

Testimony of the Western States Water Council

**Submitted to the
House Committee on Natural Resources**

**Regarding
H.R. 1904 - Reclamation Water Settlement Fund**

April 4, 2019

I. INTRODUCTION

My name is Michelle Bushman, and I am the Legal Counsel for the Western States Water Council (WSWC), a government entity and instrumentality of each and every one of the eighteen participating member states. Created pursuant to a Western Governors' resolution in 1965, our members are appointed and serve at the pleasure of their respective Governors, advising them on water policy issues. The WSWC is comprised of 18 States, including the 17 Reclamation States and Alaska, covering an expansive and diverse geographic and political spectrum. Our mission is to ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.¹

In the West, water resources are often scarce, circumscribing the growth, development, economic opportunity and social and environmental quality of life, for Indian and non-Indian communities alike. The WSWC strongly supports tribal water rights settlements and the appropriation and use of receipts that accrue to the Reclamation Fund for their intended purpose of financing the construction of authorized western water projects and programs, including those related to tribal settlements.

¹ http://www.westernstateswater.org/wp-content/uploads/2014/01/Revised-Rules-of-Organization_2015_July_10.pdf The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources, in order to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

IV. INDIAN WATER RIGHTS SETTLEMENTS

Tribal water rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights and permitted uses. The unquantified nature of many tribal rights creates great uncertainty with regard to existing state-based rights and uses and can impede local, state, and regional economic development. 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 the West's growing population.

The federal government holds Indian water rights in trust for the benefit of the tribes and is joined as a party in all water rights adjudications involving tribes. This means that the federal government has a fiduciary duty to protect tribal water rights and has a major responsibility (particularly the Department of the Interior) 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.

These negotiated settlements enable Indian and non-Indian communities to (1) tailor solutions to their unique circumstances; (2) provide infrastructure that allows Indian communities to receive wet water (not merely a legal right to water they might be financially unable to develop); (3) preserve existing water rights and uses for the surrounding non-Indian communities; (4) promote sound water management practices; and (5) establish cooperative partnerships between Indian and non-Indian communities. Tribes often waive some water rights claims, as well as breach of trust claims against the federal government, in exchange for the funding necessary for water infrastructure projects. Funding these settlements is an obligation of the United States analogous to judgments rendered against it in litigation, and failure to fund settlements could lead to new or renewed litigation and increased costs for American taxpayers.

Title X of the Omnibus Public Lands Management Act of 2009 established a Reclamation Water Settlements Fund (RWSF) in the U.S. Treasury to finance Reclamation projects that are part of Congressionally-approved Indian water right settlements. The RWSF will receive up to \$120 million per year, prioritized for settlements in New Mexico, Montana, and Arizona,² beginning in FY 2020. Congress only authorized the RWSF to be funded for 10 years, and authorized disbursements from the RWSF only through 2034.

Despite federal trust obligations, obtaining federal funding to promote and implement the negotiated resolution of these claims has proven to be difficult. Current budgetary policy 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 essential tribal or Interior Department program. It is important to recognize that the United States is receiving something of significant value in exchange for appropriating settlement funds and fulfilling its tribal trust responsibility. In addition to avoiding litigation costs, it is facilitating self-sufficient tribal economic development, and avoiding the disruption of established non-Indian uses and related Western economies. If Congress is unable to fund authorized settlements, litigation will be the primary means of resolving tribal water right claims.

