TESTIMONY OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
S. 1448, SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION EQUITABLE COMPENSATION ACT

SEPTEMBER 10, 2013

Chairwoman Cantwell, Vice-Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn, and I am the Assistant Secretary for Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the Department's views on S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act.

S. 1448 would provide a measure of justice for a historical wrong by providing equitable compensation to the Spokane Tribe for water power values from riverbed and upstream lands taken by the United States as part of the Grand Coulee Dam development in the 1930s and 1940s. The Tribe's claim is an equitable one because the Tribe missed its opportunity to make a legal claim with the Indian Claims Commission. In 1994, Congress remedied similar claims by the Confederated Tribes of the Colville Reservation which had been pending before the Indian Claims Commission. Although the Colville Tribes received compensation for their lost water power values, the Spokane Tribe never received similar compensation because they were foreclosed from doing so. While this outcome can be explained legally, it is difficult to justify morally.

S. 1448 utilizes a compensatory framework similar to the Colville settlement in an attempt to compensate the Spokane Tribe for the same type of damages for which the Colville Tribe was already compensated. Similar to the resolution achieved for Colville, S. 1448 would establish a Trust Fund in the Department of the Treasury and require the Secretary of the Interior to maintain, invest and distribute the amounts in the Trust Fund to the Spokane Tribe. S. 1448 provides a fair result for the Spokane Tribe. S.1448 does not set a precedent for any other Federal hydropower facilities or installations because of the unique fact set presented by the development of Grand Coulee Dam as explained further below. The Administration supports S. 1448.

Background

The Colville and Spokane Indian reservations were established in 1872 and 1877, respectively, on land that was later included in the state of Washington. The 155,000 acre Spokane Reservation was created by an agreement between agents of the federal government and certain Spokane chiefs on August 18, 1877. That Agreement was later confirmed by President Hayes' executive order of January 18, 1881.

The Grand Coulee Dam was constructed on the Columbia River in northeastern Washington State from 1933 to 1942 and when finished, the 550-foot high dam was the largest concrete dam in the world. It is still the largest hydroelectric facility in the United States. Lake Roosevelt, the reservoir created behind the dam, extends over 130 miles up the Columbia River and about 30 miles east along the Spokane River. The reservoir covers land on the Spokane Reservation along both the Columbia and Spokane rivers. The federal government, under a 1940 act, paid $63,000 to the Colville Tribes, and $4,700 to the Spokane Tribe for tribal land used for the dam and reservoir.

Subsequently, the Spokane Tribe and the Colville Tribes appeared before the Indian Claims Commission (ICC). The ICC was created on August 13, 1946, to adjudicate Indian claims, including "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Under section 12 of the Act, all claims had to be filed by August 13, 1951. Settlement awards of ICC claims were paid out of the U.S. Treasury.

The Spokane Tribe filed a claim with the ICC just days before the statutory deadline. The claim sought compensation for land ceded to the United States under an agreement dated March 18, 1887. It also asserted a general accounting claim. Both claims were jointly settled in 1967 for $6.7 million and neither of the claims referenced the Grand Coulee Dam.

The Colville Tribes' claims with the ICC, also filed in 1951 and designated as Docket No. 181, included broad, general language seeking damages for unlawful trespass on reservation lands and for compensation or other benefits from the use of the Tribes' land and other property. The Tribes' original petition did not specifically mention the Grand Coulee Dam. In November 1976, over 25 years after the original filing of Docket No. 181, and nearly a decade after the Spokane had settled its claims, the ICC allowed the Colville Tribes to amend their 1951 petition to seek just and equitable compensation for the water power values of certain riverbed and upstream lands that had been taken by the United States as part of the Grand Coulee Dam development.

In 1994, Congress recognized that the water power values were compensable and settled with the Colville Tribes, enacting the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act (P.L. 103-436, Nov. 2, 1994). The Act settled the claims filed in 1976 by the Tribes' amended petition. The Act provided the Colville Tribes a lump sum payment from the U.S. Treasury of $53 million for lost hydropower revenues and, beginning in 1996, annual payments that have ranged between $14 million and $21 million for their water power values claim. The cost of the annual payments is shared between the Bonneville Power Administration, which markets the power generated at the dam, and the Treasury.

