

## **April 5th Water Conference Participant List**

### **Question 3: Indian and Federal Reserved Water Rights**

What effort should be made by the federal government to encourage the adjudication or settlement of Indian water rights claims? Should a similar effort be made to quantify other federal reserved rights? Are adjudications an appropriate means to quantify those rights?

#### **Participants:**

- Western States Water Council
- New Mexico State Engineer
- Nordhaus Law Firm on Behalf of the Pueblos of Laguna, Santa Ana, Santo Domingo, and Taos
- Native American Rights Fund

**Senate Energy and Natural Resources Committee  
Water Conference**

**Western States Water Council**

**Proposals:**

1. Provide adequate funding for Interior negotiating teams for both achieving and implementing settlements in order to facilitate increased tribal participation and significantly advance the goal of achieving water rights settlements.
2. Enact legislation to establish a funding mechanism to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset to some other tribe or essential Interior Department program.
3. Enact legislation to require that the federal government pay filing fees for its claims in state general adjudications to the same extent as private water users.

**What effort should be made by the federal government to encourage the adjudication or settlement of Indian water right claims?**

The Western State Water Council has for years actively supported the negotiated settlement of the water claims of Native Americans. The Council believes that the settlement of Native American water claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole. The Council adopted a policy advocating the settlement of water claims in 1986 and has maintained this policy consistently since that date.

The Congress is to be commended for its support of negotiated Indian water right settlements. Over the past 25 years, more than nineteen settlements of Indian land and water rights have been reached in the western states and approved by the Congress. These settlements have helped save untold millions of dollars of public and private monies through avoidance of prolonged and costly litigation. A key component of this success has been the Administration's efforts to establish and maintain negotiation teams for both achieving and implementing settlements. Unfortunately, the level of funding for these negotiation teams is currently inadequate to meet the needs. Moreover, a significant cut in funding is being proposed for the FY06 federal budget. Consistent with the trust responsibility of the United States to the tribes, we urge Congress to provide the necessary funding to facilitate increased tribal participation which could significantly advance our mutual goal of achieving water rights settlements.

In addition, an appropriate funding mechanism must be found for water settlements, or the Administration's settlement policy may become a nullity.

The current practice is to treat the funding of water settlements as discretionary, with the result that a settlement can only be funded with a corresponding reduction in some other

discretionary component of the Interior Department's budget. The practical effect of this budgetary policy is to significantly hinder the funding of water settlements. It is very difficult for the Administration, the States or the Tribes to negotiate settlements knowing that they will only be funded at the expense of some other Tribe or essential Interior Department program.

Funding of water settlements should be a mandatory obligation of the United States government. The obligation is analogous to, and no less serious than the obligation of the United States to pay judgments which are rendered against it. We urge that steps be taken to change current policy to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, all of these claims will be relegated to litigation, an outcome which ought not to be acceptable to the Administration, the Congress, the Tribes or the States.

The following is draft legislative language which, if enacted, would make mandatory the funding of any water settlement authorized by Congress and approved by the President. It would appropriately treat the funding of the settlement of Indian water right claims as a judgment against the United States. It is proposed as language to amend an Interior appropriations act or a supplemental appropriations act:

“Such sums as may be necessary, not to exceed \$250,000,000 in any fiscal year, shall hereafter be available for payment of amounts authorized in Indian land and water claims settlement Acts, subject to the same protections and limitations as funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Claims Court in favor of any Indian tribe, band, group, pueblo, or Indian community.”

Historically, judgments upholding Indian claims rendered by the Court of Claims or the Indian Claims Commission have been treated and paid as were other judgments by the Court of Claims, and have not been included as part of Interior's budget. As recently as 1992, the Indian Claims Commission ruled that compensation should be paid to the tribe which it would have received related to lands taken for construction of the Grand Coulee Dam. The compensation was paid from the “judgment fund.”

We acknowledge that there may be other approaches to achieving the desired result than the above language. In 1996, Congress established a trust fund to rectify the failure to perform restoration work that was supposed to have ameliorated the negative effects to the Crow Creek Sioux Tribe from the Pick-Sloan Project. The trust was funded by placing into an account at the Department of Treasury 25% of receipts from the power revenues generated by the Pick-Sloan Missouri River Basin Program every fiscal year until the total of \$27.5 million is achieved. Interest on the corpus of the trust is to provide for the construction, operation and maintenance of a water system on the reservation. We look forward to exploring various approaches in resolving this vital issue.

