

MONTANA WATER RIGHTS

HEARINGS
BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
NINETY-SIXTH CONGRESS
FIRST SESSION
ON
OVERSIGHT ON LITIGATION INVOLVING WATER RIGHTS IN
MONTANA

JULY 30, 1979, WASHINGTON, D.C.; AUG. 10, 1979, GLASGOW;
AUG. 15, 1979, CUT BANK; AUG. 24, 1979, BILLINGS; AND AUG. 31,
1979, RONAN, MONTANA

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Statement of E.W. "Bill" Morigeau, Vice-chairman of Conf. Salish & Kootenai Tribes
Before Senator Melcher on the Department of Justice Water Suits Against Montana and
Some Water Users

Mr. Chairman:

It is a pleasure to appear here today. I have three water related areas that I will advance my views on.

Each area is either related to Montana Senate 76 Water Right Bill, or the Justice Department Water Rights Suits.

I have been reading the papers about the thousands of water users that will have to appear and defend their water rights.

This Department of Justice law suit is a complaint that (no. 1) will, protect Indian water rights and (no. 2) will also protect federal reserved water rights.

The way the complaint is written it is mighty confusing, as after examining the complaint filed in April, I find there are only six water users within the entire Flathead Reservation named as defendants, using tribal water without a water right. The other 243 named in the suit are from Columbia Falls area, Kalispell area, Whitefish, Bigfork, Swan Lake area, etc., which are using federal reserved water without a federal water right. I would like to set the record straight. The Confederated Salish and Kootenai Tribes Council has never claimed water or water rights outside of the border of the Flathead Reservation.

Federal reserved water rights in the complaint are identified as water for United States Post Offices, Federal Fish Hatcheries, U.S. Wildlife Reserves, Glacier Park, National Bison Range, two national forests and congressional appropriated water in Irrigation Projects to use the surface and ground water of the Flathead River Basin and recognizing the reserved and appropriated water rights of the United States.

Four of the nine water users within the Reservation named in the complaint were there by error and have been notified of such, leaving six including the state of Montana.

The State of Montana is named as a defendant because of the passage of Senate Bill 76. In my opinion no individual should have been named in this law suit, only the State of Montana should have been named as the defendant.

The Tribes portion of the complaint within the Reservation does not involve over five individuals, including the State of Montana. The Department of Justice acting as trustee, is asking that tribal members and the tribes has the right to use the water flowing through or under the Reservation in an amount sufficient to provide a homeland for the tribal members and to meet the present and future needs of the tribe and their members.

In 1904 Congress passed an act establishing the Flathead Indian Irrigation Project. It became apparent after 1910, when the Reservation was opened for homestead, that this project was not for actual Indian use but the water resources used for the project still remained in Indian ownership. When this error was discovered by the project planners, the Interior Department convinced Congress to appropriate the water for the project.

This appropriation did not include all of the water within the Reservation, only the waters in the project boundary.

The greatest amount of water running through, surface and ground water remained as a tribal resource.

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E.W. "Bill" Morigeau statement

This department of Justice complaint does not name any of the water users under the project as the project is managed as a federal project using federal reserved water rights.

It is sometimes difficult to distinguish between Indian and Federal reserved water rights as the title to Indian resources are held in trust by the United States for the benefit of the Tribes.

Congress, in 1946, passed an act setting up a special jurisdictional act for the Confederated Salish & Kootenai Tribes where this tribe can file their claims with the United States Court of Claims.

The taking of some of the Tribes water for the irrigation project was deemed a 5th amendment taking. The tribes may file this case to satisfy the tribes claim, as the congress has already established this tribal right.

I attended four hearings before the special water committee on Senate Bill 76. At each hearing there were representatives of the Montana Tribes and Interior Department personnel.

At each hearing representatives from the seven Montana Reservations asked the special house committee to recognize Indian water in Senate Bill 76.

It was explained to the Indians that Montana had been working on this bill for five or six years, ever since the revised Montana Constitution went into effect.

On February 28, 1979 each tribe put their views into writing requesting again that the bill recognize Indian water rights and to establish a five year moratorium in the bill giving Congress time to approve a compact whereby tribes and the trustee can actually sit down with the state planners, as each Indian Reservation water rights seemed to be under different usage and different laws, such as either under treaty, an act of congress or a federal court ruling or just plain water rights established by the Interior Department. The Indians did request the trustee that Indian water be protected if the Montana House Special Water right Committee recommended passage of Senate Bill 76 without recognizing Indian water rights. The lawsuit was therefore necessary.

If I were asked my opinion on whether the lawsuit should be cancelled, my answer would be that as soon as the Montana legislators amend Senate Bill 76 recognizing Indian water rights, I would say cancel the Justice Department lawsuit.

I will close by saying that our tribes doesn't have any water claims against the 243 defendants in the Upper Flathead River Basin. Thank You.

E.W. "Bill" Morigeau
Vice-Chairman, Confederated Salish and
Kootenai Tribes of the Flathead Reservation
East Lake Shore
Polson MT 59860

STATEMENT OF E. W. MORIGEAU, VICE CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES

Mr. MORIGEAU. I am Bill Morigeau, vice chairman of the Confederated Salish and Kootenai Tribes.

You asked if there was any shortage of water presently, and I don't believe there is—only in one area. We have noticed in the last 3 or 4 years that we have a ground water shortage. The water wells on many Indian homes are involved, and I think this is due to the increase in agricultural wells that are being drilled here on the reservation. That is the only area that there is a shortage.

There were some questions earlier on the hydrological studies here on the reservation. There may be some information in the Flathead Indian irrigation project on hydrology. I know presently that there is a contract between the Bureau of Indian Affairs and Woodward Co. from Salt Lake City. They are doing a hydrological study and a water reservation study. I think that will be complete within the year.

This morning, there was some testimony about the cities within the reservation, why they weren't named in the water suit. I think Ronan and St. Ignatius, and I know for sure Polson—I represent the Polson district—that the tribe has a watershed lease with the city of Polson. The reason, I believe, that we have this is that there wouldn't be any way for the city to get the water out of the reservoir were it not for having a lease with the tribe. The pipeline has to cross tribal lands and the city doesn't have a right-of-way across tribal lands. So the watershed leases are necessary.

This is one of the things that we brought out in Helena last February and March—that we have these watershed leases. We didn't know what Senate bill 76 might do to things such as that, especially if the cities were to try to adjudicate a water right on these streams, and end up without a right-of-way. We thought this might create quite a problem.

I spent some time here about 1½ weeks ago. I took a look at the complaint that was filed in April, and I have a copy of it here. There are 244 names listed on this complaint. I picked up the telephone book one evening, and the wife said, "What are you going to do?" and I said, "I am going to go through the telephone book and check how many of these people named here are actually from the reservation." She asked, "Well, what difference would that make?" I said, "Well, the tribes don't have any water claims against people off the reservation and towns like the city of Kalispell or the people in the Flathead Conservation District. We don't have any claims against them and never have."

I researched the records to find out, and we never have passed a resolution claiming any of their water. So that is the situation at the present time. That is how I found that there were 244 names of people living off the reservation listed on this complaint, only 9 people within the reservation borders, and 6 of those were there by error and have been notified. I don't know about the other three. I am sure that two of them are in Arlee and within the Flathead irrigation project and shouldn't have been named.

I think that our attorney here has covered the situation very well, and I just wanted to make those points known, and I thank you very much.

Senator MELCHER. Thank you, Bill. First of all, they call this the *Abell* case. You say they have named as defendants 243?

Mr. MORIGEAU. 244, I have, and that was in the April complaint. If it has been changed, I don't know anything about that.

Senator MELCHER. I can't tell from the testimony here. They say the *Abell* case, meaning the Flathead drainage, 250. As I said, Sagalkin testified for Justice. In the Flathead River drainage, there may be an additional 1,200, so it would be the sum of those—well, he says—250 and 1,200 would be 1,450.

Mr. MORIGEAU. That is what I was told, but even if there were 2,000 off the reservation, we still don't have any claims against them.

Senator MELCHER. Is there any agreement between the tribe and the city of Ronan on water?

Mr. MORIGEAU. I am really not sure. Evelyn may know.

Ms. STEVENSON. I am not sure what the status is at this particular moment. There was.

Mr. MORIGEAU. There may be, because I know the city of Ronan and the tribal council representative, Joe MacDonald, have discussed it many times.

Senator MELCHER. Where are the areas where the water table is dropping, that you mentioned?

Mr. MORIGEAU. In the Pablo area.

Senator MELCHER. Just in the Pablo area?

Mr. MORIGEAU. Pablo and east of Pablo.

Senator MELCHER. How far?

Mr. MORIGEAU. At least 3 miles.

Senator MELCHER. Can you identify the wells that cause that?

Mr. MORIGEAU. Sid Shortz, for one.

Senator MELCHER. And are these for wells that are used for sprinkler irrigation?

Mr. MORIGEAU. The wells that are affected are used just for home use.

Senator MELCHER. And he uses a lot of water?

Mr. MORIGEAU. Just for his home use.

Senator MELCHER. Let's back up. There are some people in the Pablo area under whose homes the water table is dropping?

Mr. MORIGEAU. Yes.

Senator MELCHER. Do you know why?

Mr. MORIGEAU. We assume——

Senator MELCHER. To your knowledge, do you know what causes it?

Mr. MORIGEAU. We assume that it is the many agricultural wells that have been drilled and put into operation in the last few years.

