Statement of Michael L. Connor, Commissioner
Bureau of Reclamation
U.S. Department of the Interior
Before the
Committee on Natural Resources
Subcommittee on Water and Power
U.S. House of Representatives

H.R. 3254
September 9, 2009

Madam Chairwoman and members of the Subcommittee, I am Michael L. Connor, Commissioner of the Bureau of Reclamation (Reclamation). I am pleased to provide the views of the Department of the Interior (Department) on H.R. 3254, the Taos Pueblo Indian Water Rights Settlement Act. This Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general 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. We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. As a result, the parties have taken positive and significant steps toward meeting the Federal goals just articulated. The settlement legislation has been greatly improved, contributing to long-term harmony and cooperation among the parties. We would like to continue to work with the parties and the sponsors to address certain concerns, including those discussed in this statement (such as appropriate non-Federal cost share), that could make this a settlement that the Administration could wholeheartedly support.

Negotiated Indian Water Rights Settlements

Settlements improve water management by providing certainty not just as to the quantification of a tribe's water rights but also as to the rights of all water users. That certainty provides opportunities for economic development for Indians and non-Indians alike. Whereas unquantified Indian water rights are often a source of tension and conflict between tribes and their neighbors, the best settlements replace this tension with mutual interdependence and trust. In addition, Indian water rights settlements are consistent with the Federal trust responsibility to Native Americans and with a policy of promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

In analyzing settlements, the Administration must consider the immediate and long-term water needs of the Indian tribes, the merits of all legal claims, the value of water, federal trust

responsibilities, economic efficiency measures, and the overall promotion of good public policy. An additional critical component of our analysis is cost-sharing.

Historic Water Conflicts in the Taos Valley

Before discussing the proposed settlement and the Administration's concerns with it, it is important to provide background on the disputes that led to the settlement. Taos Pueblo is located in north-central New Mexico, approximately 70 miles north of Santa Fe. It is the northernmost of 19 New Mexico Pueblos and its village is recognized as being one of the longest continuously occupied locations in the United States. The Pueblo consists of approximately 95,341 acres of land and includes the headwaters of the Rio Pueblo de Taos and the Rio Lucero. The Taos Pueblo has irrigated lands for agriculture since prehistoric times. Before the Pueblo's lands became part of the United States, they fell under the jurisdiction first of Spain, and later of Mexico, both of which recognized and protected the rights of the Pueblo to use water. When the United States asserted its sovereignty over Pueblo lands and what is now the State of New Mexico, it did so under the terms of the Treaty of Guadalupe Hidalgo. In the Treaty, the United States agreed to protect rights recognized by prior sovereigns including Pueblo rights. In 1858, Congress specifically confirmed many Pueblo land titles, including that of Taos Pueblo.

Subsequently, patents were issued to the Pueblos of New Mexico which, in effect, quitclaimed any interest the United States had in the Pueblos' land. The Pueblos were then considered to own their lands in fee simple, unlike most other Indian tribes. Despite this unusual title arrangement, the United States attempted to exercise jurisdiction over the Pueblos for their benefit, seeking to protect Pueblo lands and resources by extending the restrictions on alienation of Indian lands in the Indian Trade and Intercourse Acts to Pueblo lands. Unfortunately, initial efforts by the United States to protect Pueblo lands and waters were to no avail. New Mexico's territorial courts did not accept the application of the Trade and Intercourse Act to Pueblo lands. In *United States v. Joseph*, 94 U.S. 614 (1876), the Supreme Court expressly held that the Pueblos were not Indian tribes within the meaning of the 1834 and 1851 Non-intercourse Acts. This meant that non-Indians were able to buy Pueblo lands without regard to federal Indian law and as a result, there was significant loss of Pueblo lands to non-Indians.

After almost forty years of loss of land and water rights, the Supreme Court reversed its decision in *Joseph* and decided that the Pueblos were, in fact, covered by laws extending federal guardianship and protection. *United States v. Sandoval*, 231 U.S. 28, 48 (1913). The Supreme Court's reversal of opinion threw the status of title to lands occupied by 12,000 non-Indians in New Mexico into serious doubt, along with the water rights exercised on those lands. Responding to the outcry concerning title, Congress sought to remedy the uncertainty by passing the Pueblo Lands Act of 1924, 43 Stat. 636, to "settle the complicated questions of title and to secure for the Indians all of the lands which they are equitably entitled."

