

**Statement of Kris Polly,
Deputy Assistant Secretary for Water and Science,
U.S. Department of the Interior
before the
Senate Indian Affairs Committee
On S. 3128
White Mountain Apache Tribe Rural Water System Loan Authorization Act**

September 11, 2008

Mr. Chairman and members of the Committee, my name is Kris Polly, Deputy Assistant Secretary for Water and Science. I am pleased to provide the Department of the Interior's views on S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act. The Administration does not support S. 3128.

S. 3128 would require the Secretary of Interior, within 90 days of the legislation's enactment, to provide funding in the amount of \$9.8 million to the White Mountain Apache Tribe (Tribe) to initiate the planning, engineering, and design of a rural water system (known as the "Minor Flat Project") that is intended to be the centerpiece of a future settlement of the Tribe's water rights claims in Arizona. Until a final settlement of the Tribe's claims has been reached and enacted by Congress, we do not support the Federal government providing consideration for, or a contribution to a possible future litigation settlement. S. 3128 requires the Federal government to provide the Apache Tribe with \$9.8 million, but does not require the Tribe to reimburse the Federal government. As such, an upfront appropriation for the full amount of the proposed feasibility-level study from the Bureau of Reclamation's budget would be needed. In addition, this would essentially authorize loan forgiveness as no non-Federal contributions would be repaid to the United States Treasury.

The White Mountain Apache Reservation lies within the Salt River sub basin which provides the Phoenix metropolitan area with much of its water supply. Since 2004, the Department of Interior has been participating in negotiations with the White Mountain Apache Tribe (Tribe), the State of Arizona, the Salt River Project, various Arizona cities and irrigation districts, Freeport McMoran Copper & Gold, Inc, the Central Arizona Water Conservation District, and other water users in the Salt River basin regarding the water rights of the Tribe. The parties have made significant progress in resolving numerous disputed issues, including the total amount and source of settlement water to be provided under a settlement, but a final settlement has not been agreed to by all of the settlement parties. As the Administration has stated in previous Indian water right settlements, water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers.

The key component of the settlement being negotiated by the parties is the construction of the "White Mountain Apache Tribe Rural Water System," which would provide a 100-year water supply for the Reservation through the construction of Miner Flat Dam on the North Fork of the White River and related water delivery infrastructure. This project would provide replace and expand the current water delivery system on the Reservation, which relies on a diminishing groundwater source and is quickly becoming insufficient to

meet the needs of the Reservation population. The need for reliable and safe drinking water on the Reservation is not in question and it may be that the project proposed by the Tribe is the best way to address the need. However, more analysis needs to be done to determine the best course of action. As such, the Administration believes S. 3128 is premature.

Although S. 3128 authorizes only \$9.8 million for planning, engineering, and design of the Tribe's proposed project, it is the first step toward a settlement under which the settling parties are likely to request that the United States provide at least another \$100 million in federal funding. S. 3128 cannot be considered in a vacuum and the settlement that is intended to fund the Tribe's proposed project must be taken into consideration. The Tribe estimates the cost of the proposed project at approximately \$128 million in today's dollars. This estimate has not been verified by the Bureau of Reclamation nor has it completed a feasibility level study which would be typical before Reclamation would request funding and authority to construct such a project. Therefore, Reclamation cannot provide assurance that the project can actually be constructed within this estimate. Within the next year, Reclamation intends to initiate its own review of the cost estimate prepared by the parties to provide a higher level of assurance. This review would not involve the engineering work proposed under S. 3128, but may provide some important information to the Tribe to assist in the planning, engineering and design that they propose to undertake pursuant to S. 3128.

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("Criteria") (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

The Administration is in the process of analyzing the factors set forth in the *Criteria* in order to determine the appropriate federal financial contribution that could be recommended to Congress as consideration for settling the Tribe's water rights claims. The Department of the Interior and the Department of Justice are in the process of analyzing the Tribe's water rights claims and have requested the Tribe to provide

information on its views on potential liability the United States may have with respect to those claims and other water related claims. Until that analysis is completed, it is not possible for the Administration to determine whether paying for some or all of the construction of the proposed project is an appropriate Federal settlement contribution. Until those decisions are made, it is premature to begin design and engineering of the proposed project. The legislation is ambiguous as to whether the Department is required to carry out a feasibility study for the planning, engineering, and design of the Miner Flat Project.

As currently drafted S.3128 provides that funding made available to the Tribe will not be repaid by the Tribe, but will be repaid out of a subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act “for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of [the Arizona Water Rights Settlements Act]. . . .” We understand that the bill is likely to be amended to delete repayment from this source. We recommend such an amendment to S. 3128 because the use of this subaccount to fund an activity absent a water rights settlement enacted by Congress is not consistent with the authorized uses of the subaccount created by Section 107(a) of the Arizona Water Rights Settlements Act.

