STATEMENT
OF MICHAEL BOGERT
CHAIRMAN OF THE WORKING GROUP ON
INDIAN WATER SETTLEMENTS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON
NATURAL RESOURCES
ON INDIAN WATER RIGHTS SETTLEMENTS

APRIL 16, 2008

Chairwoman Napolitano and members of the Subcommittee, I would like to thank you for the opportunity to appear before you today to discuss this Administration's policy on Indian water rights settlements. Tribes increasingly seek quantification of their water rights as a way to confirm and protect their interests in vital and culturally significant water resources and bring much-needed economic development to struggling reservation economies. States increasingly seek quantification of Indian water rights in order to provide certainty for holders of State-based water rights, clarify State authority to manage water resources within their borders, and plan for the future. The water rights that Indians own under the U.S. Supreme Court's *Winters* doctrine have been described by Professor Charles Wilkinson as "a shadow body of law"[1] and are often viewed as looming over existing uses in many water basins of the West where Indian water rights have yet to be decreed. Non-Indian communities, relying upon increasingly scarce water supplies, realize that their water rights cannot be secure if their claims are not compatible with Indian water rights and no agreement has been reached.

My experience shows that instead of being a threatening Sword of Damocles hanging over State water rights regimes, Indian water rights can serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future. I saw this happen with the Nez Perce settlement agreement in my home state of Idaho. It is happening today in Arizona, Montana, Nevada, Washington, Utah, and other States with completed Indian water right settlements.

I would like to begin this statement by describing the event held in Arizona one month ago to celebrate the Arizona Water Settlements Act of 2004. The event was attended by almost 400 people from all over the State, ranging from members of the tribes whose water rights were settled through the agreements underlying the act to the mayors of the cities whose municipal supplies were secured to representatives of irrigation districts whose farming rights were protected to U.S. Senator Jon Kyl and other congressional representatives to State and Federal dignitaries. People who had for many years seen each other as rivals for a limited resource came together in celebration of success after a decades-long struggle to craft an agreement that promises to provide sufficient water to

[1] Charles F. Wilkinson, *The Future of Western Water Law and Policy*, *in* INDIAN WATER 1985: COLLECTED ESSAYS 51, 54-55 (Christine L. Miklas & Steven J. Shupe eds., 1986).

meet their future needs and provides a framework for sharing shortages and funding needed investments in a common future.

As noted by the Secretary's remarks on the occasion, delivered by Assistant Secretary – Indian Affairs Carl Artman, the Arizona settlement marked "an important victory in an on-going struggle that will only broaden and intensify in the coming decades." It is undoubtedly true that more communities will struggle with water shortages in the years to come, with drought and climate change exerting pressures to adapt long-term water management to new realities. This Administration, like previous Administrations, believes that when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims. But achieving a settlement is about much more than seeking Federal funding. It is about compromise, from all sides, on fundamentally held beliefs in the name of producing a workable agreement. It is about newfound understandings between neighbors regarding the ways in which their long-term interests are similar, and the ways in which these interests and visions for the future may be different. It is about sharing the burdens, as well as the benefits, that can arise from investments in infrastructure. It is about facing harsh realities about the total resources that are available and about making decisions that will reverberate for future generations of tribal members and non-Indians alike.

The remainder of this statement will focus on two of the fundamental questions regarding Indian water rights settlements. First, I will discuss the reasons settlements are generally preferable to litigation. Then, I will discuss the policies underlying the Administration's guidance on developing a position on proposed Indian water rights settlements, and explain the need for this framework for negotiating settlements. I will end by discussing the need for closer cooperation between different parts of the Federal government in promoting sound settlement policy.

Settlement versus Litigation

Indian water rights are especially valuable in the West for two reasons: first, Indian water rights cannot be lost due to nonuse, and second, Indian water rights have a priority date no later than the date of the creation of a reservation. Because most reservations were established prior to the settlement of the West by non-Indians, even very senior non-Indian water rights are often junior in priority to Indian water rights. Because tribes have lacked resources to develop their own domestic water supply systems, irrigated agriculture or other industry to make use of their water resources, their ability to use their water rights has been limited. As a result, water that would almost certainly be decreed to tribes if an adjudication were held has often been used for years by neighboring non-Indian interests and communities.

