

**Statement of Majel M. Russell
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U.S. Department of the Interior
Before the
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives
H.R. 5293**

March 13, 2008

Good morning Madam Chairwoman and members of the Subcommittee. I appreciate the opportunity to appear before this Subcommittee today to discuss H.R. 5293, a bill titled the “Shoshone-Paiute Tribes of Duck Valley Reservation Water Rights Settlement Act.” I want to emphasize at the outset of this statement that the Department of the Interior’s support for negotiated settlements as an approach to resolving Indian water rights remains strong. For over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

In addition to defining the extent of tribal water rights, negotiations allow settlement parties to develop creative solutions to water use problems. Rather than pitting neighbor against neighbor in a zero-sum legal battle, Indian water rights settlement negotiations engage local stakeholders in forward-looking discussions to seek solutions that will stimulate economic development, enhance environmental quality, and provide a platform for improved relationships between tribes and other local entities. The Administration’s commitment to cooperative conservation embraces the belief that those who live and work on the land offer the best perspective on issues involving the resources that they depend on for their economic survival. This perspective informs our

commitment to resolve some of the most difficult issues surrounding water and future economic development for tribal governments as well as those who depend on resource-based economies.

I would like to begin my statement by observing that H.R. 5293 includes many technical improvements over S. 462, companion legislation that the Administration testified on last April before the Senate Committee on Indian Affairs. We note especially changes to the language regarding management of trust funds to conform to Administration policy. H.R. 5293 as introduced is largely similar to the version of this legislation that was approved by the Senate Committee on Indian Affairs following the markup of S. 462. This version resolves certain implementation challenges that existed in the Senate version upon which we testified last spring.

We oppose H.R. 5293, however, because the settlement it proposes is inconsistent with our policy that settlement costs reflect the value of the claims being resolved and should also be proportionate to benefits received. This bill would authorize a Federal payment of \$60 million. Factors considered under the Criteria and Procedures discussed below do not justify this level of Federal contribution. This level of Federal contribution is disproportionate even given that the State of Nevada has offered a cost share in the form of state-funded administrative services costing approximately \$100,000 per year in perpetuity. Furthermore, this bill fails to provide a final resolution to legal and financial issues related to the Duck Valley Indian Irrigation Project. The Administration does not believe this legislation is an appropriate settlement of the claims involved.

Although the Administration supports most of the water allocations set forth in the Agreement underpinning this legislation, the Settlement Agreement contains

numerous terms that contradict policies regarding water rights settlements designed to ensure finality and protect the interests of the Tribes and all American taxpayers.

The balance of my statement today will begin with some background on the history of the Duck Valley Reservation and the negotiations leading up to this proposed settlement. I will then discuss some specific concerns that the Administration has regarding H.R. 5293.

History of Settlement Negotiations

The Duck Valley Reservation, home to the Shoshone-Paiute Tribes (Tribes), straddles the Idaho-Nevada border along the Owyhee River, a tributary to the Snake River. The Reservation was established by Executive Order on April 16th, 1877, and expanded by Executive Orders on May 4, 1886 and July 1, 1910. The downstream Owyhee Project, a Bureau of Reclamation Project that irrigates more than 100,000 acres of land in eastern Oregon and western Idaho, has blocked anadromous fish passage and ended what was once a valuable on-reservation fishery (we note that today fish passage is also blocked by the Hells Canyon Complex on the Snake River downstream). The Tribes' primary source of income now is derived from the irrigated agriculture made possible by the Duck Valley Indian Irrigation Project, which is owned by the Bureau of Indian Affairs and operated by the Tribes under a Self-Governance compact.

The State of Idaho initiated the Snake River Basin Adjudication (SRBA) in 1987. Soon thereafter, the State of Nevada reopened its adjudication of the Owyhee River, a tributary to the Snake River, an adjudication originally initiated in 1924. Both of these adjudications involve the water rights of the Tribes. The United States filed claims in Idaho's SRBA and Nevada's Owyhee River adjudication on behalf of the Tribes.

