

S. HRG. 114-62

ADDRESSING THE NEEDS OF NATIVE  
COMMUNITIES THROUGH INDIAN WATER  
RIGHTS SETTLEMENTS

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HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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

WEDNESDAY, MAY 20, 2015

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. John Barrasso, Chairman of the Committee, presiding.

## OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

The CHAIRMAN. Good afternoon. I call this hearing to order.

First, I want to draw attention to the Department of Interior's pattern of violating Committee rules regarding the delivery of testimony. This is the second consecutive hearing and the third time this year that testimony from the Department of the Interior is late. This lateness is unacceptable. It is disrespectful to this Committee and to the Senate, as well as disrespectful to other witnesses, and a complete disregard for the importance of the issue ahead of us today.

This Committee has options as to rectify the lateness issue. I would prefer that as Deputy Secretary, that you personally, Mr. Connor, rectify this matter within your department. I hope this Administration will take Indian Affairs more seriously and submit the testimony in a timely manner from here on out.

As you know, this topic today is water, and water is the life blood of our communities. Without it, many communities would not have safe drinking water. They couldn't irrigate fields, grow crops or raise horses, cattle and buffalo. Economic opportunities and jobs would be lost without water.

As trustee, the United States has an important obligation to address Indian water rights. Over a century ago, an important Supreme Court case, *Winters v. The United States*, paved the way for Indian tribes to settle their water rights. Since then, only a handful of Indian tribes have either litigated or settled their claims for water rights, and many more still need to be addressed.

Intensified by severe droughts across the West, there is an increasing competition for these limited water resources. To secure their rights, tribes can litigate their claims, which can be an expensive route for both the tribe and the Federal Government. In the

alternative, tribes can work with State, local and Federal officials to find a palatable solution advanced through a congressional settlement. Today's hearing will provide an opportunity to examine the most appropriate path forward in settling Indian water rights.

We also will explore the key barriers to moving these settlements through Congress. So I look forward to hearing from our witnesses today.

Senator Tester is unavoidably detained with other important Senate matters. He will be able to make his statement when he arrives.

Do any other members have opening statements? Senator Udall?

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Yes, just a short statement, Chairman Barrasso. I want to thank you and Vice Chairman Tester for holding today's important hearing.

Water settlements are incredibly important in the West. Resolving longstanding issues with Indian water rights is not only important for the economic development of the tribes but for long-term economic vitality for the States and surrounding communities.

In places like New Mexico, where water is the most precious resource, adjudication of water resources that is fair and beneficial to all is the upmost priority. I know Deputy Secretary Connor knows that well.

Indian water rights settlements are the way to ensure future certainty for water users, and allows for community collaboration. In the water space, I think it is very, very important we collaborate, rather than litigate.

With that said, I look forward to hearing from today's witnesses and yield back the balance of my time.

The CHAIRMAN. Thank you very much.

Any members on this side? Senator McCain?

**STATEMENT OF HON. JOHN MCCAIN,  
U.S. SENATOR FROM ARIZONA**

Senator MCCAIN. Mr. Chairman, thank you for holding this hearing on Indian water settlements. I can tell you first-hand how important and beneficial these congressionally-enacted Indian water settlements are to the tribes in my State.

Over the years, Congress has passed nine pieces of legislation to settle water claims in the State of Arizona involving the Ak-Chin, the Gila River Indian Community, the White Mountain Apache Tribe, the Salt River Pima-Maricopa Indian Community, the Fort McDowell Yavapai Nation, the Zuni Indian Tribe, the Prescott Yavapai Nation and much of the San Carlos Apache Tribe and the Tohono O'odham Tribe, although more work needs to be done on the last two tribes.

I had the honor, and all of us did, of working with Senator Jon Kyl, the premier water expert, not only in the Congress, but arguably in America. He personally developed at least six of these settlements during his service in the House and Senate, including the Arizona Water Settlements Act of 2004, which was the most impactful water settlement legislation in Arizona history, because

it resolved over 1 million acre-feet of water claimed by Indian tribes to the Central Arizona Project system.

My home State is fortunate that my colleague, Senator Jeff Flake, is a worthy successor to Senator Kyl when it comes to advancing future water settlements for tribes in Arizona.

Mr. Chairman, I will be brief, but today, Indian water settlements are critical in the face of the ongoing drought in the West. Each time Congress finalizes an Indian water settlement, it brings certainty in water budgets and water ownership for Indians as well as non-Indians. In past estimates, the combined total of all Indian claims in Arizona exceeded 3.6 million acre-feet of water. There isn't enough water or Federal funding to adjudicate these claims in Federal court or properly manage our water resources, which is why Congress has historically played a role in settling these claims legislatively.

Finally, these water settlements are important to the well-being of tribal members. As you know, most of these water settlements transfer Federal funding to tribal governments as compensation for releasing their claims. This funding is often used to build critical water infrastructure projects on reservations that deliver drinking water to very rural and impoverished tribal members.

For example, about 40 percent of the tribal members of the Navajo Nation currently haul their water. Congressional legislation to settle the Navajo's claim along the Little Colorado River is one way the Navajo Nation has proposed in past years to build a domestic water pipeline, turning their unusable "paper water" into "wet water" for human consumption.

I thank you again for holding this hearing. Again, Mr. Chairman, at least for those of us in the West and the Southwest, I don't know of a more critical issue than water. There is nothing more critical about the water issue, frankly, than settling the Indian water claims which are guaranteed to them by solemn treaty. And at the same time, if we are going to have a predictable water supply in States like mine and New Mexico and others, then we have to proceed with these water settlements.

I thank you, Mr. Chairman, for doing this, and I know we have a lot of water in Wyoming. I propose a pipeline that would send some of that down to Arizona and New Mexico.

[Laughter.]

Senator MCCAIN. I thank you, Mr. Chairman.

Senator UDALL. He could at least spare half the Green River, right?

[Laughter.]

The CHAIRMAN. Thank you, Senator McCain.

Senator MCCAIN. Maybe that could be our next hearing.

[Laughter.]

The CHAIRMAN. Senator Crapo?

**STATEMENT OF HON. MIKE CRAPO,  
U.S. SENATOR FROM IDAHO**

Senator CRAPO. Thank you, Mr. Chairman. I will be on the Senator from Wyoming's side on that issue.

[Laughter.]

Senator CRAPO. I have a statement, but I would just submit it for the record if the Chair will allow me.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Crapo follows:]

PREPARED STATEMENT OF HON. MIKE CRAPO, U.S. SENATOR FROM IDAHO

Thank you Mr. Chairman for holding this important hearing on Indian water rights settlements. Water resource management is a critical issue everywhere, but prolonged drought conditions and inherently arid regions in western states make this issue especially important to Idaho and its neighbors. Water is a shared resource that requires multiple interests to work together to manage effectively. When it comes to the quantification, allocation and management of water rights, multiple approaches may be employed. However, I am confident there is broad agreement on this committee, within the Administration and in Indian country that the negotiated settlement model is a far better approach than the litigation model. While negotiated settlements require serious time commitments and hard work among diverse stakeholders, the outcomes often enjoy broad and lasting support. Idaho is no stranger to the issue of water rights settlements involving Indian tribes. In fact, Idaho is a model for the type of success that can be achieved by the settlement model. For example, in 2004, Congress enacted the Snake River Water Rights Act, which was the culmination of negotiations in Idaho that achieved a fair, equitable, and final settlement of all claims of the Nez Perce Tribe and other parties with rights to Snake River water. Additionally, the Shoshone-Bannock Tribes successfully reached an agreement regarding water claims as part of this settlement effort. Other tribes in Idaho have had their water rights addressed through similar collaborative agreements codified by Congress and other efforts are currently underway. While Idaho has seen success in recent years on this issue, there are still challenges to be overcome as tribes, states and the Federal Government work on these types of agreements. As such, I look forward to hearing from today's witnesses and learning their perspectives on these issues. Once again, thank you for holding this hearing.

The CHAIRMAN. Senator Daines? I will note, Senator Daines, one of the folks testifying today is from your home State, the Assistant Attorney General from the State of Montana, the Honorable Jay Weiner. I didn't know if you wanted to make comments at this point.

**STATEMENT OF HON. STEVE DAINES,  
U.S. SENATOR FROM MONTANA**

Senator DAINES. Sure. Jay, it is great to have you here. Thanks for making the trip to D.C.

I want to thank you also for all of your hard work, particularly over the last few months, getting the Blackfeet Water Settlement ready for introduction. I am confident we have a bill that is ready to go forward.

I specifically want to thank you for your efforts to get stakeholders on and off the reservation to come to an agreement on areas such as Birch Creek and the Milk River. It is not an easy task. I commend you and thanks for being here today.

The CHAIRMAN. Thank you, Senator Daines.

We have four witnesses here today: The Honorable Mike Connor, the Deputy Secretary of the Department of the Interior; the Honor-

able Jay Weiner, the Assistant Attorney General, State of Montana; the Honorable Mark Macarro, Chairman, Pechanga Band of Luiseño Mission Indians; and Mr. Steven Moore, Senior Staff Attorney, Native American Rights Fund.

I want to remind the witnesses that your full written testimony will be part of the official hearing record, so I would ask you to please keep your statements to five minutes, so that we may have time for questions.

I look forward to hearing your testimony, beginning with Deputy Secretary Connor. Please proceed.

**STATEMENT OF HON. MICHAEL L. CONNOR, DEPUTY  
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR**

Mr. CONNOR. Chairman Barrasso, members of the Committee, first, Mr. Chairman, let me assure you, I heard you; message received with respect to the testimony. I will go back and work on that issue in particular.

I appreciate the opportunity to appear before you today to discuss Federal participation in Indian water rights settlements. The subject of Indian water rights settlements is one that I am very familiar with. I began my career at the Department of the Interior working on Indian water rights, then went back and served as the Director of the Secretary's Indian Water Rights Office. Through these and the other positions I have held, I have seen first-hand how water settlements can greatly benefit tribes and their members as well as neighboring non-Indian communities.

Drought and other water resource challenges and conflicts are dominating today's headlines. To say the least, uncertainty with respect to the availability of water is disconcerting. Yet it is something that tribes have been dealing with for well over a century.

Indian water rights settlements address this problem. Settlements have been and should remain a top priority for the Federal Government.

The Administration is proud of its record on settlements and we continue to be committed to them as an important way to address the needs of Native American communities. Indian water rights settlements are consistent with the general Federal trust responsibility and with Federal policy promoting tribal sovereignty, self-determination and economic self-sufficiency. This Administration's active involvement in negotiations has resulted in both significant improvements in the terms of settlements and substantial reduction in the Federal cost associated with recently-enacted settlements. We are currently involved in 18 ongoing negotiations around the West and are expecting that several will see action in Congress this year.

Disputes over Indian water rights are often expensive and divisive. In many instances, these disputes, which can date back 100 years or more, are a tangible barrier to socioeconomic development for tribes and significantly hinder the management of water resources. Settlement of these disputes can break down 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 these disputes.

Simply litigating title to water rights has not proven to be an effective solution for tribes or their neighbors. Litigation often lasts for decades at a great cost to all parties. A judicial decree does not provide wet water 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 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 the strict principles of seniority and priority date.

Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertainties in State and Federal law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero sum logic of prolonged litigation.

Although Congress' enactment of 29 Indian water rights settlements represents progress, much more remains to be done. Excluding Alaska, there are 277 federally-recognized tribes in the West alone. 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.

Given the ongoing challenges related to water resource management, the needs and demands in Indian Country are likely to escalate. 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 on these settlements by Reclamation has come out of Reclamation's budget, and trust funds and other settlement costs generally have come out of the Bureau of Indian Affairs budget.

In some recent settlements, Congress has included provisions for a variety of mandatory funding mechanisms. The Claims Resolution Act in 2010, for example, provided approximately \$650,000,000 of direct funding for the water rights settlements enacted therein, plus an additional \$180,000,000 for funding the Navajo-San Juan settlement enacted in the 2009 Omnibus Public Lands Act.

Another approach that Congress took in the Omnibus Public Lands Act was the creation of a 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 the Bureau of Reclamation. These funds are direct spending, not subject to further appropriation and we estimate that all the funds in the Reclamation Water Settlement Account will be fully obligated by existing authorized settlements, depending on the level of discretionary funding these settlements receive.

Some are characterizing water rights settlements as earmarks. This is not the case. The Supreme Court's decision in the Winters doctrine establishes the senior rights of tribes to water necessary to fulfill the purposes of the reservation.

Water rights and related resources are trust assets of tribes and water rights settlements enable the Federal Government to protect and enhance those assets. When negotiated in accordance with the Administration's approach, settlements approved through this process are not earmarks.

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 in partnerships to improve water management practices in some of the most stressed water basins in the Country.

Thank you for the opportunity.

[The prepared statement of Mr. Connor follows:]

PREPARED STATEMENT OF HON. MICHAEL L. CONNOR, DEPUTY SECRETARY, U.S.  
DEPARTMENT OF THE INTERIOR

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 settle-

ments 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 out-

standing 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.<sup>1</sup> 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.<sup>2</sup> 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.

The CHAIRMAN. Thank you very much, Mr. Connor. Senator Tester?

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman. Thank you, Mike, for your work. I very much appreciate it.

It is good to have Jay Weiner here. Jay and I worked together on a number of projects throughout the years. I appreciate your expertise. And I wanted to recognize President Azure from Fort Belknap, who also has a water settlement that we need to be working on. It is good to have you here.

I just want to say one thing. First of all, I didn't hear the Chairman's opening statement, but he did talk about the documents getting in late. It is really important we get them in on time. It allows Committee members and their staff to scrutinize them. We actually do read what you put in to us. So it is important, and I want to encourage you to get them in on time after this.

Look, real quickly on water settlements, it deals with money. I have a bill, S. 1365, that devotes \$35 million a year for the next

<sup>1</sup> 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.

<sup>2</sup> *Id.*

20 years to pay for tribal water rights settlements. These are big dollar items. They need to be built. They not only affect the tribes, but they also affect the communities around those reservations. So it really is a win-win deal in water infrastructure, something that we are very, very short of in this day and age.

With that, thank you, Mr. Chairman, for your courtesy.

The CHAIRMAN. Thank you very much, Vice Chairman.

Next we have the Honorable Mark Macarro. Thank you very much for being here. We await your testimony.

**STATEMENT OF HON. MARK MACARRO, CHAIRMAN,  
PECHANGA BAND OF LUISEÑO MISSION INDIANS**

Mr. MACARRO. Good afternoon, Chairman Barrasso, Vice Chairman Tester and members of the Committee. Thank you.

My name is Mark Macarro and I am the Chairman of the Pechanga Band of Luiseño Indians in southern California.

I am honored to testify today about the importance of Indian water settlements and their role in addressing the needs of Native communities. This topic is particularly relevant today given the declining and deteriorating condition of water resources in my home State of California. The lack of precipitation in California has placed a much higher strain on the precious groundwater that we have traditionally relied upon.

Water is central to who we are as a people. In fact, it is in my tribe's name. Pechanga means "at Pechaa'a, the place where water drips." It is named after a spring that my reservation is named after.

Today my people reside on a reservation of over 7,000 acres in Temecula, which is north of San Diego, about an hour. This has been our home for over 10,000 years. However, the water crisis in our region threatens not just the future vitality of my community, but our identity as Pechanga people.

Unfortunately, the conditions that restrain Pechanga's ability to receive wet water in the Temecula Valley also affect tribal communities all over the Country, particularly in the West. Yet tribal water rights remain unprotected and tribes struggle to have their water rights settled.

Since 2009, the Pechanga Band has pursued a Federal water settlement to provide our people wet water and to meet the Band's water needs for generations to come. However, there simply isn't enough groundwater for this purpose. That is why the Pechanga Water Settlement is the product of a unique collaboration between the Band, regional stakeholders and the United States that would not only settle the Band's longstanding water claims in the Santa Margarita River watershed, but will also provide certainty for all water users within the watershed.

Prior to pursuing our Federal legislation, Pechanga worked with the local water agency, Rancho California Water District, and the regional water agency, Eastern Municipal Water District, and entered into two agreements to provide immediate water resources for Pechanga. These agreements with these entities currently provide the basis for us to manage the groundwater in the Wolf Valley Basin with Rancho. And they provide for an allocation of a 1,000

acre-feet per year of recycled water from Eastern for the Band to use in place of our precious groundwater.

These collaborative agreements are an example of how tribes can work with local partners to meet a region's current and future water needs, even if groundwater sources become depleted.

We then incorporated and amended these two agreements as part of the Pechanga water settlement that we are now pursuing in Congress. I should note that the legislation has not yet been introduced in the 114th Congress, but we are working with the bill's sponsors and plan to introduce it shortly.

Under the Pechanga water settlement, the Band and Rancho were able to come to a mutually beneficial settlement where Pechanga will now receive 75 percent of the Wolf Valley Basin ground water instead of 50 percent. And in exchange for Rancho providing Pechanga with a 25 percent allocation, Pechanga agreed to dedicate a certain portion of its recycled water allocation to Rancho.

The Pechanga water settlement also calls for the Band to use imported water from the Metropolitan Water District to meet its long-term needs through the delivery of imported potable water on a permanent basis. To facilitate use of imported water, the Pechanga water settlement calls for the parties to expand infrastructure, to improve delivery and reduce salinity in imported water. These efforts will benefit all users in the Santa Margarita Basin.

All elements of the settlement were carefully constructed to create an agreement that is beneficial to all parties involved, quantifies Pechanga's federally-reserved right to water in the Santa Margarita River Basin and recognizes the United States' trust responsibility to allottees on the Pechanga Reservation. That is why the agreement includes language to protect allottee rights that is consistent with other Indian water settlements pending before Congress.

This is also a cost-effective water settlement. Not only would the settlement include a modest Federal contribution of \$28.5 million, but it would also include non-Federal contributions from Rancho and Eastern.

The existence of Federal and non-Federal contributions not only demonstrates the pragmatic nature of this settlement but they illustrate the settlement's collaborative approach to protecting water resources. This is a model that can be useful in resolving water problems across Indian Country.

Finally, I would like to emphasize the importance of having the support of the Administration and Congress in not just pursuing but also funding Indian water settlements. We have struggled to find funding for our settlements' Federal contribution. We know other water settlements face similar problems. Ideally, the Department could identify funding for Indian water settlements in the President's budget in ways that could be supported by Congress. Indian water settlements would only become a reality with the collaboration of Congress and the Administration.

In closing, I cannot emphasize enough how important it is for Congress to enact Indian water rights settlements that will provide wet water to tribal communities. I respectfully urge this Committee

to support legislation like the Pechanga Water Rights Settlement Act and other creative solutions to water rights problems.

I would be happy to answer any questions you may have.  
[The prepared statement of Mr. Macarro follows:]

PREPARED STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF  
LUISEÑO INDIANS

Good afternoon Chairman Barrasso, Vice Chairman Tester, and members of the Committee. Thank you for scheduling an Oversight Hearing on “Addressing the Needs of Native Communities Through Indian Water Rights Settlements” and inviting the Pechanga Band of Luiseño Indians to testify.<sup>1</sup> As this Committee is keenly aware, the Pechanga Band of Luiseño Indians has been working to pass our Water Settlement in Congress since 2009.