In a typical Western stream adjudication, a presiding judge can decree that a Tribe has a right to a certain amount of water of a certain priority date. Even though a judicial decree provides absolute certainty with respect to who owns what water, when compared with the status quo, adjudication may cast an even greater pall of uncertainty over existing water uses in the system with a junior priority date to the tribal water right because those

users have no way of knowing when the tribe will begin to use its water. A judicial decree does not get "wet water" to tribes, nor does it provide new infrastructure or do anything to necessarily encourage improved water management in the future. Negotiated settlements, on the other hand, can, and generally do, address these critical issues. Through a settlement, parties can agree to use water more efficiently or in ways that obtain environmental benefits, or to share shortages during times of drought. In exchange for settlement benefits, tribes can agree to subordinate use of their water rights so that existing water uses can continue without impairment. Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertainties in Federal and State law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

As I have traveled around the country to meet with the tribes and States and local governments that are involved in Indian water rights settlement negotiations, I have heard certain themes repeatedly. First, for tribes, assertion of water rights is a re-affirmation of their sovereignty and a step towards economic self-sufficiency. Second, for States, these negotiations can be an opportunity to resolve outstanding issues that local and state agencies have been unable to conclude or administer successfully in the past. Third, it is clear that many communities favor settlement because they are fed up with top-down governmental decision-making. They want to take their future into their own hands and certainly do not want their future to be decided by the stroke of a judge's pen. Settlement negotiations allow all stakeholders a place at the table and a chance to participate in the decisions that will impact their futures.

For all these advantages, settlement does pose certain risks. Tribes risk being awarded less water than they may be able to obtain through litigation in exchange for other settlement benefits which may be difficult to quantify. Non-Indian communities risk losing a status quo in which they are able to use Indian water without compensating the Tribes. And the Federal government risks being asked to foot the bill for costly water infrastructure projects that will allow existing water users to continue to use the water in the way that built State and local economies while still allowing tribes the right to use water that belongs to them but that they have been unable to use in the past.

The Federal government should provide incentives for stakeholders to consider mutually beneficial settlement rather than rancorous litigation where possible. But there is a line between a reasonably tailored incentive and being placed on the hook for costs that are disproportionate to the benefits of settlement. The next section of this statement discusses the policy guidance that the Executive Branch has used since 1990 to establish a basis for negotiation and settlement of claims related to Indian water resources.

The Role of the *Criteria and Procedures*

There is no cookie-cutter solution to the complex struggles involving tribal, environmental, domestic, industrial, and agricultural claims on limited water supplies that are arising all over the country. However, there are some common challenges in settlements that call for some generally applicable standards to guide the Federal government's participation in settlement negotiations and to inform a decision on whether a proposed settlement should be supported.

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*). These *Criteria* have been followed by all Administrations since 1990. 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. 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.

The *Criteria* are best viewed as standards that the Government can use to weigh the merits of a settlement. In some cases, a settlement that falls short with respect to one or more of the factors specified in the *Criteria* may be so heavily weighted with respect to other factors that the Administration may decide that the settlement overall should be supported, despite misgivings about some aspect of the proposed agreement. Assessing the value of potential claims against the United States also requires calibration to the particular circumstances and the problems that the settlement seeks to address. Furthermore, as legal doctrines involving not only Indian water rights but also applicable environmental statutes such as the Endangered Species Act and Clean Water Act evolve, this liability assessment must also evolve.

Two of the specifically enumerated factors in the *Criteria* reflect an overarching goal of this Administration in evaluating a proposed settlement, which I think of as "peace in the valley." Criterion 7 holds that "[s]ettlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency." In addition to the inherent value of sovereignty to tribes, successful reservation economies are crucial to long-term good relationships between tribal and non-tribal communities. Settlements that can overcome

cycles of poverty and hopelessness on reservations will do a great deal of good in the long term, helping to revive industry and tourism in places that are really struggling as well as furthering the U.S. goal of Tribal self-sufficiency and sovereignty. Another key criterion, criterion 10, addresses the goal of fostering cooperation more directly, stating that "Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties." This criterion calls upon the federal government to use its influence to provide parties with incentives to work together to identify creative solutions rather than be consumed in endless conflict.