The Administration is concerned about the potential budgetary impact the \$9.8 million loan, as authorized under S. 3128, would have on the Bureau of Reclamation’s existing programs and commitments, and has concerns with the mechanisms and sources of funding. Although the repayment is provided from Federal Funding in Section 3, budget authority for the full \$9.8 million would be required up front. Section 5 of S. 3128 authorizes appropriations, but Section 3 provides that the funds to repay the loan would be made available from the Colorado Lower River Development Fund starting in 2013. The Administration also remains concerned that, as S. 3128 provides for no reimbursement by non-Federal parties, the Federal government would be the primary source of funding for this feasibility (planning, engineering, and design) study.

The Administration does not support this bill but is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe’s water rights claims.

This concludes my written statement.

**Statement of Kris Polly,
Deputy Assistant Secretary for Water and Science,
U.S. Department of the Interior
Before the
United States Senate
Committee on Indian Affairs
S. 3355
The Crow Tribe Water Rights Settlement Act of 2008'**

September 11, 2008

Mr. Chairman and members of the Committee, my name is Kris Polly, and I am Deputy Assistant Secretary for Water and Science at the Department of the Interior. I appreciate the opportunity to appear today to present the Administration's views on S. 3355, the "Crow Tribe Water Rights Settlement Act of 2008." The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has not agreed to the compact that S. 3355 would approve. Moreover, the Administration has serious concerns about the settlement as introduced, especially about the high cost of this settlement and the lack of supporting analysis showing that the infrastructure projects mandated under this settlement are a cost effective approach to accomplishing the goals of the settling parties. Further, the Administration has concerns that the waivers and releases in the bill do not sufficiently protect the United States from future claims by the Tribe. For these reasons and others described in this statement, the Administration opposes S. 3355 as introduced. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

The Crow Reservation located in south central and southeastern Montana is home to the Crow Tribe. The Reservation was established by the Treaty of Fort Laramie in 1868 and it currently encompasses approximately 2,282,000 acres, 66% of which is held in trust for the Tribe and individual Indians. Tribal enrollment is approximately 11,500. Unemployment is roughly 54% and the Reservation economy is principally agricultural: farming and ranching. Coal mining and timber production also contribute to the Tribal economy.

Litigation concerning water rights on the Reservation began in 1975. In 1985, the United States, the Tribe and the State of Montana entered into negotiations aimed at settling the Tribe's water rights claims. In 1999, the Crow and the State reached an agreement on a Compact providing for an allocation of water for the Tribe, subordination of that right to existing state based water uses, water rights administration, water marketing, and dispute resolution mechanisms. The Federal government was not a signatory to this agreement.

S. 3355 would approve the Compact contained in section 85-20-901 of the Montana Code Annotated (2007) (including any exhibit or part of or amendment to the Compact) and authorize appropriations for a number of settlement benefits. It would settle all of the Crow Tribe's claims to water in the State of Montana and recognize a tribal water right to 500,000 acre-feet per year of water from the flow of the Bighorn River, as well as up to 300,000 acre-feet of water from Bighorn Lake (150,000 acre-feet in all years and an additional 150,000 acre-feet in dry years when natural flow is short). The Tribe's natural flow right will be subject to shortage sharing with non-Indians, which is a major concession by the Crow Tribe, who would otherwise have a senior priority water right. This bill also requires the Bureau of Reclamation to design and

construct two major infrastructure projects: (1) to restore and improve the Crow Irrigation Project to deliver water to farmland on the Crow Reservation; and (2) a municipal water system to deliver clean water to communities and businesses in most parts of the Crow Reservation. Finally, S. 3355 would establish the Crow Settlement Fund to hold Federal funding authorized under this bill, which includes funding for a number of trust funds that will benefit the Tribe. Two of these trust funds are designated to offset the costs to the Crow Tribe for the operation, maintenance, and repair of Yellowtail Dam (the dam that created Bighorn Lake) and the Crow Irrigation Project.

The Department has been working constructively with the Crow Tribe in negotiations to quantify their water right and settle claims for many years, and Department officials have visited the Reservation and met with negotiators in an effort to craft a settlement that we could support. This process has involved the Crow Tribe, the State of Montana, local water users and other affected parties. The parties have made significant progress in resolving many issues, but the Administration believes that there are more issues that need to be comprehensively addressed. Primary concerns of the Administration are the very high costs of the infrastructure projects mandated in the bill and the inadequate local and State cost share given the benefits that the State and its water users would receive under the proposed settlement, as well as the waivers in the bill, which do not protect the United States adequately from future claims by the Tribe.

We also have a number of other concerns outlined below.

My statement will begin with some background on the Department's settlements process, and then move on to a more specific discussion of the concerns that the Administration has about S. 3355.

