

**House Water and Power Subcommittee  
Oversight hearing on Indian Water Rights Settlements  
April 16, 2008**

**Testimony of John Echohawk on behalf of the  
Native American Rights Fund**

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

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

years alone, the Bush Administration spent \$2.3 billion on water infrastructure in Iraq, \$1.6 billion on water related issues in other countries, and \$2.5 billion on water rights claims in the West outside of Indian Country.

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

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

## A. Treaties and the Trust Responsibility

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

By the 1700s the United States government, fueled by settlement pressures, engaged in treaty making with tribes to resolve conflicts as non-Indians moved into Indian lands in the West. The intent of the treaties was to provide protection, stability and peace between the governments. The treaties were a reservation of rights in which the tribes retained specific land and associated water interests the United States government agreed to protect. Congress has recognized the federal government's trust responsibility created by the treaties to protect Indian water rights, and to assist where necessary in the administration of such resources. The Department of Interior has expressly acknowledged its duty to protect tribal water rights. Despite these acknowledgements, the federal government never fulfilled adequately its trust duty to protect tribal water interests. The National Water Commission, in 1973, stated that "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters." Natl. Water Commn., *Water Policies for the Future: Final Report to the Resident and to the Congress of the United States*,

475 (Govt. Prtg. Off. 1973); see also Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, 46 Nat. Resources L. 399 (2006). For political and institutional reasons, federal policy since the time of treaty making has systematically deprived the tribes of their water rights.

**B. State Water Rights and *Winters v. United States***

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

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

most Indian reservations were created prior to outside settlement by non-Indians, *Winters* rights usually gave tribes the earliest priority date and most senior rights.

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

### **C. Federal Water and Tribal Water Rights**

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

Moreover, in most cases large-scale water projects in the West were built to the detriment of tribal water rights since they allocate the majority of water available to non-Indian users. The National Water Commission in 1973, for example recognized that the federal government had *promoted and subsidized non-Indian water development at the expense of vested tribal rights*. The Klamath Irrigation Project in Southern Oregon is a prime example of this. Created in 1902, the project irrigates thousands of agricultural acres by diverting water from the Upper Klamath Lake in Southern Oregon which flows into the Klamath River in Northern California. The project provides subsidized water to non-Indian farmers but disregards senior tribal water rights. The Klamath River, through its journey from the high desert to the ocean, supports the Klamath, Yurok, Karuk and Hoopa Tribal fisheries. The project does not accommodate water for instream flows for tribal fisheries, but instead diverts water to support the irrigation project. In 2003, the largest fish kill in American history, occurred on the Klamath River when 60,000 salmon died due to lack of adequate water flows after a large diversion was made up river for the Irrigation

Project. The federal government has known of the potential environmental consequences of these diversions but refused to alter its course despite its trust obligation to protect Tribal fisheries. The Native American Rights Fund represents the Klamath Tribes in litigation over this situation.

**D. Water Problems in Indian Country**

**a. Water Shortages and Poor Water Quality**

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

In the West, the Tule River Tribe of California has been engaged in settling its water rights on the South Fork Tule River for nearly 40 years. During this time the community lacked an adequate water supply to provide fire protection, housing and economic opportunities to tribal members. The tribal housing authority has 200 pending housing applications, but is unable to act

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

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

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



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

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

#### **E. Resolution of Indian Water Rights**

The foregoing challenges in Indian Country all connect to water. Their solutions lie in water. Water is sacred. Tribes have proven they are very capable partners and players in water

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

1. **Snake River Water Rights Act of 2004**, Pub. L. No. 108-447 118 Stat. 2809 (Nez Perce Tribe).
2. **Arizona Water Settlements Act of 2004**, Pub. L. No. 108-451, 118 Stat. 3478.
3. **Zuni Indian Tribe Water Rights Settlement Act of 2003**, Pub. L. No. 108-34, 117 Stat. 782.
4. **Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000**, Pub. L. 106-263, 114 Stat. 737.
5. **Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999**, Pub. L. No. 106-163, 113 Stat. 1778.
6. **Jicarilla Apache Tribe Water Rights Settlement Act of 1992**, Pub. L. No. 102-441, 106 Stat. 2237, *as amended*, Pub. L. No. 104-261, 110 Stat. 3176 (1996), *as amended*, Pub. L.No. 105-256, §, 112 Stat. 1896 (1998).
7. **Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994**, Pub. L. No. 103-434, title I, 108 Stat. 4526, *as amended*, Pub. L. No. 104-91, § 201, 110 Stat. 7 (1996).
8. **Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992**, Pub. L. No. 102-374, 106 Stat. 1186, *as amended*, Pub. L. No. 103-263, §§ 1-1(a), 108 Stat. 707 (1993).
9. **Ute Indian Rights Settlement Act of 1992**, Pub. L. No. 102-575, title V, 106 Stat. 4600.
10. **San Carlos Apache Tribe Water Rights Settlement Act of 1992**, Pub. L. No. 102-575, title XXXVII, 106 Stat. 4600, *as amended*, Pub. L. No. 103-435, § 13, 108 Stat. 4566 (1994), *as amended*, Pub. L. No. 104-91, § 202, 110 Stat. 7 (1996), *as amended*, Pub. L. No. 104-261, 100 Stat. 3176 (1996), *as amended*, Pub. L. No. 105-18, § 5003, 111 Stat. 158 (1997).
11. **Fort Hall Indian Water Rights Act of 1990**, Pub. L. No. 101-602, 104 Stat. 3059.

