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S. 462, SHOSHONE–PAIUTE TRIBES OF DUCK VALLEY WATER RIGHTS SETTLEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

APRIL 26, 2007

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SHOSHONE–PAIUTE TRIBES OF DUCK VALLEY WATER RIGHTS SETTLEMENT ACT

THURSDAY, APRIL 26, 2007

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. I will call the Committee to order. This is a hearing of the Committee on Indian Affairs on S. 462, the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act of 2007.

The purpose of today's hearing on the Duck Valley Water Rights Settlement Act is to receive testimony that will guide this Committee in reviewing legislation to ratify an Indian water settlement and resolve tribal monetary claims against the United States.

This particular settlement involves the tribes of the Duck Valley Reservation, individual water rights holders, and the State of Nevada. S. 462 will ratify an agreement that quantifies the water rights of parties to the Nevada adjudication of the East Fork of the Owyhee River. The bill will legislatively settle the Duck Valley Tribes' claims against the United States for compromising tribal water rights and failing to maintain Federal irrigation projects serving the reservation.

Today, we will hear from Senator Harry Reid, the bill's sponsor. I believe this is the first time that the Majority Leader of either caucus has testified before this Committee. I know Senator Reid has long been a Member of this Committee, and we welcome him.

I want to thank the Senator for his past service on this Committee, and I am pleased that he continues to advocate strongly on behalf of American Indians and Indian country on important matters like health care, housing, law enforcement, and more.

I look forward to hearing his testimony on this legislation and learning how it will affect Nevadans. I understand Senator Reid has an obligation on the Senate Floor which will require him to leave before the hearing concludes, but we appreciate him being here.

We will also receive testimony from Senator John Ensign, the bill's co-sponsor. Although Senator Ensign cannot be here this morning, his written testimony will be included in full in the hear-

ing record. The record of this hearing will remain open for 2 weeks following today's hearing so that additional testimony may be submitted as well.

The Committee will also hear directly from parties to the negotiated water rights agreement and settlement discussions involving the East Fork of the Owyhee River. I congratulate all of the parties on reaching an agreement after decades of litigation, administrative adjudications, and negotiations in both Nevada and in Idaho. I understand that the Department of the Interior has some concerns with the Nevada agreement and bill, and we will look forward to receiving their testimony as well.

Senator Reid, thank you for journeying over to the Committee this morning. We look forward to hearing your testimony.

STATEMENT OF HON. HARRY REID,
U.S. SENATOR FROM NEVADA

Senator REID. Mr. Chairman, thank you very much. I do have many fond memories of this Committee, the service especially rendered by Senator Inouye for his many years of service and being an exemplary Chairman, and you and I, of course, and our years together in Congress. You have been the leader in talking about Indian health and the problems of Indians in general. So the Committee is well served by having you as Chair.

This bill, the Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act, is important because we know it will benefit the tribes of Duck Valley, the ranchers, upstream water users, and residents of the Northern Nevada and Southern Idaho region. This bill will ratify the agreement reached by the parties to Nevada's East Fork of the Owyhee River adjudication, which is supported by the tribes, the State of Nevada and all the affected individual water users.

Mr. Chairman, this tribe really deserves this. It is a wonderful, beautiful scenic area. Of course, when the reservation was placed, they [the Federal Government] picked a place where the growing season is very short. It is on a very small river. In Nevada, we don't have big rivers except the Colorado. Most rivers are very, very tiny and they are few in number.

This bill is supported not only by those that I have mentioned, but the Elko County Board of Commissioners, where the reservation is located in Elko County, NV. They support the bill. The Nevada State legislators who represent this area support the bill, Assemblyman Carpenter and Senator Rhoads.

Our bill only addresses the Owyhee River litigation. Both my colleagues from the State of Idaho, Senator Craig and Crapo, support the agreement to be ratified by this bill and support the tribe in resolving its claims against the United States. In a spirit of cooperation and consensus building, Senator Ensign and I are working with our colleagues from Idaho on an amendment that would limit tribal water marketing. We are going to introduce that at the markup of this bill.

This legislation reflects many hard years of work, as you mentioned in your opening statement, Mr. Chairman. All parties have worked closely to create a bill that resolves one of the last tribal water rights disputes in Nevada.

I strongly support this bill because it brings certainty to water rights held by the tribes, family farmers and ranchers, and the State of Nevada. It resolves tribal claims against the United States for its failure to protect the tribes' water rights and natural resources. And it ends decades of litigation and negotiations.

How will these goals be accomplished? First, the bill would approve ratifying and confirming the negotiated agreement. It is important to resolve the water rights dispute because it will allow farmers and ranchers to determine how much surface water they can use for crops and grazing. It gives them certainty, which they don't have now. The gauges, dams, and irrigation canals will be rehabilitated or replaced to improve irrigation and increase irrigable acreage in one of Nevada's important agricultural areas.

Second, the bill will settle the tribes' longstanding claims against the United States. As a result of the Bureau of Reclamation's Owyhee Irrigation Project in the 1930s and the Bureau of Indian Affairs' Duck Valley Irrigation Project during the same time, the tribes' salmon and steelhead trout runs and fish stock were destroyed. The tribe relied on these runs for food, their local economy, and for cultural uses, and they did this for many, many decades.

Further, because the United States failed to defend the tribes' water rights when some of Nevada's early settlers arrived along the Owyhee River, the tribe lost water rights to support their fishing economy, their ranches, and their farms.

All of the tribes' claims against the United States in the Owyhee River litigation will be settled by this litigation. While the United States can never fully compensate the tribes for their loss with money, I appreciate the tribes' willingness to accept the proposed settlement figure.

Just as the tribes have compromised, I hope the Department of the Interior and this Administration will work with Senator Ensign and with me to address their concerns with the bill and gain their support. I smiled, Mr. Chairman, when you said the BIA did not support this legislation, that the Department of the Interior did not support it. I have never known them to support any of them. We always have to come and work and cajole with the department. They have been difficult to work with at times.

So I hope it is time to end this painful part of our sovereign-to-sovereign relationship. I really appreciate the Committee's time and consideration of this bill. Without congressional action, the tribes, the State and affected individuals will have to resume costly litigation. The tribes, farmers and ranchers would not be able to manage their businesses efficiently without knowing their surface and storage water rights.

The Wild Horse Reservoir, frequented by outdoor enthusiasts and fishermen would not be guaranteed sufficient water for their use and enjoyment. And the tribe would not be able to address their housing and economic development needs without a settlement that provides funds for water and irrigation infrastructure development.

This bill brings certainty to these individuals and communities with water rights and finality to the parties of a decades-old adjudication. I am proud to support the efforts of our constituents in concluding the Owyhee River adjudication.

Thank you very much, Mr. Chairman.
[The prepared statement of Senator Reid follows:]

PREPARED STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Mr. Chairman, Vice Chairman, and Members of the Committee. Good morning.

It is a pleasure to be here, in this hearing room. As a former member of this distinguished Committee, I've spent many hours here working on difficult problems. Serving on this Committee with my good friend and the former Committee Chairman, Senator Inouye, was a special honor. And it allowed me to serve some of Nevada's most deserving and vulnerable residents, which is something I am pleased and proud to continue to do.

Thank you for inviting me to testify on this bill.

Senator John Ensign and I sponsored the Shoshone-Paiute Tribes of Duck Valley Water Settlement Act because we know it will benefit the Tribes of Duck Valley. the ranchers and upstream water users, and the residents of the northern Nevada and southern Idaho region.

Indeed our bill to ratify the agreement reached by parties to Nevada's East Fork of the Owyhee River adjudication is supported by the Tribe, the State of Nevada and all of the affected individual water users.

The Elko County Board of Commissioners—where the Reservation is located—supports the bill. And the Nevada State legislators who represent this area in Elko County—Assemblyman John Carpenter and Senator Dean Rhoads—support the bill.

While our bill only addresses the Owyhee River litigation, both of my colleagues from the State of Idaho, Senators Craig and Crapo, support the agreement to be ratified by this bill and support the Tribe in resolving its claims against the United States. In a spirit of collaboration, Senator Ensign and I are working with our colleagues from Idaho on an amendment that would limit tribal water marketing. We expect to introduce the amendment during the Committee's mark-up of S. 462. The Nevada and Idaho delegations will continue to work closely to pass this legislation that helps our constituents.

Mr. Chairman, this legislation reflects years of hard work and compromise by Nevadans on matters that affect their livelihoods and cultures. They have worked closely with us to create a bill that resolves one of the last tribal water rights disputes in Nevada.

