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Statement of
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Chairwoman
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Before the Subcommittee on Water and Power
House Resources Committee

Concerning
H.R. 885 – Arizona Water Settlements Act
October 2, 2003

I. INTRODUCTION

Chairman Calvert and members of the Committee. I am Vivian Juan-Saunders, Chairwoman of the Tohono O'odham Nation. The Nation's Reservation is located in southern Arizona, has a land base of 2.8 million acres, and is the second largest Indian reservation in the United States.

On behalf of the 28,000 members of the Nation, I thank you for the opportunity to speak on the Arizona Water Settlements Act of 2003 which is an issue of critical importance to our people. I would like to first express my appreciation to Representative Hayworth who co-sponsored introduction of the Settlements Act with Senator Kyl, as well as other members of the Arizona delegation who have expressed their support.

I would also like to recognize the extraordinary efforts of the negotiating team in reaching a consensus on the issues which enabled the introduction of Amendments to the Nation's 1982 water settlement. The negotiating team included representatives of the Nation, the Nation's Legislative Council, the San Xavier District, the Schuk Toak District, the San Xavier allottees, the San Xavier Cooperative Farm, the State of Arizona, the City of Tucson, Asarco Incorporated and Farmers Investment Company. Officials in the Interior Department also actively participated in the negotiations.

The written testimony filed with this Subcommittee includes a detailed summary of the Southern Arizona Water Rights Settlement Act of 1982 ("SAWRSA"); the Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments"); and cost and appropriation items related to the Amendments.

I would like to focus on the benefits which would be realized by water users in the Tucson Management Area ("TMA") as a result of the enactment and implementation of the Settlements Act, with particular emphasis on the Amendments.

1. What has historically been wide-spread uncertainty regarding the rights of water users in the TMA would be transformed into certainty regarding these rights.

2. Receipt of several significant benefits under SAWRSA was conditioned on final dismissal of the underlying water litigation (United States v. Tucson), including the annual delivery of 28,200 acre-feet of water within the San Xavier and eastern Schuk Toak Districts of the Nation; and collection of damages by the Nation for failure of the United States to deliver water to the Districts. (Under the Amendments, the damage remedy would also apply to a failure of the United States to complete the rehabilitation and extension of the Cooperative Farm within stated deadlines.) In addition, the agreement by the Nation to waive and release past and future water claims, and past injuries to water rights, only takes effect on final dismissal of United States v. Tucson. By agreement among the parties to the Amendments this lawsuit will be dismissed with prejudice. Under the Amendments, the waiver and release of claims also extends to future injuries to water rights.

3. The parties' commitment to dismiss the lawsuit was predicated on resolving long-standing differences of opinion between the Nation, the San Xavier District and the San Xavier allottees regarding the division of

water and financial benefits under SAWRSA. These disputes have been settled as follows:

(a) The Amendments provide an apportionment of water between the Nation, and the San Xavier District and San Xavier allottees.

(b) The Amendments provide the San Xavier District with the option to cash out the construction costs of a new farm authorized for construction under SAWRSA. If that option is exercised, the District and the allottees will be entitled to use the funds for a variety of purposes.

(c) The Nation has agreed to make a substantial financial contribution to subjugate lands within the proposed extension of the allottees' Cooperative Farm, provide working capital for the Cooperative Farm and to remediate contaminated groundwater within the San Xavier District. The amount of this contribution significantly exceeds the appropriations required by the Amendments.

4. A reliable source of funding is critical to the timely implementation of the Amendments. The interest on the Cooperative Fund established under SAWRSA is inadequate to fund the costs required to fulfill the obligations of the United States imposed by SAWRSA and the Amendments. This shortfall is addressed in the Amendments.

(a) The Amendments provide for a significant adjustment in the principal amount of the Fund.

(b) The Amendments also provide for the deposit in the Fund of all proceeds of sale of recharge credits received by the United States in a managed recharge project in the Santa Cruz River, using a portion of the 28,200 acre feet of effluent water deliverable by Tucson under SAWRSA.

(c) The Amendments authorize the use of the Lower Colorado River Basin Development Fund to pay identified costs of implementing the settlement.

5. Under the Amendments and related Settlement Agreement:

(a) Tucson has agreed to provide \$300,000 to repair sinkhole damage in the San Xavier District on allotted lands and lands held in trust for the Nation. Tucson has further agreed that the Nation's claims for subsidence damages in the San Xavier and eastern Schuk Toak Districts are preserved, and will be processed pursuant to the procedures outlined in the agreement.

