how the Tribe will withdraw amounts and when funds are available to be withdrawn.

*Section 12. Yellowtail Dam, Montana*

Section 12 describes provisions of S. 375 related to Yellowtail Dam. Section 12(a) discusses the Streamflow and Lake Level Management Plan referred to in the Tribal-State Compact. It describes the relationship between the Streamflow and Lake Level Management Plan, the Tribal-State Compact, and S. 375.

Section 12(b) states that the Tribe shall have the exclusive right to develop and market power generation as a water development project on the Yellowtail Afterbay Dam.

Section 12(c) requires the Bureau of Reclamation to consult with the Tribe on at least a quarterly basis on issues related to the Bureau's management of Yellowtail Dam.

*Section 13. Miscellaneous provisions*

This section includes provisions on the limits of claims and rights not waived in the Compact, S. 375, or other ongoing matters specified in S. 375. The section also confirms the status quo of tribal, state, and federal subject matter jurisdiction and regulatory authority. The section waives the United States' immunity from suit to enforce the agreement.

*Section 14. Authorization of appropriations*

This section authorizes \$160,653,000 for the Rehabilitation and Improvement of the Crow Irrigation Project; \$200,840,000 for the Design and Construction of the MR&I System; \$4,776,000 for Tribal Compact Administration; \$47,762,000 for Economic Development Projects; \$44,889,000 for Water Development Projects; \$72,256,000 for MR&I System OM&R; \$12,987,000 for Yellowtail Dam OM&R and \$15,207,000 for Crow Irrigation Project OM&R. This section also authorizes funds for environmental compliance and the Bureau of Reclamation costs for the Crow Irrigation Project and MR&I systems. Each amount appropriated is to be adjusted to reflect changes in appropriate cost indices during the period beginning on May 1, 2008, and ending on the date of appropriation.

*Section 15. Repeal on failure to meet effective date*

This section states that if the Secretary does not publish a statement of findings by March 31, 2016, the Act is repealed effective

January 1, 2016, with amounts having been appropriated and made available reverted to the general fund of the Treasury.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 10, 2009, the Committee on Indian Affairs, by voice vote, adopted S. 375 with an amendment in the nature of a substitute and ordered the bill reported to the Senate, with the recommendation that the Senate pass S. 375, as amended by the substitute.

COST AND BUDGETARY CONSIDERATIONS

*S. 375—Crow Tribe Water Rights Settlement Act of 2009*

Summary: S. 375 would approve a compact between the Crow Tribe and the state of Montana to settle tribal claims to water rights in the state. The bill also would authorize the construction and rehabilitation of systems that deliver water to tribal lands and would establish a trust fund for the tribe to operate and maintain those systems. Finally, the bill would authorize appropriations for the Department of the Interior (DOI) to develop the water systems.

Based on information from DOI and assuming appropriation of the necessary amounts, CBO estimates that implementing S. 375 would increase discretionary spending by \$193 million over the 2010–2014 period and \$510 million after 2014. Enacting the legislation would not affect direct spending or revenues over the 2010–2019 period. Enacting the bill would increase direct spending by \$29 million after 2019.

S. 375 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would require the tribe to enact a tribal water code. CBO estimates that the cost of complying with the mandate would be small and well below the threshold established in UMRA (\$69 million in 2009, adjusted annually for inflation).

This bill contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 375 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

