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BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES, SUBCOMMITTEE ON WATER AND POWER

"INDIAN WATER RIGHTS SETTLEMENTS"

APRIL 16, 2008

Chairwoman Napolitano and distinguished Members of the Subcommittee, thank you for the opportunity to submit testimony on the topic of Indian water rights settlement agreements. I am Rodney B. Lewis, former General Counsel of the Gila River Indian Community ("the Community"), a position in which I served from 1972 to 2005. During that period, I served as the Principal Negotiator on behalf of the Community in negotiations to settle the Community's significant claims to water from the Gila River and its tributaries, as well as its claims for injuries to the Community's water rights.

BACKGROUND

On December 10, 2004, President George W. Bush signed into law the Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3479 (the "Settlement Act"), which, at least to date, represents the largest settlement of Indian water rights in U.S. history. It also represents the culmination and fulfillment of the century-old hopes and dreams of the two tribes that comprise the Community, the Pimas (Akimel O'otham or "River People") and the Maricopas (Pee Posh). The patience, steadfastness and dedication of the Pimas and Maricopas throughout this century of conflict and, ultimately, reconciliation, resulted in the passage of the Settlement Act and then in the publication in the Federal Register on December 14, 2007 of the Secretary's finding that all the conditions to the enforceability of the Community's settlement had been met.

On that momentous day in December 2007, our settlement became fully enforceable. The Settlement Act will partially rectify years of deprivation of a fair water supply upon which the Community was wholly dependent. Water was and is the life blood of the Pimas and Maricopas. Water was the key to the Community's agriculturally dependent economy and absolutely essential to survival in arid central Arizona. Justice Black in *Arizona v. California*, 373 U.S. 456 (1963) described the situation of Arizona Tribes in central Arizona vividly when he stated, "that most of the lands [in central Arizona] were of the desert kind – hot, scorching sands – and that water from the river would be essential to the life of the Indian people and to the animals they hunted and crops that they raised."

Diversions upstream of the Community's Reservation by non-Indian users began shortly after the end of the Civil War. Ultimately, these illegal diversions caused Gila River water to cease to flow, preventing the irrigation of the fertile fields of the Pimas and Maricopas. The resulting shortage of water caused irreparable damage to the Community, not only to its agricultural economy, but also to the health and welfare of a once prosperous people. The resulting economic poverty and inadequate health care caused numerous health problems, including an epidemic of diabetes. The Community currently has one of the highest rates of diabetes in the world. The key to our future, as it was to our past, is retrieving for the Community its legitimate entitlement to a fair water supply to revive our once vibrant agricultural economy.

WATER RIGHTS LITIGATION

The Community's long road back began in 1925, with the filing of an action in federal court by the United States, after repeated requests and urging by various leaders of the Pima people. The United States settled certain of the Community's claims in this action, over the objection of the Community, in 1935, resulting in a consent decree that is known as the "GE 59 Decree." This consent decree, however, did not address all of the Community's claims to water and did not immediately result in redress for most of the Community's claims.

Congress, too, played an early role in starting a process that would ultimately bring some measure of restitution and redress for the Community's lost water. In 1924, Congress passed the San Carlos Indian Irrigation Project Act, Act of June 7, 1924, 43 Stat. 475. In this Act, Congress authorized the construction of an irrigation project that would be comprised of 50,000 acres of developed land within the Community's Reservation and 50,000 acres of developed land for non-Indian farmers just outside the Community's Reservation.

Predictably perhaps, the promise of this early congressionally authorized irrigation project for the Community's farmers was never fulfilled. Although the SCIIP Act required that the Indian portion of the project be built first, it was never completed, and the off-Reservation portion of the project took priority, resulting in increased depletions of water from the Gila River at the expense of the Community's farmers. To make matters worse, the federal government failed to maintain adequately those portions of the Community's irrigation project that actually were built. Thus, as the Community entered the 1970s, it remained in a position of extreme poverty and without any adequate water supply.

At this point, the federal government, again at the urging of the Community, began a new enforcement proceeding against the non-Indian diverters in the Upper Valley of the Gila River. Moreover, the initiation of a state court adjudication of all rights to the Gila River, including the Community's, brought the Community's significant claims to the Gila River and all its tributaries to the forefront. This constituted the beginning of a thirty year struggle to vindicate the Community's claims for water and at least partially rectify the tremendous damage done to the Community and its people by the misappropriation of its water and the United States failure to protect the Community or

assist adequately in the development of the Community's water resources on-Reservation.

WATER SETTLEMENT PROCESS

The water settlement process for the Community really began in the 1980s after the Community intervened on its own behalf in both the enforcement proceedings against upstream diverters and to assert its own claims, with the United States, in the state court adjudication of the Gila River. It was at this point that I became substantially involved in the negotiation process as the Community's officially designated Principal Negotiator.

