111TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
111–395

TAOS PUEBLO INDIAN WATER RIGHTS SETTLEMENT ACT

JANUARY 12, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RAHALL, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3254]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3254) to approve the Taos Pueblo Indian Water Rights Settlement Agreement, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Taos Pueblo Indian Water Rights Settlement Act".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

89–006

SEC. 2. PURPOSE.

The purposes of this Act are—

(1) to approve, ratify, and confirm the Taos Pueblo Indian Water Rights Settlement Agreement;

(2) to authorize and direct the Secretary to execute the Settlement Agreement and to perform all obligations of the Secretary under the Settlement Agreement and this Act; and

(3) to authorize all actions and appropriations necessary for the United States to meet its obligations under the Settlement Agreement and this Act.

SEC. 3. DEFINITIONS.

In this Act:

(1) ELIGIBLE NON-PUEBLO ENTITIES.—The term "Eligible Non-Pueblo Entities" means the Town of Taos, El Prado Water and Sanitation District ("EPWSD"), and the New Mexico Department of Finance and Administration Local Government Division on behalf of the Acequia Madre del Rio Lucero y del Arroyo Seco, the Acequia Madre del Prado, the Acequia del Monte, the Acequia Madre del Rio Chiquito, the Upper Ranchitos Mutual Domestic Water Consumers Association, the Upper Arroyo Hondo Mutual Domestic Water Consumers Association, and the Llano Quemado Mutual Domestic Water Consumers Association.

(2) ENFORCEMENT DATE.—The term "Enforcement Date" means the date upon which the Secretary publishes the notice required by section 10(f)(1).

(3) MUTUAL-BENEFIT PROJECTS.—The term "Mutual-Benefit Projects" means the projects described and identified in articles 6 and 10.1 of the Settlement Agreement.

(4) PARTIAL FINAL DECREE.—The term "Partial Final Decree" means the Decree entered in New Mexico v. Abeyta and New Mexico v. Arellano, Civil Nos. 7896–BB (U.S.6 D.N.M.) and 7939–BB (U.S. D.N.M) (consolidated), for the resolution of the Pueblo's water right claims and which is substantially in the form agreed to by the Parties and attached to the Settlement Agreement as Attachment 5.

(5) PARTIES.—The term "Parties" means the Parties to the Settlement Agreement, as identified in article 1 of the Settlement Agreement.

(6) PUEBLO.—The term "Pueblo" means the Taos Pueblo, a sovereign Indian tribe duly recognized by the United States of America.

(7) PUEBLO LANDS.—The term "Pueblo lands" means those lands located within the Taos Valley to which the Pueblo, or the United States in its capacity as trustee for the Pueblo, holds title subject to Federal law limitations on alienation. Such lands include Tracts A, B, and C, the Pueblo's land grant, the Blue Lake Wilderness Area, and the Tenorio and Karavas Tracts and are generally depicted in Attachment 2 to the Settlement Agreement.

(8) SAN JUAN-CHAMA PROJECT.—The term "San Juan-Chama Project" means the Project authorized by section 8 of the Act of June 13, 1962 (76 Stat. 96, 97), and the Act of April 11, 1956 (70 Stat. 105).

(9) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(10) SETTLEMENT AGREEMENT.—The term "Settlement Agreement" means the contract dated March 31, 2006, between and among—

(A) the United States, acting solely in its capacity as trustee for Taos Pueblo;

(B) the Taos Pueblo, on its own behalf;

(C) the State of New Mexico;

(D) the Taos Valley Acequia Association and its 55 member ditches ("TVAA");

(E) the Town of Taos;

(F) EPWSD; and

(G) the 12 Taos area Mutual Domestic Water Consumers Associations ("MDWCAs"), as amended to conform with this Act.

(11) STATE ENGINEER.—The term "State Engineer" means the New Mexico State Engineer.

(12) TAOS VALLEY.—The term "Taos Valley" means the geographic area depicted in Attachment 4 of the Settlement Agreement.

SEC. 4. PUEBLO RIGHTS.

(a) IN GENERAL.—Those rights to which the Pueblo is entitled under the Partial Final Decree shall be held in trust by the United States on behalf of the Pueblo and shall not be subject to forfeiture, abandonment, or permanent alienation.

(b) SUBSEQUENT ACT OF CONGRESS.—The Pueblo shall not be denied all or any part of its rights held in trust absent its consent unless such rights are explicitly abrogated by an Act of Congress hereafter enacted.

SEC. 5. PUEBLO WATER INFRASTRUCTURE AND WATERSHED ENHANCEMENT.

(a) IN GENERAL.—The Secretary, acting through the Commissioner of Reclamation, shall provide grants and technical assistance to the Pueblo on a nonreimbursable basis to—

(1) plan, permit, design, engineer, construct, reconstruct, replace, or rehabilitate water production, treatment, and delivery infrastructure;

(2) restore, preserve, and protect the environment associated with the Buffalo Pasture area; and

(3) protect and enhance watershed conditions.

(b) AVAILABILITY OF GRANTS.—Upon the Enforcement Date, all amounts appropriated pursuant to section 10(c)(1) or made available from other authorized sources, shall be available in grants to the Pueblo after the requirements of subsection (c) have been met.

(c) PLAN.—The Secretary shall provide financial assistance pursuant to subsection (a) upon the Pueblo's submittal of a plan that identifies the projects to be implemented consistent with the purposes of this section and describes how such projects are consistent with the Settlement Agreement.

(d) EARLY FUNDS.—Notwithstanding subsection (b), $10,000,000 of the monies authorized to be appropriated pursuant to section 10(c)(1)—

(1) shall be made available in grants to the Pueblo by the Secretary upon appropriation or availability of the funds from other authorized sources; and

(2) shall be distributed by the Secretary to the Pueblo on receipt by the Secretary from the Pueblo of a written notice, a Tribal Council resolution that describes the purposes under subsection (a) for which the monies will be used, and a plan under subsection (c) for this portion of the funding.

SEC. 6. TAOS PUEBLO WATER DEVELOPMENT FUND.

(a) ESTABLISHMENT.—There is established in the Treasury of the United States a fund to be known as the "Taos Pueblo Water Development Fund" (hereinafter, "Fund") to be used to pay or reimburse costs incurred by the Pueblo for—

(1) acquiring water rights;

(2) planning, permitting, designing, engineering, constructing, reconstructing, replacing, rehabilitating, operating, or repairing water production, treatment or delivery infrastructure, on-farm improvements, or wastewater infrastructure;

(3) restoring, preserving and protecting the Buffalo Pasture, including planning, permitting, designing, engineering, constructing, operating, managing and replacing the Buffalo Pasture Recharge Project;

(4) administering the Pueblo's water rights acquisition program and water management and administration system; and

(5) for watershed protection and enhancement, support of agriculture, water-related Pueblo community welfare and economic development, and costs related to the negotiation, authorization, and implementation of the Settlement Agreement.

(b) MANAGEMENT OF THE FUND.—The Secretary shall manage the Fund, invest amounts in the Fund, and make monies available from the Fund for distribution to the Pueblo consistent with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001, et seq.) (hereinafter, "Trust Fund Reform Act"), this Act, and the Settlement Agreement.

(c) INVESTMENT OF THE FUND.—Upon the Enforcement Date, the Secretary shall invest amounts in the Fund in accordance with—

(1) the Act of April 1, 1880 (21 Stat. 70, ch. 41, 25 U.S.C. 161);

(2) the first section of the Act of June 24, 1938 (52 Stat. 1037, ch. 648, 25 U.S.C. 162a); and

(3) the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.).

(d) AVAILABILITY OF AMOUNTS FROM THE FUND.—Upon the Enforcement Date, all monies deposited in the Fund pursuant to section 10(c)(2) or made available from other authorized sources shall be available to the Pueblo for expenditure or withdrawal after the requirements of subsection (e) have been met.

(e) EXPENDITURES AND WITHDRAWAL.—

(1) TRIBAL MANAGEMENT PLAN.—

(A) IN GENERAL.—The Pueblo may withdraw all or part of the Fund on approval by the Secretary of a tribal management plan as described in the Trust Fund Reform Act.

(B) REQUIREMENTS.—In addition to the requirements under the Trust Fund Reform Act, the tribal management plan shall require that the Pueblo spend any funds in accordance with the purposes described in subsection (a).

(2) ENFORCEMENT.—The Secretary may take judicial or administrative action to enforce the requirement that monies withdrawn from the Fund are used for the purposes specified in subsection (a).

(3) LIABILITY.—If the Pueblo exercises the right to withdraw monies from the Fund, neither the Secretary nor the Secretary of the Treasury shall retain any liability for the expenditure or investment of the monies withdrawn.

(4) EXPENDITURE PLAN.—

(A) IN GENERAL.—The Pueblo shall submit to the Secretary for approval an expenditure plan for any portions of the funds made available under this Act that the Pueblo does not withdraw under paragraph (1)(A).