There is no dispute that the Spokane Tribe suffered a loss arising out of the same set of actions by the United States that formed the basis of the Colville Tribes' amended claims filed in 1976. The Spokane Tribe had settled its ICC claim nearly 10 years before the Colville Tribes were allowed to amend their ICC claims to include a specific water power values claim. Thus, when these water power claims were recognized by Congress in 1994 as valid, compensable claims, the Spokane Tribe's case had long since been settled and thus there was no vehicle for the Spokane Tribes to raise a similar claim. As a result, it is partly an accident of history that the Colville Tribes received compensation and the Spokane Tribe did not.

S. 1448

S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act, is designed to provide the Spokane Tribe with an equitable and comparable compensation similar to compensation the Colville Tribes received almost two decades ago from the federal government for the Colville Tribe's lost water power values. S. 1448 establishes a Recovery Trust Fund and directs the Secretary for the Department of the Treasury to deposit $53 million into the fund. The Secretary of the Department of the Interior is directed to maintain, invest, and distribute the funds to the Spokane Tribe after the Spokane Tribe submits a distribution plan to the Secretary of the Department of the Interior. We note that expenditure of these funds would be subject to the Statutory Pay-As-You-Go Act of 2010.

S. 1448 provides that the Bonneville Power Administration (Bonneville) shall pay to the Spokane Tribe an annual amount equal to 25% of the Computed Annual Payment, defined in the bill as certain payments calculated pursuant to provisions of the Coleville Settlement Agreement, for FY2013 and provides for subsequent payments to the Spokane Tribe, from 2015 to 2023, 25% of the Computed Annual Payment for the preceding fiscal year, and from 2024 and each year thereafter, an amount equal to 32% of the Computed Annual Payment for the preceding fiscal year. The bill, starting in 2023, also provides Bonneville with $2.7 million in interest credits from the Department of the Treasury for every year that Bonneville pays the Spokane Tribe pursuant to this legislation. These percentage payments by Bonneville and interest credits to Bonneville are the same as in the previous versions of the bill and therefore the Department has no concern related to these percentages or interest credits, nor the duration of payments to be made by Bonneville to the Spokane Tribe. Finally, the bill includes a provision extinguishing all monetary claims by the Spokane Tribe regarding the Grand Coulee Dam project.

In the 112th Congress, the Department expressed concern with Section 9(a) of S. 1345, which was the bill introduced during the 112th Congress to address this issue. While the Department supported the concept of providing a clear delegation of authority to the Tribe to achieve its law enforcement goals, the Department was concerned that the language was broad and could be construed to delegate more than just the authority intended by the Tribe. The Department's concern has been addressed with the removal of former Section 9(a) of S. 1345.

Although the Administration did not support previous legislation, in part, because the Tribe had not established a legal claim to settle, the Administration supports equitably compensating the Spokane Tribe for the losses it sustained as a result of the federal development of hydropower at Grand Coulee Dam. The facts and history show that as a matter of equity the Spokane Tribe has a moral claim to receive compensation for its loss. The compensation provided by S. 1448 is commensurate with the compensation provided to the Colville Tribes for the losses arising out of the same actions. The Department supports S. 1448.

This concludes my statement and I am happy to answer any questions the Committee may have.

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KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
S. 1447, NEW MEXICO NATIVE AMERICAN
WATER SETTLEMENTS TECHNICAL CORRECTIONS ACT

SEPTEMBER 10, 2013

S. 1447, the New Mexico Native American Water Settlements Technical Corrections Act, proposes amendments to three Indian water rights settlements: the Taos Pueblo Indian Water Rights Settlement Act (Public Law 111–291) (Taos Settlement Act); the Aamodt Litigation Settlement Act (Public Law 111–291) (Aamodt Settlement Act); and the Navajo water rights settlement provision of the Omnibus Public Land Management Act of 2009 (Public Law 111–11) (Navajo Settlement Act).

Some of these proposed amendments are minor, consisting of corrections in spelling and section numbering. Other amendments are more substantive and could have budgetary impacts. The Department of the Interior continues to be fully committed to implementing these Congressionally enacted water rights settlements, and we recognize and appreciate that the goal of this bill is to make targeted fixes to these statutes in order to facilitate implementation. Many of the amendments proposed in the bill are helpful and could make the work of the implementation teams on the ground much easier by eliminating unclear language in the original enacted bills.

