

Statement of Alan Mikkelsen
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U.S. Department of the Interior
before the
Subcommittee on Water, Oceans, and Wildlife
Committee on Natural Resources
United States House of Representatives
H.R. 644, the Navajo Utah Water Rights Settlement Act of 2019;
H.R. 2459, Hualapai Tribe Water Rights Settlement Act; and H.R. 3292, Aamodt Litigation
Settlement Completion Act of 2019

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Chairman Huffman, Ranking Member McClintock, and Members of the Committee, my name is Alan Mikkelsen, and I am the Senior Advisor to Secretary Bernhardt and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to provide the Department's views on H.R. 644, the Navajo Utah Water Rights Settlement Act of 2019; H.R. 2459, Hualapai Tribe Water Rights Settlement Act; and H.R. 3292, Aamodt Litigation Settlement Completion Act of 2019.

Introduction

The Department supports the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements have the potential to resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency and improve environmental and health conditions on reservations. We understand that Congress has an important role in approving Indian water rights settlements, especially when they involve federal spending, the alteration of the Tribe's reserved water rights, or the waiver of sovereign immunity, and we stand ready to work with this Committee and Members of Congress to support Indian water rights settlements.

The framework the Department follows to guide the negotiation of Indian water rights settlements, and the support for legislation to authorize these settlements, includes four general principles set forth in the *Criteria and Procedures* published in 1990. First, settlements must be consistent with the United States' trust responsibilities. Second, Indian tribes must receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement. Third, Indian tribes must obtain the ability to realize value from confirmed water rights. Fourth, settlements must contain an appropriate cost-share by all parties benefiting from the settlement. In our current budget climate, concerns over federal costs are an area of particular interest to the Department as we evaluate Indian water rights settlements.

H.R. 664 – Navajo Utah Water Rights Settlement Act

Background

The Navajo Indian Reservation consists of approximately 26,600 square miles in Arizona, New Mexico, and Utah. Approximately 1,987 square miles lie in southeastern Utah and are the subject matter of this settlement. The current boundaries of the Nation's Reservation in Utah were formed over a large time span and was established by two Executive Orders and two Reservation Acts between the years of 1884 and 1958. The Navajo Reservation is the largest Indian reservation in the United States with a current total membership of 300,048 of which 217,609 live on the reservation. The Navajo Reservation has a total unemployment rate five times the national average, a median household income of \$20,005 and a poverty level of 42 percent. Currently, there are 5,029 Navajo residing within the Utah portion of the reservation.

The Utah portion of the Reservation is primarily a desert landscape with much of the area receiving about 7 inches of water per year. The surface water resources in the Utah portion of the reservation include the San Juan River and its tributaries, which flow along much of the northern boundary of the Reservation in Utah. In the Navajo San Juan River Basin of Utah, the primary potable water source is almost entirely from groundwater. The best aquifer water quality is from the shallow aquifers near Monument Valley that are nearly fully utilized. The deeper bedrock aquifers on the eastern portion contain more water but have significant water quality issues including high total dissolved solids (TDS) and arsenic. On the Utah portion of the Reservation, there are 2,581 households, approximately half of which have complete indoor plumbing. Approximately 46 percent of on reservation households haul water as far as 50 miles round-trip from Halchita to Monument Valley.

H.R. 664

From 2003 to 2013, the State of Utah and the Nation worked cooperatively, without litigation, to negotiate a water rights settlement for the Utah portion of Reservation. In 2013, a Federal Negotiation Team was appointed to participate in the negotiations. H.R. 664 would settle all potential reserved water rights claims of the Nation in Utah and all public domain allotments within the exterior boundaries of the Reservation in Utah.

The settlement recognizes a reserved water right of 81,500 acre-feet per year for the Nation, which will be deducted from the State of Utah's allocation of Colorado River water. This 81,500 acre-feet per year of water includes all current Navajo Utah water uses and all public domain allotment water claims within the Reservation. In order to allow current non-Indian water uses to continue unimpaired, the Nation also agrees to subordinate its reserved water right to all perfected non-tribal water rights as of the date the settlement is signed. The settlement provides for exchange and lease of water within Utah, allowing for greater flexibility in the use of water resources and greater drought resiliency. Importantly, the settlement establishes a process for quantifying and protecting water rights on public domain allotments.