In a State where water resources are extremely scarce and continue to drop to alarming levels, the Pechanga Water Settlement is especially critical for the Band and our tribal membership. The Pechanga Water Settlement and the underlying agreements to the overarching settlement agreement were drafted to achieve a creative way to not only settle once and for all the Band’s longstanding water claims in the Santa Margarita River Watershed, but also to provide the resources to meet the Band’s current and future water needs and provide the Band with “wet” water. Importantly, the Pechanga Water Settlement also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation and creates a win-win scenario.

Of course each Indian Water Settlement is unique and involves its own set of obstacles, yet there are some overarching issues that impact all Indian Water Settlements—namely, the Administration’s support of Indian Water Settlements and Congress’ commitment to identify ways to pay for them. We appreciate the opportunity today to share some examples of how the Pechanga Water Settlement will address the needs of our tribal community through its enactment and implementation and to speak to some of the obstacles we have encountered.

## **I. Background**

### *A. Background on the Pechanga Band*

The Pechanga Band of Luiseño Indians (the “Band” or “Pechanga”) is a federally recognized Indian tribe with a reservation of over 6,000 acres located northeast of San Diego, California, near the city of Temecula. Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Pechanga Reservation.

The Band has called the Temecula Valley home for more than 10,000 years. Ten thousand years from now tribal elders will share with tribal youth, as they do today, the story of the Band’s creation in this place. Since time immemorial, through periods of plenty, scarcity and adversity, the Pechanga people have governed ourselves and cared for our lands.

The history of the Band begins with our ancestral home village of Temeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the court granted in 1873. In 1875, the sheriff of San Diego County began three days of evictions. The Luiseño people were taken into the hills south of the Temecula River.

Being strong of spirit, most of our dispossessed ancestors moved upstream to a small, secluded valley, where they built new homes and re-established their lives. A spring located two miles upstream in a canyon provided them with water; the spring we have always called Pechaa’a (from pechaq = to drip). This spring is the namesake for Pechaa’anga or Pechaanga, which means “at Pechaa’a, at the place where water drips.”

On June 27, 1882, seven years after being evicted, the President of the United States issued an Executive Order establishing the Pechanga Indian Reservation.<sup>2</sup>

<sup>1</sup> While our federally recognized name is the Pechanga Band of Luiseño Mission Indians, we mostly use Pechanga Band of Luiseño Indians to refer to ourselves in recent years.

<sup>2</sup> Executive Order (June 27, 1882).

Several subsequent trust acquisitions were made in 1893,<sup>3</sup> 1907,<sup>4</sup> 1931,<sup>5</sup> 1971,<sup>6</sup> 1988,<sup>7</sup> and 2008,<sup>8</sup> each one increasing the size of the Reservation. At present, the total land area of the Pechanga Reservation is 6,724 acres.

Water is central to who we are as a people. Today, our tribal government operations, such as our environmental monitoring and natural resource management programs, exist to fully honor and protect the land and our culture upon it. In particular, we are concerned about watershed and wellhead protection for our surface and ground water resources and the availability of water for our community. Accordingly, it is of utmost importance to the Band that our water rights are federally recognized in order to protect our water in the basin and ensure that the basin will continue to provide for generations of Pechanga people in the future.

#### *B. History of Pechanga's Efforts to Protect its Water Rights*

The Band has been engaged in a struggle for recognition and protection of our federally reserved water rights for decades. In 1951, the United States initiated litigation over water rights in the Santa Margarita River Watershed known as *United States v. Fallbrook*.<sup>9</sup> The Fallbrook litigation eventually expanded to include all water users within the Santa Margarita Watershed, including three Indian Tribes—Pechanga, Ramona Band of Cahuilla Indians (“Ramona”), and Cahuilla Band of Indians (“Cahuilla”).

The United States, as trustee, represented all three Tribes before the *Fallbrook* Court. In a series of Interlocutory Judgments that were eventually wrapped into the Court’s Modified Final Judgment and Decree,<sup>10</sup> the Court examined and established water rights for various water users involved in the case. In Interlocutory Judgment 41 (IJ 41), the Court concluded that each of the three Tribes has a recognized federally reserved water right without specifying the amount of each of the Tribe’s water right. Although the Court did examine some facts in IJ 41 and developed “prima facie” findings with respect to each of the Tribes’ quantifiable water rights, final quantified rights were never established as a matter of law. As a result of IJ 41, all three Tribes have “Decreed” but “unquantified” federally reserved water rights.<sup>11</sup>

In 1974, Pechanga filed a motion with the *Fallbrook* Court to intervene as a plaintiff-intervenor and a party to the proceeding on its own behalf. In 1975, the Court granted Pechanga’s Motion and Pechanga filed a complaint to enjoin certain defendants from using more than their respective entitlements under the *Fallbrook* Decree. This complaint was subsequently resolved and the Band has remained a party to the *Fallbrook* proceedings ever since. Pechanga has not filed a motion to finally quantify its federally reserved water rights.

Until recently, we sought to avoid litigation and instead work with those entities around Pechanga to develop mutual private agreements for sharing the limited water resources in our basin. Specifically, in an effort to collaboratively develop a means of providing assured water supplies and cooperative management of a common water basin, the Band adopted an approach of negotiation and reconciliation with the primary water users in its portion of the Santa Margarita River Watershed, primarily the Rancho California Water District (RCWD) and the Eastern Municipal Water District (EMWD).

These efforts at negotiated management of water resources were successful and resulted in the Groundwater Management Agreement between the Band and RCWD in 2006, and a Recycled Water Agreement between EMWD and the Band in 2007, with the recycled water being delivered to the Band by RCWD. Both of these agreements have been successfully implemented and are in effect today. Significantly, though successful, neither of these agreements sought to address the scope of the Band’s overall water rights to the Santa Margarita River Watershed or settle its various claims related to the *Fallbrook* Decree.

Beginning in 2006 and continuing throughout 2007, the other two tribes in the Santa Margarita River Watershed, Ramona Band of Cahuilla Indians and Cahuilla Band of Indians, sought to intervene in the Fallbrook case to, among other things,

<sup>3</sup> Trust Patent (Aug. 29, 1893).

<sup>4</sup> Executive Order (Jan. 9, 1907) and Little Temecula Grant, Lot E (Mar. 11, 1907)(commonly referred to as the Kelsey Tract).

<sup>5</sup> Trust Patent (May 25, 1931).

<sup>6</sup> Trust Patent (Aug. 12, 1971).

<sup>7</sup> Southern California Indian Land Transfer Act, P.L. 110–581 (Nov. 1, 1988).

<sup>8</sup> Pechanga Band of Luiseño Mission Indians Land Transfer Act, P.L. 110–383 (Oct. 10, 2008).

<sup>9</sup> *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.).

<sup>10</sup> Modified Final Judgment and Decree, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Apr. 6, 1966).

<sup>11</sup> The Court in *Fallbrook* fixed the quantity of Pechanga’s federally reserved right at 4,994 AFY, on a prima facie basis.

quantify their respective water rights to the Santa Margarita River Watershed.<sup>12</sup> These efforts intersected the Band's otherwise successful efforts at negotiated management of joint water supplies and forced the Band to address in Fallbrook the scope of its own claims to water or risk being injured by the actions of the other two Tribes.<sup>13</sup>

In addition to participating as a litigant in the proceedings initiated by Ramona and Cahuilla, the Band also immediately started efforts to reach a settlement of its claims to water and claims for injuries to water rights relating to the Santa Margarita River Watershed. As part of its efforts to seek settlement of its claims to water, on March 13, 2008, Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through the formation of a Federal Negotiation Team under the Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.<sup>14</sup> The Secretary agreed to form a Federal Negotiation Team on August 1, 2008.

Since that time Pechanga has been working closely with the Federal Negotiation Team to effectively negotiate the terms of the settlement with the other parties and to resolve its claims against the United States in connection with the development and protection of Pechanga's water rights. Pechanga has also met with members of the Administration Working Group to discuss the Administration's outstanding concerns.

Pechanga has continued to meet with the Administration to discuss and address their outstanding concerns with the legislation and settlement, and feels confident that we will be able to achieve the Administration's support of the Pechanga Water Settlement in the near future. Pechanga also continues to work with the other settling parties, including RCWD, EMWD and MWD, to ensure that all of the parties remain supportive and committed to the Pechanga Water Settlement. Enactment of the Pechanga Water Settlement would benefit all of the parties to the Agreement and subagreements.

### C. Legislative History

#### 1. 111th Congress

The Pechanga Water Rights Settlement Act was first introduced in the 111th Congress. On December 11, 2009, Congresswoman Bono Mack, along with co-sponsors Congressman Calvert, Congressman Issa, Congresswoman Richardson, Congressman Grijalva and Congressman Baca introduced H.R. 4285 in the House. On January 26, 2010, Senator Boxer, along with co-sponsor Senator Feinstein introduced an identical bill in the Senate, S. 2956. Subsequently, the bill was reintroduced in the House by Congressman Baca, along with cosponsors Congressman Boren, Congressman Grijalva, Congressman Honda, Congressman Kildee, Congressman Lujan and Congresswoman Richardson in an effort to resolve some of the issues that the Administration raised with the legislation.

The Senate Committee on Indian Affairs held a hearing on S. 2956 on July 22, 2010 and ordered the bill to be reported favorably out of committee with amendments on November 18, 2010. The House Natural Resources Subcommittee on Water and Power held a hearing on H.R. 5413 on September 16, 2010.

At the close of the 111th Congress, the Band chose to pull back from seeking Congressional enactment of the bill in order to answer questions that tribal members and allottees had raised during the legislative process. It was critical to the Band that its membership and allottees be fully informed of the aspects and details of the legislation and settlement agreement. Thus, over the past three years the Band held a number of tribal member meetings to more fully discuss and explain the Pechanga Water Settlement and the benefits afforded under the legislation. The Band held a tribal membership vote on March 24, 2013, in which tribal members voted overwhelmingly in support of the proposed water settlement currently pending before the Committee. The Band felt this was a necessary and important step and as a result is now prepared to move forward to enact this legislation as expeditiously as possible.

<sup>12</sup>Ramona and Cahuilla are located within the Anza-Cahuilla Sub-Basin of the Santa Margarita River Watershed while Pechanga is located within the Wolf Valley Sub-Basin of the Santa Margarita River Watershed.

<sup>13</sup>Pechanga periodically filed status reports with the *Fallbrook* court apprising the Court of its progress towards reaching settlement. Pechanga also filed documents with the Court requesting that Pechanga be afforded the opportunity to weigh in when the Court considered issues of law and legal interpretations of IJ 41 with respect to Ramona and Cahuilla.

<sup>14</sup>55 Fed. Reg. 9223.

## 2. 113th Congress

On June 25, 2013, Senator Boxer, with Senator Feinstein joining as a co-sponsor, introduced S. 1219. On June 26, 2013, Congressman Calvert, joined by twelve co-sponsors, Congressman Tony Cardenas, Congressman Tom Cole, Congressman Paul Cook, Congressman Jeff Denham, Congressman Raul Grijalva, Congressman Duncan Hunter, Congressman Dorell Issa, Congressman Daniel Kildee, Congressman Doug LaMalfa, Congresswoman Betty McCollum, Congressman Raul Ruiz, and Congressman David Valadao, introduced H.R. 2508, the companion measure to S. 1219. The Senate Committee on Indian Affairs held a hearing on S. 1219 on September 10, 2013 and the bill was marked out of Committee as amended on April 2, 2014.

## 3. 114th Congress

The Pechanga Water Rights Settlement Act has not yet been introduced in the Senate or House during the 114th Congress, however, the settling parties remain supportive and have signed a letter in support of introduction of the bill again. Pechanga and Rancho California Water District are currently working with the bill's sponsors in the House and Senate, and plan to introduce the bill shortly.

## II. Structure of Settlement

The Pechanga Settlement Agreement is a comprehensive settlement agreement among Pechanga, the United States, and RCWD that incorporates a number of sub-agreements as exhibits to the overarching settlement agreement. The Pechanga Settlement Agreement includes the following agreements as exhibits:

- A. Amended and Restated Groundwater Management Agreement (“Amended GMA”);
- B. Recycled Water Agreement and Amendment No. 1 to the Recycled Water Agreement;
- C. Recycled Water Transfer Agreement;
- D. Recycled Water Scheduling Agreement;
- E. Recycled Water Infrastructure Agreement;
- F. Extension of Service Area Agreement;
- G. ESAA Capacity Agreement; and
- H. ESAA Water Delivery Agreement.

Together, the Pechanga Settlement Agreement and corresponding exhibits provide the necessary agreements to resolve Pechanga’s longstanding claims to water rights in the Santa Margarita River Watershed, secure necessary water supplies to meet Pechanga’s current and future water needs, and provide sufficient terms to make the settlement work for RCWD and its customers.

Unfortunately, there is insufficient groundwater within the Santa Margarita River Watershed to fulfill the Band’s claims to water.<sup>15</sup> To account for the limited water sources within the Santa Margarita River Watershed, the parties approached the Settlement negotiation process with an innovative attitude. The parties looked at all of the available water resources in the area, including groundwater, recycled water and imported water. The parties structured the Pechanga Water Settlement to utilize all of these water resources in such a way that not only fulfills Pechanga’s water rights but also provides attractive provisions for the water purveyors in the Basin and in California. Accordingly, the Pechanga Water Settlement includes a number of contractual agreements with RCWD, EMWD and MWD that brings together a variety of water sources through a resourceful approach.

There are three major components of the settlement:

### A. Amended Groundwater Management Agreement (“Amended GMA”)

The Amended GMA, between Pechanga and RCWD, is an integral part of the Pechanga Settlement Agreement, as it sets forth the terms and conditions governing the parties’ joint management of groundwater pumping from the Wolf Valley Basin and establishes an allocation of the safe yield of the basin. As discussed above, in 2006 Pechanga and RCWD entered into the Groundwater Management Agreement to manage the water in the Wolf Valley Basin. The parties established the safe yield of 2,100 AFY and provided each party with a 50 percent entitlement. Thus, under the existing Groundwater Management Agreement each party is entitled to 1,050 AFY. When the parties began negotiating the Pechanga Water Settlement, however,

<sup>15</sup>The need to import water to the Reservation is a fact that has been recognized by the federal team for a long period of time. Over pumping in the basin has significantly reduced water levels over time, which is one cause for the insufficient groundwater to satisfy the Band’s federally reserved water rights. One important aspect of the settlement is the establishment of groundwater pumping limits to protect the basin now and in the future.

Pechanga stressed the importance of an additional entitlement of groundwater. As a result of significant negotiations between the parties they agreed that once the Pechanga Water Settlement is passed, under the Amended GMA, Pechanga will be entitled to 75 percent (1,575 AFY) of the basin and RCWD will be entitled to 25 percent (525 AFY) of the basin. Additionally, in an effort to raise the level of water in the Wolf Valley Basin and provide storage water in years of water shortage, the Amended GMA establishes a Carryover Account between Pechanga and RCWD that provides for use of the Wolf Valley Basin as a storage aquifer for a defined amount of water to be used in shortage years. Thus, the Amended GMA not only satisfies 1,575 acre feet of water per year of the Band's entitlement to water, it also provides benefits to the entire region by improving the water levels in the Wolf Valley Basin.

#### *B. Recycled Water Agreements*

Another essential element of the Pechanga Settlement Agreement that complements the Amended GMA is RCWD's ability to use Pechanga's recycled water in partial consideration for their surrender of a portion of their current potable groundwater supply as pumped from the Wolf Valley Basin. In particular, Amendment No. 1 to Pechanga's Recycled Water Agreement<sup>16</sup> allows RCWD to utilize the unused portion of the entitlement Pechanga currently has pursuant to the Recycled Water Agreement and provides an extension of the term of the Recycled Water Agreement for 50 years with 2 additional 20 year extensions.

In conjunction with Amendment No. 1, the Pechanga Settlement Agreement incorporates the Recycled Water Transfer Agreement, the Recycled Water Scheduling Agreement and the Recycled Water Infrastructure Agreement. Together, these three agreements provide for the mechanisms and infrastructure necessary to provide RCWD with the ability to utilize Pechanga's unused portion of recycled water. More specifically, the Recycled Water Transfer Agreement provides that Pechanga agrees to transfer to RCWD a portion (not less than 300 AFY, and not more than 475 AFY) of the EMWD recycled water to which Pechanga is entitled pursuant to that agreement. The Recycled Water Infrastructure Agreement provides for the development and construction of facilities necessary for RCWD to utilize the recycled water allocated to it pursuant to the settlement. Lastly, the Recycled Water Scheduling Agreement provides the protocol for ordering and delivering the portion of Pechanga's allocation of EMWD recycled water to RCWD.

The Pechanga Water Settlement legislation, once passed, will provide the requisite funds to create the necessary infrastructure to make the recycled water agreements that are critical to the deal. Funds from the Pechanga Recycled Water Infrastructure Account will be used to pay for the Storage Pond (\$2,656,374), as are necessary under the Recycled Water Infrastructure Agreement to fulfill Pechanga's obligations to provide RCWD with a share of Pechanga's recycled water which Pechanga receives pursuant to the Recycled Water Agreement with EMWD.

#### *C. Imported Water Agreements*

Because the water supplies in the Band's portion of the Santa Margarita Basin are either too depleted to fulfill the Band's entire water needs in the medium to long term or are being used by other parties (primarily RCWD), the Band has agreed to use replacement water for the majority of its water uses in the future. Accordingly, another significant component of the Pechanga Settlement Agreement is comprised of the agreements necessary to provide MWD imported potable water to Pechanga to provide for the Band's water needs on a permanent basis. The Extension of Service Area Agreement (ESAA), is the primary agreement for providing MWD water to be used on the Reservation. The ESAA is a contractual agreement among Pechanga, EMWD, and MWD, that extends MWD's existing service area within the Band's Reservation to a larger portion of the Reservation, such that Pechanga will receive MWD water to augment its local pumped supplies.

In order to implement the ESAA, two additional agreements were necessary—the ESAA Capacity Agreement and the ESAA Water Delivery Agreement. The ESAA Capacity Agreement establishes the terms and conditions for RCWD to provide water delivery capacity of the ESAA water to Pechanga. The ESAA Water Delivery Agreement addresses service issues and billing issues related to the delivery of ESAA water to Pechanga.

The legislation provides funds from the Pechanga ESAA Delivery Capacity Account to pay for Interim Capacity (\$1,000,000) and Permanent Capacity (\$16,900,000) in accordance with the ESAA Capacity Agreement in order for RCWD to provide the requisite capacity to deliver groundwater and ESAA water to

<sup>16</sup>The Recycled Water Agreement, between Pechanga and EMWD, was executed on January 8, 2007 and provides Pechanga with 1,000 AFY of recycled water from EMWD.

Pechanga. To fulfill Pechanga's full entitlement of 4,994 AFY, Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley groundwater and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity. In the event that RCWD is unable to provide sufficient capacity, Pechanga would be forced to build its own infrastructure to deliver the imported water.

The legislation also authorizes \$5,483,653 in the Pechanga Water Fund Account for: (1) payment of the EMWD Connection Fee (approximately \$332,000); (2) payment of the MWD Connection Fee (approximately \$1,900,000); and (3) any expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement. In order to receive MWD water there are certain fees associated with connection to EMWD and MWD, in addition to the cost of the expensive MWD water. Hence, the Pechanga Water Fund Account provides the funds necessary for Pechanga to receive MWD water.