|   | By fiscal year, in millions of dollars— |      |      |      |      |           |
|---|---|------|------|------|------|-----------|
|   | 2010                                    | 2011 | 2012 | 2013 | 2014 | 2010–2014 |
| CHANGES IN SPENDING SUBJECT TO APPROPRIATION    |   |      |      |      |      |           |
| MR&I Water System:                              |   |      |      |      |      |           |
| Estimated Authorization Level .....             | 10                                      | 15   | 20   | 25   | 25   | 95        |
| Estimated Outlays .....                         | 6                                       | 12   | 17   | 22   | 24   | 81        |
| Crow Irrigation Project:                        |   |      |      |      |      |           |
| Estimated Authorization Level .....             | 10                                      | 15   | 15   | 20   | 20   | 80        |
| Estimated Outlays .....                         | 6                                       | 12   | 14   | 18   | 19   | 69        |
| Crow Settlement Fund:                           |   |      |      |      |      |           |
| Estimated Authorization Level .....             | 5                                       | 0    | 0    | 0    | 0    | 5         |
| Estimated Outlays .....                         | 5                                       | 0    | 0    | 0    | 0    | 5         |
| Administrative Costs for Bureau or Reclamation: |   |      |      |      |      |           |
| Estimated Authorization Level .....             | 8                                       | 8    | 7    | 7    | 8    | 38        |
| Estimated Outlays .....                         | 6                                       | 8    | 8    | 8    | 8    | 38        |



|                                     | By fiscal year, in millions of dollars— |      |      |      |      |           |
|-------------------------------------|---|------|------|------|------|-----------|
|                                     | 2010                                    | 2011 | 2012 | 2013 | 2014 | 2010–2014 |
| Total Spending Under S. 375         |   |      |      |      |      |           |
| Estimated Authorization Level ..... | 33                                      | 38   | 42   | 52   | 53   | 218       |
| Estimated Outlays .....             | 25                                      | 32   | 38   | 47   | 51   | 193       |

Note: MR&I = Municipal, Rural, and Industrial Water System.

Basis of estimate: For this estimate, CBO assumes that S. 375 will be enacted in fiscal year 2010 and that the necessary amounts will be appropriated in the fiscal years in which those funds would be spent. Enforcement of the settlement depends on the completion of several actions by federal, state, local, and tribal entities. For this estimate, CBO expects that those actions will be completed in fiscal year 2016. Cost estimates for the authorized water projects are based on information from DOI and on historical spending patterns for similar activities.

#### *Spending subject to appropriation*

S. 375 would authorize appropriations for a variety of activities to benefit the Crow Tribe. The Secretary of the Interior would be authorized to construct and rehabilitate water infrastructure on tribal lands, operate and maintain that infrastructure, and sponsor development projects for the tribe. CBO estimates that implementing the settlement would increase discretionary spending by \$193 million over the 2010–2014 period and \$510 million after 2014.

Municipal, Rural, and Industrial (MR&I) Water System. Section 6 would authorize the appropriation of \$201 million, plus adjustments for increases in construction costs, to build an MR&I water system that would deliver water to communities and businesses on tribal lands. Based on information from DOI, CBO expects that construction of the MR&I water system would begin in 2010 and take about 10 years to complete. CBO estimates that implementing this provision would cost \$81 million over the 2010–2014 period and \$143 million after 2014, assuming appropriation of the necessary amounts (including adjustments for inflation).

Crow Irrigation Project. Section 5 would authorize the appropriation of \$161 million, plus adjustments for increases in construction costs, to rehabilitate and improve the Crow Irrigation Project, which delivers water to farmland on tribal lands. Based on information from DOI, CBO expects that improvements to the Crow Irrigation Project would begin in 2010 and take about 10 years to complete. CBO estimates that implementing this provision would cost \$69 million over the 2010–2014 period and \$110 million after 2014, assuming appropriation of the necessary amounts (including adjustments for inflation).

Crow Settlement Fund. Section 11 would authorize the appropriation of about \$198 million (including \$5 million to administer the tribal compact), plus adjustments for increases in construction costs, to be deposited into the Crow Settlement Fund. Amounts in the fund would be used for economic and water development projects and for operation and maintenance of the Crow Irrigation Project, the MR&I system, and the Yellowtail Dam, in Montana.

