

**INDIAN WATER RIGHTS: PROMOTING THE  
NEGOTIATION AND IMPLEMENTATION OF  
WATER SETTLEMENTS IN INDIAN COUNTRY**

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**HEARING**

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**ONE HUNDRED TWELFTH CONGRESS**

**SECOND SESSION**

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**MARCH 15, 2012**  
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**THURSDAY, MARCH 15, 2012**

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

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,  
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. The Committee will come to order.

I want to say aloha and welcome to all of you here today, especially our Committee witnesses today. As you know, we are here to conduct a hearing on Indian water rights. We have three people on our panel who probably can answer all the questions we will have, and keep us straight according to the laws and all of that.

So it is good to have a hearing promoting the negotiation and implementation of water settlements in Indian Country.

The settlement of Indian water rights has benefits that extend far beyond the boundaries of Indian reservations. Over 100 years ago, the Supreme Court affirmed that in reserving homelands for their people, tribes also reserved the water rights on and off reservations. In order to fulfill its trust responsibility, Congress plays an integral role in the tribal water rights settlements.

Congress has approved over two dozen water settlements in the past 35 years. Last Congress, we enacted legislation that settled the water rights for seven tribal nations. Collectively, these seven tribes spent nearly a century litigating their water rights in court before having their settlements approved by Congress. Can you imagine this?

In determining water rights claims, a tribe and other stakeholders may pursue either litigation or negotiation. Negotiating to reach a settlement in Indian water rights claims is advantageous for all parties. It is cheaper, takes less time and is more flexible than litigation. Negotiations may also foster better working relationships between all parties. This can have positive outcomes for not only the tribes but for the surrounding non-Indian communities as well.

Before the communities can see the benefits of their settlement, several challenges remain. These include Congressional ratification securing funding and implementation. Successful implementation leads to secure and reliable access to water, economic development and alleviates uncertainty of unsettled Indian water rights claims.

Tribes have made tremendous sacrifices to protect and ensure access to water, a sacred resource. Congress must continue to review the settlement negotiation process, find funding mechanisms, then ensure that congressionally-ratified settlements are properly implemented. These issues were raised in the first session of this Congress at the Committee's Roundtable on Indian Water Rights. Today we are here to continue discussions and seek solutions.

It is important that the Committee hears from all interested parties on these matters. I would like to encourage stakeholders to submit comments or written testimony for the record, and therefore the hearing record will remain open for two weeks from today.

I would like now to invite our first panel to be ready for the questions and we will begin, of course, with the statements and testimony. But let me introduce them. The Honorable David Hayes, Deputy Secretary of the Interior. And accompanying Secretary Hayes are Mike Connor, who is the Commissioner of the Bureau of Reclamation, and Mr. Del Laverdure, who is the Principal Deputy Assistant Secretary of Indian Affairs at the Department of Interior.

Again, welcome, gentlemen. Let me ask Mr. Hayes to, if you will please, to proceed with your testimony.

**STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY,  
U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY  
MIKE CONNOR, COMMISSIONER, BUREAU OF RECLAMATION,  
AND DEL LAVERDURE, PRINCIPAL DEPUTY ASSISTANT  
SECRETARY—INDIAN AFFAIRS**

Mr. HAYES. Thank you very much, Senator. And thank you very much for holding this important hearing. We very much appreciate the opportunity to talk about the Obama Administration's commitment to Indian water rights settlements.

As you mentioned, I am accompanied here by Del Laverdure, the Principal Assistant Secretary for Indian Affairs, and Mike Connor, the Commissioner of Reclamation. I would like to make a few comments and ask that my testimony be submitted for the record. And with your indulgence, I would also, after I make a few comments, ask that Del and Mike have an opportunity to say a few words as well.

The CHAIRMAN. Please proceed.

Mr. HAYES. Thank you, Senator.

Our Administration, Senator, agrees with everything that you just said in your opening statement. We understand how water is such a sacred and valuable resource for our First Americans. We as representatives of the Federal Government are committed to addressing the water needs of Native Americans through our Indian water rights settlements.

As you said in your opening statement, these settlements not only secure tribal water rights, but they help to fulfill the promise of the United States to tribes that Indian reservations would pro-

vide their people with permanent homelands. Indian water rights settlements help us achieve that goal, while at the same time ending decades of controversy and contention among tribes and neighboring communities over water. They provide certainty and foster cooperation in the management of water resources.

As you noted, Mr. Chairman, in the last Congress, this Administration supported four Indian water rights settlements for seven tribes. We thank you for this Committee's bipartisan support for these settlements. All told, those settlements resolved a century of litigation and bitter disputes.

Those four settlements will support the maintenance of permanent water supplies and enhance economic security for the Taos Pueblo and four other pueblos in New Mexico, the Crow Tribe in Montana, of which Del Laverdure is a member, and the White Mountain Apache Tribe of Arizona. They enable the construction and improvement of domestic reservation water systems, a regional multi-pueblo domestic water system and a codified water-sharing arrangement between Indians and neighboring communities.

We are also working right now to implement the release of \$21 million in federal funding under the Soboba Settlement Act which was enacted in 2008, another historic settlement.

And as you know, when the President first came into office in March of 2009, he signed the Omnibus Public Lands Management Act, which included the Northwestern New Mexico Rural Water Project Act that settled longstanding water rights claims of the Navajo Nation within the San Juan River Basin in New Mexico. That act authorizes the construction of the Navajo-Gallup Water Supply Project, which will bring a clean and sustainable water supply to the Navajo Nation, where an estimated 40 percent of the residents are dependent upon hauling water for use in their homes. And that settlement also will help to augment the City of Gallup's drinking water system, which is facing decreasing water supplies.

I would note that this project is one of 14 infrastructure projects that our Administration has selected to be expedited through permitting and environmental review processes. The Bureau of Reclamation will initiate construction of the pipeline this spring.

We know our work is not done. We are continuing to be active participants in 16 additional negotiations. In particular, Blackfeet and the Navajo-Hopi Little Colorado River rights settlements are the subject of pending legislation. Both of these bills are the products of a great deal of effort by a multitude of parties. We are hopeful that we can move those toward resolution.

We are also working on many other settlements currently, including a settlement with the Pechanga Tribe in California, among others.

I would like to very briefly just describe how we operate in the Government, Mr. Chairman, in terms of implementing these water rights settlements. First of all, this is handled at the top of the Interior Department. Secretary Salazar is personally involved in these matters. My counselor and the chair of the working group on Indian Water Rights Settlement, Letty Belin, who is with us today, along with the assistant secretaries of Indian Affairs and Water and Science, the Commissioner of Reclamation, our solicitor, we work as a team to bring these issues to fruition.

The Secretary's Indian Water Right Office has been in place for over two decades. And we are fortunate to have Pam Williams, who is also with us, who heads up that Water Rights Office, reporting to Letty Belin.

We are operating under criteria and procedures that have been in place now for more than 20 years. We know how to do this and what it takes is will and effort and the cooperation of the Congress. We have all of those today, thanks in part to this Committee's unflinching support for trying to settle these matters instead of litigating them.

We have currently 16 appointed Federal Indian water rights negotiation teams active in negotiating water rights claims and an additional 20 teams are working on implementation of already-approved water rights settlements, including the four just enacted in 2010.

In terms of the future, we know there is much more work to be done. Our negotiating teams are working with both Indian and non-Indian interests in terms of resolving outstanding water rights. These are difficult issues to resolve. They often require substantial financial resources in order to finance the delivery of wet water to tribes. It is no good to simply have a settlement that provides a paper water right. We are committed to making this truly a right that is realized by tribes in terms of wet water on their reservations and on their homelands.

In recent years, the Congress has been very creative about finding mandatory funding availability for Indian water rights. This is incredibly important because these settlements cannot be funded out of discretionary funds at the Bureau of Indian Affairs. We applaud the work of the Congress in finding reliable funding streams for these settlements.

With that, Mr. Chairman, I would ask, with your indulgence, that Del Laverdure provide a comment or two, followed by Commissioner Connor. Thank you.

[The prepared statement of Mr. Hayes follows:]

PREPARED STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Chairman Akaka and Vice-Chairman Barrasso, and, Members of the Committee, my name is David J. Hayes, and I am the Deputy Secretary of the Department of the Interior (Department).

Thank you for the opportunity to appear before you today to discuss this Administration's policy on Indian water rights settlements. As you may know, I served first as Counselor to then-Secretary of the Interior, Bruce Babbitt, and later as Deputy Secretary during the Clinton Administration. In those capacities, I chaired the Department's Working Group on Indian Water Settlements and played a leadership role in the Department's Indian water rights program. During those years, we worked on numerous water settlements. Some of the settlements, including the Zuni Indian Tribe Water Rights Settlement; the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement; the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement; the Yavapai-Prescott Indian Tribe Water Rights Settlement; the Confederated Tribes of the Warm Springs Reservation Water Rights Settlement; the Las Vegas Paiute Settlement; and major amendments to the Colorado Ute Indian Water Rights Settlement Act, came to fruition during that time. Significant groundwork was also laid on other important settlements that occurred later, including the Arizona Water Rights Settlement; the Soboba Band of Luiseno Indians Settlement; and the Snake River Water Rights Act.



## I. Introduction

The Obama Administration recognizes that water is a sacred and valuable resource for Indian people and therefore has re-energized the Federal Government's commitment to addressing the water needs of Native American communities through Indian water rights settlements. Water settlements not only secure tribal water rights but also help fulfill the United States' promise to tribes that Indian reservations would provide their people with permanent homelands. Indian water settlements help achieve that goal, while at the same time ending decades of controversy and contention among tribes and neighboring communities over water. Indian water settlements provide certainty, which fosters cooperation in the management of water resources.

In the last Congress, this Administration supported four Indian water rights settlements for seven tribes at a total federal cost of more than \$1 billion. All told, these settlements resolved well over a century of litigation and bitter disputes. These settlements were enacted into law in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010). Support for four Indian water rights settlements that were ultimately enacted during one Congress is an unprecedented achievement. This Administration's active involvement in the negotiations of these settlements led to both significant improvements in the terms of the settlements and reduction in their federal costs, which ultimately led to our support for them. Our support for these four settlements clearly demonstrates that settling Indian water rights disputes is a high priority for this Administration and confirms that we would support Indian water settlements that result from negotiations with all stakeholders including the Federal Government, and that come with a reasonable federal price tag and good cost share contributions from states and other benefitting parties.

Effective implementation of the four settlements in the Claims Resolution Act will support the maintenance of permanent water supplies and enhance economic security for five Pueblos in New Mexico, the Crow Tribe of Montana, and the White Mountain Apache Tribe of Arizona. The agreements enable the construction and improvement of domestic reservation water systems, irrigation projects, and a regional multi-Pueblo domestic water system, and also will codify water-sharing arrangements between Indian and neighboring communities. These four settlements intend to usher in a new chapter on water in these regions—one marked by certainty, harmony, and economic activity.

In addition to its work to enact these four settlements, this Administration is working with the parties to allow the release of \$21 million in federal funding under the Soboba of Luiseño Indians Settlement Act, Pub. L. No. 110-297 (July 31, 2008), marking the final step in an historic water rights settlement and fulfilling promises made to the Soboba Band and southern California communities when the Act was approved by Congress in 2008. The implementation of the settlement is expected to stabilize water supplies in the region and enhance economic development opportunities for the Band and neighboring communities.

In March 2009, President Obama signed the Omnibus Public Lands Management Act, Pub. L. No. 111-11 (Mar. 30, 2009), which included the Northwestern New Mexico Rural Water Projects Act that settles the long standing water rights claims of the Navajo Nation within the San Juan River Basin in New Mexico. The act authorizes the construction of the Navajo Gallup Water Supply Project which will bring a clean and sustainable water supply to the Navajo Nation, where an estimated 40-percent of residents are dependent upon hauling water for use in their homes, and will help to augment the City of Gallup's drinking water system, which is facing decreasing water supplies. The Navajo-Gallup Water Supply Project is a major component of the Navajo Nation's water rights settlement with the State of New Mexico and was selected by the Administration as one of 14 infrastructure projects across the country to be expedited through the permitting and environmental review processes. The Bureau of Reclamation will initiate construction of the project this spring. The Navajo Gallup Water Supply Project will include the construction of two water treatment plants, 280 miles of pipeline, 24 pumping plants, and numerous water regulation and storage facilities.

Our work is not done, however, and we continue to be active participants in 16 additional negotiations. Two of these, Blackfeet (S. 399/H.R. 3301) and the Navajo-Hopi Little Colorado River Water Settlement (S. 2109/H.R. 4067), are the subject of pending legislation. Both the Blackfeet and Navajo-Hopi bills are the products of a great deal of effort by a multitude of parties and reflect a desire by the people of Montana and Arizona, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This Administration shares that goal and we are currently working at the highest levels within the Department to craft settlement provisions that the Administration will be able to support.

## **II. The Impetus for Water Rights Settlements**

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can date back 100 years or more, are a tangible barrier to socio-economic development for tribes, and significantly hinder the management of water resources. Settlements of Indian water rights disputes can break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of major water rights holders who are parties to the disputes. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the general federal trust responsibility to American Indians and with federal policy promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for more than 30 years, federally recognized Indian tribes, states, local parties, and the Federal Government have acknowledged that negotiated Indian water rights settlements are preferable to protracted litigation over Indian water claims.

Indian water rights are especially valuable in the West for many other reasons, including the fact that Indian reserved water rights cannot be lost due to nonuse, and Indian water rights have a priority date no later than the date of the creation of the reservation with which they are associated. Because most reservations were established prior to the settlement of the West by non-Indians, even very senior non-Indian water rights are often junior in priority to Indian water rights. Because most tribes have lacked resources to develop their own domestic water supply systems, irrigated agriculture or other industry to make use of their water resources, their ability to use their water rights has been limited. As a result, Indian water rights have often been used for years by neighboring non-Indian interests and communities with the unfortunate effect of reliance by non-Indians on water to which Indians have the senior rights.

Simply litigating title to water rights has not proven to be an effective solution for tribes or their non-Indian neighbors. Litigation often lasts for decades at great cost to all parties: the Federal Government, tribes, states and local water users. Even when litigation is concluded and a court decrees that a tribe has a right to a certain amount of water of a certain priority date, uncertainty persists. If a tribe cannot put its water rights to immediate use, Western water law principles allow other junior users to take advantage of the water until such time as a tribe can put the water to use. This, of course, casts a pall of uncertainty over a water system because junior users have no way of knowing when the tribe will be in a position to use its water.

A judicial decree does not get "wet water" to tribes, nor does it provide new infrastructure or do anything to encourage improved water management in the future. Negotiated settlements, on the other hand, can, and generally do, address these critical issues. Through a settlement, parties can agree to use water more efficiently or in ways that result in environmental benefits, or to share shortages during times of drought rather than relying on strict principles of seniority in priority date. In exchange for settlement benefits, tribes can agree to subordinate use of their water rights so that existing water uses can continue without impairment. Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertainties in Federal and State law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

## **III. The Department's Indian Water Rights Office**

This Administration's commitment to Indian water settlements is reflected in the leadership at the Department. Secretary Salazar's vision and the work of so many at the highest levels of our Department make our Indian water rights program a success. My Counselor and the Chair of the Working Group on Indian Water Settlements (Working Group), Letty Belin, along with the Assistant Secretaries of Indian Affairs and Water and Science, the Commissioner of Reclamation, the Office of the Solicitor, and the Secretary's Indian Water Rights Office, work as a team to achieve results that make a real difference, not only for tribes but for all the communities involved.

The Secretary's Indian Water Rights Office (SIWRO) was formally established as part of the Secretariat in 2009, but it has been in existence for more than two decades. The Director of SIWRO leads, coordinates, and manages the Department's Indian water rights settlement program in consultation with the Office of the Solicitor.

The current Director, Pamela Williams, reports to Letty Belin, Counselor to the Deputy Secretary, who also serves as the Chair of the Secretary's Working Group on Indian Water Settlements (Working Group).

The Working Group consists of the Solicitor and the Assistant Secretaries and makes recommendations to the Secretary regarding the position of the United States in negotiations. As the Deputy Secretary, I have taken a strong interest in supporting settlement efforts, helping to steer settlement parties towards workable solutions and personally participating in settlement negotiations that seemed to be stuck. The Department works with other federal agencies, including the Office of Management and Budget and the Department of Justice, in preparing the settlement negotiation positions of the United States.

The Federal Government is guided in negotiations by the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* (55 FR 9223, March 12, 1990) (*Criteria and Procedures*). The Department and other federal agencies participate in settlement discussions at the local level primarily through federal negotiation teams. The teams interact with settlement parties, explain federal policies on settlement and, when possible, help mold the parameters of a settlement. The SIWRO interfaces with the teams through Team Chairs appointed to each team in the field. The SIWRO works directly with the Chairman of the Working Group and provides policy direction to the teams throughout negotiations. A representative from the Department of Justice is appointed to each team, as are representatives from other federal agencies having an interest in a particular negotiation.

Once a settlement is enacted into law, SIWRO oversees its implementation, primarily through federal implementation teams, which function much like the federal negotiation teams only with a focus on helping the Indian tribe and the other parties implement the enacted settlement.

Currently, there are 16 appointed Federal Indian Water Rights Negotiation Teams active in negotiating water rights claims in the western United States. An additional 20 Federal Indian Water Rights Implementation Teams work on implementing congressionally enacted settlements, including the four enacted in 2010. With increasing drought conditions in the United States and pressure from an expanding population, the number of requests for the appointment of new negotiation teams continues to grow.

In the last ten years, six bills authorizing Indian Water Rights settlements with fourteen Indian tribes have been enacted: Zuni, Pub. L. No. 108-34, Nez Perce, Pub. L. No. 108-447, and the Arizona Water Settlements Act, Pub. L. No. 108-451 (Dec. 10, 2004) (Gila River Indian Community, Tohono O'odham Nation), Soboba Indian Tribe, Pub. L. No. 110-297 (July 31, 2008), Omnibus Public Land Management Act, Pub. L. No. 111-11 (Mar. 30, 2009) (Navajo-San Juan, and Shoshone-Paiute Tribes of the Duck Valley Reservation), and the Claims Resolution Act Pub. L. No. 111-291 (Dec. 9, 2010) (White Mountain Apache Tribe, Crow Tribe, Pueblo of Taos, Pueblo of Nambé, Pueblo of Pojoaque, Pueblo of San Ildefonso, and Pueblo of Tesuque). Of the six bills, President Obama signed two of the bills, which settled water rights claims for nine Indian tribes.

#### **IV. Future Challenges**

We recognize that much work remains to be done in this area. Through the Federal Negotiation Teams, we are actively participating in ongoing negotiations to settle water rights claims in a number of States including Arizona, Montana, New Mexico, and California. As I stated previously, legislation to approve the Blackfeet and the Navajo-Hopi settlements is currently pending in Congress. We look forward to working with this Committee and the stakeholders of these settlements to produce strong settlements that the Administration can support.

During the litigation, assessment and negotiation phases, the Bureau of Indian Affairs' (BIA) Water Resources and Water Rights Litigation and Negotiation Programs provides technical and factual work product in support of the Indian water rights claims. This program provides the major financial support for the United States to defend and assert Indian water rights. The funds are used by the United States and tribes for activities associated with establishing or defending Indian water rights through negotiations and/or litigation. Program funding is critical to supporting and advancing on-going Indian water rights litigation cases and the federal and tribal negotiations being conducted to secure adjudicated water rights in lieu of litigation. In the Indian water rights litigation cases, BIA water programs staff coordinate with the Department of Justice and Interior's Office of the Solicitor to provide expert witnesses and consultants' studies to meet court and other deadlines. In addition to providing negotiation and/or litigation support for Indian water rights claims, funds are used for technical research and studies to develop and sub-

stantiate the United States' claims for Indian trust water rights. For fiscal years 2010 to 2012, funding for this program averaged around \$8 million. For FY 2013, the budget request is for \$8.6 million.

Another program within the Department that provides assistance for Indian water rights claims is the Native American Affairs Program (NAAP) within the Bureau of Reclamation (Reclamation). NAAP provides technical support for Indian water rights settlements, and to assist tribal governments to develop, manage and protect their water and related resources. This office also provides policy guidance for Reclamation's work with tribes throughout the organization in such areas as the Indian trust responsibility, government-to-government consultations, and Indian self-governance and self-determination. For fiscal years 2010 to 2012, funding for this program averaged around \$6.8 million. For FY 2013, the budget request is for \$6.4 million.

One of the questions that we must wrestle with, and that we would like to engage this Committee and other stakeholders in further discussions of, is how to fund Indian water rights settlements going forward. Until recently, water rights settlements generally were funded through the Department's discretionary appropriations. Work to be performed under the settlements by Reclamation has come out of Reclamation's budget, and other settlement costs generally have come out of the BIA's budget.

Recognizing that discretionary budgets have been coming under increasing pressure in these tight budget times, Congress recently has included provisions for a variety of innovative funding mechanisms in water rights settlements. The Claims Resolution Act, for example, provided approximately \$650 million of direct funding for the water rights settlements enacted therein, plus an additional \$180 million of funding for the Navajo-San Juan settlement enacted in Pub. L. No. 111-11 (Mar. 30, 2009). Consistent with the budget rules established by the Statutory Pay-As-You-Go Act of 2010 (PAYGO), Pub. L. No. 111-139 (Feb. 12, 2010), Congress must provide for offsets of direct spending contained in legislation in order to avoid increases in projected deficits, and all spending contained in the Claims Resolution Act was fully offset.

Another approach that Congress took in section 10501 of Pub. L. No 111-11 (Mar. 20, 2009) was the creation of the Reclamation Water Settlement Fund. Starting in 2020, this fund will provide a limited level of funding in Indian water rights settlements enacted by Congress involving a role for Reclamation. Because funds from this source are direct spending not subject to further appropriation, increased use of this fund would require offsets to meet the requirements of statutory PAYGO. Congress also provided some funding for future Indian water rights settlements through provisions of the Arizona Water Rights Settlement Act of 2004, Pub. L. No. 108-451 (Dec. 10, 2004), providing that \$250 million be made available from the Lower Colorado River Basin Development Fund to fund Indian water rights settlements in the State of Arizona. Again, since it provides for direct spending, increased use of this fund would require offsets to meet the requirements of statutory PAYGO.

Another issue that settlements face is the need to raise awareness of the value of these settlements to all sides, including at the federal level. Some in Congress are now questioning whether Indian water rights settlements represent an overall benefit to taxpayers when balanced against the potential consequences and costs of continued litigation over Indian water rights claims. In the settlements that this Administration has supported, and that we would support in the future, I can tell you that we believe the answer is a resounding yes. The consequences and costs of litigation are different for every particular settlement and, as discussed in the Administration's testimony presented on Indian water rights settlement bills in the last Congress, are not always susceptible to simple quantification. They include the rancor between neighbors that contested litigation can cause, which may last long after the water rights have been adjudicated, as well as the prolonged uncertainty due to the time it takes to litigate complex stream adjudications. Both rancor and uncertainty can have substantial economic consequences for both Indian and non-Indian communities, preventing needed investments in businesses and infrastructure that require reliable water supplies in order to function.

To be clear, Indian water rights settlements should not be categorized as "earmarks." The U.S. Supreme Court's *Winters* doctrine establishes the senior rights of Indian tribes to water to fulfill reservation purposes. Water rights and related resources are trust assets of tribes, and water rights settlements enable the Federal Government to protect and enhance those assets. As described in this testimony, the Department has an established program that guides the process of negotiating Indian water rights settlements that satisfy federal criteria. Under the *Criteria and Procedures*, the Administration carries out careful analysis of the appropriateness of the costs of the settlement. Our support is not provided lightly; we have come

to this Committee and testified regarding our concerns with proposed water rights settlements that we do not find to have met our requirements for reducing costs, including appropriate cost shares, and producing results. Settlements that are approved through this process are not earmarks.

#### **V. Conclusion**

State and local governments, as well as Indian tribes, favor water rights settlement because they can be directly involved in shaping their own destinies, rather than having their fate to be decided by the stroke of a judge's pen. The Federal Government should continue to encourage these local efforts to resolve outstanding issues and establish water management regimes that can be the basis for, rather than a drag upon, strong local economic development.

Protracted litigation does not, ultimately, provide solutions to the real problems that communities are facing. Indian water rights settlements can spur desperately needed cooperation. From shortage sharing to water marketing to protection of instream flows, settlements allow people to identify the needed mechanisms to enable investments in a common future. In addition to establishing the basis for the courts to decree rights, these settlements often include infrastructure projects allowing tribes to make use of their water. Recent settlements have provided for projects that will provide desperately needed access to safe drinking water on reservations. These projects can improve public health, providing basic foundations for improving, health indicators such as infant mortality rates, and stimulating and sustaining economic development and growth in tribal communities.

According to the Indian Health Service (IHS), today, less than 1 percent of the population in the United States is without access to safe water, while more than 12 percent of American Indian and Alaska Native homes are without access to safe water.<sup>1</sup> As a result, for the young and old, water-hauling is a way of life on some reservations—a full-time job that limits economic opportunities and perpetuates a cycle of poverty. In these communities, tribal members routinely truck water from storage tanks at stock ponds, or other non-potable or contaminated sources, raising serious public health concerns. According to IHS, many of the homes without access to safe water are at an extremely high risk for gastrointestinal and respiratory diseases at rates similar to developing countries.<sup>2</sup>

In conclusion, I want to underscore how important this Administration believes these settlements to be. Secretary Salazar is a strong supporter of Indian water rights settlements, and he has been personally involved in efforts to make these settlements a reality. As discussed in this testimony, Indian water rights settlements, when they are done right, produce critical benefits for tribes and bring together communities to improve water management practices in some of the most stressed water basins in the country. Moreover, Indian water settlements ensure that Indian people have safe, reliable water supplies and the means to develop their homelands. I hope that I have a chance to work with this Committee and with all the stakeholders assembled today on additional settlements that can accomplish these worthy goals.

The CHAIRMAN. Thank you. May I ask you to wait a few minutes here? I would like to, before moving to Mr. Laverdure, to ask the Vice Chairman of the Committee and Senator Udall for his opening statement. And we will proceed back to Mr. Laverdure.

#### **STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you, Mr. Chairman. I am very pleased to be with you and thank you for holding this hearing on Indian water settlements. Water is a vital resource, as we know, in any community, including Indian communities. We all know that a community cannot thrive without an adequate, reliable supply of water.

<sup>1</sup> See Testimony of Robert McSwain, Deputy Director, Management Operations, Indian Health Service, before the United States Senate Committee on Banking and Housing, Oversight Hearing on: *Coordination between Federal Agencies Involved in Native American Housing and/or Infrastructure Development* (Mar. 8, 2012) at 4.

