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111TH CONGRESS }
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SENATE

{ REPORT
{ 111-117

A BILL TO APPROVE THE TAOS PUEBLO INDIAN WATER RIGHTS SETTLEMENT AGREEMENT, AND FOR OTHER PURPOSES

JANUARY 20, 2010.—Ordered to be printed

Mr. DORGAN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 965]

The Committee on Indian Affairs, to which was referred the bill (S. 965) to approve the Taos Pueblo Indian Water Rights Settlement Agreement, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 965 is to approve the Taos Pueblo Indian Water Rights Settlement, to authorize and direct the Secretary to execute the Settlement Agreement and perform all obligations of the Secretary under the Settlement Agreement, and to authorize all actions and appropriations necessary for the United States to meet its obligations under the Settlement Agreement and the Act.

BACKGROUND

The Taos Pueblo Indian Water Rights Settlement Act, S. 965, resolves a long-standing Indian water rights case in the State of New Mexico. Legislation is needed to ratify the quantification and settlement of water rights of the Taos Pueblo (Pueblo) and to resolve water rights claims of the Pueblo against the United States and release the United States from further liability. Without legislation

the Pueblo and other parties would be required to continue to engage in litigation to determine their respective water rights.

S. 965 addresses the water rights claims of the Pueblo asserted in the case of State of New Mexico, ex rel. State Engineer v. Eduardo Abeyta (Abeyta), filed in 1969, and approves the settlement of water rights in three tributaries of the Rio Grande in northern New Mexico—the Rio Pueblo, Rio Lucero and Rio Hondo. Since 1989, the vast majority of water users in the Taos Valley were represented at some point in the development of the Settlement Agreement approved by S. 965. Settlement parties include the Pueblo, the Taos Valley Acequia Association, the Town of Taos, El Prado Water and Sanitation District, and the twelve Taos-area Mutual Domestic Water Consumers' Associations.

The Pueblo is located in North-Central New Mexico. Pueblo enrollment is 2,458 members and growing. The Pueblo's land base is approximately 100,000 acres, including semi-arid lands along the Rio Grande, irrigated farmlands, and mountains. At the foot of the mountains are Pueblo farmlands that have been irrigated in pre-historic and historic times through a complex ditch irrigation system. The Blue Lake Wilderness Area, a sacred area for the Pueblo, is a major part of the watershed involved in the settlement. The Pueblo is also a National Historic Landmark and a World Heritage Site.

S. 965 ratifies the parties' March 31, 2006, Settlement Agreement, which resolves the water rights claims of the Pueblo and thousands of water right claimants throughout the Taos Valley in New Mexico. S. 965 authorizes approximately \$121 million in federal appropriations. Non-Indian parties to the settlement intend to seek about an additional \$22 million in funding from the State of New Mexico for a share of some of the settlement costs. If sufficient appropriations have not been made by 2020, some of the federal costs of S. 965 may be satisfied from the "Reclamation Water Settlements Fund" which was created by section 10501 of P.L. 111-11.

SUMMARY OF MAJOR PROVISIONS

Section 4 of S. 965 ratifies the quantification of the water rights of the Pueblo and states that those water rights are held in trust by the United States on behalf of the Pueblo.

Under section 5, the Commissioner of Reclamation is directed to provide non-reimbursable grants to the Pueblo to plan, design, and construct water related projects. Section 5 also provides for non-reimbursable grants to restore and protect the environment associated with the Buffalo Pasture, a culturally sensitive wetland that has been impacted by non-Indian groundwater production.

Section 6 establishes a Taos Pueblo Water Development Fund in the United States Treasury to be used by the Pueblo for acquiring water rights, developing water projects, administering water rights, and protecting and enhancing the watershed.

Section 7 of the bill permits marketing of Pueblo water rights subject to the approval of the Secretary of the Interior. Some of the water marketed by the Pueblo would come from a contract entered into by the Secretary of the Interior pursuant to section 9.

Section 8 authorizes the Bureau of Reclamation to provide non-reimbursable grants to non-Pueblo entities to develop water related

projects that are identified in the Settlement Agreement as serving the mutual benefit of Pueblo and non-Pueblo users in the Taos Valley.

Section 9 authorizes the Secretary of the Interior to enter into contracts for the delivery of San Juan-Chama Project water to settlement parties. Section 9 specifies that under these contracts 2,215 acre-feet per year will be delivered to the Pueblo, 366 acre-feet per year will be delivered to the Town of Taos, and 40 acre-feet per year will be delivered to the El Prado Water and Sanitation District.

