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109TH CONGRESS, *1st Session* | SENATE | REPORT 109–200

SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION GRAND COULEE DAM EQUITABLE COMPENSATION SETTLEMENT ACT

DECEMBER 8, 2005.—Ordered to be printed

Filed under authority of the order of the Senate of November 18, 2005

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

REPORT

[To accompany S. 881]

The Committee on Indian Affairs, to which was referred the bill (S. 881), to provide for equitable compensation to the Spokane Tribe of Indians of the Spokane Reservation for the use of tribal land for the production of hydropower by the Grand Coulee Dam, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 881 is to provide equitable compensation to the Tribe for the past and continued use of tribal lands for the generation of hydropower by the Grand Coulee Dam, located on the main stem of the Columbia River in the State of Washington. The Tribe has received compensation in the amount of only $4,700 for the loss of its tribal lands taken for the construction of that dam, an amount that is not comparable to the payments that have been made and that will continue to be made to the neighboring Confederated Tribes of the Colville Reservation under the terms of a congressionally approved settlement with the United States for losses sustained by those tribes as a result of the construction and operation of the dam.

49–010

BACKGROUND

I. Planning and construction of Grand Coulee Dam

Planning for the construction of the Grand Coulee Dam began during the period from 1927 to 1931, when the Army Corps of Engineers, at the direction of Congress, investigated the Columbia River and its tributaries to identify sites at which dams could be constructed to produce hydroelectric power at low cost. The Corps recommended that dams be constructed at a number of sites, including the current site of the Grand Coulee Dam.

The Corps recommended that construction of Grand Coulee Dam be undertaken by local governments or private utilities under the authority of the Federal Power Act, 16 U.S.C. §§ 791a et seq. Section 10(e) of that Act (16 U.S.C. § 803(e)) requires a licensee using Indian lands to pay to the Indian tribe an annual payment for the use of its land. In 1933, an agency of the State of Washington was issued a preliminary permit to construct a dam at the Grand Coulee site by the Federal Power Commission. Several years later, however, the Federal government assumed control of the project. Federal dam projects were not subject to the Federal Power Act.

II. Payment of compensation to tribes

Under the Act of June 29, 1940, Pub. L. No. 76–690 (codified as amended at 16 U.S.C. §§ 835d–835h), in aid of the construction of the Grand Coulee Dam project, Congress granted to the United States "all the right, title, and interest of the Indians in and to the tribal and allotted lands within the Spokane and Colville Reservations * * * as may be designated therefor by the Secretary of the Interior from time to time. * * *" This Act also provided that the Secretary of the Interior was to determine the amount of "just and equitable compensation for the tribal lands taken." Id., codified, as amended, at 16 U.S.C. § 835e.

At the time the Grand Coulee Dam project came under Federal administration, the United States recognized that the Tribe and the Confederated Tribes of the Colville Reservation had compensable interests that would be injured by the project, including interests in the development of hydropower, in a salmon fishery vital to the tribes which would be destroyed by the dam construction, and in tribal lands already identified as potential hydropower sites that would be inundated as a result of the construction of the Grand Coulee Dam.

Pursuant to the Secretary of the Interior's determination, the Tribe was paid $4,700 in compensation and the Confederated Tribes of the Colville Reservation were paid $63,000. On October 2, 2003, the Committee received testimony at a hearing on S.1438 [1] to the effect that for decades the two tribes had gone without adequate compensation and had not received the compensation to which they would have been entitled had the Dam been constructed under the authority of the Federal Power Act.