The Role of the *Criteria and Procedures*

In negotiating Indian water rights settlements, the Administration follows a process contained in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("*Criteria*") (55 Fed. Reg. 9223 (1990)). Among other things, the *Criteria* provide policy guidance on the appropriate level of Federal contribution to settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

Equally important, the *Criteria* address some bigger-picture issues, such as the need to structure settlements to promote economic efficiency on reservations and tribal self-sufficiency, and the goal of seeking long-term harmony and cooperation among all interested parties. The *Criteria* also set forth consultation procedures within the Executive Branch to ensure that all interested Federal agencies have an opportunity to collaborate throughout the settlement process. As we have testified previously, the *Criteria* is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

Monetary Concerns Regarding S. 3355

S. 3355 as introduced would cost the federal government more than one half billion dollars in federal appropriations (\$527.2 million). Under this legislation, the Crow Tribe would also benefit from not being required to repay the capital costs associated with its storage allocation from Bighorn Lake and from being granted the right to develop power at Yellowtail Afterbay Dam, an authority that is currently held by the Bureau of Reclamation. The Administration is in the process of analyzing the factors set forth in the *Criteria* in order to determine the appropriate federal financial contribution that could be recommended to Congress. While this analysis is not yet complete, the review accomplished to date does not indicate that a Federal contribution even approaching one half of a billion dollars provided for under this Act is justified. We are also unclear on how this bill interfaces with S. 3213, Title X, Subtitle B, Part II, which proposes the establishment of a Reclamation Water Settlement Fund.

Adding to our concern, the two major infrastructure projects required by this bill are both mandated to essentially conform to studies prepared by a private consulting engineering firm hired by the Crow Tribe. Both of these studies were not prepared in final form until July 2008. Given that these studies were not completed until July 2008, the Department has not had sufficient time to analyze them to determine whether the work that they propose is a cost effective and feasible approach to providing the services that the Crow Tribe is seeking. It is possible that there are alternate and more efficient means to satisfy the needs of the Tribe than those set forth in the Tribal consultant's study. More time is needed to examine the proposed work and consider whether other approaches could be utilized to obtain most or all of the goals of this settlement, as well as assess the adequacy of the engineering work and cost estimates.

Moreover, the breadth of the many benefits that would flow to the Crow Tribe under the settlement at almost exclusive federal cost, such as the rehabilitation and improvement of the Crow Irrigation Project, the design and construction of water diversion and delivery systems to serve vast geographic areas of the Crow Reservation, and significant funding for unspecified and open-ended water and economic development projects, raise serious concerns because of the precedent that such settlement benefits could set for future Indian water rights settlements. Rising tribal and State expectations about the magnitude of federal contributions to Indian water rights settlements are already impairing the Administration's ability to negotiate Indian water rights settlements on the basis of common goals and acceptance of the need for cost-sharing among all settlement beneficiaries. Enactment of this bill will make it very difficult in the future for Federal negotiators participating in settlement negotiations to set realistic expectations and convincingly hold the line on settlement costs. There are many needs in Indian country and Indian water rights settlements cannot and should not be the major vehicle to address those needs. In this instance, a Federal contribution of this order of magnitude is not appropriate. As the Administration has stated in previous Indian water right settlements water rights settlements must be designed to ensure finality and protect the interest of the Tribes and all American taxpayers. The Administration was not included in or a signatory to this proposed settlement. Numerous changes would be required before we could recommend that the Federal government enter into this Agreement.

Also, consistent with the *Criteria and Procedures*, the non-Federal cost-share should be proportionate to benefits received. This settlement lacks adequate cost-sharing, leaving the Federal government as the primary source of funding for one of the largest Indian water rights settlements to date. In addition, the *Criteria and Procedures* provide that settlements should promote economic efficiency. The Administration is concerned that the projects that would be authorized under this proposed settlement do not meet this criterion. The *Criteria and*

Procedures also provide that the Federal government shall not participate in economically unjustified irrigation investment.

Non- Monetary Concerns Regarding S. 3355

Overall cost is not the only concern that the Administration has with the bill. There are a number of provisions and issues that we stand ready to work and resolve with the settlement parties and sponsors of S. 3355. We would like to draw the Committee's attention to the following major issues.

First, as currently drafted, the provisions of the bill dealing with allottee water rights do not adequately protect the rights to which allottees are entitled under federal law. The Crow Reservation is heavily allotted and 46% of the Reservation land base is held in trust by the United States for individual Indians. The bill, however, fails to safeguard allottees' water rights. The United States owes a trust obligation directly to these individuals in addition to the obligations owed to the Tribe. The Department of the Interior and the Department of Justice have confronted this important issue in several recent Indian water rights settlement in an effort to avoid any claims of unconstitutional takings of property interests. We would like to work with the Tribe and the sponsors of the bill to rectify shortcomings in the language of the bill as drafted.