### **Should a similar effort be made to quantify other federal reserved rights?**

A policy favoring settlement of non-Indian reserved right claims is also important, although these claims are not associated with the federal government's trust responsibility for Indian tribes. Such settlements offer advantages which include: (1) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (2) the ability to promote conservation and sound water management practices; and (3) the ability to establish the basis for cooperative partnerships. While funding for the settlement of these claims is also vital, the dynamics are somewhat different and one important aspect arises chiefly in the context of state general stream adjudications discussed below.

### **Are adjudications an appropriate means to quantify those rights?**

States in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including the rights to waters claimed by the United States under either state or federal law. These adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants. Such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West. Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. § 666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims.

Although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications. This holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers. This drain on the resources of states and lack of federal government financial support significantly inhibit the ability of both state and federal agencies to protect private and public property interests.

This is nowhere more evident than in the Klamath Basin where approximately 400 of the 700 claims being adjudicated are federal claims. The complexity of these federal claims, coupled with a series of lawsuits filed in federal court by federal agencies, has significantly delayed the state adjudication. Further, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered. In Idaho, for example, the Forest Service initially filed 3,700 last-minute claims in the Snake River Basin adjudication just prior to the initial court action on

the adjudication fee issue. After the Forest Service used these last-minute claims to quantify the fiscal impact of paying fees and after the State of Idaho incurred considerable expense investigating these claims, the Forest Service withdrew all but 61 of the claims, and the state adjudication court has since dismissed all but 9 of the claims.

With this background, the western states have attempted to address this problem in the Congress. Bills have been introduced in Congress that would require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding. New Mexico proposed alternative legislation to provide federal funding support to each of the states pursuing general stream adjudications, based on a formula assessing the relative need for such support. These proposals have not advanced within Congress. We urge you to address this inequity. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U.S. Supreme Court ruling on the Forest Service claims in Idaho.

In addition, while not within this Committee's jurisdiction, it should also be noted that varying Tribal water quality standards (as well as the lack thereof) and checkerboarded reservations, raise serious state concerns over administration – on and off the reservations – which have yet to be resolved. In order to prevent voids in regulation, state water quality standards should be effective on Indian lands until replacement standards have been adopted by tribal governments which are treated as states, or promulgated by EPA. Congress should provide direction that will aid in cooperative resolution of water quality issues. All efforts should be made to develop consistent tribal/state water quality standards at adjoining jurisdictional boundaries.

**Senate Energy and Natural Resources Committee  
Water Conference**

**New Mexico State Engineer**



**Topic 3: Indian and Federal Reserved Water Rights**

The determination and quantification of Indian and federal reserved water rights is a matter of critical importance to all citizens, Indian and non-Indian alike, of the western states. This is an area where Congressional action can achieve direct and substantial benefits.

Completion of water rights adjudications is a priority for New Mexico. Toward that end, New Mexico supports settlement of Indian water rights claims and federal reserved water rights claims. New Mexico has recently completed the negotiation with the Navajo Nation of a settlement of the Nation's claims for water rights in the San Juan River Basin in New Mexico, and is in the process of negotiating other Indian water rights settlements. Based on experience, New Mexico understands the difficulties of negotiating a settlement that must take into account competing demands for a finite resource. New Mexico also understands the need to balance the uncertainties of litigation against the challenges of meeting the needs of opposing interests. Cooperation from the federal government is essential to bringing closure to New Mexico's ongoing settlement negotiations and to resolving the many outstanding Indian and federal reserved water rights claims that exist in our state.

**1. Determination of Indian Water Rights Claims and Federal Reserved Water Rights Claims**

A. The direct benefits of completing the adjudication of Indian water rights claims and federal reserved water rights claims are significant. They include the removal of a barrier to economic development for both Indians and non-Indians, and the savings to all parties of the high costs of protracted litigation. These benefits would accrue to the nation as a whole.

