

Testimony of Chairman Kyle Prior
on behalf of the
Shoshone-Paiute Tribes of the Duck Valley Reservation

Mr. Chairman and members of the Committee on Indian Affairs, thank you for inviting me to present testimony on this very important issue, the settlement of our water rights claims.

I am honored to be here to represent the Shoshone-Paiute people and to witness the culmination of many decades of hard work and persistence by the tribal leaders who came before me to fulfill the vision of our forefathers: the creation of a sustainable homeland for our people.

Duck Valley: A Sustainable Homeland

The Duck Valley Reservation is the homeland of the Shoshone-Paiute Tribes. It was established for the Tribes' use and benefit by Executive Order in 1877 pursuant to the 1863 Treaty of Ruby Valley. Lands were added by Executive Orders in 1886 and 1910, so that today, the Reservation encompasses 290,000 acres located within the States of Nevada and Idaho. The Duck Valley Reservation is unallotted and the entire Reservation is held in trust for the Tribes.

In 1877, when our forefathers first agreed to be settled on the Duck Valley Reservation (the "Reservation"), they saw a homeland that had plentiful wildlife and game, productive agricultural and range lands, and an excellent fishery abundant with salmon and steelhead. Located in Northeast Nevada and Southwest Idaho, our reservation has three primary water sources: (i) the East Fork of the Owyhee River, which flows south to north through the Reservation, (ii) Blue Creek, which is a tributary to the Owyhee River in the Idaho portion of the Reservation, and (iii) Mary's Creek, which is part of the Bruneau River Basin in Idaho. These water sources were intended to supply water for tribal uses, including irrigated agriculture, stock raising, fisheries, wildlife and domestic use. Those intentions have never been fully realized.

Our people have a long history of being agriculturists. Even before the Duck Valley Reservation was established, many of our people successfully engaged in agriculture beginning in 1875 at Carlin Farms, a nearby area reserved by Executive Order for this purpose. Despite their farming success, our people were forced to abandon their improvements when the Executive Order reserving Carlin Farms was withdrawn due to pressure from white settlers in the area.¹

When the present Duck Valley Reservation was established in 1877 and settled by our People, agriculture remained a focus. However, by 1890, it became apparent to the Tribes and the Federal government that flows from the Owyhee River, Blue Creek and

¹ JRP Historical Consulting, *Duck Valley Indian Reservation: Creation, Purposes and Water Development* (hereafter JRP Report) July 1, 2005, at II-17-18.

Mary's Creek were seasonal, and facilities to store water would be necessary to realize the full potential for irrigated agriculture on our lands. For the next 40 years, our tribal leaders and officials from the BIA tried unsuccessfully to obtain a water storage facility to support irrigation on our reservation.

Our struggles during this time were complicated by several factors including rapidly increasing non-Indian settlement in the areas surrounding our reservation; over-appropriation of Blue Creek upstream of the Reservation in Idaho; ever increasing use of water by non-Indians south of the Reservation in Nevada; and Bureau of Reclamation ("BOR") opposition to the construction of a water storage facility on the Reservation. This BOR opposition was based on the concern that construction of the Wild Horse Dam and Reservoir would compromise the future of the Owyhee Project, which served downstream non-Indian water users in Oregon and Idaho.

Throughout the struggle to obtain sufficient storage water to support agriculture on the Reservation, the need to take steps to establish and protect the Tribes' water rights was identified over and over. Yet, no steps were taken by the Federal Government to protect this vital resource. Even though specific requests were made to the Justice Department on at least two occasions, and even though a detailed complaint was prepared by the Justice Department in connection with the Tribes' rights in the Owyhee River, the Federal Government never followed through to establish and protect the Tribes' water rights. In the meantime, ever increasing use of water both to the north and to the south of the Reservation continued.

