

**Statement of Michael L. Connor,
Commissioner,
Bureau of Reclamation
U.S. Department of the Interior
before the
Water and Power Subcommittee of the
House Committee on Natural Resources
On H.R. 1065
White Mountain Apache Tribe Water Rights Quantification Act of 2009**

July 21, 2009

Madam Chairwoman and Members of the Subcommittee, I am Michael L. Connor, Commissioner of the Bureau of Reclamation. I am pleased to provide the Administration's views on HR 1065, the White Mountain Apache Tribe Water Rights Quantification Act of 2009. HR 1065 would authorize a comprehensive settlement of the Federal Indian reserved water rights claims of the White Mountain Apache Indian Tribe in Arizona.

This Administration supports the resolution of Indian water rights claims through negotiated settlement. However, our general policy of support for negotiations is premised on the federal contribution to the settlement being appropriate. Before the Administration can support a settlement, there must be a thorough analysis of the costs it would entail and the benefits to be received in order to assess the appropriateness of the proposed federal contribution. As I will discuss later, while the Administration appreciates that much good work has gone into this proposed settlement, we are unable to support it at this time.

Negotiated Indian Water Rights Settlements

Settlements improve water management by providing certainty not just as to the quantification of a tribe's water rights but also as to the rights of all water users. That certainty provides opportunities for economic development for Indian and non-Indians alike. Whereas unquantified Indian water rights are often a source of tension and conflict between tribes and their neighbors, the best settlements replace this tension with mutual interdependence and trust. In addition, Indian water rights settlements are consistent with the Federal trust responsibility to Native Americans and with a policy of promoting Indian self-determination and economic self-sufficiency. For these reasons and more, 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.

White Mountain Apache Tribe Water Rights Quantification Act of 2009

The heart of this bill is provisions ratifying and approving the White Mountain Apache Quantification Agreement dated January 13, 2009, a settlement reached between the tribe

and other non-federal parties regarding the quantification of the Tribe's water rights. H.R. 1065 requires the Bureau of Reclamation to plan, design, construct, operate, maintain, replace, and rehabilitate a rural water system to serve the White Mountain Apache tribe. It also establishes a trust fund for the operation and maintenance of the system to be constructed. Finally, the bill includes authorizations for the Secretary to carry out a number of other activities that appear to be intended to promote economic development on the White Mountain Apache reservation.

These economic development activities include (1) providing financial and technical assistance to completing the Hawley Lake, Horseshoe Lake, Reservation Lake, Sunrise Lake, and Big and Little Bear Lake reconstruction projects and facilities improvements; (2) conducting a feasibility study of options for improving the manufacture and use of timber products derived from commercial products derived from commercial forests on the White Mountain Reservation and forest management practices; (3) rehabilitating and improving the Alchesay-Williams Creek National Fish Hatchery Complex; (4) constructing a White Mountain Apache Tribe Fishery Center; (5) rehabilitating Canyon Day and other historic irrigation systems on the reservation; (6) planning, design, and construction of snow-making infrastructure, repairs, and expansion at Sunrise Ski Park; and (7) planning, designing, and constructing any recommended on-reservation recreation impoundments following a feasibility study of such impoundments.

HR 1065 is the culmination of cooperative negotiations among the Tribe and many non-Indian water users throughout northern and central Arizona. The negotiations were focused on the need for a long term solution to the problems of an inadequate Reservation domestic water supply and quantifying the Tribe's water rights. The Tribe and other non-Federal parties reached agreement in 2008. The parties are to be commended for that effort.

There is much in the proposed settlement that is positive. The rural water system authorized through this bill would 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. We do not question the Reservation's need for reliable and safe drinking water. Although a system such as the one proposed may turn out to be the best way to address the Reservation's need, the Administration has many concerns about the specific language of this legislation as introduced, which are summarized below. We also have concerns about the large federal contribution expected in the proposed settlement. We would like to work with the sponsor of legislation and the settlement parties to address our concerns.

