

**Statement of  
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U.S. Department of the Interior  
Before the  
  
Committee on Indian Affairs  
United States Senate**

**S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act**

**July 18, 2018**

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke for Water and Western Resource Issues and Chair of the Working Group on Indian Water Settlements at the Department of the Interior (Department). I am pleased to appear before you today to discuss Indian water rights settlements.

Thank you for the opportunity to provide the Department's views on S. 2154, the Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act, which would approve and provide authorizations related to a settlement agreement involving the water rights of the Kickapoo Tribe in Kansas (Tribe). The Tribe and the State of Kansas (State) executed this settlement agreement in September 2016. The Department has significant concerns about the scope of the settlement agreement between the Tribe and the State. As executed, the settlement agreement only partially resolves the Tribe's water rights and leaves unresolved critical aspects necessary to achieve a final settlement, such as anticipated federal funding, cost-sharing by the State or local parties, and waivers of claims against the United States.

For these and other reasons, the Department cannot support S. 2154 as introduced. That being said, the Department remains eager to work with all interested parties to develop and support a settlement that adheres to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

**I. Introduction**

Before I begin discussing the Kickapoo settlement, I want to note that the Department continues to support the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements can resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency, and improve environmental and health conditions on reservations. Congress also plays an important role through reviewing and approving Indian water rights settlements as they typically involve federal spending, the ultimate resolution of the Tribe's reserved water rights, and the waiver of

the United States' sovereign immunity. We stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements that adhere to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

The policy framework the Department follows to guide the negotiation of Indian water rights settlements - and to support legislation authorizing these settlements - includes four general principles set forth in the *Criteria and Procedures* published in the Federal Register in 1990:

- (1) the Department participates in water settlements consistent with the federal government's responsibilities as trustee;
- (2) Indian tribes receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement;
- (3) Indian tribes obtain the ability to realize value from confirmed water rights resulting from settlement, which ensures they do not receive legal rights to water supplies that never materialize in the delivery of water;
- (4) settlements contain an appropriate cost-share by all parties benefiting from the settlement.

The *Criteria and Procedures* also contain guidelines that the Department follows in determining whether to support a proposed settlement. One important guideline is the concept of finality contained in Criteria 3 discussed below.

Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they often provide opportunities for economic development, improve relationships, and encourage collaboration among neighboring communities. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. These ultimate outcomes and opportunities have been the basis for which the United States has pursued a policy of resolving Indian water rights disputes through negotiated settlements rather than litigation whenever possible.

## **II. Background**

### **A. The Kickapoo Reservation and the Kickapoo Tribe**

The Kickapoo Tribe originated in the Great Lakes region, but moved southwest over time. In 1832, the Tribe and United States entered into the Treaty of Castor Hill, which established the original Kickapoo Reservation in present-day northeast Kansas.

The current Reservation, reduced in size after subsequent treaties, encompasses about 30 square miles and has its headquarters in Horton, Kansas, roughly an hour north of the State capital in Topeka. Of the lands within the boundaries of the Reservation, nearly 8,000 of the

approximately 19,000 acres within the Reservation are currently owned either by the Tribe or individual Indians in trust or fee status, and the vast majority of these lands are used for agricultural purposes. The remaining 11,000 acres are owned by non-Indians, often interspersed in a “checker-boarded” pattern with lands held by the Tribe or individual Indians.

Total tribal membership, including members living off-Reservation, exceeds 1,600. According to the Tribe, roughly one-third of its members reside on-Reservation. The Tribe’s Golden Eagle Casino, its governmental operations, and farming activities provide the primary sources of employment for Tribal members. The Tribe lists economic development as its top priority.

## **B. Water Resources of the Kickapoo Reservation**

The Reservation lies within the Upper Delaware River watershed, a basin that covers portions of Nemaha and Brown Counties in northeast Kansas. The basin's waters flow into Perry Lake, a U.S. Army Corps of Engineers facility, which then flow into the Kansas (or Kaw) River between Topeka and Lawrence (which then flow into the Missouri River at Kansas City). Precipitation averages between 35 to 37 inches per year, the vast majority of which falls as rain between April and October.