(B) DESCRIPTION.—The expenditure plan shall describe the manner in which, and the purposes for which, amounts remaining in the Fund will be used.

(C) APPROVAL.—On receipt of an expenditure plan under subparagraph (A), the Secretary shall approve the plan if the Secretary determines that the plan is reasonable and consistent with this Act.

(5) ANNUAL REPORT.—The Pueblo shall submit to the Secretary an annual report that describes all expenditures from the Fund during the year covered by the report.

(f) FUNDS AVAILABLE UPON APPROPRIATION.—Notwithstanding subsection (d), $15,000,000 of the monies authorized to be appropriated pursuant to section 10(c)(2)—

(1) shall be available upon appropriation or made available from other authorized sources for the Pueblo's acquisition of water rights pursuant to Article 5.1.1.2.3 of the Settlement Agreement, the Buffalo Pasture Recharge Project, implementation of the Pueblo's water rights acquisition program and water management and administration system, the design, planning, and permitting of water or wastewater infrastructure eligible for funding under sections 5 or 6, or costs related to the negotiation, authorization, and implementation of the Settlement Agreement; and

(2) shall be distributed by the Secretary to the Pueblo on receipt by the Secretary from the Pueblo of a written notice and a Tribal Council resolution that describes the purposes under paragraph (1) for which the monies will be used.

(g) NO PER CAPITA DISTRIBUTIONS.—No part of the Fund shall be distributed on a per capita basis to members of the Pueblo.

SEC. 7. MARKETING.

(a) PUEBLO WATER RIGHTS.—Subject to the approval of the Secretary in accordance with subsection (e), the Pueblo may market water rights secured to it under the Settlement Agreement and Partial Final Decree, provided that such marketing is in accordance with this section.

(b) PUEBLO CONTRACT RIGHTS TO SAN JUAN-CHAMA PROJECT WATER.—Subject to the approval of the Secretary in accordance with subsection (e), the Pueblo may subcontract water made available to the Pueblo under the contract authorized under section 9(b)(1)(A) to third parties to supply water for use within or without the Taos Valley, provided that the delivery obligations under such subcontract are not inconsistent with the Secretary's existing San Juan-Chama Project obligations and such subcontract is in accordance with this section.

(c) LIMITATION.—

(1) IN GENERAL.—Diversion or use of water off Pueblo lands pursuant to Pueblo water rights or Pueblo contract rights to San Juan-Chama Project water shall be subject to and not inconsistent with the same requirements and conditions of State law, any applicable Federal law, and any applicable interstate compact as apply to the exercise of water rights or contract rights to San Juan-Chama Project water held by non-Federal, non-Indian entities, including all applicable State Engineer permitting and reporting requirements.

(2) EFFECT ON WATER RIGHTS.—Such diversion or use off Pueblo lands under paragraph (1) shall not impair water rights or increase surface water depletions within the Taos Valley.

(d) MAXIMUM TERM.—

(1) IN GENERAL.—The maximum term of any water use lease or subcontract, including all renewals, shall not exceed 99 years in duration.

(2) ALIENATION OF RIGHTS.—The Pueblo shall not permanently alienate any rights it has under the Settlement Agreement, the Partial Final Decree, and this Act.

(e) APPROVAL OF SECRETARY.—The Secretary shall approve or disapprove any lease or subcontract submitted by the Pueblo for approval not later than—

(1) 180 days after submission; or

(2) 60 days after compliance, if required, with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or any other requirement of Federal law, whichever is later, provided that no Secretarial approval shall be required for any water use lease with a term of less than 7 years.

(f) NO FORFEITURE OR ABANDONMENT.—The nonuse by a lessee or subcontractor of the Pueblo of any right to which the Pueblo is entitled under the Partial Final Decree shall in no event result in a forfeiture, abandonment, relinquishment, or other loss of all or any part of those rights.

(g) NO PREEMPTION.—

(1) IN GENERAL.—The approval authority of the Secretary provided under subsection (e) shall not amend, construe, supersede, or preempt any State or Federal law, interstate compact, or international treaty that pertains to the Colorado River, the Rio Grande, or any of their tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quantity of those waters.

(2) APPLICABLE LAW.—The provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) shall not apply to any water made available under the Settlement Agreement.

(h) NO PREJUDICE.—Nothing in this Act shall be construed to establish, address, prejudice, or prevent any party from litigating whether or to what extent any applicable State law, Federal law, or interstate compact does or does not permit, govern, or apply to the use of the Pueblo's water outside of New Mexico.

SEC. 8. MUTUAL-BENEFIT PROJECTS.

(a) IN GENERAL.—Upon the Enforcement Date, the Secretary, acting through the Commissioner of Reclamation, shall provide financial assistance in the form of grants on a nonreimbursable basis to Eligible Non-Pueblo Entities to plan, permit, design, engineer, and construct the Mutual-Benefit Projects in accordance with the Settlement Agreement—

(1) to minimize adverse impacts on the Pueblo's water resources by moving future non-Indian ground water pumping away from the Pueblo's Buffalo Pasture; and

(2) to implement the resolution of a dispute over the allocation of certain surface water flows between the Pueblo and non-Indian irrigation water right owners in the community of Arroyo Seco Arriba.

(b) COST-SHARING.—

(1) FEDERAL SHARE.—The Federal share of the total cost of planning, designing, and constructing the Mutual-Benefit Projects authorized in subsection (a) shall be 75 percent and shall be nonreimbursable.

(2) NON-FEDERAL SHARE.—The non-Federal share of the total cost of planning, designing, and constructing the Mutual-Benefit Projects shall be 25 percent and may be in the form of in-kind contributions, including the contribution of any valuable asset or service that the Secretary determines would substantially contribute to completing the Mutual-Benefit Projects.

SEC. 9. SAN JUAN-CHAMA PROJECT CONTRACTS.

(a) IN GENERAL.—Contracts issued under this section shall be in accordance with this Act and the Settlement Agreement.

(b) CONTRACTS FOR SAN JUAN-CHAMA PROJECT WATER.—

(1) IN GENERAL.—The Secretary shall enter into 3 repayment contracts by not later than 180 days after the date of enactment of this Act, for the delivery of San Juan-Chama Project water in the following amounts:

(A) 2,215 acre-feet/annum to the Pueblo.

(B) 366 acre-feet/annum to the Town of Taos.

(C) 40 acre-feet/annum to EPWSD.

(2) REQUIREMENTS.—Each such contract shall provide that if the conditions precedent set forth in section 10(f)(2) have not been fulfilled by December 31, 2016, the contract shall expire on that date.

(3) APPLICABLE LAW.—Public Law 87–483 (76 Stat. 97) applies to the contracts entered into under paragraph (1) and no preference shall be applied as a result of section 4(a) with regard to the delivery or distribution of San Juan-Chama Project water or the management or operation of the San Juan-Chama Project.

(c) WAIVER.—With respect to the contract authorized and required by subsection (b)(1)(A) and notwithstanding the provisions of Public Law 87–483 (76 Stat. 96) or any other provision of law—

(1) the Secretary shall waive the entirety of the Pueblo's share of the construction costs, both principal and the interest, for the San Juan-Chama Project and pursuant to that waiver, the Pueblo's share of all construction costs for the

San Juan-Chama Project, inclusive of both principal and interest shall be nonreimbursable; and

(2) the Secretary's waiver of the Pueblo's share of the construction costs for the San Juan-Chama Project will not result in an increase in the pro rata shares of other San Juan-Chama Project water contractors, but such costs shall be absorbed by the United States Treasury or otherwise appropriated to the Department of the Interior.

SEC. 10. AUTHORIZATIONS, RATIFICATIONS, CONFIRMATIONS, AND CONDITIONS PRECEDENT.

(a) RATIFICATION.—

(1) IN GENERAL.—Except to the extent that any provision of the Settlement Agreement conflicts with any provision of this Act, the Settlement Agreement is authorized, ratified, and confirmed.

(2) AMENDMENTS.—To the extent amendments are executed to make the Settlement Agreement consistent with this Act, such amendments are also authorized, ratified, and confirmed.

(b) EXECUTION OF SETTLEMENT AGREEMENT.—To the extent that the Settlement Agreement does not conflict with this Act, the Secretary shall execute the Settlement Agreement, including all exhibits to the Settlement Agreement requiring the signature of the Secretary and any amendments necessary to make the Settlement Agreement consistent with this Act, after the Pueblo has executed the Settlement Agreement and any such amendments.

(c) AUTHORIZATION OF APPROPRIATIONS.—

(1) TAOS PUEBLO INFRASTRUCTURE AND WATERSHED FUND.—There is authorized to be appropriated to the Secretary to provide grants pursuant to section 5, $30,000,000, as adjusted under paragraph (4), for the period of fiscal years 2010 through 2016.

