



**THE TOHONO O'ODHAM NATION OF ARIZONA
TESTIMONY OF THE HONORABLE EDWARD D. MANUEL, CHAIRMAN**

**U.S. HOUSE OF REPRESENTATIVES HOUSE NATURAL RESOURCES COMMITTEE
LEGISLATIVE HEARING ON H.R. 1904, THE INDIAN WATER RIGHTS SETTLEMENT
EXTENSION ACT**

April 4, 2019

INTRODUCTION

Good morning Chairman Grijalva, Ranking Member Bishop, and distinguished Members of the Committee. My name is Edward D. Manuel and I am the Chairman of the Tohono O'odham Nation, a federally recognized tribe with more than 34,000 members located in southern and central Arizona. As the Committee is aware, water is a vital resource for my tribe and other tribes in the desert Southwest. Centuries of non-Indian encroachment into tribal homelands has led to the depletion of water resources and widespread damage to our way of life and to the broader environment. At the same time, the substantial difficulty in identifying and committing federal resources necessary to fully and fairly resolve water rights claims has led to uncertainty for tribes and non-Indians alike. This uncertainty is badly compounded by chronic underfunding of already-enacted tribal water settlements.

Given these realities, long-term, stable funding sources for water settlements are critical not only for tribes seeking water settlements but also those facing implementation challenges with existing water settlements. One potential source for reliable settlement funding is the Reclamation Water Settlement Fund, created as part of the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11). However, virtually all of this Fund is dedicated to particular settlements, and therefore potentially unavailable to provide a source of funding for numerous other existing and pending settlements.

As one of the first tribes in the United States to enter into a federally-approved water rights settlement, the Southern Arizona Water Rights Settlement Act, Pub. L. 97-293 (1982) (SAWRSA), as amended, Pub. L. 108-451 (2004), as well as a tribe with water rights that are currently the subject of ongoing active settlement negotiations, the Nation is able to provide a unique perspective on these issues. Permanent extension of the Reclamation Water Settlements Fund in a way that ensures a source of funds to implement existing settlements such as SAWRSA (something the Fund currently does not do), as well as a reliable source of funds for future settlements, would go a long way toward ensuring the certainty and viability of these settlements.

The Nation greatly appreciates the leadership of Chairman Grijalva, Senator Udall, and the this Committee concerning these important issues and I am grateful for the opportunity to testify today.

I. The Nation's Water Resources

The Tohono O'odham Nation's reservations in southern and central Arizona are among the largest in the United States, collectively comprising more than 2.7 million acres. The O'odham have cultivated this land for centuries, growing all manner of crops to support their way of life. Writing in the mid-19th century, a former Superintendent of Indian Affairs for the Arizona Territory noted:

The [O'odham] inhabit that triangular space of arid land bounded by the Santa Cruz, Gila and Colorado rivers, and the Mexican boundary line." ". . .and here they have lived and planted and watched their flocks and herds ever since. . ." "They raise wheat, corn, barley, beans, peas, melons, and pumpkins, and are experts in the manufacture of pottery and willow-ware. In harvest time they spread all over the country as reapers and gleaners, returning with their wages of grain for winter." "They have horses, cattle, sheep, poultry, and a great number of dogs." "As these Indians were found in possession of the soil, they cultivate and have maintained themselves there continuously ever since, it would seem equitable that their rights should be recognized by the Government of the United States.¹

A later visitor noted that "where floods occurred, the water spread out in a thin sheet over the valley" in the O'odham homelands, "doing no damage."² These same reports noted that "[a]s late as 1873 the valley was covered with grass."³ In the late 19th century, a U.S. Indian Agent described the Nation's San Xavier Reservation as:

[N]aturally more valuable than any other piece of land I have seen in the [Arizona Territory], because the water of the Santa Cruz River rises to the surface and flows almost 2 miles before leaving the Indian land. Here is also fully a thousand acres of the finest grazing land and more than seven thousand acres of the largest mesquite timber in the territory.⁴

Throughout the late 19th and into the 20th centuries, encouraged by the federal government, the O'odham improved and expanded their existing cultivation at San Xavier and developed thousands

¹ *Water Rights of Ak Chin Indian Reservation, Ft. McDowell Indian Reservation, Gila River Indian Reservation, Papago Indian Reservation, and Salt River Pima-Maricopa Indian Reservation: Hearings Before the Senate Committee on Interior and Insular Affairs*, 94th Cong. 416 (1975) (1975 Senate Hearing) (testimony of Tohono O'odham Nation (Papago) Chairman Cecil B. Antone, quoting 1863 Report of Charles D. Poston, Superintendent of Indian Affairs, Arizona Territory).