Duck Valley Irrigation Project/Wild Horse Reservoir

Ultimately, our leaders were successful in establishing a formal Indian irrigation project in 1938, including critical storage for the project. Funding was first authorized by Congress for Wild Horse Dam and Reservoir in 1931, and construction was completed by 1938 to finally provide stored water to serve our reservation. Even with the construction of the Wild Horse Dam, however, the water resources of our Tribes were sacrificed for the benefit of non-Indian water users. The Wild Horse Dam and Reservoir were located nearly 15 miles south of the Reservation in a location that permitted 60% of the drainage flows from the Owyhee River to bypass the Wild Horse Dam and flow downstream to serve the Owyhee Project and meet off-reservation needs. The resulting loss of water has limited the number of acres of agriculture the Tribes can cultivate to 12,800 acres rather than up to 24,000-30,000 acres if the Wild Horse Dam was properly placed.²

The Bureau of Reclamation's Owyhee Project downstream in Oregon and Idaho, was planned, authorized and constructed during the same time period, and BOR treated

² The Bureau of Reclamation actively opposed the authorization and construction of the Duck Valley Reservoir because of concerns it would interfere with its own BOR Owyhee Project water supply, causing significant delays in construction of storage for the Duck Valley Project. JRP Report at VII-29-41. The BOR also actively opposed an adjudication of Duck Valley water rights that was proposed in the 1930's.

the Tribes' Project as competition for Owyhee water. Rather than protecting the prior and paramount rights of the Tribes, however, the Federal government acted to protect flows from the Owyhee River for the benefit of non-Indian water users. Just as devastating to our people was the destruction of Tribal fisheries caused by the Owyhee Project. The Project Dam was constructed without fish ladders or other devices to protect anadromous fish runs of salmon and steelhead to the Reservation. What was once an abundant resource to our people for subsistence and commerce was completely destroyed and forever lost as a result of the construction of the BOR Owyhee Project Dam.³

Federal Enforcement Efforts Abandoned

In an effort to firm up a water supply for the Reservation, the Justice Department prepared a detailed case in the 1930's to adjudicate the Tribes' water rights in the Owyhee River based on the Winters Doctrine. The filing of such an adjudication was recommended in a number of comprehensive irrigation reports prepared for the BIA, including a report completed by Charles Engle, an irrigation expert appointed by the Secretary of the Interior, who advised that the Tribes' water rights needed immediate protection.⁴ Although a comprehensive bill of complaint was developed by the Justice Department, the case was never filed and was actively opposed by BOR.⁵ Ultimately, it took the recommendations of a special attorney appointed by the Secretary, Louis Crampton, who undertook yet another exhaustive report on irrigation at Duck Valley, to bring about the construction of Wild Horse Dam in the face of BOR opposition. Yet the additional step of establishing and protecting the Tribes' water rights was never taken. JRP Report at VII-41-58.

The Tribes' water rights in Blue Creek and Mary's Creek have suffered a similar fate. Beginning at the turn of the century, non-Indian water users had constructed extensive diversion facilities on Blue Creek preventing flows from reaching the Reservation and causing several successful tribal farms to go out of business.⁶ Once again adjudication was recommended to no avail, even though it was recognized at the time that: "The longer this matter is deferred, the more numerous and difficult will be the questions relative to water supply, as water is being continually appropriated on all of these streams, both above and below the Reservation."⁷

The Federal officials responsible for protecting the Tribes' water rights continually deferred taking action to establish Duck Valley water rights in favor of development by non-Indians above and below the Reservation, and in favor of the BOR Owyhee Project. At every turn, the Tribes' water rights were continually sacrificed for the benefit of non-Indian water users.

³ It has been estimated that the average annual consumption of salmon and steelhead for each tribal member was 143 pounds. This amount does not take into consideration the Tribes' use of salmon and steelhead for trade and commerce.

⁴ JRP Report at VII-23-27.

⁵ JRP Report at VII-27-40, 59.

⁶ JRP Report at VI-1-14.

⁷ JRP Report at VI-13.

