

S. 2154, S. 3060, AND S. 3168

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

—————
JULY 18, 2018
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S. 2154, S. 3060, AND S. 3168

WEDNESDAY, JULY 18, 2018

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

The Committee met, pursuant to notice, at 3:08 p.m. in room 628, Dirksen Senate Office Building, Hon. John Hoeven, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN HOEVEN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. Good afternoon. We will call the hearing to order.

I apologize for the late start. We had votes, but I appreciate everyone's patience.

Today, the Committee will receive testimony on three bills: S. 2154, the Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act; S. 3060, a bill to repeal Section 2141 of the revised statutes to remove the prohibition of certain alcohol manufacturing on Indian lands; and S. 3172, the Indian Water Rights Settlement Extension Act.

The Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act, S. 2154, was introduced by Senator Moran on November 16, 2017. This bill would approve the tribe's water claims in the State of Kansas and authorize the tribe's water rights settlement agreement between the tribe and the State.

Most notably, the legislation would confirm the tribe's water right of 4,705 acre-feet of water per year; direct the tribe to pass a tribal water code within three years after the bill's enactment; and direct the Secretary of Agriculture, in consultation with the Secretary of the Interior, to commence a study and make recommendations to Congress for the Upper Delaware and Tributaries Watershed project.

Regarding S. 3060, Senator Cantwell introduced the legislation on June 13, 2018. This bill would repeal an 1834 Federal law that prohibited the creation, or continuation, of ardent spirit distilleries in Indian Country.

A House companion bill, H.R. 5317, was introduced by Representative Jamie Herrera Beutler. The House Natural Resources Committee held a hearing on H.R. 5317 on April 26, 2018, at which the Department of the Interior provided testimony in support of the bill. On May 24, 2018, H.R. 5317 was reported favorably by the House Natural Resources Committee.

Finally, the Indian Water Rights Settlement Extension Act, S. 3168, was introduced by Vice Chairman Udall on June 28, 2018. This bill would extend in perpetuity the Indian Water Rights Settlement Fund, which was established in the Omnibus Public Land Management Act of 2009. This settlement fund pays for certain water supply infrastructure projects, as described in Congressionally-approved Indian water rights settlement agreements.

With that, I will turn to Vice Chairman Udall for any opening statement he may have.

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

Senator UDALL. Thank you, Chairman Hoeven, for calling today's legislative hearing.

The three bills before us today cover two issues of great importance to Indian Country, economic development and tribal water rights settlements.

Senator Cantwell's bill, S. 3060, repeals an antiquated law passed over 180 years ago that prevents tribes from being able to set and operate distilleries on their own lands. The repeal of this law, which does not apply to State lands, would remove needless barriers to economic development in Indian Country and provide parity for tribes.

Moving on to my bill, S. 3168 would permanently extend the Reclamation Water Settlements Fund in order to meet our trust responsibility to Indian Country and our obligation to fully pay for Indian water rights settlements. These settlement funds, which come on line in 2020, will go a long way towards paying for the \$1.6 billion backlog to complete just five of the currently authorized Indian water rights settlements.

The importance of these settlements to providing certainty to both Indian and non-Indian communities cannot be overstated, particularly when climate change and drought threaten water supplies throughout the West. Each water settlement this bill will fund in the future is a carefully crafted agreement between multiple water users and is paramount to the economic vitality of the community.

Lastly, Senator Moran's bill, S. 2154, takes important steps towards recognizing, quantifying and defining the Kickapoo Tribe's reserved water rights. Ultimately, the bill would secure the tribe's current and future access to water, the life blood of the community.

These three bills give Congress a chance to do the right thing by those tribal communities to whom we owe legal, financial and moral obligations.

Thank you again, Mr. Chairman, for calling this hearing.

The CHAIRMAN. Are there other opening statements?

I will call on certain individuals for introductions in just a moment but are there opening statements prior to that?

[No audible response.]

The CHAIRMAN. The witnesses today are: Mr. Alan Mikkelsen, Deputy Commissioner, Bureau of Reclamation, Department of the Interior; The Honorable Harry Pickernell, Chairman, Confederated Tribes of the Chehalis Reservation, Oakville, Washington; The Honorable Lester Randall, Chairman, Kickapoo Tribe, Horton,

Kansas; and Mr. John Tubbs, Director, Montana Department of Natural Resources, Helena, Montana.

Thank you very much to all of you for being here.

Senator Moran, did you want to make an introduction?

**STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS**

Senator MORAN. I would be happy to, Mr. Chairman. Thank you very much for the opportunity. I thank you and Vice Chairman Udall for holding this hearing.

I was just visiting with my staff and in the nearly four years I have been a member of this Committee, this is the first time we have legislation that directly impacts a Kansas tribe. I appreciate the cooperation I have received from all of you in regard to addressing a water rights issue important to this tribe and our State, something the State of Kansas is anxious to have resolved, as is the tribe.

I would use this moment you gave me to make a bit of an opening statement and that is this is important and is an issue that we will have elections in Kansas and there will be another set of public officials dealing with an issue that has been unresolved for decades.

Congresswoman Jenkins, who has led the effort in the House, is retiring from the House. Again, this would be useful for us to resolve now. I look forward to working with her and all of you to see we get this resolved before the end of the congressional year.

Mostly, I would take this opportunity to thank Chairman Randall for making the trip from Kansas to discuss this legislation and its impact on the tribe. I welcome him to the Indian Affairs Committee and look forward to continuing to work with him and his tribe as we try to find good solutions that benefit tribal members and the State of Kansas.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester.

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

Senator TESTER. Thank you, Mr. Chairman.

I want to also echo some of Senator Moran's comments thanking you for this hearing. I think this is an important hearing on many different fronts.

Before I get to my introduction, I just want to thank Alan Mikkelsen for being here. We appreciate your work at the Bureau of Reclamation. I look forward to your opening statement.

As far as the bill that deals with alcohol prohibition in Indian Country, I would just say, at least in Montana, there has been a real opportunity to create employment in a very positive way, I might add, with micro distilleries. I think now is the time this bill deserves some solid debate and hopefully we can move it on.

I also want to thank Senator Moran for his leadership on water compacts. I am giving you compliments, Jerry, on your water compact. The truth of the matter, is water compacts are not easy. We appreciate Senator Moran's leadership on this issue and moving it forward.

I just want to introduce a friend of mine who has come to testify on Senator Udall's bill on the reclamation water settlements.

When I was a rookie legislator in the State legislature, one of the first people we had a chance to meet was a guy by the name of John Tubbs who, at that point in time, came out of a Republican administration and helped everyone. It did not matter about party, but giving us information when we had to make decisions.

He is someone who now is Director of the Montana Department of Natural Resource and Conservation, someone who understands water, understands the importance of water, and understands the importance of the water rights process. I just cannot thank him enough for being here today to give us his wisdom when it comes to water rights settlements. He may not look that old but he is quite old.

Thank you, Mr. Chairman.

The CHAIRMAN. I knew he was going to tease you a little bit. Senator Tester, I think those were really good remarks all around. Senator Moran, thank you as well.

We will begin with Mr. Mikkelsen. Again, try to keep your testimony to about five minutes, if you would.

STATEMENT OF ALAN MIKKELSEN, SENIOR ADVISOR TO THE SECRETARY, WATER AND WESTERN RESOURCE ISSUES; CHAIR, WORKING GROUP ON INDIAN WATER SETTLEMENTS, U.S. DEPARTMENT OF THE INTERIOR

Mr. MIKKELSEN. Thank you, Mr. Chairman.

Good afternoon, Chairman Hoeven, Vice Chairman Udall and members of the Committee.

My name is Alan Mikkelsen. I am now the Senior Advisor to the Secretary on Water and Western Resource Issues and Chair of the Department's Working Group on Indian Water Settlements.

I am here to testify on behalf of the Department on two bills, S. 3168, a bill to permanently extend the Reclamation Water Settlement Fund and S. 2154, a bill to authorize the Kickapoo Tribe Water Rights Settlement.

On behalf of the Department, I have also submitted a statement for the record on S. 3060, a bill to remove the prohibition on certain alcohol manufacturing on Indian lands.

The Administration continues to support the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Negotiated settlements allow tribes, States and local water users to achieve finality on difficult issues of title to water and free surrounding communities to make critical management development decisions.

Settlements allow the parties to develop creative solutions to difficult water resource issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and to creating water certainty and economic development opportunities in the West has been funding.

Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes.

Settlements provide opportunities for local solutions and because they have Federal and local cost share requirements, the settling parties share the burdens as well as the benefits that can arise from investments in infrastructure.

S. 3168 aims to address the need for funding by permanently extending the Reclamation Water Settlement Fund which currently authorizes the Secretary of the Interior to expend from the Settlement Fund up to \$120 million a year of the amounts deposited through fiscal year 2029, plus accrued interest in each of the years from fiscal year 2020 to fiscal year 2034.

The Administration remains committed to implementing and adequately funding the enacted settlements and has ensured adequate funding to implement all authorized settlements through the annual budget process. The department looks forward to working with the Committee to determine the best approach for authorizing future settlements.

S. 2154 would authorize and ratify the September 2016 revised settlement agreement between the Kickapoo Tribe and the State of Kansas, quantify the tribe's water rights, and direct the Secretary of the Interior to enter into the 2016 settlement. The bill also directs the Secretary of Agriculture to complete a study and make recommendations within two years related to a surface water project for the tribe.

The Department has significant concerns with S. 2154. S. 2154 does not meet the critical goal of all Indian water rights settlements, finality. S. 2154 leaves unresolved the ultimate cost of the settlement, how those costs are shared amongst the parties, and how the water right of the tribe will be realized.

Moreover, S. 2154 retains the tribe's claims against the United States, a key component of Indian water rights settlements that is meant to be resolved. S. 2154 also does not resolve the issues related to the Plum Creek project and infrastructure to meet the tribe's water right.

While the Department does not dispute the amount of water quantified in the 2016 agreement, we have concerns that directing the USDA to commence a study and make recommendations on potential alterations to this project leaves many uncertainties in relation to the amount of water or projects that will be needed to address the tribe's water needs. This creates unknown costs and potential liability that neither the United States nor anyone else should be exposed to.

In conclusion, I want to emphasize that the department is committed to working with the tribe and the State to reach a final and fair settlement of the tribe's water right claims that adheres to the principles of the department's criteria and procedures and that we can fully support. As proposed, however, the department cannot support S. 2154.

This concludes my statement on S. 3168 and S. 2154. I would be happy to answer any questions on those bills at the appropriate time.

Thank you.

[The prepared statement of Mr. Mikkelsen follows:]

PREPARED STATEMENT OF ALAN MIKKELSEN, SENIOR ADVISOR TO THE SECRETARY,
WATER AND WESTERN RESOURCE ISSUES; CHAIR, WORKING GROUP ON INDIAN
WATER SETTLEMENTS, U.S. DEPARTMENT OF THE INTERIOR

S. 2154, THE KICKAPOO TRIBE IN KANSAS WATER RIGHTS SETTLEMENT AGREEMENT ACT

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke for Water and Western Resource Issues and Chair of the Working Group on Indian Water Settlements at the Department of the Interior (Department). I am pleased to appear before you today to discuss Indian water rights settlements.

Thank you for the opportunity to provide the Department's views on S. 2154, the Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act, which would approve and provide authorizations related to a settlement agreement involving the water rights of the Kickapoo Tribe in Kansas (Tribe). The Tribe and the State of Kansas (State) executed this settlement agreement in September 2016. The Department has significant concerns about the scope of the settlement agreement between the Tribe and the State. As executed, the settlement agreement only partially resolves the Tribe's water rights and leaves unresolved critical aspects necessary to achieve a final settlement, such as anticipated federal funding, cost-sharing by the State or local parties, and waivers of claims against the United States.

For these and other reasons, the Department cannot support S. 2154 as introduced. That being said, the Department remains eager to work with all interested parties to develop and support a settlement that adheres to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

I. Introduction

Before I begin discussing the Kickapoo settlement, I want to note that the Department continues to support the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements can resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency, and improve environmental and health conditions on reservations. Congress also plays an important role through reviewing and approving Indian water rights settlements as they typically involve federal spending, the ultimate resolution of the Tribe's reserved water rights, and the waiver of the United States' sovereign immunity. We stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements that adhere to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

The policy framework the Department follows to guide the negotiation of Indian water rights settlements—and to support legislation authorizing these settlements—includes four general principles set forth in the *Criteria and Procedures* published in the Federal Register in 1990:

- (1) the Department participates in water settlements consistent with the federal government's responsibilities as trustee;
- (2) Indian tribes receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement;
- (3) Indian tribes obtain the ability to realize value from confirmed water rights resulting from settlement, which ensures they do not receive legal rights to water supplies that never materialize in the delivery of water;
- (4) settlements contain an appropriate cost-share by all parties benefiting from the settlement.

The *Criteria and Procedures* also contain guidelines that the Department follows in determining whether to support a proposed settlement. One important guideline is the concept of finality contained in Criteria 3 discussed below.

Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they often provide opportunities for economic development, improve relationships, and encourage collaboration among neighboring communities. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with

Federal policy promoting Indian self-determination and economic self-sufficiency. These ultimate outcomes and opportunities have been the basis for which the United States has pursued a policy of resolving Indian water rights disputes through negotiated settlements rather than litigation whenever possible.

II. Background

A. *The Kickapoo Reservation and the Kickapoo Tribe*

The Kickapoo Tribe originated in the Great Lakes region, but moved southwest over time. In 1832, the Tribe and United States entered into the Treaty of Castor Hill, which established the original Kickapoo Reservation in present-day northeast Kansas.

The current Reservation, reduced in size after subsequent treaties, encompasses about 30 square miles and has its headquarters in Horton, Kansas, roughly an hour north of the State capital in Topeka. Of the lands within the boundaries of the Reservation, nearly 8,000 of the approximately 19,000 acres within the Reservation are currently owned either by the Tribe or individual Indians in trust or fee status, and the vast majority of these lands are used for agricultural purposes. The remaining 11,000 acres are owned by non-Indians, often interspersed in a “checker-boarded” pattern with lands held by the Tribe or individual Indians.

Total tribal membership, including members living off-Reservation, exceeds 1,600. According to the Tribe, roughly one-third of its members reside on-Reservation. The Tribe’s Golden Eagle Casino, its governmental operations, and farming activities provide the primary sources of employment for Tribal members. The Tribe lists economic development as its top priority.

B. *Water Resources of the Kickapoo Reservation*

The Reservation lies within the Upper Delaware River watershed, a basin that covers portions of Nemaha and Brown Counties in northeast Kansas. The basin’s waters flow into Perry Lake, a U.S. Army Corps of Engineers facility, which then flow into the Kansas (or Kaw) River between Topeka and Lawrence (which then flow into the Missouri River at Kansas City). Precipitation averages between 35 to 37 inches per year, the vast majority of which falls as rain between April and October.

No reservoir or other storage facility currently exists on the Reservation. A low-head weir (dam) and associated water treatment facilities on the Delaware River built in the 1970s provide the primary water supply for the Reservation, diverting on average just over 100,000 gallons per day.

Drought conditions have occasionally led to crisis conditions on the Reservation. For example, the Department—through the Bureau of Indian Affairs and Bureau of Reclamation—provided nearly \$300,000 in 2003 to the Tribe to haul over 7 million gallons of water to the Reservation for domestic and fire prevention needs because the Delaware River and its tributaries were without flow for over sixty (60) days that year due to severe weather conditions.

C. *1994 Agreement and Subsequent Litigation*

Between the 1970s and the 1990s, the Tribe worked with the State of Kansas and a local watershed district to develop a plan under the auspices of the Watershed Protection and Flood Prevention Act, Public Law 83–566 (PL–566 program, codified at 16 U.S.C. §1001 et seq.), now administered by USDA’s Natural Resources Conservation Service (NRCS). In 1994, the parties completed an environmental impact statement and signed a Watershed Plan (1994 Agreement), which envisioned twenty (20) floodwater retarding dams off-Reservation and one multi-purpose dam (Plum Creek Reservoir) that would provide 5,700 acre-feet of water supply and recreation use for the Tribe’s present and future needs. Congress authorized funding to implement portions of the 1994 Agreement in both 1996 and 1998, and the off-reservation dams have since been built.

Plum Creek Reservoir was not constructed, however, as it would have required the acquisition of more than 1,000 acres of non-Indian lands checker-boarded with Tribal lands. Most affected non-Indian landowners refused purchase offers, and the local district refused to use its eminent domain authority.

In June 2006, the Tribe filed a complaint in federal district court against the Bureau of Indian Affairs, U.S. Department of Agriculture’s Natural Resource Conservation Service (NRCS), the Kansas Department of Agriculture’s State Conservation Commission, and the local watershed district. The complaint alleged that the Federal and State defendants had affirmative trust obligations to protect and preserve the Tribe’s Federal Indian reserved water rights (*Winters* rights) and failed to do so. The complaint also alleged that the local watershed district breached its obligations under the 1994 Agreement. The complaint sought, among other things, a dec-

laration of the existence and priority of the Tribe's *Winters* rights; an injunction preventing all defendants from violating the Tribe's *Winters* rights; and specific performance of the 1994 Agreement.

After the United States and other defendants filed motions to dismiss, the parties agreed to stay the litigation and to seek a negotiated settlement. The parties made significant progress toward resolving both the water and land acquisitions issues, but the local watershed district ultimately voted to reject the key land acquisition piece in 2011. The parties then agreed to restructure the litigation and focus on the district's obligations under the 1994 Agreement. In 2013, the federal district court ruled against the Tribe and found that the 1994 Agreement did not obligate the district to exercise its eminent domain authority to secure the land for Plum Creek Reservoir.