Water Rights Allocation

Under Section 5 of HR 1065, the Tribe would have the right to divert up to 99,000 acre-feet of water from a combination of groundwater, surface water, and Central Arizona Project water. We understand that the Tribe believes that this is a favorable quantification of its federal reserved water rights. The Department of the Interior's

preliminary analysis indicates that the allocation is appropriate and we hope to have a final Administration analysis in the near future.

Concerns about the Cost Estimate for Construction of the Rural Water System

The centerpiece of the settlement is the construction and operation of the White Mountain Apache Rural Water System (WMAT Rural Water System) described in Section 7. This system would consist of the Miner Flat Dam, a 155 foot high dam along the North Fork of the White River that would have an anticipated total storage capacity of 8,400 acre-feet with a surface area of approximately 160 acres; water treatment facilities and a pipeline conveyance system extending approximately 50 miles throughout the Reservation. The surface water delivered from this system is anticipated to meet population requirements through 2040 or beyond.

The Bureau of Reclamation recently completed a review of the Design, Engineering, and Construction (DEC) estimates for the WMAT Rural Water System. Based on that review, Reclamation determined the Tribe's cost estimate of roughly \$126.2 million, which is in the proposed legislation, is not sufficiently detailed or comprehensive to provide the necessary assurance that the project can be constructed for that amount of money. Moreover, the legislation does not provide any cap on the amount of Federal funds that can be expended for project construction. The Administration is concerned about authorizing a project in cases such as this where we are very uncertain as to end costs. Our experience has been that projects authorized in this manner can become far more expensive than originally contemplated.

Further work is needed to bring the cost estimate up to the feasibility level generally required by Reclamation authorities before a project is recommended for authorization. This work will require Reclamation funding. At this time, Reclamation is developing a cooperative agreement to allow the Tribe to complete the planning, engineering, and design of a rural water system, pursuant to P.L. 110-390, under the Indian Self-Determination and Education Assistance Act, P.L.93-638. The real cost of the WMAT Rural Water System will certainly be refined as this effort moves forward.

In addition to concerns about the cost estimate, the Administration is also concerned about the mechanism under which project construction funds would be handled, which could add to the costs of project construction. As introduced, H.R. 1065 has differing provisions regarding how the Secretary is supposed to handle the money appropriated for construction. Section 14 of HR 1065 requires the establishment of a trust fund, the "Rural Water System Construction Fund" into which construction monies would be deposited. This trust fund would be managed in accordance with the American Indian Trust Fund Management Reform Act of 1994. The Tribe would be able to withdraw these funds and spend them after submitting a plan to the Secretary. This is an unusual and cumbersome way to deal with construction funds. Reclamation, the bureau responsible for constructing the WMAT Rural Water System and the bureau to which the funds would typically be appropriated, would have to deposit construction funds into a trust account managed by a different bureau.

Under section 7(g) of HR 1065, the Tribe has the option of performing the planning, design, construction, operation, maintenance, rehabilitation, and replacement of the WMAT Rural Water System in accordance with the provision of the Indian Self-Determination and Education Assistance Act (P.L. 93-638). Reclamation believes that having the tribe carry out the construction under an ISDEAA framework is one alternative that would accomplish the intended purposes of this act in a more direct and efficient manner than the trust fund model set forward in section 14. However, the Tribe has had financial management and accounting issues with other P.L. 93-638 contracts and grants. The Department encourages the use of the Indian Self-Determination and Education Assistance Act and would support its use for the projects called for in HR 1065 if additional language could be formulated and added to the legislation allowing the Secretary of the Interior to require appropriate accounting and review measures to insure that Federal funds are expended as intended. At the very least, the legislation needs to clarify whether the Secretary is being called upon to establish a trust fund to be controlled by the Tribe or to accomplish the construction through an ISDEAA contract. We look forward to working with the bill sponsors on this clarification. Ultimately, the Administration's goal in this or any other settlement is to define, with as much certainty as possible, the Federal costs necessary and appropriate to achieve implementation of the settlement.

