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TO APPROVE THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE NAVAJO NATION IN UTAH, AND FOR OTHER PURPOSES

SEPTEMBER 9, 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. 1207]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 1207) to approve the settlement of the water rights claims of the Navajo Nation in Utah, and for other purposes, having considered the same, reports favorably thereon without amendment, and recommends that the bill do pass.

PURPOSE

The *Navajo Utah Water Rights Settlement Act of 2019*, 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's reservation extends over 27,000 square miles across the states of Arizona, New Mexico, and Utah. Tribal citizens residing on the Utah portion of the reservation, approximately 1,927 square miles, rely upon the San Juan River and its tributaries and groundwater to meet present water use demands. For example, a significant percentage of residents in the Utah portion of the reservation must haul water to meet domestic needs, since groundwater wells on the eastern half of the reservation ex-

ceed safe drinking water limits for arsenic and water quality standards for Total Dissolved Solids and pH.

The reserved water rights of the Navajo Nation in Utah were subject to the general stream adjudication in the Seventh Judicial District in and for Grand County, Utah, commonly known as the Southeastern Colorado River General Adjudication. In lieu of asserting claims through the adjudication, in August 2003, the Nation and the Governor of the State of Utah executed a Memorandum of Agreement to commence settlement discussions to quantify the Nation's water rights.

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, with the goal of resolving all the Nation's potential reserved water rights claims in Utah. The federal negotiation team finalized the terms of the Settlement Agreement in 2015, subject to the approval of Congress. The State memorialized its support for the Settlement Agreement by a Senate resolution, with the concurrence of the Governor of Utah, on July 15, 2015, and the Navajo Nation Council approved the Settlement Agreement on January 16, 2016.

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 impliedly reserved sufficient water for Indian tribes to fulfill the purpose of creating the reservation. However, *Winters* did not set forth a method to quantify water rights beyond "sufficient water to fulfill the reservation's purpose." In 1963, the U.S. Supreme Court established a method for quantifying agricultural water rights in *Arizona v. California*, adopting the practicably irrigable acreage standard.¹ Collectively, these two cases established that Indian reserved water rights may be asserted at any time, are not lost through non-use, and are paramount to water rights later perfected under state law.

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 and authorize federal funding to the federal cost share of a settlement, 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, in each of the

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.

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, which would come out of the State of Utah's undeveloped apportionment from the Colorado River. The bill would allow the Nation to exchange or lease water within the State of Utah, but prohibits exchanges or leases of the San Juan River below Lee's Ferry.

The bill uses a fund-based approach to resolving Indian water rights settlements.² This approach 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. The Department of the Interior, with the agreement of settlement parties, indicated the goal of the trust fund approach was to avoid potential cost overruns related to planning, design, and construction of several water development projects. Consistent with this approach, the Nation will be required to submit requests to withdraw funds from the trust fund to the Secretary of the Interior, subject to the Secretary's approval of an expenditure plan. The United States will be indemnified against any future liability for the expenditure or investment of any amounts withdrawn from the Fund. The Committee understands the benefits of a trust fund for this settlement. The Committee looks forward to working with the Administration on future settlements to determine the most efficient, cost-effective means of funding infrastructure to deliver water to Indian tribes in order to implement water settlements.

LEGISLATIVE HISTORY

On April 11, 2019, Senator Romney introduced S. 1207. The bill was referred to the Indian Affairs Committee. The Committee did not hold a legislative hearing on this bill. On May 15, 2019, by voice vote, the Committee ordered the bill, without amendment, to be reported favorably to the Senate. On January 17, 2019, a House companion bill was introduced, H.R. 664.

Prior Congresses. In the 115th Congress, Senator Hatch introduced S. 664, on March 15, 2017. 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 pro-

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).

vide 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 delayed full implementation of Indian water rights settlements. The Department of the Interior preferred a trust fund for this settlement in order to shift the cost uncertainty risk onto the Nation and increase the Nation's flexibility on how to develop projects to meet their immediate needs. 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.

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 2019.”

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 and directs 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 appropriations 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. The Settlement Agreement and S. 1207 will be voided if these conditions do not 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.

COST AND BUDGETARY CONSIDERATIONS

Bill Summary: S. 1207 would secure up to 81,500 acre-feet of water annually for the Navajo Nation in Utah by ratifying a settlement among the federal government, the State of Utah, and the Navajo Nation. CBO estimates that the bill would authorize the appropriation of \$241 million (including adjustments to account for inflation and interest earnings) to capitalize the Navajo Utah Settlement Trust Fund, an interest-bearing fund established under the bill that would be administered by the Department of the Interior. After the parties have satisfied certain conditions, the federal government would transfer ownership of the fund (including any appropriated interest earnings) to the nation for constructing projects to deliver water to the Navajo reservation in Utah. The bill also would direct the Bureau of Reclamation (BOR) to survey water use on the reservation.

