

**STATEMENT
OF
DAVID J. HAYES, DEPUTY SECRETARY OF THE INTERIOR,
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
ON S. 2350
"DUCHESNE CITY WATER RIGHTS CONVEYANCE ACT"**

May 2, 2000

Good morning, Mr. Chairman and members of the Committee. I am David J. Hayes, Deputy Secretary of the Interior. I am pleased to provide the Administration's views on S. 2350, which seeks to transfer to the City of Duchesne, Utah, two water rights certificates which the United States obtained under the State of Utah's water laws at the turn of the 20th Century.

Mr. Chairman, I understand that the City of Duchesne (City) and the Ute Indian Tribe of the Uintah and Ouray Reservation (Ute Indian Tribe) have worked closely on the concepts addressed in this legislation and that the Ute Indian Tribe does not oppose the City's efforts in this matter. Along with the City, the Administration supports the purposes of S. 2350 that is before this Committee. As described in this statement, the Administration recommends the inclusion of a few minor provisions and modifications to S. 2350 in order to protect the interests of the United States and other interested parties and to describe the history and unique nature of the water rights involved in order to clarify the intent of this legislation. These recommended revisions in no way change the purposes of S. 2350.

In fact, since the hearing before the House Resources Committee on April 4, 2000 on identical legislation, members of the Department and the City's representative have worked to refine the Administration's proposed revisions in order to satisfy the concerns of all interested

parties. I attach the revised changes as acceptable to the Administration with this testimony.

With the inclusion of these revisions, the Administration supports S. 2350, and we look forward to working with the Committee, the Utah delegation and the City of Duchesne to move this legislation forward.

As introduced, S. 2350 would direct the Secretary of the Interior to convey specified water rights appropriated by the United States under the laws of the State of Utah, and which the State of Utah issued certificates in the name of the United States Indian Service for those water rights, to the City of Duchesne. S. 2350 also requires certain terms to be part of the conveyance, such as requiring the City to allow the Ute Indian Tribe, its members, and those using lands held in trust for the Tribe by the United States located within the City's water service area to connect to the City's municipal water system without any connection fees or transfer of water rights for the connection. S. 2350 further specifies that the conveyance would not prohibit the City from charging anyone connected to the City's water system reasonable and customary operation and maintenance fees.

The circumstances surrounding the water rights identified for transfer under S. 2350 are unique. Various Executive and Congressional actions in the mid- to late 1800s established the present-day Uintah and Ouray Indian Reservation for the bands now known collectively as the Ute Indian Tribe. Subsequent acts of Congress provided for the allotment of Reservation lands to individual Tribal members and for the restoration of unallotted lands to the public domain to be disposed of under the homestead and townsite laws. In July 1905, President Theodore Roosevelt reserved lands for the townsite of Duchesne by Presidential proclamation under the applicable

townsite laws. In the same month, prior to the articulation of the reserved water rights doctrine in *Winters v. United States* in 1908, the United States - through the Acting U.S. Indian Agent - filed two applications under the laws of the State of Utah to appropriate waters for the benefit of the Indians of the Reservation. The applications filed by the United States identified the purposes of the appropriations to be for domestic and irrigation supplies for the townsite of Duchesne and for irrigation supplies for Indian allotments on the Reservation. The State of Utah then issued water rights certificates in the name of the United States Indian Service for domestic and municipal purposes in the town of Duchesne. Non-Indians settled the town of Duchesne, and its inhabitants have used the waters appropriated by the United States since then for townsite purposes. Since the appropriation of the water rights and the settlement of the town, confusion over the ownership of the water rights has clouded the use of those rights. In addition, over the past few decades the State of Utah and the Ute Indian Tribe have worked to quantify, under the *Winters* doctrine, the Tribe's reserved water rights. Congress ratified the quantification of the Tribe's reserved water right in 1992, subject to re-ratification by the State and the Tribe, under Title V of Public Law 102-575.