<sup>2</sup> *Id.*

And yet many Indian reservations lack the basic water supply and water delivery systems that many of us living in non-Indian communities almost take for granted. Safe and adequate water supply facilities are lacking in approximately 12 percent of American Indian and Alaska Native homes. That compares to 1 percent of the homes for the general population of the United States. The lack of reliable, potable water supplies contributes to a wide range of health, social and economic problems on many Indian reservations.

Last year, Mr. Chairman, we held a field in Wyoming on the topic of deferred maintenance on the Wind River Irrigation System. Irrigation is a very important component of the Wind River economy. It means income for the tribes and for many tribal members. At that hearing, we learned that the water delivery system on the Wind River Reservation, like many other reservations, is in a state of significant disrepair. Chronically deferred maintenance leads not only to an under-performing irrigation system, in some cases it threatens the system's future viability.

Water settlements are one way of addressing these issues, at least on some reservations. I must point out, however, that not all Indian tribes have a pending water settlement as a mechanism for funding the repair of their water systems. But that certainly does not mean that their water infrastructure needs are less urgent. They are not less urgent or less important. Not at all. Perhaps, Mr. Chairman, we can take a look at that topic at a future hearing.

I want to thank the witnesses for being with us today, and I look forward to the remaining testimony and then the questions. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much for your statement.  
Senator Udall, your opening statement.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you very much, Chairman Akaka and Vice Chairman Barrasso, for holding this important hearing. I can't think of anything more important to Indian Country than the settling of water rights. It is such a serious issue and significant federal issue across the Country and in New Mexico. It is wonderful to see the great team, David Hayes, that you have pulled together to work on this: Letty Belin, I know has extensive experience, Pam, all the others, and Mike Connor is also no doubt very capable. Part of the reason is some of the great experience he got up here on the Hill.

So thank you for doing that, we really appreciate it.

I think we all recognize the large cost that goes into negotiating settlements, paying for legal counsel and implementing the infrastructure components included in many settlements. Despite the large costs, I believe these settlements are vital to tribes and the surrounding communities. I believe that ensuring that tribal water rights are secure is a trust responsibility of the Federal Government.

In the current atmosphere of fiscal conservatism, I hope that we can still commit to negotiating and implementing water settlements without pitting tribe against tribe in a competition for funds.

Such tension, I think, is wholly inappropriate. I think that we also recognize the time that it often takes to get these settlements negotiated and implemented. I was pleased to work with many of my colleagues over the last several years to finalize the Navajo, Aamodt, Abeyta water settlements. Each of these took decades to complete, with Aamodt and Abeyta each representing 40 years of litigation. It is my hope that we can identify ways to make the process of settling tribal water claims faster and that we can help to ensure that water claims continue to be given due attention by this Administration and future Administrations.

I applaud what Interior and this team has done on all these settlements. Thank you for being here and I look forward to the questioning.

I see now that my colleague from Montana, there are a lot of water settlements in Montana, and my colleague here, Senator Tester is here to speak up on that issue. So I would yield.

The CHAIRMAN. Thank you very much, Senator Udall.  
Senator Tester, please proceed with your statement.

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Chairman Akaka. I want to welcome three of my favorite people from the Department of Interior here to the Committee today. I very much appreciate the work that you do and have done and will continue to do moving forward. You have a tough job, particularly when it comes to water. Water in the west, you guys know all the sayings that revolve around it. But it is very important, it is indeed the foundation of life.

When we talk about Indian Country and us having the duty to supply them with adequate sources of water for drinking, irrigation, residential, municipal uses, the list goes on, it is a big issue. It for the most part deals with water and dollars and both are getting to be in short supply. It deals with a lot of hard work being done at the State level, a lot of hard work being done at the local level and Indian Country. And ultimately, it involves an investment for the long term.

In Montana's case, in an area that needs all the economic opportunity that we can help provide them with and water is a foundational resource for economic development.

We have done a lot of work in the State of Montana. We still have a lot of work to do. We have had our share of successes. But we have our share of logjams, too. I look forward to working with the people sitting at this table and others in Indian Country and throughout the State of Montana and within the Administration to make some of these critical long-term investments a reality. It is one of the most important issues in Indian Country, and there are a lot of important issues in Indian Country.

So thank you all for being here, I appreciate it. I look forward to the questions and answers when we get to them.

The CHAIRMAN. Thank you very much, Senator Tester.

And now we will return to our witnesses, and follow the order that Mr. Hayes is suggesting, and call on Mr. Laverdure for your comments.

Mr. LAVERDURE. Thank you, Mr. Chairman, Mr. Vice Chairman Barrasso, Senator Tester and Senator Udall.

I think most of what I had to say has already been stolen in the opening statements. So the only thing I will mention is just personal experience and having been through that process. Water truly is the foundation for life. It is sacred, and there are many prayers and ceremonies that many people across the Nation pray for, that they have safe and reliable drinking water, and their next generation and their next generation will be protected.

So some of these successes that the Administration has had I have been happy to be a part of them. I was of course recused from Crow, but I was involved in the legislation very early some years ago, when Senator Tester took the torch and really ran with it, and Senator Baucus came through, as well as many others.

But most importantly, these water settlements, in securing them and delivering them, make a real impact on the daily lives of Indian people. I can't think of anything more important than helping to develop water systems in order for people not to go without and to increase housing, to provide the opportunity for economic and energy development.

I know sitting back in the old condemned IHS hospital in Crow Agency, we used to sit and talk amongst each other, as Crow people. What we would constantly do is debate what we would do if we could ever get our water settlement. Certainly that day finally did come, through a number of people's efforts, including David Hayes here and Secretary Salazar as well.

I remember when we were talking, we would discuss, I had to haul my own water even before my appointment up here, as did many of my relatives. Just the fact that we had to go mile and miles and miles with our cisterns and fill those up and come back, just to have it so we could make it week by week, and if you are fortunate, a couple weeks at a time, and hauling your own trash and the like.

So I just want to say that I have walked the walk, I have lived it. I can only emphasize how important not only the subject matter is, and the successes that we have had, but we have a long way to go for many other Indian nations. I think that at the end of the day when we look back, I hope that all of us collectively working together can say that we finally fulfilled that treaty promise of so many generations ago, and that from this point forward, we can look forward to others having what so many others have taken for granted, as said earlier.

Thank you for the opportunity to provide those words.

The CHAIRMAN. Thank you very much.

Mr. Connor?

Mr. CONNOR. Mr. Chairman, Vice Chairman Barrasso, Senator Tester, Senator Udall, it is a pleasure to be here with you today.

It is always problematic for me to have to follow David Hayes and Del Laverdure, particularly when Del speaks from his own personal experiences. But I will give it my best, and try and stay focused very briefly on what the Bureau of Reclamation's role is with respect to Indian Water rights settlements.

As David mentioned, we are part of a team that helps negotiate these settlements. We have a role, we have access to expertise and



we have access to water, which is very important to settle these claims. So we are glad to participate and be active members of the negotiation process.

But what our real focus is these days, and we think we have a special responsibility at the Bureau of Reclamation, is to implement these settlements. We have been charged with significant responsibilities in developing infrastructure that is critical to successfully implement these settlements. So those responsibilities and those benefits are what a lot of you have already mentioned in your opening statements. We want to make progress quickly in allowing tribes to realize the benefits of these settlements. We are focused on the need not to be lackadaisical about the longstanding lack of water in Indian Country. We want to make sure that we help ensure the certainty that these settlements are intended to provide, both to the tribes in access to safe, reliable water supplies as well as for the surrounding communities with the resolution of claims.

Then finally, we think we have a role in promoting prosperity in Indian Country through the implementation of these settlements. We take that very seriously. What I mean by that is it is both the short-term and the long-term role that we have. We look at the settlement responsibilities that we have right now through the Claims Resolution Act, the Navajo-San Juan settlement that we are responsible for and other matters going on in Arizona, the Arizona Water Settlement Act.

We will be needing to expend, over the next decade, on a consistent basis, somewhere in the neighborhood of \$150 million to \$200 million per year to develop the infrastructure needed to implement those settlements. If you look at those levels of dollars and you take the figures that we used in the Recovery Act about job creation, \$92,000 per job, we are looking at consistently over the next decade sustaining 1,600 to 2,200 jobs per year, and expending that kind of money in developing the infrastructure.

That has short-term benefits in Indian Country, plus as all of you have mentioned here, there are long-term economic benefits from having the foundation of water that is so critical to many communities, to have long-term economic benefits. So we have substantial resources in hand, as David mentioned, through the mandatory funds we have available. That is not to say we don't have budget challenges in the future, but at the Bureau of Reclamation, we are very much focused on getting to work right now and helping to realize the benefits of these settlements in Indian Country.

Then finally, I would just note that I have had a lot of terrific experiences as Commissioner of the Bureau of Reclamation, but none have been more meaningful than the celebrations, the ceremonies that I have gotten to participate in in celebrating these recent settlements, whether it is in Navajo Country, whether it was on the Crow Reservation, and the Aamodt celebration that we had in Santa Fe. It is so meaningful to so many of these tribal communities to know that they are going to have access to long-term clean water supplies and that makes this very rewarding.

Thank you very much.

The CHAIRMAN. Thank you very much, Mike, for your comments. I am going to ask Secretary Hayes two questions, then I am going

to defer to the Committee and come back, because I have further questions for you as well.

Secretary Hayes, can you please elaborate on why it is in the best interest of the United States to pursue negotiated water settlements instead of litigating Indian water claims?

Mr. HAYES. Yes, Mr. Chairman, and I notice that there are poster boards here that have stolen my thunder. The reality is that, in our judgment, settlements are the way to go. Why? Because Indian water rights affect not only tribal members, but also non-Indians. A lot of the issues associated with unresolved Indian water rights include the uncertainty that non-Indians encounter when they have been relying for many decades on water supplies. It is very important that in a settlement, we not only resolve the Indian water rights, but we also provide certainty to the non-Indian as well. You can only do that through a settlement.

Secondly, as I referred to in my testimony, judges cannot provide wet water. At most, they can confirm the water right. But you have a whole other step to get water to the reservation. We think it makes sense working closely with the Congress to handle both of those issues. Because what this is all about, as Assistant Secretary Del Laverdure commented, is about fulfilling the trust responsibility. And we feel this is a key part of it.

For other elaboration, I simply refer everyone to the excellent poster boards. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you for your response.

Secretary, once a settlement is in the implementation stage, if the parties have a breakdown of communications, what happens to get them back on track? Is there a role for Congress when conflicts like that develop?

Mr. HAYES. Senator, there can be. We understand that implementation is an incredibly important part of the exercise of delivering the benefits of Indian water rights settlements. That is why we have implementation teams. We do not stop with the passage of the law. These teams are multi-disciplinary. They include lawyers from the Department of Justice. We work very hard to work through those issues and to effectuate the intent of the Congress as written in the legislation.

Occasionally we have to come back to the Congress, but we view that as certainly not ideal. What we try to do is implement the will of the Congress as we see it.

The CHAIRMAN. Thank you very much.

Senator Barrasso?

Senator BARRASSO. Yes, Mr. Chairman, if I could, I just wanted to follow up, because I think it is an excellent chart of the settlements versus litigation. The thing that caught my eye was the component that it is less time-consuming on the one side, of the settlement. The litigation, it takes decades to resolve. I just wonder if you could share with the Committee a little bit about really what the differences are, how quickly we could hope for settlements versus what your history is of how long some of these have really taken to resolve.

Mr. HAYES. Mr. Vice Chairman, Senator Barrasso, I think it is an excellent point. I will give one vignette. When I was the Deputy Secretary before in the late 1990s, I went to a judicial conference

of judges who do water settlements. And the judge who was handling the Aamodt settlement in New Mexico stood up and said, this is the longest-standing federal case in the entire Country. And I don't want to hear anything more about it the rest of this conference.

That was 14 years ago. And that is an example. These things can go on for decades, in part, I think, Senator, because the parties cannot, through litigation, get what they need. None of the parties can get what they need. And what happened in that case, in the last two or three years, was with the prospect of an interested bipartisan Congress wanting to solve it, and an interested Administration, we were able to break through in a matter of months.

So if there is will, if there is Congressional support, as we have had here, we have enjoyed on a bipartisan basis, you can cut decades off of what otherwise would be a very expensive and a non-productive litigation.

Senator BARRASSO. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Tester?

Senator TESTER. I appreciate that, Senator Udall. The reason I appreciate that is because Del will be able to know this, Montana is playing Wisconsin right now.

[Laughter.]

Senator TESTER. So I need to know what is going on there.

I just wanted to visit with you a little bit, Secretary Hayes, on negotiating teams. The Department and other federal agencies participate in settlement discussions at the local level through federal negotiating teams. I see Susan Cunningham here who was a State rep, has done a great job negotiating for the State.

However, from the federal level, I often hear that these teams participate in discussions, that they really have no decision-making authority so they make little progress and negotiations drag on. Is that what it was intended to be, is advisory only? And do you think it would be beneficial to change that? I personally do, but I would like to get your perspective.

Mr. HAYES. Senator, we actually work hard to provide the negotiating teams with access to decisions from the Department. And the way we do it is through the shy intervention of Pam Williams, who is the Director of the Secretary's Water Rights Office, and an old hand at these things. And with Letty Belin, my counselor, as overall in charge of this effort, when negotiating teams are at a critical stage and they need input, they can get it. And if, Senator, there are occasions where you are hearing that is not the case, please let me personally know. Because it is important that we be able to provide real guidance to these negotiating teams.

Senator TESTER. Okay. I now want to talk a little bit about appropriate non-Federal, State, that is, costs. Several times in the past, well, DOI opposed one of my settlement bills because, at least the reason was given, inefficient non-Federal or State cost share. Obviously the State of Montana thought their cost share was plenty adequate.

Do you have, is there a formula that you guys use in finding out what that number is? Is there any guidance you can give the State ahead of time saying, if you are going to have a \$500 million settle-

ment, you need \$50 million or \$100 million or \$250 million to get this thing through?

Mr. HAYES. Senator, we don't have a formula, because each settlement is different, one against each other. The idea here is that to the extent that you have special benefits going to non-Indians, in addition to the certainty, but in terms, for example, of infrastructure, et cetera, there is a view that there should be a State share.

We try to work this out collaboratively with the State parties. We have had good success, including with Susan Cunningham, the aforementioned, and other representatives of the State of Montana. We have an open door policy to try to work through these issues.

Senator TESTER. I appreciate that. We could flesh that out a little more, but if that would have been the case, the State share shouldn't have been the problem, then. It was one of the problems in that. And I don't mean to put you on the spot. But that was an issue.

In 2008, and I remember this very well, Congress included an emergency fund for Indian safety and health in the global AIDS/HIV bill. Authorized some \$600 million to fund these settlements. It was a fair amount of dough. I just want to know, is it true that these programs have never been set up to take advantage of this appropriation?

Mr. HAYES. Senator, as you know, it is an authorization, not an appropriation. But we have been working on this, in fact, we are going to be delivering a letter to the Hill tomorrow that lays this out. As you know, three different departments are involved. And we very much appreciate the opportunity to lay out the needs, both for health issues, water issues, as well as public safety issues.

Senator TESTER. I appreciate the correction. I was just checking to see if you were listening.

[Laughter.]

Senator TESTER. The other thing is, is the agency set up in a position so they can make the request once the money is appropriated?

Mr. HAYES. I believe so. We are good at making requests, Senator.

[Laughter.]

Senator TESTER. That is good.

Del, I would be remiss if I didn't at least ask you a question or two. I will leave it to probably a couple. Last fall, you offered to be the Department's point man on negotiations with the Blackfeet water settlement. We are still hoping to get a final product done as soon as possible. We are in the middle of March. Can you give me an update on how things are going with the Blackfeet water settlement and with a potential estimated time line?

Mr. LAVERDURE. Yes, thank you, Senator Tester. I am conflicted on the Montana-Wisconsin game. I went to school in Wisconsin and taught there, but I know where my roots are.

Senator TESTER. That is right, Montana go.

Mr. LAVERDURE. You had asked me and I affirmed that I would be the point person. We have had some half dozen in-person meetings out at Blackfeet itself, and we are scheduled to actually be there next week in Great Falls. We are going to meet with the tribe

again and deliver some of our reactions to some of the numbers that have had the technical reports behind them. We have consistently had conference calls, probably three or four with your staff and Senator Baucus' staff, even during, in between all those meetings, to give updates.

So I think, and they consistently ask for some certain deadline. But is always dangerous to even promise that. The only thing I can assure you is that it has all the time and attention of some half dozen people working all the time on Blackfeet. That is one of only a handful to have that kind of resources devoted to it. So however the tribe reacts to the reactions that we have to the underlying dollar amounts I think is going to have a lot of impact on that timing.

Senator TESTER. Well, I appreciate that attention and sorry I didn't ask you some questions, Mike, but thank you for being here.

The CHAIRMAN. Thank you very much, Senator Tester.

Senator Udall?

Senator UDALL. Thank you, Chairman Akaka.

I wanted to ask the panel a question about the, if you reach an impasse about negotiation, and it reminds me that we have in the audience back here the new Governor of the Zia Pueblo. His name is Governor Shije, it is good to have you here. And I know that the Zia Pueblo, Santa Ana and the Jemez Pueblos have been negotiating a water settlement with the Administration and the State for five years now, and are getting close to an agreement. I just want to recognize that Governor, you are here, and I know the former Governor and tribal administrator Pete Pino is here, good to see you. And the head of your legal team, I think your legal team headed up by David Mielke, I think is also here.

So this question kind of goes to folks that are in the process, not a settlement that we have already gotten into. In your experience, what happens when the parties to a settlement, which would typically be the United States and one or more tribes, reach an impasse? Particularly if the impasse is over the Government's legal position on an issue. How does this typically get resolved? Any of the panelists that want to jump in here. I know that you have been very effective at resolving some of these. So maybe you could give a sense to folks that are looking in from the outside, David, and trying to get a sense, how do they break through on these kinds of impasses.

Mr. HAYES. Senator, I will take a quick effort at that and ask Mike and Del to give their observations.

We do have the Department of Justice involved, if there is a legal issue, a purely legal issue, we work with the Department of Justice on our team. If there are differences in the federal family, we will bring those, elevate those issues up the Justice Department chain, just like at Interior.

There are occasions when we come to a view that is at odds with the tribe and we cannot resolve them. And generally, we sometimes have to put them aside for a while and see if we can return to them. But we try very hard to be as flexible as we can. We are moving toward, on the issue of waivers, for example, standard approaches, so that folks going into the negotiations understand where we are and where we need to be. And we hope that helps.

But I would ask Del, perhaps, to give his view, and Mike.

Mr. LAVERDURE. Senator Udall, just very briefly, I know I have been part of a number, and I am sure Pam and Letty here could add into the experience. I have found that when the tribes have position of, it could be any number of things, whether it is a dollar amount or a certain item needs to be included in the legislation, we typically reconvene the entire team that you see here when we have these logjams. Then we get pretty much the best practices and perspective and experience of folks who probably have decades and decades of previous experience resolving disputes. Then we just brainstorm to see what is the real bottom line and the federal concern here, and is there any way we can make movement on that, or can we reframe this in a different way in order to find out if we can get past that impasse.

I have seen it happen on a number of occasions, and there are some where we just have to agree to step aside for a while and let the positions kind of stay where they are until we can go back at them, if we have seen any other experiences. So I can just reiterate what the Deputy Secretary has said.

Mr. CONNOR. Senator Udall, I think I would just be reiterating also that the idea, particularly what I wanted to touch on that David had mentioned was the expectations aspect of it, whether it is waivers or it is the criteria for Indian water rights settlements that we use. I think going through the four settlements and negotiating those to a place where the Administration, I can tell you, we ran into impasses consistently in the two years leading up to the Claims Resolution Act.

I think what really helped is through that process, we, as the Obama Administration, really defined how we were interpreting those criteria. Once we had these basic principles that we were trying to adhere to, the expectations were set and then we could let the creative juices flow. And borrowing on earlier settlements, as Del mentioned, people with experience, about how we could address that principle through some creative mechanism in the negotiation. I think we were able to do that.

Because you are asking the question here, I thought you would probably want me to make a plug that New Mexico State and UNM are both in the tournament later on today.

[Laughter.]

Senator UDALL. That is correct. Very good.

Chairman Akaka, I have one more question that I can wait until you ask yours and then go to mine. So if we are doing another round, whatever you would prefer.

The CHAIRMAN. Thank you. Why don't you go ahead?

Senator UDALL. Thank you.

Because David Hayes brought up the issue of the waivers, I wanted to focus in on that a little bit. But I also want to compliment David, because tribal leaders across the Country were gratified to hear his words delivered in early November to the National Congress of American Indians, when he said that the Department will not, and I think I am quoting you accurately now, David, will not allow "legalistic interpretations of the law to stand in the way of extending basic Indian rights."

I think that is what your testimony has been all about today, is really showing that you want to focus on those basic Indian rights. This Senator really appreciates that.

Now, one of the really positive things about individually settling tribal water claims is that the settlement can be tailored to meet the needs of the tribe or tribes involved, and the non-native communities involved. On the other hand, I understand through our work on Aamodt and Abeyta and the Navajo settlements that the Administration is trying to keep these settlements as uniform as possible, to keep equity in the process and streamline the process. I believe this is especially true regarding waivers that are generally included in the final settlements.

Am I accurate in my description of the direction the Administration is moving? Could you describe any efforts to make this a more uniform process, considering the virtue of settlements tailored to meet the needs of each tribe? Has there been any loss of flexibility as your department has tried to streamline these settlements as much as practical?

Mr. HAYES. Senator, we are in the waiver area trying to be more clear that we want these settlements to be final settlements, and to resolve all issues associated with the quantities of water involved. We think that is in everyone's interest. And the reason we are doing this in part is so that we can get Administration support for these settlements. There have been long periods of time when Administrations have really not been players when it comes to trying to make settlements happen. We think that the activist role the Obama Administration has played in getting the President's approval for settlements, and coming to you with Administration support materially advances the likelihood of getting those settlements.

And our ability to get Administration support, in turn, relies on our ability as Mike was referring to, to demonstrate that we are being even-handed, given the flexibility that is needed from case to case, but nonetheless to have some consistency. So we are working on that and we hope we are being helpful in that regard.

Senator UDALL. Thank you. I don't know if Mike or Del have anything to add on that front? Okay. Thank you.

Thank you, Chairman Akaka. I really appreciate it. This first panel I think is an excellent, very, very good panel.

The CHAIRMAN. Thank you very much, Senator Udall.

Let me ask a follow-up question here to Mr. Connor. Mike, and this has to do with, again, several different capacities throughout your career. You have worked on tribal water rights and from your experiences, can you please discuss areas in which the negotiation process can be made more efficient?

Mr. CONNOR. I think the efficiency in the negotiation process goes to the discussion that we were just having. It is really important that particularly the federal expectations are known to the parties negotiating the settlements. What typically has happened in my experience is that the parties get together at some point in time during the litigation when they acknowledge that maybe there is a better path to addressing their needs and concerns.

They start having discussions among themselves, I think even at that early stage, it is very important that they understand what

role the Federal Government can and is willing to play. That is part, of what we have tried to do, not only in the negotiations that we have been intimately involved in, but also for those negotiations that are subsequently occurring that they know what the expectations are with respect to waivers, with respect to non-federal contribution, with respect to parameters associated with the federal contribution.

So I think those expectations and then involving a federal negotiation team as early as possible in that process really starts to build some efficiency into the process. And of course, part of getting a federal negotiating team is the representation and the understanding that all the parties that need to be involved in the process are willing to negotiate, actively want to see a negotiation. That is one of our criteria for putting together a team. And that is just incredibly important to the process, to get everybody at the table as early as possible.

The CHAIRMAN. Thank you for your response.

Mr. Laverdure, early financial support is an essential ingredient to initiate settlement questions. What federal resources are available to tribes in the early stages of water settlements, and considering the economic conditions of the Country, what alternative sources of seed funding are or should be made available?

Mr. LAVERDURE. Thank you, Chairman Akaka.

In terms of the funding that is out there, we have really three sources. The first is water resources planning, the second is water rights litigation and negotiation and then the final is the implementation. I think you heard quite a bit about it from the Commissioner on implementation. So I will focus on the first two.

Currently, and for our fiscal year 2013 budget, we have \$5.73 million in water resources planning requests and then in the litigation-negotiation pile, we have about \$8.6 million, for a total of \$14.3 million. As you heard, the number of teams with up to 16 appointed negotiating teams, those dollars are made available depending on which phase of the settlement that they may be in. Sometimes it may be very early on, where they are going to need an assessment. They will then utilize the funds on a competitive grant basis to hire technical experts to generate the studies, reports, the hydrology, the water allocations, et cetera, so that they can begin the next phase, which would be the negotiation phase.

That is when you have the second pot of funds. Typically there is a variety of factors that are put into the grant process. But they have pending legislation or longstanding litigation, there is a priority that is provided. So a number of other factors are taken into account. But those are the primary pools of funds to start and then execute negotiations for that senior tribal water right.

The CHAIRMAN. Thank you very much for that. That is always good information that tribes can seek to use here.

Let me ask Secretary Hayes, can you reiterate why Indian water settlements are not considered earmarks?

Mr. HAYES. Gladly, Senator. And I address this in my written testimony. We clearly state in that written testimony, which you have accepted for submittal, thank you, that water rights settlements are not earmarks. Why? We are resolving fundamental legal rights of American citizens. We are doing so because we have a



trust responsibility. We have a special trust responsibility and it leads us to fulfill our legal obligations and our moral obligations. We are looking to do that across the Nation, without regard to locality, without regard to individual circumstance. This is a broad, national imperative that we have in the U.S. Government as trustee.

So there is no earmark quality to Indian water rights settlements, in our judgment.

The CHAIRMAN. Thank you. Thank you very much for that explanation.

I would like to ask Senator Udall whether you have any further questions.

Senator UDALL. I don't have any additional questions. Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you so much. Your responses will be helpful. And of course, each of us has said, there is so much more to do on this. A kind of problem we have had in the past was, we have let it go. And before you know it, a century has gone by. We need to do better than that, and really deal with some of the issues that are preset. That is what I am trying to do, is bring them up and flush it out and try to find answers as to how we can do it.

Of course, funding has been always a basic resource that is needed. Maybe it is about time we not only depend on the Federal Government to come across with those. But maybe we need to leverage other resources as well, in trying to deal with these issues and challenges that we will be facing.

But we have to work on this together. I am so glad that we have personnel and people whose hearts are in the right place, and we need to just continue to press for solutions to these and to make it clear, so we know what the problem is, and try to deal with it.