Early on, the federal government played an essential role in assisting the Community, both with funds to assist the Community in the engagement of its own experts and lawyers, but also in providing key technical and legal assistance itself, including adding the clout of the U.S. Government's participation in the process. From my own experience, this assistance is critical to any tribe seeking to vindicate its water rights and, as I mention in my recommendations section below, is an area in which the U.S. Government can and should do better.

The initial years of negotiations were frustrating and protracted. With so many State parties affected by our claims, it was, at times, difficult to obtain the focus and attention of a core group with sufficient critical mass to come to terms with us. Again, the role of the United States in this was critical. Ultimately, in 1985, the Community was able to come to terms on a proposed water budget with the State parties and the United States set at 653,500 acre-feet per year as the basis for compromising the Community's claims to water from the Gila River and its tributaries. Around this same time, Congress also authorized, as part of the Central Arizona Project build-out, a major irrigation project (the Pima-Maricopa Irrigation Project), which was intended to supplement and complement the one originally authorized, but never fully built or adequately maintained, in 1924. These two developments would serve as the foundation for the ultimate settlement reached.

Throughout the next years, the Community and the United States continued to negotiate with individual and groups of State parties in an effort to confirm the sources of water that would ultimately fill out the Community's water budget, as well as the means by which the Community was to receive the "wet" water that was to comprise its water entitlement.

The United States role in this part of the process, again, was critical. In this process, the United States Department of Interior recognized its trust responsibility (and concomitant legal exposure) to the Community (and all other Arizona tribes) and determined that, as part of its necessary contribution to the Community's overall settlement, the United States would need to make its portion of the water supply from the Central Arizona Project generally available to tribes in replacement of the water that they had otherwise lost because otherwise State parties would never be willing to settle. Moreover, the Department also recognized that its responsibility included relieving tribes, including the Community, of the responsibility to pay expensive rates for CAP water

which was essentially replacing free water to which the Arizona tribes would otherwise have been entitled.

As a result, in 1995, the Community, the United States, the State of Arizona, and the Arizona state parties came to agreement, not only on the water budget for the Community and an amount necessary to rehabilitate the SCIIP project, but also on a framework by which the funds used to repay the federal government for the construction of the CAP would be used to pay for at least a portion of the costs of the CAP water that the Community and other tribes would obtain as replacement water for the water rights non-Indian users had taken.

Throughout this period, the Community and the United States simultaneously pursued the action in federal court to enforce the Community's existing water rights and the Community's claims to water in the state court adjudication. This meant that the United States not only devoted resources to its own prosecution of these actions and claims, but also that it provided critical financial support to the Community for it to participate as a full partner in them. Because this was a period well before the Community began to develop any means of its own, this financial support was critical to the overall process. Without it, the Community would not have been able to participate as a full partner and would never have been in a position to confirm that the negotiated settlement ultimately reached was a full and fair compromise of its claims.

Beginning in the late 1990s and through 2004, the Community entered a new phase in the pursuit of its settlement. As the outlines of its proposed settlement became clearer, it became essential that the Community finalize a settlement agreement and settlement legislation for Congress to consider. In the process, the United States continued to play an important role, though perhaps less significant than in previous years. This was due, in part, to the Community stepping up its involvement and support for its own efforts, as well as to the fact that the Department of Interior was of the view that it would review and negotiate the U.S. participation in the final agreements and legislation, but would otherwise only support and monitor the Community's extensive and protracted drafting process.

Ultimately, in 2003, with the strong support of Senator Kyl and the entire Arizona congressional delegation, a nearly final settlement agreement and legislation was developed. At that juncture, the Department of Interior fully and completely engaged in a final review and negotiation of the United States' role in the settlement overall. This resulted in a version of both that Congress would ultimately consider and approve in December 2004.

The implementation phase of the Community's settlement then began. This also required substantial U.S. involvement as it entailed the amendment of the draft agreement to conform to the legislation enacted, and the approval of the settlement agreement overall by the federal court in which the Community was seeking to enforce its existing rights, as well as by the state adjudication court in which the Community was pursuing its overall claims to water rights. Throughout this period, the United States, through the federal negotiation team established by the Secretary of Interior, participated and assisted

in the process. Federal financial support for the Community's efforts in this process dwindled during this period, as it has for all tribes, a regrettable circumstance and one that the Congress should rectify if possible.

Finally, as noted above, in December 2007, the Secretary finally published in the Federal Register the notice confirming that the Community's water settlement was fully and finally enforceable, thus ending a nearly 30 year process of negotiation and compromise. As the Community faces the daunting task of implementation of this, the most significant and largest Indian water rights settlement to date, the United States must and hopefully will remain fully engaged to ensure that promises made in this settlement do not prove as ephemeral as the authorized irrigation project in 1924.