III. Proposed Kickapoo Legislation

As noted above, the Tribe's 2006 complaint asserted various claims related to its *Winters* rights in the Delaware River basin. Although the district court dismissed other claims related to the 1994 Agreement and the need to secure land for Plum Creek Reservoir, the Tribe, the State, and the United States (through the Department of Justice (DOJ) and the Department's Solicitor's Office (SOL)) continued working to resolve the underlying water rights issues and negotiated a potential water rights settlement. As directed by the court, the parties shared a draft settlement with the magistrate judge in December 2015. In September 2016, the Tribe and State—after making some critical revisions not shared with the United States—executed a revised settlement that forms the basis of S. 2154 and the subject of this hearing.

As introduced, S. 2154 would authorize and ratify the revised settlement executed by the Tribe and the State in September 2016; quantify the Tribe's water rights as outlined in the 2016 settlement; direct the Secretary of the Interior to enter into the 2016 settlement and take related actions consistent with the legislation; and direct the Secretary of Agriculture, through NRCS, to complete a study and make recommendations within two (2) years related to Plum Creek Project. S. 2154 would waive the Tribe's and United States' claims to water rights within the Delaware River Basin upon enactment, yet would retain the Tribe's claims against the United States related to its water rights. S. 2154 includes no federal appropriations at this time.

IV. Department of the Interior Positions on S. 2154

While the Department strongly supports Indian water rights settlements generally, the Department has significant concerns about S. 2154 and cannot support the bill as introduced.

As noted above, representatives from DOI and DOJ negotiated the basic structure of a proposed settlement in December 2015, one that the three sovereign parties submitted to the magistrate judge overseeing the litigation that began in 2006. The federal representatives cautioned the other parties and the magistrate judge, however, that any settlement would need to be submitted to and approved by the Working Group on Indian Water Rights and the Administration as a whole and that outstanding issues remained to be resolved, such as federal funding and associated cost-sharing as envisioned by the 1990 *Criteria and Procedures*. Rather than pursuing this course, the Tribe embarked on a separate process with the State, revising the December 2015 agreement—without the involvement or approval of the United States—and executing this revised settlement agreement in September 2016.

The Administration has significant concerns about the 2016 agreement and S. 2154. Criteria 3 of the 1990 *Criteria and Procedures* provides that "Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved." A critical goal for all Indian water rights settlements is achieving finality: resolving an Indian tribe's water and related claims once and for all and providing certainty both to the Indian tribe and to affected State and non-Indian parties with respect to water allocations within a basin and related costs to achieve the settlement. Although S. 2154 and the underlying agreement take steps in this direction, they leave unresolved the ultimate cost of the settlement, how those costs should be shared, and how the water right will be realized for the Tribe. Moreover, S. 2154 explicitly retains the Tribe's claims against the United States related to the issues this settlement is meant to resolve, the exact opposite of what an Indian water rights settlement is meant to achieve.

A critical piece of this puzzle, one that S. 2154 recognizes as unresolved, relates to the Plum Creek Project or similar infrastructure to meet the Tribe's water right. The 2016 agreement defines the Tribal Water Right as the right to divert or red divert 4,705 acre feet year and gives the Tribe a right to store at least 18,520 acre feet

in one or more yet to be constructed reservoirs. As introduced, S. 2154 would direct the Secretary of Agriculture and NRCS to commence a study and, within two (2) years, make recommendations on potential alterations to the Plan that authorized Plum Creek Project. It is unknown if such alterations will increase or reduce the amount of water that could be delivered to meet the Tribe's water right, thus leaving uncertainty as to whether this project or other projects will be needed to address the Tribe's water needs based on a reasonably foreseeable planning horizon. Although we generally support the amount of water quantified for the Tribe in the 2016 settlement executed between the Tribe and the State, the infrastructure needed to deliver reasonably foreseeable necessary water is unknown, and neither the United States nor anyone else should be exposed to unknown costs or potential liability as S. 2154 would allow.

In addition to the matters noted above, S. 2154 and the underlying agreement would alter other considerations developed as part of the original agreement—such as the timing of court proceedings and settlement enforceability—that had been structured based on previously enacted Indian water settlements.

After the Tribe and the State executed the revised agreement in September 2016, the Department and DOJ communicated concerns to the Tribe regarding these revisions, recommended that the Tribe follow the Indian water rights settlement process set forth in the *Criteria and Procedures* (including formation of a negotiation team), and urged the Tribe to dismiss the litigation. The Tribe agreed to dismiss the pending lawsuit, and the remaining parties to the litigation filed a joint stipulation requesting dismissal without prejudice, which the court approved in February 2017. The Department stands ready to work with the Tribe and the State through a Federal Negotiation Team and our established processes.

V. Conclusion

The Department recognizes that the Tribe and the State of Kansas want to achieve a Kickapoo water settlement and have devoted substantial efforts to reach that goal. The Department shares this goal and is committed to working with the Tribe and the State to reach a final and fair settlement of the Tribe's water rights claims that adheres to the principles of the *Criteria and Procedures* and that we can fully support. As proposed, however, the Department cannot support S. 2154.

S. 3060, A BILL TO REPEAL SECTION 2141 OF THE REVISED STATUTES TO REMOVE THE PROHIBITION ON CERTAIN ALCOHOL MANUFACTURING ON INDIAN LANDS

Chairman Hoeven, Vice Chairman Udall, and Members of the Committee, thank you for the opportunity to present the Department of the Interior's (Department) views on S. 3060, a bill to repeal section 2141 of the Revised Statutes to remove the prohibition on certain alcohol manufacturing on Indian lands.

Background

The Department is aware that the Confederated Tribes of the Chehalis Reservation seek to venture into a new economic development project that will be 100 percent owned by the Tribe on its Tribal lands. This economic development project consists of the construction and operation of a distillery. The Tribe approached the Bureau of Indian Affairs (BIA) Northwest Regional Office regarding this economic development venture and the BIA identified a potential obstacle to the project: one section of the Trade and Intercourse Act of 1834 prohibited distilleries in Indian country. The ban as amended remains a part of Federal law. Current 25 U.S.C. 251 reads: "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

Other sections of the 1834 law banned the sale and possession of liquor in Indian country, and those provisions also remain in the US Code at 18 U.S.C. Sections 1154, 1155, and 1156. In 1953, Congress enacted what is now codified at 18 U.S.C. Section 1161, waiving the application of those sections where a Tribe has enacted a liquor ordinance compliant with the terms of that section. The legislative history of Section 1161 makes it clear that Congress considered, and rejected, adding the distillery ban to the list of sections that would not apply where a Tribe had a liquor ordinance. The Department agrees that a legislative solution is the best avenue to remedy this situation and supports S. 3060.

S. 3060

S. 3060 would repeal Section 2141 of the Revised Statutes (25 U.S.C. 251). That section of the Code states that “Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same.”

Conclusion

Thank you for the opportunity to appear before you today. I am happy to answer any questions the Subcommittee may have.

S. 3168, TO AMEND THE OMNIBUS PUBLIC LAND MANAGEMENT ACT OF 2009 TO MAKE RECLAMATION WATER SETTLEMENTS FUND PERMANENT

Chairman Hoenes, Vice Chairman Udall, and Members of the Committee, I am Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to discuss S. 3168, a bill to amend the Omnibus Public Land Management Act of 2009 (Title X, Part II of Public Law 111–11) to make the Reclamation Water Settlements Fund permanent. The Administration remains committed to implementing and adequately funding enacted settlements, and has ensured adequate funding to implement all authorized settlements through the annual Budget process.

The Department continues to strongly support Indian water rights settlements that adhere to the principles outlined in the Department’s 1990 Criteria and Procedures that are grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. Negotiated settlements allow tribes, states, and local water users to achieve finality on difficult issues of title to water, freeing up surrounding communities to make critical management and development decisions. Settlements allow the parties to develop creative solutions to overarching water resources issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and non-Indian communities, and to creating water certainty and economic-development opportunities in the West, has been funding. Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes. Settlements provide opportunities for local solutions, and because they have federal and local cost-share requirements, the settling parties share in the burdens, as well as the benefits, that can arise from investments in infrastructure. The FY 2019 Budget requests \$173 million for the implementation of Indian water rights settlements.

Background

To date, Congress has enacted 32 Indian water settlements, addressing the need for reliable water supplies in Indian country. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and the Department continues to see an increase in requests from tribes and states to enter into water rights settlement negotiations. Many of these tribes need: clean, reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure to bring economic development to reservations. States increasingly seek settlement of Indian water rights to provide certainty for holders of State-based water rights, clarify authority to manage water resources, and plan for the future.

Indian water rights settlements can however be costly, and costs have increased over the years. Within the last ten years, the Omnibus Public Lands Management Act of 2009 (P.L. 111–11), the Claims Resolution Act of 2010 (P.L. 111–291) and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114–322) authorized seven new settlements that call for total Federal expenditures totally approximately \$2.5 billion. Although some mandatory funding was provided with the Claims Resolution Act, substantial discretionary funding is needed to meet the statutory settlement obligations. Each of these settlements contain deadlines by which funding must be completed or the settlement fails and long standing, expensive, and disruptive litigation resumes. In addition to the statutory requirements to fund these settlements within prescribed timeframes, the availability of funding has implications for economic development in Indian and non-Indian communities and raises other human considerations and equity concerns. For example, the availability of potable water can affect economic development, tribal health and welfare.

Stalled funding would also delay the receipt of the economic benefits that are associated with settlements, which is why the Budget provides sufficient resources to implement enacted settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Construction funding also provides short-term economic stimulus to localities or regions which is important given the high unemployment levels in Indian country.

The Department currently has 21 Federal negotiation teams working with tribes to achieve additional settlements, and 23 teams working on implementing enacted settlements. Two of the settlements included as priorities for the Settlement fund, Navajo Lower Colorado Basin and Fort Belknap, have not been enacted, and the Federal contributions to these settlements may approach a billion dollars based on similar enacted settlements. While allocation of funding among the priority settlements identified in the Settlements Fund is complicated by construction schedules and other matters and cannot be fully predicted, at this time it appears there will be little, if any, funding in the Settlement Fund for settlements not specifically listed as priorities. The Department has always given priority to funding settlements in the annual Budget.

Reclamation Water Settlements Fund

In 2009, Congress created the Reclamation Water Settlements Fund, which authorizes the deposit of funds that would otherwise be deposited into the Reclamation Fund, into a separate account within the U.S. Treasury. Currently, the Secretary of the Interior is authorized to expend from the Reclamation Water Settlements Fund, without further appropriation, up to \$120 million a year of the amounts deposited through FY 2029, plus accrued interest, in each of the years from FY 2020 to FY 2034. The Secretary may use money in the Reclamation Water Settlements Fund to implement congressionally approved water rights settlements, if the settlement requires the Bureau of Reclamation to provide financial assistance, or to plan, design or construct water supply infrastructure. In addition, the currently authorized Reclamation Water Settlements Fund establishes certain funding priorities for settlements in the states of New Mexico, Montana, and Arizona.

Finally, the law includes a reversion clause providing that if any settlement identified in the above funding priority is not approved by an act of Congress by December 31, 2019, the Secretary has the discretion to use the reserved funds for any authorized use.

S. 3168

S. 3168 would make the Reclamation Water Settlements Fund permanent and would not prioritize settlements other than those currently prioritized. While the current Reclamation Water Settlement Fund will become available for expenditures in 2020, much of it is already committed to existing, enacted settlements. The Department looks forward to working with the Committee to determine the best approach for authorizing future settlements.

The Department takes into consideration the effects of growing populations and related water demands, widespread drought in the West, and the need for new infrastructure and water storage in many locations. These factors are certain to drive an increase in the demand for water settlements.

I want to underscore the importance of these settlements, and recognize the aim of the bill sponsor and this Committee in considering S. 3168. Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they provide opportunities for economic development, produce critical benefits for tribes and non-Indian parties, and bring together communities to improve water management practices in some of the most stressed water basins in the country. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

As noted above, the Department supports Indian water rights settlements grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. The Department looks forward to working with the Committee and discussing the best means of achieving future settlements.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

The CHAIRMAN. Thank you, Mr. Mikkelsen.
I will turn to Senator Cantwell for the purpose of an introduction.

**STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman. Thank you for the hearing today.

I want to welcome the Chairman of the Confederated Tribes of the Chehalis Reservation, Henry Pickernell, Sr. I am so glad to see him here.

The Chairman was nominated by the Chehalis Tribal Business Council over a year ago to lead the tribe. He is a long-time water quality specialist in the tribe's Natural Resource Department and a recent graduate of Evergreen State College. He also previously served as Vice Chairman of the tribe working on the restoration of fisheries in the Chehalis Basin and expanding economic opportunities for the Chehalis Tribe.

I cannot thank him enough for being here today to talk about a bill that provides greater economic opportunities for the Chehalis Tribe and Indian Country. That legislation, S. 3060, introduced by myself and Senators Moran and Murray, would repeal an outdated, discriminatory law that prohibits tribes from operating distilleries on tribal lands.

With that, Mr. Chairman, again, thank you for having this hearing. Thank you, Chairman Pickernell for being here in Washington, D.C.

The CHAIRMAN. Thank you, Senator Cantwell.
Chairman Pickernell, you may proceed with your testimony.

**STATEMENT OF HON. HARRY PICKERNELL, CHAIRMAN,
CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION**

Mr. PICKERNELL. Good afternoon, Chairman Hoeven, Vice Chairman Udall, and members of the Committee. My name is Harry Pickernell. I am the chairman of the Confederated Tribes of the Chehalis Reservation, a federally-recognized Indian tribe located in southwest Washington State.

I am pleased to be here today to testify in support of S. 3060, a bill that would repeal an antiquated 19th Century law that has become an obstacle to the Tribe's economic development.

The Chehalis Reservation was created by Executive Order in 1864 and is located between the confluence of the Chehalis River and the Black River. Much of the Tribe's 4,800 acre land base is in a flood plain and the tribe has very little land suitable for economic development.

Southwest Washington has long been an economically-depressed area lacking in businesses and jobs for tribal members and non-Indians alike. The tribe operates a casino but is always looking for ways to diversify its economic base to continue to support its education, health, housing, safety and other programs for its members. Approximately 40 percent of tribal members are under the age of 21 and will need jobs in the future.

With the assistance of the Department of the Interior, the tribe, in partnership with the Great Wolf Company, also developed a

Great Wolf Lodge on the tribe's reservation land in Grand Mound, Washington. This is the only indoor waterpark in Washington State and the only Great Wolf Lodge on an Indian reservation.

Currently, the tribe is planning to develop a stand-alone brewery and a stand-alone distillery, both of which will be on-reservation and 100 percent-owned and operated by the tribe. Each of these enterprises is intended to both provide new skills and training to tribal members and non-Indians, but also provide skilled jobs on the reservation.

In 1953, Congress enacted 18 U.S.C. Section 1161 which excludes application of various Federal liquor prohibitions in Indian Country, provided the activities conform to State law and are conducted by tribes under liquor ordinances approved by the Bureau of Indian Affairs. When Congress established this regulatory regime, however, it missed one virtually unremembered law that prohibits distilleries in Indian Country.

That law, which is now codified at 25 U.S.C. Section 251, was enacted on June 30, 1834, and reads: "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of \$1,000; and the Superintendent of Indian Affairs, Indian agent, or subagent, within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

The apparent intent of Section 251 was to prevent non-Indian traders from avoiding taxation by setting up distilleries in Indian Country and also to prevent non-Indian traders from selling liquor to Indians who were the wards of the United States. As far as the tribe has been able to ascertain, Section 251 has never been enforced and has only been mentioned in passing once since its enactment 184 years ago. The one time Section 251 has even been mentioned in a Federal court decision was in a footnote in a Ninth Circuit Court of Appeals opinion in 1983.

That court identified Section 251 as one of the outdated statutes that were resolved by Section 1161. In reversing the decision, the U.S. Supreme Court identified Section 1161 as "abolishing Federal prohibition, and as legalizing Indian liquor transactions, as long as those transactions conformed both to tribal ordinance and State law," but the Court failed to identify Section 251 in its decision.

By allowing the tribe's project to move forward, repealing Section 251 will create jobs both for tribal members and the surrounding communities and provide an economic return to the tribe for use to support its tribal programs. These will include jobs constructing the distillery, learning the distillery production trade, and addressing the marketing and distribution of the tribe's products. By repealing Section 251, S. 3060 will not disturb or otherwise affect the requirements established by Section 1161 that the tribe, and other tribes, must one, comply with State liquor laws and regulations and two, have a BIA-approved liquor ordinance for on-reservation liquor sales.

This bill will similarly not affect the ability of the State of Washington or other States to collect liquor taxes under that same authority. Rather, S. 3060 will simply remove an antiquated and nearly forgotten Federal prohibition on the construction and operation of distilleries in Indian Country.

The United States' current policy is to support tribal self-determination and self-sufficiency. The Chehalis Tribe and other tribes must provide for their members and support surrounding communities through economic development. Although the tribe has no reason to believe that the Department of Interior is inclined to enforce Section 251, the law presents a risk that the BIA could "destroy and break Up" the tribe's distillery after the tribe begins construction.

Time is of the essence for this legislation. The tribe has its building permits in hand, has completed the full design of the project, purchased some of the equipment, and needs to continue to expend additional funds for development of this project. The tribe will also require additional financing to complete the project and this 1834 statute serves as a barrier to obtaining that financing.

The tribe urges swift consideration and passage of S. 3060. I would be happy to answer any questions the Committee may have at this time. Thank you.

[The prepared statement of Mr. Pickernell follows:]

PREPARED STATEMENT OF HON. HARRY PICKERNELL, CHAIRMAN, CONFEDERATED
TRIBES OF THE CHEHALIS RESERVATION

Good afternoon Chairman Hoeven, Vice Chairman Udall, and members of the Committee. My name is Harry Pickernell and I am the Chairman of the Confederated Tribes of the Chehalis Reservation (the "Tribe"), a federally recognized Indian tribe located in southwest Washington State. I am pleased to be here today to testify in support of S. 3060, a bill that would repeal an antiquated nineteenth century law that has become an obstacle to the Tribe's economic development.