H.R. 644 authorizes a \$198.3 million for a water development fund to be used by the Nation to meet future water needs on the reservation. Early on in the negotiations, the parties proposed that Reclamation plan, design and construct features of a Utah Navajo Regional Water Project, comprised of two San Juan River water treatment plants, one near Montezuma Creek/Aneth area and another near Monument Valley. However, in evaluating the project plans and cost estimate, Reclamation identified deficiencies that would have required significant time and effort to

resolve and could have led to project cost overruns in the future. The United States and the Nation agreed to simplify the settlement by making it a fund based settlement. This fund based settlement affords the Nation economic efficiency, greater flexibility, and tribal self-sufficiency in meeting its future water needs on an as needed basis. This approach also protects the United States from future financial demands associated with cost overruns. H. R. 644 also includes \$11.4 million to establish an operation and maintenance fund to cover the initial operation and maintenance costs associated with projects constructed from the water development fund and \$1,000,000 for a survey of all current water uses on the Navajo Utah Reservation.

In 2018, the Department worked with the Nation, the State of Utah and congressional staff to develop legislative language that would reflect the revisions to the settlement agreed to by the parties. This consensus language is reflected in the current Senate bill S. 1207, which the Department supports. H.R. 644 is largely consistent with the settlement revisions agreed to by the parties and with S. 1207, but there are minor inconsistencies. The Department looks forward to working with the bill sponsor and the Committee to revise H.R. 644 consistent with the negotiated settlement and S. 1207.

H.R. 2459 - Hualapai Tribe Water Rights Settlement Act

Background

The Hualapai Tribe's aboriginal homeland is located in the Grand Canyon and plateau region to the south of the Grand Canyon. The Tribe's main Reservation was established on January 4, 1883 by Executive Order, and is comprised of approximately 992,462 acres of tribal trust lands in northwestern Arizona. The tribal headquarters is Peach Springs, Arizona, near the southern boundary of the Reservation. The northern boundary of the main Reservation is 108 miles along the Colorado River in the Grand Canyon. There is also a 60-acre Executive Order Reservation located in the Bill Williams River basin, approximately 40 miles south of the main Reservation.

The population of the Reservation is 1,621, of whom 1,353 are tribal members, according to the 2010 U.S. Census. The total tribal membership in 2010, including members living off the Reservation, was 2,300. The majority of on-Reservation residents reside in or near Peach Springs.

The main Reservation is located primarily in the Colorado River basin with a small portion in the Upper Verde River basin. The majority of on-Reservation streams are ephemeral. Several springs discharging from the regional aquifer at the bottom of the canyons can provide baseflow for short perennial reaches, which ultimately discharge to the Colorado River. The largest of these perennial streams are Diamond Creek and Spencer Creek, with mean annual flows of over 3,700 acre-feet per year (afy) and 4,600 afy, respectively. The springs that feed these streams are remotely located in deep canyons and are not practically accessible for use by the Tribe.

Groundwater resources on the Reservation occur in varying degrees of magnitude, depending on the type and location of water-bearing zones. In order to determine the extent to which groundwater will play a role in the settlement, the Department, through the United States

Geological Survey (USGS), is conducting groundwater studies to accurately characterize the groundwater resources on and near the Reservation. One study has been published, a second is scheduled to be published this month, and the final study is scheduled to be published in December 2019.

The major water use on the Reservation occurs in two locations: The town of Peach Springs and Grand Canyon West. Current cumulative water use for the Reservation is approximately 300 afy and is derived from groundwater.

The Tribe claims water rights in the Colorado, Verde, and Bill Williams River basins. Negotiations regarding potential settlement of the Tribe's water rights claims have been ongoing since 2011, when the United States established a negotiating team to negotiate a comprehensive settlement of all the Tribe's water rights in Arizona. The negotiations were divided into two phases; the first phase addressed reserved water rights to several off-reservation tracts in the Bill Williams River basin and resulted in the Bill Williams River Water Rights Settlement Act of 2014, P.L. 113-223. The second phase, addressed in H.R. 2459, covers additional water rights in the Bill Williams River basin, as well as the remainder of the Tribe's water rights in the Colorado River basin and the Verde River basin.

