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2d Session }

SENATE

{ REPORT
{ 115-401

TO APPROVE THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE
NAVAJO NATION IN UTAH, TO AUTHORIZE CONSTRUCTION OF
PROJECTS IN CONNECTION THEREWITH, AND FOR OTHER PURPOSES

NOVEMBER 29, 2018.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 664]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 664) to approve the settlement of the water rights claims of the Navajo Nation in Utah, to authorize construction of projects in connection therewith, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill, as amended, do pass.

PURPOSE

The *Navajo Utah Water Rights Settlement Act of 2018*, as amended, would settle the Navajo Nation (Nation) water claims in the State of Utah (State) and authorize and implement the Nation & State Settlement Agreement to quantify 81,500 acre-feet per year of surface and groundwater from the Upper Colorado River Basin in Utah.

BACKGROUND

The Navajo Nation is a tribe whose reservation extends over 27,000 square miles across the states of Arizona, New Mexico, and Utah. In August 2003, the Nation and the Governor of the State of Utah executed a Memorandum of Agreement to commence settlement discussions.

The Nation and the State reached a general agreement concerning a proposed water rights settlement in 2010. In 2013, the Secretary of the Interior appointed a federal negotiations team to negotiate terms of a settlement. The terms of the Settlement

Agreement were finalized by the federal negotiations team in 2015. The Navajo Nation Council approved the Settlement Agreement on January 16, 2016. The State reiterated its support for the Settlement Agreement by a Senate resolution on July 15, 2015.

NEED FOR LEGISLATION

In 1908, the U.S. Supreme Court held in *Winters v. United States* that when Congress set aside lands for a reservation, it also gave Indian tribes the primary rights to streams on their reservations. However, *Winters* did not set forth how to quantify water rights beyond “sufficient water to fulfill the reservation’s purpose.”

The issue of quantifying water was resolved in *Arizona v. California*. The Court adopted the practicably irrigable acreage standard.¹ Collectively, these two cases established the Indian reserved water rights which may be asserted at any time and are not lost through nonuse. While many Indian reservations were established for the purpose of settling Indian people into agricultural communities, the Federal Government never invested sufficient resources into water-delivery systems to fulfill that purpose.

In order to fulfill the United States’ trust responsibility to Indian tribes, Congress plays an integral role in the Indian water rights settlements.

BILL SUMMARY

The bill, as amended, would authorize a negotiated settlement agreement of the Nation’s reserved water rights claim with the State. The bill authorizes \$198,300,000 from the federal government to fund the Navajo Water Development Trust Fund (Fund). This Fund would be used by the Nation to plan, design, and construct approved water development projects. The State would contribute \$8,000,000 into the Fund, in installments, at the discretion of the Secretary of the Interior, in each of the three years following the execution of the agreement by the Secretary.

The bill also authorizes \$11,100,000 from the federal government to be deposited into the Navajo Operations, Maintenance, and Repair (OM&R) trust account for the Nation’s approved water development projects. An additional \$1,000,000 will be authorized from the federal government to fund programmatic costs, including the preparation of a hydrographic survey of historic and existing water uses on the Nation to be filed with the adjudication court. Finally, the bill will allocate 81,500 acre-feet per year from the San Juan River in the State of Utah to the Nation.

The bill uses a fund-based approach to resolving Indian water rights settlements.² This simplified settlement replaces the Department of the Interior’s construction obligations with a water development fund for the Navajo Nation to use to build water projects on an as-needed basis with the goal of avoiding likely cost overruns related to planning, design, and construction of several water development projects. This approach also indemnifies the United

¹This standard is used to determine how much state water Indian reservations should receive by determining how many acres of the reservation could be reasonably or practically irrigated.

²Alan Mikkelsen, U.S. Dep’t of the Interior, Bureau of Reclamation, Stephen E. Boyd, U.S. Dep’t of Justice, *Letter to House Committee on Natural Resources* (Sept. 7, 2018).

States against any future financial liability or responsibility for these projects.