Under the 1924 Act, if the non-Indians could persuade a special lands board that they had used and occupied Pueblo land for a period of time, the non-Indians were awarded title, and the Pueblo was supposed to be compensated for the value. In practice, this resulted in the non-Indians successfully claiming some of the most valuable, irrigable Pueblo farmland. Taos Pueblo

lost 2,401.16 acres to claims by non-Indians under the 1924 Act. The Pueblo also lost title to 926 acres in the Town of Taos. The compensation awarded by the lands board to the Pueblos was lower than actual appraised values, and woefully inadequate. Congress followed up by enacting the 1933 Pueblo Lands Act, which provided additional compensation to the Pueblo and also expressly preserved the Pueblo prior water rights, but the compensation still did not adequately remedy the losses to the Pueblo.

In passing the 1924 and 1933 Acts, Congress recognized the necessity of resolving the uncertainty of title to land and water and also restoring the severely eroded economic footing of the Pueblos caused in large part by the loss of land and interference with water rights. Cash awards made to the Pueblos under the Acts were expressly intended to compensate the Pueblos for their losses and to help fund the replacement of their lost economic base through the purchase of lands, construction of irrigation projects, and by financing various other permanent improvements for the benefit of Pueblo lands. Sadly, the Acts did not fully accomplish their purposes. While land titles may have been more or less resolved, title to water rights clearly was not and uncertainty over title to water has continued to plague the Taos Valley.

In a final attempt to resolve title to water in the Taos Valley, in 1969 the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed. The United States filed a statement of claims in the case on behalf of the Taos Pueblo on August 1, 1989, which it revised in 1997. The revised claim was for essentially the entire flow and interrelated groundwater of the Rio Pueblo de Taos and the Rio Lucero with an aboriginal priority date. If the United States is successful in the litigation, the impact on non-Indian water users in the Taos Valley will be nothing short of devastating. They would be able to use water only if the Pueblo forbears exercising its rights.

As with many general stream adjudications in New Mexico, the Taos adjudication has moved very slowly. Motions for partial summary judgment were filed in 1991on a number of key issues concerning the legal character of the Pueblo's water rights and were fully briefed in 1995. To date, however, the Court has taken no action on the motions. Recognizing that the litigation and attendant uncertainty over water rights would continue decade after decade, the Pueblo, the United States, the State of New Mexico, the Taos Valley Acequia Association (representing 55 community ditch associations), the Town of Taos, the El Prado Water and Sanitation District, and 12 mutual domestic water consumers associations entered into negotiations.

Negotiations were not productive until a technical understanding of the hydrology of Taos Valley, including preparation of surface and groundwater models, was completed in the late 1990s. Negotiations intensified in 2003 when a mediator was retained and an aggressive settlement meeting schedule was established. The United States participated actively in the negotiations, formed a constructive working relationship with the parties and was able to resolve most issues of concern to the Government. The willingness of the 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. The dedicated efforts of all the parties resulted in a Settlement Agreement that was signed in May of 2006 by all of the major non-federal parties.

Under the terms of the negotiated settlement, the 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, reacquire the forborne water rights through purchase from willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to reacquire the forborne water rights, 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.

H.R. 3254 also contains a waiver of potential breach of trust and water related claims that the Pueblo may have against the United States. The Pueblo has identified a number of potential claims related to failure to protect, manage and develop water for which it believes the United States would be liable. It should be noted that almost all potential claims that the Pueblo could bring against the United States would face a number of jurisdictional hurdles, including statute of limitations and res judicata defenses. An award of damages against the United States is by no means a certainty, but defending against such cases can cost a great deal of time and resources in addition to having serious public policy repercussions. The waiver provided in H.R. 3254 will avoid prolonged and bitter litigation over these claims.

Provisions that the Administration Supports

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.