So it has been good to hear from you about, from your experiences and your responsibilities, what is the best way of dealing with this. So again, I am saying all of this to say thank you so much, mahalo nui loa for your efforts and I look forward to working with you. Thank you.

Mr. HAYES. Mr. Chairman, I want to thank you for your leadership, and Senator Udall, for your leadership in these matters. We cannot do this without your leadership and we very much thank you again for calling this hearing and providing us the opportunity to remind the American people collectively of what our mission is and what we must do. Thank you.

The CHAIRMAN. Thank you very much. Thank you, Del and Mike.

Now I would like to invite the second panel to the witness table. Mr. John Echohawk, who is Executive Director of Native American Rights Fund. And Ms. Maria O'Brien, Chair of the Legal Committee of the Western States Water Council. I want to welcome both of you and look forward to working with you. We would like to hear your testimony. So I am going to ask Mr. Echohawk, thank you very much, you have quite a huge and great background over the years. We always look forward to your comments and look forward to that today. So will you please proceed with your testimony?

**STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR,  
NATIVE AMERICAN RIGHTS FUND**

Mr. ECHOHAWK. Thank you, Mr. Chairman, and Senator Udall, for calling this hearing today and inviting me to testify.

As you said, Mr. Chairman, I have been around a while and have a lot of experience in this area. As I think you know, the Native American Rights Fund was started 42 years ago, as the National Indian legal defense fund, and with tribal leadership, identified the major legal issues that tribes needed to address. So few of them had legal counsel back then, and had so many rights that were really not being protected.

Tribal water rights was one of those issues that was identified for us to work on, and we have been doing that for the last 42 years. We have represented tribes in nine of the cases that so far have been settled out of the 27 that have been settled. So we have been through a lot, and we have more to go. We are currently representing six tribes on their water right issues.

For the past 30 years, we have had the honor and privilege of working with the Ad Hoc Group on Indian water rights, which is composed of the Western States Water Council and the Western Governors Association. I am pleased to be on this panel today with Maria O'Brien, who is representing the Western States Water Council and this coalition, this partnership that we have been able to form with the States on these tribal water rights issues, has really been invaluable in terms of generating the atmosphere for consideration of favorable Indian water rights settlement policies. We continue to work with them in that regard. I know Maria's testimony focuses on some of that history and some of the specific issues that we are working together with the Western States Water Council on now, so I will leave that to her.

What I would like to do in my testimony, which I want to submit for the record and just summarize here, is just to give a broad overview of these tribal water rights issues and talk a little bit about the future of these water issues for tribes.

As was discussed extensively in the last panel, we certainly have something here that is a federal responsibility. In practical terms, what happens out west is Indians and non-Indians started staring each other down in court, and wondering as neighbors why we had to do that. And we just looked around and got a better understanding of the situation and really came to the common realization that we were there because of what the Federal Government did to us.

We have substantial rights as tribes that are held in trust by the Federal Government that went unprotected. At the same time, the Federal Government allowed States and others, through federal laws and policies, to develop this water that we had a prior right to. But as we tried to get it back, we saw that it was being used.

So it set up the conflict. We came to the clear understanding that the Federal Government put us in this situation, so they have an obligation to help us find a way out. And this settlement route that we have been following here for the last 30 years is the way to go, and we are hoping that we can continue in that vein.

As we talked about in the last panel, too, the cost of the litigation is overwhelming, not only financially, but also in terms of the

tribal feelings about this whole process. The water is sacred to the tribes, and having to deal with this issue and carve up that resource is a very difficult thing to do. We have a number of challenges before us as we look to the future. We have to try to get around the status quo, because that only helps the current water users depend more and more on that water, and makes it more difficult for tribes to ever get access to any water. So the status quo does not work for us.

When I say us, I am talking about many, many tribes across the country. We have made a lot of progress, but there are many more to go. We have these negotiation teams in place, but there are more requests, more tribes that need to get involved in this process and move forward.

It is made all the more important these days because of the implications of climate change and how that is affecting everything. There is more of a need to get all the tribes involved and to deal with these issue as quickly as we can, so we can reach that certainty that we need. And we look forward to working with the Committee as the Native American Rights Fund and as a member of the Ad Hoc Group on Indian Water Rights to help the country move forward to resolve these issues.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Echohawk follows:]

PREPARED STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE  
AMERICAN RIGHTS FUND

Mr. Chairman, I want to thank you for holding this hearing and giving me an opportunity to testify. I am John Echohawk, a citizen of the Pawnee Nation of Oklahoma. I am a lawyer and Executive Director of the Native American Rights Fund, the national Indian legal defense fund headquartered in Boulder, Colorado.

Among the many important Native American legal issues that we have been addressing in the past 42 years of our existence has been tribal reserved water rights. During that time, we have been involved in nine tribal water rights cases that have resulted in negotiated settlements that have been approved by Congress. We are currently representing six tribes on their water rights claims.

For the past thirty years, the Native American Rights Fund has worked with the Western Governors Association and the Western States Water Council to promote favorable tribal water rights settlement policy. I am pleased to be on this panel today with Maria O'Brien who is representing the Western States Water Council. Her testimony covers how our two organizations have worked together to promote tribal water rights settlements and some of the specific issues that we are focusing on today. In my testimony, I want to give the Committee a broad overview of tribal water rights issues and the future of water in Indian country.

**Federal Responsibility**

Indian tribes possess substantial claims to water to support viable reservation homelands and, in some cases, off-reservation stream and river system ecosystems necessary to support fishing, hunting, gathering, ceremonial and cultural rights specifically reserved by tribes as part of 19th century treaty negotiations with the United States. These reserved rights to land and other natural resources were part of a bargained for exchange in which the United States sought and received the perpetual relinquishment of land to open vast territory for westward expansion and settlement—millions of acres of land. So, too, the tribes expected then and continue to have a right today to expect the United States will hold to its promises.

A cornerstone component of the promise is the trust relationship; the United States holds as trust assets these land and natural resources and is imbued with the affirmative obligation to protect the asset base for tribes.

During the same historical era as the treaty and reservation era, the United States also enacted laws and implementing policies in the 19th century and early 20th century to encourage the settlement of arid western lands and the development of the scarce water resources in what became “former” Indian territory. Such laws

included those permitting the homesteading of “surplus” Indian reservation lands, when reservations were allotted under the authority of the General Allotment Act of 1884; the Homestead Acts beginning first in 1862; and the Reclamation Act of 1902. (These laws were silent on their effect on prior, pre-existing Indian tribal rights to the use of water, and such rights cannot be abrogated without express consent of Congress.)

Thus, the United States created the conflict over the development and use of western water resources and the recognition and respect of reserved Indian water rights. These conflicting tribal and settler rights and expectations must ultimately be resolved. It is therefore the responsibility of the United States to facilitate and fund the resolution of such conflicts consistent with its trust responsibility to Indian tribes, irrespective of whether in a litigation or settlement context.

### Costs

Complex water rights litigation has cost tribes millions of dollars in technical and legal costs with no apparent end in sight. Several federal cases in New Mexico have spanned five to six decades. The Gila River and other tribes in Arizona have been involved in state water litigation since 1974, with at least nine trips to the Arizona Supreme Court (not all involving Indian water issues, per se, but the tribes are parties to the litigation and presumably have had to actively participate). The Wind River Tribes in Wyoming have suffered a similar litigation fate, fighting in state court since 1977 with almost as many trips to the Wyoming Supreme Court. The Confederated Salish and Kootenai Tribes in Montana have been on a similar path, but recent press accounts hold out promise for a negotiated resolution to their water conflicts.

Despite and against all odds, Indian tribes have still secured about two and a half dozen water settlements over the past 35–40 years, since federal Indian policy encouraged settlement as opposed to prolonged litigation. Dozens more tribes are either in various stages of the negotiation process or are in the queue waiting for the resources to engage in the process. Dozens more after them have not the resources to understand the nature and extent of their Reservation water resources, the hydrology of the river systems upon which they depend, or of the extent of the state-law-based water rights and competing uses that are squandering the resource. Sadly, in the last 10–15 years we have seen a general trend toward the *dwindling* of these federal resources at a time when enhanced resources could have seen more settlements mature, ripen and come to fruition.

Litigation and settlement over a resource as sacred to Indian tribes and Indian people as water will always be emotional. Tribes will always view these processes as a two-edged sword. While on the one hand there are benefits to be gained from quantifying and decreeing Indian water rights—the delivery of wet water—there are costs. Because of the McCarran Amendment, tribes are in the perilous position of having claims to water rights waived if they do not participate in state court water adjudications. And there is always the feeling that something else of importance to Indian people is being taken away by the majority society; like in the treaty era of the 19th century, the work of Manifest Destiny continues largely unabated.

The United States, by investing *more* money in Indian water litigation and settlement, would actually save time—more of the work of protecting Indian water rights and resources would be completed in a more expeditious manner. Although, we still are talking decades to resolve all of these claims, not years. What is the likelihood of a greater investment in Indian water litigation and settlement occurring in this era of intense pressure on domestic budgets? Slim. With significantly fewer human and financial resources to invest, the United States will not be able to speed up the work of finishing the ultimate task.

### Challenges

Many *may* not want the United States to speed up the process, though. The passage of time advances non-Indian water resource interests. Watersheds with unquantified and un-decreed Indian water rights have typically been viewed as having a “cloud” on the availability of the resource. That has been the impetus, in large measure, for states to commence general stream adjudications and to haul federal and Indian interests into state court to sort out rights. But state governments are as financially hard pressed, if not more so, than the Federal Government, and adjudications are very expensive. The result is the protection—sometimes unwittingly, sometimes intentionally—of the status quo, in the face of unresolved Indian claims. The giving away of more and more water in river systems for non-Indian purposes—either through state regulation or, equally insidiously, the non-regulation of ground-water development or small pond/impoundment proliferation—ultimately advances the interests of some of those who oppose Indian water rights. And with each mol-

ecule of water that is given away to non-Indian interests as tribes await the assistance of the United States to assert, litigate and/or settle their water rights, the ultimate resolution of competing claims to water in any watershed becomes more difficult.

Tremendous progress has been made to date in the settlement and sorting out of Indian water rights, but much more work remains. Consider the remaining challenges: The remaining tribes with claims to water from the Colorado River; California and its more than 100 federally recognized tribes; Oklahoma with its 39 tribes sharing essentially two river systems; the other Midwestern tribes with similar concerns to those in Oklahoma over groundwater over-development and water quality impairment; the tribes of the Dakotas and their reliance on the Missouri River system which, with the Mississippi, is the most heavily regulated commercial river in the United States; the coastal tribes in California, Oregon and Washington with their enormous cultural and economic interest in salmon fisheries and related habitat, many of them with express treaty-reserved fishing rights; the Great Lakes Tribes with off-reservation fishing and gathering habitat protection interests; and the tribes of the northeast and southeast which share many of the concerns faced by their brothers and sisters in the rest of the country. And do not forget the tribes and Native villages in Alaska, and the Native Hawaiian community in the Pacific.

Given the finite and very limited ground and surface water supplies, particularly in the West, one tried and true method in past successful Indian water settlements has been the reliance on water infrastructure—primarily in the form of concrete—to increase the size of the pie available to the stakeholders to a settlement. The several Arizona Indian water settlements are largely dependent on the construction of the Central Arizona Project. The new Navajo-Gallup settlement depends on building a pipeline several hundred miles in length. Of the remaining several hundred Indian tribes without quantified and decreed water rights, will we be dependent on a new era of dam and other infrastructure construction—more concrete? Is that even possible with federal laws such as the Endangered Species Act in place and not going anywhere soon?

There are also real concerns about some of the current “rules of the game” that work a disservice to Indian interests. State courts have traditionally been viewed as hostile to Indian rights and interests, and the McCarran “waiver” of federal and tribal sovereign immunity continues the possibility that Indian water rights will be looked upon unfavorably by patriotic state court judges. The popular election of state trial and appellate judges only enhances such outcomes. The Practicably Irrigable Acreage (PAI) standard for quantifying Indian reservation water rights also can unfairly disadvantage tribes with reservation lands that either are not economically irrigable due to soil or arid climatic conditions, and, as we consider the claims of tribes east of the 100th Meridian, disadvantage tribes with reservation lands not typically viewed as requiring irrigation to make them agriculturally productive.

Finally, climate change looms as the wildest of wild cards. We know for a fact that climate change and consequential drought will likely not spare any region of the country. The recent water wars between Georgia and Florida are but a presage to pressures to come. Will the seven states of the Colorado River Basin ever be able to live on a sustainable water budget that includes tribes? How will tribes’ interests play out against these larger forces?

State and local governments are already busily engaged in studying the effects of global warming on already limited and over-stressed water supplies. And planning the changes necessary to prepare for and manage/mitigate the effects thereof. Tribes typically lack the resources to conduct the same level of planning and preparation, and so will be even more disadvantaged in litigating, negotiating and settling their water rights in this ever-shifting context. The United States is not doing enough to prepare tribes, in terms of mitigation and adaptation resources and strategies.

### **Solutions**

Real solutions must come from the United States. Some will involve financial capital, but others lie in structural and organizational changes made within the Federal Government to effectuate a more just and expeditious resolution of Indian water claims. There must be put in place internal federal mechanisms and the means to level the playing field for tribes. Tribes must be given access to all necessary data and information from which they can make informed decisions and set priorities about protecting and asserting their water rights. This will enable them to more fully engage their state and local partners in the resolution of Indian water rights.

One state-created model is the Montana Reserved Water Rights Compact Commission. Since its creation in 1979, the Commission has completed 10 compacts with five tribes and three federal agencies in Montana. Are there useful lessons to be

learned from the Montana Indian tribes' experiences with the Montana Compact Commission, and ways to improve on it as a federal model? Any such federal compacting process must necessarily avoid the unfavorable legacy of the Indian Claims Commission which operated between 1946 and 1978.

The Native American Rights Fund and our clients stand ready to work with the Senate Indian Affairs Committee to achieve *meaningful* solutions.

The CHAIRMAN. Thank you very much, Director Echohawk, for your testimony.

And now, Ms. O'Brien, please proceed with your statement.

**STATEMENT OF MARIA O'BRIEN, LEGAL COMMITTEE CHAIR,  
WESTERN STATES WATER COUNCIL**

Ms. O'BRIEN. Thank you, Chairman Akaka, Senator Udall.

I am testifying today on behalf of the Western States Water Council, as chair of the legal committee for the Council. And I appreciate and the council appreciates the opportunity to discuss the importance of Indian Water rights settlements to western States and thanks the Committee for your leadership in addressing this important and significant issue.

The Council is a non-partisan advisory body on water policy, which is comprised of the 17 western States and is affiliated with the Western Governors Association. My testimony today is based on official Council reports, statements and positions, as well as the Council's longstanding collaboration with the Native American Rights Fund to support federal policies that facilitate the negotiated resolution of Indian water rights claims.

Today I will emphasize just a few of our interests and concerns. I have attached to my written testimony the Council's most recent position on Indian water rights. I will try to summarize really three main points that are in that written testimony. Most if not all of those points have been made today. But I think it is important to note the position of the Western States Water Council, representing 17 western States, in essence supports much of what has been said here today by Administration officials, from Committee members and from the Native American Rights Fund.

Those points are this: quantification and resolution of Indian water rights claims is absolutely critical to the stability and certainty of State western resource management. Second, resolution should be through settlement as opposed to litigation wherever possible. And finally, the Federal Government, as has been noted, has a trust obligation to provide federal funding to assist in both the negotiation and the implementation of these settlements.

Although Congress has authorized 27 Indian water rights settlements to date, the water rights claims of many more tribes remain unquantified, and the complexity as well as the cost of resolving these claims is increasing. While there have been recent successes, as has been noted, obtaining the federal funding that is absolutely essential to resolve Indian Water right claims has proven to be difficult.

I think in order to understand why this issue is so critical to western States, I will just briefly note how State-based water rights interface or really in some cases do not interface with Indian claims to water. Water use west-wide is based primarily on the notion of beneficial use. Who puts it to use first gets a priority to use

that in times of shortage. Most non-Indian water development in the west occurred after federal treaties and establishment of reservations.

Indian water rights were not included in State-based appropriation systems and State users developed those rights and the economies associated with that development independent of any recognition of any pre-existing potential federal rights. As was noted in prior testimony, or excuse me, Mr. Chairman, in your opening statements, long ago in 1908 the Supreme Court recognized that in creating reservations, tribes did in fact have claims to water based on federal law necessary to fill the purposes of treaties and reservations.

So these federal rights exist as federal enclaves in what are in essence State systems based on historic federal creation of reservations and treaties. Significantly, the rights are not based on beneficial use and remain unquantified, uncertain and in large part unknown until litigated in the context of a general stream adjudication or until settled.

The unquantified nature of these rights therefore creates great uncertainty to State-based systems and creates a lack of stability for existing uses and western State economies. This is because, again, these rights are based on present and future needs of the reservations and have priority dates that correspond to the date of the reservation, which is going to be much prior to most State-based uses.

Because of this legal overlay, the resolution of Indian water rights claims is therefore critical to western States. Resolving Indian water rights claims is critical because of their seniority and because these claims can be potentially large, thus creating the real possibility of displacement of long-established State-based rights. This is obviously especially problematic in the water-short west, as many Indian claims arise in river systems that are already fully allocated to State-based uses.

Again, therefore, that unquantified nature of these Indian water rights claims creates great uncertainty with regard to State-based uses, and can in fact serve as an impediment to local, State and regional economic development.

Mr. Chairman, I realize my time is up. If I can wrap up quickly or continue through my points at your pleasure.

[The prepared statement of Ms. O'Brien follows:]

PREPARED STATEMENT OF MARIA O'BRIEN, LEGAL COMMITTEE CHAIR, WESTERN STATES WATER COUNCIL

### **I. Introduction**

Chairman Akaka, Ranking Member Barrasso, and members of the Committee, my name is Maria O'Brien and I am an attorney with Modrall Sperling, P.A. in Albuquerque, New Mexico. I am testifying on behalf of the Western States Water Council (WSWC) in my official capacity as the Chair of the WSWC's Legal Committee. I appreciate the opportunity to discuss the importance of Indian water rights settlements to western states and thank you for your leadership in addressing this important issue.

The WSWC is a non-partisan advisory body on water policy issues closely affiliated with the Western Governors' Association (WGA). Our members, including myself, are appointed by the Governors of 18 states. My testimony is based on official WSWC reports, statements and positions, as well as efforts involving the WSWC's longstanding collaboration with the Native American Rights Fund (NARF) to sup-

port federal policies that facilitate the negotiated resolution of Indian water rights claims. I will emphasize just a few of our interests and concerns and have attached the WSWC's most recent position on Indian water rights settlements (No. #336).

For three decades, the WSWC, WGA, and NARF have worked together as part of an Ad Hoc Group on Indian Water Rights to support the negotiated settlement of Indian reserved water rights claims. Although Congress has authorized 27 Indian water rights settlements, the water rights claims of many more tribes remain unquantified and the cost and scope of resolving these rights is increasing sharply. However, obtaining federal funding necessary to resolve these claims has proven to be difficult. Providing the federal funding needed to negotiate and implement Indian water rights settlements is a trust obligation that is critical to the well-being of western states, Indian Country, and the Nation as a whole. Funding is also necessary to settle major claims against the United States.

## **II. The Prior Appropriation and Indian Water Right Claims**

For well over a century, the doctrine of prior appropriation has governed the allocation of water in most western states. Under this system, the right to divert water from a stream is based on the notion of "first in time, first in right," which means that the first parties to physically divert and use water for "beneficial use" have priority to use the water. Thus, senior water right holders with earlier priority dates (the date the water was first put to beneficial use) can force users with junior priority dates to curtail or stop their use in times of shortage.

Most non-Indian water development in the West occurred after the Federal Government entered into treaties with tribes to establish permanent homelands, or reservations, for the tribes. These treaties typically did not specify the tribes' water rights, an issue which the U.S. Supreme Court addressed in its 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908). The Court held that tribal treaties impliedly reserved water rights necessary to meet the purpose of a tribe's reservation. These reserved rights, or "*Winters* rights," and other kinds of tribal water rights arising under federal law, exist as federal enclaves within state legal systems and differ from prior appropriation rights because they arise independently of beneficial use; are indeterminate in amount until adjudicated; are measured by the present and future supplies needed to fulfill the purpose of a reservation instead of past uses; and have priority dates that correspond to the date the Federal Government created the reservation.

## **III. The Need To Resolve Tribal Water Rights Claims**

Resolving Indian water rights claims is critical for western states, because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully-appropriated for non-Indian uses. The unquantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can serve as an impediment to local, state and regional economic development. Given that water supplies are increasingly stressed due to prolonged drought, reduced snowpack, and other factors, including growing demands, quantifying Indian water rights claims and determining their impacts on state-issued rights is essential for western states to address increasing water demands related to growing populations and to provide certainty as to state-based water uses. Moreover, the quantification of tribal claims may provide a mechanism to allow for water marketing between tribes and non-Indian users such as fast growing western cities.

## **IV. Why Settlements Are Preferred**

Settlements are the preferred manner of resolving tribal water rights claims. First, they give states and tribes certainty and control over the outcome of water rights adjudications, whereas litigated outcomes are fraught with uncertainty. Second, settlements build positive relationships between states, tribes, and the Federal Government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication. Third, Indian water rights claims are extremely complex and settlements enable tribes and non-Indian neighbors to craft mutually-beneficial solutions tailored to their specific needs, including the development of water infrastructure and water markets which increase available water supplies for all users. Fourth, settlements can provide mechanisms that enable tribes to turn quantified rights into "wet water," while litigation typically provides tribes with "paper rights" only. Fifth, settlements are often less costly and time-consuming than litigation, which can last for decades and can be extremely expensive for all parties.



## V. The Need For Federal Funding

The Federal Government holds Indian water rights in trust for the benefit of the tribes and is joined as a party in water rights adjudications involving tribes. This means that the Federal Government has a fiduciary duty to protect tribal water rights and has a responsibility to help tribes adjudicate their rights and ensure that settlements are funded and implemented. It also means that each settlement must be authorized by Congress and approved by the President.

In many cases, tribes have significant breach of trust claims against the Federal Government for failing to protect their water rights. Generally, as part of a settlement, tribes will waive these claims and a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and/or tribal fishery restoration projects. Consequently, the obligation to fund settlements is analogous to, and no less serious than, the United States' obligation to pay judgments rendered against it.

Nevertheless, interpretations of the federal trust responsibility vary from one Administration to another and require intensive discussions often on a settlement-by-settlement basis. Some prior Administrations have taken a narrow view of this trust responsibility and settlements that benefit non-Indians, asserting that federal contributions should be no more than the United States' calculable legal exposure which is difficult to determine. It has long been an accepted premise that the Federal Government should bear the primary responsibility for funding tribal settlements. Congress should consider the Federal Government's fiduciary duty towards the tribes and ensure that appropriations for authorized settlements are sufficient to ensure timely, fair and honorable resolutions of tribal claims. Such an approach not only serves the interest of the United States in ensuring successful resolution of tribal rights, but assists western states in resolving these difficult and potentially disruptive claims.

### A. Funding During the Settlement Process

Tribes need federal funding to retain attorneys and experts to undertake the complex and costly legal and technical studies that are a mandatory prerequisite to any negotiation. States and tribes also rely on federal negotiating teams under the Indian Water Rights Office within the Department of the Interior, which provide one federal voice and expedites the settlement process. Failing to adequately fund these programs hinders the resolution of tribal claims, thereby prolonging uncertainty regarding state-issued rights. Thus, Congress and the Administration should fully fund the Indian Water Rights Office and provide tribes with sufficient resources to participate in the settlement process.

### B. Authorizing Funding to Implement a Settlement

In the arid West, where water is scarce and tribal rights often pertain to fully-appropriated stream systems, settlements often require the construction of water storage and delivery projects to augment or allow existing water supplies to be used more advantageously by all water users. These projects generally do not reallocate water from existing non-Indian water users, but allow tribes to develop additional water supplies in exchange for foregone claims. Without federal monetary resources to build these projects, settlements are simply not possible in many cases.

While federal support is essential to settlements, a number of western states have also acknowledged that they are willing to bear an appropriate share of settlement costs. To this end, western states have appropriated tens of millions of dollars for existing settlements and devoted significant in-kind resources, including the administrative resources associated with the negotiation process and the value of their water rights.

### C. Appropriating Funding For Settlements

Congressionally-authorized settlements are receiving funding, but there is a need for increasing appropriations. Moreover, the House Republican Conference adopted a moratorium on earmarks in the 112th Congress that apparently includes Indian water rights settlements. Settlements are not earmarks benefiting a specific state or congressional district, but represent trust obligations of the United States. They involve a quid-pro-quo in which tribes receive federal funding in exchange for waivers of tribal breach of trust claims against the Federal Government. If Congress is unable to implement settlements as a result of earmark reform, litigation will be the primary means of resolving tribal water right claims. This could result in decades of associated legal expenses and court-ordered judgments against the United States that would likely exceed the total costs of settlement, thereby increasing costs for federal taxpayers.

In addition, current budgetary policy (pay go) requires water rights settlement funding to be offset by a corresponding reduction in some other discretionary program. It is difficult for the Administration, states, and tribes to negotiate settlements knowing that funding is uncertain or may only occur at the expense of some other tribal or essential Interior Department program. Consequently, Congress should consider the unique legal nature of settlements, namely that the United States is receiving something of value in exchange for appropriating settlement funds and fulfilling its tribal trust responsibility, thereby avoiding potentially costly litigation.

*D. The Reclamation Water Settlements Fund*

In addition to the tool of direct appropriations which Congress has available to it to fund Indian Water Rights settlements, Title X of the Omnibus Public Lands Management Act, which became law in 2009, established a Reclamation Water Settlements Fund in the U.S. Treasury to finance Reclamation projects that are part of Congressionally-approved Indian water right settlements. The Fund will provide up to \$120 million per year for ten years with money transferred from the Reclamation Fund and prioritized for settlements in New Mexico, Montana, and Arizona. However, the Fund will not begin receiving money until FY 2020, leaving a significant gap in funding for various projects, the costs of which may increase significantly by FY 2020.

*E. The Emergency Fund for Indian Safety and Health (EFISH)*

One way Congress might address this gap is by appropriating money to the Emergency Fund for Indian Safety and Health (EFISH), authorized by Title VI of the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act 2008. EFISH currently authorized about \$600 million for water supply projects that are part of Indian water settlements approved by Congress over a five-year period beginning October 1, 2008. This funding is above amounts made available under any other provision of law.