At the request of the Parties, a Federal Negotiation Team was formed in 1990. After over a decade of negotiations, and with the participation of the Federal Team, in 2005 the Tribes came to agreement with the States of Idaho and Nevada and affected water users on the water allocation aspects of settlement agreements in both States. The overarching settlement issue, however, remained the appropriate Federal and State financial contributions to the proposed settlement. The Tribes and States were disappointed with the Administration's position that the Federal contribution to the settlement should be \$9.3 million, with a non-Federal contribution of \$5.4 million, to settle the Tribes' claims in both Idaho and Nevada.

Discussions with the State of Idaho foundered and the proposal for Idaho or its water users to make any financial contribution was rejected. Instead, because of looming litigation deadlines, Idaho decided to make an offer of judgment based on the filings made by the United States on behalf of the Tribes. Evaluating the State's offer of judgment and determining that it provided an outcome to the litigation that was as good as, or better than, what could reasonably be expected if the litigation proceeded through trial, the United States accepted the offer, which effectively concluded the Idaho portion of this settlement by confirming certain water rights in the Tribes.

The Nevada litigation remains unresolved. Although talks have taken place and some agreements have apparently been reached among the Tribes, the State of Nevada, and upstream water users, the Administration has not been included in those discussions in recent years. Numerous changes would be required before we could recommend that the Federal Government enter into this Agreement.

The Role of the *Criteria and Procedures*

When negotiating and evaluating Indian water rights settlements, the Administration follows longstanding policy guidance on Indian water settlements found at 55 Fed. Reg. 9223 (1990), *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (Criteria)*. Among other considerations for Federal participation in the negotiation of Indian water rights settlements, the *Criteria* provide 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.

The *Criteria* call for Indian water rights settlements to contain non-Federal cost-sharing 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. These principles are set out in the *Criteria* so that all non-Federal parties have a basic framework for understanding the Executive Branch's position.

Equally important, the *Criteria* address a number of other 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.

Monetary Concerns Regarding H.R. 5293

With this backdrop, we now turn to the fiscal elements of the bill before this Subcommittee. The total cost of \$60 million significantly exceeds the Administration's position on an appropriate Federal contribution to the settlement, and the bill does not specify any non-federal cost-share. Under this bill, this amount settles only the water rights claims in Nevada, whereas the Administration's prior analysis was based on settling the water rights claims in two states. As we have said many times before this Subcommittee, the Administration's position as set forth in the *Criteria* is that the fiscal burden associated with an Indian water rights settlement should not be borne solely by the United States. Other parties receiving benefits under a settlement should also contribute based on the value of the benefits received. Therefore, with respect to the levels of funding proposed in this legislation, it would be premature to assume that future budget proposals will recommend discretionary appropriations at the levels proposed in the bill.

Unfortunately, the non-Federal parties to the proposed Duck Valley settlement have a very different assessment from the Administration of both the benefits from settlement to the non-Federal parties and the litigation risk from claims that the Tribes might assert against the Federal government. Based on the Federal assessment of the relative benefits and liabilities, non-Federal parties should be contributing substantially to the cost of the settlement. This view is based on significant litigation cost savings by the State of Nevada as well as the benefit to non-Indian water users, who stand to secure water rights through settlement that would be subject to limitation were the Tribal claims to be litigated. The States and non-Indians water users would also benefit from the

certainty that comes with settlement of outstanding water rights claims. The State cost share would not necessarily be entirely in the form of cash; one option is non-monetary contributions such as in-kind services provided by the State natural resource agencies to support the Tribes' water or other resource development. In this light, we acknowledge that the State of Nevada has already committed to providing the services of state-funded water commissioners and measuring devices to oversee the administration of settlement requirements and the operation and maintenance of measuring devices needed on the system. Based on data provided by the State in its letter dated August 16, 2007, the cost to the State of Nevada over the coming two years of providing these services will average a little over \$100,000 per year and will continue indefinitely. The net present value of this commitment by the State of Nevada comes out to approximately \$2 million (assuming a 5% discount rate). This level of cost share by the non-Federal parties is significantly lower than the Administration can support.