LEGISLATIVE HISTORY

On March 15, 2017, Senator Hatch introduced S. 664. The bill was referred to the Indian Affairs Committee. On December 6, 2017, the Committee held a legislative hearing on the bill.

In the Department of the Interior's written testimony, the Deputy Commissioner of the Bureau of Reclamation, Alan Mikkelsen stated:

The Department supports the goals of the settlement, which include quantifying the reserved water rights attached to the Utah portion of the Navajo reservation and facilitating the development of essential municipal water systems that will provide a reliable quantity and quality water supply for the communities within the Reservation, which currently lacks the sort of basic services that most Americans take for granted. The Department is working with the Nation and sponsor of S. 664 to ensure this bill meets these goals while adhering to the *Criteria and Procedures* that guide the Department's participation in Indian water rights settlements.

On October 3, 2018, by voice vote, the Committee ordered the bill, as amended, to be reported favorably to the Senate.

Amendments. One amendment, in the nature of a substitute, was offered by Senator Hoeven, on behalf of Senator Hatch. This substitute amendment did the following:

The substitute amendment addressed concerns raised by the Department of the Interior regarding cost overruns. Historically, cost overruns have caused delays into fully implementing Indian water rights settlements. The Department of Interior prefers establishing a trust fund so that interest earned in the account can be applied to future increased costs of implementing the Indian water rights settlement. Additionally, the substitute amendment—

- Establishes the Navajo Water Development Trust Fund and the Navajo OM&R Account. The Navajo Water Development Trust Fund is authorized to receive \$198.3 million from the federal government and the Navajo OM&R Account is authorized to receive \$11.1 million from the federal government;
- Stipulates that depletions that occur on allotted land are accounted for as a depletion by the Nation, including any water use existing on an allotment as of the date of the enactment of the bill, reasonable domestic and stock water uses, and any water rights that may be decreed in the general stream adjudication.
- Prohibits the Nation from infringing upon the reasonable domestic and stock water use of an allottee.
- Preserves the rights of public domain allottees to make claims in the general stream adjudication;
- Requires that off-reservation usage and leasing be in accordance with the agreement and approved by the Secretary of the Interior,
- Specifies that if a conflict exists between the bill and the settlement agreement that the text of the bill will control; and

- Makes other grammatical and technical changes to the bill.

Prior Congresses. In the 114th Congress, Senator Hatch introduced S. 3482, on November 17, 2016. The bill was referred to the Committee. No further action was taken.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

“Navajo Utah Water Rights Settlement Act of 2018.”

Section 2. Purposes

The primary purpose of the Act is to authorize and implement the Navajo Nation/State of Utah Settlement Agreement and to permanently settle the Navajo Nation’s water rights claims in Utah.

Section 3. Definitions

This section provides definitions to key terms in the Act.

Section 4. Ratification of Agreement

This section states that Congress ratifies the Settlement Agreement, which would quantify the water rights of the Navajo Nation in Utah and establish the conditions that must be met to make the Agreement effective, including funding for water development on the Navajo Reservation in Utah. In addition, Congress authorizes the Secretary of the Interior to execute the Settlement Agreement on behalf of the United States and to amend the Agreement as necessary to conform to the Act.

Section 5. Navajo water rights

This section states that Congress confirms that the Navajo Nation shall have the right to use and deplete up to 81,500 acre-feet per year from water sources in Utah, and that these rights are held in trust by the United States and are not subject to forfeiture or abandonment. Further, the water rights of allottees on or adjacent to the Reservation in Utah must be satisfied out of the Nation’s rights. The Nation may allocate, distribute, and lease its water rights for off-reservation use in accordance with the agreement, with the approval of the Secretary of the Interior. But the Nation is prohibited from objecting in the general stream adjudication or any other applicable forum to the quantification of reasonable domestic and stock uses of the water from this settlement on an allotment.

Section 6. Navajo trust accounts

This section sets forth that, using the appropriations authorized in Section 7, the Secretary of the Interior is authorized to establish the Navajo Utah Settlement Trust Fund (Fund) that includes two accounts, to plan, design, and construct the water diversion and delivery of the Navajo water development projects.