I strongly support this bill because:

- It brings certainty to water rights held by the Tribes, the family farmers and ranchers, and the State;
- It resolves the tribal claims against the United States for its failure to fully protect the Tribe's water rights and natural resources;
- And it ends nearly 2 decades of litigation and negotiations.

First, the bill would approve, ratify, and confirm the negotiated agreement that quantifies the various types of water rights held by the Tribe and the upstream water users. The State of Nevada and the Tribe will administer and enforce these rights.

It is important to resolve the water rights dispute because it will allow farmers and ranchers to determine how much surface water they can use for crops and grazing. They will know how much stored water they have and can use for irrigation and domestic use under drought conditions. The gauges, dam and irrigation canals will be rehabilitated or replaced to improve irrigation and increase irrigable acreage in one of Nevada's important agricultural areas.

Second, the bill will settle the Tribes' long-standing claims against the United States. As a result of the Bureau of Reclamation's Owyhee Irrigation Project in the 1930s and the Bureau of Indian Affairs' Duck Valley Irrigation Project during the same time, the Tribe's salmon and steelhead trout runs and fish stock were destroyed. The Tribe relied on these runs for food, their local economy, and cultural uses.

Further, because the United States failed to defend the Tribe's water rights when some of Nevada's early settlers arrived along the Owyhee River, the Tribe lost water rights to support their fishing economy, ranches, and farms.

All of the Tribe's claims against the United States in the Owyhee River litigation will be settled by this legislation. The bill would authorize a $60 million settlement so the Tribe could develop their water rights.

The Tribe calculates the harm caused by the Federal Government at a much higher level than the bill's $60 million figure that Senator Ensign and I propose. The Department of Interior however, recently re-evaluated the Federal liability for these

tribal claims. While the Department proposed a $40 million figure during negotiations, the Department most recently and without explanation, valued the claims at less than $10 million. Both proposals are significantly less than the Senate-proposed $60 million figure. Senator Ensign and I disagree with the Department's most recent assessment and stand by our original proposal of $60 million.

While the United States can never fully compensate the Tribes for their loss I appreciate the Tribes' willingness to accept the proposed settlement figure. Just as the Tribes have compromised, I hope that the Department of Interior and this Administration will work with Senator Ensign and I to address their concerns with the bill and gain their support. It is time to end to this painful part of our sovereign-to-sovereign relationship.

Mr. Chairman, I appreciate this Committee's timely consideration of this bill.

Without Congressional action, the Tribe, the State and the affected individuals would have to resume costly litigation. The Tribe, farmers and ranchers would not be able to manage their businesses efficiently without knowing their surface and storage water rights. The Wild Horse Reservoir, frequented by outdoor enthusiasts and fishermen, would not be guaranteed sufficient water for their use and enjoyment. And the Tribe would not be able to address their housing and economic development needs without a settlement that provides funds for water and irrigation infrastructure development.

This bill brings certainty to those individuals and communities with water rights and finality to the parties of a nearly 20-year adjudication. Senator Ensign and I are proud to support the efforts of our constituents in concluding the Owyhee River adjudication.

Thank you for the opportunity to join you again today. I look forward to working with the Members of this Committee to facilitate the bill's approval and passage in the U.S. Senate.

The CHAIRMAN. Senator Reid, thank you very much.

I had mentioned that the Department of the Interior has some concerns. As you mentioned, that is not particularly unusual. The Department of the Interior seems to always have some concerns. But let me just say to you and to those who have been involved in negotiating a settlement here, I think it is encouraging that the parties can get together and try to find common ground, which has been the case. I commend you and Senator Ensign for bringing this legislation to the Senate.

So let me thank you for your testimony today, and we will allow you to get back to your busy schedule. Senator Reid, thank you for being here.

Next, we will hear from Patrick Ragsdale, Director of the BIA at the Department of the Interior. Mr. Ragsdale, thank you for being here.

Kyle Prior, Chairman of the Shoshone-Paiute Tribes, Duck Valley Reservation in Nevada; and Allen Biaggi, Director of the Department of Conservation and Natural Resources in the State of Nevada, Carson City, NV.

We thank all three of you for joining us today to provide testimony to this Committee. Mr. Ragsdale, you heard my comment to Senator Reid. We invite the Department of the Interior here because you and the BIA obviously have interests in all of these issues. It is the case that the Department of the Interior seems to have a lot of concerns, but this Committee is always anxious to hear them, and we appreciate your being here. Why don't you proceed?

The entire statement that is offered by all three of you will be made a part of the permanent record. Let me also say that the Ranking Member, Senator Thomas, is not able to be with us this morning, at least in the early part of this hearing. He has another hearing, but he joins me in welcoming all three of you.

Mr. Ragsdale, you may proceed.

STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. RAGSDALE. Thank you, Mr. Chairman. It is good to be here again, and thank you for including my full statement in the record. I will summarize my statement and try to be brief for the Committee's benefit.

The Department of the Interior supports negotiated settlements of water rights between and among Indian tribes, States, and local parties, which include the Federal Government in its role as trustee. We have preferred the process of negotiation and settlement over the process of protracted and costly litigation for more than two decades.

We believe that the benefits are obvious when local stakeholders can work out collaborative solutions that provide mutual benefits that quantify water rights which will enhance economic development and ensure environmental quality.

In 1990, the Department of the Interior published guidance in the form of criteria and procedures in the *Federal Register* to establish the basis for negotiating settlements and foster a process for framework for negotiation.

That being said, the Administration opposes this particular bill, S. 462, because the bill is inconsistent with the overall guidance published in the *Federal Register*. This bill would authorize a Federal payment of $60 million without any Federal cost share. We note the bill language in paragraph seven of section II states that all the parties have entered into a settlement agreement, including the United States. This is not accurate because it has not been executed for the reasons contained in my full statement.

There are other concerns about the provisions in the proposed water settlement agreement that the bill embraces that need a review to ensure finality to the settlement. These concerns are both monetary and non-monetary.

In conclusion, we are committed to supporting the settlement process. More importantly, we are prepared to re-engage in the process of negotiation to work out the provisions, including appropriate cost sharing, which may be monetary and non-monetary in nature, that benefit the Shoshone-Paiute Tribes, the State of Nevada, and local entities.

Finally, I want to stress that we wish to work with the parties and this Committee, as well as the Nevada delegation, to advance this settlement.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ragsdale follows:]

PREPARED STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and Members of the Committee. I appreciate the opportunity to appear before this Committee today to discuss S. 462, a bill titled the "Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act." I want to emphasize at the outset of this statement that the Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. For over 20 years, Indian Tribes, States, local parties, and the Federal Government have recognized that, when possible, negotiated Indian water

rights settlements are preferable to protracted litigation over Indian water rights claims.

In addition to defining the extent of tribal water rights, negotiations allow settlement parties to develop creative solutions to water use problems. Rather than pitting neighbor against neighbor in a zero-sum legal battle, Indian water rights settlement negotiations engage local stakeholders in forward-looking discussions to seek solutions that will stimulate economic development, enhance environmental quality, and provide a platform for improved relationships between Tribes and other local entities. The Administration's commitment to cooperative conservation embraces the belief that those who live and work on the land offer the best perspective on issues involving the resources that they depend on for their economic survival. This perspective informs our commitment to resolve some of the most difficult issues surrounding water and future economic development for tribal governments as well as those who depend on resource-based economies.

The United States supports the settlement process, and we are committed to attaining a final settlement of the water rights of the Shoshone-Paiute Tribes of the Duck Valley Reservation. We oppose S. 462 as written because the settlement it proposes is inconsistent with our policy that settlement costs reflect the value of the claims being resolved and should also be proportionate to benefits received. This bill as currently written would authorize a Federal payment of $60 million without any non-Federal cost share.

I would like to make an initial point about the current status of these negotiations and the Agreement between the parties to this proposed settlement. S. 462 states in paragraph 7 of section 2 that the United States, the Tribes, the State of Nevada, and the upstream water users have entered into a settlement agreement to resolve the water rights of the Tribes. This is not accurate. Although the Administration supports most of the water allocations set forth in the Agreement underpinning this legislation, the United States opposes some of the provisions contained in the Agreement and has not executed it. The Agreement contains numerous terms that contradict policies regarding water rights settlements that are designed to ensure finality and protect the interests of the Tribes and all American taxpayers.

The balance of my statement today will begin with some background on the history of the Duck Valley Reservation and the negotiations leading up to this proposed settlement. I will then discuss some specific concerns that the Administration has regarding S. 462.

