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STATEMENT

OF

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BEFORE THE HOUSE SUBCOMMITTEE ON WATER AND POWER

COMMITTEE ON RESOURCES

ON H.R. 885

ARIZONA WATER SETTLEMENT ACT

OCTOBER 2, 2003

Good morning Mr. Chairman and members of the Committee. I am Bennett W. Raley, Assistant Secretary for Water and Science at the Department of the Interior. I am accompanied by Aurene Martin, Acting Assistant Secretary for Indian Affairs. I appreciate the opportunity to appear before this Committee to discuss H.R. 885, a bill to authorize the Arizona Water Rights Settlement Act of 2003.

H.R. 885 is the single most far-reaching piece of federal legislation regarding water use within Arizona since Congress authorized the Central Arizona Project thirty-five years ago. H.R. 885 is an impressive and complex bill, designed to provide a comprehensive resolution of critical water use issues facing the State of Arizona, and Arizona Indian tribes today. This legislation provides certainty regarding the use of water in Arizona in a number of ways: it provides water to settle outstanding water rights claims of certain Arizona tribes; provides financing of infrastructure so that all tribes can put CAP water to use; and it provides water for future water rights settlements. It also provides water necessary to accommodate the explosive population growth in the cities of central Arizona; it provides certainty for farmers who currently utilize imported water supplies from the Colorado River; and it also provides a mechanism to secure water to protect against future droughts. These arrangements, necessary to all users of Colorado River water in Arizona are accomplished utilizing local tax revenues to accomplish the financing of all undertakings under the global settlement embodied in the legislation.

The Administration supports the core concepts of the settlements that are achieved through H.R. 885 and the overarching goal of resolving many important water challenges facing the State of Arizona, with the caveats discussed below. We believe that the comprehensive approach that is embodied in H.R. 885 is the right way to resolve these longstanding disputes regarding the use of the CAP and this portion of Arizona's allocation to the Colorado River.

Before providing detailed comments on particular provisions of the bill, some of which will require addressing outstanding concerns, it is necessary to review the overall structure and goals of H.R. 885. As we move forward, this Administration remains committed to working with the Committee, Senator Kyl, and the settlement parties to reach mutually agreeable solutions to all remaining issues. The resolution of these outstanding issues is an extremely high priority for the Department of the Interior.

Background

Even in the days before statehood, Arizona's leaders saw the need to bring Colorado River water to the interior portions of the State. During the 1940's and 50's California developed facilities allowing the utilization of more than its apportionment from the Colorado River and quickly began full use of its share of the river, and more. During that same time, Arizona began developing its own plans for utilization of its 2.8 maf apportionment. However, California effectively prevented Arizona from implementing its plans, arguing that development and use of water from Colorado River tributaries within Arizona counted against its

apportionment and limited significant additional development and diversion from the mainstream by Arizona.

Unable to reach resolution on this issue, in 1952 Arizona brought an original action in the U.S. Supreme Court, asking the Court to clarify and support Arizona's apportionment from the Colorado. After 12 years of fact finding by a Special Master and arguments by the two states, the Supreme Court issued a decision in 1963 affirming Arizona's 2.8 maf apportionment.

Despite Arizona's victory in the Supreme Court, California was still able to extract a final concession from Arizona. In exchange for California's support of Congressional authorization in 1968 for the Central Arizona Project (CAP), Arizona was forced to allow its CAP water to have a subservient priority to California water use during times of shortage on the Colorado River system. This was a significant concession since CAP water use represents more than half of Arizona's Lower Basin apportionment -- approximately 1.5 maf of its 2.8 maf. The CAP brings this critical supply from the Colorado River through Phoenix, to Tucson, Arizona via a primary canal of more than 330 miles.

After decades of fighting to get the CAP authorized and constructed, in the early 1990's Arizona faced financial and water supply disputes over how the Project -- and the State's allocation from the Colorado River -- would be utilized.