(2) TAOS PUEBLO WATER DEVELOPMENT FUND.—There is authorized to be appropriated to the Taos Pueblo Water Development Fund, established at section 6(a), $58,000,000, as adjusted under paragraph (4), for the period of fiscal years 2010 through 2016.

(3) MUTUAL-BENEFIT PROJECTS FUNDING.—There is further authorized to be appropriated to the Secretary to provide grants pursuant to section 8, a total of $33,000,000, as adjusted under paragraph (4), for the period of fiscal years 2010 through 2016.

(4) ADJUSTMENTS TO AMOUNTS AUTHORIZED.—The amounts authorized to be appropriated under paragraphs (1) through (3) shall be adjusted by such amounts as may be required by reason of changes since April 1, 2007, in construction costs, as indicated by engineering cost indices applicable to the types of construction or rehabilitation involved.

(5) DEPOSIT IN FUND.—Except for the funds to be provided to the Pueblo pursuant to section 5(d), the Secretary shall deposit the funds made available pursuant to paragraphs (1) and (3) into a Taos Settlement Fund to be established within the Treasury of the United States so that such funds may be made available to the Pueblo and the Eligible Non-Pueblo Entities upon the Enforcement Date as set forth in sections 5(b) and 8(a).

(d) AUTHORITY OF THE SECRETARY.—The Secretary is authorized to enter into such agreements and to take such measures as the Secretary may deem necessary or appropriate to fulfill the intent of the Settlement Agreement and this Act.

(e) ENVIRONMENTAL COMPLIANCE.—

(1) EFFECT OF EXECUTION OF SETTLEMENT AGREEMENT.—The Secretary's execution of the Settlement Agreement shall not constitute a major Federal action under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) COMPLIANCE WITH ENVIRONMENTAL LAWS.—In carrying out this Act, the Secretary shall comply with each law of the Federal Government relating to the protection of the environment, including—

(A) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(B) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(f) CONDITIONS PRECEDENT AND SECRETARIAL FINDING.—

(1) IN GENERAL.—Upon the fulfillment of the conditions precedent described in paragraph (2), the Secretary shall publish in the Federal Register a statement of finding that the conditions have been fulfilled.

(2) CONDITIONS.—The conditions precedent referred to in paragraph (1) are the following:

(A) The President has signed into law the Taos Pueblo Indian Water Rights Settlement Act.

(B) To the extent that the Settlement Agreement conflicts with this Act, the Settlement Agreement has been revised to conform with this Act.

(C) The Settlement Agreement, so revised, including waivers and releases pursuant to section 11, has been executed by the Parties and the Secretary prior to the Parties' motion for entry of the Partial Final Decree.

(D) Congress has fully appropriated or the Secretary has provided from other authorized sources all funds authorized by paragraphs (1) through (3) of subsection (c) so that the entire amounts so authorized have been previously provided to the Pueblo pursuant to sections 5 and 6, or placed in the Taos Pueblo Water Development Fund or the Taos Settlement Fund as directed in subsection (c).

(E) The Legislature of the State of New Mexico has fully appropriated the funds for the State contributions as specified in the Settlement Agreement, and those funds have been deposited in appropriate accounts.

(F) The State of New Mexico has enacted legislation that amends NMSA 1978, section 72–6–3 to state that a water use due under a water right secured to the Pueblo under the Settlement Agreement or the Partial Final Decree may be leased for a term, including all renewals, not to exceed 99 years, provided that this condition shall not be construed to require that said amendment state that any State law based water rights acquired by the Pueblo or by the United States on behalf of the Pueblo may be leased for said term.

(G) A Partial Final Decree that sets forth the water rights and contract rights to water to which the Pueblo is entitled under the Settlement Agreement and this Act and that substantially conforms to the Settlement Agreement and Attachment 5 thereto has been approved by the Court and has become final and nonappealable.

(g) ENFORCEMENT DATE.—The Settlement Agreement shall become enforceable, and the waivers and releases executed pursuant to section 11 and the limited waiver of sovereign immunity set forth in section 12(a) shall become effective, as of the date that the Secretary publishes the notice required by subsection (f)(1).

(h) EXPIRATION DATE.—

(1) IN GENERAL.—If all of the conditions precedent described in section (f)(2) have not been fulfilled by December 31, 2016, the Settlement Agreement shall be null and void, the waivers and releases executed pursuant to section 11 and the sovereign immunity waivers in section 12(a) shall not become effective, and any unexpended Federal funds, together with any income earned thereon, and title to any property acquired or constructed with expended Federal funds, shall be returned to the Federal Government, unless otherwise agreed to by the Parties in writing and approved by Congress.

(2) EXCEPTION.—Notwithstanding subsection (h)(1) or any other provision of law, any unexpended Federal funds, together with any income earned thereon, made available under sections 5(d) and 6(f) and title to any property acquired or constructed with expended Federal funds made available under sections 5(d) and 6(f) shall be retained by the Pueblo.

(3) RIGHT TO SET-OFF.—In the event the conditions precedent set forth in subsection (f)(2) have not been fulfilled by December 31, 2016, the United States shall be entitled to set off any funds expended or withdrawn from the amount appropriated pursuant to paragraphs (1) and (2) of subsection (c) or made available from other authorized sources, together with any interest accrued, against any claims asserted by the Pueblo against the United States relating to water rights in the Taos Valley.

SEC. 11. WAIVERS AND RELEASES.

(a) CLAIMS BY THE PUEBLO AND THE UNITED STATES.—In return for recognition of the Pueblo's water rights and other benefits, including but not limited to the commitments by non-Pueblo parties, as set forth in the Settlement Agreement and this Act, the Pueblo, on behalf of itself and its members, and the United States acting in its capacity as trustee for the Pueblo are authorized to execute a waiver and release of claims against the parties to New Mexico v. Abeyta and New Mexico v. Arellano, Civil Nos. 7896–BB (U.S.6 D.N.M.) and 7939–BB (U.S. D.N.M.) (consolidated) from—

(1) all claims for water rights in the Taos Valley that the Pueblo, or the United States acting in its capacity as trustee for the Pueblo, asserted, or could have asserted, in any proceeding, including but not limited to in New Mexico v. Abeyta and New Mexico v. Arellano, Civil Nos. 7896–BB (U.S.6 D.N.M.) and 7939–BB (U.S. D.N.M.) (consolidated), up to and including the Enforcement Date, except to the extent that such rights are recognized in the Settlement Agreement or this Act;

(2) all claims for water rights, whether for consumptive or nonconsumptive use, in the Rio Grande mainstream or its tributaries that the Pueblo, or the

United States acting in its capacity as trustee for the Pueblo, asserted or could assert in any water rights adjudication proceedings except those claims based on Pueblo or United States ownership of lands or water rights acquired after the Enforcement Date, provided that nothing in this paragraph shall prevent the Pueblo or the United States from fully participating in the inter se phase of any such water rights adjudication proceedings;

(3) all claims for damages, losses or injuries to water rights or claims of interference with, diversion or taking of water (including but not limited to claims for injury to lands resulting from such damages, losses, injuries, interference with, diversion, or taking) in the Rio Grande mainstream or its tributaries or for lands within the Taos Valley that accrued at any time up to and including the Enforcement Date; and

(4) all claims against the State of New Mexico, its agencies, or employees relating to the negotiation or the adoption of the Settlement Agreement.

(b) CLAIMS BY THE PUEBLO AGAINST THE UNITED STATES.—The Pueblo, on behalf of itself and its members, is authorized to execute a waiver and release of—

(1) all claims against the United States, its agencies, or employees relating to claims for water rights in or water of the Taos Valley that the United States acting in its capacity as trustee for the Pueblo asserted, or could have asserted, in any proceeding, including but not limited to in New Mexico v. Abeyta and New Mexico v. Arellano, Civil Nos. 7896–BB (U.S.6 D.N.M.) and 7939–BB (U.S. D.N.M.) (consolidated);

(2) all claims against the United States, its agencies, or employees relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including but not limited to damages, losses or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights, claims relating to interference with, diversion or taking of water or water rights, or claims relating to failure to protect, acquire, replace, or develop water, water rights or water infrastructure) in the Rio Grande mainstream or its tributaries or within the Taos Valley that first accrued at any time up to and including the Enforcement Date;

(3) all claims against the United States, its agencies, or employees for an accounting of funds appropriated by the Act of March 4, 1929 (45 Stat. 1562), the Act of March 4, 1931 (46 Stat. 1552), the Act of June 22, 1936 (49 Stat. 1757), the Act of August 9, 1937 (50 Stat. 564), and the Act of May 9, 1938 (52 Stat. 291), as authorized by the Pueblo Lands Act of June 7, 1924 (43 Stat. 636), and the Pueblo Lands Act of May 31, 1933 (48 Stat. 108), and for breach of trust relating to funds for water replacement appropriated by said Acts that first accrued before the date of enactment of this Act;

(4) all claims against the United States, its agencies, or employees relating to the pending litigation of claims relating to the Pueblo's water rights in New Mexico v. Abeyta and New Mexico v. Arellano, Civil Nos. 7896–BB (U.S.6 D.N.M.) and 7939–BB (U.S. D.N.M.) (consolidated); and

(5) all claims against the United States, its agencies, or employees relating to the negotiation, Execution or the adoption of the Settlement Agreement, exhibits thereto, the Final Decree, or this Act.