B. In New Mexico, the need for the adjudication of Indian and federal water rights claims is acute. The lands of 22 Indian Tribes, Nations, and Pueblos lie within the borders of New Mexico. Of these, only the water rights of the Jicarilla Apaches have been fully adjudicated. The remaining Indian claims are typically to water rights of such senior priority and large quantity that, if recognized and fully exercised, they could displace significant numbers of non-Indian water rights developed under state law. In one instance, the claims of the Navajo Nation are potentially so large that they could exceed New Mexico's apportionment under the Upper Colorado River Basin Compact.

Based on an understanding of the importance of Indian water rights settlements, the New Mexico legislature is now considering legislation to establish an Indian Water Rights Settlement Fund. This fund would provide a mechanism for the state to comply with its funding obligations under potential Indian water rights settlements. This legislation recognizes the need for New Mexico to plan ahead to make the Indian water rights settlements successful, but New Mexico's efforts will not succeed without a corollary effort on the part of the federal government. Notwithstanding the current federal budget difficulties, the federal government needs to prioritize settlement and funding relating to Indian water rights.

C. Federal action and inaction have contributed significantly to the considerable uncertainty surrounding Indian and federal water rights claims. This uncertainty accentuates the present urgent need for those claims to be adjudicated.

In New Mexico, it is easy to see how actions and inaction of the federal government have contributed to the present uncertainty over the water rights claims of Pueblo Indians. It is well known, for example, that the early U.S. Supreme Court case of *U.S. v. Joseph*, 94 U.S. 614 (1876) (in which the Pueblo Indians were determined not to be “Indians” for purpose of the Non-Intercourse Act, with the consequence that they could own and alienate their lands, which they did), followed by the Court’s 1913 decision in *U.S. v. Sandoval*, 231 U.S. 28 (which reversed *Joseph*, finding that the Pueblos were, and always had been, subject to and benefited by the Non-Intercourse Act), threw into doubt the validity of some forty years of real estate transactions involving lands within Pueblo grants. In addition, the attempts by Congress to address the problem, by the Pueblo Lands Act of 1924 and the 1933 Act, were wholly inadequate.

The federal government also has contributed to the uncertainty surrounding the water rights claims of Indian Nations and Tribes other than the Pueblos, and of the federal government. Federal actions or policies that have contributed to this include the creation and dissolution of Indian reservations, periodic recurrence of radical shifts in federal Indian policy, and other federal actions which may “impliedly” reserve water without an actual appropriation.

D. It is therefore appropriate for the United States to provide substantial support to promote the completion of adjudication of Indian and federal reserved water rights claims, by both settlement and litigation.

E. Congress helps enormously, of course, by legislative approval and funding of successful Indian water rights settlements, and this expectation of United States support is usually critical to achieving a settlement.

New Mexico is proud of its accomplishments in negotiating a Settlement Agreement with the Navajo Nation. The Settlement was completed in December 2004 after years of negotiations and resolves the claims of the Navajo Nation to the use of waters of the San Juan River Basin in New Mexico in a manner that would inure to the benefit of the Navajo Nation and the State of New Mexico. The negotiating parties made great efforts to provide information to the public and third parties regarding the Settlement and to take comments into account in finalizing the Agreement.

The Settlement provides water rights and associated water development projects for the benefit of the Navajo Nation in exchange for a release of claims to water that potentially might otherwise displace existing non-Navajo water uses in the San Juan River Basin in New Mexico. Along with the Settlement Agreement, the parties have negotiated: 1) a proposed court decree for entry in the San Juan River Adjudication setting forth the rights of the Navajo Nation to use and administer waters of the San Juan River Basin in New Mexico; 2) a proposed Settlement Act for Congress to authorize the Bureau of Reclamation to construct and operate the Navajo-Gallup Water Supply Project, to fund the Bureau of Reclamation to complete and rehabilitate Navajo water projects in the San Juan River Basin in New Mexico, and to approve the Settlement Agreement and other authorizations to secure to the Navajo Nation a water supply to meet the needs of

the Nation and its members; and 3) a Settlement Contract to provide for deliveries to the Navajo Nation under Bureau of Reclamation water projects, namely the Navajo Indian Irrigation Project, the Navajo-Gallup Water Supply Project, and the Animas-La Plata Project. Continued cooperation from the federal government will be critical to ensure the benefits of this settlement can be achieved.

In addition, under the Settlement, the federal government is responsible for providing approximately \$620 million of the funding necessary to implement the settlement. The state is responsible for funding an additional \$35 million and local parties and the Jicarilla Apache Nation are responsible for yet another \$131 million. This level of funding represents a reduction from the amounts originally proposed, and New Mexico expects that the federal government will cooperate in enabling the Settlement to progress.