No reservoir or other storage facility currently exists on the Reservation. A low-head weir (dam) and associated water treatment facilities on the Delaware River built in the 1970s provide the primary water supply for the Reservation, diverting on average just over 100,000 gallons per day.

Drought conditions have occasionally led to crisis conditions on the Reservation. For example, the Department - through the Bureau of Indian Affairs and Bureau of Reclamation - provided nearly \$300,000 in 2003 to the Tribe to haul over 7 million gallons of water to the Reservation for domestic and fire prevention needs because the Delaware River and its tributaries were without flow for over sixty (60) days that year due to severe weather conditions.

## **C. 1994 Agreement and Subsequent Litigation**

Between the 1970s and the 1990s, the Tribe worked with the State of Kansas and a local watershed district to develop a plan under the auspices of the Watershed Protection and Flood Prevention Act, Public Law 83-566 (PL-566 program, codified at 16 U.S.C. §1001 et seq.), now administered by USDA's Natural Resources Conservation Service (NRCS). In 1994, the parties completed an environmental impact statement and signed a Watershed Plan (1994 Agreement), which envisioned twenty (20) floodwater retarding dams off-Reservation and one multi-purpose dam (Plum Creek Reservoir) that would provide 5,700 acre-feet of water supply and recreation use for the Tribe's present and future needs. Congress authorized funding to implement portions of the 1994 Agreement in both 1996 and 1998, and the off-reservation dams have since been built.

Plum Creek Reservoir was not constructed, however, as it would have required the acquisition of more than 1,000 acres of non-Indian lands checker-boarded with Tribal lands. Most affected

non-Indian landowners refused purchase offers, and the local district refused to use its eminent domain authority.

In June 2006, the Tribe filed a complaint in federal district court against the Bureau of Indian Affairs, U.S. Department of Agriculture's Natural Resource Conservation Service (NRCS), the Kansas Department of Agriculture's State Conservation Commission, and the local watershed district. The complaint alleged that the Federal and State defendants had affirmative trust obligations to protect and preserve the Tribe's Federal Indian reserved water rights (*Winters* rights) and failed to do so. The complaint also alleged that the local watershed district breached its obligations under the 1994 Agreement. The complaint sought, among other things, a declaration of the existence and priority of the Tribe's *Winters* rights; an injunction preventing all defendants from violating the Tribe's *Winters* rights; and specific performance of the 1994 Agreement.

After the United States and other defendants filed motions to dismiss, the parties agreed to stay the litigation and to seek a negotiated settlement. The parties made significant progress toward resolving both the water and land acquisitions issues, but the local watershed district ultimately voted to reject the key land acquisition piece in 2011. The parties then agreed to restructure the litigation and focus on the district's obligations under the 1994 Agreement. In 2013, the federal district court ruled against the Tribe and found that the 1994 Agreement did not obligate the district to exercise its eminent domain authority to secure the land for Plum Creek Reservoir.

### **III. Proposed Kickapoo Legislation**

As noted above, the Tribe's 2006 complaint asserted various claims related to its *Winters* rights in the Delaware River basin. Although the district court dismissed other claims related to the 1994 Agreement and the need to secure land for Plum Creek Reservoir, the Tribe, the State, and the United States (through the Department of Justice (DOJ) and the Department's Solicitor's Office (SOL)) continued working to resolve the underlying water rights issues and negotiated a potential water rights settlement. As directed by the court, the parties shared a draft settlement with the magistrate judge in December 2015. In September 2016, the Tribe and State - after making some critical revisions not shared with the United States - executed a revised settlement that forms the basis of S. 2154 and the subject of this hearing.