For most of the 1990's uncertainty existed for Arizona: uncertainty over who would receive water from the CAP, and uncertainty over the costs of the project and who would repay those costs. Perhaps most importantly to the State, uncertainty existed over the ability of the State to store water and protect against the eventual shortages on the Colorado -- which have a unique impact on Arizona water users due to the junior status imposed by Congress in 1968.

The uncertainty also involved complex and contentious litigation filed in 1995 between the federal government and the Central Arizona Water Conservation District, the political entity which operates the CAP and repays the local costs of the project. After years of litigation over the CAP, extensive negotiations were conducted to resolve the complicated CAP issues so that the needs of all project beneficiaries would be adequately addressed.

During these discussions it became clear that financial repayment and other operational issues could not be resolved until there was a firm agreement on the amount of CAP water that would be allocated to federal uses, i.e., allocations to Indian tribes in Arizona. When these discussions were initiated, 32% of the CAP water was allocated for Federal uses, 56% for Non-Federal uses and 12% was un-contracted.

Both the United States and the State of Arizona were interested in dedicating un-contracted water to allow settlement of outstanding Indian water rights claims and to meet emerging needs for municipal purposes. The amount of water needed for future Indian water rights settlements within Arizona turned in large part on consideration of the large pending claim of the Gila River Indian Community (Community) in the on-going general stream adjudication of the Gila River system. The Gila River Indian Reservation encompasses approximately 372,000 acres south of, and adjacent to, Phoenix, Arizona.

The claim filed by the United States on behalf of the Community in the Gila River adjudication was for 1.5 million AFA. This represents the largest single Indian claim in Arizona -- and one of the largest Indian claims in the West. If this claim were successful, the amount of water available to central Arizona cities, towns, utilities, industrial and commercial users, and major agricultural interests would be greatly reduced.

Consequently, on-going negotiations of that claim were put on a parallel track with the CAP litigation negotiations, with the understanding that tandem resolution of the issues would be necessary. The underlying premise of the settlement that emerged -- including the framework of this legislation -- is to achieve a comprehensive resolution of all outstanding CAP issues. This, in turn, will allow sustainable operation of the CAP in a manner that provides benefits and equitable treatment to all intended project beneficiaries. The alternative, piecemeal and sequential resolution of all of the outstanding disputes on the CAP, would be doomed to fail.

The linkage embodied in this legislation integrates U.S. obligations under Federal statutes and the trust relationship with Indian tribes. As with the initial authorization of the CAP in 1968, we are presented with a unique opportunity to provide a final settlement of many of the complex Federal, State, Local, Tribal and private water issues in the State.

In May of 2000, the Department and CAWCD reached agreement on a stipulated settlement of the CAP litigation. This stipulation serves as a blueprint for a comprehensive resolution of the suite of CAP issues I have identified above. The stipulation requires that a number of conditions must occur before it is effective or final. Under the stipulation, these conditions must occur before December 2012 or the stipulation will terminate.

The CAWCD v. U.S. settlement stipulation is contingent on Congressional enactment of a Gila River Indian Community Settlement; Amendment of the Southern Arizona Indian Water Rights Settlement (SAWRSA); and the identification of a firm funding mechanism for the CAP, GRIC and SAWRSA settlements.

Settlement Stipulation & H.R. 885: The Arizona Water Rights Settlement Act of 2003

H.R. 885 approves three separate and significant settlements: the settlement stipulation reached in the CAWCD v. U.S. litigation (addressing CAP operational and repayment issues), the Gila River settlement (addressing water rights claims of the Gila River Indian Community), and the SAWRSA settlement (addressing water rights claims of the Tohono O'Odham Nation).

The basic structure of the stipulation developed in 2000 is preserved in H.R. 885, subject to certain conditions. The main components of the settlement contained in H.R. 885 are to provide: (1) additional water to resolve tribal claims; (2) certainty regarding allocation of available water supply; (3) additional water supplies for Arizona's growing cities; (4) financial and operational certainty for CAWCD (operator and repayment entity of CAP); (5) affordable water for non-Indian agriculture; (6) appropriate repayment of CAP costs; (7) structures and programs to bank water for Arizona's future; (8) and a firm funding mechanism to provide affordable water to tribes, while developing the infrastructure necessary to allow all of Arizona's tribes to fully utilize their CAP supplies.