H.R. 5293 would require the Federal Government to contribute a total of \$60 million into two different trust funds for the benefit of the Tribes. One of the funds, with a proposed Federal contribution of \$45 million, would be established to enable the Tribes to cover the costs of water resource planning and development. The other fund, with a proposed Federal contribution of \$15 million, would be established to cover operation and maintenance costs for the Duck Valley Indian Irrigation Project and other water-related projects funded under this Act. The *Criteria* do not generally allow Federal funding of operation and maintenance costs. And, as I have discussed above, the total cost of the settlement as proposed in this bill is significantly higher than the Administration's assessment of an appropriate Federal contribution.

Non-Monetary Concerns Regarding H.R. 5293

In addition to opposing the proposed Federal funding level, the Administration remains concerned that this bill fails to provide a final resolution to conflicts over the Duck Valley Indian Irrigation Project. H.R. 5293 does not ensure that any of the funds authorized to settle the Tribes' water-related claims will be used to rehabilitate the Project. Nor does the bill include any requirement that the Tribes waive claims against the United States relating to the Project. Compounding these concerns, H.R. 5293 would allow the Tribes to use funds authorized under this bill to expand the Project without specifying who would be responsible for maintaining the expanded Project. Without provisions resolving the respective responsibilities of the Tribes and the Bureau of Indian Affairs, there is a significant risk of continued conflict over the size and operation and maintenance of this Project. Under such circumstances, this bill cannot be said to provide the finality that is an overarching goal of Indian water rights settlements.

Without attempting to give a line-by-line analysis, there are some additional outstanding legal and technical concerns with this legislation. We note two issues of particular concern. First, given the existence of other Federal lands and irrigation projects in the Owyhee River basin with claims that are not resolved through this Act, it is important for the bill to include language specifically providing that nothing in this Act should quantify or affect the land and water rights or claims of any Federal agency, Indian tribe, band or community other than the Shoshone-Paiute Tribes of the Duck Valley Reservation.

Second, although some improvements have been made in H.R. 5293 as compared with S. 462, the Department of Justice continues to have concerns about the bill's waiver provisions. For example, the waivers should extend to all water rights or water rights claims on the Duck Valley Indian Reservation, and not just those relating to the East Fork of the Owyhee River, and should cover all claims to fishing rights. We would like to work with the Subcommittee and the Nevada delegation to revise the bill to address these and other issues that could prevent the bill from accomplishing its intended purpose of achieving a final settlement of the water rights claims of the Tribes of the Duck Valley Reservation.

Conclusion

The Administration remains committed to supporting the settlement process and ensuring that such settlements fulfill the Government's responsibilities to Indian Tribes while also protecting the interests of the taxpaying public. The Administration hopes that the parties can come to an agreement including an appropriate cost share, so that together we can achieve a settlement that will allow the Shoshone-Paiute Tribes to put their water to use in an economically beneficial manner. Water resource development would further the U.S. goal of Tribal self-sufficiency and sovereignty.

Madam Chairwoman, this completes my statement. I am happy to answer any questions the Subcommittee may have.

**Statement of Majel M. Russell
Principal Deputy Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Before the
Subcommittee on Water and Power
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On
H.R. 4841**

March 13, 2008

Madam Chairwoman and members of the Subcommittee, my name is Majel M. Russell and I am the Principal Deputy Assistant Secretary - Indian Affairs at the Department of the Interior. I appreciate the opportunity to appear today to present the Administration's views on H.R. 4841, the "Soboba Band of Luiseño Indians Settlement Act."

The Administration supports H.R. 4841, provided that the Settlement Agreement that the bill approves is modified to be fully consistent with the language included in H.R. 4841 and the agreements among the parties and the United States. Passage of this bill would bring to an end almost sixty years of sporadic litigation and over ten years of settlement negotiations. Parties to the Settlement Agreement include the Soboba Band of Luiseño Indians (Soboba Tribe) and three water districts active in the San Jacinto water basin in Riverside County, California, where the Soboba Reservation is located: the Eastern Municipal Water District (EMWD), the Lake Hemet Municipal Water District (LHMWD), and the Metropolitan Water District of Southern California (MWD). Approval by Congress of this Settlement Agreement would resolve contentious questions of liability and ownership of water rights that have hindered the Soboba Tribe's efforts to stimulate economic growth and provide an adequate standard of life for its people as well as regional efforts to achieve sustainable water management in the over-drafted San Jacinto basin.

