



Landmark tribal water rights deal nears Senate floor

By JODI RAVE of the Missoulian

Senate committee members Tuesday assured quick passage of one of the largest tribal water rights agreements in the West.

Nez Perce tribal leaders and Idaho officials testified before the Senate Committee on Indian Affairs for the Nez Perce-Snake River Water Rights Act. Both sides declared victory for tribal and non-tribal water users.

The estimated \$193 million agreement could put to rest 180,000 river water claims.

"We think it's one of the most important decisions for Indian water rights in the country," said Michael Bogert, an attorney for the state of Idaho.

Sen. Daniel Inouye, D-Hawaii, asked the tribe and state to work out final details so the committee could approve it when it returns from recess after Labor Day.

Nez Perce Chairman Anthony Johnson said the agreement honors the tribe's long-standing aboriginal claims to fish and water in the Snake River basin.

Johnson thanked the committee for moving quickly to hear testimony on an agreement only made public in May after five years of confidential negotiations.

"It provides certainty for the Nez Perce tribe as well as certainty for our water users," said Bogert, who called the agreement a model for future tribal water settlements.

The agreement addressed three major points of concern - in-stream flows for farmers and ranchers; the Endangered Species Act; and reserved water rights for Indians.

The proposal would allow the Bureau of Reclamation to purchase up to 60,000 acre feet of water while continuing its lease of 427,000 acre feet of the Snake River. Provisions are also included for increased flows for salmon recovery. Finally, the agreement would protect the tribe's treaty-based fisheries.

"One of the perennial problems in the West is the settlement of Indian water claims, and it stems from a federal court case," said Raymond Cross, a University of Montana law professor.

That 1908 Supreme Court case, known as *Winters v. U.S.*, dealt with the Milk River and Montana's Fort

Belknap Indian Reservation.

The Winters decision proclaimed tribes' right to future water use, and it "stirred up a storm in 1908," Cross said.

Then in 1952, Congress passed the McCarran Amendment, allowing state water courts to determine and quantify Indian reserve claims.

"States take differing attitudes toward the Indian reserve rights claim," Cross said. "Montana may have taken a more modern attitude when it adopted its water code."

The state opted to negotiate water claims instead of litigate. Five of seven Montana tribes have state-approved compacts.

Montana has not reached settlements with tribal leaders of the Flathead and Blackfeet reservations. Irrigation water once intended for the Confederated Salish and Kootenai Tribes is used by non-Indians on the Flathead.

That creates "practical, economic, structural wrinkles that now complicate how they would work out these deals," with the Salish and Kootenai, Cross said. "The tribe has taken a rather strict attitude of who's going to administer the water rights."

Susan Cottingham, director of the Montana Reserved Water Rights Compact Commission, said the Salish and Kootenai tribes have a more complicated relationship with the state over water use.

"The Montana Supreme Court has had a series of lawsuits brought to it by the tribe to force the state not to issue any new permits until their water rights are settled. The Supreme Court agreed."

Of the five tribes with state-approved agreements, only two - the Chippewa Cree and Northern Cheyenne - have congressional approval.

"The most ironclad, bullet-proof agreements are of course those settlements approved by Congress," Cross said. "Agreements that don't have that are simply bargains."

As for the Nez Perce, the settlement was touted as a win-win for tribes and the state.

"It's an example of creativity in settling contentious water rights in the West," said Michael Olsen, a Bureau of Indian Affairs attorney.

Nez Perce, Idaho and congressional leaders have until March 31, 2005, to finalize the proposal. If the state and tribe do their part, Inouye promised quick passage of the bill.

"This will be our Christmas present to you, sir," the retiring senator said to the Nez Perce chairman.

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