Except for amounts appropriated to administer the tribal compact, which could be spent by the tribe after it ratifies the compact,

amounts in the fund could not be spent by the tribe until certain conditions are met. Among others, the Secretary of the Interior would have to publish a statement of findings in the Federal Register indicating that all parties have executed the compact; the Montana water court and U.S. district court would have to issue a judgment and final decree concerning the compact; \$198 million would have to be appropriated to the Crow Settlement Fund; and Montana would have to appropriate amounts due to the tribe under the compact. Should the Secretary not publish the required statement of findings by March 31, 2016, verifying that all conditions necessary to execute the agreement have been met, the agreement would not take effect, and no federal funds could be spent after that date.

CBO expects that the tribe would ratify the compact in 2010 based on information from the tribe. At that time, the tribe could spend amounts appropriated to the Crow Settlement Fund to administer the compact, and the budget would record an expenditure of \$5 million. Based on information from DOI, CBO expects that all other conditions necessary to execute the agreement would be met in 2016. At that time, all other amounts in the fund could be spent by the tribe, and the budget would record an expenditure of \$212 million (including adjustments for inflation). The Secretary of the Interior would then be required to invest those amounts in U.S. Treasury obligations.

Payments to certain tribal trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. As a result, CBO expects that the entire amount deposited into the settlement fund (excluding the amount for tribal compact administration) would be recorded as an outlay in 2016 when the funds could be spent by the tribe. Subsequently, any use of such funds would have no effect on the federal budget. Because S. 375 would direct the Secretary to invest amounts in the fund only after those amounts are available to the tribe, CBO expects that no interest would accrue on the amounts in the fund until 2016. CBO estimates that, in total, implementing section 11 would cost \$5 million in 2010 and \$212 million in 2016.

DOI Administrative Costs. S. 375 would authorize the appropriation of such sums as may be necessary for DOI to conduct certain administrative activities related to the compact. Based on information from DOI, CBO estimates that DOI would need about \$8 million a year to carry out its responsibilities under the bill, including \$1 million a year over the 2010–2011 period for environmental compliance activities related to the compact. In total, CBO estimates that those administrative activities would cost \$38 million over the 2010–2014 period and \$45 million after 2014, assuming appropriation of the necessary amounts.

#### *Direct spending*

Section 8 would allocate a portion of the water supply in Bighorn Lake that was created by the construction of the Yellowtail Dam to the Crow Tribe. The legislation would require that any capital costs of the Yellowtail Dam that would be allocated to the tribe as a result of enacting S. 375 would be nonreimbursable by the tribe. (Nonreimbursable costs are costs incurred by the federal govern-

ment to construct a project that are not recovered from project beneficiaries.)

Under current law, about one-third of the capital costs of the Yellowtail Dam will eventually be repaid to the federal government by private entities that contract for water supplies from Bighorn Lake. (The remaining two-thirds of those costs will be repaid by ratepayers who receive electricity from the dam.) Under the bill, about 90 percent of those capital costs would become nonreimbursable because most of the water in Bighorn Lake would be allocated to the tribe. Currently, the tribe does not purchase water from the lake and, hence, does not pay for any portion of the capital costs of the dam. Further, the tribe is not expected to enter into a contract for water from the dam in the next 10 years. CBO expects that, at some point after 2019, one or more entities will purchase water from Bighorn Lake. Those entities would repay a portion of the capital costs of the dam (\$29 million) over several years. Such collections are classified as offsetting receipts (a credit against direct spending), are deposited into the Reclamation Fund, and cannot be spent without further appropriation.

By making a portion of the capital costs of the Yellowtail Dam nonreimbursable, enacting this legislation would result in the loss of offsetting receipts totaling about \$29 million sometime after 2019.

Intergovernmental and private-sector impact: S. 375 would require the Crow tribe to enact policies that would govern tribal water rights as detailed in the agreement. That requirement would be an intergovernmental mandate as defined in UMRA because it would place a statutory requirement on the tribe that is separate from provisions of the agreement. CBO estimates that the cost of the mandate would be small and well below the threshold established in UMRA (\$69 million in 2009, adjusted annually for inflation). Furthermore, amounts authorized for the Crow Settlement Fund could be used to pay for any such costs.

