INDIAN WATER RIGHTS SETTLEMENTS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING ON "INDIAN WATER RIGHTS SETTLEMENTS"

Wednesday, April 16, 2008
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 2:01 p.m. in Room 1324, Longworth House Office Building, Hon. Grace F. Napolitano [Chairwoman] presiding.

Present: Representatives Napolitano, Costa, Baca, and Smith.

STATEMENT OF THE HONORABLE GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Good afternoon. This meeting of the Subcommittee on Water and Power will come to order. I would like to make it clear that the purpose of this meeting is to hold an oversight hearing on Indian water rights settlements.

We welcome Members of Congress. Unfortunately, our friend and colleague and Ranking Member of the Subcommittee, Ms. Cathy McMorris Rodgers will not be able to be with us today, but she is ably represented by her colleague, Adrian Smith. She is participating in a Farm Bill conference, unfortunately, and cannot make both of them. We sometimes do get double-booked.

We welcome all guests to the Subcommittee today. We are expecting Congressman Raúl Grijalva of Tucson, Arizona, who is Chairman of the Subcommittee on National Parks, Forests and Public Lands, as well as Congressman Steve Pearce of Hobbs, New Mexico, the Ranking Member of the Energy and Minerals Subcommittee, and we will welcome them when they arrive.

I ask unanimous consent that Congressman Raúl Grijalva and Congressman Steve Pearce be allowed to sit on the dais and participate in the Subcommittee proceedings today. Hearing no objection, so ordered.

After my opening statement, I will recognize all of the Members of the Subcommittee for any statement they may have. Any Member of Congress who desires to be heard will be heard, and, of course, any additional material from anybody in the audience or elsewhere may be submitted for the record by Members, by witnesses, or any interested party.

The record will be kept open for 10 business days following this hearing. The five-minute rule, with a timer, and you have that timer in front of you, as do I, will be enforced, and that means I will start knocking on you as you get near. Green means go; yellow, you are near the end, wrap it up; and red means stop, or I will.

My opening will start with the Winneman-Wintu tribal women, who shared a poem on water, and my staff slipped it in. This is a very good topic to start on. "Water says, 'Wherever you put me, I will be in my home. I am awfully smart. Lead me out of my springs, lead me out of rivers, but I came from the ocean, and I shall go back into the ocean. You can dig a ditch, put me in it, but when I am out of sight, I am on my way home.'"

There is no more basic or universal need than water. Water is the economy. A century ago this year, the United States Supreme Court affirmed the basic right to water for First Americans. This case, known as the Winters case, became the fundamental doctrine of Indian water rights. The Court asserts that Congress must have intended to reserve water for the Indian reservation at the time of its creation.

One hundred years after this important case, only 21 Indian water rights claims have been resolved or are near resolution. There are four bills addressing Indian water rights settlements before Congress as we speak, and we are expecting nine more this session. As western communities face more demands for water, we can expect more tribes to assert their water rights.

Today, we are happy to welcome all of our witnesses and thank you for being here today. I would like to thank Mr. Bogert and his staff in the Indian Water Rights Office for being so forthcoming with me and my Subcommittee and hope that we will continue the same candor in our discussions this afternoon. Our goal for the hearing is for Congress to better understand how these settlements start, how they are negotiated, and how the come to a finality.

This is only the beginning of our consideration on this issue, and I hope to continue learning more and speaking to you in the future.

[The prepared statement of Mrs. Napolitano follows:]

Statement of The Honorable Grace F. Napolitano, Chairwoman, Subcommittee on Water and Power

Wintu tribal women shared the following poem on water.

Water says this, "Wherever you put me I'll be in my home. I am awfully smart. Lead me out of my springs, lead me out of my rivers, but I came from the ocean and I shall go back into the ocean. You can dig a ditch and put me in it...(But) when I am out of sight, I am on my way home."

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Our goal for this hearing is for Congress to better understand how these settlements start, are negotiated, and come to finality. This is only the beginning of our conversation on this issue, and I hope to continue learning more in talking with you all in the future.

Mrs. NAPOLITANO. With that, I welcome my colleagues for any statement they may have, and I will now ask my acting Ranking Member, Adrian Smith, to please take the mike.

STATEMENT OF THE HONORABLE ADRIAN SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. SMITH. Thank you, Madam Chairwoman, for holding this important hearing.

We certainly have water supply uncertainty everywhere in the West. Population growth, environmental mandates, activist judges masquerading as biologists, and drought constantly put a strain on water and power resources.

Unsettled litigation on Native American water rights is also a cause of much uncertainty. Like most observers, I strongly believe litigation does little to solve water problems. Tribal and nontribal communities deserve long-term certainty in where their water is coming from and how much they will have.

As long as today's hearing is not about partisan finger pointing, I think it will be a productive first step in settling litigation and bringing about more water certainty. Every Republican and Democratic administration, just like every Republican and Democratically controlled Congress, will have to wrestle with funding water priorities. As we have seen with all water infrastructure, funding is a bipartisan problem.

The same has been true, and will be true, with funding water rights settlements. Historically, most water rights settlements passed by Congress are consensus based. I hope that remains true for future settlements. This hearing can help reflect that positive tone.

I hope today's hearing will bring about more transparency in how the settlement process is conducted and how both tribal and nontribal communities are impacted in this process. Congress does not have, nor should it have, all of the answers, but if this hearing helps provide a better roadmap for resolution of claims, then this hearing will have been a success.

I thank the witnesses for their time and efforts to appear before this Subcommittee and look forward to your testimony. Thank you.

[The prepared statement of Mr. Smith follows:]

Statement of The Honorable Adrian Smith, a Representative in Congress from the State of Nebraska

Thank you, Madame Chairwoman, for holding this important hearing.

We have water supply uncertainty everywhere in the West. Population growth, environmental mandates, activist judges masquerading as biologists, and drought constantly put a strain on water and power resources.

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Every Republican and Democrat Administration—just like every Republican or Democrat-controlled Congress—will have to wrestle with funding water priorities. As we've seen with all water infrastructure, funding is a bipartisan problem. The same has been true—and will be true—with funding water rights settlements. Historically, most water rights settlements passed by Congress are consensus-based. I hope that remains true for future settlements. This hearing can help reflect that positive tone.

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I thank the witnesses for their time and efforts to appear before this Subcommittee and look forward to their testimony.

Mrs. NAPOLITANO. Thank you, Mr. Smith. Mr. Costa?

STATEMENT OF THE HONORABLE JIM COSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COSTA. Thank you very much, Madam Chairwoman, for this timely hearing. You are to be commended for your efforts to bring greater transparency to an issue that is troublesome in many parts of the country, as it relates to Native American tribes, but as we all know, water is the lifeblood of our ability to sustain life, and, therefore, as it relates to water issues, not only in the West but throughout the country, we oftentimes have contentious issues. Your desire to be Solomon-like in trying to bring the various parties together for clarification on these issues and to try to reach settlement agreements, notwithstanding the complication of those settlement agreements, is something that I think we all want to associate ourselves with.

So I want to thank you again for holding this very timely hearing this afternoon, and we will continue to work with you and all of the various Native American sovereign nations that, like other parts of our country, have difficult challenges when it comes to ensuring not only their current water needs, their appropriated or riparian water rights, but their long-term water needs as climate changes and our population growth increases. Thank you very much.

Mrs. NAPOLITANO. You are very welcome, sir. I beg the indulgence of the panel of witnesses and others because it looks like we may have a vote in about 15 minutes, which means we will take leave and return to continue the hearing.

Now, we will proceed to hear from our witnesses. We have two panels, whose witnesses will be introduced before they testify. After we hear from our first panel, we will have a question-and-answer period before we move on to the second panel.

All of your submitted prepared statements will be entered into the record, so if you can—I know because I read one of them, it took me a little while—if you condense it to the most salient points you want to make, that would be greatly appreciated because you will run out of time by the time you get to the fifth page. Then you have 12 more.

All witnesses will be asked to summarize high points of your testimony, limit your remarks to five minutes. The timer will be used. That also applies to all of the questioning from the Members. If

there are additional questions, I am sure we will have a second go-around.

For our first panel, we have Michael Bogert, Chairman of the Working Group on Indian Water Rights at the Department of the Interior in Washington; Susan Cottingham, Director of the Montana Reserved Water Rights Compact Commission from Helena, Montana. She will be testifying on behalf of the Western States Water Council and the Western Governors' Association.

Third, we have John Echohawk, Executive Director of the Native American Rights Fund in Boulder, contracting officer; and, finally, John F. Sullivan, General Manager of the Salt River Project of Phoenix, Arizona, and welcome to our panel.

I would like to have us begin with Mr. Bogert, sir.

STATEMENT OF MICHAEL BOGERT, CHAIRMAN OF THE WORKING GROUP ON INDIAN WATER RIGHTS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. BOGERT. Madam Chairwoman, thank you. As a preliminary matter, I wanted to extend the Secretary's warmest greetings, and we appreciate the opportunity to have been invited to speak with you today.

With your indulgence and on my time, I would like to introduce, if I could, Madam Chairwoman, my Indian Water Rights staff.

Mrs. NAPOLITANO. Please do.

Mr. BOGERT. I would like to introduce Pam Williams, who is our Director of the Indian Water Rights Office; Cynthia Reid from our Legislative Affairs Unit; Bella Sewald, soon to be in the Solicitor's Office, but she has been part of our team on the water rights settlement front. I think Frank Frieman is here from our team.

Madam Chairwoman, we appreciate the opportunity to introduce our good people at Interior. They are the heart and soul of our team that deals on a daily basis with these water rights. We greatly appreciate your accommodation in letting us help you become a little bit more familiar with our team.

Mrs. NAPOLITANO. With one proviso, sir. We need their phone numbers.

Mr. BOGERT. We will provide those, Madam Chairwoman.

Mrs. NAPOLITANO. Thank you, sir.

Mr. BOGERT. As another matter of protocol, I wanted to make sure that the Committee and the Chair knew that the Secretary extends his greetings to President Shirley, one of our great tribal leaders across the country. He values the president's friendship, and we appreciate that he is here today, and the Secretary sends his warmest greetings.

Chairwoman Napolitano and distinguished Members of the Subcommittee, thank you for the opportunity to visit with you this afternoon about the administration's policy on probably some of the most important work that we can ever do within the administration and on Capitol Hill.

Madam Chairwoman, we appreciate your leadership on this issue. We appreciate the fact that we have a chance to delve little bit further into the details of how these settlements are put together and how we can work with you here in Congress.

Our experience is that tribal governments increasingly seek quantification of their water rights as a way to confirm and protect their interests in vital and culturally significant water resources. We also know that Indian water settlements have the great potential to bring much needed economic development to struggling reservation economies.

States involved in these negotiations increasingly seek quantification of the Indian water rights in order to provide certainty for holders of state-based water rights, clarify state authority to manage water resources within their borders, and plan for the future.

The water rights that the tribal governments own, under the U.S. Supreme Court Winters doctrine, Madam Chairwoman, that you identified in your remarks, have been described by some legal scholars as "a shadow body of law" and are often viewed as looming large over existing uses in many water basins of the west where Indian water rights have yet to be decreed.

Non-Indian communities relying on increasingly scarce water supplies realize that their water rights cannot be secure if their claims are not compatible with Indian water rights, and no agreement has been reached.

This administration, like previous administrations, believes that, whenever possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims. A judicial decree does not get "wet water," as we describe it in the trade, or actual water, water that can be used for on-reservation uses by our tribal governments to tribes, nor does it provide new infrastructure or do anything to necessarily encourage improved water management in the future.

Negotiated settlements, on the other hand, can, and generally do, address these critical issues. For tribes, assertion of water rights is a reaffirmation of their sovereignty and a step toward economic self-sufficiency. For states, these negotiations can be an opportunity to resolve outstanding issues that local and state agencies have been unable, for whatever reasons, to conclude or successfully administer in the past.

Many communities favor settlement because they are fed up with top-down governmental agency and judicial decision-making and desire to attempt to control their own destiny as much as possible.

Thus, settlement negotiations allow everyone a place at the table and a chance to participate in the decisions that will impact the future.

When negotiating and evaluating Indian water rights settlements, the administration follows the criteria and procedures, longstanding policy guidance on Indian water settlements followed by all administrations since 1990. Among other considerations for Federal participation in the negotiation of Indian water rights settlements, the criteria provide guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities.

The criteria are best viewed as standards and guidance that the Federal government can use to weigh the merits of a settlement. In some cases, a settlement that falls short with respect to one or

more of the factors described in the criteria may be so heavily weighted with respect to other factors that the administration may decide that settlement should generally be supported, despite misgivings about some aspect of the proposed agreement.

Assessing the value of potential claims against the United States also requires calibration to the particular circumstances and the problems that the settlement seeks to address. Achieving a settlement is about compromise from all sides on fundamentally held beliefs in the name of purchasing a workable agreement.

Madam Chair, I was just remarking with Susan and John, who have been through many of these, that those who believe that collaboration is an easy path; they have not truly collaborated in these contexts, so maybe we could talk a little bit more about that.

Accordingly, each settlement is inherently imperfect for all of the parties, and, instead, these agreements are about sharing the burdens, the risks, and the benefits.

Since the Secretary became the 49th Secretary of the Interior, we have traveled all over the West in the last two years to provide technical assistance and support for our negotiating teams. Secretary Kempthorne has personally directed these teams to engage closely in an effort to purchase solid achievements rather than just maintain the status quo.

To provide a secure foundation for these commitments, we are taking steps to permanently establish the Indian Water Rights Office within the Office of the Secretary at the Department of the Interior. We believe this would improve the institutional capacity of the office and confirm its importance to Interior programs and the future of the West.

Madam Chairwoman, we appreciate your interest and leadership and that of the Subcommittee on Indian Water Rights Settlements. As I said earlier, and as we have visited privately, this is some of the most important work that we can do with you and Congress.

We look forward to close coordination with your fine staff and the Subcommittee over the coming year. This completes my statement, Madam Chairwoman. I have one more staff member, John Bezdek, of our Solicitor's Office, who is also very valuable to us in our Indian water rights settlements, and thank you for your time.

[The prepared statement of Mr. Bogert follows:]

Statement of Michael Bogert, Chairman of the Working Group on Indian Water Settlements, U.S. Department of the Interior

Chairwoman Napolitano and members of the Subcommittee, I would like to thank you for the opportunity to appear before you today to discuss this Administration's policy on Indian water rights settlements. Tribes increasingly seek quantification of their water rights as a way to confirm and protect their interests in vital and culturally significant water resources and bring much-needed economic development to struggling reservation economies. States increasingly seek quantification of Indian water rights in order to provide certainty for holders of State-based water rights, clarify State authority to manage water resources within their borders, and plan for the future. The water rights that Indians own under the U.S. Supreme Court's Winters doctrine have been described by Professor Charles Wilkinson as "a shadow body of law"[1] and are often viewed as looming over existing uses in many water basins of the West where Indian water rights have yet to be decreed. Non-Indian communities, relying upon increasingly scarce water supplies, realize that their water

[1] Charles F. Wilkinson, The Future of Western Water Law and Policy, in Indian Water 1985: Collected Essays 51, 54-55 (Christine L. Miklas & Steven J. Shupe eds., 1986).

rights cannot be secure if their claims are not compatible with Indian water rights and no agreement has been reached.

My experience shows that instead of being a threatening Sword of Damocles hanging over State water rights regimes, Indian water rights can serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future. I saw this happen with the Nez Perce settlement agreement in my home state of Idaho. It is happening today in Arizona, Montana, Nevada, Washington, Utah, and other States with completed Indian water right settlements.

I would like to begin this statement by describing the event held in Arizona one month ago to celebrate the Arizona Water Settlements Act of 2004. The event was attended by almost 400 people from all over the State, ranging from members of the tribes whose water rights were settled through the agreements underlying the act to the mayors of the cities whose municipal supplies were secured to representatives of irrigation districts whose farming rights were protected to U.S. Senator Jon Kyl and other congressional representatives to State and Federal dignitaries. People who had for many years seen each other as rivals for a limited resource came together in celebration of success after a decades-long struggle to craft an agreement that promises to provide sufficient water to meet their future needs and provides a framework for sharing shortages and funding needed investments in a common future.

As noted by the Secretary's remarks on the occasion, delivered by Assistant Secretary—Indian Affairs Carl Artman, the Arizona settlement marked "an important victory in an on-going struggle that will only broaden and intensify in the coming decades." It is undoubtedly true that more communities will struggle with water shortages in the years to come, with drought and climate change exerting pressures to adapt long-term water management to new realities. This Administration, like previous Administrations, believes that when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims. But achieving a settlement is about much more than seeking Federal funding. It is about compromise, from all sides, on fundamentally held beliefs in the name of producing a workable agreement. It is about newfound understandings between neighbors regarding the ways in which their long-term interests are similar, and the ways in which these interests and visions for the future may be different. It is about sharing the burdens, as well as the benefits, that can arise from investments in infrastructure. It is about facing harsh realities about the total resources that are available and about making decisions that will reverberate for future generations of tribal members and non-Indians alike.

The remainder of this statement will focus on two of the fundamental questions regarding Indian water rights settlements. First, I will discuss the reasons settlements are generally preferable to litigation. Then, I will discuss the policies underlying the Administration's guidance on developing a position on proposed Indian water rights settlements, and explain the need for this framework for negotiating settlements. I will end by discussing the need for closer cooperation between different parts of the Federal government in promoting sound settlement policy.

Settlement versus Litigation

Indian water rights are especially valuable in the West for two reasons: first, Indian water rights cannot be lost due to nonuse, and second, Indian water rights have a priority date no later than the date of the creation of a reservation. Because most reservations were established prior to the settlement of the West by non-Indians, even very senior non-Indian water rights are often junior in priority to Indian water rights. Because tribes have lacked resources to develop their own domestic water supply systems, irrigated agriculture or other industry to make use of their water resources, their ability to use their water rights has been limited. As a result, water that would almost certainly be decreed to tribes if an adjudication were held has often been used for years by neighboring non-Indian interests and communities.

In a typical Western stream adjudication, a presiding judge can decree that a Tribe has a right to a certain amount of water of a certain priority date. Even though a judicial decree provides absolute certainty with respect to who owns what water, when compared with the status quo, adjudication may cast an even greater pall of uncertainty over existing water uses in the system with a junior priority date to the tribal water right because those users have no way of knowing when the tribe will begin to use its water. A judicial decree does not get "wet water" to tribes, nor does it provide new infrastructure or do anything to necessarily encourage improved water management in the future. Negotiated settlements, on the other hand, can, and generally do, address these critical issues. Through a settlement, parties can agree to use water more efficiently or in ways that obtain environmental benefits,

or to share shortages during times of drought. In exchange for settlement benefits, tribes can agree to subordinate use of their water rights so that existing water uses can continue without impairment. Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertainties in Federal and State law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

As I have traveled around the country to meet with the tribes and States and local governments that are involved in Indian water rights settlement negotiations, I have heard certain themes repeatedly. First, for tribes, assertion of water rights is a re-affirmation of their sovereignty and a step towards economic self-sufficiency. Second, for States, these negotiations can be an opportunity to resolve outstanding issues that local and state agencies have been unable to conclude or administer successfully in the past. Third, it is clear that many communities favor settlement because they are fed up with top-down governmental decision-making. They want to take their future into their own hands and certainly do not want their future to be decided by the stroke of a judge's pen. Settlement negotiations allow all stakeholders a place at the table and a chance to participate in the decisions that will impact their futures.

For all these advantages, settlement does pose certain risks. Tribes risk being awarded less water than they may be able to obtain through litigation in exchange for other settlement benefits which may be difficult to quantify. Non-Indian communities risk losing a status quo in which they are able to use Indian water without compensating the Tribes. And the Federal government risks being asked to foot the bill for costly water infrastructure projects that will allow existing water users to continue to use the water in the way that built State and local economies while still allowing tribes the right to use water that belongs to them but that they have been unable to use in the past.

The Federal government should provide incentives for stakeholders to consider mutually beneficial settlement rather than rancorous litigation where possible. But there is a line between a reasonably tailored incentive and being placed on the hook for costs that are disproportionate to the benefits of settlement. The next section of this statement discusses the policy guidance that the Executive Branch has used since 1990 to establish a basis for negotiation and settlement of claims related to Indian water resources.

The Role of the Criteria and Procedures

There is no cookie-cutter solution to the complex struggles involving tribal, environmental, domestic, industrial, and agricultural claims on limited water supplies that are arising all over the country. However, there are some common challenges in settlements that call for some generally applicable standards to guide the Federal government's participation in settlement negotiations and to inform a decision on whether a proposed settlement should be supported.

When negotiating and evaluating Indian water rights settlements, the Administration follows longstanding policy guidance on Indian water settlements found at 55 Fed. Reg. 9223 (1990), Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (Criteria). These Criteria have been followed by all Administrations since 1990. Among other considerations for Federal participation in the negotiation of Indian water rights settlements, the Criteria provide guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities.

The Criteria call for Indian water rights settlements to contain non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government. These principles are set out in the Criteria so that all non-Federal parties have a basic framework for understanding the Executive Branch's position. The Criteria also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process.