However, at this time the Department and its sister agencies have not yet completed a full assessment of the potential impacts of this legislation, particularly the budgetary and fiscal impacts. Once we complete this analysis, if there are provisions that the Administration does not support as currently drafted, we would welcome the opportunity to work with the sponsors and bill proponents to address out concerns. The changes to each settlement proposed by S. 1447 are discussed below.

Aamodt Litigation Settlement

The Aamodt Settlement Act provides for indexing of mandatory appropriations in two places, Sections 617(a) and (c). Like the provisions in the Taos Settlement Act, discussed below, both of these provisions would allow for multiple indexing adjustments over a specified period of time - between Fiscal years 2011 and 2016. Section 3(b)(1) of S.1447 would remove these time limitations.

The Department believes that indexing continuing throughout the construction period (ending in 2024) for the municipal water system that is the center of this settlement

could help to ensure complete implementation of this settlement. The current limitations on indexing could put completion of the water system and, thus, the settlement itself, in jeopardy. However, at the same time we believe that the changes in indexing will have impacts on the Treasury and could trigger mandatory offset requirements. As noted above, the Administration is still reviewing this legislation and therefore is not taking a position on these provisions at this time.

The elimination of any reference to years for indexing of the Aamodt Settlement Pueblos' Fund in Section 3(b)(2) of S. 1447 may have a similar effect but analysis of this proposed provision is complicated by virtue of other cost adjustment provisions. Additionally, we note that section 615 of the Aamodt Settlement Act provides that the funds appropriated under section 617(c) are to be invested by the Secretary of the Interior following the date the waivers become effective under section 623 of that Act. After section 623 is triggered, the funds would be earning interest, which will help maintain the purchasing power of the funds and make indexing less necessary.

Finally, section 3(a) of the bill refers to "Section 615(c)(7)" of the Settlement Act. Because there is no section 615(c)(7) in the Act, we assume this should be a reference to "Section 615(**d**)(7)". The goal of this language seems to be to allow the Tribe to use its OM&R fund earlier in some situations, but always after the enforceability date. The Department has no objection to this particular provision.

Navajo Water Settlement

Section 4 of S. 1447 would amend the Navajo Settlement Act in several respects. The first two amendments are non-substantive in nature and are supported by the Department.

Section 4(c) of the bill would amend section 10604(f)(1) to allow the Navajo Nation to begin receiving groundwater (non-project water) through Project facilities without triggering the 10 year operation and maintenance (O&M) payment waiver provision of Section 10603(c)(2)(A) of the Settlement Act. This amendment benefits the United States in that it would prevent the Navajo Nation from requesting O&M payment waivers (which would require the Department to pay O&M costs) until Project water from the San Juan River is delivered to the Navajo Nation. The Navajo Nation has the responsibility for paying O&M costs of non-Project water delivery under Section 10602 (h) (1) of the Settlement Act.

Section 4(d)(1) of the bill would amend Section 10609 of the Settlement Act to allow funding identified for the Conjunctive Use Wells in the San Juan River Basin and in the Little Colorado and Rio Grande Basins to be used for planning and design as well as construction and rehabilitation of wells. Without the amendment only construction and rehabilitation are authorized uses of the funds. Because costs are capped, this change will have no effect on the final costs of the settlement. The Department believes that using this funding for planning and design is useful, since only a coarse level of planning, and no design work, has been done for these wells.

Section 4(d)(2) of the bill would amend the Settlement Act by increasing the amount of Project funding that can be spent on cultural resources work from two to four percent of total project costs. The Project area is rich in cultural resources and significant work must be done in this area, so the proposed increase appears to be reasonable and appropriate. Correspondingly, section 4(d)(3) would reduce the percentage of funds that may be spent on fish and wildlife facilities from four percent to two percent. Based on current information, this change also appears to be reasonable and appropriate. Both of these proposed changes are consistent with the Project cost estimate included in the FEIS and, when taken together, they do not increase the cost of the Project.