F. Unfortunately, participation by the Departments of Justice and Interior in recent negotiations to resolve Indian water rights claims in New Mexico has been perfunctory and non-substantive.

In addition to the Navajo settlement, New Mexico is in the process of negotiating settlements in the *Aamodt* adjudication, in the Nambe-Pojoaque-Tesuque area, and the *Abeyta* adjudication, in Taos, both of which are long-standing water rights adjudication suits. In the *Aamodt* case, which has the distinction of being the oldest active case in federal court, settlement negotiations have been proceeding for over four years, and while the federal government participated in the negotiations through the Justice Department, recent public pronouncements that the federal government is unwilling to contribute more than a fraction of the total proposed settlement costs have caused extreme disruption to the negotiation process. It is unreasonable for the federal government to attend settlement discussions without meaningful participation, and to withhold substantive comments until a settlement is finalized and legislation is introduced before Congress. New Mexico is encouraged by the recent appointment of Jennifer Gimbel within the Department of the Interior to oversee Indian water rights settlements, and looks forward to working closely with her within the next few years to finalize the settlements under negotiation and obtain the necessary congressional support. New Mexico is also supportive of the comments made on this issue by the New Mexico delegation during the Senate Energy and Natural Resources Committee hearing on the Fiscal Year 2006 Interior Department budget.

G. In most of the west, and certainly in New Mexico, it is crucial that all Indian and federal water right claims be adjudicated. The surface waters of New Mexico's streams were fully appropriated years ago, and the competing demands on the state's available water supplies do not allow the luxury of putting off quantification questions. The adjudication of reserved water right claims asserted by the federal government should be made a priority along with the adjudication of Indian water rights claims.

Recommendations:

1. *Congress should make clear that the timely adjudication of Indian water rights and federal reserved water rights is an important priority of the United States deserving of special attention from the Departments of Justice and Interior.*
2. *Congress should support the timely adjudication of Indian and federal reserved water rights at all levels of the process, by any available means, including:*
  - *providing sufficient funding for, and the specific direction to use, federal technical expertise and assets (through the USBOR, USGS, etc.) to aid settlement negotiations; and*
  - *requiring, as a condition of funding, annual reporting on the progress of achieving Congress' goal of timely adjudication of Indian and federal reserved water rights.*
3. *Congress should fund settlements of Indian water rights claims without requiring corresponding reductions in Department of Interior programs.*

**2. Role of Water Rights Adjudications**

A. General stream adjudications, legislatively prescribed and undertaken by the states, are the indispensable tool for the determination of all competing water rights claims in a stream system. The needs and the history of each state are different, and the general stream adjudication process has taken different forms in different states, from quasi-administrative to strictly judicial, but all should be supported as no other viable alternative exists for the determination of federal and Indian water rights claims alongside competing water rights claims developed under state law. In New Mexico, where unappropriated water on its major rivers ceased to exist long ago, no other mechanism exists to determine the water rights of all parties. The adjudication of water rights is a process that must succeed for the benefit of all. The more timely this process is completed, the better.

B. It would not be helpful or advisable for Congress to attempt quantification of Indian and federal reserved water rights outside the existing general stream adjudication process. While that process has sometimes suffered from delays and lack of needed resources, it is the only process which can legitimately determine all water rights claims in a basin in a fair and principled manner, and it is the process which Congress has explicitly approved with the passage of the McCarran Amendment.

Recommendations:

1. *Congress should support the water rights adjudication process generally, including by:*
  - *providing sufficient funding for the federal judiciary's special needs in water rights adjudications, such as Special Masters, and specialized clerk and support staff; and*
  - *providing funding for the continuance of adjudication and administration efforts by the states, many of which are struggling to cope with the burdens of adjudicating and administering water rights.*

- 2. Attempts to quantify Indian water rights and federal reserved water rights outside the existing general stream adjudication process should be avoided.*

**Senate Energy and Natural Resources Committee  
Water Conference**

**Nordhaus Law Firm on Behalf of the Pueblos of Laguna, Santa Ana,  
Santo Domingo, and Taos**

These comments—which are submitted by the Nordhaus Law Firm on behalf of the Pueblos of Laguna, Santa Ana, Santo Domingo, and Taos—address two portions of the Committee’s third question: (1) what effort should be made by the federal government to encourage adjudication or settlement of Indian water rights claims?; and (2) are adjudications an appropriate means to quantify those rights?

