Statement of Michael Bogert
Chairman of the Working Group on Indian Water Settlements
U.S. Department of the Interior
Before the
House Committee on Natural Resources
Subcommittee on Water and Power
On
HR 6768

September 25, 2008

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear today to present the Administration's views on HR 6768, containing two titles, the "Aamodt Litigation Settlement Act" and the "Taos Pueblo Indian Water Rights Settlement Act." The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, does not support HR 6768 as introduced and has serious concerns with the costs of these proposed settlements. We would like to work with Congress and all parties concerned in developing settlements that the Administration can support.

Before discussing the Administration's significant concerns with HR 6768, I would like to acknowledge that the Department has been working constructively with the all of the parties to both the Aamodt and Taos settlements for many years. This process has included the State of New Mexico, Santa Fe County, the City of Santa Fe, the Town of Taos and numerous local water users in addition to the Pueblos of Tesuque, Nambe, Pojoaque, San Ildefonso, and Taos. While there remain significant issues on which we disagree, especially the questions of the appropriate federal financial contribution and whether the waivers adequately protect the United States from future claims, our working relationship with the parties has been constructive.

My statement will begin with some background on the Department's Indian water rights settlement process and then move on to a more specific discussion of the concerns that the Administration has about HR 6768.

The Role of the *Criteria and Procedures*

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("*Criteria and Procedures*") (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria and Procedures* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the Criteria *and Procedures* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria and Procedures* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-

sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria and Procedures* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria and Procedures* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

The Aamodt Litigation Settlement Act

The Aamodt litigation (titled *State of New Mexico, ex rel. State Engineer and United States of America, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, and Pueblo de Tesuque v. R. Lee Aamodt*) has been on-going since 1966 and is often described as one of the longest running cases in the federal court system. It involves the water rights of four Pueblos (Pojoaque, Tesuque, San Ildefonso, and Nambe) and involves over 2,500 defendants. The case seeks to adjudicate and quantify water rights in the Rio Pojoaque basin, immediately north of Santa Fe, New Mexico, which is the homeland of the Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso. The basin is water short. The average annual surface water yield of the watershed is approximately 12,000 acre-feet per year, but claimed irrigated acreage call for the diversion of 16,200 acre-feet per year. Deficits have been addressed by using groundwater with the result that those resources are now threatened.

Negotiations to resolve the Pueblos' water rights in the basin have a long history but in recent years, the parties intensified their efforts to settle. The Department of the Interior and the Department of Justice have participated in these settlement efforts. The United States did not execute the Agreement and does not support it in its current form, as we continue to disagree with the nonfederal parties on several issues. The goal of the parties has been to prevent impacts on surface water flows from excessive groundwater development as well as controlling groundwater extractions. In order to allow junior state based water right holders to continue to use water while still allowing the Pueblos the right to use and further develop their senior water rights, the nonfederal parties agreed on a settlement centered on a regional water system that will utilize water imported from the Rio Grande to serve needs of the Pueblos and other water users in the basin. In May 2006, the Pueblos and many other settlement parties executed a Settlement Agreement which requires the construction of the regional water system to deliver treated water to Pueblos and non-Pueblo water users. It also requires the United States to provide 2,500 acre feet per year of imported water for Pueblo use through the regional water system.

HR 6768 approves the settlement, authorizes the planning, design and construction of the regional system, and provides the Pueblos with a trust fund to subsidize the operations, maintenance, and replacement (OM&R) costs of the system and to rehabilitate, improve, operate and maintain water related infrastructure other than the regional system facilities. The bill also requires the United States to acquire water for Pueblo use in the regional water system by allocating to the Pueblos remaining available Bureau of Reclamation San Juan Chama water and purchasing other water. The total cost of the settlement is estimated to be at least $279.2 million, with a Federal contribution of $162.3 million, and State and local contributions of $116.9 million.

The Administration has followed the process set forth in the *Criteria and Procedures* in analyzing the Aamodt settlement and has concluded that calculable legal exposure plus costs related to Federal trust or programmatic responsibilities do not justify a federal financial contribution of $162.3 million. This amount is not consistent with the *Criteria and Procedures*; is substantially above the appropriate Federal contribution; and is not proportionate to the benefits received. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

In addition, the Administration was not a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal government enter into this Agreement. The *Criteria and Procedures* provide that settlements should promote economic efficiency. The Administration is concerned that the projects that would be authorized under this proposed settlement do not meet this criterion.