The EMWD Connection Fee, approximately \$332,000, will be paid to EMWD as an inlieu payment instead of standby charges which normally would be collected on an annual basis through the owner's property tax bill. Rather than have any fees that could be considered a tax on Pechanga, EMWD has agreed to a one-time payment by Pechanga for connection to EMWD. Similar to the EMWD Connection Fee, MWD normally provides extension of their service through annexations. Due to tribal sovereignty concerns, instead of going through a normal annexation, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD. Additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities. Under the ESAA, Pechanga has agreed to pay a one-time connection fee that amounts to approximately \$1,900,000.

As discussed above, as a result of the depletion of the Santa Margarita Basin water supply, Pechanga must obtain imported water from MWD as a replacement for its water from the Santa Margarita Basin. The United States has a programmatic responsibility to ensure that Pechanga's entitlement is fulfilled through replacement water, such as the MWD imported water, if existing water is unavailable.<sup>17</sup> The Pechanga Water Fund provides funds to bring down the cost of the expensive MWD imported water.

Lastly, the legislation provides for a Pechanga Water Quality Account in the amount of \$2,460,000 to pay for critical infrastructure and programs that will bring down the salinity in the basin, which of course benefits all users in the basin. The Band and RCWD are both committed to reducing the levels of brine and salinity in the Wolf Valley Basin, especially given the fact that the imported water from MWD has a higher salinity level than the groundwater in the Wolf Valley Basin.

### III. Recognition of Tribal Water Right

In addition to the contractual elements of the Pechanga Water Settlement that provide the "wet" water to the Band and make the overall agreement work for the other parties to the Pechanga Water Settlement, a critical element of the Settlement is recognition of the Band's federal reserved right to water (the "Tribal Water Right"). Both the Pechanga Settlement Agreement and the federal legislation recognize the Band's Tribal Water Right as being the same as it was established on a "prima facie" basis in the original *Fallbrook* Decree in 1965 of up to 4,994 AFY.

The Tribal Water Right will also be adopted and confirmed by decree by the Fallbrook federal district court. This is especially important for the Band as it constitutes the full recognition of its water entitlements under the Fallbrook Decree.

<sup>17</sup>For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. 108-451) included the Lower Colorado River Basin Development Fund that provided for a payment "to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(i) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlement Act)". See Sec. 107 (a)(2)(A).

#### IV. Protection of Allottee Rights

No Indian Water Settlement would be complete without specific provisions that explicitly protect allottees. The Pechanga Water Settlement is no exception. Pechanga has worked closely with the Federal Negotiation Team to ensure that the allottee rights on the Pechanga Reservation are adequately protected. First, allottees will receive benefits that are equivalent to or exceed the benefits they currently possess.<sup>18</sup> Furthermore, in accordance with Section 5(d) of S. 1219, 25 U.S.C. 381 (governing use of water for irrigation purposes) shall specifically apply to the allottees' rights. Under the legislation, the Tribal Water Code to be adopted by the Band must provide explicit protections for allottees-the Tribal Water Code must provide that:

- tribal allocations of water to allottees shall be satisfied with water from the Tribal Water Right;
- charges for delivery of water for irrigation purposes for allottees be assessed on a just and equitable basis;
- there is a process for an allottee to request that the Band provide water for irrigation use to the allottee;
- there is a due process system for the Band to consider a request by an allottee (appeal and adjudication of any denied or disputed distribution of water and resolution of any contested administrative decision).<sup>19</sup>

The inclusion of these provisions reflects the United States' most recent allottee language as was included in other recent Indian Water Settlements. As a result, the allottee language is consistent with other Indian Water Settlements pending before Congress, and provides allottees with the same protections provided to other tribal allottees. Again, explicit protections for allottees are another example of how Indian Water Settlements address the needs of Native Communities.

#### V. Non-Federal Contribution

Pechanga is cognizant that in addition to the Federal contribution, the non-Federal contribution to an Indian water settlement should be proportionate to the benefits received by the non-Federal parties under the settlement. The Band has insisted on such non-Federal contribution from non-Indian parties throughout the negotiations for this settlement and successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

For purposes of the Committee's understanding, we outline each of the non-Federal contributions to the settlement, including Pechanga's own contribution to the settlement.

##### A. RCWD Contribution

As discussed above, the Pechanga Settlement Agreement is a carefully structured settlement with the United States, RCWD and EMWD. Substantial efforts were made by all parties in order to reach settlement. One of the largest issues of contention during negotiations was the allocation of the groundwater in the Wolf Valley Basin. The previous Groundwater Management Agreement allocated 50 percent of the water to each party. For Pechanga, it was absolutely critical that the Settlement Agreement provide the Band with the majority of the safe yield. Thus, RCWD agreed to allocate an additional 25 percent of the Wolf Valley Basin to Pechanga as part of the settlement. Additionally, RCWD will wheel the MWD water under the ESAA to Pechanga in perpetuity and RCWD agrees to provide desalination and brine disposal for water utilized in the Wolf Valley, which will improve groundwater quality in the Wolf Valley Basin for both RCWD and Pechanga. RCWD's contribution to the Pechanga Settlement Agreement, therefore, involves more than a foregoing of its assertion of water rights, but rather, involves the implementation of a partnership to utilize, convey, and improve the quality of both local and imported water for both RCWD and Pechanga.

The monetary quantification of RCWD's contribution, measured exclusively upon its agreement to forego the right to 25 percent of groundwater in the Wolf Valley Basin, has been calculated at \$33,630,332. This calculation assumes that 25 percent of the Wolf Valley Basin equals 525 acre-feet per year, one-fourth of the agreed upon amount of the safe yield in the Wolf Valley Basin. It further assumes that RCWD's contribution will be equal to the rate it must pay for MWD water (as replacement for its share of groundwater from the Wolf Valley Basin), inflated at 3

<sup>18</sup> See Sec. 5(a) of S. 1219 of the 113th Congress.

<sup>19</sup> See Sec. 5(f).

percent per year, and an effective earnings rate on the amount expended of 3.5 percent. Utilizing these assumptions, the present value of RCWD's contribution is \$33,630,332.

#### *B. Pechanga Contribution*

As with many other Indian water rights settlements, the Pechanga Water Fund Account provides for a subsidy payment that partially fulfills the United States' programmatic responsibility to provide Pechanga with replacement water.

The Pechanga Water Fund Account amount was developed using the following financial assumptions:

- The Account is to be used to partially subsidize the cost of MWD water to reduce the cost of the water using interest earned by the account.
- The cost of MWD water was projected based on the published rates for an acre-foot of MWD Tier 2 Treated Water plus the EMWD charge of \$127.80 in 2010, escalated at four percent (4 percent) per year thereafter.
- The Account is projected to accrue interest at an average four percent (4 percent) rate of return.
- The amount of MWD water to be purchased each year was based on a general estimate of the projected water use in the proposed MWD service area that cannot be met from other sources.

While most subsidy funds for Tribes provide funds that will bring the cost of the imported water in line with local water, the Pechanga Water Settlement only seeks to subsidize 10 percent of MWD water such that Pechanga is bearing 90 percent of the cost of imported water.

#### *C. EMWD Contribution*

Although EMWD is not a party to the actual Settlement Agreement, EMWD's contribution is certainly proportionate to the benefits it will receive from the Settlement. Namely, the ESAA with MWD and EMWD is an absolutely critical component of the Settlement, without which it would be impossible to fulfill the Band's water entitlements. Moreover, EMWD agreed to extend the term of the Recycled Water Agreement with Pechanga and allow Pechanga to sell its unused portion of recycled water to RCWD, both of which were necessary to effectively settle with RCWD. In return for these contributions, EMWD will receive \$332,000 as Pechanga's connection fee to EMWD (discussed in further detail above). This benefit to EMWD is proportionate to the efforts EMWD has made in securing the ESAA with MWD and the amendments to the Recycled Water Agreement.

#### *D. MWD Contribution*

Like EMWD, MWD is not a party to the actual Settlement Agreement, however, MWD is a party to the ESAA, which as discussed above, is an exhibit to the Settlement Agreement. The ESAA is essentially the contractual equivalent of an annexation to MWD and EMWD, with the Band's sovereignty issues protected by contract in the ESAA. In 2009, Governor Schwarzenegger issued a State of Emergency for the State of California's drought situation. In response, MWD issued a press release recognizing the severe water supply challenges in California. MWD's press release further stated that MWD has taken a number of critical steps to address the drought, including the reduction of water supplies to member agencies and mandatory water conservation. As a result of California's drought and MWD's efforts to address these problems it is unlikely that MWD will be approving any annexations in the near future.

Accordingly, the ESAA with MWD and EMWD, which has already been approved in principle by the MWD Board is extremely important, without such agreement it would be nearly impossible for Pechanga to "annex" to MWD and receive water supplies to fulfill the Band's water entitlements. Moreover, under the ESAA, Pechanga will become a customer of MWD just like any other customer, such that Pechanga will be able to acquire water from MWD for its future water needs as those needs change. Therefore, as part of the Settlement and in order to fulfill the ESAA, MWD will receive \$1,900,000 as a connection fee from Pechanga to MWD. The value of becoming part of MWD's service area capable of receiving MWD water is invaluable and undoubtedly represents a proportionate contribution to the benefit, if any, MWD will receive.

### **VI. Congressional and Administrative Support**

One of the biggest problems that Pechanga has encountered in passing our Water Settlement is how the Administration will ultimately fund it. While our settlement is very small, only \$28.5 million in federal authorizations, especially in comparison

to many Indian Water Settlements, that has still continued to be the looming issue. The question of the day seems to be: How will Indian Water Settlements be funded?

Important to this question are two elements. First, the Administration must find ways to finalize negotiations on Indian Water Settlements to a point where they can publicly and through written letter “support” the water settlements. In 2010, the Department of Interior was able to issue support letters for the Indian Water Settlements that were passed as part of the Claims Resolution Act that effectively resulted in Congressional passage of the package. That commitment and support must continue and remain a priority for the Administration. Additionally, the Department should identify funding in the President’s Budget to pay for Indian Water Settlements.

Second, Congress can take a supportive role in identifying potential offsets for the Indian Water Settlements or work with the Administration to support funding in the President’s Budget. Together, the Administration and Congress play a critical role in making these Indian Water Settlements a reality and bringing the benefits of such settlements to the Native Communities.

### **VII. Conclusion**

As outlined above, the Band is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of “wet” water in replacement for its “paper” water rights. The negotiation process with RCWD, EMWD, MWD and the United States has been a long process that was aimed at examining the unique concerns and priorities of each party and implementing those priorities through contractual agreements that benefit everyone involved. Living in Southern California the Pechanga Band and our settling parties are faced with the constant struggle to identify available water resources and provides for our tribal membership and customers. We remain optimistic that Congress will enact the Pechanga Water Settlement to provide certainty to Pechanga and other Californians that are impacted by this settlement.

There is no one size fits all approach to Indian Water Settlements but there should be a commitment from the Administration and Congress to support and enact Federal legislation that resolve Indian Communities long-standing claims to water while also providing certainty to the non-Indians in the area and importantly find the funding to pay for them. Again, the Band views our Water Settlement as a win-win situation that will enable us to provide water to our tribal members for generations to come without having to pursue costly and time-consuming litigation.

In closing, Chairman Barrasso and members of this Committee, I would like to thank the Committee for holding an oversight hearing on this important issue in Indian Country. We appreciate the Committee’s interest in hearing how Indian Water Settlements can address the needs of Indian Country and we welcome the opportunity to answer any questions that you may have with respect to the Pechanga Water Settlement and how we are proposing to accomplish just that result.

The CHAIRMAN. Thank you, Mr. Macarro.  
Mr. Weiner?

### **STATEMENT OF JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA**

Mr. WEINER. Chairman Barrasso, Vice Chairman Tester, Senator Daines and members of the Committee, thank you very much for the opportunity to testify today on this important issue. Thank you also, Senator Tester and Senator Daines, for the kind words.

Montana has long invested in the settlement process and we are pleased that we have now, at the State legislative level, approved all seven of our settlements with our reservations in Montana. The Montana legislature most recently approved the Confederated Salish and Kootenai Tribes’ settlement in its just-concluded legislative session. All these settlements are the product of a tremendous amount of hard work on the part of State and tribal and Federal personnel. They are really collaborative efforts and Montana is very proud of the process that we have engaged in.

As you identified in your opening statement, Chairman Barrasso, and as many of you have, and as you have heard from the prior witnesses, these settlements are critical to address water allocation challenges and other resource challenges throughout the West, and certainly to the state of Montana. Tribal rights are very senior, but often largely, if not completely, undeveloped. This causes great uncertainty for even longstanding uses of water under State law, where we face the risk of being displaced by tribal development in the absence of settlement process.

Unquantified tribal rights also present significant challenges for the management and administration of State water, greatly complicating efforts like drought planning and water allocation, as well as the enforcement of water rights in times of shortage.

And unlike litigation, which as you have heard, and as many of you have identified, can quantify paper rights but does very little to address practical water issues, settlements afford an opportunity to resolve these potentially contentious issues in a manner that allows the recognition and development of tribes' legal entitlement to water in a manner that simultaneously protects State law based water rights and allows for the efficient administration and enforcement of both Indian and non-Indian water rights in a way that benefits everybody. Litigation simply does not afford those opportunities.

I mentioned that Montana is very proud of its settlement efforts. We have a unique process in Montana. Back in 1979, as part of our statewide water adjudication, recognizing that Indian and federal-reserved water rights needed to be incorporated in our adjudication, Montana created the Reserved Water Rights Compact Commission, which is a bipartisan State agency specifically tasked by the legislature and assigned a permanent staff of lawyers and technical personnel to negotiate these Indian water rights settlements and that we have found to be a very valuable process to allow us to recognize tribes' legal entitlements to water, to protect State law based water users, which has been one of the state's paramount goals in this effort, and to allow for the sorts of creative solutions that allow these not just to resolve the immediate allocation issues but to provide creative solutions and foundations for the economic improvement on reservations and for the neighboring communities. These are important drivers of our rural economies, and of the agricultural economy that is critical to a State like Montana.

The Blackfeet Water Rights Settlement, which has been reintroduced in this Congress as S. 1125, and whose passage the State of Montana strongly supports, thank you, Chairman Barrasso, is an excellent example of how these things can work and can solve some of these problems. Settlements do not solve every issue that is there. But they certainly can recognize and can try to facilitate the resolution of issues.

With the Blackfeet settlement, for example, we had to address the fact that the Bureau of Reclamation constructed one of its four original irrigation projects to serve over 100,000 acres of irrigated land significantly downstream of the Blackfeet Reservation by building infrastructure on the Blackfeet Reservation to divert water from one Blackfeet stream to another for use of those downstream irrigators. That was a source of significant grievance for the

tribe, because they have not received any direct benefits from that project for over a century that it has been in operation.

We were able through the settlement process to negotiate a way to recognize tribal water rights, to allow the tribe to receive those benefits in a way that protected that Bureau of Reclamation project. Similarly, there is a very significant private irrigation company whose origins trace back to the Carey Land Act of 1894, also known as the Desert Land Act that serves tens of thousands of acres south of the reservation and also provides municipal water from Birch Creek, which has been a source of contention on the reservation at least since 1908. There was an enforcement case down there the same year that Winters was decided.

And again through the settlement process, and through significant State contribution to the settlement, we have been able to find a way to resolve that water allocation issue on Birch Creek. It will require significant Federal contributions as well to help the tribe realize the benefits from these resources and from the State for what we have bargained for. But this is exactly the sort of thing that settlements allow for. These are important economic drivers. We strongly support this settlement.

Thank you again for the opportunity to testify today, and I very much look forward to answering your questions.

[The prepared statement of Mr. Weiner follows:]

PREPARED STATEMENT OF JAY WEINER, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA

Chairman Barrasso, Vice Chairman Tester, Senator Daines and other distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Jay Weiner, and I am an assistant Attorney General with the Montana Attorney General's Office. I have spent over a decade negotiating and working to secure the ratification and implementation of Indian water rights settlements in Montana.

Montana has been remarkably successful in resolving Indian water rights claims through settlement negotiations. We concluded our first settlement in 1985 with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, and in the recently concluded session, the Montana legislature approved a water rights settlement with the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation, marking the seventh and last settlement the State has approved with the Indian nations whose reservations are located in Montana. In between, Montana reached settlements with the Northern Cheyenne Tribe in 1991, the Chippewa Cree Tribe of the Rocky Boys Reservation in 1997, the Crow Tribe in 1999, the Fort Belknap Indian Community in 2001 and the Blackfeet Tribe in 2009. Congress approved the Northern Cheyenne Tribe-Montana settlement in 1992, the Chippewa Cree Tribe-Montana settlement in 1999, and the Crow Tribe-Montana settlement in 2010. The Blackfeet Tribe-Montana settlement was recently re-introduced in Congress by Senators Tester and Daines as S. 1125, and we are hopeful of securing final congressional approval of that settlement during this Congress. We anticipate that the CSKT-Montana and Fort Belknap-Montana settlements will also be brought before Congress for ratification when appropriate federal legislation is ready, and we look forward to those settlements being finally approved as well. These settlements were each the product of significant negotiation and compromise on the part of all of the negotiating parties—the respective Tribe, the State of Montana and the United States—and provide, through their resolution of the Tribes' legal claims to water rights, their administrative provisions, and the funding for tribal development of those rights, huge benefits to all Montanans, Indian and non-Indian, and to the United States as a whole.

The process of arriving at these water rights settlements is never an easy one. Montana, like most of our sister western states, subscribes to the prior appropriation doctrine to govern the allocation and use of our water resources. Under that doctrine, which is often described as "first in time is first in right," the first user of water on a source has a superior claim to that water over all subsequent water

users. That is, a senior—or earlier—user is entitled to the last drop of water he or she needs before the next, junior user is entitled to drop one. Because of the significant advantages conferred by seniority, Montana—again, like other prior appropriation states—limits the size of a water right to the quantity that the appropriator actually puts to beneficial use.

Indian water rights sit in awkward tension with these basic state water law principles as a consequence of the reserved water rights doctrine first announced by the United States Supreme Court in the 1908 decision *Winters v. United States*, 207 U.S. 564, which involved a dispute over the water rights of the Fort Belknap Indian Community in north-central Montana. This doctrine is grounded in the principle that in ceding millions of acres of land to the United States, tribes in no way intended to relinquish their ability to use water for the benefit of their homelands and reservations. In this way, *Winters* builds on a 1905 United States Supreme Court case, *United States v. Winans*, 198 U.S. 371, that recognized that the Indian treaties that led to the creation of many of today's reservations were grants of rights from Indian to the United States, not grants of rights to Indians from the United States. Under the *Winters* doctrine, tribal water rights are generally entitled to priority dates based not on when water was first put to beneficial use but rather on the date on which the particular Indian reservation was created. In the case of the Blackfeet Tribe, for example, that priority date is October 17, 1855, which is when the Blackfeet Tribe entered into a treaty with the United States at Fort Benton, Montana. That is a very senior date for a water right in Montana. Moreover, the *Winters* doctrine holds that the quantity of water entitled to that priority date is measured not by actual beneficial use, as with other water rights in Montana, but rather is the amount necessary to satisfy the purpose or purposes for which the reservation was created. That is a very nebulous standard, which is a significant reason why quantifying these water rights is a major challenge for states, tribes and the United States. But without quantification, tribes are hampered in their ability to make productive use of their water and non-Indian water right holders operate under the cloud cast by these very senior but otherwise unquantified Indian water rights which could potentially disrupt long-standing but legally junior uses of water if and when a tribe obtains the ability to develop its water. States are also constrained in their ability to administer and enforce water rights if large, senior tribal claims remain unadjudicated. A failure to account for tribal claims in state adjudications also raises problems for states' compliance with the McCarran Amendment, 43 U.S.C. § 666, which waived federal and tribal sovereign immunity to allow for the adjudication and administration of federal and Indian rights in state courts. All of these are potential sources of considerable conflict and acrimony. Montana has therefore long deemed it imperative to have these tribal rights quantified as quickly and efficiently as possible.