² Clotts, H.V. 1915. *Report on Nomadic Papago Surveys*, at 59 (U.S. Department of Interior).

³ *Id.*

⁴ 1975 Senate Hearing at 417.

of additional acres of farmland in the northern portion of the Main Reservation in the Sif Oidak District.⁵

During the same period, however, non-Indian settlement and water use drastically undermined the Nation's use of its water rights. For example, east of the Nation's Main and San Xavier Reservations, mining, irrigation, and the growth of nearby Tucson created "a serious imbalance between existing supply and demand," resulting in "significant, long term declines in local groundwater levels."⁶ By 1975, "the surface flow of the Santa Cruz River...disappeared. Except for a few small Mesquite, the forest of trees...vanished; and due to the lack of water all farming, except for...800 acres [was] destroyed."⁷ The damage to the Nation's reservation and water supply ultimately led the Nation and the United States on the Nation's behalf to file suit against major water users.⁸ Meanwhile, similar actions by non-Indians along the northern boundary of the Nation's Main Reservation depleted the water table within the Sif Oidak District "to a point where many of the existing wells went dry and irrigation had to be abandoned."⁹

This damage was further exacerbated by decades of inaction and mismanagement by the federal government, and by the encouragement of off-reservation irrigation through Reclamation loans and low cost preference-rate federal power, representing a comprehensive and profound failure on the part of our trustee to protect our water rights.

As the Nation indicated in testimony before the Subcommittee on Indigenous Peoples earlier this year, climate change and drought also have negatively impacted our water rights by reducing recharge to our groundwater aquifers and surface water for livestock and wildlife.¹⁰ These conditions also threaten reliable delivery of Central Arizona Project (CAP) water, a source of water that is critical for the Nation's SAWRSA water settlement discussed below, for a potential future comprehensive settlement of the Nation's water rights, and for the mitigation of the damage to the Nation caused by non-Indian reliance on groundwater.

II. Chronic Underfunding of an Existing Settlement: The Southern Arizona Water Rights Settlement Act

The Nation settled a portion of the substantial water rights claims relating to its reservation lands through SAWRSA and its amendments. Under this settlement, the Nation gave up its significant claims concerning damages to groundwater and surface water in the far eastern portion of the Nation's Main Reservation and in San Xavier District.¹¹ In exchange for releasing these claims, the United States promised that the Nation would receive reliable, affordable, and long-term access to CAP water. Unfortunately, federal funding problems have prevented the full implementation of SAWRSA. If these problems are not fixed, the Nation will not receive the benefit of its bargain, and may lose access to its water entitlements, forcing the closure of long-operating farms in which the

⁵ 1975 Senate Hearing at 418-423.

⁶ S. Rep. 97-568 at 38 (1982).

⁷ 1975 Senate Hearing 421-422.

⁸ S. Rep. 97-568 at 40.

⁹ 1975 Senate Hearing at 423.

¹⁰ *The Impacts of Climate Change on Tribal Communities: Hearing before the House Natural Resources Subcommittee on Indigenous Peoples*, 116th Cong. (February 12, 2019) (Testimony of Tohono O'odham Nation Vice Chairman Verlon Jose at 1), available at <https://naturalresources.house.gov/imo/media/doc/VernonJoseTestimony02.12.19.pdf>.

¹¹ See generally Pub. L. 108-451 at Title III.

Nation has invested millions of tribal dollars, layoffs for tribal employees, default on crop loans, and the breach of related water settlement agreements.