Section 10 authorizes approximately \$121 million in federal appropriations. Section 10 also provides that one of the conditions for the Settlement Agreement and the waivers and releases contained in S. 965 to become effective is the appropriation by the State of New Mexico of funding for State contributions for a share of projects identified in the Settlement Agreement.

Section 11 provides waivers of the Pueblo and the United States, as trustee, to claims and parties in the Abeyta case.

LEGISLATIVE HISTORY

In the 110th Congress, Senator Bingaman and Senator Domenici introduced S. 3381 which contained authorizations nearly identical to S. 965. On September 11, 2008, the Committee held a legislative hearing on S. 3381, and it was reported out of the Committee on September 23, 2008. That bill was never considered by the full Senate.

S. 965 was introduced by Senator Bingaman on May 4, 2009, with Senator Tom Udall as an original cosponsor, and referred to the Committee on Indian Affairs. At an open business meeting on September 10, 2009, the Committee approved S. 965 with an amendment offered by Senator Udall.

A companion bill, the Taos Pueblo Indian Water Rights Settlement Act, H.R. 3254, was introduced in the House of Representatives on July 17, 2009, by Representative Lujan, and referred to the House Committee on Natural Resources. On September 9, 2009, a hearing on H.R. 3254 was held by the Water and Power Subcommittee of the House Committee on Natural Resources.

SUMMARY OF AMENDMENT

During the consideration of S. 965, the Committee adopted an amendment to improve the bill. The amendment deleted an exemption for Secretarial approval of certain subcontracts and extended the deadline for Secretarial approval of certain contracts. Both changes were made in response to concerns raised by the Administration. The amendment also included a technical change to make deadlines consistent.

SECTION-BY-SECTION ANALYSIS OF S. 965 AS AMENDED

Section 1. Short title

Section 1 provides the short title of S. 965 as the “Taos Pueblo Indian Water Rights Settlement Act.”

Section 2. Purpose

Section 2 specifies the purposes of S. 965, including: to approve the Taos Pueblo Indian Water Rights Settlement Agreement, to authorize the Secretary to execute the Settlement Agreement and to perform obligations under it, and to authorize necessary actions and appropriations.

Section 3. Definitions

Section 3 defines terms used in S. 965.

Section 4. Pueblo rights

Section 4(a) states that the rights to which Taos Pueblo is entitled under the Partial Final Decree will be held in trust by the United States and not subject to forfeiture, abandonment or permanent alienation. Section 4(b) states that the Pueblo will not be denied its rights held in trust absent its consent unless explicitly abrogated by a future act of Congress.

Section 5. Pueblo water infrastructure and watershed enhancement

Section 5(a) requires the Secretary of the Interior, acting through the Commissioner of Reclamation, to provide grants and technical assistance to the Pueblo on a non-reimbursable basis for specified purposes. Section 5(b) provides that upon the enforcement date, all amounts appropriated pursuant to section 10(c)(1) will be available in grants to the Pueblo after the requirements of section 5(c) have been met. Section 5(c) states that the Secretary will provide financial assistance pursuant to subsection (a) upon Taos Pueblo's submittal of a plan. Section 5(d) provides that \$10 million of the monies authorized to be appropriated pursuant to section 10(c)(1) will be made available upon appropriation or upon availability of funds from other authorized sources and will be distributed to Taos Pueblo upon receipt by the Secretary of a written notice, Tribal Council resolution, and a plan for this portion of the funding from Taos Pueblo.

Section 6. Taos Pueblo Water Development Fund

Section 6(a) establishes the Taos Pueblo Water Development Fund in the Treasury and specifies uses of the fund by Taos Pueblo. Section 6(b) directs the Secretary to manage and distribute money from the Taos Pueblo Water Development Fund in accordance with the American Indian Trust Fund Management Reform Act, S. 965 and the Settlement Agreement.

Section 6(c) directs the Secretary to invest amounts in the Taos Pueblo Water Development Fund in accordance with the American Indian Trust Fund Management Reform Act and other specified acts. Section 6(d) provides that all monies in the Taos Pueblo Water Development Fund will be available to Taos Pueblo after the requirements of subsection (e) are met. Section 6(e) identifies conditions for expenditures and withdrawals from the Taos Pueblo Water Development Fund.

Section 6(f) provides that \$15 million of the monies authorized to be appropriated pursuant to section 10(c)(1) will be made available upon appropriation for specified purposes and will be distributed to Taos Pueblo by the Secretary upon receipt of a written notice and

Tribal Council resolution. Section 6(g) prohibits distribution of the Taos Pueblo Water Development Fund on a per capita basis.