There are two ways to resolve Indian water rights claims: litigation or negotiation. Litigation is costly, divisive, zero-sum, and protracted. While litigation is sometimes nevertheless necessary, Montana made the choice when setting up our state-wide stream adjudication in 1979 to attempt to resolve these claims by negotiation whenever possible. To that end, our Legislature created the Montana Reserved Water Rights Compact Commission, a state agency specifically tasked with negotiating settlements with Indian Tribes (and federal agencies) claiming federal reserved water rights in the State of Montana. (I served the Compact Commission as a staff attorney for nine years.) To become fully effective, each of the settlements the Compact Commission negotiates must be ratified by the Montana Legislature, the respective Tribe and the United States, and then the water rights being recognized must be issued as a final decree by the Montana Water Court so that they are included as part of our state-wide stream adjudication. We are very proud that we have now successfully negotiated settlements with all of the tribes in Montana. Should any of those settlements fail to obtain federal approval, however, the tribal claims would need to be litigated before the Montana Water Court. This would be a long and costly process, fraught with uncertainty for the State, the Tribes and the United States. This is particularly true since the federal legislation approving these settlements also provide for the waiver of each tribe's claims for damages against the Federal Government related to the United States' failure to protect and develop the tribe's water resources. This avoids litigation exposure on the part of the United States, and is another crucial component of the finality that these settlements provide. The federal contribution to each settlement is in part consideration for the waiver of these claims.

The negotiating process is rarely simple, however. These are complex resource allocation issues that touch on some of the most sensitive areas of tribal-state relations. Not infrequently, there are historical grievances, and significant legacies of mistrust between tribes and states, and between tribes and their non-Indian neigh-

bors, that must be overcome. Litigation often serves to deepen these divisions, while a successful settlement can help heal them—by reducing the potential for actual conflict over water resources and allowing for a more collaborative future, and by improving lines of communication and fostering a climate of better mutual understanding. The negotiating process itself also presents significant technical challenges, as the negotiating parties must develop and share tools and information that allow for a shared assessment of water budgets, existing and potential future water uses, soil conditions, the feasibility of water delivery projects and other technical data that provide the foundation for a successful negotiated settlement. Some of this same data development process is necessary for litigation, but in litigation, the parties assemble their own data to prepare for a battle of the experts in court. In settlement negotiations, the parties' technical resources can be deployed to better practical effect (as well as more cost-effectively), creating the basis for successful settlement implementation and administration.

The Blackfeet settlement process provides a good illustration of these dynamics. There are six major streams on the Blackfeet Reservation, which meant that a great deal of technical work was required before the negotiating parties were able to engage in substantive negotiations over the optimal allocation of those water resources. Moreover, many of these sources were also sites of longstanding conflict between the Blackfeet Tribe and other water users. One of those streams, Birch Creek, which forms the southern boundary of the Blackfeet Reservation, is the primary source of supply for the Pondera County Canal and Reservoir Company (PCCRC), a large private irrigation company that serves nearly 80,000 acres and provides municipal water to communities just south of the Blackfeet Reservation, whose roots trace back to the federal Carey Land Act of 1894 (also known as the Desert Land Act) and which is a significant economic driver for that region of Montana. Birch Creek is also an important source of supply for thousands of acres of the on-reservation Bureau of Indian Affairs (BIA)-owned and -operated Blackfeet Irrigation Project. This stream was the focus of an early federal court case involving Indian water rights called *Conrad Investment Co. v. United States*, 161 F. 829, which was decided by the Ninth Circuit Court of Appeals in 1908 shortly after the *Winters* decision was issued. *Conrad Investment* decreed part but not all of the Blackfeet Tribe's rights in Birch Creek, and that stream remained a source of contention thereafter. In addition, the Bureau of Reclamation (BOR) diverts water from the St. Mary River—which originates in Glacier National Park before flowing northeast across the Blackfeet Reservation and into Canada—into the Milk River—which also originates on the Reservation before flowing into Canada and then back into Montana further downstream—for use of its Milk River Project in north-central Montana, a project whose irrigators contribute approximately 10 percent of Montana's agricultural economy. The Milk River Project is one of the original four reclamation projects authorized under the 1902 Reclamation Act, and has long been a source of grievance for the Blackfeet Tribe and its members since they have watched the BOR divert large quantities of water off their reservation for over a century without the Tribe or its members receiving any direct benefits from the project. The St. Mary and Milk Rivers are also governed by the 1909 Boundary Waters Treaty between the United States and Canada, an agreement that was negotiated without consultation with or consideration of the needs of the Blackfeet Tribe. This was another source of controversy and consternation that informed the negotiations.

Addressing all of these issues and dynamics required nearly two decades of negotiations, which included an intensive process of public involvement to identify and address key stakeholder concerns and to build the political support necessary to advance the settlement through the legislative approval process at the state, federal and tribal levels. The State and the Tribe are pleased that this settlement recognizes the Blackfeet Tribe's water rights while also ensuring the protection of state law-based water users, including PCCRC and Milk River Project irrigators. It also sets forth administrative provisions to govern the use of water by the Tribe and by state law-based water users on and adjacent to the Blackfeet Reservation, and a process to resolve disputes over the administration of those water rights. These are critical tools that allow both tribal and state water managers to plan for drought and other contingencies, and are precisely the sort of practical tools that litigation does not provide. (Additional information about the specifics of the Blackfeet settlement may be found in the testimony I presented to this Committee on May 8, 2013, when it heard S. 434, the legislation introduced in the 113th Congress to ratify the Blackfeet Tribe-Montana settlement. S. 1125 obviates the State's concern with S. 434 that I identified on page 6 of that testimony, and the State strongly supports the enactment of S. 1125.)

The Blackfeet settlement was approved by the Montana Legislature in 2009 and since that time the State and the Tribe have been working with the Administration

and the Congress to secure federal ratification as well. This has been an arduous process. While the United States was represented by a federal negotiating team during the entire negotiation process, the limited nature of the resources the Department of the Interior has to devote to all of the Indian water right negotiations underway west-wide meant that we received sustained and detailed policy review from the United States only when the Blackfeet settlement arrived in Washington, DC. This dynamic bespeaks the critical importance of the Congress providing adequate funding for the Department of the Interior to engage meaningfully in settlement negotiations as early in the process as possible.

In these negotiations with the Administration over the last five years, the Tribe and the State have both agreed to modify the settlement in ways that reduce federal costs and that address other policy issues that the Department of the Interior and the Office of Management and Budget have identified. The Administration's evaluation of settlements are guided by the Criteria and Procedures (C&P), a document first promulgated in the early 1990s, ostensibly as a tool for ensuring some degree of longitudinal consistency across administrations for the evaluation of Indian water rights settlements. Although the C&P were developed without any meaningful consultation with tribes or states, we have learned to work with them over the years. Through this process with the Administration, the cost of the federal settlement legislation has been reduced by over \$170 million, and the State has agreed to increase its contribution by 40 percent, from \$35 million to \$49 million, one of the largest cash contributions to an Indian water rights settlement any state has ever made.

This \$49 million contribution, which has not only been authorized but fully funded by the Montana Legislature to support the Blackfeet settlement, is of a piece with Montana's longstanding commitment to contributing to Indian water rights settlements. In the early 1990s, the State spent \$21.8 million as part of the Northern Cheyenne settlement, which included the repair and enlargement of a failing state-owned dam, the additional capacity of which was used to make additional water available to the Northern Cheyenne Tribe as part of that settlement. The State spent \$550,000 as part of the smaller Chippewa Cree settlement and contributed \$15 million to the Crow Tribe settlement. The State has also committed to—and fully funded—a contribution of \$17.5 million for the Fort Belknap-Montana settlement that has been ratified by the Montana legislature but not yet approved by Congress. In approving the CSKT compact in its recently concluded legislative session, Montana also agreed to contribute \$55 million to that settlement, and appropriated the first \$3 million of that amount.

These are significant amounts of money for a state like Montana, and reflect the depth of Montana's commitment to the settlement process and investment in the benefits that settlements provide. Beyond the important benefits previously described, these include projects that make material differences in the lives of reservation residents and surrounding communities. These settlements commonly include funding for the rehabilitation of the often dilapidated infrastructure of on-reservation BIA irrigation projects, and fund or pave the way for the construction of systems to provide safe, potable drinking water to communities that for too long have struggled without. S. 1125, for example, provides funds to build a regional drinking water system for the Blackfeet Reservation and to rehabilitate portions of the Blackfeet Irrigation Project for which there is a significant backlog of deferred maintenance. It also, in conjunction with the State's contribution, provides funds to construct a pipeline to bring water from the Four Horns Reservoir on Badger Creek one drainage south to Birch Creek to help alleviate the water conflicts there. This infrastructure also helps the Tribe enhance the economic benefit it can make from its water resources. This is a further example of the sorts of creative solutions that enable settlements to work.

The difference in cost between a settlement like Chippewa Cree and one like CSKT reflects both the significantly different nature of the size and scope of the issues the settlement needs to resolve, but also the fact that settlement costs tend to increase over time as needs become ever more acute and things like construction costs rise. Delay in reaching, approving and implementing settlements should be avoided. Not only does it increase settlement costs, but it can jeopardize the very viability of the settlement itself as governmental actors change and the rationale behind how a settlement was structured and what compromises and trade-offs were agreed to fades from institutional memories. It is in part for this reason that Montana continues to appreciate that, as made clear by the 2012 colloquy between then-Senator Kyl and Senator Toomey, found in the February 2, 2012 *Congressional Record*; the Senate does not consider funding for Indian water rights settlements to be congressionally directed spending because of the important national benefits these settlements supply. We are also encouraged by the letter issued in late February by House Natural Resources Committee chairman Rob Bishop (*see* attach-

ment), which provides a pathway for navigating the earmark issue in the House, which has been an impediment to moving these settlements forward for the last few years. I personally look forward to the opportunity to work with this Committee and its staff on securing passage of S. 1125 during the 114th Congress and the CSKT and Fort Belknap settlements as they become ripe for congressional consideration.

Thank you again for the opportunity to provide testimony on this important matter. I would be happy to answer any questions the Committee or its staff might have and to provide any additional information that would be helpful.

**Attachment**

ROB BISHOP OF UTAH  
CHAIRMAN

**U.S. House of Representatives**  
**Committee on Natural Resources**  
**Washington, DC 20515**  
February 26, 2015

The Honorable Eric Holder  
Attorney General  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable Sally Jewell  
Secretary  
Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Mr. Attorney General and Madame Secretary:

The House Natural Resources Committee (Committee) has primary authorizing jurisdiction over the legislative resolution of Indian water rights claims within the House of Representatives. Additionally, given the longstanding policy of the United States that disputes regarding Indian water rights should be resolved through negotiated settlement rather than through litigation, both of your Departments play key roles in negotiating and developing settlements regarding these claims before they are ever considered by Congress.

The Committee recognizes that settlements to these matters are generally preferable to protracted litigation, which does little to provide water supply and financial certainty for settling and other parties. Importantly, settlements, if crafted correctly, can also provide relief to the United States from burdensome legal obligations and benefit all American taxpayers. The Committee recognizes that the Executive branch is charged with implementing existing Indian water rights settlement criteria and procedures designed to meet these goals.<sup>1</sup>

Due to the direct linkage between your efforts in negotiating the proposed resolution of these claims and our responsibility in enacting such proposals both for the benefit of the United States interests and to help Tribal and non-tribal parties, it is important that we work together to facilitate Congressional consideration when you have reached resolution.

Due to growing federal debt and increased budgetary pressures from existing Indian water rights settlements, it is important that the proposed settlements, their proposed legislation and the federal costs associated with them be fiscally responsible and justified in order to protect the American taxpayer and future Tribal needs.

As Chairman of the Committee, I write this letter to inform you of the process that the Committee intends to follow when considering future Indian water rights settlements during this Congress and to inform you of the assistance the Committee will need from you and your designees in order to proceed forward.

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<sup>1</sup> Department of the Interior Working Group on Indian Water Settlements for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, Federal Register, Vol. 55, No. 48, March 12, 1990.

Given the role your Departments have in negotiating each proposed settlement, to help expedite the Committee's consideration of proposed legislation enacting such settlement that is fiscally responsible, your departments – in concurrence with the Office of Management and Budget – must also play a significant and initial role in codifying and explaining the Administration's support of the financial aspects of legislation codifying such settlement to the Committee. Put simply, your Departments must convey support for and forward the settlements and the proposed authorizing legislation, specifically including federal spending levels, before any Committee consideration takes place.

To that end:

1. I anticipate each of you will provide a statement to the Committee affirming that each proposed settlement resolution transmitted by your Department adheres to the current criteria and procedures.
2. I ask that your Departments specifically affirm to the Committee that a settlement meets Criteria 4<sup>2</sup> and 5(a) and (b)<sup>3</sup> to ensure that the American taxpayer is deriving benefits from any such settlement prior to Committee consideration. Related to such determination, both Departments will be expected to affirm that a particular settlement represents a net benefit to the American taxpayer as compared to the consequences and costs of not settling litigation, and specifically support the federal financial authorization included in the proposed legislative text.
3. For settlement legislation to be considered, the Attorney General or his/her designee must have conveyed to a court and all settling parties have agreed, in writing, to the settlement pending a legislative resolution before it is forwarded to the Committee for it to be considered.
4. Both Departments and the settling parties must have approved, in writing, the legislative text needed to codify the settlement before it is transmitted to the Committee and have provided that proposed text to the relevant court.
5. Based on precedent<sup>4</sup>, the Committee requests that the Department of Justice consent to being available to testify if any legislative text is considered by the Committee related to such proposals.

<sup>2</sup> Criteria 4, as included in Federal Register, Vol. 55, No. 48, March 12, 1990 states: "The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government."

<sup>3</sup> Criteria 5(a) and (b), as included in Federal Register, Vol. 55, No. 48, March 12, 1990 state: "Federal contributions to a settlement should not exceed the sum of the following two elements: a. First, calculable legal exposure – litigation costs and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, likelihood of loss. b) Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence.) – Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process."

<sup>4</sup> Testimony of Mr. Peter Steinfeld, Appellate Section Chief, Department of Justice, before the Joint Hearing on S.2259 before the Subcommittee on Water and Power of the Senate Committee on Energy and Natural Resources and the Senate Committee on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994.

6. Both Departments must list the legal claims being settled in any document transmitting legislative text; and
7. Such settlements and proposed legislation shall not include financial authorizations for claims already settled by Congress or claims that have no legal basis.

The actions of your Departments, as outlined above, will play a very critical role in expediting the Committee's consideration of these important settlement efforts. If your Departments follow this process -- starting with settlement legislation being proposed and supported by the Administration -- it is my intent to then introduce the settlement legislation at the Administration's request and consider such legislation in the Committee at the appropriate time. In conclusion, it is my intent that your actions prior to Committee consideration will determine whether negotiated settlements proceed in the legislative process.

I look forward to working with you to help achieve fiscally responsible settlements that help federally recognized tribes, other settling parties and the American taxpayer.

Sincerely,



Rob Bishop  
Chairman

The CHAIRMAN. Thank you very much for your testimony.  
Mr. Moore?

**STATEMENT OF STEVEN C. MOORE, SENIOR STAFF ATTORNEY,  
NATIVE AMERICAN RIGHTS FUND**

Mr. MOORE. Thank you, Mr. Chairman and members of the Committee.

First of all, I would like to thank you for inviting me to testify. My executive director, John Echo Hawk, sends his warm regards to the Committee.

NARF has been in existence for 45 years. Over the 45 years of our existence, we have represented over two dozen Indian tribes in water litigation and settlement matters, principally around the West. I would like to acknowledge the comments of Senator McCain, recognizing that these are solemn treaty obligations of the United States that we are talking about here, setting aside reservations for Indians, Indian tribes in exchange for the cession by the tribes of millions of acres in the West that opened that land up to settlement by non-Indians. These are contracts, binding contracts on the United States. The United States has a solemn legal and moral obligation to do what it can to advance these matters, water rights and responsibilities and resources.

And the U.S., as you said, Mr. Chairman, acknowledges that there is a trust responsibility here, a primary trust responsibility for the United States.

In our work over the years at the Native American Rights Fund, and my boss, John Echo Hawk, really is the visionary in this re-

gard, John set out over three decades ago to establish with the Western States Water Council and the Western Governors Association an Ad Hoc Working Group on Indian water settlements. That bond today is still very strong between the Water Council and the Western Governors and NARF. The message, the single, solitary message that the ad hoc committee and those three organizations bring to this Committee and to the U.S. Congress is that settlements are the way to go with respect to these divisive water matters and contentious water matters.

We know how to litigate. We know how to spend millions of dollars in litigation between Indian tribes, between the United States and between States and private water users. All that does is make the attorneys rich. And I have seen that throughout my 37 years litigating water cases in five western States. The attorneys are the beneficiaries ultimately. And I am an attorney, so I am not knocking the bar itself.

But at the end of the day, what we have are further divided communities, tribal and State communities. Historically Tribes and States have been antagonistic and bitter enemies. Let's not continue that into the next century and beyond. Let's find a way to build new relationships around water, around the wise use and management of water. It is a shrinking resource in the West, to be sure.

Some specific comments that I would like to make in the remaining period of my time is, our experience at NARF is that Indian tribes, from the very front end of the water process through settlement and implementation and effectuation of settlement, need access to funding. Senator Tester hit the nail on the head. Tribes in many parts of the Country don't even know the water resources that are on their reservations, how much water is available, surface and groundwater, how much is unappropriated or appropriated. There are resources that come through the Department of Interior, but they are meager at best. So most tribes cannot tap into the resources that they need to understand the water resources on their reservations and what competition they are up against.

Then they are further hamstrung in their ability to litigate those issues. They don't have access to the dollars sufficient for attorneys and technical consultants. Assuming they get through the litigation process, because sometimes the U.S. is involved but oftentimes not, they don't have the technical and legal resources to fully support them in the negotiation process and the settlement process. At the end of the day, they need fully-funded settlements that turn the paper water into wet water.

So I am here today to deliver that message. I think the Water Council and the Western Governors believe the same as NARF does, that we need more effective resources to assist the tribes through this process, so at the end of the day we have wise use and management of water, conservation of water, which is a dwindling resource. And we have improved relationships between the three sovereigns in the United States.

I am happy to stand for questions.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF STEVEN C. MOORE, SENIOR STAFF ATTORNEY, NATIVE  
AMERICAN RIGHTS FUND

“In the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.”

National Water Commission, *Water Policies for the Future: Final Report to the Resident and to the Congress of the United States*, 475 (Govt. Prtg. Off. 1973) at 475.

