

**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**

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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.