Section 7. Marketing

Section 7(a) authorizes Taos Pueblo to lease water rights secured to it under the Settlement Agreement and Partial Final Decree subject to approval of the Secretary. Section 7(b) authorizes Taos Pueblo to subcontract to third parties water made available to the Pueblo under the San Juan-Chama Project contract authorized by section 9(b)(1)(A) provided that the delivery obligations under such subcontract are consistent with the Secretary's existing San Juan-Chama Project obligations and subject to approval of the Secretary.

Section 7(c) specifies certain limitations on the diversion or use of water off Pueblo Lands pursuant to Pueblo water rights or Pueblo contract rights to San Juan-Chama Project water. Section 7(d) specifies the maximum term of any water use lease or subcontract and provides that Taos Pueblo will not permanently alienate any rights under the Settlement Agreement, the Partial Final Decree, or S. 965.

Section 7(e), as amended, requires Secretarial approval of any lease or subcontract within a specified time and provides that no Secretarial approval will be required for any water use lease with a term of less than 7 years. Section 7(f) states that the nonuse by a lessee or subcontractor of any right to which Taos Pueblo is entitled under the Partial Final Decree will in no event result in a forfeiture, abandonment, relinquishment or other loss. Section 7(g) states that the approval authority under subsection (e) will not amend, construe, supersede or preempt specified State or Federal law, and provides that 25 U.S.C. Sec. 177 will not apply to any water made available under the Settlement Agreement.

Section 7(h) declares that nothing in S. 965 will be construed to prejudice any party from litigating whether or to what extent specified law applies to the use of the Pueblo's water outside New Mexico.

Section 8. Mutual-benefit projects

Section 8(a) requires the Secretary, acting through the Commissioner of Reclamation, to provide financial assistance in the form of grants on a non-reimbursable basis to Eligible Non-Pueblo Entities to plan, permit, design, engineer and construct the Mutual Benefits Projects in accordance with the Settlement Agreement for specified purposes. Section 8(b) specifies the Federal and non-Federal shares of the total cost of planning, designing and constructing the Mutual Benefit Projects and authorizes non-Federal share in the form of in-kind contributions.

Section 9. San Juan-Chama Project contracts

Section 9(a) requires that contracts issued under this section be in accordance with S. 965 and the Settlement Agreement. Section 9(b) authorizes the Secretary to enter into 3 repayment contracts—one with Taos Pueblo and one each with two other settling parties, the Town of Taos and El Prado Water and Sanitation District—for the delivery of specified amounts of San Juan-Chama Project water, and provides for the expiration of each contract if the conditions precedent to the settlement set forth in Section 10(f)(2) have

not been fulfilled by a specified date. Section 9(c) requires the Secretary to waive Taos Pueblo's share of the construction costs, including both principle and interest, for the San Juan-Chama Project and specifies that those construction costs waived will be non-reimbursable.

Section 10. Authorizations, ratifications, confirmations, and conditions precedent

Section 10(a) authorizes, ratifies and confirms the Settlement Agreement resolving the Taos Pueblo's water rights claims in the Taos Valley and amendments to make the Settlement Agreement consistent with S. 965. Section 10(b) directs the Secretary to execute the Settlement Agreement, including any amendments necessary to make the Agreement consistent with S. 965, after execution by Taos Pueblo.

Section 10(c) authorizes appropriations for the Taos Pueblo Infrastructure and Watershed Fund, the Taos Pueblo Water Development Fund, and Mutual Benefits Projects Funding; requires adjustment of the amounts authorized by changes in costs since April 1, 2007 as indicated by specified indices; and requires the funds to be deposited into a Taos Settlement Fund to be established in the Treasury, except for specified early funds to Taos Pueblo. Section 10(d) authorizes the Secretary to enter into agreements and to take measures necessary and appropriate to fulfill the intent of the Settlement Agreement and S. 965.

Section 10(e) states that the Secretary's execution of the Settlement Agreement will not constitute a major federal action under the National Environmental Policy Act and requires the Secretary to comply with Federal laws relating to the protection of the environment.

Section 10(f) declares the conditions precedent for the Settlement Agreement to become enforceable and for the waivers and releases to become effective, and provides that upon fulfillment of those conditions the Secretary will publish in the Federal Register a statement of finding that the conditions have been fulfilled. Section 10(g) declares that the Settlement Agreement will become enforceable and the waivers and releases will become effective as of the date that the Secretary publishes the notice that the conditions precedent set forth in subsection (f)(2) have been fulfilled.