The Chehalis Reservation was created by Executive Order in 1864 and is located between the confluence of the Chehalis River and the Black River. Much of the Tribe's 4,800 acre land base is in a flood plain and the Tribe has very little land suitable for economic development.

Southwest Washington has long been an economically depressed area lacking in businesses and jobs for Tribal members and non-Indians alike. The Tribe operates a casino but is always looking for ways to diversify its economic base to continue to support its education, health, housing, safety and other programs for its members. Approximately 40 percent of Tribal members are under the age of 21 and will need jobs in the future.

With the assistance of the Department of the Interior, the Tribe, in partnership with the Great Wolf Company, also developed a Great Wolf Lodge on the Tribe's reservation land in Grand Mound, Washington. This is the only indoor waterpark in Washington State and the only Great Wolf Lodge on an Indian reservation.

Currently, the Tribe is planning to develop a stand-alone brewery and a stand-alone distillery, both of which will be on-reservation and 100 percent owned and operated by the Tribe. Each of these enterprises is intended to both provide new skills and training to Tribal members and non-Indians, but also provide skilled jobs on the Reservation.

In 1953, Congress enacted 18 U.S.C. section 1161 (Section 1161), which excludes application of various federal liquor prohibitions in Indian country provided the activities conform to state law and are conducted by tribes under liquor ordinances approved by the Bureau of Indian Affairs (BIA). When Congress established this regulatory regime, however, it missed one virtually unremembered law that prohibits distilleries in Indian country.

That law, which is now codified at 25 U.S.C. section 251 (Section 251), was enacted on June 30, 1834, and reads:

Every person who shall, within the Indian country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of \$1,000; and the superintendent of Indian affairs, Indian agent, or subagent, within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same.

The apparent intent of Section 251 was to prevent non-Indian traders from avoiding taxation by setting up distilleries in Indian country and also to prevent non-Indian traders from selling liquor to Indians who were the wards of the United States.

As far as the Tribe has been able to ascertain, Section 251 has never been enforced and has only been mentioned in passing once since its enactment 184 years ago. The one time Section 251 has even been mentioned in a federal court decision was in a footnote in a Ninth Circuit Court of Appeals opinion in 1983. That court identified Section 251 as one of the outdated statutes that were resolved by Section 1161. In reversing the decision, the U.S. Supreme Court identified Section 1161 as “abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both to tribal ordinance and state law,” but the Court failed to identify Section 251 in its decision.¹

By allowing the Tribe’s project to move forward, repealing Section 251 will create jobs both for Tribal members and the surrounding communities and provide an economic return to the Tribe for use to support its tribal programs. These will include jobs constructing the distillery, learning the distillery production trade, and addressing the marketing and distribution of the Tribe’s products.

By repealing Section 251, S. 3060 will not disturb or otherwise affect the requirements established by Section 1161 that the Tribe (and other tribes) must (1) comply with state liquor laws and regulations and (2) have a BIA-approved liquor ordinance for on-reservation liquor sales. This bill will similarly not affect the ability of the State of Washington or other states to collect liquor taxes under that same authority. Rather, S. 3060 will simply remove an antiquated and nearly forgotten federal prohibition on the construction and operation of distilleries in Indian country.

The United States’ current policy is to support tribal self-determination and self-sufficiency. The Chehalis Tribe and other tribes must provide for their members and support surrounding communities through economic development. Although the Tribe has no reason to believe that the Department is inclined to enforce Section 251, the law presents a risk that the BIA could “destroy and break up” the Tribe’s distillery after the Tribe begins construction.

Time is of the essence for this legislation. The Tribe has its building permits in hand, has completed the full design of the project, purchased some of the equipment, and needs to continue to expend additional funds for development of this project. The Tribe will also require additional financing to complete the project and Section 251 serves as a barrier to obtaining that financing.

The Tribe urges swift consideration and passage of S. 3060. I would be happy to answer any questions the Committee may have at this time.

The CHAIRMAN. Thank you, Chairman Pickernell.
Now we will turn to Chairman Randall.

**STATEMENT OF HON. LESTER RANDALL, CHAIRMAN,
KICKAPOO TRIBE**

Mr. RANDALL. Good afternoon, Chairman Hoeven, Senator Moran, and other members of the Committee. [Greeting in native tongue.]

I am Lester Randall, Chairman of the Kickapoo Tribe in Kansas. I am here today to testify on behalf of the Kickapoo Tribal Council and tribal members in support of S. 2154, a bill to approve our Water Settlement Agreement, enacted in September 2016 with the State of Kansas.

That agreement accomplishes a number of critical steps in the decades-long effort to achieve water security. I will provide an overview of those steps for you in a moment.

First, I wanted to express the tribe’s appreciation to the State of Kansas and its political leadership and technical staff. A meaningful, respectful partnership has been created between the tribe and State on water management in the Delaware River basin. We believe this relationship has a long lasting value to both sovereigns.

¹The Ninth Circuit’s footnote is in *Rehner v. Rice*, 678 F.2d 1340, 1333 n.6 (9th Cir. 1982), and the U.S. Supreme Court’s subsequent decision is *Rice v. Rehner*, 463 U.S. 713 (1983).

I also want to express the tribe's appreciation to Senator Moran, Congresswoman Jenkins and their staffs for their commitment and leadership on this vital matter to the tribe. Lastly, I want to thank the attorneys from the Departments of the Interior, Justice, and Agriculture who assisted with negotiation of this agreement.

Every Indian water settlement comes to Congress and is borne of its own unique circumstances. The Kickapoo Water Settlement is no different. What makes our legislation unique is that we are asking Congress to approve a water agreement that is a direct outgrowth of a water storage project Congress blessed 20 years ago in 1998 through the Department of Agriculture's Small Watershed Program. We have not yet built the storage project but it is more critical today than it was 20 years ago.

The Kickapoo Tribe in Kansas has lived in northeast Kansas since it entered into the 1832 Treaty of Castor Hill with the United States. By virtue of the 1832 treaty, the tribe holds senior water rights under the Winters doctrine from the Delaware River and its tributaries.

Water is sacred to our people. It is an essential cornerstone to building our homeland. Economic development is a top priority with the tribe to the meet growing needs of our community and to maximize our economic resources for the benefit of our tribal members. A dependable water supply is essential for us to meet future housing and economic development, fire protection and farming needs.

Drought is no stranger to the reservation in northeast Kansas. Governor Colyer issued a statewide drought declaration in March of this year. It is still in effect. Kansas has notified the water users in the Delaware River Basin of cutbacks due to the drought.

Because the Kickapoo Reservation sits on a rock formation blocking access to groundwater, our only water supply is the Delaware River and a few of its tributaries that flow through the reservation. We have relied on a small dam and water treatment plant on the river, one built with a small grant from the United States back in the 1970s. Over the years, the dam and treatment plant have required multiple repairs but both structures are old and inadequate for our current needs.

After construction of the small dam and the water treatment system, the tribe wanted to embark on a larger water development project. We sought assistance through the Bureau of Indian Affairs in the early 1980s who sent us to the Soil Conservation Office, now NRCS.

Under the SCS Small Watershed Program, also known as the P.L. 83-566 Program, the tribe, in conjunction with the local watershed district, began in a decade-long effort in 1983 to design a plan for a water storage project known as the Upper Delaware and Tributaries Project. The centerpiece of the project was a water storage dam to be built on the reservation on the Plum Creek. Plum Creek is a tributary to the Upper Delaware River. A Federal watershed agreement was executed by all the parties in 1994.

Following a full NEPA EIS review and issuance of a final record of decision in 1994 by NRCS, congressional authorization for the Plum Creek Project was secured in 1996 by the Senate and in 1998 by the House. We have been told by NRCS legal counsel that the

USDA considers the congressional authorization of the project to still be valid. As a project sponsor, it is the tribe's responsibility under the P.L. 83-566 Program to secure land and water rights for the project.

As for the land rights, the tribe has purchased 250 acres of the Plum Creek drainage all with our own money. Depending on the final size of the project, we already own over half of the land.

As for the water rights, in September 2016, the tribe and State entered into an agreement to quantify the tribe's water rights. An important next step is to have Congress approve the agreement. By enacting S. 2154, approving the settlement agreement, it approves the water rights to meet the tribe's future and present needs, establishes the storage, seepage and evaporation components of the tribal water right, monitoring and reporting requirements, protects the senior water right for the Delaware River Basin, directs the tribe to enact a water code to protect and regulate use of water by the tribal members, directs the Interior Department to sign an agreement and carry out its terms, directs NRCS to consult with the Department of the Interior, the tribe and the State to make recommendations for the alteration of the Plum Creek Project to effectuate the tribe's water right.

The tribe would like to emphasize that no other land or water interests for any other tribes are adversely impacted by S. 2154.

In closing, thank you again for convening this hearing on S. 2154. I am happy to answer any questions you might have for me. Thank you.

[The prepared statement of Mr. Randall follows:]

PREPARED STATEMENT OF HON. LESTER RANDALL, CHAIRMAN, KICKAPOO TRIBE

Introduction

Good afternoon, Chairman Hoeven, Senator Moran, and other members of the Committee. I'm Lester Randall, Chairman of the Kickapoo Tribe in Kansas. I'm here today to testify on behalf of my Tribal Council and Tribal members, in support of S. 2154, a bill to approve our Water Settlement Agreement, enacted in September 2016 with the State of Kansas. That Agreement accomplishes a number of critical steps in the Tribe's decade's long effort to achieve water security. I'll provide an overview of those steps for you in a moment.

First, I wanted to express the Tribe's appreciation to the State of Kansas and the leadership and technical staff in its Department of Agriculture and Division of Water Resources. A meaningful, respectful partnership was created between the Tribe and the State on water management in the Delaware River basin that we believe will have lasting value to both sovereigns. Thanks also to former Governor Sam Brownback and current Governor Jeff Colyer, and also to Attorney General Derek Schmidt.

I also want to express the Tribe's appreciation to Senator Moran and his staff, for their commitment and leadership on this vital matter to the Tribe. And also, on the House side, to Congresswoman Jenkins and her staff for all of their support and assistance.

Exhibit 1 are copies of Federal and State of Kansas letters relevant to S. 2154.

Exhibit 2 are examples of copies of key local supporters of S. 2154.

Every Indian water settlement that comes to Congress is born of its own unique circumstances. The Kickapoo Water Settlement bill is no different. What makes this legislation, and the underlying Agreement between the Tribe and the State, unique is that we are asking the Congress to approve a water agreement evolving from a project the Congress blessed 20 years ago through the Department of Agriculture's Small Watershed Program.

The Kickapoo Tribe in Kansas has lived in northeast Kansas since it entered into the 1832 Treaty of Castor Hill with the United States. In a later treaty in 1854 the Tribe ceded over 600,000 acres of land to the United States, retaining approximately

150,000 acres for our Reservation. An additional cession of land took place in 1862, which the Tribe opposed, opening our Reservation to allotment and homesteading.

The Kickapoo Tribe was the first of three other Indian tribes in northeast Kansas to compact with the state for their gaming operations called the “Golden Eagle Casino”, the largest employer in Brown County. Economic development is the top priority for the Kickapoo Tribe, to meet the growing needs of its community and to maximize its economic resources for the benefit of tribal members. The Kickapoo Tribe has a diverse workforce made up of over 130 professionals and technical staff members. The day-to-day operations include issues with environmental, health, road maintenance, compliance, financial, legal, gaming, and planning community growth.

Drought is no stranger to our Reservation in northeast Kansas, which is east of the 100th Meridian, often thought of as a dividing line between the drier western United States and the wetter Midwest. Governor Colyer issued a state-wide drought declaration in March of this year, which is still in effect. And the Division of Water Resources has notified water users in the Delaware River basin, where our Reservation sits, of impending cutbacks.

Water, while being sacred to the Kickapoo, is an essential cornerstone to a vibrant homeland. A dependable water supply is essential for us to meet our present and future housing, economic development, fire protection, and agricultural pursuits at the Tribal farming enterprise. By virtue of its 1832 Treaty with the United States, the Tribe possesses senior water rights under the *Winters* doctrine, which implicitly reserved sufficient water from the Delaware River and its tributaries to make the Reservation a viable, permanent homeland for the Kickapoo people.¹

The Tribal community’s drinking water needs are critical. The Reservation sits on a rock formation blocking access to groundwater. The only current water supply is the Delaware River, a modest sized river and its tributaries that flow through the Reservation. We’ve relied on a small dam and water treatment plant on the river, one that we built with a small grant from the United States government in the 1970s. Over the years the dam and treatment plant have been repeatedly repaired, but both structures are old and inadequate for the current needs.

After construction of the small dam, pump house and treatment system, in the mid-1970s, the Tribe wanted to embark on a larger scale water development project. The Tribe sought the assistance of the Bureau of Indian Affairs in the early 1980s, who sent us to the Soil Conservation Service (SCS), which is now the Natural Resources Conservation Service (NRCS). Under the SCS Small Watershed Program, also known as the PL 83–566 Program, the Tribe in conjunction with a local watershed district, four local conservation districts, the State of Kansas, and SCS/NRCS, began in 1983 a decade long effort to design, plan and seek congressional approval of a water storage project known as the Upper Delaware and Tributaries Project. The centerpiece of the Project was a multi-purpose storage project to be built on Plum Creek.

Plum Creek is a tributary to the Upper Delaware River. A federal Watershed Agreement was executed by all the parties in 1994, following a full NEPA Environmental Impact Statement review, and a final Record of Decision issued by NRCS. Congressional authorization was secured for the Plum Creek Project in 1996 by the Senate, and in 1998 by the House. We have been told by NRCS’ legal counsel that the USDA considers the congressional authorization of the Project to still be valid. See Exhibit 3.

As a project sponsor, it is the Tribe’s responsibility under the PL–566 Program to secure two things—first, the land rights for the Project, and, second, the water rights.

As for the land rights, the Tribe over the past decade has purchased about 250 acres of land in the Plum Creek drainage—with its own money—where the Project would be located. It will continue those efforts, offering fair market value or land exchanges where possible. Depending on the final size of the Project, the Tribe already owns over half of the needed land.

As for the water rights, in September of 2016, after several years of technical negotiations, the Tribe and the State of Kansas’ Department of Agriculture and Attorney General entered into the Agreement that quantifies the Tribe’s water right, and how that water right is to be administered by the State on the Delaware River and its tributaries. The U.S. Departments of Interior, Justice and Agriculture were involved in the negotiation of the Settlement Agreement.

¹The *Winters* doctrine is aptly named after the seminal reserved water case *Winters v. United States*, 207 U.S. 564 (1908), reaffirmed in subsequent Supreme Court decisions and followed by numerous lower federal and state courts over the past century. See, generally, Cohen, Felix, HANDBOOK OF FEDERAL INDIAN LAW (2012 Ed.), § 19.03 at 1210–1227.

An important next step is to have Congress approve the Tribal-State Settlement Agreement. By enacting S. 2154, and approving the Settlement Agreement, the Congress:

- Approves the water right of 4,705 acre feet per year as a federal reserved water right;
- Directs the federal Interior Department to execute the Settlement Agreement and to carry out the terms of the Agreement consistent with this Act;
- Establishes the storage, seepage and evaporation components of the Tribal water right;
- Establishes the administration of the right by the State as the senior water right in the river basin;
- Establishes the Tribe's monitoring and reporting requirements for water consumption on the Reservation;
- Directs the Tribe to enact a water code that recognizes and protects the interests of Kickapoo Tribal members who own interests in allotted land on the Reservation, and who have an interest in the water right;
- Directs NRCS, in consultation with the Interior Department, to commence a study of and make recommendations for alterations to the Plum Creek Project to effectuate, in part, the Tribe's water right;
- Splits the waiver of claims by the Tribe against the United States, consistent with the fact that S. 2154 does not authorize the appropriations of funding to construct water storage at the Plum Creek Project or anywhere else on the Reservation, and consistent with a settlement agreement between the Tribe and the United States in a tribal trust lawsuit resolved in April of 2012;
- As set out in more detail below, the Settlement Agreement and S. 2154 are in compliance with the Interior Department's 1990 Criteria and Procedures, to the extent relevant, given the unique nature of the Settlement Agreement;
- S. 2154 does not authorize the appropriation of, or appropriate funds, for a water storage project for the Tribe at the Plum Creek Project site or elsewhere. Once reviewed by NRCS, the Tribe contemplates the parties will come back to Congress with recommendations for water storage and the costs associated therewith;
- Though not relevant on the Senate side, the Tribe has been cognizant of the "Bishop" process on the House side, and has worked with Congresswoman Jenkins' office to engage the House Natural Resources Committee staff on the unique, phased nature of this settlement.

The Tribe, Its Membership and Its Reservation, and the Consequences to the Tribal Community from a Lack of Access to a Dependable Water Supply

The Tribe has an enrolled membership of 1,600, about 400 of whom live on or near its 30 square mile Reservation in northeast Kansas. The Tribe is organized under the Indian Reorganization Act of 1934, and its government operates under a constitution approved by the Secretary of the Interior in 1937. The Tribe was moved in the 19th century several times by the United States government—from the Fox River Valley in Wisconsin to multiple locations in Illinois, Missouri and Kansas—pursuant to nine treaties spanning a fifty-year period between 1809 and 1862.² See Exhibit 4. The Tribe has lived in its present territory in Kansas since 1832, twenty-nine years prior to Kansas Statehood in 1861. See Exhibit 5.

The Tribe presently holds equitable title to 4,859 acres, and fee title to another 2,189 acres, of land within its Reservation boundaries located within Brown County, Kansas. Tribal members own equitable title to another 2,861 acres of allotted land. See Exhibit 6. Under Federal law the underlying legal title to this land is held in trust for the Tribe and its members by the United States.