Concern about the inadequacy of the waivers contained in a predecessor bill, Title II of H.R. 6768, was previously a significant barrier to United States' support for the settlement. After hearings on that bill in the 110th Congress, the Taos settlement parties promptly and diligently worked with the Departments of Interior and Justice to address waiver concerns. The waivers contained in H.R. 3254 are the result of many months of hard work and compromise and are supported by the Administration.

A central and noteworthy feature of the settlement is funding for the protection and restoration of the Pueblo's Buffalo Pasture, a culturally sensitive and sacred wetland that is being impacted by non-Indian groundwater production. Under the settlement, the non-Indian municipal water suppliers have agreed to limit their use of existing wells in the vicinity of the Buffalo Pasture in exchange for new wells located further away from the Buffalo Pasture. These agreements will allow the Pueblo to continue to utilize this valued wetland in the manner considered essential to Pueblo cultural and religious values.

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, including the Pueblo's agreement to share its surface water with its non-Indian neighbors, consistent with local customs, until its water rights are reacquired from the non-Indian irrigators on a willing buyer-willing seller basis.

Provisions the Administration Seeks to Negotiate Further

Despite the positive provisions enumerated above, 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. We are concerned about the large Federal contribution in the trust fund and believe there should be further discussion with the parties about the activities included in this part of the settlement. An additional $33,000,000 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 reduce the amount of early money that is authorized.

H.R. 3254 also sets a deadline for the Department to enter into the contracts that will be impossible for the Department to meet taking into consideration the environmental compliance and other work that must be accomplished before the contracts can be executed. If the contracts are to be awarded before the settlement is final, we recommend that the deadline for entering into the contracts be extended to 9 months after the date of enactment of this legislation.

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.

Moreover, the United States recommends that 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" -- 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 underlying adjudication.

Finally, the United States is concerned that H.R. 3254 as introduced 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 believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

Conclusion

The Taos settlement is the product of a great deal of effort by many parties and reflects a desire by the people of the State of New Mexico, Indian and non-Indian, to settle their differences through negotiation rather than litigation. Settlement of the underlying litigation and related claims in this case would fulfill a long-standing federal goal of restoring to the Taos Pueblo the water rights and water resources necessary for its economic and cultural future, while at the same time accomplishing this goal without causing harm to local farmers, communities and other non-Indian water-users within the Taos basin. 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 the non-Indian water users.

The Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results, ensuring continued friction in the basin to the detriment of both the Pueblo and its non-Indian neighbors. We believe that this settlement contains some important compromises and has the potential to produce positive results for all the parties concerned. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned towards 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 any future settlements on issues including cost-sharing and eligible costs.

Madam Chairwoman, this concludes my statement. I would be pleased to answer any questions the Subcommittee may have.

H.R. 3342

September 9, 2009

Madam Chairwoman and members of the Subcommittee, I am Mike Connor, Commissioner of the Bureau of Reclamation. I am pleased to provide the Department of the Interior's views on H.R. 3342, the Aamodt Litigation Settlement Act, which would provide approval for, and authorizations to carry out, a settlement of the water rights of four pueblos in New Mexico -- the Pueblos of Tesuque, Nambe, Pojoaque, and San Ildefonso. This Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general 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.

This settlement would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing for over 40 years. We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. As a result, the parties have taken positive and significant steps toward meeting the Federal goals just articulated, contributing to long-term harmony and cooperation among the parties. We would like to continue to work with the parties and the sponsors to address certain concerns, including those discussed in this statement (such as appropriate non-Federal cost share) that could make this a settlement that the Administration could wholeheartedly support.

Negotiated Indian Water Rights Settlements

Settlements improve water management by providing certainty not just as to the quantification of a tribe's water rights but also as to the rights of all water users. That certainty provides opportunities for economic development for Indian and non-Indians alike. Whereas unquantified Indian water rights are often a source of tension and conflict between tribes and their neighbors, the best settlements replace this tension with mutual interdependence and trust. In addition, Indian water rights settlements are consistent with the Federal trust responsibility to Native Americans and with a policy of promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

In analyzing settlements, the Administration must consider the immediate and long-term water needs of the Indian tribes, the merits of all legal claims, the value of water, federal trust responsibilities, economic efficiency measures, and the overall promotion of good public policy. An additional critical component of our analysis is cost sharing.

