

**TESTIMONY OF THOMAS BUSCHATZKE
DIRECTOR
ARIZONA DEPARTMENT OF WATER RESOURCES
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 1770, HUALAPAI TRIBE WATER RIGHTS SETTLEMENT ACT OF
2017**

DECEMBER 6, 2017

Chairman Hoeven, Vice-Chairman Udall, and members of the Committee:

I. Introduction

My name is Thomas Buschatzke. I am the Director of the Arizona Department of Water Resources. Thank you for the opportunity to testify on behalf of the State of Arizona on S. 1770, the Hualapai Tribe Water Rights Settlement Act of 2017. The State of Arizona strongly supports S.1770.

II. Importance of settling Indian water rights claims in Arizona

There are 22 federally recognized Indian tribes within the State of Arizona. The total population of all Indian tribes in Arizona as of 2010 was 234,891, which is the third highest among all states. The total area of all Indian reservations in Arizona is approximately 20 million acres, which is second only to Alaska. Arizona ranks first among all states in the percentage of tribal land in the state – 27.7 percent.

Half of the 22 federally recognized Indian tribes in Arizona still have unresolved water rights claims. Resolving these claims through settlement is a strategic priority for the State, not only because it will avoid the cost and uncertainty of litigating the claims, but it will provide certainty to all water users in the state regarding available water supplies in the most expeditious manner possible. In many cases, a settlement will also provide the tribe with funding to construct the infrastructure necessary to put its water supplies to beneficial use.

III. Hualapai Tribe's water rights claims

The Hualapai Tribe is one of the eleven Indian tribes in Arizona with unresolved water rights claims. The Tribe's main reservation covers approximately one million acres in the northwestern portion of the state. The Colorado River forms the northern boundary of the reservation, and the

Grand Canyon National Park is located immediately north of the reservation. The Tribe also has reservation and trust lands south of its main reservation in the Bill Williams River watershed.

The Tribe has asserted claims for both groundwater and surface water for its reservation and trust lands. The Tribe's claims include a claim to water from the Colorado River, a critical water supply for agricultural, municipal and industrial water users along the Colorado River, as well as water users in Central Arizona using Colorado water delivered through the Central Arizona Project ("CAP").

The Tribe claims a right to Colorado River water for domestic, municipal and industrial uses on its reservation and trust lands, including use at Grand Canyon West. Grand Canyon West is a major tourist attraction located adjacent to the Grand Canyon on the Tribe's main reservation. One of the main features of Grand Canyon West is the Skywalk, a glass walkway overhanging the Grand Canyon where tourists can walk out and look through the glass walkway to the bottom of the Canyon.

IV. Settlement Negotiations with Hualapai Tribe

In late 2011, the State of Arizona and several other major water users in the state (collectively referred to as the "State Parties") began negotiating with the Hualapai Tribe for a comprehensive settlement of the Tribe's water rights claims. The United States participated in the settlement negotiations through a negotiating team appointed by the Secretary of the Interior. Early in the settlement negotiations, the Tribe and State Parties agreed that as part of a comprehensive settlement of the Tribe's claims, the Tribe should receive an allocation of CAP water from the volume of Non-Indian Agricultural ("NIA") priority CAP water set aside for future Indian water rights settlements in Arizona in the Arizona Water Settlements Act of 2004 (Public Law 108-451). The Tribe and the State Parties also agreed that the settlement should include an authorization by Congress of an appropriation of monies to construct a pipeline to carry the CAP water from the Colorado River to Peach Springs, the Tribe's main residential center, and Grand Canyon West.

V. Hualapai Phase 1 Settlement

In late 2012, the parties agreed to bifurcate the settlement into two phases, with Phase 1 consisting of a limited settlement of the Tribe's water rights claims in the Bill Williams River watershed and Phase 2 consisting of a comprehensive settlement of all the Tribe's water rights claims in Arizona, including the Tribe's claims to water for its main reservation. The settlement

was bifurcated so that Phase 1 could become effective as soon as possible without waiting for the comprehensive settlement to be negotiated. Finalization of the Phase 1 settlement by the end of 2015 was necessary to expedite a water rights transfer as part of the settlement, resulting in benefits to a state party, the federal government and the environment.

The Phase 1 settlement was approved by Congress in December 2014 and became law on December 16, 2014 (Public Law No: 113-223). The settlement became effective in December 2015 after all the conditions for the settlement were met.