The Tribe created the Kickapoo Housing Authority in 1966–67. The federal Housing and Urban Development HUD awarded the Tribe and its Housing Authority a grant to construct tribal homes in 1967–68. Prior to that, our homes on the Reservation—about 20 in number—were served through individual shallow wells at each home. These homes were scattered throughout the Reservation on individual allotment lands.

The first housing project was developed on tribal lands, homes were closer together and required a larger water supply. That first housing project involved the

²See 7 Stat. 117 (1809); 7 Stat. 130 (1815); 7 Stat. 145 (1816); 7 Stat. 200 (1819); 7 Stat. 202 (1819); 7 Stat. 208 (1820); 7 Stat. 391 (1832); 10 Stat. 1078 (1854); 12 Stat. 1249 (1862).

construction of 40 homes. Second and third housing projects followed in the next few years. Because the Tribe did not have its own water source, it had to create a means to hook up to the City of Horton's water supply, a distance of 5 miles from the housing projects. This was a very expensive alternative, and was only viewed as a stop-gap measure. It was the only viable alternative, since HUD would not provide funding for housing without an assurance of water availability.

The current Kickapoo Water Treatment Plant currently supplies water to both Indian members and non-Indians—about 60 persons—who live within Reservation boundaries. The Tribe operates its own Tribal School—grades K through 12—and would like to supply water to this facility, but is unable to supply the school with water from its own system.

The Tribe also provides basic fire protection to all Reservation residents, both Kickapoo tribal members and non-Indians alike, under mutual aid agreements executed with neighboring jurisdictions. The Tribe's ability to do so, however, is limited by an unreliable water supply. Reservation residents and numerous Tribal structures are in constant danger. In March of 2005, an arsonist set a large fire on Kickapoo lands, destroying 1,500 acres. Without the aid of neighboring communities, a larger land area, including homes and other structures, would likely have been destroyed due to the shortage of water.

Several housing and economic development opportunities for the Kickapoo people have been lost over time because the Kickapoo Tribe could not ensure that the Tribe's water works could meet their water needs. Several years ago the Kickapoo Tribe was granted, but had to reject, a 25-unit housing project awarded by the State of Kansas Housing Resources Corporation due to the lack of a stable water source. And a constrained water supply restricts economic development opportunities on the Reservation, which in turn restricts the prosperity of the Tribe and the Kickapoo people.

The Hydrology of the Kickapoo Reservation, and the Crippling Effects of Drought and Drought Sensitivity

East of the 100th Meridian, the Delaware River in northeast Kansas traverses the Kickapoo Reservation and benefits from more than 35 inches of precipitation annually, with a total average runoff for the entire river of about 200,000 acre feet, about 60,000 acre feet of which is annually available to the Reservation, about 8,750 acre feet from the Plum Creek drainage alone. Unfortunately, despite its location, drought and water shortage are not an unknown or unexpected part of living in northeast Kansas. The Reservation faces off-again-on-again drought conditions resulting in a continual challenge in obtaining an adequate and reliable water source to meet the basic health and sanitary needs of its residents. Indeed, northeast Kansas including our Reservation has been identified by the Kansas Water Office as a "drought sensitive" area of the State.

In 2003, for instance, the Delaware River and its tributaries were completely without flow for over 60 days due to the severe drought conditions in the Midwest. The Tribe was forced to severely ration water and truck over 7,000,000 gallons of drinking water to the Reservation. The Bureau of Indian Affairs provided the Tribe \$186,000 for water-hauling assistance. The Tribe's commercial operations, as well families and non-Indian residents, were forced to cut water consumption by almost 60 percent. Droughts since 2003 continue to beset the Tribe and its members.

In times of natural drought, such as that experienced in the summer of 2003, the combined effect of the drought and the man-made impoundments and other land treatment actions in the watershed have caused the Upper Delaware River to run dry for long periods of time. A generation ago and earlier the watershed was far more reliable for meeting the Tribe's needs. Now the water shortages come with increasing frequency, and are not just connected to drought events. Developments upriver have altered the hydrology.

On a year-in and year-out basis, the Tribal Council has to issue periodic notices to the customers served by its water company that the system is in a shortage situation, and voluntary restrictions go into effect. In the most challenging conditions the cutbacks are mandatory. Indeed, in March of this year the Kansas Water Office announced that the water rights above the Muscotah gage on the Delaware River were put under State administration due to drought conditions in the watershed. See https://kwo.ks.gov/docs/default-source/drought/rpt_09_midjune2018_drought-061218_dk.pdf?sfvrsn=0 Governor Colyer also issued a statewide drought declaration at the same time, which is still in effect. See <https://kwo.ks.gov/docs/default-source/drought/exec-order-18-11-final.pdf?sfvrsn=2>

The Kickapoo Tribe's Forty-Five Year Effort to Develop a Water Supply under Federal Law

Water security is an essential element of tribal sovereignty, and for more than 45 years the Tribe has been on a quest to achieve water security and stability. Despite best efforts, the Tribe's long-term goal of water security for itself and all Reservation residents has to date fallen short.

In the mid-1970s the Tribe constructed its own rudimentary water diversion, treatment and supply system with financial assistance from the Federal government. In 1976–1977, the Tribe was awarded a grant from what was then called the Economic Development Administration, or EDA, of the U.S. Department of Commerce. The grant, in the amount of \$1.3 million, was for the construction of a low water impoundment dam on the Delaware River, an intake and raw water pump station, water treatment plant, distribution system, and sewage treatment plant. It supplies water to both Indians and non-Indians alike who live within the Reservation boundaries and within the reach of the delivery system. See Exhibit 7.

The low water impoundment dam was developed as a temporary supply measure to serve the Tribe until a larger, permanent reservoir could be developed on the Reservation. A 1970s 25-year comprehensive plan for Reservation growth and development, funded by a grant from the Administration for Native Americans (ANA), of the U.S. Department of Health and Human Services, revealed that the small project funded by EDA would only be the first of several steps taken by the Tribe to secure water for long-term needs. It also found that without impoundment the surface water from the Delaware River system would *not* meet *long term* water needs, and that the groundwater sources within our Reservation boundaries were insufficient.³

Construction began on the EDA-funded dam and water treatment facility in 1977, with completion in 1978. Then-Kansas Governor Bob Bennett attended the ribbon-cutting ceremony. Given our *Winters* rights to water, the Tribe appreciated that the State of Kansas never challenged our diversion of water from the Delaware River into our fledgling treatment plant and water delivery system.

At the same time, in 1978, the local watershed district—the Nemaha Brown Joint Watershed District #7—submitted to the SCS a General Plan for the development of the Upper Delaware River and Tributaries Watershed for the development of various water storage, flood control, soil erosion and land treatment activities. Kansas law required Nemaha Brown to prepare their General Plan, in order to be eligible to secure funding for water and soil conservation programs from the Kansas State Conservation Commission. SCS also required the watershed district to have an approved General Plan. See Exhibit 8.

The General Plan expressly mentioned the Tribe's fervent intent to develop a municipal, commercial, industrial and fire protection water supply for its Reservation. The Plan identified 5 possible sites within the reservation for the development of a reservoir storage project. One of those sites was on Plum Creek, a tributary to the Delaware; the other four were on other Delaware tributaries. *Id.*

In the early 1980s the Tribe first learned of the federal PL-566 Small Watershed Program, funded and administered by SCS. The PL-566 Program law was amended by Congress in 1981 to enable Indian tribes for the first time to become local sponsors of watershed development plans, and to be eligible for funding from SCS for those purposes. Early on the Tribe wrote SCS and inquired whether it could become a local project sponsor under the PL-566 program. The Tribe was told it could not be an exclusive sponsor, because it did not have jurisdiction over the entire Delaware River watershed. Under Kansas law Nemaha Brown shared responsibility for the watershed with the Tribe. Neither the Tribe nor Nemaha Brown would have exclusive authority to operate federal flood and soil erosion control programs in the Delaware River watershed. Officials from the Tribe and Nemaha Brown then traveled to Washington, D.C. together in February of 1983 to work out more of the details of a joint sponsorship with SCS officials.

This led to the Tribe and Nemaha Brown formally creating a Joint Watershed Board in 1983. Exhibit 9. The Agreement states that “[i]t is the understanding of the District and the Tribe that the goal of the two local agencies is the ultimate construction of all needed structures within the watershed.” The Plum Creek project was one of the key water storage projects contemplated by the parties to the Joint Agreement. Both the SCS and the Kansas State Conservation Commission officially

³The Indian Health Service and the BIA funded exploratory investigations for groundwater at about that same time, which found that there were no reliable sources of groundwater within the Reservation boundaries. A similar study was conducted by the Kansas Geological Survey in subsequent years, producing the same results. http://www.kgs.ku.edu/Hydro/Publications/OFR00_31/index.html Consequently, the Tribe has to rely exclusively on surface water for tribal domestic and commercial needs.

endorsed the joint co-sponsorship agreement, as did then Senator Nancy Landon Kassenbaum.

The Tribe was then able to secure \$156,000 from the Bureau of Indian Affairs to retain a Topeka engineering firm to conduct the preliminary engineering analysis to initiate the PL 566 application process. This was a highly unusual step for the BIA, to expend Indian trust funds for the technical services of an engineering firm to be used not only to benefit Indian reservation lands but also off-Reservation, non-Indian interests. Ultimately, it enabled the Kickapoo-Namaha Brown PL-566 application to receive priority ranking in the 1990s by SCS.

Between 1983 and 1994, the Tribe, the Namaha Brown and SCS analyzed and selected viable sites for flood retention dams and related land treatment activities to be part of the final Watershed Plan. Public meetings sponsored jointly by the Kickapoo Tribe and Nemaha Brown were held in 1990 and 1991 to explain the nature and scope of the project to interested individuals and communities in Brown County. Those meetings kicked off the formal EIS process under the National Environmental Policy Act (NEPA).

In June of 1994, the Kickapoo Tribe entered into the Watershed Agreement with the watershed district, four local conservation districts, the State of Kansas Department of Agriculture, and the SCS to jointly develop the Watershed Plan. The Agreement allowed cost-sharing of flood control and water supply projects under the PL-566 Program. It set forth an express plan to control erosion, provide drinking water and reduce flooding for the entire watershed, through the construction of 20 small flood retention dams and one large, multi-purpose water storage project, the Plum Creek dam and reservoir, designed to provide a reliable long-term water supply for the Kickapoo reservation. The Plum Creek Project was designed to be a 400 acre water surface area and 1200 acre land area, multi-use reservoir that will provide for sufficient water to meet the present and future needs of the Kickapoo Reservation and its Indian and non-Indian residents. See Exhibit 10.

A notice of publication of the final EIS was published in the Federal Register on May 13, 1994. See Exhibit 11. NRCS issued a Record of Decision in 1994, approving the project's compliance with NEPA, and recommending authorization by the Office of Management and Budget and the Congress. See Exhibit 12. On June 30, 1994, the United States Army Corps of Engineers (ACE) issued a §404 Clean Water Act permit—Permit # DA-199401028—for the Plum Creek project to Nemaha Brown. Revised special conditions for the permit to Nemaha Brown were issued by the Corps of Engineers on October 16, 2002.

In 1998, the parties to the 1994 Watershed Agreement obtained final Congressional authorization for the development of the Project, including Plum Creek, under the Federal PL-566 program. See Exhibits 13 and 14.

The Plum Creek storage project is the largest storage site on the Reservation. It was designed in 1994 by NRCS to hold about 10,500 acre feet of storage capacity, about 3,500 acre feet of which is for flood control, and about 7,000 feet of which is for storage of water for consumptive uses. The Plum Creek sub-drainage provides sufficient water to fill a project of that capacity. On average, over the past 35-year period of record, about 8,570 acre feet of water per year flows out of Plum Creek into the Delaware River. In most years this will provide the Tribe with a reliable source of water. Extended drought cycles may make complete annual refill impossible year in and year out, and so the project's storage will have to be managed with that in mind. There are smaller storage project sites on the Reservation, and those also will be kept in mind in future water planning efforts. But the Tribe does not own as much of the land area at those smaller alternative sites.

Overview of the September 2016 Kickapoo Tribe Water Rights Settlement Agreement

The Water Right Settlement Agreement establishes the nature, extent and characteristics of the Tribal Water Right and the respective rights, duties and obligations of other parties to the agreement. Under the Agreement, the Tribe may divert or redirect, as available, up to 4,705 acre-feet of water per year with a priority date of October 24, 1832 for any direct use for the Tribe. Domestic use by members and allottees does not count against the Tribal Water Right. Kansas domestic water rights are exempt from administration to protect the Tribal Water Right. The Tribe may store in one or more reservoirs, for the purpose of subsequent direct use, up to a combined volume of 18,520 acre-feet. The combined volume may be increased if seepage characteristics of the reservoir or reservoirs requires. Direct use and storage allowances of the agreement were determined based on municipal build-out concept, using methods consistent with the Kansas law for Kansas water users. See Exhibit 15.

The Settlement Agreement includes a Memorandum of Agreement which establishes clear and transparent procedures for communication, monitoring and protection of the Tribal Water Right. The MOA provides for a process of annual reviews by the State and Tribe to insure it remains current, especially as the Tribe develops storage.

Under the Settlement Agreement, the Kansas Department of Agriculture—Division of Water Resources and the Chief Engineer have the following responsibilities:

- Agree to recognize the Tribal Water Right with a priority date of October 24, 1832.
- Review applications of Kansas water rights to ensure prevention of injury to the Tribal Water Right and to provide notice of applications to the Tribe.
- Monitor the basin as prescribed in the Memorandum of Agreement.
- Respond to notices of impairment through evaluation and administration, as needed.
- Review annually, with the Tribe, the Memorandum of Agreement to insure it remains appropriate as the Tribe develops its demand and constructs storage.

Under the Settlement Agreement, the Kickapoo Tribe of Kansas has the following responsibilities:

- Construct and maintain dams and other water structures.
- Provide the Chief Engineer copies of inspection reports and notice of significant changes in construction and operation, any structural problems of dams or reservoirs and proposed remedies, and any serious problems such as dam failure.
- Enact a Tribal Water Code.
- Meter all diversion and annually report water use.
- Provide additional data required by the Chief Engineer to administer water rights to protect the Tribal Water Right.
- Review annually, with KDA–DWR, the Memorandum of Agreement.

It is generally believed that the Delaware River Basin has sufficient water supplies to satisfy the rights of the Kickapoo Tribe without reducing the established water rights of Kansas water right holders.

Key Provisions of S. 2154, Kickapoo Water Rights Settlement Legislation

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

SECTION 2. PURPOSES.—to approve and authorize the Kickapoo Tribe Water Rights Settlement Agreement between the Tribe and the State. Direct Interior and Agriculture Departments to execute the provisions of the Agreement and the Act.

SECTION 3. DEFINITIONS.

SECTION 4.—authorizes, ratifies and confirms the Settlement Agreement. Secretary of the Department of the Interior directed to execute the Agreement. Key provisions of the Agreement affecting the Department and the U.S. include:

- approval of tribal water code [Article 6],
- monitor State administration of state water law in the Delaware River Basin [Article 7],
- publish findings in the Federal Register when all conditions necessary for completion of the Agreement have been fulfilled [Article 10],
- waivers and release of claims [Article 12],
- Compliance with all federal laws, no exceptions of waivers.

SECTION 5. KICKAPOO TRIBE WATER RIGHTS.—tribal water rights confirmed and held in trust, allottee due process protections, tribal water code to allocate and administer tribal water rights to allottees and members, Secretarial approval of tribal water code.

SECTION 6. EFFECT OF KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT AND ACT.—does not affect the State’s administration of state water rights, does not affect the ability of the U.S. to enforce federal law, does not affect ability of U.S. to fulfill obligations as trustee to other tribes or allottees, does not confer jurisdiction on state courts, enforceability date.

SECTION 7. WATER FACILITIES.—NRCS PL–566 Small Watershed Program and Upper Delaware River Watershed Plan. Congressional approval in 1996 and 1998, authorizing a water storage project for the Tribe. Study and make rec-

ommendations to Congress to possibly alter plan to effectuate, in part, the Tribal water rights.

SECTION 8. WAIVER AND RELEASE OF CLAIMS; RETENTION OF CLAIMS.—Tribe and the U.S. waive claims to water rights, Tribe waives claims against U.S. for failure to establish water rights, but not damages resulting from failure to establish, quantify, acquire, develop, enforce or protect such water rights. See Exhibit 16.

SECTION 9. JUDICIAL PROCEEDINGS.—on enactment of Act, proceedings to bind all water rights in the Delaware River Basin to the Agreement and the Tribe's water rights, so that Kickapoo water rights become enforceable.

SECTION 10.—MISCELLANEOUS PROVISIONS.—limited waiver of immunity, other tribes not affected, limitation on claims for reimbursement, nothing affects current law, no use of condemnation or eminent domain.

Compliance with the Federal Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims

The Kickapoo Settlement is consistent with the United States' responsibility as trustee to Indians, and will secure to the Tribe the right to use and obtain benefits from Reservation water resources, thus ensuring that the Tribe will receive equivalent benefits for claims it will waive as part of the settlement. The settlement resolves all outstanding Kickapoo water right claims, quantifies a tribal right to 4,705 acre-feet for all present and future needs on the reservation, and does so while creating a mechanism for administering the tribal water right vis-à-vis the established water rights of Kansas water right holders, thereby creating a framework that will encourage long-term cooperation among local water interests, the State, the Tribe and the United States. The settlement includes a process that will specify who may use the tribal water right, where, and under what conditions. Finally, this settlement is a crucial and long-awaited step towards achieving a permanent tribal homeland promised to the Kickapoo Tribe in the treaties and agreements ratified by Congress in the 19th century that serve as the foundation of the relationship between the Tribe and the United States.