Section 10(h) provides that the Settlement Agreement will become null and void, and the waivers and releases will not become effective, if the conditions precedent set forth in subsection (f)(2) have not been fulfilled by a specified date, and requires the return to the Federal government of unexpended Federal funds and title to property acquired or constructed with expended funds, unless otherwise agreed by the parties and approved by Congress, with an exception for the early funds made available to Taos Pueblo under sections 5(d) and 6(f) and a right for the United States to set off amounts against claims asserted by the Pueblo against the United States relating to water rights in the Taos Valley.

Section 11. Waivers and releases

Section 11(a) requires the Taos Pueblo and the United States to execute specified waivers and releases associated with water rights claims of Taos Pueblo and the United States in its trustee capacity

to the Pueblo in the Taos Valley or the Rio Grande mainstream or tributary water. Section 11(b) requires the Taos Pueblo to execute specified waivers and releases of certain claims against the United States associated with Taos Pueblo's water rights claims. Section 11(c) identifies certain rights and claims of Taos Pueblo and the United States on its behalf that are retained and provides that all rights, remedies, privileges, immunities, powers and claims not specifically waived are retained. Section 11(e) provides for the tolling of periods of limitation and time-based equitable defenses relating to claims described in this section.

Section 12. Interpretation and enforcement

Section 12(a) provides for a limited waiver of sovereign immunity by the United States and Taos Pueblo in any court of competent jurisdiction over the subject matter relating only and directly to the interpretation or enforcement of the Settlement Agreement or S. 965. Section 12(b) states that nothing in S. 965 will be interpreted as conferring, restricting, enlarging, or determining the subject matter jurisdiction of any court. Section 12(c) states that nothing in S. 965 will be deemed to determine or limit any authority of the State of New Mexico or Taos Pueblo to regulate or administer waters or water rights.

Section 13. Disclaimer

Section 13 disclaims any effect of S. 965 on the land and water rights of any other Indian tribe.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 10, 2009, the Committee on Indian Affairs, by voice vote, adopted S. 965, as amended, and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 965 as amended.

COST AND BUDGETARY CONSIDERATIONS

S. 965—Taos Pueblo Indian Water Rights Settlement Act

Summary: S. 965 would approve and ratify a settlement agreement between the Taos Pueblo and the state of New Mexico. The agreement would settle the Pueblo's claims to water rights in the state. As part of that agreement, the bill would authorize the appropriation of funds to construct and rehabilitate water infrastructure and preserve environmentally sensitive lands in the Taos Valley. The bill also would establish a trust fund for the Pueblo to acquire water rights and maintain the water infrastructure. Finally, the bill would authorize appropriations to mitigate any adverse impacts on Pueblo lands caused by diverting water to execute the settlement agreement.

Based on information from the Department of the Interior (DOI), CBO estimates that implementing S. 965 would cost \$25 million over the 2010–2014 period and an additional \$114 million to be spent beginning in fiscal year 2017 (as specified by the proposed settlement agreement), assuming appropriation of the necessary amounts. Enacting S. 965 would not affect direct spending or revenues.

S. 965 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 965 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Pueblo Water Infrastructure:						
Estimated Authorization Level	1	3	3	3	0	10
Estimated Outlays	1	3	3	3	0	10
Water Development Fund:						
Estimated Authorization Level	3	3	3	3	3	15
Estimated Outlays	3	3	3	3	3	15
Total Spending Under S. 965:						
Estimated Authorization Level	4	6	6	6	3	25
Estimated Outlays	4	6	6	6	3	25

Basis of estimate: For this estimate, CBO assumes that S. 965 will be enacted early in fiscal year 2010 and that the necessary amounts will be appropriated each year. The enforcement of the settlement agreement depends on the completion of a number of actions by federal, state, local, and tribal entities. CBO expects that those actions will be completed early in fiscal year 2017. The estimated costs of those projects are based on information from DOI and on historical spending patterns for similar activities.

In 2006, the Taos Pueblo in New Mexico and several other parties signed a settlement agreement resolving a water-rights dispute in the Taos Valley. The United States would become a party to that agreement upon enactment of S. 965, provided that certain other conditions are met. Among those conditions, the Secretary would have to publish a statement of findings in the Federal Register indicating that all parties have executed the agreement; the U.S. district court would have to issue a partial decree concerning the agreement; the Congress would have to appropriate sufficient funds to carry out certain provisions of the bill, which CBO estimates would cost \$139 million; and New Mexico would have to appropriate amounts it would owe the Pueblo under the agreement.

