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TESTIMONY OF

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MONTANA RESERVED WATER RIGHTS COMPACT

COMMISSION

ON BEHALF OF THE WESTERN GOVERNORS' ASSOCIATION

AND THE WESTERN STATES WATER COUNCIL

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

NATURAL RESOURCES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 16, 2008

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

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

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

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

The western states' sovereign counterparts, the Indian nations claiming water rights, have also supported negotiated settlement of these difficult legal issues. The National Congress of

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

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

However, over the years, federal fiscal and legal policies have hindered this successful process. Under the "Criteria and Procedures" adopted in 1990, the Department of Interior has continued to espouse settlement while the administration has taken an increasingly narrow view of its trust responsibilities to tribes and its willingness to fund settlements that benefit non-Indians. In coordination with the Office of Management and Budget (OMB) and the Department of Justice (DOJ), the Department of Interior has been asserting that its contribution to settlement

should be no more than its calculable legal exposure. Even this can be narrowly drawn so that often its financial obligation is little or none.

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

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

While federal support is an essential part of these settlements, the western states acknowledge that they should bear an appropriate share of the settlement costs, especially those corresponding to non-Indian benefits. In Montana over $56 million has been appropriated for existing settlements. More than an additional $20 million could potentially be authorized in the

next session. In New Mexico the legislature has appropriated over $36 million for Indian water rights settlements. In addition to contributing monies to fund the settlements, many states have devoted significant in-kind resources to cover the administrative costs associated with the negotiations process.

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

Failure to conclude meaningful water settlements will undermine the western states' planning for sustainable growth and disrupt their ability to meet long-term water demands. State and tribal commitment to pursue these settlements may be jeopardized if federal support is not forthcoming. Litigation could also substantially disrupt non-Indian uses. Further, if tribes are

forced to litigate their water rights, their eventual quantification may be meaningless without federal dollars to develop their water supplies for their homelands.

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

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

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

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

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

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