The Tribe doesn't disagree that as a general proposition the Federal Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 FR 9223-01 (C&Ps) provide important guidance to the Department in settling Indian reserved water rights, which involve claims by the Tribe and third parties, and necessarily involve the Department as trustee. And the Tribe doesn't disagree that the C&Ps have a role to play in the implementation of S.2154, once enacted. But, as in all things, context matters. Behind S. 2154, and the Settlement Agreement it approves, is an extraordinarily long history of struggle by the Tribe to attain water security and equity in the Delaware River watershed, with the knowledge of the Interior Department and the Bureau of Indian Affairs, but without the trustee's involvement, until very recent years. This struggle included the resolution of legal claims in an expensive federal court lawsuit brought by the Tribe to which the United States was a party. Key representatives of the Interior, Agriculture and Justice Departments, as well as water engineering consultants, played an integral role in the resolution of the litigation and the negotiation of the Settlement Agreement.

By letter dated April 6, 2018, the Interior Secretary's Indian Water Rights Settlement Office notified the Tribe of its appointment of a federal negotiation team under the C&Ps. See Exhibit 17. The team's formal appointment (though the members of the team have not all been identified as of the date of the writing of this testimony) at this point in the settlement process represents another unique aspect of this Settlement. S. 2154 is a settlement of the Tribe's water right and the myriad details concerning administration of the right in the Delaware River watershed. It was negotiated and signed by the Tribe and the State in September of 2016. The Tribe does not see the utility of a federal negotiation team in relation to the Settlement Agreement that S. 2154 approves, with one exception. As noted below in relation to criteria #4, however, Section 7 of S. 2154 contains a key direction to the Natural Resources Conservation Service to study and make recommendations to Congress for changes and improvements to the previous watershed plan authorized by Congress in 1998 that included a multi-purpose storage project on Plum Creek, a tributary to the Delaware River. The federal negotiation team will most certainly play an instrumental role in that process, and it should include as a team member an official from the Kansas office of the NRCS.

Notably, the settlement does not include a Federal financial contribution. Instead, it is focused on the Federal government's programmatic responsibilities, including

assistance by the Bureau of Indian Affairs (BIA) to work with the SCS/NRCS to fulfill storage needs promised in the early 1990s. The Settlement and this Act resolve some but not all of the Tribe's damages claims against the Federal government, as explained earlier. Importantly, the Settlement provides resolution to a primary tribal claim against the federal government, that of the failure to secure and protect the federal reserved water rights of the tribe in a basin that has seen considerable federal investment on private lands (but not on the Tribe's trust lands).

An important component of the settlement involves progress towards development of storage. The SCS now NRCS completed a study in the mid-1990s of a proposed storage project on Plum Creek that was found to be economically feasible and consistent with federal guidelines at the time. S. 2154 directs NRCS, the Tribe and the Interior Department to revisit the 1994 Plan and make recommendations to Congress for further action.

The following is a description of how the process employed to settle the Tribe's water rights complies with the Criteria and Procedures.

1. The Criteria and Procedures are applicable to all negotiations involving Indian water rights claims settlements.

The Criteria and Procedures are applicable as the Tribe and the United States government seek to quantify reserved Indian water rights through a negotiated framework.

2. The Department of the Interior will support legislation authorizing those agreements to which it is a signatory party.

The Department of Interior is not yet a signatory party to the Kickapoo Global Settlement Agreement ("Agreement"). However, it has participated actively through the negotiations that have been an outgrowth of the Tribe's lawsuit. The Department cannot become a party to the settlement agreement until authorized to do so by Congress via ratifying legislation.

3. Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.

The Agreement will resolve all the outstanding Kickapoo water claims on the Delaware River and its tributaries that flow through the Kickapoo Reservation. The Settlement Agreement secures the water rights of all the water users in the Delaware River Basin vis-à-vis the Kickapoo rights, and creates a mechanism for administration of all federal and state water rights.

The Agreement outlines the Tribe's allocation, use, timing and potential locations of use.

Finality respecting the Tribal Water Right is achieved through the Agreement. In doing so each party thereby agrees to abide by its terms. The Tribe has agreed to waive all claims against state law based water users and the United States Government relating to the water rights the Agreement recognizes, in exchange for federal legislation approving the Agreement and directing the Secretaries of Interior and Agriculture to effectuate the terms of the Agreement.

4. The total cost of the settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

The Settlement Agreement does not authorize appropriations and therefore this C&P element is not relevant at this stage. As explained earlier in this testimony, Congress in 1996 and 1998 authorized the Delaware River Project, subject to the availability of appropriations, under the authority of the PL-566 Small Watershed Program. Following receipt of recommendations from the Natural Resources Conservation Service per Section 7 of S. 2154, the Tribe will ask Congress to take up the funding authority and mechanism at that time. It is possible that the appropriations process may proceed through the agriculture committees of the House and Senate, as would occur under the PL-566 program.

5. Federal contributions to a settlement should not exceed the sum of the following two elements, (1) United States liability if the claims were litigated and if the case is lost; federal and non-federal exposure in present value based on the size of the claims, value of the water, timing of the award, and likelihood of loss and (2) additional costs related to federal trust or programmatic responsibilities (justification for why such contributions cannot be funded through the normal budget process)

See #4, above. This criteria is not relevant to S. 2154 and the Settlement Agreement.

6. Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-federal parties.

See #4, above. This criteria is not relevant to S. 2154 and the Settlement Agreement.

7. Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.

The Tribe, the State of Kansas and the United States have negotiated a unique settlement that works to promote efficient use of the water resources of the Delaware River in northeast Kansas, and thereby promoting economic development on the Kickapoo Reservation, tribal self-sufficiency, and the economy of northeast Kansas.

For over 40 years the Tribe has been working to secure an adequate and clean water supply. During this time the Tribe has conducted various studies regarding economic development projects, housing developments, public safety requirements and community development projects. The studies consistently demonstrate a need for a reliable water supply to be successful.

Currently, the Tribe has a need for increased housing on the Reservation. However, the Tribe has been limited in its ability to build homes, in part because it does not have an adequate water supply necessary for housing developments. The Agreement will provide for sufficient water for the Tribe to build homes for members. The same holds true for economic development enterprises on the Reservation.

In addition, the water supply will increase public safety on the Reservation. The Reservation has been subjected to fires, which have threatened Tribal member's homes and the Reservation's natural resources. An adequate water supply will assist the Tribe in achieving its fire safety goals.

8. Operating capabilities and various resources of the Federal and non-Federal parties to the claim negotiations should be considered in structuring a settlement.

Throughout the multi-year process of negotiations the parties—Tribal, State and Federal—have built strong relationships with one another that have fostered a willingness to achieve a positive settlement. Each party has contributed its unique resources to the Agreement. During the negotiation process the parties' strengths and weakness were considered and each party contributed to the Agreement in a complimentary manner. The final Agreement is a manifestation of each party's contribution to the Agreement.

9. The U.S. shall not bear any obligations or liability regarding the investment, management or use of such funds.

See #4, above. This criteria is not relevant to S. 2154 and the Settlement Agreement.

10. Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdictions.

The Tribe appreciates the relationships it established with the other negotiating parties through this process. In particular, the Tribe appreciates the closer ties it's developed with the State Department of Agriculture, Attorney General, and Congressional delegation on water related matters. These closer ties build stronger channels of communication on other substantive topics.

Moreover, the terms of the Agreement facilitate long-term harmony among all the signatories through providing stability by securing the parties water rights. The Agreement also provides detailed processes for implementing the provisions of the Agreement. Through the process of agreeing to the rules, all the parties carefully considered their obligations in the Agreement. As a result, all the parties are aware of their obligations and have willingly accepted such obligations. This provides for long term harmony and stability among the water users on the Delaware River.

11. Settlements should not include a list of provisions, subparagraphs a-j.

See #4, above. These criteria are not relevant to S. 2154 and the Settlement Agreement.

12-14. Specific cost/financial considerations.

See #4, above. These criteria are not relevant to S. 2154 and the Settlement Agreement.

15. Settlement agreements should include the following standard language: Federal financial contributions to a settlement will normally be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation.

See #4, above. This criteria is not relevant to S. 2154 and the Settlement Agreement.

16. Settlements requiring the payment of a substantial Federal contribution should include standard language providing for the costs to be spread out over more than one year.

See #4, above. This criteria is not relevant to S. 2154 and the Settlement Agreement.

The Settlement and proposed legislation do not include financial authorizations for claims already settled by Congress. The claims that will be settled have a legal basis, have not been previously resolved by Congress, and were not settled in prior cases against the United States. The Settlement carries over damages claims not waived in an earlier, 2012 Settlement Agreement between the Tribe and the United States. See Exhibit 16. The Settlement does not resolve additional claims against the United States brought by the Tribe; the legal assessment, and potential financial contribution of the United States to their resolution, are forthcoming and not included as part of this Settlement.

Conclusion

Thank you again for convening this hearing on S. 2154. It is a unique piece of legislation driven by unique circumstances. It is important that Congress act now to approve the Kickapoo Water Right Settlement Agreement through the enactment of this Act, to enable these sovereign entities, with assistance from the United States, to continue to build on the momentum gained in the Agreement and the Act. Indian water settlements typically are built in increments, and this is no different in that respect.

INDEX OF EXHIBITS*

| Exhibit No. | Description |
|-------------|--|
| 1 | Federal and State of Kansas letters relevant to S. 2154 |
| 2 | Examples of key local supporters of S. 2154 |
| 3 | April 8, 2016 Letter from Deputy Regional Attorney of USDA to Steven Moore Regarding authorization of the Watershed Plan |
| 4 | Map of Former and Present Kickapoo Lands |
| 5 | 1832 Treaty with the Kickapoos |
| 6 | Current Map of Tribal and Allotted Land Tracts |
| 7 | Small Tribal Dam, Delaware River and Water Treatment Facility Photos |
| 8 | General Plan, Upper Delaware and Tributaries, Nemaha -Brown Watershed Joint District, July 1978 |
| 9 | Nemaha- Brown-Kickapoo Joint Watershed Board Agreement |
| 10 | Jan. 1994 Watershed Plan and Environmental Impact Statement (EIS) for Upper Delaware and Tributaries Watershed (Atchison, Brown, Jackson, and Nemaha Counties, Kansas) |
| 11 | Notice of Publication of Final EIS in Federal Register, May 13, 1994 |
| 12 | 1994 Record of Decision: Upper Delaware and Tributaries Watershed (Atchison, Brown, Jackson, and Nemaha Counties, Kansas) |
| 13 | 1996 Final Senate approval for the development of the Project, including Plum Creek, under the Federal PL-566 |
| 14 | 1998 Final House approval for the development of the Project, including Plum Creek, under the Federal PL-566 |
| 15 | Sept. 2016 Final Settlement Agreement between Kickapoo Tribe and State |
| 16 | Joint Stipulation of Settlement between Defendants (Salazar, Secretary of the US Interior) and Kickapoo Tribe of Kansas (Apr. 11, 2012) |
| 17 | April 6, 2018 Letter from Interior Secretary to Kickapoo Tribe notifying Tribe of its appointment of a federal negotiation team under the C&Ps |

**The Exhibits have been retained in the Committee files and are available at https://www.narf.org/nill/documents/20180711_kickapoo_testimony_s2154.html
**

The CHAIRMAN. Thank you, Chairman.
Director Tubbs.

**STATEMENT OF JOHN TUBBS, DIRECTOR, MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION**

Mr. TUBBS. Chairman Hoeven, Vice Chairman Udall, and distinguished members of this Committee, thank you for the opportunity to appear in front of you today in support of S. 3168.

I am John Tubbs, Director of the Department of Natural Resources and Conservation for the State of Montana. Governor Bullock sends his greetings. Today, I appear on behalf of the State of Montana and the Western States Water Council.

My Department is made up of four divisions: Forestry; Trust Lands; Conservation and Resource Development; and, most relevant to this hearing, Montana's Water Resource Division.

This topic today, water settlements, is very near and dear to my heart. I have worked on settlements for 30 years. Under President Obama, I was proud to serve as Deputy Assistant Secretary for Water and Science with the U.S. Department of the Interior.

In 1979, the Montana Legislature established the Montana Reserved Water Rights Compact Commission as part of the comprehensive State-wide adjudication process to negotiate settlements with Montana's tribal Nations and Federal agencies claiming reserved water rights within the State of Montana.

Montana has eighteen compacts settling reserved water rights within our borders, including our seven reservations. These negotiations were massive undertakings, and Montana is very proud that it was able to secure positive results, as well as avoid protracted and costly litigation.

Just last month, Governor Bullock, Secretary Zinke and Blackfeet Tribal Chairman Barnes executed the Blackfeet Water Rights Settlement that will enable clean drinking water and irrigation projects to go forward. As you know, the Confederated and Salish and Kootenai Tribes have a water settlement bill that is on deck. Thank you, leaders of this Committee, for giving these matters the time and attention they deserve.

The State of Montana and Western States Water Council supports any effort to provide a stable and appropriate funding source for water rights settlements. Of course you are aware that previously the Western States Water Council asked the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose of continuing conservation, development and wise use of resources to meet western water-related needs.

In regard to S. 3168, Montana and the Western States Water Council support this effort to make the Reclamation Water Settlement Fund permanent. Congress, and this Committee in particular, has made impressive efforts to move water rights settlement bills, and it makes good sense for future water settlement dollars to be assured.

Montana and the Western States are committed to continuing to work cooperatively with the Department of the Interior and the Bureau of Reclamation to meet our present water needs in the West, and those of future generations, within the framework of State water law, as envisioned by President Roosevelt and the Congress in 1902.

I am happy to be here in support of S. 3168 and stand ready to answer any questions you may have related to this testimony.
[The prepared statement of Mr. Tubbs follows:]

PREPARED STATEMENT OF JOHN TUBBS, DIRECTOR, MONTANA DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION

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My Department is made up of four divisions: Forestry; Trust Lands; Conservation and Resource Development; and, most relevant to this hearing, Montana's Water Resource Division. This topic today—water settlements—is very near and dear to my heart. Under President Obama, I was proud to serve as Deputy Assistant Secretary for Water and Science with the U.S. Department of the Interior.

The 1979 Montana Legislature established the Reserved Water Rights Compact Commission as part of the comprehensive state-wide adjudication process to negotiate settlements with Montana's tribal nations and federal agencies claiming reserved water rights within the State of Montana. Montana has eighteen compacts settling reserved water rights within our borders—including our seven reservations. These negotiations were massive undertakings, and Montana is very proud that it was able to secure positive results, as well as avoid protracted and costly litigation. Just last month, Secretary Zinke and Blackfeet Tribal Chairman Barnes executed the Blackfeet Water Settlement that will enable clean drinking water and irrigation projects to go forward. As you know, the Confederated and Salish and Kootenai Tribes have a water settlement bill that is on deck. Thank you, leaders of this Committee, for giving these matters the time and attention they deserve.

The State of Montana and Western States supports any effort to provide a stable and appropriate funding source for water settlements. Of course you are aware that previously Western States asked the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose of continuing conservation, development and wise use of resources to meet western water-related needs.

In regard to S. 3168, Montana and Western States support this effort to make the Reclamation Water Settlement Fund permanent. Congress, and this Committee in particular, has made impressive efforts to move water settlement bills, and it makes good sense for future water settlement dollars to be assured.

Montana and Western States are committed to continuing to work cooperatively with the Department of Interior and the Bureau of Reclamation to meet our present water needs in the West, and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902.

I am happy to be here in support of S. 3168 and stand ready to answer any questions you may have related to my testimony.

Attachments

RESOLUTION OF THE WESTERN STATES WATER COUNCIL REGARDING THE
THE RECLAMATION FUND—ROHNERT PARK, CALIFORNIA—JUNE 29, 2017

WHEREAS, in the West, water is indeed our "life blood," a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life—the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

WHEREAS, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies "reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land. . ." in seventeen western states, to be continually invested and reinvested; and

WHEREAS, then President Theodore Roosevelt stated, "The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The con-

stant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children's children. . . ."¹ and

WHEREAS, the Secretary of the Interior was authorized and directed to "locate and construct" water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service—today's U.S. Bureau of Reclamation; and

WHEREAS, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the "ultimate greatest good of the greatest number;" and

WHEREAS, the Bureau of Reclamation has facilities that include 338 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation's vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 53 hydroelectric power plants, enough to serve 3.5 million households, while providing 289 recreation areas with over 90 million visits annually, and further providing flood control, and fish and wildlife benefits; and

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return some one billion in gross power revenues to the federal government, prevent millions in damages due to floods each year, and supports over \$45 billion in economic returns and supporting over 344,000 jobs; and

WHEREAS, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

WHEREAS, according to the Administration's FY 2018 request actual and estimated receipts and collections accruing to the Reclamation Fund are \$ 1.969 billion for FY 2016, \$1.475 billion for FY 2017, and \$1.528 billion for FY 2018, compared to actual and estimated appropriations of \$996 million for FY 2016, \$ 1 billion for FY 2017, and \$878 million for FY 2018 and as a result the unobligated balance at the end of each year respectively is calculated to be \$15.133 billion, \$15.608 billion and \$16.308 billion; and

WHEREAS, this unobligated balance in the Reclamation Fund continues to grow at an increasing rate from an actual balance of \$5.67 billion at the end of FY 2006, to the estimated \$16.308 billion by the end of FY 2018, over a 187 percent increase; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources, and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties—but these receipts are only available for expenditure pursuant to annual appropriation acts; and

WHEREAS, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger, while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs—rec-

¹State of the Union Address, 1907.

ognizing and continuing to defer to the primacy of western water laws in allocating water among uses—and work with the States to meet the challenges of the future.

BE IT FURTHER RESOLVED, that such “needs” may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

BE IT FURTHER RESOLVED, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).