Based on information from DOI and assuming appropriation of the necessary amounts, CBO estimates that implementing the legislation would cost \$25 million over the 2010–2014 period and \$114 million after 2016. Should the Secretary of the Interior not publish the required statement of findings by December 31, 2016, verifying that all conditions necessary to execute the agreement have been met, the agreement would not take effect, and any appropriated funds that remain unspent and title to any property acquired or constructed with federal funds would be returned to the federal government (unless otherwise specified by the bill).

Pueblo water infrastructure

Section 5 would authorize the Secretary of the Interior to provide grants to the Taos Pueblo to construct and maintain water infra-

structure and to restore and protect environmentally sensitive lands and watersheds. The bill would authorize the appropriation of \$30 million (plus additional amounts needed because of increases in construction costs) over the 2010–2016 period. Of that amount, \$10 million could be expended upon appropriation. The remaining \$20 million would not be available to the Secretary until the enforcement date of the settlement—near the beginning of fiscal year 2017. CBO estimates that implementing this grant program would cost \$10 million over the 2010–2014 period and an additional \$24 million beginning in 2017.

Water Development Fund

Section 6 would authorize the appropriation of \$58 million (plus additional amounts needed because of increases in construction costs) over the 2010–2016 period for the Taos Pueblo Water Development Fund. The Secretary of the Interior would be directed to hold those funds in trust for the Pueblo until the enforcement date of the settlement—the beginning of fiscal year 2017. After that date, the Secretary would be required to invest amounts in the fund in U.S. Treasury obligations, and those amounts would be available to the Pueblo to construct, operate, and maintain certain water system facilities owned or operated by the Pueblo.

Of the total amount authorized to be appropriated to the fund, \$15 million would be available immediately for the Pueblo to acquire certain water rights. Control over those amounts would be transferred to the Pueblo when appropriated. The remaining amounts could be spent by the Pueblo only after the settlement agreement is executed. Assuming appropriation of the authorized amounts, CBO estimates that outlays from the fund would total \$15 million over the 2010–2014 period and \$52 million after 2016.

Payments to certain tribal trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. As a result, CBO expects that the entire amount deposited into the Taos Pueblo Water Development Fund (excluding amounts made available to acquire water rights) would be recorded as an outlay in 2017 when the funds could be spent by the Pueblo. Subsequently, any use of such funds would have no effect on the federal budget. Because S. 965 directs the Secretary to invest amounts in the fund only after those amounts are available to the Pueblo, CBO expects that no interest would accrue on the amounts in the fund until after the payments are made in 2017.

Mutual-benefit projects

Section 8 would authorize the Secretary of the Interior to provide grants to local governments (other than the Taos Pueblo) for projects intended to mitigate the impact of diverting water from present uses to execute the settlement. The bill would authorize the appropriation of \$33 million (plus additional amounts needed because of increases in construction costs) over the 2010–2016 period. The funds would be available on the settlement's enforcement date—the beginning of fiscal year 2017. Assuming appropriation of the authorized amounts, CBO estimates that implementing this grant program would have no cost over the 2010–2014 period and would cost \$38 million after 2016.

Intergovernmental and private-sector impact: S. 965 contains no intergovernmental or private-sector mandates as defined in UMRA. The bill would authorize water projects and provide other assistance that would benefit state, local, and tribal governments. Any costs to those governments would be incurred voluntarily as a condition of federal assistance.

Estimate prepared by: Federal costs: Jeff LaFave; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

IN REPLY REFER TO:



OCT 22 2009

The Honorable Byron Dorgan
Chairman, Senate Committee on
Indian Affairs
United States Senate
Washington, DC 20510

Dear Senator Dorgan:

In response to your request, this letter presents the views of the Administration regarding S. 965, the "Taos Pueblo Indian Water Rights Settlement Act," as reported by the Committee on Indian Affairs on September 10, 2009. For overall views regarding the purposes and importance of this settlement, I would refer the Committee to testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 9, 2009, on House companion bill H.R. 3254. The House legislation was identical to S. 965 prior to the amendments made by the Senate Committee on Indian Affairs during the markup.