The Criteria are best viewed as standards that the Government can use to weigh the merits of a settlement. In some cases, a settlement that falls short with respect to one or more of the factors specified in the Criteria may be so heavily weighted with respect to other factors that the Administration may decide that the settlement overall should be supported, despite misgivings about some aspect of the proposed agreement. Assessing the value of potential claims against the United States also

requires calibration to the particular circumstances and the problems that the settlement seeks to address. Furthermore, as legal doctrines involving not only Indian water rights but also applicable environmental statutes such as the Endangered Species Act and Clean Water Act evolve, this liability assessment must also evolve.

Two of the specifically enumerated factors in the Criteria reflect an overarching goal of this Administration in evaluating a proposed settlement, which I think of as "peace in the valley." Criterion 7 holds that "[s]ettlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency." In addition to the inherent value of sovereignty to tribes, successful reservation economies are crucial to long-term good relationships between tribal and non-tribal communities. Settlements that can overcome cycles of poverty and hopelessness on reservations will do a great deal of good in the long term, helping to revive industry and tourism in places that are really struggling as well as furthering the U.S. goal of Tribal self-sufficiency and sovereignty. Another key criterion, criterion 10, addresses the goal of fostering cooperation more directly, stating that "Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties." This criterion calls upon the federal government to use its influence to provide parties with incentives to work together to identify creative solutions rather than be consumed in endless conflict.

Given Interior's historic role as the architect of many of the Congressionally-enacted policies that led to the development of the West, and as the trustee of Federally recognized tribes, the "peace in the valley" factors remain fundamental to this Administration's evaluation of proposed settlements. But we must also take a hard look at the cost-related factors included in the Criteria as well in order to ensure that the interests of U.S. taxpayers are being protected. Settlement should not be a blank check for a region to obtain a Federal subsidy that may fairly be viewed as wasteful or excessive. One of the advantages of the cost sharing requirement under the Criteria is that the willingness of settling parties to cost share for a project is a good indicator of how truly invested they are in the proposed solution. It is all too easy to be in favor of a plan that comes at the sole expense of the Federal government and all taxpayers. But a settlement to which many interests are contributing deserves to be taken more seriously and given more favorable treatment by both Executive branch and Congressional reviewers.

The Need for Cooperation among Agencies and Branches of Government

The Criteria were written to ensure coordination and common purpose among the relevant executive branch agencies—particularly Interior, the Department of Justice, and OMB, but also sometimes including Indian Health Service, the Forest Service, and others. The procedural provisions of the Criteria also reference providing briefings for Congress consistent with the Administration's negotiation position on settlements.

As a practical matter, many settlement proponents are finding that the process outlined under the Criteria takes a long time and that the Federal position on funding is very different than the levels of funding and non-Federal cost share that they had expected. In this situation settlement proponents have decided that their energies would be better spent convincing Congress to enact their settlement legislation without the support of the Administration. As this Subcommittee wrestles with these requests, we urge caution. The settlements that have been introduced in this Congress so far are still the tip of the iceberg. It is Interior's estimate that as many as 9 settlement bills may be introduced before this session ends. At this time, three of the anticipated 9 have been introduced and have already had hearings in the last year: authorizing legislation for the Duck Valley (S. 462/H.R. 5293), Soboba (H.R. 4841), and Navajo-San Juan (S. 1171/H.R. 1970) settlements.

Since 2002, three bills authorizing Indian Water Rights settlements have been enacted with either the full or qualified support of this Administration: Zuni (P.L. 108-34), Nez Perce (P.L. 108-447), and the Arizona Water Settlements Act (P.L. 108-451). We have testified in favor of a fourth settlement, the Soboba settlement (H.R. 4841), which we hope will be enacted shortly, and against authorizing legislation for two other settlements, the Navajo-San Juan (S. 1171/H.R. 1970) and Duck Valley (S. 462/H.R. 5293) settlements. Enactment of all 9 of the bills that are expected to be introduced this Congress with the funding levels being proposed by non-Federal settlement proponents would subject the Federal government to billions of dollars of additional authorizations.

In considering proposed settlements, we believe it is important to remember the dynamics of settlement. By this I mean that each enacted settlement establishes a benchmark that influences the course of ongoing settlement negotiations in other places. There are currently 19 Federal negotiation teams that have been established to support settlement negotiations, and we have received 7 requests for new teams

and believe that more requests will be forthcoming. If this Congress were to proceed to enact numerous settlement bills over the Administration's objection with provisions, including cost share provisions, that are not consistent with the Criteria, it would be very difficult in the future for Federal negotiators to participate in settlement negotiations, set realistic expectations, and convincingly hold the line on settlement costs.

In closing, I would like to emphasize the commitment of the Department of the Interior to successful negotiation of these settlements. When nominating then-Governor Kempthorne to serve as the 49th Secretary of the Interior, President Bush specifically noted that one of Governor Kempthorne's qualifications to serve was his previous work to resolve a long-standing water rights issue, which was, of course the Nez Perce agreement in Idaho. The Secretary has made supporting the Indian water rights settlement negotiation process one of his priorities. His staff has travelled all over the West over the last two years to provide technical assistance and support to negotiating teams.

Secretary Kempthorne has personally directed these teams to engage closely in an effort to produce solid achievements rather than just maintain the status quo. To provide a secure foundation for these commitments, we are taking steps to establish the Indian Water Rights office permanently within the Office of the Secretary at the Department of the Interior. This would improve the institutional capacity of the office and confirm its importance to Interior programs and to the future of the West.

Madame Chairwoman, we appreciate your interest in Indian water rights settlements. We look forward to close cooperation with this Subcommittee over the coming year. This completes my statement. I am happy to answer any questions the Subcommittee may have.

Mrs. NAPOLITANO. Thank you, sir. I appreciate your introducing your staff, and, do not forget, we will want your phone numbers. Thank you so very much for your testimony, and now we have Susan Cottingham.

STATEMENT OF SUSAN COTTINGHAM, DIRECTOR, MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION, HELENA, MONTANA, ON BEHALF OF THE WESTERN STATES WATER COUNCIL AND WESTERN GOVERNORS' ASSOCIATION

Ms. COTTINGHAM. Good afternoon, Madam Chairwoman. My name is Susan Cottingham. I am Director of the Montana Reserved Water Rights Compact Commission.

This commission was established by the Montana legislature nearly 30 years ago to negotiate Indian water rights settlements rather than litigate them, and, over the years, we have concluded agreements with six out of the seven Indian tribes in Montana. We currently have three settlements that are being readied for congressional approval this year.

In this capacity as Director of the commission and as a member of the Ad Hoc Group on Indian Water Settlements, I have worked for 22 years on Indian water settlements.

I am very pleased today to be appearing with Mr. Bogert. We have appreciated so much the energy of him and always the continuing energy of the Indian Water Rights Office, who have worked very, very hard on these settlements over the years under some very difficult political situations. We understand.

I am also honored to be here with John Echohawk, who is one of my colleagues on the Ad Hoc Group on Indian Water Settlements, and they have been a leader in working on these settlements around the West.

The Western Governors have consistently had a policy, over the last couple of decades, of supporting these negotiated settlements.

There are many benefits for the settlements, and I think Mr. Bogert touched on some of them. I know, from our point of view, the settlements have avoided very costly and lengthy litigation.

We have been able to come up with some very practical solutions to very difficult water-allocation issues because, as you can imagine, in many of these watersheds we have had unquantified tribal reserved water rights and also non-Indian water users who have made many big investments in developing water, and so we have to come up with some very practical solutions to these settlements.

They have fostered some very sound management practices. We have looked at conservation and other measures to try to produce water for these settlements, and, maybe most importantly, they have provided some cooperative partnerships between the non-Indians and the tribes which were not there before, and that we are very proud of.

So I just wanted to touch briefly on those. I think a couple of the major issues that you will see in everyone's written testimony and that we will be discussing today are funding the Indian water settlements and the negotiation process over the years—and how it has worked, or what difficulties we have had with it. I just want to touch on those briefly in the time that I have.

The funding issue is one that we have grappled with over the years. Each individual settlement comes and is dealt with on its own merits, but because there are criteria procedures that the United States follows, sometimes we find ourselves in the position of the United States, opposing our settlements because the dollar figures are too high.

So we have worked, over the years, to try to find funding mechanisms. I think the key issue there is we want to make sure that the Indian water settlements are funded but not at the expense of other important tribal programs. We do not want tribes to be competing against each other or other Interior programs, so we have really looked for a funding mechanism. I think the efforts now, this year, to look at the Reclamation Fund and perhaps use some of the money from the Reclamation Fund to begin to fund those settlements is a very exciting development, and we hope that your Committee will take a look at those issues as well.

The other issues are the negotiating process, and I think you will hear, from some of the case studies today, that it is a long and difficult process. It is one in which the Federal government's involvement has been a mixed bag. Sometimes we have great negotiating teams that are involved early on; other times, we have negotiating teams that come in at the last minute, and the tribes and states have agreements, and we have to sort of battle it out at the last minute.

So I think we are hopeful that the Federal negotiating teams get some decision-making authority early on in the process so that they can be very active players in that process. We understand that the Indian Water Rights Office's budgets often do get cut, and they do the best they can, but we think that it really needs to be addressed. It really is an issue that frustrates a lot of us out West.

I think it is clear that if we fail to conclude these settlements, we are going to go to litigation, which is not going to serve the

tribes well, to get them money for their water development or the non-Indian water users in the states who are looking for certainty.

There is a finite number of settlements that are left, and I think the main issue we need to deal with is, even though they seem expensive now, they are going to be even more exorbitantly expensive 10 or 20 years down the road, and they are an obligation that the United States has to these tribes and to the western communities.

So we are deeply grateful for your attention to this issue, and we hope to work with you and your staff on coming up with some solutions on how we might get through some of these hurdles and move forward in the future. Thank you again.

[The prepared statement of Ms. Cottingham follows:]

Statement of Susan Cottingham, Director, Montana Reserved Water Rights Compact Commission, on Behalf of the Western Governors' Association and the Western States Water Council

Good afternoon. My name is Susan Cottingham. I am director of the Montana Reserved Water Rights Compact Commission. In this capacity, and as a member of the Ad Hoc Group on Indian Water Settlements, I have worked to promote these Indian Water Rights Settlements for nearly 22 years.

I appear before you today representing the Western Governor's Association (WGA) and the Western States Water Council, WGA's water policy arm.

First: let me thank the Subcommittee, not only for the opportunity to appear but more importantly, for recognizing the importance of these settlements to Western communities and providing a forum for discussing the difficulties currently impacting their ultimate success.

For the past two decades, the Western Governors have strongly and consistently supported the negotiated settlement of Indian reserved water rights. Their most recent policy statement reads: "The Western Governors continue to support negotiated rather than litigated settlement of Indian water rights disputes. The federal government has major responsibility for ensuring successful conclusion of the process, including providing information and technical assistance to tribes, providing federal negotiating teams to represent one federal voice and further the process, seeking approval of agreements, fully funding the federal share, and ensuring that the settlements are implemented."

The western states' sovereign counterparts, the Indian nations claiming water rights, have also supported negotiated settlement of these difficult legal issues. The National Congress of American Indians (NCAI) "believes that the settlement of tribal water and land claims is one of the most important aspects of the United States' trust obligations to Indians and is of vital importance to the country as a whole." My colleague John Echohawk will be speaking in more depth today from the tribal perspective. I also want to note with appreciation Mr. Bogert's sincere efforts, with the support of the Indian Water Rights Office at Interior, to further the settlement process in the context of various negotiations ongoing in the West, reflecting a commitment Secretary Kempthorne made early in his tenure as Interior Secretary.

Over the past 25 years, 20 Indian water rights settlements have been reached in the western states and approved by Congress. At the time these settlements were approved, very few were supported by the governing administration. Although progress has been made, many more settlements will need to be addressed in the future. These settlements have provided practical solutions, infrastructure and funding, while saving millions of dollars of private and public monies by avoiding prolonged and costly litigation. They have also fostered conservation, sound water management practices, and established the basis for cooperative partnerships between Indian and non-Indian communities.

However, over the years, federal fiscal and legal policies have hindered this successful process. Under the "Criteria and Procedures" adopted in 1990, the Department of Interior has continued to espouse settlement while the administration has taken an increasingly narrow view of its trust responsibilities to tribes and its willingness to fund settlements that benefit non-Indians. In coordination with the Office of Management and Budget (OMB) and the Department of Justice (DOJ), the Department of Interior has been asserting that its contribution to settlement should be no more than its calculable legal exposure. Even this can be narrowly drawn so that often its financial obligation is little or none.

In addition to a narrow view of trust responsibilities, budgetary policy can also frustrate the settlement process. Under current budgetary policy, funding of water right settlements must be offset by a corresponding reduction in some other discretionary component of the Interior Department's budget. It is difficult for the administration, the states, and the tribes to negotiate settlements knowing that funding may only occur at the expense of some other tribal or other essential Interior Department program. The WGA and WSWC believe that Congress should take steps to ensure that any settlement authorized by the Congress and approved by the President will be funded and implemented without a corresponding offset to some other tribal or essential Interior Department program.

It has long been the accepted premise that meeting the cost of Indian water and infrastructure in Indian water rights settlements is the trust responsibility of the federal government. In this regard, the WGA and the WSWC believe opportunities to more fully utilize revenues accruing in the Reclamation Fund should be explored as an appropriate source for this funding.

While federal support is an essential part of these settlements, the western states acknowledge that they should bear an appropriate share of the settlement costs, especially those corresponding to non-Indian benefits. In Montana over $56 million has been appropriated for existing settlements. More than an additional $20 million could potentially be authorized in the next session. In New Mexico the legislature has appropriated over $36 million for Indian water rights settlements. In addition to contributing monies to fund the settlements, many states have devoted significant in-kind resources to cover the administrative costs associated with the negotiations process.

The states and the federal government must work together to jointly design and fund settlements projects that provide the greatest benefit for Indian and non-Indian water users alike. Instead, the western states and tribes have continued to work hard to conclude water settlements in a virtual vacuum of meaningful federal participation and financial commitment. Although federal negotiating teams have been appointed, in practice they are often given little authority for substantive policy decisions until late in the process. Settlements in Montana and New Mexico have languished, in part, because the Interior Department has pulled back its funding commitments. Granting greater decision-making authority to federal negotiating teams throughout the settlement process could significantly streamline future negotiations and administration approval. In addition, providing the Interior Department with sufficient funding to properly staff negotiating teams with needed personnel will reduce the strain on existing teams and facilitate future settlement.

Failure to conclude meaningful water settlements will undermine the western states' planning for sustainable growth and disrupt their ability to meet long-term water demands. State and tribal commitment to pursue these settlements may be jeopardized if federal support is not forthcoming. Litigation could also substantially disrupt non-Indian uses. Further, if tribes are forced to litigate their water rights, their eventual quantification may be meaningless without federal dollars to develop their water supplies for their homelands.

The national obligation to Indian water rights settlements is a finite list of pending problems, one that grows shorter with each settlement. It is a national obligation that can be met in full, once and for all, by concluding settlements with those tribes and pueblos whose rights have not yet been adjudicated. But, while the number of pending settlements is set, the cost of implementing them will continue to rise. Postponing this duty only increases its cost to the nation, as it perpetuates the hardship to Indian people unable to enjoy the full use of their water rights and the inability of non-Indian governments to plan for water use in the absence of firm data on respective use entitlements.

I'd like to briefly use Montana's experiences with these issues as illustration.

The first compact to be evaluated through the Criteria and Procedures was Northern Cheyenne in 1991. The parties spent three years in intensive negotiations. In April of that year, the federal team supported the compact in the Montana legislature. By May when the working group first looked at it, the administration had changed its position and began actively opposing the compact. The State of Montana and the Tribe were forced to end run the administration's opposition (as has happened with other settlements since) and Congress approved the settlement later that year. Although former President Bush signed the bill, the United States didn't officially sign the compact until over two years later.

In contrast, the Rocky Boys settlement was approved with the support of the administration in 1999 some eight years later. The administration worked closely with the Tribe to propose $50 million in settlement funds by taking a broader view of the United States' trust responsibility.

Montana now has three settlements awaiting Congressional approval. Although we have been working with administration officials to deal with concerns they have with the bills, we do not believe they will support any of these settlements (some of which have been in the works for 20 years). Because of the United States' continued refusal to fund these agreements in any meaningful way, we again expect the Tribes and State to come to Congress without administration support.

The two major issues before us today, the federal decision-making process and the funding necessary for settlement, are inextricably connected. Instead of engaging early in the negotiating process to come up with creative and meaningful solutions to these difficult allocation problems, the administration uses an increasingly narrow view of its legal exposure to oppose these settlements after the States and Tribes have labored to conclude an agreement. We sincerely hope this Subcommittee's historic hearing will call attention to the difficulties we are facing and help to foster a new dialogue on how to fund these settlements so vital to our Western future.

Mrs. NAPOLITANO. Thank you, Ms. Cottingham. [Off mike.]

We have a very short time to get to the vote, but we will be back probably—it is going to be, at least, half an hour, maybe 40 minutes because there are about five votes. So hold tight for us, and we will be back. Thank you.

[Whereupon, at 2:23 p.m., a short recess was taken.]

Mrs. NAPOLITANO. The Committee has now reconvened, and, again, I apologize for the delay but, as you know, we had to go and do some voting.

Now, we will move on to the third witness, and that is Mr. John Echohawk, Executive Director, Native American Rights Fund, Boulder, Colorado.

STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND, BOULDER, COLORADO

Mr. ECHOHAWK. Thank you, Madam Chairwoman. I am a member of the Pawnee Nation of Oklahoma. I am a lawyer, and I have been working on these Indian water rights settlements for 38 years, and we have, I think, had some progress, but we have got quite a ways to go yet.

We are currently working on behalf of four tribes. In addition to our work on behalf of these individual tribes, in the last 26 years, we have been privileged to be part of the Ad Hoc Group on Indian Water Rights and, as such, representing tribes and their interests in meetings with the states and businesses from the West. It has been a pleasure to work with Susan Cottingham and the Western Governors' Association, the Western States Water Council, for the last 26 years.

The reason we have come together in this ad hoc group is because we have determined that we have got a common interest—the tribes and the states and the businesses in the West—a common interest in coming together and advocating in Washington for the United States government to fund its fair share of Indian water rights settlements when they have been negotiated. It has been our experience that the funding issue is the most difficult issue in these Indian water rights negotiations.

This has been a problem that we have had through all of the various administrations in the last 26 years and the various Congresses. No matter who is in power in the administration or in the Congress, the issues is always the same, and that is funding: How are these settlements going to be funded? That remains the issue

today. We feel like the United States government has moral and legal responsibilities, under the trust's responsibility, to fund its fair share of these settlements.

We have found ourselves, in the West—the states, the tribes, and the private parties—in litigation in courts staring at each other, knowing that, in the end, there are going to be winners and losers and wondering why we are doing that—because we did not cause this problem. The Federal government caused this problem. They did not protect Indian water rights as trustee. At the same time, they encouraged the states to move forward with development, under state law, and that is what they have done. So now we are pitted against each other in a situation that was not of our making.

So to resolve this situation, we think it is only fair that the Federal government ought to pay its fair share of those settlement costs, and trying to find a way to do that has always been the major focus of the ad hoc group. As Susan pointed out, we have searched constantly for a funding mechanism. As she referenced, I think maybe we have a possibility here of a funding mechanism coming up on the Senate side in the legislation.

They are starting to move forward on the New Mexico tribal water rights settlements, and, as I understand it, that involves the use of the Reclamation Fund, and I would encourage the Subcommittee to follow that carefully and see if that might be a way that we could identify a funding mechanism, at least for those parts of these settlements that involve the Bureau of Reclamation and use of the Reclamation Fund.

In addition to the funding issue relating to the settlements, we have always had another funding issue that is peculiar to the tribes, and that is the issue of Federal funding for the negotiations themselves. These tribes are, in most instances, not able to fund the full cost of the participation of their lawyers and their experts in these negotiations and have always relied on support from the Federal government, through their trust responsibility, to enable the tribes to be at the negotiating table as well.

Unfortunately, over the years, the funds set aside for those negotiations have dwindled to the point now where many tribes cannot meaningfully participate in those negotiations. So we also need to work together on a way to get more funds to tribes for their negotiations.

With that, Madam Chair, I want to thank you again for holding these hearings, and I will be glad to answer any questions you may have.

[The prepared statement of Mr. Echohawk follows:]

Statement of John Echohawk on behalf of the Native American Rights Fund

Good afternoon, my name is John Echohawk, and I am the Executive Director of The Native American Rights Fund (NARF), located in Boulder, CO. NARF is a legal defense fund for Native American tribes, organizations and individuals. Since 1970, NARF has tackled the most important and pressing legal issues facing Native Americans in court rooms and in the halls of Congress. We are honored to be asked to provide testimony to the House Subcommittee on Water and Power regarding the challenges of securing tribal water rights settlements. Water rights issues have been one NARF's most consistently pursued program priorities due to the paramount importance of providing reliable, clean water supplies to our Native American communities. The process of securing water supplies is very cumbersome and expensive

and proves to be a costly challenge to many tribes who need their water today. Through this testimony, I will highlight the challenges of securing tribal water rights settlements, and also present potential solutions to be pursued.

