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TO AMEND THE OMNIBUS PUBLIC LAND MANAGEMENT ACT OF 2009 TO MAKE THE RECLAMATION WATER SET- TLEMENTS FUND PERMANENT

DECEMBER 19, 2019.—Ordered to be printed

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

R E P O R T

[To accompany S. 886]

[Including cost estimate of the Congressional Budget]

The Committee on Indian Affairs, to which was referred the bill (S. 886) to amend the Omnibus Public Land Management Act of 2009 to make the Reclamation Water Settlements Fund permanent, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 886 is to extend the termination date of the Reclamation Water Settlements Fund for an additional ten years; clarify Reclamation Water Settlements Fund eligibility for claims concerning Indian water resources; preserve existing priorities for Reclamation Water Settlements Fund expenditures for the initial Reclamation Water Settlements Fund authorization period; provide sufficient funding and time to implement the Aamodt Litigation Settlement Act; and authorize a project study to advance the Tribal water rights settlement agreed to by the Kickapoo Tribe and the State of Kansas.

BACKGROUND

The Omnibus Public Land Management Act of 2009 established the Reclamation Water Settlements Fund in the Treasury of the United States to provide financial assistance to plan, design, and

construct, or rehabilitate water infrastructure to implement the settlement of claims concerning Indian water rights resources approved by Congress. Starting in 2020, the Omnibus Public Land Management Act of 2009 will direct \$120,000,000 in revenue that would otherwise be deposited in the Reclamation Fund into the Reclamation Water Settlements Fund. The Reclamation Fund is supported by proceeds from the sale of public lands; onshore royalties from oil, gas, and other mineral leases on Federal lands; and repayments from Bureau of Reclamation projects. Balances in the Reclamation Fund are not available for Bureau of Reclamation program expenditures unless Congress appropriates funds in appropriation bills. Over time, congressional appropriations from the Reclamation Fund have exceeded receipts into the Reclamation Fund, which has created a balance of \$16.6 billion as of the end of fiscal year 2018.

At the time of enactment of the Omnibus Public Land Management Act of 2009, Congress recognized the growing risk unresolved Indian water rights claims posed to both Indian and non-Indian water users. Since the Supreme Court holding in *Winters v. United States*,¹ Indian Tribes may pursue claims to federally reserved water rights. Indian Tribes and non-Tribal communities often choose to settle these Tribal claims in order to avoid the time, expense, hostility, and uncertainty of litigation. Since 1990, it has been the policy of the Department of the Interior that Indian water rights should be resolved through negotiated settlements rather than litigation.

NEED FOR LEGISLATION

Since 1978, 35 Indian water rights settlements have been finalized with an estimated federal cost of \$5.8 billion. In the last 10 years alone, Congress has authorized seven new settlements that call for federal expenditures totaling approximately \$2.5 billion. The Bureau of Reclamation's principal operating account—the Water and Related Resources Account—currently dedicates 14% of its budget to Indian water rights settlements. This spending percentage has doubled in the past 15 years.

Currently, the Department of the Interior has 20 negotiating teams working on new settlements projected to cost between \$2 and \$3 billion in the following states: New Mexico, Idaho, Montana, California, Arizona, Washington, Utah, Oregon, and Nevada. In addition to current settlement negotiations, other settlements will require negotiation in future years. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and a reliable funding stream will be needed to support enacted and future water settlements.

The Reclamation Water Settlements Fund will begin expending funds in 2020 based on the statutorily mandated priority list. The remaining balance to complete priority settlements, the additional settlements pending before Congress, along with the settlements involving current negotiation teams, will exceed available expenditures from the Reclamation Water Settlements Fund. With the growing demand, the Committee recognizes the need to extend the Reclamation Water Settlements Fund by an additional 10 years. In

¹ 207 U.S. 54 (1908).

doing so, the Reclamation Water Settlements Fund will provide a reliable funding source for current and future Indian water rights settlements and ensure the viability of the United States' preference for settling claims for Indian water rights instead of litigation. The extension of the Reclamation Water Settlements Fund will also alleviate mounting pressure on the Bureau of Reclamation's operating budget.

The Aamodt Litigation Settlement Act (Title VI of the Claims Resolution Act) authorized the planning, design, and construction of the Pojoaque Basin Regional Water System in order to deliver sufficient water to the settlement parties to implement the May 3, 2006, settlement agreement among the State of New Mexico; the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque; the United States; the County of Santa Fe; and the City of Santa Fe. The settlement agreement, as authorized by Congress through the Aamodt Litigation Settlement Act, resolved litigation that began in 1966 regarding claims in the Pojoaque Basin of New Mexico. The core of the settlement agreement incorporates the Pueblos' commitment to abstain from making water priority calls against non-Pueblo users, provided that the non-Pueblo users agree to specific options outlined in the settlement agreement.