H.R. 2459

H.R. 2459 would resolve the Tribe's remaining water rights claims in Arizona; ratify and confirm the Hualapai Tribe water rights settlement agreement among the Hualapai Tribe, the United States, the State of Arizona, and others; and authorize funds to implement the Settlement. The bill would reallocate 4,000 acre-feet of fourth-priority Central Arizona Project non-Indian agriculture priority water to the Tribe to be used for any purpose on or off the Reservation within the lower Colorado River basin in Arizona. The bill authorizes the appropriation of a total of \$173,500,000 for a variety of purposes associated with the design, construction, operation, maintenance, and replacement of the project.

Notwithstanding the Department's general policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation, the Department has serious concerns with the legislation as introduced, and therefore cannot support the bill.

The Department is particularly concerned about 1) the waiver of protections for the federal reserved groundwater rights; 2) the size and cost of the project; (3) the accuracy of the cost estimate. The Department also believes there is a less costly alternative to supply water that warrants further assessment. In addition, the United States has significant concerns regarding the overly-broad and unnecessary waiver of federal sovereign immunity. The Department testified on similar bills in the 114th and 115th Congresses and has expressed many of these same concerns to Members of Congress in both the Senate and the House.

The Department opposes the provisions of the Settlement that prohibit the Tribe and the United States from objecting to any use of groundwater outside the boundaries of the Reservation, even if those uses interfere with acknowledged Federal reserved groundwater rights. This provision would require a Tribe to significantly compromise its reserved water rights to groundwater and

would establish a deleterious precedent in Arizona and throughout Indian Country. Waiving these rights in a State that so heavily relies on groundwater is particularly concerning.

Second, the cost of the Settlement is approximately \$173.5 million in 2016 dollars. The centerpiece of the Settlement is a water supply project that includes a 70-mile pipeline from the Colorado River lifting water over 4,000 feet in elevation at an estimated cost of \$134.5 million. The Department is concerned about the scope, size, and phasing of the project given current and projected water uses on the Reservation. Most significantly, the present plan requires building facilities (such as intake, pumping and water plants) that may not be used for 40-50 years, if ever, creating unnecessary operations, maintenance and repair costs and the need to replace facilities before they are even used. Because it is based on an appraisal level cost estimate which the Bureau of Reclamation cautions is an insufficient basis for determining the true cost of the project, we believe the cost to construct the project will greatly exceed the costs currently contemplated in H.R. 2459.

Third, we have significant questions about the accuracy of the cost estimates for the project. For these reasons, the Department supports fund-based settlements which gives tribes the flexibility to determine over time what water supply projects best meet their needs.

The *Criteria and Procedures* require the Department to analyze whether the settlement “include[s] non-Federal cost sharing proportionate to the benefits received by the non-Federal parties.” We believe the State parties can and should contribute a commensurate share of the cost of the settlement in return for the benefits they will receive. The State contribution in this case is the firming of 557.5 afy, which is not commensurate with the benefit to the State of Arizona for a final settlement of all Hualapai water claims.

The Department recognizes that the Tribe, the State of Arizona, and the state parties want to achieve a Hualapai water settlement and have devoted substantial efforts to that goal. However, in our view, H.R. 2459, as introduced, is untenable. The Department remains committed to working with the Tribe and other interested parties to pursue a fund-based settlement acceptable to all parties.

H.R. 3292 Aamodt Litigation Settlement Completion Act

H.R. 3292 would amend the Aamodt Settlement Litigation Act (Settlement Act) to provide additional authorization for expenditure of both mandatory and discretionary appropriations to complete construction of the Pojoaque Basin Regional Water System. The Department has been working very closely with the four settlement Pueblos, the State of New Mexico, the County of Santa Fe and the City of Santa Fe and to reach an agreement with them concerning a revised design for the Pojoaque Basin Regional Water System and the Federal and non-Federal cost-share of additional funds needed to complete its construction. The Department has concerns with the legislation as introduced, but would like to work with the settlement parties and sponsors to craft amendments that could we could support.