History of Settlement Negotiations

The Duck Valley Reservation, home to the Shoshone-Paiute Tribes, straddles the Idaho-Nevada border along the Owyhee River, a tributary to the Snake River. The Reservation was established by Executive Order on April 16, 1877, and expanded by Executive Orders on May 4, 1886 and July 1, 1910. The downstream Owyhee Project, a Bureau of Reclamation Project that irrigates more than 100,000 acres of land in eastern Oregon and western Idaho, has blocked anadromous fish passage and ended what was once a valuable on-reservation fishery. The Tribes' primary source of income now is the irrigated agriculture made possible by the Duck Valley Irrigation Project, which is owned by BIA and operated by the Tribes under a Self-Governance compact.

The State of Idaho initiated the Snake River Basin Adjudication (SRBA) in 1987. Soon thereafter, the State of Nevada reopened its adjudication of the Owyhee River, a tributary to the Snake River, an adjudication originally initiated in 1924. Both of these adjudications involve the water rights of the Shoshone-Paiute Tribes. The United States filed claims in Idaho's SRBA and Nevada's Owyhee River adjudication on behalf of the Shoshone-Paiute Tribes.

At the request of the Parties, a Federal Negotiation Team was formed in 1990. After over a decade of negotiations, and with the participation of the Federal Team, in 2005 the Shoshone-Paiute Tribes came to agreement with the States of Idaho and Nevada and affected water users on the water allocation aspects of settlement agreements in both States. The overarching settlement issue, however, remained the appropriate Federal and State financial contributions to the proposed settlement. The Tribes and States were disappointed with the Administration's position that the Federal contribution to the settlement should be $9.3 million, with a non-Federal contribution of $5.4 million, to settle the Tribes' claims in both Idaho and Nevada.

Discussions with the State of Idaho foundered and the proposal for Idaho or its water users to make any financial contribution was rejected. Instead, because of looming litigation deadlines, Idaho decided to make an offer of judgment based on the filings made by the United States on behalf of the Tribes. Evaluating the State's offer of judgment and determining that it provided an outcome to the litigation that

was as good as, or better than, what could reasonably be expected if the litigation proceeded through trial, the United States accepted the offer, which effectively concluded the Idaho portion of this settlement by confirming certain water rights in the Tribes.

The Nevada portion remains unresolved. Although talks have taken place between the Tribes and the Nevada State Attorney General's Office over the contents of a proposed Agreement, the Administration has not been included in those discussions in recent years. Numerous changes would be required before we could recommend that the Federal Government enter into this Agreement.

The Role of the *Criteria and Procedures*

When negotiating and evaluating Indian water rights settlements, the Administration follows longstanding policy guidance on Indian water settlements found at 55 Fed. Reg. 9223 (1990), *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria").* Among other considerations for Federal participation in the negotiation of Indian water rights settlements, the *Criteria* provide guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities.

The *Criteria* call for Indian water rights settlements to contain non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government. These principles are set out in the *Criteria* so that all non-Federal parties have a basic framework for understanding the Executive Branch's position.

Equally important, the *Criteria* address a number of other issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process.

Monetary Concerns Regarding S. 462

With this backdrop, we now turn to the fiscal elements of the bill before this Committee. The total cost of $60 million significantly exceeds the Administration's position on an appropriate Federal contribution, and the bill does not specify any non-Federal cost-share. As we have said many times before this Committee, the Administration's position as set forth in the *Criteria* is that the fiscal burden associated with an Indian water rights settlement should not be borne solely by the United States. Other parties receiving benefits under a settlement should also contribute based on the value of the benefits received. While the Administration has not had the opportunity to thoroughly revisit the appropriate monetary contributions to a Duck Valley settlement since the Idaho water rights were finally resolved in late 2006, we stand ready to work with the Tribes, the Nevada delegation, and this Committee to structure appropriate cost-sharing provisions consistent with the *Criteria.*

Unfortunately, the non-Federal parties to the proposed Duck Valley settlement have a very different assessment from the Administration of both the benefits from settlement to the non-Federal parties and the litigation risk from claims that the Tribes might assert against the Federal Government. Based on the Federal assessment of the relative benefits and liabilities, non-Federal parties should be contributing substantially to the cost of the settlement. This view is based on significant litigation cost savings by the State of Nevada as well as the benefit to non-Indian water users, who stand to secure water rights through settlement that would be subject to limitation were the Tribal claims to be litigated. The States and non-Indians water users would also benefit from the certainty that comes with settlement of outstanding water rights claims. The State cost share would not necessarily be entirely in the form of cash; one option that could be explored would be non-monetary contributions such as in-kind services provided by the State natural resource agencies to support the Tribes' water or other resource development. As the Agreement currently stands, however, the level of cost share by the non-Federal parties is significantly lower than the Administration can support.

Moreover, S. 462 would require the Federal Government to contribute a total of $60 million into two different trust funds for the benefit ofthe Tribes. One of the funds, with a proposed Federal contribution of $45 million, would be established to enable the Tribes to cover the costs of water resource planning and development. The other fund, with a proposed Federal contribution of $15 million, would be established to cover operation and maintenance costs for the Duck Valley Irrigation Project and other water-related projects funded under this Act. The *Criteria* do not

generally allow Federal funding of operation and maintenance costs. And, as I have discussed above, the total cost of the settlement as proposed in this bill is higher than the Administration's assessment of an appropriate Federal contribution.

Non-Monetary Concerns Regarding S. 462

In addition to opposing the proposed Federal funding level, the Administration has identified a number of legal and technical flaws in both S. 462 as introduced and the underlying Agreement. Without attempting to give a line-by-line analysis in this context, I note that the Department of Justice does not believe that the bill's waiver provisions are correctly drafted. Additionally, the bill presents conflicting requirements regarding the release of Federal funds that could prevent appropriated funds from ever being released to the Tribes if the bill is passed as introduced. We would like to work with the Committee and the Nevada delegation to revise the bill to address these and other issues that could prevent the bill from achieving its intended purpose of achieving a final settlement of the water rights claims of the Shoshone-Paiute Tribes of the Duck Valley Reservation.

Conclusion

The Administration remains committed to supporting the settlement process and ensuring that such settlements fulfill the Government's responsibilities to Indian Tribes while also protecting the interests of the taxpaying public. The Administration hopes that the parties can come to an Agreement including an appropriate cost share, so that together we can achieve a settlement that will allow the Shoshone-Paiute Tribes to put their water to use in an economically beneficial manner. Water resource development would further the U.S. goal of Tribal self-sufficiency and sovereignty.

Mr. Chairman, this completes my statement. I am happy to answer any questions the Committee may have.

The CHAIRMAN. Mr. Ragsdale, thank you very much.

Next, we will hear from Mr. Prior. Mr. Prior, as I indicated, your statement will be made a part of the record as well. You are here as Chairman of the Shoshone-Paiute Tribes, Duck Valley Reservation. Mr. Prior, why don't you proceed?

STATEMENT OF KYLE PRIOR, CHAIRMAN, SHOSHONE–PAIUTE TRIBES, DUCK VALLEY RESERVATION

Mr. PRIOR. Good morning, Mr. Chairman. I am honored to be here to express the support of the Shoshone-Paiute people for the water settlement contained in S. 462, a measure that will bring us closer to the creation of a sustainable homeland for our people.

In short, this bill has critical importance to the future of the Shoshone-Paiute Tribes. First, the bill will approve our water rights settlement in Nevada. It has been 130 years since our reservation was first established, and the settlement will finally establish the Federal reserve water rights of the tribes.

Because of our economy, our very livelihood depends on agriculture and stock raising. This water rights settlement literally represents the key to our future as a tribe.

Second, the bill resolves our longstanding water-related claims against the Federal Government. These claims involve the fundamental failure of the United States to protect our water rights and our water and fishery resources. Our settlement agreement with Nevada and private water users provides us with over 100,000 acre feet of surface water from the Owyhee River, storage water from the Wild Horse Reservoir, all water from springs and creeks on the reservation, and all present uses of groundwater plus perennial yield of the aquifer.

At the same time, the agreement protects the use of water by ranchers south of the reservation. It allows them to continue the

use of water without interruption in a manner in which they have historically irrigated. The only restriction is the number of acres that can be irrigated. The parties negotiated this acreage number after considerable technical work and the field work. Therefore, the Nevada settlement provides the water needed by the tribes, and also provides the water needed by our neighbors.

When our reservation was established by Executive Order in 1877, we already had a tradition of agriculture. We have a long history and culture of dependence on salmon fishing. Our Duck Valley Reservation represented the best of all worlds: Sufficient land for a strong agricultural base; a vital fishery; and abundant wildlife and water flows.

