TESTIMONY OF
MICHAEL BLACK
DIRECTOR, BUREAU OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON
H.R. 4924 BILL WILLIAMS RIVER WATER RIGHTS SETTLEMENT ACT OF 2014

SEPTEMBER 19, 2014

Good afternoon, Chairman McClintock, Ranking Member Napolitano, and Members of the Committee, I am Michael Black, Director of the Bureau of Indian Affairs at the Department of the Interior. I am pleased to provide the Department of the Interior's views on H.R. 4924, the Bill Williams River Water Rights Settlement Act of 2014. H.R. 4924 would authorize, ratify and confirm two agreements which together resolve a number of issues in the Bill Williams River basin, including issues related to a sever and transfer of water rights to serve Freeport Minerals Corporation's mining operation and the Lower Colorado River Multi-Species Conservation Program as well as resolving certain water rights issues among Freeport Minerals Corporation (Freeport), the United States and the Hualapai Tribe. While the Administration supports the goals of the bill, we have significant concerns about the waiver of sovereign immunity provision in H.R. 4924 that must be resolved before the Administration can support the bill. We look forward to working with the parties, the bill's sponsors, and this Committee to address this issue.

Background

The Hualapai Tribe's main Reservation of approximately 1 million acres is located on the south side of the Colorado River and includes Grand Canyon lands. The main Hualapai Reservation is the home of the famous Grand Canyon West Skywalk and other tourist facilities that are a significant source of the Tribe's economic development. In addition to its main Reservation, the Tribe has a smaller Executive Order Reservation of approximately 60 acres along the Big Sandy River, located in the Bill Williams River basin.

The Hualapai Tribe claims water rights in the Colorado, Verde, and Bill Williams River basins. Negotiations regarding potential settlement of the water rights claims of the Hualapai Tribe in Arizona have been ongoing since 2011, when the United States established a negotiating team to negotiate a comprehensive settlement of all of the Tribe's water rights within the State of Arizona One matter addressed in the negotiations has concerned applications filed in 2010 by Freeport to sever and transfer certain water rights in the Bill Williams River basin for the benefit of mining operations at its Bagdad Copper Mine. The Department of the Interior protested those applications to protect federally reserved water rights, including water rights that the Department holds in trust for the Hualapai Tribe and rights associated with lands held by the Department's Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM).

H.R. 4924 would approve two agreements in which, among other things, Freeport agrees to confirm the Tribe's water rights claims related to the small Executive Order Reservation. Initially, the Tribe's primary objective was to negotiate a comprehensive settlement for both its main Reservation and its smaller Executive Order Reservation. Early in the negotiations, however, serious technical issues were identified with respect to water infrastructure projects proposed for the main Hualapai Reservation that required the investigation of additional alternatives before the Tribe's water rights in the Colorado River basin could be resolved. At the same time, the Hualapai Tribe, Freeport, and the United States decided that negotiations over certain time sensitive issues related to Freeport's sever-and-transfer application should proceed.

As a result, the originally contemplated comprehensive settlement was split into two phases. The first phase, which is the subject of H.R 4924, focuses on resolution of certain water rights issues in the Bill Williams River basin involving the Tribe, the Department of the Interior, the Arizona Game and Fish Commission, and Freeport. It is expected that future negotiations, to which all the parties, including Freeport, have committed, will address additional water rights of the non-tribal parties in the Bill Williams River basin, as well as a comprehensive settlement of all the Tribe's water rights claims for its main Reservation.

Legislation and Agreements

H.R. 4924 would authorize, ratify, and confirm two agreements, the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and Hualapai Tribe Bill Williams River Water Rights Settlement Agreement and direct the Secretary of the Interior to execute both agreements. These Agreements would waive the objections of the settling parties to Freeport's sever-and-transfer application in return for securing various benefits to the Tribe and the United States. There is no on-going general water rights adjudication in this basin to provide a mechanism by which all of the water rights users in the basin could be bound. Consequently, the Agreements are settlements among only some of the water users in the Bill Williams River basin, including most importantly Freeport, which claims significant, if not the largest, water rights in the basin. I will summarize the key features of each of these two agreements.