The structure of H.R. 885 represents Arizona's extensive efforts to resolve these contentious issues. The bill is strongly supported by the relevant Arizona State Agencies, Members of Congress with Arizona constituencies, the Gila River Community, the Tohono O'odham tribe, and a wide array of Arizona interests. In light of the diverse parties, competing interests and longstanding controversies involved, H.R. 885, if amended to address certain issues, represents the best prospect to restructure the CAP in a context that reconciles the Public, Tribal and Private interests – including statutory obligations of the United States.

I will summarize each of the three titles contained in H.R. 885 and comment on some of the provisions of each that are of concern to the Administration.

Title I – Central Arizona Project Settlement

The critical components of the CAP stipulated settlement are set forth in Title I of H.R. 885. They include: (1) a final allocation of CAP water supplies so that 47% of Project water is dedicated to Arizona Indian tribes and 53% is dedicated to Arizona cities, industrial users and agriculture; (2) setting aside a final additional allocation pool of 197,500 acre-feet for use in facilitating the GRIC settlement and future Arizona Indian water rights settlements; (3) a final allocation of 65,647 AFA of remaining high priority (M&I) water to Arizona cities and towns; (4) relief from debt incurred under section 9(d) of the 1939 Reclamation Projects Act by agricultural water uses, which allows these users to relinquish their long term CAP water contracts so that the water can be used for the Indian water rights settlements and future municipal use; and (5) allowing the Colorado River Lower Basin Development Fund (LBDF), the Treasury fund where CAP repayment funds are deposited, to be used for the costs of Indian water rights settlements, completing tribal water delivery systems and reducing the cost of CAP water for tribes to affordable levels.

H.R. 885's utilization of the Colorado River Lower Development Fund is intended to meet the terms of the stipulation by providing for, among other things, subsidizing fixed OM&R costs for Indian tribes, including OM&R costs for the Gila River Indian Community, rehabilitation of the San Carlos Irrigation Project (SCIP), construction of Indian Distribution Systems, and funds for future Indian water settlements.

The financing mechanism assumed in H.R. 885 is complex, and operates outside of the normal annual appropriations process. Given this, the Administration is currently reviewing the funding provision to determine whether it is an appropriate way to satisfy the contingencies of the settlement. There may be other funding mechanisms that meet the firm funding requirement of the settlement. We look forward to working with the Committee on this issue.

Title II – Gila River Indian Community Water Rights Settlement

Title II of H.R. 885 is the Gila River Indian Community Settlement. This settlement would resolve all of the Community's water rights claims in the general stream adjudication of the Gila River system, litigation that covers much of the water supply of central Arizona. This litigation has been the subject of negotiation and settlement talks for more than 13 years.

The major components of the settlement are: (1) confirmation of existing, and dedication of additional, water supplies for the Community in satisfaction of its water rights claims; (2) use of existing facilities to deliver the additional water supplies; (3) funding for on-Reservation agricultural development; and (4) protection of the Reservation groundwater supplies.

While the United States supports a settlement of the Gila River Community's water claims, and believes the majority of the provisions of the Settlement Act in this title are consistent with that objective, we do have concerns, detailed below, that we want to work on with the Committee, Senator Kyl and the various parties to promptly resolve.

A. Inclusion of a Settlement with the San Carlos Apache Tribe

In resolving the water rights claims of the Gila River Indian Community, we must remain mindful not to place the United States in a position of having conflicting obligations to two Indian tribes. The Gila River Indian Community and the San Carlos Apache Tribe have reservations and existing decreed water rights in the same watershed. In litigation underlying the settlement, the United States has argued in favor of both the Gila River Indian Community's and the San Carlos Apache's water rights under the 1935 Globe Equity Decree. That Federal Consent Decree addresses the water rights of those tribes, as well as the rights of most non-Indian water users, in the mainstem of the Gila River above the confluence of the Gila and Salt rivers. The GRIC settlement will alter operations under the Gila Decree. These changes have the potential to impact the rights of the San Carlos Apache Tribe.