EFISH funding is only authorized through FY 2012, and the Administration has not yet requested money for EFISH in its budget requests. It is still in the process of creating a required spending plan for these funds. One way to address the absence of a federal spending plan might be for Congress to promptly appropriate authorized money into Reclamation's Settlements Fund, which already prioritizes funding in specified amounts for approved settlements.

**VI. The Consequences of not Funding Settlements**

If settlements are not authorized and funded, tribes may have no choice but to litigate their water claims. This is problematic because it may give them "paper rights," but may not provide them with a way of turning those rights into "wet water." Litigated outcomes could also provide tribes with senior water rights that could displace established state-issued water rights that are essential to meet non-Indian industrial, residential, and municipal needs in the West.

For instance, the Navajo Nation's settlement with New Mexico, which Congress has authorized, provides the Nation with an amount of water within New Mexico's Colorado River Compact allocation. The settlement still requires court-approval and could fail for a lack of appropriated funds. If it fails, the Navajo Nation would have little choice but to litigate its water rights claims. The United States has already filed claims on behalf of the Navajo Nation that exceed New Mexico's Colorado River apportionment under the Compact. If the United States and the Navajo Nation were to prevail on these claims, the allocation of water between the seven Colorado River Basin states could be jeopardized, disrupting the entire Southwestern economy.

Montana has also reached settlements with the Fort Belknap and Blackfeet Tribes as part of a state-wide adjudication process aimed at resolving its federal reserved water rights claims by 2020. However, until Congress authorizes these settlements, state-issued water rights in basins where these tribes have claims will remain in limbo. If Congress delays authorization, the tribes may litigate their claims in court, which could disrupt established non-Indian uses.

In addition to the previously mentioned costs associated with litigated outcomes, postponing the implementation of Indian water rights settlements will be far more expensive for the Federal Government in the long-run because increasing water demands, decreasing water supplies, and other factors will only increase the costs of resolving these claims.

**VII. Conclusion**

The national obligation to Indian water rights settlements is a finite list that grows shorter with each settlement. Nevertheless, the cost of implementing them will only continue to rise. Postponing this duty only increases its costs to the Fed-

eral Government, perpetuates hardships to Indians, and creates uncertainty for all water users, hindering effective state and regional water planning and development and economic investment and security. The WSWC appreciates the opportunity to testify on this important matter and looks forward to working with the Committee and Congress to support the negotiated resolution of Indian water rights claims.

**Attachment**

RESOLUTION OF THE WESTERN STATES WATER COUNCIL (POSITION NO. 336)

IN SUPPORT OF INDIAN WATER RIGHTS SETTLEMENTS

IDAHO FALLS, IDAHO—OCTOBER 7, 2011

**WHEREAS**, the Western States Water Council, an organization of eighteen western states and adjunct to the Western Governors' Association, has consistently supported negotiated settlement of Indian water rights disputes; and

**WHEREAS**, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

**WHEREAS**, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

**WHEREAS**, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

**WHEREAS**, the successful resolution of certain claims may require "physical solutions," such as development of federal water projects and improved water delivery and application techniques; and

**WHEREAS**, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

**WHEREAS**, the settlement of Native American water claims and land claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States; and

**WHEREAS**, the obligation to fund resulting settlements is analogous to, and no less serious than the obligation of the United States to pay judgments rendered against it; and

**WHEREAS**, Indian water rights settlements involve a waiver of both tribal water right claims and tribal breach of trust claims that otherwise could result in court-ordered judgments against the United States and increase costs for federal taxpayers; and

**WHEREAS**, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

**NOW, THEREFORE, BE IT RESOLVED**, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the Western States; and

**BE IT FURTHER RESOLVED**, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

**BE IT FURTHER RESOLVED**, that Congress should expand opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves; and

**BE IT FURTHER RESOLVED**, that Indian water rights settlements are not and should not be defined as Congressional earmarks; and

**BE IT FURTHER RESOLVED**, that steps be taken to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program.

The CHAIRMAN. Thank you. Thank you very much, Chairwoman.

Let me ask you each a question and I will defer to Senator Udall. Mr. Echohawk, in your testimony you mention that NARF has been involved in tribal water rights settlements for decades. Can you please discuss how settlements have evolved over time with respect to funding, cost and the parties involved? And has the process improved or not improved?

Mr. ECHOHAWK. Over the 30 years that we have worked with the Western Sates Water Council on this issue, we have always found that the funding is the most difficult issue. And of course over that period of time, the Federal Government has gone through a lot of ups and downs in terms of its budget, the monies that are available and funding mechanisms to fund these settlements.

I remember one of the first battles that we fought was basically trying to make sure that funds that went to the tribal water rights settlements were not taken directly out of the Bureau of Indian Affairs budget, where basically the tribes had to fund their own settlements. So that was one of the battles that we had to fight early on. It just kind of progressed over the years. But finding the funding has always been the issue. It is frankly still the major issue today.

The CHAIRMAN. I see. We are always looking for a solution to that. I would take that we still are looking for a better solution. Maybe together we can try to work this out.

Ms. O'Brien, you mentioned that differences in the way various Administration have interpreted the federal trust responsibility have prolonged the settlement process. Given your experience working in the field, what would you recommend to shorten the lengthy negotiation process?

Ms. O'BRIEN. Mr. Chairman, I think that in his testimony, or in answer to a question, Commissioner Connor touched upon some of the essentials to the answer to your question. I think for purposes of State and all stakeholders participating in the negotiation process, clarity from the federal teams, from the Administration in terms of what will be appropriate and supportable in terms of settlements from the beginning is absolutely essential. Full engagement of federal teams from the commencement, with clear communication throughout the various arms of the Federal Government is absolutely essential.

So I think it is both clarity and engagement. Some of that requires funding, some of that requires clear policy that is not just clear internally to the Federal Government and the Administration, but clear to stakeholders who are trying to work collaboratively and cooperatively with the federal teams.

The CHAIRMAN. Thank you for your responses.

Senator Udall?

Senator UDALL. Thank you, Chairman Akaka. It is great to have two very able witnesses with us, and Maria O'Brien, great to have you here. I know you have worked extensively in this area, and you are with a New Mexico firm. I was reading through your bio here,

you have been involved in many of these issues. So it is good to have your expertise here today.

Just before I start into my questions, I was just wondering, both of you sat here, you listened to the first panel. Is there anything that you heard on the first panel that you either take issue with or that you would want to expand upon or some kind of complementary theme or anything along that line? John, do you want to start?

Mr. ECHOHAWK. Well, I want to commend the Administration for their commitment and their hard work on these tribal water rights settlement issues. I thought it was an excellent panel. I know that they are doing the best they can with what they have.

But as I highlighted in my testimony, the needs out there are still great. Many unmet needs exist and the Administration does what it can with the budget that it has, the figures that Del Laverdure cited are fine and I know they are trying to increase that. But that funding level is down from what it used to be. Tribes are not able to participate in this process at the level that they need to. The Administration itself does not really have the manpower that is needed in the Indian Water Rights Office to do all the work that needs to be done. I know they can't really say much about that, but I certainly can. It would be great to see more people working on these issues in the Department and more tribes able to participate in that process with federal support.

Senator UDALL. So you are urging us to really take a hard look at the budget and try to make sure that we fund in areas that are like this that could really make a difference for tribes?

Mr. ECHOHAWK. Yes, it would be great to give them what they ask and more.

Senator UDALL. Thank you. Maria?

Ms. O'BRIEN. I would support everything that Mr. Echohawk said, and I would again state that, I think full funding of the Indian Water Right Office is absolutely essential, both for purposes of the negotiation process as well as in the implementation. Implementation due to collective recent successes is absolutely critical in numerous States now in the west. But we cannot be complacent. We need to ensure that the resources are allocated at the federal level sufficient to bring those successes to actual fruition.

Senator UDALL. And a lot of times it is the actual funding of the settlement that makes a difference, to move the settlement forward, isn't it? I mean, you can come to an agreement. But if the Federal Government isn't willing to step up and put funding into it, then the settlement really doesn't mean anything. Would you agree with that?

Ms. O'BRIEN. Senator Udall, I would wholeheartedly agree with that. And it is also critical, most if not all of the settlements have certain time frames in which certain things need to be accomplished. And if those things are not accomplished in those time frames, significant issues in terms of potentially having to come back to Congress, if not total failure of the settlements, will occur. So funding needs to be there and it needs to be timely. federal teams need to be sufficiently coordinated to expend that funding appropriately and in the appropriate time frame.

Senator UDALL. On this chart here, we are looking at settlements and litigation. I thought, John, one of the things on the litigation side, it says only makes lawyers rich.

[Laughter.]

Senator UDALL. I was thinking of you when I saw that. I thought, well, you know, then John Echohawk should be a billionaire, because he has been in these vineyards for so long. I am not sure you are there yet, are you?

Mr. ECHOHAWK. No, we are not, Senator. As you know, as a non-profit organization, most of the representation we do is at no cost or reduced cost. It is increasingly difficult to try to maintain that level of representation that we do provide to our tribes. Some of them are able to contribute something in terms of fees but we are barely hanging on in terms of the representation of the six tribes that we currently represent.

Senator UDALL. One of the, and I will do some other questions, Mr. Chairman, after you have finished some of yours, too, if we do another round, but one of the things that should be emphasized, and I think it is important what your organization stands for is the idea that in the water rights situation, if there is a status quo situation, frequently that is hurting the tribes. The other non-Indian users are gaining water. And the status quo ends up hurting the tribes.

So if it wasn't for litigators like you and others that are out there who weigh in on behalf of tribes and file litigation and do all the hard work in the litigation vineyard, if that doesn't happen, you don't have the ability to preserve and then finally get to a settlement. So I think we need to also recognize that there are organizations like yours and people like you who are really committed to these causes over the years that have made a real difference. So it is true, when you weigh it out, you have this settlement litigation. But on the other hand, at certain points, if we didn't have litigation, tribes could have lost it all.

So I just compliment you for your work. I am not asking for a comment on that one.

Chairman Akaka, I have a few more questions here, but my time has run out on this round, I think.

The CHAIRMAN. Thank you very much. We will have another round here, Senator.

Mr. Echohawk, in your opinion, see, I am always going back to your experience, because you have been long enough to see these develop or not develop, but in your opinion, what kind of structural and organizational changes within the Federal Government would result in more just and timely resolutions of Indian water claims?

Mr. ECHOHAWK. Mr. Chairman, I commended the Administration for all the efforts that they put forth in terms of moving these issues forward in the recent years. But again looking at the big picture and the future, that effort is still not enough. Senator Udall asked about legal representation. Well, there are many tribes out there who still are unrepresented on this issue, tribes that have valuable water rights that are at stake that want to participate in this process, but they don't have the wherewithall to do that.

Even though it is difficult in these budget times to try to ramp things up and increase funding in this area, that is really what

needs to be done, a real increased commitment to resolve these tribal water rights issues throughout the Country.

The CHAIRMAN. Yes, I think it is important that we continue to look at the Federal Government and see that its structure can help the cause or try to lead to resolutions that are needed, of course. So thank you for your response.

Ms. O'Brien, in your testimony you mention, and the big word is unquantified, tribal Water rights creates great uncertainty. And of course, it has. Can you please discuss the potential for economic development and job creation once tribal water rights are quantified?

Ms. O'BRIEN. Yes, Mr. Chairman. First to start with kind of the flip side of that, about the potential disruption if those claims are litigated instead of coming up with a workable solution in terms of where tribes get what they deserve in terms of quantification of their claims and State-based longstanding uses can be accommodated in that context.

I know Stanley Pollock is here, water counsel for the Navajo Nation, but I am going to talk a little bit about the Navajo Nation's claims in the San Juan River Basin in New Mexico. In that context, as you well know, Mr. Chairman, the claims of the Navajo Nation were recently congressionally approved through a settlement with the Federal Government and the State of New Mexico.

Absent settlement and subject to litigation, if the Navajo Nation's claims in the San Juan Basin, if even a fraction of those claims which are claimed were recognized, it would blow the top off of New Mexico's entitlement under the Upper Colorado River compact. It would thereby disrupt the economy of that region. It would disrupt, potentially disrupt the water supply to power generating stations on the San Juan River, which are a cornerstone of the southwestern power grid, which relies on water from the San Juan Basin.

The settlement of those claims will allow for certainty in the basin. It recognizes, due to the tribe's subordination of their earlier priority date to other water uses, existing essential uses for the municipalities in that basin. It secures, in essence, the water supply for the power generating stations and the coal mining operations, significant industrial uses there. It then allows additional water, through the quantification of the tribe's claims, to be made available within New Mexico, within the Basin, for leasing for additional economic development, whether that be for power generation or for other uses in the Basin. Because now it is known what is the tribe's claim.

So the tribe gets economic benefit from the quantification of their claim, and then now their partners, the other water users in the Basin, can have access to additional water supplies as needed and necessary both for additional economic development as well as, in times of shortage, to shore up supplies for essential economic uses.

The CHAIRMAN. Thank you very much.

Let me then ask Senator Udall for his further questions.

Senator UDALL. Thank you. Maria, you hit on something that I think, if we move towards settlement, we end up building relationships, too, in many other areas. You mentioned that settling, in your testimony, Native American Water claims, has had the added benefit of building positive relationships between States, tribes and

the Federal Government, which is essential in dealing with a shared resource.

Could you expand on this idea? Do you have examples of how these relationships have been built and what the results have been?

Ms. O'BRIEN. Yes, Senator Udall. I think another example I would offer is also from New Mexico, in terms of partnerships going forward. That is the settlement of the Aamodt litigation north of Santa Fe. That was noted as one of the, at least in one point in time, the longest-running litigated case on the federal docket. So there was clearly decades and decades of acrimony and dispute among non-Indian users and Indian users within the Basin over a very finite yet shared resource.

These are communities that live together and that will need to and want to continue to live together going forward. So it is actually essential to figure out how to share this vital resource that is necessary for communities to figure out how to use together.

The economies of tribes and local communities are now intertwined. They are just by the very nature of the way growing populations have worked, they are intertwined. Therefore developing, not just because it is a shared resource, but developing partnerships on the shared resource is absolutely essential.

So after decades of fighting on the shared resource, one of the solutions in Aamodt that the parties were able to come and agree upon was the construction of a regional water system that will serve both Indian and non-Indian users. And that regional water system will be operated by four pueblos and the county of Santa Fe. So it will be in fact a joint government to government, community to community, regional water system that will again serve both Indian and non-Indian resources going forward.

So it will support further economic development, because it will allow additional supplies to be brought into this region, where water is very scarce. And it will allow the pueblos to develop the resources that were quantified to them after these many, many years of both litigation and settlement. So I think that is a prime example of a very intractable, difficult problem, given how scarce water is in the region where the Aamodt settlement occurred, and in developing a strategy and tailoring it to solve the problem. That could not have been done through litigation or without the significant federal funding that was required to support that settlement.

Senator UDALL. Thank you. I think that is a great example.

John Echohawk, it is my understanding that the negotiation team in the Indian Water Rights Office is the federal voice in water settlements being discussed today. Do you believe the Indian Rights Water Office and its team of negotiators are functioning effectively? Is there any need for improvement or changing or expanding the voice of the Federal Government?

Mr. ECHOHAWK. Well, I think they are doing a great job, Senator, with the resources they have. As we talked about, there are ins and outs, ups and downs in all those negotiations. I think they do the best job they can with the resources they have. But the federal resources available to them, both in terms of being able to staff their own team and to have the tribes who need to be there to involve the tribes in that process and then once that settlement is reached,



then to get the federal funding to do that, that is still the big challenge. We have come a long way, but there is so much more to do and resources are short. But they do the best they can with what they have.

Senator UDALL. Thank you. I think you have highlighted the fact that it is clear we need additional resources in a number of areas here in order to really bring justice to Native American water rights claims.

Thank you, Chairman Akaka. Thank you very much. I have completed my questioning for this panel.

The CHAIRMAN. Thank you very much, Senator Udall, for your part in this hearing.

I would like to thank our panelists here for what you have contributed already and we again, my plea to you is, we need to continue to work together on this to try to find resolutions that have been out there for, well, I guess it is true, if I can say, for centuries, and seven tribes or eight tribes doing something about it. But we have 500 tribes. So we have lots of work to do, and we need to continue to press toward trying to get this resolved for the indigenous people of this continent and this Country.

Thank you very much for your participation here.

Now I would like to invite the third panel to the witness table. And that is Ms. Judith Royster, who is Professor and Co-Director of the Native American Law Center at the University of Tulsa College of Law in Tulsa, Oklahoma, and Mr. Michael Bogert, Senior Counsel at Crowell and Moring in Washington, D.C.

Welcome to you, and thank you so much for being here and taking the time to be here with us at this hearing. Ms. Royster, please proceed with your testimony.

**STATEMENT OF JUDITH V. ROYSTER, PROFESSOR/CO-DIRECTOR, NATIVE AMERICAN LAW CENTER**

Ms. ROYSTER. Thank you, Mr. Chairman, and Senator Udall. I am very pleased to have been invited to be here.

My written testimony is mostly about the drawbacks of litigation and the upsides of negotiation. And I noticed this poster, which covers most of those points. So I would like to take this time to bring up just a couple of things that I think aren't necessarily on that list or other things to consider.

Ms. O'Brien talked about the fact that the litigation of Indian water rights is primarily in State court as part of these massive general stream adjudications. And the uncertainty that results from that I think is in part from the fact that you have a number of State courts interpreting federal precedent which is not itself clear. So you get, in these general stream adjudications, out of State courts, a great variability in their understanding of federal law.

That is, the Supreme Court charged the State courts with following federal law in the determination of tribal water rights. But there is a lot of room for interpretation. And you are getting significant variance, which is not tied to the particular needs of the parties, but to differences in interpretation in the law, which I think is one of the things that negotiated settlements can help resolve.

That negotiated settlements, the sort of second point I want to make that is an expansion on what is here, is that there seemed to me to be sort of three interrelated issues with the water rights. There is the determination of water rights, and then there is the implementation through funding and the construction of water delivery systems and the like. Then there is a third issue of administration. You have the water, now what do you do with it and how do you manage it.

And the primary drawback, I think, of litigation is that litigation only covers the first of those. Litigation gives you the determination of the water right, but it doesn't do anything in terms of the access to wet water or to the further issues of the management and administration of water rights. A number of the commentators today have talked about the wet water issue and the importance of having the funding and the promise of wet water and the authorization for projects.

But beyond that, there are things that can come up in settlements, that do come up in most of the settlements, that sort of go to a third stage of this issue, which is the use and administration and management of water rights. I would like to use just a couple of examples.

The first of those are tribal water codes for the administration of the reserved water rights. Under current law, there is at least technically a moratorium on federal approval of tribal water codes that has been in place since 1975. It makes it difficult for those tribes that wish to develop water codes to do so. Most of the settlement acts, a significant number of them, build in provisions for tribes to develop water codes and in many cases for secretarial administration of water rights until the tribes do so, an issue that can't possibly be resolved in the course of litigation.

A second type of issue like this, which is dealt with in many of the settlements, perhaps most of the settlements, is the question of water marketing and the ability of tribes to participate in a growing western use of putting water to perhaps a higher economic and beneficial use without depriving the water rights holder of the economic value, without taking the value away from the person who holds the water.

There is a serious question under federal law as to whether tribes can engage in water marketing without congressional approval. But congressional approval has been built into a number of these water rights settlements, so that tribes that have water which they wish to share with non-Indian communities or which they are not yet able to put to use can market that water. And it is often marketed to off-reservation municipalities, which are in serious need of water at a reasonable cost.

By building in those matters and those flexibilities into the settlements, the settlements can reach beyond those first two stages of determination and wet water to the sort of third issue of the administration and management of water rights. Thank you.

[The prepared statement of Ms. Royster follows:]

PREPARED STATEMENT OF JUDITH V. ROYSTER, PROFESSOR/CO-DIRECTOR, NATIVE  
AMERICAN LAW CENTER

Good afternoon. My name is Judith Royster, and I am a professor and co-director of the Native American Law Center at the University of Tulsa College of Law in Tulsa, Oklahoma. Thank you, Mr. Chairman, for inviting me to testify before the Committee at this oversight hearing on Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country. I am honored to be here.

Although consent decrees involving tribal water rights date back at least to 1910, the modern era of tribal water rights settlements begins in 1978 with the settlement act for the Ak-Chin Indian Community in Arizona. Since 1978, Congress has enacted 27 Indian water rights settlement acts into law, affecting tribes in eight western states and Florida. This shift from litigation of tribal water rights to negotiated settlements is in significant part a reaction to the drawbacks of state general stream adjudications for determining tribal reserved rights to water.

#### **Indian Reserved Right To Water**

Indian tribes have, as a matter of federal law, rights to sufficient water to fulfill the purposes for which their reservations or other lands were set aside. In 1908, in *Winters v. United States*,<sup>1</sup> the U.S. Supreme Court determined that when lands were set aside for the use and occupation of Indian tribes, sufficient water was impliedly reserved as well. Without water, the reservations could not support liveable communities. Water is necessary to life.

The *Winters* doctrine of tribal reserved water rights provides that because water is impliedly reserved with the land, the priority of Indian water rights is the date that the lands were set aside. As a result, tribal reserved water rights are prior and paramount to later-created state law water rights. Unlike rights created under state law, Indian water rights are not forfeited or abandoned for non-use. Today, in consequence, Indian tribes without adjudicated decrees or negotiated settlements hold large, but unquantified and generally unused, rights to water.

In addition to *Winters* rights, some tribes may hold water rights under the approach of the 1905 decision in *United States v. Winans*.<sup>2</sup> In *Winans*, the Court construed a treaty that guaranteed the tribes the right to continue their aboriginal practices: in that case, the right to take fish. The Court determined that the treaty rights included certain implied rights, such as access to the fishing places, necessary to ensure that the right to fish can be exercised. Thus, if a treaty, statute, or agreement confirms aboriginal practices that require water—such as fishing or traditional agriculture—the right to sufficient water for those practices was impliedly reserved as well. These rights carry a priority date of time immemorial.

#### **State General Stream Adjudications and Indian Water Rights**

All western states have a process to determine rights to water under state law. Historically, however, the state courts and administrative agencies did not have jurisdiction over the property rights, including the water rights, of Indian tribes or the Federal Government. Instead, tribal and federal water rights, which arise under and are governed by federal rather than state law, were determined in federal court proceedings.

In 1952, Congress enacted the McCarran Amendment, which expressly permits the United States to be joined as a party in a state lawsuit “for the adjudication of rights to the use of water in a river system or other source.”<sup>3</sup> These state proceedings, known as general stream adjudications, are large, complex, comprehensive lawsuits intended to determine all rights to water in a river system. At the end of the adjudication, the state should have a record of all water rights owners within that river system, their priority dates, points of diversion, permitted uses, flow rates, quantity of use, and so forth.

In 1976, the U.S. Supreme Court held that the United States could be joined as a party in a general stream adjudication not only to adjudicate federal water rights, but Indian tribal reserved water rights as well.<sup>4</sup> The Supreme Court also determined that, as a general matter, federal courts should abstain from hearing Indian water rights cases, in favor of state general stream adjudications. It noted, however, that state courts must apply federal law to determine the nature and extent of both tribal and federal water rights.

<sup>1</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>2</sup> 198 U.S. 371 (1905).

<sup>3</sup> 43 U.S.C. § 666(a).

<sup>4</sup> *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

Nothing in the McCarran Amendment provides that Indian tribes can be joined as parties in state general stream adjudications. Because the Federal Government can be joined, however, and required to represent tribal rights,<sup>5</sup> most tribes choose to waive their sovereign immunity to suit and voluntarily join as parties in order to represent their rights. As a result, most adjudications of Indian water rights since the mid-1970s have taken place in state court, as part of general stream adjudications.

#### **Drawbacks To Using State General Stream Adjudications To Determine Indian Water Rights**

The use of state general stream adjudications to determine Indian reserved rights to water has proved to have a number of well-documented drawbacks.

One significant drawback arises from the nature of general stream adjudications. Because they are comprehensive proceedings, often involving thousands of water rights, general stream adjudications may run for literally decades. The costs of such prolonged litigation are extensive, running into the tens of millions of dollars. During the course of the litigation, tribal and federal resources are devoted to the proceedings rather than to other uses and priorities. A state may permit new state-law uses to begin during the adjudication, further complicating the process.

Moreover, state court may be an unfriendly forum for tribes. State judges are, in most states, ultimately answerable to the voters. To the extent that tribal water rights are in conflict with, or perceived to be in conflict with, the water rights of state users, state courts may favor state users. In addition, in a majority of western states, the state water agency is more than simply a party to the water rights litigation. In most of the states, the water agency makes at least preliminary findings and determinations. Where the state water agency is both a representative of state interests and a preliminary fact-finder, tribes may well distrust the process to fairly consider tribal interests.

In addition to the historic conflict between states and tribes, state court rulings in general stream adjudications have varied significantly. Although the U.S. Supreme Court cautioned states to follow federal law in determining tribal water rights, state court interpretations of federal law are not uniform. For example, one state finds that the only purpose for which a reservation was created was agriculture, while another finds a broad purpose of creating a viable homeland. One state restricts the uses that tribes may make of their water rights, while others do not. One state determines that Indian water rights do not extend to groundwater, while others find that groundwater may, at least under certain circumstances, be used to fulfill the tribal right. These variances in the application of federal reserved water rights principles are not necessarily tailored to the needs of the parties, but rather to the various state courts' interpretation of federal precedent.

A final and crucial drawback to litigation of Indian water rights is the end result. The ultimate purpose of litigating Indian water rights is not only a declaration of those rights, but the ability to put the water to uses that best serve the needs of the Indian community. In general stream adjudications, Indian tribes receive determinations of water rights, but those rights are paper rights only. At the end of a long, costly litigation process, the tribe has a recognized water right, but not "wet" water or the means of putting the decreed water to actual use. Moreover, given that the tribe itself may spend upwards of a million dollars to obtain the paper right, few if any tribal resources remain available to fund water projects and delivery systems. Similarly, the Federal Government may spend considerable resources helping to litigate Indian water rights, without being able to offer financial assistance for water projects after the water rights are determined.

#### **Advantages of Water Rights Settlements**

In light of these substantial drawbacks of state general stream adjudications, negotiated settlements of Indian rights to water have significant advantages.

First, the settlement acts resolve tribal claims to water with respect to both the states and the Federal Government. At the heart of every settlement act is a quantification of the tribal right to water. Tribes waive their reserved rights to water under the *Winters doctrine* and their water claims against the United States. They agree, in general, to a lesser quantity of water than they could receive under the *Winters* approach of securing sufficient water to fulfill the purposes for which the land was set aside. In exchange, the tribes receive guarantees of financial assistance in developing their water resources.

