Testimony of
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Before the Senate Committee on Indian Affairs

Oversight Hearing on Indian Water Rights:
Promoting the Negotiation and Implementation of Water Settlements in Indian Country

March 15, 2012

Mr. Chairman, I want to thank you for holding this hearing and giving me an opportunity to testify. I am John Echohawk, a citizen of the Pawnee Nation of Oklahoma. I am a lawyer and Executive Director of the Native American Rights Fund, the national Indian legal defense fund headquartered in Boulder, Colorado.

Among the many important Native American legal issues that we have been addressing in the past 42 years of our existence has been tribal reserved water rights. During that time, we have been involved in nine tribal water rights cases that have resulted in negotiated settlements that have been approved by Congress. We are currently representing six tribes on their water rights claims.

For the past thirty years, the Native American Rights Fund has worked with the Western Governors Association and the Western States Water Council to promote favorable tribal water rights settlement policy. I am pleased to be on this panel today with Maria O'Brien who is representing the Western States Water Council. Her testimony covers how our two organizations have worked together to promote tribal water rights settlements and some of the specific issues that we are focusing on today. In

my testimony, I want to give the Committee a broad overview of tribal water rights issues and the future of water in Indian country.

Federal Responsibility

Indian tribes possess substantial claims to water to support viable reservation homelands and, in some cases, off-reservation stream and river system ecosystems necessary to support fishing, hunting, gathering, ceremonial and cultural rights specifically reserved by tribes as part of 19th century treaty negotiations with the United States. These reserved rights to land and other natural resources were part of a bargained for exchange in which the United States sought and received the perpetual relinquishment of land to open vast territory for westward expansion and settlement—millions of acres of land. So, too, the tribes expected then and continue to have a right today to expect the United States will hold to its promises.

A cornerstone component of the promise is the trust relationship; the United States holds as trust assets these land and natural resources and is imbued with the affirmative obligation to protect the asset base for tribes.

During the same historical era as the treaty and reservation era, the United States also enacted laws and implementing policies in the 19th century and early 20th century to encourage the settlement of arid western lands and the development of the scarce water resources in what became "former" Indian territory. Such laws included those permitting the homesteading of "surplus" Indian reservation lands, when reservations were allotted under the authority of the General Allotment Act of 1884; the Homestead Acts beginning first in 1862; and the Reclamation Act of 1902. (These laws were silent on their effect on

prior, pre-existing Indian tribal rights to the use of water, and such rights cannot be abrogated without express consent of Congress.)

Thus, the United States created the conflict over the development and use of western water resources and the recognition and respect of reserved Indian water rights. These conflicting tribal and settler rights and expectations must ultimately be resolved. It is therefore the responsibility of the United States to facilitate and fund the resolution of such conflicts consistent with its trust responsibility to Indian tribes, irrespective of whether in a litigation or settlement context.

Costs

Complex water rights litigation has cost tribes millions of dollars in technical and legal costs with no apparent end in sight. Several federal cases in New Mexico have spanned five to six decades. The Gila River and other tribes in Arizona have been involved in state water litigation since 1974, with at least nine trips to the Arizona Supreme Court (not all involving Indian water issues, per se, but the tribes are parties to the litigation and presumably have had to actively participate). The Wind River Tribes in Wyoming have suffered a similar litigation fate, fighting in state court since 1977 with almost as many trips to the Wyoming Supreme Court. The Confederated Salish and Kootenai Tribes in Montana have been on a similar path, but recent press accounts hold out promise for a negotiated resolution to their water conflicts.

Despite and against all odds, Indian tribes have still secured about two and a half dozen water settlements over the past 35-40 years, since federal Indian policy encouraged settlement as opposed to prolonged litigation. Dozens more tribes are either in various stages of the negotiation process or are in the queue waiting for the resources to engage in

the process. Dozens more after them have not the resources to understand the nature and extent of their Reservation water resources, the hydrology of the river systems upon which they depend, or of the extent of the state-law-based water rights and competing uses that are squandering the resource. Sadly, in the last 10-15 years we have seen a general trend toward the *dwindling* of these federal resources at a time when enhanced resources could have seen more settlements mature, ripen and come to fruition.

Litigation and settlement over a resource as sacred to Indian tribes and Indian people as water will always be emotional. Tribes will always view these processes as a two-edged sword. While on the one hand there are benefits to be gained from quantifying and decreeing Indian water rights—the delivery of wet water—there are costs. Because of the McCarran Amendment, tribes are in the perilous position of having claims to water rights waived if they do not participate in state court water adjudications. And there is always the feeling that something else of importance to Indian people is being taken away by the majority society; like in the treaty era of the 19th century, the work of Manifest Destiny continues largely unabated.

The United States, by investing *more* money in Indian water litigation and settlement, would actually save time—more of the work of protecting Indian water rights and resources would be completed in a more expeditious manner. Although, we still are talking decades to resolve all of these claims, not years. What is the likelihood of a greater investment in Indian water litigation and settlement occurring in this era of intense pressure on domestic budgets? Slim. With significantly fewer human and financial resources to invest, the United States will not be able to speed up the work of finishing the ultimate task.