We believe that additional efforts to resolve the concerns of the San Carlos Apache Tribe should be taken, and Interior has engaged in a serious effort to do that. The Department has taken a number of steps in this regard and is prepared to do more. Interior officials have met with the San Carlos Tribal leaders on numerous occasions, and our sincere hope is that we can reach resolution on a wide array of issues so that agreement on the San Carlos Apache Tribe's water rights can be added to this legislation as it proceeds. We look forward to working with the Committee and the Tribes on this matter.

B. Waivers of the United States Enforcement Authorities

H.R. 885, as introduced, also includes significant waivers of the United States ability to enforce environmental statutes relating to water quality in the Gila River basin. The settling parties seek to limit their exposure to environmental liability. However, the Administration believes the waivers, as currently drafted, may provide undue immunity from environmental liability and shift costs for cleanup to the Federal government. This could restrict the ability for the federal government to clean up the most contaminated waste sites in the Gila River Basin. For example, the legislation waives claims by the United States against both parties to the settlement as well as non-parties. As drafted, this legislation can also be interpreted to provide a waiver for future claims under certain environmental statutes, including those under the Superfund authority. This could restrict the ability for the federal government to cleanup the most serious hazardous waste sites in the Gila River Basin. These water quality waivers were not included in prior water rights settlements affecting Indian Tribes and are not necessary in this legislation.

Following the introduction of H.R. 885, the Department of Justice entered into discussions with the settlement parties regarding the waivers. These discussions continue to progress. The Administration is committed to continuing these discussions to find a solution to these significant issues, as this legislation must maintain the Federal government's ability to protect human health and environment.

C. Overly Broad Waiver of the United States Sovereign Immunity

The Administration also is concerned, as we believe that H.R. 885 contains an overly-broad waiver of United States sovereign immunity. We believe that this provision is unnecessary, as sovereign immunity waivers in the McCarran Amendment allow a suit against the United States to administer its adjudicated water rights. Further, if such a waiver is retained, it should be narrowly drafted. The Administration also has some

concern about the scope of certain waivers under Section 312 of the bill.

D. Impacts of the Intended Water Exchanges

H.R. 885 authorizes several water exchanges between the Community and various parties in the State, including the Phelps Dodge Corporation, ASARCO and several municipalities in the Upper Gila River watershed. While we support the mechanism of water exchanges, we want to work with the committee to ensure that the current language adequately takes into account the water rights of the San Carlos Apache Tribe, parties affected in the State of New Mexico (under the Colorado River Basin Project Act), listed species and critical habitat under the Endangered Species Act (ESA), and rights to divert water in relation to the Globe Equity Decree. Previous analyses indicate that appurtenant structures and dams involved in this agreement could lead to more extensive and frequent Gila River drying, which, in turn, could lead to potential ESA conflicts.

E. Fifth Amendment Takings Concern

Title II places the ownership of all settlement water in the hands of Gila River Indian Community, notwithstanding the fact that the Gila Decree (the 1935 Globe Equity Decree) framed its award under that Decree "for the reclamation and irrigation of the irrigable Indian allotments on said reservation." We would like to refine the language of the bill to reduce the likelihood that an individual allottee may assert a "takings" claim based on the settlement. Both Interior and Justice are committed to working with the settlement parties and the proponents of H.R. 885 to reduce any risk of a Fifth Amendment taking and to assure that the rights of individual Indian allottees are protected.

F. Costs Associated

Federal contributions to the proposed settlement within this Title include the fulfillment of existing statutory and programmatic responsibilities and the assumption of new obligations designed to put GRIC in a position to utilize the water resources confirmed or granted in the settlement. There are also numerous costs contained within this title, which the United States does not believe are reasonably related to the costs avoided and benefits received, and we look forward to working with the Committee and Senator Kyl prior to further consideration of this legislation to ensure the costs contained in the legislation are appropriate.