**1. Tribal Water Rights Claims Must Be Resolved.**

Resolution of outstanding tribal water rights claims is a critical priority throughout the West, both for the affected tribes and the states in which they are located. There is no dispute that Indian tribes possess the most senior water rights in the West. *See, e.g., New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976); *New Mexico, ex rel., State Engineer v. Aamodt, et al.*, 618 F. Supp. 993 (D.N.M. 1985). Without a lawful quantification of those rights, however, efforts to manage water use in this arid region are profoundly hampered, and that has induced the State of New Mexico to declare the resolution of tribal water rights claims to be a critical state priority. *See generally* New Mexico State Water Plan at 11, 64-65 (Dec. 23, 2003) (available at <<<http://www.seo.state.nm.us/water-info/NMWaterPlanning/2003StateWaterPlan.pdf>>>); *cf. id.* at § E. Furthermore, regardless of planning and management difficulties, the absence of finality with respect to the scope and extent of tribal water rights unfairly undermines tribal efforts to develop those resources and to pursue desperately needed collective economic benefits, and the longer it takes to obtain finality, in fact, the more pressure there is on scarce water supplies that could otherwise satisfy tribal rights. The bottom line is that until outstanding claims are resolved, both the Indian and non-Indian communities throughout the West will be burdened by unnecessary conflict and uncertainty. *See generally* Western Water Policy Review Comm’n, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY (June 1998).

**2. Exclusive Reliance on Litigation Efforts Is Inefficient.**

The Committee has asked whether adjudication is “an appropriate means” for the quantification of water rights, and the general answer has to be “yes.” Under relevant state law, *see generally* NMSA 1978, § 72-4-15 (1907), and the McCarran Amendment, 43 U.S.C. § 666, the quantification of any right to water located within New Mexico, including tribal rights, must be decided by a court; indeed, absent an appropriate court order, the protection of those property interests may be compromised. *See, e.g., United States v. Bluewater-Toltec Irr. Dist.*, 580 F. Supp. 1434 (D.N.M. 1984), *aff’d*, 806 F.2d 986 (10th Cir. 1986). However, the fact that adjudication may be considered “appropriate” does not end the discussion.

For example, the adjudication of water rights by *exclusive* reliance on litigation has, by no means, proven efficient. For example, the *Aamodt* and *Abeyta* adjudications, which the state filed in federal court more than 35 years ago, have so far failed to produce a quantification of the water rights separately held by the Pueblos of Nambe, Pojoaque, San Ildefonso, Taos, or Tesuque. Similarly, although litigation was initiated more than

20 years ago to adjudicate all rights to the waters of the Rio San José, the state court in the *Kerr-McGee* adjudication has so far not entered a single interim order determining any non-Indian water right, nor did it order an expedited *inter se* subproceeding on the rights of the Pueblos of Acoma and Laguna until 2002. Procedural issues in that subproceeding continue to consume the parties' and the court's energies. In *Abousleman*, which will adjudicate the rights of the Pueblos of Jemez, Santa Ana, and Zia, the federal court ruled only last summer on cross-motions for summary judgment that were filed in [1989]. It is troubling that all of these actions relate to the adjudication of water rights on tributaries to the Rio Grande; at this time, there is no publicly known plan to commence a general adjudication of rights to the waters of the Rio Grande main stem, an action that could affect almost all of the federally recognized Indian tribes in New Mexico. One can only imagine how long such a comprehensive court action would take to complete.

Adapting to these legal realities and consistent with the Interior Department's 1990 guidelines, 55 FED. REG. 9223 (Mar. 12, 1990), tribes have not relied exclusively on litigation. For example, the Jicarilla Apache Nation successfully concluded negotiations on a final settlement of its rights in the San Juan and Rio Chama basins in 1998 and 1999. The eight Pueblos that are party to the *Aamodt*, *Abeyta*, and *Abousleman* adjudications have likewise pursued a negotiated resolution of their claims, and at present, the *Aamodt* and *Abeyta* Pueblos are nearing closure on the local phase of those efforts. The Pueblos of Acoma and Laguna, on the other hand, have been unable to obtain sufficient attention from the United States for more than the most preliminary of discussions with the current federal negotiation team assigned to the *Kerr-McGee* adjudication. Largely due to a scarcity of resources, those negotiation efforts have proceeded slowly, when they have proceeded at all.