(c) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS.—Notwithstanding the waivers and releases authorized in this Act, the Pueblo on behalf of itself and its members and the United States acting in its capacity as trustee for the Pueblo retain—

(1) all claims for enforcement of the Settlement Agreement, the Final Decree, including the Partial Final Decree, the San Juan-Chama Project contract between the Pueblo and the United States, or this Act;

(2) all claims against persons other than the Parties to the Settlement Agreement for damages, losses or injuries to water rights or claims of interference with, diversion or taking of water rights (including but not limited to claims for injury to lands resulting from such damages, losses, injuries, interference with, diversion, or taking of water rights) within the Taos Valley arising out of activities occurring outside the Taos Valley or the Taos Valley Stream System;

(3) all rights to use and protect water rights acquired after the date of enactment of this Act;

(4) all rights to use and protect water rights acquired pursuant to State law, to the extent not inconsistent with the Partial Final Decree and the Settlement Agreement (including water rights for the land the Pueblo owns in Questa, New Mexico);

(5) all claims relating to activities affecting the quality of water including but not limited to any claims the Pueblo might have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (including but not limited to claims for damages to natural resources),

the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), and the regulations implementing those Acts;

(6) all claims relating to damages, losses, or injuries to land or natural resources not due to loss of water or water rights (including but not limited to hunting, fishing, gathering, or cultural rights); and

(7) all rights, remedies, privileges, immunities, powers, and claims not specifically waived and released pursuant to this Act and the Settlement Agreement.

(d) EFFECT OF SECTION.—Nothing in the Settlement Agreement or this Act—

(1) affects the ability of the United States acting in its sovereign capacity to take actions authorized by law, including but not limited to any laws relating to health, safety, or the environment, including but not limited to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), and the regulations implementing such Acts;

(2) affects the ability of the United States to take actions acting in its capacity as trustee for any other Indian tribe or allottee;

(3) confers jurisdiction on any State court to—

(A) interpret Federal law regarding health, safety, or the environment or determine the duties of the United States or other parties pursuant to such Federal law; or

(B) conduct judicial review of Federal agency action; or

(4) waives any claim of a member of the Pueblo in an individual capacity that does not derive from a right of the Pueblo.

(e) TOLLING OF CLAIMS.—

(1) IN GENERAL.—Each applicable period of limitation and time-based equitable defense relating to a claim described in this section shall be tolled for the period beginning on the date of enactment of this Act and ending on the earlier of—

(A) December 31, 2016; or

(B) the Enforcement Date.

(2) EFFECT OF SUBSECTION.—Nothing in this subsection revives any claim or tolls any period of limitation or time-based equitable defense that expired before the date of enactment of this Act.

(3) LIMITATION.—Nothing in this subsection precludes the tolling of any period of limitations or any time-based equitable defense under any other applicable law.

SEC. 12. INTERPRETATION AND ENFORCEMENT.

(a) LIMITED WAIVER OF SOVEREIGN IMMUNITY.—Upon and after the Enforcement Date, if any Party to the Settlement Agreement brings an action in any court of competent jurisdiction over the subject matter relating only and directly to the interpretation or enforcement of the Settlement Agreement or this Act, and names the United States or the Pueblo as a party, then the United States, the Pueblo, or both may be added as a party to any such action, and any claim by the United States or the Pueblo to sovereign immunity from the action is waived, but only for the limited and sole purpose of such interpretation or enforcement, and no waiver of sovereign immunity is made for any action against the United States or the Pueblo that seeks money damages.

(b) SUBJECT MATTER JURISDICTION NOT AFFECTED.—Nothing in this Act shall be deemed as conferring, restricting, enlarging, or determining the subject matter jurisdiction of any court, including the jurisdiction of the court that enters the Partial Final Decree adjudicating the Pueblo's water rights.

(c) REGULATORY AUTHORITY NOT AFFECTED.—Nothing in this Act shall be deemed to determine or limit any authority of the State or the Pueblo to regulate or administer waters or water rights now or in the future.

SEC. 13. DISCLAIMER.

Nothing in the Settlement Agreement or this Act shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims, or entitlements to water of any other Indian tribe.

PURPOSE OF THE BILL

The purpose of H.R. 3254 is to approve the Taos Pueblo Indian Water Rights Settlement Agreement, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

The Taos Pueblo is located approximately 70 miles north of Santa Fe, encompassing an area of approximately 100,000 acres of land, with more than 2,450 enrolled tribal members. The Pueblo of Taos is the only living Native American community designated both a World Heritage Site by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), as well as being a registered National Historic Landmark. The pueblo's multi-storied adobe buildings have been continuously inhabited for over 1,000 years.

H.R. 3254 would settle the water rights claims of Taos Pueblo and the 40 year-old litigation dealing with the adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems (titled the *State of New Mexico ex rel. State Engineer, et al.* v. *Abeyta* and the *State of New Mexico ex rel. State Engineer* v. *Arellano et al.* (Civil Nos. 7896–BB (U.S. 6 D.N.M.) and 7939–BB (U.S. D.N.M.) (consolidated)).

A Settlement Agreement was signed in May of 2006 by the Pueblo of Taos, the State of New Mexico, the Taos Valley Acequia Association (representing 55 community ditch associations), the Town of Taos, El Prado Water and Sanitation District, and the 12 Taos-area Mutual Domestic Water Consumer Associations. Collectively the parties to the Agreement represent the majority of water users in the Taos Valley. The settlement provides water certainty to both tribal and non-tribal communities.

H.R. 3254 would ratify and approve the Settlement Agreement and quantify the Taos Pueblo's water rights in the Taos Valley System. The settlement secures to the Pueblo water rights totaling 11,927.51 acre-feet per year (AFY) in depletions, including 2,215 AFY from the San Juan-Chama Project. The Pueblo agreed to initially forbear using 4,678 AFY of this amount as of the settlement signing date to allow for continued non-Indian use. The Pueblo will then buy those water rights as they become available.

COMMITTEE ACTION

H.R. 3254 was introduced on July 17, 2009 by Representative Ben Ray Luján (D–NM). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water and Power. On September 9, 2009, the Subcommittee held a hearing on the bill.

On September 30, 2009, the Subcommittee was discharged from the further consideration of H.R. 3254 and the full Natural Resources Committee met to consider the bill. Subcommittee Chair Grace F. Napolitano (D–CA) offered an amendment in the nature of a substitute, that responded to certain concerns raised by the Department of the Interior. The amendment in the nature of a substitute was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; Table of contents

Section 1 provides that this Act may be cited as the "Taos Pueblo Indian Water Rights Settlement Act," and provides the table of contents.

Section 2. Purpose

Section two gives the purposes of the Act as: (1) to approve, ratify and confirm the Taos Pueblo Indian Water Rights Settlement Agreement, (2) to authorize and direct the Secretary of the Interior to execute the Settlement Agreement and to perform all obligations of the Secretary under the Settlement Agreement and Act, and (3) to authorize all actions and appropriations necessary for the United States to meet its obligations under the Settlement Agreement and this Act.

Section 3. Definitions

Section 3 provides definitions of terms used in the Act.

Section 4. Pueblo rights

Subsection 4(a) states that tribal water rights to which the Pueblo is entitled under the Partial Final Decree will be held in trust by the United States, through the Secretary of the Interior, on behalf of the Pueblo. The Tribes' water rights cannot be lost by forfeiture, abandonment, or permanent alienation.

Subsection 4(b) states that the Pueblo shall not be denied their rights held in trust without the Pueblo's consent unless repealed by a future Act of Congress.

Section 5. Pueblo water infrastructure and watershed enhancement

Subsection 5(a) authorizes the Secretary, acting through the Commissioner of Reclamation, to provide nonreimbursable grants and technical assistance and prescribes the purposes thereof.

Subsection 5(b) provides that all amounts appropriated or received from other sources will be available for grants to the Pueblo after the listed requirements are met.

Subsection 5(c) authorizes the Secretary to provide financial assistance, pursuant to subsection 5(a) when the Pueblo submits a plan that identifies projects to be implemented, consistent with the purposes of this section.

Subsection 5(d) makes $10 million of the monies authorized to be appropriated available for early funding through grants to the Pueblo to be distributed by the Secretary on receipt of written notice in the form of a Tribal Council resolution, and a plan under subsection (c).

Section 6. Taos Pueblo Water Development Fund

Subsection 6(a) establishes the Taos Pueblo Water Development Fund within the United States Treasury to pay for or reimburse the costs incurred by the Pueblo for the purposes listed in the subsection.