Challenges

Many *may* not want the United States to speed up the process, though. The passage of time advances non-Indian water resource interests. Watersheds with un-quantified and un-decreed Indian water rights have typically been viewed as having a "cloud" on the availability of the resource. That has been the impetus, in large measure, for states to commence general stream adjudications and to haul federal and Indian interests into state court to sort out rights. But state governments are as financially hard pressed, if not more so, than the federal government, and adjudications are very expensive. The result is the protection—sometimes unwittingly, sometimes intentionally—of the status quo, in the face of unresolved Indian claims. The giving away of more and more water in river systems for non-Indian purposes—either through state regulation or, equally insidiously, the non-regulation of groundwater development or small pond/impoundment proliferation—ultimately advances the interests of some of those who oppose Indian water rights. And with each molecule of water that is given away to non-Indian interests as tribes await the assistance of the United States to assert, litigate and/or settle their water rights, the ultimate resolution of competing claims to water in any watershed becomes more difficult.

Tremendous progress has been made to date in the settlement and sorting out of Indian water rights, but much more work remains. Consider the remaining challenges: The remaining tribes with claims to water from the Colorado River; California and its more than 100 federally recognized tribes; Oklahoma with its 39 tribes sharing essentially two river systems; the other Midwestern tribes with similar concerns to those in Oklahoma over groundwater over-development and water quality impairment; the tribes

of the Dakotas and their reliance on the Missouri River system which, with the Mississippi, is the most heavily regulated commercial river in the United States; the coastal tribes in California, Oregon and Washington with their enormous cultural and economic interest in salmon fisheries and related habitat, many of them with express treaty-reserved fishing rights; the Great Lakes Tribes with off-reservation fishing and gathering habitat protection interests; and the tribes of the northeast and southeast which share many of the concerns faced by their brothers and sisters in the rest of the country. And do not forget the tribes and Native villages in Alaska, and the Native Hawaiian community in the Pacific.

Given the finite and very limited ground and surface water supplies, particularly in the West, one tried and true method in past successful Indian water settlements has been the reliance on water infrastructure—primarily in the form of concrete—to increase the size of the pie available to the stakeholders to a settlement. The several Arizona Indian water settlements are largely dependent on the construction of the Central Arizona Project. The new Navajo-Gallup settlement depends on building a pipeline several hundred miles in length. Of the remaining several hundred Indian tribes without quantified and decreed water rights, will we be dependent on a new era of dam and other infrastructure construction—more concrete? Is that even possible with federal laws such as the Endangered Species Act in place and not going anywhere soon?

There are also real concerns about some of the current "rules of the game" that work a disservice to Indian interests. State courts have traditionally been viewed as hostile to Indian rights and interests, and the McCarran "waiver" of federal and tribal sovereign immunity continues the possibility that Indian water rights will be looked upon

unfavorably by patriotic state court judges. The popular election of state trial and appellate judges only enhances such outcomes. The Practicably Irrigable Acreage (PAI) standard for quantifying Indian reservation water rights also can unfairly disadvantage tribes with reservation lands that either are not economically irrigable due to soil or arid climatic conditions, and, as we consider the claims of tribes east of the 100th Meridian, disadvantage tribes with reservation lands not typically viewed as requiring irrigation to make them agriculturally productive.

Finally, climate change looms as the wildest of wild cards. We know for a fact that climate change and consequential drought will likely not spare any region of the country. The recent water wars between Georgia and Florida are but a presage to pressures to come. Will the seven states of the Colorado River Basin ever be able to live on a sustainable water budget that includes tribes? How will tribes' interests play out against these larger forces?

State and local governments are already busily engaged in studying the effects of global warming on already limited and over-stressed water supplies. And planning the changes necessary to prepare for and manage/mitigate the effects thereof. Tribes typically lack the resources to conduct the same level of planning and preparation, and so will be even more disadvantaged in litigating, negotiating and settling their water rights in this ever-shifting context. The United States is not doing enough to prepare tribes, in terms of mitigation and adaptation resources and strategies.

Solutions

Real solutions must come from the United States. Some will involve financial capital, but others lie in structural and organizational changes made within the federal

government to effectuate a more just and expeditious resolution of Indian water claims. There must be put in place internal federal mechanisms and the means to level the playing field for tribes. Tribes must be given access to all necessary data and information from which they can make informed decisions and set priorities about protecting and asserting their water rights. This will enable them to more fully engage their state and local partners in the resolution of Indian water rights.

One state-created model is the Montana Reserved Water Rights Compact Commission. Since its creation in 1979, the Commission has completed 10 compacts with five tribes and three federal agencies in Montana. Are there useful lessons to be learned from the Montana Indian tribes' experiences with the Montana Compact Commission, and ways to improve on it as a federal model? Any such federal compacting process must necessarily avoid the unfavorable legacy of the Indian Claims Commission which operated between 1946 and 1978.

The Native American Rights Fund and our clients stand ready to work with the Senate Indian Affairs Committee to achieve *meaningful* solutions.