The inefficiencies of relevant state law adjudication processes or the federal administrative negotiation guidelines do not necessarily constrain options for how to proceed with the quantification of tribal water rights. As the courts have stated, Congress has not abandoned tribal water rights to state law control or otherwise compromised the controlling authority of federal law with respect to those rights. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 800 (1976); *Aamodt*, 537 F.2d 1102. Accordingly, as discussed in the next section, Congress can—and should—act to improve the quantification process by declaring a federal priority for the resolution of tribal water rights, authorizing increased funding for the litigation and negotiation processes, and requiring the formal promulgation of clearer and more substantive guidance for intergovernmental water rights negotiations. Such an act would be appropriate given Congress' plenary authority over Indian affairs and, particularly, in light of the United States' trust responsibility with respect to the protection of tribal water rights.

- 3. Congress Should Declare the Resolution of Tribal Water Rights a Critical Federal Priority and Require the Dedication of Adequate Financial and Human Resources for the Fair Quantification of Tribal Water Rights.**



Fifteen years ago, the United States declared its preference for the negotiated resolution of tribal water rights. See 55 FED. REG. 9223. Congress and the Administration must back that preference with a commitment of the funding and human resources necessary to bring these critical and complex efforts to fruition. The simple truth is that these efforts are expensive, especially for tribal governments that are too often hamstrung by insufficient financial resources. In the *Abeyta* negotiations, for example, Taos Pueblo's negotiation team, which includes paid tribal staff members as well as legal and technical consultants, has had to attend almost 120 negotiation sessions during 2004. In January 2005, alone, the Pueblo team met in *Abeyta* negotiation sessions 21 out of 31 days. This recent pace, which was urged by the federal court and which was critical to the dramatic progress that the parties made last year, has required a tremendous dedication of resources. However, due to insufficient federal funding, the Pueblo was forced to allocate funds to the settlement effort at the expense of other essential Pueblo programs, and substantial work performed in this effort remains unpaid due to a lack of funds.

Throughout the West, tribes have had no alternative but to commit scarce tribal funds on the quantification of their water rights, and the United States has not matched that tribal commitment, either in terms of funding or human resources. Recently, there has been much public attention paid to the Justice and Interior Departments' refusal to offer more than \$11 million for the *Aamodt* settlement, a figure that pales in comparison to the settlement's estimated cost of more than \$200 million. Furthermore, the Justice Department has tasked only one Denver-based attorney to represent fifteen of the Indian tribes in New Mexico that are currently engaged in litigation and/or negotiation over their water rights. No matter the skill of this able and committed attorney, his task is daunting. These brief examples represent the insufficiency of the federal commitment to the timely and fair resolution of tribal water rights claims.

Finally, while financial and human resources are desperately needed for the successful and fair quantification of tribal water rights, Congress should also provide guidance and greater clarity as to *how* those resources could be most effectively and efficiently deployed. Through appropriate legislation, for example, it could:

- declare that the resolution of outstanding tribal water rights claims is a federal priority;
- declare that the policy of the United States is to seek resolution of tribal water rights claims through intergovernmental (federal-tribal-state) negotiation;
- require that the Interior and Justice Departments develop and implement plans for the completion of litigation or negotiation of those claims;

- require that the Interior Department actively commence its representation of the United States in any tribal water rights negotiation at the earliest possible stage;
- establish a fund outside of the Interior Department annual budget and appropriate to it sufficient money to cover annual federal and tribal costs arising from ongoing quantification efforts; and
- similar to what the New Mexico Legislature is presently considering, establish a tribal water rights settlement fund and appropriate to it sufficient money to cover the costs of implementing future settlements.

To provide greater clarity to the negotiation process, such legislation should also direct the Interior Department to promulgate regulations that:

- establish how timely intergovernmental negotiations for the quantification of tribal water rights should be commenced and conducted;
- standardize the “shape of the table” to preserve and facilitate the intergovernmental (federal-tribal-state) nature of these efforts;
- establish a uniform threshold scope for these efforts to encourage an appropriate and realistic focus; and
- establish standardized procedures for developing timely administrative policy on specific issues as they arise in negotiations.