POLICY RECOMMENDATIONS

In many ways, the Community is one of a lucky handful of tribes that has survived a long and arduous process that at least partially vindicated its water rights claims. Our experience demonstrates both how hard and long the process is, but also the critical role that the United States plays in such a "success story". Overall, we all should be proud of the accomplishment achieved. However, there are some areas that could clearly benefit from congressional review and improvement:

First, Congress should review and significantly increase the financial support that the United States provides to tribes to support them in their full participation in water rights claims and settlement negotiations. As noted above, the funding for such financial support has decreased consistently in recent years, even as the number of tribal water rights claims continues to rise. I cannot underscore enough how important this financial support is, particularly to tribes as impoverished as the Community was at the outset of its negotiation process in the 1980s.

Second, Congress should also provide sufficient funding and support to the Department of Interior overall to fully fund sufficient federal negotiation teams for all tribes that meaningfully seek them. Even as the number of tribes seeking a federal negotiation team to support them in a possible negotiation process has increased, funding levels overall for such negotiation teams appears to have decreased and this trend must be reversed. As I noted above, participation by the United States in negotiations is critical, not only to draw state parties to the table, but to supplement the clout of the tribes in the overall negotiation process so that the end result is a fair and balanced deal and not one of adhesion for the tribe.

Third, Congress should also seek ways to increase its oversight over the water settlement process overall and declare it to be a clear priority for the Department of Interior. This will improve both the accountability for the Department in making progress in difficult negotiations, but also hopefully help to accelerate the overall progress in protracted ones. Nothing makes for progress better than having to explain what has happened (or not) and why. It would also help to clarify for all which settlement negotiations are truly feasible, and which ones are perhaps not ripe, thereby

allowing for meaningful prioritization of settlement possibilities by the Department and others.

Oversight might include not only hearings such as this one today, which is an excellent step in the right direction, but also an overall annual report by the Department to Congress on all federal negotiation teams and all formal requests for such a team.

Fourth, Congress should also require the Department to clarify its own guidelines for appointment of federal negotiation teams. The guidelines issued by the Department are not only vague, they provide no basis for discontinuation of federal negotiation teams for tribal settlement negotiations that are going nowhere. This is important as we all realize that no matter how high a priority Congress may set on settlement of Indian water rights claims, pragmatic cost considerations will limit what is truly doable. Congress should require the Department to review and determine, with a fair pragmatic eye, whether any existing federal negotiation team could perhaps be dissolved due to a lack of progress in the preceding years and a lack of viable prospects for any progress in the near future.

Finally, Congress should also require the Department to clarify its process for determining an appropriate federal contribution to an Indian water rights settlement. Particularly in the years after our settlement was enacted in 2004, the overriding consideration for the federal government has been solely how to limit its legal exposure to a possible claim by a tribe against it. While perhaps predictable, this limitation of the U.S. contribution to a tribal water settlement unfairly ignores the United States' trust role for tribes and the complicity of the United States in the misappropriation of tribes' water rights by non-Indian users.

The Community's experience is again illustrative. In the 1924 SCIIP Act, Congress specifically required that the irrigation project on the Community's Reservation be built before the non-Indian portion of the project. This never occurred. Instead, the United States fully funded and constructed the non-Indian portion of the project, largely ignoring the congressional requirement to the contrary.

As former General Counsel, I am aware of the exigent legal precedent that governs claims for breach of trust against the United States. In our instance, the Community may very well have had a justiciable and winnable claim against the United States for its egregious breach of this statutorily imposed responsibility. But I also know how difficult it would have been to successfully prosecute such a claim to its conclusion.

Think how difficult it will be for all the other tribes in similar, but perhaps weaker legal positions vis-a-vis their own trustee. And more importantly, think of whether the United States should measure its honor and obligation in such a parsimonious and dishonorable a fashion. Understanding that money is tight and only so much can be done, Congress should support and require a process that does not require tribes to routinely to bear this burden without stepping up to the United States' overall trust responsibility in this regard, regardless of the strict legal exposure.

Finally, Congress should review its own role in funding water rights settlements. The significant number looming on the horizon and their sheer size makes it clear that Congress must develop some mechanism that allows for settlements to be approved and funded with minimal regard for the budgetary implications. These are, after all, settlements of legal claims and they should have a priority for funding that is analogous to that of claims funded by the Judgment Fund. To that end, Congress should consider some budgetary mechanism or legislation that either makes all settlements fundable through either the Judgment Fund or some similar kind of mechanism that alleviates the budgetary restraints that will almost certainly foreclose any real possibility of settlement of these larger water rights claims.

CONCLUSION

I want to thank the Chairman and the Members of this Committee for the honor and privilege of testifying before you today. I believe that your attention to this often over looked area of Indian rights is critical to beginning a renewed push toward settlement of these longstanding claims to water. I hope you make this a priority for the United States in the coming years.

I also want to thank you all personally for your support and passage of the Community's settlement in 2004. Madame Chair, and Members of the Committee, from the bottom of my heart I thank you for your support for my Community at such a critical time in our history. You will forever have the gratitude and appreciation of our people.