

**TESTIMONY
OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**ADDRESSING THE NEEDS OF NATIVE COMMUNITIES THROUGH INDIAN WATER RIGHTS
SETTLEMENTS**

MAY 20, 2015

Chairman Barrasso, Vice-Chairman Tester, and Members of the Committee, my name is Michael Connor 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 addressing the needs of Native Communities and fulfilling the Federal trust responsibility to American Indians through Indian water rights settlements. The subject of Indian water rights settlements is one with which I am very familiar. I began my career as an attorney in the Department working on Indian water rights, and then serving as the Director of the Interior Secretary's Indian Water Rights Office. In that capacity, and in the positions I have held since, I have seen first-hand how water settlements can greatly benefit both Tribes and their members and neighboring non-Indian communities.

Today, implementing existing settlements and reaching new agreements is more important than ever given the need for water on many Indian reservations and throughout the West and the uncertainty regarding its availability due to drought, climate change, and increasing demands for this scarce resource. Settlements resolve long-standing claims to water; provide reliability with respect to supplies, facilitate the development of much-needed infrastructure; improve environmental and health conditions on reservations; and promote collaboration between Tribes, states, and local communities. Settlements have been, and should remain, a top priority for the Federal government.

I. Introduction

The Administration is proud of its record on Indian water rights settlements, and we continue to be committed to settlements as an important way to address the water needs of Native American communities. Indian water rights settlements are consistent with the general Federal trust responsibility to American Indians and with Federal policy promoting tribal sovereignty, self-determination, and economic self-sufficiency. 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. These settlements resolve what has often been decades of controversy and contention among tribes and neighboring communities over water, replacing those conflicts with certainty, which fosters cooperation in the management of water resources and promotes healthy economies.

Since 2009, the Administration has supported and Congress has enacted six Indian water rights settlements for nine tribes at a total Federal cost of slightly more than \$2 billion. All told, these settlements resolved disputes and litigation spanning well over a century. Most recently, the Administration was pleased to support two smaller and less comprehensive water rights settlements involving Tribes, in the 113th Congress: the Pyramid Lake Paiute Tribe-Fish Springs Ranch Settlement Act and Bill Williams River Water Rights Settlement Act of 2014. The Administration is working with all of the affected tribes now to implement these settlements.

This Administration's active involvement in settlement negotiations has resulted in both significant improvements in the terms of the settlements and substantial reduction in their Federal costs, which ultimately led to our support for these six Indian water rights settlements. Our support for these settlements clearly demonstrates that settling Indian water rights disputes is a high priority for this Administration and confirms that we stand ready to support Indian water settlements that result from negotiations with all stakeholders, including the Federal government, and represent a good use of taxpayer dollars good cost share contributions from states and other benefitting parties.

The Department has made significant strides in implementing the four settlements in the Claims Resolution Act and the two settlements in the Omnibus Public Lands Management Act. When fully implemented, these settlements will help ensure permanent water supplies and enhance economic security for five Pueblos in New Mexico, the Crow Tribe of Montana, the White Mountain Apache Tribe of Arizona, Navajo Nation lands located in the San Juan river basin in New Mexico and the Shoshone-Paiute Tribes of the Duck Valley Reservation located in part in both Nevada and Idaho. The Department is well underway in constructing 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 must haul water for use in their homes, and will help to augment the City of Gallup's drinking water system. As of today, we estimate that 326 jobs have been created directly by this project, a majority of which are held by Native Americans. Preliminary work on the construction of the Crow, White Mountain Apache and Aamodt domestic water projects is on-going. In addition, the United States has initiated critically needed improvements in the irrigation systems of the Duck Valley, Crow and Navajo Nation. These settlements are ushering in a new chapter on water in these regions- one marked by certainty, cooperation, and economic activity.

While recent settlements have provided desperately needed infrastructure in Indian country, much more work remains to be done. We are currently involved in 18 additional settlement negotiations around the West and are expecting several will see action in Congress this year. There are a few settlements that have been introduced this Congress, and numerous other settlements that have been in negotiation for many years that are approaching a resolution. It is difficult to predict which of these will reach final stages this year but we are continuing our active involvement in all. In addition to existing settlement teams, the demand for new teams continues to grow. We are in the process of appointing a negotiation team for the Coeur d'Alene Tribe in Idaho and we are considering appointing an assessment team for the Ohkay Owingeh Pueblo in New Mexico.

II. The Impetus for Water Rights Settlements.

Disputes over Indian water rights are often 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. We have seen this time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. 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 rights 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, neighboring non-Indian interests and communities have come to rely over the course of decades on a water supply for which Indians have senior water 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. Certain costs associated with these settlements cannot be monetized. For example, although we know that uncertainty and conflict over water reduces economic development and quality of life in the affected area, it is very difficult if not impossible to put a dollar figure on those costs. Even when litigation is concluded and a court decrees that a tribe has a right to a certain amount of water with a specific 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, continues to fuel conflict and 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 provide “wet water” to tribes, nor does it authorize new infrastructure or do anything to encourage improved water management. 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 and do 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 prolonged litigation that can 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 Program

The Administration's commitment to Indian water settlements is reflected in the high level leadership at the Department that focuses on these settlements. My Counselor and the Chair of the Working Group on Indian Water Settlements (Working Group), along with the Assistant Secretaries of Indian Affairs and Water and Science, the Commissioner of Reclamation, the Solicitor, and the Secretary's Indian Water Rights Office (SIWRO), work as a team to achieve results that make a real difference, not only for tribes but for all the communities involved.

