



United States Department of the Interior

Washington, DC 20240
NOV 15 2010

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

Dear Chairman Dorgan:

For over 20 years, the Federal Government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Consistent with this view, the Obama Administration has re-energized the Federal Government's commitment to addressing the water needs of Native American communities through Indian water rights settlements. Over the past 20 months, this Administration has developed a track record of strong support for Indian water rights settlements. The President signed into law two settlements in March 2009 (P.L. 111-11). Also in 2009, the Department of the Interior delivered supportive testimony on several pending settlement bills which articulated clear principles that the Administration will apply in considering support for new settlements and identified specific issues that needed to be resolved with respect to the pending settlements. Finally, the Administration's 2011 budget requests funding that not only supports implementation of approved settlements, but also includes increases to the Bureau of Indian Affairs and Bureau of Reclamation programs that support Federal and tribal participation in pending negotiations. The Administration's general 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.

The White Mountain Apache Tribe Water Rights Quantification Act (H.R. 1065) was passed by the House on January 21, 2010 and is currently pending before the Senate. Companion legislation (S. 313) was reported by the Senate Committee on Indian Affairs on January 20, 2010. Since the bill was passed in the House, substantial work and refinements have been made to this settlement by the parties and the Arizona delegation which have greatly improved the bill. These discussions have resulted in revised legislation that addresses many of the Administration's major policy objections. The Administration still has concerns about the legislation, as outlined in this letter. Nevertheless, given our strong commitment to working closely with Indian tribes to help fulfill long-standing rights, the Administration supports the enactment of H.R. 1065 if modified as proposed by the settlement parties and as described in this letter.

The key changes made in this legislation to address the Administration's concerns are outlined briefly below.

Title to the Water System

In response to Administration concerns regarding provisions in earlier versions requiring the United States to hold title to the White Mountain Apache Tribe (WMAT) rural water system in trust, section 7 of this legislation has been amended to mandate the transfer of title to the rural water system to the Tribe once a series of criteria have been met. The Administration strongly supports this provision as revised to require the Tribe to take title to the system after the system is constructed and operational. Having the Tribe take title to the domestic water supply system is consistent with self-determination and tribal sovereignty and with other recent legislation that provides tribes with assets and opportunities that they then can control as reservation economies and conditions evolve. The Administration believes that offering assistance to facilitate tribal self-sufficiency is preferable to creating an expectation that the Federal government will permanently own, operate and subsidize infrastructure.

The conditions for the conveyance of title are laid out in section 7 of the revised legislation and are substantially consistent with the processes laid out in the Aamodt settlement (S. 1105) and the Crow settlement (S. 375 as reported). Section 7 has been rewritten to give the Department the clear parameters it needs to determine how to build a system satisfying the requirements of the statute while also affording appropriate flexibility for the Secretary and the Tribe to modify plans for the system by mutual agreement. The goal of this section is to enable the construction of a system that will be cost effective and meet the needs of the Tribe. The revisions proposed to this section provide the clarity that both the Tribe and the Department need to complete construction of the system for the \$126.2 million authorized for these purposes under this legislation.

Changes in the Waiver and Release of Claims Section

Concerns with respect to some of the original waiver provisions of the bill have been addressed and changes have been agreed to by the United States and the settlement parties. One of the issues of particular concern to the United States Forest Service (USFS) was ambiguity about whether certain boundary and land claims were included in the water rights settlement. Clarifying language has been added to the effect that nothing in the Act expands, diminishes, or impacts any claims the Tribe may assert, or any defense the United States may assert, concerning title to land outside the current survey of the northern boundary of the reservation

A second major change relates to the Tribe's retention of certain damages claims with respect to actions taken on USFS lands or lands formerly held by the USFS. The language in S.313 as originally introduced was unclear and appeared to be far broader in nature than what the Tribe actually was trying to achieve. The provision has now been re-written to ensure that the Tribe and the United States can protect the Tribe's water rights from injurious groundwater pumping on specific USFS lands if the water is used

for purposes, such as municipal, commercial, or industrial uses, that are beyond the scope of USFS federal reserved rights. The protections would apply to uses on USFS lands or if water was transported off USFS lands for such purposes. In addition, claims may be brought against successors in interest to the USFS.

Clarifying Changes in Section 10 Dealing with ISDEAA Contract

At the request of the Department of the Interior, the parties to this settlement agreed to changes in section 10 of this legislation to clarify that although the Tribe is authorized in this legislation to carry out planning, design, and construction work through an Indian Self-Determination and Education Assistance Act (ISDEAA) contract, this contract would be subject to appropriate Departmental oversight. The Tribe will not have direct control of the funds authorized for these purposes other than through an agreement under ISDEAA with appropriate sideboards to ensure accountability for the expenditure of funds as provided for under section 7(h). This provision states that any ISDEAA contract entered into to carry out the provisions of this Act “shall incorporate such provisions regarding periodic payment of funds, timing for use of funds, transparency, oversight, reporting, and accountability as the Secretary determines to be necessary . . . to ensure appropriate stewardship of Federal funds.” The Administration supports the changes made in section 10 to ensure that the section 7(h) language will be controlling so that the Secretary will maintain appropriate levels of supervision over the funds authorized for the planning, design, and construction of the WMAT rural water system.

Authorization of Funding for Stand-Alone Activities

In earlier communications regarding this settlement, the Administration expressed concerns that the WMAT Settlement Fund established in section 12 of H.R. 1065 authorizes federal appropriations for numerous Tribal projects that are extraneous to the settlement. Section 12(b)(2)(C) authorizes the Tribe to spend amounts in the WMAT Settlement Fund for fish production, including hatcheries, rehabilitation of recreational lakes and existing irrigation systems, water-related economic development projects, protection, restoration, and economic development of forest and watershed health, and cost overruns for the completion of the rural water system. The Administration believes that these projects should be considered on their own merits in separate authorizing legislation.

The Tribe has agreed to modifications to the Settlement Agreement to clarify that the authorization for the Secretary to provide support for these additional activities under section 12(b)(2)(C) is not required for the Settlement to become final, and that the Secretary has discretion whether to propose to expend funds for these activities.

The Tribe has also agreed to changes in the bill reducing by \$35 million the amount authorized to be appropriated for the WMAT Settlement Fund in order to establish a “Cost Overrun Subaccount” administered by the Secretary to complete work on the WMAT rural water system and to cover the costs of operating and maintaining the rural water system prior to conveyance of the system to the Tribe. The Secretary’s Cost

Overrun Subaccount is established under Section 12(f) of the revised legislation. Under section 12(b)(2)(B)(i), any amount of the \$35 million not used by the Secretary prior to conveyance of the WMAT rural water system to the Tribe would be deposited in the Tribe's Settlement Fund. The effect of this revision in the bill is a potential reduction in the total amount authorized for the WMAT Settlement Fund from the original authorization of \$113.5 million to \$78.5 million, if this \$35 million is used for cost overruns.

Neither the \$35 million Cost Overrun Subaccount nor the \$78.5 million WMAT Settlement Fund is required in order for this settlement to be final and for the WMAT rural water system to be conveyed to the Tribe.

Sovereign Immunity

The United States objects to Section 11(a) -- which waives the sovereign immunity of the United States for "interpretation or enforcement of this Act or the Agreement" in "a United States or State court." This subsection should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in similar bills, such as S. 1105, the Aamodt Litigation Settlement Act, and S. 375, the Crow Tribe Water Rights Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication. The United States believes that the waiver of sovereign immunity provided by Congress under the McCarran Amendment, 43 U.S.C. § 666, is sufficient to assure appropriate administration and enforcement of the Act and Agreement. One portion of this waiver of sovereign immunity is particularly problematic. As currently drafted, Section 11(a)(2)(B) provides for waiver of the sovereign immunity of the United States for suit by any "landowner or water user in the Gila River basin or Little Colorado River basin in the State." This waiver sweeps beyond water rights holders or parties to the settlement and could be interpreted to include all water users -- including those who happen to drink a glass of water and all property owners -- within two extensive watersheds. This provision is unnecessary and unjustifiable and will encourage wasteful and needless litigation and dispute. The United States urges deletion of this portion of the bill and would strongly oppose inclusion of such language in any future legislation.

Technical Changes

The Administration's support for the settlement also requires some technical corrections to more accurately reflect the intent of certain provisions and ensure internal consistency. Recent revisions to the legislation agreed to by the parties have addressed each of these technical issues as follows.

First, section 2 of earlier versions of this bill included both "Findings" and "Purposes" as separate subsections. The Administration raised concerns that the Findings section was not necessary and should be deleted. The revised version of the bill now being supported

by the Tribe and other settlement parties deletes the entire Findings section. As revised, the “Purposes” section of the bill reflects the policy behind this legislation accurately.

Second, changes made in section 4(b) appropriately clarify the extent of the Secretary’s discretion in approving changes to the Agreement subsequent to enactment of this legislation.

Third, the Administration agrees with the revised language in section 5(a) under which the tribal water rights are to be “held in trust by the United States on behalf of the Tribe” and are “not subject to forfeiture or abandonment.”

Fourth, the language ensuring that all applicable environmental laws and regulations apply found in section 14 and section 4(c)(1) has been harmonized.

Finally, the Administration agrees with the refinement to section 13 regarding the statutory antideficiency provision.