Thus, the second and crucially important advantage of negotiated settlements is the promise of "wet" water. Every settlement act authorizes appropriations for

<sup>5</sup>*Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

water development or management projects, or more generally for economic development purposes. A few more recent settlements include mandatory appropriations. Costs are shared among the various interested parties, including the tribes, the states, and the Federal Government. The importance of this feature cannot be overstated. Tribes with litigated paper rights to water face enormous obstacles in getting that water into use; tribes with negotiated rights have some guarantee that financial assistance is forthcoming.

Third, water rights settlements are faster and less expensive than litigation through a general stream adjudication. Negotiated settlements are by no means quick or cheap. But compared to adjudications, negotiated settlements take less time and use fewer tribal, state, and federal resources to conclude. As settlements become more common, parties have greater expertise in the process, and prior settlements may serve as models for future negotiations.

Fourth, water settlements are flexible and tailored to the needs and circumstances of the parties. Unlike variances in adjudication decrees that result from inconsistent state court interpretation of federal law, variances in negotiated settlements serve the interests of all parties. Settlement acts often clarify issues that are not entirely resolved under federal precedent. For example, a significant number of settlement acts protect tribal uses of water for other than agricultural irrigation. Some settlements specify that the water rights may be used for any purpose, while others protect the tribe's ability to use part of its water rights for an instream flow to ensure that sufficient water remains in the river itself. Similarly, settlement acts may specifically address groundwater rights. Settlements in the Southwest tend to do so, while settlements in the Northern Plains tend not to, indicating the relative importance of the groundwater issue in those regions.

As part of their flexibility, settlement acts often address issues that are outside the scope of a general stream adjudication. Often these involve issues of water use and administration for which there is currently no general statutory or regulatory authority. For example, the Secretary of the Interior placed a moratorium on the approval of tribal water codes back in 1975, pending the adoption of federal regulations. No regulations were ever issued, and thus tribes that require federal approval of their laws face a serious roadblock in regulating water rights. Several of the settlement acts address this issue directly, providing for the creation of a tribal water code to administer water rights, often with the Secretary of the Interior administering tribal water rights until the adoption of a tribal code.

As another example, tribes' ability to engage in water marketing is open to question under current law. Water marketing, generally defined as the lease or sale of water rights to another user, is gaining wide acceptance in western states as a means of ensuring that water is put to the most economic and beneficial use, without requiring the water rights holder to forego the value of the right. Water marketing can be enormously beneficial to tribes, ensuring that tribes receive the economic value of their water rights, particularly during times when the tribe itself is not able to put the water right to actual use. States and state-law water users may also benefit from tribal water marketing by having a reliable source of additional water at a reasonable cost.

Under current federal law, the sale or encumbrance of Indian property requires federal consent.<sup>6</sup> Because tribal water rights are property rights, it is likely that the lease of these rights requires congressional authorization. While no statute generally permits tribal water marketing, most of the settlement acts do. The tribes' ability to market their water rights is generally subject to certain limitations. Virtually all of the acts prohibit the permanent sale of tribal water rights, but rather authorize leasing. A significant number restrict the lease term to no more than 99–100 years. Tribes are often limited to marketing water from certain sources or, more often, to certain users such as nearby municipalities, benefitting local governments as well as the tribes. In most cases, the marketed water is expressly subject to state law during the period it is used off-reservation by the non-tribal users.

On occasion, water rights settlements address other water-related issues outside the scope of litigation. For example, one settlement included a hiring preference for tribal members in connection with a water project. Another addressed tribal-state relations in connection with water quality standards under the Clean Water Act.

The final advantage of water rights settlements over litigation is harder to quantify. Parties in litigation are in conflict with one another. It is the nature of litigation to have winners and losers. Even in a general stream adjudication, the proceedings can be adversarial. Negotiated settlements, at their best, are less so. The aim of a negotiated settlement is to reach a result that is beneficial to and acceptable to all parties. States, tribes, and the Federal Government must necessarily

<sup>6</sup>Nonintercourse Act, 25 U.S.C. § 177.

work together to reach a settlement before it is presented to Congress. The parties may not emerge from the process as friends, but a good process fosters respect and understanding. If negotiated water settlements lead to greater cooperation in state-tribal relations, that alone is an advantage worth pursuing.

#### **Disadvantages of Water Settlements**

Negotiated water settlements are not without their disadvantages. As noted above, faster and cheaper does not mean fast and cheap. Moreover, implementation of water settlements has been slow. Further proceedings are often necessary, funding must be appropriated, water projects designed and constructed, and so forth. The specific needs and means of fostering implementation of water rights settlements I leave to others at this hearing.

#### **Conclusion**

Tribal water rights will be determined, whether through general stream adjudications in state court or in negotiations among the parties. Despite some disadvantages to negotiated water settlements, the advantages of settlements to all parties—tribes, the Federal Government, the states, and often municipalities as well—as well as the relative advantages of settlement over adjudication argue in favor of increased use of Indian water rights settlements.

Even in this time of federal retrenchment, Indian water rights negotiations and settlements should not be abandoned. A significant number of tribes have successfully concluded settlements, but many more tribes are now in the process or even just beginning to consider negotiations. Those tribes should not be disadvantaged by the timing.

The Federal Government has a trust responsibility for Indian water rights. In the Western Water Policy Review Act of 1992, Congress “recognize[d] its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources.”<sup>7</sup> The Department of the Interior, in its criteria and procedures for participation in tribal water settlements, similarly states that “Indian water rights are vested property rights for which the United States has a trust responsibility.” As trustee for Indian tribes and property, the Federal Government should assure that the process of negotiated water rights settlements, including federal funding for water projects, is available to later-settling tribes as well as to those that have already settled their water rights.

The CHAIRMAN. Thank you very much, Ms. Royster.  
Mr. Bogert?

#### **STATEMENT OF MICHAEL BOGERT, SENIOR COUNSEL, CROWELL & MORING**

Mr. BOGERT. Thank you, Mr. Chairman.

I appear before you, and I appreciate the invitation to speak, as a recovering federal trustee. I held the position that Letty Belin, who is behind us, and I had the privilege and honor of serving with Pam Williams in the Secretary’s Indian Water Right Office in the Bush Administration. Many of the colleagues and the people who have been a part of these settlements for years were partners in our Administration, when we were doing this.

So Mr. Chairman, my initial image of this problem began right here in this Committee almost eight years ago, with our water settlement in the great State of Idaho, with the Nez Perce Tribe. We brought before you the most unlikely group of constituencies in the State of Idaho. We brought before you our water user communities, the leadership of the tribe itself. We brought forward our timber interests. We asked this Committee to take a look at what we believe is the most innovative approach to Indian water rights settlements perhaps that this Committee has ever considered in 2004.

And to address some of the issues of the benefits of proceeding with a settlement as opposed to litigation, that settlement, Mr.

<sup>7</sup>Pub. L. No. 102–575, § 3002(9), 106 Stat. 4600, 4695.

Chairman, gave Mike Connor 30 years of protection for his Bureau of Reclamation projects in our Upper Snake for a biological opinion under the ESA. Mike is the beneficiary of the foresight of that settlement, one that this Committee reviewed and approved.

We worked with the tribe to work on habitat restoration that ultimately, with our great State of Idaho, two-thirds belonging to the Federal Government, is assisting the United States in its Endangered Species Act obligations under several biological opinions, due to the operation and the impact of the ESA on our home State.

Mr. Chairman, we ultimately resolved, as Maria O'Brien so eloquently described, what was the cloud over our system of State water law as a result of our settlement. We had over 150,000 initial claims in the Snake River Basin adjudication, and ultimately through our settlement, we were able to remove the cloud of uncertainty over our system of water law. Maria referred to the *Winters* claims that cloud State law systems as potential poor displacement. I think there are some that would use the term potential violence to the system of prior appropriations that the States understand.

So for us, Mr. Chairman, there was no other alternative than to negotiate, than to bring in the Federal Government and to work with the tribe to try to resolve these uncertainties. Indeed, one of the great beauties of the McCarran Amendment is the opportunity to grab the federal agencies by the lapels and bring them to the negotiating table, because you can. Because the McCarran Amendment says the Federal Government must come to a State law process.

To the extent of negotiation versus litigation, why not take that opportunity in one of the few moments of a waiver of sovereign immunity that Congress has afforded us in that process?

So Mr. Chairman, we decided, at the risk of desecrating the almost sacred words of Chief Joseph, that we wanted to fight no more forever. We decided we wanted to bring our people before you and take a look at the settlement and determine whether Congress would bring it forward. I think by any measure, Mr. Chairman, it has withstood the test of time.

Senator Udall, you asked about relationships. Back home in Idaho, the tribe brought forward a list of streams that they wanted protected in our State. The tribe is fiercely proud of their land stewardship and their relationship and their culture with listed species, salmon, the gray wolf. We brought them in and integrated them into our State process with our State water board. As a result of our being at the table with the tribe, they were a full participant in a State law system of dedicating in-stream flows through the Idaho State water board. I can assure you, Senator, that that would not have been possible had we litigated and had we attempted to defeat what the tribe's claims were in our general stream adjudication, the Snake River Basin Adjudication.

Mr. Chairman, this settlement back home is so powerful that when I look at your list of winners and losers, I can't even imagine what it would have been like if we had defeated the Nez Perce Tribe in court. I can't even imagine what it would have been like, all of the benefits and all of the opportunities and all of the relationships that we have had as a result of that settlement. I can assure you, it would have been ten times worse to listen to some of

the voices who said, let's litigate. Let's just bring this through the courts and let's protect what we can from the claims, the honorable claims of the tribe.

With that, Mr. Chairman, I am, and thank goodness I didn't have to have OMB clear my testimony for you today.

[Laughter.]

Mr. BOGERT. Another great honor of being a recovering trustee. Those are, if you will, my comments. I submit my testimony to the Committee, Mr. Chairman, and I look forward to your questions.

[The prepared statement of Mr. Bogert follows:]

PREPARED STATEMENT OF MICHAEL BOGERT, SENIOR COUNSEL, CROWELL & MORING

Chairman Akaka, Vice Chairman Barrasso and distinguished members of the Committee, thank you for the opportunity to appear before you today and discuss promoting the negotiation and implementation of water rights settlements in Indian Country.

### **I. Introduction**

The perspective I bring to the Committee today is framed by three separate modes of practical experience with Indian water settlements.

First, through the steady discipline and progress of the Snake River Basin Adjudication in my home state of Idaho, we worked with the Nez Perce Tribe, our water user and agriculture community as well as both the Clinton and Bush Administrations to achieve success in our Indian water rights settlement Agreement. The Snake River Water Rights Act of 2004, Pub. L. No. 108-44 7, 118 Stat. 2809, 3431 (div. J., title X of Consolidated Appropriations Act of 2005), is perhaps the most innovative Indian water rights settlement ever enacted by Congress.

Second, when Governor Kempthorne was asked to serve as Secretary of the Interior, I was invited to join his team and participate in the Bush Administration's management of over eighteen separate Indian water rights settlements.

Third, as a private citizen now observing the continued evolution of these important water matters, the nature and the magnitude of both the problems and the proposed solutions to these settlements are at times astonishing. But they are not insurmountable and there are some things we can discuss to improve the process.

### **II. Discussion**

#### *A. The Problem Set*

The path through Indian water rights settlements leads to transformation.

In Idaho, we went from litigation to celebration of our Agreement with the Nez Perce Tribe on the banks of the Boise River. It was inspiring.

In New Mexico, we heard first-hand about the longest-active Federal litigation, the *Aamodt* case (originally filed in 1966!). At one point, we were advised, the case couldn't even progress through litigation because, through the sheer passage of time, the court could not determine *what the appropriate law was* in order to rule on a summary judgment motion. This was confounding.

In Navajo Country, we spoke with "the water haulers," good people who make several round trips a week to put quarters into a machine that dispenses potable water into large receptacles on their trucks for their domestic needs. The images were overpowering.

There are many issues that occupy the daily calendars of Members of Congress. The boots-on-the-ground moments described above support a reasonable proposition that perhaps there is nothing more important in the Federal Government than resolving the issue of water rights in Indian Country.

This proposition became personally elucidating when, during a 2007 tribal leaders conference, a Pueblo Governor, upon hearing about how the *Aamodt*, Taos and Navajo pipeline settlement discussions were enthusiastically proceeding, took to the floor and asked our Federal team when was it going to be his Pueblo's turn to begin work on their water settlement, and by the way, would there be any water left? There was not a really good answer to his question then and there still might not be a good answer to this day.

The problem set before the Committee is simple: whatever water there is, and wherever it is (either above or below ground), there is not enough of it and what water remains is subject to intense competition. Then, whatever water is available



on the margins needs to be delivered to Indian Country through a fiscally-sound means.

I believe these issues are too complex to be resolved by any other process than negotiation. It is essential that the process itself and resulting Indian water rights settlements be supported on Capitol Hill. There is no other sensible alternative.

*B. What is at Stake in these Settlements*

So, what is there to negotiate, and why negotiate in the first place?

As this Committee is well aware, the doctrine established by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1907), holds that when a reservation is set aside for an Indian tribe, an implied right to water in an amount sufficient to fulfill the purposes of the reservation is also created. Unsettled *Winters* claims consign uncertainty over state-law systems of water management. The intersection of these interests and the potential violence to state management of water has been eloquently articulated by this Committee:

Generally speaking, in states that have adopted systems based on prior appropriation, the ownership and priority of water rights in a particular stream originate with the act of diverting water for beneficial use. Tribal reserved water rights (including the water rights of those who hold allotted trust lands located within Indian reservations) and their dates of priority, on the other hand, arise from the creation of the reservation, and are not dependent on diversion for beneficial use. Because in many areas the establishment of Indian reservations preceded the initiation of most non-Indian water uses, Indian reserved water rights often have priority over the rights of other water users whose rights are based in state law. Accordingly, if Indian tribes were to exercise long-dormant but senior *Winters* rights at times when there are insufficient flows available to satisfy the needs of all users, Indian and non-Indian alike, existing non-Indian water users with rights based on the state-law systems of prior appropriation would often face the subordination of their rights to divert and use water.

S. Rpt. No. 108-389, at 2 (2004). In Indian Country, so much is at stake with infrastructure, actual water, and future funding hanging on a decision to resolve—forever—a tribe's *Winters* rights. These are the biggest decisions tribal leadership will ever make and they certainly should not be taken lightly. There is a mirror image of similar difficult decisions for the non-Federal participants to the same settlement, and often additional pressures of other Federal law such as the Endangered Species Act and the Clean Water Act enter into the calculus.

What are the benefits of a negotiated outcome? During the summer of 2004, then-Governor Dirk Kempthorne provided his views on the Snake River Water Rights Act to this very Committee. For us, the return on our investment in the Nez Perce Agreement was incalculable:

This agreement protects Idaho's sovereignty by maintaining our system of water law and our existing water rights, which is a process familiar to this committee in traditional water rights settlements.

It provides certainty for the Nez Perce Tribe by resolving their water rights, as well as certainty for our Idaho water user community and important stakeholders our natural resource economy because of the protections contained in the agreement for the next 30 years.

It provides opportunity by setting forth a new way of going about protecting endangered species while preserving access to State and private timber lands for our resource-based industries and the rural communities that depend on Idaho's forests.

NezPerce-Snake River Water Rights Act: Hearing on S. 2605 Before the S. Comm. on Indian Affairs, 108th Cong. 47 (2004) (statement of Dirk Kempthorne, Governor of Idaho).

When Governor Kempthorne became Secretary Kempthorne, we were truly educated about the legal obligations of a Federal Trustee. In that role we were called to Capitol Hill to account for our management of the pending multiple water settlements, and, as we did with the Snake River Act, we touted the significant benefits of the negotiation model:

Through [an Indian water] settlement, parties can agree to use water more efficiently or in ways that obtain environmental benefits, or to share shortages during times of drought. In exchange for settlement benefits, tribes can agree to subordinate use of their water rights so that existing water uses can continue without impairment. Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertain-

ties in Federal and State law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

Statement of Michael Bogert, Chairman of the Working Group on Indian Water Settlements, before the House Subcommittee on Natural Resources (April 16, 2008). These observations hold true to this moment.

With this understanding of the benefits should a negotiation effort succeed, what about the negotiating opportunity itself?

If for no other reason, this setting should be exploited because it is one of the precious few opportunities where Congress has afforded non-Federal parties a perfectly lawful place at the negotiating table with Federally-recognized tribes and the United States Government. In addition to a few provisions of the Indian Gaming Regulatory Act where Congress ceded authority to Governors to negotiate Class III gaming compacts directly with gaming tribes, *see, e.g.*, 25 U.S.C. § 2710(d)(3)(a), likewise, the McCarran Amendment diverts the United States and tribes into a State-law process through a rare, express waiver of sovereign immunity. See 43 U.S.C. § 666.

There are voices in Indian Country, legitimately perhaps, distrusting of state-law infrastructure as a means to ultimately determine their fate as sovereigns. However, history shows that more often than not, McCarran Amendment proceedings are a unique and valuable relationship-building tool even if, in some instances, the journey begins with a shotgun wedding. Governor Kempthorne often said during our settlement negotiations with the Nez Perce that while the Tribe was, of course, a sovereign tribal government, he also considered them fellow Idahoans.

### C. *Can this Process Be Better?*

The traditional model for the success of Indian water rights settlements consists of several stages.

First, if the settlement discussions germinate in a state with a disciplined general stream adjudication, perhaps a fortunate confluence of timing and ripeness materializes.

Then, if a settlement successfully makes its way through the state law process and becomes embodied in Federal legislation, hopefully there are senior members of the Congressional Delegation to deftly maneuver the legislation through the process. No small amounts of divine inspiration and perspiration are invested to make Indian water settlements succeed. Hopefully there is always room around the margins for improvement, and the following are a few observations and suggestions on how the process might be made better.

#### 1. Earlier Funding

Much has been debated—as it should—about the cost to the Federal Government of funding Indian water rights settlements. For now, the *Criteria and Procedures for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (March 12, 1990), a policy that was very much a focus of discontent in Indian Country when we were at the Department of the Interior, has withstood the test of time. The *Criteria and Procedures* guide Executive Branch decisions on water settlements and affirm that the taxpayers are entitled to a sound financial resource allocation and a reasonable return on its investment for peace with Indian water rights.

So, while legitimate debate over the cost-justification for these settlements continues, at least one answer to the New Mexico Pueblo Governor mentioned earlier might be with early funding supporting the development of outstanding water rights claims in Indian Country.

There was always a long line outside the door of the Secretary's Indian Water Rights Office for seed funding for lawyers, hydrologists and other experts to assist tribes in developing their claims. Even before formal negotiations commence, a tribe's *Winters* claims can only be ascertained, evaluated and prioritized with this essential seed funding. This early financial support is an essential ingredient and the foundation for the future success of Indian water settlements, and it should be actively supported on Capitol Hill.

#### 2. Trustee Agency Coordination

Our Federal Government can always be better coordinated. Also, it is not necessarily intuitive that the agencies housed at the Department of the Interior *share* trustee responsibility with other Cabinet-level departments, including the Environmental Protection Agency. I served as the Regional Administrator in EPA Region 10 in 2005 and 2006, and the tribal outreach programs there are a model. As the

EPA Region with the largest accumulation of Federally-recognized tribes (271), Region 10 is rightfully proud of its work in Indian Country.

I believe more can be done on a cross-Federal agency basis to maximize the resources dedicated to assist developing Indian water rights settlements, through, for example, cooperative programs, interagency staffing agreements, or similar tools. Trustee responsibility in the area of water settlements should not solely be the burden of the Department of the Interior, especially with water quality being mentioned more often in the same breath as water quantity.

### 3. Is the System Built for Partial Settlements?

As was recognized by this Committee in its 2004 report on the Snake River Water Rights Act, the process of resolving Indian water settlements can be arduous. “[T]he general stream adjudication process has proven itself to be an unwieldy, expensive and, above all, slow method for resolving the competing water rights claims in a stream or watershed.” S. Rpt. 108-389 at 2. Is there an alternative to the years needed to resolve broader *Winters* claims, by all parties, in Indian Country?

In some cases, non-Federal parties and Tribes may be in an advantageous position to begin negotiating their separate peace with each other in various local watersheds. As noted earlier, unlike Idaho with its Snake River Basin Adjudication (and now the North Idaho Adjudication), other states are less fortunate in their ability to simply call upon its state water law construct to accommodate negotiations between Tribes and other parties to settle outstanding water rights claims.

Certainty is a vital component of an Indian water rights settlement. However, with certainty comes the painstaking process of identifying any and all possible claims to be resolved in exchange for waivers and the blessing of Congress that there was finally “Peace in the Valley.”

We should begin a conversation about whether it is possible to make incremental progress on settlements where the parties can resolve key elements of what eventually becomes a much broader discussion of the full satisfaction of a Tribe’s *Winters* claims.

For example, if water settlement discussions can be focused on certain divisible components and resolved *prior* to the much tougher and more robust negotiations over broader Federal reserved water rights, then they should proceed with all speed. It does not make sense to wait—perhaps years—for a larger settlement construct to emerge if parties can resolve their differences and provide much needed resources to Indian Country as a result of a partial settlement with a tribe. These “mini-settlements” should be supported as a matter of policy by the Executive Branch and welcomed by Congress if an agreement is appropriately scaled and satisfies the interest of the tribe and the other settling parties.

## III. Conclusion

In closing, I want to dispel a few myths about Indian water settlements.

### A. *Myth Number 1: Collaboration is Easy*

It is awfully easy to talk about bringing collaborative processes to Indian water settlements, but the warm and fuzzy

feelings that surround the term “collaboration” is really a false impression. Collaboration is tougher than it looks and is not for the faint of heart.

Collaboration is tough because it requires sitting at a negotiating table with dislikable people and listening to positions that are antithetical to yours. It is tough because often, one has to retreat and seriously contemplate one’s genetic makeup and dearly-held values of the people one represents.

Collaboration sometimes requires battling with people that you once believed were your friends (in Idaho, we had to overcome opposition to the Nez Perce Agreement by the state Farm Bureau).<sup>1</sup> And, collaborative processes are extremely uncertain as to where the ebb and flow of the discussions will lead and when the negotiations will end. In short, collaboration is not for the meek; if it is not difficult, it is not being undertaken correctly.

Contrast collaboration to litigation. Dedicating the outcome of a water controversy to the courts is the best resolution if there is simply nothing left to lose. Certainly, there is a time and a place to litigate, but courts cannot address the relationships that may be irreparably injured in the wake of an adverse decision. And, with all due respect to the judicial branch of government, courts are least-equipped to rearrange local and regional economies.

<sup>1</sup>For more on the Nez Perce Agreement, see Laurence Michael Bogert, *The Future Is No Place To Place Your Better Days: Sovereignty, Certainty, Opportunity, and Governor Kempthorne’s Shaping of the Nez Perce Agreement* 42 IDAHO L. REV. 673 (2006).

Finally, courts are incapable of awarding the types of settlement benefits that were described earlier in Governor Kempthorne's statement on the Snake River Act. No long-term ESA protection, no delegated timber programs, and no state partnerships with the Tribe. These types of benefits and investment in the future are forgone with litigation.

*B. Myth Number 2: There Are No Heroes in This Process*

It is sometimes great sport to bash Federal bureaucracy in an oversight environment, and perhaps there might be an inclination to do the same with respect to water settlements in Indian Country.

My experience is different. Having been a part of this work in Idaho and at the Department of the Interior, the Committee should be advised that there is a dedicated group of career Federal public servants that truly understand what is at stake in these settlements. The day-to-day work that ultimately leads to success in resolving Indian water rights claims is incremental, unseen and unsung. But because it is not conspicuous does not mean that good work is not being accomplished.

Because of the decentralization of the Department of the Interior's settlement assessment and negotiation teams, there are many quiet heroes who make the work of advancing stakeholder development—in Indian Country and elsewhere—as some of the most fulfilling work they do as Trustee agency representatives.

A final concluding thought. The Academy Award winning documentary "Man on Wire" is the epic drama of Philippe Petit, a French high wire artist who walked between the World Trade Center Twin Towers in 1974.

The many months of planning this maneuver began with Petit remarking to his compatriots that: "It's impossible that's sure . . . let's start working." The only thing that kept Petit from his demise was the cable strung between the towers, and yet he dramatically defeated the "impossible."

Some may speak of water rights, water supply, water quality and allocation of water in Indian Country in the near fatal terms that Petit approached his walk between the Twin Towers.

I disagree. There is a choice, but it requires enduring the messy collaborative process and attempting to develop the relationships necessary to give the process a chance. These are opportunities to test the boundaries of the human spirit and they must be chosen.

The challenges with water settlements in Indian Country may seem impossible, but failure will be a *fait accompli* if the hard work is not even attempted.

The CHAIRMAN. Thank you very much, Mr. Bogert.

Let me begin by asking Professor Royster, over the past 35 years, more than two dozen Indian water rights claims have been resolved through settlement. To your knowledge, how many claims have been resolved through litigation during that time? And what is the end product of a settlement negotiation versus that of litigation?

Ms. ROYSTER. Mr. Chairman, I was trying to add up in my head as you talked. I think I can perhaps safely say fewer than 27. But off the top of my head, I am thinking about five or six, but I am sure there are more.

But with respect to the end result, I think the end result that you get is the difference between a determination that water rights exist, that is one level from litigation, versus the possibility, at least, of all three levels from settlement that you get not only a determination, but you get authorization for funding, you get implementation through the implementation process, and you get the additional ability to address issues that would not ordinarily be able to be addressed in the course of litigation, but that benefit not just the tribes but the States and surrounding communities as well.

The CHAIRMAN. Thank you.

Counsel, we held a hearing on emergency preparedness that discussed the need for greater coordination and utilization of federal resources. You mentioned these same needs with regard to water

settlements. Can greater coordination and utilization of federal resources make the settlement process more efficient?

Mr. BOGERT. Mr. Chairman, in my testimony I describe that having served at the Environmental Protection Agency, the great enthusiasm, particularly Region X in Seattle, for the 170-plus federally-recognized tribes that they have responsibility for, the answer, unequivocally, is yes. I believe that good government can always be better government. And to the degree that the fierce dedication of, for example, the Environmental Protection Agency to clean water in Indian Country, I think has the same synergy and energy that we still have with the good career people at the Department of Interior that work on settlements.

And Mr. Chairman, I touched on this very briefly in my testimony. One of the emerging issues that you are seeing in these settlements is the notion that there is a potential cause of action in Indian Country for the failure of the United States to maintain clean water for the duration, potentially, of their trust obligations from the creation of the reservation.