Subsections 6(b,) 6(c) and 6(d) direct the Secretary to manage and invest the amounts in the fund and establish the availability date.

Subsection 6(e) lists the conditions for expenditures and withdrawals, including the submission of a tribal management plan to the Secretary by the Pueblo.

Subsection 6(f) authorizes that $15 million of the monies authorized to be appropriated under section 10(c)(2) may be used for purposes listed in subsection 6(f)(1) and, upon appropriation or availability from other authorized sources, be distributed by the Secretary to the Pueblo upon receipt of written notice from the Taos Tribal Council.

Subsection 6(g) specifies that funds from the Taos Pueblo Water Development Fund are not to be distributed to Pueblo members on a per capita basis.

Section 7. Marketing

Subsection 7(a) allows the Pueblo, subject to the approval of the Secretary under subsection (e), to market water rights secured under the Settlement Agreement and partial Final Decree.

Subsection 7(b) allows the Pueblo, subject to approval of the Secretary, to subcontract San Juan-Chama water made available to the Pueblo under this Act to third parties for use within the Taos Valley.

Subsection 7(c) subjects diversions or use of San Juan-Chama water off Pueblo Lands to the same federal, state and interstate compact requirements as non-Pueblo San Juan-Chama water and provides that such diversions or use will not impair water rights or increase water depletions within the Taos Valley.

Subsection 7(d) requires that water leases or subcontracts cannot exceed 99 years. The Pueblo is not authorized to permanently alienate any of its rights under the Settlement Agreement, the Partial Final Decree and this Act.

Subsection 7(e) provides that the Secretary has 180 days after submission or 60 days after compliance, if required, with the National Environmental Policy Act of 1969, to approve or disapprove any lease or subcontract, but provides that water leases for less than seven years do not require the approval of the Secretary.

Subsection 7(f) provides that the nonuse by a lessee or subcontractor of Pueblo contracted water will not result in a forfeiture, abandonment, relinquishment or other loss of the Pueblo's right.

Subsection 7(g) provides that the approval authority of the Secretary shall not amend, construe, supersede or preempt any state or federal law, interstate compact, or international treaty that pertains to the Colorado River, the Rio Grande, or any of their tributaries.

Subsection 7(h) provides that nothing in this Act shall be construed to establish, address, prejudice, or prevent any party from litigating whether or to what extent any applicable state law, federal law or interstate compact does or does not permit, govern, or apply to the use of the Pueblo's water outside of New Mexico.

Section 8. Mutual-benefit projects

Subsection 8(a) directs the Secretary, acting through the Commissioner of Reclamation, to provide financial assistance in the form of non-reimbursable grants to eligible non-Pueblo entities to plan, permit, design, engineer and construct the Mutual-Benefit Projects in accordance with the Settlement Agreement.

Subsection 8(b) defines the cost share for the Mutual-Benefit Projects to a 75 percent non-reimbursable federal share and 25 percent non-federal cost share.

Section 9. San Juan-Chama project contracts

Subsection 9(a) states that contracts issued under this section must be in accordance with this Act and the Settlement Agreement.

Subsection 9(b) directs the Secretary to enter into three repayment contracts, no later than 180 days from the date of enactment of this Act, for the delivery of certain amounts of San Juan-Chama Project Water, and provides requirements for the contracts.

Subsection 9(c) waives the entirety of the Pueblo's share of construction costs for the San Juan-Chama Project as non-reimbursable. Waiver of the Pueblo's share of construction costs will not result in an increase in the pro rata share of other San Juan-Chama water contractors but such costs will be absorbed by the United States Treasury or otherwise appropriated to the Department of the Interior.

Section 10. Authorizations, ratifications, confirmations and conditions precedent

Subsection 10(a) authorizes, ratifies and confirms the Settlement Agreement and any amendments made to the Settlement Agreement to make the Agreement consistent with this Act.

Subsection 10(b) authorizes and directs the Secretary to execute the Settlement Agreement as approved by Congress.

Subsection 10(c) creates a settlement fund and authorizes the appropriation of $30 million for fiscal years 2010–2016, as adjusted for changes in construction costs since April 1, 2007, to fund the water infrastructure and watershed enhancement projects as authorized in section 5. It also authorizes to be appropriated $58 million for fiscal years 2010–2016, as adjusted for changes in construction costs since April 1, 2007, to the Taos Pueblo Water Development Fund, established in section 6(a). This subsection also authorizes to be appropriated $33 million for fiscal years 2010–2016, as adjusted for inflation since April 1, 2007 for certain grants pursuant to section 8. Monies in both funds are to be made available upon the enforcement date, except as provided in section 5(d).

Subsection 10(d) and 10(e) authorize and direct the Secretary to execute the Agreement as approved by Congress and to carry out any and all environmental compliance required by federal law.

Subsection 10(f) lists the conditions precedent for the settlement to come into effect and requires the Secretary to publish in the Federal Register a statement once the conditions are met.

Subsection 10(g) states that the Settlement Agreement is enforceable and the waivers and releases are effective on the date the Secretary publishes the notice in the Federal Register.

Subsection 10(h) states that the agreement is null and void if its conditions are not fulfilled by December 31, 2016, with exceptions providing that the Pueblo can retain early money made available under section 5(d) and 6(f). The United States is entitled under this circumstance to set off any funds expended or withdrawn from the amount appropriated in the Taos Pueblo Infrastructure and Watershed Fund and the Taos Pueblo Water Development Fund.

Section 11. Waivers and releases

Subsection 11(a) requires the Pueblo and the United States to execute specified waivers and releases, including those associated with the water rights claims of Taos Pueblo and the United States in its capacity as trustee for the Pueblo in the Taos Valley or the Rio Grande mainstream or tributary water.

Subsection 11(b) authorizes the Taos Pueblo to execute specified waivers and releases of certain claims against the United States, including those associated with Taos Pueblo's water rights claims.

Subsection 11(c) identifies certain rights and claims of Taos Pueblo and the United States on its behalf that are retained and provides that all rights, remedies, privileges, immunities, powers and claims not specifically waived are retained.

Section 11(d) provides that the Settlement Agreement or this Act does not affect certain federal laws, trust responsibilities, confer on a state court jurisdiction over certain actions, or waive certain rights of any individual Pueblo member.

Section 11(e) provides for the tolling of periods of limitation and time-based equitable defenses relating to claims described in this section.

Section 12. Interpretation and enforcement

Subsection 12(a) provides for a limited waiver of sovereign immunity on the part of the United States or the Pueblo.

Subsection 12(b) provides that nothing in this Act shall effect the subject matter jurisdiction of any court, including the court that enters the Partial Final Decree adjudicating the Pueblo's water rights.

Subsection 12(c) provides that nothing in this Act shall determine or limit the authority of the State of New Mexico or the Pueblo to regulate or administer water or water rights currently or in the future.

Section 13. Disclaimer

Section 13 provides that nothing in this Act affects any water right or claim of any Indian tribe, band or community other than the Pueblo of Taos.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has in-

cluded in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to approve the Taos Pueblo Indian Water Rights Settlement Act, and for other purposes.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 3254—Taos Pueblo Indian Water Rights Settlement Act

Summary: H.R. 3254 would approve and ratify a settlement agreement between the Taos Pueblo and the state of New Mexico. The agreement would settle the Pueblo's claims to water rights in the state. As part of that agreement, the bill would authorize the appropriation of funds to construct and rehabilitate water infrastructure and preserve environmentally sensitive lands in the Taos Valley. The bill also would establish a trust fund for the Pueblo to acquire water rights and maintain the water infrastructure. Finally, the bill would authorize appropriations to mitigate any adverse impacts on Pueblo lands caused by diverting water to execute the settlement agreement.

Based on information from the Department of the Interior (DOI), CBO estimates that implementing H.R. 3254 would cost $25 million over the 2010–2014 period and an additional $114 million to be spent beginning in fiscal year 2017 (as specified by the proposed settlement agreement), assuming appropriation of the necessary amounts. Enacting H.R. 3254 would not affect direct spending or revenues.

H.R. 3254 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3254 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Pueblo Water Infrastructure:						
Estimated Authorization Level	1	3	3	3	0	10
Estimated Outlays	1	3	3	3	0	10
Water Development Fund:						
Estimated Authorization Level	3	3	3	3	3	15
Estimated Outlays	3	3	3	3	3	15

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
Total Spending Under H.R. 3254:						
Estimated Authorization Level	4	6	6	6	3	25
Estimated Outlays	4	6	6	6	3	25

Basis of estimate: For this estimate, CBO assumes that H.R. 3254 will be enacted early in fiscal year 2010 and that the necessary amounts will be appropriated each year. The enforcement of the settlement agreement depends on the completion of a number of actions by federal, state, local, and tribal entities. CBO expects that those actions will be completed early in fiscal year 2017. Cost estimates for the authorized water projects are based on information from DOI and on historical spending patterns for similar activities.