First, the Big Sandy River-Planet Ranch Water Rights Settlement Agreement would facilitate the severance and transfer of certain water rights owned by Freeport on property known as "Planet Ranch" along the Bill Williams River. The Agreement would resolve pending objections by Interior Department bureaus and the Arizona Game & Fish Commission, enabling a portion of Freeport's water rights on Planet Ranch to be moved upstream to a well field owned by Freeport along the Big Sandy River, a tributary to the Bill Williams River. Freeport pumps water from the well field and transports it to Freeport's Bagdad Mine located approximately 25 miles from the Big Sandy River. Under the Agreement, Freeport would agree to a "diversion limitation" or cap on its withdrawals from the well field and other specified groundwater wells at its historic maximum pumping level of 10,055 acre-feet per year. This cap would provide an important measure of predictability regarding future flows in the Big Sandy River, where downstream federal interests include wilderness areas managed by the Bureau of Land Management and the Bill Williams National Wildlife Refuge administered by the Fish & Wildlife Service. Importantly, water that is not transferred to the well field would remain at Planet Ranch. The Bureau of Reclamation (Reclamation) would lease some of that water along with Planet Ranch lands for the Lower Colorado River Multi-Species Conservation Program (MSCP). The leased

water rights and land would provide important environmental protection in furtherance of the MSCP. Under the Agreement, the lands leased by Reclamation would be permanently donated by Freeport to the Arizona Game and Fish Commission.

Next, the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement would secure a number of benefits and protections for the Tribe, including non-Federal funding of certain measures that could lay groundwork for a later comprehensive settlement of all of the Tribe's water rights in the State of Arizona. This Agreement provides that Freeport will agree to reserved water rights of 694 acre-feet per year for the approximately 60 acres of land that the Department holds in trust for the Tribe and 560 acres it holds in trust for allottees in the Bill Williams River basin. Freeport would also implement certain protections for the Tribe's water uses on culturally significant lands that the Tribe holds in fee. Finally, the Tribe would receive a substantial contribution from Freeport into the Tribe's Economic Development Fund, which would be used to help meet water related needs on the Tribe's main Reservation on the Colorado River. Freeport would contribute an additional $1 million to enable completion of the ongoing study of water supply alternatives for the main Reservation, which is an important pre-requisite to, and a key step facilitating, the Tribe's goal of reaching a final settlement of its Colorado River claims in the future.

Remaining Concerns & Conclusion

H.R 4924-provides a number of benefits for all of the parties -- the Hualapai Tribe, the Interior Department, the Arizona Game & Fish Commission, and Freeport Minerals Corporation -- as well as the many parties that are participants in the Lower Colorado River Multi-species Conservation Program. The parties have negotiated intensively within the last year to reach agreement on the two settlement agreements addressed in H.R. 4924 and have resolved many issues. However, there is still one important issue and a few smaller matters to be worked out with respect to both these agreements. As a result, the Administration cannot support the legislation as introduced, but we would support an amended bill that adequately addresses our concerns.

Most significantly, we oppose the bill's inclusion of a new, ad hoc waiver of the sovereign immunity of the United States. These Agreements, like other settlements that the United States enters into, can be enforced against the United States through existing avenues, including general waivers of sovereign immunity, such as those provided in the Tucker Act, the Administrative Procedure Act, and the McCarran Amendment.

Piecemeal waivers of sovereign immunity for particular matters do not aid in the uniform resolution of underlying disputes but tend to promote wasteful litigation and may lead to conflicting outcomes. There are few standards to guide the application of such waivers, creating the prospect of resource-intensive litigation over procedural and other matters that are well-established in the context of existing sovereign immunity waivers. Nor is it clear how various state or federal forums will understand such waivers in relation to existing administrative and judicial review processes, creating the possibility of conflicting results.

While several Indian water rights settlement acts include sovereign immunity waivers, those settlements comprehensively quantified and resolved tribal water rights claims with finality. In

contrast, this bill resolves no tribal water rights with finality and will not result in a court-approved water decree determining basin-wide water rights. Moreover, the bill does not reach all trust or other federally reserved claims in the basin and otherwise lacks the hallmarks of a traditional Indian water rights settlement. In addition, the waiver of sovereign immunity in H.R. 4924 is in some ways broader than any waiver to date in an Indian water rights settlement, for the first time expressly extending to suits filed in state court against the United States relating to particular settlements. In particular, the United States opposes any new waiver of sovereign immunity in state court.

The United States has repeatedly communicated its concerns about the waiver of sovereign immunity to the parties, and proposed alternative ways to address the parties' enforcement concerns. Although the parties and the United States have not reached agreement on an alternative to the proposed waiver of sovereign immunity as of this time, we are committed to continue working with the parties and the Committee to find solutions to this issue.

In addition, the Department has a number of other concerns with H.R. 4924 as introduced. We have been working closely with the parties to resolve those issues and believe that we have made substantial progress on those issues, including proposed changes to bill language.

The Department looks forward to working with the parties, the sponsors, and the Committee to fix the one remaining significant issue in the legislation so that the United States can support the bill. Thank you.