

**Testimony of Chairman Brian Thomas
Before the
House Natural Resources Committee
Subcommittee on Water Oceans and Wildlife
On**

**H.R. 1869, a bill to Amend the Omnibus Public Land Management Act of 2009 to
make a technical correction to the water rights settlement for the Shoshone-
Paiute Tribes of the Duck Valley
Reservation Water Rights Settlement**

June 29, 2021

Subcommittee Chairman Huffman and Ranking Member Bentz, my name is Brian Thomas and I am the Chairman of the Shoshone-Paiute Tribes of the Duck Valley Reservation. Thank you for inviting me to testify on H.R. 1869, a bill to Amend the Omnibus Public Land Management Act of 2009 to make a technical correction to the water rights settlement for the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement. I would also like to thank Representative Amodei for championing this legislation.

Purpose of Technical Amendment

In 2009, Congress enacted the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act, P.L. 111-11, § 10801-10809 (“Settlement Act”). The Settlement Act ratified the Nevada agreement quantifying the federal reserved water rights of the Shoshone Paiute Tribes (“Tribes”). (A separate consent decree was entered in Idaho.) The Act further provided that the United States would deposit \$45 million for the rehabilitation of the Bureau of Indian Affairs’ (BIA’s) Duck Valley Irrigation Project and other water-related projects in a Development Fund and \$15 million for operation and maintenance of the projects be deposited in a Maintenance Fund. Pursuant to the Settlement Act, the Development Fund and Maintenance Fund are held in trust by the Federal Government for the benefit of the Tribe.

H.R. 1869 would amend the 2009 Settlement Act to transfer interest income earned through the investment of Settlement Act trust funds during the five-year period of appropriation—back to the tribal trust funds created by the Settlement Act. The amendment is necessary to comport with the Tribes’ understanding and expectation regarding the availability of investment income before the settlement’s effective date. To this end, H.R. 1869 authorizes funds to be appropriated of approximately \$5 million based on the amount of interest the trust funds are estimated to have earned in the Tribes’ accounts during the five years before the effective date. The actual interest earned on the Tribes’ trust funds during this period was returned to Treasury and removed from the Tribes’ accounts because of the Department of the Interior’s interpretation of Settlement Act.

Background on Duck Valley Water Rights Settlement

The Duck Valley Reservation is the homeland of the Tribes and encompasses 290,000 acres of remote land on the border between the States of Nevada and Idaho. Although the reservation has significant land suitable for agriculture and agriculture is the primary economic activity on the Reservation, the Reservation has lacked sufficient infrastructure necessary to provide dependable water supplies for irrigation and drinking water. The lack of access to dependable water supplies has been a chronic problem for the Tribes since the reservation was established in 1877.

Inconsistent natural flows and non-Indian settlement south of the Reservation in Nevada and north of the Reservation in Idaho and Oregon have led to chronic water stress and conflict. In addition, since the 1930s, the downstream Owyhee Project—a Bureau of Reclamation Project that irrigates more than 100,000 acres of land in eastern Oregon and western Idaho—has blocked anadromous fish passage and ended a once valuable on-reservation fishery. When, in 1938, the Bureau of Indian Affairs completed construction of Wild Horse Reservoir (the storage facility for the BIA Duck Valley Irrigation Project) to provide critical storage water for the reservation, the relief to the Tribe was far from complete. Wild Horse Reservoir is located nearly 15 miles south of the Reservation. This location failed to capture the full amount of water available to the Tribes and set up the potential for serious conflict with water users between the Reservoir and the Reservation, thereby affecting the number of acres the Tribes could cultivate and inhibiting reservation development.

The Settlement Act put an end to decades of tension over water rights between the Tribes and their non-Indian neighbors. In addition to providing certainty regarding the Tribes' water right, the Act resolved tribal claims against the United States for its failure to protect the Tribes' water rights and natural resources, claims which the Tribe estimated could lead to the federal government having to pay significantly more than the \$60 million federal contribution authorized in the 2009 Settlement Act. Due to the settlement, both Indian and non-Indian farmers and ranchers in the area around the reservation now have certainty regarding water allocations available to them for crops and grazing, and the Tribes have much-needed funds to provide long-term economic benefit to the Duck Valley Reservation.

The Settlement Act funds go toward assisting the Tribes in their ongoing work to accomplish the goals of the Settlement Act, which include rehabilitation of the Duck Valley Indian Irrigation Project, provision of a municipal water supplies, and other critical water related projects.

Statement of Need for the Amendment

An amendment is necessary because the Department of the Interior interpreted the Settlement Act's silence on investment before the settlement's effective date as precluding federal authority to invest the settlement funds for the Tribe before that date. As a result, all trust fund investment earnings prior to the effective date—approximately \$5 million—were withdrawn from the Tribes' accounts and remitted to the Treasury. When legislation authorizing this water rights settlement was enacted as part of the

Omnibus Public Lands Management Act of 2009, P.L. 111-11, the Settlement Act explicitly authorized investment of the trust funds starting on the date the waivers authorized under the settlement became effective (“effective date”). The effective date under the Settlement Act occurred when the Secretary of the Interior published a Federal Register notice stating that all of the actions required had been accomplished. Among the required actions was the establishment and funding of two trust funds, the Development Fund and the Maintenance Fund, and full appropriation of the \$60 million settlement trust funds.