(b) Asarco has agreed to accept Central Arizona Project (CAP) water for processing ore at the Mission Mine and reduce groundwater withdrawals by an acre foot for each acre foot of CAP water delivered. The intended effect of this exchange is to stabilize or elevate the groundwater table in the San Xavier District. Subject to receiving adequate security to assure repayment, the Nation has agreed to provide a loan to Asarco of up to \$800,000 to construct the CAP delivery system to the Mine.

(c) Farmers Investment Company has agreed to various limitations on its groundwater withdrawals affecting the San Xavier District. The agreement will be recorded in the official records of Pima County to assure the limitations bind successors in interest.

6. Finally, certain provisions of Title I of the Settlements Act are essential to implementation of the Amendments.

(a) SAWRSA did not identify the source for the 28,200 acre feet of water. Title I identifies CAP agricultural priority water as the source of water to satisfy the annual delivery of the 28,200 acre feet identified in SAWRSA.

(b) Title I obligates the United States to firm the 28,200 acre-feet of CAP agricultural priority water to a municipal and industrial delivery priority, with financial or in kind assistance provided by the State of Arizona.

(c) Title I provides that unallocated CAP water and dedicated funding will be available for future Indian water settlements. These features of the Settlements Act are of particular importance to the Nation in order to facilitate the settlement of the Nation's remaining water claims in the Sif Oidak District and portions of adjoining Districts which are within the boundaries of the Pinal Active Management Area.

II. SOUTHERN ARIZONA WATER

RIGHTS SETTLEMENT ACT OF 1982

A. Overview of Settlement

In 1975 the Papago Tribe (now the Tohono O'odham Nation), the United States and two individual Indian allottees, as representatives of a class of Indian trust allotment landowners in the San Xavier District, sued the City of Tucson and other water users in the Upper Santa Cruz Basin, claiming damages and seeking to enjoin pumping of groundwater (United States v. Tucson). There was concern that the litigation would cast a cloud over the future of the Tucson area. Local entities engaged in extensive negotiations with the United States and the lawyers for the Indian parties and finally reached a settlement in 1982. In October 1982, Congress passed the Southern Arizona Water Rights Settlement Act of 1982, 96 Stat. 1274 ("SAWRSA"), which embodied the settlement.

The terms of the settlement called for the Nation to receive, without charge, farm improvements, 66,000 acre feet of water annually, the right to pump 10,000 acre feet of groundwater annually within the San Xavier District and a \$15 million trust fund. (Of the 66,000 acre feet, 37,800 acre feet is the Nation's contracted Central Arizona Project (CAP) water for the San Xavier District and the eastern Schuk Toak District.[1] An additional 28,200 acre feet of the water was to be acquired by the Secretary and delivered after United States v. Tucson was dismissed.) The City was required to transfer 28,200 acre feet of effluent water to the United States and, with the State and other local entities, to contribute a total of \$5.25 million to a Cooperative Fund. Interest on the Cooperative Fund was available to the United States for payment of the ongoing costs of implementing the settlement. The San Xavier allottees' water rights were to be satisfied out of water provided to the Nation in the settlement.

The City, State and local interests timely performed all of their obligations under the settlement and the Nation agreed to dismiss the case. The San Xavier allottee landowners objected to certain aspects of SAWRSA and opposed dismissal of the litigation.

In 1993, allottees filed a class action lawsuit (Alvarez v. Tucson) in which they sought to enjoin groundwater pumping by the City and others, and asserted more than \$200 million damages. Individual San Xavier allottees also filed a lawsuit in 1993 against the United States (Adams v. United States) which asserted breaches of trust related to the allottees' land and water resources, and sought declaratory and injunctive relief. Dispositive motions in these lawsuits are pending before the Court. Rulings on the motions have been suspended to allow the SAWRSA parties to negotiate amendments which would resolve the outstanding issues among the parties.

For many years, the Nation, the San Xavier District, the Schuk Toak District, the allottees, the City of Tucson, the State of Arizona, Asarco Incorporated and Farmers Investment Co. negotiated amendments to SAWRSA that would allow full implementation of the settlement, provide important clarification in the allocation of existing benefits, and provide more flexible water use by the parties.

B. Specific Benefits and Obligations of Parties

The following is a summary of the substantive provisions of SAWRSA, as amended by the Southern Arizona Water Rights Technical Amendments Act of 1992 (106 Stat. 3256).