Historic Water Conflicts in Rio Pojoaque Basin

Before discussing the proposed settlement and the Administration's concerns with it, it is important to provide background on the disputes that led to the settlement. The Rio Pojoaque basin, immediately north of Santa Fe, New Mexico, is home to the four Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso. In total the Pueblos hold approximately 51,000 acres of land in the basin. Like other pueblos in New Mexico, the four Pueblos were agricultural people living in established villages when the Spanish explorers first entered the area. Before the Pueblos' lands became part of the United States, they fell under the jurisdiction first of Spain, and later of Mexico, both of which recognized and protected the rights of the Pueblos to use water. When the United States asserted its sovereignty over Pueblo lands and what is now the State of New Mexico, it did so under the terms of the Treaty of Guadalupe Hidalgo. In the Treaty, the United States agreed to protect rights recognized by prior sovereigns including Pueblo rights. In 1858, Congress specifically confirmed many Pueblo grant land titles, including those of the Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso.

Subsequently, patents were issued to the Pueblos of New Mexico which, in effect, quitclaimed any interest the United States had in the Pueblos' grant lands. The Pueblos were then considered to own their lands in fee simple, unlike most other Indian tribes. Despite this unusual title arrangement, the United States asserted jurisdiction over the Pueblos for their benefit, seeking to protect Pueblo lands and resources by extending the restrictions on alienation of Indian lands in the Indian Trade and Intercourse Acts to Pueblo lands. Unfortunately, initial efforts by the United States to protect Pueblo lands and waters were ineffective. New Mexico's territorial courts did not accept the application of the Trade and Intercourse Act to Pueblo lands. In *United States v. Joseph*, 94 U.S. 614 (1876), the Supreme Court expressly held that the Pueblos were not Indian tribes within the meaning of the 1834 and 1851 Non-intercourse Acts. This meant that non-Indians were able to buy Pueblo lands without regard to federal Indian law and as a result, there was significant loss of Pueblo lands to non-Indians.

After almost forty years of loss of land and water rights, the Supreme Court reversed its decision in *Joseph* and decided that the Pueblos were, in fact, covered by laws extending federal guardianship and protection. *United States v. Sandoval*, 231 U.S. 28, 48 (1913). The Supreme Court's reversal of opinion threw the status of title to lands occupied by 12,000 non-Indians in New Mexico, along with the water rights exercised on those lands, into serious doubt. Responding to the outcry concerning title, Congress sought to remedy the uncertainty by passing the Pueblo Lands Act of 1924, 43 Stat. 636, to "settle the complicated questions of title and to secure for the Indians all of the lands which they are equitably entitled."

Under the 1924 Act, if the non-Indians could persuade a special lands board that they had used and occupied Pueblo land for a period of time, the non-Indians were awarded title, and the Pueblo was supposed to be compensated for the value. In practice, this resulted in the non-Indians successfully claiming some of the most valuable, irrigable Pueblo farmland. The Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso collectively lost more than 4000 acres to claims by non-Indians under the 1924 Act. The compensation awarded by the lands board to the Pueblos was lower than actual appraised values, and woefully inadequate. Congress followed up by

enacting the 1933 Pueblo Lands Act, which provided additional compensation to the Pueblos and also expressly preserved the Pueblos' prior water rights, but the compensation still did not adequately remedy the losses to the Pueblo.

In passing the 1924 and 1933 Acts, Congress recognized the necessity of resolving the uncertainty of title to land and water and also restoring the severely eroded economic footing of the Pueblos caused in large part by the loss of land and interference with water rights. Cash awards made to the Pueblos under the Acts were expressly intended to compensate the Pueblos for their losses and to help fund the replacement of their lost economic base through the purchase of lands, construction of irrigation projects, and by financing various other permanent improvements for the benefit of Pueblo lands. Sadly, the Acts did not fully accomplish their purposes. While land titles may have been more or less resolved, title to water rights clearly was not and uncertainty over title to water has continued to plague all the residents of the basin.