Thus, even though the Acting U.S. Indian Agent filed the appropriations on behalf of the Ute Indians to protect their interests, history shows that the appropriations really did not serve the purposes of the United States in this regard. Furthermore, the full amount of the Tribe's reserved water right has been ratified by Congress, subject to reratification by the State and the Tribe, and that right did not include the State certificated rights appropriated in 1905. Finally, the proposed transfer of the water rights certificates held by the United States also includes benefits for the Ute Indian Tribe and its members.

Given this unique history, the Administration supports conveying title to the water rights certificates to the City of Duchesne as proposed in S. 2350. The Administration recommends the following additions or modifications to S. 2350 to protect the interests of the United States and other interested parties and to describe the unique circumstances surrounding these water rights in order to clarify the intent of the legislation.

First, the Administration recommends the inclusion of a Congressional Findings section which outlines the unique circumstances of the water rights certificates at issue. The history described above provides the fundamental factual circumstances which the Administration views important to clarify the intent and purposes of this legislation.

As noted previously, members of the Department and the City's representative have worked to refine the proposed findings since the hearing before the House Resources Committee. One point of discussion has centered on the finding regarding the filing of the water rights applications by the Acting U.S. Indian Agent. I must emphasize that, as expressly stated in the applications, the Acting U.S. Indian Agent could only file the water rights applications on "behalf of the Indians of the Uintah Indian Reservation, Utah." Thus, any suggestion that the Acting U.S. Indian Agent would file for anyone other than the Ute Indians is incorrect, and the finding addressing the filing of the water rights must necessarily state that the Agent filed "on behalf of the Indians of the Reservation." This recognition in no way changes the purposes or goals of this legislation.

Second, the Administration recommends the inclusion of a section which acknowledges the Secretary's responsibility to comply with all applicable environmental laws and regulations prior to conveying the water rights certificates to the City of Duchesne. In light of the history and use of the water rights involved, such compliance will likely require little time and effort. Nonetheless, the Administration has insisted that legislation involving natural resources, including title transfers, shall require compliance with all applicable environmental laws prior to making irreversible commitments.

Third, the Administration recommends the inclusion of a provision which clarifies that this legislation does not otherwise affect water rights held by the United States. Fourth, the Administration recommends the inclusion of a provision which clarifies that this legislation does not affect or modify any treaty or other right of the Ute Indian Tribe or any other Indian tribe. Similar provisions have been incorporated into various pieces of legislation in the past. These provisions will ensure that no one misconstrues this legislation to affect any other interest of the United States, the Ute Indian Tribe, or any other Indian tribe and thus will ensure continued support for the legislation.

Finally, the Administration also recommends a few minor modifications to the existing language of S. 2350. For example, in the introductory text and the conveyance section, the Administration recommends modifying the text to state that the legislation authorizes, rather than directs, the Secretary to convey title to the water rights; this modification is necessary to be consistent with the requirement to comply with all applicable environmental laws prior to making the conveyance. I understand the City has no problem with this change, but would also like to

ensure that the conveyance authorized by this legislation would in fact occur in a timely fashion. We will work with the Committee, the City, and the Utah delegation on appropriate language in the context of including necessary amendments. In addition, the operation and maintenance fee provision should also specify that the imposition of such fees shall be done in a nondiscriminatory way. A few other minor technical modifications are also recommended to clarify the legislation.

Thus, with the revisions recommended above and as outlined in the attached document, the Administration supports S. 2350. Again, we look forward to working with the Committee, the Utah delegation and the City of Duchesne to move this legislation forward.

This concludes my statement. I will be happy to answer any questions you may have.

Proposed Amendments to S. 2350 - Duchesne City Water Rights Conveyance Act

in the introductory text, delete "direct" and insert "authorize"

in the introductory text, delete "to" before "certain"

in the introductory text, insert ", and for other purposes" after "Utah"

on page 1, line 6, insert new Section 2 as follows:

"SEC 2. FINDINGS.

