

**WRITTEN TESTIMONY OF THOMAS BUSCHATZKE
DIRECTOR
ARIZONA DEPARTMENT OF WATER RESOURCES
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER, OCEANS, AND WILDLIFE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 2459, HUALAPAI TRIBE WATER RIGHTS SETTLEMENT ACT OF
2019**

JUNE 26, 2019

Chairman Huffman, Ranking Member McClintock, and members of the Subcommittee:

I. Introduction

My name is Thomas Buschatzke. I am the Director of the Arizona Department of Water Resources. Thank you for the opportunity to testify on behalf of the State of Arizona on H.R. 2459, the Hualapai Tribe Water Rights Settlement Act of 2019. The State of Arizona strongly supports this legislation.

II. Importance of settling Indian water rights claims in Arizona

There are 22 federally recognized Indian tribes within the State of Arizona. The total population of all Indian tribes in Arizona as of 2010 was 234,891, which is the third highest among all states. The total area of all Indian reservations in Arizona is approximately 20 million acres, which is second only to Alaska. Arizona ranks first among all states in the percentage of tribal land in the state – 27.7 percent. Indian tribes in Arizona have some of the oldest and largest claims to water in the state.

Half of the 22 federally recognized Indian tribes in Arizona still have unresolved water rights claims. Resolving these claims through settlement a priority for the State, not only because it will avoid the cost and uncertainty of litigating the claims, but it will provide certainty to all water users in the state regarding available water supplies in the most expeditious manner possible. In many cases, a settlement will also provide the tribe with funding to construct the infrastructure necessary to put its water supplies to beneficial use.

III. Hualapai Tribe's water rights claims

The Hualapai Tribe is one of the eleven Indian tribes in Arizona with unresolved water rights claims. The Tribe's main reservation covers approximately one million acres in the northwestern portion of the state. The Colorado River forms the northern boundary of the reservation, and the Grand Canyon National Park is located immediately north of the reservation. The Tribe also has reservation and trust lands south of its main reservation in the Bill Williams River watershed.

The Tribe has asserted claims for both groundwater and surface water for its reservation and trust lands. The Tribe's claims include a claim to water from the Colorado River, a critical water supply for agricultural, municipal and industrial water users along the Colorado River, as well as water users in Central Arizona using Colorado water delivered through the Central Arizona Project ("CAP").

The Tribe claims a right to Colorado River water for domestic, municipal and industrial uses on its reservation and trust lands, including use at Grand Canyon West. Grand Canyon West is a major tourist attraction located adjacent to the Grand Canyon on the Tribe's main reservation. One of the main features of Grand Canyon West is the Skywalk, a glass walkway overhanging the Grand Canyon where tourists can walk out and look through the glass walkway to the bottom of the Canyon. Over one million visitors come to Grand Canyon West each year, providing a major source of income for the Tribe and making it a key employment center in the region.

IV. Settlement Negotiations with Hualapai Tribe

In late 2011, the State of Arizona and several other major water users in the state (collectively referred to as the "State Parties") began negotiating with the Hualapai Tribe for a comprehensive settlement of the Tribe's water rights claims. The United States participated in the settlement negotiations through a negotiating team appointed by the Secretary of the Interior. Early in the settlement negotiations, the Tribe and State Parties agreed that as part of a comprehensive settlement of the Tribe's claims, the Tribe should receive an allocation of CAP water from the volume of Non-Indian Agricultural ("NIA") priority CAP water set aside for future Indian water rights settlements in Arizona in the Arizona Water Settlements Act of 2004 (Public Law 108-451, Section 104(a)). The Tribe and the State Parties also agreed that the settlement should include an authorization by Congress of an appropriation of monies to construct a pipeline to carry the CAP water from the Colorado River to Peach Springs, the Tribe's main residential center, and Grand Canyon West.

V. Hualapai Phase 1 Settlement

In late 2012, the parties agreed to bifurcate the settlement into two phases, with Phase 1 resolving only the Tribe's water rights claims in the Bill Williams River watershed and Phase 2 settling all the Tribe's remaining water rights claims in Arizona, including its claims to water for its main reservation. The settlement was bifurcated so that Phase 1 could become effective as soon as possible without waiting for the comprehensive settlement to be negotiated. Finalization of the Phase 1 settlement by the end of 2015 was necessary to expedite a water rights transfer as part of the settlement, resulting in benefits to a state party, the federal government and the environment.

The Phase 1 settlement was approved by Congress in December 2014 and became law on December 16, 2014 (Public Law 113-223). The settlement became effective in December 2015 after all the conditions for the settlement were met.

