

ADDITIONAL VIEWS OF  
THE HONORABLE TOM McCLINTOCK

On September 30, 2009, the Natural Resources Committee met to mark up H.R. 3254. This bill authorizes the Secretary of the Interior to approve the settlement of water rights claims of the Taos Pueblos.

This bill rightly attempts to resolve longstanding Indian water rights claims, but Congress lacks sufficient information to assess whether the \$136 million authorized in this legislation is appropriate. Therefore, as Ranking Republican of the House Water and Power Subcommittee, I have serious fiscal concerns with this well-intended bill.

It is important that Congress play a role in settling Indian water rights claims, some of which comprise the oldest standing litigation in the federal court system. Settling legal claims not only resolves litigation but also can help establish water supply certainty for water users on and off reservations.

But Congress must also answer key questions when it considers these and other settlements and should not be just a rubber stamp. For example, one of the most important questions involving a settlement—especially when American taxpayer dollars will be used—is whether resolving the litigation will be advantageous to the federal government compared to its liability under current law. That question has not been answered for H.R. 3254.

If Congress were the board of directors of a private corporation deciding whether to approve a negotiated legal settlement, we would be guilty of breaching our fiduciary responsibility to stockholders if we made that decision without consulting legal counsel to determine the company's financial exposure absent the settlement.

Since this question remains unanswered, Congress is forced to be the arbitrator between sides involved in the litigation. This is a role Congress should not be forced to assume without sufficient information. Given the astounding fact that the current Administration has expressed general fiscal and other reservations about this bill, Congress should ask for and deserves answers. As part of this, Department of the Interior was asked for its views on the bill as passed by the Natural Resources Committee. The Department's response to Congress, which is attached, clearly indicates there are numerous issues that still need to be resolved.

I also sent a letter on September 25, 2009 to the Department of Justice asking for opinions on this legislation. The letter specifically asks the Attorney General to provide his view on the "likelihood that the recipients of water rights and funds transferred by these settlements would prevail on the merits of their claims and whether these settlement amounts represent a net benefit to the taxpayers as compared to the consequences and costs of litigation."

To date, I have not received a response from Justice to this question, and I fundamentally believe that Congress needs this and other answers before moving forward with spending hundreds of millions of American taxpayer dollars.

My request is based on precedent. In an appearance before the Natural Resources Committee on legislation resolving Colville Indian claims, a Clinton Administration Justice Department official testified in 1994, “[T]he Federal government is not that well postured for a victory on this claim which has been pending for over 40 years. Absent the settlement, we could well litigate it for another ten years and the outcome could easily be a significant cost to the taxpayers and the public.” This testimony was very helpful in moving that legislation forward. According to the Congressional Research Service, Justice Department officials have testified on additional settlements pending before Congress, so there is no reason why this Congress should act without similar information on this bill.

Without these transparent answers and with the large amount of taxpayer funding in this bill—scored by the Congressional Budget Office as \$25 million for 2010–2014 and an additional \$114 million after 2017—I have serious concerns with the way this Congress and the Obama Administration are moving forward on H.R. 3254 and Indian water rights settlement bills in general.

TOM McCLINTOCK.