For example, given the correlative benefits, we support the rehabilitation and completion of the Indian portion of the San Carlos Irrigation Project (SCIP) -- an irrigation project that was initiated in the 1930's but never completed and which has fallen into significant disrepair. However, we believe that the language of H.R. 885, requiring the Secretary to provide for the "rehabilitation, operation, maintenance and replacement" of the San Carlos Irrigation Project, needs to be refined. Our view is that both the cost control and indexing mechanisms for these expenditures need to be revisited.

Similarly, when looking at the government's cost of addressing subsidence damages on the reservation, we recognize the settlement requires the United States to repair past and future subsidence damage. We believe that federal liability for such damages should be limited.

Additionally, in some instances we believe that existing costs have been shifted from State parties to the United States, and those costs may be more appropriately addressed by other existing Federal programs. We believe disbursements from the Lower Basin Fund should be limited to those costs which have a direct relationship to the core concepts of the settlements addressed in H.R. 885.

We also believe that a closer look should be given to some of the costs included in the provisions of Title II, dealing with the Upper Gila River. One example is the costs identified to line San Carlos Irrigation and Drainage District (the non-Indian component of SCIP) canals so that water can be conserved. The Administration supports this concept but believes a greater share of the conserved water should be provided to the United States for possible use in settling the San Carlos Apache Tribe's water rights claims in the Gila River.

Title III - Amendments to the Southern Arizona Water Rights Settlement Act (SAWRSA)

The Southern Arizona Water Rights Settlement Act, known as "SAWRSA," Pub. L. 97-293, was enacted in 1982 to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation. SAWRSA did not settle all outstanding Tohono O'odham water rights claims.

Claims for the Sif Oidak District and other Reservation lands remain to be settled.

As originally enacted, SAWRSA allocated 37,000 AFA of CAP water to the San Xavier and Shuk Toak Districts of the Nation, together with another 28,200 AFA of water to be delivered from any source by the United States to the Districts. All of the water is to be delivered without cost to the Nation. The original settlement also requires the United States to rehabilitate and extend an historic allottee farming operation and design and construct irrigation facilities sufficient to put remaining settlement water to use.

Construction of all irrigation facilities and the full implementation of SAWRSA has not occurred, principally because of a disagreement over proper allocation of settlement benefits between the Nation and allottees within the San Xavier District. Because of this disagreement, the allottees have refused to join in the dismissal of United States v. City of Tucson, CIV. 75-39 TUC-WDB (D. Ariz.), the litigation which lead to the enactment of the settlement. SAWRSA requires the United States, the Nation and the allottees to dismiss the litigation as a condition of full effectiveness of the settlement.

For over ten years, the Department of the Interior, the City of Tucson and other state parties have been engaged in discussions with the Nation and the allottees in an attempt to agree on amendments that would resolve disputed issues. The Nation and the allottees have now agreed on how settlement water resources and funds should be distributed. The agreements between the Nation and the allottees are contained in Title III of H.R. 885. Essentially, the Nation and the allottees have agreed upon allocation of water resources, construction of new irrigation facilities and sharing of settlement funds.

In general, the Administration supports these agreements and we look forward to working with the Committee to clarify or refine a few items we remain concerned about. Chief among these is the so called "net proceeds" issue that revolves around the United States ability to make the Cooperative Fund a self sustaining fund and potential federal liability if it is not self sustaining or is under-funded.

Conclusion

It is important to emphasize that the Administration fundamentally supports this important settlement effort if it is amended to address concerns discussed above, and we look forward to working with the Committee to revise specific provisions of the legislation so that we can support the bill without reservation.

The Administration lauds the tremendous efforts dedicated by all parties to find a workable solution to this complex set of issues and supports the core settlement concepts and framework as set forth in H.R. 885. We recognize that this legislation will resolve long-standing and critical water challenges facing the State of Arizona. We look forward to working with the Committee, Senator Kyl, and the settlement parties to craft legislation that accomplishes these goals in a manner that comports with Federal financial policy and legal considerations.

This concludes my testimony. I would be pleased to answer any questions that the members of the Committee may have.

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