Although the Phase 1 settlement was not a comprehensive settlement of the Hualapai Tribe's water rights claims, it included the following provisions designed to facilitate a comprehensive Phase 2 settlement that would include an allocation of CAP water to the Tribe:

1. An agreement by Freeport Minerals Corporation ("Freeport"), one of the State Parties, to transfer \$1 million to the Tribe as a contribution toward the cost of the Tribe's study of alternative water projects to transport CAP water to its main reservation from the Colorado River.
2. An agreement by Freeport to contribute money to the Hualapai Tribe Economic Development Fund to enable the Tribe to acquire additional Colorado River water rights with the intent to increase the security of the Tribe's water rights, and to otherwise facilitate the use of water on the Tribe's reservation.
3. An acknowledgement that Freeport's contribution to the Hualapai Tribe Economic Development fund will be considered a non-federal contribution that counts toward any non-federal contribution associated with a settlement of the claims of the Tribe for rights to Colorado River water.

Before the Phase 1 settlement agreement became effective, Freeport transferred \$1 million to the Tribe for the study of water project alternatives. After the Phase 1 settlement became effective, Freeport made a multimillion-dollar contribution to the Hualapai Tribe Economic Development Fund for the purpose described above.

VI. Hualapai Phase 2 Settlement

During negotiations for a Phase 2 settlement, the Tribe contracted with an engineering firm to conduct a study of alternative projects to bring CAP water from the Colorado River to Peach Springs and Grand Canyon West on the Tribe's reservation. The Tribe paid for the study in substantial part with the \$1 million that Freeport contributed for that purpose as part of the Phase 1 settlement. The study concluded that the most feasible project was a pipeline carrying the CAP water from Diamond Creek, located near the southeastern portion of the Tribe's reservation, to Peach Springs and then on to Grand Canyon West, a total of 70 miles.

In June 2016, the Tribe and the State Parties agreed to the terms of a Phase 2 settlement. The key provisions of the settlement are the following:

1. The Tribe will receive an allocation of 4,000 acre-feet per year of NIA priority CAP water from the volume of NIA priority CAP water set aside for future Indian water rights settlements in section 104(a) of the Arizona Water Settlements Act of 2004.
2. The United States and the State of Arizona will each firm 557.50 acre-feet per year of the Tribe's NIA priority CAP water to the equivalent of the higher priority CAP municipal and industrial priority water during water shortages.
3. The Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation, will plan, design, and construct the Hualapai Water Project, which includes a pipeline to convey not less than 3,414 acre-feet per year of Colorado River water from Diamond Creek to Peach Springs and Grand Canyon West for municipal, commercial, and industrial uses. Congress will authorize an appropriation of \$134.5 million for construction of the Project, \$32 million for operation, maintenance and replacement costs by the Tribe, and \$7 million for use by the Secretary of the Interior in operating the water project before title is conveyed to the Tribe and to provide technical assistance to prepare the Tribe for the operation of the Project.
4. The Tribe will have the right to use all groundwater under and surface water on its reservation and trust lands.
5. Certain lands adjacent to the Tribe's reservation will be brought into reservation status and certain lands owned in fee by the Tribe near its reservation will be held in trust for the Tribe by the Secretary of the

Interior. No additional lands may be brought into trust for the Tribe without approval by Congress.

6. The Tribe, the United States and the State Parties will execute mutual waivers of claims for water rights and injury to water rights.

Legislation authorizing and approving the settlement was introduced in the Senate in 2016 (S. 3300) and in both the Senate and the House of Representatives in 2017 (S. 1770 and H.R. 4723). The 2016 Senate bill was heard by the Senate Committee on Indian Affairs on September 14, 2016 and the 2017 Senate bill was heard by the Senate Committee on Indian Affairs on December 6, 2017. Neither Senate bill was enacted into law. The 2017 House bill did not receive a hearing and was not enacted into law.

VII. The State of Arizona Supports H.R. 2459

The State of Arizona strongly supports H.R. 2459. The State believes the Phase 2 settlement authorized by the legislation is a reasonable and fair settlement that will benefit the Hualapai Tribe, the State of Arizona, Arizona water users and the United States.

A. Hualapai Tribe

For the Hualapai Tribe, the settlement provides a renewable water supply and the infrastructure to convey that water supply from the Colorado River to critical areas on the Tribe's reservation. Because there are no significant surface water streams on the reservation, water from the Colorado River is the only renewable water supply available to the Tribe. The water supply will serve the Tribe's main population center at Peach Springs, which is currently served groundwater from wells that are experiencing declining water levels. The water supply will also serve Grand Canyon West, the only viable economic development area on the Tribe's reservation. Grand Canyon West is currently served groundwater from a low-production well approximately 35 miles away.