It has been noted that our reservation began as a virtual paradise, but because of the detrimental actions and inactions of the Federal Government to fully protect our water rights, we have been unable to realize its promises for our people. We have detailed our claims against the Federal Government in our written testimony.

No. 1, is the failure of the Federal Government to establish and protect our water rights in the face of rapidly increasing non-Indian settlement in the area surrounding the reservation, including extensive non-Indian water development that directly affected the availability of water for the tribes. On at least two occasions in the 1930s, requests were made to the Department of Justice to take steps to protect the tribes' water rights, and a detailed complaint was actually prepared by the Justice Department in at least one instance, but the case was never filed.

No. 2, is the failure of the Federal Government to provide the necessary storage and infrastructure for irrigated agriculture. The need for storage was identified as early as the 1890s, but it took over 40 years before Wild Horse Reservoir was constructed in 1931. Over the years, the basic infrastructure for the irrigation project has fallen into disrepair and the project is seriously dilapidated due to inadequate funding and neglect. In addition, only a portion of the anticipated acres have been actually put into production.

No. 3, is the destruction of our salmon fishery by the United States when it constructed the Bureau of Reclamation Owyhee Project. The Owyhee Dam served as an insurmountable barrier to salmon to reach our reservation, which was once an abundant resource for subsistence and commerce, and it was lost forever.

No. 4, is that within the Department of the Interior, the interests of the Bureau of Reclamation Owyhee Project were consistently favored over the interests of the tribes. Development on the reservation was not only significantly delayed as a result, but the amount of water made available to the tribes was impacted. For example, Wild Horse Reservoir was constructed 15 miles south of the reservation, rather than on the reservation. Only 40 percent of available water could be captured and made available to the tribe as a result. This was done so that more water could flow down to non-Indian irrigators.

In a nutshell, at every turn, our water rights have been continually sacrificed for the benefit of non-Indian water users.

In 1989, the State of Nevada formally began a water rights adjudication in the Owyhee River Basin. Our water rights were also at issue as part of the Snake River Basin adjudication in Idaho. Since

that time, we have spent well over 1 decade negotiating a settlement. The negotiations were conducted under the department of the Interior's policy and guidelines for Indian water settlements, and a Federal negotiating team was an active party.

Throughout the process, the tribes and all of the parties, including the United States, anticipated a significant Federal contribution by the Federal Government. At the end of our negotiations, the Federal negotiating team recommended to the Secretary a contribution of $44.9 million. However, at the eleventh hour, the Federal Government abandoned this recommendation and its own policy that it had utilized for at least two decades, and unilaterally reduced its contribution to a mere fraction of the Federal team's recommendation.

Further, the Federal Government is now taking the position that there must be a substantial State contribution to settlement. This makes little sense because our issue is almost entirely Federal. The tribes' water rights in Idaho have since been resolved through a consent decree that was entered in December 2006. This consent decree quantifies the tribes' water rights in Idaho, but does not resolve any of the tribes' damages claims against the Federal Government, nor does the consent decree provide any means for the tribe to put that water to use.

We now look to Congress to ensure that the tribes can benefit from the Nevada agreement and our decree rights in Idaho. Passage of this bill will bring closure to a sad chapter in our history, and will begin to allow our people and the future generations of the tribes to have a viable homeland.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Prior follows:]

PREPARED STATEMENT OF KYLE PRIOR, CHAIRMAN, SHOSHONE-PAIUTE TRIBES, DUCK VALLEY RESERVATION

Mr. Chairman and Members of the Committee on Indian Affairs, thank you for inviting me to present testimony on this very important issue, the settlement of our water rights claims.

I am honored to be here to represent the Shoshone-Paiute people and to witness the culmination of many decades of hard work and persistence by the tribal leaders who came before me to fulfill the vision of our forefathers: the creation of a sustainable homeland for our people.

Duck Valley: A Sustainable Homeland

The Duck Valley Reservation is the homeland of the Shoshone-Paiute Tribes. It was established for the Tribes' use and benefit by Executive Order in 1877 pursuant to the 1863 Treaty of Ruby Valley. Lands were added by Executive Orders in 1886 and 1910, so that today, the Reservation encompasses 290,000 acres located within the States of Nevada and Idaho. The Duck Valley Reservation is unallotted and the entire Reservation is held in trust for the Tribes.

In 1877, when our forefathers first agreed to be settled on the Duck Valley Reservation (the "Reservation"), they saw a homeland that had plentiful wildlife and game, productive agricultural and range lands, and an excellent fishery abundant with salmon and steelhead. Located in Northeast Nevada and Southwest Idaho, our reservation has three primary water sources: (i) the East Fork of the Owyhee River, which flows south to north through the Reservation, (ii) Blue Creek, which is a tributary to the Owyhee River in the Idaho portion of the Reservation, and (iii) Mary's Creek, which is part of the Bruneau River Basin in Idaho. These water sources were intended to supply water for tribal uses, including irrigated agriculture, stock raising, fisheries, wildlife and domestic use. Those intentions have never been fully realized.

Our people have a long history of being agriculturists. Even before the Duck Valley Reservation was established, many of our people successfully engaged in agri-

culture beginning in 1875 at Carlin Farms, a nearby area reserved by Executive Order for this purpose. Despite their farming success, our people were forced to abandon their improvements when the Executive Order reserving Carlin Farms was withdrawn due to pressure from white settlers in the area. [1]

When the present Duck Valley Reservation was established in 1877 and settled by our People, agriculture remained a focus. However, by 1890, it became apparent to the Tribes and the Federal Government that flows from the Owyhee River, Blue Creek and Mary's Creek were seasonal, and facilities to store water would be necessary to realize the full potential for irrigated agriculture on our lands. For the next 40 years, our tribal leaders and officials from the BIA tried unsuccessfully to obtain a water storage facility to support irrigation on our reservation.

Our struggles during this time were complicated by several factors including rapidly increasing non-Indian settlement in the areas surrounding our reservation; over-appropriation of Blue Creek upstream of the Reservation in Idaho; ever increasing use of water by non-Indians south of the Reservation in Nevada; and Bureau of Reclamation (BOR) opposition to the construction of a water storage facility on the Reservation. This BOR opposition was based on the concern that construction of the Wild Horse Dam and Reservoir would compromise the future of the Owyhee Project, which served downstream non-Indian water users in Oregon and Idaho.

Throughout the struggle to obtain sufficient storage water to support agriculture on the Reservation, the need to take steps to establish and protect the Tribes' water rights was identified over and over. Yet, no steps were taken by the Federal Government to protect this vital resource. Even though specific requests were made to the Justice Department on at least two occasions, and even though a detailed complaint was prepared by the Justice Department in connection with the Tribes' rights in the Owyhee River, the Federal Government never followed through to establish and protect the Tribes' water rights. In the meantime, ever increasing use of water both to the north and to the south of the Reservation continued.

Duck Valley Irrigation Project/Wild Horse Reservoir

Ultimately, our leaders were successful in establishing a formal Indian irrigation project in 1938, including critical storage for the project. Funding was first authorized by Congress for Wild Horse Dam and Reservoir in 1931, and construction was completed by 1938 to finally provide stored water to serve our reservation. Even with the construction of the Wild Horse Dam, however, the water resources of our Tribes were sacrificed for the benefit of non-Indian water users. The Wild Horse Dam and Reservoir were located nearly 15 miles south of the Reservation in a location that permitted 60 percent of the drainage flows from the Owyhee River to bypass the Wild Horse Dam and flow downstream to serve the Owyhee Project and meet off-reservation needs. The resulting loss of water has limited the number of acres of agriculture the Tribes can cultivate to 12,800 acres rather than up to 24,000–30,000 acres if the Wild Horse Dam was properly placed. [2]

The Bureau of Reclamation's Owyhee Project downstream in Oregon and Idaho, was planned, authorized and constructed during the same time period, and BOR treated the Tribes' Project as competition for Owyhee water. Rather than protecting the prior and paramount rights of the Tribes, however, the Federal Government acted to protect flows from the Owyhee River for the benefit of non-Indian water users. Just as devastating to our people was the destruction of Tribal fisheries caused by the Owyhee Project. The Project Dam was constructed without fish ladders or other devices to protect anadromous fish runs of salmon and steelhead to the Reservation. What was once an abundant resource to our people for subsistence and commerce was completely destroyed and forever lost as a result of the construction of the BOR Owyhee Project Dam. [3]

Federal Enforcement Efforts Abandoned

In an effort to firm up a water supply for the Reservation, the Justice Department prepared a detailed case in the 1930s to adjudicate the Tribes' water rights in the Owyhee River based on the Winters Doctrine. The filing of such an adjudication was

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[1] JRP Historical Consulting, *Duck Valley Indian Reservation: Creation, Purposes and Water Development* (hereafter JRP Report) July 1, 2005, at 11–17–18.