Duck Valley Indian Irrigation Project, A Failed Promise

The Duck Valley Indian Irrigation Project (“DVIIP”), which was finally constructed in 1938 along with the Wild Horse Dam as its storage facility to deliver water to irrigate agricultural lands on the Reservation, was never completed, and its promise has remained unfulfilled. As constructed, the DVIIP would only deliver water to 12,800 acres of reservation lands, not the full 24,000 acres of irrigable reservation lands that had been identified by a number of studies conducted by the government. Thus, the Tribes’ goal of maximizing the amount of irrigated agricultural lands has never been fully realized.

Over the years, the Federal government has not provided sufficient funds to adequately maintain the DVIIP, and the fees generated by the DVIIP are insufficient to even nominally maintain the DVIIP. Since the 1960’s, the DVIIP has been required to operate on an annual budget of \$60,000, the amount of the operation and maintenance fees charged to water users. As a result, the DVIIP has fallen into a substantial state of disrepair. Of the 12,800 acres of DVIIP lands, 7,000 acres are in sub-optimal production and the remaining 5,800 acres are currently fallow because of the deteriorating facilities and poor engineering. In addition to the reduced number of acres in production, those DVIIP lands that remain under active irrigation suffer from lower yields and less income than similarly situated off-reservation farms due to less than optimal cropping patterns.⁸

The subsidies that were promised to the Project have never materialized, and the level of disrepair has steadily increased. Some of the problems plaguing the DVIIP include overgrown and silted irrigation ditches, non-functioning gates and turnouts, and poorly engineered and unlined irrigation ditches, resulting in a highly inefficient delivery system and steadily declining agricultural production. Based on our current estimates, it will cost over \$10.7 million to fully rehabilitate the DVIIP to bring all 12,800 acres of agricultural lands into production.

For the last five years, the Tribes have operated and maintained the Project under a Memorandum of Agreement and now as part of our Self-Governance Compact. Some improvement has occurred, but without significant funds to rehabilitate and better the Project, and to cover operation costs, progress is minimal.

Settlement Negotiations

Mr. Chairman, we have been engaged in negotiations with private water users, the State of Idaho, the State of Nevada, and the Federal government to settle our water rights claims for over 15 years. It should be noted that the parties conducted these negotiations consistent with the Department of the Interior’s policy for the settlement of claims concerning Indian water resources. Throughout this process, the Shoshone-Paiute Tribes and all of the other parties have anticipated a significant Federal contribution to our

⁸ See the attached graph depicting the comparative cropping patterns in Idaho, Nevada, and the Shoshone-Paiute. It should be noted that alfalfa is a higher income producing crop than hay.

settlement. In fact, the Federal negotiating team reported to the Tribes that it would recommend a Federal contribution of \$44.9 million to settle the Tribes water rights claims. At the point where we had reached agreements with all parties to settle our claims, we learned that the Federal government, at the direction of OMB, had abandoned their prior offer and reduced the Federal contribution to \$6 million. Further, the Federal government is now taking the position that there must be a substantial state contribution to settlement, even though, at Duck Valley, the issues and responsibilities are almost entirely Federal. This abrupt shift in position has caused all of the parties in our settlement to re-examine their respective positions and consider their litigation alternatives.

In fact, because of the delay in reaching agreement on a Federal contribution, the State of Idaho abandoned the Idaho portion of the settlement and made an offer of judgment to resolve the Tribes' water rights claims through a consent decree. The consent decree was entered by the Idaho court on December 12, 2006, and decreed the Tribes' water rights in Idaho. Under the decree the Tribes' have approximately 19,516 acre-feet in the Owyhee River and its tributaries, including Blue Creek, based on the water necessary for domestic/commercial/municipal/commercial purposes, irrigation, reservoir storage, stock water and instream flow for stock and wildlife. The Tribes' claims for lake level maintenance, wildlife habitat and instream flows for fisheries were disallowed. The consent decree in Idaho did not resolve any of our water related claims against the Federal government, however; nor did it provide the means to put any of the Tribes' water to use. Thus the need for the present Federal settlement remains undiminished.