My experience with the good people that are enthusiastic about discharging their trust obligations in the Federal Government, Mr. Chairman, is they should be coordinated. Their interests are perfectly aligned to the needs in Indian Country, both with respect to supply as well as clean water. I have witnessed it, having worked at the Environmental Protection Agency and seeing the similar enthusiasm that they have to bring good work to Indian Country.

The CHAIRMAN. Professor, in your opinion, can enabling tribes to market their water lead to economic development and job opportunities for tribal and surrounding communities?

Ms. ROYSTER. Mr. Chairman, I think absolutely yes. The marketing of water really allows the tribes to participate in something which is widespread now across the west and in which most water holders can participate, and really to recover the economic value of their water resources in cases where the tribe either is not yet in a position to put that water to use, or wishes not to put it to use. It benefits the tribe enormously in terms of economic development, and most of the settlements that allow this provide that the water will be sold to local municipalities.

I am thinking in particular of some of the Arizona settlements where the water is provided, marketed to municipalities at a rate which may be a little below fair market value, but the tribe gets an economic value, the municipality gets a deal and a guaranteed additional water supply.

The CHAIRMAN. Counsel, from your experience, can you please discuss the Federal Government's role during the implementation of PHASE? What were some of the key challenges during your tenure at the Department of Interior?

Mr. BOGERT. Mr. Chairman, I guess I have two perspectives on this. One, having come from a state with our own settlement, and then having the opportunity to be a part of managing the settlements at the Department of Interior, first, it is very easy when we are back home in Idaho to fall prey to the notion that our settlement is the most important settlement in the world, and it should be the only one that folks in Washington, D.C. should be paying attention to. That is what I thought, that is what I used to think.

Then having come to Washington and understanding pressures on individual hallway budgets, Bureau of Reclamation, Bureau of Land Management. I gained a better appreciation for the issues of implementation.

Mr. Chairman, often, and again, having served with good career people at the Department of the Interior and understanding their fierce dedication to advancing these settlements, which is still as enthusiastic today as it was when we were there, often these issues come down to just simply how many bodies you can get on the playing field from the reaches of these federal agencies. For example, we have been talking about assessment teams and negotiating teams.

Mr. Chairman, these people have other duties within their agencies. Their role on these teams are merely a part of what their full-time portfolio is. One of the great quandaries of these settlements, Mr. Chairman, is the sheer serendipity of them, when they are ready, how they make their way through the system and ultimately how much pressure there is, both on the Department to act and on Congress, to give it the blessing.

I think so much of this is dogged determination on implementation and in our own case in Idaho, we are eight years down the road on our settlement on a Section 6 agreement under the ESA where the State of Idaho would have a delegated program under the Endangered Species Act. It is still in a relative middle phase, Mr. Chairman, it is a problem.

But to the degree that critical needs have to be linked, probably, with those deliverables, I think it is a matter of prioritization and a renewal of commitment to getting the work done.

The CHAIRMAN. With your experiences here, working for the Department and also addressing these problems over the years, I just want to ask both of you whether you have any further ideas as to how we can deal with the challenges of this.

Mr. BOGERT. One thing in particular, and having been out of government for a while, I was very spoiled in Idaho with our very disciplined general stream adjudication. Yes, it took us a bit to get through the process of resolving the Nez Perce claims, and now there is a North Idaho adjudication. But what I found, Mr. Chairman, is that often other States have a less convenient means of bringing people together through the discipline of a general stream adjudication.

One of the ideas that I think might be worth further discussion is the notion that if you have parties that have developed a relationship with the tribe, non-federal parties, other State entities that are cultivating the framework of a potential settlement with a tribe, but it is potentially self-sustainable, outside of the larger *Winters* claims, or the larger water rights that attach to ultimately providing the needs of the reservation, we should be able to partially settle those, Mr. Chairman.

To the extent that, for example, Senator Kyl ran a bill in 2008 that provided a loan to the White Mountain Apache Tribe that began to develop in the feasibility studies for their water treatment facility. I think that finality and certainty goes into a much larger conversation about broader settlements and certainty, I think, Mr. Chairman, if we think about this, we should be able to pick off por-

tions of a settlement that ultimately can be resolved while the parties continue to work on the larger claims.

Whether this fits with the notion of certainty and finality or what the *Criteria and Procedures* say about this, I think it is a conversation worth exploring, Mr. Chairman. Because I believe the parties that are willing to cultivate the relationship and put terms of making a separate peace with respect to their relationship, they shouldn't have to wait for the machinery of a general stream adjudication to make its way through a process.

The CHAIRMAN. Thank you.

Professor, do you have any comments further?

Ms. ROYSTER. Mr. Chairman, just one or two quick comments, which is, I think that this idea of a partial settlement is intriguing, and a really interesting thing that perhaps the parties and Congress could pursue.

The only thing that I would add is something that was raised earlier. My memory fails me, sir, as to whether it was your point, but simply that we are in a time of federal retrenchment on budgets. And it would be a shame if the momentum on settlements were to be lost, that these are crucial, crucial for tribes, crucial for the surrounding communities, crucial for the certainty of western water rights. And that the tribes, the great majority of tribes who do not yet have their water rights quantified, should have the ability to have their settlements enacted and funded as well.

Thank you.

The CHAIRMAN. Well thank you very much for your responses. We look forward to continuing to work with you on these issues. We know how complex the problem is. It is not only, what do we do with the water, but in some places, where do we get the water or how can we get the water. And delivery becomes another thing to think about. So it is very complex.

But we need to deal with these so that we can have more certainty among the tribes as to what they can do with their water, water problems. And because the Country is so different throughout the continent, there are different sites in the Country where they may have similar problems but separated. We need to put all of these together and see what we can do to help the population of indigenous people.

Thank you so much for your part. We really appreciate it. Again, I want to express my mahalo, my thank you, to you and all the other witnesses. And today we heard about the benefits of settlement negotiations and the challenges in funding and implementing Indian water rights settlements. Our distinguished witnesses raised many ideas and potential solutions to more effectively negotiating and implementing tribal water rights settlements. I look forward to continuing these conversations with the Administration, with tribal leaders, tribal organizations, other interested parties and stakeholders here.

Finally, I would like to express the importance of hearing from all interested stakeholders on these matters. So therefore, the hearing record will remain open for written testimony for two weeks from today. So thank you again, mahalo for participating with us, and mahalo for your interest. And of course, you know that we

have roundtable discussions as well as other discussions where we want to hear from the tribes and people about these issues.

So we look forward to that and try to do the best we can together. So thank you very much, this hearing is adjourned.

[Whereupon, at 4:39 p.m., the Committee was adjourned.]



## A P P E N D I X

### PREPARED STATEMENT OF THE LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND PALA BANDS OF MISSION INDIANS, AND THE SAN LUIS REY RIVER INDIAN WATER AUTHORITY

Chairman Akaka, Vice Chairman Barrasso, and Members of the U.S. Senate Committee on Indian Affairs, this written testimony is submitted to the Committee on behalf of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, and the San Luis Rey River Indian Water Authority.

The subject of the Committee's March 15th hearing is embodied in the provisions of the San Luis Rey Indian Water Rights Settlement Act of 1988, in which the Congress authorized the parties to litigation involving the use of the waters of the San Luis Rey Basin to engage in negotiations that would lead to the settlement of water rights claims in that litigation as well as address issues in proceedings before the Federal Energy Regulatory Commission. While our Bands long ago elected to pursue a negotiated settlement of our water rights claims, we believe that our experience in the negotiation and implementation of the San Luis Rey Indian Water Rights Settlement Act may be instructive to other tribal governments and the Committee.

#### **Background**

In the latter part of the nineteenth century and the early part of the twentieth century, the United States established reservations for the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians along and in the vicinity of the San Luis Rey River in northern San Diego County pursuant to Executive Orders and the Mission Indian Relief Act of 1891, and the United States reserved sufficient water to fulfill the purpose of each reservation under the *Winters* Doctrine.

However, beginning in 1894, the United States also allocated the same waters of the San Luis Rey River to the predecessors of the City of Escondido and the Vista Irrigation District through a series of Federally-issued and Federally-approved agreements, rights-of-way and licenses, for the construction of facilities to store and divert the waters of the San Luis Rey River originating above the five Bands' reservations. Using those facilities, the City and the District (collectively referenced as "the Local Entities") historically diverted 90 percent of the flow of the San Luis Rey River away from the five reservations to the communities served by Escondido and Vista. The water is conveyed to Escondido and Vista through a canal that traverses three of the reservations—La Jolla, Rincon, and San Pasqual—as well as Bureau of Land Management lands.

In the late 1960's and early 1970's, the five Bands and the United States initiated proceedings before the U.S. District Court for the Southern District of California and what is now the Federal Energy Regulatory Commission (FERC) seeking monetary, injunctive and other relief against Escondido and Vista. Following fifteen years of litigation, the Supreme Court issued a decision in 1984, accepting some arguments for each side, rejecting others, and remanding the case to the Federal Energy Regulatory Commission.<sup>1</sup> Rather than pursuing further litigation, the United States, the Bands and the Local Entities entered into settlement negotiations which culminated in the enactment of the San Luis Rey Indian Water Rights Settlement Act in 1988.

The Act provides that the settlement of water rights disputes shall take effect when the parties (the United States, the Local Entities and the Bands) have entered into a settlement agreement providing for the complete resolution of all claims, controversies, and issues involved in all of the pending proceedings among the parties in the U.S. District Court for the Southern District of California and the Federal Energy Regulatory Commission, and stipulated judgments or other appropriate final dispositions have been entered in those proceedings.

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<sup>1</sup>*Escondido Mutual Water Co., v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

The Act also authorizes the establishment of the San Luis Rey Tribal Development Fund in the Treasury of the United States, and addresses the duties of the United States in providing a supplemental water supply for the benefit of the Bands and the Local Entities, subject to the provisions of the settlement agreement. Specifically, the Act authorizes and directs the Secretary of the Interior to arrange for the development of not more than a total of 16,000 acre feet per year of supplemental water to be shared by the Bands and the Local Entities.

The basic idea of the settlement is that the Local Entities would be made whole, and that the Bands would have rights to sufficient water from both the San Luis Rey River and the supplemental water to meet their present and future needs, in order to assure that the Bands would have the full original measure of their Federally-reserved rights to water before 90 percent of their water had been diverted away from their reservations, and the same water had been allocated to the Local Entities.

We provide this summary of the Act to the Committee as a context for understanding what the parties to the Settlement Act have been trying to achieve in the process of negotiations designed to reach a settlement agreement.

### Challenges

Unfortunately, our experience with the merits of negotiation versus litigation has not been consistent with the benefits that are customarily ascribed to the negotiated settlement of tribal water rights claims. For instance, as stated above, while 15 years of litigation culminated in a ruling by the U.S. Supreme Court, and 4 years of negotiations led to the enactment of our 1988 Settlement Act, we have now been in the implementation and further negotiation phase for 24 years, and we still have no settlement agreement that would bring about the complete resolution of the claims that cannot be dismissed until a settlement agreement is signed.

Thus, for us, the negotiation process has not been less time-consuming than litigation, or less expensive than litigation, and the process certainly has not achieved certainty and access to water rights.

We would like to be able to say that the negotiations process encourages collaboration amongst the parties, but collaboration between the United States and the Bands was more evident in the litigation phase than it has been in the negotiation process. And while we would also like to attribute more flexibility to a negotiation process in which the parties can craft mutually beneficial solutions, the United States has adopted a legal position based on the government's construction of the Act which it believes constrains the government's flexibility and "ties its hands" when it comes to preserving the Bands' pre-existing Federally-reserved rights to water on our reservations and within the San Luis Rey River basin.

One of the first challenges we encountered in our dealings with the United States is that our Settlement Act was enacted into law 24 years ago, and it thus apparently doesn't conform to what the government now requires of contemporary Indian water rights settlements. For instance, our Settlement Act was a settlement of claims in litigation amongst the parties—it wasn't a general adjudication of the rights of the other thousands of San Luis Rey River water users—and the scope of the Act is limited to those parties—the United States, the five Bands, and the two Local Entities.

Our Settlement Act was intended to remedy the fact that the government was responsible for diverting water away from our reservations, and the purpose of the Act was to make the parties injured by the government's actions whole—by importing water into the San Luis Rey basin for the Bands and the Local Entities to *supplement* the supply of water to which both the Bands and the Local Entities have prior existing legal rights.

And as explained more extensively in his 1986 letter to the Chairman of the Senate Select Committee on Indian Affairs,<sup>2</sup> Assistant Attorney General John R. Bolton advised the Committee that the United States supported enactment of the San Luis Rey Indian Water Rights Settlement Act because it "would bring to an end all costly litigation—both existing and prospective—involving the past and future use of waters of the San Luis Rey River between the Bands, Mutual, and Vista" (the Local Entities) and that "pending and potential claims against the United States would be settled".

Nonetheless, twenty years later, when the United States asks us "what is in this settlement for us?"—we think that the Congress answered that question in 1988 with the enactment of our Settlement Act, and that Assistant Attorney General

<sup>2</sup>August 11, 1986 letter from Assistant Attorney General, John R. Bolton, U.S. Department of Justice, to the Honorable Mark Andrews, Chairman, U.S. Senate Select Committee on Indian Affairs.

Bolton was clear that bringing about the end of existing and prospective costly litigation was one of the principal benefits that the Congress conferred upon the government in the Settlement Act.

Today however, the government construes the 1988 Settlement Act to mean that the Act was intended to *extinguish* the Bands' Federally-reserved rights to the waters running through our reservations and to the surface and ground waters in the San Luis Rey watershed, as the price we must pay for the provision of supplemental water that the Act directs the Secretary to deliver to the San Luis Rey basin.

Naturally, because we and representatives of the Local Entities were working closely with members of Congress in the years leading up to the enactment of our Settlement Act, and we know exactly what the underlying circumstances were that the Congress sought to address in the Act, we have had to contest the government's construction of the history of our Settlement Act.

We know, for instance, that there is nothing in our Settlement Act that extinguishes the Bands' pre-existing Federally-reserved rights—nor is there any provision in the Act in which the Congress authorized the Executive branch of the government to interpret the Act as an extinguishment or termination of the Bands' existing Federally-reserved rights to water on our reservations or in the San Luis Rey River basin. Nor is there any language in the Act which relieves the United States of its trust responsibility to protect the Bands' existing Federally-reserved rights.

The reality is that by the Federal Government's action, 90 percent of the water to which we have a Federally-reserved right, was diverted away from our reservations. Congress sought to restore to us that water which was lost to us through diversion. The Congress didn't say—and there is nothing in the Act to support the proposition—that the Congress' true (but well hidden and unstated) objective was to strip us of, or restrict us from, exercising the rights to what little water we had left.

The truth is that the Congress authorized the delivery of enough water to restore to the Bands and the Local Entities—the same amount of water that had been diverted away from the Bands' reservations and allocated to Local Entities in breach of the government's responsibility to preserve and protect the Bands' Federally-reserved water rights. Everything else was to remain the same.

On March 1, 2012, the government declared that our negotiations have reached an impasse and that there was no purpose to be served by further discussions or negotiations. So while the Congress has appropriated the funds authorized in our Settlement Act, and the supplemental water is now poised to be delivered to the San Luis Rey River basin to make the parties whole—exactly the result that the Congress intended to achieve—the government is using its new “legal position” to frustrate the will of the Congress.

Our only options now seem to be to return to the Congress to seek a clarifying amendment to our Settlement Act, or to return to litigation in an effort to preserve and protect our Federally-reserved rights to sufficient water to sustain life and fulfill the purposes for which our reservations were established as permanent homelands for our people.

### **Questions**

In conclusion, our experience prompts us to offer some questions for other tribes to consider about tribal water settlements generally—

What are the government's priorities in reaching a negotiated settlement? What are the principal interests the government is seeking to satisfy if those interests are not related to the United States' execution of its trust responsibilities for Indian lands and resources?

If there is a conflict between the government's commitment to other interests and its trust responsibility for Indian lands and resources, does the government have a higher duty to protect tribal lands and resources as trustee?

How do tribal governments achieve some equal footing with the government in the negotiation process?

How much does the potential for liability affect the government's substantive positions?

What happens when there is an impasse declared between a tribe and a Federal team—is there a mechanism for having the issues in controversy heard at a higher level or by an impartial third party?

What recourse does a tribe have if the government adopts a legal position that is certainly not expressly stated in the governing statute, and then issues a “take it or leave it” ultimatum?

These, we think, are crucial questions for a tribe to ask and have answered before entering into a negotiation process—because if our experience is any example, the government’s highest priority appears to be protecting the United States at all costs, even if that self-protection comes at the expense of those who have been injured by the government’s actions.

We have a close and strong working relationship with the City of Escondido and the Vista Irrigation District. We have worked together for years to craft a water management system that will serve all the water users in the San Luis Rey River basin—one which will fulfill the intent of the Congress as expressed in our Settlement Act and our settlement agreement—and which will enable us to assure that our children and our grandchildren and future generations will have the water that we all need to sustain life.

So when the government asks us, “what’s in it for us?”, we wonder what the government’s interests are, and why they are seemingly so different from ours.

We thank the Committee for affording us the opportunity to share our experience and our views with the Committee.

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PREPARED STATEMENT OF CHARLES J. DORAME, CHAIRMAN, NORTHERN PUEBLOS  
TRIBUTARY WATER RIGHTS ASSOCIATION

### Introduction

Members of the Committee, my name is Charles J. Dorame. I am a former Governor of the Pueblo of Tesuque in New Mexico, and Chairman of the Northern Pueblos Tributary Water Rights Association (NPTWRA or Association). The NPTWRA is made up of the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque. The four Pueblos are parties in the water adjudication captioned *State of New Mexico v. Aamodt, et al.*, filed in the federal district court in New Mexico in 1966. The Aamodt case was filed to determine the nature and extent of Pueblo Indian Water Rights.

The Aamodt Litigation Settlement Act (ALSA) became law as part of the Claims Resolution Act of 2010, Title VI, Public Law 111–291. The ALSA approved the Settlement Agreement and Cost Sharing and System Integration Agreement negotiated by the government parties and representatives of individual water rights holders in the Pojoaque River Basin, a tributary of the Rio Grande north of Santa Fe New Mexico. On behalf of the four Pueblos, we appreciate the support provided by the United States in helping our Indian Water Rights Settlement reach its present status. This statement is submitted to share perspective on the settlement of the leading case with the only published opinions on Pueblo Indian Water Rights.

Our water settlement will provide water and infrastructure to need the needs of our future generations.

### Promoting Negotiation

2.1. *Litigation Background.* The State of New Mexico filed the Aamodt water adjudication in 1966 in federal court. The United States waived sovereign immunity for itself and the four Pueblos and had those five parties realigned as plaintiffs-in-intervention. After the federal district court in 1973 made an initial determination of Pueblo water rights, the United States appealed and the Pueblos intervened. The Tenth Circuit Court of Appeals ruled in 1976 that the Pueblos were entitled to independent representation, and that Pueblo Indian Water Rights were not measured based on state law. *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976) (“Aamodt”). In 1985, the federal district court ruled that Pueblo Indian Water Rights on Pueblo grant lands arose from our aboriginal sovereignty and concluded that the aboriginal root for these water rights remained unextinguished, except to the extent affected by the 1924 Pueblo Lands Act, 43 Stat. 636. *Aamodt II*, 618 F.Supp. 993 (D.N.M. 1985). In 1987, the Court issued Findings of Fact on the Historically Irrigated Acreage (HIA) within each Pueblo’s grant boundary which are still owned by the Pueblo. In 1994, the New Mexico Court of Appeals ruled that Pueblo Indian Grant Lands are not entitled to water rights measured according to the “Winters doctrine”, relying on the Aamodt rulings. *State v. Kerr McGee*, 120 N.M. 118 (N.M. Ct.App. 1995).

2.2. *Starting Negotiations.* After a series of trials before a Special Master in the 1990s, where the federal district judge rejected the special master reports on Pueblo “replacement rights” grounded in section 19 of the 1924 Act, and Winters doctrine rights for the Nambé Pueblo reservation, the parties in the Aamodt case represented by active counsel requested court-ordered mediation. That Order halted further litigation on the case. The court appointed a settlement judge. The court-ordered mediation, and the presence of a settlement judge were essential ingredients in moving the negotiation process forward in the Aamodt case. The United States through the

Department of Justice, and the State of New Mexico shared the costs for the settlement judge. The settlement moved ahead based on prior court rulings, and the expectation of additional water for use in the Basin, and a regional water system to deliver it to Pueblo and other county residents, thereby protecting existing water uses.

The Settlement Agreement was signed in 2006 by each of the four Pueblos, the County of Santa, City of Santa, and the State of New Mexico. The United States said it would not sign the Settlement Agreement unless directed by Congress.

The federal role in promoting negotiated settlement of the Aamodt case was essential. It provided funds for technical studies, and other support which contributed to the negotiation of the 53 page Settlement Agreement. The Department of Justice lawyer in the settlement negotiations had responsibility for drafting terms of the Settlement Agreement as they were negotiated. The federal water rights negotiating team also contributed significantly. Both staff and funding through the Bureau of Indian Affairs Southwest Regional Water Office provided technical and other support. The Bureau of Reclamation authored a Settlement Study published in 2004, with over 20 appendices containing additional technical reports that contributed to that Study of options for a Regional Water System.

2.3. *Legislation.* We worked for years with our New Mexico Congressional Delegation to develop legislation that would approve the negotiated Settlement Agreement. The draft legislation was revised through the years to address concerns raised from congressional staff. Then, in 2009, the Administration took a more active role and negotiated additional changes in the proposed legislation in order to advance its goals of uniformity in certain key sections across several Indian Water Rights Settlements. Those changes were included in the final version of the Aamodt Litigation Settlement Act, which, together with three other Indian Water Rights Settlements, were part of the Claims Resolution Act of 2010, Public Law 111–291.

Thus the Aamodt settlement took 10 years to accomplish formal federal approval of our Indian Water Rights Settlement. The court-ordered mediation, the court rulings on Indian Water Rights priority and amount, were critical components to the success of the settlement. Funding and staff support through the Department of Justice and the Department of Interior for the settlement process, as well as independent representation for each of the four Pueblos, were also essential elements of this settlement. Financial commitments by the State of New Mexico and Santa Fe County contributed importantly to securing Administration support for passage of our Settlement by Congress.

3. *Implementation of Water Settlement of the Aamodt Litigation Water Settlement.* The Aamodt Litigation Settlement Act approved the Settlement Agreement and Cost Sharing and System Integration Agreement, provided they are conformed to change as required by that Act, that Act provided \$81.8 million of mandatory appropriations to move the settlement forward. \$56.4 million were made available to the Bureau of Reclamation to begin design, engineering, and environmental work for the Regional Water System which is an essential element of the settlement. This is a majority of federal funds authorized and required to design and build the Regional Water System needed to implement our settlement. The remainder of the mandatory appropriations were to pay for sources of water supply to be delivered through the Regional Water System, to provide for future needs of the four Pueblos. Another component of the Aamodt Pueblos' Settlement Fund is for improving Pueblo water infrastructure.

The Pueblos are grateful to have the mandatory appropriations for almost half of the federal share required to implement the Aamodt Litigation Settlement Act. We have been working closely with the federal implementation team and the Bureau of Reclamation to conform the Settlement Agreement and the Cost Sharing and System Integration Agreement to the Aamodt Litigation Settlement Act. That process is essentially complete. We still need to craft language for a Partial Final Decree on Pueblo Indian Water Rights, and an Interim Administrative Order so that the court process for approval of the Settlement Agreement and entering of a Partial Final Judgment on Pueblo Indian Water Rights resume, and move to completion. The ALSA requires not only approval of those documents by the court, but also entry of a final decree of all rights in the case by June 30, 2017. The law allows that date to be moved by consent of the government parties, if necessary.

3.1. *Need for Additional Funds to Complete Settlement;* \$37.5 million needed through BIA by 2017; Additional \$50 million through Reclamation needed by 2021. The Aamodt Litigation Settlement Act provides that if the Regional Water System required by the Act and the Settlement Agreement have not been completed by June 30, 2021, one or more Pueblos may ask the Secretary of Interior to consult and then make a finding on whether that Regional Water System has been substantially completed. This Act provides a window of three years between June 30, 2021, and June

30, 2024, for one or more Pueblos to ask the court to vacate the Final Decree, and resume litigation, if the Regional Water System is not substantially complete. We want to avoid that situation, if at all possible.

Therefore, the Pueblos are concerned that the five year federal timeline for environmental compliance and federal appropriations of at least \$37.5 million need to be completed by 2017, and the remaining \$50 million for the federal share of construction for the Regional Water System need to be appropriated so that construction can be complete by June 30, 2021.

The four Pueblos continue to work cooperatively with the federal implementation team and others to help that happen. We look forward to working with our congressional delegation, and appropriate committees and Congress, as well as current and future administrations to assure that the significant federal support that has brought our Indian Water Rights Settlement to this point will be joined by appropriations in the future sufficient to implement our Settlement Agreement and the Aamodt Litigation Settlement Act.

3.2. *Trust Responsibility.* We are concerned that federal staffing and support for Indian Water Rights Settlements generally, and the Aamodt Litigation Settlement in particular are adequately funded in the future at a level to maintain the federal trust responsibility to protect Pueblo Indian water resources. Our contacts with people both in the Department of Justice and the Department of Interior, particularly the Bureau of Indian Affairs, indicate that budget limitations currently in place have resulted in challenges for staff in those agencies to provide the time and resources to implement not only the Aamodt Litigation Settlement, but others as well. We are also concerned that several sources of funding within the BIA that have provided a financial support for settlements in the past are shrinking. We see this as a trend in the wrong direction.

Successful implementation of the Aamodt Litigation Settlement Act requires federal financial support for robust tribal involvement. That includes support for Pueblo governmental representatives, as well as technical and legal experts to give the greatest chance for success for implementing our Indian Water Rights Settlement. Having a decree that recognizes enough senior first priority rights, combined with additional water through the Regional Water System means that each of our four Pueblos will have water to meet our present and future needs. Constructing the infrastructure in a way that works for each Pueblo, and our Santa Fe County parties, so that so that our water rights may be available for use as our Pueblos grow into the future is an essential part of our settlement.

We urge Congress to make the necessary resources available so that the Aamodt Litigation Settlement can be fully implemented. That means providing an additional \$37.5 million through the BIA before 2017, and an additional \$50 million through the Bureau of Reclamation for the rest of the federal share to construct the Regional Water System and make it substantially complete prior to 2021.

