

**Statement of
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Before the

Committee on Indian Affairs
United States Senate**

S. 664, the Navajo Utah Water Rights Settlement Act of 2017

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Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is Alan Mikkelsen, and I am the Deputy Commissioner at the Bureau of Reclamation (Reclamation) 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, a subject I have first-hand and extensive experience with given my years working and living throughout the West.

Thank you for the opportunity to provide the Department's position on S. 664, the Navajo Utah Water Rights Settlement Act of 2017, which would authorize the settlement of water right claims of the Navajo Nation (Nation) to the portion of its land within the State of Utah. The Department supports the goals of the settlement, which include quantifying the reserved water rights attached to the Utah portion of the Navajo reservation and facilitating the development of essential municipal water systems that will provide a reliable quantity and quality water supply for the communities within the Reservation, which currently lacks the sort of basic services that most Americans take for granted. The Department is working with the Nation and sponsor of S. 664 to ensure this bill meets these goals while adhering to the *Criteria and Procedures* that guide the Department's participation in Indian water right settlements.

I. Introduction

Before I begin discussing the Navajo Utah settlement, I want to note that the Department supports the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements have the potential to 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. We understand that Congress plays an important role in approving Indian water rights settlements, especially when they involve federal spending or the waiver of the United States' sovereign immunity, and we stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements.

The framework the Department follows to guide the negotiation of Indian water rights settlements, and the support for legislation to authorize these settlements, includes four general principals set forth in the *Criteria and Procedures* published in 1990. First, settlements must be consistent with the Nation's trust responsibilities. Second, Indian tribes must receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement. Third, Indian tribes must obtain the ability to realize value from confirmed water rights. This ensures Tribes do not receive legal rights to water supplies that never materialize in the delivery of water. Fourth, settlements must contain an appropriate cost-share by all parties benefiting from the settlement. In our current budget climate, concerns over federal costs are an area of particular interest to the Department as we evaluate Indian water rights settlements.

II. Historical Context

The Navajo Reservation is the largest Indian reservation in the United States with a current total membership of 300,048, of which 217,609 live on the reservation. The Navajo Reservation has a total unemployment rate five times the national average, a median household income of \$20,005, and a poverty level of approximately 42 percent. The Navajo Indian Reservation consists of approximately 26,600 square miles in Arizona, New Mexico, and Utah. Approximately 1,987 square miles lie in southeastern Utah and are the focus of this settlement. The current boundaries of the Navajo Nation Reservation in Utah were established over a period of time by two Executive Orders and two congressional Acts between the years of 1884 and 1958. Currently, there are 5,029 Navajo tribal members residing within the Utah portion of the reservation.

The portion of the Navajo Reservation in Utah is primarily a desert landscape with much of the area receiving about 7 inches of water per year. Surface water resources include the San Juan River and its tributaries, which flow along the much of the northern boundary of the Reservation in Utah. The primary potable water source is almost entirely from groundwater and the majority of the groundwater is of relatively low quality. The shallow aquifers near Monument Valley provide the highest quality water, but those aquifers are nearly fully utilized. The deeper bedrock aquifers in the eastern portions of the Reservation contain more water but have significant water quality issues, including high total dissolved solids (TDS) and arsenic. Much of the Reservation in Utah lacks easy access to potable water. Of the 2,581 households, only roughly half have indoor plumbing. Approximately 46 percent of households haul water, some as far as 50 miles round-trip from Halchita to Monument Valley.

III. Proposed Navajo Utah Settlement Legislation

Since 2003, the State of Utah, the Nation, and the United States have worked cooperatively, without litigation, to negotiate a water rights settlement for the portion of the Navajo Reservation within Utah.

As introduced, S. 644 contains a number of provisions that the Department supports. The legislation recognizes a reserved water right of 81,500 acre-feet per year of depletion for the Navajo Nation, which will be deducted from the State of Utah's allocation of water in the Upper Basin of the Colorado River. The Department believes that the amount of water negotiated is an appropriate quantification of the Nation's water rights and is in keeping with important statutes,

compacts, and regulations that make up the “Law of the Colorado River.” As part of the proposed settlement, the Navajo agree to subordinate their reserved water right to all perfected non-tribal water rights as of the date the settlement is signed, which is relatively common in tribal water rights settlements. . Finally, S. 664 provides for exchange and lease of Navajo’s water rights within Utah, allowing for greater flexibility in the use of water resources and greater drought resiliency.

As introduced, Section 6 of the bill would authorize \$198.3 million in appropriations for Reclamation to plan, design, and construct several Navajo water development projects. S. 664 also includes \$11.4 million to establish an operation and maintenance fund to cover the initial operation and maintenance costs associated with projects constructed from the water development fund, as well as \$1 million for a survey of all current water uses on the Utah portion of the Reservation, which will allow both the State and Nation to manage water resources. Section 6 also includes a state contribution of \$8 million payable to the Secretary of the Interior for planning, design and construction of the Navajo water development projects.

In evaluating the project plans and cost estimates, Reclamation identified deficiencies that would require significant time and effort to resolve and very likely would lead to project cost overruns in the future. Subsequent to the introduction of S. 664, the United States, the Nation, and the State discussed a simplified settlement, which would replace the Department’s construction obligations under Section 6 with a water development fund to be used by the Nation to build water projects on an as needed basis. Such a revision would afford the Navajo Nation the opportunity to achieve economic efficiency and flexibility in designing and construction water projects over time as needs arise. We believe that a fund-based settlement would allow for tribal self-sufficiency in meeting future water needs while, at the same time, relieving the Department of the risks inherent in attempting to design and estimate the costs of projects that have not advanced beyond a conceptual level. We will continue to work with the Nation, the State, and the bill sponsor to craft changes to the proposed bill that would allow for Administration support.

The Department also has other concerns about the bill as introduced. Of significant concern is how the water rights held by individual Indians on public domain allotments located within the exterior boundaries of the Reservation will be quantified and protected. We have made substantial progress with the Nation and the State in negotiating potential changes to bill language that would address this concern and are confident that we will be able to satisfactorily address this issue. The provisions on indexing the water development fund are also under discussion. Finally, the waiver language included in the bill as introduced needs to be modified to be consistent with current Administration policy.

IV. Conclusion

In conclusion, the Department supports the goals of the settlement which include quantifying the reserved water rights attached to the Utah portion of the Navajo reservation and facilitating the development of essential municipal water systems that will provide a reliable quantity and quality water supply for the communities within the Reservation. The Department is supportive of a fund-based settlement for the Navajo Utah Reservation, as it would allow the Nation the greatest flexibility and self-determination in meeting its future water needs. The Department is

working with the Nation and sponsor of S. 664 to ensure this bill meets these goals while adhering to the *Criteria and Procedures* established for tribal water right settlements.