Title to the Rural Water System

HR 1065 requires that the WMAT Rural Water System be held in trust by the United States. This stands in sharp contrast to the manner in which title to domestic water supply systems is handled in other enacted and pending water rights settlements. Generally, title is transferred to tribes or other project users once construction is complete. The Administration believes transferring title to the domestic water supply system is more consistent with concepts of self determination and tribal sovereignty and we would prefer that the WMAT Rural Water System be so transferred.

Concerns about the Waivers and Releases

The waivers and releases authorized in Section 12 of the 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. The U.S. Forest Service also has concerns about the waiver provisions. We believe that the issues raised are not irreconcilable if we are given the opportunity to work with the parties towards resolving them. Recently enacted settlements, such as the Duck Valley Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement, P.L. 111-11, provide an example of waiver and release provisions that were negotiated with the parties in a manner that addressed many of the Justice Department's concerns.

Additional Concerns about the Financial Structure of this Settlement

In addition to authorizing the WMAT Rural Water System, HR 1065 also authorizes appropriations for several other projects as part of the settlement: (a) snow-making facilities (\$25 million); (b) fish hatcheries (\$12.47 million); (c) irrigation rehabilitation (\$4.95 million); (d) a forest products feasibility study and implementation funds (\$25 million); and (e) recreation lakes improvements (\$48.67 million), a total of approximately \$116 million in addition to the amount authorized for the rural water system. However, under H.R. 1065 as introduced, the waivers by the Tribe and the United States of the Tribe's federal reserved water rights become effective once there is funding to construct the rural water system. With the exception of the funding for the rehabilitation of the irrigation systems on the reservation, the other settlement activities authorized in this legislation are completely uncoupled from the waivers. The final effectiveness and enforceability of the settlement is not contingent on these other appropriations, but only upon the appropriations for the design and construction of the WMAT Rural Water System. Other settlements have followed a different model under which a tribe receives an appropriation in a fund to accomplish its own development priorities in using the water it receives under a settlement. We believe that model might be preferable, although the Administration has not determined what would be an appropriate amount of federal funding for such a fund.

We also note that the bill as introduced would require all of the funding for the rural water system to be appropriated by October 31, 2013. Given the realities of federal budgeting, it will be much more realistic to provide a longer period to budget for what are ultimately determined to be the appropriate federal costs of this system. To the extent that one of the factors driving the settlement proponents to ask for this money upfront is a desire for waivers that come into effect earlier, we would suggest that they look at other settlements involving construction where waivers are able to come into effect but are subject to nullification if construction does not get completed within the time frame established in the settlement agreement and authorizing legislation.

Process Concerns and Conclusion

This legislation has to be analyzed and understood within the context of the large numbers of Indian water rights settlements which are expected to be introduced during the course of the 111th Congress. We need to establish negotiating approaches and standards that will result in fair consideration and treatment of all of the settlements that this Congress will be asked to review. While we are aware that the settling parties worked closely with the Federal negotiating team in developing the parameters of this settlement, we have also been informed by the team that issues involving the cost of the settlement were not considered. We believe that these costs need to be discussed and negotiated and that the benefits of the settlement must justify the costs. The Administration needs to complete its analysis of the settlement so that we can inform the parties what level of funding we would be able to support, and we need to explore alternative funding mechanisms that will provide a realistic chance for this settlement to be implemented in a way that fulfills the promise that it represents to the Tribe and to others for a comprehensive settlement.

In conclusion, the Administration appreciates and is encouraged by the willingness of the settlement parties to negotiate their differences in a cooperative spirit. We are committed to working with Congress and all parties to develop settlement legislation that the Administration can support.

Thank you, Madam Chairwoman, for the opportunity to present this testimony. I will be pleased to answer questions you and other Members might have.