I want to begin by emphasizing, as I did in the testimony delivered at the House hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by S. 965 would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing since 1969, when the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed. Under the terms of the negotiated settlement, the Taos Pueblo (Pueblo) has a recognized right to a total of 11,927.71 acre-feet per year (AFY) of depletion, of which 7,249.05 AFY of depletion would be available for immediate use. The Pueblo has agreed to forebear from using 4,678.66 AFY in order to allow non-Indian water uses to continue without impairment. The negotiated settlement contemplates that the Pueblo would, over time, acquire the right to put its forborne water rights to use through purchasing and

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retiring state-based water rights from willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to acquire enough state-based water to put all its forborne water rights to use, however. The quantity of water secured under the settlement is a tremendous compromise on the quantity of water claimed by the United States and the Pueblo. If the claims asserted in litigation by the United States and the Pueblo were successful, the court could award the Pueblo rights to approximately 78,000 AFY of diversion and 35,000 AFY of depletion of water in the basin. This is very valuable water. The cost of water rights in northern New Mexico is extraordinarily high and has been estimated to be as much as \$10,500 to \$12,000 per acre-foot of consumptive use per year.

We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns that could make this a settlement that the Administration could wholeheartedly support. I will not reiterate the entire statement made by the Administration during the September 9, 2009 House hearing but instead will focus this set of comments on the areas in this legislation that were improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, we believe a closer look can and should be given to the costs of the settlement and the share and timing of those costs to be borne by the United States. S. 965 authorizes a Federal contribution of \$121,000,000, to be paid over 7 years. Of this total, \$88,000,000 is authorized to be deposited into two trust accounts for the Pueblo's use. An additional \$33,000,000, adjusted to reflect changes in construction cost indexes since 2007, is authorized to fund 75% of the construction cost of various projects that have been identified as mutually beneficial to the Pueblo and local non-Indian parties. The State and local share of the settlement is a 25% cost-share for construction of the mutual benefit projects (\$11,000,000). The Settlement Agreement provides that the State will contribute additional funds for the acquisition of water rights for the non-Indians and payment of operation, maintenance and replacement costs associated with the mutual benefits projects. The Administration believes that this cost-share is disproportionate to the settlement benefits received by the State and local non-Indian parties. We believe that increasing the State and local cost share for the mutual benefit projects is both necessary and appropriate, and consistent with the funding parameters of other Federal water resources programs.

An unusual and problematic provision of S. 965 would allow the Pueblo to receive and expend \$25 million for the purposes of protecting and restoring the Buffalo Pasture, constructing water infrastructure, and acquiring water rights before the settlement is final and fully enforceable. The Department believes providing early settlement benefits is not good public policy and has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties only when the settlement is final and enforceable so that no entity can benefit if the settlement fails. Limited departure from this practice may sometimes be appropriate, but there should always be statutory provisions ensuring that the United States is able to recoup

unexpended funds or receive credits or off-sets for the water and funding provided by the United States if the settlement fails and litigation resumes.

The amount of funding that would be provided to Taos before the settlement is final is also of concern. In previous settlements allowing early benefits, the funding was far more limited—less than \$4 million. Although the Department understands the Pueblo's need for immediate access to funds, especially to halt deterioration of the condition of Buffalo Pasture, we remain concerned about the precedent that this would set for the many other pending Indian water settlements that are working their way toward Congress. We recommend that the bill be amended to significantly reduce the amount of early money that is authorized. In addition, we are of the view that the statutory provisions addressing our concern that the United States' ability to receive value for the settlement benefits it has provided in the event that the settlement fails should be strengthened. The Administration suggests that language be added to Section 10(h) to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement, including any water secured for the Pueblo, in the event that the settlement fails.

The Administration notes an amendment made at markup to S. 965 setting a more appropriate deadline for the Department to enter into the contracts. The new language requires the Secretary to enter into the contracts at the date that is 180 days after the date of enactment of S. 965 into law. This language would allow the Secretary 6 months to complete the environmental compliance and other work that must be accomplished before the contracts can be executed. The Administration had recommended that the legislation allow 9 months to complete all necessary work. The new language is an improvement from the original language although we would still recommend building in an additional 3 months to recognize the need for adequate startup time and complete analysis.

We also recommend that the settlement legislation be amended to require Secretarial approval for all water leases and subcontracts. As currently written, section 7(e)(2) exempts leases or subcontracts of less than 7 years duration from the approval requirement. Secretarial approval is required for all existing San Juan Chama subcontracts and we believe there is no reason to depart from that practice here. With respect to leasing other types of water, the requirement of Secretarial approval has been the standard practice in Indian water rights settlements and allows for appropriate environmental compliance to be undertaken. S. 965 as amended deletes the phrase "or subcontract" from this section but this does not address the Administration's concern regarding the appropriateness of Secretarial approval in these circumstances.

Additionally, the United States objects to Section 12(a) -- which waives the sovereign immunity of the United States for "interpretation and enforcement of the Settlement Agreement" in "any court of competent jurisdiction." This section should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in H.R. 3342, the Aamodt Litigation Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication.