As introduced, S. 2154 would authorize and ratify the revised settlement executed by the Tribe and the State in September 2016; quantify the Tribe's water rights as outlined in the 2016 settlement; direct the Secretary of the Interior to enter into the 2016 settlement and take related actions consistent with the legislation; and direct the Secretary of Agriculture, through NRCS, to complete a study and make recommendations within two (2) years related to Plum Creek Project. S. 2154 would waive the Tribe's and United States' claims to water rights within the Delaware River Basin upon enactment, yet would retain the Tribe's claims against the United States related to its water rights. S. 2154 includes no federal appropriations at this time.

### **IV. Department of the Interior Positions on S. 2154**

While the Department strongly supports Indian water rights settlements generally, the Department has significant concerns about S. 2154 and cannot support the bill as introduced.

As noted above, representatives from DOI and DOJ negotiated the basic structure of a proposed settlement in December 2015, one that the three sovereign parties submitted to the magistrate judge overseeing the litigation that began in 2006. The federal representatives cautioned the other parties and the magistrate judge, however, that any settlement would need to be submitted to and approved by the Working Group on Indian Water Rights and the Administration as a whole and that outstanding issues remained to be resolved, such as federal funding and associated cost-sharing as envisioned by the 1990 *Criteria and Procedures*. Rather than pursuing this course, the Tribe embarked on a separate process with the State, revising the December 2015 agreement -- without the involvement or approval of the United States -- and executing this revised settlement agreement in September 2016.

The Administration has significant concerns about the 2016 agreement and S. 2154. Criteria 3 of the 1990 *Criteria and Procedures* provides that "Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved." A critical goal for all Indian water rights settlements is achieving finality: resolving an Indian tribe's water and related claims once and for all and providing certainty both to the Indian tribe and to affected State and non-Indian parties with respect to water allocations within a basin and related costs to achieve the settlement. Although S. 2154 and the underlying agreement take steps in this direction, they leave unresolved the ultimate cost of the settlement, how those costs should be shared, and how the water right will be realized for the Tribe. Moreover, S. 2154 explicitly retains the Tribe's claims against the United States related to the issues this settlement is meant to resolve, the exact opposite of what an Indian water rights settlement is meant to achieve.

A critical piece of this puzzle, one that S. 2154 recognizes as unresolved, relates to the Plum Creek Project or similar infrastructure to meet the Tribe's water right. The 2016 agreement defines the Tribal Water Right as the right to divert or redivert 4,705 acre feet year and gives the Tribe a right to store at least 18,520 acre feet in one or more yet to be constructed reservoirs. As introduced, S. 2154 would direct the Secretary of Agriculture and NRCS to commence a study and, within two (2) years, make recommendations on potential alterations to the Plan that authorized Plum Creek Project. It is unknown if such alterations will increase or reduce the amount of water that could be delivered to meet the Tribe's water right, thus leaving uncertainty as to whether this project or other projects will be needed to address the Tribe's water needs based on a reasonably foreseeable planning horizon. Although we generally support the amount of water quantified for the Tribe in the 2016 settlement executed between the Tribe and the State, the infrastructure needed to deliver reasonably foreseeable necessary water is unknown, and neither the United States nor anyone else should be exposed to unknown costs or potential liability as S. 2154 would allow.

In addition to the matters noted above, S. 2154 and the underlying agreement would alter other considerations developed as part of the original agreement - such as the timing of court proceedings and settlement enforceability - that had been structured based on previously enacted Indian water settlements.

After the Tribe and the State executed the revised agreement in September 2016, the Department and DOJ communicated concerns to the Tribe regarding these revisions, recommended that the Tribe follow the Indian water rights settlement process set forth in the *Criteria and Procedures* (including formation of a negotiation team), and urged the Tribe to dismiss the litigation. The Tribe agreed to dismiss the pending lawsuit, and the remaining parties to the litigation filed a joint stipulation requesting dismissal without prejudice, which the court approved in February 2017. The Department stands ready to work with the Tribe and the State through a Federal Negotiation Team and our established processes.