### Introduction

Mr. Chairman, I want to thank you for holding this hearing and giving me an opportunity to testify. I am Steven Moore, a senior attorney with the Native American Rights Fund, the national Indian legal defense fund headquartered in Boulder, Colorado.

One of the most important Native American legal issues NARF has addressed in the past 45 years of our existence has been Indian tribal reserved water rights. During that time, we have been involved in nine tribal water rights cases that have resulted in negotiated settlements approved by Congress. We are currently representing five tribes on their water rights claims in various stages of litigation and/or settlement—the Klamath Tribes in Oregon, the Tule River Tribe in California, the Agua Caliente Band of Cahuilla Indians in California, the Kickapoo Tribe in Kansas, and the Nez Perce Tribe in Idaho.

### Background

For centuries prior to European contact, Native Americans had sufficient land and water to provide for their needs. The rivers ran free of dams, impoundments and artificial waterways, allowing for ecosystems to support themselves naturally. Many tribes, especially in the Pacific Northwest, lived off fish runs, harvesting them only at levels that supported their people while sustaining the fish populations. Other tribes in the Southwest had complex irrigation and water purification systems to use the limited water most efficiently. The functional water “policy” of Native American tribes was to protect and preserve this sacred resource. Tribal ceremonies celebrated water, and cultural values to protect and honor water were practiced from generation to generation.

Indian tribes possess substantial water claims to support viable reservation homelands and off-reservation fishing, hunting and gathering rights specifically reserved by tribes as part of their 19th century treaty negotiations with the United States. These reserved rights to land and other natural resources were part of a bargained for exchange, in which the United States sought and received the perpetual relinquishment of land to open vast territory for westward expansion and settlement. Indeed, tribes ceded title to millions of acres in the process. Then and now, Indian tribes expect the United States will honor its promises.

A cornerstone of the promise is the federal trust responsibility. The United States expressly acknowledges that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.” 1990 Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (March 12, 1990)(“Criteria and Procedures”).

Yet, during the same historical era as the treaty and reservation era, the United States also enacted laws and implemented policies encouraging the settlement of arid western lands and the development of the scarce water resources in what became “former” Indian aboriginal territory. Such laws included those permitting the homesteading of “surplus” Indian reservation lands, when reservations were allotted under the authority of the General Allotment Act of 1884, the Homestead Acts beginning in 1862, and the Reclamation Act of 1902. (These laws were silent on their effect on prior, pre-existing Indian tribal rights to the use of water, rights that under federal cannot be abrogated without express consent of Congress.)

During the early and mid-1900s, the United States entered into a period of mass water infrastructure development in the arid West to simulate the depressed economy and to accommodate population growth. Although these projects affected tribal water rights, they were developed with little to no consideration or assertion of such rights. As a result, private water users, businesses, and government entities have enjoyed the benefits of water development while, in most instances, tribes have been left wanting. The lack of development of senior tribal water rights, however, has created significant uncertainty in the Western system of water allocation and use. Because many tribes have not yet asserted their prior and paramount, reserved water

rights, non-Indian irrigation and other commercial interests in many parts of the United States are concerned about the durability of their junior water rights.

Moreover, in most cases large-scale water projects in the West were built to the detriment of tribal water rights because they allocate the majority of water available to non-Indian users. The National Water Commission in 1973, for example, recognized that the Federal Government had promoted and subsidized non-Indian water development at the expense of vested tribal rights. *National Water Commission, Water Policies for the Future: Final Report to the Resident and to the Congress of the United States*, 475 (Govt. Prtg. Off. 1973) at 476–7.

The Klamath Irrigation Project in Southern Oregon is a prime example. Created in 1902, the project irrigates thousands of agricultural acres by diverting water from the Upper Klamath Lake in Southern Oregon that flows into the Klamath River in Northern California. The project provides subsidized water to non-Indian farmers but disregards senior tribal water rights. The Klamath River, through its journey from the high desert to the ocean, supports the Klamath, Yurok, Karuk and Hoopa Tribal fisheries. The project does not accommodate water for instream flows for tribal fisheries, but instead diverts water to support the irrigation project. In 2003, the largest fish kill in American history, occurred on the Klamath River when 60,000 salmon died due to lack of adequate water flows after a large diversion was made up river for the Irrigation Project. The Federal Government acknowledges the potential environmental consequences of these diversions but refused to alter its course despite its trust obligation to protect Tribal fisheries. The Native American Rights Fund represents the Klamath Tribes in litigation over and potential settlement of this situation.

Thus, the United States created the conflict over the development and use of western water resources. These conflicting tribal and settler rights and expectations must ultimately be resolved. It is therefore the responsibility of the United States to facilitate and fund the resolution of such conflicts consistent with its trust responsibility to Indian tribes, irrespective of whether it is in a litigation or settlement context.

Tribes will always view these processes as a two-edged sword. On the one hand there are benefits to be gained from quantifying and decreeing Indian water rights—the delivery of wet water. Yet, there are costs for tribes. There is always the feeling that something else of importance to Indian people is being taken away by the majority society and that the work of Manifest Destiny continues largely unabated.

#### **Ad Hoc Group on Indian Water Rights**

In 1982, the Ad Hoc Group on Indian Water Rights was formed. Its membership consists of the Native American Rights Fund, the Western Governors Association, the Western States Water Council and the Western Business Roundtable (formerly the Western Regional Council). Although the Ad Hoc Group's constituents were pitted against each other in litigation over Indian water rights claims, the Ad Hoc Group came together because of our shared interest in assuring the Federal Government paid its fair share of the costs of Indian water rights settlements that were negotiated in order to avoid litigation. The Federal Government should pay its fair share of the settlement costs because it failed as trustee to protect Indian water rights in the West, and instead encouraged states and non-Indians to develop and use water, thereby becoming the primary cause of the litigation between Indians and non-Indians over this issue.

Over the years, NARF, along with its Ad Hoc Group partners, has worked to educate each Administration and Congress on the importance of having favorable federal policies on Indian water rights settlements. These successful efforts have resulted in 29 Indian water rights settlements being enacted into law. In our experience, securing the funding for the Federal Government's fair share of the cost is the most difficult problem to overcome in an Indian water rights settlement. Constrained federal budgets in recent years have been compounded by a misunderstanding among some that funding these Indian water rights settlements is congressionally directed spending. It is not. As Senators Kyle and Toomey made clear in a 2012 colloquy on the Senate floor, it is spending to fulfill financial obligations of the United States. It is imperative that each Administration and Congress work together and fund the Federal Government's obligations of each negotiated Indian water rights settlement in order to rectify the results of its failed water policies.

#### **Resolution of Indian Water Rights Through Litigation**

Historically tribal water rights claims were resolved in the court systems. Federal courts have jurisdiction over tribal water rights claims unless the state has initiated a general stream adjudication on a waterway utilized by a tribe. In such cases, the

state court has jurisdiction over tribal water rights claims pursuant to the McCarran Amendment. Lengthy litigation often results in “paper water” rights with no funding for water infrastructure development. Moreover, the aggressive nature of litigation divides the community of water users into adversarial camps and thereby reinforces old political debates over water usage. For all parties, litigation is expensive and can take decades. For these reasons most tribes, states and private water users prefer negotiated settlements of water rights.

At the present time, there are many cases in the courts, predominantly in the western United States, involving the adjudication of Indian reserved water rights. A large portion of the water in the west is at stake in these cases—over 45 million acre-feet of water according a Western States Water Council survey in 1984.

The purpose of these cases is to define or quantify the amount of water that tribes are entitled to under their reserved water rights. Although tribal claims are typically based agricultural uses of water, some claims are also being made for non-agricultural water uses that also fulfill the purposes for which the reservations were created. These cases are typically huge and complex, pitting the states and thousands of private water claimants under state law against the tribes and the Federal Government as trustee for the tribes.

Complex water rights litigation has cost tribes millions of dollars in technical and legal costs, though, with no apparent end in sight. Several federal cases in New Mexico have spanned five to six decades. The Gila River and other tribes in Arizona have been involved in state water litigation since 1974, with at least nine trips to the Arizona Supreme Court (not all involving Indian water issues, *per se*, but the tribes are parties to the litigation and presumably have had to actively participate). The Wind River Tribes in Wyoming have suffered a similar litigation fate, fighting in state court since 1977, with almost as many trips to the Wyoming Supreme Court. The Confederated Salish and Kootenai Tribes in Montana have been on a similar path, but very recently the Montana Legislature finally approved and the governor signed a comprehensive negotiated settlement.

#### **The Primacy of Indian Water Rights Under the Winters Doctrine**

The doctrine of prior appropriation directed most allocation of water in the West at the beginning of the 20th century during westward expansion. Prior appropriation was the principle that the first parties to physically divert and use the water for “beneficial use” should have the first right to the water. Subsequent rights to the same water were only entitled to water not used by those with senior rights. This principal governs state water law, and created a priority system for water allocation. However, tribal water rights are not governed by state law.

Indian water rights are based on federal law because they were reserved in the treaties and executive orders that created the reservations. The Supreme Court acknowledged federal reserved water rights for Indian reservations in the 1908 case, *Winters v. United States*, 207 U.S. 564 (1908). *Winters* came from a dispute between tribes on the Fort Belknap Reservation and upstream non-Indian water users on the Milk River in Montana. During drought conditions, large diversions by the upstream users inhibited Indian diversions on the Reservation. The United States, on behalf of the tribes filed a lawsuit in federal court in 1905 to enjoin the upstream diversion. On review, the Supreme Court held that treaties created an implied water right, a “*Winters* right”, necessary to meet the purposes of the reservation, and prohibited uses of water by non-Indians that interfered with the tribes. *Winters* accomplished this by establishing a priority date for tribal reserved water rights as of the date the reservation was created. Since most Indian reservations were created prior to outside settlement by non-Indians, *Winters* rights usually give tribes the earliest priority date and most senior rights.

The Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963) established that *Winters* water rights are quantified by determining how much water is necessary to irrigate the arable acreage on the reservation. Known as the “PIA” standard, it assumes the Federal Government set aside Indian reservations with the singular purpose of developing agrarian societies. In recent years, the courts have broadened the purposes behind establishing reservations. In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), for instance the Ninth Circuit Federal Court of Appeals noted the general purpose of the Reservation was to provide a homeland for the Indians. It claimed this was a broad purpose and must be liberally construed to benefit the Indians. The court supplemented the PIA standard with water for instream flows to support tribal fisheries. In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the same court rejected the notion of Indian reservations having one singular agrarian purpose, and also awarded water for agriculture and instream flows. In *Gila River*, 35 F.3d 68 (Ariz. 2001), the court rejected the singular purpose PIA standard to adopt the multi-purpose homeland standard which provides for live-

stock watering, municipal, domestic and commercial water uses. The Court in *Arizona v. California*, and following in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), also made it clear that Indian reservations were intended to serve as homelands where tribes could create livable self-sustaining communities whether the purpose be agrarian or to support other ways of life. These cases demonstrate that each reservation can have several purposes for which it was reserved that require broad interpretation to meet tribal water needs.

More recently, tribes have established that the *Winters* doctrine extends not only to surface water but to groundwater. Tribes such as the Gila River Tribe in Arizona, and the Agua Caliente Band of Cahuilla Indians in Palm Springs, California, have had to litigate their right to groundwater in the desert environs in which their reservations are located. Other tribes such as the Lummi in Washington State and the Confederated Salish and Kootenai Tribes in Montana have been engaged in long struggles to secure rights to groundwater.

#### **Settlement of Indian Water Rights**

The process of settling water rights claims allows the community of water users to address an array of water problems using creative solutions that are not available through litigation. This flexibility provides incentives for all water users on a waterway to be privy to the negotiations. In most cases, the settlement of water rights claims becomes part of a larger water bill that includes agricultural, economic, and government water rights claims. The Snake River Water Rights Act of 2004 settled water rights claims on the Snake River of Idaho including those of several federal agencies and departments, the Nez Perce Tribe, represented by the Native American Rights Fund, the State of Idaho, agricultural and timber producing interests. The Snake River Settlement Agreement accommodated non-Indian Upper Snake River interests by honoring an existing water release agreement from the Upper Snake River, and by providing habitat protection and restoration in the Salmon and Clearwater basins under Section 6 of the Endangered Species Act.

The Nez Perce Tribe also secured a reliable water supply, instream flows, the transfer into trust of BLM on-reservation land, right to access 600 hundred springs and fountains on federal land off-reservation and the authorization of \$90 million for tribal domestic water and sewer, and habitat improvements. Instream flows in over 200 streams and rivers were decreed under state law. The Settlement benefited all parties by providing stability regarding the scope of water rights on the Snake River, and by providing funding to develop such rights. Additionally, the parties obtained more benefits through land and water transfers with funding to develop such interests under the Settlement than would have been possible in court.

Throughout the West, states, tribes and private water users are recognizing settlements as an opportunity to resolve long term water and related environmental problems. No longer are these just Indian water rights settlements, they are basin wide agreements, driven by local circumstances and interests, that resolve long standing problems experienced by all water users in a watershed. Between 1978 and 2014, Congress enacted 29 Indian water rights settlement acts. Requests for federal involvement in Indian water rights settlements have been constant since 1978 and they are going to continue to increase. The Federal Government, working with local communities, must be prepared to respond with adequate resources to resolve once and for all the water conflicts occurring in Indian Country.

#### **Much Unfinished Work Remains**

The passage of time makes the resolution of Indian water rights more complex and difficult. Watersheds with un-quantified and un-decreed Indian water rights have typically been viewed as having a “cloud” on the availability of the resource. That has been the impetus, in large measure, for states to commence general stream adjudications, and to haul federal and Indian into state court to sort out rights. But state governments are as financially hard pressed, if not more so, than the Federal Government, and adjudications are very expensive. The result is the protection—sometimes unwittingly, sometimes intentionally—of the status quo, in the face of unresolved Indian claims. The giving away of more and more water in river systems for non-Indian purposes, either through state regulation or, equally insidiously, the non-regulation of groundwater development or small pond/impoundment proliferation, ultimately advances the interests of some of those who oppose Indian water rights. And with each molecule of water that is given away to non-Indian interests as tribes await the assistance of the United States to assert, litigate and/or settle their water rights, the ultimate resolution of competing claims to water in any watershed becomes more difficult.

While tremendous progress has been made to date in the settlement and sorting out of Indian water rights, much more work remains. Despite and against all odds,

Indian tribes have secured about two dozen water settlements over the past 35–40 years, since federal Indian policy encouraged settlement—and the government began to invest the financial and human resources necessary to achieve settlements—as opposed to prolonged litigation. Dozens more tribes are either in various stages of the negotiation process, or are in the queue waiting for the resources to engage in the process. Sadly, in the recent 10–15 years we have seen a general trend toward the dwindling of these resources, just at a time when enhanced resources could have seen more settlements mature, ripen and come to fruition.

While many large and complex settlements have been achieved over the past several decades, a look forward is equally daunting. Consider the remaining possibilities: California and its more than 100 federally recognized tribes; Oklahoma with its 39 tribes sharing essentially two river systems; the other Midwestern tribes with similar concerns to those in Oklahoma over groundwater over-development and water quality impairment; the tribes of the Dakotas and their reliance on the Missouri River system which, with the Mississippi, is the most heavily regulated commercial river in the United States; the coastal tribes in California, Oregon and Washington with their enormous cultural and economic interest in salmon fisheries and related habitat; the Great Lakes Tribes with offreservation fishing and gathering habitat protection interests; and the tribes of the northeast and southeast which share many of the concerns faced by their brothers and sisters in the rest of the country. And what of the tribes and Native villages in Alaska, and the Native Hawaiian community in the Pacific?

We know for a fact that climate change will likely not spare any region of the country, particularly the western United States where we find the largest land-owning tribes with the largest need for water. The crushing drought in California, and the recent water wars between Georgia and Florida are but a presage of the pressures to come. How will tribes' interests play out against these larger forces?

Given the finite and very limited ground and surface water supplies, particularly in the West, one tried and true method in past successful Indian water settlements has been the reliance on water infrastructure—primarily in the form of concrete—to increase the size of the pie available to the stakeholders to a settlement. The several Arizona Indian water settlements are largely dependent on the construction of the Central Arizona Project. The new Navajo-Gallup settlement depends on building a pipeline several hundred miles in length. Of the remaining several hundred Indian tribes without quantified and decreed water rights, are we dependent on a new era of dam and other infrastructure construction? Is that even possible, given the complex array of federal, state and local laws confronting new developments?

The PAI standard for quantifying Indian reservation water rights also can unfairly disadvantage tribes with reservation lands that either are not economically irrigable due to soil or arid climatic conditions, and, as we consider the claims of tribes east of the 100th Meridian, disadvantage tribes with reservation lands not typically viewed as requiring irrigation to make them agriculturally productive.

Finally, climate change looms as the wildest of wild cards. State and local governments are already busily engaged in studying the effects of global warming on already limited and over-stressed water supplies. And planning the changes necessary to prepare for and manage/mitigate the effects thereof. Tribes typically lack the resources to conduct the same level of planning and preparation, and so will be even more disadvantaged in litigating, negotiating and settling their water rights in this ever-shifting context.

### **Solutions**

Real solutions must come from the legislative and executive branches of the United States government. Some will involve financial capital, but others lie in structural and organizational changes made within the Federal Government to effectuate a more just and expeditious resolution of Indian water claims. Federal mechanisms and the means to level the playing field for tribes must be put in place. Tribes must be given access to all necessary data and information from which they can make informed decisions and set priorities about protecting and asserting their water rights. This will enable them to more fully engage their state and local partners in the resolution of Indian water rights.

One state-created model is the Montana Reserved Water Rights Compact Commission. Since its creation in 1979, the Commission has completed compacts with the seven resident Montana tribes.<sup>1</sup> Are there useful lessons to be learned from the

<sup>1</sup> Completed tribal compacts are with: Assiniboine & Sioux Tribes of the Fort Peck Reservation; Northern Cheyenne Tribe; Crow Tribe; Gros Ventre & Assiniboine of the Fort Belknap Res-

Montana Indian tribes' experiences with the Montana Compact Commission, and ways to improve on it as a federal model? At a minimum, what sets the Montana process apart is the express acknowledgement in state law that Indian tribes have senior Winters water rights. Second, the state committed the resources to see the work done. The resulting settlement compacts are not perfect, but they reflect the value of political leadership and hard work to achieve lasting solutions. The neighboring state of Idaho has also achieved settlements with the resident tribes in the Snake River Basin—the Nez Perce, Shoshone-Bannock and Shoshone Paiute. Idaho utilized a litigation framework rather than a compacting process, which resulted generally in a more adversarial and thus antagonistic structure, but positive settlements, while taking more time, resulted nonetheless. The remaining North Idaho Adjudication is framed similarly. Congress could learn from the lessons the states, particularly Montana. As noted above, much work remains and it will take substantial leadership and resources from the Congress to achieve lasting solutions across Indian Country.

#### **Recommendations for Fiscal Change—A Permanent Funding Mechanism for Indian Water Settlements**

It is time for a change. The Federal Government must prioritize settling tribal water rights claims, and it must consider options to accommodate a growing number of settlements. Indian Country can no longer tolerate the lack of water and water infrastructure that has inhibited them from developing their communities. The Federal Government has an obligation as trustee to assist in the development of tribal water rights and Congress must look to create a permanent funding mechanism for tribal water settlements.