Nation's Benefits:

1. The United States is required to annually deliver 37,800 acre feet of CAP water without the Nation having to pay any OM&R or capital charges.
 - a. 27,000 acre feet for San Xavier District
 - b. 10,800 acre feet for eastern Schuk Toak District
2. The United States is required to improve and extend the allottees' Cooperative Farm in San Xavier and to construct irrigation works for a new farm in San Xavier to take the CAP water.
3. The United States is required to annually deliver an additional 28,200 acre feet of water suitable for agriculture, after the pending water claims litigation is finally dismissed.
 - a. 23,000 acre feet to San Xavier District

b. 5,200 acre feet to eastern Schuk Toak District

4. If the United States fails to deliver any of the 66,000 acre feet in any year after October 1992, it must pay the Nation damages equal to the value of the undelivered quantity of water (the deadline was extended to June 30, 1993 by the Technical Amendments enacted in 1992).

5. The United States established a \$15,000,000 Trust Fund which is managed by the Nation, the interest from which can be used to develop land and water resources within the Nation.

Nation's Obligations:

1. The Nation agreed to file a stipulation for dismissal of United States v. Tucson, and to file in court the allottee class representatives' petition to dismiss.

2. The Nation agreed to waive and release all past claims of water rights or injuries to water rights, and to waive and release all future claims of water rights. This waiver and release encompasses past and future claims of federal reserved water rights in the San Xavier District and the eastern Schuk Toak District. The waiver and release does not take effect until United States v. Tucson is finally dismissed.

3. The Nation agreed to limit pumping of groundwater:

a. To 10,000 acre feet per year in the San Xavier District

b. To the 1981 pumping amount in the eastern Schuk Toak District

4. The Nation agreed to comply with the water management plan established by the Secretary of the Interior.

City's Obligations:

1. The City agreed to make 28,200 acre feet of effluent available to the Secretary.

2. The City contributed \$1,500,000 to a Cooperative Fund, the interest from which is for "carrying out the obligations of the Secretary" under provisions of the settlement.

Other Obligations:

1. Other contributors to the Cooperative Fund were:

State of Arizona \$2,750,000

Anamax, Cyprus-Pima, AS&R \$1,000,000

("Asarco"), Duval & Farmers

Investment Co. ("FICO")

United States \$5,250,000

2. If United States v. Tucson was not dismissed by October 1985, the Cooperative Fund was to be terminated and the contributed funds returned to the contributors (this provision was deleted by the Technical Amendments in 1992).

3. The United States is not obligated to annually deliver the 28,200 acre feet of water to the Nation until United States v. Tucson is finally dismissed.

4. The United States is not obligated to pay the Nation damages for failure to annually deliver any of the 66,000 acre feet of water until United States v Tucson is finally dismissed.

5. The Nation can only use its settlement water within the Tucson Management Area (TMA).

6. The Nation can sell or lease settlement water, but only within the TMA.

III. SOUTHERN ARIZONA WATER RIGHTS

SETTLEMENT AMENDMENTS ACT OF 2003

The Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments") appears as Title III in the Arizona Water Settlements Act of 2003 (the "Settlements Act"). Subject to the satisfaction of all conditions to the effective date of the Amendments (Section 302), the Amendments will clarify, restate, supplement and modify the provisions of SAWRSA in the following respects:

1. The Secretary would be obligated to annually deliver 28,000 acre feet of water from the federal share of CAP water. The Secretary and the State are required to cooperate in a program to firm this CAP water for municipal and industrial delivery priority pursuant to the obligations in Section 105 of Title I to the Settlements Act.
2. The Secretary would be required to rehabilitate and extend the allottees' existing Cooperative Farm by a date certain, or pay specified penalties. The Farm would be extended to 2,300 acres. Rehabilitation of the Cooperative Farm would include bank stabilization on the Santa Cruz River and repair of sinkholes.
3. Pursuant to an agreement between the Nation, the San Xavier District and the allottees, the Nation would make a substantial financial contribution for subjugation of lands within the proposed extension to the Cooperative Farm, working capital for the Cooperative Farm and a fund to remediate contaminated groundwater within the District.
4. The San Xavier District would receive the option of taking cash instead of construction of a new farm.
5. Penalties payable by the United States for failure to timely perform its obligations with regard to the Cooperative Farm and its extension would be payable to the Cooperative Farm Association.
6. The San Xavier District and the allottees would be entitled to annually receive up to 35,000 acre feet of the settlement water for beneficial use, subject to compliance with the Nation's water code.
7. SAWRSA does not provide for specific releases of claims for future injuries to water rights. The release of claims for future injuries to water rights would be required by the Amendments so long as groundwater withdrawals outside the San Xavier District are in compliance with State law and with the related Settlement Agreement.
8. The waiver and release of water rights by the Nation and the allottees, other than the rights established in SAWRSA, would be confirmed, clarified and made more explicit. One of the conditions to the effective date of the Amendments would be final dismissal of the litigation. As to any allottees who opt out of a class, their water rights, if any, would be barred.
9. Lands acquired by the Nation outside the boundaries of the Nation's Reservation which the Nation seeks to have taken into trust by the United States will not include federal reserved rights to surface water or groundwater.
10. SAWRSA now limits the Nation to pumping no more than 10,000 acre feet of groundwater per year within the San Xavier District, with no provisions for underground storage and recovery. The Amendments would create a deferred pumping storage account, with an initial credit to recognize a portion of the groundwater allowance that has not been pumped since 1983. Withdrawals from the deferred pumping storage account could not exceed 10,000 acre feet in any year or 50,000 acre-feet over any ten-year period. The Amendments would also allow direct underground storage and recovery of surface water, in a manner similar to that provided for under current State law. Comparable provisions are made for pumping groundwater within the eastern Schuk Toak District. The Nation could also pump additional groundwater during CAP shortage periods and interruption in CAP deliveries.
11. SAWRSA now requires that all of the Nation's water be used within the boundaries of the Tucson Management Area (TMA). The Amendments would allow the Nation to lease its water outside the TMA, after giving a right of first refusal to users within the TMA. It would also allow the Nation to use a portion of its settlement water within the Nation's Reservation outside of the TMA.
12. A new comprehensive Settlement Agreement among the Nation, the allottee classes, the United States, the State of Arizona, the City of Tucson, Asarco and FICO would be approved by the Amendments.

13. Separate agreements would be entered into among the Nation, United States, allottees and Tucson; the Nation, San Xavier District, allottees, the United States and Asarco; and the Nation, San Xavier District, allottees, United States and FICO. These agreements would be confirmed and approved by the Amendments.

a. The Tucson Agreement provides:

(i) For the payment by the City of Tucson of \$300,000 to the San Xavier District to establish a sinkhole remediation fund to be used to maintain and repair any future sinkholes after the United States has completed its sinkhole repair project.

(ii) For the release by the United States and the allottees of past, present and future claims for damages from sinkholes or subsidence; release by the United States and the Nation of past, present and future claims for damages from sinkholes; and an administrative process for review by the City of any claim of the Nation for damages from subsidence before any court action is filed on such claim.

b. The Asarco Agreement provides:

(i) Up to 10,000 acre feet of the 35,000 acre foot allocation of CAP water for use in San Xavier will be delivered annually to Asarco for mining purposes in exchange for an equivalent reduction in groundwater pumping pursuant to a water agreement with the Nation.

(ii) Asarco will have an option to renew the existing on-Reservation well site lease with the Nation for an additional 25 year term.

(iii) Subject to adequate security to assure repayment, the Nation agrees to loan Asarco up to \$800,000 for construction of a CAP delivery system repayable over a period not to exceed 14 years.

(iv) Pursuant to A.R.S. § 45-841.01, the Nation is qualified to earn marketable storage credits which have an assigned value under the Asarco Agreement and are used to repay the Asarco loan and thereafter apportioned between the Nation and the San Xavier District.

(v) With the exception of discharges of toxic or hazardous substances to groundwater, certain claims for groundwater contamination by Asarco are settled by Asarco payments of water lease delivery charges into a settlement fund, with Asarco making additional direct payment from its funds to the extent of any shortfall in the scheduled payment amount.

(vi) Waivers and releases of all past and future claims by the Nation, San Xavier District, allottees, United States and Asarco related to withdrawal of groundwater by the parties within the TMA.

c. The FICO Agreement provides:

(i) Limitation of 850 acre feet annual withdrawal of groundwater by FICO within two miles of the exterior boundaries of the San Xavier District.

(ii) Limitation of 36,000 acre feet annual withdrawal of groundwater by FICO from all FICO lands.

(iii) Prohibition on FICO from selling groundwater credits to third parties for withdrawal within three miles of the exterior boundaries of the Tohono O'odham Nation.

(iv) Except as otherwise provided in (i), (ii) and (iii) above, waivers and releases of all past and future claims by the Nation, allottees, United States and FICO related to withdrawal of groundwater by the parties within the TMA

(v) FICO shall record the Agreement in the official records of Pima County upon the effective date of the Amendments.

(vi) Terms of the Agreement are binding on heirs, devisees, executors, assigns and successors of the parties.