The Congress finds that--

(a) in 1861, President Lincoln established the Uintah Valley Reservation by Executive Order, Congress confirmed the Executive Order in 1864, 13 Stat. 63, and additional lands were added to form the Uintah Indian Reservation (now known as the Uintah and Ouray Indian Reservation);

(b) pursuant to subsequent acts of Congress, lands were allotted to the Indians of the reservation, and unallotted lands were restored to the public domain to be disposed of under homestead and townsite laws;

(c) in July 1905, President Theodore Roosevelt reserved lands for the townsite of Duchesne by Presidential proclamation and pursuant to the applicable townsite laws;

(d) in July 1905, the United States, through the Acting United States Indian Agent, filed two applications, 43-180 and 43-203, under the laws of the State of Utah to appropriate certain waters on behalf of the Indians of the Reservation;

(e) the stated purposes of the water appropriation applications were, respectively, "for irrigation and domestic supply for townsite purposes in the lands herein described" and "for the purpose of irrigating Indian allotments on the Uintah Indian Reservation, Utah, ... and for an irrigating and domestic water supply for townsite purposes in the lands herein described";

(f) the United States subsequently filed change applications which provided that the entire appropriation for each water right sought would be used for "municipal and domestic purposes" in the town of Duchesne;

(g) the State Engineer approved the change applications, and the State of Utah issued water rights certificates, identified as Certificate Numbers 1034 and 1056, in the name of the United States Indian Service in 1921, pursuant to the applications filed, for domestic and municipal uses in the town of Duchesne;

(h) non-Indians settled the town of Duchesne, and the inhabitants have utilized the waters appropriated by the United States for townsite purposes;

(i) pursuant to Title V of Public Law 102-575, Congress ratified the quantification of the reserved water rights of the Ute Indian Tribe, subject to re-ratification of the water compact by the State of Utah and the Tribe;

(j) the Ute Indian Tribe does not oppose legislation which will convey the water rights appropriated by the United States in 1905 to the City of Duchesne because the appropriations do not serve the purposes, rights or interests of the Tribe or its members, because the full amount of the reserved water rights of the Tribe will be quantified in other proceedings, and because the Tribe and its members will receive substantial benefits through such legislation; and

(k) the Secretary of the Interior requires additional authority in order to convey title to those appropriations made by the United States in 1905 in order for the City of Duchesne to continue to enjoy the use of those water rights and to provide additional benefits to the Ute Indian Tribe and its members as originally envisioned by the 1905 appropriations."

on page 1, line 6, renumber prior "SEC. 2" as "SEC. 3"

on page 1, line 8, insert "the" before "Interior"

on page 1, line 9, delete "shall", insert "is hereby authorized to"

on page 2, line 3, insert "Department of the Interior's" before "United"

on page 2, lines 20-21, delete "or connection", insert ", connection, or similar"

on page 3, line 5, delete "and customary", insert ", customary, and non-discriminatory"

on page 3, insert new sections 4 through 6 as follows:

"SEC. 4. ENVIRONMENTAL COMPLIANCE.

In effecting the conveyance authorized in Section 3, the Secretary shall comply with all applicable environmental laws and regulations.

SEC. 5. WATER RIGHTS.

(a) Except as provided in Section 3, nothing in this Act may be construed as a relinquishment or reduction of any water rights reserved, appropriated, or otherwise secured by the United States in the State of Utah on or before the date of enactment of this Act.

(b) Nothing in this Act may be construed as establishing a precedent for conveying or otherwise transferring water rights held by the United States.

SEC. 6. TRIBAL RIGHTS.

Nothing in this Act may be construed to affect or modify any treaty or other right of the Ute Indian Tribe or any other Indian tribe."

STATEMENT
OF
DAVID J. HAYES, DEPUTY SECRETARY OF THE INTERIOR,
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
ON S. 2351,
the "SHIVWITS BAND OF THE PAIUTE INDIAN TRIBE OF UTAH
WATER RIGHTS SETTLEMENT ACT"

MAY 2, 2000

Good morning Mr. Chairman and members of the Committee. I am David J. Hayes, Deputy Secretary of the Interior. It is my pleasure to be here today to testify on behalf of the Administration on S. 235 1, a bill to authorize a water rights settlement for the Shivwits Band of the Paiute Indian Tribe of Utah.