In 2006, the Taos Pueblo in New Mexico and several other parties signed a settlement agreement resolving a water-rights dispute in the Taos Valley. The United States would become a party to that agreement upon enactment of H.R. 3254, provided that certain other conditions are met. Among those conditions, the Secretary would have to publish a statement of findings in the Federal Register indicating that all parties have executed the agreement; the U.S. district court would have to issue a partial decree concerning the agreement; the Congress would have to appropriate sufficient funds to carry out certain provisions of the bill, which CBO estimates would cost $139 million; and New Mexico would have to appropriate amounts it would owe the Pueblo under the agreement.

Based on information from DOI and assuming appropriation of the necessary amounts, CBO estimates that implementing the legislation would cost $25 million over the 2010–2014 period and $114 million after 2016. Should the Secretary of the Interior not publish the required statement of findings by December 31, 2016, verifying that all conditions necessary to execute the agreement have been met, the agreement would not take effect, and any appropriated funds that remain unspent and title to any property acquired or constructed with federal funds would be returned to the federal government (unless otherwise specified by the bill).

Pueblo water infrastructure

Section 5 would authorize the Secretary of the Interior to provide grants to the Taos Pueblo to construct and maintain water infrastructure and to restore and protect environmentally sensitive lands and watersheds. The bill would authorize the appropriation of $30 million (plus additional amounts needed because of increases in construction costs) over the 2010–2016 period. Of that amount, $10 million could be expended upon appropriation. The remaining $20 million would not be available to the Secretary until the enforcement date of the settlement—near the beginning of fiscal year 2017. CBO estimates that implementing this grant program would cost $10 million over the 2010–2014 period and an additional $24 million beginning in 2017.

Water Development Fund

Section 6 would authorize the appropriation of $58 million (plus additional amounts needed because of increases in construction costs) over the 2010–2016 period for the Taos Pueblo Water Development Fund. The Secretary of the Interior would be directed to hold those funds in trust for the Pueblo until the enforcement date of the settlement—the beginning of fiscal year 2017. After that date, the Secretary would be required to invest amounts in the fund in U.S. Treasury obligations, and those amounts would be available to the Pueblo to construct, operate, and maintain certain water system facilities owned or operated by the Pueblo.

Of the total amount authorized to be appropriated to the fund, $15 million would be available immediately for the Pueblo to acquire certain water rights. Control over those amounts would be transferred to the Pueblo when appropriated. The remaining amounts could be spent by the Pueblo only after the settlement agreement is executed. Assuming appropriation of the authorized amounts, CBO estimates that outlays from the fund would total $15 million over the 2010–2014 period and $52 million after 2016.

Payments to certain tribal trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. As a result, CBO expects that the entire amount deposited into the Taos Pueblo Water Development Fund (excluding amounts made available to acquire water rights) would be recorded as an outlay in 2017 when the funds could be spent by the Pueblo. Subsequently, any use of such funds would have no effect on the federal budget. Because H.R. 3254 directs the Secretary to invest amounts in the fund only after those amounts are available to the Pueblo, CBO expects that no interest would accrue on the amounts in the fund until after the payments are made in 2017.

Mutual-benefit projects

Section 8 would authorize the Secretary of the Interior to provide grants to local governments (other than the Taos Pueblo) for projects intended to mitigate the impact of diverting water from present uses to execute the settlement. The bill would authorize the appropriation of $33 million (plus additional amounts needed because of increases in constructions costs) over the 2010–2016 period. The funds would be available on the settlement's enforcement date—the beginning of fiscal year 2017. Assuming appropriation of the authorized amounts, CBO estimates that implementing this grant program would have no cost over the 2010–2014 period and would cost $38 million after 2016.

Intergovernmental and private-sector impact: H.R. 3254 contains no intergovernmental or private-sector mandates as defined in UMRA. The bill would authorize water projects and provide other assistance that would benefit state, local, and tribal governments. Any costs to those governments would be incurred voluntarily as a condition of federal assistance.

Previous CBO estimate: On October 13, 2009, CBO transmitted a cost estimate for S. 965, the Taos Pueblo Indian Water Rights Settlement Act, as ordered reported by the Senate Committee on Indian Affairs on September 10, 2009. The House and Senate

versions of the legislation are similar, and our cost estimates are the same.

Estimate prepared by: Federal costs: Jeff LaFave; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

EARMARK STATEMENT

H.R. 3254 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

ADDITIONAL VIEWS

H.R. 3254, the Taos Pueblo Indian Water Rights Settlement Act reflects a large amount of work, time and patience by the people of the Pueblo of Taos and their local, state and federal partners. It is unacceptable that there has been 40 years of outstanding litigation dealing with the adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems (titled the *State of New Mexico ex rel. State Engineer, et al.* v. *Abeyta* and the *State of New Mexico ex rel. State Engineer* v. *Arellano et al.* (consolidated)). Enactment of H.R. 3254 would adjudicate the water rights of the Pueblo of Taos, end 40 years of litigation, and will provide certainty to the water rights of the Pueblo of Taos and the non- pueblos in the Taos Valley.

Since the Criteria and Procedures have been issued, there has been consensus policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. In this case, according to testimony given by the Bureau of Reclamation Commissioner Michael L. Connor, "the willingness of the Taos Pueblo, in particular, to agree to reasonable and necessary compromises has been impressive, and the leadership of the Pueblo negotiation team is to be commended for dedication and steadfastness over many years of very difficult negotiations."

There has also been concerns raised that resolving water rights is a way of asking taxpayers to pay for a project from which those taxpayers derive no benefit. The commitment of the federal government to act as the Trustee of the Pueblo comes with a responsibility to address the water rights of each tribe or pueblo.

Included with these views is a November 3, 2009, letter submitted by the Taos Pueblo (Pueblo) in response to the October 22, 2009 letter, to the Subcommittee on Water and Power by Commissioner Michael L. Connor regarding H.R. 3254.

Based on testimony provided by the Commissioner of the Bureau of Reclamation, if the claims asserted in litigation by the United States and the Pueblo were successful, "the court could award the Pueblo rights to approximately 78,000 AFY of diversion and 35,000 AFY of depletion of water in the basin." The Pueblo of Taos settled for a water right of 11,927 acre-feet depletion. With an estimated cost of water rights in northern New Mexico to be as much as $10,500 to $12,000 per acre-foot of consumptive use per year, the value of this water could be estimated to be as much as $240 million. This potential value is much more than the amount that is authorized to be appropriated in H.R. 3254, a clear financial benefit to all taxpayers. The Administration further recognizes that there is no guarantee that the Pueblo will be able to require enough state-based water to pull all its forborne water rights to use, which the Pueblo sees as the Pueblo "bearing" the risk.

The Pueblo has also agreed to language changes proposed by the Administration by deleting the exemption from Secretarial ap-

proval of subcontracts of the San Juan-Chama Project water from terms less than seven years in section 7(e)(2) and extending the time for the Secretary of the Interior to enter into the San Juan-Chama Project contracts to six months after enactment.

In context, all settlements are unique and focused on the needs of the specific of each tribe or pueblo. The difference between settlements is the degree to which the details have been worked out before any legislation is introduced. In the case of the Pueblo of Taos, the details have been addressed and there is unanimous support for the Settlement between the Pueblo and non-Pueblos within the Taos Valley.

We hope that this Administration will continue to rededicate itself and commit its resources to fulfilling its leadership role in the settlement negotiations process.

Enclosure (1).

GRACE F. NAPOLITANO.
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November 3, 2009

By Facsimile Transmittal to (202) 225-1931

The Honorable Nick J. Rahall, II
Chairman, House Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, DC 20515

Re: H.R. 3254, Taos Pueblo Indian Water Rights Settlement Act

Dear Chairman Rahall:

Taos Pueblo respectfully submits this letter in response to the October 22, 2009 letter from Commissioner of Reclamation Michael L. Connor to you, providing views of the Administration regarding H.R. 3254 ("Connor letter") as a supplement to the views of the Administration provided in Commissioner Connor's testimony delivered to the House Subcommittee on Water and Power on September 9, 2009 ("Administration Testimony"). We commend Commissioner Connor and this Administration for their vision and commitment to our settlement efforts that have resulted in strong Administration support for the core settlement components and no objection to the overall cost of our settlement.