Over a five-year period beginning in fiscal year 2010 and ending in fiscal year 2014, \$45 million were appropriated to the Development Fund and \$15 million were appropriated to the Maintenance Fund, as required under the terms of the Settlement Act. During this time, the Office of Special Trustee (now the Bureau of Trust Funds Administration), invested the Tribes’ funds as they were appropriated. The Secretary published the required notice in the Federal Register of findings related to the implementation of the Settlement Act and underlying Settlement on January 25, 2016. 81 Fed. Reg. 4063. This date of publication was the effective date under the terms of the Settlement Act.

As noted above, section 10807(e) of the Settlement Act required the Secretary of the Interior to invest amounts in these Funds after the effective date. However, the Act was silent with respect to pre-effective date investment, and the Department of the Interior, through the Office of the Special Trustee, invested trust fund monies prior to this date for the Tribes and regularly consulted with the Tribes and provided periodic statements to the Tribe concerning the investment income.

In 2016, after the effective date and full appropriation of the settlement funds, the Department of the Interior expressed the position that the Tribe may not be entitled to the investment funds earned in their accounts prior to the effective date. The Tribes immediately inquired about the investment income earned by the trust funds. In a letter dated February 29, 2016, from the Tribe to the Department of the Interior, the Tribe informed then Acting Assistant Secretary – Indian Affairs, Larry Roberts, that “[w]e have been counting on the investment revenues as part of the overall settlement funds available to the Tribes, and such funds are essential to the settlement projects that we undertake.” (See attached letter from the Tribes to the Department of the Interior dated Feb. 29, 2016).

In response to this and one other letter from Tribe, the Department of the Interior explained the agency’s position that “any interest the Fund generated pre-effective date may not be used in connection with the implementation of the Act and underlying Settlement” and accordingly, the Department withdrew the investment funds from the Tribe’s accounts and remitted the funds to the general fund of the Treasury. (See attached letter to the Honorable Lindsey Manning, Chairman of the Tribes, dated October 6, 2016). By enacting this bill, Congress will confirm for the Bureau of Trust Funds Administration that any ambiguity in the Settlement Act regarding investment of the settlement funds must be interpreted in the way most favorable to the Tribes, consistent with the federal trust responsibility to Tribes, and the funds returned to the Tribe.

Conclusion

As a result of the Department of the Interior's position on the Settlement Act's investment of interest income, the United States Treasury, and not the Tribe, profited from tribal trust funds. As trustee, the United States should interpret ambiguous provisions in favor of tribes. Moreover, the slow timeframe for settlement and lack of interest earnings before the effectiveness date eroded the value of the trust funds due to inflation.

This amendment appropriates the amount of money that the trust funds earned during the five-year period of appropriation, before the January 25, 2016 effective date, and authorizes the amount to be returned to the Tribes' trust funds. This will restore the value of the trust funds provided to the Tribes to the level intended by Congress and enable the Tribes to fulfill the promise of the Settlement Act: to be able to make use of their water right to fulfill the economic potential of the Duck Valley Reservation.

**THE SHOSHONE-PAIUTE TRIBES
OF THE DUCK VALLEY INDIAN RESERVATION**

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February 29, 2016

Larry S. Roberts
Acting Assistant Secretary – Indian Affairs
MS-3642-MIB
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement
Investment Revenue

Dear Mr. Roberts,

I am writing to provide you additional information concerning the investment revenue issue relating to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement funds. Vice Chairman Buster Gibson and Councilmembers Cristi Walker and Rudy Blossom raised this issue when they met with you on February 24, 2016.

The Shoshone-Paiute Tribe of the Duck Valley Reservation Water Right Settlement Act, Pub. L. 111-11, Title X, Subtitle C (Mar. 30, 2009), became final on January 25, 2016, with the publication of the Secretary of the Interior's findings. 81 Fed. Reg. 4063 (January 25, 2016). At that point the waivers became final and the settlement funds became available to the Tribes. The settlement funds consist of \$45 million in development funds and \$15 million in operation and maintenance funds. The funds were appropriated over a five year period beginning in 2010, and all funds are now in the Tribes' Treasury accounts. As the funds were appropriated, they were deposited in the Tribes' development and O&M accounts, and OST began investing the funds. Regular account reports were provided to the Tribes, including the investment amounts. And, OST consulted with the Tribes concerning appropriate investments for the funds. There is now approximately \$5.5 million in investment revenue in the accounts.