Although the Phase 1 settlement was not a comprehensive settlement of the Tribe's water rights claims, it included provisions designed to facilitate a comprehensive settlement that would include an allocation of NIA priority CAP water to the Tribe and the construction of a pipeline to carry the water to the Tribe's reservation. Those provisions are the following:

1. The settlement agreement provides that Freeport Minerals Corporation ("Freeport"), one of the State Parties, will transfer \$1 million to the Tribe as a contribution toward the cost of the Tribe's study of water project alternatives for its main reservation.
2. The settlement agreement provides that Freeport will contribute money to the Hualapai Tribe Economic Development Fund. Both the settlement agreement and the legislation approving the settlement provide that the money may be used only for the purpose of facilitating settlement of the claims of the Tribe for rights to Colorado River Water by enabling the Tribe to acquire Colorado River water rights with the intent to increase the security of the Tribe's water rights, and to otherwise facilitate the use of water on the Tribe's reservation.
3. Both the settlement agreement and the legislation approving the settlement provide that Freeport's contribution to the Hualapai Tribe Economic Development fund shall be considered a non-federal contribution that counts toward any non-Federal contribution associated with a settlement of the claims of the Tribe for rights to Colorado River water.

Before the Phase 1 settlement agreement became effective, Freeport transferred \$1 million to the Tribe for the study of water project alternatives. After the Phase 1 settlement became effective, Freeport made a multi-million dollar contribution to the Hualapai Tribe Economic Development Fund for the purposes described above.

VI. Hualapai Phase 2 Settlement

During negotiations for a Phase 2 settlement, the Tribe contracted with an engineering firm to conduct a study of alternative projects to bring water from the Colorado River to Peach Springs and Grand Canyon West on the Tribe's reservation. The Tribe paid for the study in substantial part with the \$1 million that Freeport contributed for that purpose as part of the Phase 1 settlement. The study concluded that the most feasible project was a pipeline carrying Colorado River water from Diamond Creek, located near the southeastern portion of the Tribe's reservation, to Peach Springs and then on to Grand Canyon West, a total of 70 miles.

In June 2016, the Tribe and the State Parties agreed to the terms of a Phase 2 settlement. The key terms of the settlement are the following:

1. The Tribe will receive an allocation of 4,000 acre-feet per year of NIA priority CAP water from the volume of NIA priority CAP water set aside for future Indian water rights settlements in the Arizona Water Settlements Act of 2004.
2. The United States and the State of Arizona will each firm 557.50 acre-feet per year of the Tribe's NIA priority CAP water to the equivalent of the higher priority CAP municipal and industrial priority water during water shortages.
3. The Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation, will plan, design, and construct the Hualapai Water Project, which includes a pipeline to convey not less than 3,414 acre-feet per year of Colorado River water from Diamond Creek to Peach Springs and Grand Canyon West for municipal, commercial, and industrial uses. Congress will authorize an appropriation of \$134.5 million for construction of the Project, \$32 million for operation, maintenance and replacement costs by the Tribe, and \$7 million for use by the Secretary of the Interior in operating the water project before title is conveyed to the Tribe and to provide technical assistance to prepare the Tribe for the operation of the Project.
4. The Tribe will have the right to use all groundwater under and surface water on its reservation and trust lands.
5. Certain lands adjacent to the Tribe's reservation will be brought into reservation status and certain lands owned in fee by the Tribe near its reservation will be held in trust for the Tribe by the Secretary of the

Interior. No additional lands may be brought into trust for the Tribe without approval by Congress.

6. The Tribe, the United States and the State Parties will execute mutual waivers of claims for water rights and injury to water rights.

A bill approving and authorizing the Phase 2 settlement was introduced in Congress by Senator Jeff Flake on September 8, 2016 (S. 3300), with Senator John McCain as a co-sponsor. The bill was heard by the Senate Committee on Indian Affairs on September 14, 2016, but no further action was taken on the bill. On September 7, 2017, Senator Flake reintroduced the bill with minor changes, again with Senator McCain as a co-sponsor. The reintroduced bill, S. 1770, is before you today.

VII. The State of Arizona Supports S. 1770

The State of Arizona strongly supports S. 1770. The State believes the Phase 2 settlement authorized by the bill is a reasonable and fair settlement that will benefit the Hualapai Tribe, the State of Arizona, Arizona water users and the United States.

A. Hualapai Tribe

For the Hualapai Tribe, the settlement provides a renewable water supply and the infrastructure to convey that water supply from the Colorado River to critical areas on the Tribe's reservation. Because there are no significant surface water streams on the reservation, water from the Colorado River is the only renewable water supply available to the Tribe. The water supply will serve the Tribe's main population center at Peach Springs, which is currently served groundwater from wells that are experiencing declining water levels. The water supply will also serve Grand Canyon West, the only viable economic development area on the Tribe's reservation. Grand Canyon West is currently served groundwater from a low-production well approximately 35 miles away.