RESOLUTION OF THE WESTERN STATES WATER COUNCIL IN SUPPORT OF INDIAN WATER RIGHTS SETTLEMENTS—ALBUQUERQUE, NEW MEXICO—OCTOBER 20, 2017

WHEREAS, the Western States Water Council, an instrumentality of eighteen western states advising Western Governors on water policy, has consistently supported negotiated settlement of disputed Indian water rights claims; and

WHEREAS, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

WHEREAS, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

WHEREAS, the successful resolution of certain claims may require “physical solutions,” such as development of federal water projects and improved water delivery and application techniques; and

WHEREAS, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

WHEREAS, the settlement of Native American water claims and land claims is one of the most important aspects of the United States’ trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States; and

WHEREAS, the obligation to fund resulting settlements is analogous to, and no less serious than the obligation of the United States to pay judgments rendered against it; and

WHEREAS, Indian water rights settlements involve a waiver of both tribal water right claims and tribal breach of trust claims that otherwise could result in court-ordered judgments against the United States and increase costs for federal taxpayers; and

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of disputed Indian water rights claims as the best solution to a critical problem that affects almost all of the Western States; and

BE IT FURTHER RESOLVED, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

BE IT FURTHER RESOLVED, that Congress should expand opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves; and

BE IT FURTHER RESOLVED, that Indian water rights settlements are not and should not be defined as Congressional earmarks; and

BE IT FURTHER RESOLVED, that steps be taken to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program.

The CHAIRMAN. Thank you, Director Tubbs.

Now we will start with five minute rounds of questioning.

My first question would be for Chairman Pickernell. It sounds like an interesting project. You have this distillery project. Can you talk a bit about the benefits it will provide in terms of jobs, economic impact, what your product is, and how you plan to sell it and so forth? Can you tell us a bit more about that?

Mr. PICKERNELL. The plan for the distillery is to work in junction with a restaurant, a fine dining restaurant. One half will be a fine dining restaurant and the other half will be a working distillery with a glass partition where people can watch.

The first phase is the construction. That is going to bring probably 100 jobs to the surrounding communities and tribal members. After construction, we plan to have 30 to 40 full-time positions as permanent positions to fill that business.

The CHAIRMAN. What will you distill, whiskey?

Mr. PICKERNELL. I believe it is bourbon.

The CHAIRMAN. Will that be provided at the restaurant?

Mr. PICKERNELL. No, it will be distributed as well.

The CHAIRMAN. Distributed as well.

Mr. PICKERNELL. Correct.

The CHAIRMAN. Mr. Mikkelsen, I have a question for you regarding the Vice Chairman's bill, S. 3168. Can you tell us a bit about how extending the Reclamation Water Settlement Fund would benefit tribes and other stakeholders? Can you also talk a bit about the cost as well?

Mr. MIKKELSEN. Thank you, Mr. Chairman.

There is roughly \$2.6 billion authorized by Congress in recent years for Indian water rights settlements. That is not an indexed number; that is the actual.

The CHAIRMAN. Two billion dollars billion for how long?

Mr. MIKKELSEN. Two point six billion dollars that you have authorized here in Congress for water rights settlements. That number, obviously, does not include anything in the pipeline right now. We believe, with some of the settlements mentioned here, that there is probably roughly another \$5 billion worth of settlements currently in the pipeline.

I would also note that we have 22 settlements we are negotiating across the Country right now in addition to the 32 that have been approved by Congress. Those 22 include some of those approaching congressional authorization and congressional action here. That is included in that \$5 billion figure I am talking about.

I would also add that currently roughly 12 percent of Reclamation's current budget goes toward Indian water rights settlements. We are going to have to have a discussion with the Committee and the Hill on where we are going in the future to fund all of these settlements.

The CHAIRMAN. Right. That is why I am trying to understand what we have authorized and what the outstanding total is pending in water settlements. That is what I am trying to get at. You

were getting at it but I am not sure I got the totals. How much is authorized versus how much is pending?

Mr. MIKKELSEN. You have authorized, at this point, about \$2.66 billion. That is not an indexed number; that is the actual number you authorized. You have appropriated roughly about \$1.6 billion out of what you have already authorized that still has to be appropriated.

The CHAIRMAN. How much is outstanding in terms of what has been approved for funding?

Mr. MIKKELSEN. There is about \$1.6 billion that is outstanding of currently authorized projects.

The CHAIRMAN. So \$1 billion is covered, \$1.6 billion is authorized, yet unfunded?

Mr. MIKKELSEN. Yes, \$2.6 is authorized and about \$1.6 billion is still outstanding.

The CHAIRMAN. I am trying to understand, does that include all of the water rights agreements that have been approved?

Mr. MIKKELSEN. The number we are talking about here is just authorized, currently authorized.

The CHAIRMAN. Already currently authorized?

Mr. MIKKELSEN. Already currently authorized.

The CHAIRMAN. Not anything we are looking at authorizing?

Mr. MIKKELSEN. That is correct.

The CHAIRMAN. Thank you.

Vice Chairman Udall.

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

How many Indian water rights settlements are Interior and DOJ currently negotiating across the Country? I think you said the number of teams across the Country is 22?

Mr. MIKKELSEN. We are working on 22 settlements right now. We actually have 21 Federal negotiation teams and one assessment team out there right now, Senator.

Senator UDALL. The Navajo Utah legislation will cost upwards of \$200 million. The Hualapai settlement will also end up somewhere in that range. The CSKT settlement from the last Congress will possibly cost more than \$2 billion. That is just three settlements, isn't that correct?

With that in mind, what is the total estimated cost of all those settlements that are still in the middle of negotiations, at least in the billions?

Mr. MIKKELSEN. Roughly \$5 billion.

Senator UDALL. Your estimate does not even include costs, overruns or inflation, correct?

Mr. MIKKELSEN. That is correct.

Senator UDALL. Could you estimate the percentage of Bureau of Reclamation's budget that goes toward Indian water rights settlements currently?

Mr. MIKKELSEN. It is currently roughly about 12 percent.

Senator UDALL. Do you envision that percentage to grow as more settlements are agreed upon?

Mr. MIKKELSEN. The Reclamation budget has become a major contributor to Indian water rights settlements so I would have to say the answer to that is yes.

Senator UDALL. Your testimony states "The Reclamation Settlement Fund is already spoken for through 2029." What happens when the fund expires? How would Reclamation look to cover the shortfall moving forward?

Mr. MIKKELSEN. I would say we are looking forward to the opportunity that this bill affords us to discuss how to address the issue in the future. We do look forward to working with you on this.

Senator UDALL. Basically, the answer is yes to the question. It is all spoken for and we do not have a good plan for moving forward. Basically, I think that is what you are saying. I am not asking for a response.

Mr. Mikkelsen, I would just like to say for the record that I find it very difficult, knowing the current funding constraints we face in Congress, to fund these Indian water rights settlements solely through discretionary spending.

This Administration and Congress have said they are committed to Indian water rights settlements versus costly litigation. However, we need that commitment tied to a true financial commitment. I look forward to working with you on this Indian water rights funding mechanism.

The CHAIRMAN. You mentioned 12 percent of the BOR budget goes to Indian water rights settlements. Do you know how much that is?

Mr. MIKKELSEN. Yes, sir. It is basically \$120 million a year right now out of \$1 billion.

Senator UDALL. That is the total. You deposit the money in the Treasury and every year Treasury is not allowed to spend any more than \$120 million, is that correct?

Mr. MIKKELSEN. That is correct.

The CHAIRMAN. In addition to any other appropriated funds though, or is that total?

Mr. MIKKELSEN. That is in a discrete fund. The Bureau of Indian Affairs also contributes to these settlements.

The CHAIRMAN. That is in addition to what we appropriate separately for these agreements, correct or not?

Mr. MIKKELSEN. Some of it is mandatory and some of it is discretionary.

The CHAIRMAN. That was my question.

Senator UDALL. Mr. Tubbs, under my proposed legislation, there are at least 11 States, predominantly in the West, who would be eligible for the Bureau of Reclamation funding to plan, design or construct a water project.

Please explain how implementing prompt, quality Indian water rights settlements clarify water issues for surrounding communities?

Mr. TUBBS. In four words: increased certainty, reduced risks. It increases certainty for those communities and reduces risk. Any water rights settlements are part of the statewide water rights system. As a reserved right, they are not quantified until negotiated. They remain a large uncertainty for State-based water rights holders as well as the tribal members themselves.

Only through negotiated settlements, because we do not think litigation is a good idea, are we able to quantify those water rights.

When we do, it is permanent. We need a permanent funding solution to go with the permanent settlement.

The tribes are being asked to sign, in our settlements, a waiver that all litigation will be settled by the passage of these Acts. A permanent fund to go with that level of commitment by the United States is, I think, an appropriate measure as well as the Reclamation Fund being the appropriate source.

Senator UDALL. Mr. Tubbs, what is the benefit of supporting a permanent fund to encourage Congress-approved Indian rights settlements or agreements versus litigation? I think you touched on a little bit of that. As you know, I think you have been around a while, as Senator Tester said, some of these pieces of litigation can go on for 40 years. We have had one in New Mexico for more than 40 years.

You have the tribe and all the surrounding communities with uncertainty. Is that correct?

Mr. TUBBS. That is correct. It is substantial. Right now, we have two that have not seen Federal settlement, the CSKT and the Ft. Belknap in our State.

Should those go into litigation, you are absolutely correct. There would be decades of uncertainty where the quantification of those water rights would be based on an objection process by individual water right owners.

They would all have to hire their own attorneys. Each municipality would have to represent their interests. The State of Montana would have to be in the fight as well as the sovereign tribe and the United States.

The settlement packages bring all of that together in one large negotiation. It is cost effective. It also addresses the future needs of not only the tribal communities, but often the non-tribal interests around those tribal communities. Both sides benefit greatly.

Bottom line, from a water rights perspective, we need certainty. Through Federal settlement, we can get that. The Reclamation Fund needs to be there to fund the investments necessary to garner that certainty.

Senator UDALL. There is very little certainty when you have litigation.

Mr. TUBBS. Right now, the Blackfeet was the most recent one that was fully executed and signed off by the Secretary this year. It needs to be funded by 2025. That is over \$400 million Congress needs to appropriate.

I think you and your colleagues would appreciate having a safe harbor for meeting the settlement of a legal claim against the United States as opposed to a discretionary allocation within your tight budgets

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

The CHAIRMAN. Senator Moran.

Senator MORAN. Mr. Chairman, again, thank you for hosting this hearing. Thank you for scheduling it on a day when I could participate.

Let me direct my questions to Chairman Randall. First of all, Chairman, you heard the testimony of the Department of the Interior. In your testimony, you complimented the cooperation you had

from the Department of the Interior and others in reaching this settlement agreement that would be confirmed by S. 2154.

What role did Interior play in those negotiations? When you thanked them for their involvement, what was that involvement?

Mr. RANDALL. We did thank them. There were several agencies involved in this, the State, Ag, Justice and the Department of the Interior. I think the involvement could probably be better answered by Steve Moore, our lawyer. Mr. Chairman, do you mind if Steve Moore comes and answers some of this question?

The CHAIRMAN. Mr. Moore.

Mr. MOORE. Thank you, Mr. Chairman and Senator Moran.

As Mr. Tubbs alluded, settlement negotiations involving Indian water rights span several years, involve technical and legal analysis, complex technical and legal analysis.

The CHAIRMAN. Would you state your name and position for the record, please?

Mr. MOORE. Steven Moore, an attorney with the Native American Rights Fund in Colorado. I represent the Kickapoo Tribe.

Senator MORAN. Mr. Moore, my question to the chairman, which you can help answer, is we are appreciative of the Department of the Interior participating in these discussions that resulted in this split settlement. But today, they testified they oppose the legislation that approves the settlement they apparently participated in the negotiations of.

What is the disconnect here? What is missing?

Mr. MOORE. I think from the tribe's standpoint, Senator, the disconnect is a rigid application of the Interior Department criteria and procedures to a water settlement that has been negotiated as an outgrowth of the development of a project under the USDA Small Watershed Program.

There are important elements of the criteria and procedures that would benefit the remaining negotiation aspects between the tribe, the State and NRCS. Section 7 of S. 2154 provides that mechanism by directing NRCS to convene a consultation process with Interior, the tribe and the State, bring us back to the table, reevaluate and resize the project that was authorized now 20 years ago by both the House and the Senate after full NEPA review. That was a 20-year process the tribe engaged in.

Now we are 20 years hence. We are going to need a supplemental EIS. We need to resize the project in the watershed and then do a cost analysis. The way the tribe would like to proceed under congressional directive is that would be Phase II under Section 7 of S. 2154.

However, right now let us approve the water right, lock it in, provide certainty to the State and the water users in the Delaware River Watershed, provide certainty to the tribe, and not potentially risk losing all the gains we have made in quantifying the water right.

We want Congress to confirm and then we would begin that process in Federal court in Kansas of binding all the few water users in the Delaware River Watershed to the water right. These things are done incrementally by tribes and States in the United States.

We have had great cooperation with the United States, but we find ourselves, ironically, here today trying to lock in that water

right and then move on with NRCS and complete the process under the Small Watershed Program.

We do find it is very ironic that the Interior Department cannot come to the hearing today and support this process. We feel as though Interior is bound by their obligation to their own criteria and procedures. Their criteria and procedures do not bind USDA and the Small Watershed Program process.

Senator MORAN. If I can, Mr. Chairman, let me follow up.

You described, in a sense, that we are locking in the water right and then we can proceed to determine how we are going to best use that water right in storage and application. What would be the consequence of waiting until all those other issues were resolved before locking in the water right?

If this legislation does not become law and we fail to accomplish that, then the tribe is sent back to do more I guess to meet the criteria and procedures of the Department of the Interior but in the period of time in which the tribe has to do that, what are we losing in the absence of passage of this legislation? What would be the detriment?

Mr. MOORE. The absolute detriment to the tribe, to the State of Kansas and its administrative scheme, is that we risk the water right that has now been fully negotiated would be second-guessed by later administrations, State, Federal, tribal, and then the water right is lost.

If we lose all of the gains we have made to date on the water right, we could end up having to start over completely. The testimony of the State of Kansas makes abundantly clear that the State is 100 percent behind S. 2154 and the congressional approval of the water right. The State of Kansas has been wonderful to work with, their legal and technical staff.

There is tremendous risk, tremendous downside to not approving the water right now. There is no downside to approving it.

Senator MORAN. When the chairman outlined the long history of this issue and this project, it almost makes you nauseous to think of all the steps that have been necessary over such a long period of time. To be so close now to getting at least a significant portion of this issue behind us, it would be, in my view, a terrible mistake to let that opportunity pass.

This issue has been around as long as I have been a public official. It would be nice to see the opportunities that Kansas and the tribe have created, with the support of Agriculture and to some degree, Interior, completed while that opportunity now presents itself.

It would be a terrible loss if we have to re-litigate these issues one more time with a different set of State officials, Federal officials or tribal officials.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

Senator Daines.

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

Senator DAINES. Thank you, Chairman Hoeven and Vice Chairman Udall.

I want to welcome a couple of Montanans to the Committee. John Tubbs from Helena serves as our State's Director of the Department of Natural Resources and Conservation. Welcome, John.

I would also welcome Alan Mikkelsen, Senior Advisor to the Secretary of Interior for Water and Western Resource Issues and also Chair of the Working Group on Indian Water Settlements at the Department who is from St. Ignatius but I believe is now based in Colorado.

You are also a part-time fly fishing guide. I am sure you would rather be out on a stream as the water has now cleared up, versus being here. I am grateful you both are here. Thank you.

I also want to echo your sentiments, Mr. Tubbs, that water rights settlements are preferable to resolving water rights claims via litigation. I went to school at Montana State to get an engineering degree. I did not go to the University of Montana to get a law degree because you need some great lawyers but it is also really expensive when it comes time to litigate.

It is certainly the less costly and preferred option. The settlements also provide more certainty for tribes as well as other water users across Montana.

I would like to focus today on Vice Chairman Udall's Indian Water Rights Settlement Extension Act. I very much appreciate the Vice Chairman's intention here. Indian water rights settlements, like the Blackfeet settlement, need to be funded in a very timely manner. Unfortunately, discretionary appropriations are trickling in quite slowly.

I have continued to make the charge to the Department of the Interior to request more funding for the Blackfeet water rights settlement so that Congress can fund it by the 2025 enforceability date. As we all know, there has been a lot of work to get it to this point.

I am conscious, however, of the Indian Water Rights Settlement Extension Act's impact on the deficit as it would authorize \$120 million in new mandatory spending every year from 2030 onward in perpetuity. Overall, I am interested to learn more about this legislation.

Mr. Mikkelsen, if this legislation were enacted, how would the department prioritize disbursement of the newly authorized funds, meaning for fiscal years 2030 and beyond, after the projects specified in the underlying law are complete?

Mr. MIKKELSEN. Thank you, Senator Daines.

As you noted, the settlement fund is likely to be expended funding priority settlements and the department has not yet developed prioritization criteria given the time horizon in which the Settlement Fund will be fully expended.

Senator DAINES. I have a follow-up question, Mr. Mikkelsen. As additional water rights settlements are ratified by Congress would they then be able to be funded by the Reclamation Water Settlements Fund if permanently extended as this bill proposes?

Mr. MIKKELSEN. Yes. Any authorized Indian water rights settlement would be eligible. The answer to your question is yes.

Senator DAINES. Thank you.

I want to switch now to Mr. Tubbs. Would you agree that this proposed change to current law is unlikely to benefit the Blackfeet water rights settlement since it has to be funded by 2025, four years before the current authorization for the Reclamation Water Settlement Fund is set to expire?

Mr. TUBBS. I would agree that should Congress actually come through and get the appropriations done, having watched Congress over the decades, I do want to work with you and make sure we do get to that by 2025 so that this fund is available.