I have worked on Indian water issues for over 38 years, during which time NARF has represented tribes throughout the West in water rights adjudications and settlement negotiations. Through our experiences in the past three decades we have encountered one consistent challenge: the federal government's inability to commit adequate financial and human resources to resolving tribal water rights claims. For centuries, the federal government has promoted and subsidized non-Indian water rights to the detriment of vested tribal water rights. In the past four years alone, the Bush Administration spent $2.3 billion on water infrastructure in Iraq, $1.6 billion on water related issues in other countries, and $2.5 billion on water rights claims in the West outside of Indian Country.

The lack of federal commitment to developing tribal water rights is especially troubling considering the conditions we see across Indian Country: unemployment consistently above 50%, health care and education lagging far behind non-tribal communities, limited opportunities for economic development, and infrastructure either old or non-existent. It is not uncommon for tribal members to drive over 50 miles to haul water for their homes, many which still have no access to electricity. It is as if Native Americans fell through the web of the federal system that is charged with ensuring our well-being under the trust responsibility. Significant obstacles exist across our tribal communities, but access to a clean reliable water supply should not be one of them.

As these issues cross state and tribal borders, most tribes and states have created partnerships to address the water problems in Indian country. We recognized we had a common interest in making sure the federal government paid its faire share of the costs of resolving Indian water rights. Despite their best efforts, the federal commitment to Indian water rights settlements remains inconsistent, and the lack of federal funding plagues the settlement process. Coming from a state with a large Native American population, your colleagues, New Mexico Senators Domenici and Bingaman, are familiar with these issues. Recently, in S. 1711, they proposed to create a permanent funding mechanism for Indian water right settlement by using the Reclamation Fund. We strongly urge this Committee to support the New Mexico Senators on this issue. We believe securing a permanent funding mechanism will resolve most of the problems of settling Indian water rights throughout the West.

A. Treaties and the Trust Responsibility

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

By the 1700s the United States government, fueled by settlement pressures, engaged in treaty making with tribes to resolve conflicts as non-Indians moved into Indian lands in the West. The intent of the treaties was to provide protection, stability and peace between the governments. The treaties were a reservation of rights in which the tribes retained specific land and associated water interests the United States government agreed to protect. Congress has recognized the federal government's trust responsibility created by the treaties to protect Indian water rights, and to assist where necessary in the administration of such resources. The Department of Interior has expressly acknowledged its duty to protect tribal water rights. Despite these acknowledgements, the federal government never fulfilled adequately its trust duty to protect tribal water interests. The National Water Commission, in 1973, stated that "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters." Natl. Water Commn., Water Policies for the Future: Final Report to the Resident and to the Congress of the United States, 475 (Govt. Prtg. Off. 1973); see also Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, 46 Nat. Resources L. 399 (2006). For political and institutional reasons, federal policy since the time of treaty making has systematically deprived the tribes of their water rights.

B. State Water Rights and Winters v. United States

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

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

The Supreme Court in 1963 established that Winters water rights are quantified by determining how much water is necessary to irrigate the arable acreage on the reservation. Know as the "PIA" standard, it assumes the federal government set aside Indian reservations with the singular purpose of developing agrarian societies. In recent years, the courts have broadened the purposes behind establishing reservations. In Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), for instance the Ninth Circuit Federal Court of Appeals noted the general purpose of the Reservation was to provide a homeland for the Indians. It claimed this was a broad purpose and must be liberally construed to benefit the Indians. The court supplemented the PIA standard with water for instream flows to support tribal fisheries. In United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), the same court rejected the notion of Indian reservations having one singular agrarian purpose, and also awarded water for agriculture and instream flows. In Gila River, 35 F.3d 68 (Ariz. 2001), the court rejected the singular purpose PIA standard to adopt the multi-purpose homeland standard which provides for livestock watering, municipal, domestic and commercial water uses. Most notably the Supreme Court in Arizona v. California, 373 U.S. 546 (1963), and Menominee Tribe v. United States, 391 U.S. 404 (1968), made it is clear that Indian reservations were intended to serve as homelands where tribes could create livable self-sustaining communities whether the purpose be agrarian or to support other ways of life. These cases demonstrate that each reservation can have several purposes for which it was reserved that require broad interpretation to meet tribal water needs.

C. Federal Water and Tribal Water Rights

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

Moreover, in most cases large-scale water projects in the West were built to the detriment of tribal water rights since they allocate the majority of water available to non-Indian users. The National Water Commission in 1973, for example recognized that the federal government had promoted and subsidized non-Indian water development at the expense of vested tribal rights. The Klamath Irrigation Project in Southern Oregon is a prime example of this. Created in 1902, the project irrigates thousands of agricultural acres by diverting water from the Upper Klamath Lake in Southern Oregon which flows into the Klamath River in Northern California. The project provides subsidized water to non-Indian farmers but disregards senior tribal

water rights. The Klamath River, through its journey from the high desert to the ocean, supports the Klamath, Yurok, Karuk and Hoopa Tribal fisheries. The project does not accommodate water for instream flows for tribal fisheries, but instead diverts water to support the irrigation project. In 2003, the largest fish kill in American history, occurred on the Klamath River when 60,000 salmon died due to lack of adequate water flows after a large diversion was made up river for the Irrigation Project. The federal government has known of the potential environmental consequences of these diversions but refused to alter its course despite its trust obligation to protect Tribal fisheries. The Native American Rights Fund represents the Klamath Tribes in litigation over this situation.

D. Water Problems in Indian Country

a. Water Shortages and Poor Water Quality

The lack of water supply and related infrastructure has plagued Indian communities for over a century. In New Mexico over 40 percent of the people on the Navajo Reservation haul water for domestic use. In Kansas, the Kickapoo Tribe in times of frequent drought is forced to haul water to provide basic domestic water supplies for their members, despite repeated requests for government assistance. Represented by the Native American Rights Fund, the Tribe in 2006, out of frustration, initiated litigation against the federal government for failure to protect its water supply. Poor drinking water quality has created health problems on reservations across the country, and inadequate water supplies have caused tribes to forgo economic and community development opportunities that hinge on water availability. For decades tribes have made repeated requests to the federal government for assistance in resolving their water problems. Although the federal government may provide limited remedial assistance, the federal response is not adequate nor is it made in a timely manner.

In the West, the Tule River Tribe of California has been engaged in settling its water rights on the South Fork Tule River for nearly 40 years. During this time the community lacked an adequate water supply to provide fire protection, housing and economic opportunities to tribal members. The tribal housing authority has 200 pending housing applications, but is unable to act due to the lack of water supply. In 1922, the federal government entered into a water sharing agreement with non-Indian water users downstream on the South Fork Tule River. Although the South Fork Tule River runs through the heart of the Tule Reservation, the Tribe was not a party to the agreement. The agreement left the Tribe without a dependable water supply in the dry months of the year. In 1970, the Tule River Tribe began corresponding with the federal government regarding the precarious status of its water situation and later secured the representation of the Native American Rights Fund. The Tribe made repeated requests to the federal government to appoint a negotiation team to formally initiate water settlement talks. A team was not appointed until Congress directed the Administration to do so in 2000. Recently the Tribe signed a water settlement agreement with downstream water interests. The United States appointed representatives to the negotiations, but at the end of the process would not sign the agreement, citing a lack of statutory authority. After almost 40 years of consistent effort, the Tule River Tribe still does not have an adequate water supply to meet its community needs. Progress is being made but progress is slow. The Tribe is hampered by a lack of federal leadership and financial resources.

These stories demonstrate universal themes. Tribes across the country are unable to provide basic government services or protect the general health, welfare and safety of their communities due to an inadequate water supply. Despite repeated requests made over several decades to the federal government, the tribes' trustee refuses to dedicate the financial and human resources necessary to resolve water problems in Indian country.

b. Degradation of Tribal Cultural and Natural Resources and Climate Change

Over-appropriation of water supplies has resulted in the degradation of tribal trust natural resources. Traditional lifestyles continue to be the primary source of survival and sometimes income for tribal members who rely on subsistence hunting and fishing. Over-allocation of water has diminished the stability of many Pacific Northwest tribal fisheries as there is not sufficient water available to protect fish and human interests. The Klamath River home to the Klamath, Yurok, Karuk and Hoopa Tribal fisheries was once the third largest salmon producing river in the Pacific Northwest. Over-allocation of the water to the Klamath Irrigation Protect has severely reduced the salmon runs making it nearly impossible to continue the Tribal members' fishing way of life.

The effects of climate change further threaten the natural environment of Indian reservations across the country. Climate change threatens to alter the hydrology of

all streams and rivers, affecting water quantity, temperature and resulting quality. Already Native American communities are suffering from the effects of climate change. Native villages in Alaska are being forced to move to higher elevations due to rising sea levels. The fishing tribes of the Pacific Northwest are witnessing smaller salmon runs. The Northeastern tribes ice fishing season has shortened due to increasing temperatures. The Southwestern tribes are witnessing the introduction of invasive plant species depriving native plants of limited water sources. Tribal water rights must be secured to protect our communities from these pressing immediate threats to our way of life.

E. Resolution of Indian Water Rights

The foregoing challenges in Indian Country all connect to water. Their solutions lie in water. Water is sacred. Tribes have proven they are very capable partners and players in water adjudication and settlement frameworks, when they have financial resources to participate meaningfully. Most tribes and their down-stream neighbors prefer to negotiate water settlements since they provide the flexibility to resolve long-term water problems using environmental solutions that are not available in the court system while saving time and money that would have been expended in litigation. Settlements remove water uncertainty by defining the scope and priority date of each water users rights without employing the adversarial roles of litigation. Between 1978 and 2007, Congress ratified the following 20 Indian water rights settlement acts into law:

1. Snake River Water Rights Act of 2004, Pub. L. No. 108-447 118 Stat. 2809 (Nez Perce Tribe).
2. Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478.
3. Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782.
4. Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000, Pub. L. 106-263, 114 Stat. 737.
5. Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, 113 Stat. 1778.
6. Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, 106 Stat. 2237, as amended, Pub. L. No. 104-261, 110 Stat. 3176 (1996), as amended, Pub.L. No. 105-256, § , 112 Stat. 1896 (1998).
7. Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, title I, 108 Stat. 4526, as amended, Pub. L. No. 104-91, § 201, 110 Stat. 7 (1996).
8. Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186, as amended, Pub. L. No. 103-263, §§ 1-1(a), 108 Stat. 707 (1993).
9. Ute Indian Rights Settlement Act of 1992, Pub. L. No. 102-575, title V, 106 Stat. 4600.
10. San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, title XXXVII, 106 Stat. 4600, as amended, Pub. L. No. 103-435, § 13, 108 Stat. 4566 (1994), as amended, Pub. L. No. 104-91, § 202, 110 Stat. 7 (1996), as amended, Pub. L. No. 104-261, 100 Stat. 3176 (1996), as amended, Pub. L. No. 105-18, § 5003, 111 Stat. 158 (1997).
11. Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059.
12. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, title I, 104 Stat. 3289, as amended, Pub. L. No. 109-221, § 104, 120 Stat. 336 (2006).
13. Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469.
14. Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, title II, 104 Stat. 3289.
15. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973, as amended, Pub. L. No. 104-46, 109 Stat. 402 (1995), as amended, Pub. L. No. 106-554, title III, 114 Stat. 2763 (2000).
16. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549, as amended, Pub. L. 102-238, 105 Stat. 1908 (1991).
17. San Luis Rey Indian Water Rights Settlement Act, Pub. L. 100-675, title I, 102 Stat. 4000 (1988), as amended, Pub. L. No. 102-154, 105 Stat. 990 (1991), as amended, Pub. L. No. 105-256, § 11, 112 Stat. 1896 (1998), as amended, Pub. L. No. 106-377, § 211, 114 Stat. 1441 (2000).

18. Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No.97-293, title III, 96 Stat. 1261, as amended, Pub. L. No. 102-497, § 8, 106 Stat. 3255 (1992).
19. Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 7, 101 Stat. 1556, incorporating Seminole Water Rights Compact, reprinted in Seminole Land Claims Settlement Act: Hearings on S. 1684 Before the Senate Select Comm. On Indian Affairs, 100th Cong. 83-122 (1987).
20. Ak-Chin Indian Community Act of 1978, Pub. L. No. 95328, 92 Stat. 409, as amended, Pub. L. No. 98-530, 98 Stat. 2698 (1984), as amended, Pub. L. No. 102-497, § 10, 106 Stat. 3258 (1992), as amended, Pub. L. No. 106-285, 114 Stat. 878 (2000).

There are currently 19 sets of settlement negotiations underway according to Interior Department figures. They are:

1. Aamodt (Pueblos of Nambe, Pojoaque, San Ildefonso & Tesuque).
2. Abousleman (Pueblos of Jemez Zia & Santa Ana).
3. Blackfeet (Blackfeet Tribe).
4. Crow (Crow Tribe).
5. Duck Valley (Shoshone-Paiute Tribes).
6. Flathead (Confederated Salish & Kootenai Tribes).
7. Fort Belknap (Gros Ventre & Assiniboine Tribes).
8. Kerr McGee (Pueblos of Acoma & Laguna).
9. Little Colorado River (Navajo Nation, Hopi Tribe & San Juan Southern Paiute Tribe).
10. Lummi (Lummi Nation).
11. Navajo Nation Colorado River (Main Stream).
12. Navajo-San Juan (Navajo Nation).
13. Soboba (Soboba Band of Luiseno Indians).
14. Taos (Pueblo of Taos).
15. Tule River (Tule River Indian Tribe).
16. Upper Gila River/San Carlos (San Carlos Apache).
17. Walker River (Walker River Paiute Indian Tribe, Bridgeport Indian Colony & Yerington Paiute Tribe).
18. White Mountain (Apache Tribe).
19. Zuni/Ramah (Pueblo of Zuni & Navajo Nation).

Nine tribal water rights settlement bills have been either introduced or are being prepared to be introduced to Congress with a $3 billion combined price tag. Requests for federal involvement in Indian water rights settlements have been constant since 1978 and they are going to continue to increase. The federal government must be prepared to respond with adequate resources to the water crisis occurring in America.

a. Litigation of Indian Water Rights

Historically tribal water rights claims were resolved in the court systems. Federal courts have jurisdiction over tribal water rights claims unless the state has initiated a general stream adjudication on a waterway utilized by a tribe. In such cases, the state court has jurisdiction over tribal water rights claims pursuant to the McCarran Amendment. Lengthy litigation often results in "paper water" rights with no funding for water infrastructure development. Moreover, the aggressive nature of litigation divides the community of water users into adversarial camps and thereby reinforces old political debates over water usage. For all parties, litigation is expensive and can take decades. For these reasons most tribes, states and private water users over time have learned through experience to favor negotiated settlements of water rights.

b. Settlement of Indian Water Rights

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

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

Throughout the West states, tribes and private water users are recognizing settlements as an opportunity to resolve long term water and related environmental problems. No longer are these just Indian water rights settlements, they are basin wide agreements that resolve long standing problems experienced by all water users.

c. Ad Hoc Group on Indian Water Rights

In 1982, the Ad Hoc Group on Indian Water Rights was formed. Its membership consists of the Native American Rights Fund, the Western Governors Association, the Western States Water Council and the Western Business Roundtable (formerly the Western Regional Council). Although the Ad Hoc Group's constituents were pitted against each other in litigation over Indian water rights claims, the Ad Hoc Group came together because they realized they had a common interest in making sure the federal government paid its fair share of the costs of Indian water rights settlements that were negotiated in order to avoid litigation. The Ad Hoc Group felt the federal government should pay its fair share of the settlement costs because they were the primary cause of the litigation between Indians and non-Indians in the West since they had not protected the Indian water rights as trustee for the Indians, but instead had encouraged states and non-Indians to develop and use water as previously explained.

Over the years, the Ad Hoc Group has worked with each Administration and Congress to educate them on the importance of having favorable federal policies on Indian water rights settlements. Their efforts have been successful; 20 Indian water rights settlements have been enacted into law. The experience of the Ad Hoc Group on these issues leads to the conclusion that securing the federal funding to pay for the federal government's fair share of the cost is the most difficult problem to be overcome in an Indian water rights settlement. Each Administration and Congress must work together to come up with the federal government's fair share of each negotiated Indian water rights settlement.

d. Administration

The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims governs the role and contribution of the federal government in such settlements. Generally, under the Criteria and Procedures a tribe requests a federal team to be appointed to settlement negotiations. The federal team is composed of representatives from federal departments and agencies, including the Department of Justice. The team is not allowed to take a position on the settlement during negotiations nor is it authorized to bind the United States to the agreement. Once a settlement agreement is reached, the federal team presents it to the Administration and the Office of Management and Budget (OMB) for an evaluation of the federal liability and a position by the Administration.

The first Bush Administration adopted the Criteria and Procedures without tribal consultation in 1990. After its adoption, it was presented as a flexible internal document that was merely guidelines to provide consistency in the federal participation in settlement negotiations. But to the contrary, the Criteria and Procedures have been used inconsistently to benefit the position of the United States. The following provides more information as to how the United States has used the Criteria and Procedures to limit the federal role in and contribution to Indian water rights settlements.

i. Limited Federal Role

The Criteria and Procedures limit the participation of the federal government in resolving Indian water rights settlements because federal negotiation teams are not allowed to take a position regarding provisions of the settlement agreement or on the entire settlement during negotiations. This process is flawed because it does not allow the parties to adjust their positions to accommodate federal interests and concerns. Only when the negotiating parties, except for the federal government, reach an agreement does the federal negotiation team present the settlement agreement for approval to the Administration and OMB.

Last year, the New Mexico Rural Water Project Act was introduced by Senators Domenici and Bingaman from New Mexico. The bill, S.1711, includes the settlement of the Navajo claims in the San Juan River Basin. Senator Domenici expressed his frustration with the process, "[S]ix years ago, I asked the Interior Department to get involved with negotiations and I was told a team was assigned to participate. Now the department is claiming they weren't involved. That just doesn't make sense to me." See, http://domenici.senate.gov/news/regionrecord.cfm?id=278073&region=RegionNWNM. The Senator's statement highlights the need for more meaningful participation early on in the process by higher-level officials who are vested with the authority to negotiate on behalf of the United States government. It is simply unacceptable to have Indian tribes and others spending precious time and resources over decades negotiating water rights settlements only to be told at the end of the process the Administration opposes the settlement.

ii. Limited Federal Funding

The 1990 the Criteria and Procedures also created several financial impediments to resolving Indian water rights settlements. They created a formula to calculate the United States' liability to tribes for damages to their water resources that is used to determine the federal contribution to the settlement. The calculation includes: the United State's legal exposure; potential litigation costs and judgment obligation if the case is lost; Federal and non-Federal exposure calculated in present value and the likelihood of loss, plus additional costs related to Federal trust or programmatic responsibilities. Too often those factors are narrowly and technically construed by the Administration simply to avoid fiscal costs associated with a fair and honorable settlement.

Yet, consistently, the various Administrations oppose these bills not because of substantive issues but merely because they acknowledge federal wrong doing and legal exposure, and the consequent fiscal outlays. The federal government's opposition to Indian water settlements particularly is politically unwarranted when a settlement is a portion of a larger bill that settles all disputes in a drainage or watershed beyond the narrow resolution of water rights. More often today parties are looking to bundle water settlements with other environmental solutions such as those related to endangered species. These settlements empower local water users to find progressive solutions to resolving long-term water problems in the West and in doing so they generate broad support from all parties involved and local political players. The Administrations should be a part of the support for these bills as opposed to contesting them to avoid fiscal responsibilities.

e. Congress

Congress becomes involved in settlements only after it is finalized and is presented for Congressional approval. Congruently, the Administration takes a position on the settlement. Often settlement bills pass due to the strength of their support in Congress, despite the Administration's opposition. In these cases, parties attempt to work within the bounds of the Criteria and Procedures but are left to work to override the Administration's opposition to the settlement with their delegation. Senator Domenici acknowledge this very problem in a recent statement made regarding his experience with the New Mexico Rural Water Project Act:

> "I am so frustrated with the Office of Management and Budget and its near total stonewalling on our water settlements. This is, I believe, preventing Interior Secretary Kempthorne and his departments from keeping his commitment to make the Navajo settlement a priority—to finally solve the problem. I say we charge ahead and force the administration to be part of the solution."

The Executive Branch, as trustee, is vested with the primary obligation to tribes to solve their water conflicts once and for all times. To the extent the Criteria and Procedures have become a tool of political manipulation, which only frustrates the legal and moral obligations of this Nation, Congress should direct that they be modified and re-interpreted.

F. Recommendations for Fiscal Change—A Permanent Funding Mechanism for Indian Water Settlements

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

The Reclamation Fund is an appropriate mechanism to fund tribal water rights settlements, as part of its mandate is to fund tribal water settlements. With more attention and development, the Reclamation Fund could provide the majority of funding for tribal water settlements. Congress has already recognized the Reclamation Fund for these means, as New Mexico Senators Domenici and Bingaman currently propose to use the Reclamation Fund to develop a water delivery system on the Navajo Reservation.