A pipeline to bring Colorado River water to Grand Canyon West is essential for further economic development on the Tribe's reservation. The Tribe's reservation is in a location with breathtaking views of the west rim of the Grand Canyon. This provides the Tribe with a unique asset that is a significant economic development resource. Currently, over one million visitors come to Grand Canyon West each year to walk on the Skywalk and experience the views of the Grand Canyon. The Tribe would like to further develop Grand Canyon West to include additional tourist attractions that

would significantly increase the number of visitors each year. However, development at Grand Canyon West, and the annual number of visitors, is essentially capped at current levels due to the lack of additional water supplies for the area. Construction of a pipeline to bring Colorado River to Grand Canyon West would remove that cap and allow the Tribe to fully utilize the unique asset on its reservation for economic development.

In addition, the current lack of water supplies prevents the Tribe from constructing housing near Grand Canyon West for the employees who work there. As a result, most of those employees live in Peach Springs and drive to work each day over a dirt road. The travel time is two hours each way in good weather, for a total travel time of four hours each day. Travel time is significantly longer in wet or snowy conditions. Construction of a pipeline to carry Colorado River water to Grand Canyon West would allow the Tribe to construct a residential community near Grand Canyon West where its employees can live. Housing closer to Grand Canyon West will benefit the employees and their families who would have more time together.

B. State of Arizona and Arizona Water Users

For the State of Arizona, the settlement is a major step toward resolving the outstanding water rights claims of Indian tribes in the state. Resolving the Hualapai Tribe's claims through settlement will avoid the costs and risks associated with litigating the claims and will provide certainty to water users in the state. Perhaps the main risk to water users in the state from litigating the Tribe's claims is a risk to their Colorado River water supplies. As mentioned previously, the Tribe's reservation is located adjacent to the Colorado River and the Tribe has asserted claims to water from the River. The water from the Colorado River that the Tribe will receive through the settlement will not affect the Colorado River entitlements of other water users in the State because the Tribe will receive a portion of the NIA priority CAP water being held by the Secretary of the Interior for Indian water settlements in the state.

The settlement will allow further development of Grand Canyon West, which would result in additional employment on the reservation and an increase in tourism at that location. This, in turn would benefit the economy of the region and would increase tax revenues for both local governments and the State of Arizona.

Another benefit to the State of Arizona is that the settlement will provide the Tribe with a renewable water supply to replace its current groundwater pumping. Use of renewable water supplies instead of groundwater is consistent with the State's policy of preserving groundwater supplies for

times of drought. Additionally, because the aquifer beneath the Tribe's reservation extends to areas off the reservation, the Tribe's use of a renewable water supply will help preserve groundwater supplies for non-tribal water users in the region. This is especially important in this area of the state, where the groundwater supplies are limited and there is minimal groundwater recharge.

C. United States

For the United States, the settlement will avoid the costs and risks to the United States associated with litigating the Tribe's water rights claims. The risks include the possibility that the Tribe would prevail in an action in the Court of Federal Claims to recover damages against the United States for failing to protect its water rights.

In addition to avoiding the costs and risks of litigation, the settlement would likely result in a significant economic benefit to the United States Treasury. The Tribe contracted with Professor Joseph P. Kalt, Ford Foundation Professor (Emeritus) of International Political Economy at the John F. Kennedy School of Government at Harvard University, to prepare a report on the economic benefits of a pipeline to carry Colorado River water to Grand Canyon West. In his report, Professor Kalt concluded that the pipeline would result in significantly more visitors to Grand Canyon West, and that over a 50-year period, the benefits to the United States from increased federal tax revenues resulting from the additional visitors would greatly exceed the federal outlays for construction, operation, and maintenance of the pipeline. Professor Joseph P. Kalt, *Economic Impact of the Hualapai Water Rights Settlement and Proposed Diamond Creek Pipeline*, July 16, 2017.

VIII. Concerns Raised by the United States Department of the Interior

In a written statement submitted to the Senate Committee on Indian Affairs on December 6, 2017, Alan Mikkelsen, Chair of the Working Group on Indian Water Settlements for the United States Department of the Interior (DOI), stated that DOI could not support S. 1770, the Hualapai Water Rights Settlement Act of 2017, due to several concerns it had with the legislation. Because S. 1770 is essentially identical to H.R. 2459, I would like to address three of the concerns raised in Mr. Mikkelsen's statement.

A. Cost of Water Supply Project

One of the concerns raised by Mr. Mikkelsen was that DOI believes that the cost to construct the water supply project to carry CAP water from the

Colorado River to the Tribe's reservation will greatly exceed the costs currently contemplated in the legislation. Mr. Mikkelsen stated that DOI believes it should "evaluate the water rights, water availability, and water resource needs of the Tribe from a holistic viewpoint, including information regarding available groundwater resources."