On behalf of the Pueblos of Tesuque, San Ildefonso, Pojoaque, and Nambé which together make up the Northern Pueblos Tributary Water Rights Association, we appreciate the opportunity to submit this statement to the Senate Indian Affairs Committee regarding negotiation and implementation of water settlements in Indian country. Our water rights settlement on the Pojoaque River Basin Tributary of the Rio Grande in New Mexico is vital to the survived, future growth and development of our Pueblos.

We look forward to working with all branches of the Federal Government, as well as State and County governments, to accomplish the requirements for our Indian Water Rights Settlement in the Pojoaque River Basin in New Mexico. We trust Congress will take the necessary steps to provide the federal resources needed to fully implement our settlement.

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PREPARED STATEMENT OF HON. CHARLES W. MURPHY, CHAIRMAN, STANDING ROCK  
SIOUX TRIBE

Chairman Akaka and members of the Committee on Indian Affairs, my name is Charles W. Murphy. I serve as Chairman of the Standing Rock Sioux Tribe of North Dakota and South Dakota. Standing Rock is currently engaged in negotiations with the two states for a comprehensive water rights agreement. Our Tribe is on the front lines, working to secure water for our present and future needs.

Accordingly, I appreciate that the Committee is conducting this oversight hearing. I respectfully request that my statement be included in the Committee record.

The lack of positive involvement by the Secretary of the Interior has impeded the establishment of a negotiation framework to resolve Standing Rock's water rights issues. Meanwhile, the Army Corps of Engineers' operations under the Missouri

Basin Pick-Sloan Program and the recently-released *Draft Garrison Dam/Lake Sakakawea Surplus Water Report* (2010) jeopardize our current water uses and our efforts to secure a negotiated settlement of our reserved water rights.

Standing Rock's experience has been as follows:

- The process of getting a federal team appointed to assist with water settlement negotiations is inequitable and arbitrary.
- The Secretary fails to comply with the existing stated policy of supporting negotiations rather than litigation.
- *The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Cases* should be reviewed and updated. The Criteria impose conflicting duties upon the Secretary by tying federal funding for the implementation of settlements to federal liability toward the affected Tribe. (55 Fed. Reg. 9223).
- The Secretary appears unwilling to address conflicts, between the reserved water rights of the Standing Rock Sioux Tribe and the Pick-Sloan Missouri Basin program operations, and the resulting potential liabilities of the United States. This conflict is evidenced by the Army Corps of Engineers' *Draft Garrison Dam/Lake Sakakawea Surplus Water Report* (2010), which suggests that the future water withdrawals from the Missouri River main stem are to be limited to "surplus water," to be defined by the Corps.
- Increased funding is needed for technical and litigation support to Tribes that are engaged in water negotiations, as well as for implementation of existing settlements.
- The Secretary should formally rescind the Moratorium on the Approval of Tribal Water Codes (January 15, 1975).

#### **Standing Rock Request for Appointment of Federal Team—Arbitrary and Inequitable Treatment at DOI**

The Standing Rock Sioux Tribe is a signatory of the Fort Laramie Treaty of September 17, 1851 (11 Stat. 749) and the Fort Laramie Treaty of April 29, 1868 (15 Stat. 635). The Standing Rock Reservation was originally part of the Great Sioux Reservation, established in Article II of the 1868 Treaty. Our Reservation is comprised of 2.3 million acres of farm and range lands in the central plains of North Dakota and South Dakota, along the Missouri River. Agriculture and livestock comprise our main economic base.

At present, the Standing Rock Tribal Farm enterprise operates irrigation on approximately 5,000 acres of Reservation farm land. The Tribe seeks self sufficiency through expanded agricultural and economic development. Article VI of the 1868 Fort Laramie Treaty commits the United States to assist with the cultivation of our farm land, and evidences an intent that agriculture is a primary purpose for the establishment of our Reservation. (15 Stat. 636).

Accordingly, under the *Winters* Doctrine,<sup>1</sup> Standing Rock possesses extensive water rights to the Missouri River, its tributaries on and bordering our Reservation, and the basin's groundwater. The Tribe should receive federal support in our efforts to address our claims and to receive tangible benefits from them.

In April, 2010, I contacted then-Governor John Hoeven of North Dakota and then-Governor Mike Rounds of South Dakota and proposed a multi-party negotiation for the purpose of addressing Standing Rock's water rights claims. They agreed and appointed state negotiating teams to work with Standing Rock to negotiate a comprehensive water rights agreement. On December 6, 2010, I, South Dakota Governor Michael Rounds, South Dakota Attorney General Marty Jackley, and North Dakota Attorney General Wayne Stenjhem, signed a Rule 408 Agreement, to preserve the confidences of the negotiating parties.

The Tribe and local stakeholders have sought federal participation, from the start of the negotiation process. I wrote to Interior Secretary Salazar on September 3, 2010, requesting the appointment of a federal negotiating team, to assist the Tribe with reaching a negotiated settlement. (Exhibit A, attached hereto). South Dakota Governor Dennis Daugaard wrote to Secretary Salazar on February 7, 2011, re-

<sup>1</sup>See *Winters v. United States*, 27 U.S. 564, a case in which the United States Supreme Court held the Fort Belknap Indian Reservation may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority dating back to the treaty that established the reservation. The *Winters* doctrine established that when the Federal Government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established.

questing the appointment of a federal team. (Exhibit B). On June 9, 2011, North Dakota Governor Jack Dalrymple made a corresponding request. (Exhibit C).

On November 7, 2011, the Office of the Secretary responded to my September, 2010 letter. The Counselor to the Deputy Secretary wrote to me,

While North Dakota and South Dakota have submitted letters supporting the Tribe's request, the path towards a binding resolution of tribal water claims in the two states is not precisely clear. In addition, while there is an apparent abundant supply of water in the Missouri River Basin, the diverse interests of stakeholders and the numerous jurisdictional issues are quite complex, and the (Secretary's) Working Group is not convinced that appointment of a Federal Negotiating Team is appropriate at this time.

(Exhibit D).

The Standing Rock Sioux Tribe's "path towards a binding resolution" is no different than that of any other Tribe that enters a negotiated settlement, to be approved by Congress. Nevertheless, the Counselor implies that litigation is necessary for the appointment of a federal team. Of course, the Secretary's Indian Water Policy states in part, "It is the policy of this administration . . . that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation." (*Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Cases*, 55 Fed. Reg. 9223, March 12, 1990).

The fact that the Tribe and local stakeholders developed a negotiation framework, without engaging in litigation, is being used by the Secretary's office to justify inaction. This contravenes the Secretary's published criteria, and undermines the ability of Standing Rock and the North and South Dakota negotiation teams to succeed in reaching a comprehensive settlement.

With respect to Standing Rock's current negotiations, the Secretary's Office has requested that the Tribe produce water rights data that is the subject of our Rule 408 Agreement with the governors and state attorneys general. I have, in turn, requested that the United States execute the agreement; to date, it has refused to do so. Consequently, the United States remains a non-entity in important water settlement negotiations involving the main stem of the Missouri River.

Standing Rock is the first Tribe in the Great Plains region of the Missouri Basin to pursue a comprehensive framework for a negotiated water settlement. We are working with technical and legal teams appointed by the governors of North Dakota and South Dakota, addressing present and future beneficial water uses on the Standing Rock Reservation and the potential liabilities of the United States arising from the infringement of our reserved water rights under the Missouri Basin Pick-Sloan program. Congressional approval of a negotiated settlement will benefit the Standing Rock Sioux Tribe, address uncertainty for all water users in the region, and benefit the United States, by addressing liabilities and resolving conflicts arising under Pick-Sloan.

In 1986, an independent commission appointed by then-Secretary Donald Hodel, the Joint Tribal Advisory Committee, issued a report which contained recommendations for the mitigation of Pick-Sloan's impacts on our Tribe. (U.S. Department of the Interior, *Final Report of the Joint Tribal Advisory Committee*, May 23, 1986). The report identifies "Protection of Reserved Water Rights," as a major item requiring the Secretary's consideration. (JTAC Final Report, p. 51). Thus, a Secretarial Commission released a report 25 years ago, recommending action to protect Standing Rock's reserved water rights. Yet the Secretary's office denied my request for appointment of a federal team to assist in our efforts, for reasons that remain unclear.

### **There is a Need to Update the Secretary's Criteria for Federal Participation in Indian Water Settlements**

This highlights major problems with the Secretary's *Criteria for Federal Participation in Indian Water Settlements*. The criteria limit the Secretary's discretion to agree to the federal investment of funding to implement a settlement based upon the United States' exposure to liability. (55 Fed. Reg. 9223). It imposes conflicting duties upon the Secretary. The Secretary is tasked to act, "consistent with the Federal Government's responsibilities as trustee to Indians," while at the same time ensuring that, "Federal contributions to a settlement should not exceed the sum of . . . calculable legal exposure . . ." (Sec. 5, 55 Fed. Reg. 9223).

These conflicting duties create both procedural and substantive problems for Tribes. They result in an institutional inertia, which we see in the response to my request for appointment of a federal negotiating team for Standing Rock. Sub-



stantively, they place DOI in an adversarial position to the Tribes, as the United States acts to limit its potential liabilities.

The Secretary should review and update the criteria. The process for resolving conflicts arising from federal water development needs to be clarified. The constraints on the federal investment of funds for Tribal development as part of settlements must be re-examined.

The lack of a coherent response to my request for the appointment of a federal negotiating team enhances the challenges facing our Tribe. We are involved in important discussions on reserved water rights to the Missouri River and its major tributaries in the upper Great Plains. The Missouri River Basin has been developed by the Army Corps of Engineers under the Pick-Sloan Missouri Basin Program, and potential liabilities of the United States are at issue. Rather than working cooperatively with Standing Rock, Secretary Salazar's office failed to research the pertinent issues, denied my request for the appointment of a federal team, and then provided a vague and incomprehensible rationale for its actions.

The reference in the Office of the Secretary's letter that "there is an abundant water supply in the Missouri River Basin," demonstrates a misunderstanding of the issues facing our Tribe. (See A. Dan Tarlock, *The Missouri River: The Paradox of Conflict without Scarcity*: 2 Great Plains Nat. Resources J. 1 (1997)). The waters of the Missouri River on the Standing Rock Sioux Reservation are impacted by the Pick-Sloan Missouri Basin Program. Congress authorized the Pick-Sloan Program in the Flood Control Act of December 22, 1944. (58 Stat. 887). It consists of six massive dams on the Missouri River main stem, operated by the Corps for flood control, navigation and hydropower; and numerous Reclamation projects on the tributaries to the Missouri. The main stem reservoir with the largest multi-purpose storage pool, Oahe, overlays the Standing Rock Reservation.

During the recent drought of the early 2000s, the Oahe Reservoir declined in elevation by approximately 15 feet, due to on-going water releases for downstream navigation. On November 23, 2003, our Reservation public water system was rendered inoperative. For a period of 12 days, three communities on our Reservation, with a cumulative population of 5,777, were forced to rely on bottled water. Our kidney dialysis patients at the Fort Yates Hospital were forced to travel to Bismarck, North Dakota, 65 miles away. Low water created a public health crisis on our Reservation.

This was a direct result of the Pick-Sloan program. It demonstrates the need for strong and positive federal participation in our water negotiations with North Dakota and South Dakota. This should include representatives of both the Secretary of the Interior and the Secretary of the Army because the Corps of Engineers operates the Pick-Sloan program dams on the main stem of the Missouri River.

#### **The Army Corps of Engineers' Pick-Sloan Program Infringes on Standing Rock Water Rights to the Missouri River**

The Corps of Engineers operates the six Missouri River main stem dams pursuant to the *Missouri River Master Water Control Manual* ("Master Manual"). The Corps of Engineers updated the Master Manual in 2004. The Master Manual prescribes the operational criteria for the dams. The Corps recently released the *Draft Garrison Dam/Lake Sakakawea Surplus Water Report*, which prescribes the quantity of water that all water users may divert from the Garrison project on the Missouri River, subject to storage fees.

The Master Manual and the Draft Surplus Water Report threaten the reserved water rights of the Standing Rock Sioux Tribe. These documents fail to account for the impacts, on our water rights, of the Corps' operation of the Missouri River main stem dams. They encourage downstream economic investment and development and overall reliance on the vested, prior, and superior water rights of the Tribe.

Downstream navigation, metropolitan areas, nuclear power plants and other water users rely on the water flows supplied by the Corps of Engineers. These waters are subject to the claims of the Standing Rock Sioux Tribe. Nevertheless, the Corps of Engineers has taken no steps to acknowledge, on behalf of the United States, the need to preserve and protect our reserved water rights.

I have expressed my concerns to Assistant Secretary of the Army for Civil Works, Joellen Darcy. I am encouraged that staff from the Corps of Engineers' Northwestern Division Office and Omaha District recently attended a Standing Rock/North Dakota/South Dakota water rights meeting; however, Assistant Secretary Darcy has stopped short of appointing a formal member to the negotiating team. In a letter to me dated February 2, 2012, she identified the Secretary of the Interior as the official with the responsibility of appointing a federal team for Standing Rock. (Exhibit E).

But it is the Corps of Engineers' operations under the Pick-Sloan program which impact Standing Rock's water rights to the Missouri River. Consequently, the Corps should participate as a primary member of a federal negotiating team, for Standing Rock. I urge the Committee to inquire of the Corps of Engineers the process necessary for the assignment of agency staff and legal counsel to approve the Rule 408 Agreement and participate in the Standing Rock I North Dakota I South Dakota water rights negotiations.

The Corps of Engineers' *Draft Garrison Dam/Lake Sakakawea Surplus Water Report* (December 2010) underscores the continuing irreparable damage to the *Winters* Doctrine water rights of the Standing Rock Sioux Tribe. The report concludes that the Missouri River contains a specific quantity of water, of very small proportion relative to its natural flow, which is surplus to the purposes of the Pick-Sloan program. The Corps is proposing to limit future water diversions to the quantity of water identified as "surplus water," in order to protect downstream navigation flows. This infringes on our reserved water rights at Standing Rock.

The threat to our water rights is evidenced by the state of Missouri's contention to the Corps of Engineers that there is no surplus water available in the Missouri River for future diversions. The state bases its position on the fact that the Corps reduced navigation flows during the recent drought. But the navigation service targets in the Master Manual, unlike the reserved water rights of the Standing Rock Sioux Tribe, are not property rights under federal law.

Nevertheless, the waters of the Missouri River that are subject to the *Winters* Doctrine claims of the Standing Rock Sioux Tribe, are also claimed by the state of Missouri as needed for its navigation use under the Pick-Sloan program. The state has invested in metropolitan water use and navigation infrastructure, in reliance upon the continued availability of the Tribe's unused, reserved water rights. Under these circumstances, it becomes extremely difficult for the Standing Rock Sioux Tribe to protect its water rights for future uses.

This mirrors the failure of the United States to protect the waters of Indian Tribes, in other water basins. For example, the Salt and Gila Rivers, water sources needed for the reserved water rights of Indian Tribes in the Southwest, were developed to benefit real estate speculation in the Sun Belt economy, and for the Bureau of Reclamation. As a result, the water available for some Tribes has been limited to contract water imported from the Colorado River, with an inferior priority date, and subject to Colorado River water shortages. (*e.g.* San Carlos Apache Tribe Water Rights Settlement Act of 1992, 106 Stat. 4740).

In the Missouri River Basin, there is an opportunity to resolve Indian water rights issues. This will require the United States to take corrective steps before downstream investments and reliance precludes this opportunity. Instead, the Corps of Engineers is proposing actions that will make things worse.

The definition of "surplus water" in the *Draft Surplus Water Report* complicates the water rights settlement discussions of the Standing Rock Sioux Tribe. The states of North Dakota and South Dakota are unsure of the quantity of water in the Missouri River that is surplus to current uses, in light of the Corps of Engineers' definition of "surplus water." The uncertainty resulting from the *Surplus Water Report* enhances the challenge facing the Standing Rock Sioux Tribe, as we attempt to reach an agreement on our water rights.

The natural flow of the Missouri River, as it leaves South Dakota, is 28.4 million acre-feet per year. (United Sioux Indian Tribes, *Missouri River Basin Water Supply and Water Requirements of the United Sioux Indian Reservations* 2-11 (1979)). The water depletions for irrigation and municipal and industrial water supplies in the upper Missouri basin are far less than the natural flow. (See U.S. Army Corps of Engineers, *Final Environmental Impact Statement, Missouri River Master Water Control Manual, Review and Update* 3-115 (2004)). The finding by the Corps in its Surplus Water Report of an absence of a significant quantity of "surplus water" in the Missouri River is not supported by the facts. Vast quantities of water flow through the Dakotas and the Standing Rock Indian Reservation in the Missouri River.

The report raises other important questions. The Standing Rock Sioux Tribe does not know if, under the Pick-Sloan program, the Corps of Engineers is claiming all natural flow of the Missouri River. We also do not know the degree to which the Corps of Engineers claims that the reserved water rights of the Tribe are included within its definition of Pick-Sloan project water. The draft report confuses the issues of whether there is "surplus water" in the natural flow of the Missouri River, "surplus water" in storage in the reservoirs, or "surplus water" in excess of Pick-Sloan project purposes. This confusion exacerbates the difficulty we face in seeking an out-of-court resolution to the reserved water rights claims of the Standing Rock Sioux Tribe.

### **There is a Need for Enhanced Funding**

The Committee on Indian Affairs can assist our Tribe by enacting legislation to enhance the funding available for Tribes that are currently engaged in settlement discussions on water. There is a significant need for funding for technical and legal support for Tribes such as Standing Rock. In our case, we are working with two states, both of which possess far greater resources than our Tribe.

Enhanced funding shall be necessary for Tribes such as Standing Rock to succeed in reaching future water agreements. Funding should be available for technical and legal support to Tribal negotiating teams. The Bureau of Indian Affairs is providing minimal funding for technical investigations, and no funding for litigation support to Standing Rock. I am informed that \$0 funds have been provided to Tribes in Fiscal Year 2012 for this purpose. This imposes significant burdens on our Tribe as we address complex technical and legal issues. It jeopardizes our ability to reach a settlement and may have the effect of significantly increasing the costs of resolving these issues in the long-term.

### **The Secretary Should Rescind the Moratorium on Tribal Water Codes**

Moreover, the Secretary of the Interior should formally rescind the moratorium on the approval of Tribal Water Codes. (Memorandum from Secretary Rogers C.B. Morton to the Commissioner of Indian Affairs, January 15, 1975). The outdated policy of refusing to approve water codes contravenes the subsequently-adopted policy to support Indian water settlements, because Tribal water codes are integral to the implementation of settlements. The 1975 Memorandum should be formally rescinded, and the Bureau of Indian Affairs should fully fund the implementation of water codes by Tribes.

At Standing Rock, the Tribal Council enacted our Water Code in 1983. (Standing Rock Sioux Tribe Code of Justice, Title XXXIV). It is an integral aspect of the management of water and natural resources on the Standing Rock Indian Reservation. It will be an important component of the implementation of a comprehensive water agreement for our Tribe.

### **Conclusion—Urgent Federal Action is Needed for the Protection of Standing Rock Reserved Water Rights in the Missouri River Basin**

In conclusion, the Secretary's Office of Indian Water Rights has provided no assistance to the Standing Rock Sioux Tribe, in our complex water negotiations with the states of North Dakota and South Dakota. The response to my request for the appointment of a federal negotiating team demonstrates a lack of understanding of the issues facing the Tribe. The process of attempting to work with the Secretary has been uneven, with a lack of accountability to our Tribe.

In the short-term, the Secretary should comply with Indian water policy and assist Tribes in complex water negotiations, such as those facing Standing Rock. In the long-term, the Secretary's published *Criteria for Federal Participation in Indian Water Settlements* needs to be substantially revised.

The Corps of Engineers, which built and operates the Pick-Sloan projects on the Missouri River main stem, should also assist with the Tribal/state negotiations because the operations of the Corps, under the Pick-Sloan program, have caused serious long-term harm to the waters of the Standing Rock Reservation.

Historically, our war chiefs, such as Sitting Bull and Gall, defended the rights of our people. That is the legacy of our Tribe. We will continue to fight for our Treaty rights and our valuable water rights.

Our Tribe is committed to working with local stakeholders to reach a mutually beneficial agreement. The United States must fulfill its responsibility as well. My experience in the Standing Rock Sioux Tribe water negotiations leads me to believe that the executive branch is unwilling to do so. This is very troubling for the Standing Rock Sioux Tribe, and it could have adverse ramifications throughout Indian Country in the upper Missouri River Basin.

On behalf of the Standing Rock Sioux Tribal Council, I thank the Committee on Indian Affairs for your consideration of my testimony. *Pila miya*.

**Attachments**

UNITED STATES OF AMERICA  
Department of the Interior  
Bureau of Indian Affairs  
Margaret A. Gates  
Acting Deputy Assistant Secretary  
for Indian Affairs  
Jerome McMillan, Jr.  
Acting Director



September 3, 2010

Charles W. Murphy  
Chairman  
Standing Rock Sioux Tribe  
P.O. Box 100  
Sisseton, SD 58573  
Phone: 605/837-2222  
Fax: 605/837-2223  
www.standingrocktribe.com

The Honorable Kenneth Salazar  
Secretary of the Interior  
Washington, DC 20510

RE: Standing Rock Federal Water Right Negotiation Team

Dear Secretary Salazar:

The Standing Rock Sioux Tribe respectfully requests the appointment of a federal water right negotiation team to participate in the development of a water right agreement between the Standing Rock Sioux Tribe, State of North Dakota, State of South Dakota and United States to determine the nature, extent and priority of the Tribe's reserved water rights in the Missouri River, its tributaries bordering or traversing the Reservation and groundwaters underlying the reservation.

Our water rights are vested property rights which our forefathers reserved for our benefit as our territory was reduced in the 1851 and 1868 treaties and when the Standing Rock Indian Reservation was created by Congress in 1889. The Tribe seeks the participation of the United States as its Trustee. The Tribe seeks value for our confirmed water rights and assistance in the establishment of appropriate cost sharing commensurate with benefits to each non-Tribal party.

The Tribe is asserting water right claims to be settled with finality with the United States, North Dakota, South Dakota and other necessary States and parties consistent with no action or with revisions by Congress to the purposes of the Pick Sloan Project as authorized for study by PL 111-8. A settlement with finality will ensure that our prior and superior water rights are preserved and protected relative to navigation demands, growing municipal, rural and industrial demands and other demands for purposes of Pick Sloan and other purposes unrelated to Pick Sloan in a future environment that will likely experience progressively lower natural streamflow for division among growing levels of demands.

I look forward to your appointment of a federal negotiating team pursuant to the policy of the United States published at 53 FR 9223, March 12, 1990 and as subsequently amended.

Sincerely,

  
Charles W. Murphy, Chairman  
Standing Rock Sioux Tribe

Statement of Charles W. Murphy  
Exhibit A



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

February 7, 2011

The Honorable Kenneth Salazar  
Secretary of the Interior  
1849C Street, N.W.  
Washington, D.C. 20510

Re: Water Rights Negotiation Team

Dear Secretary Salazar:

On September 3, 2010, Chairman Charles Murphy of the Standing Rock Sioux Tribe wrote you asking for the appointment of a federal water right negotiation team. South Dakota joins in this request.

On April 26, 2010, Chairman Murphy requested a meeting with Governor Rounds to discuss the Standing Rock Sioux Tribes reserved water rights under the Winters doctrine. Governor Rounds met with Chairman Murphy on June 16, 2010, and following that meeting formed a negotiation team made up of representatives from the Governor's Office, the Attorney General's Office, the Department of Environment and Natural Resources, the Department of Agriculture, and the Department of Game, Fish and Parks.

The first negotiation meeting between South Dakota, North Dakota, and the Standing Rock Sioux Tribe occurred on September 9, 2010. A second meeting was held on November 16, 2010. A third meeting is planned for early this spring but the parties have yet to set the date for the third meeting.

I want to assure you that I support the continued negotiation of a settlement concerning a reserved water right for the Standing Rock Sioux Tribe. I fully anticipate a successful outcome to these negotiations which will result in a beneficial agreement to all of the citizens of South Dakota and North Dakota including the members of the Standing Rock Sioux Tribe.

Thank you for your consideration of appointing a federal negotiation team to participate in these on-going settlement discussions.

Sincerely,

Handwritten signature of Dennis Daugaard in cursive script.  
Dennis Daugaard

Statement of Charles W. Murphy  
Exhibit B



State of  
North Dakota  
Office of the Governor

Jack Dalrymple  
Governor

June 9, 2011

The Honorable Kenneth Salazar  
Secretary of the Interior  
1849 N. Street NW  
Washington, DC 20510

Re: Water Rights Negotiation Team

Dear Secretary Salazar:

On September 3, 2010, Chairman Charles Murphy of the Standing Rock Sioux Tribe wrote you asking for the appointment of a federal water right negotiation team. On February 7, 2011, South Dakota Governor Dennis Daugaard wrote you to join in the request. North Dakota also joins in the request for a Federal water right negotiation team.

North Dakota has engaged in three negotiation meetings regarding the Standing Rock Sioux Tribe's water rights under the *Winters* doctrine. The first negotiation meeting between South Dakota, North Dakota, and the Standing Rock Sioux Tribe occurred on September 9, 2010. A second meeting was held on November 16, 2010. A third meeting was held May 25, 2011. A conference call has been scheduled to arrange for a fourth face-to-face meeting to continue building on the progress made to date.

North Dakota supports the continued negotiation of a settlement concerning a reserved water right for the Standing Rock Sioux Tribe. A federal negotiation team will assist us in reaching an agreement of mutual benefit to North Dakota, South Dakota, and the Standing Rock Sioux Tribe. I am confident that we will achieve a result that meets the needs of all parties.

Thank you for your consideration of appointing a federal negotiation team to participate in these on going settlement discussions.

Sincerely,

  
Jack Dalrymple  
Governor

Statement of Charles W. Murphy,  
Exhibit C



United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

NOV 07 2011

Honorable Charles W. Murphy  
Chairman, Standing Rock Sioux Tribe  
P.O. Box D  
Fort Yates, North Dakota 58538

Dear Chairman Murphy:

As Chairman of the United States Department of the Interior Working Group on Indian Water Settlements (Working Group), I write to respond to your request for the appointment of a Federal Negotiation Team to support negotiation of the water rights claims of the Standing Rock Sioux Tribe (Tribe). While both North Dakota and South Dakota have submitted letters supporting the Tribe's request, the path towards a binding resolution of tribal water rights claims in the two states is not precisely clear. In addition, while there is an apparent abundant supply of water in the Missouri River Basin, the diverse interests of stakeholders and the numerous jurisdictional issues are quite complex, and the Working Group is not convinced that appointment of a Federal Negotiation Team is appropriate at this time.