The federal Reclamation Fund is an appropriate mechanism to fund tribal water rights settlements, as part of its mandate is to fund tribal water settlements. With more attention and development, the Reclamation Fund could provide the majority of funding for tribal water settlements. Congress has already recognized the Reclamation Fund for these means, as the 2009 Navajo-Gallup Settlement authorized for the first time tapping into the Fund to develop a water delivery system on the Navajo Reservation. Authorization to tap into additional funding from the Fund for other Indian water settlements should be enacted by Congress.

Another possible source of funding is the federal Judgment Fund. The resolution of Indian water rights is a fundamental legal obligation of the United States, after all. And like other legal obligations paid out of the federal Judgment Fund,<sup>2</sup> these settlements are not earmarks, and should not be subject to the political whim of Congress. Indian water settlements which achieve the support of all stakeholders in any given state or states with interests in a particular watershed should not be allowed to become political footballs.

#### **Conclusion**

The foregoing challenges in Indian Country all connect to water. Their solutions lie in water. Water is sacred. Tribes have proven they are very capable partners and players in water adjudication and settlement frameworks when they have financial resources to participate meaningfully. Most tribes and their down-stream neighbors prefer to negotiate water settlements since they provide the flexibility to resolve long-term water problems using environmental solutions that are not available in the court system, while saving time and money that would otherwise be expended in litigation. Settlements remove water uncertainty by defining the scope and priority date of each water users' rights without employing the expensive, adversarial roles of litigation.

The Federal Government has a legal obligation set forth in the treaties to protect and develop Indian water rights. Although the Federal Government's historical treatment of Indian water rights was less than adequate, this Congress has the opportunity to take a new direction. The future of Indian Nations depends on a con-

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ervation; the Chipewea Cree of the Rocky Boy's Reservation, the Blackfeet Tribe, and the Confederated Salish and Kootenai Tribes.

<sup>2</sup>In 1956, Congress established the Judgment Fund, which is a permanent, indefinite appropriation to pay judgments against federal agencies that are not otherwise provided for by other appropriations. In 1961, legislation was enacted allowing the Judgment Fund to pay, among other things, Department of Justice (DOJ) settlements of ongoing or imminent lawsuits against federal agencies. The Judgment Fund is intended to allow for prompt payment of settlements and awards to claimants, thereby reducing the assessment of interest against federal agencies (where allowed by law) during the period between the rendering and payment of such settlements and awards. The Judgment Fund makes such payments upon certification that a court has handed down an award or that a settlement has been reached. The Judgment Fund is currently managed by the Department of the Treasury's Financial Management Service (FMS).

sistent commitment from the Federal Government to develop water supplies and infrastructure in Indian communities. Many states, in recognition that their water problems are inextricably tied to tribal water problems have already made this guarantee.

Today in this testimony we have set forth suggestions for the future commitment of the Federal Government to Indian water settlements. Our four decades experience working with tribes and states on these issues has convinced us that obtaining funding is the largest impediment to resolving water problems in the West. We request that Congress to remove this obstacle and create a permanent funding mechanism for all facets of Indian water rights settlements. In doing so, this Congress can join their constituents to help resolve water problems in the West.

We thank the Committee for providing us with the opportunity to discuss these issues. The Native American Rights Fund and our clients stand ready to work with the Senate Indian Affairs Committee to achieve meaningful solutions for bringing clean, reliable supplies of water to Indian Country.

The attachments to this testimony have been retained in the Committee files.

The CHAIRMAN. Thank you very much, Mr. Moore.  
Senator McCain?

Senator McCAIN. Thank you, Mr. Chairman.

Secretary Connor, I will be very parochial, if you don't mind. What are Arizona's next Indian water settlements that Interior is close to moving as legislation?

Mr. CONNOR. Senator, right now there are several active negotiations that are getting teed up. Whether or not they will be ready to go this particular Congress, I am not sure. There is certainly the Tonto-Apache and their work with the community of Payson, and looking at a joint water supply system. I think that one particularly holds a lot of promise and some creativity on once again sharing resources between the tribe's needs and the community's needs.

We would certainly like to see and have been working on the Wallapi settlement on the Main Stem Colorado River, as you are well aware. Thank you for your support. Phase one of that settlement on the Bill Williams Watershed was completed at the end of the last Congress. There is activity now to see if a water supply project can be developed that is feasible for that next settlement.

And certainly there is not activity right now, but once again, as you are well familiar with, there are still significant needs with the Navajo and the Hopi in the Little Colorado River Basin. There is a framework there for a settlement that the tribes ultimately did not support at the end of the day. But there is a strong foundation should the parties decide to return to the negotiation table.

Beyond that, we are also working with the San Carlos Apache Tribe, not only in evaluating the claims that they have in the Gila Watershed but also so that we can finally implement their settlement of the 1992 settlement, their Salt River claims. And Chairman Rambler has been very active in working with the Bureau of Reclamation and trying to develop a plan that we can use the existing resources already provided under the Arizona Water Settlement Act to develop the infrastructure necessary to bring water to that tribe consistent with that settlement.

Beyond that, a lot of implementation activity, as you are well familiar with.

Senator McCAIN. A lot of implementation still has to be done.

Mr. CONNOR. Yes.

Senator MCCAIN. Do me a favor and for the record, give me an update on the enacted water settlements, how we are doing on that.

Mr. CONNOR. Absolutely.

Senator MCCAIN. The drought is terrible. Arizona faces cutbacks in water deliveries. An AP story this week warned that Lake Mead is 37 percent full, as you know. Feds have warned that water levels could force supply cuts to Arizona and Nevada by 2017.

Arizona's allocation of Colorado River water could be cut 11.4 percent or by an amount normally used by more than 600,000 homes. A total of 47 percent of the water in the CAP, Central Arizona Project, supplies designated for Indian water rights settlements, and by some estimates only about 100,000 acre-feet are left available for use in future settlements. That makes the Central Arizona Project the largest single provider of Colorado River Water to Native American water users in the Colorado River system.

What is the impact, do you think of these imminent water cutbacks, for Congress and you, for trying to complete future water settlements?

Mr. CONNOR. You are absolutely right, Senator, the demands of the Colorado system and the projections for shortages and just to follow up on that a little bit, we are looking at a 20 percent possibility of shortages in 2016, and a little bit above 50 percent in 2017. That is the study that you referenced earlier.

So these are significant right now. The State of Arizona has been planning for this for quite a while. And through the groundwater bank and firming up existing supplies, they have done a terrific job in partnership with a lot of other entities in shoring up those water supplies.

Nonetheless, a lot of the existing settlements are built up on non-Indian ag water associated with the Central Arizona Project. We have been working, in the implementation phase, pursuant to the Arizona Water Settlements Act, of firming up those water supplies, so that in the event of shortages they still have a high percentage of reliability that they will be delivered.

But it will, once we are into a shortage situation, which we could be within the next two years, it will add scrutiny to particularly tribal entities who want to ensure that whatever water that they are willing to settle their claims for is a very high and reliable supply. That is critical to their homeland. So I think it will put a premium on our need to shore up and demonstrate the long-term reliability, which will require more investments.

Senator MCCAIN. Which may, if many of the predictions hold true, it simply is not going to be there, not only for future settlements, but for existing allocations.

Mr. CONNOR. Exactly. And there are priorities within the Central Arizona Project, there are leasing arrangements, there are more and more transactional arrangements, creative ways to share water. And that is what is needed, as well as, we have to continue to look at the efficiency by which we use water.

Senator MCCAIN. If we keep up like we are doing, our children and grandchildren will not experience the same lifestyle, whether we are Indian or non-Indian.

Mr. CONNOR. Absolutely. We are going to have to have fundamental change in how we use water resources with respect to conservation, efficiency and institutional arrangements to share the resources, as well as infrastructure investments and more recharge and making use of high flow events. It is the whole range of items.

In the Colorado River Basin, the last 10 to 15 years have demonstrated a lot of these creative arrangements between the States, between communities, between the United States and Mexico, even. And as much progress as we have made and as much water as we have added to Lake Mead through conservation, through these arrangements, we are not keeping up with the challenges that Mother Nature is providing to us right now. It is a scary situation.

Senator McCAIN. I want you to kill off that salt cedar, okay?

Mr. CONNOR. Absolutely.

[Laughter.]

Senator McCAIN. Thank you.

The CHAIRMAN. Thank you, Senator McCain. Senator Udall?

Senator UDALL. Senator McCain is right about the salt cedar, there is no doubt about it.

Thank you, Mr. Chairman. Deputy Secretary Connor, as you know, the funding is a condition precedent to the settlement agreement becoming final and enforceable. In my State, the Taos Pueblo is in the last year of authorized appropriations under the Taos Pueblo Indian Water Rights Settlement Act. Full appropriations must be made before the end of March, 2017.

How important is it for the State to fulfill its commitment? Do you work with the States to ensure equal commitment on State funding levels? And has Congress over the years extended authorizations of Indian water rights settlements to ensure conditions in the authorizing legislation are met?

Mr. CONNOR. I believe, and I will need to more fully answer this question for the record, but I think there have been extensions in certain settlements where there were some issues associated with meetings, some of the deadlines where there was knowledge that there was an intent and ability to ultimately meet them. So I think the issue of deadlines, it is possible, but it is not preferable by any stretch of the imagination.

The three New Mexico settlements that have come about in the last six years, the Navajo, the Taos and the Aamodt, have been really significant from the standpoint that the State of New Mexico stepped up and was a significant financial partner in all those settlements. We have had good success with funding from the State, but there has been a question about the Taos funding. Unfortunately, in the late stages of where we are in implementation, that could threaten the settlement in its finality.

So it is a very critical issue that the State needs to address. Because we have built that settlement on the foundation of both Federal and State funding. And the State and Federal funding has been appropriated in previous years and it is in our budget to complete the Federal responsibilities.

Senator UDALL. My staff and I have been working very closely with the State to let them know what the situation is, how urgent it is that they step forward on their side of it. I hope that you will

do the same thing when you have any contact with them. Then we will try to work with you, if we do get in a situation where we need an extension.

But I think that just like you say, the preferable way to proceed is to make sure that they come up with the money on time and that the money is what they agreed to all along. It is unacceptable to not do that.

Secretary Connor, negotiation of these tribal water settlements is obviously critical. Can you describe the internal mechanics of the negotiation process through the working group at Interior and how our negotiation is treated? How do you resolve issues and what changes have you considered to approve the process?

Mr. CONNOR. Overall, by the time the Working Group on Indian Rights Settlements gets involved at Interior, these are very mature negotiations that are close to finality. The framework, both from a water rights claims, the ultimate claims that are being resolved as part of the settlement, and the financial aspects of the settlement, Federal contribution, are pretty well developed at that point in time. The working group is looking within Interior, which is several of the assistant secretaries, the solicitor, the counselor to the deputy secretary who is the chair of the working group, are really evaluating the settlements and comparing it to the 1990 Federal Criteria which outlines the basis for Federal participation and Federal contribution to Indian water rights settlements.

Certainly we are looking for the Federal contribution, is it in line with the trust responsibility, does it give value commensurate with the tribe's, the claims that they are relinquishing as part of the settlement, those are certain factors. Is there a commensurate non-Federal contribution for benefits being received by non-Federal entities?

But also there is looking at the overall feasibility of the project, both its economic feasibility and its environmental feasibility as part of the analysis also. So from that process in several instances, there has been either agreement that we should move forward, we can refine the settlement in a certain way or send out our negotiators to work through that process. Or at times it has been, we need to revisit the contribution and the infrastructure being looked at.

So that is the dialogue, that's the process. It is the 1990 criteria and procedures that really define the role.

Senator UDALL. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Udall.

Senator DAINES?

Senator DAINES. Thank you, Mr. Chairman. President Azure, it is good to have you here, from Fort Belknap, as well. We are surrounded by Montanans. Jay, good to have you here as well.

We have a couple of Blackfeet tribal members who are enroute, their flight has been delayed. They were going to be here today. That would be Gerry Lunac and Jeanne Whiteing, as well as Ryan Smith. I want to thank them for all their hard work on the Blackfeet water settlement, as well as my colleague, Senator Tester from Montana. We look forward to working together with members of the Committee to move it across the finish line. Certainly, as you

have heard from many of the members here today, it is time to create certainty for both our tribal and our non-tribal users.

I know I am supposed to call you Mr. Weiner, but to me it is Jay. If that is okay, Jay?

Mr. WEINER. Please.

Senator DAINES. You have done a lot of work on these settlements. What would you say is the importance of having this consensus you describe in your testimony, between the Blackfeet Tribe, the State, and important as well, the non-tribal water users, in getting us to where we are now, which I would argue is closer to the finish line than we have ever been before with the Blackfeet settlement?

Mr. WEINER. Thank you, Senator Daines. I think you are absolutely right. The effort to come to consensus is part of why, even though settlement is a preferable path to litigation, it is not a short path. The efforts that are involved in identifying not just the hydrologic issues involved, and assembling the technical data that is necessary to lead to a mutually agreeable basis for settlement, but the process of identifying all the other issues that come to bear.

As I mentioned in my testimony, on Blackfeet, the longstanding grievance that the Blackfeet Tribe understandably has as a result of the Milk River Project's construction, the longstanding conflict that exists on Birch Creek, Blackfeet was also a complicated settlement because much of the water on the Blackfeet Reservation is also subject to the 1909 Boundary Waters Treaty between the United States and Canada, which was negotiated with no consideration for the tribe's water whatsoever. It has been another source of grievance for the tribe that we needed to try to account for in the settlement, not necessarily to resolve, but certainly to structure the settlement in such a way that it fit within the Boundary Waters treaty allocation, but also address the fact that the tribe has legitimate historical grievances.

So one of the things about the settlement process that is so critical and really is one of the things that litigation simply doesn't afford is the opportunity to try to come to those kinds of understanding about these historical grievances between States and tribes, between tribes and their non-Indian neighbors, and to surmount them, so that the future does not look like the past and that there really is the opportunity for tremendous collaboration, not just over water but over all sorts of other issues. These really are engines for community harmony in many ways, and for the improvement of relations that have all kinds of important economic follow-on effects, but also social follow-on effects.

Senator DAINES. Could you elaborate a little more on those economic benefits? How important is this, Jay?

Mr. WEINER. This is essential. From Montana's perspective, the Milk River Project accounts for roughly 10 percent of our irrigated agricultural economy. And the Birch Creek water users are an important small grains producer, they also provide municipal water. These are very important drivers of Montana's agricultural economy.

We would very much like to see this settlement also provide a basis for the tribe to be able to address the longstanding backlog of deferred maintenance on the on-reservation irrigation project to

increase their contribution to the reservation economy, to Montana's economy as a whole. These are absolutely critical pocketbook issues.

And particularly when you are talking about irrigated agriculture, all of the follow-on effects and the way that they support our small, rural communities, all of the people, not just the farmers, the equipment dealers, the fuel producers, everyone that relies on these for their way of life and to sustain these, they are critical to Montana.

Senator DAINES. Thank you, Jay.

Deputy Secretary Connor, the Blackfeet Water Settlement is a result of a long process, Jay has articulated it well, of building consensus among stakeholders both on and off the reservation, including the tribe, the State, non-tribal irrigators. Of course, one of the last hurdles here in this process is negotiations with the Department of the Interior. I understand the Blackfeet folks I mentioned who are flying in, assuming the flight gets in today, they are meeting with your office actually tomorrow. I will be following those discussions closely, as I know Senator Tester will as well.

I would like to secure your commitment to work for support of the settlement at both the Department of the Interior and the Department of Justice. Can I get your commitment to work with us through all the steps in that process so we can address the outstanding issues in a timely manner and get the Blackfeet water settlement through Congress and signed into law?

Mr. CONNOR. Yes, Senator Daines. You have my commitment to work with you on that process. There has been tremendous progress made on the Blackfeet settlement with the State's assistance, with the tribe's assistance. As Jay articulated, there are legitimate disputes that the tribe has had with the State and with the Federal Government and Bureau of Reclamation. I think we have worked through a lot of those issues. I think there are a few remaining. We are very committed to working through on this settlement.

Senator DAINES. Yes, I think the stars are lining up on this one as well. There has been a lot of hard ground that has been tilled and worked and cultivated here. As Jay mentioned, I think that as well as the economic benefits it brings the communities together as well. It is a great opportunity for us and I look forward to getting it across the finish line in this Congress.

Mr. CONNOR. Absolutely.

Senator DAINES. Thank you.

The CHAIRMAN. Thank you, Senator Daines.

Senator Tester?

Senator TESTER. Thank you, Mr. Chairman.

Deputy Secretary Connor, always good to see you. I want to go back to S. 1365, which would dedicate funds to water settlements. Has the Department had a chance to look at this bill?

Mr. CONNOR. No, not in any great detail yet. But I will certainly do that.

Senator TESTER. If you could take a peek at it and let us know what you think, I would very much appreciate that. I think when push comes to shove on all this stuff, it is going to be money, to

be honest with you. If we can get a dedicated fund to that, I think it could make a big, big difference.

Jay, I want to follow up on something that Senator Daines asked about, only from a little different twist. And by the way, congratulations for getting all seven compacts through the legislature. I know this last one was a hell of a fight. So you need to get credit for that.

In terms of Blackfeet and Fort Belknap, and we have the chair of Fort Belknap here, where it is at least partially and totally for Fort Belknap on the same water resource, can one be done without the other or does Blackfeet have to come first and then Fort Belknap, or can Fort Belknap get done without Blackfeet?

Mr. WEINER. Thank you, Senator Tester. From Montana's perspective, we support all of our settlements and would like to see all of them move forward as soon as possible.

We believe that each settlement can and, frankly, should be considered individually. Although there is some overlap on the Milk River, between the rights of the Blackfeet Tribe and the Fort Belknap Indian Community, I think there are two important reasons why they do not need to move in tandem, one of which is that in part in response to concerns that the Fort Belknap Indian Community had raised, there is now language specifically in S. 1125 that provides for a dedicated process for those two reservations, and with the assistance of the department of Interior, if necessary, to come up with a mechanism between themselves to resolve any possibility of conflict on that source.

From the State's perspective, and there have been some who have accused the State of essentially trying to negotiate away the same water twice, we do not believe that the hydrology of the system, given the distance and the nature of the water supply there, the Milk River, as I know you know, Senator Tester, and Senator Daines also, is a prairie stream that arises on the Blackfeet Reservation, flows up into Canada and comes back down into Montana a good ways downstream. The hydrology of that system is such that it is inordinately unlikely and indeed, there is not funding in S. 1125 for the sort of project that the Blackfeet Tribe would need to develop, to have even, the hypothetical possibility of conflict with the Fort Belknap Tribe's water rights.

So for those reasons, we support both settlements strongly. We would like to see them move. But we do not believe that in any way do they need to be linked for their consideration by this Committee or in this Congress.

Senator TESTER. I appreciate your answer. You do know a little bit about water rights and Indian water compacts, that is for certain. Montana is lucky to have you.

Montana is going to contribute \$49 million for the Blackfeet water settlement and I think \$50 million for Salish Kootenai.

Mr. WEINER. It is \$55 million, Senator Tester.

Senator TESTER. Okay, I stand corrected. What do they get out of this? What does the State of Montana get out of it?

Mr. WEINER. There are many things that the State of Montana, Senator Tester, achieves from these settlements. It is why the State has supported this process for so long.