This bill contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Jeff LaFave; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## EXECUTIVE COMMUNICATIONS

## United States Department of the Interior

BUREAU OF RECLAMATION  
Washington, DC 20240

NOV 18 2009

IN REPLY REFER TO:

The Honorable Byron Dorgan  
Chairman, Senate Committee on  
Indian Affairs  
United States Senate  
Washington, DC 20510

Dear Chairman Dorgan:

In response to your request, this letter presents the views of the Administration regarding S. 375, the "Crow Tribe Water Rights Settlement Act of 2009," as reported by the Committee on Indian Affairs on September 10, 2009. For overall views regarding the background and purposes of this settlement, I would refer the Committee to testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 22, 2009, on House companion bill H.R. 3563. The House legislation is identical to S. 375 as reported by the Committee on Indian Affairs.

I want to begin by emphasizing, as I did in the testimony delivered at the House hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by S. 375 would resolve a long-standing dispute about the scope and quantity of the Crow Tribe's water rights and would also resolve water rights litigation concerning this issue that has been on-going since 1975. The Department has worked with the Crow Tribe and the State of Montana for a number of years in an effort to reach agreement on Federal legislation that would approve the Compact and provide funds for the Tribe to put its water rights to use. After a hearing on a predecessor bill (S. 3555 in the 110<sup>th</sup> Congress) at which the last Administration raised a number of monetary and non-monetary concerns with the bill, both the Tribe and the State worked cooperatively with the Department to address many of these issues. A number of important issues were addressed when S. 375 was introduced and additional positive changes were made in the legislation during mark up. We would like to continue to work with the parties and the sponsors to address certain remaining concerns to make

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this a settlement that the Administration could support. I will not reiterate the entire statement I made during the September 22, 2009, House hearing but instead will focus this set of comments on the areas in this legislation that were improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, the Administration notes with approval that Section 6(g) of S. 375 now requires that title to the municipal, rural and industrial (MR&I) water system to be constructed under the settlement to deliver clean water to communities and businesses in most parts of the Crow Reservation be conveyed to the Tribe after construction is complete. This is consistent with other recently enacted water rights settlements. The Administration believes that transferring title to infrastructure is consistent with concepts of self-determination and tribal sovereignty. We would like to work with the Tribe and Congress to refine the language of Section 6(g) to ensure that the title transfer is appropriately structured.

Second, we also note with approval that changes were made in section 13 to address concerns raised by the State of Wyoming about the impact of the legislation on the Yellowstone River Compact. We appreciate the efforts of the Tribe and the states of Wyoming and Montana to work together to resolve these issues. It appears that this language is consistent with the rights of the Tribe as set forth in the Compact.

Third, notwithstanding significant improvement in the legislation, the high costs of the infrastructure projects and other benefits called for in the bill and the large disparity between the local and State cost share and the Federal settlement contribution remain of concern. S. 375 as amended authorizes more than one half billion dollars in federal appropriations, making the settlement, if enacted, one of the largest to date. As a practical matter, the size of the Federal obligation created under S. 375 in relation to the Bureau of Reclamation's budget presents significant challenges. Currently, Reclamation has a backlog of more than \$2 billion in authorized rural water projects, many of which have a significant tribal component. Moreover, the breadth of the many benefits that would flow to the Crow Tribe under the settlement at almost exclusively federal cost, such as the rehabilitation, improvement, and expansion of the Crow Irrigation Project, the design and construction of water diversion and delivery systems to serve vast areas of the Crow Reservation, and significant funding for unspecified and open-ended water and economic and water development projects, raises serious concerns because of the precedent that enactment of such a large settlement could set for future Indian water rights settlements.