Given Interior's historic role as the architect of many of the Congressionally-enacted policies that led to the development of the West, and as the trustee of Federally recognized tribes, the "peace in the valley" factors remain fundamental to this Administration's evaluation of proposed settlements. But we must also take a hard look at the cost-related factors included in the *Criteria* as well in order to ensure that the interests of U.S. taxpayers are being protected. Settlement should not be a blank check for a region to obtain a Federal subsidy that may fairly be viewed as wasteful or excessive. One of the advantages of the cost sharing requirement under the *Criteria* is that the willingness of settling parties to cost share for a project is a good indicator of how truly invested they are in the proposed solution. It is all too easy to be in favor of a plan that comes at the sole expense of the Federal government and all taxpayers. But a settlement to which many interests are contributing deserves to be taken more seriously and given more favorable treatment by both Executive branch and Congressional reviewers.

The Need for Cooperation among Agencies and Branches of Government

The *Criteria* were written to ensure coordination and common purpose among the relevant executive branch agencies- particularly Interior, the Department of Justice, and OMB, but also sometimes including Indian Health Service, the Forest Service, and others. The procedural provisions of the *Criteria* also reference providing briefings for Congress consistent with the Administration's negotiation position on settlements.

As a practical matter, many settlement proponents are finding that the process outlined under the *Criteria* takes a long time and that the Federal position on funding is very different than the levels of funding and non-Federal cost share that they had expected. In this situation settlement proponents have decided that their energies would be better spent convincing Congress to enact their settlement legislation without the support of the Administration. As this Subcommittee wrestles with these requests, we urge caution. The settlements that have been introduced in this Congress so far are still the tip of the iceberg. It is Interior's estimate that as many as 9 settlement bills may be introduced before this session ends. At this time, three of the anticipated 9 have been introduced and have already had hearings in the last year: authorizing legislation for the Duck Valley (S. 462/H.R. 5293), Soboba (H.R. 4841), and Navajo-San Juan (S. 1171/H.R. 1970) settlements.

Since 2002, three bills authorizing Indian Water Rights settlements have been enacted with either the full or qualified support of this Administration: Zuni (P.L. 108-34), Nez Perce (P.L. 108-447), and the Arizona Water Settlements Act (P.L. 108-451). We have testified in favor of a fourth settlement, the Soboba settlement (H.R. 4841), which we hope will be enacted shortly, and against authorizing legislation for two other settlements, the Navajo-San Juan (S. 1171/H.R. 1970) and Duck Valley (S. 462/H.R. 5293) settlements. Enactment of all 9 of the bills that are expected to be introduced this Congress with the funding levels being proposed by non-Federal settlement proponents would subject the Federal government to billions of dollars of additional authorizations.

In considering proposed settlements, we believe it is important to remember the dynamics of settlement. By this I mean that each enacted settlement establishes a benchmark that influences the course of ongoing settlement negotiations in other places. There are currently 19 Federal negotiation teams that have been established to support settlement negotiations, and we have received 7 requests for new teams and believe that more requests will be forthcoming. If this Congress were to proceed to enact numerous settlement bills over the Administration's objection with provisions, including cost share provisions, that are not consistent with the *Criteria*, it would be very difficult in the future for Federal negotiators to participate in settlement negotiations, set realistic expectations, and convincingly hold the line on settlement costs.

In closing, I would like to emphasize the commitment of the Department of the Interior to successful negotiation of these settlements. When nominating then-Governor Kempthorne to serve as the 49th Secretary of the Interior, President Bush specifically noted that one of Governor Kempthorne's qualifications to serve was his previous work to resolve a long-standing water rights issue, which was, of course the Nez Perce agreement in Idaho. The Secretary has made supporting the Indian water rights settlement negotiation process one of his priorities. His staff has travelled all over the West over the last two years to provide technical assistance and support to negotiating teams.

Secretary Kempthorne has personally directed these teams to engage closely in an effort to produce solid achievements rather than just maintain the status quo. To provide a secure foundation for these commitments, we are taking steps to establish the Indian Water Rights office permanently within the Office of the Secretary at the Department of the Interior. This would improve the institutional capacity of the office and confirm its importance to Interior programs and to the future of the West.

Madame Chairwoman, we appreciate your interest in Indian water rights settlements. We look forward to close cooperation with this Subcommittee over the coming year. This completes my statement. I am happy to answer any questions the Subcommittee may have.