If I may, I would mention one other point of clarification I think would be useful to the Committee. While I believe the Reclamation Fund is the appropriate source of funding for these types of settlements, the burden is placed on Reclamation because, as you know, Reclamation is separated from the Department of the Interior in the appropriations process to its own grouping, not allowing the full girth of the agency to come to bear.

Within your processes on the congressional side, you are limiting the issue to the Reclamation side of the appropriating committees. The Interior side of the committees is not dealing with this under the budget cap issues you face. It really places Reclamation, the agency, in harm's way that even though this benefits all of the Interior agencies and often other agencies like Agriculture and the Army Corps of Engineers, the burden in the budget cap process is falling strictly on Reclamation itself.

I think that is a distinction worthy of this Committee's knowledge.

Senator DAINES. Thank you. I am out of time but you just highlighted another reason why we are in desperate need of reforming our budgeting and appropriating processes in terms of authorizing committees, appropriations committees, the funds and agencies and so forth. That is another topic for another day.

Thank you, Mr. Tubbs, for that comment.

The CHAIRMAN. Thank you, Senator Daines.

Vice Chairman Udall, did you have additional questions?

Senator UDALL. I have one additional question.

Chairman Randall, in New Mexico we have had some years like the one we are in where we have had very limited snow pack in the mountains and thus very little water for downstream communities. Then we had a good year or two and a long stretch of persistent drought.

This, along with devastating wildfires, has especially strained our watersheds and water resources but we have been working on a number of water settlements that are critically important for the tribes and surrounding communities.

It is important that they have water security in times of drought. Negotiating the settlements is not always easy. As we say in the West, whiskey is for drinking and water is for fighting. It is a good start and I believe we must continue to do our part as the Federal Government to pay our fair share.

Chairman Randall, the question I have is how will securing permanent funding to implement Indian water settlements help tribes like Kickapoo better adapt to a changing environment?

Mr. RANDALL. Even though at this time we are not asking for the appropriations part, it is detrimental to every tribe. As tribal leaders, we all talk about how important water is to our people.

As for our tribe, speaking for my tribe only, I have a bunch of kids back home watching this because we have to work on our future. Without the future, there is no tribe. Without the funding, what Mr. Tubbs said they are trying to do for the tribes is great.

Without the water, we always say, the Indian way, water is life. That is what we believe. Water is sacred to us. Without the funding for the water settlements, it would be detrimental to all the tribes and even the surrounding communities.

In the surrounding communities like ours, we have just as many non-members using our water as we do. It affects everyone around us. I hope that answered your question a little bit.

Senator UDALL. That was very good.

Mr. Chairman, after hearing all this testimony today, the questioning and contributions by Senators, I would like to say in our bill, 3168, we are trying to bring certainty, as Mr. Tubbs said, to the process.

What ends up happening is when you have the authorization ending in 2029, all of these people are out in the field negotiating. We have water settlements that have gone on. Giving certainty allows communities to move forward and negotiate settlements and allows them to bring certainty for tribes, non-Indian communities and surrounding or nearby tribes.

I think I want to make really clear and note for the record that my bill is outside the ten-year scoring window. Therefore, the bill will not score. What we are trying to do is help Reclamation, help the tribes and everyone in this process understand there is going to be dollars there. If you do a settlement, there are going to be dollars there to take care of it.

Thank you very much.

Mr. RANDALL. I would definitely say we support John Tubbs' bill.

Mr. TUBBS. Mr. Chairman, if I may. Mr. Mikkelsen suggested there are 22 settlements being negotiated with a potential cost of around \$5 billion, one of the largest being the Confederated Salish and Kootenai settlement that is fully engaged at Interior and Mr. Mikkelsen.

At \$120 million per year, one of the certainties that is improved is the tribal governments are competing with each other with a deadline of 2029 when the money runs out. You are actually pitting tribes against tribes on who gets on first. If it was possible to extend that so there was enough certainty beyond 2029 and tribes could see their future within that allocation, I think you would give certainty to tribal communities.

Senator UDALL. Thank you very much for that comment.

The CHAIRMAN. The hearing record will be open for two weeks.

I want to thank all the witnesses for their time and testimony today.

Also, before we adjourn, I want to take a moment to personally thank two our Committee staffers who will be leaving, Ken Rooney,

who served as counsel for Senator Udall's staff, and Hanna Beyer, who served on my staff as our Committee's press secretary.

Both have served the Committee with distinction and we wish them well in their future endeavors. We thank them for all their hard work.

With that, our hearing is adjourned. Again, thank you.

[Whereupon, at 4:13 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF BURKE W. GRIGGS, SPECIAL ASSISTANT ATTORNEY
GENERAL, STATE OF KANSAS

Introduction

Good afternoon, Chairman Hoesven, Vice Chairman Udall, Senator Moran, and the other members of the Committee. I am Burke Griggs, Special Assistant Attorney General for the State of Kansas and associate professor of law at Washburn University, where I teach natural resources law. Between 2014 and 2016, I served as the State's Counsel of Record in the settlement negotiations that produced the 2016 Kickapoo Tribe Water Rights Settlement Agreement ("Agreement"), the first reserved water rights settlement in Kansas history. I am here today on behalf of the State of Kansas ("State") to testify in support S. 2154, a bill to approve the Agreement. On behalf of former Governor (and now Ambassador) Sam Brownback, Governor Jeff Colyer, Attorney General Derek Schmidt, Jackie McClaskey, Secretary of the Kansas Department of Agriculture, David W. Barfield, Chief Engineer of the Kansas Division of Water Resources (DWR), and Tracy Streeter, Director of the Kansas Water Office, I am pleased to write that the State fully and enthusiastically supports S. 2154. By effecting the Agreement in statute, S. 2154 will establish certainty for all water rights owners in the Delaware River Basin of Kansas and clarify the protection of those rights in times of water shortage.

The State expresses its gratitude and respect for the Kickapoo Tribe ("Tribe"), Chairman Randall, and their counsel, who have all worked tirelessly to achieve the Agreement. That work has produced a relationship of mutual trust between the State and the Tribe. The State would also like to express its gratitude to the Tribe's federal representatives at the Departments of Justice and the Interior, who have provided valuable expert assistance to both the Tribe and the State as they worked through the technical and procedural requirements of the Agreement. Finally, the State expresses its gratitude to Senator Moran and his staff for their commitment and leadership on this matter, and to Representative Jenkins and her staff for their assistance as well.

My testimony consists of five sections. Section I provides background to the Tribe's reserved water right, the Tribe's ongoing efforts to secure necessary water-supply infrastructure, and the litigation and negotiation which together produced the Agreement. Section II summarizes the Agreement and its effect upon Kansas water rights upstream and downstream of the Reservation. Section III summarizes S. 2154, which approves, authorizes, and ratifies the Agreement. Section IV briefly explains how S. 2154 complies with the 1990 Criteria and Procedures for approving tribal reserved water rights settlements.

I. Background

A. The Tribe's Reserved Water Right in the Delaware River Basin and Kansas Water Law

The Tribe's ancestral homelands are in the Fox River Valley of Wisconsin, but the United States removed the Tribe south and west between 1809 and 1862, from Illinois to Missouri and finally to Kansas. The Tribe's equitable title to land within the present boundaries of Kansas dates to 1832, when the Tribe signed the Treaty of Castor Hill, which established a reservation bestriding the Missouri River in northeast Kansas and northwest Missouri. Subsequent treaties in 1854 (the same year as the Kansas-Nebraska Act) and 1862 (the same year as the Homestead Act) dramatically reduced the size of the original reservation. The present Kickapoo Reservation ("Reservation") encompasses thirty square miles in Brown County, Kansas. Of that, the Tribe holds equitable title to 4,589 acres and fee title to 2,189 acres; tribal members own equitable title to another 2,681 acres of allotted land. Non-Indian successors in title to Indian allottees own the remainder of the acreage within the boundaries of the Reservation.

The Reservation is located within the uplands of the Delaware River Basin (“Basin”) in northeast Kansas, a part of the state that is generally lacking in substantial groundwater supplies.¹ Unlike nearby communities such as Topeka, which can access both surface and groundwater, the Tribe is dependent upon the river alone. As set forth more extensively in the testimony of Chairman Randall, the Tribe has faced chronic and severe water shortages due principally to periods of drought, diversions by holders of Kansas water rights upstream (including watershed dams), and, paradoxically, conservation practices such as field terracing. As Kansas irrigators and other water users seek out localized supplies of surface water and groundwater in the Basin, their diversions threaten to diminish surface flows even further. Given the Tribe’s water supply situation and present levels of water rights development in northeast Kansas, establishing the Tribe’s water right has become an important matter for both sovereigns.

As this Committee well knows, Native American tribes are entitled to substantial water rights under federal law. Under the Supreme Court’s decision in *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, the Court has repeatedly held that tribes possess implied federal reserved water rights with attributes necessary to ensure that the Reservation is a viable homeland for the Tribe in perpetuity. Pursuant to what has become known as the “*Winters* Doctrine,” this federal, implied, and reserved water right has two principal attributes: a priority date of October 24, 1832—the date of the Treaty of Castor Hill, which established the Tribe’s homeland in Kansas—and of sufficient quantity to satisfy all present and future water uses for the Reservation’s purposes, including the various irrigation, domestic, municipal, industrial, and cultural uses of water. Due to their nature as implied, reserved rights, *Winters* rights are presently perfected and immune from abandonment.

But declaring that a right exists is a far piece from enjoying its benefits; and the *Winters* Doctrine generally presents two formidable burdens. The first burden is borne principally by a tribe—that of transforming the bare legal rights afforded it under *Winters* into wet water and water-supply infrastructure. The second burden is borne by the tribe, the United States, and the relevant state together—that of integrating a federal reserved water right into long-established state-law based systems for water rights administration. Because most reservations across the western United States exist in areas that are severely over-appropriated—that is, there are far more state-law based water rights than there are water supplies to satisfy both those rights and federal reserved rights—most tribal reserved water rights litigation in the West has taken the form of basin-wide water rights adjudications in state court, which have generally proven to be difficult, expensive, and contentious proceedings.²

Fortunately, the Tribe and the State have managed to avoid many of the hydrological and legal pitfalls of a typical reserved water rights proceeding. Hydrologically, the Basin is located in the relatively wet (albeit drought-prone) region of northeast Kansas; as a consequence, the recognition and effectuation of the Tribe’s *Winters* right should not fundamentally disrupt statelaw based water rights. I can state this with confidence, because under the Kansas Water Appropriation Act (KWAA), K.S.A. § 82a-701 *et seq.*, Kansas enjoys a legal regime that is well-suited to integrating the Tribe’s federal reserved rights with state-law water rights, generally according to the prior appropriation doctrine. Under the KWAA, all non-domestic uses of water in the State have been permitted and quantified since 1945 under a centralized administrative system led by the Chief Engineer of DWR, with jurisdiction over both surface and groundwater statewide. Since 1978, the KWAA has required annual water-use reporting for all non-domestic rights. These permitting and reporting requirements have provided water-usage data enabling the State and the Tribe to work through the contours of the Tribe’s *Winters* right within a legally well-defined waterscape of existing property rights—and to accommodate that right while establishing certainty and security for all state water rights in the Basin.

¹T. J. TROMBLEY *et al.*, OVERVIEW OF WATER RESOURCES IN AND NEAR INDIAN LANDS IN NORTHEASTERN KANSAS AND SOUTHEASTERN NEBRASKA, U.S. GEOLOGICAL SURVEY WATER-RESOURCES INVESTIGATIONS REPORT 96-4070 (1996).

²For example, the Gila River Adjudication in Arizona has produced the largest and longest judicial proceeding in the history of Arizona, and among the most complex in American history. See Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007). Recent major water rights adjudications, such as the Big Horn Adjudication in Wyoming (1997–2014) and the Snake River Basin Adjudication in Idaho (1987–2014), took decades to resolve nearly half a million dispersed state and federal claims into approximately 150,000 decreed water rights. The Snake River decree alone runs 275,000 pages. And these are the successful ones.

B. Efforts by the Tribe and State parties to secure land and water infrastructure under The NRCS's Small Watershed Program

Like many tribes across the West, the Tribe began to seek support for its water needs during the 1970's. However, it pursued these efforts through a program that no other tribe has employed: the United States Department of Agriculture-National Resources Conservation Service's Small Watershed Program, also known as the P.L. 83-566 program. Starting in 1983, the Tribe and the Nemaha-Brown Counties Watershed Board formed a Joint Watershed Board, which worked with four local conservation districts, the State, and NRCS to develop a Watershed Plan. The Watershed Plan envisioned an extensive system of small flood-retention dams across the Basin and five larger, multi-purpose reservoirs, four which could serve tribal lands. The largest of those four was to be sited on Plum Creek, a tributary of the Delaware, and was designed to provide a long-term water supply for the Tribe as part of the Upper Delaware and Tributaries Project ("Project"). Over the next ten years, the Project underwent full review under the National Environmental Policy Act (NEPA), which produced an Environmental Impact Statement (EIS) that was approved via a Record of Decision by the NRCS in 1994. The United States Army Corps of Engineers issued a Clean Water Act Section 404 permit that same year, amending it in 2002. In 1997, the parties to the Joint Watershed Plan obtained Congressional authorization enabling further review of the Project.³

The State is hopeful that the Tribe can develop its necessary water infrastructure through the P.L. 83-566 Program, but also recognizes that the Tribe, as the sponsor of the project, bears responsibility for seeing the project through.

C. Litigation, Negotiation, and Agreement, 2006-2017

Despite the cooperation and progress achieved by the Joint Watershed Board between 1983 and 1998, disputes began to emerge regarding the issue of land acquisition for Plum Creek Reservoir—including the issue of whether the Tribe could force the State to condemn land necessary for its construction. In 2006, the Tribe sued the Bureau of Indian Affairs and the State, requesting that they condemn such land and recognize the Tribe's *Winters* water right.⁴ For the next several years, the litigation proceeded along two different paths: a contentious dispute over land acquisition between the Tribe and the Brown-Nemaha Board, and a generally cooperative effort concerning the recognition of the water right issue. (The State has never challenged the existence of the Tribe's *Winters* right, and has protected the Tribe's existing water-supply infrastructure since 1978.) The Federal District Court for the State of Kansas resolved the land issue in 2014; as set forth more fully in Chairman Randall's testimony, the Tribe has taken full responsibility for acquiring the necessary land for its reservoir through voluntary purchases from willing sellers, and has acquired 250 acres so far. In the wake of the court's resolution of the land issue, the State and the Tribe agreed to suspend active litigation and devote their full attention to negotiating the details of the Tribal Water Right. After two years of cooperative technical and legal negotiations, the Tribe and the State signed the Agreement on September 8, 2016. Following the execution of the Agreement, the parties filed a joint stipulation of dismissal without prejudice, and the court dismissed the case without prejudice in February, 2017.

II. The 2016 Kickapoo Tribe Water Rights Settlement Agreement

A. The Principal Elements of the Agreement

The Agreement integrates the recognition and operation of the Tribal Water Right in harmony with the established legal and administrative structures of the KWAA, while preserving the Tribe's autonomy over the ownership, use, and governance of the Tribal Water Right. The Agreement establishes the nature, extent, and attributes of the Tribal Water Right as well as the respective rights, duties, and obligations of the Tribe and the State. Please allow me to summarize the five most important components of the Agreement from the State's perspective.

First, there is the Tribal Water Right itself, as fully described in Article 5 of the Agreement. The two most important attributes of the Tribal Water Right are its priority and its authorized quantities of annual diversion and overall storage. The Agreement recognizes the priority date of the Tribal Water Right as October 24, 1832—the date of the Treaty of Castor Hill, which makes this right by far the oldest recognized water right in the State, predating Kansas statehood by nearly thirty years. The Tribe may divert up to 4,705 acre-feet of water annually, for any direct

³ Senate Report 105-13, April 22, 1997.

⁴ *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas vs. Bruce I. Knight et al.*, No. 06-CV-2248-CMTJJ (D. Kan., 2006-2017).

use by the Tribe. The Tribe is also authorized to store up to a combined volume of 18,520 acre-feet in any year, in one or more reservoirs, to support this direct use. This combined volume may be increased if the seepage losses from reservoir storage exceed current estimates memorialized in the Agreement. These authorized quantities of the Tribal Water Right were determined based on a municipal build-out concept, treating the Tribe's water needs as essentially similar to that of a growing municipality in eastern Kansas. Water resources engineers for both the State and the Tribe agreed that, given the Tribe's planned water uses, this method is superior to the default method of quantifying reserved water rights for tribes according to the "practically irrigable acreage" method that predominates in other reserved water rights proceedings.⁵ Because Kansas is a prior appropriation state and the Tribe holds a federal reserved right that is also the senior water right in the Basin, the Agreement presents no takings issues under the United States or Kansas Constitutions.

Second, Article 5 sets forth other rights and duties of the Tribe. Importantly, the Agreement recognizes the Tribe's right to market its water to non-Indians for irrigation and any other beneficial uses recognized under the KWAA, including off-reservation uses, provided that the Tribe provides notice and an opportunity for hearing to the Chief Engineer. The Tribe has full responsibility to construct and maintain its water-supply infrastructure to federal standards; it must provide the Chief Engineer with copies of inspection reports for and significant changes to that infrastructure. In the event of any structural problems or failures, the Tribe must provide prompt or immediate notice to DWR, as the situation requires. The Tribe must account to the State for all use of the Tribal Water Right; it must also meter all of its diversions and report its annual water usage to DWR, and provide any additional data necessary to administer Kansas non-domestic water rights in times of shortage. The Agreement contains standard forms to enable consistent and prompt communication of this information.