In a final attempt to resolve title to these Pueblos' water, a general stream adjudication was initiated in 1966. That case, now in its 43rd year, is *New Mexico v Aamodt* and is one of the longest running cases in the federal court system. Forty-three years of litigation has yielded surprisingly little in the way of results. The parties initially skirmished over whether state or federal law applied and what role, if any, Spanish colonial and Mexican law would play. A 1976 decision by the Tenth Circuit Court of Appeals held that the Pueblos' water rights were not subject to New Mexico's prior appropriation law. Subsequently, the United States District Court, nineteen years into the case, ruled the federal reserved water rights or *Winters* doctrine does not apply to the unique circumstances of the Pueblos' grant lands. The Tenth Circuit court denied interlocutory appeal and litigation proceeded on a Historically Irrigated Acreage (HIA) quantification standard for the grant lands, but a *Winters* right quantification standard for other lands reserved for the Pueblos. Judge Mechem directed the parties to negotiate in 1998, and in 2000 the litigation was stayed. The parties, who had engaged in sporadic settlement talks since 1992, then intensified their efforts to settle the litigation.

The settlement negotiations were difficult for many reasons, including that the basin is chronically water short. The average annual surface water yield of the watershed is approximately 12,000 acre-feet per year, but claimed irrigated acreage calls for the diversion of 16,200 acre-feet per year. Deficits have been addressed by using groundwater with the result that groundwater resources are now threatened. The negotiation goal of the parties was to control groundwater extraction in order to prevent impacts on surface water flows from excessive groundwater development. In order to allow junior state-based water right holders to continue to use water while still allowing the Pueblos the right to use and further develop their senior water rights, the non-federal parties agreed to a settlement centered on a regional water system that will utilize water imported from the San Juan basin to serve needs of the Pueblos and other water users in the Rio Pojoaque basin. In May 2006, the Pueblos, the State of New Mexico, and other non-federal settlement parties executed a Settlement Agreement which requires the construction of the regional water system to deliver treated water to Pueblos and non-Pueblo water users. It also requires the United States to provide, via the regional water system to be constructed, 2,500 acre/feet per year of imported water for Pueblo use.

Concerns Related to Cost

H.R. 3342 approves this Settlement Agreement, authorizes the planning, design, and construction of the regional water system and authorizes the appropriation of $106.4 million for that system. In addition, the bill provides the Pueblos with a $37,500,000 trust fund to subsidize the operations, maintenance, and replacement costs of the system, and $15,000,000 to rehabilitate and maintain water-related infrastructure other than the regional system facilities. The bill also requires the United States to acquire water for Pueblo use in the regional water system by specific purchases and by allocating available Bureau of Reclamation San Juan-Chama Project water to the Pueblos. The total cost of the settlement is estimated to be at least $286.2 million, with a federal contribution of $174.3 million, to be paid over 13 years, and State and local contributions of about $116.9 million (subject to finalization and execution of the cost share agreement).

This represents a 40% non-federal cost share which is a significant improvement over many past settlements and is moving in the right direction. The Administration considers the willingness of the settling parties to provide a significant cost share for this project to be a good indication that they are invested in and deeply supportive of this settlement. It is evident that serious consideration has been given by the settlement proponents to the design and intended function of the facilities to be constructed under this settlement. A settlement to which many interests are contributing deserves more favorable treatment by federal government than a settlement that comes at solely federal expense.

Nevertheless, the Administration is concerned about the costs of this settlement for several reasons. First, the absence of a signed cost share agreement among the parties for the construction of the regional water system creates uncertainty about the viability of the system as planned and the costs to be borne by the United States.

Second, the Administration is concerned about the validity of the cost estimates that the settlement parties are relying on for the regional water system. The parties rely on an engineering report dated June 2007 that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. Much of the cost information contained in the engineering report was arrived at three years ago, none of the costs have been indexed to 2007, and the total project cost estimates cannot be relied upon. Any additional costs (both for the Pueblo related and non-Pueblo related components of the regional water system) may become the responsibility of the United States under H.R. 3342. To better understand the risks associated with costs that could potentially greatly exceed the current cost estimate, Reclamation has identified and is allocating the resources necessary to complete a design, engineering, and construction review of the engineering report by the end of this calendar year. On the basis of this review, Reclamation will be able to provide the bill proponents with a better sense of whether or not the project is likely to be able to be completed using the funds authorized in this bill. The Administration believes that the parties should agree in the cost share agreement that the non-federal parties will share proportionately any increases in cost estimates that result from Reclamation's analysis.