For instance, the Navajo Nation's settlements with New Mexico and Utah provides the Navajo Nation with quantified amounts of water from within the respective states' Colorado River Compact allocation. In both settlements, the tribe has voluntarily reduced its claimed

² Omnibus Public Lands Management Act, Pub. L. No. 111-11, 123 Stat. 991 (2009). Section 10501 of Title X requires the Secretary of the Treasury to deposit \$120 million into the fund for fiscal years 2020-2029. It prioritizes this funding for: (1) the Navajo-Gallup Water Supply Project and the Taos and Aamodt settlements in New Mexico; (2) settlement agreements between Montana with the Blackfeet Tribe, the Crow Tribe, or the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation if a settlement(s) is subsequently approved and authorized by an act of Congress; and (3) a settlement agreement between Arizona and the Navajo Nation.

reserved water rights which would exceed both states' apportionments of the Colorado River. Without the Congressional authorization, appropriated funding, court approval, and full implementation of these settlements, the Navajo Nation would have no choice but to litigate its water rights claims. If the Navajo Nation were to prevail, many junior water users could lose water.

Other settlements remain to be completed. The Secretary's Indian Water Rights Office currently has 21 federal negotiation teams assigned, including tribes with settlements previously introduced before Congress. Arizona and the Hualapai tribe have worked to complete their water rights settlement, and a Navajo-Hopi settlement was also previously introduced. Kansas and the Kickapoo tribe were able to reach a settlement of tribal claims. Montana has reached settlements with the Fort Belknap Tribes and the Confederated Salish and Kootenai Tribes as part of a state-wide adjudication process aimed at resolving all water rights claims in the state. However, until Congress authorizes and funds these settlements, state-issued water rights in basins where these tribes have claims will remain uncertain. If Congress delays authorization and funding negotiated settlements, the tribes may litigate their claims in court, which could disrupt established non-Indian uses. Moreover, postponing the authorization and implementation of Indian water rights settlements will be far more expensive for the federal government in the long-run because growing water demands, decreasing water supplies, construction cost inflation and other factors will only increase the costs of resolving these claims.

The Congress and the Administration should fully support the use of the funds that accrue to the Reclamation Fund for their intended purpose of supporting western water development, including water infrastructure projects that are part of authorized Indian water rights settlements.

One way to ensure stability in settlement implementation would be to make both the authorized annual transfers to the RWSF and the ability to expend monies from the RWSF permanent.

III. THE RECLAMATION FUND

Recognizing the importance of water to the development of the arid West, the Congress passed the Reclamation Act on June 17, 1902.³ It provided that monies be “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in the seventeen western states, to be continually invested and reinvested.

President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children....”⁴

Under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources. Its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil

³ Reclamation Act, Pub. L. 57-161, 32 Stat, 388 (1902).

⁴ Theodore Roosevelt, Seventh Annual Message to Congress, December 3, 1907. The Reclamation Service preceded today’s U.S. Bureau of Reclamation.

and mineral-related royalties – but these receipts are only available for discretionary federal expenditures pursuant to annual appropriation acts. This includes construction and operational expenditures of the Bureau of Reclamation and the Western Area Power Marketing Administration.

The Reclamation Fund originated as a revolving fund for development of irrigation projects on the arid and semiarid lands of the 17 western states. However, receipts were not sufficient to fund early Reclamation projects. The Mineral Leasing Act of 1920 provided for the deposit of receipts from natural resource royalties into the Reclamation Fund. Originally over 50% of receipts, in 1976 that amount was reduced to 40% of federal royalty payments from the production of oil, gas, coal, potassium, and other minerals on federal lands. Such payments currently account for more than half the Fund's receipts. In recent years, these receipts have increased significantly, with greater energy development and rising energy prices.⁵ The WSWC has recommended the Administration and the Congress investigate the advantages of restoring the Reclamation Fund as a true revolving trust fund with annual receipts appropriated for authorized purposes in the year following their deposit.⁶

Reclamation's dams and reservoirs, water conveyance systems, and power generating facilities are integral components of America's infrastructure. Reclamation's water and power projects and activities throughout the western United States are not only essential for sustainable and safe water supplies for agricultural, municipal and industrial purposes, but also provide energy in the form of hydropower, and maintain ecosystems that support fish and wildlife, hunting and recreation, as well as rural economies.⁷

⁵ Stern, Charles V., The Reclamation Fund: A Primer, Congressional Research Service, R41844, April 18, 2013.