The Confederated Tribes of the Colville Reservation asserted various claims before the Indian Claims Commission under the Indian Claims Commission Act of 1946, Pub. L. 79–726 ("ICCA"). How-

[1] Similar legislation introduced by Senator Cantwell (with Senators Inouye and Murray as cosponsors) in the 108th Congress. S. 1438 was passed by the Senate with an amendment on November 19, 2004.

ever, in addition to their ICCA land claims, the Colville Tribes sought and obtained, in 1978, an award of $3.257 million for the loss of fisheries as a result of the Grand Coulee Dam project, and about 15 years later negotiated a settlement with the United States of their claim for hydropower losses resulting from the Dam under the fair and honorable dealings standard of the ICCA.[2] In 1994, Congress approved the settlement agreement, which provided for a compromise final judgment in the amount of $53,000,000 and annual installments in perpetuity to be made by the Bonneville Power Administration ("BPA") as set forth in the Settlement Agreement between the Confederated Tribes and the United States.[3] See, Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Pub. L. No. 103–436, 108 Stat. 4577 (November 2, 1994) ("Colville Confederated Tribes Act").

Although the Spokane Tribe litigated certain issues under the ICCA, it did not litigate its claims for loss of water power values in that forum or elsewhere.[4] Nevertheless, a 1976 legal memorandum issued by the Office of the Solicitor of the Department of the Interior discussed the claims of the Tribe and the Colville Tribes for lost hydropower values in relation to the construction of the Grand Coulee Dam, and in reaching the conclusion that the claims of the two tribes had merit, the memorandum did not contend or suggest that the Spokane Tribe's claim was weaker than, or legally distinguishable from, that of the Confederated Tribes.[5] It appears that the Spokane Tribe would have a claim to compensation that is legally comparable to that of the Colville Confederated Tribes but for the five-year statute of limitations applicable to claims under the ICCA.[6]

SUMMARY OF PROVISIONS OF S. 881

Under the proposed legislation, the Spokane Tribe would be compensated for the use of its lands for the production of hydropower by the Grand Coulee Dam under a formula based in part on that by which the Confederated Tribes of the Colville Reservation were compensated in the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Pub. L. 103–436, 108 Stat.

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[2] See, written testimony of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Division, United States Department of Justice, dated August 2, 1994, presented at the hearing held on that date on H.R. 4757, the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, before the Subcommittee on Oversight and Investigations, House Committee on Resources. *See, also, Confederated Tribes of the Colville Reservation* v. *United States,* 964 F. 2d 1102 (Fed. Cir., 1992).

[3] Under the 1994 Colville Settlement Agreement, the annual installments payable by BPA from revenues derived from power generated by the Grand Coulee Dam Project are equal to $15,250,000, subject to an annual adjustment under a formula set forth in section 2 of the Agreement. See, H. Rept. 103–685.

[4] In his written testimony submitted to the Committee at its hearing on S. 1438 held on October 2, 2003, the Spokane Tribe's Chairman, Warren Seyler, contended that, while the tribe had failed to assert claims under the ICCA for loss of water power values as a result of the Grand Coulee Dam project, certain obstacles unique the Tribe made the task of filing claims under the ICCA "unusually difficult"—such as Bureau of Indian Affairs' failure to carry out its advisory responsibilities under the ICCA by giving the Tribe adequate notice of its rights to assert claims under the Act (Mr. Seyler stated that they learned of that from neighboring tribes "only months before the 1951 filing deadline") and delay on the part of the Commissioner of Indian Affairs in approving the Tribe's contract with legal counsel, "costing our Tribe much critical time."

[5] Memorandum to the Solicitor from Lawrence A. Aschenbrenner, Acting Associate Solicitor, Division of Indian Affairs, United States Department of Interior (1976), Reimbursement to the Colville and Spokane Tribes for Construction of the Grand Coulee and Chief Joseph Dams.

[6] Under section 12 of the Indian Claims Commission Act, Pub. L. No. 79–726 (60 Stat. 1049), claims must have been filed with the Commission not later than 5 years after the approval of the Act—i.e., within 5 years after August 13, 1946.

4577 (November 2, 1994). The Spokane Tribe has contended that it lost lands equivalent in area to 39.4% of the lands lost by the Colville Confederated Tribes, and that a settlement based solely on this claimed percentage would justify payments to the Spokane Tribe equal to 39.4% of the payments made to the Confederated Colville Tribes. In S. 881, this percentage has been reduced to 29% with the Tribe's agreement, in recognition in part of the fact that certain lands located within, as well as contiguous to, the boundaries of the Spokane Indian Reservation taken for construction of the Grand Coulee Dam would be restored or transferred to the Tribe under section 9 of the bill.