Second, the waiver provisions of this bill are also of serious concern to the Administration. We note that the Department of Justice does not believe that the bill's waiver provisions are correctly drafted. The waivers set forth do not adequately protect the United States from future liability and do not provide the measure of certainty and finality that a federal contribution of more than one half a billion dollars should afford. Again, we stand ready to work with the Tribe and sponsors on this issue.

Third, we would like to work with Congress and the settlement proponents on developing more specific language that delineates precisely the extent of United States responsibility for delivering the 300,000 acre-foot allocation from Bighorn Lake provided for under section 8. The legislation as introduced provides that this water will be held in trust by the United States. Congress should establish clear parameters for Federal responsibility to avoid future litigation over this issue.

Also, related to the Bighorn Lake allocation is the issue of capital cost reimbursability. The bill as drafted relieves the Tribe of these costs, but is silent about whether the costs will be spread among other project beneficiaries, such as power users.

Fourth, we note that this legislation sets up a trust fund to partially cover Operation, Maintenance, and Replacement costs for the Crow Irrigation Project and Yellowtail Dam that would otherwise be charged to the Crow Tribe. Although the Administration understands that the settlement framers were trying to ensure the viability of the facilities to be renovated and built under this settlement by providing for these trust funds, the *Criteria* provide that operation and maintenance costs of infrastructure should not be funded using settlement dollars.

Fifth, there is potential inconsistency between the processes outlined in section 11(d)(4) under which the Crow Tribe is able to withdraw money from the Crow Settlement Fund and the requirements for the Secretary to disburse funds from the Crow Settlement Fund under section 11(d)(3). It is not clear whether the Secretary is able to make the expenditures as provided under

section 11(d)(3) without the Tribe having submitted either a tribal management plan or an expenditure plan under section 11(d)(4). The processes described in section 11(d)(4) are consistent with the Trust Fund Reform Act, and it would make sense in S. 3355 to amend subsection 11(d)(3) to clarify that these processes apply.

Sixth, there is some ambiguity surrounding the right granted to the Crow Tribe in section 12(b) of S. 3355 to “develop and market power generation as a water development project on the Yellowtail Afterbay Dam.” It is unclear if this language is intended to preclude the United States from developing power in its own right or if it is intended to give the Tribe an exclusive right to enter into the sort of contract (Lease of Power Privilege (LOPP)) that can be issued to a non-Federal entity to utilize water power head and storage from Reclamation projects.

Seventh, and of extraordinary concern to the Administration, is the fact that the appendices that are referenced in the Crow Tribe-Montana Compact have not yet been prepared. Of particular concern is the fact that Appendices 1 and 3 of the Crow Tribe-Montana Compact are not available for review. In the words of the Compact (Article III A.6.b), Appendix 3 is supposed to be a “list of existing water rights as currently claimed and permits and reservations issued” in the Bighorn River Basin. This list is of utmost importance to the water rights of the Crow Tribe that are recognized under the Compact and would be recognized by S. 3355 because the Compact provides (in Article III.A.6.a(1) and (2)) that the Tribal Water Right shall be exercised as junior in priority to any water rights listed in Appendix 3 to the Compact. Appendix 1 is supposed to be a proposed decree to be issued by the Montana Water Court. According to section 4 of S. 3355, this legislation would ratify the Crow Tribe-Montana Compact, and the term Compact is defined in section 3 of S. 3355 as including any exhibit or part of or amendment to the Compact. Therefore, this bill seeks Congressional approval of the Compact as a whole, including the Appendices, which are critical to the terms of the settlement, and future amendments to the Compact, that the United States has not reviewed and that may not even have been drafted. The Administration strongly urges against the enactment of legislation that would provide United States approval of documents when the United States has not received these documents for review.

This list is not comprehensive. We would appreciate the opportunity to work with the Committee and the Montana delegation to revise the bill to address these and other issues that could prevent this bill from achieving its intended purpose of achieving a final settlement of the water rights claims of the Crow Tribe in Montana.

Conclusion

For the aforementioned reasons we have mentioned in this testimony, we oppose S. 3355.

The settlement is the product of a great deal of effort by many parties and reflects a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. However, as I stated at the outset of this testimony, the Administration does not have adequate information at this time to determine that the projects called for in this bill are consistent with our programmatic objectives and our responsibility to American taxpayers as well as our responsibility to protect the Crow Tribe. The Administration believes that it is necessary for there to be a full discussion on all aspects of the settlement, including the specific goals of the Crow Tribe and the State of Montana for the settlement of these claims and whether these goals can be met by alternative, less expensive means.

The Administration is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims. A clean, reliable water supply is of utmost importance to the members of the Crow Tribe, as it is to all Americans, and the United States is committed to working towards achieving it. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be concluded in the next year.

Mr. Chairman, this concludes my written statement.