Historically, Reclamation Fund monies have not been equitably expended on Indian water rights development. Since its creation a minimal percentage of the Fund has used for Indian water rights projects despite its mandate. Once non-Indian water development slowed down, the funds were not appropriated to other projects. Instead, the funds were left un-appropriated not for lack of need, but for lack of political pressure to direct the funds to the tribal communities that needed it. Today, we strongly urge this Committee to request monies from the Reclamation Fund to support tribal water rights settlements.

G. Department of Interior, Indian Water Rights Office

Under the Department's Indian Water Rights Office, there are supposed to be teams of negotiators representing the various interests of the United States, not the least of which is the clear legal fiduciary responsibility owed to federally recognized tribal governments. A decade ago these negotiation teams were quite active and there were a number of serious water rights negotiations ongoing in various parts of the country. Today we see these negotiation teams are continuing to do good work, however, they are struggling because of dwindling resources. The lack of resources makes it increasingly difficult for negotiation teams to fully participate in a meaningful way. This trend could become an obstacle to tribes in negotiating their water rights if not addressed immediately.

H. Funding for Tribes for Negotiations

I also want to point out that negotiating and quantifying their water rights is perhaps one of the most important and long lasting actions that a tribal government can ever undertake. It will bind them and future generations of tribes and will likely forever impact future development on their homeland. It is therefore important for tribes to be able to have the financial ability to undertake the technical studies that are a mandatory prerequisite to any negotiation. Issues such as stream flow data, aquifer analysis, fish and wildlife needs and potential for commercial and residential development all must be undertaken for an Indian tribe to enter the difficult and highly technical arena of water rights negotiations. Funding available to tribes from the BIA for these type of studies has been steadily shrinking in recent years and this putting tribes in a very difficult position. Funding for tribal participation in settlement negotiations must be increased.

I. Conclusion

The federal government has a legal obligation set forth in the treaties to protect and develop Indian water rights. Although the federal government's historical treatment of Indian water rights was less then adequate, this Congress has the opportunity to take a new direction. The future of Indian Nations depend on a consistent commitment from the federal government to develop water supplies and infrastructure in their communities. Many states, in recognition that their water problems are inextricably tied to tribal water problems have already made this guarantee.

Today in this testimony we have set forth suggestions for the future commitment of the federal government to Indian water settlements. Our 38 years of experience working with tribes and states on these issues has convinced us that obtaining funding is the largest impediment to resolving water problems in the West. We request that Congress to remove this obstacle and create a permanent funding mechanism for Indian water rights settlements. Two of your colleagues have already stepped to the plate to suggest the Reclamation Fund as a potential funding source. We urge other Members of Congress to join Senators Domenici and Bingaman to make the federal commitment consistent by using the Reclamation Fund as a permanent funding mechanism for Indian water settlements. In doing so, this Congress can join their constituents to help resolve water problems in the West.

We thank the Committee for providing us with the opportunity to discuss these issues. We look forward to working together to bring clean reliable water supplies to Indian Country.

Mrs. NAPOLITANO. Thank you so very much for your testimony, Mr. Echohawk, and we will move on to Mr. John Sullivan.

Before I move forward, I just wanted to let you know that, while I am the only one here—Mr. Miller was on the Floor just now speaking, Mr. Baca is at the farm conference on the Senate side, and Mr. Costa is in a markup, but their interest is very heavy in these issues. So while they may not be present—I am sure my colleagues on the other side are the same way—they a have a great interest in this. So your testimony here is very valuable and will be very seriously considered by the Subcommittee.

So now, thank you, we move on to Mr. John F. Sullivan, general manager of the Salt River Project in Phoenix, Arizona.

STATEMENT OF JOHN F. SULLIVAN, GENERAL MANAGER, SALT RIVER PROJECT, PHOENIX, ARIZONA

Mr. SULLIVAN. Thank you, Madam Chairwoman. I appreciate the promotion that you just gave me, but I am the associate general manager of the Water Group at SRP. I just want to make that clear for my boss.

I also serve on the Board of Directors of the National Water Resources Association and on the Advisory Committee for the Family Farm Alliance. Both groups have a definite interest in this very timely issue that you have raised today.

The Salt River Project operates seven dams and reservoirs that impound runoff from multiple watersheds and deliver about a million-acre feet of water annually to municipal, industrial, and agricultural water users in what is now the Phoenix metropolitan area. We also operate a number of deep wells that provide drought protection for the Phoenix area and serve about 900,000 electric customers in the Phoenix metropolitan area.

Over the past four decades, SRP has worked with numerous tribes and stakeholders to resolve water rights disputes in a manner that benefits both the Indian communities and their non-Indian neighbors. As you can see from the map that is projected, we have reached settlements with the Salt River Pima-Maricopa Indian Community, the Fort McDowell Yavapai Nation, the San Carlos Apache Tribe, and the Zuni Indian Tribe.

Our commitment to the negotiating process has yielded significant successes for us, and today's hearing, combined with these past experiences, is a great way toward meeting the challenges of future quantifications and settlements.

Just last month, in Arizona, we celebrated the completion of the Gila River Indian Community and the Tohono O'odham Nation water rights settlements.

We want to give our thanks to you, Chairwoman Napolitano, also to Congressman Grijalva, and Ranking Member McMorris Rodgers for the leadership you have provided in steering those settlements through the Congress. We do very much appreciate that.

We also appreciate the efforts of Senators Kyl and McCain and the Gila River Indian Community in providing that settlement agreement, a very complicated one.

I am very pleased to report that we continue to work diligently toward completion of other settlements of water claims, particularly with the White Mountain Apache Tribe, who have claims to water from the Gila and Little Colorado River Basins, as well as claims of the Navajo Nation and the Hopi Tribe. We have also initi-

ated discussions with the Yavapai Apache Nation on the Verde River watershed.

Our experience has shown firsthand that productive solutions and mutual benefits can occur when tribes and other stakeholders work collaboratively. Most important among those benefits is water supply certainty for not only the Indian tribes but also for the non-Indian community.

The negotiation process is also beneficial because it moves away from often costly and contentious litigation. The obvious primary benefit of avoiding litigation is the savings of money and resources that can be used for a more useful purpose.

In addition, we have seen improved communication and trust occur between the various parties to these settlements.

While progress on settling Indian water rights claims has been on many fronts, there are still many outstanding disputes that must be resolved. I have a few thoughts about what must be done to solve those.

First, water supply is at the heart of every settlement agreement. We have had the advantage, in Arizona, of having Central Arizona Project water available to be part of the equation to solving these problems.

As we move forward with other settlements, it is necessary to be creative and to find other water resources so that all of the parties can benefit from a settlement.

Additionally, a collaborative and trustworthy process needs to be maintained in future settlements. We particularly encourage the administration to use the Office of Indian Water Rights, that they be actively involved early, and consistently throughout the progress.

Last, obviously, money. Money is very important and also in short supply. So I would encourage that this Committee seriously consider creative ways to bring money to the table for these settlements.

Madam Chairwoman, I thank you for the time you have allowed me to address the Subcommittee, and I would be happy to answer questions.

[The prepared statement of Mr. Sullivan follows:]

Statement of John F. Sullivan, Associate General Manager, Salt River Project

Madam Chairwoman and members of the subcommittee, my name is John Sullivan and I am the Associate General Manager, Water Group, at the Salt River Project (SRP). In my capacity of Associate General Manager, I also serve on the board and advisory committee of the National Water Resources Association (NWRA) and the Family Farm Alliance, respectively. Thank you for the opportunity to testify today before the subcommittee on Indian water rights settlements. We appreciate the subcommittee's attention to this timely issue that is important to SRP, its customers, and water users throughout the West.

Over the four past decades, SRP has worked with numerous tribes and stakeholders to resolve water rights disputes in a manner that benefits both Indian communities and their non-Indian neighbors. Attached to my testimony is a map that shows the location of the settlements we have been involved with. Our commitment to the negotiations process has led to significant successes, and today's hearing combined with our past experience is a great step toward meeting the challenges of future quantifications and settlements.

Just last month in Arizona, we celebrated the completion of the Gila River Indian Community and Tohono O'Odham Nation water rights settlements, which were passed as part of the Arizona Water Settlements Act in 2004. Completion of these

settlements is a landmark achievement, and I would like to thank Congressman Grijalva, Chairwoman Napolitano, Ranking Member McMorris-Rodgers, and other members of the Natural Resources Committee for your part in initially passing and subsequently amending the Act. In addition, I would again like to thank Senators Kyl and McCain, the Gila River Indian Community, the Tohono O'Odham Nation, the State of Arizona, the Central Arizona Water Conservation District, the City of Phoenix and all of the others that were instrumental to the success of these settlements.

I am also pleased to report that we are continuing to work diligently towards the completion of the settlement of the claims of the White Mountain Apache Tribe to surface water and ground water from the Gila and Little Colorado River Basins, as well as the claims of the Navajo Nation and the Hopi Tribe to surface water and ground water from the Little Colorado River Basin and to water from the Lower Colorado River. In the near future, we hope to culminate our negotiations with these tribes into settlement agreements that can then be presented to the Congress for its approval.

The Salt River Project

SRP is composed of the Salt River Valley Water Users' Association ("Association") and the Salt River Project Agricultural Improvement and Power District ("District"). Under contract with the federal government, the Association, a private corporation authorized under the laws of the Territory of Arizona, and the District, a political subdivision of the State of Arizona, provide water from the Salt and Verde Rivers to approximately 250,000 acres of land in the greater Phoenix area. Over the past century, most of these lands have been converted from agricultural to urban uses and now comprise the core of metropolitan Phoenix.

The Association was organized in 1903 by landowners in the Salt River Valley to contract with the federal government for the building of Theodore Roosevelt Dam, located some 80 miles northeast of Phoenix, and other components of the Salt River Federal Reclamation Project. SRP was the first multipurpose project approved under the Reclamation Act of 1902. In exchange for pledging their land as collateral for the federal loans to construct Roosevelt Dam, which loans have long since been fully repaid, landowners in the Salt River Valley received the right to water stored behind the dam.

In 1905, in connection with the formation of the Association, a lawsuit entitled Hurley v. Abbott, et al., was filed in the District Court of the Territory of Arizona. The purpose of this lawsuit was to determine the priority and ownership of water rights in the Salt River Valley and to provide for their orderly administration. The decree entered by Judge Edward Kent in 1910 adjudicated those water rights and, in addition, paved the way for the construction of additional water storage reservoirs by SRP on the Salt and Verde Rivers in Central Arizona.

Today, SRP operates six dams and reservoirs on the Salt and Verde Rivers in the Gila River Basin, one dam and reservoir on East Clear Creek in the Little Colorado River Basin, 1,300 miles of canals, laterals, ditches and pipelines, groundwater wells, and numerous electrical generating, transmission and distribution facilities. The seven SRP reservoirs impound runoff from multiple watersheds, which is delivered via SRP canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area. SRP also operates approximately 250 deep well pumps to supplement surface water supplies available to the Phoenix area during times of drought. In addition, SRP provides power to nearly 900,000 customers in the Phoenix area, as well as other rural areas of the State.

Past Arizona Indian Water Rights Settlements

Salt River Pima—Maricopa Indian Community—The Salt River Pima-Maricopa Community reservation consists of approximately 53,000 acres of land on the northeast corner of the Phoenix metropolitan area, at the confluence of the Salt and Verde Rivers. In the early-1980's, as part of the ongoing water rights adjudication in the state court, the Community and the United States asserted claims to approximately 185,000 acre-feet of water annually from the Salt and Verde rivers. Negotiations involving the United States and numerous municipalities and water districts, including the Salt River Project, began in the mid-1980s and eventually led to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988. The settlement resolved the concerns of both the Community and the other settling parties by securing 122,400 acre-feet annually of a dependable water supply, and the funds needed to utilize the resource, in exchange for the Community agreeing to waive any additional water rights claims or claims for money damages.

The Salt River Project was integrally involved in negotiating this settlement and SRP water and facilities are an important piece of the final agreement. First, to

allow the Community to utilize more of its historic entitlement from the Salt River, the settlement requires that a portion of the New Conservation Space behind Roosevelt Dam, completed in 1995 and now operated by SRP, be made available for the storage of 7,000 acre-feet of the Indian Community's early entitlement to water from the Salt River. The agreement also entitles the Indian Community to divert up to 26,000 acre-feet of SRP stored water annually for use on the reservation lands, depending on the amount of water stored in SRP reservoirs on May 1 of each year.

Fort McDowell Yavapai Nation—The Fort McDowell Yavapai Nation, formerly called the Fort McDowell Indian Community, has a reservation 23 miles northeast of Phoenix. The Verde River runs through the reservation. In the early 1980s, the United States asserted claims to water on behalf of the Community in the amount of 31,500 acre-feet per year plus instream flows. Both the United States and Community indicated that they intended to assert larger claims in the future. The Fort McDowell Indian Community Water Rights Settlement Act of 1990 was negotiated between the Community and several non-Indian parties, including SRP, and was signed into law in November of 1990. In exchange for a waiver of the Community's claims for water rights or injuries to water rights, the Act provides an annual entitlement of 36,350 acre-feet of water to be used on the Community's reservation. In addition, the Act authorized the federal appropriation of $23 million and a $13 million loan pursuant to the Small Reclamation Projects Act.

SRP was actively involved in negotiating the Fort McDowell Indian Community Settlement. The settlement agreement requires that SRP make available 3,000 acre-feet of storage space behind Bartlett and Horseshoe dams, to allow the Community to regulate and better utilize its historic entitlement to the diversion of water from the Verde River. As part of the agreement, the Indian Community is also entitled to divert up to 6,730 acre-feet annually of SRP stored water from the Verde River, depending on the amount of water stored in SRP's reservoirs on May 1 of each year, and SRP provides a minimum of 100 cfs except during extreme droughts.

San Carlos Apache Tribe—The San Carlos Apache Tribe has a reservation located in east-central Arizona, near the city of Globe. The United States filed claims in the Gila River Adjudication on behalf of the Tribe for over 292,000 acre-feet of water annually from the Salt and Gila rivers, their tributaries and ground water. In October of 1992, Congress enacted the San Carlos Apache Tribe Water Rights Settlement Act. The Act recognized the Tribe's right to divert 7,300 acre-feet annually from the Salt River or from the Black River, which is a tributary to the Salt River upstream from SRP's reservoirs, with a priority date of 1871. In addition, the Act allocated to the Tribe approximately 64,000 acre-feet annually from the Central Arizona Project and recognized the Tribe's right to use water from all on reservation tributaries, as well as groundwater beneath the reservation. In exchange for these sources of water and the Settlement Act's establishment of a$38.4 million tribal trust fund for on-reservation economic development, the Tribe agreed to waive its claims on the Salt River and its tributaries. The Act did not resolve the San Carlos Apache Tribe's claims to water from the Gila River, however, and the Tribe continues to assert these claims in the adjudication currently pending in the Arizona courts.

SRP was heavily involved in the negotiation of this settlement, which required almost a decade to complete. Other major participants included several major cities in Maricopa County, irrigation districts and industrial users in central Arizona.

Zuni Indian Tribe—The Zuni Heaven Reservation, located in eastern Arizona in the Little Colorado River Basin, was authorized by Congress in legislation enacted in 1984 and amended in 1990. The purpose of the reservation was to recognize longstanding religious and sustenance activities by the Tribe on these lands along the Little Colorado and Zuni rivers in the vicinity of St. Johns, Arizona. In 2003, Congress enacted the Zuni Indian Tribe Water Rights Settlement Act. The Act confirmed the terms of a settlement agreement entered into among the Tribe, the United States, the State of Arizona and several local water users and utilities, including SRP. The settlement agreement permanently resolved the Tribe's water rights claims and provided resources to restore wetlands and the Sacred Lake on the Zuni Heaven Reservation.

To restore the wetlands and lake on the Zuni Heaven Reservation for its religious and sustenance needs, the settlement act authorized the Tribe to acquire the rights to up to 3,600 acre feet of surface water annually, from willing sellers in the Norviel Decree area of eastern Arizona. The Tribe also was permitted to pump a maximum of 1,500 acre-feet of groundwater per year to supplement surface water during times of shortage. The Settlement also established the Tribe's right to existing surface water supplies in the amount of 1,935 acre-feet annually. The Zuni Indian Tribe Water Rights Settlement Act provided federal funding for the acquisition of water rights, and for facilities construction and related costs, in the amount of $19.25 mil-

lion. The State of Arizona and the Arizona Game and Fish Commission also provided a total of $6.6 million in funding for the settlement for wetland restoration and enhancement of instream flow and riparian areas. Further, SRP contributed $1 million toward providing a water supply for the Sacred Lake and the reestablishment of riparian vegetation on the reservation. In exchange for these benefits, the Zuni Tribe and the United States on its behalf agreed to waive their objections to all existing uses of surface water and groundwater in the Little Colorado River Basin, as well as objections to certain future uses, as outlined in the agreement.

Gila River Indian Community—The Gila River Indian Community's Reservation encompasses approximately 377,000 acres of land in central Arizona. Most of the lands within the Reservation are located within the Gila River watershed, while a small portion of the lands lie within the Salt River watershed, west of Phoenix and several miles downstream from SRP's reservoirs. In the Gila River Adjudication, pending before the Arizona courts, the Indian Community had asserted claims to water from Salt and Gila Rivers, their tributaries and ground water totaling more than 2.7 million acre-feet annually. As I have mentioned, the Gila River Indian Community Water Rights Settlement was passed as title two of the Arizona Water Settlements Act in 2004. The settlement resolves all outstanding water related litigation between the Indian Community and the other settling parties, and settles, once and for all, the water rights of the Indian Community to surface water and ground water in the Gila River Basin.

Under the settlement agreement, the Community is entitled to an average of 653,500 acre-feet of water annually from a number of sources. Of that total, up to 35,000 acre-feet annually will come from SRP stored water, and up to an additional 328,500 acre-feet of water from the Central Arizona Project (CAP). Under specified conditions, portions of the Community's CAP water will exchanged with SRP for the storage of the same amount of Salt and Verde River water in SRP reservoirs. The Arizona Water Settlements Act also provided federal funding in the amount of $200 million to be used for the rehabilitation of the Community's existing water system, for rehabilitation of past subsidence damages on the reservation, to defray some of the operation, maintenance and replacement costs of the CAP water to be delivered to the Community, and to implement a program to monitor water quality on the reservation.

Benefits of Settlements

Madam Chairwoman, as you can see, the Salt River Project has a history of negotiating and settling Indian water rights disputes, and we have seen the productive solutions and mutual benefits that can occur when tribes and other stakeholders work collaboratively.

Most important among the benefits is water supply certainty, which is a fundamental outcome of any water rights settlement. In order to realize this certainty, it is critical that settlements contain comprehensive waivers of water rights claims. The assurance of a consistent long-term supply gives all water users the confidence to invest in conveyance infrastructure or make capital expenditures, such as permanent crops or commercial and residential development, needed for the most effective and valuable utilization of their water supply.

The negotiation process is also beneficial because it moves away from often costly and contentious litigation. In the courts, water rights claims can be, and have been, contested for decades. The obvious primary benefit of avoiding litigation is the savings of money and resources that can be used for a more useful purpose. However, there can be additional benefits of settling water rights claims through the settlement process. Securing a water entitlement through litigation will not of itself provide the funding or assistance needed for tribes to put their water to use. By working through the settlement process, a framework can be put in place to ensure that an entitlement results in delivered water, rather than only a paper water right.

In addition, the improved communication and trust produced by a negotiated settlement has allowed Indian communities and their neighbors to improve water management regionally. The Gila Indian Community settlement is an example of how, by maintaining a positive relationship, opportunities have become available for cities to increase water supply by entering into lease and exchange agreements with the Indian Community for presently unused water resources. When parties are treated fairly and have a stake in the solution, these types of arrangements, which maximize the benefit of our water resources, are more readily attainable.

Continued Challenges and Recommendations:

While progress on settling Indian water right claims has been made on many fronts, there are still outstanding disputes in Arizona and throughout the West that tribes and water users are working to address. In fact, some of the most difficult

issues associated with all Indian water rights settlements are becoming even more complicated. Moving forward, there are several important challenges that need to be given attention.

Process—While each settlement negotiation has its own characteristics and unique challenges, the themes of collaboration and a trustworthy process, and the goals of certainty and a definitive resolution can remain the constant. SRP has found that it takes an inclusive process to produce the kind of creative solutions needed to settle complex and wide-ranging water rights claims. Involving members of the federal team, such as Interior's Office of Indian Water Rights, at an early point in the process is essential to a favorable outcome.

Water Supply—Many water basins in the West are already over-appropriated. As growth and drought persist, constructing water budgets for future settlements that are operable for all the parties involved becomes increasingly complex. The availability and dedication of Central Arizona Project (CAP) water was instrumental in several of the more recent Indian water rights settlements in Arizona. It is important that water providers and the federal government continue to take advantage of opportunities to develop new sources of water and stretch existing supplies. Without incremental growth of supply and increased conservation, the ability to find water to dedicate to future Indian settlements, without injuring other parties, will become limited.