At the time of enactment, Congress anticipated that the cost of the Pojoaque Basin Regional Water System would exceed the amounts authorized by Congress. The Aamodt Litigation Settlement Act therefore included a provision requiring the Secretary of the Interior to initiate negotiations with the settlement parties to determine an appropriate cost share for the additional contributions in order to ensure that the Pojoaque Basin Regional Water System would be completed by the substantial completion deadline. The bill would authorize the agreement, increase the federal cost share ceiling by an additional \$137,000,000, and extend the substantial completion deadline by an additional four years.

The Kickapoo Tribe of Kansas and the State of Kansas executed an agreement on September 9, 2016, in order to achieve a fair, equitable, and final settlement of claims to water rights in the Delaware River Basin in Kansas. It is the view of the Committee that Congress would benefit from a study conducted by the Secretary of Agriculture, in consultation with the Secretary of the Interior, of the multipurpose dam described in the Upper Delaware and Tributaries Watershed Plan, along with recommendations with respect to any material alternations or changes to the Upper Delaware and Tributaries Watershed Plan. The Committee intends to use the results of the study to consider authorizing the water rights agreed to by the Kickapoo Tribe and State of Kansas on September 9, 2016.

LEGISLATIVE HISTORY

S. 886 was introduced on March 27, 2019, by Senator Udall, along with Senators Cortez Masto and Heinrich. The bill was referred to the Committee on Energy and Natural Resources. On May 23, 2019, the Committee on Energy and Natural Resources discharged the bill by unanimous consent. The bill was then referred to the Committee on Indian Affairs that same day.

On July 17, 2019, the Committee on Indian Affairs met to consider the bill. The Committee did not hold a legislative hearing on the bill.

Amendment. One amendment, in the nature of a substitute, was offered by Senator Udall. The substitute amendment—

- Limits the duration of the Reclamation Water Settlements Fund to an additional 10 years;
- Clarifies that the Reclamation Water Settlements Fund is available only for Indian water rights settlements;
- Ensures settlements that receive congressional authorization prior to litigation are eligible for the Reclamation Water Settlements Fund;
- Ensures the authorized priority list for Reclamation Water Settlements Fund distribution ends after the first 10 years of the Reclamation Water Settlements Fund, and that all Indian water rights settlements would be eligible for Reclamation Water Settlements Fund disbursement during the 10-year extension;
- Extends the termination date for Reclamation Water Settlements Fund disbursements to 2044;
- Establishes a \$90 million cap on the amount of annual allocations any individual settlement can receive during the additional 10 years;
- Allows unused Reclamation Water Settlements Funds reserved for water rights claims of the Navajo Nation in the Lower Colorado River basin to be repurposed toward the Lower Colorado River Basin Development Fund, with 65% percent allocated to the Future Water Settlement Subaccount of the Lower Colorado River Basin Development Fund;
- Extends the eligibility date for priority settlements by two years, which will allow the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation in Montana and the Navajo Nation in the Lower Colorado River basin in Arizona maintain their respective priorities for the first ten years of the Reclamation Water Settlements Fund, if Congress enacts their settlements within the extended deadline;
- Includes the Aamodt Litigation Settlement Completion Act of 2019 (S. 1875), as revised to address concerns raised by the Department of the Interior during a House hearing on its companion measure (H.R. 3292);
- Increases the federal cost ceiling of the Pojoaque Basin Regional Water System by \$137 million, extends the substantial completion date by four years (2028), consistent with the “611(g) Agreement” reached between the United States and the Aamodt settlement parties, and makes additional conforming amendments; and
- Includes a provision directing U.S. Department of Agriculture, in consultation with the Department of the Interior, to conduct a study of the Upper Delaware and Tributaries Watershed Plan no later than two years after the date of enactment, and make recommendations with respect to any material alterations or changes to the Upper Delaware and Tributaries Watershed Plan in order to facilitate future congressional consideration of the Kickapoo Tribe Water Rights Settlement Agreement.

The amendment was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the Senate by voice vote.

On March 27, 2019, a companion bill was introduced, H.R. 1904, by Representative Grijalva, in the House of Representatives. The bill was referred to the Committee on Natural Resources of the House of Representatives. On April 4, 2019, the House Committee on Natural Resources held a legislative hearing on the bill. No further action was taken.

In the 115th Congress, Senator Udall introduced S. 3168 on June 28, 2018. The bill was referred to the Committee on Indian Affairs. On July 18, 2018, the Committee held a legislative hearing on the bill.

In the Department of the Interior’s written testimony, the July 18, 2018, Alan Mikkelsen stated:

[T]he 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.