As Commissioner Connor's letter highlights, substantial compromises by Taos Pueblo have also made this achievement possible. We are waiving the vast majority of our formidable senior historic water rights claims—approximately 23,000 AFY—and settling for 11,927.51 AFY of depletion rights (*see* Testimony of Nelson J. Cordova on behalf of Taos Pueblo, September 9, 2009 ("Taos Pueblo Testimony") at 4). As Commissioner Connor emphasizes, "[t]his is very valuable water" that "has been estimated to be as much as $10,500 to $12,000 per acre-foot of consumptive use" (Connor letter at 2). Simple math therefore suggests the value of this "tremendous compromise" (Administration Testimony at 4) ranges over $240 million—far in excess of the settlement funding for the Pueblo of $88 million and the total federal settlement funding of $121 million. The Administration further recognizes there is "no guarantee that the Pueblo will be able to acquire enough state-based water to put all its forborne water rights to use" (Connor letter at 1-2), in other words, we are bearing the burden of this risk. As Commissioner Connor has noted, "[t]he United States participated actively in the negotiations . . . and was able to resolve most issues of concern to the Government" (Administration Testimony at 3). "The willingness of the Pueblo, in particular, to agree to reasonable and necessary compromises has been impressive" (*id*). Several of our additional significant compromises and the associated core settlement components are summarized in the Administration Testimony under "Provisions that the Administration Supports":

- Waivers and releases of claims (Administration Testimony at 4);
- Funding for the "central and noteworthy" protection of our sacred Buffalo Pasture (*id.* at 4);
- "Perhaps the most significant positive attribute of the negotiated settlement is that it solidifies and makes permanent many water sharing arrangements that the Pueblo and its non-Indian neighbors have struggled for years to establish" (*id.* at 5); and

- "Overall, it provides some innovative mechanisms for managing water in Taos Valley to satisfy the Pueblo's current and future water needs, while minimizing disruption to non-Indian water users" (*id.* at 6).

We have made further compromises to address the current Administration's concerns through amendments (1) deleting the exemption from Secretarial approval of subcontracts of San Juan-Chama Project (SJCP) water for terms less than 7 years in Section 7(e)(2), and (2) extending the time for the Secretary to enter into the SJCP contracts to six months after enactment. We appreciate that the Administration presented its views in the context of its support for the fundamental terms of the settlement and the Pueblo's substantial compromises and leadership. Our views and the steps we have taken to address the Administration's four remaining concerns are as follows:

1. **"A closer look" at the costs of the settlement and the United States' share has shown they are reasonable and appropriate.**

A close look at the costs of the settlement and the share of costs borne by the United States was taken by the Federal Administration during the many years of settlement negotiations at which the Department of the Interior and the Department of Justice were at the settlement negotiations table. In addition, in April 2007, Taos Pueblo provided the Federal Administration an updated estimate and justification for the Pueblo's settlement funds and the other local parties provided updated cost estimates for the Mutual-Benefit Projects.

2. **The early timing of a portion of Pueblo settlement funding is necessary to the linchpin components of this settlement that the Administration supports.**

The Administration notes that "providing early settlement benefits is not good public policy," and acknowledges that "[l]imited departure from this practice may sometimes be appropriate" (Connor letter at 2). Such a limited departure is appropriate and justified in this case because of the tight connection between the purposes and amount of the early funding and the innovative settlement mechanisms at the core of the settlement that are *supported by the Administration* as illustrated by the following examples (totaling approximately the $25 million authorized by H.R. 3254):

- "The Department understands the Pueblo's need for immediate access to funds, especially to halt deterioration of the condition of the Buffalo Pasture" (Connor letter at 3), which is included in the early funding purposes (Sections 5(a), 5(d)(1) and 6(f)(1));

- Early funding purposes include acquiring water rights to meet the critical initial target level of exercise of our Historically Irrigated Acreage water rights and the staffing needed for the many other water sharing arrangements which the Administration supports (*see* Administration Testimony at 5);

- Early funding for water infrastructure (Sections 5(a)(1), 5(d), and 6(f)(1)) includes the irrigation infrastructure improvements needed to enable us to reach the HIA initial target; and

- Certain Pueblo drinking water infrastructure problems identified by the Indian Health Service as in need of urgent attention are eligible for this early funding.

While the dollar amount of the early funding is greater than that of settlements dating back six and ten years ago, it is commonly known that the costs of water rights, for instance, have dramatically increased, and the overall costs of the Taos settlement are quite modest in comparison with enacted and pending Indian water rights settlements, especially given the claims we are waiving. The existing language in Section 10(h)(3) allows the United States the right "to set off any funds expended or withdrawn" from the early funding for water rights

purchases and other early funding purposes "against any claims asserted by the Pueblo against the United States relating to water rights in the Taos Valley." Although we believe this sufficiently addresses the Administration's concern "that no entity can benefit if the settlement fails" (Connor letter at 2), we welcome their suggestions for clarification.

3. The remaining exemption from Secretarial approval of leases of water rights appurtenant to tribal lands is consistent with exceptions in recent settlement legislation.

We agreed to the Administration's request to eliminate the exemption in Section (7)(c)(2) from Secretarial approval for subcontracts of our SJCP contract rights. Since the Administration's additional concern about the short-term lease exemption came to light, we have explained why retaining the exemption for leases of less than 7 years is consistent with precedent, policy and practice (*compare* Pub. L. No. 111-11, §10701(d) (no Secretarial approval required for Navajo Nation leases, contracts or other transfers of water rights not under federal water contract) *with id.* §10701(c)(1)(B) (Secretarial approval required for subcontracts of federal contract water); *see also* Snake River Water Rights Act of 2004, Pub. L. No 108-447, § 7(g) (subject to Water Code and without further approval of the Secretary, Snake River Tribe may lease reserved water right through state water bank). We appreciate that the Secretary's Office of Indian Water Rights is engaged with us in reviewing these and other comparable exceptions from the "standard practice" (Connor letter at 3).

4. The limited waiver of sovereign immunity in Section 12(a) is appropriate.

Section 12(a) was revisited at length in our negotiation of waivers and releases of claims with the Departments of Justice and Interior last fall. Rather than "engender additional litigation" (Connor letter at 3), we believe the limited waiver in Section 12(a) "if any Party to the Settlement Agreement brings an action in any court of competent jurisdiction over the subject matter relating only and directly to the interpretation or enforcement of the Settlement Agreement or this Act . . . for the limited and sole purpose of such interpretation or enforcement" will *avoid* future frivolous litigation over whether the McCarran Amendment, 43 U.S.C. § 666, which waived the United States' sovereign immunity for "adjudication" and "administration" of water rights, also waived immunity from suits to enforce water rights settlements. Moreover, similar provisions to Section 12(a) have been enacted for other Indian water rights settlements (*see* Taos Pueblo Testimony at 14).

We believe our settlement demonstrates strong Administration support overall, and we look forward to productive dialog with Commissioner Connor and others in the Administration towards the timely enactment and successful implementation of our settlement. We respectfully ask this Committee to promptly issue its favorable report on H.R. 3254 so that our settlement's promise can be fulfilled.

Sincerely,

Ruben A. Romero
Governor

Bernard Lujan
War Chief

cc: Ranking Minority Member Doc Hastings, House Committee on Natural Resources
Chairwoman Grace F. Napolitano, Subcommittee on Water and Power, House Committee on Natural Resources
Ranking Minority Member Tom McClintock, Subcommittee on Water and Power, House Committee on Natural Resources
The Honorable Ben Ray Lujan, U.S. House of Representatives
The Honorable Martin T. Heinrich, U.S House of Representatives
Senior Policy Advisor for Native American Affairs, Kimberly Teehee, the White House

Deputy Secretary of the Interior David Hayes, Department of the Interior
Councilor to the Deputy Secretary, Alletta Belin, Department of the Interior
Commissioner Michael L. Connor, Bureau of Reclamation
Director of the Secretary's Office of Indian Water Rights Pamela Williams, Department of the Interior
Federal Negotiation Team Chair, John E. Peterson, Department of the Interior
Abeyta Local Parties
Lt. Governor Tony R. Mirabal, Taos Pueblo
Tribal Secretary Luis F. Zamora, Taos Pueblo
Lt. War Chief Samuel Gomez, Taos Pueblo
War Chief Secretary Floyd D. Gomez, Taos Pueblo
Tribal Council Secretary Ernesto Luhan, Taos Pueblo
Councilman Nelson J. Cordova, Taos Pueblo
Councilman Gilbert Suazo, Sr., Taos Pueblo
Susan G. Jordan, Nordhaus Law Firm, LLP
Noelle Graney, Nordhaus Law Firm, LLP

ADDITIONAL VIEWS OF THE HONORABLE TOM MCCLINTOCK

On September 30, 2009, the Natural Resources Committee met to mark up H.R. 3254. This bill authorizes the Secretary of the Interior to approve the settlement of water rights claims of the Taos Pueblos.

This bill rightly attempts to resolve longstanding Indian water rights claims, but Congress lacks sufficient information to assess whether the $136 million authorized in this legislation is appropriate. Therefore, as Ranking Republican of the House Water and Power Subcommittee, I have serious fiscal concerns with this well-intended bill.

It is important that Congress play a role in settling Indian water rights claims, some of which comprise the oldest standing litigation in the federal court system. Settling legal claims not only resolves litigation but also can help establish water supply certainty for water users on and off reservations.