Finally, section 4(e) of the bill would correct language in the Settlement Act that, absent amendment, could be interpreted to mean that the court in the stream adjudication had jurisdiction over the Project contract between the United States and the Navajo Nation. The Department supports this clarification which comports with existing law.

Taos Pueblo Indian Water Rights

S. 1447 proposes to amend two provisions of the Taos Settlement Act. Section 2(a) of the bill would modify Section 505(f)(1) of the Taos Settlement Act by expanding the list of allowable purposes for which $15,000,000 in "early money" provided by Section 505(f) could be used. The Section 505(f) funding made available for immediate expenditure by Taos Pueblo represents an exception to the Department of the Interior's general policy that all settlement benefits should flow at the same time, only after settlement enforceability conditions are met.

Accordingly, the purposes for which the money could be spent under Section 505(f) were carefully negotiated with the Pueblo to make some funds available to the Pueblo for specific high priority purposes, such as protection of sacred wetlands known as the Buffalo Pasture and purchase of State-based water rights that are rapidly increasing in cost. Expanding the purposes for which "early money" can be expended removes the distinctions between Section 505(f) and Section 505(a), which sets forth the full list of allowable purposes for which the Taos Pueblo Water Development Fund can be expended once the settlement is final and enforceable. The Administration wishes to work with the Pueblo and the bill's sponsors to determine exactly what problems the Pueblo needs to address.

The second amendment to the Taos Settlement Act is a proposed change to the indexing of mandatory appropriations for settlement funding in the current version of the Act. Section 509(c)(1) of the Act provides that mandatory appropriations are subject to indexing but allows such indexing only between fiscal years 2011 and 2016. S.1447 would remove the time limitations for indexing.

The Administration is still analyzing this amendment but believes that the changes in indexing will have impacts on the Treasury and could trigger mandatory offset requirements. Moreover, we note that section 505 of the Taos Settlement Act provides that the Fund at issue is to be invested by the Secretary of the Interior

following the enforceability date of the settlement. Therefore, the funds at issue will already be able to earn interest beginning not later than 2017, which will help maintain the purchasing power of the funds provided and make indexing less necessary.

The final amendment to the Taos Settlement Act would remove the requirement contained in Section 509(c)(2)(A)(i) that $16,000,000 of mandatory funding for grants to non-Indian parties be transferred from Treasury between fiscal years 2011 and 2016. The full $16,000,000 has already been transferred from Treasury to the Bureau of Reclamation and will be available for distribution upon the enforceability date of the settlement. The Department believes that the purposes of this amendment have already been achieved.

Conclusion

The Department agrees that technical amendments to the Taos, Aamodt and Navajo Settlement Acts should be made. We stand ready to work with the sponsors, the bill proponents and this Committee to craft a technical corrections bill that accomplishes the goals of the sponsors in a manner that the Administration fully supports.

TESTIMONY OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 1219, THE PECHANGA BAND OF LUISEÑO INDIANS
WATER RIGHTS SETTLEMENT ACT

SEPTEMBER 10, 2013

Good afternoon Madam Chairwoman, Vice-Chairman Barrasso, and Members of the Committee. My name is Kevin Washburn. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's views on S. 1219, the Pechanga Band of Luiseño Indians Water Rights Settlement Act, which would provide approval for, and authorizations to carry out, a settlement of all water rights claims of the Pechanga Band of Luiseño Indians (Band) in the Santa Margarita River Basin in southern California. At this point, we are unable to support S. 1219. However, based on the progress by the parties to date, the Administration is committed to achieving a settlement that can be supported by all parties.

I. Introduction

Negotiating settlements of Indian water rights claims has been and remains a high priority for this Administration. Indian water rights settlements help to ensure that Indian people have safe, reliable water supplies and are in keeping with the United States' trust responsibility to tribes. They promote cooperation in the management of water resources and encourage communities to work together to resolve difficult water supply problems. The Administration's policy on negotiated Indian water settlements has been set forth in detail in our support for the settlements enacted into law in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010), which benefitted seven tribes in three different states, and in the testimony I gave before this Committee in May 2013 on the proposed Blackfeet Water Rights Settlement Act of 2013. I will not restate this policy or the principles that underlie it, except to note that Secretary Jewell continues to make the negotiation and implementation of Indian water rights settlements a high priority for the Department. The Department understands that Indian water rights and related resources are trust assets of tribes, that water rights settlements enable the Federal government to protect and enhance those assets, and that when Congress enacts an Indian water rights settlement it is fulfilling its unique obligation to Indian tribes. The Department is committed to working with the Band, the State of California, the local parties, this Committee, and the sponsors of S. 1219 to craft a settlement that we all can support.