SECTION-BY-SECTION ANALYSIS (AS AMENDED)

Section 1—Short title

This section states that the bill may be cited as the “Indian Water Rights Settlement Extension Act”.

Section 2—Reclamation Water Settlements Fund

This section extends the period in which the Secretary of the Treasury is required to deposit \$120,000,000 in revenues that would otherwise be deposited in the Reclamation Fund, into the Reclamation Water Settlements Fund. Under the existing authority, this period runs from fiscal years 2020 through 2029. This section extends the period in which deposits are directed to the Fund by an additional ten years.

This section would also extend the period in which the Secretary of the Interior is authorized to expend amounts from the Fund by 10 years, extending the period through 2034. The extension period would not be subject to the existing priority list. No more than \$90 million could be expended for a single settlement, unless the Secretary of the Interior determines that allocating greater than \$90 million to a settlement would not adversely affect the funding of other congressionally approved settlements.

This section would clarify that the Reclamation Water Settlements Fund is available for claims involving Indian water resources and remove the requirement that settlement parties must be in litigation in order to be eligible for the Reclamation Water Settlements Fund. Section 2(2)(B) also ensures that trust fund settlements are eligible for the Reclamation Water Settlements Fund by removing the requirement that the Bureau of Reclamation must be the agency providing financial assistance for the planning, design, and construction of water infrastructure, instead substituting the Secretary of the Interior.

This section clarifies that the priorities for the use of the Reclamation Water Settlements Fund are limited to the first 10 years of the Reclamation Water Settlements Fund. Section 2(C)(i)(I)(cc) amends the Arizona settlement priority to require the Secretary of the Interior to repurpose amounts otherwise reserved for the Indian water rights settlement agreement entered into by the State of Arizona with the Navajo Nation to resolve the water rights claims of the Nation in the Lower Colorado River basin in Arizona, to the Lower Colorado River Basin Development Fund, with 65 percent of that amount deposited into the Future Indian Water Settlement Subaccount. The repurposing would be available if the Indian water rights settlement agreement entered into by the State of Arizona with the Navajo Nation to resolve the water rights claims of the Nation in the Lower Colorado River basin in Arizona was not authorized by Congress by December 31, 2021.

Section 2(C)(iii) would extend the priority eligibility deadline by an additional two years, to December 31, 2021. This section provides the Secretary of the Interior with the flexibility to fund settlements with pending enforceability or substantial completion deadlines, irrespective of the priorities.

Section 3—Amendments to Aamodt Litigation Settlement Act

This section increases the federal cost ceiling of the Aamodt Litigation Settlement Act by an additional \$137,000,000 and extends the substantial completion date by an additional four years to June 30, 2028. This section authorizes, ratifies, and confirms the 611(g) Agreement, an agreement reached between the United States, the State of New Mexico, the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque; and the City of Santa Fe in order to provide sufficient funding to implement the Aamodt Settlement Agreement and complete construction of the Pojoaque Basin Regional Water System. This section requires the Secretary of the Interior to execute the 611(g) Agreement.

Section 4—Kickapoo Tribe

This section requires U.S. Department of Agriculture's Natural Resource Conservation Service to, in consultation with the Secretary of the Interior, commence a study of the multipurpose dam described in the Upper Delaware and Tributaries Watershed Plan and make recommendations to Congress on necessary material alternations to the Plan in order to effectuate the water rights agreed to by the Kickapoo Tribe and State of Kansas on September 9, 2016.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated October 4, 2019, was prepared for S. 886:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 4, 2019.

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. 886, the Indian Water Rights Settlement Extension Act.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

At a Glance			
S. 886, Indian Water Rights Settlement Extension Act			
As ordered reported by the Senate Committee on Indian Affairs on July 17, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2024	2020-2029
Direct Spending (Outlays)	0	74	157
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	74	157
Spending Subject to Appropriation (Outlays)	0	*	*
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	< \$5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

The bill would:

- Increase the amounts authorized to be appropriated to implement the Aamodt Water Settlement by \$157 million (including adjustments to account for inflation)
- Appropriate \$120 million to the Reclamation Water Settlements fund each year from 2030 through 2039
- Require the Department of Agriculture to study the plan developed by Kickapoo Tribe to resolve their water rights claims and to recommend changes to that plan

Estimated budgetary effects would primarily stem from:

- Expenditures from the Reclamation Water Settlements fund to implement the Aamodt Water Settlement

Bill summary: S. 886 would increase the maximum authorized amount available to implement the Aamodt Water Settlement by \$137 million plus expected inflation. The bill also would appropriate \$1.2 billion after 2029 to the Reclamation Water Settlements

fund for future Indian water settlements.² Finally, the bill would direct the Department of Agriculture to study and recommend changes to the plan developed by the Kickapoo Tribe to resolve their water rights claims.