Background

The Rio Pojoaque basin, immediately north of Santa Fe, New Mexico, is home to the four Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso. In total, the Pueblos hold approximately 51,000 acres of land in the basin. Like other pueblos in New Mexico, the four Pueblos were agricultural people living in established villages when the Spanish explorers first entered the area. The Pueblos' history is a complicated one that resulted in the Pueblos losing much of their aboriginal lands.

In a case from 1867, the Supreme Court held that the Pueblos were not Indian tribes within the meaning of the 1834 and 1851 Non-intercourse Acts. This meant that non-Indians were able to acquire Pueblo lands without regard to federal Indian law and as a result, there was significant loss of Pueblo lands to non-Indians. After almost forty years of loss of land and water rights, the Supreme Court reversed its decision and decided that the Pueblos were, in fact, covered by laws extending federal guardianship and protection. The Supreme Court's reversal of opinion threw the status of title to lands occupied by 12,000 non-Indians in New Mexico, along with the water rights exercised on those lands, into doubt. Congress sought to remedy the uncertainty by passing the Pueblo Lands Act of 1924 to "settle the complicated questions of title and to secure for the Indians all of the lands which they are equitably entitled."

Under the 1924 Act, if the non-Indians could persuade a special lands board that they had used and occupied Pueblo land for a period of time, the non-Indians were awarded title, and the Pueblo was supposed to be compensated for the value. In practice, this resulted in the non-Indians successfully claiming some of the most valuable, irrigable Pueblo farmland. The Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso collectively lost more than 4000 acres to claims by non-Indians under the 1924 Act. The compensation awarded by the lands board to the Pueblos was lower than actual appraised values. Congress followed up by enacting the 1933 Pueblo Lands Act, which provided additional compensation to the Pueblos and also expressly preserved the Pueblos' water rights. However, the compensation still did not fully remedy the losses to the Pueblo, and the Acts did not fully accomplish their purposes. While land titles may have been more or less resolved, title to water rights was not and uncertainty over title to water in the basin has continued.

The Aamodt Adjudication and Settlement

In a further attempt to resolve title to these Pueblos' water, a general stream adjudication was initiated in 1966. After decades of litigation, the parties negotiated a settlement agreement. The settlement negotiations were difficult for many reasons, including that the basin is chronically water short. The average annual surface water yield of the watershed is approximately 12,000 acre-feet per year, but claimed irrigated acreage calls for the diversion of 16,200 acre-feet per year. Deficits were addressed by using groundwater with the result that groundwater resources became threatened. The settlement seeks to control groundwater extraction in order to prevent impacts on surface water flows from excessive groundwater development. In order to allow junior state-based water right holders to continue to use water while still allowing the Pueblos the right to use and further develop their senior water rights, the settlement is centered on a regional water system, the Pojoaque Basin Regional Water System, that will utilize water imported from the San Juan basin to serve needs of the Pueblos and other water users in the Rio Pojoaque basin. As required by the *Criteria and Procedures*, the Aamodt Settlement provides

that, in exchange for the Regional Water System, the Pueblos and the United States waive and release claims that could be brought against the County and the City concerning injury to the Pueblos' water rights, and of claims that the Pueblos could bring against the United States, including breach of trust.

The Settlement Act provides that the Secretary shall “substantially complete” construction of a regional water system that is capable of diverting, treating, transmitting and distributing 2,500 acre-feet of water for the four Pueblos and up to 1,500 acre-feet of water for the County. Section 623(e)(4)(B) provides that if the Secretary does not achieve “substantial completion” of the Regional Water System by 2024, any of the four Pueblos can seek to have the final decree voided, thus voiding the settlement and all waivers and releases of claims.

The Cost-Sharing Agreement, referenced in the Settlement Act, provides that of “the \$177,300,000 in estimated Regional Water System construction costs as of October 1, 2006, the United States shall pay \$106,400,000 and the State and County shall pay the non-Federal share to be \$70,900,000.” With indexing to 2018, the total amount of Federal funding authorized to construct the Project under the Settlement Act is \$139.8 million and the non-Federal funding previously agreed to is \$91.0.2 million, for a total of \$231 million, \$213 million of which is construction costs.