Funding—Funding is often needed to build or improve water infrastructure needed by tribes to deliver and beneficially use the water they are entitled to under a settlement. As water users throughout the West know, state and federal budgets are tight and relying on the appropriations process to fund projects can be uncertain. In many cases, the inability to fully fund projects prolongs construction and raises the total price.

In response to the questions posed in my invitation to testify, I believe having a source of funding dedicated to Indian water rights settlements would greatly improve the opportunity for successful agreements moving forward. I also recognize that this is easier said than done. Non-traditional funding sources may be needed to meet the financial need, and the water and tribal communities need to engage this question, along with the federal and state governments, to ensure that there is an ability to pay for needed features of future settlements.

Support from the Department of the Interior—As I have already mentioned, the Secretary of the Interior's Office of Indian Water Rights is important for technical support and it is important for it to be involved early and consistently throughout the process. I urge the Interior Department, in this and subsequent administrations, to continue engaging in negotiations and making Indian water rights settlements a priority.

Madam Chairwoman and Members of the Subcommittee, thank you once again for the opportunity to testify before you today. I would be happy to answer any questions.

Mrs. NAPOLITANO. Thank you, Mr. Sullivan, and we could not agree with you more. There are a number of questions that come to mind in reading the testimony from all of you, insofar as it was a little hurriedly because there was a lot of reading to do. But the message seems to be the same: There has not been adequate focus on addressing Indian water rights, whether it is the funding, whether it is the teams, you know, it is all in one, from looking at the testimony.

But in looking at what is going to be proposed, in establishing an Indian Water Rights Committee, would that be not setting another bureaucratic group in motion? Would that be able to handle it because if you do not fund it, then it is not going to do you any good, or if you fund it only partially? Would any of you address that, please.

Mr. BOGERT. Madam Chairwoman, are we talking about the establishment of the Water Rights Office?

Mrs. NAPOLITANO. Correct. That is correct.

Mr. BOGERT. A wonderful question. Let me just clarify what our intentions are. We have had, for quite a while, before even this ad-

ministration came into office, the Secretary's Indian Water Rights Office, which has been a function of the Department of the Interior, and it has been funded through contributions by several of the bureaus and agencies that make up the Department.

What we indicated in our testimony is that what we are developing now is the formalization of this office. It is a functioning office, and it has been referred to by some of the other testimony now. Pamela Williams is its Director. It is the focus by which we are coordinating presently 19 outstanding water rights settlements, 13 implementation teams.

Our point is that we think that it is not necessarily more bureaucracy but a better function within the Department if we decide, and if the Secretary agrees, that we ought to formally make it a part of the Secretary's office and to provide the aura and the leadership out of the Secretary's office to help coordinate what the administration's position will be on these settlements.

Our experience is that we have many hallways at Interior to coordinate in terms of trying to develop a common position on water rights settlements. There was a lot of discussion today about the Bureau of Reclamation. We work very closely with the Assistant Secretary for Indian Affairs, the Bureau of Indian Affairs.

We have several constituencies, Madam Chairwoman, at the Department of the Interior that we must coordinate with on a daily basis. Also, I would say we coordinate with the Justice Department. We also coordinate with the Office of Management and Budget outside of the Department of the Interior.

Mrs. NAPOLITANO. How would that help resolve the issue that they have clearly pointed out in their testimony, and that is that there is not enough funding to be able to carry it because some of them go back 30, 40 years?

Mr. BOGERT. Madam Chairwoman, the issue of funding, we think, is an outstanding issue in its whole orbit. We acknowledge that that is an issue. We had a meeting that involved—Susan was there, John was there, and several of the folks on the ad hoc working group in the Secretary's office—almost a year ago when this issue came up. I think we have done an excellent job of identifying this as a key issue.

I think, Madam Chairwoman, in our testimony when we talk about formalizing the Secretary's Indian Water Rights Office, it is our effort at making sure that, at least as far as the Department of the Interior is concerned and the Secretary and future Secretaries of the Interior are concerned, that Indian water rights settlements deserve the priority that they are entitled to at the Department of the Interior, and Secretary Kempthorne would concur with that assessment.

Mrs. NAPOLITANO. Would this then require legislation to either clarify or be able to put extra teeth so that we would be able to put not only the funding but the emphasis and the focus on it?

Mr. BOGERT. Madam Chairwoman, I think the function of how we manage our settlements—I will just say, with our team here in committee—we are fiercely proud of the work and the coordination that we have done. I would say, and I think my colleagues here on the panel would concur, we have never had, if you will, more atten-

tion on water rights settlements maybe since Indian water rights have been in existence. We think, and we have discussed this——

Mrs. NAPOLITANO. Let me put it another way. What will help expedite those water rights that have been out there for a long time and take care of those that are coming before us, which nine apparently will be coming before us shortly, and then take care of some of the other issues that they have faced, address them before they become issues and languish another 20 or 30 years?

No aspersions on your staff, but, again, we go back to the issue of funding and everybody working on the same page to be able to address those rights and address them timely so that they will not have to go through the system but come to Congress for resolution?

Mr. BOGERT. Madam Chairwoman, the very conversation we are having today is the first start and the first step. We may end up having over $4 billion in tribal water rights settlements up here on Capitol Hill. This very conversation about how we are going to try to stay ahead of the curve with the tight fiscal restraints that we have; we think that this is the first step in a very good conversation and a very relevant conversation.

Mrs. NAPOLITANO. I am glad to hear you are finally having a conversation, which probably has been long coming but, again, what do you need from us—any clarification of the guidelines, any support to be able to clarify the Winters mandate? What is it that you need to be able to not have that again become another decade or two before we again have to look at it and begin to say, "Well, we looked at it 10 years ago, 20 years ago, and we are still in the same boat?"

Mr. BOGERT. Madam Chair, I think the first step is a healthy debate with the administration and with our friends in Congress about whether we can reconcile perspectives that these settlements—this is my view——

Mrs. NAPOLITANO. Are you talking about OMB? Let us call it what it is.

Mr. BOGERT. This, I think, is the policy issue that we will have to work with you in Congress on. There is one school of thought that, as these settlements mature, that often it is the personalities of the Members of Congress and the seniority of the Members of Congress that ultimately are the indicia of whether or not a settlement may succeed.

There is another school of thought, and this is what we talk about all of the time at Interior, and we are discussing this with the Secretary now, whether there should be a more programmatic, institutional approach to managing the settlements. Madam Chair, if we had had this conversation a year ago, with your leadership and this discussion, we would have had maybe one and a half settlements that would be ready to have attracted the attention of Congress. We may have 11.

So we have gone from one and a half to 11 in the course of one year for factors that are very difficult to try to handicap, some of which, and Susan is here, the work of the Montana Compact Commission has to be completed; therefore, we may be reviewing Montana compacts.

We think that the ebb and flow of these negotiations, and this was our experience back home, sometimes you have movement and

momentum in discussions that are warranting of immediate attention and immediate action on Capitol Hill to authorize, confirm, and ratify these agreements. We happen to be in an environment today, in 2008, where we have a lot of settlements, many settlements, more than some of us have ever seen before, that are ready for attention, and, Madam Chair, it is very difficult, I think, to predict the outcome of these negotiations.

I can tell you that we have attended to these, we understand where these settlements are, and we have discussed the 19 that we are having to manage. We are just hopeful that the summer brings great energy and enthusiasm and longevity to the work that we can pour into these.

Mrs. NAPOLITANO. Well, I appreciate your candor, and anything we can do to help, sir. That is one of the things that has been evident in this Subcommittee in the past. I have been on the Subcommittee for almost 10 years, and I have seen very few of them having to come before us. When I am beginning to look at the background, that they have to come to Congress for resolution, something is wrong.

I have only been the Chair a year and a half. My staff, because of what has been transpiring in the Subcommittee, brought to my attention that we were not dealing with water rights for the Native Americans, and this was one of the reasons that we began to delve into it. We look forward to being able to work with you, sir, in being able to help you in any manner, shape, or form, whether it is through legislation or otherwise, to be able to move this forward, and I would like to recognize Mr. Baca for a short opening statement.

STATEMENT OF THE HONORABLE JOE BACA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BACA. Well, thank you very much, Madam Chair. First of all, I appreciate your leadership and your sincerity in trying to deal with the problems that affect Native Americans, especially as we look at water, and I know what it is like because currently I am serving on the Agriculture Committee, and we are going through a conference committee, and one of the things that I have done is to make sure that I have put in the additional funding for Native American institutions as well that should be receiving the additional funding.

As I realize that not only do we look at northwestern New Mexico, and I am familiar with New Mexico because I am originally from New Mexico and that area, so I know that water is important. It is not a strange problem to us, especially in the—where we have had a lot of problems, and we know very well that you need good quality of water not only for individuals in that area, and that is why the settlements are very important.

I appreciate the endeavors that the Chairwoman has taken to make sure that we look at the problem of securing enough funds to implement water settlement agreements and learning how reclamation funds can also help.

That becomes very important because everyone should have access to water in our communities. It does not matter where we are at. Whether we are on a reservation or off the reservation, it is im-

portant that we do what is necessary, and it takes leadership like our Chairwoman here, who has really taken on the leadership, under Water and Power, to address this issues. I thank the Committee for coming and stressing the importance of what it means to your area and what it means for other tribal members that we will hear from the in the future as well. Thank you.

Mrs. NAPOLITANO. Thank you, Mr. Baca. Could I have any of you answer any of the questions that I had to Mr. Bogert before? Any comments on that?

Ms. COTTINGHAM. If I might, Madam Chairwoman, I guess I would just like to emphasize, I think the two main issues that we have tried to identify for you here today are, one, the long and sometimes difficult negotiation process that the parties go through to try to get to these settlements and some of the difficulties that the states and tribes have had getting the Federal folks engaged at an early stage.

I think it is very intimately tied to the funding issue because we do not have a permanent settlement fund and because these settlements, as they come to Interior, compete with other programs, I think sometimes the Federal groups come to the table with a mindset that, you know, how much are we going to have to spend here, rather than coming with the parties and trying to figure out what it is we are trying to solve. What are the difficult allocation issues? Let us be creative, and then we will worry about how we are going to fund it later.

So I guess what we are trying to say is that the whole negotiation process and the funding; they are sort of a cart-and-horse issue, but I think if we can move forward on the funding issue and try to get something that would perhaps relieve the pressure on the Federal government to—I mean, you know OMB. As you pointed out, to try to take a narrower view of what Federal obligations are going to be, then we can really start to identify, are we going the enlarge a reservoir? Are we going to do some conservation measures, and, if so, then what is it going to take to take?

I would say for the record that the states have recognized that we need to be a part of the funding solution. Montana has spent over $50 million on the settlements that we have so far, including all of the administrative money to get these done. So the states are putting up money as well.

So I think it is sort of a difficult issue, but I think, if we could get some resolution and get a permanent fund, it would relieve some of the pressure on the Federal folks to come in and sort of juggle the whole funding issue and really come in with some creative ideas.

Mr. SULLIVAN. Madam Chairwoman, I would agree that if there was a dedicated fund for Indian water rights settlements, that would help enhance the discussions.

I can also say, from our experience in the negotiations with the Gila River Indian Community, we started in those negotiations in 1988. Serious negotiations did not take place, though, until probably late in the 1990s, and what it took was a commitment from the then-Secretary of the Interior, Bruce Babbitt, to the negotiations, and the addition of the Federal negotiating team actively at the table added the kind of synergy we needed to complete those

negotiations. Also, the fact that you had a Senator from Arizona, John Kyl, in partnership with the Secretary of the Interior, saying, "You need to resolve your differences on water rights and how the settlement would be implemented," was very helpful. So the active involvement of the administration at the table added to those negotiations.

Similarly, in our negotiations with the White Mountain Apache Tribe, we see a similar dedication by the Federal negotiating team. Their active involvement is very helpful in kind of bringing issues to closure.

Mrs. NAPOLITANO. Thank you. Mr. Echohawk?

Mr. ECHOHAWK. Madam Chairwoman, I would just like to emphasize a point that our friend, Michael Bogert, made, and that is that he has got pending requests for another 13 additional negotiation teams besides the 19 that he has going, and I think that, again, illustrates the magnitude of the issue that we still have before us, and for the Department to be able to staff those requests, put together 13 more negotiation teams, they are going to need more support over at the Office of Indian Water Rights.

Again, as both Susan and John have said, before we really get serious in those negotiations, we are going to have to have some light at the end of the tunnel on the funding issue, or all of those negotiations are going nowhere.

Mrs. NAPOLITANO. Thank you so very much. I am going into an area where it is the inconsistent application of the criteria and procedures, so, Mr. Bogert, you are on my hot seat right now.

There were two comments that were repeated in almost every testimony for today's hearing, and the first is, with your appointment as Secretary's Water Counselor, the level of Federal participation in the process has improved significantly, so that is to your credit, sir, a testament to your water team's hard work and diligence, and you are to be commended.

The second set of comments deal with the criteria and procedures, and I completely agree with you, Mr. Bogert, that we should not have a cookie-cutter formula for the settlement. However, these were published to provide a consent standard, and I do not believe that standard has been applied to the criteria and procedures in their implementation in a consistent or transparent manner.

For instance, when we look at cost share, you are currently requesting a "proportionate" cost share. What was the cost share for Arizona water settlement and the Snake River settlement?

Mr. BOGERT. Madam Chair, first of all, let me clarify. We have been engaged because Secretary Kempthorne has directed this engagement. As a former Governor who was part of the Nez Perce agreement—John Echohawk's firm represented the Nez Perce Tribe—we came into these positions at Interior, once the Secretary was confirmed, with, we think, as transparent an understanding of the importance of these settlements.

So the Secretary knows firsthand, from having helped and led the negotiations back home, how important these are. I needed to make sure that the Committee understood that that is a part of our mission.

Mrs. NAPOLITANO. Understood.

Mr. BOGERT. Second, Madam Chairwoman, by the time this administration leaves office, we should have four separate settlements with financial commitments of almost $3 billion to the water rights settlements.

I think, to the extent that the criteria and procedures and discussions and appropriate examination of just exactly how the criteria and procedures have been involved to provide the framework for those settlements and those negotiations, first, our view is that the criteria and procedures are not a rigid, inflexible, unyielding framework by which we evaluate what the administration's positions will be on settlements.

I think, if one were to take a look at the criteria and procedures, the criteria and procedures indicate that, for example, part of our evaluation, to the extent that tribal governments can achieve economic self-sufficiency as a result of a settlement, to the extent there is economic value, to the extent that there is a breadth of peace in the valley, if you will, we think that the criteria and procedures are not an inflexible means by which we view through the lens of the United States what our position should be.

But that having been said, Madam Chairwoman, part of our issue and part of our debate around the criteria and procedures is what weight of authority should they be given? Are there some parts of the criteria and procedures that should carry more importance in terms of the hierarchy? We would say that is a wonderful discussion to have. We have them all of the time, Madam Chairwoman, because we view each settlement separately, we view each settlement as a means by which tribal governments are achieving a means to an end, economic self-sufficiency, at times, being part of them.

But, Madam Chair, our view has never been that the criteria and procedures are a rigid, inflexible means by which we negotiate. Indeed, we would say that it brings discipline to the discussions, it brings sequence to the issues that need to be negotiated, and a means by which we can focus on the key issues of the moment, which internally we must debate in the administration formally before taking a position on legislation.

Mrs. NAPOLITANO. I know, but you still have not answered my question: What was the cost share for Arizona water settlement and the Snake River settlement?

Mr. BOGERT. I believe the State of Idaho, in terms of the non-Federal participation——

Mrs. NAPOLITANO. I am not talking state; Federal share.

Mr. BOGERT. The Federal share? I am sorry, Madam Chair.

Mrs. NAPOLITANO. Federal and state, both.

Mr. BOGERT. Snake River was, I believe, close to $200 million. The programmatic obligations are $170 million. There was no direct state cost share.

Madam Chair, part of the individual circumstances for that particular settlement, and I know it well because we were involved in the negotiations back home in Idaho, is that fundamentally that settlement was driven by considerations under the Endangered Species Act—and the expense of imposition of the ESA on the good people of Idaho.

In terms of two of the Section 6 ESA components to that settlement, the State of Idaho was obligated to commit a 25-percent cost share in order to enter into the ESA constructs that were part and parcel of that settlement, and these were in-kind services and programmatic obligations that were assumed by the State of Idaho, which is an appropriate consideration, under the criteria and procedures.

Mrs. NAPOLITANO. Well, we have another vote. I would certainly ask that you submit, and you did not answer the one about the Arizona water settlement, but you can put that in writing for me, please submit to the Subcommittee the documentation on how that was arrived at, please, so that we can better understand.

Mr. BOGERT. It would be our pleasure.

Mrs. NAPOLITANO. I would appreciate it. I have got 12 minutes to get to the Floor. Just one vote, which means I have got to travel five minutes to give a vote and five minutes back. I will move forward because I have got, at least, another five minutes.

Mr. Echohawk and Ms. Cottingham, from a tribal and state perspective, how has the implementation of the criteria and procedures changed the cost share for Federal and state governments, and could you give us some examples, as briefly as you can so I can get to a vote?

Ms. COTTINGHAM. Madam Chairwoman, I guess when we talk about the inconsistent application, you know, for a state like Montana, some of the tribes do not have very rich water resources. They have some poor soils. They do not have a lot of water initially, and when the OMB and the Interior Department analyze what the potential legal exposure of the United States might be, which is, really, their main part of how they analyze these settlements, places like Montana really get the short end of the deal.

I appreciate the fact that, in Nez Perce, there were major environmental issues involved, but I think if each settlement was approached with the same kind of flexibility to look at the needs—the economic needs, the drinking water needs——

Mrs. NAPOLITANO. Are you saying that it is not applied evenly?

Ms. COTTINGHAM. I do not believe it has been. I think, over the years, it has gotten to be narrower perhaps in response to the fact that there is less Federal money to dole out, but I think there are some places in Montana where, if they looked just at what they might face legally in court, if this went to court, it does do a disservice to the Montana settlements, which may not have the same kind of legal calculus. That is just my view of it.

Mrs. NAPOLITANO. Mr. Echohawk?

Mr. ECHOHAWK. Madam Chair, when the criteria and procedures were announced in 1990, they were presented by the administration to the tribes as a document that was going to be flexible, could be flexibly interpreted to evaluate the settlements. Over the years, it has come down to the point where the only factor being considered now is the so-called "legal exposure of the United States" in case they get sued for breach of trust. In our view, that is not the flexibility in the interpretation of the criteria and procedures that was promised.

Mrs. NAPOLITANO. Do you have an example? Do you have an example of this?

Mr. ECHOHAWK. Well, I think the position of the administration in some of these settlements in recent years, where they have come forward and testified in opposition to settlements, the basis of that opposition has been their calculation of this legal liability.

Mrs. NAPOLITANO. Thank you. On the basic settlement process and its effectiveness, there have been 21 water rights settlements since 1978. That is almost one a year, in calculation, you know.

To Mr. Sullivan, the Salt River Project played a key role in the Arizona Water Settlement Act. How do you think this process can be improved?

Mr. SULLIVAN. Well, I think, as I answered earlier, one of the things was, once we got the Federal team actively involved in the negotiations, they added synergy to that process. I think we have learned from that because the Federal team has become actively involved in the White Mountain Apache settlement, the one we are currently working on, much quicker, and I think that is fruitful for everyone involved because, as we work out issues like water budgets and the financial issues, the administration and the Federal government is at the table as we discuss those issues.

It helps frame those issues better when we come back to Congress to discuss these settlements. So I think that is one thing we learned from the negotiations in the Arizona water settlement with two different Indian tribes, two different claims, and two different settlements was the act of involvement of the Federal team was a good thing, and we would certainly encourage that in other settlements that we are actively involved in.

Again, having the Secretary of the Interior committed to get that done was a major commitment.

Mrs. NAPOLITANO. Mr. Echohawk and Ms. Cottingham, how do you think the Federal, state, and tribal partnerships have changed over the years?

Ms. COTTINGHAM. Madam Chairwoman, that is an excellent question. I would have to think about that for a minute.

I think, when we first embarked in Montana on the settlement process, and our process is very clearly laid out—it is a three-sovereign process—tribe, state, and Federal government—that we wanted to bring to the table, and I think most of us, especially the tribes, probably thought that the U.S. would be the trustee for the tribes and that they would maybe be working in partnership across the table from the state.

I think what has happened over the years is we have found, with one exception, that, on these settlements, the tribes and the state come together and get their settlements agreed to and then come back and try to go to Congress with or without the support of the Federal government. So I think it is interesting that the dynamic has changed over the years. I think any reference to 21 settlements; I think there are probably only a handful of those that actually had the support of the administration at the time. Again, I emphasize, it is not this administration. I have been working on these since 1991.

But I do think it has been an interesting dynamic that the parties that are on the ground tend to be the ones that are coming up with the settlement and then either coming back and going to Congress without the support of the administration. I think we have

tried to work much more closely with Mr. Bogert and his staff on a lot of these issues.