Mr. Chairman it is particularly disheartening to our people that after 15 long years of negotiations with representatives of the Federal government, including the Bureau of Reclamation, the Bureau of Indian Affairs and the Department of Justice, the results of those lengthy and difficult negotiations, including the original recommendation of a Federal contribution of \$44.9 million, can be delayed and even wiped out by certain Federal officials at the 11th hour of the process. These Federal officials have never engaged in or participated in negotiations with our Tribe and have never set foot on our Reservation to see the challenges we must contend with each day.

Indeed, as a result of the intransigence of the Federal government in moving forward with a comprehensive settlement in a timely fashion, the Tribes had little choice but to accept the offer of judgment made by the State of Idaho involving the Tribes' water rights in Idaho. Time literally ran out in the face of the litigation schedule set by the Idaho courts, and in the face of the unwillingness of the Federal government to reconsider its proposed Federal contribution of \$6 million.

On a more positive note, our settlement agreement with the State of Nevada and private water users in Nevada provides the Tribes with 111,476 acre-feet of surface water from the Owyhee River, storage water in the Wild Horse Reservoir, all water flows originating from springs and creeks on the Reservation, and 2,606 acre-feet of ground water, plus perennial yield. At the same time, the agreement protects the use of water by irrigators upstream (south) of the Reservation. The agreement is premised on allowing the upstream irrigators to continue their flood irrigation in the same manner they

historically have irrigated, without interference, provided that the overall acreage agreed upon by the parties is not exceeded. The agreement also provides a small amount of storage to the upstream water users.

The Nevada agreement, together with the Tribes' decreed rights in Idaho, fulfills a critical aspect of our overall goal of creating a fully sustainable homeland for our people. Yet, there is one major element that remains unresolved. We will not be able to realize a fully sustainable homeland for our people without a significant Federal contribution to our settlement. A significant Federal contribution is essential to enable the Tribes to fully utilize their water through the rehabilitation and construction of water delivery structures necessary to transport water from the Wild Horse Dam and Reservoir and from Blue Creek, to restore and protect Reservation fisheries and critical wildlife habitat throughout the Reservation, and for the construction of other essential water related projects.

Conclusion

The Tribes cannot help but view the government's recent change in position as eerily similar to its past failures to secure water necessary to make our reservation a permanent homeland. It bears repeating that the United States is directly responsible for failing to protect the Tribes' water rights in the face of non-Indian development, failing to properly operate and maintain the Duck Valley Indian Irrigation Project, failing to properly site reservoirs and storage facilities in order to avoid waste of water resources, and failing to protect the Tribes' salmon fishery.

Mr. Chairman, rather than continue to focus on the past, the Tribes are committed to securing a stable and productive future for our people. In this regard, we believe that a federal contribution of \$60,000,000 would reasonably support the return of a viable Reservation for our people. This amount is significantly less than the \$135,090,000 that is supported by our damages claims against the Federal government, which satisfies a key component of the Department of the Interior's water rights settlement policy. Nevertheless, this amount would enable the Shoshone-Paiute Tribes to:

- Rehabilitate the Duck Valley Indian Irrigation Project
- Develop a portion of Owyhee PIA lands
- Provide a delivery system from Blue Creek
- Develop a Stream Bank Maintenance Program
- Make Reservoir Repairs
- Develop a Wildlife Habitat Project
- Provide for a Municipal Water System
- Capitalize a DVIP Operation, Maintenance & Repair Trust Fund
- Provide an economic development fund
- Provide for Land Acquisition
- Develop a Water Management Plan & Code

Unfortunately, as we sit here today, the offer on the table from our Federal trustee is not the original recommendation of \$44.9 million but less than 15% of that amount. We have participated in the Federal government's negotiation process. We have followed the Federal Water Settlement Guidelines and we now have a Nevada settlement agreement on the table for approval.

It is respectfully submitted that it is time for the United States of America to fulfill the promises of a generation past by providing a Federal contribution of \$60,000,000 to settle the water rights claims of the Shoshone-Paiute people and to fulfill the vision of our forefathers: the creation of a sustainable homeland for the Shoshone-Paiute people. S.462 is a just and fair bill that would help us to realize our vision upon passage.

Thank you.

Comparative Cropping Patterns:

