

In The Matter Of:
Indian Water Rights Settlements Tribal Consultation

Reporter's Transcript of Proceedings
October 9, 2016
United States Department of the Interior

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UNITED STATES DEPARTMENT OF THE INTERIOR

REPORTER'S TRANSCRIPT OF PROCEEDINGS
INDIAN WATER RIGHTS SETTLEMENTS TRIBAL CONSULTATION

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REPORTED BY:
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Certified Reporter
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1 PROCEEDINGS

2 MR. CONNOR: Good afternoon, everybody. We
3 can go ahead and get started. I am Mike Connor; I am the
4 department secretary of the U.S. Department of the
5 Interior. This is the consultation on the Criteria and
6 Procedures for Indian Water Rights Settlements. So if
7 that's what you wanted to participate in, then you're in
8 the right place. If that's not, then it might be
9 interesting anyway.

10 Let me just let you know, I'm going to say a
11 few words to kick us off. Sam Hirsch with the Department
12 of the Justice, our partners in water rights settlements,
13 is going to say a few words. We'll turn it over to Pam
14 Williams, who's going to talk a little bit about the
15 Indian water rights program, walk you through a
16 presentation, talk about the specific questions that we're
17 going to be contemplating and trying to answer as part of
18 the consultation process. So that's how we're going to
19 show those.

20 Let me start, appropriately so, by asking
21 chairman of the Confederation of Indian Tribes to come
22 here, and Vernon Finley, if you will start us off with an
23 invocation, we'd be honored.

24 VERNON FINLEY: Thank you very much. First
25 of all, I want to beg the forgiveness of Governor Lewis

1 and all of the people whose homeland is here, for I am
2 honored to be asked for this, but also I -- I'm in your
3 territory, and it's -- my elders have taught me that you
4 always ask permission.

5 (Invocation.)

6 MR. CONNOR: I don't know that we need to
7 formally stand here at the podium, Sam, but I'll turn it
8 over to you, and you can come up here or speak from the
9 table there.

10 Chairman Finley, I just want to say thank
11 you very much for that wonderful opening. In addition to
12 that, of course I think you set the tone and remind us in
13 particular how important protocol is and respect in Indian
14 country with your comments, so I very much appreciate that
15 reminder as we start off this consultation session.

16 So let me just briefly outline that I think
17 through the entire eight years that I've been part of the
18 Interior Department, we have talked about the Criteria and
19 Procedures for Indian Water Rights Settlements, the 1990
20 Criteria and Procedures, how to interpret them
21 appropriately. We've also at times talked about whether
22 they need to be modified, updated, or made more clear.

23 Quite frankly, during the course of that
24 time, we thought we had a very good approach of
25 interpreting what those criteria mean. We think that

1 they, in this administration in particular, as I talked
2 about in my talk earlier today, that we have an
3 interpretation that I think has lent itself to negotiating
4 in earnest and in good faith and in getting to the end of
5 what we'd all like to see is Indian water rights
6 settlements that the federal government and the tribes
7 that it's working with can agree on and that we can take
8 to Congress and get enacted.

9 And so, nonetheless, there is a lot of
10 interpretation that any administration can bring to that
11 process. So I know there was a revisiting of that from
12 people's perspective with a memorandum that the Office of
13 Management and Budget sent to Interior and Justice this
14 year earlier in June. And that discussion, quite frankly,
15 caught a lot of you off guard and led for a call for
16 discussion on that.

17 I think the Office of Management and Budget,
18 another partner of ours who we've had a very good success
19 in working with during the course of this administration,
20 has made it clear that memo does not represent any change
21 in policy. And I think they sent letters out to all the
22 folks who have weighed in to that effect. But, yet, I do
23 think it's appropriate now that we look to those Criteria
24 and Procedures, have a conversation about what folks in
25 Indian country, and those in particular who are interested

1 in Indian water rights settlements, think we should do
2 with those, whether we should retain them, et cetera,
3 whether we should modify them.

4 Pam's going to get into the details, but I
5 just wanted to set the stage. That's what we're here to
6 discuss today. But more importantly, that's what we're
7 here to listen to you all about today. So that's really
8 the extent of my comments from the Interior Department's
9 perspective.

10 Up here with me, I just want to introduce,
11 folks, Letti Belin, over on the far end of the table, is
12 counselor to the deputy secretary, counselor to myself,
13 she's also the chair of the Working Group on Indian Water
14 Rights Settlements of the Interior Department, and has led
15 that effort for almost the entirety of the administration.

16 Mike Black, the director of the Bureau of
17 Indian Affairs. Mike has been a great partner and big
18 supporter of Indian water rights settlements. When I was
19 commissioner of the Bureau of Reclamation, Mike and I used
20 to debate whose budget should be responsible for most of
21 the budget. So I appreciated those discussions then,
22 almost all the time, but I know Mike is a tireless
23 advocate. The bottom line was always, from his and my
24 perspective, was to get to ensure that we were going to
25 implement those settlements.

1 Pam Williams, our director of the Secretary
2 of Indian Water Rights Office, is here. As I mentioned,
3 Pam's going to do a short presentation for you all.

4 And also, I will turn it over now to Sam
5 Hirsch, with the Department of Justice, a wonderful
6 partner and supporter, Sam himself and Sam through the
7 Indian Resources Section. Sam is the principal deputy
8 assistant attorney general for Environment and Natural
9 Resources Division and a great partner on this as well as
10 a lot of other things.

11 Sam.

12 MR. HIRSCH: Thank you, Mike. And thank you
13 to the folks that put on today's summit. I was only able
14 to attend a piece of it myself but did get a report that
15 it's been a great success.

16 I would like to say on behalf of the Justice
17 Department that we fully appreciate how important these
18 issues are. They're incredibly important for tribal
19 economic development. They're incredibly important for
20 public health. And they're incredibly important for
21 supporting the values of treaty rights, trust
22 responsibility, and tribal sovereignty. We also
23 understand that this is a propitious time to be talking
24 about these issues, not only with the good news announced
25 earlier about the Taos settlement, but also with the

1 possibility for some potential real movement in the
2 lame-duck session of Congress coming up.

3 The Justice Department's role in Indian
4 water rights settlements, I think as most of you know, is
5 an important one, but in some ways a secondary one. We're
6 sort of a junior partner to the Interior Department on
7 these issues. We play a role in almost all stages, but it
8 gets more important towards the tail end of the process
9 usually when you're looking at getting a consent decree
10 entered in court. But we can't have better partners in
11 Interior than the folks up here.

12 Having a deputy secretary who is this
13 knowledgeable about these issues has been a wonderful
14 thing, and the leadership of Letti, and Pam, and Fain, and
15 the other folks in the Indian Water Rights Office is
16 fantastic. What Mike and his boss, Larry Roberts, have
17 been doing in BIA makes the Interior's office terrific.
18 And also the Solicitor's Office should get a nod as well.

19 On the Justice Department side, some of you
20 may know some of the attorneys who are most involved in
21 the water rights work. I do want to recognize
22 particularly our Indian Resources Section. Some of the
23 attorneys you may know there include Dave Harder, Vanessa
24 Willard, Pat Barry, Brad Bridgewater, and Guss Guarino.
25 But the person I think you most need to know the chief of

1 the Indian Resources Section, Craig Alexander. I'm going
2 to ask him to stand up for a second.

3 Craig is one of the finest public servants I
4 know, and he's enormously knowledgeable about water rights
5 issues, and incredibly dedicated. He'll probably kill me
6 for saying this, but he flew in last night and is flying
7 out on a redeye tonight, but wanted to be here even though
8 he's got a medical emergency in his family recently. So
9 he came out here just to be with you guys. If you haven't
10 had a chance to see him, grab him after the meeting and
11 say hello. He's someone you should get to know in the
12 future.

13 I am certainly the least knowledgeable
14 person about these issues up at this dais. But I just
15 want to point out two things that are on my mind. Again,
16 I apologize if I speak from relative ignorance here, but
17 things I've been thinking about with regards to these
18 issues.

19 One is that, at least since the late '70s,
20 Carter Administration or so, there's been a federal policy
21 of favoring settlement over litigation when it comes to
22 Indian water rights issues. And yet in that nearly 40
23 years, we've had fewer than 40 tribes have settlements.
24 So averaging a pace of less than one a year. And we know
25 with climate change, with the draught conditions we see,

1 and with everything affecting especially the western part
2 of the country, but in some ways all parts of the country,
3 the need for these settlements is only going to increase,
4 and we have to figure out a way to pick up the pace.

5 This administration has been going at a far
6 better clip than either of the two previous
7 administrations, thanks to the folks up here. But in the
8 future, it's hard to imagine we're not going to need a lot
9 more of these settlements and a lot better pace than we've
10 ever seen in the history of our 40-year effort.

11 Related to that is what Mike pointed out,
12 which is the Criteria and Procedures, which is of course
13 an Interior policy, dates from 1990, and at that point of
14 the few dozen settlements we've now got in hand, only a
15 handful had actually happened at that point. So since
16 1990, there's a whole body of collected knowledge
17 represented by you in this room that is not reflected in
18 the Criteria and Procedures.

19 So I think this is a great time to be
20 looking at that, thinking whether they need -- how they
21 need updating, improving, strengthening. And, like I
22 said, we couldn't have better colleagues from Interior and
23 couldn't have a more knowledgeable group from the tribal
24 side to fill us in.

25 I will be eagerly taking notes for the next

1 two hours and look forward to hearing from all of you
2 about those issues. Thank you.

3 MS. WILLIAMS: Good afternoon. Is Colby
4 still here? Do we have a microphone for when we -- oh,
5 you've got it. Martin's got it. Okay.

6 I'm Pam Williams; I'm the director of the
7 Secretary's Indian Water Rights Office. And I came to the
8 Department of the Interior right after the Criteria and
9 Procedures were adopted, so I can tell you firsthand,
10 they're getting a little aged.

11 I wanted to real quickly mention my office.
12 So I have Marty von Gnechten, who's my new policy analyst;
13 Duane Mecham, acting deputy; Fain Gildea, Senior Policy
14 Analyst. So that's the Secretary's Indian Water Rights
15 Office. We are here in full force, this is it. So if you
16 have any questions, grab one of these guys because they
17 should have the answers or should be able to get the
18 answers.

19 Also, I wanted to real quickly mention,
20 could everybody in the audience that's worked on an Indian
21 water rights settlement come from Interior, raise their
22 hand? I know during the day, I had a lot of people here.
23 There are a few more. We've had people from the
24 Solicitor's office in and out. We have Scott Bergstrom.
25 We did have Ramsey Krupp, who's the head of the water --

1 water resources -- Water Division in the Solicitor's
2 Office.

3 I'm going to try to run through this slide
4 presentation very quickly because I want to give you guys
5 the time to talk. I don't want to talk about this. But I
6 wanted to give a little bit of background on the Criteria
7 and Procedures because that's what we're here to talk
8 about today. The Criteria and Procedures promulgated in
9 1990. They provide the administrations guidelines for
10 engaging in Indian water rights settlements. They include
11 the factors to be considered in deciding federal
12 contribution to a settlement, obviously a very important
13 aspect. And they've been followed by every administration
14 since 1990 but with differing interpretations.

15 They provide a general framework for
16 negotiating settlements. And these were mentioned by Mike
17 Connor in his remarks earlier, that the United States
18 participates consistent with this trust responsibility,
19 tribes receive equivalent value for rights that they give
20 up, et cetera. So I won't spend any more time on that.
21 And this will be available on our website in Interior so
22 you can look at it more closely.

23 The criteria are broken into sort of process
24 and then sort of guidelines. And the procedures
25 anticipate there would be four phases of negotiation. In

1 an ideal world, this would be great if all settlements
2 followed this, but they don't; they vary, but the Criteria
3 and Procedures sort of set it up this is the way, in an
4 ideal world, it should work.

5 Phase I, fact finding work. The team goes
6 out and figures out, you know, the lay of the land, what
7 reservation, how big is it and how many people, who the
8 parties are, just, you know, basic facts.

9 Then Phase II is assessment and
10 recommendations where the team goes out with the tribes
11 and non-Indian parties, assesses the situation, and comes
12 up with a settlement recommendation that they take back to
13 the Department.

14 Phase III, briefings and negotiation
15 position. That's where we're supposed to decide on a
16 negotiation position, a federal negotiation position.

17 And then phase IV, actual negotiations.
18 Now, that's not the way it works in the real world, but
19 that's the way the criteria and procedures are set up.

20 And I talked about, that's what you see in
21 fact finding. The parties, evaluate the claims, describe
22 the hydrology, et cetera.

23 Assessment. This is the hardest part, the
24 most time-consuming part. You're supposed to figure out
25 all the costs presuming no settlement, all the costs

1 presuming settlement, the best/worst/most likely case
2 scenario in litigation, the value of the tribe's claim, et
3 cetera. That is a very time-consuming process.

4 Again, briefings toward negotiation and
5 negotiation.

6 Real quickly, going to criteria -- and I'm
7 going through this really quickly because I do want to
8 hear from you; I don't want to hear from me. There are 16
9 criteria altogether, and the criteria apply to all
10 negotiations, and they sort of set the ground rules for
11 the administrations. And in theory, if you meet all the
12 criteria and you negotiate with the federal government,
13 the federal government is supposed to support the
14 settlement.

15 The goal of all Indian water rights
16 settlements is to resolve all outstanding water claims and
17 achieve finality. So that we're finished, it's supposed
18 to be the equivalent of a decree in a general circuit
19 adjudication. So final, and the tribe's rights are
20 recognized, and an infrastructure is provided.

21 The most controversial criteria, and the
22 ones that I want to focus on, are Criterion 4, 5, and 6,
23 and they focus on cost. As we heard earlier, the big
24 focus is on cost. It's really nothing new, there's always
25 been a focus on costs, but the cost of settlements are

1 increasing so there's an increasing focus on cost.

2 Criteria 4. "The total cost of a settlement
3 to all parties should not exceed the value of the existing
4 claims as calculated by the Federal Government."

5 That should be the costs all pending or
6 potential litigation, including claims against the United
7 States and claims against other nonfederal parties,
8 potential offsets, and risks to all parties in the absence
9 of a settlement. That is somewhat vague.

10 5, federal contributions -- this is my
11 favorite one. "Federal contributions to a settlement
12 should not exceed the sum of the following two elements:"

13 Calculable legal exposure, potential
14 liability of the Federal Government and non entities.

15 And programmatic costs, such as costs that
16 would be borne by United States on a programmatic level.

17 4, 5 -- 4 and 5 are very challenging because
18 they're somewhat vague, they tie federal funding to,
19 quote, federal legal exposure, which is a very difficult
20 standard to meet. I think a lot of people like to look at
21 this and say, okay, well, what kinds of claims do the
22 tribes have for breach of trust against the United States?
23 And if you measure it by that, and you look at -- you look
24 at that and you determine, okay, what's the liability, you
25 have to consider things like statute of limitation

1 defenses, breach of trust cases in the last 20 years have
2 not really been going that well for the tribes, and so you
3 come up with a very small number.

4 And we asked our friends at the Department
5 of Justice to help us sort of assess U.S. liability, and
6 it really tends not to be a big number. Although maybe it
7 should be, just because of the way the law has developed,
8 it has not been a huge number.

9 Legal exposure does not account for equity,
10 historical circumstances, the fact that the United States
11 bears a significant responsibility for the fact that
12 things are the way they are in Indian country today. So
13 that is one of the big problems with those two criteria.

14 6 provides that nonfederal cost-sharing
15 should be equivalent to the benefits received by the
16 nonfederal parties.

17 Okay. We're sitting here in the state of
18 Arizona. Arizona has -- okay, Stanley, what's the biggest
19 contribution Arizona ever did, 2 million?

20 STANLEY POLLACK: I'm not even sure they did
21 that.

22 MS. WILLIAMS: Yeah, maybe not even that.
23 Arizona historically has not --

24 STANLEY POLLACK: They would say they've
25 donated the water.

1 MS. WILLIAMS: Montana, I think, has
2 probably done pretty well in terms of coming up with the
3 money. I think Fain can tell us, what is it, in Blackfoot
4 what do we have, it's 422 million for the feds, and what's
5 the tribal -- or federal -- or state?

6 MS. GILDEA: 49 million.

7 MS. WILLIAMS: Okay. So that's the
8 cost-share thing. This drives OMB crazy. Okay. So we
9 have cost shares. Everybody's supposed to pay their
10 share. And here's, actually, the statistics on this.
11 Twenty-six settlements enacted by Congress. Eight of the
12 26 had zero cost shares. Six settlements had cost shares
13 between zero and 5 percent; 10 had between 5 and 30. So
14 there we go.

15 Another very important thing that has
16 happened recently is Congressman Bishop wrote to Interior
17 and Justice and said that in order to have an Indian water
18 rights settlement move in the house, he wanted to have
19 letters -- a letter from Justice and Interior that
20 contained the following elements or statements.

21 Number one, we had to certify that the
22 settlement complied with all of the Criteria and
23 Procedures, especially 4 and 5. Remember what those were,
24 cost. The administration supports or sponsors the
25 settlement in legislation. Written support from us. And

1 a list of all the claims being settled, all the waivers.
2 And we didn't have the -- I didn't have in there the net
3 benefit to the American taxpayer.

4 With respect to the Criteria and Procedures,
5 all but four of the 33 existing settlements were enacted
6 by Congress after the Criteria and Procedures. So these
7 things were, you know, 1990, and we've had a tremendous
8 number of settlements since then.

9 We've learned a lot of lessons in the last,
10 you know, 30 years. Settlements are getting larger and
11 more complex. Settlements are getting more expensive.
12 And the need for settlement teams and the pace of
13 settlement continues to increase. And as Sam mentioned,
14 at the rate we're going, we're not going very fast.

15 Consultation questions. Do the Criteria and
16 Procedures need to be reviewed and reconsidered given that
17 the Criteria and Procedures were promulgated in 1990,
18 prior to negotiation and completion of a great majority of
19 enacted water rights settlements?

20 Two. Have the Criteria and Procedures been
21 useful to achieve Indian water rights settlements? Have
22 they been applied consistently and fairly?

23 If reconsidered, should both the substantive
24 criteria and the procedures, including process through
25 various federal agencies, be re-examined?

1 Four. What Criteria and Procedures should
2 be revised? Why should they be revised? What is the best
3 mechanism to accomplish the revision?

4 We're going to have another consultation
5 November 3rd in Billings. The Dear Tribal Leader letter
6 has gone out on that one, and we anticipate another one in
7 Seattle sometime in January.

8 Tushar, would you come up and give us a
9 little bit of the rules of the road in terms of the
10 consultation, in terms of who speaks when and how we do
11 that?

12 MR. KANSAL: Sure. Happy to, Pam.

13 Hi, everyone. My name's Tushar Kansal. I
14 am a mediator and facilitator with a nonprofit firm called
15 Consensus Building Institute. What I'm doing here today
16 is just taking notes, and I'm going to be creating a
17 meeting summary, which should be publicly available on the
18 Indian Water Rights Office's website.

19 In addition, there's also a court reporter,
20 Kristen, here. And so she is kind of officially taking a
21 full transcription of everything that's said. And so the
22 idea is that we will be capturing kind of all of the input
23 and feedback coming from everybody here who'd like to
24 speak.

25 A few kind of quick suggestions or

1 guidelines for this session is, one, we would love to
2 have, you know, any and all tribal leaders who would like
3 to speak, have them speak first, and then open it up to
4 others who would also like to speak. So start with tribal
5 leaders and then everyone else.

6 When you speak, if you could, please give us
7 your name and affiliation. Particularly for court
8 reporter, it would helpful if you could spell out your
9 name and affiliation. But if you, you know, say it, that
10 would be great.

11 We'd love to have your comments focused on
12 the Criteria and Procedures, please, which is kind of what
13 the Office, and Pam's office, is looking for feedback on.

14 And let me just take a quick show of hands
15 in terms of how many people would like to speak? This
16 isn't binding. You can change your mind one way or the
17 other.

18 All right. So there's like 12, maybe a
19 couple more than that, folks here who would like to speak.
20 So I would ask you, please, to sort of keep that in mind
21 and be considerate. So obviously want to hear from you,
22 you know, please do say your piece, but also do, please,
23 try and leave a little bit of time for others to speak
24 also. So I think that that's it.

25 Pam, is there anything else?

1 MS. WILLIAMS: No. I think people who just
2 raised their hand, and Marty's got the microphone and will
3 run around the room.

4 MR. KANSAL: Okay. Thanks.

5 MR. CONNOR: Can I just real quickly just
6 add, I don't think we'll be responding to each -- the
7 input we receive -- we will do some wrap-up comments at
8 the end with some general thoughts on some of the
9 questions raised. But I just wanted to let you know,
10 we'll let everybody talk and not have us interrupt the
11 flow of the commentary, as I just did.

12 JOE GARCIA: Joe Garcia, I'm head councilman
13 at Ohkay Owingeh pueblo in New Mexico.

14 Two points. What are the most significant
15 factors within the listings of criteria that you have that
16 has caused most grief? And if you have data regarding
17 that for all of the criteria, would be one way to
18 understand what's the worst one that you're dealing with.

19 And then the question about the Bishop
20 letter. Was the Bishop letter part of the agreement when
21 the bill was passed and the negotiation, guidance,
22 criteria, and all that was passed? Or can someone like
23 Bishop come in and propose their own, what do you call it,
24 factors? In this case, it seems like it's his own factor
25 about requiring tribes to get those letters and whatnot.

1 So thank you.

2 MYRON ARMIJO: Good afternoon, Panel. I'm
3 Governor Myron Armijo from the pueblo at Santa Ana.

4 My question to all of you is the letter from
5 OMB to, I believe it was to the Interior, and what effect
6 it would have on Indian water rights settlements going
7 forward.

8 STEPHEN LEWIS: Governor Stephen Lewis, from
9 the Gila, G-i-l-a, River Indian Community.

10 First of all, thank you for hosting this
11 consultation on the current process of negotiating and
12 reviewing Indian water rights settlements and potential
13 improvements to the process. On behalf of the Gila River
14 Indian Community, I'd like to provide a brief statement
15 today and reserve the right to submit any additional
16 written comments at a later date.

17 As you know, the Gila River Indian Community
18 successfully passed our water settlement in 2004. Thus
19 far, we do not have a pending or future water settlement.
20 Implementation of our water settlement continues to be a
21 critical priority for the community. Through our
22 experience negotiating and finalizing our settlement, we
23 are intimately familiar with the Department's process for
24 negotiating Indian water settlements. I've seen firsthand
25 how that process has evolved over the years, particularly

1 the role of the OMD, which of course has always played a
2 role in the negotiation process. Now has the potential to
3 play an even larger role given the OMB's recent memo.

4 We have concerns with the new OMB memo and
5 its implications on the ability of tribes to pass
6 legislation to secure water for their communities. The
7 United States has a trust responsibility to protect Indian
8 water rights and programmatic responsibilities to all
9 tribes. OMB's new memo and efforts to inject itself even
10 earlier into the negotiation process threatens to absolve
11 the United States of its trust responsibility, or at a
12 minimum, seriously could stymie the negotiation process.

13 Further, the OMB memo, coupled with the new
14 House natural resources process for considering Indian
15 water settlements, places a heightened importance on the
16 1980 Criteria and Procedures.

17 When our settlement was negotiated in late
18 1990s, early 2000s, the Criteria and Procedures operated
19 as only guiding policy principles for the Interior, as you
20 all know. So given the House's strict reliance on the
21 Criteria and Procedures, especially Criteria 4 and 5, we
22 feel that the Criteria and Procedures should be
23 reconsidered and replaced with policy guidance that takes
24 into account why Indian water rights settlements are vital
25 for Indian communities of the United States as part of its

1 trust obligation and programmatic responsibilities.

2 In particular, the federal negotiation team
3 played an essential role in each Indian water settlement.
4 Now they negotiate directly with all the parties involved
5 in the settlement. Additionally, decisions are often the
6 result of compromise between the parties in the
7 negotiations, and to have OMB evaluate each negotiating
8 position would only delay the proceedings and result in a
9 drain on already-limited tribal resources, not to mention
10 federal resources.

11 So in closing, we urge the administration to
12 acknowledge that there is no one-size-fits-all approach to
13 Indian water settlements. There isn't a simple
14 mathematical formula that can be applied to each
15 settlement alike, as much as OMB would prefer, to remit
16 Indian water settlements through a standard methodology.
17 Rather, there should be a commitment from the
18 administration and Congress to support and enact federal
19 legislation that resolves Indian communities' longstanding
20 claims to water. It will also provide a certainty to the
21 non-Indians in the area, and importantly, find the funding
22 to pay for them.

23 We commend the administration for reviewing
24 the process for negotiating water rights settlements.

25 Thank you.

1 VERNON FINLEY: Good afternoon. Vernon
2 Finley, from the Confederated Salish and Kootenai Tribes.

3 First of all, I want to appreciate that
4 Interior and Justice are here to -- for this consultation,
5 but I think the -- the elephant in the room has no
6 clothes. The absence of OMB is disappointing to say the
7 least. But nevertheless, to discuss, first of all, OMB
8 really needs to be at the table for this type of
9 consultation in order for it to be meaningful.

10 And the OMB memo needs to be withdrawn until
11 such consultation is complete. And the OMB memo changes
12 the current Criteria and Procedures by adding processes
13 that aren't currently, or never have been, required and
14 unilaterally gives OMB the sole authority over whether the
15 Criteria and Procedures have been met.

16 The Criteria and Procedures must be revised
17 in the following ways. Number one, they have to be
18 revised to avoid inconsistent interpretations from within
19 the government and from one administration to the next.

20 And they have to eliminate undue focus on
21 the US liability as the problem.

22 And number three, they need to be changed in
23 order to bring the Criteria and Procedures up to date, and
24 in consultation with tribes, and in a way that reflects
25 the complex negotiation process and political realities at

1 the tribal, state, and federal levels.

2 They need to be revised to reflect that the
3 normal budget process has been insufficient for Indian
4 programs for decades. And they need to insure that the
5 Criteria and Procedures are flexible and are not applied
6 as strict rules and requirements.

7 Thank you very much.

8 DAMON CLARKE: Damon Clarke, Dr. Damon
9 Clarke, Hualapai Tribe.

10 On June 23, OMB issued the memo to the
11 Interior and Justice Departments. The OMB issued this
12 memorandum unilaterally without any prior consultation
13 with any Indian tribe whatsoever. It must be withdrawn
14 because it plainly violates President Obama's November
15 5th, 2009, directive to the executive departments and the
16 agencies on tribal consultation, which requires all
17 federal agencies to consult with tribes on all significant
18 changes of policy affecting tribes.

19 This very significant change of policy in
20 the procedures under which the Executive Branch
21 participates on Indian water settlement negotiations and
22 finalizes such settlements for approval by Congress. This
23 change drastically reduces the prospects for success of
24 any Indian water settlements.

25 The current process is that the Interior and

1 Justice Department manages the detailed and complex
2 negotiations of all the issues in tribal water settlement.
3 Until this is negotiated, OMB's role is limited to the
4 following three items.

5 OMB is notified when federal negotiation
6 team of Interior and Justice representative is appointed.
7 The Interior must prepare and submit to Justice and OMB a
8 fact-finding report of a possible settlement and seek
9 OMB's legal and financial views. Interior and Justice
10 provides OMB with periodic updates on the status of
11 negotiations, and when the settlement is ready to be
12 presented to Congress must again seek OMB's legal and
13 financial views.

14 Instead of periodic status reports, Interior
15 and Justice must now have regular, detailed discussions on
16 any individual proposed settlement. Instead of allowing
17 Interior and Justice to manage day-to-day negotiation
18 process, the OMB memo requires those agencies to first
19 submit in advance any negotiation position on any issue to
20 OMB for its response.

21 The Interior and Justice are also required
22 to provide OMB with a quarterly updated document. How the
23 proposed terms being negotiated are consistent with each
24 element of the Criteria and Procedure.

25 And finally, there have been 27

1 congressional approval of tribal water settlements in the
2 recent decades. These settlements reverse the process
3 that took place between 1900 and 1970, when the United
4 States spent hundreds of millions of dollars to build
5 water projects provided to non-Indians despite the tribe's
6 prior paramount legal water rights.

7 Federal financial support of Indian water
8 settlements over the past several decades have been an
9 essential component for rectifying this historical wrong
10 to tribes and for belating providing water to tribes for a
11 variety of uses: Municipal, domestic, agriculture, and
12 commercial.

13 Thank you.

14 RUSSELL BEGAY: Thank you again. Russell
15 Begay, Navajo Nation President, with Jonathan Nez, Vice
16 President of Navajo Nation.

17 And first of all, thank you for the
18 consultation. We did send a letter out asking for a
19 consultation after we received the OMB letter where we
20 directed the letter to Director Cecelia Munoz, White House
21 Domestic Policy Counsel; Attorney General Lynch, U.S.
22 Department of Justice; Sally Jewell, Department of
23 Interior; Director Shaun Donovan, OMB, where we stated
24 that we're aware OMB issued a memorandum of June 23rd,
25 2016, concerning their review process for proposed Indian

1 water rights settlements.

2 This memorandum could potentially have
3 profound ramification on the ability of Indian tribes to
4 obtain water rights settlements. Yet the memorandum was
5 issued without consultation with tribal officials.
6 Executive Order 13175 requires federal agencies that
7 promulgate policy stating any action that may have a
8 substantial effect on Indian tribes who engage in
9 meaningful government-to-government consultation with
10 tribal governance.

11 By this letter, the Navajo Nation
12 respectfully requests that the memorandum be withdrawn and
13 meaningful consultation start to take place immediately.
14 Given that the OMB memorandum cites to the 1990 Criteria
15 and Procedures for Indian water rights settlement, 55
16 Federal Regulation 9223, we believe that consultation must
17 include not only OMB but department of Interior and
18 Justice.

19 And we recommend that today, October 9th, be
20 the beginning of the consultation. I do have a copy of
21 the federal register, Department of Interior Working Group
22 and Indian Water Settlements Criteria and Procedure, or
23 their participation of federal government negotiation for
24 the settlement of Indian water rights. And looking at
25 Criteria Number 4, the total costs of a settlement of all

1 parties shall not exceed the value of existing claims as
2 calculated by the federal government.

3 Navajo Nation believes that the liability of
4 U.S. to be used as a standard for settlement is wrong. We
5 believe that the calculation should done, based on
6 treaties. Agreement based on the trusteeship of the U.S.
7 government and by Supreme Court cases like the Winters
8 adoption. Not on how much -- how liable the U.S. will be.
9 And also, in Criteria Number 5(A), it states, first
10 calculable legal exposure, litigation costs, and judgment
11 obligation if the case is lost. This is where it says
12 Number 5, federal contribution to a settlement should not
13 exceed the sum of the following two elements, and the one
14 I just read is that the judgment obligation of the case is
15 lost. Legal exposure, again, is wrong.

16 And that, again, we should -- the federal
17 government should look at this trust responsibility and
18 the needs of the tribe, not on how much they will lose in
19 case -- in case they lose the case that is being
20 litigated.

21 And then also under Criteria Number 5(B),
22 second additional costs related to the federal trusts are
23 programmatic responsibilities assuming the U.S. obligation
24 and trustee can be compared to existing procedures.
25 Federal contributions relating to programmatic

1 responsibilities should be justified as to why such
2 contribution cannot be funded through the normal budget
3 process.

4 Again, once again, also Number 6 Criteria,
5 some issues include nonfederal cost-share in proportion to
6 the benefits received by the nonfederal parties. We
7 believe that those two related to the letter that was
8 drafted by OMB stating that they need to be participant in
9 the settlement came up with the five criteria.

10 Again, we believe that -- Navajo Nation
11 believes that, again, that water settlement, they are
12 saying be based on how much the U.S. will -- will lose in
13 a case. And we are saying that it should not be based on
14 that but it should be based on the treaties that we've
15 signed, the agreements that's been made, the promises that
16 have not been fulfilled, the trusteeship of the U.S.
17 government, and cases that have been heard.

18 And also I have in my hand a letter from Rob
19 Bishop, Chairman, where his entire emphasis in the letter
20 is how much the taxpayer will lose. It should never be
21 based on how much the taxpayer will lose, but on how much
22 our Indian nations have lost already because water has
23 been -- (Applause) -- because water has been withheld from
24 us. We fought for years for these water rights, but many,
25 as stated just a while ago, have not been fulfilled.

1 And so using the standard of the United
2 States, losing the amount of monies that it will lose,
3 should not be the standard. Rather, the standard, once
4 again, in these criteria, should be based on treaty
5 agreements, on trust responsibilities of U.S. government,
6 the needs of the nation. Because in the southwest and
7 throughout the nation, the needs for water on Indian land
8 is tremendous. And that should be taken into
9 consideration first, not the needs of the Cities of
10 Phoenix, Las Vegas, and places like that, but first, on
11 the needs of the original people, the indigenous people of
12 this land, of this country.

13 And so we're asking that these Criteria and
14 Procedures be changed so that it focuses on the needs of
15 the Indian nations, not on how much the federal government
16 will lose.

17 Thank you.

18 TONY SMALL: Good afternoon. My name's Tony
19 Small; I'm the councilman for the Ute Indian Tribe, which
20 is located on the Uintah and Ouray Reservation in Utah.
21 We have 3,157 tribal members living on the second-largest
22 Indian reservation in the United States. We believe that
23 water is essential for life on a large reservation. For
24 economic security, as a cultural resource, as necessary to
25 support our fish and wildlife habitat, and drinking water

1 resource for our people. All of our reservation lands lie
2 within the drainage of the Colorado River basin.

3 We have been trying to settle and finalize
4 our Indian water rights with a water compact for many
5 years, over a century, but the process has been very, very
6 difficult. The heart of our reservation in the Uintah
7 Basin is a checkerboard of land ownership and
8 jurisdiction, with homestead fee lands mixed in with
9 tribal trust lands.

10 After the establishment of our reservation,
11 the Department's Indian commissioners recognized very
12 early on that we required development of water resources
13 to be able to form more lands. Congress approved the
14 construction of Uintah Indian Irrigation Project; however,
15 even as early as 1905, the government knew that storage
16 facilities were necessary if our Indian people were going
17 to be successful. Congress even authorized the president
18 to reserve any reservoir sites or other lands necessary to
19 reserve and protect the water supply for the Indians.

20 We have been competing for scarce water with
21 non-Indians who settled on our reservation, and in seven
22 out of every ten years, there are critical shortages in
23 the natural flow of the rivers in the Uintah Basin. These
24 rivers are our sole source of water, but we have watched
25 as the Bureau of Reclamation has assisted the non-Indians

1 for the past century with the development of storage
2 facilities that can provide supplemental water to irrigate
3 the non-Indian lands.

4 We are hopeful when the federal government
5 took the initiative in 1916 to file a suit on our behalf
6 to protect us from non-Indian water users. This resulted
7 in a 1923 federal court decree for water rights on a
8 portion of our irrigated lands. In its complaint, the
9 United States asserted that unless the waters of the river
10 were conserved by storage, it would become impossible to
11 supply the needs for the Indians.

12 Nevertheless, the reclamation planning for a
13 non-Indian water project in one of our primary irrigation
14 water sub-basins began in 1918, and two reservoirs were
15 built by the 1940s. Many other private reservoirs now dot
16 the landscape across our project lands. But reservoirs to
17 supplement the insufficient natural flow of the rivers
18 serving our Indian irrigation project lands have never
19 been built, even though several shortages are all well
20 documented.

21 And after a century of BIA's trust
22 management of our Indian Irrigation Project, our project
23 has been left with the need for almost \$200 million for
24 the rehabilitation and replacement of project structures
25 and storage facilities. The BIA's deferred maintenance

1 and lack of storage construction for the project continues
2 to severely affect our ability to benefit both
3 economically, environmentally, and socially from efficient
4 crop production under our Uintah Indian Irrigation
5 Project.

6 Indian irrigation projects are the heart and
7 soul of many Indian water rights settlements, but our
8 tribe has been ignored and even shunned by the Department
9 in trying to get the BIA to acknowledge their programmatic
10 responsibilities over our irrigation project. Our Indian
11 irrigation project may also be the only such project that
12 Congress required in 1906 to be held by the United States
13 in trust for the tribe. An inherited trust responsibility
14 that the Department continues to ignore.

15 And we have found many problems with BIA's
16 administration and oversight of our project. For example,
17 we have recently discovered that BIA has designated a
18 disproportionate number of Indian lands as permanently
19 non-accessible so that they no longer receive their
20 opportunistic water rights. However, there is very small
21 number of non-Indian acreage in the same geographic area
22 that are identified as permanently non-accessible. Who is
23 using the tribal-reserved water rights no longer used on
24 the Indian lands?

25 In another instance, we have found that BIA

1 has entered into water exchanges, and that we lost on one
2 water rights transfer agreement using our senior reserved
3 water rights to benefit non-Indian irrigators who have
4 junior water rights. Many of these agreements are
5 unwritten, informal. We have concluded that at least one
6 such water transfer agreement is illegal.

7 Today I sadly inform you that a century
8 after litigation a portion of our reserved water rights,
9 we still do not have congressionally-approved and
10 federally-decreed reserved water rights for all our Indian
11 lands that can be irrigated. The failure of the federal
12 government to provide the leadership as our trustee to
13 resolve the deferred maintenance and storage needs of our
14 Indian irrigators have, after all this time, shows that
15 the system is broken.

16 We have recently adopted a tribal water
17 policy and are developing a water resource development
18 plan for the purpose of utilizing all of our presently
19 used and unused water rights that will be designated to
20 promote economic development and water conservation with
21 environmentally-sound projects. Consistent with our water
22 policy, we have identified four essential elements that
23 are required in order for us to complete an agreement on
24 our water compact.

25 One, tribal water storage. Two,

1 rehabilitation and betterment of the Uintah Irrigation
2 Project. Three, the tribal administration regulation and
3 enforcement of our tribal water rights. And four, the
4 restoration of the application of the Nonintercourse Act
5 to all our tribe's reserved water rights.

6 Although we feel that the Department's
7 longstanding policy to federal Indian water rights and the
8 resulting process is useful, we do not feel that the
9 federal government has acted as a trustee would be
10 expected to act to protect our Indian water rights and our
11 project property. Our history shows that too often the
12 Department has not acted on our behalf but instead has
13 taken actions to benefit the non-Indians.

14 The Central Utah Project successfully
15 completed a water transfer to the Wasatch Front by
16 diverting 60,000 acre-feet of water from our basin.
17 Funding for the Indian Irrigation Project has been
18 woefully insufficient. The number of Indian irrigation
19 projects with deferred maintenance needs is well
20 documented. The Department needs to consider interagency
21 funding sources, including the Bureau of Reclamation, to
22 get these projects rehabilitated, repaired as a solemn,
23 programmatic, and trust responsibility. Using reclamation
24 funds for the purpose -- for this purpose would be a step
25 in the right direction to rectify the century of

1 inattention to our water development needs and
2 insufficient funding that has otherwise been provided to
3 non-Indians competing for the shortage of water in our
4 basins.

5 We believe that the Department has lost its
6 way over the decades in protecting Indian water rights
7 from aggressive non-Indian water development and failed to
8 develop our water resources, an obligation it has as a
9 trustee of this valuable natural resource. For more than
10 a century, our tribe's water has been lost downstream
11 because it could not be stored, developed, and put into
12 economic use for our tribal members. We feel the trustee
13 has too often sat back, watched us be robbed of our
14 natural resources by failing to work with us to secure our
15 water rights and protect our trust property, the Uintah
16 Indian Irrigation Project.

17 We urge the Department to take this tribal
18 consultation seriously. We need the Department to take a
19 more proactive role in advocating for tribal rights to
20 water for tribal homelands and in finding the means to
21 develop these waters, including through improvements to
22 Indian irrigation projects now and for the future of our
23 tribal people.

24 Thank you.

25 EDWARD MANUAL: My name is Edward Manual;

1 I'm the chairman of the Tohono O'odham Indians here in
2 Arizona.

3 Regarding the Criteria and Procedures, we do
4 have specific issues and problems with all those criterias
5 and procedures, but we'll be submitting a letter on that.

6 Regarding the OMB letter, we have a serious
7 problem with that. It's dangerous on the tribal
8 sovereignty.

9 On Bishop's letter, we question that letter
10 because were there field hearings done? Were they
11 conducting field hearings before the letter was sent out
12 with tribal leaders, with different tribes?

13 All tribes have different water needs. All
14 tribes are different in land base, size of their needs.
15 And why would they put a funding limitation on those water
16 settlements as they come in?

17 That raises a question on the federal trust
18 responsibility. What is the federal trust responsibility?
19 If they can set limitations on us. When the United States
20 citizens come in for a major project, funding never
21 becomes an issue. When foreign countries come in
22 requesting for assistance, funding is not an issue. So
23 why is it an issue for Indian tribes to settle for some of
24 their water that's the primary claim. A small majority of
25 that water because the majority of that water that belongs

1 to the tribal government, to the tribes throughout the
2 country, we've lost it. The citizens of the United States
3 are enjoying that water. So why aren't they -- why are
4 they questioning the taxation on it? When it's our water
5 in the first place.

6 Thank you.

7 BRIAN CLADOOSBY: Thank you. I want to
8 thank those that spoke before me. I want to thank our
9 trustees for being here with us today to listen to these
10 very important issues.

11 Just out of curiosity, how many of you are
12 appointed? Raise your hand. And two career? Nice.
13 That's good.

14 Is there anyone from Standing Rock here?
15 How many tribes here support Standing Rock?

16 I don't know how normal this is for a court,
17 but when we started this session at 4 o'clock today, the
18 judge ruled against Standing Rock. At 4 o'clock today.
19 When we started this. I don't know how usual it is for a
20 judge to come out with an order at 4 o'clock on a Sunday.
21 But Standing Rock was denied its injunction. And I know
22 Chairman Archambault would be standing here. I'm wearing
23 my --

24 I'm Brian Cladoosby; I'm the chairman of
25 Swinomish and president of NCAI. But I'm standing here in

1 support of the chairman, my good friend. And so we call
2 upon --

3 I'll share with you what the judge said. He
4 said that, our precedent requires the parties seek an
5 injunction to clearly show, one, a substantial likelihood
6 of success on the merits; two, the existence of
7 irreparable harm absent injunction; and three, the equity
8 is favor injunctive relief; and four, injunctive relief
9 will not negatively impact the public interest.

10 We find the Tribe does not carry its burden
11 of persuasion on these factors, and so we deny the motion.

12 I'm glad it doesn't end there. This next
13 part I'm going to read to you is very important for our
14 trustee, for the administration, because this is coming
15 from the judge. He's sending a clear message here. He
16 says, although, although the Tribe has not met the narrow
17 and stringent standards governing this extraordinary form
18 of relief, we recognize Section 106 of the National
19 Historic Preservation Act was intended to mediate
20 precisely the disparate perspectives involved in a case
21 such as this one. Its consultative process, designed to
22 be inclusive and facilitate consensus, ensures competing
23 interests are appropriately considered and adequately
24 addressed.

25 But ours is not the final word. A necessary

1 easement still awaits government approval, a decision
2 Corps counsel predicts is likely weeks away; meanwhile,
3 Intervenor DAPL has rights of access to the limited
4 portion of pipeline corridor not yet cleared, where the
5 Tribe alleges additional historic sites are at risk. And
6 here's the judge, "We can only hope the spirit of Section
7 106 may yet prevail."

8 Four o'clock today. So we would hope our
9 trustees would bring back to the administration that they
10 deny this easement, number one. And number two, that they
11 request a full EIS because this is about water. This is
12 about water rights. And water is life.

13 Thank you.

14 DANIEL JORDAN: My name is Daniel Jordan,
15 former council member for Hoopa. And I also am on the
16 Tribe's fishery water negotiating and hopefully management
17 team. We spend more time negotiating than managing,
18 unfortunately, these days.

19 The Hoopa Valley Tribe is up in northern
20 California. We have court orders and we have
21 congressional statutes that direct the federal government
22 to restore the river -- a dam was built in 1963 that began
23 diverting the only water source in California, internal
24 water source in California, from the Trinity River to the
25 Central Valley.

1 Between 1963 and 1974, 80 percent of the
2 fishery was destroyed in violation of law. We began a
3 series of -- of things. In 1992, we got a congressional
4 directive for the Department of Interior to restore our
5 fishery. And Central Valley water people sued; we won
6 that in court. And the Court, in 2004, said that the
7 congressional mandate to restore the Trinity River fishery
8 resources was unlawfully long overdue. And that was in
9 counter to, or at least it wasn't reaching as far as the
10 tribes had, the United States was found in violation of
11 trust responsibilities. That's our history.

12 Today we spend about \$700,000 a year
13 protecting court orders and congressional statutes, mostly
14 from the United States's attacks on our rights. That's
15 our history. That's who we are. We're in California,
16 we're -- as I said this morning, we are in the
17 neighborhood of the California Water Mafia, which is the
18 Central Valley. We are the only water source that is
19 diverted in the state to the Central Valley, which creates
20 us as a target.

21 United States is our trustee. They have
22 court orders they have to -- they have to abide by. But
23 that hasn't been happening. We have -- we still have
24 fishery -- unfortunately, the system has evolved -- has
25 degraded to what we have at least two endangered species

1 today that directly impact tribal fishing rights, and
2 those species that the United States holds in trust for
3 us. We also have two court actions that are going on
4 right now, where by Central Valley water people who are
5 trying to challenge the legal authority of the United
6 States to protect our rights.

7 And in the meantime, Secretary Jewell's
8 office, this department, has negotiated deals on the
9 Klamath side. We have presented significant amount of
10 documentation saying it was a bad decision, it was not
11 scientifically justified. Yet this department, Secretary
12 Jewell's office, Obama administration, because Jewell's
13 only been in office what, a year and a half or less than
14 two years, made decisions to over-allocate water on the
15 Klamath, causing a fish kill situation down in lower
16 Klamath.

17 To alleviate that, we dump water from the
18 Trinity River down to prevent the fish kills from
19 happening because of the Department of Interior's water
20 deal on the Klamath side. In the meantime, the Department
21 of Interior, this administration, has negotiated a deal
22 with California water interests to give them
23 895,000 acre-feet of water, mostly from the Trinity River,
24 which is us, right after \$375 million in debt to the
25 United States, that water, 395,000 acre-feet of water,

1 generates an annual value of over \$300 million at today's
2 values. It would go up, of course, in the future. That's
3 our life. That's what we deal with.

4 And we spend \$700,000 a year fighting
5 against our own trustee. Just to fulfill the court orders
6 and the legal obligations that Congress passed that said
7 the United States cannot rip off the Trinity River and the
8 Hupa Tribe for its own benefit, to deliver water to
9 non-Indian contractors.

10 These are fine -- the trust principles of
11 the secretary are fine on paper. My question is, we're
12 not in a water settlement. We thought we had a deal with
13 the United States. Do these principles apply when --
14 outside of a water settlement negotiation? Because I'm
15 talking about trust responsibilities. I'm talking about
16 the contractual treaty obligations of the United States.
17 Are we going to have to -- the Hupa Tribe, is the Hupa
18 tribe going to have to file a litigation case, a water
19 rights claim against the United States to fulfill the
20 court orders and the statutes that are on the books so we
21 can claim rights to these principles to be applied in the
22 secretary's ongoing management of the Klamath and Trinity
23 Rivers of the Central Valley that directly impact us?

24 The question is what do these even apply to?
25 Because if they don't apply to us, tell us what does apply

1 to us. Because we read the secretary's trust principles.
2 One of them is to protect treaty fishing rights. Our
3 fishing rights are going away on us. We don't know what
4 to do. Again, this is the Obama administration. This
5 is -- this is the president that says, we will honor
6 relationships with Indian tribes. We will improve them.
7 We like the words.

8 As I said this morning, in this case,
9 Secretary Jewell, on the Klamath, Trinity, and Central
10 Valley has appointed the Bureau of Reclamation, who is the
11 non-Indian water provider from our river systems as the
12 primary negotiator. There's not a single Indian
13 representative at the table. The Bureau of Indian Affairs
14 is not at the table. So where do we fit into any of this?
15 So again, these are great on paper. They look good, like
16 President Obama's things, they look good on paper. Where
17 can we take them to enforce them? Do we need to file a
18 water rights case to get the United States to simply
19 fulfill the terms of its obligations?

20 This stuff is all in writing. So that's my
21 question, is that if this doesn't help us, tell us what
22 does. Because we're ready to go there. As you know, we
23 are head-to-head with this administration on water issues
24 in the Klamath, Trinity, and Central Valley. This is
25 nonsense stuff. As we speak, we're losing our rights.

1 And we got nobody to talk to. So just tell us where we
2 go.

3 Now, again, we're good at what we do because
4 we've been taught well. We understand the legislative
5 process, the appropriation process, authorizing process.
6 Secretary Jewell just supported a piece of legislation
7 that would have allowed the United States to not enforce
8 trust responsibilities, on its choice, to a tribe that
9 doesn't waive rights. That's life for us. And again, we
10 understand this stuff because we sit in a hotbed of
11 California Water Mafia agendas all the time.

12 Tell us how we can get some help from this
13 administration. But if it's not, we'll just stand
14 head-to-head with this administration, and we'll use
15 appropriation process, and we use the authorizing law
16 process, we use the courts, we use everything to try to
17 someday get to a point where the words, like President
18 Obama said, will make the relationship honorable. I guess
19 we'll wait that out. But, my gosh, how long do we keep
20 doing this stuff? I mean, you guys are the
21 representatives of this administration. How long do we
22 keep this up?

23 VIRGIL JOHNSON: Good afternoon. My name is
24 Virgil Johnson; I'm the tribal chairman of the
25 Confederated Tribes of the Goshute Reservation. We are

1 located on the Utah-Nevada border. And we have about
2 112,000 acres of land that is our reservation. We have
3 about 600 -- just a little over 600 members. A third of
4 the tribal members live on the reservation, and two-thirds
5 live off the reservation in the urban areas. And so we
6 are a small tribe.

7 And we are currently in litigation with the
8 Southern Nevada Water Authority. The Southern Nevada
9 Water Authority has built an eight-foot diameter pipeline
10 from northern Nevada down to Las Vegas, and they want to
11 take the water from eastern Nevada and ship it to Las
12 Vegas. But that water that we have belongs to our -- our
13 tribe.

14 One thing that I haven't heard thus far,
15 dealing with cultural items, things that are sacred to our
16 people. The pipeline where they want to go through goes
17 through a space in part of our aboriginal land called --
18 called Cedar Water. At that location, a long time ago, in
19 the 1800s, our people were killed, massacred, in that
20 area, men, women, and children, by the military. And
21 before that, our people used that particular land, and
22 it's got water there, for ceremonies, for healing
23 ceremonies, and ceremonies in general.

24 Historically, once our people were
25 massacred, cedar trees started to grow in that area. And

1 those cedar trees still stand today where those Indians
2 were massacred. Our native rituals and the ceremonials,
3 and the people who do those kind of things, still use that
4 land. And we want to protect not only that land, but we
5 also want to protect our water. Those things are very
6 sacred to us as Native people. And I think that's
7 something that we can't overlook. Because if we overlook
8 those, then what that is saying is that there is no
9 concern for those type of items for Native Americans.

10 I would like to compare that with if the
11 Native Americans were upset and went into Arlington
12 National Cemetery and started digging up the graves and
13 keeping all the medals or whatever that those soldiers
14 earned when they were in World War II, World War I, and
15 Vietnam, and over in the Middle East. That would be
16 very -- wouldn't be good. And that's what has happened in
17 the past.

18 And because of that, because of our
19 cultural, we need to be very protective of our culture,
20 because that's who we are as Native Americans. That's how
21 we see it on our reservation. And to give up our water,
22 we do not want to give up our water. And so we have asked
23 the federal government to assist us in our water and to
24 protect our water.

25 And so what we have done as a tribe, we've

1 met with Mr. Black. Last week when we were at the tribal
2 leadership meeting in Washington, DC, and other top
3 officials in Washington, DC. And we are a small tribe.
4 And I concur with the president of the Navajo Tribe and
5 what he mentioned. I concur with everything that he said.
6 You see, we could be Navajos, we could be Chippewas, we
7 could be Goshutes, we could be Shoshones; we are all
8 native, and we need to stand together.

9 And I was saddened to hear the information
10 of what happened at Standing Rock. And that seems to be
11 something historical that we have constantly had to battle
12 through the years. And we continue to do it. But to have
13 the panel here to listen and to hear what we are saying,
14 to me that's a good sign. That's a good sign.

15 And I think as natives, we have come to the
16 point where those individuals who go out and become
17 educated and bring it back to the reservation, to protect
18 our rights, so they understand the paperwork and those
19 kind of things. That that's what it takes. That's what
20 it takes. And so what's good for one tribe should be good
21 for everybody else. I know circumstances are different.
22 But the ruling and things like that should be -- should be
23 common across the board for all Native Americans.

24 So I just wanted to tell the panel thank you
25 because this shows that there is some interest in what

1 needs to be done to assist the Native Americans. And we,
2 as a tribe, are looking forward to getting some things
3 taken care of and -- and hopefully, what you've heard thus
4 far is something that you will give some serious
5 consideration to and to hear what is going on.

6 And I brought that up because I didn't see
7 anything on the criteria and those kind of things dealing
8 with these cultural items. Cultural items that make
9 Native Americans who we are very significant, they are
10 very important, and we can't -- we should never overlook
11 those things.

12 Thank you.

13 LORETTA TUELL: Good afternoon. My name is
14 Loretta Tuell, T-u-e-l-l. I'm Nez Perce from Lapwai,
15 Idaho. I'm actually a shareholder at Greenberg Traurig.
16 And I'm the former director on the Committee of Indian
17 Affairs, and in that capacity, I wanted to address the
18 four questions that you presented.

19 Do the Criteria and Procedures need to be
20 reviewed and reconsidered under the Criteria and
21 Procedures promulgated in 1990, prior to negotiation and
22 completion of the great majority of enacted Indian water
23 settlements? Yes.

24 Have the Criteria and Procedure been useful
25 to achieve Indian water rights settlements? Absent any

1 other process, yes.

2 Have they been applied consistently and
3 fairly? No.

4 If reconsidered, should both the substantive
5 criteria and the procedures, including process through
6 various federal agencies, be re-examined? Yes.

7 And on number 4, you posed three questions.
8 What criteria or procedures should be revised? Why should
9 they be revised? What is the best mechanism to accomplish
10 the revision?

11 I would direct your attention to two
12 hearings held during the Obama administration. One in the
13 112th Congress on the 3rd of 15, 2012. I would direct you
14 to the title, it's called Oversight Hearing in Indian
15 Water Rights, Promoting the Negotiation and Implementation
16 of Water Settlements in Indian country.

17 Specifically, at that day, David Hayes, a
18 former deputy secretary of the department, testified. And
19 I think it's important to look at his testimony. At that
20 time we also had John Echohawk from the Native American
21 Rights Fund and a testimony from the Western States Water
22 Council. I think all of them address that fourth
23 question.

24 And if you turn your attention to the 104th
25 Congress, where on May 20th, 2015, you, yourself, Michael

1 Connor, testified in the hearing called Addressing the
2 Needs of Native Communities Through Indian Water
3 Settlements. Your testimony took off from David Hayes'
4 testimony in 112. And I think, again, they answer the
5 questions posed in number 4.

6 I would say that one of the things that
7 guide us as policymakers in your roles now in the
8 Department of Interior is not to reinvent the wheel.
9 There is an ample record for you to go back since 1990 in
10 the Criteria and Procedures to move forward, based on the
11 Department's actual testimony to Congress in two
12 congresses in the Obama administration.

13 Going forward, my real concern is because
14 this is a late aspect of the Obama administration and the
15 consultation will be open until January, how much of your
16 consultation will have an impact given the election in
17 November? If it goes a certain way and the same party's
18 in control, it sets the framework for going forward. If
19 not, it may be another quest for Indian country to believe
20 that it's a lot of carrot, no stick, no stick, no carrot,
21 where we again are just having consultations and
22 conversations that go nowhere.

23 So I would encourage you to at least, no
24 matter what happens in November, to set a framework
25 forward, to take off all the legislative history built

1 into the Department, to ensure that we, as Indian Country,
2 and advocates and policymakers on both sides aren't left
3 just standing with no recourse. That we do see something
4 that happens. Because in wake of the recent activities at
5 OMB and at the House Resources Committee, it's unclear
6 ground how we go forward.

7 So thank you.

8 KATIE BROSSY: Hi. I'm Katie Brossy,
9 outside legal counsel for the Crow Tribe of Montana. And
10 unfortunately, they could not be here today, but they
11 asked me to provide a brief statement on their behalf, and
12 they may provide additional written comment at a later
13 date.

14 Thank you for holding this consultation on
15 an important issue to Indian Country. As you know, in
16 2010, Congress passed the Crow Water Settlement as part of
17 the Claims Resolution Act. The Crow Water Settlement was
18 a uniquely complex water rights settlement. In addition
19 to recognizing the critical importance of water to the
20 Crow people and settling significant water rights claims,
21 the act involved funding to provide the basic right that
22 most Americans take for granted, clean drinking water.

23 The negotiation of a water settlement like
24 Crow's that involves both water rights claims and
25 infrastructure issues are highly complicated. We

1 acknowledge that OMB has a significant role to play in
2 this complicated process, but that participation should
3 not be as early or as involved as OMB has proposed under
4 its recent memo.

5 To implement this guidance would subordinate
6 tribal communities' need for water to the apparent desire
7 of OMB to play a greater role in an already strenuous
8 process. The OMB memo makes significant changes to the
9 water settlement negotiation process and places additional
10 obligations on Interior and Justice that severely limit
11 these agencies' discretionary authority. These changes
12 all come without adding much, if anything, of substance to
13 an already complicated federal and congressional
14 settlement review process.

15 Moreover, at a time when the Obama
16 administration has made significant strides in dealing
17 with Indian Country in a transparent fashion, this memo
18 was issued without consultation and was only obtained
19 through a FOIA request. That lack of transparency
20 conflicts with the way the administration and its agencies
21 have worked with Indian Country on a
22 government-to-government basis.

23 More importantly, however, the OMB memo
24 demonstrates a misunderstanding of the complex water
25 settlement negotiation process, and it will only delay

1 justice for tribal communities. The OMB memo demonstrates
2 a disregard for the pivotal role that Interior and Justice
3 play in negotiating settlements and ignores the already
4 rigorous review process required under the new Bishop
5 letter.

6 The requirement that every federal
7 negotiating position be cleared by OMB will stunt
8 negotiations, frustrate a desire to reach settlement, and
9 injure those tribal and non-tribal parties that depend on
10 the certainty provided in a water rights settlement.

11 All of these concerns are only compounded by
12 the vagueness that underlies the authority that OMB is
13 attempting to assert over water settlement negotiation.
14 The memo infers that OMB, and not the subject matter
15 experts at Interior and Justice, will have final say over
16 settlements. This defies logic. Simply put, there are a
17 number of problems that would flow from implementation of
18 the OMB policy and the negotiation of every Indian water
19 settlement in the future.

20 No one can dispute the role that OMB plays
21 in water rights settlements, but that role must be defined
22 and work in concert with other agencies, not subordinate
23 them. At the end of the day, settlements are a preferred
24 method for resolving Indian water rights disputes. There
25 may be ways to streamline this process, but multiple

1 layers of additional OMB review is not the answer.

2 For all of these reasons, the OMB memo
3 should be withdrawn, and the administration should instead
4 review and reconsider whether the Criteria and Procedures
5 take into account the unique and complex issues involved
6 in future Indian water rights settlements.

7 Thank you.

8 DAVE MIELKE: Thank you. I'm Dave Mielke
9 with the Sonosky Firm. And I'm here on behalf of the
10 Pueblo of Isleta. The councilman from the pueblo is also
11 here with me today. I have three questions.

12 One, Deputy Secretary Connor, you mentioned
13 that this administration has come up with a good
14 interpretation of the Criteria and Procedures. Is this
15 interpretation memorialized anywhere? And if it is, can
16 you share it with us?

17 Second, if it's not memorialized anywhere,
18 should it be memorialized in writing so that the next
19 administration hopefully continues to interpret the
20 Criteria and Procedures in a manner that promotes and
21 facilitates Indian water rights settlements.

22 And third, do the Departments of Justice and
23 Interior plan to formally respond to the OMB memo during
24 this administration?

25 MARY PAVEL: A Sonosky two-fer today. I'm

1 Mary Pavel, partner with Sonosky, Chambers, Sachse,
2 Endreson & Perry, with the Skokomish Tribe,
3 S-k-o-k-o-m-i-s-h.

4 One of the things I have talked about, and I
5 think the prism -- so the question is should 4 and 5, in
6 particular, be re-examined. And as Loretta said,
7 unequivocally, yes. And I think it has to be, you know,
8 the chairman of the Navajo Nation talked about it. The
9 prism with which the United States looks at it has to be
10 reconsidered.

11 Because if we look at the restoration
12 projects on the Skokomish River that's authorized and that
13 OMB and Army Corps are so thrilled and excited about, when
14 it was first looked at as a flood control product, it
15 didn't meet anybody's. People said they could have bought
16 all the land in the valley for the cost of restoring that
17 river.

18 But if you look at it as ecosystem
19 restoration, if you look at it as habitat restoration, if
20 you look at it as a cultural set of what that river means
21 to my people, it's incalculable. The value and the
22 benefit of that work is incalculable. And that's why it's
23 one of four river restoration projects in the nation
24 authorized -- or will be authorized when WRDA finally gets
25 through. So you've got to think about the prism and the

1 values with which the trustee is exercising its
2 responsibility.

3 So, unequivocally, yes. And I think, you
4 know, that's -- the Army Corps process has its challenges,
5 but they did expand the prism through which they were
6 looking at the work that they do to restore rivers and
7 water bodies of the United States.

8 JEANNE WHITING: Thank you. My name is
9 Jeanne Whiting. I'm an attorney in private practice,
10 formerly with the Native American Rights Fund. And I have
11 spent my entire career working on Indian water rights
12 settlements. First one I worked on passed in 1992, the
13 Northern Cheyenne Settlement. Also worked on Duck Valley,
14 passed in 2009. And now the Blackfeet Tribe settlement,
15 which is pending in Congress as part of the WRDA bill. I
16 am also a member of the Blackfeet Tribe, and I've worked
17 on that settlement for at least a couple of decades.

18 I want to say a couple of things about the
19 Criteria and Procedures. I certainly agree with
20 everything that people have said about the Criteria and
21 Procedures in this room. And there are definite issues
22 relating to them. I will say, however, that until
23 recently, they didn't have a big impact on settlements.
24 If I'm not mistaken, I think that the number of
25 settlements the administration has actually supported is

1 very small compared to the number of -- the 30-some
2 settlements that have been passed. In almost all cases,
3 the administration opposed those settlements, and OMB
4 opposed those settlements. So the Criteria and Procedures
5 have not really had a big impact until recently.

6 But I think that does illustrate something
7 about OMB. Regardless of the fact that it has been the
8 policy of the -- of many administrations to support
9 settlement of water rights rather than litigation, OMB has
10 never liked these settlements. They didn't like them
11 20 years ago, they don't like them now. And regardless of
12 the administration's policy to prefer settlements, OMB has
13 never really liked these. And we see that because we have
14 seen very few who have been supported by the
15 administration.

16 Now, why the focus, then, on the Criteria
17 and Procedures at this point in time? I think there are a
18 couple of -- there's one main reason, and that's Congress.
19 What we see now is, in the House in particular, is that
20 Congress -- or the House has decided that Indian water
21 settlements are earmarks. And so that -- if, in fact,
22 that position continues, we probably won't see any Indian
23 water settlements in the near future.

24 So the Bishop criteria, you know, we don't
25 like it, but it is one way of getting around the earmark

1 issue. And I think what it does point up, however, is
2 that we have a lot of work to do with Congress still. I
3 know that NARF and the Western States Water Council has
4 spent a lot of time trying to educate Congress on the
5 importance of settlements, the fact that they are
6 important for all the reasons that the people in this room
7 have stated up to this point in time. But it is a
8 continuing process. And with budget issues, it's gotten
9 much, much worse.

10 So our real focus should be not just on
11 Interior but also on Congress because we're getting
12 renewed focus on these Criteria and Procedures because of
13 this earmark issue.

14 I do want to mention just a couple of things
15 relating to the Criteria and Procedures there, however,
16 and something that hasn't been raised yet, and that's the
17 process. As Pam went through, you know, there is a
18 process for Interior to consider these settlements and to
19 take positions on them. In fact, Interior doesn't take a
20 position on a settlement until a bill is introduced.
21 That's almost too late.

22 It doesn't work for Interior to wait until a
23 bill gets introduced to take a position. It's taking
24 Blackfeet -- we were introduced first in 2010, we're now
25 in 2016. Except for one year that there was a delay

1 because of a tribal meltdown, we have been continuously
2 negotiating that settlement with Interior. That should
3 have taken place throughout the process of negotiating the
4 settlement to begin with. We had a federal team for
5 20-some years. We had representatives of the Department
6 of Justice, the Solicitor, various federal agencies. It's
7 too late to take a position once a bill is introduced. It
8 just does not work.

9 The other point I want to make is that
10 Interior has its own conflicts of interest that I think it
11 needs to deal with in a very direct way. You know,
12 Interior does have a lot of interests that it is
13 representing in this process. Bureau of Reclamation, Fish
14 and Wildlife Service, Parks Service, Forest Service.
15 There is not a good process for dealing with conflicts of
16 interest. And I think it's incumbent upon particularly
17 the assistant secretary's office to step up its role in
18 these settlements to make sure that there's a balance
19 within the department when these conflicts arise. Because
20 otherwise, the tribes, particularly in this atmosphere
21 where the House is saying, you don't even get your bill
22 introduced unless you have absolute agreement with
23 Interior, it gives Interior enormous clout in getting its
24 way on a number of different issues that really are
25 conflicts. And I think Interior really has to set up a

1 process to deal with that.

2 I'll just leave it at that. I'm sure there
3 might be others who want to speak as well.

4 ALFRED LOMAHQUAHU: Good afternoon,
5 everyone. My name is Alfred Lomahquahu; I'm the vice
6 chairman for Hopi Tribe. I know everybody's getting
7 sleepy, and I agree with everything that each one of you
8 guys have said and how we need to hold DOI accountable
9 every part of it. I'm not a lawyer, I'm not a doctor, I
10 don't even have a college degree. But I know one thing, I
11 have some sense. I have some sense. And it seems to me
12 like a lot of that sense just went out the window. The
13 basics, it just went out the window.

14 What I'm trying to say is we need to just
15 cut the bullshit. DOI, do your job. And one of the
16 things that I see here, this morning when I came, this
17 whole thing was full. I look at it again, maybe a third.
18 And we spoke -- several different individuals spoke to
19 this this morning, that we need to unite as tribes, share
20 our resources, unite and be together. I've seen different
21 ethnic races achieve something that Native Americans have
22 never achieved. Look at Martin Luther King. Look at
23 Cinco de Mayo, Cesar Chavez united all these immigrants.
24 Why haven't the Native Americans done the same thing and
25 spoke as one unit and make DOI and all these government

1 entities accountable. They serve two masters. They
2 should be serving us rather than Congress.

3 Why? Because we're the ones that they're
4 paid to work for. We're the ones that they have a job.
5 That's why they have a job, because they're here for us.
6 Yet they say, oh, Congress is like this, Congress is like
7 that, you know. So what? If you really look at what your
8 scope of work is, this is where it's at, with these
9 people.

10 And yes, we need to communicate more, a lot
11 more better than we are communicating now. Administrative
12 transitions, sometimes we have to start from square one.
13 We're working with the Navajo Tribe on our settlements.
14 You have to sometimes put some of these differences aside
15 in order to work with each other. Yeah, there's some
16 things that I don't like about Navajo Tribe, (laughter)
17 especially their number one man over there (laughter), but
18 you have to make sure that you put things aside so that
19 you work in benefit of what you really want.

20 And I think it's time that all of the tribes
21 start setting these precedents where we can use this as a
22 model to start moving forward. There's a lot of issues
23 before us. Land issues. It's not water, it's also land.
24 And one of the things that I don't want to see is this to
25 be just another consulting. You know, we consulted with

1 the tribes on so-and-so. So that's it. They go back to
2 D.C. I've sat across from Mr. Connor several times on
3 another issue, so I just don't want it to be another
4 consultation. Let's make sure that DOI, Department of
5 Indian Affairs, let's set some tasks that we can follow up
6 with so that we know that there's something that actually
7 came out of this meeting.

8 Thank you.

9 RUSSELL BEGAY: We love the Hopis, too,
10 Navajo. We can share fry bread, mutton stew, and all of
11 that, steamed corn.

12 IRENE CUCH: I'd just like to make this
13 short. I have a question. Now, this consultation is
14 based on a criteria, right? They're criteria you guys
15 handed out. My question has to do -- and I believe I
16 heard, was it Letti or Pamela mentioned that there are
17 some water settlements that's already been negotiated and
18 finalized. And I know ours was in 1990. It was called
19 the CUPCA, Central Utah Project, 1990. But I know
20 throughout the years --

21 Excuse me. My name is Irene Cuch; I'm the
22 former chair of the Ute Indian Tribe. I retired back in
23 the year 2013. But I'm still active, especially with
24 water. I am on a water commission, I'm a commissioner,
25 I'm on a water board for the Ute Tribe.

1 But throughout the years, I believe since
2 1990, we've been bringing up this issue. We don't believe
3 our water settlement's been quite completed. There's
4 still some negotiation that needs to be done. And that's
5 to restore the funding. That's for the two storages. The
6 funding was supposed to have been for the storages that
7 were taken out. And we have requested -- I believe Tony
8 in his statement kind of mentioned that. And I just
9 wanted to reiterate that those funds be restored.

10 It was mentioned here earlier about paper
11 water and wet water. We would like to have wet water.
12 And that would be for the storages. Without that, we
13 can't do much. Our water settlement's been based on the
14 acres, and that has to do with the Uintah Irrigation
15 Project. But this compact we're working on would have to
16 do with other projects such as economic development,
17 leasing, housing, commercial, so on. But we can't do that
18 unless we get the storage, the two storages built.

19 So if I can recall, you said in your
20 statement that the settlement, the past settlements, can
21 be amended. Is this what you said, that we can -- that
22 can be amended, a 1990 Ute tribe settlement, and ask for
23 those -- those funding for the dams be restored? We need
24 it. Without dams, we can't really move. We can't really
25 go into what we would really like to do with that, to

1 build up our water project for the reasons I expressed.

2 We don't have a casino on our reservation,
3 but we rely on oil and gas revenues. That's our income.
4 But we would like to ask Department of Interior if you can
5 reconsider our water settlement, and that it be amended to
6 include -- to restore the money back for the dams.

7 Thank you.

8 MR. CONNOR: Thank you, everybody, for your
9 comments, the time you've put into this consultation, the
10 thoughtful nature of your comments, a lot of good comments
11 and questions. I'm not going to -- one, we've reached the
12 end of our time, so I will try and wrap up briefly.

13 I want to capture a couple of the high-level
14 questions that came about the Criteria and Procedures just
15 real quickly. I'm not going to talk about individual
16 matters that have been brought up, probably because I
17 don't know enough about the individual matters to comment
18 intelligently at this point in time. Some of the --

19 And then I'll open it up to anybody else who
20 may want to offer some brief wrap-up comments here.

21 We started off with some very good comments,
22 I think they were schematically about the Criteria and
23 Procedures themselves, which ones were really at issue.
24 And before I get into that, though, I just do want to
25 point out at a high level, there is a good discussion

1 about the Criteria and Procedures. And particularly
2 whether they're -- they have enough definiteness, if
3 that's the right word, to really follow them and
4 understand what they mean as opposed to them being very
5 open to interpretation across administrations. I think
6 that's a very good set of questions.

7 I would note, though, that the Criteria and
8 Procedures have been successfully used. I would note, for
9 the record, overall, there have been 29 enacted Indian
10 water rights settlements. This president, President
11 Obama, has signed into law six of those. And this
12 administration has also given written support for three
13 more pending matters before Congress that we would like to
14 get done before the end of this administration. That's
15 nine settlements out of a total history since the 1970s,
16 if we get those 3, 32. So I do think that this
17 administration has applied these Criteria and Procedures
18 in a way that can work to get to very, very good
19 settlements for tribes. And I think the numbers speak for
20 themselves. This president, if we get those three across
21 the finish line, this will be the most successful
22 administration with respect to getting Indian water rights
23 settlements enacted.

24 So they can work. The question is -- and
25 that gets to a lot of the questions about the specific

1 nature of some of the Criteria and Procedures. Somebody
2 nailed it -- I think it was Governor Garcia from Ohkay
3 Owingeh -- talked about what Criteria and Procedures
4 caused the most grief? I think that was a really good way
5 to characterize the question because I think the grief
6 depends on which side of the table you sit with respect to
7 those Criteria and Procedures. But there's three that I
8 think are really the core, whether it's the Bishop letter,
9 whether it's the OMB memo, whether it's the Criteria and
10 Procedures themselves, whether it's the dialogue that we
11 have internally, the 3, 4, 5, and 6, basically. The total
12 costs, to not exceed the value of the claims overall, how
13 is that interpreted?

14 The federal contribution itself, right now
15 is written as the legal exposure plus programmatic and
16 federal trust responsibilities. And then last is the cost
17 sharing, which really relates to states and non-Indian
18 parties and how they benefit from particular settlements.
19 I just mention that one because it's grief to the states
20 and the non-Indian parties when we're negotiating
21 settlements. And it's always one of those issues that
22 gets negotiated to the end.

23 So I just mention that. I think it has less
24 relevance here. Really, with respect --

25 The key issue, and it's raised in the OMB

1 memo, and it's really the key to Dave Mielke, your
2 question, what is the interpretation of the programmatic
3 and federal trust responsibilities? I think it's valuable
4 to go through the exercise of calculating legal exposure
5 because at the end of the day, there's always some
6 exposure, even if it's the litigation process. That's the
7 way we've looked at it at Interior. So there's always
8 some level of value that -- that is there because of the
9 legal process of adjudicating Indian water rights.

10 But the Criteria and Procedures are written
11 that plus the programmatic and trust responsibilities, and
12 I think that's the real key. We've looked at it, we do
13 look historically, what is the level of contribution,
14 water rights, the whole sum of previous settlements,
15 that's a factor. Then we go back to the principles.
16 Especially with the Criteria and Procedures. What are
17 tribes giving up, in regards to their legal rights and
18 claims, mostly claims, as part of any Indian water rights
19 settlement. That's a factor.

20 Third is what is the value that it takes to
21 ensure that tribes get benefit from the settlements, the
22 actual use of water. And then, of course, there's always
23 the overriding nature of the claims that are based on
24 treaty rights, statutory rights, et cetera, that's a
25 factor. So for the way we've interpreted is looking at

1 all those factors as part of our programmatic and trust
2 responsibilities, and that's from that standpoint how
3 we've negotiated a lot of these settlements.

4 That gets to the specific nature. Are they
5 memorialized? They're memorialized in a lot of
6 discussions that we've had internally and with the Office
7 of Management and Budget as part of this process, and some
8 of that has come out as a result of the Bishop letter.
9 But I don't know that they've been specifically
10 delineated. And I thought that was a good point that
11 people raised.

12 Another point I want to just make clear, the
13 Bishop letter, Chairman Bishop, chairman of the House
14 National Resources Committee. Separate branch of
15 government. We're not doing a consultation on Chairman
16 Bishop's letter. That is the prerogative of him as the
17 chairman of the House National Resources Committee to
18 provide whatever process, issues that he thinks have to be
19 addressed in order to introduce legislation and move it
20 through the committee in which he chairs. We don't play a
21 role in that.

22 And I say that just to make clear that's the
23 nature of our separation of powers. And I just want
24 people to understand. And I think Chairman Bishop would
25 also want me to say that we, the administration, have no

1 role in this process also. I think he would very much
2 endorse the comments that I just made, quite frankly.

3 That's a matter that has to be taken up by
4 folks the chairman and his staff. And quite frankly,
5 which he has to explain to other members of his committee
6 and members of the house of representatives. That's the
7 way they work through their process.

8 Finally, I would just note, there is --
9 somebody asked what is the effect of the OMB letter on
10 Indian water rights settlements. At this point in time --
11 the OMB memo. At this point in time, there's no change in
12 policy. There's an active dialogue going on between the
13 departments and OMB. But that active dialogue exists on
14 the individual settlements themselves. I think what
15 you've seen there is a process that's already been ongoing
16 as we, the administration, have chosen to specifically
17 speak to settlements and indicate that we will send
18 letters of support for those settlements when we've
19 negotiated the details with the tribes.

20 We have had to undergo a process that's been
21 different over the last eight years, which is being up and
22 briefing the staff at the Office of Management and Budget
23 because that's just the nature of how the administration
24 works. We send those letters up on the Hill. Those
25 letters have never been just the Interior and Justice

1 Department. We work as an administration, when we have to
2 get a clearance through the White House, which means OMB
3 to get those letters sent up. So I think what -- the
4 process is being more defined by the proposal that is in
5 that memo.

6 But I just want people to know there's
7 already been some of that interaction, briefing, et
8 cetera. This would more formalize it. It would create
9 certain parameters. We're discussing those issues with
10 the Office of Management and Budget. But just even under
11 the existing way that we do business, there is a lot of
12 interaction between the Departments and OMB itself.

13 Lastly, two last things I would just
14 mention. I appreciated -- I think it was the Crow Tribe's
15 comments somebody mentioned -- there is a rigorous process
16 already that goes on with respect to negotiating
17 settlements at the Department of Interior, Department of
18 Justice. We do have a certain set of policy parameters
19 that we try and ensure are part of every settlement. We
20 do look at the costs and the federal contribution and
21 interpret the Criteria and Procedures. It's a very active
22 process itself, and I just appreciated somebody recognized
23 that. It's not as if, you know, we're going to do things
24 differently. We already do that. We negotiate that, and
25 we try to explain ourselves to tribes as part of that

1 process.

2 And then last of all, I think Chairman
3 Johnson of the Goshute Reservation noted that we need to
4 take cultural resources into account. I just mention
5 that, that in the context that he mentioned with respect
6 to the issues that the tribe has with Southern Nevada
7 Water Agency, as I understood it, it's the impact of an
8 infrastructure project on the cultural resources of the
9 tribe that exists outside the reservation. There is, as
10 President Cladoosby mentioned, there is an ongoing
11 situation similar to that going on with the Dakota Access
12 Pipeline. I just wanted to reference that because that is
13 one of the reasons why we are embarking on a set of
14 consultations on how the federal government permits
15 infrastructure projects and its impact to tribal interests
16 from a lot of different perspectives, cultural resources
17 in particular.

18 So I would just invite everybody to
19 participate in those consultations. Specifically, to see
20 whether we need to be doing things differently. And as
21 contemplated in the communication we've had amongst the
22 departments, maybe we need to look at our authorities, and
23 from the authority's perspective look at potential
24 legislation to address how we participate and address
25 those interests as part of our permitting processes.

1 Thank you very much, again. I'll open it up
2 if anybody else has some quick comments to wrap up.

3 MR. HIRSCH: Just a couple things. First, I
4 just wanted to thank all of you for sticking it out and
5 staying here and educating us about your views on Indian
6 water rights settlements. I know I learned a lot, and
7 took a lot of notes, and taking a lot back to my
8 department based on what I heard today.

9 There's two things I wanted to raise. One
10 involves a request for more help from you guys. And the
11 other involves something that I'm going to pledge to do in
12 response to what I've heard today.

13 The first is that there was, I think, a bit
14 of tension between two different things. On the one hand,
15 I think it was Governor Lewis who said it very nicely,
16 this is not a one-size-fits-all issue. And I think
17 Chairman Finley from CSKT said that we need to be flexible
18 and not have strict rules. Then we heard a lot of stories
19 from Ute, from Crow, President Begay from the Navajo,
20 talking about the very unique circumstances of water
21 rights issues on their reservations. So there's that
22 whole "let's make sure we treat different things
23 differently."

24 On the other hand, there's a whole line of
25 comments saying that there's trust responsibility, and the

1 United States needs to be more careful to be consistent,
2 to be fair, things shouldn't vary so much from one
3 administration to the next, there shouldn't be this
4 arbitrariness that seems to be infecting the process.

5 And I think particularly as the pace
6 increases, Mike talked about nine of these 32 settlements,
7 potentially, just coming in the last eight years alone out
8 of a 40-year period, and I spoke earlier about the
9 likelihood that there would be more increase in pace, and
10 should be more increase in pace, in the future, this need
11 to keep things consistent is going to become stronger. At
12 the same time, we need to be very respectful of the fact
13 that every single tribe is different, and every single
14 tribe's water rights issues are different.

15 So the question, how do we come up with new
16 policies that accomplish both of those missions that are
17 better than what we've got right now. And I think for
18 that, we need your help. We need your continued
19 participation in these upcoming consultations. And
20 especially we need your written input. If you were going
21 to tear apart the Criteria and Procedures, what would you
22 replace it with? How would you deal with squaring that
23 tension between wanting to be flexible but also wanting to
24 be fair to everybody.

25 There was also a question -- I think it came

1 from Isleta -- about does our department plan to formally
2 respond to OMB? The answer is yes and no. First the no.
3 They said -- OMB said, in their letter to NCAI -- I'm
4 going to quote it, "The administration continues to follow
5 the 1990 Criteria and Procedures when evaluating costs and
6 benefits of potential settlements, and the recent OMB memo
7 did nothing to change this policy in any way."

8 Frankly, at this point, we're taking them at
9 their word and we're treating that memo as if it didn't
10 change anything. That's the no.

11 The yes, and I'm speaking a little out of
12 school here, but Letti, if it's all right with you, Letti
13 and I met with OMB and said a lot of things, but we said,
14 you should come to these consultations. And they didn't.
15 And then we wrote to them and said, you should come to
16 these consultations. And they didn't. So I'm going to
17 take another run at it. I would love for them to be here
18 with us. We have more consultations coming up. I think
19 they have a valuable perspective. I think a lot of the
20 individuals there want to do the right thing. But it
21 would be wonderful if they could hear from you, and you
22 could hear from them. So that's my pledge to you. I'm
23 going to take another run at that. I don't, by any means,
24 guarantee success, but I can at least try.

25 MR. CONNOR: Thank you. Thank you very

1 much, Sam.

2 Just a couple wrap-up comments. As I think
3 Pam pointed out, next consultation, November 3rd. I think
4 there was a Dear Tribal Leader letter that highlighted the
5 logistical information associated with that November 3rd
6 consultation.

7 And lastly, written input, again,
8 January 31st, 2017. I think it identifies Pam and her
9 office as the recipient of that. We strongly encourage
10 that, in addition to the transcripts that we will review
11 as part of the process. Very much hearing also the desire
12 that we try and memorialize something before the
13 administration leaves.

14 So thank you very much for your input.
15 Appreciate it.

16 (The proceeding concluded at 6:20 p.m.)
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1 STATE OF ARIZONA)
) ss.
2 COUNTY OF MARICOPA)

3 BE IT KNOWN that the foregoing proceedings were
4 taken before me; that the witness before testifying was
5 duly sworn by me to testify to the whole truth; that the
6 foregoing pages are a full, true, and accurate record of
7 the proceedings, all done to the best of my skill and
8 ability; that the proceedings were taken down by me in
9 shorthand and thereafter reduced to print under my
10 direction.

11 I CERTIFY that I am in no way related to any of
12 the parties hereto, nor am I in any way interested in the
13 outcome hereof.

14 [X] Review and signature not required.

15 I CERTIFY that I have complied with the ethical
16 obligations set forth in ACJA 7-206(F)(3) and ACJA 7-206
17 J(1)(g)(1) and (2).

18 Dated at Phoenix, Arizona, this 21st day of
19 October, 2016.

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25

KRISTEN L. WUNSCH, RPR
Certified Reporter
Arizona CR No. 50719

* * * * *

26 I CERTIFY that GRIFFIN & ASSOCIATES, LLC, has
27 complied with the ethical obligations set forth in ACJA
28 7-206 (J)(1)(g)(1) through (6).

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GRIFFIN & ASSOCIATES, LLC
Registered Reporting Firm
Arizona RRF No. R1005

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