It has been an interesting change over the years to see how the dynamics worked with the trustee. The state and tribe often, and I do not think it is just in Montana—in many states—becoming the partners and then coming back and trying to convince Congress that they have a good deal.

Mrs. NAPOLITANO. So you think it is changing for the better.

Ms. COTTINGHAM. I think now it has been changing for the better, but I think, over the years, it has been an interesting dynamic because, again, often the Federal negotiating teams do not have the authority to work on the issues early on. I think that has changed under the last administration, and they are trying to do it sooner rather than later, but it has still been a difficult process.

Mrs. NAPOLITANO. I have one more question, if you really can just give it a minute. How do you think the Federal, state, and tribal partnership has changed over the years? Has it changed?

Mr. ECHOHAWK. When the Native American Rights Fund was started in the 1970s, Madam Chairwoman, we were focused primarily on having the Indian water rights claims filed in conjunction with our trustee, the Federal government, and we have had a very good partnership with the Federal government. We were able to bring all of these claims forward, got many of them filed, started the litigation process.

When we then got into the negotiation process, we, again, expected the Federal government to be there with us and to be ready to bring their fair share of the settlement costs to the table, but we found out that that created a whole new dynamic.

The Federal government was not willing to do that, and, as a result of that, we had to create new partnerships with the states and the non-Indian water users to help us get the political leverage to make the Federal government pay its fair share of these settlement costs, and, in that sense, the dynamic had changed, and that is still the dynamic that is going on today and that we are talking about here today, getting the Federal government to pay its fair share of these settlement costs is still the most important issue that we are facing.

Mrs. NAPOLITANO. And to take a leadership role.

Mr. ECHOHAWK. Yes, ma'am.

Mrs. NAPOLITANO. Well, thank you. You have 10 days to submit any further comments for the record or questions, and, with that, I thank all of the witnesses. I am going to run. I have got three minutes to get across the street. I will return. I will recess for 15 minutes. It is one vote. I shall return.

[Whereupon, at 4:15 p.m., a short recess was taken.]

Mrs. NAPOLITANO. For the second panel, we have Jeanne S. Whiteing, Tribal Counsel of the Blackfeet Tribe from Browning, Montana; second, The Honorable Joe Shirley, Jr., President of the Navajo Nation from Window Rock, Arizona; and the third guest, Rodney B. Lewis, former General Counsel of the Gila River Indian Community, from Sacaton, Arizona, and welcome to all three of you.

I would like to have you start with the testimony. I have maybe 15 to 20 minutes when I have to run back, but I wanted to come

back and hear your testimony so that it goes on the record. So if you would, ma'am, Ms. Whiteing, please.

STATEMENT OF JEANNE S. WHITEING, LEGAL COUNSEL AND MEMBER, BLACKFEET TRIBE, BROWNING, MONTANA

Ms. WHITEING. Thank you, Madam Chair. Good afternoon. I would like to convey the greetings of the Blackfeet Tribal Chairman, Earl Old Person, to the Committee, who sends his thanks as well to you and the Committee for holding this hearing.

I do want to correct one thing. I am Jeanne Whiteing, and I serve as Legal Counsel to the Blackfeet Tribe in their water rights negotiations. I am also a member of the tribe. I am not, however, a member of the tribal council. That is a much more difficult job than mine, and, fortunately, I am not a member of the council.

Mrs. NAPOLITANO. OK. I have you as Tribal Counsel and a member of the Blackfeet Tribe.

Ms. WHITEING. Legal counsel, yes. Madam Chair, as I said, I represent the Blackfeet Tribe in their water rights negotiations, but I have been working in the water rights field for over 30 years, and I have been struck by the testimony this afternoon, struck by the fact that the issues that we are discussing today—the funding issues and the process issues—are exactly the same issues that were encountered in the first water settlement that I worked on, and that is the water settlement for the Northern Cheyenne Tribe that was enacted by Congress in 1992.

The issues there were funding and process. The administration, after the negotiation was fully completed, opposed the settlement on the funding. The process was also at issue because the negotiation did go forward with the Federal team. The Federal team thought that they had authority to negotiate the settlement but found, in the end, that the decisions were actually made by OMB, and the work that had been put into the settlement, as far as the Federal team was concerned, was for naught because it did not mean anything in the end.

The key, in my opinion, is a clear and firm funding mechanism. It frees up the Department to be involved in the settlements in a more substantive way, and it frees up the Department to come up with creative solutions to what are some very difficult water rights issues.

Moreover, we believe that this would facilitate the trust responsibility to the tribes, the tribes' responsibility to protect and preserve tribal water rights by allowing the Department to become involved in the process in a more meaningful way.

I want to emphasize why this is important for another reason, and that is many of the significant water rights issues that we are negotiating on behalf of the Blackfeet Tribe, as well as other tribes, are really the making of the United States, as far as we are concerned. The Blackfeet Tribe has been involved in negotiations of its water rights for almost two decades, and, fortunately, in the last two years, we have been able make significant progress so that we expect to have a compact ready for congressional introduction in the very near future.

In our written testimony, we detail the history of the tribe and the history of the water rights issues facing the tribes, but despite

the significant water resources on the reservation, the tribe has been unable to benefit, in any meaningful way, from the water on the reservation.

On the other hand, others have benefitted from those water resources. In 1909, the St. Mary's and Milk River were divvied out between the United States and Canada in the 1909 Boundary Waters Treaty. The St. Mary's River has been diverted off of the reservation for almost 100 years for use far downstream, over 200 miles downstream, for the Milk River Project, which is a Bureau of Reclamation project.

We are hopeful that the tribe will finally begin to benefit from its water rights through better community water systems, through rehabilitated and increased irrigation, and through other uses. However, the Federal negotiation process has made the road to Congress a very rocky one, and we are particularly concerned that that is so because, as I say, many of the issues that we are having to deal with are caused by either the actions or inactions of the Federal government.

We believe that the criteria and procedures have been used as an actual impediment to settlements. The narrow manner in which the criteria and procedures have been interpreted to allow for involvement of the negotiation teams and the very narrow view in terms of how the funding is viewed. A very strict legal liability standard is utilized. We believe that that standard has been applied inconsistently. It has not been utilized in some settlements but has been utilized in others.

Almost all of the settlements require a Federal contribution. However, the criteria and procedures and the manner in which that contribution has been calculated has definitely proved to be an impediment to almost all settlements. In fact, we do not believe that there are many settlements that have actually been supported by the administration.

Mrs. NAPOLITANO. Could you describe [off mike].

Ms. WHITEING. Yes. We would want to mention just one issue that we do not believe has been mentioned in this process up to this point in time, and that is that we believe that there has to be a clear process for handling conflicts within the Federal government in terms of the various competing Federal water rights that exist in the negotiation process, and we would urge that that conflict-of-interest issue be addressed by the Department and a clear policy for resolving those issues be set out.

Thank you, Madam Chair, and we appreciate the opportunity to testify here.

[The prepared statement of Ms. Whiteing follows:]

Statement of Jeanne S. Whiteing on behalf of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana

On behalf of the Blackfeet Tribe, I would like to thank the Subcommittee on Water and Power for holding this Oversight Hearing on Indian Water Rights Settlements, and for inviting the Blackfeet Tribe to present testimony. My name is Jeanne Whiteing, and I serve as Legal Counsel to the Blackfeet Tribe in its water rights negotiations. I am also a member of the Tribe.

The Blackfeet Tribe has been involved in negotiations to resolve its water rights with the State of Montana and the United States for almost two decades. In the last two years, significant progress has been made and I am pleased to report that a water rights compact has been completed with the Montana Reserved Water

Rights Compact Commission, subject to the approval of the Blackfeet membership, the Montana Legislature and Congress.

Water is the most important resource issue for the Blackfeet Tribe today, and the Tribe welcomes the opportunity to provide comment on the settlement process and the funding of settlements. In order to put these issues in context, I would first like to provide some background on the Blackfeet Reservation, the water resources of the Reservation, and the water rights issues faced by the Tribe.

The Blackfeet Reservation

The Blackfeet Tribe is a sovereign Indian Nation residing on the Blackfeet Indian Reservation in Montana and exercising jurisdiction and regulatory control within the Reservation. The Reservation was formally established by Treaty with the United States on October 17, 1855. As originally set aside, the Blackfeet Reservation encompassed most of the western and northern part of what is now the State of Montana. It was gradually reduced to the present 1.5 million acre Reservation through various executive orders, agreements and an act of Congress. The Reservation is bordered on the north by Canada.

The Reservation was allotted under two separate allotment acts in 1907 and 1919. With the advent of allotment, land ownership within the Reservation was irrevocably altered. Currently, approximately 65% of the Reservation is owned by the Tribe or individual Tribal members, the remainder being held by non-Indians. There are 15,200 enrolled members of the Blackfeet Tribe, about half of whom reside on the Reservation. Water is critical to Reservation communities for drinking water supplies, for commercial and industrial purposes, and for the maintenance and development of local economies

The Blackfeet Economy

The Blackfeet economy is heavily dependent on agriculture and stock raising. A large percentage of land on the Reservation is utilized for agricultural purposes, both irrigated agriculture and dry land farming. The Tribe and tribal members own large numbers of cattle, and regularly lease land to pasture cattle for others. Stock raising and agriculture provide the mainstay of the economy, and both are directly dependent on water in order to be viable activities. The reservation also contains significant oil and gas reserves and timber resources that substantially contribute to the tribal economy. Notwithstanding its significant resources, unemployment on the Reservation regularly runs over 60%.

Water Resources and Water Rights

Under the Winters Doctrine, the Blackfeet Tribe has reserved rights to the water resources of the Reservation with a treaty priority date of 1855. These rights are held by the United States in trust of the Tribe, and they are tribal trust resources subject to the trust responsibility of the United States.

Several watersheds are encompassed within the Reservation, including St. Mary River, Milk River, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. The St. Mary River is part of the Hudson Bay drainage; all other streams on the Reservation are part of the Missouri River Basin. The average annual water supply on the Reservation is approximately 1.1 million acre feet.

Adjudication/Negotiation of Blackfeet Rights

In April 1979, the State of Montana enacted a statewide water rights adjudication system sometimes referred to as Senate Bill 76. In the same month and year, the United States filed a case on behalf of the Blackfeet Tribe in the Federal Court in Montana to adjudicate the Tribe's water rights. The Blackfeet case was one of several federal court cases filed by the United States on behalf of Montana tribes. The jurisdictional conflict that ensued between the state adjudication and the federal cases was ultimately decided in favor of state court adjudication in Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

In enacting its adjudication system, the Montana Legislature uniquely indicated its intent that federal water rights, including Indian water rights, should be resolved through negotiated compacts, MCA 85-2-701, and established the Montana Reserved Water Rights Compact Commission to negotiate such compacts, MCA 2-15-212.

The Blackfeet Tribe initiated negotiations with the Compact Commission in 1989. The negotiations proceeded in fits and starts until about three years ago when the negotiations gained significant momentum. The Tribe and the Compact Commission agreed to a compact last fall for presentation for approval by Congress, the Montana Legislature and the Blackfeet membership.

The Issues for Negotiation

While the actual resolution of Indian water rights is a straightforward process of determining quantity, purpose and priority date, the process for reaching that point is anything but straightforward, The parties to a negotiation must engage in a delicate balance of compromise of water rights, utilization of existing water supplies and creation of additional water supplies to satisfy rights and mitigate impacts, and other creative alternatives. As is the case for many other tribes, the process at Blackfeet is further complicated by the fact that the critical disputes and controversies that must be resolved through the negotiations are, for the most part, the result of actions and inactions of the Federal Government. A description of the primary issues at Blackfeet illustrates this.

Boundary Waters Treaty and the Milk River Project. The St. Mary and Milk Rivers are allocated between the United States and Canada under the 1909 Boundary Waters Treaty.. Prior to entering into the Boundary Waters Treaty, the Bureau of Reclamation's predecessor, the Reclamation Service, had begun plans for an irrigation project utilizing St. Mary River water in order to justify an allocation under the Treaty. The Project was authorized in 1902, and soon after the completion of the Boundary Waters Treaty, the Reclamation Service, constructed the Milk River Project which diverts the United States' share of the St. Mary River off the Reservation to serve water users on the Milk River over two hundred miles downstream from the Reservation.

Although the Winters case had been decided in 1908, before the Boundary Water Treaty was completed and the Milk River Project was constructed, and although the Winters case involved the Milk River, the United States never consulted with the Blackfeet Tribe and never considered the effect of the Treaty or the Project on the water rights of the Tribe. In the 1896 negotiations leading to the relinquishment of the Tribe's western lands, the Tribe was promised that it would benefit from the Project, but no benefit has ever materialized and no Reservation lands are served by the Project. Early Milk River Project documents show that as part of the planning process, a Reservation project had been identified as feasible, but the Reclamation Service rejected the Reservation project in favor of the downstream non-Indian project.

For nearly a hundred years, the United States' share of the St. Mary River has been diverted off the Reservation by the Bureau of Reclamation for use by the Milk River Project. St. Mary water is diverted into a 29 mile canal on the Reservation before it discharges into the North Fork of the Milk River. The water then flows into Canada for 216 miles before it returns to the United States and is stored in Fresno Reservoir to serve the 121,000 acres of the Milk River Project.

Although the Tribe has never received any benefit from the Milk River Project, the Project facilities utilize Tribal lands and the Tribe has suffered the environmental consequences of the facilities, including frequent flooding, the silting in of the pristine alpine St. Mary's Lake, and impacts to Reservation fisheries particularly in Swiftcurrent Creek and St. Mary Lake. Various problems also result from the seepage of the canal and other aging structures. Presently, the Milk River Project facilities on the Reservation include Lake Sherburne, Swiftcurrent Dike, St. Mary Diversion Dam, and the 29 mile St. Mary Canal, which includes two large sets of siphons and a series of five large concrete drop structures near the lower end of the canal. In the Water Resources Development Act of 2007 (WRDA), Congress authorized $153 million for the rehabilitation of the diversion facilities located on the Reservation.

Other Issues. In the 100 years since the Winters decision, significant non-Indian development has occurred on and off the Blackfeet Reservation to the detriment of the Blackfeet Tribe, but without any answer from the United States as trustee for the Blackfeet Tribe, with the exception of the 1908 Conrad Investment case affecting Birch Creek. The result is that negotiation of Blackfeet water rights in the face of such non-Indian uses is substantially more difficult, and in some cases requires mitigation measures for such users in order for settlement to occur. On Birch Creek, the Tribe and the State have had to negotiate a separate agreement to mitigate impacts to the local water users who now irrigate 70-80,000 acres directly off the Reservation.

The Blackfeet Irrigation Project. The BIA Blackfeet Irrigation Project was authorized in the 1907 Blackfeet allotment act. The Project has 38,300 assessed acres in three units that presently include both Indian lands (65%) and non-Indian lands (35%). Like most other BIA irrigation projects, the Blackfeet project has major condition problems. A low estimate of deferred maintenance costs for the project is $29,130,222. GAO, Report on Indian Irrigation Projects (February 2006). In addition, the project remains uncompleted a hundred years after it was authorized.

The Federal Negotiation Process

Since 1989, it has been the policy of the Administration that Indian water rights should be resolved through negotiated settlements. In 1990, the Department of the Interior, therefore, established a Working Group on Indian Water Rights settlements and published criteria and procedures for Department involvement in negotiations. Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (March 12, 1990). These Criteria and Procedures have remained the policy of the Administration since their publication.

A Blackfeet Federal Negotiating Team was appointed in 1990. The Team includes representatives from Bureau of Indian Affairs, Interior Solicitor's office, Department of Justice, Bureau of Reclamation, Fish and Wildlife Service, and the Forest Service. The Team, along with the Tribe and the State, has put in countless hours in the Blackfeet negotiations, and has worked on settlement in complete good faith. The appointment of Michael Bogert, Counselor to the Secretary, has brought a welcome interest to the Blackfeet settlement, and the Tribe is especially pleased that Mr. Bogert paid a visit to the Reservation to express the Department's interest. Nevertheless, the process that the Team has been required to follow has presented a number of problems that have made the negotiations difficult, and have, at times, impeded the negotiations. As a result, we have not reached final agreement with the Department.

This situation is not unusual among Indian water settlements. Of the approximately twenty Indian water rights settlements enacted to date by Congress, only a small number of them have been supported by the Administration. We have identified a number of reasons for why this is so at Blackfeet.

1. The Narrow Role of the United States in the Process

First and foremost, the Department of the Interior (Interior) views its role in settlements very narrowly. Rather than taking a broad problem solving approach to settlement that seeks to find and sustain a full and lasting resolution, the United States takes a narrow view of its role that focuses on minimizing its responsibility and involvement. Fundamentally, it is an approach that seeks to deny any responsibility for the problems or any responsibility for fixing them, even though the disputes and conflicts involved are often the making of the Federal Government. The Department's approach is to require the Tribe, the State and the water users to resolve the issues with little input and few resources from the Department.

Thus, the Federal Team is involved in the negotiations but is not authorized to take any positions. In effect, the Federal Team is a mere observer to the process. While the Team can and does identify issues or concerns of the Federal Government, the Team rarely identifies solutions or make proposals because it has no authority to do so. This means that no real negotiation takes place with the Federal Government, and it is often not until the settlement is completed by the other parties, that an Administration position is formulated.

The Department's narrow approach to settlement makes the negotiation particularly difficult if, as in the case at Blackfeet, the issues to be resolved are fundamentally federal issues. As described above, the fundamental water disputes and conflicts that require resolution through the settlement process are disputes and conflicts that trace to the actions and inactions of the Federal government. It is exactly these conflicts that present the most significant challenge to reaching a settlement of the Tribe's water rights. Without full participation of the Department and a willingness to fully engage in the process, and without some acceptance of responsibility in the matter, there is little prospect of negotiating a settlement that is likely to meet with the approval of the Administration.

2. The Liability Approach to Funding Settlements

Almost all settlements include a federal contribution to settlement, and the criteria and procedures focus in large part on the manner in which such contributions will be considered and calculated. Under the criteria and procedures, the federal contribution is limited to Acalculable legal exposure@ and Acosts related to Federal trust or programmatic responsibilities,@ provided that the latter cannot be funded through normal budget process. Few settlements have met these criteria, and this has been the most significant factor in the lack of Administration support for settlements when they reach Congress.

Over the years, the Administration's interpretation of the funding criteria has varied. In more recent years, any consideration of trust or programmatic responsibilities has been de-emphasized or eliminated in favor of an analysis of the United States' narrow legal liability, unless the trust or programmatic responsibilities can

be funded through the normal budget process. More recently, it now appears that even trust or programmatic items must be justified by a showing of legal liability. This has created large discrepancies between settlement costs proposed by the parties and the Department's calculation of its legal liability. This discrepancy has hindered the prospect of reaching final agreement with the Administration, and has resulted in strong Administration opposition to settlements rather than a mere lack of support.

Further, many of the potential claims are historic claims, and the Administration frequently concludes that the claims are barred by the statute of limitations or other limitations. Therefore liability is significantly discounted or denied altogether.

The Administration's policy of basing settlement funding strictly on a finding of legal liability for claims against the Federal Government leads to inequitable results, and does not allow for realistic solutions to significant water rights and water related problems. It is particularly disturbing that this policy is applied even to matters that are within the programmatic obligations of the Department and within the Department's trust responsibility to Tribes.

Application of a strict legal liability standard appears to be confined to Indian water rights settlements. Where other issues and concerns are involved, the Administration appears to be willing to take a more flexible approach, and a strict legal liability approach is rarely applied to other kinds of project such as the recent authorization in the 2007 WRDA legislation of $153 million for the rehabilitation of the St. Mary diversion facilities for the Milk River Project.

3. The Inconsistent Application of the Criteria

The above discussion illustrates a third point we would like to make, and that is, the Department is not consistent in the manner in which it approaches settlement or the manner in which it applies the criteria and procedures to the federal contribution to settlement. One additional area of inconsistency we would mention relates to how the Department requires or determines a state or local contribution bears comment as well. In some settlements, no state contribution has been required; in others, the state contribution has been determined by the Department to be inadequate. There does not appear to be a consistent application of the requirement of a state contribution, or any consistent method for determining the amount of an appropriate state contribution. The Department's consideration of the state contribution issue also fails to take into account the circumstances of a settlement, i.e. whether the issues to be resolved are primarily federal because they are the result of the actions and inactions of the Federal Government.

We are not clear why the Administration strictly applies the criteria and procedures to some settlements, but not others. Such inconsistency is inequitable, and often results in a broad rejection of the criteria and procedures by those engaged in settlement.

4. Conflicts Among Federal Water Rights

One matter that is not addressed in the criteria and procedures is the manner in which conflicts between or among federal water rights will be resolved. This matter has particular significance at Blackfeet, and we are concerned that there is not a clear process for considering and resolving such conflicts.

Blackfeet is affected by water rights compacts that have been negotiated and finalized for Glacier National Park and Lewis and Clark National Forest, which are immediately adjacent to and upstream from the Blackfeet Tribe. The Department has also participated in the Fort Belknap Compact which involves a separate Tribe on the Milk River, a stream that arises on and flows through the Blackfeet Reservation. The United States also holds state water rights for the Bureau of Reclamation Milk River Project and the Bureau of Reclamation Tiber Dam, a large storage facility immediately downstream from the Blackfeet Reservation. The Department also filed separate state water right claims for the BIA Blackfeet Irrigation Project.