At some point approximately a year and a half to two years ago – after the majority of the funds had been appropriated, deposited in the Tribes' accounts and invested -- OST questioned whether the Settlement Act authorized investment of the funds before the Secretary published the final findings in the Federal Register. OST therefore stopped investing the funds -- without notice to the Tribes -- apparently in reliance on the following language in section 10806 (e) of the Settlement Act:

(e) Administration of Funds. – Upon completion of the actions described in section 10808(d) (publication of the findings), the Secretary, in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.) shall manage the Funds, including investing amounts from the Funds...

We understand the Solicitor's office has been looking at this issue and may issue an opinion concluding that there was no authority to invest for the period before publication of the findings. Upon issuance of the opinion, we understand the investment funds of over \$5.5 million may be returned to the Treasury.

We are seeking your assistance in making sure that the investment revenues are not returned to the Treasury and that an administrative or legislative solution be identified to insure that the investment funds are paid to the Tribes. We are hopeful that an administrative solution is possible since we understand that legislation will take some time and is likely to be difficult.

This matter is of critical importance to the Tribes as we begin the process of implementing our water rights settlement and spending the settlement funds on crucial Reservation projects, including vital rehabilitation activities at the BIA's Duck Valley Irrigation Project. We have been counting on the investment revenues as a part of the overall settlement funds available to the Tribes, and such funds are essential to the settlement projects that we expect to undertake. We ask that you work with others within the Department of the Interior to find a way to make sure these critical funds are paid to the Tribes.

We very much appreciate your interest and willingness to look into this matter and look forward to a favorable outcome. Please contact our water rights attorney, Jeanne Whiteing, (303) 444-2549, if you need additional information.

Sincerely,



Lindsey Manning
Chairman



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

OCT 06 2016



The Honorable Lindsey Manning
Chairman, The Shoshone-Paiute Tribes of the
Duck Valley Indian Reservation
P.O. Box 219
Owyhee, Nevada 89832

Dear Chairman Manning:

I am writing in response to your inquiry to Larry Roberts, Principal Deputy Assistant Secretary – Indian Affairs, concerning the investment revenue issue related the Duck Valley Reservation Water Rights Settlement (Settlement) and the related appropriated monies (Fund). Specifically, you have requested that any revenue generated by the investment of the Fund prior to January 25, 2016, be paid to the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation (Tribes). For the reasons discussed below, this is to inform you that the Department of the Interior (Department) lacks the legal authority to comply with your request. Moreover, the Department has a legal obligation to remit any amounts generated by any investment of the Fund prior to January 25, 2016, to the general fund of the Treasury and has therefore, acted accordingly.

As you are aware, under the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation Water Rights Settlement Act, P.L. 111-11, § 10807 (2009) (the Act), the Settlement became effective on January 25, 2016, upon the publication in the Federal Register of the Secretary of the Interior's (Secretary) findings related to the implementation of the Act and underlying Settlement. 81 Fed. Reg. 4063 (January 25, 2016). In addition to approving and ratifying the Settlement, the Act provided for the creation of two funds, the development fund and the maintenance fund, and authorized appropriation of monies to be deposited into the respective funds. The Fund consists of \$45,000,000 in development funds and \$15,000,000 in maintenance funds. The Fund was appropriated over a 5 year period beginning in fiscal year 2010 and ending in fiscal year 2014.

Neither the Act nor the Settlement provides authority for the Fund to be invested or to earn interest prior to the effective date of the Settlement, January 25, 2016. Notably, upon publication of the Secretary's findings, the Act directs the Secretary to "manage the funds, including by investing amounts from the Funds in accordance with [25 U.S.C § 161 and 25 U.S.C. § 162a]." Pub. L. 111-11 § 10807(e) (2009). Congress's specific directive to the Secretary to invest appropriated amounts post-effective date undercuts any argument that Congress – without specifically authorizing investment – intended the Fund earn interest pre-effective date. This notwithstanding, the Fund was inadvertently invested and earned interest for a period of time prior to January 25, 2016.

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Council, Dennis, Peck R, Jeanne / e-file: Investment Funds Decision
DATE 10/13/16
SENDER MG

While it is true that following the effective date, the Act requires the Fund to be managed as a trust fund and that will bear interest in accordance with 25 U.S.C. § 161a, the Fund, prior to the effective date of January 25, 2016, did not constitute a trust fund. Rather, money held in the Fund prior to the effective date remained the property of the United States set aside for the as-of-then unconsummated Settlement. Therefore, since there is no explicit language in the Act or the Settlement identifying interest as a source of the Fund nor directing the payment of interest from the Fund pre-effective date, it is the Department's position that it lacks the authority to expend any interest generated by the investment of the Fund prior to January 25, 2016. In conclusion, any interest the Fund generated pre-effective date may not be used in connection with the implementation of the Act and underlying Settlement. Accordingly, the interest generated by investment of the Fund prior to January 25, 2016, has been remitted to the general fund of the Treasury in accordance with 31 U.S.C. § 3302(b).

Sincerely,

A handwritten signature in black ink that reads "Alletta Belin". The signature is written in a cursive, flowing style.

Alletta Belin

Senior Counselor to the Deputy Secretary