Section 7. Authorization of appropriations

This section authorizes appropriations of \$198,300,000 to the Fund for the planning, design and construction of approved water development projects, and within that Fund, authorizes appropria-

tions of \$11,100,000 for the Navajo OM&R Account of the Fund. Additionally, the bill authorizes \$1,000,000 to fund programmatic costs, including the preparation of a hydrographic survey of historic and existing water uses on the Reservation to be filed with the adjudication court. The State shall contribute \$8,000,000 to the Secretary of the Interior for deposit into the Fund.

Section 8. Conditions precedent

This section establishes conditions that must be met for the settlement and the waivers to become effective, including the appropriation of funds authorized in Section 7, the execution of the waivers, and the entry of a final judgment and decree by the adjudication court. These conditions must occur by October 31, 2030 unless the parties to the Agreement extend the deadline.

Section 9. Waivers and releases

This section dictates the waivers and releases that must be executed in order for the settlement to be binding and effective. Because tribal water rights are held in trust by the United States, Congress must affirmatively state what claims are settled and disposed of by the Act.

Section 10. Miscellaneous provisions

This section sets forth the expression of Congress' intent that nothing in this Act shall establish a standard for the qualifications of the water rights of any other tribe or to quantify or adversely affect the water rights of any tribe other than the Navajo Nation.

Section 11. Relation to allottees

This section clarifies that nothing in this Act or the agreement shall affect the rights or claims of allottees, or the United States, acting in capacity as trustee for or on behalf of allottees, for water rights or damages related to lands allotted by the United States to allottees.

Section 12. Antideficiency

This section states that the United States shall not be liable for any failure to carry out any obligation or activity authorized by this Act if adequate appropriations are not provided expressly by Congress to carry out the purposes of this Act.

NOVEMBER 28, 2018.

Hon. JOHN HOEVEN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 664, the Navajo Utah Water Rights Settlement Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Aurora Swanson.

Sincerely,

KEITH HALL,
Director.

Enclosure.

COST AND BUDGETARY CONSIDERATIONS

S. 664—Navajo Utah Water Rights Settlement Act of 2018

Summary: S. 664 would secure up to 81,500 acre-feet of water annually for the Navajo Nation by ratifying a settlement being negotiated between the United States, the state of Utah, and the Navajo Nation. The bill would authorize the appropriation of \$209 million to capitalize the Navajo Utah Settlement Trust Fund, an interest-bearing fund established under the bill. After the parties meet certain conditions, the federal government would transfer ownership of the fund (including any earned interest that is appropriated to the fund) to the nation for constructing projects to deliver water to the reservation of the Navajo Nation in Utah. The bill also would direct the Bureau of Reclamation (BOR) to survey water use on the reservation. Using information from BOR, CBO estimates that enacting those provisions would cost \$242 million over the 2019–2023 period, assuming appropriation of the authorized and necessary amounts.

Enacting S. 664 would affect direct spending by increasing offsetting receipts because the state of Utah would be required to contribute \$8 million to the trust fund; therefore pay-as-you-go procedures apply. However, because the federal government would record a federal expenditure of the fund's balance when ownership of the fund is transferred to the Navajo Nation, there would be no net effect on direct spending over the 2019–2023 period. Enacting the bill would not affect revenues.

CBO estimates that enacting S. 664 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 664 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). CBO cannot determine whether the cost of those mandates would exceed the annual threshold established in UMRA (\$80 million in 2018, adjusted annually for inflation). S. 664 contains no private-sector mandate as defined in UMRA.

Basis of estimate: For this estimate, CBO assumes that S. 664 will be enacted by the end of 2018. The bill would authorize the appropriation of specific amounts but does not specify in which year any appropriation should be provided. CBO has estimated how much would need to be provided each year based on information from BOR. CBO expects all of the following conditions to be met by 2023:

- The parties have finalized and executed the settlement including amendments required to conform with the bill,
- Utah has contributed \$8 million to the trust fund and enacted the necessary legislation,
- All parties have executed waivers and releases of claims as required under the bill, and
- The court has confirmed the water rights of the Navajo Nation in accordance with the bill.