The legislation authorizes an appropriation of \$134.5 million for construction of the water supply project. This is the amount (in 2016 dollars) that the Tribe's consultant, DOWL, estimated the project would cost in a study prepared for the Tribe. DOWL's study was a more thorough study than the typical appraisal level study. DOWL conducted field investigations and arrived at its cost estimates using the same methods that are used by the Bureau of Reclamation to estimate costs. The State of Arizona believes that the costs in the legislation are based on sound estimates of actual construction costs and the State is not aware of any evidence indicating that the project will greatly exceed those costs.

As for the statement that DOI believes it should evaluate information regarding available groundwater resources, the State of Arizona is opposed to a settlement that would require the Tribe to rely on groundwater. The State does not believe that groundwater would be a dependable water supply for the Tribe over the long-term. Given the proximity of the Tribe's reservation to the Colorado River and the absence of significant surface streams on the reservation, the State believes that CAP water from the Colorado River, a renewable water source, would provide a more sustainable water supply for the Tribe. Additionally, as mentioned previously, the use of a renewable water supply is consistent with the State's policy of preserving groundwater supplies for periods of drought.

B. Tribe's Agreement Not to Object to Groundwater Pumping off the Reservation

Mr. Mikkelsen's statement raised a concern regarding the provision in the settlement that prohibits the Tribe and the United States from objecting to any use of groundwater outside the boundaries of the Tribe's reservation. The State of Arizona believes that this is a reasonable provision given that the settlement will allow the Tribe to rely on CAP water from the Colorado River, a renewable water supply, for its current and future water demands. If the Tribe has the ability to use a renewable water supply to meet its demands, there is no need for it to have the right to object to groundwater pumping off the reservation. The Tribe recognizes this, and it has agreed to waive its right to object to off-reservation pumping.

C. Non-Federal Contribution

Another concern raised in Mr. Mikkelsen's statement was that the non-federal cost sharing is not proportionate to the benefits received by the non-federal parties. Mr. Mikkelsen stated that "[w]e believe that the State parties can and should contribute a commensurate share of the cost of the settlement in return for the benefits they will receive." The State of Arizona strongly believes that the non-federal parties, including the State Parties, are contributing a proportionate share of cost of the settlement in return for the benefits they will receive.

As previously mentioned, Freeport made a multimillion-dollar contribution to the Hualapai Tribe Economic Development Fund as part of the Phase 1 settlement. The Tribe may use this money only for the purpose of facilitating settlement of its claims for rights to Colorado River Water by acquiring Colorado River water rights to increase the security of the Tribe's water rights, and to otherwise facilitate the use of water on the Tribe's reservation. As required by the federal legislation approving the Phase 1 settlement, Freeport's financial contribution to the Hualapai Tribe Economic Development Fund must be considered a non-federal contribution towards the Phase 2 settlement.

In addition to the multimillion-dollar contribution to the Hualapai Tribe Economic Development Fund, Freeport provided \$1 million to the Hualapai Tribe to use toward a study of water project alternatives to bring water to the Tribe's reservation. This financial contribution should also be considered a non-federal contribution because it was made for the purpose of facilitating the Phase 2 settlement.

In addition to Freeport's large financial contributions, the State of Arizona has agreed to firm 557.5 acre-feet of the Tribe's 4,000 acre-feet per year allocation of NIA priority CAP water to the equivalent of CAP municipal and industrial priority during water shortages until 2108. The State estimates the cost to firm this water at \$3.25 million dollars.

Finally, the Tribe has agreed to pay the cost of constructing an electric transmission line to supply power to pump the water through the pipeline. The Tribe's consultant estimates this cost at approximately \$40 million. Although this is not a contribution by a State Party, it is a contribution that should be considered when evaluating the percentage of the costs of the settlement that the federal government will not be paying because of non-federal contributions.

The financial contributions that will be made to this settlement by Freeport and the State of Arizona are substantial. The State believes that these

contributions demonstrate that the State Parties are providing cost-sharing proportionate to the benefits they will receive from the settlement. When the \$40 million contribution by the Tribe is added to the State Parties' contribution, the non-federal contributions to the settlement total approximately 30 percent compared to the Federal appropriation. The State of Arizona believes that this is more than an adequate non-federal contribution.

IX. Conclusion

The State of Arizona strongly supports H.R. 2459, the Hualapai Tribe Water Rights Settlement Act of 2019. The legislation authorizes a comprehensive settlement of the Hualapai's Tribe's water rights claims, including its claims to the Colorado River – a critical water supply for water users in the state. Settlement of the Tribe's water rights claims is an important step in achieving the State's goal of settling all outstanding Indian water rights claims in the state. Settlement of the claims will avoid the costs and risks of litigation and will provide certainty to water users in the state.