Moreover, the Administration is concerned about the validity of the cost estimates that the settlement parties are relying on for the regional water system. The parties rely on an engineering report dated June 2007 that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. Much of the cost information contained in the engineering report was arrived at three years ago, none of the costs have been indexed, and the total project cost cannot be relied upon. These additional costs would become the responsibility of the United States under HR 6768. Also, multiple site-specific cost issues remain that can not be resolved until final project design is completed, not the least of which is access limitations at the diversion point for the system on the Rio Grande. The costs associated with NEPA and EIS compliance along with the costs to acquire unspecified easements (including possible condemnation expenses) have not been adequately studied. This uncertainty may serve to drive the overall settlement's costs and the corresponding Federal commitment much higher than anticipated.

Overall cost is not the only concern that the Administration has with the bill. There are a number of other provisions and issues that need to be addressed and resolved. We stand ready to address these with the settlement parties and sponsors of HR 6768. We would like to draw the Committee's attention to the following major issues.

First, the waiver provisions of this bill are of significant concern to the Administration. The Department of Justice has concerns that the waivers set forth in the bill do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that the proposed federal contribution should afford. Again, we stand ready to work with the settlement parties and sponsors on this issue.

Second, we would like to work with Congress and the settlement proponents on developing more specific language that delineates precisely the extent of United States responsibility for delivering the San Juan Chama project allocation provided for under section 113. The legislation as introduced provides that this water supply will be held in trust by the United States. Congress should establish clear parameters for Federal responsibility in order to avoid future litigation over this issue.

Third, although the Administration understands that the settlement framers were trying to ensure the viability of the facilities provided for under this settlement by establishing a trust fund to subsidize OM&R, the *Criteria* provide that operation and maintenance costs of infrastructure should not be funded using settlement dollars.

This list is not comprehensive. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

The Taos Pueblo Indian Water Rights Settlement Act

Taos Pueblo is located in north-central New Mexico, approximately 70 miles north of Santa Fe. It is the northernmost of 19 New Mexico Pueblos and its village is recognized as being one of the longest continuously occupied locations in the United States. The Pueblo consists of approximately 95,341 acres of land and includes the headwaters of the Rio Pueblo de Taos and the Rio Lucero.

In 1969 the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed, entitled *State of New Mexico ex rel. State Engineer, et al. v. Abeyta* and *State of New Mexico ex rel. State Engineer v. Arellano et al.* (consolidated).

In 1989 Taos Pueblo began settlement negotiations with the local water users. The Federal Team was established in 1990 to represent the United States in the negotiation. Negotiations were not productive until a technical understanding of the hydrology of Taos Valley, including preparation of surface and groundwater models, was completed in the late 1990s. Negotiations intensified in 2003 when a mediator was retained and an aggressive settlement meeting schedule was established. The parties' dedicated efforts resulted in a Settlement Agreement that was signed in May of 2006 by all of the major non-federal parties, including the State of New Mexico, Taos Pueblo, the Town of Taos, the Taos Valley Acequia Association (representing 55 community ditch associations) and several water districts. The United States did not sign the Settlement Agreement and does not support it in its current form.

Under the terms of the Settlement Agreement, the Taos Pueblo has a recognized right to 12,152.71 acre-feet per year (AFY) of depletion, of which 7,474.05 AFY of depletion would be available for immediate use. The Pueblo has agreed to forebear from using 4,678.66 AFY in order to allow non-Indian water uses to continue. The Pueblo would, over time, reacquire the forborne water rights through purchase from willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to reacquire the forborne water rights.

A central feature of the settlement is funding for the protection and restoration of the Pueblo's Buffalo Pasture, a culturally sensitive and sacred wetland that is being impacted by non-Indian groundwater production. Under the settlement, the non-Indian municipal water suppliers have agreed to limit their use of existing wells in the vicinity of the Buffalo Pasture in exchange for new wells located further away from the Buffalo Pasture.

