EXHIBIT 16
DATE 3.23.05
HB 782

TESTIMONY OF
FAYE BERGAN, CHIEF LEGAL COUNSEL
MONTANA RESERVED WATER RIGHT COMPACT COMMISSION
BEFORE THE
HOUSE NATURAL RESOURCES COMMITTEE
ON HB 782

In the McCarran Amendment (43 U.S.C. § 666)(1952), Congress waived the sovereign immunity of the United States to involuntary joinder as a party in a comprehensive adjudication of all water rights in state court. The U.S. Supreme Court has ruled that the McCarran Amendment also applies to Indian reserved water rights. Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800 (1976).

In 1975, the United States filed suit in Federal District Court for the adjudication of water rights in the Tongue River and Rosebud Creek. Other federal suits for other tribes soon followed. What ensued was a nine-year legal battle to secure state jurisdiction for the adjudication of all water rights, including federal and Indian reserved water rights. The litigation eventually reach the U.S. Supreme Court. The Supreme Court confirmed the Congressional deference to adequate and comprehensive state adjudications of water. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983)(deciding Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982) in a consolidated case). The case was remanded to the Ninth Circuit Court of Appeals, and all federal actions in Montana are currently stayed pending the outcome of the state court proceedings. Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187 (1983).

The Ninth Circuit left the question of whether Montana's process was adequate to adjudicate federal and Indian reserved water rights open for state determination. This issue was specifically addressed in State ex rel. Greely v. the Confederated Salish & Kootenai Tribes, 219 Mont. 76 (1985). The Montana Supreme Court concluded that the Montana Water Use Act *on its face* is adequate to adjudicate Indian reserved water rights. The question of whether the Act is adequate *as applied* was left for a later date. If the adequacy of the adjudication as applied is appealed by an Indian tribe or its trustee, the issue will receive "particularized and exacting scrutiny." Id. at 96.

The Reserved Water Rights Compact Commission is authorized to negotiate compacts with the federal government and the several Indian tribes in Montana. All water rights compacts are in substantial part based on integration of reserved water rights with water rights under State law. An accurate quantification of water rights under State law is essential to the successful operation of existing compacts and negotiation of future compacts. To maintain state court jurisdiction over Indian reserved water rights, the statewide adjudication under the Water Use Act must be adequate as applied. See State ex rel. Greeley v. Confederated Salish & Kootenai Tribes, 219 Mont. 76 (1985).