The Department is still in the process of analyzing S. 1219 and is able to offer only preliminary comments on the bill at this time. Before I discuss the settlement agreement and address Federal concerns, however, I do want to recognize the significant efforts of the Band over many years to

protect its water rights and to secure a safe and adequate supply of water for its community. These efforts have led to this proposed settlement, which reflects a creative and cooperative approach to solving problems of water supply and water quality on and near the Pechanga Reservation. One of the most positive features of this settlement is how it builds upon prior agreements to establish a long term cooperative arrangement for sustainable ground water management in the Santa Margarita basin.

S. 1219 would approve a settlement negotiated among the Band and the Rancho California Water District (RCWD), the Eastern Municipal Water District (EMWD), the Metropolitan Water District (MWD), and the United States. The settlement would resolve water rights claims for the Band that the United States brought nearly 60 years ago in *United States v. Fallbrook Public Utility District*, the general stream adjudication of the Santa Margarita river system. The United States also brought water rights claims for two other Indian tribes in the same river system, the Cahuilla Band of Mission Indians and the Ramona Band of Cahuilla Mission Indians. Separate settlement discussions are underway with respect to those claims and our Federal Team, which has been in place since 2008, is working closely with each of the Bands.

II. Federal Concerns

We testified about the complexity of this settlement and the issues that need to be addressed on September 16, 2010. I won't repeat our testimony on that earlier version of the legislation, H.R. 5413, other than to say that we will continue to analyze those issues as well as the related issue of non-Federal cost share. S. 1219 includes some positive changes and we appreciate that the Band is willing to work with the Department to address our concerns, including our concerns with Federal obligations, cost, cost share, water quantity, and water quality.

The proposed legislation would recognize a Federal reserved water right in the Band in the amount of 4,994 acre feet, to be made up of water from various sources, including imported water and recycled water that would be furnished under contracts between the Band and the local parties. These various sources include 1) 1,575 afy of local groundwater; 2) 525 to 700 afy of imported recycled water; and 3) up to 3,000 afy of imported potable water. S. 1219 calls for a Federal settlement contribution of $40.19 million for a number of purposes, including $12.23 million to assist the Band in purchasing potable water imported from MWD and $27.96 million for infrastructure that would treat and deliver imported recycled and potable water to the Reservation.

Overall, the requested Federal monetary contribution in S. 1219 is down just over $10 million from prior versions of the legislation ($50.242 million to $40.192 million. Other changes in the legislation include the elimination of the demineralization and brine disposal facility, which had been a critical element of the settlement previously. Funding for that facility now appears to have been transferred to a general water quality account "to fund groundwater desalination activities" by the Band. The Department has requested that the Band provide more information about the rationale supporting these changes.

In addition, the Band's Reservation also includes a small portion of land in the San Luis Rey watershed. In the interest of achieving a comprehensive settlement of all of the Bands water rights claims, we are weighing whether principles of finality would better be achieved by including water rights for that parcel of land in the settlement.

Because of scarcity and tremendous competition, water rights in southern California are extremely expensive. In these circumstances, great care must be given to the decision to include imported and recycled water as part of the Band's Federal reserved water rights. We are continuing to examine cost and other issues associated with how the settlement treats imported water. While we are unable to support S. 1219, based on the progress by the parties to date, the Administration is committed to working with the Band and the local parties to achieving a settlement that can be supported by all parties.

III. Conclusion

The Pechanga Band and its neighbors are to be credited for working towards a negotiated settlement of their dispute over water rights. After years of litigation, this settlement lays out a potential framework for resolving the Band's Federal reserved water rights claims, and achieving other goals such as managing groundwater, addressing water quality issues, and alleviating water shortages in the basin.

We look forward to working with the Band and the local parties to finalize a settlement that appropriately secures the Band's water rights and defines clearly the roles and responsibilities of each party to the settlement.