Cost Sharing

One of the Administration’s fundamental principles is that settlements should include appropriate cost-sharing proportionate to the benefits received by all non-tribal parties benefiting from the settlement. We estimate the non-federal cost sharing in this settlement to be approximately \$22.7 million, comprising \$2 million from the State of Arizona towards construction of the WMAT rural water system, and an estimated \$20.7 million that the State of Arizona will be contributing related to firming of water rights. The State of Arizona will be responsible for firming 3,750 acre-feet of water from the Central Arizona Project. The costs of firming are currently estimated to be \$5,520/AF and therefore the estimated value of the State’s contribution of firming costs is \$20,700,000 (3,750 x \$5,520). Combined with the \$2 million for the WMAT rural water system, the State of Arizona’s total contribution is estimated at \$22,700,000.

We would note that the agreement contemplates the value of an expected lease for water between the Tribe and local entities, estimated to be approximately \$56 million, as a non-Federal cost share. However, consistent with how lease revenues were considered in similar Indian water rights bills (e.g., the Taos Pueblo Indian Water Rights Settlement Act (H.R. 3254)), this lease should be considered a separate transaction between these parties and not credited as part of the non-Federal cost share toward this settlement.

The total authorized cost of this Settlement to the Federal government is \$292.2 million: (1) \$126.2 million authorized for construction of the WMAT rural water system under section 12(a); (2) \$35.0 million to the Cost Overrun Fund discussed above; (3) \$50.0 million for the WMAT Maintenance Fund established under section 12(b)(3); (4) \$2.5 million provided for operation and maintenance under section 12(e); and (5) \$78.5 million authorized to be appropriated under section 12(b)(2)(B).

Only \$126,193,000 of the authorized amounts must be appropriated in order to achieve the Enforceability Date required by section 9(d) of the legislation. However, the Bureau of Reclamation will not be able to transfer title of the rural water system to the Tribe until construction of the system is completed, which will require appropriations of at least \$126.2 million and could cost an additional \$35 million if needed for cost overruns. Further, unless Congress appropriates the \$50 million for the WMAT Maintenance Fund, and unless at least \$4.95 million is appropriated to the Tribe's trust fund for irrigation projects, the Tribe's waiver of claims related to its irrigation system under section 9(a)(3)(E) will not come into effect. Since appropriation of these amounts will be needed to ensure the Federal government gets the benefits of the settlement, the cost of these components of this settlement to the Federal government is estimated to be at least \$181.1 million (\$126.2 million + \$50.0 million + \$4.95 million), and could be up to \$216.1 million if there are cost overruns.

Including the non-Federal cost share of \$22.7 million, the minimum total cost of these components of the legislation is estimated at \$203.8 million (\$22.7 million + \$181.1 million), and the non-Federal cost share is calculated to be 11%.

The Administration believes that those who share in the benefits of projects should help to pay for them, including all benefits to non-Indian parties in Indian water settlements. Those benefits include not just infrastructure improvements, but also quantified water rights. The certainty provided to all parties by final settlements has great value, and the Administration intends to pursue cost-sharing from all parties commensurate with the benefits and value they obtain from the settlement.

We recognize that each Indian water settlement must take into account the specific facts on the ground that are unique to the affected communities and that the proposed WMAT settlement will involve significant changes in water rights in an area that has limited water resources and is struggling to bring potable drinking water to its communities. However, we are concerned about the large Federal contribution for construction of the WMAT rural system (at least 98 percent of construction costs) relative to the non-Federal cost-share in this settlement. As a general matter, we also believe that non-Federal parties should share in paying for any construction cost overruns.

Conclusion

For the most part, the Administration's major policy objections to H.R. 1065 are satisfactorily addressed in the revised legislation. The revisions improve the bill significantly and, although noting the concerns raised in this letter, the Administration supports H.R. 1065 as the settlement parties propose to amend it. Given the budget challenges facing the Federal government, the revised bill would allow the government to fulfill the Federal trust responsibility while also acting with proper regard for the fiscal limitations that exist both now and in the foreseeable future.

The Department looks forward to working with the Congress and stakeholders to negotiate settlements that are consistent with the Administration's trust responsibility and

that embody the principles of helping Tribes realize value from confirmed water rights while ensuring appropriate cost sharing from all parties. Jointly with Congress, the Administration would like to identify and implement clear criteria for going forward with any future settlements on issues including cost-sharing and eligible costs. Ultimately, this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation and ensure that legislation introduced in Congress is consistent with these principles.

We note that support by the Administration for a proposed settlement, and enactment by Congress marks the beginning and not the end of the process of carrying out an Indian water rights settlement. Once a settlement is enacted, its funding requirements are reviewed annually as part of the budget and appropriations process. The Administration and Congress will need to work closely on funding the expected Federal contribution if the settlements that have already been enacted and those that are currently being negotiated are to be successfully implemented. We look forward to engaging in that dialogue and ensuring the most productive path possible for the resolution of Indian water rights claims.

The Office of Management and Budget advises that that there is no objection to the submission of this letter from the standpoint of the President's program.

Sincerely,



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Chair of the Working Group on Indian Water
Rights



Michael L. Connor
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