The Secretary has determined the current total cost to design and construct the Regional Water System is approximately \$406 million in 2018 dollars, which exceeds the authorized amounts by \$193 million. The increase in costs is primarily due to the fact that the project costs were based on an appraisal level study, which grossly underestimated costs. Congress added section 611(g) to the Settlement Act to provide that if the costs to construct the Regional Water System exceed the amounts made available, the Secretary will initiate negotiations with the four Settlement Pueblos, the State of New Mexico, the County of Santa Fe and the City of Santa Fe to reach agreement on the non-Federal cost-share.

Accordingly, the Department has been working diligently with those parties on a 611(g) Agreement to share the cost of the additional funding needed to complete construction of the Regional Water System. The current draft of the Agreement would provide for \$137 million in additional Federal funding and a non-Federal contribution of approximately \$56 million to satisfy the estimated \$193 million funding shortfall. Like the Settlement Act, the 611(g) Agreement negotiations are aimed at providing a substantial non-Federal contribution to ensure the State and County are invested in and supportive of the successful implementation of the settlement.

Significantly, the four Pueblos, the State, the County and the City have tentatively agreed to amend the definition of “substantial completion” to provide that if the Department expends all of the available Federal and non-Federal funding provided for in the Settlement Act and any additional authorized appropriations provided by Congress, the State, and the County, but cannot fully complete the Project due solely to the lack of additional authorized Project funding, the Project shall satisfy the Settlement Act's requirement of substantial completion. This amended definition would provide certainty that there will be no future request for additional Federal funding. The current draft of the 611(g) Agreement also provides a consensus design concept for

the Project, which would incorporate \$15 million in savings that the four Pueblos, the State, the County and the City agreed upon. The 611(g) Agreement would also provide for the extension of all dates related to substantial completion of the Project.

H.R.3292

The bill adds a definition of the 611(g) Agreement, and directs the Secretary to execute the 611(g) Agreement, amended as necessary to conform with the provisions of the legislation. The bill would authorize \$150 million, indexed from 2018 until 2028, in additional Federal appropriations to construct the Regional Water System.

We note that the bill adjusts certain dates in the Settlement Act, but is inconsistent in the date extensions, which conflicts with the agreement¹. We would like to work with the sponsor to amend these provisions to more appropriately correspond with the extension of the final construction date of 2028 contemplated in the bill. The legislation as introduced either conflicts with or lacks many of the critical provisions that the four Pueblos, the State, the County and the City have tentatively agreed to as part of the 611(g) Agreement negotiations. Specifically, the Department is concerned with the increase in the Federal cost share to \$150 million from the \$137 million. We also note the amended definition of “substantial completion” is not expressly included in the bill. The Department believes inclusion of a new definition of “substantial completion” is necessary to make clear that once all available appropriations are expended, the Project be deemed complete, the waivers and releases will be permanent and the settlement will be final.

The Department is committed to the successful implementation of a cost-effective Aamodt Settlement that satisfies the mutual interests of the Federal government, the Pueblos, the State and the County, and that adheres to the Criteria and Procedures. We would like to work with the parties, sponsors and the Committee to craft a bill that we could support.

Conclusion

Thank you again for the opportunity to appear before the Committee today to provide the Department’s views on this legislation. We look forward to continue working with the Committee in support of Indian water rights settlements.

¹ H.R. 3292 as introduced extends the deadline in section 623(e)(2) of the Settlement Act, but retains the existing provision which provides that on or after June 30, 2021, one or more of the Pueblos can request the Secretary confer with them concerning whether the criteria for substantial completion will be met by June 30, 2028, rather than June 30, 2024 as originally provided. The bill also extends the deadline in section 623(e)(5)(A) to provide that one or more of the Pueblos can seek to void the final decree by June 30, 2028, rather than June 30, 2024, but retains the existing deadline of June 30, 2023, by which one or more of the Pueblos can first seek to void the decree.