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). 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.

Once a settlement is enacted by Congress, 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 18 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. With drought, climate change, increasing populations, and other factors impacting the availability of water and increasing the competition for this finite resource, the number of requests for the appointment of new negotiation teams continues to grow.

In the negotiation phase, the Department's efforts are supported by the Bureau of Indian Affairs' (BIA) Water Resources and Water Rights Litigation and Negotiation Programs, which provide technical and factual work product in support of the Indian water rights claims and provide financial support for the United States to defend and assert Indian water rights. In addition, the Native American Affairs Program within the Bureau of Reclamation (Reclamation) provides technical support for Indian water rights settlements, and assists tribal governments in developing, managing and protecting their water and related resources. This office also provides policy guidance for Reclamation's work with tribes in such areas as the Indian trust responsibility, government-to-government consultations, and Indian self-governance and self-determination. Once a settlement is enacted by Congress, and appropriations are authorized to implement it, primary funding responsibilities fall to Reclamation and the Bureau of Indian Affairs, although other agencies can and do contribute based on the particular terms of a settlement. To support these efforts, the President's FY 2016 Budget requests \$244.5 million for Indian water rights settlements (\$40.8 million for negotiation and legal support and \$203.7

million for implementation, including \$136 million for Reclamation and \$67.7 million for the Bureau of Indian Affairs).

IV. Future Challenges

Although Congress' enactment of 29 Indian water settlements is a good start in addressing the need for reliable water supplies in Indian country, much more remains to be done. There are 277 federally recognized tribes in the West alone (excluding Alaska), and we are seeing increased interest in Indian water rights settlements east of the 100th Meridian. Many of these tribes are in need of: clean, reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure necessary to bring economic development to reservations.

The Administration will need to continue to work with Congress to enact and fund upcoming settlements. With some notable recent exceptions, water rights settlements generally have been funded through the Department's discretionary appropriations. Work to be performed under the settlements by Reclamation has come out of Reclamation's budget, and trust funds and other settlement costs generally have come out of the BIA's budget, but all Departmental agencies have been asked from time to time to expend discretionary funds from their budgets on implementation of these water settlements. In all of these cases, the Administration has worked successfully with Congress to secure the funds needed to continue to implement and completed signed settlements.

In some recent settlements Congress has included provisions for a variety of mandatory 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 the Omnibus Public Lands Management Act.

Another approach that Congress took in section 10501 of the Omnibus Public Lands Management Act 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 calling for expenditures by Reclamation. By statute, these settlements must meet certain criteria and there is priority for settlements in the states of New Mexico, Arizona and Montana. These funds are direct spending not subject to further appropriation, and we estimate that all of the funds in the Reclamation Water Settlement Account will be fully obligated by existing, authorized settlements, however this estimate is dependent on the level of discretionary funding that these settlements receive. Congress also envisioned some funding for future Indian water rights settlements through provisions of the Arizona Water Rights Settlement Act of 2004 (AWSA) by identifying future settlements as eligible to receive funds from the Lower Colorado River Basin Development Fund. Unfortunately, due to downturns in the economy, this fund has not produced the level of revenue expected at the time that law was enacted and other costs of the AWSA have proven greater than anticipated.

The Administration believes that Indian water rights settlements, when the product of a well thought-out process, represent an overall benefit to taxpayers when balanced against the potential

consequences and costs of continued litigation over Indian water rights claims. First and foremost, from both a cost and timing perspective, settlements typically offer the most efficient way to provide much-needed water supplies to many tribal communities in fulfillment of the purposes of their reservations and basic Federal responsibilities. Moreover, settlements provide mechanisms that can protect current uses by non-Indian water rights holders. In addition, the consequences and costs of litigation are different for each particular settlement and are not always susceptible to simple monetary quantification.

Some have suggested that Indian water rights settlements are “earmarks”. This is not the case. 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. And, in almost every case, settlements are entered into to either prevent or resolve longstanding litigation that drains resources from the Federal government, Indian tribes, and other affected parties, and exposes the Federal government and other parties to substantial risks. 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. The Administration has not viewed settlements as earmarks.

V. Conclusion

State and local governments, as well as Indian tribes, favor water rights settlements because they can be directly involved in shaping their own destinies, rather than leaving their fate to be decided by an uncertain course of litigation. 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 the best solution for the real problems that communities face. Indian water rights settlements can spur critically 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 and non-Indians to continue using water that was subject to senior rights by Indian tribes. Recent settlements have authorized projects that will provide desperately needed access to safe drinking water on reservations and repair of irrigation systems that have severely deteriorated over time. These projects can improve public health by 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.¹ For the young and old, water-hauling is a way of life on some reservations. 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.² Additionally, for these tribal members, hauling water can be a full-time job that limits economic opportunities and perpetuates the cycle of poverty.

In conclusion, I want to underscore the importance of these settlements to this Administration. 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 help ensure that Indian people have safe, reliable water supplies and the means to develop their homelands, and that neighboring communities receive needed certainty in water resources to foster economic development and growth. 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.

¹ 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.

² Id.