12. **Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990**, Pub. L. No. 101-618, title I, 104 Stat. 3289, as amended, Pub. L. No. 109-221, § 104, 120 Stat. 336 (2006).
13. **Fort McDowell Indian Community Water Rights Settlement Act of 1990**, Pub. L. No. 101-628, 104 Stat. 4469.
14. **Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990**, Pub. L. No. 101-618, title II, 104 Stat. 3289.
15. **Colorado Ute Indian Water Rights Settlement Act of 1988**, Pub. L. No. 100-585, 102 Stat. 2973, *as amended*, Pub. L. No. 104-46, 109 Stat. 402 (1995), *as amended*, Pub. L. No. 106-554, title III, 114 Stat. 2763 (2000).
16. **Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988**, Pub. L. No. 100-512, 102 Stat. 2549, *as amended*, Pub. L. 102-238, 105 Stat. 1908 (1991).
17. **San Luis Rey Indian Water Rights Settlement Act**, Pub. L. 100-675, title I, 102 Stat. 4000 (1988), *as amended*, Pub. L. No. 102-154, 105 Stat. 990 (1991), *as amended*, Pub. L. No. 105-256, § 11, 112 Stat. 1896 (1998), *as amended*, Pub. L. No. 106-377, § 211, 114 Stat. 1441 (2000).
18. **Southern Arizona Water Rights Settlement Act of 1982**, Pub. L. No. 97-293, title III, 96 Stat. 1261, *as amended*, Pub. L. No. 102-497, § 8, 106 Stat. 3255 (1992).
19. **Seminole Indian Land Claims Settlement Act of 1987**, Pub. L. No. 100-228, § 7, 101 Stat. 1556, incorporating Seminole Water Rights Compact, *reprinted in Seminole Land Claims Settlement Act: Hearings on S. 1684 Before the Senate Select Comm. On Indian Affairs, 100<sup>th</sup> Cong. 83-122 (1987)*.
20. **Ak-Chin Indian Community Act of 1978**, Pub. L. No. 95-328, 92 Stat. 409, *as amended*, Pub. L. No. 98-530, 98 Stat. 2698 (1984), *as amended*, Pub. L. No. 102-497, § 10, 106 Stat. 3258 (1992), *as amended*, Pub. L. No. 106-285, 114 Stat. 878 (2000).

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

1. **Aamodt (Pueblos of Nambe, Pojoaque, San Ildefonso & Tesuque).**
2. **Abousleman (Pueblos of Jemez Zia & Santa Ana).**
3. **Blackfeet (Blackfeet Tribe).**
4. **Crow (Crow Tribe).**
5. **Duck Valley (Shoshone-Paiute Tribes).**
6. **Flathead (Confederated Salish & Kootenai Tribes).**
7. **Fort Belknap (Gros Ventre & Assiniboine Tribes).**
8. **Kerr McGee (Pueblos of Acoma & Laguna).**

9. **Little Colorado River (Navajo Nation, Hopi Tribe & San Juan Southern Paiute Tribe).**
10. **Lummi (Lummi Nation).**
11. **Navajo Nation Colorado River (Main Stream).**
12. **Navajo-San Juan (Navajo Nation).**
13. **Soboba (Soboba Band of Luiseno Indians).**
14. **Taos (Pueblo of Taos).**
15. **Tule River (Tule River Indian Tribe).**
16. **Upper Gila River/San Carlos (San Carlos Apache).**
17. **Walker River (Walker River Paiute Indian Tribe, Bridgeport Indian Colony & Yerington Paiute Tribe).**
18. **White Mountain (Apache Tribe).**
19. **Zuni/Ramah (Pueblo of Zuni & Navajo Nation).**