To address ongoing charges associated with the delivery of the Nation's CAP water entitlement, SAWRSA created the "Cooperative Fund" as part of the Nation's settlement and identified several different sources of funding from different parties, for this fund:

- A \$16 million federal dollar contribution;
- A separate \$5.25 million federal contribution;
- \$5.25 million from other parties.¹²

The settlement further provided that only the interest (and not the principal) may be spent. In the 1980s, the two \$5.25 million contributions were made. However, the \$16 million contribution was never made. Accordingly, Congress provided, through the 2004 amendments to SAWRSA, for the addition of a second \$16 million in principal.¹³ However, like the first \$16 million, this second \$16 million federal contribution was never made, whether through a stable fund like the Reclamation Water Settlements Fund, or through Interior's annual appropriation process.

Had federal contributions been deposited as intended, the principal and accrued interest on these additional deposits would ensure reliable access to the Nation's water entitlement for decades to come. Instead, the Cooperative Fund is dangerously undercapitalized. The Tohono O'odham Farming Authority (TOFA), a tribal enterprise, operates two large farms that – thanks in large part to the injuries described above – depend nearly exclusively on CAP water. TOFA has invested millions of dollars in the development of these farms in reliance on its settlement, and pays for substantial crop loan with the revenue generated by these farms. Many full time employees and numerous seasonal workers depend on these farms for their livelihoods. What is more, the settlement agreement commits the Nation to annually deliver 10,000 acre-feet of the Nation's CAP entitlement to other entities.¹⁴ The depletion of the Cooperative Fund would force the Nation to either divert scarce financial resources from other parts of its government, or face the elimination of CAP water deliveries and suffer the closure of its farms, the loss of its farm developments and associated jobs, the default on its crop loans, and the potential breach of its related settlement obligations.

The Nation has suffered decades of injuries to its water rights, brought on by non-Indian surface water diversions and damage to our groundwater, often aided and abetted by the federal government. These injuries are further compounded by settlement implementation roadblocks and funding shortfalls. While we continue to work with Interior on short term funding solutions, unless SAWRSA is fully implemented, the Nation will not be able to receive the long-term benefits of the substitute water supply promised to the Nation in the settlements.

¹² See Pub. L. 97-293 at Sec. 313(b).

¹³ See Pub. L. 108-451 at Sec. 310(a)(2).

¹⁴ *Id.* at Sec. 307(a)(1)(G)(i)(II).

III. The Need for a Reliable Source of Funds for the Nation's Contemplated Future Comprehensive Settlement

SAWRSA settled the Nation's water rights claims to a little over 100,000 acres – less than 1/20th of our reservation lands. Water rights claims associated with most of our remaining ±2.6 million acres of land are the subject of ongoing settlement negotiations with the Department of the Interior.¹⁵ As these negotiations progress it will be critical to identify, as part of the settlement's legislative component, a reliable source of funds. Such a funding source would avoid the fiscal problems that have plagued the Nation's SAWRSA settlement, provide for the timely construction of authorized water projects, and ensure that the comprehensive settlement of the Nation's remaining water rights claims is final and fully implemented. A reliable funding source should also provide technical support to tribes like the Nation as part of what is a notoriously time consuming and expensive process.

Unfortunately, resistance to adequate funding for Indian water rights settlements through congressional appropriations have stymied both past attempts at implementing existing settlements like SAWRSA and the funding of comprehensive settlements like the one under negotiation for the Nation. The extension of the Reclamation Water Settlement Fund in perpetuity would greatly contribute toward this kind of funding stability. However, it is important to be clear that extension of the Fund is only one part of the solution. Given the substantial funding backlogs already faced by the Reclamation Water Settlement Fund, it also is critical that Interior and other federal agencies implement water settlements by using discretionary funding through the annual appropriation process. In so doing, these agencies should prioritize funding based on whether a settlement already has been authorized and whether the settlement actually has been implemented to a greater or lesser extent. Without this commitment from appropriate federal agencies, water settlement funding and implementation will remain incomplete.

CONCLUSION

The Nation appreciates the Committee's interest in this critically important issue, as well as the opportunity to share our unique history and perspective. Our water resources are an essential part of who we are as O'odham, and we look forward to working with you as our trustee to secure the federal funding necessary for their protection. This concludes my prepared remarks. I am happy to answer any questions that the Committee may have.

¹⁵ Certain other land and water rights claims associated with the Nation's 10,000-acre Gila Bend Reservation were separately settled through the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. 99-503 (1986).