[2] The Bureau of Reclamation actively opposed the authorization and construction of the Duck Valley Reservoir because of concerns it would interfere with its own BOR Owyhee Project water supply, causing significant delays in construction of storage for the Duck Valley Project. JRP Report at VII–29–41. The BOR also actively opposed an adjudication of Duck Valley water rights that was proposed in the 1930s.

[3] It has been estimated that the average annual consumption of salmon and steelhead for each tribal member was 143 pounds. This amount does not take into consideration the Tribes' use of salmon and steelhead for trade and commerce.

recommended in a number of comprehensive irrigation reports prepared for the BIA, including a report completed by Charles Engle, an irrigation expert appointed by the Secretary of the Interior, who advised that the Tribes' water rights needed immediate protection.[4] Although a comprehensive bill of complaint was developed by the Justice Department, the case was never filed and was actively opposed by BOR.[5] Ultimately, it took the recommendations of a special attorney appointed by the Secretary, Louis Crampton, who undertook yet another exhaustive report on irrigation at Duck Valley, to bring about the construction of Wild Horse Dam in the face of BOR opposition. Yet the additional step of establishing and protecting the Tribes' water rights was never taken. JRP Report at VII–41–58.

The Tribes' water rights in Blue Creek and Mary's Creek have suffered a similar fate. Beginning at the turn of the century, non-Indian water users had constructed extensive diversion facilities on Blue Creek preventing flows from reaching the Reservation and causing several successful tribal farms to go out of business.[6] Once again adjudication was recommended to no avail, even though it was recognized at the time that: "The longer this matter is deferred, the more numerous and difficult will be the questions relative to water supply, as water is being continually appropriated on all of these streams, both above and below the Reservation."[7]

The Federal officials responsible for protecting the Tribes' water rights continually deferred taking action to establish Duck Valley water rights in favor of development by non-Indians above and below the Reservation, and in favor of the BOR Owyhee Project. At every turn, the Tribes' water rights were continually sacrificed for the benefit of non-Indian water users.

Duck Valley Indian Irrigation Project, A Failed Promise

The Duck Valley Indian Irrigation Project (DVIIP), which was finally constructed in 1938 along with the Wild Horse Dam as its storage facility to deliver water to irrigate agricultural lands on the Reservation, was never completed, and its promise has remained unfulfilled. As constructed, the DVIIP would only deliver water to 12,800 acres of reservation lands, not the full 24,000 acres of irrigable reservation lands that had been identified by a number of studies conducted by the government. Thus, the Tribes' goal of maximizing the amount of irrigated agricultural lands has never been fully realized.

Over the years, the Federal Government has not provided sufficient funds to adequately maintain the DVIIP, and the fees generated by the DVIIP are insufficient to even nominally maintain the DVIIP. Since the 1960s, the DVIIP has been required to operate on an annual budget of $60,000, the amount of the operation and maintenance fees charged to water users. As a result, the DVIIP has fallen into a substantial state of disrepair. Of the 12,800 acres of DVIIP lands, 7,000 acres are in sub-optimal production and the remaining 5,800 acres are currently fallow because of the deteriorating facilities and poor engineering. In addition to the reduced number of acres in production, those DVIIP lands that remain under active irrigation suffer from lower yields and less income than similarly situated off-reservation farms due to less than optimal cropping patterns.[8]

The subsidies that were promised to the Project have never materialized, and the level of disrepair has steadily increased. Some of the problems plaguing the DVIIP include overgrown and silted irrigation ditches, non-functioning gates and turnouts, and poorly engineered and unlined irrigation ditches, resulting in a highly inefficient delivery system and steadily declining agricultural production. Based on our current estimates, it will cost over $10.7 million to fully rehabilitate the DVIIP to bring all 12,800 acres of agricultural lands into production.

For the last 5 years, the Tribes have operated and maintained the Project under a Memorandum of Agreement and now as part of our Self-Governance Compact. Some improvement has occurred, but without significant funds to rehabilitate and better the Project, and to cover operation costs, progress is minimal.

Settlement Negotiations

Mr. Chairman, we have been engaged in negotiations with private water users, the State of Idaho, the State of Nevada, and the Federal Government to settle our water rights claims for over 15 years. It should be noted that the parties conducted these negotiations consistent with the Department of the Interior's policy for the settlement of claims concerning Indian water resources. Throughout this process,

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[4] JRP Report at VII–23–27.
[5] JRP Report at VII–27–40, 59.
[6] JRP Report at VI–1–14.
[7] JRP Report at VI–13.
[8] See the attached graph depicting the comparative cropping patterns in Idaho, Nevada, and the Shoshone-Paiute. It should be noted that alfalfa is a higher income producing crop than hay.

the Shoshone-Paiute Tribes and all of the other parties have anticipated a significant Federal contribution to our settlement. In fact, the Federal negotiating team reported to the Tribes that it would recommend a Federal contribution of $44.9 million to settle the Tribes water rights claims. At the point where we had reached agreements with all parties to settle our claims, we learned that the Federal Government, at the direction of OMB, had abandoned their prior offer and reduced the Federal contribution to $6 million. Further, the Federal Government is now taking the position that there must be a substantial state contribution to settlement, even though, at Duck Valley, the issues and responsibilities are almost entirely Federal. This abrupt shift in position has caused all of the parties in our settlement to reexamine their respective positions and consider their litigation alternatives.

In fact, because of the delay in reaching agreement on a Federal contribution, the State of Idaho abandoned the Idaho portion of the settlement and made an offer of judgment to resolve the Tribes' water rights claims through a consent decree. The consent decree was entered by the Idaho court on December 12, 2006, and decreed the Tribes' water rights in Idaho. Under the decree the Tribes' have approximately 19,516 acre-feet in the Owyhee River and its tributaries, including Blue Creek, based on the water necessary for domestic/commercial/municipal/commercial purposes, irrigation, reservoir storage, stock water and instream flow for stock and wildlife. The Tribes' claims for lake level maintenance, wildlife habitat and instream flows for fisheries were disallowed. The consent decree in Idaho did not resolve any of our water related claims against the Federal Government, however; nor did it provide the means to put any of the Tribes' water to use. Thus the need for the present Federal settlement remains undiminished.

Mr. Chairman it is particularly disheartening to our people that after 15 long years of negotiations with representatives of the Federal Government, including the Bureau of Reclamation, the Bureau of Indian Affairs and the Department of Justice, the results of those lengthy and difficult negotiations, including the original recommendation of a Federal contribution of $44.9 million, can be delayed and even wiped out by certain Federal officials at the 11th hour of the process. These Federal officials have never engaged in or participated in negotiations with our Tribe and have never set foot on our Reservation to see the challenges we must contend with each day.

Indeed, as a result of the intransigence of the Federal Government in moving forward with a comprehensive settlement in a timely fashion, the Tribes had little choice but to accept the offer of judgment made by the State of Idaho involving the Tribes' water rights in Idaho. Time literally ran out in the face of the litigation schedule set by the Idaho courts, and in the face of the unwillingness of the Federal Government to reconsider its proposed Federal contribution of $6 million.

On a more positive note, our settlement agreement with the State of Nevada and private water users in Nevada provides the Tribes with 111,476 acre-feet of surface water from the Owyhee River, storage water in the Wild Horse Reservoir, all water flows originating from springs and creeks on the Reservation, and 2,606 acre-feet of ground water, plus perennial yield. At the same time, the agreement protects the use of water by irrigators upstream (south) of the Reservation. The agreement is premised on allowing the upstream irrigators to continue their flood irrigation in the same manner they historically have irrigated, without interference, provided that the overall acreage agreed upon by the parties is not exceeded. The agreement also provides a small amount of storage to the upstream water users.

The Nevada agreement, together with the Tribes' decreed rights in Idaho, fulfills a critical aspect of our overall goal of creating a fully sustainable homeland for our people. Yet, there is one major element that remains unresolved. We will not be able to realize a fully sustainable homeland for our people without a significant Federal contribution to our settlement. A significant Federal contribution is essential to enable the Tribes to fully utilize their water through the rehabilitation and construction of water delivery structures necessary to transport water from the Wild Horse Dam and Reservoir and from Blue Creek, to restore and protect Reservation fisheries and critical wildlife habitat throughout the Reservation, and for the construction of other essential water related projects.