⁶ http://www.westernstateswater.org/wp-content/uploads/2012/10/408_WSWC-Position-on-the-Reclamation-Fund_2017Jun29.pdf

⁷ https://www.usbr.gov/budget/2019/FY_2019_Budget_Justifications.pdf (page 2)

The Reclamation Act succeeded as a catalyst for the settlement of the arid West, which is now among the most urbanized regions in America. The water and power resources developed and provided by the Bureau of Reclamation (as well as the flood control benefits) over more than a century supported growth and continue to be critical to the maintenance of water supply for the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities and diverse rural communities across the West. However, the federal government has not adequately invested in maintaining its complex water infrastructure so vital to the West, and the lack of water infrastructure throughout Indian country hinders economic growth and self-sufficiency.

IV. BUREAU OF RECLAMATION WATER INFRASTRUCTURE BUDGET

Over the years, rising energy prices and declining federal appropriations from the Fund for Bureau of Reclamation purposes have resulted in an increasingly large unobligated balance. According to the Administration's FY2020 budget request,⁸ actual receipts accruing to the Reclamation Fund from various sources were \$1.842 billion for FY2018, with estimated receipts of \$3.321 billion for FY2019, and \$2.583 billion for FY2020. By way of comparison, actual appropriations were \$1.233 billion for FY2018, and estimated appropriations are \$1.308 billion for FY2019, while the President's FY2020 Bureau of Reclamation budget request is \$885 million. The unobligated balance in the Reclamation Fund at the end of FY2018 was \$16.630 billion. It is estimated to be \$18.643 billion at the end of FY2019, and \$20.341 billion by the end of FY2020.

⁸ THE APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2020, 617 (March 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/03/appendix-fy2020.pdf>.

This unobligated balance has been used to support other federal purposes, contrary to Congress' original intent.

Requested and appropriated funds have not been sufficient to complete many authorized projects in a timely manner or address many identified Reclamation program needs, including authorized tribal settlements. Increasing appropriations from the Reclamation Fund proportionate to receipts would expedite work to meet pressing water resources infrastructure and conservation and management program priorities. The WSWC supports collaboration and leadership at all government levels – federal, state, tribal, and local – and the private sector – to address America's infrastructure needs and establish water infrastructure improvements as a public policy priority.⁹ Substantial and sustained investments in water project construction, maintenance, rehabilitation and replacement is necessary and pays long-term dividends. Inconsistent, inadequate, and untimely funding increases project construction and financing costs, as well as risk.

The federal government has a significant role to play in financing and cost-sharing for water-related infrastructure given federal tribal trust and treaty obligations, other past commitments, and federal regulatory mandates. The WSWC urges the Congress to investigate the advantages of converting the Reclamation Fund from a special Treasury account to a true revolving trust fund with annual receipts appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).¹⁰

⁹ WSWC Position #419 – Infrastructure; <http://www.westernstateswater.org/policies-2/>.

¹⁰ http://www.westernstateswater.org/wp-content/uploads/2012/10/408_WSWC-Position-on-the-Reclamation-Fund_2017Jun29.pdf

VII. CONCLUSION

In conclusion, Congress should provide adequate funding for the Bureau of Reclamation to undertake project construction related to Indian water rights settlements from revenues accruing to the Reclamation Fund, while recognizing the existence of other legitimate needs that may be financed by those reserves.

WSWC recommends the Congress carefully consider present and future needs for investment in water resources infrastructure. It is vital that the West maintain sustainable, reliable and robust infrastructure systems necessary to deliver adequate supplies of clean water to meet present and future needs of both tribal and non-tribal communities. Further, the Congress should investigate the advantages of converting the Reclamation Fund from a special account into a true revolving trust fund with receipts promptly and fully appropriated for their intended purpose in the continuing conservation, development and wise use of western water resources and work with the states to meet their future water, energy and infrastructure needs.