A pipeline to bring Colorado River water to Grand Canyon West is essential for further economic development on the Tribe's reservation. The Tribe's reservation is in a location with breathtaking views of the west rim of the Grand Canyon. This provides the Tribe with a unique asset that is a significant economic development resource. Currently, approximately one million visitors come to Grand Canyon West each year to walk on the Skywalk and experience the views of the Grand Canyon. The Tribe would like to further develop Grand Canyon West to include additional tourist

attractions that would significantly increase the number of visitors each year. However, development at Grand Canyon West, and the annual number of visitors, is essentially capped at current levels due to the lack of additional water supplies for the area. Construction of a pipeline to bring Colorado River to Grand Canyon West would remove that cap and allow the Tribe to fully utilize the unique asset on its reservation for economic development.

In addition, the current lack of water supplies prevents the Tribe from constructing housing near Grand Canyon West for the employees who work there. As a result, most of those employees live in Peach Springs and drive to work each day over a dirt road. The travel time is two hours each way in good weather, for a total travel time of four hours each day. Travel time is significantly longer in wet or snowy conditions. Construction of a pipeline to carry Colorado River water to Grand Canyon West would allow the Tribe to construct a residential community near Grand Canyon West where its employees can live. Housing closer to Grand Canyon West will benefit the employees and their families who would have more time together.

B. State of Arizona and Arizona Water Users

For the State of Arizona, the settlement is a major step toward resolving the outstanding water rights claims of Indian tribes in the state. Resolving the Hualapai Tribe's claims through settlement will avoid the costs and risks associated with litigating the claims and will provide certainty to water users in the state. Perhaps the main risk to water users in the state from litigating the Tribe's claims is a risk to their Colorado River water supplies. As mentioned previously, the Tribe's reservation is located adjacent to the Colorado River and the Tribe has asserted claims to water from the River. The Colorado River supplies the Tribe will receive through the settlement will not affect the Colorado River entitlements of other water users in the State because the Tribe will receive a portion of the NIA priority CAP water being held by the Secretary of the Interior for Indian water settlements in the state.

Another benefit to the State of Arizona is that the settlement will provide the Tribe with a renewable water supply to replace its current groundwater pumping. Use of renewable water supplies instead of groundwater is consistent with the State's policy of preserving groundwater supplies for times of drought. Additionally, because the aquifer beneath the Tribe's reservation extends to areas off the reservation, the Tribe's use of a renewable water supply will help preserve groundwater supplies not just for the Tribe, but for non-tribal water users in the region. This is especially important in this area of the state, where the groundwater supplies are limited and there is minimal groundwater recharge.

C. United States

For the United States, the settlement will avoid the costs and risks to the United States associated with litigating the Tribe's water rights claims. The risks include the possibility that the Tribe would prevail in an action in the Court of Federal Claims to recover damages against the United States for failing to protect its water rights in the *Arizona v. California* litigation.

In addition to avoiding the costs and risks of litigation, the settlement would likely result in a significant economic benefit to the United States Treasury. The Tribe contracted with Professor Joseph P. Kalt, Ford Foundation Professor (Emeritus) of International Political Economy at the John F. Kennedy School of Government at Harvard University, to prepare a report on the economic benefits of a pipeline to carry Colorado River water to Grand Canyon West. In his report, Professor Kalt concluded that the pipeline would result in significantly more visitors to Grand Canyon West, and that over a 50-year period, the benefits to the United States from increased federal tax revenues resulting from the additional visitors would greatly exceed the federal outlays for construction, operation, and maintenance of the pipeline. Professor Joseph P. Kalt, *Economic Impact of the Hualapai Water Rights Settlement and Proposed Diamond Creek Pipeline*, July 16, 2017.

VIII. Issues Raised by the Department of the Interior with the 2016 Bill and Phase 2 Settlement

On September 14, 2016, the previous administration provided this Committee with a statement ("Statement") of its position on the bill introduced in 2016 (S. 3300). The statement raised several issues with the bill and with the Phase 2 settlement. I would like to address two of those issues.

A. Non-Federal Contribution

In its Statement, the Department of the Interior stated that "the State Parties have failed to make earnest efforts to provide for adequate cost-sharing relative to the benefits they will receive in this Indian water rights settlement." The State of Arizona disagrees with this statement. As previously mentioned, Freeport made a multi-million dollar contribution to the Hualapai Tribe Economic Development Fund as part of the Phase 1 settlement. The Tribe may use this money only for the purpose of facilitating settlement of its claims for rights to Colorado River Water by enabling it to acquire Colorado River water rights to increase the security of the Tribe's water rights, and to otherwise facilitate the use of water on the Tribe's reservation.

As required by the federal legislation approving the Phase 1 settlement, Freeport's financial contribution to the Hualapai Tribe Economic Development Fund must be considered a non-federal contribution towards the Phase 2 settlement. Freeport's payment of \$1 million to the Hualapai Tribe to use toward a study of water project alternatives to bring water to the Tribe's reservation should also be considered a non-federal contribution because it was made for the purpose of facilitating the Phase 2 settlement.