Estimated Federal cost: The estimated budgetary effect of S. 1207 is shown in Table 1. The costs of the legislation fall within budget function 300 (natural resources and environment).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF S. 1207

	By fiscal year, millions of dollars						
	2019	2020	2021	2022	2023	2024	2019–2024
Navajo Utah Settlement Trust Fund							
Estimated Authorization	0	16	50	51	53	54	224
Estimated Outlays	0	0	0	0	0	224	224
Interest Appropriated to the Navajo Utah Settlement Trust Fund							
Estimated Authorization	0	0	1	3	5	7	17
Estimated Outlays	0	0	0	0	0	17	17
Survey of Water Use							
Estimated Authorization	0	1	0	0	0	0	1
Estimated Outlays	0	*	1	*	0	0	1
Total Changes							
Estimated Authorization	0	17	51	54	58	61	242
Estimated Outlays	0	*	1	*	0	241	242

Components may not sum to totals because of rounding; * = between zero and \$500,000.

Basis of estimate: For this estimate, CBO assumes that S. 1207 will be enacted by the end of 2019. The bill would authorize the appropriation of specific amounts but does not specify the year in which any appropriation should be provided. CBO has estimated the necessary amounts for each year using information from BOR and assumes that by 2024 all of the following conditions would be met:

- The parties would have finalized and executed the settlement, including amendments required to conform to provisions of S. 1207;
- The State of Utah would have contributed \$8 million to the trust fund and enacted certain necessary legislation;
- All parties would have executed waivers and releases of claims as required under the bill; and
- The courts would have confirmed the water rights of the Navajo Nation in accordance with the bill.

In addition, CBO assumes that the amounts authorized in order to capitalize the fund (with adjustments to account for anticipated inflation, as required by the bill) would be appropriated over the 2020–2024 period. In 2024, BOR would publish a statement of findings in the *Federal Register* that the bill’s conditions have been met and ownership of the trust fund would be transferred to the Navajo Nation.

Spending subject to appropriation: S. 1207 would authorize the appropriation of \$224 million (including adjustments to account for inflation) in capital, an estimated \$17 million in accrued interest, and \$1 million for a survey of water use over the 2019–2024 period. Assuming appropriation of those amounts, CBO estimates that the bill would cost \$242 million over the same period (see Table 1).

Navajo Utah Settlement Trust Fund. S. 1207 would establish the Navajo Utah Settlement Trust Fund, consisting 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 appropriation of \$198 million for constructing water projects and \$11 million for OM&R, for a total of \$209 million. Because the bill requires adjustments for inflation, CBO estimates that the total amount would rise to \$224 million for the 2020–2024 period.

Under the bill, the federal government would retain ownership of amounts deposited into the trust fund until 2024, when all the settlement conditions are expected to be satisfied. Deposited amounts could be credited with interest earnings if those earnings are appropriated to the trust fund. In 2024, the federal government would transfer ownership of the trust fund to the Navajo Nation; the amount transferred (including any appropriated interest earnings) would be considered a federal expenditure. Based on projections of interest rates and assumptions concerning the timing of appropriations, CBO estimates that interest earnings would total \$17 million. Accordingly, CBO estimates that the total amount transferred would be \$241 million.

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

Survey of Water Use. S. 1207 would authorize the appropriation of \$1 million to implement the bill and to survey historical and current water use on the portion of the Navajo reservation in Utah. CBO estimates that the survey would take about three years to complete and would cost \$1 million over the 2019–2024 period.

Nonbudgetary effects: Once the settlement is finalized and executed by the parties, S. 1207 would require the State of Utah to contribute \$8 million to the trust fund in three installments. CBO

estimates that the state would pay \$2.67 million in 2021, 2022, and 2023 and that those amounts would be transferred to the Navajo Nation in 2024, when all the settlement conditions are expected to be satisfied. Generally, when the federal government takes control of assets that belong to others, those amounts are considered non-budgetary and their collection and disbursement do not affect the deficit.

Mandates: 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 (\$82 million in 2019, adjusted annually for inflation).

The mandates would arise from several of the bill's requirements:

- Ratification of the Navajo Water Rights Settlement Agreement to the extent that the agreement does not conflict with the bill's provisions. Because that agreement has not been finalized by the Navajo Nation 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.
- A requirement that the State of Utah to contribute \$8 million to the Navajo Utah Settlement Trust Fund. That amount is below the UMRA threshold.
- Prohibition of the Navajo Nation from raising claims to certain water rights or for damage to water, land, and other resources resulting from the loss of water or water rights.

In addition to the cost of the state's payment to the trust fund, there would be a tribal mandate that would involve the forgone value of awards and settlements of claims that the Navajo Nation could not raise. 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 mandates' costs. Therefore, CBO cannot determine whether the cost of the intergovernmental mandate would exceed the annual threshold.

S. 1207 contains no private-sector mandates as defined in UMRA.

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

Estimate reviewed by: Kim P. Cawley, Chief, Natural and Physical Resources; Susan Willie, Chief, Mandates Unit; Theresa Gullo, Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has received no communication from the Executive Branch regarding S. 1207.

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. 1207 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.