Third, Article 6 of the Agreement requires the Tribe to enact a Tribal Water Code within three years after the date of enactment of federal legislation approving the Agreement—ideally, S. 2154, in this session of Congress. The Tribal Water Code must provide the following: a governance and permitting system for all uses of the Tribal Water Right, including storage; that allocations of water to allottees and members of the Tribe shall be satisfied with water from the Tribal Water Right; due process protections for allottees and members of the Tribe regarding individual allocations for irrigation rights; and full administrative procedures for subsequent changes to such allocations. Notably, the Agreement does not limit the ability of allottees and members to obtain additional state-law water rights under the KWAA, provided, of course, that water is available and that they comply with the statutory and administrative requirements of the KWAA. Such state-law, individually-granted water rights are not to be counted against the Tribal Water Right.

Fourth, Article 7 of the Agreement sets forth the procedures by which the State, through the Chief Engineer, shall protect the Tribal Water Right. The Chief Engineer shall review all subsequent applications for any new Kansas water rights and for changes to existing Kansas water rights to ensure that they do not impair the Tribal Water Right. As part of that review, the Chief Engineer shall provide notice to the Tribe and to the United States, and grant a hearing if either the Tribe or the United States shows that the approval of such an application could impair the Tribal Water Right. Article 7 fully incorporates a subsidiary agreement, a Memorandum of Agreement (MOA), to protect the Tribal Water Right by administering non-domestic Kansas water rights during times of water shortage. The MOA is a necessary part of the Agreement, because the Tribe's present use of water under the Tribal Water Right is relatively small; but as the Tribe builds out water-supply infrastructure to the full capacity of that right, DWR's administration of Kansas water rights will evolve accordingly. Thus, the MOA contains detailed procedures for monitoring stream conditions and protecting the water supplies stored at the Tribe's existing low-head dam, as well as for future storage at the proposed Plum Creek Reservoir. Because of these evolving water-supply dynamics, the State and the Tribe are required to review the MOA on an annual basis, to ensure that it remains appropriate as the Tribe develops new water demands and constructs additional storage. Notably, the Agreement expressly forbids the administration of Kansas domestic water rights, and it also recognizes the "no injury rule," which states that the Chief Engineer will not administer non-domestic Kansas water rights when such administration would not reduce the impairment of the Tribal Water Right.

Article 7 of the Agreement and the MOA fully integrate the senior Tribal Water Right into a set of procedures for protecting all water rights in Kansas in harmony

⁵See, e.g., *Arizona v. California*, 373 U.S. 546, 600–01 (1963).

with KWAA, while respecting the jurisdictional boundaries between the State and Tribal sovereigns. Both the Tribe and the State recognize that communication and cooperation are essential to the protection of the Tribal Water Right.

Finally, Articles 10 through 12 set forth the terms by which the Agreement will realign the parties to the 2006–2017 lawsuit. Article 10 requires the original complaint in the 2006–2017 lawsuit to be amended, to add as new defendants all Kansas water rights holders in the Basin. This provision will enable these holders to review, participate in, and be bound by the terms of the Agreement. At the same time, Article 10 also requires the dismissal of Chief Engineer Barfield from the 2006–2017 lawsuit (a dismissal that has since occurred). Article 11 realigns the United States from defendant to plaintiff, so that it can claim legal title for the Tribal Water Right and equitable title in the same on behalf of the Tribe; it also requires the dismissal of the Director of the Bureau of Indian Affairs from the lawsuit (a dismissal that has also since occurred). Under Article 12, the Tribe, in return for the State's recognition of the Tribal Water Right, waives any future claims to federal reserved water rights other than the Tribal Water Right; waives any claims for past damages for water shortages caused by a lack of recognition of the Tribe's pre-Agreement, unquantified *Winters* right; and waives all claims against the State relating to the 2006–2017 lawsuit. None of these provisions are effective until the bill (or a subsequent equivalent) is enacted into law. Once enacted, the Federal District Court for the State of Kansas retains jurisdiction to enforce the Agreement and its enabling legislation.

B. Kansas Water Rights affected by the Agreement

During times of shortage, when the Tribe is unable to meet its direct demands or when storage is below target levels, the Tribe may request the administration of non-domestic Kansas upstream water rights. At this time, these non-domestic rights are few and relatively small: they include 2 irrigation rights, 4 industrial rights, 2 recreational rights, and storage rights for 23 sediment-control small watershed dams. These watershed dams will be required to bypass inflows, but will not be required to release water that has already been stored. And in any case, the no-injury rule applies: the Chief Engineer will not administer these Kansas water rights if he determines that administration would be futile—that is, if he determines that curtailing them will not result in additional water being made available for the Tribal Water Right.

As the Tribe builds out its own water infrastructure to fully develop the Tribal Water Right, the Tribe will use and store water that formerly flowed downstream. However, few water rights are immediately downstream of the Reservation. Moreover, the maximum drainage area anticipated to be controlled by the Tribe's reservoir storage is anticipated to be less than 5 percent of the drainage area above Valley Falls, Kansas.

Maps of the relevant upstream and downstream portions of the Basin are attached to my testimony as Exhibits 1 and 2 respectively.

III. S. 2154 Effects the Tribe-State Consensus of the Agreement

S. 2154 gives the approval of the United States to the Agreement, thus enabling it to become effective. The bill has five principal components, which I will summarize briefly.

First, the bill authorizes, ratifies, and confirms the Agreement, its recognition of the Tribal Water Right, and its procedures for protecting that right. (These details are summarized above in Section II of this testimony).

Second, Section 7 of the bill directs the NRCS and the Secretary of Interior's Indian Water Rights Office to cooperate in a study of the Upper Delaware and Tributaries Project, which commenced under the P.L. 83–566 program and was authorized by the Senate in 1997. (See Section I.B of this testimony). The study, to be completed within two years of the bill's enactment, will make recommendations for updating the Watershed Plan as necessary to effectuate the Tribal Water Right. This is a crucial part of the bill, for it directs the United States to employ pre-existing legal and regulatory approvals in effectuating the Tribal Water Right.

Third, the bill confirms and authorizes the realignment of the parties to the 2006–2017 lawsuit (as set forth in Sections 10 and 11 of the Agreement), and affirms the Agreement's waivers (as set forth in Section 12 of the Agreement). These details are summarized above in Section II.A. of this testimony.

Fourth, the bill expressly forbids the use of eminent domain in acquiring land necessary for the development of the Tribal Water Right and its infrastructure. This provision makes clear that the Tribe has the responsibility for making all such acquisitions through voluntary transactions with willing sellers.

Finally, the bill neither appropriates funds nor authorizes the appropriation of funds for a water storage project at the Plum Creek Project site or elsewhere. Once the NRCS reviews the project as required in Section 4 of the bill, the Tribe will bear the burden of obtaining the necessary appropriations.

IV. The Agreement and S. 2154 Comply With Congressional Requirements

Like all tribal reserved rights, the Tribal Water Right is subject to the Federal Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (“Criteria and Procedures”).⁶ These are not regulations, but are rather a set of sixteen guidelines that federal agencies are to follow in determining whether and how to support a particular tribal water rights settlement. Since their publication in 1990, successive administrations have applied the Criteria and Procedures with various interpretations. Based on the State’s review, both the Agreement and S. 2154 fully comply with the Criteria and Procedures. The testimony of Chairman Randall summarizes that compliance in greater detail, but the State would like to emphasize three aspects of that compliance.

First, S. 2154 authorizes, ratifies, and confirms the Agreement, thus resolving with finality all water-related and other legal claims by the Tribe against the State. Second, the United States—represented ably by counsel from the Departments of Justice and the Interior—has been fully involved in the negotiation of the Agreement. Passage of S. 2154 will enable the Department of the Interior to become a party to the Agreement.

Finally—and perhaps most importantly—the bill neither appropriates nor authorizes the appropriation of funds. As a consequence, the fiscal requirements of the Criteria and Procedures are not relevant to S. 2154. If the bill is enacted, those requirements will engage after the NRCS and Interior issue their recommendations pursuant to Section 7 of the bill; at that point, the burden will fall upon the Tribe to obtain congressional authorization of the appropriations necessary to effectuate those recommendations. Because of the unique features of the P.L. 83-566 program, it is possible that the appropriations process may proceed through the agriculture committees of the Senate and the House.

Conclusion

By way of conclusion, the State would like to emphasize two points about S. 2154. First, it ratifies the Agreement, which is the culmination of years of trusting and effective cooperation among the Tribe, the State, and the United States. Second, the bill does not request money; it is the initial step in an incremental legislative process—a process that the State hopes can obtain assistance through the P.L. 83-566 program. Because of these two points, the State fully supports S. 2154 and requests the Committee to vote to advance the bill. On behalf of the State, I thank the Committee for the opportunity to provide this testimony.

⁶55 Fed. Reg. 9223–9225 (March 12, 1990).

EXHIBIT 1

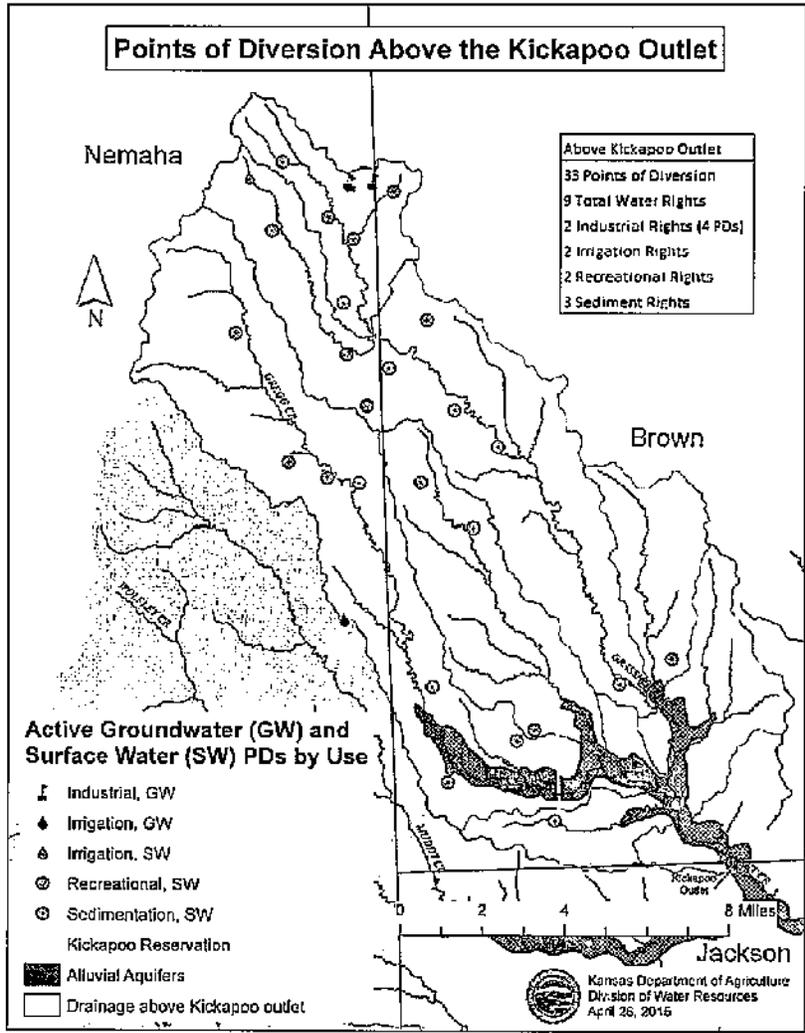
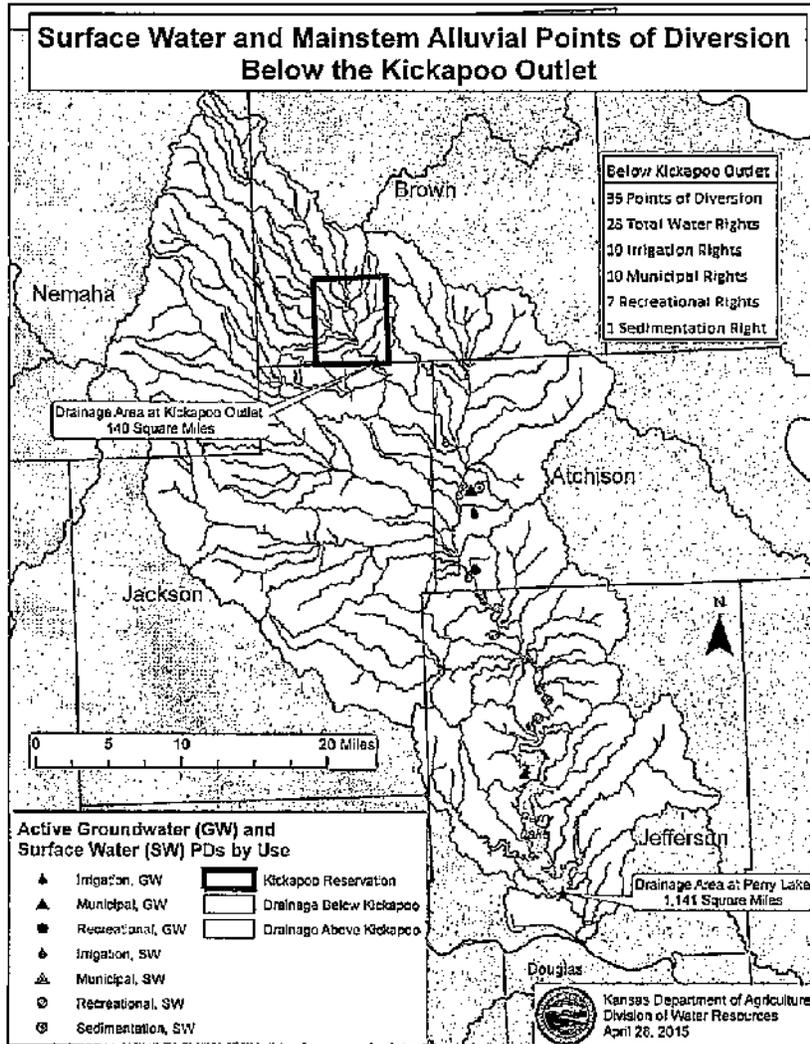


EXHIBIT 2



PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI)

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization advocating on behalf of American Indians, Alaska Natives and Indian tribal governments, we thank the members of the Senate Committee on Indian Affairs for the opportunity to provide this testimony for the record. The following testimony will focus on NCAI's support for S. 3168, a bill to amend the Omnibus Public Land Management Act of 2009 to make the Reclamation Water Settlements Fund permanent.

Indian Water Settlements

Tribes retain pivotal legal rights to available water resources based upon aboriginal rights claims and federal reserved water rights claims, yet Indian wet water re-

sources are scarce. For this reason, tribes consistently work together with the federal government to resolve existing legal claims to water through coordinated Indian water rights settlements. Such settlements can provide water to tribal nations sufficient for homeland purposes, and also provide certainty for local communities and states with respect to finite water resources. Indian water rights settlements are critically important to tribal nations and the American nation as a whole. While the Department of the Interior's Bureau of Indian Affairs, Office of the Solicitor, and Secretary's Indian Water Rights Office play major roles in settling Indian water rights claims, the Bureau of Reclamation (Reclamation) plays a critical role in all facets of such settlements, particularly with respect to implementing water projects associated with Indian water settlements. A vital component for Reclamation's work is water settlement funding.

S. 3168—Permanent Extension of Reclamation Water Settlements Fund

S. 3168 would extend the Reclamation Water Settlements Fund (Reclamation Fund) permanently, ensuring that the time-tested Indian water rights settlement process can continue into the future without the threat of losing settlement funding by a date certain. The Reclamation Fund, codified at 43 U.S.C. § 407, is only authorized to receive deposits beginning in FY 2020 and ending FY 2029, yet the Fund is already deemed critical and will be heavily relied upon by currently enacted and future Indian water rights settlements.

The Reclamation Fund is vital to funding infrastructure projects, such as irrigation canals, dams and storage reservoirs, treatment facilities, and distribution facilities, tied to Indian water rights settlements. These infrastructure projects ensure that wet water reaches Indian lands and peoples for domestic, commercial, municipal, agricultural, industrial, and ceremonial uses. Importantly, future Indian water rights settlements are currently authorized to tap into the Reclamation Fund for infrastructure needs only until FY 2034, when the Fund terminates and would revert back to the U.S. Treasury under current law.

The process of preparing for water settlements, actually negotiating settlement language, and implementing settlements takes years and in many instances decades. Each water settlement is unique, and takes into account a host of minute hydrological details; specific population considerations; historical considerations; political, legal, as well as scientific realities; consideration of the federal trust responsibility; and present and future uses. Having a sunset date of 2034 for the Reclamation Fund unduly burdens the settlement process, placing a timeclock on the water settlement process that only in some instances may be finalized. In other instances, the sunset of the Reclamation Fund could leave parties at the table during negotiations, only to have critical funding resources removed from the process, potentially unraveling any progress made and resulting in overall water uncertainty.

This is important to note since, as the Department of the Interior recently testified, Congress has only enacted 32 Indian water settlements. The Department also indicated that there are over 280 federally recognized tribes in the West (excluding the 229 tribes in Alaska), and it has seen an increase in requests from both tribes and states to enter into water settlement negotiations. These requests will only increase as regions develop climate adaptation plans, in addition to dealing with real world challenges such as drought and water shortage due to other factors like industrial agricultural uses or natural resource development.

For these reasons, NCAI fully supports S. 3168 to ensure funding resources are available for all current and future enacted Indian water rights settlements. This approach ensures a future of water security, which is a paramount concern for regions combatting severe drought and water shortages. As this Committee is aware, even though Indian water settlements often take years to finalize and ratify through Congressional action, they are by far the preferred vehicle for determining water rights and achieving water certainty.

Conclusion

In conclusion, NCAI appreciates the opportunity to provide testimony to the Senate Committee on Indian Affairs. Water resources are vital to ensuring a healthy future for tribal nations and providing certainty to local communities and states regarding available finite water resources. For the aforementioned reasons, NCAI reiterates its support for S. 3168.