The Administration believes that several aspects of the costs of this legislation need additional analysis, including (1) the intended uses of the funds S.375 proposes to be placed in the Crow Settlement Fund established under this legislation for "economic development projects" and "water development projects," totaling altogether almost \$93 million; (2) the potential for a non-Federal contribution, based on any non-Indian benefits received, to the irrigation and M&I projects required under the settlement; and (3) the appropriate size of trust funds to subsidize the operation, maintenance and repair (OM &R) costs of Yellowtail Dam (the dam that created Bighorn Lake), the municipal water

systems to be constructed under this legislation, and the rehabilitation of the Crow Irrigation Project. Given the very large size of the Federal contribution to the settlement and the number of benefits that it will provide to the Crow Reservation, heightened scrutiny must be given to the various trust funds that are created and the purposes for which they are established. Given the undefined nature of the purposes for the money slated for "economic development," the Administration questions whether any such fund is appropriate.

Fourth, the Administration is concerned that the legislation mandates that certain engineering reports be used to define the scope of the significant infrastructure development authorized in the settlement. These reports are not at the appropriate level of detail to be used as a mandate. The Administration will be working with the Crow Tribe and its technical experts to analyze, and achieve more clarity on, the infrastructure to be constructed, whether the work proposed is the most cost effective way to use the sizeable funds authorized in the legislation and if greater economies of scale that could be obtained through different configurations of the proposed rural water system.

Fifth, a critical element of our further analysis will focus on the rights of allottees vis a vis the priorities for the rehabilitation and expansion of the Crow Irrigation Project. S. 375 would waive federal rights held by the allottees in exchange for outlined settlement benefits. The Administration has an obligation to allottees to assure the water rights waived and substitute benefits are of equivalent value. At minimum, we recommend that S. 375 be amended to allow the proposed infrastructure projects to be modified to ensure that allottees are receiving fair benefits for rights surrendered.

Sixth, Section 12(b) of S. 375 grants the Crow Tribe the exclusive right to develop power at the Yellowtail Afterbay Dam, a component of the Yellowtail Unit, Pick-Sloan Missouri Basin (PSMB) project. We are looking closely at the implications of this provision and whether it provides for consistency of cost allocation for other PSMB beneficiaries.

Seventh, the Administration remains concerned that key Compact documents remain incomplete or in dispute, including the list of existing water uses on trust land. If the parties do not wish to complete all the documents at this point, they can be negotiated after the legislation is enacted, but the bill should not ratify documents that have yet to be negotiated. Moreover, the list of existing uses is important to the Administration because it will be used to determine shortage sharing and priority rights for both the Tribe and allottees. Past Indian water right settlements that were approved by Congress in an incomplete status have been very difficult to implement, causing lengthy delays and, in some cases, the need to come back to Congress. The Administration believes the better course is to complete all aspects of the settlement agreement in advance of congressional approval.

Eighth, the financial structure and timing of the waivers as proposed in this settlement raise serious concerns for the Administration. The final effectiveness and enforceability of this settlement could occur as soon as the United States has appropriated only the

funds authorized for the Crow Settlement Fund, which is about half of the total benefits called for in the settlement; the legislation provides no parameters establishing when the other aspects of the settlement are to be fulfilled. Under this settlement structure, the waivers by the Tribe and the United States of further claims for the Tribe's federal reserved water rights are uncoupled from final receipt by the Tribe of the central settlement benefits (rehabilitation and expansion of the Crow Irrigation Project and construction of a MR&I system for the reservation). The State of Montana and its water users will receive their most important settlement benefit – waivers – far in advance of the Tribe receiving its full settlement benefits. The Department of the Interior has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties at the same time. In this way, no entity benefits disproportionately in the event that all the major settlement benefits are not realized.

In conclusion, S. 375 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This is a goal that the Administration emphatically shares. We are committed to working with the Tribe and the State of Montana to complete a full and robust analysis of the settlement in order assure that it is final and fair, will provide certainty to the State of Montana and non-Indian users, and will enable the Crow Tribe to put its water rights to use for the economic benefit of the Crow Reservation and its residents. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,



Michael L. Connor  
Commissioner

cc: The Honorable John Barrasso  
Vice Chair, Senate Committee on Indian Affairs

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impact of S. 375 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 375 will not effect any changes in existing law.