Third, multiple site-specific cost issues remain that cannot be resolved until final project design is completed, not the least of which is access limitations at the diversion point for the system on

the Rio Grande. The costs associated with NEPA and EIS compliance, acquiring unspecified easements (including possible condemnation expenses), and agency implementation costs have not been studied and are not included in current cost estimates to develop the proposed regional water system. These uncertainties will likely serve to drive the overall settlement's costs and the corresponding Federal commitment higher than anticipated. These costs should be reflected in the authorization levels provided for in this bill.

Other Federal Concerns

In addition to costs, there are other provisions and issues that need to be addressed and resolved.

The waiver provisions of this bill were significantly improved as a result of negotiations over the last year between the Pueblos, non-federal parties, and the United States. Nonetheless, there is one ongoing concern. The waiver provisions of H.R. 3342 include a provision that could be interpreted as waiving important environmental protections that would otherwise be available to the Pueblos, the citizens of New Mexico, and the United States. This provision, section 204(a)(9) of the bill, is confusing and unnecessary, and could lead to injury to the environment. The Administration cannot accept waivers which have the potential to erode important environmental safeguards put in place to permit the United States to take actions to protect the health, safety, and well being of its citizens and the environment. Fortunately, I am pleased to report that the parties have worked with the Departments of Interior and Justice on this issue and it is my understanding that they have reached agreement on removal of this provision.

In addition, the settlement poses an arrangement under which the United States will expend significant funds to plan, design and construct a regional water system. While the Pueblos would be waiving their water rights and related damages claims in exchange for the system, under H.R. 3342 the Pueblos retain the right to withdraw these waivers and trigger nullification of the entire settlement agreement, if the system is not substantially complete by 2021. To minimize the risk of building a system only to have waivers withdrawn and the settlement fail, the Administration believes the legislation should include: (1) a definition of substantial completion, (2) a mechanism for determining when it has occurred, and (3) a clearly specified process to challenge that determination.

The Administration has long worked with local parties on these issues and has strongly advocated for a process under which substantial completion is determined by the Secretary of the Interior and, subsequently, subject to review under the Administrative Procedures Act. Our concern stems from the fact that, as introduced, the legislation provides neither certainty of process nor any clear substantive standards for how a determination that substantial completion has not been achieved would be made, or how a court would be expected to handle any subsequent review and litigation over the settlement voiding provisions contained in H.R. 3342 if these provisions are triggered. Under the provisions of H.R. 3342 as introduced, the only certainty is that any litigation ensuing from a claim to void the settlement would be protracted, expensive, and have few bounds. The United States believes that one lesson to be learned from the forty-three years of Aamodt litigation is not to set up a legal regime that has the potential to lead to expensive, long-lived, and futile litigation. The Administration believes that the bill must adopt such a substantial completion provision.

Finally, while language in section 203(f) provides generally in the event the settlement is voided that the United States is entitled to return of any unexpended federal funds and property, the Administration suggests that Congress add additional language to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement in the case that the settlement fails.

Conclusion

The Aamodt settlement is the product of a great deal of effort by many parties and reflects a desire by the people of the State of New Mexico, Indian and non-Indian, to settle their differences through negotiation rather than litigation. Settlement of the underlying litigation and related claims in this case would fulfill a long-standing federal goal of restoring to the Pueblos the water rights and water resources necessary for their economic and cultural future. This settlement would accomplish this goal by stabilizing chronic groundwater deficits in the basin without causing harm to local water users. Overall, the proposed settlement would provide some innovative mechanisms for managing water in Pojoaque River basin to satisfy the Pueblos' current and future water needs while minimizing disruption to the non-Indian water users.

The 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 Pueblos nor their non-Indian neighbors benefit from continued friction in the Rio Pojoaque basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblos 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.

Madam Chairwoman, this concludes my statement. I would be pleased to answer any questions the Subcommittee may have.