There is no clear process for resolving potential conflicts among federal rights. In some instances, the Blackfeet Tribe has received considerable pressure from the Department to subordinate its water rights to the water rights of other Federal entities. And, in some cases, the attorneys for other Federal entities have become involved in the negotiations outside of the Federal Team process. These conflicts have seriously impacted the Blackfeet negotiations.

5. Funding for Tribal Participation in Settlement

The Bureau of Indian Affairs funds tribes to participate in water rights negotiations, and provides funds for tribal technical experts. Such funding is critical to the process. The Blackfeet Tribe would be unable to participate in the process without such funding. And, because the Department does not provide technical experts for

the Blackfeet negotiations, the Tribe's technical experts are essential to the settlement process.

Funding has varied significantly from year to year, and in some cases no funds have been made available. Inconsistent funding has significantly delayed the process. The Blackfeet Tribe believes that when negotiations have reached the stage when settlement is more likely than not, the Department should shift funds that it currently expends on litigation to settlement.

6. Lack of a Clear Funding Mechanism for Settlements

Last, but certainly not least, the lack of a clear mechanism for funding Indian water rights settlements has been and continues to be a major impediment to Administration approval and congressional approval of settlements. The problem has substantially increased as the number of pending settlements has increased in the last several years.

It has been suggested that Indian water settlements be funded through Indian programmatic budgets, for example, community water systems should be funded by the Indian Health Service, etc. However, such budgets are inadequate or non-existent to begin with and are getting smaller, while competition among tribes for such funds has increased. Requiring all of Indian country to bear the burden of the costs of Indian water settlements is no solution when such budgets are already grossly inadequate.

We know that others witnesses are focusing on this issue, but we want to emphasize the importance of this issue to the Blackfeet Tribe.

Thank you for the opportunity to present testimony on this very important issue. We deeply appreciate the Chairman Grace Napolitano's interest in these issues, and look forward to assisting the Subcommittee in addressing these issues.

Mrs. NAPOLITANO. Thank you for your testimony. The Honorable Joe Shirley, Jr., please.

STATEMENT OF THE HONORABLE JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION, WINDOW ROCK, ARIZONA

Mr. SHIRLEY. The Honorable Chairwoman Napolitano and Members of the Subcommittee, greetings from the Navajo Nation.

The Navajo Nation has considerable experience with water rights settlement. We were pleased to provide testimony before your Subcommittee last year on H.R. 1970, and we appreciate the continued efforts of your staff to thoroughly grasp and investigate the magnitude of the water needs facing Navajo people, as well as Native Americans.

We are currently involved in finalizing a settlement with the State of New Mexico, and we are in discussions with the States of Arizona and Utah to quantify our water rights through negotiated settlements rather than through litigation.

I have submitted my written testimony for the record and want to summarize my responses to Congressman Napolitano's six questions.

First, the role of the Federal government should be as an aggressive trustee of our water rights. The Navajo Nation is concerned that the strict application of the criteria and the procedures for the participation of the Federal government in negotiations may create incentives for the U.S. to not advocate aggressively for the interests of Native American tribes in the settlement and litigation of tribal water rights claims.

As a general proposition, minimizing the claims of the tribes reduces the U.S.'s potential liability and thereby reduces the level of Federal contribution to water rights settlement under the current interpretation of the criteria and procedures.

This creates a conflict between the role as trustee and the role of minimizing Federal financial responsibility under the criteria and procedures.

In the case of Arizona, the U.S. has neglected the Navajo Nation's water rights claims to the Colorado River and has pursued a wide variety of activities concerning the management and allocation of the waters of the river without accounting for the needs of the Navajo Nation. The Navajo Nation believes that its position in these discussions would be enhanced if the U.S. would affirmatively pursue the adjudication of these claims in Federal court. The U.S. has refused this request.

Nevertheless, the Federal negotiation team was appointed, and settlement discussions are ongoing. The effectiveness of the Federal team is severely hampered by the conflict between its competing roles. The tribal role in the quantification of water rights is difficult and challenging.

The objective of the Navajo Nation is to obtain a water supply that meets the needs of future generations of Navajos to live and thrive in the Navajo Nation as their permanent homeland.

These efforts, whether through negotiation or litigation, require the expenditure of significant resources for attorneys and experts. With the reduction in Federal funds available for tribes to pursue these claims, we can no longer rely on the U.S. to fund the tribal efforts.

The state governments also play a vital role in the quantification efforts, including the adjudication of water rights in state courts. However, the states face the same fiscal limitations as the Federal government, and, as a result, most of the water rights adjudications proceed at a snail's pace.

Second, the benefits of the settlement process is that the three sovereigns involved negotiate as sovereigns. We sit down, we negotiate, and find a solution that best meets the need of the people we represent. The costs of litigation beyond expense of the allocation of scarce tribal resources is that litigation forces the parties to push themselves into corners rather than look for common solutions concerning the use of water.

In litigation, the most that tribes can receive is their paper water rights pursuant to a judicial decree, but, through water settlements, tribes have been able to obtain wet water through the development of infrastructure to put water to use on our homelands. In the case of the Navajo Nation, we need reliable, safe drinking water.

Third, I cannot say that the settlement process has removed water uncertainty because the Nation does not currently enjoy a finalized settlement. I do know that the settlement process has allowed us to build relationships with non-Navajo parties who also want to see our settlement succeed.

Fourth, the effectiveness of the Department's Indian Water Rights Office varies. At times, the office has been extremely helpful, and, at other times, it has been an obstacle. In the case of the New Mexico settlement, the Indian Water Rights Office appointed both assessment and settlement teams to participate in negotiations between the Navajo Nation and the State of New Mexico. However, the Department was unable to formulate a position with

respect to the settlement and advised the parties that its hands were tied by OMB. Eventually, the U.S. disappeared from the negotiations, and the final agreement was hammered out without Federal participation.

With the appointment of Michael Bogert in 2006 as the Secretary's Water Counselor, the level of Federal participation in this process improved significantly, and we are grateful for the assistance of the office in helping to revise and improve the substance of our proposed settlement legislation. We are also grateful for Mr. Bogert and his staff personally visiting the Navajo Nation on several occasions and for witnessing firsthand our critical need for a drinking water infrastructure.

Despite Mr. Bogert's efforts, we were disappointed when the Department of the Interior testified against H.R. 1970 before this Subcommittee on June 27, 2007.

Mrs. NAPOLITANO. [Off mike.]

Mr. SHIRLEY. Well, I am trying to answer your six questions, Honorable Chairwoman, but I think you understand what we are trying to go through, and, of course, Mr. Bogert has been there and has relayed back to the U.S. Government what our needs are, so thank you very much.

[The prepared statement of Mr. Shirley follows:]

Statement of President Joe Shirley, Jr., Navajo Nation

Thank you, Chairwoman Napolitano and members of the Water and Power Subcommittee of the House Committee on Natural Resources. My name is Joe Shirley, Jr., and I am President of the Navajo Nation, a federally recognized Indian nation with the largest reservation in the United States. I appreciate this opportunity to share with you the Navajo Nation's perspective on Indian Water Rights Settlements, a topic of vital importance to the Navajo Nation.

The Navajo Nation has considerable experience with Indian Water Rights Settlements. Most recently, I was pleased to provide testimony before this subcommittee on H.R. 1970—the Northwestern New Mexico Rural Water Projects Act which would authorize a settlement of the Navajo Nation's water rights in the San Juan River basin in New Mexico, and would authorize the Navajo-Gallup Water Supply Project to provide much needed potable water supplies to the Navajo Nation. The Navajo Nation is currently involved in discussions with the states of Arizona and Utah to quantify our water rights through negotiated settlements, rather than through the adjudication process.

Chairwoman Napolitano has posed several questions to frame the discussion of Indian Water Rights settlements, and I will address each one using the experiences of the Navajo Nation as a foundation for my testimony.

First, what do you see are the respective roles of the federal government including Congress, as well as state, local and tribal governments in dealing with Indian Water Rights adjudication and settlement?

The role of the federal government, including the Congress, is to be an aggressive trustee of our water rights. The Navajo Nation is concerned that the present application of the Criteria and Procedures for the Participation of the Federal Government in Negotiations creates incentives for the United States to oppose the interests of Indian tribes in both the litigation and settlement of tribal water rights claims. As a general proposition, minimizing the claims of the tribes reduces the United States' potential liability and thereby reduces the level of federal contribution to water rights settlements under the current interpretation of the Criteria and Procedures which almost always looks solely to the question of federal liability in determining the merits of a particular settlement.

In the case of Arizona, the United States has neglected the Navajo Nation's water rights claims to the Colorado River and has pursued a wide variety of activities concerning the management and allocation of the waters of the river without accounting for the needs of the Navajo Nation. As a result of this neglect, the Navajo Nation sued the Secretary of the Interior in March of 2003. Since that time, we have been engaged in settlement discussions with the United States, the State of Arizona, and others concerning a possible quantification through a negotiated settlement.

The Navajo Nation believes that its position in these discussions would be enhanced if the United States were to affirmatively pursue the adjudication of these claims in federal court; however, the United States has refused the request of the Navajo Nation to pursue such claims. Nevertheless, a federal negotiation team has been appointed pursuant to the aforementioned Criteria and Procedures and settlement discussions are on-going. The effectiveness of the federal team is severely hampered by the conflict between the role of the Department of the Interior as trustee for the Navajo Nation and its job under the Criteria and Procedures to minimize federal financial responsibility, as well as the lack of federal resources to devote to the settlement effort.

The tribal role in the quantification of water rights is difficult and challenging. The objective of the Navajo Nation in the adjudication and negotiation process is to obtain a water supply that meets the needs of future generations of Navajos to live and thrive on the Navajo Nation as their permanent homeland. These efforts, whether through litigation or negotiation, require the expenditure of significant resources for attorneys and experts. Over the past several decades, the federal funding to pursue these efforts has been reduced significantly. Tribes can no longer rely on the United States to fund the tribal efforts and the funding for the federal government's participation in this process has been significantly reduced as well.

The state governments play a vital role in the quantification efforts, including the adjudication of water rights in state courts. However, the states face the same fiscal limitations as the federal government, and as a result, most of the water rights adjudications proceed at a snail's pace. This serves to continue the status quo in terms of the utilization and allocation of water supplies which typically favor the non-Indian water users to the detriment of Indian tribes. In the settlement process, the Navajo Nation seeks to form partnerships with the states in order to build necessary water infrastructure on our homeland, while seeking a balance between the needs of the Navajo People and the water needs of our neighbors. This is a difficult exercise because the water supplies available are generally over-allocated. The federal government can greatly assist in this process by providing the resources to help pay for the water infrastructure needed to equitably allocate the use of water among all of the water users. Again, we are concerned that by focusing almost exclusively on the issue of federal liability, the current interpretation of the Criteria and Procedures is being used to limit the role of the United States, rather than to further the announced federal policy in support of settlements..

Second, what are the costs and benefits of the settlement process when compared to litigation?

The benefit of the settlement process is that the three sovereigns involve act like sovereigns. We sit down, negotiate, and find a solution that best meets the needs of the people we represent.

In addition to being extremely expensive, litigation forces the parties to push themselves into corners, bounded by the rules of litigation, rather than look for common solutions concerning the use of water, the most precious resource to human beings. In litigation we end up creating enemies whereas with settlement we create partners.

In litigation, the most the tribes can receive is a "paper water right" pursuant to a judicial decree. But through water settlements, tribes have been able create "wet water" through the development of infrastructure to put water to use on our homelands. In the case of the Navajo Nation, we need reliable, safe drinking water. All of our settlement efforts are premised on the proposition that we are willing to compromise our "paper water rights" in exchange for sustainable drinking water projects. These projects come at a significant cost, and we remain concerned that the Criteria and Procedures are not applied in a manner that undermines our settlement efforts.

Third, how has the settlement process helped remove water uncertainty for the tribes and the non-Indian communities?

This is a theoretical question for me, because the Nation does not currently enjoy a finalized settlement. I do know that where we have reached agreement with the State of New Mexico concerning the San Juan River, I see something that can be hard for some to believe. We have non-Indian friends in the basin, particularly in the City of Farmington. In the 1970s, the City of Farmington was the site for a very violent crime committed against Navajo people. Today, because of the settlement, we have friends in and around Farmington who support H.R. 1970 because the settlement is a good thing for the non-Indian water users, as well as for the Navajo Nation.

Fourth, how effective is the Department's Indian Water Rights Office and how can they be improved?

This is a difficult question, because at various times the Indian Water Rights Office has been extremely helpful and at other times has been an obstacle in the settlement process. In the case of the New Mexico settlement, the Indian Water Rights Office first appointed an assessment team and later appointed a full settlement team to participate in the negotiations between the Navajo Nation and the State of New Mexico. Despite the appointment of these teams, the United States was unable to formulate a position with respect to the settlement and typically advised that the Navajo Nation and the State of New Mexico would have to negotiate with the Office of Management and Budget. Eventually, the United States disappeared from the negotiations and the final agreement was hammered out without federal participation. The Navajo Nation and the State of New Mexico executed the settlement agreement on April 19, 2005.

With the appointment of Michael Bogart as the Secretary's Water Counselor, the level of federal participation in this process improved significantly, and we are grateful for the assistance of the Indian Water Rights Office in helping to revise and, in many instances, to improve the substance of our proposed settlement legislation. We are also grateful for Mr. Bogart and his staff for personally visiting our Navajo Nation on several occasions and for witnessing firsthand our critical need for drinking water infrastructure. Mr. Bogart personally traveled the route where the proposed Navajo-Gallup Water Supply Project will hopefully be built, and he met with many Navajo residents who currently haul water from distant water points in order to have potable water in their homes. Despite Mr. Bogart's efforts, we were disappointed when the Department of the Interior testified against H.R. 1970 before this subcommittee on June 27, 2007. We suspect that the Indian Water Rights Office is convinced that the proposed settlement represents an appropriate resolution of the water rights of the Navajo Nation; however, the official position of the United States is not informed by the Indian Water Rights Office, but by the Office of Management and Budget (OMB) which is opposed to the expenditure of large amounts of federal dollars even in the face of the critical lack of drinking water infrastructure on the Navajo Nation.

We believe that the Indian Water Rights Office is well-intentioned and committed to helping improve the conditions in Indian Country through the implementation of water rights settlements; however, the Office's effectiveness is severely constrained by OMB policies. Senators Bingaman and Domenici have raised concerns that the Administration's water policies are being dictated by OMB and that the Criteria and Procedures have been applied in an inconsistent manner that has favored certain settlements to the exclusion of others. The Navajo Nation shares these concerns and supports the Senators' request, that OMB reconsider its position, as expressed in the attached letter of June 15, 2007.

As a leader, I want us to move forward and not dwell on the past. We are committed to working with the Indian Water Rights Office, and we have pledged to provide Mr. Bogart with an analysis of the how H.R. 1970, despite its substantial costs, is consistent with the Criteria and Procedures and why the settlement should be supported by this Administration.

In addition to our settlement efforts with the States of New Mexico and Arizona, the Navajo Nation has enjoyed productive negotiation discussions with the State of Utah, but those settlement efforts are hampered due to the lack of any federal presence, and the Indian Water Rights Office is reluctant to appoint a Federal Team. In light of the Department's testimony on H.R. 1970 that it could not support a settlement that the United States did not actively participate in, both the Navajo Nation and the State of Utah are hesitant to proceed much further in the settlement process without the appointment of a Federal Team. We understand the huge commitment of resources that the Indian Water Rights Office has made in our efforts with the States of New Mexico and Arizona, but we cannot believe our trustee would allow a settlement to fail with the State of Utah for lack of any federal participation.

Fifth, most Indian Water Rights Settlements require Congressional approval or funding. When should representatives of the relevant Congressional and Committee Offices become involved in a particular settlement?

From our experience, there is no question that the availability of federal funding to pay for drinking water infrastructure is the key to whether a settlement will succeed or fail. After the local parties have reached a conceptual agreement, the relevant Congressional and Committee offices should become involved to provide advice on what level of federal funding may be achievable. The involvement by these offices should include a field visit to understand the resources involved, including the physical and human landscape.

As Madam Chairwoman knows, the Navajo Nation has enjoyed a close relationship with your staff and we appreciate the efforts of your staff to facilitate a hearing

on H.R. 1970. We are grateful that your staff was able to visit the Navajo Nation and to witness firsthand, the plight of the Navajo People who lack potable water supplies.

Sixth, would it be helpful if Congress established a "budget" or a target amount for Indian Water Rights Settlements over a period of time, and if so, how would that budget be allocated between settlements?

We believe that Congress must set aside funds to be used exclusively for Indian Water Rights Settlements. In the absence of such set asides, funding for water rights settlements will compete with funding for other programs out of the Bureau of Indian Affairs budget which provides essential services in Indian County. We do not wish to fund any Indian water settlement at the expense of other important programs to the Navajo Nation and to other Indian tribes. H.R. 1970 provides one such mechanism through the creation of a Reclamation Water Settlement Fund. This fund will not be sufficient to fund all future settlements but it represents the kind of approach that we favor because it does not take money from other tribal programs.

Finding monies to fund water settlements represents a significant challenge for Congress. Trying to ascertain a target amount of money is equally daunting. The Navajo Nation is a participant in the ad hoc group, the Joint Federal-Tribal Water Funding Task Force, which periodically meets with Congressional staff to discuss the funding needs for Indian Water Rights Settlements. We believe that constant dialogue with the tribes is essential. Finally, we suggest that any mechanism that creates a pool of money for funding settlements be viewed as a tool to facilitate settlements and not as an absolute barrier or limit to the amount of funding that can be made available. It is difficult to project all of the future needs of the tribes, and we respectfully suggest that settlements may become more difficult, and potentially more expensive, as the available water supplies become less and less.

The Navajo Nation appreciates the efforts of this Subcommittee to address the challenge of Indian Water Rights Settlements. We look forward to continued dialogue with the Subcommittee concerning the settlements throughout Indian Country and we hope that our discussions with the States of Arizona and Utah will also succeed so that we may bring these settlements to this Subcommittee for its consideration in the future.

Mrs. NAPOLITANO. Thank you for your testimony. I am very well aware of some of the background that has been provided to us from some of the tribes, so it is very, very clear.

Yes. We go on to Mr. Lewis, please.

STATEMENT OF RODNEY B. LEWIS, FORMER GENERAL COUNSEL, GILA RIVER INDIAN COMMUNITY, SACATON, ARIZONA

Mr. LEWIS. Good afternoon, Madam Chairwoman. I am Rodney Lewis. I am the former General Counsel of the Gila River Indian Community and also a member there. I have been engaged in the process of Indian water rights settlements for over 30 years. During that time, I was fortunate to be able to work with this Committee in its consideration and approval of the Gila River Indian Community's settlements of its claims to water in 2004.

I am honored to have the opportunity to share some of my experience with you today in hopes that it may be helpful in your consideration of how to improve the Federal negotiation and approval process for the settlement of these critical tribal claims.

First, in his testimony, Mr. Bogert focused on the Gila River Indian Community settlement as a model example of the kinds of compromises necessary to produce workable settlements. I could not agree more. However, from my experience, the community's ability to consider meaningful compromises is predicated on its confidence in the process that produced these compromises.

The confidence was instilled by the fact that the community, with strong, Federal financial support at the outset, was able to participate in the legal court battles and negotiation proceedings as a full partner and participant. With Federal funding, particularly in the beginning, the community was able to hire the lawyers and experts necessary for it to prosecute its claims itself in court with the United States and to negotiate actively in its own behalf as a separate party.

Without its own team of experts and professionals, the community would have been forced to rely solely on the United States, and oftentimes the United States is limited in its resources and its capacity to assist in these negotiations.

As Mr. Bogert's testimony also makes clear, however, the United States has multiple roles in this process.

First, the United States is the tribe's trustee and, in that capacity, must serve as an active advocate for the tribe and its water rights. The United States also has a trust responsibility to the tribe to develop the tribe's water resources. However, as Mr. Bogert stated in his testimony, this administration has served the role of "holding the line on settlement costs."

I certainly understand and appreciate the role, but the United States has the trust responsibility itself to advocate for tribes and the fiscally responsible role to advocate against them. You can, I think, see why tribes seek and must have their own team of advisers to assist them in crafting fair and appropriate compromises. Otherwise, tribal councils, such as my own, could never feel comfortable approving settlements for the fear that somehow the United States might not have balanced these conflicting roles appropriately in their instance.

So Federal negotiations, Federal financial support for negotiations and litigation is absolutely essential. Federal support was essential for us, and it is for tribes currently seeking the success we were able to achieve. Compromise, otherwise, is impossible to achieve.

In addition to the importance of Federal financial support for tribal participation in prosecuting and settling their water rights, one area where tribes are currently suffering is the amount of resources and personnel made available within the Federal departments themselves, particularly the Department of the Interior for the Federal negotiation teams who represent and coordinate the settlement efforts. There are currently 19 Federal water settlement teams, with seven more requested by tribes and more requests to come.