Finally, the United States is concerned that after markup S. 965 still fails to provide finality on the issue of how the settlement is to be enforced. The bill leaves unresolved the question of which court retains jurisdiction over an action brought to enforce the Settlement Agreement. This ambiguity may result in needless litigation. The Department of Justice and the Department of the Interior believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

Overall, the negotiated settlement represents a positive step towards the resolution of historic water disputes in an area that has limited water resources and is struggling to support the population it has attracted. It is a settlement that contains many provisions that the Administration can support, which are described in detail in the testimony delivered before the House Subcommittee on Water and Power on September 9, 2009.

In conclusion, I would like to emphasize that this Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results. Neither the Pueblo nor their non-Indian neighbors benefit from continued friction in the basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblo and also ensures that the appropriate costs of the settlement are borne proportionately. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. In addition, we would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,



Michael L. Connor
Commissioner

cc: The Honorable John Barrasso
Vice Chair, Senate Committee on Indian Affairs

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impact of S. 965 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 965 will not make any changes in existing law.

ADDITIONAL VIEWS OF SENATOR TOM UDALL

I am pleased that the Indian Affairs Committee voted to report S. 965, The Taos Pueblo Indian Water Rights Settlement Act. I appreciate the support of my colleagues on this bill and the efforts of the Chairman to move this bill forward in a timely manner.

Following the Committee Business Meeting in which S. 965 was reported, the Administration submitted a letter to the Committee, through Commissioner of Reclamation Michael L. Connor, expressing its views on S. 965. As explained in Commissioner Connor's letter, these views supplement his testimony delivered to the House Subcommittee on Water and Power on September 9, 2009 on identical companion legislation, H.R. 3254.

In response to both the letter and the testimony, I received a letter from Pueblo of Taos Governor Ruben A. Romero, and War Chief Bernard Lujan discussing some of the issues raised. To ensure clarity and completeness of the Committee's report on S. 965, I would like to submit portions of the Pueblo's response that address issues raised by the Administration and Commissioner Connor. In the portions below, the Pueblo refers to the Administration's testimony before the House Subcommittee on Water and Power on September 9, 2009 as "Administration Testimony," and the letter submitted by Commissioner Connor to the Committee as the "Connor letter." The Pueblo's letter stated in part:

We commend Commissioner Connor and this Administration for their vision and commitment to our settlement efforts that have resulted in strong Administration support for the core settlement components and no objection to the overall cost of our settlement.

As Commissioner Connor's letter highlights, substantial compromises by Taos Pueblo have also made this achievement possible. We are waiving the vast majority of our formidable senior historic water rights claims—approximately 23,000 AFY—and settling for 11,927.51 AFY of depletion rights. As Commissioner Connor emphasizes, "[t]his is very valuable water" that "has been estimated to be as much as \$10,500 to \$12,000 per acre-foot of consumptive use" (Connor letter at 2). Simple math therefore suggests the value of this "tremendous compromise" (Administration Testimony at 4) ranges over \$240 million—far in excess of the settlement funding for the Pueblo of \$88 million and the total federal settlement funding of \$121 million. The Administration further recognizes there is "no guarantee that the Pueblo will be able to acquire enough state-based water to put all its forborne water rights to use" (Connor letter at 1–2). As Commissioner Connor has noted, "[t]he United States participated actively in the negotiations . . . and was able to resolve most issues of concern to the Government" (Administration Testimony at 3). "The willingness of the Pueblo, in particular, to agree to reasonable and necessary compromises has been impressive" (id). Several of our additional significant compromises

and the associated core settlement components are summarized in the Administration Testimony under “Provisions that the Administration Supports”:

- Waivers and releases of claims (Administration Testimony at 4);
- Funding for the “central and noteworthy” protection of our sacred Buffalo Pasture (id. at 4);
- “Perhaps the most significant positive attribute of the negotiated settlement is that it solidifies and makes permanent many water sharing arrangements that the Pueblo and its non-Indian neighbors have struggled for years to establish” (id. at 5); and
- “Overall, it provides some innovative mechanisms for managing water in Taos Valley to satisfy the Pueblo’s current and future water needs, while minimizing disruption to non-Indian water users” (id. at 6).