Conclusion

The Tribes cannot help but view the government's recent change in position as eerily similar to its past failures to secure water necessary to make our reservation a permanent homeland. It bears repeating that the United States is directly responsible for failing to protect the Tribes' water rights in the face of non-Indian development, failing to properly operate and maintain the Duck Valley Indian Irrigation Project, failing to properly site reservoirs and storage facilities in order to avoid waste of water resources, and failing to protect the Tribes' salmon fishery.

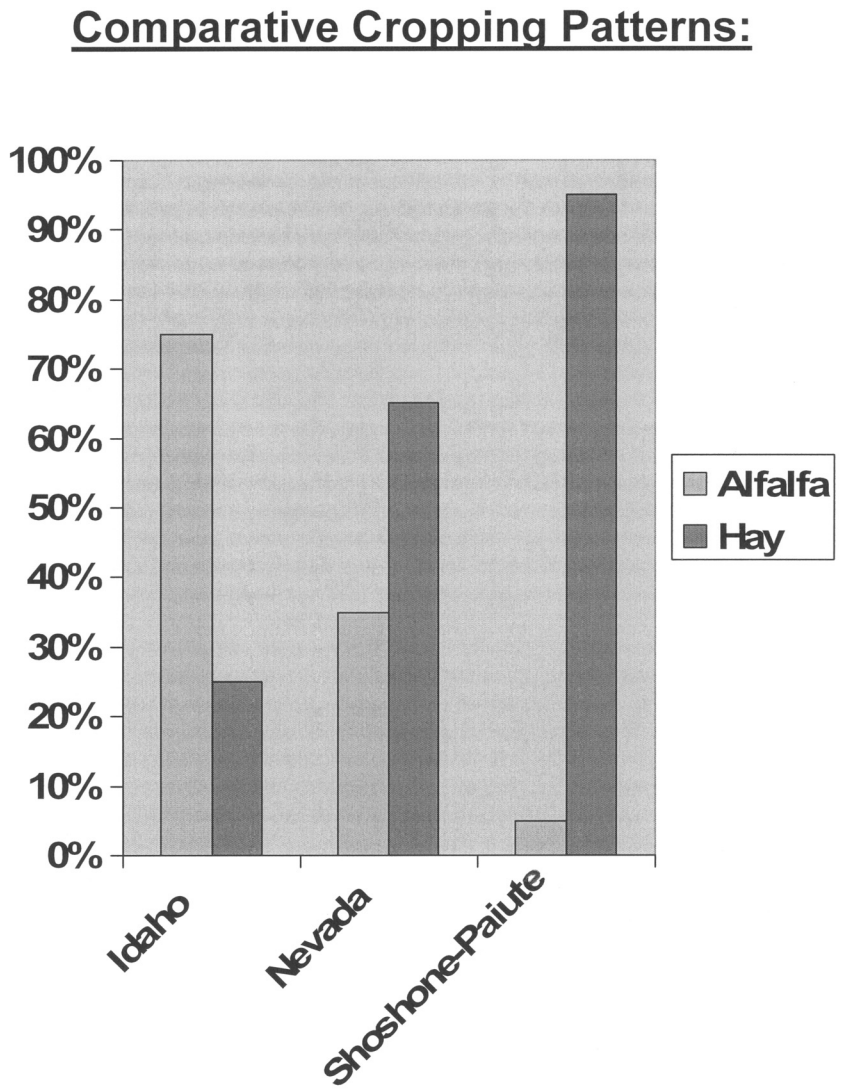
Mr. Chairman, rather than continue to focus on the past, the Tribes are committed to securing a stable and productive future for our people. In this regard, we believe that a Federal contribution of $60,000,000 would reasonably support the return of a viable Reservation for our people. This amount is significantly less than the $135,090,000 that is supported by our damages claims against the Federal Government, which satisfies a key component of the Department of the Interior's water rights settlement policy. Nevertheless, this amount would enable the Shoshone-Paiute Tribes to:

- Rehabilitate the Duck Valley Indian Irrigation Project
- Develop a portion of Owyhee PIA lands
- Provide a delivery system from Blue Creek
- Develop a Stream Bank Maintenance Program
- Make Reservoir Repairs
- Develop a Wildlife Habitat Project
- Provide for a Municipal Water System
- Capitalize a DVIIP Operation, Maintenance and Repair Trust Fund
- Provide an economic development fund
- Provide for Land Acquisition
- Develop a Water Management Plan and Code

Unfortunately, as we sit here today, the offer on the table from our Federal trustee is not the original recommendation of $44.9 million but less than 15 percent of that amount. We have participated in the Federal Government's negotiation process. We have followed the Federal Water Settlement Guidelines and we now have a Nevada settlement agreement on the table for approval.

It is respectfully submitted that it is time for the United States of America to fulfill the promises of a generation past by providing a Federal contribution of $60,000,000 to settle the water rights claims of the Shoshone-Paiute people and to fulfill the vision of our forefathers: the creation of a sustainable homeland for the Shoshone-Paiute people. S. 462 is a just and fair bill that would help us to realize our vision upon passage.

Thank you.



The CHAIRMAN. Chairman Prior, thank you very much. You are Chairman of the Shoshone-Paiute Tribes. Is that correct?

Mr. PRIOR. That is correct.

The CHAIRMAN. And how long have you been Chairman?

Mr. PRIOR. Since October, sir.

The CHAIRMAN. All right.

Our final witness is Allen Biaggi. Allen Biaggi is here today representing the State of Nevada. Mr. Biaggi is Director of the Department of Conservation and Natural Resources in the State of Nevada.

Mr. Biaggi, were you and the State involved in these negotiations?

Mr. BIAGGI. Yes, sir; we were.

The CHAIRMAN. Why don't you proceed? Your entire statement will be made part of the permanent record. You may summarize.

STATEMENT OF ALLEN BIAGGI, DIRECTOR, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA

Mr. BIAGGI. Good morning, Mr. Chairman. Thank you for allowing me to be here today in strong support of S. 462, on behalf of the State of Nevada.

For background, the Owyhee River system is located in extreme Northeastern Nevada on the Idaho border. The system is unique to the State in that it is only one of a handful of rivers and streams that do not have their terminus in the Great Basin.

Our major river systems, such as the Carson, Truckee, Walker, and Humboldt all drain internally in the State into internal lakes and playas. These waters never reach the ocean. The Owyhee, on the other hand, is a tributary to the Snake River and to the Columbia system with its terminus in the Pacific Ocean. The Owyhee is also unique in that it is the only major waterway shared by Nevada and Idaho and, of course, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation.

As you all know, Nevada is the most arid State in the Union. As such, water is a precious and highly valued commodity. The United States, on behalf of the tribes, has filed various claims for reserved water rights. Water users on the East Fork of the Owyhee River have also filed claims for vested rights or have obtained permits for water rights under Nevada law. Many of these claims are competing, resulting in disputes and the potential for protracted litigation.

About 1 decade ago, negotiations began between the Shoshone-Paiute Tribes, the United States, the State of Nevada, and the upstream water users, with the goal of resolving the water rights claims in an amicable manner in the absence of an administrative or court process. Discussions became more focused and results-oriented about 5 years ago and the Owyhee River Agreement is the product of those negotiations. It should be noted that in the grand scheme of water rights negotiations, the resolution of a system as complex as the Owyhee, with its varied interests and multiple parties, in only a decade is almost unprecedented.

In speaking for the State of Nevada, we are proud to be a part of this agreement and we applaud all the parties for their hard work and diligence. We also have agreed to certain financial and operational commitments which underscores our support of the settlement. Specifically, the State of Nevada will provide the services of a Water Commissioner to oversee and enforce the agreement and we will fund and maintain two critically important stream flow gauges on the East Fork of the Owyhee River.

With regard to the upstream water users, that is those farmers and ranchers who have long had a presence on the East Fork of the Owyhee, I would never be so presumptuous as to speak for them. I know a representative for them could not be here today.

I do know, however, that their position on the agreement can be summarized by noting that during the negotiation process there was a considerable amount of give and take on both sides, and that neither side is entirely satisfied.

The upstream water users believe the agreement is the best possible under the conditions and the circumstances. The upstream water users and the members of the tribes have always been able to resolve water matters in a manner which considers both parties, and this agreement further demonstrates that spirit.

In closing, I would like to thank Senator Reid for introducing S. 462 to ratify this agreement, and to his very capable and competent staff. S. 462 is in the best interest of the tribes, the upstream water users, and most importantly, the precious water resources of the West.

I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Biaggi follows:]

PREPARED STATEMENT OF ALLEN BIAGGI, DIRECTOR, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA

Good morning Chairman Dorgan, and Indian Affairs Committee members, my name is Allen Biaggi and I am the Director of the Nevada Department of Conservation and Natural Resources. This morning I am speaking in support of S. 462 on behalf ofthe State of Nevada.