In addition to Freeport's large financial contribution, the State of Arizona has agreed to firm 557.5 acre-feet of the Tribe's 4,000 acre-feet per year allocation of NIA priority CAP water to the equivalent of CAP municipal and industrial priority during water shortages until 2108. The State estimates the cost to firm this water at \$3.2 million dollars.

Finally, the Tribe has agreed to pay the cost of constructing an electric transmission line to supply power to pump the water through the pipeline. The Tribe's consultant estimates this cost at approximately \$40 million. Although this is not a contribution by a State Party, it is a contribution that should be considered when evaluating the percentage of the costs of the settlement that the federal government will not be paying because of non-federal contributions.

The financial contributions that will be made to this settlement by Freeport and the State of Arizona are very substantial. The State firmly believes that these contributions show that the State Parties have made an "earnest effort" to provide for adequate cost-sharing relative to the benefits they will receive from the settlement. When the \$40 million contribution by the Tribe is added to the State Parties' contribution, the non-federal contributions to the settlement are more than adequate.

B. CAP Fixed OM&R Charges

The Department of Interior also expressed opposition to the provision in the bill requiring the Tribe to pay a CAP fixed OM&R charge for the use of NIA priority CAP water on the Tribe's reservation. This charge is an annual charge assessed against all users of CAP water based on the amount of CAP water they use. The charge is used by the Central Arizona Water Conservation District ("CAWCD") to pay its fixed costs in operating the Central Arizona Project. The Department stated that it did not support the charge because it believed it amounted to a double charge to be paid by the Tribe for water deliveries – the Tribe's OM&R costs to bring the water to its reservation through the pipeline to be constructed on the reservation, and the CAP fixed OM&R charge. The State of Arizona disagrees with the Department's position on this issue.

First, the Colorado River water the Tribe will receive in this settlement is legally classified as CAP water. It is appropriate for all users of CAP water to pay the CAP fixed OM&R charge because without proper operation, maintenance and replacement of the CAP, there would be no CAP canal and no CAP water.

Second, the Tribe's payment of CAP fixed OM&R would not amount to a double charge. All users of CAP water are responsible for paying the expenses relating to their own delivery systems, as well as CAP fixed OM&R charges relating to the CAP system. These are separate and distinct charges.

Third, the Department's argument that the Tribe will not use the CAP canal to bring its CAP water to its reservation misses the point. The settlement reduces the water supply that otherwise would be available to be diverted through the CAP and used for other purposes, so the Tribe should pay the CAP fixed OM&R charge for the CAP water it receives. If the Tribe were relieved of the requirement to pay the charge, the reduced supply in the CAP system would cause an increase in the charges assessed against all other CAP users, including other Indian tribes that receive CAP water. It is important to retain the provision in the bill to avoid this inequitable result. Moreover, the Tribe has the ability to use the CAP canal in the future to carry its CAP water for storage in central Arizona or for use pursuant to a water exchange or lease. The Tribe should therefore be required to help pay the fixed costs of operating, maintaining and replacing the CAP.

Finally, it is important to note that the Tribe agreed to pay the CAP fixed OM&R charge during the negotiations for the Phase 2 settlement in return for the benefits it will receive through the settlement. It is also important to note that payment of the charge by the Tribe will not impose any additional costs on the federal government. For those reasons, it is not inequitable to either the Tribe or the federal government to retain the provision in the bill.

IX. Conclusion

The State of Arizona strongly supports S. 1770, the Hualapai Tribe Water Rights Settlement Act of 2017. The bill is important to the State of Arizona because it authorizes a comprehensive settlement of the Hualapai's Tribe's water rights claims, including its claims to the Colorado River – a critical water supply for water users in the state. Settlement of the Tribe's water rights claims is an important step in achieving the State's goal of settling all outstanding Indian water rights claims in the state. Settlement of the claims

will avoid the costs and risks of litigation, and will provide certainty to water users in the state.

The settlement will provide significant benefits to the Hualapai Tribe in return for settling its water rights claims. The settlement will allow the Tribe to replace its groundwater use with a renewable water supply, consistent with the State's policy of preserving non-renewable groundwater supplies for use during drought conditions. The settlement will allow the Tribe to maximize economic development on the reservation by providing the water necessary for expansion of development at Grand Canyon West. The Tribe will also have sufficient water to construct a residential community near Grand Canyon West so that employees will no longer be required to endure a daily commute of two-hours to work and two-hours back to their homes.

Finally, the settlement will provide significant benefits to the United States. The settlement will avoid the costs and risks to the United States of litigating the Tribe's water rights claims. It will also provide a significant financial benefit to the United States Treasury through increased tax revenues resulting from the Tribe's expansion of Grand Canyon West. The financial benefits that the United States will receive through the settlement will greatly exceed the costs that the United States will incur in constructing a pipeline to bring water from the Colorado River to the Tribe's reservation.