As I have hit on, there are the specific benefits that we negotiate for in the settlements. One of the State's critical objectives in all of our settlements is the protection of existing non-Indian uses that have built up over years, over decades, over generations, that because of the first in time, first in right prior appropriation doctrine and the Winters doctrine are nevertheless junior in priority to these tribal rights.

The criterion and procedures were discussed, and certainly one of the things that the criterion procedures call for that Montana has always embraced and strongly supported are appropriate State contributions for benefits that flow to non-Federal parties. So Montana's contributions have historically been pegged in large part for the benefits that we negotiate for in these settlements.

In addition, there are the significant economic effects for both reservation and off-reservation communities. That is a benefit we believe to tribes, and also a benefit to the State. The tribes are, they are tribes whose borders and reservations are within Montana.

Senator TESTER. Good. Chairman Macarro, first of all, thanks for being here. Your testimony talks about your Pechanga settlement and how various entities in California work together to work out this agreement. You need to be commended for that.

What happens if this bill doesn't get enacted at this level? After you have done your work at your level.

Mr. MACARRO. I think the uncertainty that, it certainly puts everybody at a disadvantage, the uncertainty of not knowing how much water we can pump, both for domestic potable purposes, economic development purposes. And that uncertainty also applies to the local water district and the larger community that the reservation is situated in. So it affects Indians and non-Indians alike.

There are some pragmatic concerns, if something doesn't happen in this Congress, the pragmatic concerns range from personalities and people, there are people at Interior, for instance, or Justice that have worked on Pechanga's water settlement for a couple of decades, actually. I think they may be in their twilight years of Federal civil service and maybe looking at retiring.

When they go, if they go before our settlement is completed, there is a lot of institutional knowledge, a lot of practical knowledge about our settlement that will go out with them. The learning curve on these things, on each settlement, each is its own creation to some degree, but that will fall to somebody new. So that is a setback in the actual settlement for the tribe.

There are political environments. The local parties that the tribe has local agreements with that I referred to in the testimony, both with the local water agency, regional water agency, those are starting to age, those agreements, those local agreements. There is a lot of goodwill, a lot of collaboration and coordination that was in place six to eight years ago when the initial discussions were had in earnest.

We hope that that is still there, the indications are it is still there. But the more forward we move in time, the more uncertain those sentiments become. I would like to thank that the goodwill is as good as it is, whether Congress approves these agreements or not. However, the imprimatur of Congressional approval signed

into law by the President would be the best guarantee of the agreements being in place a year from now or 20 years from now.

Senator TESTER. Very good. Thank you, Mark. I want to thank you all for your testimony. Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Tester. Senator Lankford?

**STATEMENT OF HON. JAMES LANKFORD,  
U.S. SENATOR FROM OKLAHOMA**

Senator LANKFORD. Gentlemen, thank you for being here. I appreciate the conversation on this. These are obviously extremely complicated issues. Recognizing the threats that are out there and the length of litigation, I want to talk a little bit about tribes that are currently not in settlement processes and States that are currently not in that. What can tribes and States do to avoid litigation that they can proactively do now before we get to that stage in the days ahead? Anyone can take that who wants to take that one on.

Mr. CONNOR. I will take a shot at that, Senator Lankford. I think fundamentally, and I think Mr. Moore referenced this, understanding the nature of the water resources, getting as much information from a technical standpoint, having, particularly for tribes, that vision of what it is that they need for a sustainable future with respect to water, what their overall needs are for their reservations, I think is good preparation.

And to the point that Steve raised, we are in our budget process for 2016, investing more resources, trying to provide more technical support so that tribes can do that planning that is necessary. I think that puts them in a good position to approach the States and local communities who they may have water resource issues with.

I know in the situation that exists in Oklahoma, with Chickasaw in Oklahoma City, I think there has been some very good work, and I know very good discussions. I can only assume that is based on a good understanding of the resource that has put them in a position to resolve those issues.

Senator LANKFORD. Mr. Moore, were you trying to say something as well?

Mr. MOORE. Yes, Senator. You have a unique situation in Oklahoma with 39 federally-recognized tribes on two river systems. We have met with a number of tribes in Oklahoma and I think our advice to them has been, work together. If the tribes don't work together, if they are not trying to work out their differences so that they can move forward in talks with the state and the private water users, then you have a really fractured situation. I think as a political leader in the State, that represents chaos for you, if people can't try and work and come together.

So again, I call him Jay because he's a friend, too, Mr. Weiner here, and the Montana Compacting Commission I think is a process that when you look around the West, it is noteworthy. The State of Montana did something very important. They statutorily recognized the Winters doctrine and the primacy of Indian water rights. They said, we are going to recognize that doctrine, we are not going to fight about it, and we are going to move forward from there. That is different from many States, where they are still fighting about the Winters doctrine.

I represent a tribe in California, the Agua Caliente Band of Cahuilla Indians in Palm Springs. We are fighting over that tribe's right to a share of the groundwater with the two local water districts who refuse to recognize the extension of the Winters doctrine in that context.

So if you move back to a 19th century approach you just create more antagonism, more hardship. I would advise the State of Oklahoma and its political leadership to look to Montana as a means of trying to create a framework for moving forward on resolving these matters.

Senator LANKFORD. Right. And the State leaders and the tribes are working very well together. We have an ongoing conversation which they will resolve among themselves within the State.

The challenge is determining tribal usage of water and that primacy, how far that extends. And it will be an ongoing conversation, I assume not just in Oklahoma, but nationwide. Is that for the benefit of the tribe while on the reservation or in our case, in the same area? Or is that an economic benefit that you can gather and sell and distribute? How is that typically worked out in place to place and what is the process on that?

Mr. WEINER. Senator Lankford, in the Montana settlements we have routinely built in leasing provisions because one of the things that we want to make sure that happens is that there are multiple avenues for tribes to develop their water resources. If they can put them to use on the reservation, then more power to them.

But if they have the ability to provide a clear framework to make additional water available to off-reservation users who have need for that water, we very much use our settlements as a tool to facilitate that process. We build in specific leasing provisions oftentimes to synchronize them with state law to make sure that there is appropriate regulatory approval for the off-reservation uses, synched up with the leasing provisions.

Senator LANKFORD. Best time to be able to negotiate this, in a time of drought or a time of plenty? I assume in a time of plenty, because this is going to multiply out in tribal locations and States all across the Country. Once you get to a time of drought, that is when everyone pays attention to it, suddenly.

Mr. WEINER. I would certainly agree with that, Senator Lankford. I would say that it is on occasion that it is times of drought that you realize all the issues that need addressing. It is sometimes possible that plenty is not as much of a panacea as it might seem to be. Certainly our recent experience with the Confederated Salish and Kootenai Tribes in Western Montana where there is in fact an abundance of wet water does not necessarily alleviate conflict.

Senator LANKFORD. Okay. And typical length, if I might ask, what is the typical length of a settlement at this point where we are right now? I know there is no normal, but give me a median.

Mr. WEINER. To speak from Montana's experience, to get to State legislative approval, the negotiations generally have gone on and off oftentimes for a decade. But there usually is a particular driver that helps bring the State and the tribe to the table to make the hard decisions that need to be made. So what we often find is that

settlement processes move slowly, slowly, slowly until they start moving very quickly.

So it is, in terms of the actual duration of settlement from stem to stern to get to State legislative approval, I would say you are talking decades. But in terms of doing the end product, very hard work once the foundation has been laid, those things can often come together, months is optimistic, but not very many years.

Senator LANKFORD. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Lankford.

Mr. Connor, as you know, the drought situation across the West appears to get worse every year. Mr. Macarro made reference to what was happening in Southern California. In drought-stricken California, lakes and rivers are drying out. Mandatory water restrictions are now in place. There are front page pictures in the newspaper about barren areas next to areas that are watered and that are lush and green.

How should the United States balance the need to finalize Indian water settlements with priorities for water users in these drought-stricken places?

Mr. MACARRO. I think there are crisis situations that we are trying to address very urgently with respect to California, in particular. The situation there is not an either/or. I think in that particular case, most of the work that is being done by the folks on the ground are committed to working through those drought issues.

In a lot of cases, there are analogies to Indian water rights settlements. What we are doing now, as you mentioned, there are areas being watered next to areas that are being fallowed. That is because of the seniority in the water rights system. That means there are winners and losers.

In some of those cases, as we move forward, and that is within our same Bureau of Reclamation projects even. Not everybody is on the same level. What we are trying to do there is facilitate arrangements to move water from the haves to the have-nots. There are financial arrangements, there is the use of our infrastructure. And it is a priority for not only Reclamation, but the Department as a whole.

Separately we do have these ongoing responsibilities with respect to Indian water rights settlements. So we are moving full forward with respect to the implementation activity. We have been very fortunate through the most recent settlements to have the resources to keep moving forward in this particular time frame. We are certainly concerned about the next several budget cycles and getting the resources we need to maintain our momentum.

But we haven't had to make choices. If I understood your question correctly, we are not having to make choices about not moving forward with the settlement, even negotiations and implementation activity, and not being able to do what we can in our all hands on deck approach to dealing with the drought issues.

The CHAIRMAN. Water settlements are intended to quantify the rights of tribes and to water sources. Some of the settlements that have been proposed for Congressional approval have included items which appear to go beyond merely quantifying those rights. Any additional items come at a cost to taxpayers and to other tribes that have to fight for appropriations and for their needs.

So in light of the tight budgets and the increasing water demands that are out there, how do you balance the need to settle the tribal water rights with the needs of other tribes that also require funding? I know Senator Tester mentioned a piece of legislation.

Mr. CONNOR. That has been a difficult issue, particularly for the Bureau of Reclamation. We view the obligations that we have to implement settlements as fundamental legal obligations through court settlements that have been authorized and embraced by the Congress. So they quite frankly, in a budget situation, have been elevated as a priority as opposed to maybe in the rural water projects, which are congressionally authorized, very good projects, incredibly important for those communities typically involved. A lot of Native American communities in the Plains area who are receiving waters, and the funding there has lagged at times within our budget relative to the priority that we placed on Indian water rights settlement.

The CHAIRMAN. So Mr. Weiner, along those lines, the scope of the water settlements such as that contained in S. 1125 can be extensive. This bill authorizes \$420 million for the Blackfeet settlement fund. You go through it and the fund includes various accounts, I think seven different accounts, we could go through each of them, but various accounts to improve Federal water irrigation systems and expand Federal reservoirs. In the State of Montana they're trying to figure out how much of this is really for the primary purpose.

Can you explain how each of these proposed accounts, and I don't want to go through each of the seven, but just generally how the proposed accounts benefit the tribe or tribal members, specifically with the Blackfeet Reservation? And I may end up submitting something more in writing for you.

Mr. WEINER. And I would be happy to supplement my answers with whatever specificity you would like, Chairman Barrasso. But certainly I would note that the \$420 million figure in S. 1125 actually reflects a reduction of \$170 million from the way that this bill was originally introduced, as S. 3290, in 2010. And that reflects a very difficult process that the tribe in particular, but the State also participated in with the Administration, pursuant to the criteria and procedures, to look very carefully at the balance of spending and the projects being identified in the settlement.

In addition, as part of that process, the State agreed to increase its contribution to settlement by 40 percent. In fact, we have not only authorized our \$49 million contribution, but fully funded it.

So we do believe that the projects that are identified, and the spending that is identified in this bill is not in any way expansive or an over-large allocation. In fact, in many ways it reduces some of the benefits that we hoped to see from this settlement to the Blackfeet Tribe.

But in terms of the accounts themselves that you referenced, the major funding that is contemplated in S. 1125 has to do with addressing the deferred maintenance backlog for the Blackfeet irrigation project and has to do with the construction of a municipal-rural-industrial drinking water system for the reservation, to ensure that Blackfeet tribal residents in fact enjoy access to safe, po-

table drinking water, which is a real, real challenge and something that we certainly believe that nobody, Indian, non-Indian, no America should be without. And it is a very important component of this settlement.

There are smaller amounts of money; obviously no amount of money is inconsiderable in this budgetary climate. But there are smaller amounts of money to help the tribe address resource administration issues, so that again, what the settlement contemplates to allow tribal and State water resource managers to actually be able to administer and implement this settlement is capacitated.

In addition, there is a Federal contribution to go with the State contribution to allow for the rehabilitation of a piece of infrastructure on that Blackfeet irrigation project in a way that allows a trans-basin diversion of some of that water to help resolve the water conflict on Birch Creek, which is the stream that I mentioned which is the southern boundary stream of the Blackfeet Reservation, that serves both the Blackfeet irrigation project and the Pond Oreille County Canal and Reservation Company, which is that Carey Land Act project that I mentioned.

I certainly understand it is a significant amount of money. There are no two ways about it. And certainly that funding is one of the challenges that all these settlements face when they come to Congress.

The CHAIRMAN. Mr. Connor, did you want to jump in on that?

Mr. CONNOR. I just wanted to double down on one of the points Jay made real quick. Because of those stresses on the Federal budget, we have a responsibility to fulfill the needs for an Indian water rights settlement in as efficient a manner as possible. A lot that we have done in the last couple of years, particularly on Blackfeet, have been surrounding what should be the Federal contribution, what should be the State contribution. We have had good partners and good discussions along those lines.

But it is fundamental to the success that we do it as efficiently as possible. And I think what has happened in the last few years is it demonstrates support between the Administration and the Congress for Indian water rights settlements, demonstrates that there is a willingness to move forward and fund these things.

So it has facilitated negotiations to tighten up those contributions.

Mr. WEINER. Senator, if I may make one additional point.

The CHAIRMAN. Sure.

Mr. WEINER. Thank you. One of the other reasons, over time, that these settlements seem to expand in cost is that as you are well aware, the backlog of deferred maintenance for irrigation projects, for drinking water projects simply continues to grow. It is one of the reasons Montana strongly supports things like your Irrigate Act, and like Senator Tester's Rural Development bill. Because to the extent that the Congress is able to make programmatic funding available for those things, that will significantly help, as we move forward, take the burden off some of these Indian water rights settlements, which right now are almost the only game in town for tribes to receive funding for these absolutely critical pieces of infrastructure.

The CHAIRMAN. And not just for tribes; for the non-tribal communities nearby. Because water is the lifeblood in the West. It is important to tribes and also the surrounding non-tribal communities, specifically and particularly ranching, farming communities. So that is kind of the follow-up question, how do the settlements that your State reach with tribes address the impacts to other water users who are not necessarily a party to the settlement but are concerned about losing their water supplies?

Mr. WEINER. That concern is essentially baked into the Montana process. The Compact Commission's job, essentially, is to try to reach these quantification agreements in a way that protects all of these individual, State-based water users. Essentially, one of the major cost-effective innovations of the Montana process is that when it works, and we believe it has worked across the board, it spares all those individual water users from needing to lawyer up from engaging in a relationship of conflict with a tribe or tribes. Through the settlement process we are able to ensure their protection. That is one of the major reasons that the State contributes significantly to these settlements.

The CHAIRMAN. Thank you. Senator Lankford?

Senator LANKFORD. I have just one quick question, it is an expansive question.

Mr. Connor, let me ask you about Bureau of Reclamation issues within the state. The State is making a decision to move water from one reclamation area to another reclamation area, whether that be a tribal area or non-tribal area. What is the process to do that? If a State said, we need to move water that is currently sitting in this reclamation area to another one, but it is within the State, fulfilling State requirements, fulfilling settlement agreements on tribal areas? What is the process on that?

Mr. CONNOR. Typically, the process started when the reclamation project was developed. Initially we went forward, we being the Bureau of Reclamation, and apply to the State for a State permit to develop that reclamation project. At that point in time, we are either working with the State to determine how that project would receive water in the face of senior water users who are already there. Then once we had a reclamation project and we had that water supply available, typically they are on par, the water users are on par within the project. We work with the State continually to acknowledge our contract rights versus State water rights.

It is not typically part of the ongoing operations issues, once the project is constructed. Usually those issues were worked out prior.

Senator LANKFORD. You are talking about decades ago?

Mr. CONNOR. Exactly.

Senator LANKFORD. So what happens if just perchance, maybe population changes in an area after decades and decades and a State wants to move water from one reclamation area to another one? State pays for it? State does it? What is the process for that? Is that permissible or non-permissible?

Mr. CONNOR. Anything is permissible with respect to improved water management. We are having these discussions in the State of California right now, given the stresses on the system.

Typically, there are legal rights that people have, contractual rights. But we deal with reality, we try and create an incentive or

create by agreement a mechanism by which the transition can take place.

Senator LANKFORD. As these settlements come through for Congressional approval, would a State make moving water from one reclamation area to another, or would that require Congressional approval? Or is that something that would come back through the Bureau of Reclamation and be done?

Mr. CONNOR. Typically an action like that would have to require Congressional approval.

Senator LANKFORD. So it takes an act of Congress, literally, to move water from one area to another area within a State. Do you know how common that is, as far as to be able to move from one reclamation area to another one, abiding by compacts, settlements, all those things?

Mr. CONNOR. It is not very common, and I will tell you why. Most of the arrangements that we are entering into in moving water between entities are year-to-year operational decisions. Nobody wants to, well, I would say it is a rarity when people want to relinquish their long-term rights to water. Short-term transactions are something that people are interested in based on their own economic needs, based on the realities of drought situations.

So it is a rarity to do a fundamental shift like that. More and more it is institutional short-term arrangements.

Senator LANKFORD. Thank you.

The CHAIRMAN. Thank you, Senator Lankford.

Mr. Macarro, your written testimony noted that to assist in funding of these Indian water settlements that the Administration's involvement was critical. I think you specifically stated that the Administration must find ways to finalize the negotiations, so the Department can publicly and through written letters support the water settlements.

What do you think have been barriers to achieving that support that you talk about?

Mr. MACARRO. First of all, I think most tribes everywhere would agree that Congress acting on water settlements, proactively acting as a mandate and not a choice, and I say that with regard to funding, that it shouldn't be an issue of well, we don't have funding in the budget this year or this cycle, so we won't fund anything. My view is that it should happen every time.

Beyond that, in 2010, first of all, let me start out by saying that Indian water settlements of the past were able to obtain letters of support from Interior. I would like to thank Deputy Secretary Connor's efforts and commitments with water settlements, because he was a big part of that.

Now, it is my understanding that the support, with regard to the barriers question, the support process involves Interior working both with Justice and OMB to determine the benefits under each settlement. More specifically, the Federal contribution reflects the Federal programmatic responsibility to each tribe for water development and management, as well as the potential liability for claims by the tribe.

This type of analysis and calculation has some level of complexity that is inherently part of the process. So from Pechanga's perspective, we are at the tail end of this process and are at a place where

Interior should be able to make that determination for our settlement in the near future. There are lots of moving internal parts, some of which we see and can participate in and many of which we can't. They are part of the various agencies' work.

Especially one of the dangerous places, I think, is when an Administration changes. The handoff of these issues sometimes falls between the cracks. So there is a lack of continuity as well that feeds into that. I would identify that as a barrier as well.

The CHAIRMAN. And it is sometimes not just even a change of Administration, it can be a change in an administrator or somebody that's in charge of a specific component or project.

Mr. MACARRO. Exactly. I spoke to certain personalities that actually are deeply involved in many of these things until they are gone, then somebody comes in and there are new styles, new organization.

The CHAIRMAN. Lack of information, lack of knowledge, has to get ramped up again.

Mr. MACARRO. Absolutely.