This sounds impressive, but, in my experience, too often the Federal negotiation teams are short staffed where the same people serve on multiple teams. This means that the Federal negotiation teams can often be negotiation teams in name only. Too often, we hear from Federal officials that they cannot clone themselves, and other settlements are on the front burner.

As General Counsel for the tribe with a department of my own to manage for 30 years, I understand prioritization of tasks and opportunities. However, I can tell you that the problem now is that these teams are not adequately staffed, and Congress should seek to emphasize to the administration that they should ensure that

the teams established, and the teams to be established, should be sufficiently staffed so that progress and compromise can be achieved.

That concludes my oral testimony today. I would like to underscore again how deeply grateful I am for the opportunity to appear before you today, not just to share my experience in an area I have worked in for so long but also to express again the gratitude and appreciation of the Gila River Indian Community and myself for the work that you and other Members of this Committee made in making our dream of settlement a reality. I hope that this hearing leads to the opportunity for other tribes to have their own dreams realized. Thank you.

[The prepared statement of Mr. Lewis follows:]

Statement of Rodney B. Lewis, Former General Counsel, Gila River Indian Community

Chairwoman Napolitano and distinguished Members of the Subcommittee, thank you for the opportunity to submit testimony on the topic of Indian water rights settlement agreements. I am Rodney B. Lewis, former General Counsel of the Gila River Indian Community ("the Community"), a position in which I served from 1972 to 2005. During that period, I served as the Principal Negotiator on behalf of the Community in negotiations to settle the Community's significant claims to water from the Gila River and its tributaries, as well as its claims for injuries to the Community's water rights.

BACKGROUND

On December 10, 2004, President George W. Bush signed into law the Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3479 (the "Settlement Act"), which, at least to date, represents the largest settlement of Indian water rights in U.S. history. It also represents the culmination and fulfillment of the century-old hopes and dreams of the two tribes that comprise the Community, the Pimas (Akimel O'otham or "River People") and the Maricopas (Pee Posh). The patience, steadfastness and dedication of the Pimas and Maricopas throughout this century of conflict and, ultimately, reconciliation, resulted in the passage of the Settlement Act and then in the publication in the Federal Register on December 14, 2007 of the Secretary's finding that all the conditions to the enforceability of the Community's settlement had been met.

On that momentous day in December 2007, our settlement became fully enforceable. The Settlement Act will partially rectify years of deprivation of a fair water supply upon which the Community was wholly dependent. Water was and is the life blood of the Pimas and Maricopas. Water was the key to the Community's agriculturally dependent economy and absolutely essential to survival in arid central Arizona. Justice Black in Arizona v. California, 373 U.S. 456 (1963) described the situation of Arizona Tribes in central Arizona vividly when he stated, "that most of the lands [in central Arizona] were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and crops that they raised."

Diversions upstream of the Community's Reservation by non-Indian users began shortly after the end of the Civil War. Ultimately, these illegal diversions caused Gila River water to cease to flow, preventing the irrigation of the fertile fields of the Pimas and Maricopas. The resulting shortage of water caused irreparable damage to the Community, not only to its agricultural economy, but also to the health and welfare of a once prosperous people. The resulting economic poverty and inadequate health care caused numerous health problems, including an epidemic of diabetes. The Community currently has one of the highest rates of diabetes in the world. The key to our future, as it was to our past, is retrieving for the Community its legitimate entitlement to a fair water supply to revive our once vibrant agricultural economy.

WATER RIGHTS LITIGATION

The Community's long road back began in 1925, with the filing of an action in federal court by the United States, after repeated requests and urging by various leaders of the Pima people. The United States settled certain of the Community's claims in this action, over the objection of the Community, in 1935, resulting in a

consent decree that is known as the "GE 59 Decree." This consent decree, however, did not address all of the Community's claims to water and did not immediately result in redress for most of the Community's claims.

Congress, too, played an early role in starting a process that would ultimately bring some measure of restitution and redress for the Community's lost water. In 1924, Congress passed the San Carlos Indian Irrigation Project Act, Act of June 7, 1924, 43 Stat. 475. In this Act, Congress authorized the construction of an irrigation project that would be comprised of 50,000 acres of developed land within the Community's Reservation and 50,000 acres of developed land for non-Indian farmers just outside the Community's Reservation.

Predictably perhaps, the promise of this early congressionally authorized irrigation project for the Community's farmers was never fulfilled. Although the SCIIP Act required that the Indian portion of the project be built first, it was never completed, and the off-Reservation portion of the project took priority, resulting in increased depletions of water from the Gila River at the expense of the Community's farmers. To make matters worse, the federal government failed to maintain adequately those portions of the Community's irrigation project that actually were built. Thus, as the Community entered the 1970s, it remained in a position of extreme poverty and without any adequate water supply.

At this point, the federal government, again at the urging of the Community, began a new enforcement proceeding against the non-Indian diverters in the Upper Valley of the Gila River. Moreover, the initiation of a state court adjudication of all rights to the Gila River, including the Community's, brought the Community's significant claims to the Gila River and all its tributaries to the forefront. This constituted the beginning of a thirty year struggle to vindicate the Community's claims for water and at least partially rectify the tremendous damage done to the Community and its people by the misappropriation of its water and the United States failure to protect the Community or assist adequately in the development of the Community's water resources on-Reservation.

WATER SETTLEMENT PROCESS

The water settlement process for the Community really began in the 1980s after the Community intervened on its own behalf in both the enforcement proceedings against upstream diverters and to assert its own claims, with the United States, in the state court adjudication of the Gila River. It was at this point that I became substantially involved in the negotiation process as the Community's officially designated Principal Negotiator.

Early on, the federal government played an essential role in assisting the Community, both with funds to assist the Community in the engagement of its own experts and lawyers, but also in providing key technical and legal assistance itself, including adding the clout of the U.S. Government's participation in the process. From my own experience, this assistance is critical to any tribe seeking to vindicate its water rights and, as I mention in my recommendations section below, is an area in which the U.S. Government can and should do better.

The initial years of negotiations were frustrating and protracted. With so many State parties affected by our claims, it was, at times, difficult to obtain the focus and attention of a core group with sufficient critical mass to come to terms with us. Again, the role of the United States in this was critical. Ultimately, in 1985, the Community was able to come to terms on a proposed water budget with the State parties and the United States set at 653,500 acre-feet per year as the basis for compromising the Community's claims to water from the Gila River and its tributaries. Around this same time, Congress also authorized, as part of the Central Arizona Project build-out, a major irrigation project (the Pima-Maricopa Irrigation Project), which was intended to supplement and complement the one originally authorized, but never fully built or adequately maintained, in 1924. These two developments would serve as the foundation for the ultimate settlement reached.

Throughout the next years, the Community and the United States continued to negotiate with individual and groups of State parties in an effort to confirm the sources of water that would ultimately fill out the Community's water budget, as well as the means by which the Community was to receive the "wet" water that was to comprise its water entitlement.

The United States role in this part of the process, again, was critical. In this process, the United States Department of Interior recognized its trust responsibility (and concomitant legal exposure) to the Community (and all other Arizona tribes) and determined that, as part of its necessary contribution to the Community's overall settlement, the United States would need to make its portion of the water supply from the Central Arizona Project generally available to tribes in replacement of the water that they had otherwise lost because otherwise State parties would never be

willing to settle. Moreover, the Department also recognized that its responsibility included relieving tribes, including the Community, of the responsibility to pay expensive rates for CAP water which was essentially replacing free water to which the Arizona tribes would otherwise have been entitled.

As a result, in 1995, the Community, the United States, the State of Arizona, and the Arizona state parties came to agreement, not only on the water budget for the Community and an amount necessary to rehabilitate the SCIIP project, but also on a framework by which the funds used to repay the federal government for the construction of the CAP would be used to pay for at least a portion of the costs of the CAP water that the Community and other tribes would obtain as replacement water for the water rights non-Indian users had taken.

Throughout this period, the Community and the United States simultaneously pursued the action in federal court to enforce the Community's existing water rights and the Community's claims to water in the state court adjudication. This meant that the United States not only devoted resources to its own prosecution of these actions and claims, but also that it provided critical financial support to the Community for it to participate as a full partner in them. Because this was a period well before the Community began to develop any means of its own, this financial support was critical to the overall process. Without it, the Community would not have been able to participate as a full partner and would never have been in a position to confirm that the negotiated settlement ultimately reached was a full and fair compromise of its claims.

Beginning in the late 1990s and through 2004, the Community entered a new phase in the pursuit of its settlement. As the outlines of its proposed settlement became clearer, it became essential that the Community finalize a settlement agreement and settlement legislation for Congress to consider. In the process, the United States continued to play an important role, though perhaps less significant than in previous years. This was due, in part, to the Community stepping up its involvement and support for its own efforts, as well as to the fact that the Department of Interior was of the view that it would review and negotiate the U.S. participation in the final agreements and legislation, but would otherwise only support and monitor the Community's extensive and protracted drafting process.

Ultimately, in 2003, with the strong support of Senator Kyl and the entire Arizona congressional delegation, a nearly final settlement agreement and legislation was developed. At that juncture, the Department of Interior fully and completely engaged in a final review and negotiation of the United States' role in the settlement overall. This resulted in a version of both that Congress would ultimately consider and approve in December 2004.

The implementation phase of the Community's settlement then began. This also required substantial U.S. involvement as it entailed the amendment of the draft agreement to conform to the legislation enacted, and the approval of the settlement agreement overall by the federal court in which the Community was seeking to enforce its existing rights, as well as by the state adjudication court in which the Community was pursuing its overall claims to water rights. Throughout this period, the United States, through the federal negotiation team established by the Secretary of Interior, participated and assisted in the process. Federal financial support for the Community's efforts in this process dwindled during this period, as it has for all tribes, a regrettable circumstance and one that the Congress should rectify if possible.

Finally, as noted above, in December 2007, the Secretary finally published in the Federal Register the notice confirming that the Community's water settlement was fully and finally enforceable, thus ending a nearly 30 year process of negotiation and compromise. As the Community faces the daunting task of implementation of this, the most significant and largest Indian water rights settlement to date, the United States must and hopefully will remain fully engaged to ensure that promises made in this settlement do not prove as ephemeral as the authorized irrigation project in 1924.

POLICY RECOMMENDATIONS

In many ways, the Community is one of a lucky handful of tribes that has survived a long and arduous process that at least partially vindicated its water rights claims. Our experience demonstrates both how hard and long the process is, but also the critical role that the United States plays in such a "success story". Overall, we all should be proud of the accomplishment achieved. However, there are some areas that could clearly benefit from congressional review and improvement:

First, Congress should review and significantly increase the financial support that the United States provides to tribes to support them in their full participation in water rights claims and settlement negotiations. As noted above, the funding for

such financial support has decreased consistently in recent years, even as the number of tribal water rights claims continues to rise. I cannot underscore enough how important this financial support is, particularly to tribes as impoverished as the Community was at the outset of its negotiation process in the 1980s.

Second, Congress should also provide sufficient funding and support to the Department of Interior overall to fully fund sufficient federal negotiation teams for all tribes that meaningfully seek them. Even as the number of tribes seeking a federal negotiation team to support them in a possible negotiation process has increased, funding levels overall for such negotiation teams appears to have decreased and this trend must be reversed. As I noted above, participation by the United States in negotiations is critical, not only to draw state parties to the table, but to supplement the clout of the tribes in the overall negotiation process so that the end result is a fair and balanced deal and not one of adhesion for the tribe.

Third, Congress should also seek ways to increase its oversight over the water settlement process overall and declare it to be a clear priority for the Department of Interior. This will improve both the accountability for the Department in making progress in difficult negotiations, but also hopefully help to accelerate the overall progress in protracted ones. Nothing makes for progress better than having to explain what has happened (or not) and why. It would also help to clarify for all which settlement negotiations are truly feasible, and which ones are perhaps not ripe, thereby allowing for meaningful prioritization of settlement possibilities by the Department and others.

Oversight might include not only hearings such as this one today, which is an excellent step in the right direction, but also an overall annual report by the Department to Congress on all federal negotiation teams and all formal requests for such a team.

Fourth, Congress should also require the Department to clarify its own guidelines for appointment of federal negotiation teams. The guidelines issued by the Department are not only vague, they provide no basis for discontinuation of federal negotiation teams for tribal settlement negotiations that are going nowhere. This is important as we all realize that no matter how high a priority Congress may set on settlement of Indian water rights claims, pragmatic cost considerations will limit what is truly doable. Congress should require the Department to review and determine, with a fair pragmatic eye, whether any existing federal negotiation team could perhaps be dissolved due to a lack of progress in the preceding years and a lack of viable prospects for any progress in the near future.

Finally, Congress should also require the Department to clarify its process for determining an appropriate federal contribution to an Indian water rights settlement. Particularly in the years after our settlement was enacted in 2004, the overriding consideration for the federal government has been solely how to limit its legal exposure to a possible claim by a tribe against it. While perhaps predictable, this limitation of the U.S. contribution to a tribal water settlement unfairly ignores the United States' trust role for tribes and the complicity of the United States in the misappropriation of tribes' water rights by non-Indian users.

The Community's experience is again illustrative. In the 1924 SCIIP Act, Congress specifically required that the irrigation project on the Community's Reservation be built before the non-Indian portion of the project. This never occurred. Instead, the United States fully funded and constructed the non-Indian portion of the project, largely ignoring the congressional requirement to the contrary.

As former General Counsel, I am aware of the exigent legal precedent that governs claims for breach of trust against the United States. In our instance, the Community may very well have had a justiciable and winnable claim against the United States for its egregious breach of this statutorily imposed responsibility. But I also know how difficult it would have been to successfully prosecute such a claim to its conclusion.

Think how difficult it will be for all the other tribes in similar, but perhaps weaker legal positions vis-a-vis their own trustee. And more importantly, think of whether the United States should measure its honor and obligation in such a parsimonious and dishonorable a fashion. Understanding that money is tight and only so much can be done, Congress should support and require a process that does not require tribes to routinely to bear this burden without stepping up to the United States' overall trust responsibility in this regard, regardless of the strict legal exposure.

Finally, Congress should review its own role in funding water rights settlements. The significant number looming on the horizon and their sheer size makes it clear that Congress must develop some mechanism that allows for settlements to be approved and funded with minimal regard for the budgetary implications. These are, after all, settlements of legal claims and they should have a priority for funding that

is analogous to that of claims funded by the Judgment Fund. To that end, Congress should consider some budgetary mechanism or legislation that either makes all settlements fundable through either the Judgment Fund or some similar kind of mechanism that alleviates the budgetary restraints that will almost certainly foreclose any real possibility of settlement of these larger water rights claims.

CONCLUSION

I want to thank the Chairman and the Members of this Committee for the honor and privilege of testifying before you today. I believe that your attention to this often over looked area of Indian rights is critical to beginning a renewed push toward settlement of these longstanding claims to water. I hope you make this a priority for the United States in the coming years.

I also want to thank you all personally for your support and passage of the Community's settlement in 2004. Madame Chair, and Members of the Committee, from the bottom of my heart I thank you for your support for my Community at such a critical time in our history. You will forever have the gratitude and appreciation of our people.

Mrs. NAPOLITANO. Thank you so very much.

For the record, I want to introduce a letter that was sent on June 15th to then-Director of OMB Rob Portman, signed by both Senators Bingaman and Domenici, specifically asking for the hopes of initiating a constructive dialogue with OMB regarding several pending Indian water rights, and it goes on to request information.

I do not know whether that has been answered, but we are going to issue a follow up to find out where we are with it and try to see where we can work with the Senate to be able to bring a little more clarity to this.

Because I have a few minutes to get to the Floor, there are various questions—actually there are four—I would like to have you submit for the record in writing since there will not be time for me to sit here and go through them. It is unique because all of you represent a different native nation. My staff will get this information to you.

One: When was your settlement process initiated?

Two: What have you seen as the biggest impediment to the settlement process, from your vantage point?

Third, when did, or do you expect your settlement process to be finalized?

And, fourth, what has been the value in working with a negotiating team?

We understand the other issues about the funding, about some of the criteria, all of that, and that will be taken into consideration, but, from you, those are the main issues that I would like to have in writing for this Committee to be able to read and be able to digest, if you will, what are the nations, what are the tribes, looking at?

With that, I thank the witnesses very much for your patience, your indulgence, and I trust we will be working a lot more with Mr. Bogert and with the tribes in order to be able to continue working on this issue that is so critical to not only the Native Americans but to this country's well-being.

This concludes the oversight hearing on Indian water rights settlements. There will be others. Our thanks to all of our witnesses for being here today. Your testimonies and expertise have, indeed, been very enlightening and helpful, and, under Committee Rule 4[h], additional material for the record should be submitted within 10 business days after this hearing.

Your cooperation, and certainly Mr. Bogert's and his staff—thank you for bringing them and introducing them to us—you are very welcome any time to come before the Subcommittee, and replying promptly to any questions submitted to you in writing would be greatly appreciated, and this hearing is now adjourned. Thank you very much and God bless.

[Whereupon, at 4:55 p.m., the Subcommittee was adjourned.]

[The letter to former OMB Director Rob Portman submitted for the record by Chairwoman Napolitano follows:]

United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150
ENERGY.SENATE.GOV

June 15, 2007

Rob Portman, Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Portman:

We are writing in hopes of initiating a constructive dialogue with the Office of Management and Budget (OMB) regarding several pending Indian water rights settlements in New Mexico. The settlements would resolve litigation involving the United States through a negotiated agreement of Indian water rights claims filed in several ongoing general stream adjudications, many of which were initiated by the United States. One such case has lasted more than 40 years. Resolution of these claims have numerous benefits, including (1) improving water management by providing certainty as to the rights of water users; (2) avoiding the direct and indirect costs of litigation to all parties; (3) acting consistent with the Federal trust responsibility to Native Americans; and (4) settling all liability issues associated with the claims.

As your staff is aware, we have three settlements in New Mexico for which we expect legislative action this year. The largest involves the Navajo Nation's water rights claims in the San Juan River basin. We have introduced legislation to implement this settlement (S. 1171) and expect to have a hearing before the Energy & Natural Resources Committee this month. The other settlements involve the Aamodt case, addressing the claims of four Pueblos in the Rio Pojoaque, and the Abeyta case, addressing Taos Pueblo's claims in the Rio Pueblo de Taos (see our earlier letter of May 22, 2007).

The Administration's recent testimony on the Duck Valley Water Rights Settlement Act, and statements by Administration officials regarding the New Mexico settlements, give us strong concern that the Administration is changing its policies on Indian water rights settlements to the detriment of New Mexico. In particular, it now appears that the Administration is interpreting it criteria and procedures for participating in settlements in an overly restrictive manner, unprecedented by any Administration.

The Duck Valley testimony is replete with statements asserting that the State of Nevada should pay a substantial portion of the costs of the settlement. With respect to New Mexico, Administration officials have also stated that there should be no federal contribution for any non-Indian benefits contained in a settlement. These statements are inconsistent with the Administration's position on three recent settlements signed into

law by the President: (1) the Arizona Water Rights Settlement Act (P.L. 108-451); (2) the Snake River Water Rights Settlement Act (P.L. 108-447); and (3) the Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34). The Administration's testimony on these settlements did not raise these issues, nor did the testimony discuss federal liability as the basis for determining the level of federal contribution. Moreover, asserting that there should be no Federal contribution for non-Indian benefits in a settlement makes little sense when put into context. The Administration has actively supported legislation to authorize the Water 2025 and Rural Water programs which contain provisions to allow for a 50% and 75% federal cost-share respectively. The projects included in the New Mexico settlements all fall within those programs and, at a minimum, should not be held to different standards merely because they are associated with settlements. The contrary is true. They should engender more support since they are helping to resolve long-standing Federal claims and issues.

Finally, much has been made of the cost of the New Mexico settlements. Granted, they are expensive, but the delegation has worked closely with the parties to reduce the costs. Also, the federal contribution being sought will be spread out over 15-20 years. As noted earlier, over the past four years the President has signed into law three settlements that will ultimately cost the Federal treasury almost $2.5 billion. The Administration has followed that with active support for a non-Indian water-related settlement involving the San Joaquin River in California that will cost approximately $650 million. It's also worth noting that during this same time period, the Administration has invested over $1.6 billion in international water supply programs and spent an additional $2.3 billion on water infrastructure and management in Iraq. While these expenditures have been necessary to meet acute needs, the situation that exists on the Navajo Reservation, where over 40% of the residents must haul water and have incomes below the national poverty level, is no less acute.

We sincerely hope that OMB reassesses the position it's been signaling on the New Mexico settlements. Failure to support these settlements will result in endless litigation and do nothing to address the pressing need for water that exists in many areas of the country. These matters involve long-neglected federal responsibilities and it is unacceptable policy to have OMB arbitrarily determining winners and losers in the realm of western water. Having worked with you before, we are appealing to you for a better result. We appreciate your consideration of this matter and look forward to hearing from you in the near future.

Sincerely,

Jeff Bingaman
Chairman

Pete V. Domenici
Ranking Member

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