The Administration supports S. 2351 on one important condition and with recommended changes explained later in this testimony. Our support is conditioned on the parties' execution of a final settlement agreement, including subsidiary agreements, which resolves the Shivwits Band's water rights claims in the Virgin River System adjudication. It is my understanding that the parties are aware of the importance of a final executed settlement agreement and understand that full Administration support must be conditioned on such an agreement. I am informed that the parties will be meeting later this week (May 4-5) in Salt Lake City and are within sftiking distance of finalizing the settlement agreement in accordance with the principles set forth in S. 235 1.

We are pleased with the substantive content of S. 2351 which is the product of an impressive cooperative effort among the Shivwits Band, the State of Utah, several local non-

Indian entities, and the United States. The parties have worked non-stop over the last year to resolve a number of difficult issues and put the details of the settlement together. The Administration would like to thank Senators Hatch and Bennett for introducing the bill. We also want to make clear our desire to work closely with the Committee once the settlement agreement is finalized to ensure that any necessary changes are made to the bill so that this important legislation can be enacted into law.

Background

The Shivwits Indian Reservation is located in Washington County, Utah, approximately 10 miles northwest of the city of St. George. The Reservation is within the Shivwits Band's aboriginal territory. The United States initiated establishment of the Reservation pursuant to an Act of Congress on March 3, 1891. The boundaries of the Reservation were first delineated by Executive Order in 1916. A 1937 Act of Congress extended those boundaries, increasing the Reservation's size to approximately 28,000 acres.

The Shivwits Band's history includes its involvement in the failed federal termination policy of the 1950s. In 1954, Congress terminated the Southern Paiute Tribe, including the Shivwits Band, while at the same time expressly preserving the Tribe's water rights. Recognizing that the termination policy was fundamentally flawed, Congress, in 1980, restored the Southern Paiute Tribe to federally recognized status (P.L. 96-227). Despite the hardships of the termination era, the Shivwits Band was able to maintain its entire Reservation land base so that the total Reservation was fully restored to trust status in 1980.

Of course, water is critical to the Shivwits Band's ultimate goal of developing a sustainable Reservation economy. The Band is made up of approximately 300 enrolled members and the Reservation population is projected to exceed 400 people within the next 30 years. The primary water resource is the Santa Clara River which flows through the middle of the Reservation in a north to south direction before joining the Virgin River near St. George. In 1980, the State of Utah initiated an adjudication of all rights to the use of water in the Virgin River and its tributaries, including the Santa Clara River. In 1987, the United States filed claims on behalf of the Band to approximately two-thirds of the present day average annual flow of the Santa Clara River. Recognizing the benefits of negotiation over litigation, the parties initiated the settlement discussions that ultimately resulted in S. 2351.

S. 2351

Under the terms of S. 2351, Congress would approve and authorize federal participation in three agreements which constitute a final settlement of the water rights claims of the Shivwits Band and the United States on behalf of the Shivwits Band. In addition, the settlement agreement will secure a total of 4,000 acre-feet per annum (afa) for the Band's present and future uses. The water is provided primarily through the development of two small projects in which the Band will be a partner with its non-Indian neighbors. The first is the St. George water reuse project which will treat effluent discharged by the St. George Water Reclamation Facility and transport 2,000 afa of such effluent to the Shivwits Band for its use. The second facility is the Santa Clara project, consisting primarily of a pressurized pipeline to deliver water from Gunlock Reservoir. The pipeline will use water more efficiently and reduce water losses that exist in the present delivery system. As a result, 1,900 afa of water, including conserved water, will be used to settle

the Shivwits Band's water rights claims and to provide year-round flows in the Santa Clara River for environmental purposes. The balance of the Band's settlement water budget (100 afa) is made up of groundwater withdrawals on the Reservation

S.2351 would authorize a total federal contribution of \$24 million towards the settlement. Three million dollars of this amount would be made available for environmental needs. As a condition of the settlement, \$5 million would be placed in a trust fund to be made available to the Shivwits Band for economic development purposes consistent with the Act. Fifteen million dollars would be made available to the City of St. George to fund the Band's share of the reuse project. Finally, an additional \$1 million would be added to the trust fund to assist the Band with its share of operation, maintenance, repair, and replacement (OM&R) costs associated with the Santa Clara project.