The CHAIRMAN. Thank you very much.

Mr. Moore, in your written testimony you raised a concern that Indian tribes need to have a level playing field when addressing their water rights claims. You said tribes need to be given access to all necessary data and information. Could you just elaborate a little bit on the types of data and information that the Indian tribes need in these cases?

Mr. MOORE. Yes, Mr. Chairman. The first thought that comes to my mind is the kind of information that the U.S. Geological Survey, USGS, can generate. And they often do that in a partnership kind of relationship with state and local water entities. If the USGS made resources available or through the Interior Department funding resources were made available to USGS to do targeted studies for Indian tribes, that would be a tremendous benefit.

Off-the-shelf kind of information and access to data that is already in existence through USGS reports, just making that available to Indian tribes would also be of tremendous help, just so the tribes and their water resource managers and their policy people can begin to understand the playing field that they are operating in.

The CHAIRMAN. Thank you.

There are no other questions, so I would let you know that members are still able to submit written follow-up questions for the record, so the hearing record will be open for the next two weeks. I want to thank all of you for being here today, for your time and for your testimony.

The hearing is adjourned.

[Whereupon, at 3:39 p.m., the hearing was adjourned.]

# A P P E N D I X

PREPARED STATEMENT OF HON. SHERRY COUNTS, CHAIRWOMAN, HUALAPAI TRIBE

I am Sherry Counts, Chairwoman of the Hualapai Tribe. I appreciate the opportunity to submit this written testimony in conjunction with the Senate Committee's ongoing oversight of Indian water settlements.

The Hualapai Reservation encompasses approximately 1 million acres in northwestern Arizona. All lands on the Reservation are tribal trust lands; there are no allotments or fee inholdings. The Colorado River forms the 108-mile northern boundary of the Reservation through a portion of the Grand Canyon.

At this oversight hearing on Indian water settlements, I want to describe the efforts the Tribe has made and continues to make to quantify its water rights reserved under federal law in order to develop a secure water supply for its future needs. I also want to offer some suggestions on how Congress could improve its process for considering and enacting Indian water settlements. First, let me give some background on our Reservation and its water needs.

## **1. Background on the Hualapai Reservation**

Our Reservation has no significant surface streams other than the Colorado River, and very limited groundwater resources. While the Tribe is presently able to supply its main residential community, Peach Springs, with groundwater, that groundwater supply comes from an aquifer that extends for several hundred square miles outside our Reservation, and the Tribe's well levels are currently declining. Most groundwater elsewhere on the Reservation is thousands of feet below the surface. Consequently, the Colorado River is the only feasible water supply for satisfying the future needs of the Reservation.

The Tribe has over 2,300 members. We have constructed and operate Grand Canyon West, a world class tourist development on the Reservation on the western rim of the Grand Canyon. Grand Canyon West currently employs over 300 tribal members (and another 300 non-Indians) and hosts about 1,000,000 visitors a year. But it is located a two-hour drive from Peach Springs, where virtually all of the tribal members on the Reservation live. Thus tribal employees at Grand Canyon West have daily commutes of four hours a day, and even longer in inclement weather.

The Tribe also employs approximately 100 other tribal members in a tribally-owned hotel in Peach Springs and a seasonal Colorado River rafting enterprise operated by the Tribe. Without conducting any gaming, our Tribe is moving towards achieving full employment for our members and economic self-sufficiency.

However, the lack of water on the Reservation is the major obstacle to our reaching these goals. The nearest groundwater to Grand Canyon West is 35 miles away. That supply is barely adequate for current operations, and completely inadequate for growth. With additional water, the Tribe could take advantage of the potential for further development at Grand Canyon West and add one or two hotels, an RV park and a campground that would provide additional jobs to tribal members and revenues to the tribal government. Water at Grand Canyon West would also support the development of a residential community there, so our tribal members would not have to commute four hours each day from Peach Springs to get to their jobs.

## **2. The Tribe's Ongoing Efforts to Settle Our Reserved Water Rights Claims**

Over the past four years, we have been negotiating a comprehensive settlement of all of the Tribe's reserved water rights with the Justice and Interior Departments, the State of Arizona and major private entities in Arizona. The Tribe hopes to submit this settlement to Congress as soon as we resolve about a dozen outstanding issues with the Federal, State and private entities involved in the negotiations—hopefully later this year.

In addition, the Tribe, the United States and Freeport Minerals Corporation concluded an agreement last year settling our water rights claims in the Big Sandy Creek, a tributary of the Bill Williams River, south of our main Reservation. This settlement was approved by Congress last December in the Bill Williams River

Water Rights Settlement Act of 2014, Public Law 113–223. We thank this Committee for its favorable consideration of that legislation, which provided many benefits to the Hualapai Tribe.

First, as a result of this legislation, the two major landowners and water users in Big Sandy Creek—the United States and Freeport Minerals Corporation—confirmed federally reserved water rights for the Tribe totaling 300 acre feet a year (afy) relating to a 60-acre parcel of Tribal land along Big Sandy Creek that was added to the Hualapai Reservation by an 1911 Executive Order. Freeport and the United States also confirmed federally reserved water rights totaling 394 afy for two off-reservation trust allotments issued to Hualapai tribal members in the Big Sandy. The agreements ratified by this legislation protect these water rights by also requiring Freeport to provide supplemental water to the tribal and allotted lands in certain circumstances to ensure the Tribe and allottees can fully utilize these reserved water rights.

Second, the agreements provide vital protections for the Tribe’s water rights on fee land it owns along Big Sandy Creek, called Cholla Canyon Ranch. The Tribe has applied to the Secretary of the Interior to take the Ranch into trust for it, and Freeport has agreed to support that application. This Ranch contains a spring that is sacred to the Tribe, Cofer Hot Spring, the flows of which have diminished in recent years due to pumping by Freeport. In 2012, Freeport ceased all but the most minimal pumping in the aquifer that feeds Cofer Hot Spring, and in the settlement agreements, Freeport agreed permanently to cease pumping more than minimal amounts from that aquifer. Under the agreements and legislation, Freeport also gave the Tribe a right of first refusal to purchase Freeport’s lands at Banegas Ranch and surrounding land that Freeport owns, in order to protect the flow of Cofer Hot Spring. Pursuant to the agreements, Freeport will record a binding covenant in the county land records that will impose the same pumping limitations on any future purchaser of any portion of Banegas Ranch, should Freeport decide to sell and should the Tribe decide not to buy these lands.

In addition to these important benefits that the Settlement Act provides for the Hualapai Tribe in the Big Sandy Creek, as part of the settlement Freeport also contributed \$1 million to the Tribe for the purpose of completing an essential study the Tribe had initiated (with its own funds and with a grant from the Bureau of Reclamation) to determine the feasibility and costs of various infrastructure projects to bring Colorado River water to the Hualapai Reservation. This contribution by Freeport allowed the Tribe to complete this study last year, which is a prerequisite to finishing its ongoing negotiations for the comprehensive settlement of its Colorado River water rights.

Lastly, when this legislation becomes fully effective later this year, Freeport will contribute a substantial additional sum to a tribal economic development fund that the Tribe will use to purchase rights to use Colorado River water. The Settlement Act specifically provides that these two contributions by Freeport will count as non-federal contributions to the final comprehensive Colorado River water rights settlement the Tribe is negotiating with federal and state parties.

### **3. Suggestions on How Congress Might Improve Its Consideration and Enactment of Indian Water Settlements**

As I understand it, Congress has enacted approximately thirty Indian water rights settlements in the past three decades. I believe that this slow and sometimes tortuous process—resulting in an average of one settlement per year—could be improved if Congress focused more directly and sharply on meeting the sometimes desperate needs of Indian reservations for water.

Of course, the basic water needs of particular tribes vary greatly, and must be considered separately for each tribe. I have focused on the specific future needs and problems on my Reservation, because I know these needs and problems the best. I know that many tribes lack sources of water on their reservations that are sufficient to meet their basic needs for drinking water. Just a decade ago, the United States Civil Rights Commission reported that approximately half all Indian homes on reservations lacked full kitchens and bathrooms with drinking-quality running water! Congress long ago recognized that tribal economic development relies on community stability and basic governmental services, specifically including safe drinking water and adequate waste disposal systems. S. Rep. No. 100–274, at 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2623 (Indian Self-Determination and Education Assistance Act Amendments of 1987). Ample safe drinking water for domestic and municipal uses is an absolute necessity for tribes to become economically self-sufficient and to participate meaningfully in the modern American economy.

Some tribes have sufficient municipal and domestic water supplies to meet their current needs, but face threats to their water supplies from surface and/or ground-

water diversions by neighboring communities or irrigation projects. Other tribes face the problem of antiquated water delivery systems for their irrigated agriculture or municipal and domestic supplies.

Virtually all Indian tribes have far less water available to them than is necessary for the tribe to become economically self-sufficient. This has occurred despite the strong recognition in the two controlling Supreme Court cases—*Winters v. United States*, 207 U.S. 564 (1908), decided over 100 years ago, and *Arizona v. California*, 373 U.S. 546, 599–601 (1963), decided over 50 years ago—that Indian tribes have water rights which are superior to the rights of virtually all non-Indian water users because of the early use and occupancy of their Reservations by the tribes. These and other court decisions firmly establish that tribal water rights are protected by federal law and that the United States, which holds title to these rights for the benefit of the tribes, has a trust responsibility toward them.

Despite this very favorable legal framework, almost all tribes, including mine, lack the water they need to attain economic self-sufficiency today because Congress and the Executive Branch have failed to adhere to the legal principles set forth by the courts in *Winters*, *Arizona v. California* and other cases recognizing the superiority of tribal water rights.

For most of the 20th century, Congress appropriated millions of dollars each year for western states to construct water projects operated under federal reclamation laws, almost entirely to provide water to non-Indians. And the Bureau of Reclamation, an Interior Department agency, constructed and operated most of these non-Indian irrigation systems, or contracted with irrigators within each Project to administer it. The legally superior Indian rights to water on these same river systems, recognized by the Supreme Court in *Winters*, were largely ignored. In the cases that did adjudicate Indian water rights, the U.S. Justice and Interior Departments usually failed to properly assert reserved rights for tribes as set forth in the *Winters* case.

As the National Water Commission's Final Report summarized the situation in the 1970s:

During most of this 50-year period [following the decision in *Winters v. United States*, 207 U.S. 564 (1908)], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes have had in the waters used for the projects . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorer chapters.

NAT'L WATER COMM'N WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES pp. 474–75 (Washington: Government Printing Office, 1973).

While things have improved for those tribes affected by congressionally approved water settlements in recent decades, these settlements have benefitted only a relatively few tribes. The vast majority of tribes today still lack enough water to live adequately.

This can change only if Congress now establishes the overriding policy goal of meeting the existing and future needs on Indian Reservations for a sufficient water supply to allow each tribe to achieve economic self-sufficiency. While the present and future needs of each Reservation vary, Congress should establish a national Indian water policy to address and meet those needs. This should be done because sufficient water supplies are a necessary condition of lifting tribes out of poverty and enabling the tribes to achieve a living standard comparable to other Americans. My Tribe is doing everything we can to achieve that goal, but we cannot reach it without the delivery of water from the Colorado River that constitutes over 100 miles of our Reservation border.

I recognize of course that the policy I propose will cost money. The monetary cost of Indian water settlements is, I believe, a primary reason there have been so few settlements. And I recognize that one reason our settlement agreement in the Big Sandy Creek was enacted by Congress last year was that it required no federal

monetary contribution. Bringing Colorado River water to our Reservation, by contrast, will have a significant cost.

To implement the national Indian water policy I propose, I believe that Congress should establish a comprehensive fund with appropriated monies bearing interest and held separately in the U.S. Treasury for the sole purpose of funding settlements of tribes' reserved water rights claims. Establishing this kind of dedicated fund is necessary to improve and broaden the implementation of water settlements and, in a reasonable number of years, to bring water to all reservations. The necessity for tribes to secure individual appropriations has, in the past, been a costly and time consuming process that has greatly delayed and reduced the effectiveness of the settlements that have been approved by Congress. Even after a settlement has been reached and ratified by Congress, it can fail as a practical matter if Congress delays in appropriating the funds needed to construct the infrastructure to be built under the terms of the very settlement it ratified, or because the Interior Department delays in taking other actions necessary to implement the settlement. Another problem with the existing ad hoc funding system is that funding for settlements comes out of the existing Interior Department's budget which reduces funding available to meet other Departmental needs and priorities—which mostly results in reducing funding for other federal Indian programs. These problems would be largely rectified if a comprehensive fund were established outside existing Interior budgets so that the federal costs of any settlement approved by Congress are immediately available. The fund should be initially sized to fund both existing settlements and any newly negotiated settlements over a set time period, say the next five or ten years, and then replenished periodically thereafter.

#### **Conclusion**

I appreciate the opportunity to present this written testimony and would be delighted to work with the Committee both on the comprehensive resolution of the Hualapai Tribe's Colorado River water rights and on the broader issues involved in establishing a national Indian water policy. Thank you for your help in the past and for considering the views of my Tribe.

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#### PREPARED STATEMENT OF VERNON FINLEY, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION TRIBAL COUNCIL

On behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation I would like to thank Chairman Barrasso, Vice Chairman Tester and Committee members for holding an oversight hearing on the important subject of "Addressing the Needs of Native Communities through Indian Water Rights Settlements." As Vice Chairman Tester noted at the hearing, the Salish and Kootenai Tribes recently completed negotiations concerning the Tribes' reserved and aboriginal rights with the State of Montana and the United States. We are pleased to report that our Compact was ratified by the Montana Legislature last month after years of complex negotiations.

Our Compact has now been taken under review by the Departments of Interior and Justice. It is our hope that we will soon be asking members of the Committee to introduce legislation to ratify our Compact in the months ahead. However, we are keenly aware of the pace at which Interior and Justice have reviewed prior water settlements. We have heard from many of our sister tribes that water settlement review has historically been a slow and difficult process for tribes. Accordingly, we appreciate Senator McCain's efforts to seek firm commitments by Justice and Interior to diligently review Indian water settlements. We similarly appreciate Deputy Secretary Connor's commitment on behalf of the Department of Interior to get the job done.

Throughout the hearing many of the Members and the witnesses noted that Indian water settlements save the American taxpayer the cost and uncertainty of expensive, protracted, and complex litigation. At the same time settlements allow the parties to obtain benefits that cannot be achieved through litigation.

Our Compact with the State of Montana does all of this and more. It quantifies the aboriginal and reserved water rights of the Tribes, while avoiding decades of costly and uncertain litigation involving water rights claimants across roughly two-thirds of the State of Montana. It resolves the complex scenario on the Flathead Reservation where most water originates on Tribal lands, flows through non-Indian lands, and then back to Tribal lands.

The Compact also confirms a water right in the name of the Tribes for the massive Flathead Indian Irrigation Project, benefitting Indian and non-Indian water users within that Project by securing the most senior water right in the system for

the Project. It further ensures water delivery to water users in the Project without exhaustive litigation. It also commits most of the State's monetary contribution to settlement to improving the Flathead Indian Irrigation Project, which is primarily used by non-Indian irrigators, providing a substantial benefit to the non-Indian agricultural community on the Reservation and the region's economy overall.

Our Compact confirms the Tribes' rights to water in off-Reservation streams and rivers where Tribal members have historically hunted and fished, while protecting existing uses of water. This component of the Compact was widely supported by Montana's fishing community who recognized that protecting fish habitat is good for all people for both recreation and subsistence. The Compact also eliminates the need for the implementation of restrictive measures under the Endangered Species Act, ensuring local control of habitat, rather than federal overreach.

Importantly, the Compact provides for shared shortages of water in dry years, rather than simply requiring all water to go to the senior water rights holder. As the senior water rights holder with an 1855 priority date, this is a significant concession by the Tribes.

And the Compact makes tens of thousands of acre feet of water available from the Hungry Horse Reservoir that was previously unavailable. This water can be used for municipal, domestic, commercial, or industrial purposes by non-Indians under nominal lease rentals from the Tribes.

There are many other benefits achieved through our Compact that are too numerous to recount here—none of which could have been achieved through litigation. This Compact was only reached after significant concessions by the Tribes and the creativity allowed in negotiation. We were very pleased that the Montana Legislature recognized the benefits in the Compact and the Tribes' concessions and ratified it this April.

But it is important that our Compact receives swift review by Interior and Justice, and ultimately ratification by Congress. Under the terms of the Compact, the Tribes may withdraw if Congress fails to ratify within four years of state ratification. This is only fair. The Tribes cannot be expected to make concessions and waive claims if the other parties aren't committed to approving the settlement and funding it.

In addition, the long and sometimes contentious process of negotiation and State ratification unfortunately created community rifts both on and off-Reservation. In order to support efforts to heal our communities, which have already begun, the interests of all Montanans would be best served by not prolonging the path to Congressional consideration and approval any more than necessary.

Moreover, the Flathead Indian Irrigation Project continues to deteriorate with growing maintenance needs that lack adequate funding. Without state and federal contributions to settlement, the project will continue to deteriorate and stifle the region's agricultural producers and economy generally. A deteriorated and leaking Project also creates tension between irrigation interests and the need for instream flows for the on-reservation fishery. Certainly one of the benefits of the Compact is the repair and increased efficiency of the Project and the amelioration of this particular conflict.

And we agree with Mr. Moore's comments at the hearing that Congress must consider its solemn trust responsibility to the Tribes stemming from promise made under the Hellgate Treaty of 1855. Congress must fund damage claims, fix infrastructure, and confirm the Tribes' water and treaty rights, including the Tribes' right to lease water thereby improve the economy of the State we live in.

For all of these reasons, we were very pleased with the leadership of Chairman Barrasso and Vice Chairman Tester for calling this important hearing. But the hearing highlighted the work to be done in the months ahead by all of us. We call upon the Committee to continue to work to find solutions to swiftly move settlements through Congress.

We strongly support the efforts of Chairman Barrasso, Vice Chairman Tester, Senator Daines and other key Senators in introducing S. 438, the IRRIGATE Act. This bill will begin to address the longstanding maintenance backlog on the Flathead Indian Irrigation Project which is in a state of disrepair. Improvements to the Project will deliver more water to fields and leave more water in streams for crucial fish and aquatic habitat.

We also strongly support the efforts of our own Senators Tester and Daines and other Senators in their bill (S. 1365) to authorize the Secretary of the Interior to use designated funding to pay for construction of authorized rural water projects, and for other purposes. This bill is widely supported by Indian tribes throughout Montana because it addresses two important areas for funding: the completion of authorized rural water projects and Indian water settlements. This bill saves taxpayers money by allowing timely completion of infrastructure projects without bear-

ing the inflationary costs of a stalled project that accrue over decades of construction. It also creates a mechanism for water settlement projects, especially for settlement implementation, in Indian country going forward. We urge the Members of the Indian Affairs Committee to work with the leadership of the Senate Energy and Natural Resources Committee to swiftly hear this bill and to advance it for adoption this session.

Finally, we call upon the Committee to continue to find mechanisms to fund Indian water settlements and operational, maintenance, and replacement costs of both existing and new projects. In the Hellgate Treaty we relinquished millions of acres in the Pacific Northwest for non-Indian settlement, and in our Compact we made vast concessions of our rights. Now we ask Congress to live up to its promises and fund settlements that are fair for the benefits of our nation's Indians and all Americans.