But Congress must also answer key questions when it considers these and other settlements and should not be just a rubber stamp. For example, one of the most important questions involving a settlement—especially when American taxpayer dollars will be used—is whether resolving the litigation will be advantageous to the federal government compared to its liability under current law. That question has not been answered for H.R. 3254.

If Congress were the board of directors of a private corporation deciding whether to approve a negotiated legal settlement, we would be guilty of breaching our fiduciary responsibility to stockholders if we made that decision without consulting legal counsel to determine the company's financial exposure absent the settlement.

Since this question remains unanswered, Congress is forced to be the arbitrator between sides involved in the litigation. This is a role Congress should not be forced to assume without sufficient information. Given the astounding fact that the current Administration has expressed general fiscal and other reservations about this bill, Congress should ask for and deserves answers. As part of this, Department of the Interior was asked for its views on the bill as passed by the Natural Resources Committee. The Department's response to Congress, which is attached, clearly indicates there are numerous issues that still need to be resolved.

I also sent a letter on September 25, 2009 to the Department of Justice asking for opinions on this legislation. The letter specifically asks the Attorney General to provide his view on the "likelihood that the recipients of water rights and funds transferred by these settlements would prevail on the merits of their claims and whether these settlement amounts represent a net benefit to the taxpayers as compared to the consequences and costs of litigation."

To date, I have not received a response from Justice to this question, and I fundamentally believe that Congress needs this and other answers before moving forward with spending hundreds of millions of American taxpayer dollars.

My request is based on precedent. In an appearance before the Natural Resources Committee on legislation resolving Colville Indian claims, a Clinton Administration Justice Department official testified in 1994, "[T]he Federal government is not that well postured for a victory on this claim which has been pending for over 40 years. Absent the settlement, we could well litigate it for another ten years and the outcome could easily be a significant cost to the taxpayers and the public." This testimony was very helpful in moving that legislation forward. According to the Congressional Research Service, Justice Department officials have testified on additional settlements pending before Congress, so there is no reason why this Congress should act without similar information on this bill.

Without these transparent answers and with the large amount of taxpayer funding in this bill—scored by the Congressional Budget Office as $25 million for 2010–2014 and an additional $114 million after 2017—I have serious concerns with the way this Congress and the Obama Administration are moving forward on H.R. 3254 and Indian water rights settlement bills in general.

TOM MCCLINTOCK.

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

OCT 2 2 2009

IN REPLY REFER TO:

The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power
Committee on Natural Resources
House of Representatives
Washington, DC 20515

Dear Ms. Napolitano:

In response to your request, this letter presents the views of the Administration regarding H.R. 3254, the "Taos Pueblo Indian Water Rights Settlement Act," as reported by the Subcommittee on Water and Power on September 30, 2009. For overall views regarding the purposes and importance of this settlement, I would refer to my testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 9, 2009, prior to changes made during the markup.

I want to begin by emphasizing, as I did in the testimony delivered at the September 9 hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by H.R. 3254 would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing since 1969, when the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed. Under the terms of the negotiated settlement, the Taos Pueblo (Pueblo) has a recognized right to a total of 11,927.71 acre-feet per year (AFY) of depletion, of which 7,249.05 AFY of depletion would be available for immediate use. The Pueblo has agreed to forebear from using 4,678.66 AFY in order to allow non-Indian water uses to continue without impairment. The negotiated settlement contemplates that the Pueblo would, over time, acquire the right to put its forborne water rights to use through purchasing and retiring state-based water rights from willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to acquire enough state-based water to put all its

forborne water rights to use, however. The quantity of water secured under the settlement is a tremendous compromise on the quantity of water claimed by the United States and the Pueblo. If the claims asserted in litigation by the United States and the Pueblo were successful, the court could award the Pueblo rights to approximately 78,000 AFY of diversion and 35,000 AFY of depletion of water in the basin. This is very valuable water. The cost of water rights in northern New Mexico is extraordinarily high and has been estimated to be as much as $10,500 to $12,000 per acre-foot of consumptive use per year.

We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns that could make this a settlement that the Administration could wholeheartedly support. I will not reiterate the entire statement made by the Administration during the September 9, 2009 hearing but instead will focus this set of comments on the areas in this legislation that were improved by the markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, we believe a closer look can and should be given to the costs of the settlement and the share and timing of those costs to be borne by the United States. H.R. 3254 authorizes a Federal contribution of $121,000,000, to be paid over 7 years. Of this total, $88,000,000 is authorized to be deposited into two trust accounts for the Pueblo's use. An additional $33,000,000, adjusted to reflect changes in construction cost indexes since 2007, is authorized to fund 75% of the construction cost of various projects that have been identified as mutually beneficial to the Pueblo and local non-Indian parties. The State and local share of the settlement is a 25% cost-share for construction of the mutual benefit projects ($11,000,000). The Settlement Agreement provides that the State will contribute additional funds for the acquisition of water rights for the non-Indians and payment of operation, maintenance and replacement costs associated with the mutual benefits projects. The Administration believes that this cost-share is disproportionate to the settlement benefits received by the State and local non-Indian parties. We believe that increasing the State and local cost share for the mutual benefit projects is both necessary and appropriate, and consistent with the funding parameters of other Federal water resources programs.

An unusual and problematic provision of H.R. 3254 would allow the Pueblo to receive and expend $25 million for the purposes of protecting and restoring the Buffalo Pasture, constructing water infrastructure, and acquiring water rights before the settlement is final and fully enforceable. The Department believes providing early settlement benefits is not good public policy and has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties only when the settlement is final and enforceable so that no entity can benefit if the settlement fails. Limited departure from this practice may sometimes be appropriate, but there should always be statutory provisions ensuring that the United States is able to recoup unexpended funds or receive credits or off-sets for the water and funding provided by the United States if the settlement fails and litigation resumes.

The amount of funding that would be provided to Taos before the settlement is final is also of concern. In previous settlements allowing early benefits, the funding was far more limited –less than $4 million. Although the Department understands the Pueblo's need for immediate access to funds, especially to halt deterioration of the condition of Buffalo Pasture, we remain concerned about the precedent that this would set for the many other pending Indian water settlements that are working their way toward Congress. We recommend that the bill be amended to significantly reduce the amount of early money that is authorized. In addition, we are of the view that the statutory provisions addressing our concern that the United States' ability to receive value for the settlement benefits it has provided in the event that the settlement fails should be strengthened. The Administration suggests that language be added to Section 10(h) to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement, including any water secured for the Pueblo, in the event that the settlement fails

The Administration notes an amendment made at markup to H.R. 3254 setting a more appropriate deadline for the Department to enter into the contracts. The new language requires the Secretary to enter into the contracts at the date that is 180 days after the date of enactment of H.R. 3254 into law. This language would allow the Secretary 6 months to complete the environmental compliance and other work that must be accomplished before the contracts can be executed. The Administration had recommended that the legislation allow 9 months to complete all necessary work. The new language is an improvement from the original language although we would still recommend building in an additional 3 months to recognize the need for adequate startup time and complete analysis.

We also recommend that the settlement legislation be amended to require Secretarial approval for all water leases and subcontracts. As currently written, section 7(e)(2) exempts leases or subcontracts of less than 7 years duration from the approval requirement. Secretarial approval is required for all existing San Juan Chama subcontracts and we believe there is no reason to depart from that practice here. With respect to leasing other types of water, the requirement of Secretarial approval has been the standard practice in Indian water rights settlements and allows for appropriate environmental compliance to be undertaken. H.R. 3254 as amended deletes the phrase "or subcontract" from this section but this does not address the Administration's concern regarding the appropriateness of Secretarial approval in these circumstances.

Additionally, the United States objects to Section 12(a) -- which waives the sovereign immunity of the United States for "interpretation and enforcement of the Settlement Agreement" in "any court of competent jurisdiction." This section should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in H.R. 3342, the Aamodt Litigation Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication.

Finally, the United States is concerned that after markup H.R. 3254 still fails to provide finality on the issue of how the settlement is to be enforced. The bill leaves unresolved

the question of which court retains jurisdiction over an action brought to enforce the Settlement Agreement. This ambiguity may result in needless litigation. The Department of Justice and the Department of the Interior believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

Overall, the negotiated settlement represents a positive step towards the resolution of historic water disputes in an area that has limited water resources and is struggling to support the population it has attracted. It is a settlement that contains many provisions that the Administration can support, which are described in detail in the testimony delivered before the House Subcommittee on Water and Power on September 9, 2009.

In conclusion, I would like to emphasize that this Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results. Neither the Pueblo nor their non-Indian neighbors benefit from continued friction in the basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblo and also ensures that the appropriate costs of the settlement are borne proportionately. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. In addition, we would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,

Michael L. Connor
Commissioner

cc: The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources

The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

The Honorable Tom McClintock
Ranking Member, Subcommittee on Water and Power, Committee on Natural Resources

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