In addition, CBO assumes that the amounts authorized to be appropriated to capitalize the fund (with adjustments to account for anticipated inflation as required by the bill) would be appropriated over the 2019–2023 period. In 2023, BOR would publish a statement of findings in the *Federal Register* that the conditions have

been met and the ownership of the trust fund would be transferred to the Navajo Nation.

Spending subject to appropriation

CBO estimates that implementing the bill would cost \$242 million over the 2019–2023 period, assuming appropriation of the authorized and necessary amounts.

Survey of Water Use. S. 664 would authorize the appropriation of \$1 million for costs to implement the bill and for conducting a survey of historic and existing water use on the portion of the reservation located within Utah. CBO estimates that the survey would take about three years to complete and would cost \$1 million over the 2019–2023 period.

Navajo Utah Settlement Trust Fund. S. 664 would establish the Navajo Utah Settlement Trust Fund, which would consist of two interest-bearing accounts—the Navajo Water Development Projects Account and the Navajo Operation, Maintenance and Replacement (OM&R) Account. To capitalize those accounts, the bill would authorize the appropriation of \$198 million for constructing water projects and \$11 million for OM&R for a total of \$209 million. CBO estimates that the authorized appropriations would increase by \$15 million because of the authorized adjustments for anticipated inflation. Amounts deposited into the fund would be credited with interest earnings if those earnings are appropriated to the trust fund.

Under the bill, the federal government would retain ownership of amounts deposited into the trust fund until 2023, when all the settlement conditions are expected to be satisfied. At that time, the federal government would transfer the ownership of the trust fund to the Navajo Nation, and the amount in the fund (including any appropriated interest earnings) would be considered a federal expenditure. Based on CBO’s projections of interest rates and the assumed timing of appropriations, CBO estimates those interest earnings would total \$17 million. Accordingly, CBO estimates the total amount transferred would be \$241 million.

The federal government would retain fiduciary responsibility over the amounts until they are needed by the Navajo Nation to plan, design, construct, and maintain water projects, but those expenditures would not affect the federal budget.

Changes in direct spending

S. 664 would require the state of Utah to contribute \$8 million to the trust fund in three installments once the settlement is finalized and executed by the parties. CBO estimates that the state would pay those installments of \$2.67 million in 2020, 2021, and 2022 and that those amounts would be recorded in the federal budget as offsetting receipts. CBO estimates that enacting that provision would have no net effect on direct spending over the 2019–2023 period because the total amount contributed by the state to the trust fund would be transferred to the Navajo Nation in 2023.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays that are subject to those pay-as-you-go procedures are shown in the following table.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 664 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

Mandates: S. 664 contains intergovernmental mandates as defined in UMRA. Specifically, the bill would:

- Ratify the Navajo Water Rights Settlement Agreement to the extent that the agreement does not conflict with provisions in the bill. Because the agreement has not been finalized by the tribe and the state of Utah, actions the parties could take to complete the agreement would be limited to those allowed under the bill. Such a restriction is a mandate under UMRA.
- Require the state of Utah to contribute \$8 million to a trust fund to be administered by the U.S. Department of the Interior.
- Prevent the Navajo Nation from raising claims to some water rights and claims for certain damage to water, land, and other resources resulting from the loss of water or water rights.

The cost of the mandates would include the state's payment to the trust fund as well as the forgone value of awards and settlements of claims that the Navajo Nation would be prevented from raising under the bill. Because both the number of claims that could be barred or terminated and the value of forgone compensation stemming from those claims are uncertain, CBO has no basis for estimating the cost of the mandate. Therefore, CBO cannot determine whether the cost of the intergovernmental mandate would exceed the annual threshold established in UMRA for such mandates (\$80 million in 2018, adjusted annually for inflation).

S. 664 contains no private-sector mandates as defined in UMRA.

EXECUTIVE COMMUNICATIONS

The Committee has received no communication from the Executive Branch regarding S. 664.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 664 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

In accordance with Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived.