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111TH CONGRESS }
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SENATE

{ REPORT
111-115

A BILL TO AUTHORIZE THE SECRETARY OF THE INTERIOR, ACTING THROUGH THE COMMISSIONER OF RECLAMATION, TO DEVELOP WATER INFRASTRUCTURE IN THE RIO GRANDE BASIN, AND TO APPROVE THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE PUEBLOS OF NAMBE, POJOAQUE, SAN ILDEFONSO, AND TESUQUE

JANUARY 20, 2010.—Ordered to be printed

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

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1105]

The Committee on Indian Affairs, to which was referred the bill, S. 1105, to authorize the Secretary of the Interior, acting through the Commissioner of Reclamation, to develop water infrastructure in the Rio Grande Basin, and to approve the settlement of the water rights claims of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque, having considered the same, reports favorably thereon, as amended, and recommends that the bill do pass.

PURPOSE

The purpose of S. 1105 is to approve an Indian water rights settlement, to authorize and direct the Secretary of the Interior to execute the settlement agreement and perform all obligations of the Secretary pursuant to that agreement, and to authorize all actions and appropriations necessary for the United States to meet its obligations under the settlement agreement and this Act.

BACKGROUND

The Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque are located in the Pojoaque River Basin, a tributary of the Rio Grande in Northern New Mexico. The basin is largely rural and agricultural; however, residential development is increasing. Water is im-

portant to the community, not only for basic municipal needs, but also for its sacred role in Pueblo culture.

The Aamodt Litigation Settlement Act, S. 1105, would resolve a long-standing Indian water rights case in the State of New Mexico. Quantification and settlement of Indian water rights requires Federal legislation. Legislation is necessary in this instance because the agreement resolves the claims of the Pueblos against the United States and releases the United States from further liability and because the agreement contemplates a number of Federal activities for which authorization is required, such as the design and construction of a regional water system. Without legislation the Pueblos and other parties would be forced to continue to engage in litigation to determine the respective rights of water users.

S. 1105 resolves the Indian water rights claims of four Pueblos stemming from the State of New Mexico, ex rel. State Engineer v. Aamodt (Aamodt) lawsuit which was filed in April 1966 making it one of the longest-running Indian water rights cases in the United States. A comprehensive Settlement Agreement was reached in January 2006 between the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque, the State of New Mexico, Santa Fe County, and the City of Santa Fe. The Settlement Agreement would secure water to meet the current and future needs of the four Pueblos, protects longstanding water uses and resources in the Basin, preserves centuries-old non-Pueblo irrigation in the Basin, and provides water for current and future uses by all of the Basin's residents.

Approximately \$174.3 million in federal appropriations would be authorized by S. 1105. In addition to that amount, the State of New Mexico, Santa Fe County, and the City of Santa Fe are prepared to contribute about an additional \$116.9 million to the proposed settlement. These funds would be used to construct a water system to serve the Pueblos and county residents, fund a Pueblo Water Acquisition Fund and a Pueblo Conservation Fund, pay for city water delivery offsets, fund operation, maintenance, and recovery of Pueblo water systems, fund county water rights acquisitions, and provide in-basin water rights to be transferred to the county water utility. If sufficient appropriations have not been made by 2020, some of the federal costs of S. 1105 may be satisfied by the "Reclamation Water Settlements Fund" which was created by Section 10501 of Pub. L. 111-11.

SUMMARY OF MAJOR PROVISIONS

Section 101 directs the Secretary of the Interior, acting through the Commissioner of Reclamation, to plan, design and construct a regional water system. The purpose of the regional water system is to provide water to the four Pueblos and other areas within Santa Fe County. Section 101 would also require the Pueblos to consent to required rights-of-way necessary for the construction of the regional water system.

Construction on the regional water system may not begin until the Secretary executes the Settlement Agreement and the Cost-sharing and System Integration Agreement. In addition, the State and County must have entered into an agreement with the Secretary regarding the non-Federal share of construction costs. Costs associated with the County's water distribution elements will be

borne by the State and local governments. Once the regional water system has been constructed, the Secretary will convey to each Pueblo any portion of the system located on its lands and to the County its part of the distribution system.

Section 102 would require that the Pueblos and Santa Fe County enter into an Operating Agreement for the water system which must be approved by the Secretary of the Interior. Section 103 of the bill would authorize the Secretary to acquire water rights for the Pueblos. Section 104 of the bill would set out the water delivery and allocation requirements of the regional water system developed pursuant to Section 101. Section 105 of the bill would establish an Aamodt Settlement Pueblos' Fund in the United States Treasury to be used for water-related infrastructure, operation and maintenance costs, and acquisition of water rights.

Section 107 would authorize the following appropriations over fiscal years 2010 through 2022: \$106,400,000 for planning, design, and construction of the regional water system (subject to annual adjustments for increases in engineering cost indices); \$15,000,000 for rehabilitation and improvement of agricultural delivery facilities (subject to adjustment in accordance with the CPI Urban Index commencing October 1, 2006); \$37,500,000 to assist the Pueblos in paying their share of operation and maintenance costs (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011); and \$5,000,000 to acquire reserved water rights for the Nambé Pueblo (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011). Section 107 also authorizes \$5,400,000 for the acquisition of certain water rights if those rights are acquired by December 31, 2010, (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011); and \$5,000,000 for the operation, maintenance or replacement costs associated with the Pueblo water facilities prior to conveyance of those facilities to the Pueblos.

Section 201 would authorize, ratify and confirm the Settlement Agreement and the Cost-Sharing and System Integration Agreement and requires the Secretary of the Interior to execute those agreements.

Section 203 sets forth the conditions for implementation of the Settlement Agreement and enforcement provisions.

Section 204 provides waivers of the Pueblos and the United States, as trustee, to claims and parties in the Aamodt case.

LEGISLATIVE HISTORY

In the 110th Congress, Senators Bingaman and Domenici introduced S. 3381 which contained authorizations almost identical to S. 1105. On September 11, 2008, the Committee held a legislative hearing on S. 3381, and it was reported out of the Committee on September 23, 2008. However, S. 3381 was never considered by the full Senate.

In the 111th Congress, S. 1105 was introduced by Senator Bingaman on May 20, 2009 with Senator Tom Udall as an original cosponsor. S. 1105 was referred to the Committee on Indian Affairs and in an open business meeting on September 10, 2009, the Committee approved S. 1105 with an amendment offered by Senator Tom Udall.

A companion bill, H.R. 3342, the Aamodt Litigation Settlement Act, was introduced in the House of Representatives on July 29, 2009, by Representative Luján. H.R. 3342 was referred to the House Committee on Natural Resources. On September 9, 2009, a hearing on H.R. 3342 was held by the Water and Power Subcommittee of the House Committee on Natural Resources.

SUMMARY OF AMENDMENT

The amendment approved by the Committee addressed certain concerns raised by the Administration. For example, in Section 203, the amendment provides for judicial review of the Secretary's decision when the Secretary makes the determination of whether the regional water system is substantially complete. The amendment also deletes Section 204(a)(9) which the Administration had raised a concern about. The Committee was informed that local parties determined that Section 204(a)(9) was not necessary because it was never the belief of those parties that diverting ground or surface water in accordance with the terms of the Settlement Agreement would cause an unacceptable change in the concentration of the naturally occurring constituencies, such as salinity, in the basin's water supply. The parties never envisioned litigation among themselves related to such issues subsequent to the settlement and are of the view that they have resolved all issues related to the diversion of water in accordance with the terms of the Settlement Agreement.

SECTION-BY-SECTION ANALYSIS OF S. 1105 AS AMENDED

S. 1105 has two Titles: Title A authorizes the Pojoaque Basin Regional Water System, and Title B ratifies the Pojoaque Basin Indian Water Rights Settlement entered by the settling parties in 2006.

Section 1. Short title

Section 1 provides the short title of S. 1105 as the "Aamodt Litigation Settlement Act."

Section 2. Definitions

This section defines important terms used in S. 1105.

TITLE I—POJOAQUE BASIN REGIONAL WATER SYSTEM

Section 101. Authorization of regional water system

Section 101 directs the Secretary of the Department of the Interior, acting through the Commissioner of Reclamation, to plan, design and construct a regional water system. The purpose of the regional water system is to provide water to the four Pueblos and Santa Fe County Water Utility. Section 101 also requires the Pueblos to consent to required rights-of-way necessary for the construction of the regional water system. Construction on the regional water system may not begin until the Secretary executes the Settlement Agreement and the Cost-sharing and System Integration Agreement, and the State and County have entered an agreement with the Secretary regarding the non-Federal share of construction costs. As amended, Section 101(f) provides that the federal costs of constructing the Pueblo water facilities will be capped. Costs asso-

ciated with the County's water distribution elements will be borne by the State and local governments. Once constructed, the Secretary will convey to each Pueblo any portion of the regional water system located on its lands and to the County its portion of the distribution system.

Section 102. Operating agreement

Section 102 requires the Pueblos to develop and submit to the Secretary an Operating Agreement for the regional water system and states required provisions of the Operating Agreement including distribution lines for the County and the Pueblos, the allocation of regional water system capacity, the terms of any unused water capacity in the regional water system, and other matters.

Section 103. Acquisition of Pueblo water supply for the regional water system

Section 103, as amended, obligates the Secretary to secure and hold in trust a firm supply of water for the Pueblos. Specifically, the Secretary is required to acquire water rights to 302 acre-feet of Nambé reserved water; acquire water rights to 1,141 acre-feet from water acquired by the County for so-called "Top of the World water rights" in the Aamodt case; and enter into a contract with the Pueblos for 1,079 acre feet of San Juan Chama Project water.

Section 103(g) clarifies that compliance with subsections 103(a)–(f) satisfies all obligations of the Secretary to acquire and secure a water supply for the Pueblos pursuant to the Settlement Agreement. Section 103(h) states that the Pueblos, County, or Regional Water Authority may acquire additional water rights to ensure that all parties receive the full allocation of water provided by the Settlement Agreement.

Section 104. Delivery and allocation of regional water system capacity and water

Section 104 concerns the allocation and operation of the regional water system including capacity to divert sufficient water from the Rio Grande to provide 4,000 acre-feet of consumptive water use and requisite peaking capacity. Section 104 also allocates to the Pueblos 2,500 acre-feet of water per year for consumptive use to the four Pueblos plus peaking capacity and to the County 1,500 acre feet of water per year for consumptive use.

Section 105. Aamodt Settlement Pueblos' Fund

Section 105 establishes in the Treasury of the United States the Aamodt Settlement Pueblos' Fund consisting of funds appropriated for the construction of the regional water system and additional elements of the settlement including operation and maintenance. These additional elements are set forth in Section 107.

Section 106. Environmental compliance

Section 106 provides that the laws of the Federal Government related to environmental protection, including but not limited to the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), apply to S. 1105.

Section 107. Authorization of appropriations

Section 107 would authorize the following appropriations over fiscal years 2010 through 2022: \$106,400,000 for planning, design, and construction of the regional water system (subject to annual adjustments for increases in engineering cost indices); \$15,000,000 for rehabilitation and improvement of agricultural delivery facilities (subject to adjustment in accordance with the CPI Urban Index commencing October 1, 2006); \$37,500,000 to assist the Pueblos in paying their share of operation and maintenance costs (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011); and \$5,000,000 to acquire reserved water rights for the Nambé Pueblo (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011). Section 107 also authorizes \$5,400,000 for the acquisition of certain water rights if those rights are acquired by December 31, 2010, (subject to adjustment in accordance with the CPI Urban Index commencing January 1, 2011); and \$5,000,000 for the operation, maintenance or replacement costs associated with the Pueblo water facilities prior to conveyance of those facilities to the Pueblos.

TITLE II—POJOAQUE BASIN INDIAN WATER RIGHTS
SETTLEMENT

Section 201. Settlement agreement and contract approval

Section 201 ratifies and requires the Secretary to execute the Settlement Agreement. Section 201 also authorizes the Pueblos to enter contracts to lease or exchange water rights as provided in the Settlement Agreement.

Section 202. Environmental compliance

Section 202 provides that the Secretary's execution of the Settlement Agreement does not constitute a major Federal action for purposes of NEPA. It also provides that in implementing Title I, the Secretary is required to comply with the laws of the Federal government relating to environmental protection, including NEPA and ESA.

Section 203. Conditions precedent and enforcement date

Section 203, as amended, requires the Secretary to publish in the Federal Register a statement of findings that certain conditions have been met, to wit: that any changes required of the Settlement Agreement by virtue of S. 1105 have been made; that the Settlement Agreement, so revised, contain required waivers and releases; that Congress has fully appropriated, or the Secretary has provided from other authorized sources, all funds authorized by S. 1105 by 2016; that the Secretary has acquired or entered into contracts for the water supply for the Pueblos and that water has been satisfactorily permitted by the New Mexico State Engineer; that the State of New Mexico has enacted any necessary legislation and provided funding required under the Settlement Agreement; that a partial final decree setting forth the water rights of the Pueblos has been approved by the U.S. District Court for the District of New Mexico; and, a final decree setting for the water rights for all parties to the Aamodt case has been approved by the U.S. District Court for the District of New Mexico by 2017.

Section 203(c) provides that the Settlement Agreement will become enforceable as of the date the U.S. District Court for the District of New Mexico enters a partial final decree.

Section 203(e), as amended, provides that the Secretary shall determine whether construction of the regional water system is substantially complete and allows for judicial review of that determination.

Section 204. Waivers and releases

Section 204, as amended, requires the Pueblos to execute a waiver and release of all past, present or future claims to surface and groundwater rights the Pueblos, or the U.S. on behalf of the Pueblos, could have asserted in the Aamodt case; all past, present or future claims for damages, losses, or injuries to water rights or claims of interference, diversion, or taking water for lands within the Pojoaque Basin that could have been asserted in the Aamodt case; their defenses in the Aamodt case to claims previously asserted by other parties in the Aamodt case; and all pending inter se challenges against other parties to the Settlement Agreement.

Section 204 also requires the Pueblos to execute similar waivers and releases of all causes of action against the U.S. arising out of past, present, or future claims for water rights that were asserted or could have been by the United States in the Aamodt case; all past, present or future claims for damages, losses, or injuries to water rights or claims of interference, diversion, etc. for lands within the Pojoaque Basin that could have been asserted by the Pueblos against the United States in the Aamodt case; and all claims arising out of the negotiation or adoption of the Settlement Agreement that the Pueblos may have against the United States.

Section 204 provides that notwithstanding the above waivers and releases, the Pueblos and the United States retain claims regarding water rights outside the Pojoaque Basin; all claims for the enforcement of the Settlement Agreement, the Final Decree or S. 1105; all rights to use and protect water rights acquired pursuant to state law to the extent not inconsistent with the Settlement Agreement of the Final Decree; and all rights, remedies, privileges, immunities, powers, and claims not specifically waived and released pursuant to the Settlement Agreement or S. 1105.

Section 204 also provides that applicable statutes of limitation will be tolled from the date of enactment of S. 1105 and end on the date of enforcement. It also provides that nothing in section 204 revives any claims or tolls any period of limitation that expired before the enactment of S. 1105.

Section 205. Effect

Section 205 provides that nothing in S. 1105 or the Settlement Agreement affects the land and water rights, claims, or entitlements to water of any Indian tribe, pueblo, or community other than the Pueblos.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 10, 2009, the Committee on Indian Affairs, by voice vote, adopted S. 1105, as amended, and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 1105, as amended.

COST AND BUDGETARY CONSIDERATIONS

S. 1105—Aamodt Litigation Settlement Act

Summary: S. 1105 would approve and ratify a settlement agreement between four Pueblos and the state of New Mexico. The agreement would settle the Pueblos' claims to water rights in the state. As part of the settlement agreement, the bill would authorize the appropriation of funds to construct a regional water system in the Rio Grande River Basin. The bill also would create a trust fund for the Pueblos to maintain that system. In addition, the bill would authorize appropriations for the Department of the Interior (DOI) to operate and maintain certain portions of the system until they are conveyed to the Pueblos. Finally, the bill would authorize appropriations for the Secretary of the Interior to acquire certain water rights on behalf of the Pueblos.

Based on information from DOI and assuming appropriation of the authorized and necessary amounts, CBO estimates that implementing S. 1105 would cost \$71 million over the 2010–2014 period and \$128 million after 2014. Enacting S. 1105 would not affect direct spending or revenues.

S. 1105 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

If the Secretary of the Interior acquires property through eminent domain in order to construct the regional water system under the Aamodt litigation settlement, S. 1105 would impose a private-sector mandate as defined in UMRA. Based on information from the Department of the Interior, CBO expects that the Secretary would use that authority sparingly and that the cost of the mandate, if imposed, would fall well below the annual threshold established in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1105 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Regional Water System:						
Estimated Authorization Level	0	0	10	25	35	70
Estimated Outlays	0	0	6	18	29	53
Settlement Trust Fund:						
Estimated Authorization Level	0	0	3	3	4	10
Estimated Outlays	0	0	3	3	4	10
DOI Operation and Maintenance Costs:						
Estimated Authorization Level	0	0	1	1	1	3
Estimated Outlays	0	0	1	1	1	3
Water Rights:						
Authorization Level	5	0	0	0	0	5
Estimated Outlays	2	2	1	0	0	5
Total Changes:						
Estimated Authorization Level	5	0	14	29	40	88
Estimated Outlays	2	2	11	22	34	71

Note: DOI = Department of the Interior.

Basis of estimate: For this estimate, CBO assumes that S. 1105 will be enacted early in fiscal year 2010 and that the necessary amounts will be appropriated for each year. Enforcement of the settlement agreement depends on the completion of a number of actions by federal, state, local, and tribal governments. Based on information from DOI, CBO expects that those actions will be completed by fiscal year 2017. Cost estimates for the authorized water projects are based on information from DOI and on historical spending patterns for similar activities.

In 2006, four Pueblos in New Mexico (Nambé, Pojoaque, San Ildefonso, and Tesuque) and the city and county of Santa Fe, New Mexico, signed a settlement agreement resolving a water rights dispute (known as the Aamodt case) in the Rio Grande River Basin. The United States would become party to that agreement upon enactment of S. 1105, provided that certain conditions are met. Among other actions, the Secretary of the Interior would have to publish a statement of findings in the Federal Register indicating that all parties have executed the agreement; the U.S. district court would have to issue a judgment and final decree concerning the agreement; Congress would have to appropriate certain amounts specified in the bill (about \$68 million) to carry out part of the agreement; and New Mexico would have to appropriate funds for the Pueblos.

Based on information from DOI and assuming appropriation of the necessary amounts, CBO estimates that implementing the legislation would cost \$71 million over the 2010–2014 period and \$128 million after 2014. Should the Secretary not publish the required statement of findings by September 15, 2017, verifying that all conditions necessary to execute the agreement have been met, the agreement would not take effect, and no federal funds could be spent after that date.

Regional water system

Section 101 would authorize the Secretary of the Interior, acting through the Commissioner of Reclamation, to construct a regional water system in the Rio Grande River Basin in New Mexico. The system would divert water from the Rio Grande River to certain Pueblos and to the Santa Fe County Water Utility. The state of New Mexico and Santa Fe County would be required to pay a portion of the system's cost. Once construction of that system is complete, the Secretary would be required to convey components of the system to state, local, and tribal entities. Assuming appropriation of the necessary amounts, CBO estimates that constructing the water system would cost \$53 million over the 2010–2014 period and an additional \$75 million after 2014.

Settlement trust fund

Section 105 would authorize the appropriation of \$57.5 million to be deposited into the Aamodt Settlement Pueblos' Fund. A portion of that amount would be adjusted for increases in construction costs. Once certain conditions have been met, the Secretary of the Interior would be required to invest amounts in the fund in U.S. Treasury obligations. The fund would be used by the Pueblos to operate and maintain certain portions of the regional water system owned by the Pueblos.

Amounts in the fund could not be spent by the Pueblos until certain conditions specified in the bill are met. About 35 percent of the funds would be available for expenditure after the United States District Court approves the settlement agreement, which we expect would occur in 2012. Those funds would be used by the Pueblos to acquire certain water rights and to operate and maintain certain water systems. CBO expects that the Pueblos would spend between \$3 million and \$5 million a year over the 2012–2016 period for those purposes.

The remaining 65 percent of the funds could be spent when the Secretary determines that certain portions of the new regional water system are substantially complete. Information from DOI suggests that the system would be substantially complete by the end of 2017. At that time, we expect that the settlement agreement would be executed, the remaining funds would be available to the Pueblos, and the budget would record an expenditure of \$42 million. In total, CBO estimates that implementing this provision would cost \$10 million over the 2010–2014 period and \$51 million after 2014.

Payments to certain tribal trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. As a result, CBO expects that the entire amount deposited into the Aamodt Settlement Pueblos' Fund (excluding amounts made available for certain Pueblo water systems) would be recorded as an outlay in 2017 when the funds could be spent by the Pueblos. Subsequently, any use of such funds would have no effect on the federal budget. Because S. 1105 directs the Secretary to invest amounts in the fund only after those amounts are available to the Pueblos, CBO expects that no interest would accrue on the amounts in the fund until 2017 when federal payments could first be spent by the Pueblos.

DOI operation and maintenance costs

Section 107 would authorize the appropriation of \$5 million for DOI to pay operation and maintenance costs associated with certain portions of the regional water system prior to their conveyance to the Pueblos. Based on information from DOI, CBO expects that land and infrastructure associated with those projects would be conveyed to the Pueblos in 2017. Assuming appropriation of the authorized amounts, CBO estimates that operating and maintaining those projects would cost about \$1 million a year over the 2012–2016 period.

Water rights

Section 103 would authorize the appropriation of \$5.4 million for the acquisition of water rights pursuant to the settlement agreement. Those funds would be used by the Secretary of the Interior to acquire, on behalf of the Pueblos, a specified amount of water from Santa Fe County. Assuming appropriation of the authorized amounts, CBO estimates that acquiring those water rights would cost \$5.4 million over the 2010–2012 period.

Estimated impact on State, local, and tribal governments: S. 1105 contains no intergovernmental mandates as defined in UMRA. The bill would authorize water projects and provide other

assistance that would benefit state, local, and tribal governments. Any costs to those governments would be incurred voluntarily as a condition of federal assistance.

Estimated impact on the private sector: If the Secretary of the Interior acquires property through eminent domain in order to construct the regional water system under the proposed settlement, the bill would impose a private-sector mandate as defined in UMRA. The cost of the mandate would be the fair market value of the property and any expenses incurred by the owners in transferring that property to the federal government. Based on information from the DOI, CBO expects that only a few small tracts of private land may need to be acquired and that the value of that land is small. CBO therefore expects that the cost of the mandate, if imposed, would fall well below the annual threshold established in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

Estimated prepared by: Federal Costs: Jeff LaFave; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

OCT 22 2009

The Honorable Byron Dorgan
Chairman, Senate Committee on
Indian Affairs
United States Senate
Washington, DC 20510

Dear Senator Dorgan:

In response to your request, this letter presents the views of the Administration regarding S. 1105, the "Aamodt Litigation Settlement Act," as reported by the Committee on Indian Affairs on September 10, 2009. For overall views regarding the purposes and importance of this settlement, I would refer the Committee to testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 9, 2009, on House companion bill H.R. 3342. The House legislation was identical to S. 1105 prior to the amendments made by the Senate Committee on Indian Affairs during the markup.

I want to begin by emphasizing, as I did in the testimony delivered at the House hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by S. 1105 would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing for over 40 years. We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns, such as ensuring an appropriate non-Federal cost share that could make this a settlement that the Administration could wholeheartedly support. I will not reiterate the entire statement made by the Administration during the September 9, 2009 House hearing but instead will focus this set of comments on the areas in this legislation that were

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improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, changes were made in section 101(f) of S. 1105 that limited the amount of funding to be expended by the Secretary of the Interior (Secretary) to construct the Pueblo Water Facilities under this Act to an amount certain, indexed based on construction cost fluctuations. Although the United States agrees with the concept that the amount it is required to pay should be known in advance of bill authorization and limited to an agreed upon figure, as we stated in our testimony in the House, the Administration is concerned about the validity of the cost estimates that the settlement parties are relying on for the regional water system. The parties rely on an engineering report dated June 2007 that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. Much of the cost information contained in the engineering report was arrived at three years ago, none of the costs have been indexed to 2007, and the total project cost estimates cannot be relied upon.

Although section 101(f) of the bill as reported by the Committee establishes a limit on the amount of funding that the United States can expend for construction of the Pueblo Water facilities, it is important for Congress to understand that the provisions of section 203 allow the settlement and this Act to be voided if the water system is not completed by 2021. This nullification provision creates the risk that, even if the United States, the County, the State, and the Pueblos all follow through on their commitments under the Agreement and this bill, the settlement could fail in the event that the costs for the system turn out to be higher than the current cost estimates contemplate or than the authorizations allow.

This is a scenario that all of the parties, including the United States, must strive to avoid, because it would mean a return to litigation and conflict after the expenditure of significant resources by all parties towards a failed solution. In order to reduce the risk of this outcome, I have committed that the Bureau of Reclamation will carry out additional studies and analyses of the proposed water system. These studies will be completed by the end of the year and should shed light on the current cost estimate and the possibility that actual costs could be higher than expected.

In order to distribute the risk of higher costs fairly while avoiding the possibility of entirely unraveling the settlement, the Administration believes that the legislation should provide that the parties to this settlement, including the State and the United States, should share proportionately any increases in construction costs beyond those currently contemplated. The Federal government should not bear the brunt of higher costs without proportionate increases by other Aamodt settlement parties based on the percentage of overall construction costs that the parties are committing to in the Cost-Sharing Agreement. Moreover, either the Cost-Sharing Agreement should be executed before Congress ratifies it or its execution should be made a condition of beginning construction. To ensure open discussion and consideration of the reasons for any increased costs beyond those contemplated at this time, the legislation could also include language

providing that the Bureau of Reclamation will consult with the State and the Pueblos regarding any cost increases.

Second, as currently written, section 103(e)(1)(C) of the bill would probably be interpreted to waive reimbursement to the Federal Government of operation, maintenance and repair (OM&R) costs associated with water to be provided from with the San Juan-Chama Project under the bill. This subsection reads "the costs associated with any water made available from the San Juan-Chama (SJC) Project which were determined nonreimbursable and nonreturnable pursuant to Pub. L. No. 88-293, 78 Stat. 171 (March 26, 1964) shall remain nonreimbursable and nonreturnable." The current language could make both the construction and the OM&R costs nonreimbursable. We do not believe it was the intent of the parties to make the OM&R costs nonreimbursable. Reimbursement of OM&R costs should not be waived, and to make that clear the section should be amended to read:

(C) the construction costs associated with any water made available from the San Juan-Chama (SJC) Project which were determined nonreimbursable and nonreturnable pursuant to Pub. L. No. 88-293, 78 Stat. 171 (March 26, 1964) shall remain nonreimbursable and nonreturnable.

Third, the United States continues to have concerns about the language used in section 107(c)(2)(B). As amended, this provision states that "the amount authorized under subparagraph (A) shall expire after the date on which construction of the Regional Water System is completed and the amounts required to be deposited in the account have been deposited under this section by the Federal Government." This legislative language requires clarification. First, we assume that the account referenced is the Aamodt Settlement Pueblos' Fund, but this should be specified. Second, as introduced, S. 1105 provided that once the System was complete and an OM&R account was funded, "the Federal Government shall have no obligation to pay for the operation, maintenance, and replacement costs of the Regional System." This language had the advantage of clearly specifying that any obligation to pay for the operation, maintenance, and replacement costs ended when the specified criteria were met. The new language lacks that clarity. It would be a clearer statement of Congressional intent if the language stated **both** that the Secretary is authorized to pay operation, maintenance, or replacement costs for the Regional Water System until the Regional Water System is completed and the amount authorized in section 107(c) for the Aamodt Settlement Pueblos' Fund has been appropriated to that Fund, **and** that thereafter the Federal Government shall have no obligation to pay for the operation, maintenance, and replacement costs of the Regional System.

Fourth, the United States still has concerns with language used in section 203(f) providing generally that in the event the settlement is voided, the United States is entitled to return of certain funds and property. First, we note that similar but not identical provisions are included in section 105(d)(7)(C) and section 203(b). These provisions should be harmonized. The Administration suggests that language be added at the end of

section 203(b) to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement, including any water secured for the Pueblos, in the event that the settlement fails.

Fifth, the United States notes with approval the changes made in section 203(a)(2) that ensure that the conditions precedent for the settlement to stay effective include appropriate issuance of permits by the New Mexico State Engineer to the Regional Water Authority to change the points of diversion to the mainstem of the Rio Grande for the diversion and consumptive use of water by the Pueblos and as part of the water supply for the Regional Water System.

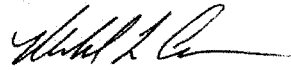
Sixth, the Administration supports the decision to delete section 204(a)(9) of this bill, a provision to which we had objected in our testimony in the House hearing because of concerns that it would have the potential to erode important environmental safeguards and to create ambiguities as to the scope of the waivers.

Seventh and finally, the Administration supports the language added following section 203(e) regarding the process by which the Pueblos retain the right to withdraw the waivers authorized under this settlement and trigger nullification of the entire settlement agreement if the system is not substantially complete by 2021. The new language lays out a process under which substantial completion is determined by the Secretary of the Interior and, subsequently, subject to review under the Administrative Procedures Act. The new language includes (1) a definition of substantial completion; (2) a mechanism for determining when it has occurred; and (3) a clearly specified process for challenging that determination. By adopting this provision, the parties to this settlement have established a clear legal threshold for failure of the settlement. This clarity regarding the conditions and processes for determining finality will minimize the risk of futile litigation in the future.

In conclusion, I would like to emphasize that this Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results. Neither the Pueblos nor their non-Indian neighbors benefit from continued friction in the Rio Pajoaque basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblos and also ensures that the appropriate costs of the settlement are borne proportionately. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. In addition, we would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Connor".

Michael L. Connor
Commissioner

cc: The Honorable John Barrasso
Vice Chair, Senate Committee on Indian Affairs

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impact of S. 1105 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 1105 will not make any changes in existing law.

ADDITIONAL VIEWS OF SENATOR TOM UDALL

I am pleased that the Indian Affairs Committee voted to report S. 1105, Aamodt Litigation Settlement Act. I appreciate the support of my colleagues on this bill and the efforts of the Chairman to move this bill forward in a timely manner.

Following the Committee Business Meeting in which S. 1105 was reported, the Administration submitted a letter to the Committee, through Commissioner of Reclamation Michael L. Connor, expressing its views on S. 1105. As explained in Commissioner Connor's letter, these views supplement his testimony delivered to the House Subcommittee on Water and Power on September 9, 2009 on identical companion legislation, H.R. 3342.

In response to both the letter and the testimony, I received a letter from representatives of the seven local government parties to the Aamodt settlement and leadership of the Pueblos of San Ildefonso, Nambe, Pojoaque, and Tesuque discussing some of the issues raised. To ensure clarity and completeness of the Committee's report on S. 1105, I would like to submit portions of this response that address issues raised by the Administration and Commissioner Connor:

First. The Commissioner expressed concerns about the allocation of risk in the event that the cost of constructing the Regional Water System exceeds the budget authorization. The non-federal settlement parties agree that execution of the Cost-Sharing Agreement should be made a condition of beginning construction and that requirement is already in Section 101(d)(1) of S. 1105.

The Commissioner also suggested that the Bureau of Reclamation be required to consult with the State and the Pueblos regarding any cost increases. The State, Santa Fe County and the Pueblos all expect that the Bureau of Reclamation will consult with us during the design, and construction phases. If there are any cost increases, the regular on-going consultation process will provide the best opportunity to allocate responsibility for such increases. It is difficult, if not impossible, to allocate the responsibility for cost overruns in the abstract. The non-federal parties strongly urge the Congress to proceed with this legislation with that understanding but without additional language added to address this concern.

Second. The Commissioner proposed to revise the language pertaining to the San Juan-Chama project water required to fulfill terms of this settlement. The language proposed by the Commissioner is acceptable to the Pueblos. This change involves inserting the word "construction" before the word "cost" in Section 103(e)(1)(C).

Third. The non-federal parties think the language in the Bill as written adequately address the concern raised by the United States about Section 107(c)(2)(B). However, we do not object to the clarification suggested by the Commissioner on behalf of the United

States, that the legislation state “both that the Secretary is authorized to pay operation, maintenance, or replacement costs for the Regional Water System until the Regional Water System is completed and the amount authorized in section 107(c) for the Aamodt Settlement Pueblos’ Fund has been appropriated to that Fund, and that thereafter the Federal Government shall have no obligation to pay for the operation, maintenance, and replacement costs of the Regional System”.

Fourth. The non-federal parties agree that there is value in harmonizing the language in Sections 105(d)(7)(C) and Section 203(f). We propose the following three changes to achieve that:

- Insert as new section 203(f)(4):

Right to Set-Off. The United States shall be entitled to set off any funds expended or withdrawn from the amounts appropriated pursuant to section 107(c) together with any interest accrued against any claims against the United States relating to water rights in the Pojoaque Basin asserted by a Pueblo that received the direct benefit of such funds.

- Section 105(d)(7)(C) should be similarly modified to read “If the conditions precedent in section 203 have not been fulfilled by September 15, 2017, the United States shall be entitled to set off any funds expended or withdrawn from the amounts appropriated pursuant to section 107(c) for the direct benefit of a Pueblo, together with any interest accrued, against any claims asserted by that Pueblo against the United States relating to the water rights in the Pojoaque Basin.”

- Section 203(b)(2) should be modified to parallel Section 203(f)(3).

TOM UDALL.