For background, the Owyhee River system is located in extreme northeastern Nevada on the Idaho border. The system is unique to the state in that it is one of only a handful of rivers and streams that do not have their terminus in the Great Basin. Our major river systems such as the Carson, Truckee, Walker and Humboldt all drain internally in the State into terminal lakes or playas. These waters never reach the ocean. The Owyhee, on the other hand, is tributary to the Snake River and the Columbia system with its terminus in the Pacific Ocean. The Owyhee is also unique in that it is the only major waterway shared by Nevada and Idaho and of course the Shoshone-Paiute tribes of the Duck Valley Indian Reservation.

Nevada is the most arid state in the union. As such water is a precious and highly valued commodity. The United States, on behalf of the Tribe, has filed various claims for reserved water rights. Water users on the East Fork of the Owyhee River have also filed claims for vested rights or have obtained permits for water rights under Nevada law. Many of these claims are competing, resulting in disputes and the potential for protracted litigation.

About a decade ago, negotiations began between the Shoshone-Paiute Tribes, the United States, the State of Nevada and the upstream water users with the goal of resolving the water rights claims in an amicable manner in the absence of an administrative or court process. The discussion became more focused and results oriented about 5 years ago and the Owyhee River Agreement is the product of those negotiations. It should be noted that in the grand scheme of water rights negotiations, a resolution in a system as complex as the Owyhee with its varied interests of multiple parties in only a decade is almost unprecedented.

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In closing, I would like to thank Senator Reid for introducing S. 462 to ratify this agreement and to his very capable and competent staff. S. 462 is in the best interest of the Tribes, the upstream water users and, most importantly, the precious water resources of the west.

I would be pleased to answer any questions you may have.

OWYHEE RIVER WATER AGREEMENT OVERVIEW

The Duck Valley Indian Reservation was established by Congress in 1877 and further defined by Executive Orders in 1886 and 1910. On behalf of the Duck Valley Tribe, the United States has filed various claims for reserved water rights. Water users on the Owyhee River have also filed claims for vested rights or have obtained permits for water rights under Nevada law. Many of these claims are competing, resulting in disputes and litigation.

It is the desire of all of the parties to settle the water rights claims in an amicable manner in the absence of an administrative or court process. The Owyhee Agreement serves to settle these disputed claims and fairly allocate the surface and ground water resources within the basin.

Parties to the agreement:

Duck Valley Indian Reservation
Individual water users on the East Fork Owyhee River
The United States on behalf of the Tribe
The State of Nevada

Details of the Agreement

Negotiation of the agreement has been underway for about 4 years. The State of Nevada, through contract services, had Pete Morros, former State Engineer and DCNR Director head the effort. Other individuals participating in the process were Jeannie Whiteing, Esq. of Whiteing and Smith, Boulder Colorado representing the United States and Joe Ely, representing the Tribe. David Stanton, Esq. of Elko represented the upstream water users.

Under the agreement, the tribe shall have right to 111,476 acre feet of surface water annually with a priority date of April 16, 1877. The Tribe shall also have rights to springs and creeks located on tribal lands. The Tribe may use this water for any purpose that may be authorized by its governing body including use of that water off the reservation with the provision that such use be compliant with Tribal and State law.

Additionally, the Tribe may pump up to 2,606 acre-feet of ground water based on water currently or historically used on the Reservation. Ground water must be appropriated in accordance with Tribal Water Law (which must be substantially similar to Nevada Water Law) but the amount cannot exceed the perennial yield within the reservation boundaries.

Water amounts for use by the upstream water users is defined in the agreement by maps of currently irrigated areas and specific duties for various uses and crops. The agreement specifies a process for determining water availability in a given hydrologic year, storage in Wildhorse Reservoir and a process of allocation in times of shortage.

The agreement has provisions for dispute resolution and defines the State Court as the court of competent jurisdiction.

Reserve rights for tribes is a major issue in the West. It is clearly stated that the agreement is not precedent setting for these rights or for future agreements in Nevada.

Through the agreement the State shall provide the services of a water commissioner to oversee and enforce this agreement. The State also agrees to fund and maintain two stream flow gages on the Owyhee River.

The CHAIRMAN. Mr. Biaggi, thank you very much.

Mr. Ragsdale, let me start with you first. The BIA in the Department of the Interior were originally a part of negotiations, I believe, for 15 years to try to resolve this dispute. Let me ask historically, do you believe that the Federal Government mishandled, aggrieved, and injured the Shoshone-Paiute Tribes with respect to the way it handled water rights early on?

That tribe, as I understand it from Mr. Prior's testimony, was placed on the Duck Valley Reservation in the late 1800s, 1877. At that point, the chairman of the tribe, Mr. Prior, has described the circumstances under which the tribe was shortchanged. They perhaps would feel cheated because water rights they expected to have were not available to be used.

So the question is: Does the Federal Government have some responsibility and liability to this tribe in the way that it mishandled water rights, in your judgment?

Mr. RAGSDALE. Well, I would agree with much of what the Chairman has testified to here today. I would agree that the Federal Government has a responsibility, in its role as trustee, to help develop water rights and protect Indian water rights. The Chairman's story about his tribe is not unlike a lot of Indian tribes that are negotiating their water rights, or that have negotiated their water rights. So I would not disagree.

The CHAIRMAN. So then did the Government adequately protect the water rights of this Indian tribe, in your judgment?

Mr. RAGSDALE. The situation is what it is.

The CHAIRMAN. I understand that.

Mr. RAGSDALE. The irrigation project was never fully completed.

The CHAIRMAN. I understand that. My question was not that. My question was, did the Federal Government meet its responsibility to adequately protect the water rights of this Indian tribe?

Mr. RAGSDALE. With due respect, Mr. Chairman, I don't think that I should be answering that question. I am not a lawyer and I am not representing the Department of the Interior as its lawyer.

The CHAIRMAN. But the Department was involved for 15 years in a settlement. The reason I am asking that question is because there is something curious going on here. The Department of the Interior on behalf of the Federal Government was involved for 15 years in negotiations with the tribe, with the other non-Indian users, with the State. And originally, I believe, and you might correct me if I am wrong, talked about a potential settlement of $44 million, and then reduced that to $10 million.

The implication of that, of course, is first, that the Federal Government, at least during the negotiations, felt there was some kind of a liability, perhaps because they mishandled the water rights; and second, something happened in the negotiations that persuaded the Federal Government to decide they won't settle for $44 million, but they will try to reduce that to $10 million.

Can you give me some background on why that occurred?

Mr. RAGSDALE. I will try to, Mr. Chairman.

It is my understanding that the water rights team at the time that the $45 million number was mentioned were authorized to present that number at the table, but the final number had not been approved through all the channels of the Federal Government, that is, through the Department of Justice and the Office of Management and Budget.

Now, the Department of the Interior has been engaged with the tribe and the State, it is my understanding, until the last year, but the departmental water team has not been engaged in finalizing the proposed agreement. My understanding is that the team could be engaged in negotiations very quickly to go over some of the tech-

nical concerns that are embodied in the proposed water agreement that the bill embraces, and also to talk about the monetary share and allocation and try to work through that.

The CHAIRMAN. Mr. Ragsdale, it appears to me that the negotiation is complete, although you have some concerns about it. The reason I am asking you these questions, I think there is something curious here about your saying that the team from the Department of the Interior Department of the Federal Government at one point proffered $40 plus million as a settlement offer, but you said that was withdrawn because even though they were at the table negotiating and offered that, somehow OMB had not approved it, or Justice had not approved it? That is a curious way to engage in negotiations, offer something that has not been approved?

Mr. RAGSDALE. Perhaps that is so. I wasn't around so that I can tell you exactly what happened, but it is my discussion, and it is common in negotiations; 10 or 20 years ago, I served on some water teams and tried to solve some Indian water rights issues. Often in terms of the negotiation, you will have numbers that are proffered and discussed between the teams, and then the teams have to get back to the ultimate decider and decide what can be agreed to. That is where we are now.

The CHAIRMAN. It is curious to me. Normally in negotiations, those that offer something have the authority to offer it. You are suggesting that we have people who come to a table offering something they don't have authority to offer.

I am a little disappointed that after 15 years, a negotiation occurs which appears to mean every side has given something. The non-Indian users, the Indian tribe, everybody has given a little something, having been participants in the negotiations for a long while. The sole exception here is the Department of the Interior, the Federal Government, which I think caused the problem, pulls out of the negotiations and says, not us, not now.