## **V. Conclusion**

The Department recognizes that the Tribe and the State of Kansas want to achieve a Kickapoo water settlement and have devoted substantial efforts to reach that goal. The Department shares this goal and is committed to working with the Tribe and the State to reach a final and fair settlement of the Tribe's water rights claims that adheres to the principles of the *Criteria and Procedures* and that we can fully support. As proposed, however, the Department cannot support S. 2154.

**STATEMENT FOR THE RECORD  
UNITED STATES DEPARTMENT OF THE INTERIOR  
BEFORE THE  
SENATE COMMITTEE ON INDIAN AFFAIRS  
ON S. 3060**

**July 18, 2018**

Chairman Hoeven, Vice Chairman Udall, and Members of the Committee, thank you for the opportunity to present the Department of the Interior's (Department) views on S. 3060, a bill to repeal section 2141 of the Revised Statutes to remove the prohibition on certain alcohol manufacturing on Indian lands.

**Background**

The Department is aware that the Confederated Tribes of the Chehalis Reservation seek to venture into a new economic development project that will be 100 percent owned by the Tribe on its Tribal lands. This economic development project consists of the construction and operation of a distillery. The Tribe approached the Bureau of Indian Affairs (BIA) Northwest Regional Office regarding this economic development venture and the BIA identified a potential obstacle to the project: one section of the Trade and Intercourse Act of 1834 prohibited distilleries in Indian country. The ban as amended remains a part of Federal law. Current 25 U.S.C. 251 reads: "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

Other sections of the 1834 law banned the sale and possession of liquor in Indian country, and those provisions also remain in the US Code at 18 U.S.C. Sections 1154, 1155, and 1156. In 1953, Congress enacted what is now codified at 18 U.S.C. Section 1161, waiving the application of those sections where a Tribe has enacted a liquor ordinance compliant with the terms of that section. The legislative history of Section 1161 makes it clear that Congress considered, and rejected, adding the distillery ban to the list of sections that would not apply where a Tribe had a liquor ordinance. The Department agrees that a legislative solution is the best avenue to remedy this situation and supports S. 3060.

**S. 3060**

S. 3060 would repeal Section 2141 of the Revised Statutes (25 U.S.C. 251). That section of the Code states that "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

**Conclusion**

Thank you for the opportunity to appear before you today. I am happy to answer any questions the Subcommittee may have.



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**On S. 3168, to amend the Omnibus Public Land Management Act of 2009 to make  
Reclamation Water Settlements Fund permanent.**

**July 18, 2018**

Chairman Hoeven, Vice Chairman Udall, and Members of the committee, I am Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to discuss S. 3168, a bill to amend the Omnibus Public Land Management Act of 2009 (Title X, Part II of Public Law 111-11) to make the Reclamation Water Settlements Fund permanent. The Administration remains committed to implementing and adequately funding enacted settlements, and has ensured adequate funding to implement all authorized settlements through the annual Budget process.

The Department continues to strongly support Indian water rights settlements that adhere to the principles outlined in the Department's 1990 Criteria and Procedures that are grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. Negotiated settlements allow tribes, states, and local water users to achieve finality on difficult issues of title to water, freeing up surrounding communities to make critical management and development decisions. Settlements allow the parties to develop creative solutions to overarching water resources issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and non-Indian communities, and to creating water certainty and economic-development opportunities in the West, has been funding. Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes. Settlements provide opportunities for local solutions, and because they have federal and local cost-share requirements, the settling parties share in the burdens, as well as the benefits, that can arise from investments in infrastructure. The FY 2019 Budget requests \$173 million for the implementation of Indian water rights settlements.

**Background**

To date, Congress has enacted 32 Indian water settlements, addressing the need for reliable water supplies in Indian country. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and the Department continues to see an increase in requests from tribes and states to enter into water rights settlement negotiations. Many of these tribes need: clean,

reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure to bring economic development to reservations. States increasingly seek settlement of Indian water rights to provide certainty for holders of State-based water rights, clarify authority to manage water resources, and plan for the future.