We have made further compromises to address the current Administration’s concerns through amendments (1) deleting the exemption from Secretarial approval of subcontracts of San Juan-Chama Project (SJCP) water for terms less than 7 years in Section 7(e)(2), and (2) extending the time for the Secretary to enter into the SJCP contracts to six months after enactment. We appreciate that the Administration presented its views in the context of its support for the fundamental terms of the settlement and the Pueblo’s substantial compromises and leadership. Our views and the steps we have taken to address the Administration’s four remaining concerns are as follows:

1. “A closer look” at the costs of the settlement and the United States” share has shown they are reasonable and appropriate

A close look at the costs of the settlement and the share of costs borne by the United States was taken by the Federal Administration during the many years of settlement negotiations at which the Department of the Interior and the Department of Justice were at the settlement negotiations table. In addition, in April 2007, Taos Pueblo provided the Federal Administration an updated estimate and justification for the Pueblo’s settlement funds and the other local parties provided updated cost estimates for the Mutual-Benefit Projects.

2. The early timing of a portion of Pueblo settlement funding is necessary to the linchpin components of this settlement that the Administration supports

The Administration notes that “providing early settlement benefits is not good public policy,” and acknowledges that “[l]imited departure from this practice may sometimes be appropriate” (Connor letter at 2). Such a limited departure is appropriate and justified in this case because of the tight connection between the purposes and amount of the early funding and the innovative settlement mechanisms at the core of the settlement that are supported by the Administration as illustrated by the following examples (totaling approximately the \$25 million authorized by S. 965):

- “The Department understands the Pueblo’s need for immediate access to funds, especially to halt deterioration of the condition of the Buffalo Pasture” (Connor letter at 3), which is included in the early funding purposes (Sections 5(a), 5(d)(1) and 6(f)(1));
- Early funding purposes include acquiring water rights to meet the critical initial target level of exercise of our Historically Irrigated Acreage water rights and the staffing needed for the many other water sharing arrangements which the Administration supports (see Administration Testimony at 5);
- Early funding for water infrastructure (Sections 5(a)(1), 5(d), and 6(f)(1)) includes the irrigation infrastructure improvements needed to enable us to reach the HIA initial target; and
- Certain Pueblo drinking water infrastructure problems identified by the Indian Health Service as in need of urgent attention are eligible for this early funding.

While the dollar amount of the early funding is greater than that of settlements dating back six and ten years ago, it is commonly known that the costs of water rights, for instance, have dramatically increased, and the overall costs of the Taos settlement are quite modest in comparison with enacted and pending Indian water rights settlements, especially given the claims we are waiving. The existing language in Section 10(h)(3) allows the United States the right “to set off any funds expended or withdrawn” from the early funding for water rights purchases and other early funding purposes “against any claims asserted by the Pueblo against the United States relating to water rights in the Taos Valley.” Although we believe this sufficiently addresses the Administration’s concern “that no entity can benefit if the settlement fails” (Connor letter at 2), we welcome their suggestions for clarification.

3. The remaining exemption from Secretarial approval of leases of water rights appurtenant to tribal lands is consistent with exceptions in recent settlement legislation

We agreed to the Administration’s request to eliminate the exemption in Section (7)(e)(2) from Secretarial approval for subcontracts of our SJCP contract rights. Since the Administration’s additional concern about the short-term lease exemption came to light, we have explained why retaining the exemption for leases of less than 7 years is consistent with precedent, policy and practice (compare Pub. L. No. 111–11, § 10701(d) (no Secretarial approval required for Navajo Nation leases, contracts or other transfers of water rights not under federal water contract) with id. § 10701(c)(1)(B) (Secretarial approval required for subcontracts of federal contract water); see also Snake River Water Rights Act of 2004, Pub. L. No 108–447, § 7(g) (subject to Water Code and without further approval of the Secretary, Snake River Tribe may lease reserved water right through state water bank). We appreciate that the Secretary’s Office of Indian Water Rights is engaged with us in reviewing these and other comparable exceptions from the “standard practice” (Connor letter at 3).

4. The limited waiver of sovereign immunity in Section 12(a) is appropriate

Section 12(a) was revisited at length in our negotiation of waivers and releases of claims with the Departments of Justice and Interior last fall. Rather than “engender additional litigation” (Connor letter at 3), we believe the limited waiver in Section 12(a) “if any Party to the Settlement Agreement brings an action in any court of competent jurisdiction over the subject matter relating only and directly to the interpretation or enforcement of the Settlement Agreement or this Act . . . for the limited and sole purpose of such interpretation or enforcement” will avoid future frivolous litigation over whether the McCarran Amendment, 43 U.S.C. § 666, which waived the United States’ sovereign immunity for “adjudication” and “administration” of water rights, also waived immunity from suits to enforce water rights settlements. Moreover, similar provisions to Section 12(a) have been enacted for other Indian water rights settlements.

TOM UDALL.