I think that is a curious way to deal with this issue, given the history. But you have a right to do so, certainly, and we asked you to come to this hearing because we want your opinion. But I must tell you, I am very disappointed because it seems to me that the Federal Government has mismanaged the water rights of this tribe, and I believe that is the case over a long period of time. This is not unique. It has happened in a lot of parts of this Country, as you just said.

I think one of the first obligations of the Federal Government is to aggressively participate in negotiations to reach an agreement, a fair settlement for the tribe.

Mr. RAGSDALE. Mr. Chairman, if I could just say?

The CHAIRMAN. Yes?

Mr. RAGSDALE. Again, we hope to be able to do that. I think that there are some technical issues that the experts in the department have talked to me about, that they think they can work with the tribes and the State to come to resolution with. And then the main issue is going to be the monetary contribution and the share. I would hope that we would get to closure on that quickly.

The CHAIRMAN. Mr. Ragsdale, I think the train has left the station. You might have a ticket, but the train is gone. So we will see.

Chairman Prior, I asked the question you referred to it in your testimony. You feel as a result of this agreement that you have given some. I understand. Are you completely happy with the negotiated settlement that you come here supporting on behalf of your tribe?

Mr. PRIOR. Mr. Chairman, historically it has been documented that this tribe's claims against the Federal Government could be around $138 million. Through negotiations with the Federal team, and that give and take that you just spoke of, this tribe has given up quite a bit to come to this point, where we feel we could resolve our claims against the U.S. Government in the area of water once and for all.

The amount $44.9 million in good faith was reported to the tribes. My leadership truly believe that they were the ones to make that offer and to have the offer stick. To walk away from a negotiation and not have it go anyway was totally disheartening, but we are very hard-working people. My people are ranchers and agriculturalists at heart, and they have been since they were removed from their homelands to live here. We have made do with what we have so far. If it has been cultivating 12,000 acres, so be it. We have done the best we could. But this would definitely make the reservation a thriving agricultural economy once again.

The CHAIRMAN. How many enrolled members do you have in the tribe, Chairman Prior?

Mr. PRIOR. We have nearly 2,000 enrolled members, sir.

The CHAIRMAN. Is this still principally an agricultural tribe?

Mr. PRIOR. It is. Agriculture is still the heart of our tribe's economy. We have ranchers who produce alfalfa and hay for their livestock. Of course, water is part of the fisheries issue as well.

The CHAIRMAN. Mr. Biaggi, with respect to the State of Nevada and its position in this negotiation, I assume you were representing the State's interest, but also trying to bridge the interests of the non-Indians who moved in to fill the void of water rights the Indians thought that they possessed. Do you think this is a fair settlement? Do you think the legislation offered by Senators Reid and Ensign represent an appropriate way to resolve this dispute?

Mr. BIAGGI. Mr. Chairman, I do. The State of Nevada is rife with conflicting water issues, not only on the Owyhee, but every major river system. We are very pleased and honored to be a part of the discussions and the negotiations, and to be a part of this agreement. The State of Nevada has stepped up with its commitments to assist the tribe and the water users in a fair allocation of the water. We look forward to this moving forward, and we again thank Senator Reid and believe this is good legislation.

The CHAIRMAN. We have been joined by the Vice Chairman of the Committee, Senator Craig Thomas from Wyoming. Senator Thomas, welcome.

STATEMENT OF HON. CRAIG THOMAS,
U.S. SENATOR FROM WYOMING

Senator THOMAS. Thank you. I am sorry. I had a conflicting meeting, so I won't take more time, since I didn't hear the testimony, but I am glad you had the hearing. Certainly, I hope we can help come to some agreement to get this thing completed.

The CHAIRMAN. Senator Thomas, thank you. It is clear to us, as I think all of the witnesses have stated, water rights represent a controversial set of issues, not just in Indian country, but in many other venues around the Country. But it is the case, I think, that water rights on behalf of tribal water rights have been mishandled terribly in many cases by the Federal Government.

That is why, Mr. Ragsdale, I want you to succeed. I want the BIA to do well. I want you to make good policy. But I have to tell you, I am disappointed that every party to these negotiations, that have gone on for a long, long time, every party, the Tribes, the non-Indian water users, and the State of Nevada, has now agreed to a negotiated settlement except the Department of the Interior. I find that disappointing because, as I indicated, the history here shows the Department of the Interior was involved.

I am not just talking about this Administration. I am talking about going back 15 years. The Department of the Interior was involved in negotiations and actually proffered a settlement of $44 million at one point, and then withdrew it. I am wondering, and I hope this is not the case, if there are some in the Office of Management and Budget that think it is cheaper to go to court than it is to settle. I would hope that is not the case, because the Federal Government has responsibility for mishandling water rights on behalf of tribes. We have a trust responsibility, and we need to be aggressively searching for a fair settlement. That ought to be our responsibility.

This piece of legislation is bipartisan introduced by both of the Senators in the State of Nevada. Senator Thomas and I will take it under advisement with our other Committee members and hope to move ahead. My sense is that this negotiation, hard-fought over a long period of time, will be the kind of thing that will settle a longstanding water dispute. I am inclined to hope that this Committee will be able to take effective action to move this to the Floor of the Senate.

Do any of the witnesses have any other comments? If not, thank you.

This hearing is adjourned.

[Whereupon, at 10:35 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JOHN ENSIGN, U.S. SENATOR FROM NEVADA

Mr. Chairman, Senator Thomas, and Distinguished Members of the Committee:

Thank you for holding this important hearing on S. 462, The Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act. It is my pleasure to provide written testimony in support of this measure. I also wish to thank Senator Harry Reid for his leadership on this bill and for the work of Tracy Hartzler-Toon, a staff member for this Committee

The Duck Valley Indian Reservation is the homeland of the Shoshone-Paiute Tribes. The reservation, established by Executive Order in 1877, encompasses approximately 290,000 acres across Nevada and Idaho, including the Owyhee River and two blue line streams. In the 1930s, the Shoshone-Paiute Tribes' fishing industry was damaged, as the area salmon runs were ruined with the construction of the Bureau of Reclamation's Owyhee Irrigation Project Dam. Salmon fishing was an integral part of the Tribes' economic and cultural livelihood.

The Bureau of Indian Affairs oversaw the Duck Valley Indian Irrigation Project. The project encompassed 12,000 acres of land that became the Wild Horse Reservoir, the primary water storage facility located fifteen miles south of the Reservation. The project provided very little, if any, economic benefit for the Tribes. Finally, after years of negotiations, all parties involved have reached an agreement.

S. 462 achieves two things. First, it ratifies the Owyhee River Settlement in Nevada that was reached in 2006. Additionally, the Shoshone-Paiute Tribes would receive $60 million. This money would be allocated for the acquisition of land and water rights, and create and maintain water-related projects. These projects will assist the Tribes economic development by producing a functional irrigation system; promoting wildlife habitat restoration; and development of fish hatcheries. This legislation provides the Shoshone-Paiute people with long-term economic security, more opportunities for prosperity, and a foundation to become more economically self-sufficient.

I applaud all the groups for coming together to reach an understanding on these difficult water rights issues. The Elko County Commission, the State of Nevada and Governor Jim Gibbons, upstream water users and the Tribes.

I look forward to working with my colleagues in the Senate to pass this legislation and addressing any concerns.

PREPARED STATEMENT OF HON. DEAN HELLER, U.S. REPRESENTATIVE FROM NEVADA

Mr. Chairman and Members of the Committee on Indian Affairs, thank you for inviting me to give testimony on the Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act. This legislation will settle water rights claims that have gone unresolved far too long for the Shoshone-Paiute Tribes of the Duck Valley Reservation in my district in northern Nevada.

The Duck Valley Reservation was established in 1877 and is located along the Nevada/Idaho border. Water in the arid western states is a precious commodity and is the lifeblood for farmers, ranchers, and wildlife. Without proper water management, none of this can exist.

With the appropriate allocation of the East Fork of the Owyhee River, Blue Creek, and Mary's Creek, the Tribe can realize its full potential for raising livestock, farming, fisheries, and maintain healthy wildlife populations. As you can see, this legislation is very important for the health of the Duck Valley Reservation.

The Shoshone-Paiute Tribes of Idaho and Nevada have engaged in negotiations to resolve the water rights of the Duck Valley Reservation. The legislation under consideration today approves, ratifies, and confirms the agreement that the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and the Upstream Water Users of the East Fork Owyhee River.

The Duck Valley Water Rights Settlement Act will complete the water agreement and provide adequate funding for water management and irrigation projects. I intend to introduce companion legislation in the near future to finally help resolve this important Issue.

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