Under section 5 of S. 881, an interest-bearing settlement fund account would be established in the Treasury to be known as the Spokane Tribe of Indians Settlement Fund. From amounts appropriated pursuant to section 11 of the bill, for fiscal year 2006, the Secretary of Interior would deposit $17,800,000 into the Fund, and for each of the four fiscal years thereafter, the Secretary would deposit into the Fund the sum of $12,800,000. These funds would be held in trust by the Secretary unless and until the Spokane Business Council submitted a written notice to the Secretary of a resolution requesting that all or portion of the amounts in the Fund be paid to the Spokane Business Council. Of the initial deposit, $5,000,000 must be used by the Business Council for the planning, design, construction, equipping, and operation and maintenance of a Cultural Resource Repository and Interpretive Center to house cultural resources affected by the operation of the Grand Coulee Dam and to provide an educational facility addressing the culture and history of the Spokane Tribe. Of the remaining amounts deposited in the Fund (including earned interest), 25% may be used by the Spokane Business Council for discretionary purposes of general benefit to members of the Spokane Tribe, while 75% may be used by the Business Council to carry out resource development, credit, scholarship, or reserve, investment, and economic development programs.

Under section 6 of S. 881, on March 1, 2007, the Administrator of the BPA ("Administrator") must pay the Tribe an amount equal to 29% of the computed annual payment due to the Colville Confederated Tribes under Sec. 5(b) of the Colville Confederated Tribes Act for fiscal years 2005 and 2006 (with the amount for 2005 to be adjusted to reflect the change in the Consumer Price Index published by the Department of Labor), and on or before March 1 of each year thereafter, the Administrator must make annual payments to the Tribe equal to 29% of the payment for the previous fiscal year pursuant to the Colville Settlement Agreement. The Administrator is required to make commensurate annual cost reductions to recover each payment to the Tribe.

Under the terms of section 7 of S. 881, upon payment to the Tribe, the sections 5 and 6 funds could be used or invested by the Spokane Business Council in the same manner and for the same purposes as other Spokane Tribe governmental funds. Expenditure of funds transferred to the Tribe by the Administrator would not require approval by the Secretary of the Interior or the Administrator, and neither the Secretary nor the Administrator has a trust responsibility for the investment, supervision or administration of any of the funds once they have been transferred to the Tribe pur-

suant to section 5 or 6. Further, under section 7(c) of S. 881, the payment of funds under sections 5 and 6, together with interest and income generated by the funds, are to be treated in the same manner as payments under section 6 of the Saginaw Chippewa Tribe of Michigan Distribution of Judgment Funds Act (100 Stat. 677).[7]

Section 8 authorizes the Administrator to deduct certain sums ($2,600,000 in fiscal year 2007 and $1,300,000 each fiscal year thereafter in which payments are made under section 6) from the interest otherwise payable to the Secretary of the Treasury from "net proceeds" as defined in section 13 of the Federal Columbia River Transmission Act, 16 U.S.C. § 838k, subject to certain limitations and requirements described in section 8(b) of the bill.

Under section 9 of S. 881, the Secretary of the Interior is directed to transfer administrative jurisdiction from the Bureau of Reclamation to the Bureau of Indian Affairs for certain lands located within the exterior boundaries of the Spokane Indian Reservation as well as certain lands along the south bank of the Spokane River. Such lands are to be held in trust for the Tribe and included within the Spokane Indian Reservation, subject to a reservation of rights and easement on behalf of the United States to carry out the Columbia Basin Project, including the operation, maintenance, repair and replacement of boat ramps, docks and other recreational facilities owned or permitted by the United States and existing on the enactment of the Act. Any land transferred under section 9 that was, before the date of enactment of the Act, included in the Lake Roosevelt National Recreation Area would remain part of the Recreation Area and remain under the administrative authority or responsibility of the National Park Service. Section 9 also requires "cognizant agencies of the Department of the Interior" to enter into a memorandum of understanding with the Tribe to provide for the coordination in the application of section 9(c).[8]

Section 10 provides that the making of the prescribed payments under sections 5 and 6, together with the restoration of ownership in trust under section 9, constitute full satisfaction of the Tribe's claims to a fair share of annual hydropower revenues generated by the Grand Coulee Dam Project for the past and continued use of the land of the Tribe for the production of hydropower at the Grand Coulee Dam.