IV. FUNDING COSTS UNDER AMENDMENTS

The following is a summary of the various provisions in the Amendments that authorize use of the Lower Colorado River Basin Development Fund. The summary first discusses federal obligations in the Amendments that arise from obligations in SAWRSA and second new federal financial obligations under Amendments.

A. FEDERAL OBLIGATIONS ARISING FROM SAWRSA

Section 304(c)(3)(B): Authorizes the Secretary of the Interior to pay to the San Xavier District the sum of \$18,300,000 in lieu of and in full satisfaction of, the obligation of the Secretary to construct a “new farm” in the San Xavier District including design and construction activities relating to additional canals, laterals, farm ditches, and irrigation works for the efficient distribution of water described in section 303(a)(1)(A) of SAWRSA. Use of the funds is regulated pursuant to section 304(f).

History of the Expenditure. Section 303(a)(1)(B) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to improve and extend the irrigation system, including the design and construction of additional canals, laterals, farm ditches and irrigation works, necessary for the efficient annual distribution for agricultural purposes of 27,000 acre feet of water referred to in 303(a)(1)(A) of SAWRSA. Section 304(c)(3)(B) of the Amendments gives the San Xavier District the option to cash out the construction benefit of a new farm and thereby use the portion of the 27,000 acre feet annual distribution not required for the existing or extended Cooperative Farm for other purposes. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Sections 308(d)(2)(A)(i) and (ii): Authorizes the Secretary to enter into a contract with the San Xavier District and to pay a sum not to exceed \$891,200 for the development of a water management plan for the San Xavier District and authorizes the Secretary to enter into a contract with the Nation and to pay a sum not to exceed \$237,200 for the development of a water management plan for the eastern Schuk Toak District.

History of the Expenditure. Section 303(a)(3) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to establish water management plans for the San Xavier District and the eastern Schuk Toak District, that have the same effect as those plans developed under State law. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Section 310(a)(2)(A)(ii): Establishes that the Cooperative Fund may be increased in principal by an amount not to exceed \$32,000,000 based on a determination by the Secretary that the additional funds are necessary to carry out the Amendments and after providing notice to Congress.

History of the Expenditure. Section 313(b)(3)(B) of SAWRSA provided for an additional sum up to \$16,000,000 which the Secretary determined to be necessary to meet the Secretary's obligations, after providing notice to Congress. SAWRSA provides that the \$16,000,000 shall be adjusted pursuant to section 312(b)(2). Section 313(b)(2) states that the adjustment represents the additional interest that would have been earned by the Cooperative Fund had the monies been contributed initially. The Technical Amendments to SAWRSA enacted in 1992 inadvertently dropped the reference to the means for calculating the adjustment. Thus, the requirement to adjust the \$16,000,00 existed between 1982 and 1992.

Section 317(a)(1): Authorizes an expenditure of \$3,500,000 (adjusted for fluctuations in construction costs) to construct features of the irrigation systems described in sections 304(c)(1) through (4) that are not authorized to be constructed under any other provision of law.

History of the Expenditure. Section 303(a)(4) of SAWRSA authorizes the appropriation of up to \$3,500,000, adjusted for fluctuations in construction costs.

Section 317(a)(5): Authorizes an expenditure of \$4,000,000 to carry out section 311(d).

History of Expenditure. Section 303(b)(1) of SAWRSA authorized the Secretary to carry out a study to determine the available and suitability of water resources within the Sells Reservation. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

B. NEW FEDERAL OBLIGATIONS OF AMENDMENTS

Sections 311(c)(1) and (2): Authorizes the Secretary to expend sums not to exceed \$215,000 for the San Xavier District and \$175,000 for the eastern Schuk Toak District for groundwater monitoring programs.

History of the Expenditure. The tribal parties and the federal team reached agreement on this new obligation prior to the introduction of S. 3231, the Arizona Water Settlements Act of 2000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Section 311(f): Authorizes the Secretary to conduct a feasibility study of a land exchange between the allottees and Asarco at a cost not to exceed \$250,000.

History of the Expenditures. This is a new obligation. The introduction of S. 2992, the Arizona Water Settlements Act of 2002, included a land exchange study with Asarco but did not provide a specific dollar amount for the study. The Amendments have included a sum not to exceed \$250,000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

[1]

The Tohono O'odham Nation is the national government and consists of Districts organized as political subdivisions of the Nation. The San Xavier and Schuk Toak Districts are two of the 11 Districts of the Nation. The San Xavier District and the eastern portion of the Schuk Toak District are within the Upper Santa Cruz Basin and are part of the SAWRSA settlement.