The Working Group met on June 10, 2011, to consider the Tribe's request for a Federal negotiating team. The Working Group concluded that it would be premature to appoint a negotiating team at this time but directed the Secretary's Office of Indian Water Rights and the Bureau of Indian Affairs to continue working on gathering information on the extent of existing data available regarding the Tribe's water rights claims, resources in the Great Plains Region that might be available to address the Tribe's needs, the overall question of tribal water rights claims in the Missouri River Basin, Federal agency interests and authorities in the Missouri River Basin, and potential mechanisms for achieving a full and final settlement in the absence of a general stream adjudication. The Working Group further directed that a report on these efforts should be prepared and submitted to the Working Group for its further consideration. These tasks are underway.

The Working Group plans to consider the report it has requested and decide at that time how it will respond to the Tribe's request for a Federal Negotiation Team. I thank you for your patience.

Sincerely,

Alletta Belin  
Counselor to the Deputy Secretary

Statement of Charles W. Murphy  
Exhibit D



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20319-8108

CGO -2 2312

Mr. Charles W. Murphy  
Chairman, Standing Rock Sioux Tribe  
P.O. Box D  
Fort Yates, North Dakota 58538

Dear Chairman Murphy:

I am responding to your letter of December 30, 2011, concerning water rights negotiations between the Standing Rock Sioux Tribe, North Dakota and South Dakota. I apologize for the delay in responding.

As I noted in my response to your letter of November 26, 2011, I am considering your request for a representative of the Department of the Army to participate in the water rights negotiations. Among other factors, an important prerequisite for such participation is the appointment of a federal water settlement team by the Secretary of the Interior. However, the U.S. Army Corps of Engineers (Corps) will participate as technical advisors in your meeting with the State on February 14, 2012. As the discussions about federal participation in the Tribe's water rights negotiations proceed, and future opportunities for further Corps participation arise, the Corps will evaluate whether signing a non-disclosure agreement is necessary.

I thank you for your views and look forward to meeting with you on these important matters. Please contact Mr. Chip Smith, my Assistant for Environment, Tribal and Regulatory Affairs if I can be of further assistance.

Very truly yours,

Ms. Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

Statement of Charles W. Murphy  
Exhibit E





DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

FEB -2 2012

Mr. Charles W. Murphy  
Chairman, Standing Rock Sioux Tribe

Dear Chairman Murphy:

I am responding your letter of November 28, 2011, concerning the Lake Sakakawea Surplus Water Report and related matters. I apologize for the delay in responding.

The Lake Sakakawea report remains under review in my office. The purpose of the surplus water report is to identify whether any water stored in the U.S. Army Corps of Engineers (Corps) main stem reservoirs may be made available for temporary municipal and industrial water supply needs through short-term agreements pursuant to Section 6 of the Flood Control Act of 1944. Corps regulations allow for water to be considered surplus based on one of several factors, including when the authorized use for the water has not developed. In the case of the Corps Missouri River projects, large amounts of water initially planned for irrigation development remain unused for that purpose. The report will identify whether a portion of this water originally anticipated to be used for irrigation, and not likely to be used for that purpose within the next 10 years, can be temporarily used for municipal and industrial needs, without adversely affecting any existing lawful use of such water. Before any water supply agreement for such water could be executed, a valid state or tribal water right must be presented.

The Corps will continue to protect and take into account the Standing Rock Sioux Tribe's reserved water rights. The Missouri River Mainstem Reservoir System Master Water Control Manual, dated March 2006, provides flexibility to incorporate present and future water depletions into system operations, including the eventual exercise of tribal reserved water rights. In other words, when tribal water rights are exercised, the Corps will account for these consumptive uses as a depletion and adjust system operations accordingly. It should be noted that, unless specifically provided for by law, water rights (tribal or otherwise) do not entail an allocation of storage. Therefore, I will ask the Corps to continue to consult and coordinate with the Tribe in accordance with tribal requests on this report and related matters.

In your letter you requested that a representative from the Army participate in water right discussions with the Tribe and the states of North and South Dakota. I assure you that your request will be given full consideration pending the Secretary of the Interior's decision to appoint a federal water rights negotiation team per the Tribe's December 30, 2011, request to the Department of the Interior. In the interim, the Corps is able to provide technical expertise on the operation of the reservoir system, and will send representatives to the February 14, 2012, meeting. Brigadier General John McMahon, Commander of the Corps' Northwestern Division, will work with you to complete those arrangements.

I would be pleased to meet with you to discuss the issues raised in your letter. Please contact Mr. Chip Smith, my Assistant for Environment, Tribal and Regulatory Affairs to arrange for a meeting at a mutually convenient time.

Very truly yours,

Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil Works)

Exhibit F

PREPARED STATEMENT OF HENRY PINO, BOARD PRESIDENT, BLACKWATER COMMUNITY SCHOOL

Dear Chairman Akaka:

I am writing on behalf of the Blackwater Community School, a tribally operated school funded by the Department of the Interior, located in Coolidge, Arizona on the Gila River Indian Community. Blackwater Community School (BWCS) educates children from birth through grade two. BWCS has been in existence since 1939 and has an enrollment of 239 students. BWCS has met the Adequate Yearly Progress (AYP) standard since the passage of the No Child Left Behind Act and recently was recognized by the state of Arizona as a Title 1 Distinguished School, one of two schools recognized by the state of Arizona. We are a high achieving school and take our education responsibilities seriously.

We are writing to express our deep concern for the recent FY 2013 budget submitted to Congress by the Bureau of Indian Education (BIE), Department of the Interior. Our school depends solely on funding by the Federal Government, as we do not have a tax base on which to depend. In the past four years we have seen a decline in funding by the BIE in the basic instructional support program, the Indian School Equalization Program (ISEP). This program provides for teacher's salaries, instructional materials, computers, desks, paper, pencils, professional development, in short, all of the necessary requirements to provide a quality education program. Sufficient ISEP funding is critical to maintaining the quality of the BIE schools' instructional program. The ISEP funding in FY 2010 was \$391 million dollars; for FY 2011 \$390 million dollars; for FY 2012 \$390 million dollars; and the BIE is proposing a funding amount of \$389 million dollars for FY 2013, an actual decrease from the previous fiscal year. In other words while costs increase to educate students-the Consumer Price Index has increased 11 percent over the past four years-the BIE is proposing a decrease in funding for the basic education of its students! The BIE is comprised of 173 schools of which 50 are making AYP according to the BIE, a percentage of 30 percent. This is an abysmal statistic. The BIE is proposing to decrease funding for its instructional program but expects higher achieving schools! The core of a school is the quality of its teachers, staff, and instructional leaders. It is impossible to attract and retain high quality teachers and staff if adequate funding is not available. We recommend the ISEP funding level be set at 11 percent more than what is proposed by the Department of the Interior, to match the last four year's Consumer Price Index increase. This would mean an increase of no less than \$42 million dollars. Realizing this may be difficult in the short term due to budget constraints, we propose to increase ISEP over the next five years by \$8.4 million each year. If BIE expects to see an improvement in its education program it must provide sufficient funds for its classrooms.

#### **Student Transportation**

The BIE is also proposing a decrease in transportation costs. This fund pays for bus drivers and fuel for school buses and has never been adequately funded. The cost of gasoline has increased dramatically since fiscal year 2008 as noted by the U.S. Energy Information Agency-more than 35 percent over the past three years. The cost for diesel fuel has increased by over 41 percent during the same time period. However the transportation funding provided by the BIE in this budget will actually decrease by half a percent. This means our school has to absorb the cost of the transportation program elsewhere from our already constrained budget. In fact, there really isn't anywhere else to make up the difference except from the instructional program, which is already underfunded. We recommend the transportation line item be increased by no less than 35 percent over the next five years. This will require an increase of \$3.6 million each year.

#### **Family and Child Education Program**

Blackwater Community School also operates the Family and Child Education Program (FACE). This exemplary family literacy program provides parents and children with a high quality early childhood, adult education, and parenting program. It is highly successful and has improved the lives of thousands of children and families. We have operated a FACE program over 18 years and have been selected as the outstanding FACE site twice. Our staff has been recognized to be exemplary by the National Center for Family Literacy. However, this program is woefully underfunded. The program has not received an increase in funding to match current operating costs for the past four years. This means it is impossible to replace materials for children; computers for the adult education program; increase staff salaries; provide staff development, and increase student enrollment. We have a waiting list each year. The FACE funding in FY 2008 was \$15,028 million and the current FY 2013 budget request is \$15,388 million-less than a 3 percent increase over the past

five years! In today's dollars, the funding has actually decreased by over 8 percent. It is impossible to maintain a high level of service when budgets do not keep even with actual costs. We recommend the FACE budget be increased no less than 11 percent for FY 2013 to \$16,681,000, an increase of \$1.3 million dollars.

#### **Tribal Grant Support**

While we applaud a FY 2013 budget request of \$2 million for this program this will meet only 62 percent of need according to the BIE's budget justification. They also project there may be an additional three schools that will become grant schools by 2013. If that occurs, the level of need will decrease to less than 60 percent. This will lead to the possibility of more audit exceptions because schools are unable to adequately address internal financial controls. This will also preclude schools from implementing adequate procurement and financial programs. We suggest the BIE increase its funding level to no less than 70 percent of need and increase this program over the next five years to meet 100 percent of need. This will require an additional funding amount of \$4.6 million dollars per year for the next five years.

#### **Education Program Enhancements**

While we applaud the BIE's focus on supporting school improvement and realize there are many schools that need help, there are 50 schools that are currently meeting AYP that receive no additional support. We propose that a portion of this funding be set aside for those schools currently making AYP. This will ensure schools have additional financial support to maintain their AYP status as the current ISEP formula is not adequate and there aren't other funds to address this need. We propose twenty percent of the Education Program Enhancement funding, or \$2.4 million dollars, be set aside for schools meeting AYP. At present the only way to receive additional funding is to *not* attain AYP!

#### **Facilities Operation/Maintenance and School Construction**

The BIE is requesting insufficient resources to provide adequate facilities for new school construction and school replacement, and have again with this budget request, requested insufficient funds to maintain facilities in their current inventory. The facility operations fund is currently meeting only 50 percent of need while utility costs continue to rise. Everyone realizes that utility costs such as electricity, propane and fuel oil will continue to increase. They certainly will not decrease! As an example, our school's electrical and propane have increased 10 percent over the past year and our water and waste management have increased more than 90 percent over the same time period. The maintenance fund has not been increased for the past five years and in fact will decrease next year, at the FY 2012 level. This level of funding will cause facilities to fall further into disrepair and require larger expenditure of funds in the long term. The backlog will continue to rise and the need for school replacement and new construction will increase dramatically. It will be impossible to keep the facilities operational at the requested funding level and could lead to an overall facility emergency situation when this budget is implemented. We propose that the operations and maintenance fund be increased over the next five years by increasing the maintenance fund by \$2.2 million and the operations fund by \$6.7 million each year.

We are also disappointed with the lack of funding for new school construction and school replacement funds. Our school is grossly overcrowded having increased enrollment by 70 percent over the past three years. Our school was constructed for 100 students and we currently have 239 students. Our school is too small to house our present student enrollment yet the Bureau's budget does not provide additional resources to address this situation. While we appreciate the efforts of the Bureau to provide temporary housing via modular classrooms, we currently have more students educated in modular classrooms than in permanent construction. We currently have ten modular classrooms and a modular kitchen/cafeteria. We have more temporary housing square footage than permanent construction! Our school requires, according to the Bureau's own calculations, new construction totaling more than 22,000 square feet. The BIE's Acting Director in 2008 documented our need for a multi-purpose facility to include other program space such as classrooms, administrative space, and a kitchen/cafeteria. We request school replacement construction be increased to provide funding at no less than the FY 2011 level.

#### **Administrative Provision**

Finally we propose the following Administrative Provisions language be eliminated, "Appropriations made available in this or any other Act for schools funded by the Bureau shall be available only to the school in the Bureau school system as of September 1, 1996. No funds available to the Bureau shall be used to support expanded grades for any school or dormitory beyond the grade structure in place

or approved the Secretary of the Interior at each school in the Bureau school system as of October 1, 1995.” Blackwater Community School has been a kindergarten through grade two school for many years. Parents have requested we continue to educate their children beyond grade two, as they are still too young to successfully transition to public schools off the reservation. Our students have not completed their primary grade education when they are required to move to a different school. We are unable to continue our children’s education beyond grade two because of this provision that has been in effect since 1996 even though the community has requested that we do so. We have documented our ability to provide a quality education for children who attend our school. The community believes it to be in the children’s best interest if we provide a continuum of education through the first five grades. We request this language be eliminated or modified to allow us to continue to meet the education needs of our community.

Thank you for allowing us to provide our views on the FY 2013 budget request submitted by the Bureau of Indian Education. Please contact me if you require us to provide more information.

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PREPARED STATEMENT OF HON. IRENE C. CUCH, CHAIRWOMAN, BUSINESS COMMITTEE OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

Chairman Akaka, Vice Chairman Barrasso, and Members of the Senate Committee on Indian Affairs, my name is Irene Cuch. I am the Chairwoman of the Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation in northeastern Utah. The Tribe appreciates the Committee’s attention to the need to complete the work of settling Indian Reserved Water Rights.

With ever-increasing competition for water, especially acute on the Colorado River and its tributaries, both tribes and non-Indian water users benefit from the certainty that results from Indian Water Rights settlements. For several decades now, federal policy has recognized the benefit of settling Indian Reserved Water Rights rather than resorting to decades of expensive litigation with uncertain results. Nevertheless, many tribes have yet to realize the benefit from this federal policy. Too many tribes are still waiting for Congressional and state recognition of the quantity of their reserved water rights. Too many tribes have yet to settle the past government failures to protect and develop Indian reserved water in order to fulfill its trust responsibility to the tribes. The Ute Indian Tribe is one of those tribes still waiting for the finality that settled reserved water rights can bring to our reservation and our people by providing valuable support to develop our water and reservation economy.

The Ute Indian Tribe is made up of several bands, one of which is indigenous to Utah, and several of which were placed on the Reservation during the nineteenth century as the result of a federal policy to move the Ute Indians out of the State of Colorado. The three Ute Bands are: the Uintah, the Whiteriver, and the Uncompahgre Bands. The Uintah and Ouray Reservation was initially made up of two separate reservations: the Uintah Valley Reservation, which was established by Executive Order in 1861, and subsequently confirmed by Congress in 1864; and the Uncompahgre Reservation, which was established by executive order in 1882. Together they encompass more than 4.5 million acres of Indian land, fee land, and federal land. Indian Trust lands comprise approximately 1.2 million acres. There are approximately 3,157 members of the Ute Indian Tribe who live within the Reservation.

Every tribe has its own unique course of dealings with the United States government as it relates to securing its Reserved Water Rights. In 1923, the Ute Indian Tribe was the beneficiary of the leadership the United States assumed by filing two lawsuits in its capacity as trustee to adjudicate part of the Indian Reserved Water Rights of our Tribe and its allottees. The lawsuit successfully enjoined junior appropriators from interfering with water diversions under the 1906 Uintah Indian Irrigation Project, sourced from tributaries of the Duchesne River. This, however, was only a fraction of the total quantity of the Tribe’s Reserved Water Rights. It also remains a “paper” right, while the settlement of all of the tribe’s water rights remains elusive. A century of government control of the Tribe’s practically irrigable acreage and related Reserved Water Rights, illustrated in well-documented historical records, reveals that the Federal Government has failed to address the well-known fact that the Ute Tribe and its allottees cannot achieve the full benefit of its Reserved Water Rights without storage facilities.

After the 1923 federally-decreed water rights were issued by the court, the Tribe’s fate with regard to the development of its reserved water rights became entwined with the harnessing of the Colorado River and the passage of the Colorado River

Storage Project Act of 1956. This reclamation project authorized the initial phase of the Central Utah Project (“CUP”). Shortly after that, the State obtained an agreement with the United States to stay any further adjudication of the Indian and non-Indian water rights of the Uintah and Green River Basins pending the outcome of a negotiated agreement about (1) the Ute Tribe’s quantified Water Rights, (2) the purposes for which the Tribal Waters can be used, and (3) the Tribe’s authority to administer its Tribal Waters within the State—rather than expend a significant amount of money and time fighting for or against Tribal Water Rights in court, with an uncertain outcome.

The earliest description of the Central Utah Project (which was designed to utilize Utah’s apportioned share of Upper Basin Colorado River water), acknowledged the need to “borrow” Indian water flowing into the Uintah and Ouray Indian Reservation. At this point in time, the Tribe relied on its trustee, the United States, when it agreed in 1965 to the government’s request that it defer the development and use of some of its irrigable lands, 15,242 acres of Indian land west of the Green River, in order to benefit the development of water for non-Indians on the Utah Wasatch Front and the growing population of Salt Lake City. The Deferral Agreement, as it became known, has been recognized by the United States as the “cornerstone” of the CUP, without which the “Secretary of the Interior [could not] certify to the Congress that an unchallenged water right existed so that construction could proceed on the Bonneville Unit of the Central Utah Project.” Memorandum of the Regional Solicitor to the Superintendent of the Uintah and Ouray Reservation, dated September 9, 1988.

Promises were made to the Ute Indians that they would have full and complete recognition of their water rights, with a priority date of 1861, and that the Tribe’s quantified water rights west of the Green River would be recognized without resort to litigation. In exchange for supplying critically needed water to Salt Lake City and its environs, the Ute Tribe was to receive, over time, its full quota of Colorado River water, as well as the promised vital storage facilities, as part of the Central Utah Project, which we need to develop and obtain the full beneficial use of our Reserved Water Rights. We relied on the representations of the United States—and, yet, we still do not have a final Water Compact and comprehensive water settlement.

In 1992, Congress enacted the Ute Indian Rights Settlement Act in order to settle the Federal Government’s failure to comply with the requirements of the 1965 Deferral Agreement. The 1992 Act compensated the Tribe (1) for our loss of economic benefits over a period of about 25 years of deferred development of some of our irrigable lands, (2) for our agreement to defer the development and use of certain irrigable lands with their related Reserved Water Rights in perpetuity for the benefit of non-Indians on the Wasatch Front, and (3) for the government’s contractual failure to build vital storage facilities for the Tribe and allottees as promised. However, the Tribe still does not have a Water Compact that has been approved by Congress and ratified by the Tribe and the State of Utah. And, importantly, we still do not have “wet” water, which is the ultimate goal of a water settlement that allows us to use our Reserved Water Rights, even though the quantification of these rights has been recognized by the United States and the State of Utah since 1965.

To the dismay of the Tribe, it appears now that the Department of Interior wants to call the 1992 Settlement Act a comprehensive water settlement of the Ute Tribe’s Reserved Water Rights. It clearly is not. We are currently using our best, good faith efforts to dissuade the Department and the water rights team that the 1992 Act was such a comprehensive water settlement because it did not contemplate nor address the Tribe’s critical need for storages. We believe that we retain a right to a comprehensive water rights settlement that will include the Tribe’s well-recognized right to and need for storage.

The Water Compact revised by Congress and approved in the 1992 Ute Indian Rights Settlement Act moves over 132,000 acre feet of water per year of diversion rights to the Green River. However, on its way through that part of the Reservation, the Green River flows within a deep canyon. As a result, the Tribe is physically limited in its ability to use Green River water on Tribal lands. Thus, in transferring some of the Tribe’s Water Rights to the Green River, the government in essence assured that the Tribe would hold only a “paper” water right, rather than a “wet” water right for any real use of this water. The only feasible option for the Tribe to make beneficial use of its “paper” Green River water rights is through water leasing, in particular, to the Lower Colorado River Basin states.

This brief history of a long and complicated course of dealings between the Ute Tribe and the United States with regard to the Tribe’s use of and benefit from its Reserved Water Rights is intended to highlight an important principle for the United States’ participation and leadership role in Indian Reserved Water Rights negotiations—reliability and dependability. The Ute Tribe has, unfortunately, not

been able to rely on the representations of its trustee over a century of dealings and is concerned that it cannot now depend on its trustee to do the right thing and resolve the fundamental legal rights of our Tribe and people.

We are encouraged, however, by this Committee's effort to focus attention on the long-standing problems of settling tribes' Reserved Water Rights, and with the current Administration's increased effort to bring these long-standing disputes to a successful resolution. Congressional support to fund water settlements will go a long way to achieving this end. We remain committed to the process of negotiating a settlement of our Reserved Water Rights with the assistance of the federal team, and look forward to finalizing these negotiations in the near future with the type of Congressional support this Committee can provide.

Thank you for the opportunity to testify on this important subject.

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PREPARED STATEMENT OF D. LYNN DALTON, COMMUNITY SERVICES ADMINISTRATOR,  
HOTEVILLA VILLAGE

Honorable Daniel Akaka, Chairman; and Honorable Members of Senate Committee on Indian Affairs:

This testimony is submitted on behalf of the Hotevilla Village Board of Directors and the members of the village.

We urge and request that Congress continue to acknowledge tribal water rights. It is not the tribes who negatively affect non-Indian water users, rather it is non-Indian water users who have and will continue to negatively impact tribes with regard to access and use of precious, and sacred, water resources. The federal trust responsibility is not to be taken lightly. Claims by the states that tribes will harm state rights and development is ludicrous.

When states cry out that tribal economic development should be limited with regard to use of water, they first need to apply those standards to themselves. Historically, the tribes have conserved and used water responsibly and within their means. The dominant society needs to follow the examples of the tribes. If water resources are not available, communities must stop or limit development. Allowing unsustainable growth is irresponsible and fosters an adversarial climate among tribal and non-tribal communities.

To shorten the settlement process, Indian water rights settlements should address Indian water rights only. It is unfair to tribes to place them in an adversarial position with state and private entities. Tribes have the same need for water as on-tribal entities. The ability of tribes to exchange or bank water should be applied uniformly.

Tribes have been an easy target for sacrifice—land, natural resources, limited economic and social opportunities. Do not require tribes to sacrifice their “honorable” rights to their fair share of water through unfair legislation.

On February 14, 2012, Senator McCain introduced S. 2109, entitled “Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012.” Reflected in S. 2109 are provisions that benefit Peabody Coal, Navajo Generating Stations, and APS. The continued presence of these entities are being forced upon the Hopi and Navajo Tribes in what is, essentially, blackmail through water rights settlement legislation. There is strong data available that supports the finding that our N-Aquifer has been irreparably damaged by the over pumping by Peabody Coal. There has been damage to the quality of our water on Hopi. We cannot support any legislation that requires us to waive our rights to claim damages to our water system and water quality “from time immemorial, past, present, future, and forever.” Before we move forward with any settlement, the Secretary of Interior must declare material damage to our N-Aquifer and require Peabody Coal to repair damage that has been done, as called for in their current lease.

S. 2109, in its current form, is not a water rights settlement for Hopi, but rather, is a water claims settlement. Wet water from the Little Colorado River has not been quantified for Hopi. Hopi is expected to subsist with the water available from the N-Aquifer. Our springs have dried up and the water quality of our eastern villages is unacceptable.

The statement that settlements help meet the needs of tribes is, in this specific case, untrue. If the goal is to move away from litigation as a method for resolving water rights; tribal rights and claims must be given due priority and respect and reflected accordingly in the settlement agreements. As in the case of S. 2109, the lengthy waivers and unclear benefits of the settlements make litigation appear more attractive.

Thank you for the opportunity to submit this testimony.

## PREPARED STATEMENT OF THE NAVAJO NATION

The Navajo Nation appreciates the opportunity to submit additional comments for the record on the matter of settlement of Indian water rights. The Navajo Nation is grateful for the participation of the United States in the efforts to settle the Nation's water rights claims. The federal implementation team for the Navajo Nation New Mexico San Juan River settlement has been instrumental in moving the settlement forward, including the commencement of construction of the Navajo-Gallup Water Supply Project, the cornerstone of the settlement approved by Congress in the Omnibus Public Land Management Act of 2009 (Public Law 111-11). The federal team assigned to the negotiations concerning the claims of the Navajo Nation and Hopi Tribe to the Little Colorado River (LCR) Basin in Arizona also played a critical role, particularly in negotiations over trust resources jointly held by tribes. Legislation to approve and implement this settlement was recently introduced, first in the Senate as S. 2109 and shortly thereafter in the House as H.R. 4067.

With that preface, the Nation submits that lack of formal involvement of the United States in water rights negotiations should not be a deterrent to a final water rights settlement when a tribe and other affected parties have reached agreement. The Navajo Nation is located in three states and multiple water basins requiring the Nation to adjudicate its water rights claims in multiple forums. The Nation and the State of Utah executed a Memorandum of Understanding in 2003 committing, if possible, to the amicable resolution of the Nation's water rights claims in the State without litigation. In 2007, the President of the Navajo Nation and the Governor of Utah each requested that the Secretary of the Interior appoint a federal negotiating team to assist with the negotiations. No negotiation team has been appointed despite renewed requests by the leaders of both the State and the Nation in early 2010. The Nation's supplemental request to the Department, dated August 10, 2010, for a federal team was unsuccessful, despite efforts by the Nation to fully address the factors established by the Working Group on Indian Water Rights Settlements to be considered for the establishment of new negotiation teams. Undeterred, representatives of both the State and the Nation have approached Department officials at virtually every opportunity to continue to advocate for the appointment of a federal negotiating team, or in the alternative, some less formal federal presence to address those issues in the settlement in which the United States has a particular interest or responsibility.

Representatives of the Navajo Nation and the State of Utah have reached agreement regarding the Nation's water rights claims in the State, and proposed legislation to approve and implement the settlement has been drafted. The settlement agreement and proposed legislation are largely modeled on the four Indian water rights settlements recently approved by Congress as part of the Claims Resolution Act of 2010. The Nation is anxious to have settlement legislation introduced which would also authorize much-needed drinking water infrastructure for Navajo communities in Utah. However, we have been informed that the Department of the Interior may oppose the settlement because of the lack of federal involvement in the negotiations.

The Nation understands that the Department has limited financial and personnel resources to devote to federal negotiating teams, and the Department provided compelling testimony for the need for additional resources during the oversight hearing. However, agency resource problems should not be an excuse for opposing a water rights settlement negotiated by a tribe without formal federal participation when such settlement is otherwise consistent with the Department's policies and is in the best interests all parties concerned, including the United States. If settlement of Indian water rights claims is truly the policy of the United States, surely any attempt by the Department to oppose a settlement negotiated without a formal federal negotiation team would violate that policy.

The Navajo Nation is grateful to the Committee for holding this important oversight hearing and appreciates this opportunity to provide insight to the Committee on the difficulties that may lie ahead for proposed legislation to authorize the Navajo Nation's settlement with the State of Utah.