Title II of HR 6768 approves the Settlement Agreement reached by the settlement parties and authorizes a Federal contribution of $113,000,000. Of this total, $80,000,000 is authorized to be deposited into two trust accounts for the Pueblo's use. An additional $33,000,000 is authorized

to fund 75% of the construction cost of various projects that have been identified as mutually beneficial to Pueblo and non-pueblo parties. The State and local share of the settlement is a 25% cost-share for construction of the mutual benefit projects ($11,000,000). The Settlement Agreement provides that the State will contribute additional funds for the acquisition of water rights for the non-Indians and payment of operation, maintenance and replacement costs associated with the mutual benefits projects. The Administration believes that this cost-share is disproportionate to the settlement benefits received by the State and local parties. A Federal contribution of this order of magnitude is not appropriate. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

The Administration was not a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal government enter into this Agreement. Also, consistent with the *Criteria and Procedures*, the non-Federal cost-share should be proportionate to benefits received. This settlement lacks adequate cost-sharing. In addition, the *Criteria and Procedures* provide that settlements should promote economic efficiency. The Administration is concerned that the projects that would be authorized do not meet this criterion.

Under this legislation, the Pueblo would receive an allocation of 2,215 acre-feet per annum of San Juan-Chama Project water which it will be allowed to use or market. The Pueblo would also benefit from not being required to repay the capital costs associated with this allocation of water.

An unusual provision of the legislation would allow the Pueblo to expend $25 million for the protection and restoration of the Buffalo Pasture and acquisition of water rights before the settlement is final and fully enforceable. Indian water rights settlement funds are not usually made available to a tribe until the settlement is final and enforceable so that all settlement benefits flow at the same time and no entity benefits if the settlement fails. We question whether such a departure from settlement protocol would be appropriate. Although the Administration understands the Pueblo's need for immediate access to funds, we remain concerned about the precedent that settlement money could be spent without a settlement becoming final.

The Administration has followed the process set for in the *Criteria and Procedures* in analyzing the Taos settlement and has concluded that calculable legal exposure plus costs related to Federal trust or programmatic responsibilities do not justify a federal financial contribution of $113 million. This is not consistent with the *Criteria and Procedures*; is substantially above the appropriate Federal contribution; and is not proportionate to the benefits received.

Cost is not the only concern that the Administration has with the bill. There are several other provisions that raise concerns. We stand ready to work to address these concerns with the settlement parties and sponsors of HR 6768. We would like to draw the Committee's attention to the following issues.

First, the waiver provisions of this bill are of serious concern to the Administration. We note that the Department of Justice has concerns that the waivers set forth in the bill do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that the Federal contribution contained in the bill should afford.

In addition, Title II of HR 6768 fails to provide finality on the issue of how the settlement is to be enforced. The bill leaves unresolved the question of which court retains jurisdiction over an action brought to enforce the Settlement Agreement. This ambiguity may result in needless litigation. The Department of Justice and the Department of the Interior believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

This list is not comprehensive. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

Conclusion

This settlement is the product of a great deal of effort by many parties and reflects a desire by the people of State of New Mexico, Indian and non-Indian, to settle their differences through negotiation rather than litigation.

The Administration is committed to working with the settlement parties to reach final and fair settlements of Pueblo water rights claims.

Mr. Chairman, this concludes my statement. I would be pleased to answer any questions the Committee may have.

Statement of Michael Bogert
Chairman of the Working Group on Indian Water Settlements
U.S. Department of the Interior
before the
House Committee on Natural Resources
Subcommittee on Water and Power
On HR 6754
White Mountain Apache Tribe Rural Water System Loan Authorization Act

September 25, 2008

Madam Chairwoman and members of the Committee, I am pleased to provide the Department of the Interior's views on HR 6754, the White Mountain Apache Tribe Rural Water System Loan Authorization Act. The Administration does not support HR 6754.

HR 6754 would require the Secretary of Interior, within 90 days of the legislation's enactment, to provide funding in the amount of $9.8 million to the White Mountain Apache Tribe (Tribe) to initiate the planning, engineering, and design of a rural water system (known as the "Minor Flat Project") that is intended to be the centerpiece of a future settlement of the Tribe's water rights claims in Arizona, which I understand as now been introduced by Senator Kyl on September 11, 2008 as S. 3473. Until a final settlement of the Tribe's claims has been reached and enacted by Congress, we do not support the Federal government providing consideration for, or a contribution to a possible future settlement. HR 6754 requires the Federal government to provide the White Mountain Apache Tribe with $9.8 million, but does not require the Tribe to reimburse the Federal government. As such, an upfront appropriation for the full amount of the proposed feasibility-level study from the Bureau of Reclamation's budget would be needed. In addition, this would essentially authorize loan forgiveness as no non-Federal contributions would be repaid to the United States Treasury.