S.2351 ensures that water development as part of this settlement is consistent with environmental needs by authorizing appropriations of \$3 million for the Secretary to address Endangered Species Act concerns by acquiring water rights and habitat for the benefit of listed or candidate native plant and animal species in the Santa Clara River and Virgin River basins. This acquisition will provide a base flow in the Santa Clara River for environmental benefits. This base flow of 3 cfs is part of the Virgin River Resource Management and Recovery Program which is intended to prioritize and implement native fish recovery actions to offset the impacts of future water development in the Virgin River basin. Thus, the Administration supports the inclusion of this program in S. 2351 as a means of shaking a balance between water development and species needs.

We have a concern that the \$ 1 million for OM&R would cover essentially all the Band's obligation for the project. As a matter of general policy, the Administration opposes paying full

OM&R costs associated with tribal use of water secured in water rights settlements. This policy reflects our view that it is appropriate for Tribes to pay for at least some of the annual costs associated with water service as a means to ensure settlement projects which are economically viable and efficient. Should Congress decide to retain the \$ 1 million appropriation for the Band's share of project OM&R, the bill needs to make clear that once enacted, the United States has no further obligation to pay any OM&R associated with the Santa Clara Project.

Except for the concern just raised, we believe the significant federal contribution contemplated in S. 2351 is appropriate to facilitate resolution of the Shivwits Band's claims. The settlement will release the United States from any potential damage claims that might be asserted by the Band and will relieve the government of the obligation to litigate, at significant cost and over many years, the Band's water fights claims. Moreover, the settlement is in keeping with the United States trust responsibility since it assists in securing a critical resource for the Shivwits Band. The water made available, along with the other settlement benefits, will allow the Band to move towards economic self-sufficiency in accord with the policy of Indian self-determination. At the same time, resolution of the Band's water rights claims will provide certainty to its neighbors, enabling them to plan and make necessary investments based on the assurance that they have secure and stable water rights.

Recommended Changes

While we strongly support the settlement in concept as set forth in S. 2351, we must recommend changes to the bill as introduced. These recommendations for changes were also made with respect to H.R. 3291, the companion settlement bill in the House of Representatives. It is my understanding that Congressman Hansen has offered amendments to H.R. 3291 which

incorporate our recommendations. We appreciate the opportunity to work cooperatively with the Congress to improve proposed legislation.

It is important to understand that the benefits accruing to the Band and other settling parties become available only after the entry of a final water rights decree by the adjudication court. Achieving this culmination of the settlement can sometimes be as complex as negotiating the settlement itself. While we do not question the commitment of the settling parties to finalizing the settlement other factors can arise which may delay final court approval. Our experience has shown that including a deadline for settlement approval serves as positive motivation to keep the court process moving. We recommend such a deadline here. The bill should also contain specific consequences if the settlement is not approved such as the return of appropriated funds to the Treasury. The bill should further specify that once the settlement becomes effective pursuant to the requirements of section 14, however, the bill Trust Fund will be a Tribal asset. As an additional matter, the waivers and release provisions of section 9 must be expanded and clarified in a manner consistent with the settlement agreement once finalized. The exact changes needed in section 9 should be available after the Parties' negotiating session later this week.

As I noted earlier, we would like to work closely with the Committee to implement the necessary changes to S. 2351.