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[7] Pub. L. 99–346 (June 30, 1986). Section 6 of the Saginaw Chippewa Act provides that distributions of certain funds paid to that tribe under that Act to its enrolled members are not subject to Federal, State or local income taxes and that such distributions may not be used as a basis for denying or reducing (1) financial assistance or other benefits under the Social Security Act to such tribal member or the member's household, or (2) any other Federal financial assistance or benefit to which the tribal member or member's household may be otherwise entitled.

[8] S. 881 does not provide a deadline for the transfer of administrative jurisdiction over the subject lands from the Bureau of Reclamation to the Bureau of Indian Affairs, but the Committee interprets this section to mean that the transfer will occur within a reasonable time. The Committee encourages the cognizant agencies to negotiate and execute the memorandum of understanding prior to the actual transfer of jurisdiction, even though the bill does not expressly require that the memorandum of understanding be executed before the transfer. The Committee has been informed that the Tribe has no objection to and supports the direct involvement of the State of Washington, Stevens County, and Lincoln County in the development of the memorandum of understanding. The Committee anticipates that the State's participation in the memorandum of understanding would be the best way to clarify and resolve a range of possible jurisdictional issues, if any, that might arise. Further, the Committee does not interpret section 9 of S. 881 to have any effect on the status of real property on the south bank of the Spokane River that may belong to the State or Lincoln County—if indeed the State or county own or claim to own any such real property.

Section 11 of S. 881 authorizes the appropriation of such funds as are necessary to accomplish the Act, and section 12 provides that nothing in this Act establishes any precedent or is binding on the Southwestern Power Administration, Western Area Power Administration, or Southeastern Power Administration.

LEGISLATIVE HISTORY

Settlement bills relating to the Tribe's claims were introduced in the 106th Congress (S. 1525 and H.R. 2664), in the 107th Congress (S. 2567 and H.R. 4859), and in the 108th Congress (S. 1438 and H.R. 1753). On October 2, 2003, the Senate Indian Affairs Committee held a hearing on S. 1438, and on the same date the Water and Power Subcommittee of the House Resources Committee held a hearing on H.R. 1753. In the 109th Congress, S. 881 was introduced on April 21, 2005, by Senator Cantwell, for herself and Senators Dorgan, Murray and Inouye, and was thereafter referred to the Committee on Indian Affairs. H.R. 1797, related legislation introduced by Representative Cathy McMorris and cosponsored by Representatives Norman Dicks, Dale Kildee and Jay Inslee, was passed by the House of Representatives on July 25, 2005.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, in an open business session on June 29, 2005, by voice vote ordered that S. 881 be reported favorably to the Senate, without amendment.

SECTION-BY-SECTION ANALYSIS

Section 1—Short title

Section 1 states that the Act may be cited as the "Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act."

Section 2—Findings

Section 2 states 17 findings made by Congress that detail the background to and reasons for this legislation.

Section 3—Purpose

Section 3 states that the purpose of this Act is to provide fair and equitable compensation to the Tribe for the use of its land for the generation of hydropower by the Grand Coulee Dam.

Section 4—Definitions

Section 4 provides definitions for various terms used in the Act.

Section 5—Settlement fund

Section 5(a) provides for the establishment in the Treasury of the United States of an interest-bearing trust fund to be known as the "Spokane Tribe of Indians Settlement Fund," consisting of amounts deposited in the Fund under subsection (b) and any interest earned on investment of amounts in the Fund.

Section 5(b) provides that, from amounts made available under section 11, for fiscal year 2006, the Secretary shall deposit in the Fund $17,800,000, and for each of the 4 fiscal years thereafter, the Secretary shall deposit in the Fund $12,800,000.