Indian water rights settlements can however be costly, and costs have increased over the years. Within the last ten years, the Omnibus Public Lands Management Act of 2009 (P.L. 111-11), the Claims Resolution Act of 2010 (P.L. 111-291) and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322) authorized seven new settlements that call for total Federal expenditures totally approximately \$2.5 billion. Although some mandatory funding was provided with the Claims Resolution Act, substantial discretionary funding is needed to meet the statutory settlement obligations. Each of these settlements contain deadlines by which funding must be completed or the settlement fails and long standing, expensive, and disruptive litigation resumes. In addition to the statutory requirements to fund these settlements within prescribed timeframes, the availability of funding has implications for economic development in Indian and non-Indian communities and raises other human considerations and equity concerns. For example, the availability of potable water can affect economic development, tribal health and welfare. Stalled funding would also delay the receipt of the economic benefits that are associated with settlements, which is why the Budget provides sufficient resources to implement enacted settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Construction funding also provides short-term economic stimulus to localities or regions which is important given the high unemployment levels in Indian country.

The Department currently has 21 Federal negotiation teams working with tribes to achieve additional settlements, and 23 teams working on implementing enacted settlements. Two of the settlements included as priorities for the Settlement fund, Navajo Lower Colorado Basin and Fort Belknap, have not been enacted, and the Federal contributions to these settlements may approach a billion dollars based on similar enacted settlements. While allocation of funding among the priority settlements identified in the Settlements Fund is complicated by construction schedules and other matters and cannot be fully predicted, at this time it appears there will be little, if any, funding in the Settlement Fund for settlements not specifically listed as priorities. The Department has always given priority to funding settlements in the annual Budget.

### **Reclamation Water Settlements Fund**

In 2009, Congress created the Reclamation Water Settlements Fund, which authorizes the deposit of funds that would otherwise be deposited into the Reclamation Fund, into a separate account within the U.S. Treasury. Currently, the Secretary of the Interior is authorized to expend from the Reclamation Water Settlements Fund, without further appropriation, up to \$120 million a year of the amounts deposited through FY 2029, plus accrued interest, in each of the years from FY 2020 to FY 2034. The Secretary may use money in the Reclamation Water Settlements Fund to implement congressionally approved water rights settlements, if the settlement requires the Bureau of Reclamation to provide financial assistance, or to plan, design or construct water supply infrastructure. In addition, the currently authorized Reclamation Water Settlements Fund

establishes certain funding priorities for settlements in the states of New Mexico, Montana, and Arizona.

Finally, the law includes a reversion clause providing that if any settlement identified in the above funding priority is not approved by an act of Congress by December 31, 2019, the Secretary has the discretion to use the reserved funds for any authorized use.

### **S. 3168**

S. 3168 would make the Reclamation Water Settlements Fund permanent and would not prioritize settlements other than those currently prioritized. While the current Reclamation Water Settlement Fund will become available for expenditures in 2020, much of it is already committed to existing, enacted settlements. The Department looks forward to working with the Committee to determine the best approach for authorizing future settlements.

The Department takes into consideration the effects of growing populations and related water demands, widespread drought in the West, and the need for new infrastructure and water storage in many locations. These factors are certain to drive an increase in the demand for water settlements.

I want to underscore the importance of these settlements, and recognize the aim of the bill sponsor and this Committee in considering S. 3168. Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they provide opportunities for economic development, produce critical benefits for tribes and non-Indian parties, and bring together communities to improve water management practices in some of the most stressed water basins in the country. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

As noted above, the Department supports Indian water rights settlements grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. The Department looks forward to working with the Committee and discussing the best means of achieving future settlements.

This concludes my written statement. I am pleased to answer questions at the appropriate time.