Estimated Federal cost: The estimated budgetary effect of S. 886 is shown in Table 1. The costs of the legislation fall within budget function 300 (natural resources and environment).

TABLE 1.—ESTIMATED DIRECT SPENDING UNDER S. 886

	By fiscal year, millions of dollars—												
	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2020– 2024	2020– 2029	
Estimated Budget Authority	0	0	0	0	0	0	0	0	0	0	0	0	0
Estimated Outlays	0	15	17	17	25	28	40	13	2	0	74	157	

The increase in direct spending shown in the table would result in an equivalent decrease after 2029 because the amounts that would be spent for the Aamodt Water Settlement under the bill would otherwise have been spent after 2029.

S. 886 would also appropriate \$120 million to the Reclamation Water Settlements fund each year from 2030 to 2039. The provision would increase direct spending after 2029 by \$1.2 billion plus any interest that would accrue on unspent balances in the fund that also would be available to spend.

Basis of estimate: For this estimate, CBO assumes that S. 886 will be enacted near the end of 2019. S. 886 would increase the maximum amount that could be spent for the Aamodt Water Settlement and would require the water distribution facilities for that settlement to be substantially complete by 2028. Because the bill does not specify how much would be needed in each year to meet that schedule, CBO has estimated the necessary amounts for each year using information from the Bureau of Reclamation (BOR).

Direct spending: Enacting the bill would increase direct spending by \$157 million over the 2019–2029 period and would decrease direct spending by an equivalent amount after 2029. CBO does not estimate any increased budget authority over the 2020–2029 period because the money that would be spent has already been provided.

In addition, the bill would appropriate \$1.2 billion for Indian water settlements over the 2030–2039 period.

Aamodt Water Settlement. S. 886 would increase the maximum amount authorized to be spent by BOR to construct water distribution facilities for the Aamodt Water Settlement by \$157 million—\$137 million specified in the bill plus an estimated \$20 million to account for inflation. By increasing the amounts authorized for that project, CBO expects that the \$157 million needed for constructing those facilities would be spent from the Reclamation Water Settlements Fund without further appropriation over the next 10 years. That fund was established to pay for authorized settlements. Under current law, the Aamodt Water Settlement was identified as a priority project that will receive amounts from the fund if annual appropriations are insufficient to meet the requirements of the settlement.

Under current law, CBO estimates that about \$900 million will be spent from the fund for settlements over the next 10 years and the remaining balance of about \$500 million will be spent after 2029. Under the bill, a portion of that \$500 million balance would be needed sooner and would be expended before 2029 to pay for the

² As of 2019, 36 Indian water settlements have been federally approved, with total estimated costs—mostly for construction of new distribution facilities—in excess of \$5.8 billion. See Charles V. Stern, *Indian Water Rights Settlements*, CRS Report R44148 (Congressional Research Service, April 16, 2019), <https://go.usa.gov/xVGUq>.

Aamodt Water Settlement. CBO estimates that implementing those provisions would increase direct spending by \$157 million over the 2020–2029 period. There would be an equivalent decrease in direct spending after 2029.

Reclamation water settlements fund. S. 886 would appropriate an additional \$120 million each year from 2030 to 2039 to fund future Indian water settlements. The bill also would extend the fund's termination date from 2034 to 2044. CBO estimates that enacting those provisions would increase direct spending by at least \$1.2 billion; that amount does not include the interest that would accrue on unspent balances in the fund that also would be available to spend after 2029 before the fund is terminated in 2044.

Spending subject to appropriation: S. 886 would direct the Department of Agriculture and other federal agencies to study the Upper Delaware and Tributaries Watershed Plan developed by the Kickapoo Tribe and other interested parties in the state of Kansas. The agencies would be directed to study the multipurpose dam described in that plan and recommend changes as necessary to achieve an equitable water settlement for the Kickapoo Tribe and other parties. CBO estimates that the cost of preparing the study would be insignificant.

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 Table 1.

Increase in long-term deficits: CBO estimates that enacting S. 886 would increase net direct spending by about \$1 billion over the 2030–2039 period. However, enacting the bill would not increase on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2030.

Mandates: None.

Estimate prepared by: Federal Costs: Aurora Swanson; Mandates: Rachel Austin.

Estimate reviewed by: Kim P. Cawley, Chief, Natural and Physical Resources; H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has received no communication from the Executive Branch regarding S. 886.

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. 886 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

On February 6, 2019, the Committee unanimously approved a motion to waive subsection 12 of rule XXVI of the Standing Rules of the Senate. In the opinion of the Committee, it is necessary to

dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.