Section 5(c) provides that the Fund shall be maintained and invested by the Secretary in accordance with the Act of June 24, 1938 (25 U.S.C. §162a).

Section 5(d) provides that at any time after funds are deposited into the Fund, the Spokane Business Council may submit to the Secretary written notice of the adoption by the Spokane Business Council of a resolution, requesting that the Secretary pay all or a portion of the amounts in the Fund to the Spokane Business Council, and provides further that not later than 60 days after receipt of such a notice, the Secretary shall pay the amount requested to the Spokane Business Council.

Section 5(e) provides that, of the initial deposit under subsection (b)(1), $5,000,000 shall be used by the Spokane Business Council for the planning, design, construction, equipping, and continuing operation and maintenance of a Cultural Resource Repository and Interpretive Center to house, preserve, and protect the burial remains, funerary objects, and other cultural resources affected by the operation of the Grand Coulee Dam, and provide an interpretive and educational facility regarding the culture and history of the Tribe. The funding of these activities does not, however, alter or affect any authority, obligation, or responsibility of the United States under the Native American Graves Protection and Repatriation Act (25 U.S.C. §§3001 et seq.), the Archaeological Resources Protection Act (16 U.S.C. §§470aa et seq.), the National Historic Preservation Act (16 U.S.C. §§470 et seq.), or the National Environmental Policy Act of 1969 (42 U.S.C. §§4321 et seq.). Of all other amounts deposited in the Fund (including interest generated on these amounts), 25 percent shall be reserved by the Spokane Business Council and used for discretionary purposes of general benefit to all members of the Tribe, and 75 percent shall be used by the Spokane Business Council to carry out resource development programs, credit programs, scholarship programs, or reserve, investment, and economic development programs.

Section 6—Payments by the Administrator

Section 6(a) provides that on March 1, 2007, the Administrator shall pay to the Tribe the amount that is equal to 29 percent of the Computed Annual Payment for fiscal year 2005, adjusted to reflect the change in the Consumer Price Index for all urban consumers published by the Department of Labor, from the date on which the payment for fiscal year 2005 was made to the Colville Tribes to the date on which payment is made to the Tribe under this provision, and the amount that is equal to 29 percent of the "Computed Annual Payment" for fiscal year 2006.[9]

Section 6(b) provides that on or before March 1, 2008, and March 1 of each year thereafter, the Administrator shall pay to the Tribe the amount that is equal to 29 percent of the Computed Annual Payment for the previous fiscal year.

Section 6(c) provides that pursuant to the payment schedule in subsection (b), the Administrator shall make commensurate cost reductions in expenditures on an annual basis to recover each pay-

[9] "Computed Annual Payment" is a term defined in section 4 of S. 881 that refers to the annual payment to the Confederated Tribes of the Colville Reservation pursuant to their Settlement Agreement with the United States. See footnote 3, above.

ment to the Tribe. This specific cost reduction plan will be included in the annual budget submitted to Congress.

Section 7—Treatment after funds are paid

Section 7(a) provides that payments made to the Spokane Business Council or the Spokane Tribe under section 5 or 6 may be used or invested by the Spokane Business Council in the same manner and for the same purposes as other Tribe governmental funds.

Section 7(b) provides that neither the Secretary nor the Administrator shall have any trust responsibility for the investment, supervision, administration, or expenditure of any funds after the date on which the funds are paid to the Spokane Business Council or Tribe under section 5 or 6.

Section 7(c) provides that the payments of all funds to the Spokane Business Council and Spokane Tribe under sections 5 and 6, and the interest and income generated by the funds, shall be treated in the same manner as payments under section 6 of the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act (100 Stat. 677). Section 6 of the Saginaw Chippewa Act provides that distributions of certain funds paid to that tribe under the Act to its enrolled members are not subject to Federal, State or local income taxes and that such distributions may not be used as a basis for denying or reducing (1) financial assistance or other benefits under the Social Security Act to such tribal member or the member's household, or (2) any other Federal financial assistance or benefit to which the tribal member or member's household may be otherwise entitled.

Section 7(d) provides that after the date on which funds are paid to the Spokane Business Council or to the Tribe under section 5 or 6, the funds shall constitute Spokane Tribe governmental funds and shall be subject to an annual tribal government audit.

Section 8—Repayment credit

Section 8(a) provides that the Administrator shall deduct from the interest payable to the Secretary of the Treasury from net payments (as defined in section 13 of the Federal Columbia River Transmission System Act (16 U.S.C. §838k)) $2,600,000 in fiscal year 2007 and $1,300,000 in each subsequent fiscal year in which the Administrator makes a payment under section 6.

Section 8(b)(1) provides that except as provided in paragraphs (b)(2) and (b)(3), each deduction made under this section shall be a credit to the interest payments otherwise payable by the Administrator to the Secretary of the Treasury during the fiscal year in which the deduction is made, and shall be allocated pro rata to all interest payments on debt associated with the generation function of the Federal Columbia River Power System that are due during the fiscal year. Section 8(b)(2) provides that if, in any fiscal year, the deduction is greater than the amount of interest due on debt associated with the generation function for the fiscal year, the amount of the deduction that exceeds the interest due on debt associated with the generation function shall be allocated pro rata to all other interest payments due during the fiscal year. Section 8(b)(3) provides that to the extent that a deduction exceeds the total amount of interest described in paragraphs (1) and (2), the de-

duction shall be applied as a credit against any other payments that the Administrator makes to the Secretary of the Treasury.

Section 9—Transfer of administrative jurisdiction and restoration of ownership of land

Subsection 9(a) provides that the Secretary of the Interior shall transfer administrative jurisdiction from the Bureau of Reclamation to the Bureau of Indian Affairs over all land acquired by the United States under the Act of June 29, 1940 (16 U.S.C. §835d), that is located within the exterior boundaries of the Spokane Indian Reservation established pursuant to the Executive Order of January 18, 1881, and all land on the south bank of the Spokane River that extends westerly from Little Falls Dam to the confluence of the Spokane River and the Columbia River and that is located at or below contour elevation 1290 feet above sea level.

Subsection 9(b) provides that all land transferred under this section shall be held in trust for the benefit and use of the Tribe and shall become part of the Spokane Indian Reservation.

Subsection 9(c)(1) provides that the United States reserves a perpetual right, power, privilege, and easement over the land transferred under this section to carry out the Columbia Basin Project under the Columbia Basin Project Act (16 U.S.C. §§835 et seq.). Subsection 9(c)(2) provides further that the rights reserved include the right to operate, maintain, repair, and replace boat ramps, docks, and other recreational facilities owned or permitted by the United States and existing on the date of enactment of this Act. Subsection 9(c)(3) provides that land transferred under this section that, before the date of enactment of this Act, was included in the Lake Roosevelt National Recreation Area shall remain part of the Recreation Area, and provides further that nothing in this section shall affect the authority or responsibility of the National Park Service to administer the Lake Roosevelt National Recreation Area under the Act of August 25, 1916 (39 Stat. 535, chapter 408; 16 U.S.C. §1 et seq.). Subsection 9(c)(4) provides that the cognizant agencies of the Department of the Interior shall enter into a memorandum of understanding with the Spokane Tribe to provide for coordination in applying this subsection.

Section 10—Satisfaction of claims

Section 10 provides that payments by the Secretary under section 5 and the Administrator under section 6 and transfer of administrative jurisdiction to the Bureau of Indian Affairs and restoration of ownership of land in trust and added to the Reservation under section 9 constitute full satisfaction of the claim of the Tribe to a fair share of the annual hydropower revenues generated by the Grand Coulee Dam project for the past and continued use of the land of the Spokane Tribe for the production of hydropower at Grand Coulee Dam.

Section 11—Authorization of appropriations

Section 11 authorizes the appropriation of such funds as are necessary to carry out this Act.

Section 12—Precedent

Section 12 provides that nothing in this Act establishes any precedent or is binding on the Southwestern Power Administration, Western Area Power Administration, or Southeastern Power Administration.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 881, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 7, 2005.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 881, the Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mike Waters.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

S. 881—Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act

Summary: S. 881 would establish and authorize funds to be appropriated to the Spokane Tribe of Indians Settlement Fund to compensate the Spokane Tribe of Indians for the use of its land by the Grand Coulee Dam project in Washington. Starting in 2007, the bill would require the Bonneville Power Administration (BPA) to make annual payments to the tribe from receipts generated from the sale of electricity. Those payments to the tribe would be offset by increases in the rates charged to BPA's customers for electricity sales, and thus would result in no net cost to the government. Under the bill, BPA also would be relieved from making certain interest payments to the Treasury for funds borrowed on BPA's behalf. CBO estimates that provision would reduce receipts collected by BPA by $13 million over the 2007–2015 period, and by $1.3 million per year after 2015. (Those effects constitute an increase in direct spending.)

Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would cost $69 million over the 2006–2010 period for payments into the Spokane Tribe of Indians Settlement Fund. S. 881 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). The payments authorized by this bill would benefit the Spokane Tribe.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 881 is shown in the following table. The costs of this legislation fall within budget functions 450 (community and regional development) and 270 (energy).

	By fiscal year, in millions of dollars—									
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
CHANGES IN SPENDING SUBJECT TO APPROPRIATION										
Payments to Spokane Tribe Settlement Fund Account:										
Authorization level	18	13	13	13	13	0	0	0	0	0
Estimated Outlays	18	13	13	13	13	0	0	0	0	0
CHANGES IN DIRECT SPENDING										
Interest Credits for BPA:										
Estimated Budget Authority	0	3	1	1	1	1	1	1	1	1
Estimated Outlays	0	3	1	1	1	1	1	1	1	1

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted by the end of fiscal year 2005 and that the authorized amounts will be appropriated for each year.

Spending Subject to Appropriation

This bill would authorize the appropriation of payments to the Spokane Tribe as compensation for land taken to build the Grand Coulee Dam. The bill would authorize the appropriation of $18 million in 2006 and $13 million annually over the 2007–2010 period to a new tribal trust fund. Thus, CBO estimates that implementing the bill would cost $18 million in 2006 and $69 million over the 2006–2010 period.

Payments to certain 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 to the fund in any year would be recorded as budget authority and outlays in that year. Because the trust funds would be nonbudgetary, the subsequent use of such funds by the tribe would not affect Federal outlays.

Direct Spending

S. 881 would require BPA to make annual payments to the Spokane Tribe. Under the bill, such payments would be equal to 29 percent of the annual payment BPA currently makes to the Colville Tribe. The payments would begin in 2007 and would total about $5 million per year, except in 2007 when BPA would be required to make two payments. Payments would continue so long as electricity continues to be generated at the Grand Coulee Dam. Although the bill would require that the payments be offset by commensurate cost reductions, CBO expects that these payments would contribute to an increase in costs to the agency. Because BPA is a cost-recovery agency that charges its customers for the electricity it generates, CBO assumes that these payments to the tribe would become part of BPA's cost structure and would be offset by an increase in the new electricity rates that the agency plans to impose in 2007. Thus, this annual payment to the tribe would result in no net cost to the government.

The bill also would allow BPA to reduce the amount of interest costs that is transfers to the U.S. Treasury for funds borrowed to construct BPA's infrastructure. The bill would authorize BPA to forgo interest payments of $2.6 million in 2007 and $1.3 million each year thereafter for as long as payments are made to the tribe. As a cost-recovery agency, BPA would reduce its annual collections from electricity ratepayers by the amount of these forgone interest payments. Thus, CBO estimates that BPA collections, which are recorded in the budget as offsetting receipts, would be reduced by $2.6 million in 2007 and about $13 million over the 2007–2015 period.

Intergovernmental and private-sector impact: S. 881 contains no intergovernmental or private-sector mandates as defined in UMRA. The payments authorized by this bill would benefit the Spokane Tribe.

Previous CBO estimate: On June 16, 2005, CBO transmitted a cost estimate for H.R. 1797, the Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act, as ordered reported by the House Committee on Resources on May 18, 2005. The two versions of the legislation are similar, and our cost estimates over the 2006–2015 period are the same.

Estimate prepared by: Federal Costs: Mike Waters, Lisa Cash Driskill, Julie Middleton, and Jimin Chung. Impact on State, local and Tribal governments: Marjorie Miller. Impact on the Private Sector: Selena Caldera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to 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. 881 should be minimal.

EXECUTIVE COMMUNICATIONS

The Committee received the following communication, dated June 28, 2005, from the Department of the Interior regarding S. 881:

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, DC, June 28, 2005.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of the Interior on S. 881, "Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act". The Administration opposes the bill.

S. 881 would provide compensation to the Spokane Tribe for the use of its land for the generation of hydropower by the Grand Coulee Dam. Specifically, S. 881 would require the Secretary of the Interior to deposit $69 million over 5 years, $17,800,000 for fiscal

year 2006 and $12,800,000 for the following 4 fiscal years, into a trust fund held by the U.S. Treasury for the Spokane Tribe. S. 881 would also transfer land and administrative jurisdiction from the Bureau of Reclamation to Bureau of Indian Affairs for the Spokane Tribe. The land transferred would be held in trust for the Spokane Tribe and would become part of the reservation.

The Administration has several issues with this bill. First, the Spokane Tribe has not brought forward a legal claim that would warrant this type of settlement and there is no legal claim pending. The Administration questions whether the Tribe has or could bring any legal claim that would entitle it to compensation as contemplated under the bill. In light of the lack of any pending legal claim and the lack of Administration support for this legislation, the Administration does not believe this legislation is currently justified as a settlement of claims. The Administration therefore believes it would be premature to assume that future budget proposals will recommend discretionary appropriations at the levels proposed in the bill. Regardless, the Administration has been working with the Spokane Tribe to address the Tribe's concerns. However, no agreement has been reached to date. The Administration believes these negotiations should continue.

Second, the Department is concerned with transferring land and jurisdiction from the Bureau of Reclamation to the Bureau of Indian Affairs for the Tribe absent a prior written agreement to fully address future management responsibilities. While under the present draft Reclamation would be granted a perpetual easement to operate the Columbia Basin Project, it is imperative that the parties specifically reach agreement on the details of the lands and easement rights involved and how the transferred areas will be managed prior to the passage of this legislation. At a minimum, such an agreement should be required prior to the actual transfer taking place.

Third, both the Executive and the Judicial Branches are faced with the question of Congress' intent when it puts land into trust status. What specific duties are required of the Secretary, administering the trust on behalf of the United States, with respect to trust lands? Tribes and individual Indians frequently assert that the duty is the same as that required of a private trustee. Yet, under a private trust, the trustee and the beneficiary have a legal relationship that is defined by private trust default principles and a trust instrument that defines the scope of the trust responsibility. Congress, when it establishes a trust relationship, should provide the guideposts for defining what that relationship means.

Much of the current trust controversy stems from the absence of clear guidance as to the parameters, roles, and responsibilities of the trustee and the beneficiary. As Trustee, the Secretary may face a variety of issues, including land use and zoning. Accordingly, the Secretary's trust responsibility to manage the land should be addressed with clarity and precision. Congress should decide these issues, not the courts.

Along these lines, the pending litigation-related assertions and claims made against the Department regarding its stewardship of trust properties suggest the need to identify and mitigate current programmatic weaknesses before becoming obligated with new responsibilities for additional lands that may be taken into trust. The

broad claims for historical accounting, trust mismanagement, Indian assertions of unfunded mandates and trust responsibilities and the presence of statutory requirements that require funding for activities with little commensurate advantage for Indian beneficiaries suggest the need for a critical evaluation of any activity designed to take additional lands into trust until after these other situations are addressed materially.

When we are required to transfer federal lands and then take the land into trust, Congress potentially is subjecting the United States to new responsibilities and it should clearly state what those responsibilities are.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

JOHN W. KEYS III,
Commissioner.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that S. 881 makes no changes to existing law.

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