This settlement provides a just resolution that protects the Soboba Tribe's water rights, avoids protracted litigation, and advances the interests of the entire San Jacinto basin.

The fact that all parties are making significant contributions indicates the importance of this settlement to everyone involved. The value of the non-Federal contribution that is provided for in the Settlement Agreement exceeds \$80 million, which is approximately four times the Federal cost share of \$21 million that would be authorized by H.R. 4841. Under the Settlement Agreement, the Soboba Tribe is also contributing by agreeing to forbear in its use of a portion of its water rights for the next fifty years. By gradually phasing in increased water use, the Soboba Tribe is giving two local water districts the time they need to develop and implement a groundwater management plan to cure the current overdraft in the San Jacinto basin. The Soboba Tribe's forbearance has a monetary value of over \$58 million and this contribution, combined with the Federal monetary support, was key to convincing the three water districts involved to agree to make their own significant contributions.

A crucial provision of the settlement is the agreement by MWD to deliver 7,500 acre-feet of water each year for the next 30 years to the two local water districts, EMWD and the LHMWD, to use to recharge the San Jacinto groundwater basin. Recharging the depleted basin should help not only to fulfill the Band's water rights but also to terminate chronic groundwater overdrafts that, if left unaddressed, would eventually lead to further degradation of the basin's environment. When implemented, the groundwater management plan that is being developed will restore groundwater levels to close to the historic norm and ensure that the rate at which water is being withdrawn from the aquifer does not exceed the rate at which the aquifer is being recharged, thus supporting the conditions for a sustainable water budget and long-term health of the valley ecosystem. We believe that this settlement illustrates the potential of negotiated settlements to resolve Indian water rights claims in a manner that both recognizes local needs and provides for long-term improvements in regional water management.

Background

Water use in the San Jacinto Valley by the Tribe predates American settlement in the 1860s; the earliest known diversion of water from the San Jacinto River was from the

Soboba Ditch used by the Soboba Tribe. The Soboba Indian Reservation was created by Executive Order in 1883. Until non-Indian diversions from the River began in the late 1800s, the San Jacinto River flowed through the Reservation year-round. Construction of the Hemet Dam on the South Fork of the San Jacinto River in 1893 together with diversion of surface flows effectively stopped the summer and autumn flow of the San Jacinto River to the Soboba Indian Reservation. This left the Soboba Tribe without surface water for irrigation of its main valley lands. Since that time, groundwater has been the main source of water supply to the Reservation.

Construction of the San Jacinto Tunnel by the MWD, which took place between 1933 and 1939 as part of the Colorado River Aqueduct System, resulted in the interception of significant amounts of groundwater that used to naturally recharge the aquifer under the Soboba Reservation. The tunnel reduced the number of springs on the Reservation from 40 to just a few. Groundwater pumping in the basin has subsequently lowered the water table to over 200 feet below the land surface, and presently it is estimated that the basin groundwater overdraft is about 10,000 acre-feet per year.

Litigation involving Indian water rights in the basin began as far back as 1950 when the Soboba Tribe brought claims before the Indian Claims Commission (ICC) against the United States for failing to protect the Tribe's water resources. A 1976 ICC ruling found that the Soboba Reservation "has been transformed from an oasis into a desert, completely unsuitable for the purposes for which it was established." In 1992, the United States reached a settlement with the Soboba Tribe for \$12 million for damages for failure to protect the Tribe's water through 1991.

In 1995, a Federal Negotiation Team was appointed to seek a settlement of the Soboba Tribe's water rights claims and to find mechanisms to prevent further damage to the Reservation. The Team has worked with the Soboba Tribe and the other parties to this settlement consistent with the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*

(Criteria), found at 55 Fed. Reg. 9223 (1990), to develop the Agreement that would be approved through the passage of H.R. 4841.