The Pueblos do not propose a radical overhaul of the present negotiations process; nonetheless, the current administrative guidelines for the negotiated settlement of tribal water rights are too vague to provide adequately uniform direction or to facilitate timely progress. And perhaps more importantly, administrative guidelines do not carry the full weight of the United States’ endorsement or authority, and such gravity would be appropriate in matters as critical as those affecting tribal trust resources.

**Senate Energy and Natural Resources Committee  
Water Conference**

**Native American Rights Fund**

Topic #3: **Indian and Federal Reserved Water Rights**

Proposals:

- a. Enact legislation to establish a funding mechanism to ensure that any Indian land or water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset to other tribal programs or essential Interior Department programs.
- b. Provide increased funding for Interior Department tribal programs that support tribal participation in settlement negotiations in order to facilitate increased tribal participation in negotiations and significantly advance the goal of achieving water rights settlements.

Discussion:

What effort should be made by the federal government to encourage the adjudication or settlement of Indian water rights claims?

The Native American Rights Fund, the National Congress of American Indians and the Indian Representatives on the Joint Federal-Tribal Indian Water Funding Task Force believe that the resolution of Indian water claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole. As sovereign governments, each tribe decides for itself how its water rights claims will be resolved and the federal government should honor that decision. We support those tribes who have decided to resolve their water rights claims through negotiated settlements, and those who are either pursuing litigation or have decided to wait to address their water rights issues.

We commend the Congress and the Administration for recognizing that settlement of Indian water rights claims is an obligation of the United States government and for encouraging the settlement of those claims. However, an appropriate funding mechanism must be found for Indian water rights settlements or the settlement policy will become a nullity.

The current practice is to treat the funding of Indian water settlements as discretionary, with the result that a settlement can only be funded with a corresponding reduction in some other discretionary component of the Interior Department's budget. The practical effect of this budgetary policy is to significantly hinder the negotiation and funding of new settlements. It is very difficult for the federal government, the tribes, the states and private parties to negotiate settlements knowing that they will only be funded at the expense of other tribes or essential Interior Department programs.

We would note that Congress has given serious consideration to proposals to take Indian water settlements off-budget. In the 107<sup>th</sup> Congress, Chairman Domenici introduced S. 1186, that provided a budgetary mechanism to ensure that funds will be available to satisfy the Federal Government's responsibilities with respect to negotiated settlements of disputes related to Indian water rights claims and Indian land claims. S. 1186 is important legislation that deserves additional consideration by the Energy and Natural Resources Committee.

Funding of Indian water rights settlements should be a mandatory obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgments which are rendered against it. We urge that steps be taken to change the current policy to ensure that any Indian water rights

settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, all Indian water rights claims will have to be litigated or languish, an outcome which ought not to be acceptable to the federal government, the tribes, the states and private parties.

The following is draft legislative language which, if enacted, would make mandatory the funding of any Indian water rights settlement authorized by Congress and approved by the President. It would appropriately treat the funding of the settlement of Indian water rights claims as a judgment against the United States. It is proposed as language to amend an Interior appropriations act or a supplemental appropriations act:

"Such sums as may be necessary, not to exceed \$250,000,000 in any fiscal year, shall hereafter be available for payment of amounts authorized in Indian land and water claims settlements Acts, subject to the same protections and limitations as funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Claims Court in favor of any Indian tribe, band, group, pueblo, or Indian community."

Historically, judgments upholding Indian claims rendered by the Court of Claims or the Indian Claims Commission have been treated and paid as were other judgments by the Court of Claims, and have not been included as part of Interior's budget. We acknowledge that there may be other approaches to achieving the desired result and suggest that such funding mechanisms might be considered in joint oversight hearings with the Senate Indian Affairs Committee.

We also urge increased funding for the Interior Department to facilitate tribal participation in Indian water rights settlement negotiations. Without tribal participation in negotiations, settlements can never be reached. Too often the lack of funding slows the negotiation process or prevents tribes from negotiating at all. The limited Interior Department funding that does exist is prioritized for litigation and negotiations suffer. We urge Congress to provide increased funding that will facilitate increased tribal participation in water settlement negotiations and significantly advance the goal of achieving water rights settlements.