Conclusion

The water rights settlement to be ratified and approved by S. 2351 represents the best approach to resolving contentious issues surrounding water rights in the West. Negotiated

agreements between Indian tribes, states, local parties, and the federal government continue to be the most effective way to resolve reserved water right claims in a manner that secures tribal rights to assured water supplies for present and future generations while at the same time providing for sound water resource management. The known benefits of settlement far outweigh the uncertainties that are inherent in litigation. Accordingly, the Department of the Interior has been actively engaged in negotiating this settlement as well as other settlements in the West. We continue to work on implementation of the long-delayed 1988 Colorado Ute Water Rights Settlement which includes a significantly down-sized Animas-La Plata Project. In addition, we are working to resolve a number of water issues in Arizona that would facilitate several water rights settlements, including one involving the Gila River Indian Community which has one of the largest, if not the largest, Indian reserved water rights claim in the West. The Western Governors are supportive of these efforts as evidenced by Western Governors Association Resolution 98-029 (June 30, 1998) which reiterates support for negotiated settlements of Indian land and water claims. Enactment of S. 2351, in addition to its own benefits, builds upon the Indian water rights settlement groundwork laid by the Rocky Boys settlement (P.L. 106-163), and provides momentum for moving these other valuable settlements to completion.

As a final matter, I should note that the State and Shivwits Band will testify today that the Shivwits Band of Paiute Indian Tribe water rights settlement is broadly supported in the State of Utah. The Administration is excited about the prospect for enactment of another Western water settlement. We will work closely with the Committee to ensure that this non-controversial settlement can move swiftly through the legislative process once the settlement agreement is finalized.

ATTACHMENT

Text of initial changes recommended by the Department of the Interior to S. 2351, as attachment to Department testimony. Other changes will be necessary once the settlement agreement is finalized.

Addition to Section 4. Definitions:

(12) VIRGIN RIVER RESOURCE MANAGEMENT AND RECOVERY PROGRAM. The term "Virgin River Resource Management and Recovery Program" means the proposed multi-agency program, to be administered by the United States Fish and Wildlife Service, Bureau of Land Management National Park Service, State of Utah, Washington County Water Conservancy District, and Grand Canyon Trust whose purpose is to prioritize and implement native fish recovery actions that offset impacts due to future water development in the Virgin River basin.

Addition to Section 11. Shivwits Band Water Development Trust Fund:

(f) LIMITATION - The moneys authorized to be appropriated under subsections (b) and (c) shall not be available for expenditure or withdrawal by the Shivwits Band until the requirements of section 14 have been met and the Shivwits Band has executed the waivers and releases required under section 9(b). Once the settlement becomes effective pursuant to the terms of section 14, the assets of the trust fund belong to the Shivwits Band and are not returnable to the United States Government.

Addition to Section 14. Effective Date:

(b) DEADLINE - In the event that the requirements of section 14(a) are not completed to allow the Secretary's statement of findings to be published by December 31, 2003-

(1) the United States' approval, ratification, and confirmation of the Agreements identified in section 8 shall be null and void;

(2) except as provided in section 9(c) and section 14(c) below, this Act shall be of no further force and effect.

(c) RETURN OF FUNDS TO THE TREASURY - In the event that the approval, ratification, and confirmation of the Agreements as set forth in section 8 becomes null and void under section 14(b), all unexpended funds appropriated under section II (b) and (c), together with all interest earned on such funds shall revert to the general fund of the Treasury 12 months after the expiration of the deadline established in section 14(b).

Section I I (b) should be modified to refer to fiscal years 2002 and 2003, rather than 2001 and 2002.

Addition to Section 13, Miscellaneous Provisions

(c) WAIVER OF SOVEREIGN IMMUNITY - Except to the extent provided in subsections (a), (b), and (c) of section 208 of the Department of Justice Appropriation Act 1953 (43 U.S.C 666), nothing in this Act may be construed to waive the sovereign immunity of the United States. Furthermore, the submission of any portion of the Settlement Agreement to the District Court in the Virgin River adjudication is solely to inform the Court of the specifics of this settlement and shall not expand State court jurisdiction or expand in any manner the waiver of sovereign immunity of the United States in 43 U.S.C. 666, or any provision of federal law.

Technical change to Section 10(f)

There is authorized to be appropriated from the Land and Water Conservation Fund, \$3,000,000 for the water rights and habitat acquisition fund

Finally, we will provide shortly a copy of S. 2351 showing our amendments and with some other minor edits to ensure consistency between the bill and the Agreements.