The White Mountain Apache Reservation lies within the Salt River sub basin which provides the Phoenix metropolitan area with much of its water supply. Since 2004, the Department of Interior has been participating in negotiations with the White Mountain Apache Tribe (Tribe), the State of Arizona, the Salt River Project, various Arizona cities and irrigation districts, Freeport McMoran Copper & Gold, Inc, the Central Arizona Water Conservation District, and other water users in the Salt River basin regarding the water rights of the Tribe. The parties have made significant progress in resolving numerous disputed issues, including the total amount and source of settlement water to be provided under a settlement, but a final settlement has not been enacted by congress. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

The key component of the introduced settlement is the construction of the "White Mountain Apache Tribe Rural Water System," which would provide a 100-year water supply for the Reservation through the construction of Miner Flat Dam on the North Fork of the White River and related water delivery infrastructure. This project would provide replace and expand the current water delivery system on the Reservation, which relies on a diminishing groundwater source and is quickly becoming insufficient to meet the needs of the Reservation population. The need for reliable and safe drinking water on the Reservation is not in question and it may be

that the project proposed by the Tribe is the best way to address the need. However, more analysis may be required to determine the best course of action. As such, the Administration believes HR 6754 is premature.

Although HR 6754 authorizes only $9.8 million for planning, engineering, and design of the Tribe's proposed project, it is the first step toward a settlement under which the settling parties are requesting that the United States provide at least another $116 million in federal funding. HR 6754 cannot be considered in a vacuum and the settlement that is intended to fund the Tribe's proposed project must be taken into consideration. The Tribe estimates the cost of the proposed project at approximately $126.2 million in October 2007 dollars. This estimate has not been verified by the Bureau of Reclamation nor has it completed a feasibility level study which would be typical before Reclamation would request funding and authority to construct such a project. Therefore, Reclamation cannot provide assurance that the project can actually be constructed within this estimate. Within the next year, Reclamation intends to initiate its own review of the cost estimate prepared by the parties to provide a higher level of assurance. This review would not involve the engineering work proposed under HR 6754, but may provide some important information to the Tribe to assist in the planning, engineering and design that they propose to undertake pursuant to HR 6754.

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("*Criteria*") (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

The Administration is in the process of analyzing the factors set forth in the Criteria in order to determine the appropriate federal financial contribution that could be recommended to Congress as consideration for settling the Tribe's water rights claims.
The Department of the Interior and the Department of Justice are in the process of analyzing the Tribe's water rights claims and have requested the Tribe to provide information on its views on potential liability the United States may have with respect to those claims and other water related claims. Until that analysis is completed, it is not possible for the Administration to determine whether paying for some or all of the construction of the proposed project is an appropriate Federal settlement contribution. Until those decisions are made, it is premature to begin design and engineering of the proposed project. The legislation is ambiguous as to whether the

Department is required to carry out a feasibility study for the planning, engineering, and design of the Miner Flat Project.

As currently drafted HR 6754 provides that funding made available to the Tribe will not be repaid by the Tribe, but will be repaid out of a subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act "for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of [the Arizona Water Rights Settlements Act]. . . ." We understand that the bill is likely to be amended to delete repayment from this source. We recommend such an amendment to HR 6754 because the use of this subaccount to fund an activity absent a water rights settlement enacted by Congress is not consistent with the authorized uses of the subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act.

The Administration is concerned about the potential budgetary impact the $9.8 million loan, as authorized under HR 6754, would have on the Bureau of Reclamation's existing programs and commitments, and has concerns with the mechanisms and sources of funding. Although the repayment is provided from Federal Funding in Section 3, budget authority for the full $9.8 million would be required up front. Section 5 of HR 6754 authorizes appropriations, but Section 3 provides that the funds to repay the loan would be made available from the Colorado Lower River Development Fund starting in 2013. The Administration also remains concerned that, as HR 6754 provides for no reimbursement by non-Federal parties, the Federal government would be the primary source of funding for this feasibility (planning, engineering, and design) study.

The Administration does not support this bill but is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims.

This concludes my written statement.