Senator MELCHER. In that area?

Mr. MORIGEAU. Yes.

Senator MELCHER. All right, and mostly east of Pablo?

Mr. MORIGEAU. I wouldn't want to guess, but around the Pablo area.

Senator MELCHER. How much drop has been noted in the water table?

Mr. MORIGEAU. I couldn't answer that other than the fact that they have reported a shortage of water at times and no water at all, at times.

Senator MELCHER. This is from their own private wells?

Mr. MORIGEAU. Yes.

Senator MELCHER. Do you think, perhaps, the Flathead irrigation project does have some hydrologic information in this area?

Mr. MORIGEAU. It is very possible, Senator, that they do, because the people who are doing the water study are getting much information from the Flathead project.

Senator MELCHER. Has the tribe developed a long-range plan that would involve use of more water than is currently being used by the tribe or individual members of the tribe?

Mr. MORIGEAU. We are working on establishing a tribal ranch on the river down on our range unit 47—that is the number of our range unit—and we have in the neighborhood of 3,000 acres. We recently purchased another 240 and there is about 600 acres of cultivation land that could be irrigated very well, and we are in the process right now. One of our priorities is to establish a tribal ranch at that point. That would be one area.

Senator MELCHER. That would be one area?

Mr. MORIGEAU. Yes; and also water uses for the possible recreation areas. I think there is plenty of water on the reservation for the fishers' program. That is one of the programs that will be defended in this lawsuit, but again, it is a nonconsumptive use and won't make any difference for the future.

Senator MELCHER. You said recreational, did you not?

Mr. MORIGEAU. Yes; I did.

Senator MELCHER. Why does that depend on this lawsuit?

Mr. MORIGEAU. Well, if you tie in recreation to water——

Senator MELCHER. A beneficial use?

Mr. MORIGEAU. Yes.

Senator MELCHER. What kind of recreation? Maybe we will decide right now if it is beneficial.

Mr. MORIGEAU. It is one of the best fishing areas within the United States.

Senator MELCHER. I think that is beneficial—if you catch any. Even if the tribe were to irrigate an additional 3,000 acres—I am not sure that you meant that amount would be irrigated. That isn't a great amount of water, is it? Wouldn't that water come right out of the river there?

Mr. MORIGEAU. It would be pumped out of the river. I just mentioned that because that is merely one of the areas that we would like developed and put a sprinkler system into it. It won't affect any of the present water users on the reservation at all.

Senator MELCHER. Does the tribe have any other plans that would be using water other than the ones you have mentioned? I don't mean additional home use or anything like that. Has the tribe any plans for industrial use of water?

Mr. MORIGEAU. I think so. As you know, in the past 3 years the tribe has passed two resolutions authorizing the Corps of Engineers to complete studies at the lower Flathead sites—power sites—and one day we hope to have those developed for the benefit of western Montana, and of course, for the region.

Senator MELCHER. All right. That is putting water to use, but I am thinking now of consumptive use for industrial purposes. Does the tribe have any plans for that?

Mr. MORIGEAU. No; I don't think so, unless you could term agricultural uses as consumptive uses.

Senator MELCHER. No; I mean consumptive uses of an industrial type.

Mr. MORIGEAU. No.

Senator MELCHER. All right, so the sum and substance of it is, there is plenty of water right now except for some lowering of the water tables for some individuals in their home use east of Pablo?

Mr. MORIGEAU. Yes.

Senator MELCHER. And the tribe would be likely to use more water for agricultural purposes, specifically in the areas that you have mentioned?

Mr. MORIGEAU. Yes; that is right.

Senator MELCHER. It really does not indicate any problem for a lack of water at this time or in the foreseeable future as far as the tribe is concerned.

I think I have asked all the questions I want to ask of both of you. I don't believe that there is any use in pursuing a discussion of the *Winters* doctrine in this case, because the tribe simply is not envisioning much more water than they are now using. If I have misunderstood you on that, please correct me, because we like to understand what the tribe's position is.

Ms. STEVENSON. I don't know exactly what the immediate goals are of the tribe for consumptive or agricultural uses of water in the immediate future. There are many kinds of ideas that come up—additional recreational uses, small kinds of industry. So far, the reading I have obtained from the tribal council is that they are very interested in conservation, so this precludes any large factories or pulpmills or anything of that kind that might endanger the recreational or ecological beauty of this area. That is a very big concern around here. Those kinds of commercial ventures that are feasible without interfering with that are what they have been batting around for ideas. Then, of course, there is the question of where does funding come from for any of these beneficial uses that would be projected in the very near future.

Senator MELCHER. Thank you both, very much.

Ms. STEVENSON. Thank you.

Mr. MORIGEAU. Thank you.

[The following material from Lake County was received for inclusion in the record.]