The parties did not all come to the negotiating table at once. In 2000, the Soboba Tribe filed a lawsuit against MWD in United States District Court seeking damages and injunctive relief on the grounds that the construction and operation of the San Jacinto Tunnel have interfered with the Soboba Tribe's water resources and its rights to the beneficial use and enjoyment of the Reservation. This litigation provided the impetus MWD needed to join the water rights negotiations and the active participation of the three water districts, MWD, EMWD, and LHMWD, proved crucial to the agreement underlying this settlement.

Details of the Agreement and Current Status

Under the Settlement Agreement reached among the parties, the water districts will guarantee the delivery of 7,500 acre-feet per year for 30 years to recharge the San Jacinto basin. In addition, to resolve claims of past damages to the Tribe, MWD and EMWD together are also contributing 128 acres of land, with an estimated value of \$55 million. EMWD together with LHMWD are providing \$30 million in a combination of monetary and in-kind contributions to the settlement (waiving the usual fee for water hookups and providing habitat mitigation land for recharge project development).

The Settlement Agreement provides for a basin recharge plan and the development of a Water Management Plan to stop the current overdraft in the San Jacinto basin. The United States would provide funding in the amount of \$10,000,000 for only a portion of the basin recharge plan; most of the funding would come from local sources. The agreement also includes Federal funding in the amount of \$11,000,000 for the Soboba Tribe for rehabilitating and maintaining water and sewage infrastructure and other water-related development projects. No Federal money will be available for expenditure until the Settlement Agreement becomes effective under section 10(a) of H.R. 4841.

The Settlement Agreement releases the parties from potential damage claims: MWD is released from damage claims related to the San Jacinto tunnel and LHMWD and EMWD are both released from damage claims based on interference with the Soboba Tribe's water rights. Implementation of the settlement will release the United States from any potential damage claims that could be asserted by the Soboba Tribe with respect to failure to protect the Tribe's water rights and will relieve the Federal government of the obligation to litigate the Soboba Tribe's water rights claims at substantial Federal expense.

As referenced in H.R. 4841, all the parties except the United States signed a Settlement Agreement in June of 2006. Enactment of H.R. 4841 will allow the United States to join in the Settlement Agreement after modifications are made to the agreement consistent with the provisions of H.R. 4841 and understandings among the parties. The water districts that are parties to the settlement and the Soboba Tribe have all been actively participating in activities consistent with the settlement over the last year. Notably, the Soboba Tribe has already started work on rehabilitating its existing water and sewer system, and the water districts have already made progress in planning and design work for the new water delivery infrastructure required under the Settlement Agreement.

Conclusion

It is most significant that the Settlement Agreement ratified by H.R. 4841 includes provisions, particularly those related to the recharge and restoration of the San Jacinto basin aquifer, that could not be achieved through litigation. Negotiating a settlement rather than facing each other in court allowed the parties to develop a settlement that went beyond zero-sum battles over a disappearing groundwater resource. Not only does this settlement provide the Soboba Tribe with an assured water right, but it also provides the framework for regional groundwater management that will help to restore the groundwater flows to some of the dry springs on the Soboba Reservation and to prevent the current overdraft situation from continuing in the future.

Enactment of this legislation will ensure the future water supply of the Soboba people as well as providing for the needs of the valley's non-Indian inhabitants and providing a legally sound basis for future water management decisions by the three water districts that participated in these negotiations. We believe that the Federal participation and contribution contemplated in H.R. 4841 is appropriate to resolve the Soboba Tribe's water rights claims. This settlement illustrates how negotiated agreements among Indian tribes, states, local parties, and the Federal government can resolve reserved water right claims, provide assured water supplies for present and future tribal generations, and wisely manage an increasingly scarce resource. It also illustrates the gains that can be made when all stakeholders, including non-Indian and non-Federal parties, are willing to make substantial contributions to achieve long-term solutions of their water management dilemmas.

This concludes my statement. I would be happy to answer any questions that the Subcommittee may have.