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

**a. Litigation of Indian Water Rights**

Historically tribal water rights claims were resolved in the court systems. Federal courts have jurisdiction over tribal water rights claims unless the state has initiated a general stream adjudication on a waterway utilized by a tribe. In such cases, the state court has jurisdiction over tribal water rights claims pursuant to the McCarran Amendment. Lengthy litigation often results in "paper water" rights with no funding for water infrastructure development. Moreover, the

aggressive nature of litigation divides the community of water users into adversarial camps and thereby reinforces old political debates over water usage. For all parties, litigation is expensive and can take decades. For these reasons most tribes, states and private water users over time have learned through experience to favor negotiated settlements of water rights.

**b. Settlement of Indian Water Rights**

The process of settling water rights claims allows the community of water users to address an array of water problems using creative solutions that are not available through litigation. This flexibility provides incentives for all water users on a waterway to be privy to the negotiations. In most cases, the settlement of water rights claims becomes part of a larger water bill that includes agricultural, economic, and government water rights claims. The Snake River Water Rights Act of 2004 settled water rights claims on the Snake River of Idaho including those of several federal agencies and departments, the Nez Perce Tribe, represented by the Native American Rights Fund, the State of Idaho, agricultural and timber producing interests. The Snake River Settlement Agreement accommodated non-Indian Upper Snake River interests by honoring an existing water release agreement from the Upper Snake River, and by providing habitat protection and restoration in the Salmon and Clearwater basins under Section 6 of the Endangered Species Act. The Tribe secured a reliable water supply, instream flows, the transfer into trust of BLM on-reservation land, right to access 600 hundred springs and fountains on federal land off-reservation and the authorization of \$90 million for tribal domestic water and sewer, and habitat improvements. Instream flows in over 200 streams and rivers were decreed under state law. The Settlement benefited all parties by providing stability regarding the scope of water rights on the Snake River, and by providing funding to develop such rights.

Additionally, the parties obtained more benefits through land and water transfers with funding to develop such interests under the Settlement than would have been possible in court.

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

**c. Ad Hoc Group on Indian Water Rights**

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

Over the years, the Ad Hoc Group has worked with each Administration and Congress to educate them on the importance of having favorable federal policies on Indian water rights settlements. Their efforts have been successful; 20 Indian water rights settlements have been enacted into law. The experience of the Ad Hoc Group on these issues leads to the conclusion

that securing the federal funding to pay for the federal government's fair share of the cost is the most difficult problem to be overcome in an Indian water rights settlement. Each Administration and Congress must work together to come up with the federal government's fair share of each negotiated Indian water rights settlement.

**d. Administration**

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

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

**i. Limited Federal Role**

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

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

**ii. Limited Federal Funding**

The 1990 the Criteria and Procedures also created several financial impediments to resolving Indian water rights settlements. They created a formula to calculate the United States'



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

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

**e. Congress**

Congress becomes involved in settlements only after it is finalized and is presented for Congressional approval. Congruently, the Administration takes a position on the settlement. Often settlement bills pass due to the strength of their support in Congress, despite the Administration's opposition. In these cases, parties attempt to work within the bounds of the

Criteria and Procedures but are left to work to override the Administration's opposition to the settlement with their delegation. Senator Domenici acknowledge this very problem in a recent statement made regarding his experience with the New Mexico Rural Water Project Act:

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

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

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

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

The Reclamation Fund is an appropriate mechanism to fund tribal water rights settlements, as part of its mandate is to fund tribal water settlements. With more attention and development, the Reclamation Fund could provide the majority of funding for tribal water settlements. Congress has already recognized the Reclamation Fund for these means, as New

Mexico Senators Domenici and Bingaman currently propose to use the Reclamation Fund to develop a water delivery system on the Navajo Reservation.

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

**G. Department of Interior, Indian Water Rights Office**

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

**H. Funding for Tribes for Negotiations**

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

#### **I. Conclusion**

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

Today in this testimony we have set forth suggestions for the future commitment of the federal government to Indian water settlements. Our 38 years of experience working with tribes and states on these issues has convinced us that obtaining funding is the largest impediment to resolving water problems in the West. We request that Congress to remove this obstacle and

create a permanent funding mechanism for Indian water rights settlements. Two of your colleagues have already stepped to the plate to suggest the Reclamation Fund as a potential funding source. We urge other members of Congress to join Senators Domenici and Bingaman to make the federal commitment consistent by using the Reclamation Fund as a permanent funding mechanism for Indian water settlements. In doing so, this Congress can join their constituents to help resolve water problems in the West.

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