

On December 6, the Senate Indian Affairs Committee held a legislative hearing to receive testimony on the Navajo Utah Water Rights Settlement Act (S.664) and the Hualapai Tribe Water Rights Settlement Act (S. 1770). Witnesses included Bureau of Reclamation Deputy Commissioner Alan Mikkelson, Navajo Nation President Russell Begaye, Hualapai Nation Chairman Damon Clarke, Utah Lieutenant Governor Spencer Cox, and Arizona Department of Water Resources Director Thomas Buschatzke.

Mikkelson noted that the Department of the Interior “supports the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation.” The 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.”

### **Navajo-Utah**

Mikkelson testified in support of the goals of Navajo-Utah bill, noting a few concerns that they are still negotiating with the Navajo Nation and the State, including the waiver of claims language, indexing the water development fund, water rights on public domain allotments within the Reservation boundaries, and construction of infrastructure. “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 a needed basis. Such a revision would afford the Navajo Nation the opportunity to achieve economic efficiency and flexibility in designing and [constructing] water projects over time as needs arise. We believe that a fund-based settlement would allow for tribal self-sufficiency...[while] 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.”

Begaye reminded the Committee of the terms of the 1868 Treaty with the Navajo Nation, including the United States’ promise to assist the Nation to create a permanent homeland on their reservation lands. “In the arid West, it is clear – no lands can be a permanent homeland without an adequate supply of water. The Navajo Nation will secure its water rights either through litigation or through settlement.... [T]he advantages of settlement in this case far outweigh the costs, risks, and policy disadvantages of divisive litigation.” In particular, the settlement results in a quantification of the Nation’s water rights in the Upper Basin of the Colorado River while protecting existing Utah water right commitments and interstate compacts.

Begaye noted that, even using conservative estimates of the value of the water foregone by the Nation, in the range of \$250M to \$850M, the benefits far exceed the \$211M authorization for appropriations included in the bill. That does not include the added value of the foregone litigation and related costs for “the failure of the United States to ensure that the Upper Colorado River Basin Compact does not limit Navajo uses of water in Utah.” Nor does it include the value of the Nation’s agreement not to make calls on the San Juan River against upstream water users in Colorado and New Mexico, avoiding “the threat of litigation that could jeopardize the Law of the River.”

Recent hurricanes in Houston, Florida, and Puerto Rico highlighted “the terrible economic and social costs associated with the lack of safe water supplies....” While less than 1% of the general American population lives without safe water and waste disposal facilities, “the corresponding rate on the Navajo Reservation in Utah has been estimated to be at least 40%. Investment in basic water delivery infrastructure is essential for the Navajo people....” Communities such as Oljato on the Utah-Arizona border have “a single spigot on a desolate road, miles from any residence” to serve 900 people. The water development fund would allow the Navajo Nation’s Department of Water Resources to use its technical expertise to manage the projects identified by the Nation, Utah, and the United States that will provide the greatest return on investment, and to build them in the most cost-efficient manner as needed for future development and water quality purposes. The fund allows “the flexibility to adopt project designs that take advantage of economies of scale....”

Cox also testified in support of S. 664, noting the importance of the settlement to protect Utah’s water users, as well as the quality of life improvements and economic opportunities for Navajo Nation citizens living in Utah. He acknowledged the competing interests for federal resources, but said that the contemplated expenditure was both justified and appropriate, given the federal trust obligations and the waivers of liability.

The Navajo Nation and state also agree that the Utah contribution of \$8M is an appropriate share of costs from the state. “This bill, and the process that led to it, is the essence of cooperative federalism. The state and tribal governments, with input and assistance from the federal government, have worked together to find an equitable solution to pressing challenges. This is the kind of agreement we should celebrate and try to do more often.”

## **Hualapai-Arizona**

Mikkelson expressed greater concern with the Hualapai legislation. The Department of the Interior believes “the cost to construct a 70-mile pipeline from the Colorado River lifting water over 4,000 feet in elevation will greatly exceed the costs currently contemplated in S. 1770 and might trigger significant additional litigation.” Interior wants to complete its ongoing groundwater studies to better inform its views on the pipeline, water rights, water availability, and the tribe’s water resource needs. He also took issue with the non-federal cost share of the settlement, noting that it should be proportionate to the benefits those parties receive. The provisions of S. 1770 include “an overly broad waiver of sovereign immunity,” ambiguous language about the settlement fund, a prohibition against objecting to groundwater uses outside the reservation “even if those uses interfere with acknowledged Federal reserved groundwater rights,” and unnecessary project-related obligations for Reclamation. Interior is still committed to the goal of achieving a final and fair settlement of the Tribe’s water rights claims, Mikkelson concluded, but one that adheres to Interior’s 1990 *Criteria and Procedures*.

Clarke countered Mikkelson’s testimony with details about the Tribe’s tourism-based economy at Grand Canyon West, the limited and diminishing groundwater resources, and the lack of any significant surface streams other than the Colorado River. He pointed to a July 2017 report by Professor Joseph P. Kalt, *Economic Impact of the Hualapai Water Rights Settlement and Proposed Diamond Creek Pipeline*, showing that the settlement would support 10,000 jobs, \$1.5B in federal tax revenues, and over \$9.3B in gross domestic product for the United States. “I believe this settlement is unique among Indian water settlements in supporting this level of regional and national economic benefits – benefits that dwarf the level of federal outlays authorized by S. 1770.”

The Tribe paid for an engineering study that concluded the most feasible project was a 70-mile pipeline from Diamond Creek to the residential community at Peach Springs and on to Grand Canyon West. The water would accommodate increased tourism and the development of a new residential community near Grand Canyon West for tribal members who work there and currently commute over four hours a day on dirt roads. Clarke said the lack of water “is our major obstacle to achieving economic self-sufficiency....”

Clarke also pointed to the “substantial non-federal contributions to this settlement,” including the Freeport Minerals Company providing a multi-million dollar contribution to the Tribe’s “economic development fund which the Tribe can use to purchase Colorado River water rights to supplement the allocation of CAP water provided by the settlement.” Freeport contributed an additional \$1M “that enabled the Tribe to conduct an essential ‘appraisal-plus level’ study to determine the feasibility and costs of alternative infrastructure projects to bring Colorado River water to the Hualapai Reservation.” Arizona has agreed to firm 557.5 acre-feet of the Tribe’s allocation of CAP water until 2018, at an estimated cost of \$3.2M. The Tribe has agreed to pay the cost of constructing an electric transmission line that will supply power to pump water through the proposed pipeline, at a cost of about \$40M. “In aggregate these various non-federal contributions to the settlement constitute over 30% of the Federal costs of the comprehensive settlement.”

Buschatzke explained the annual charge for the use of priority CAP water on the reservation, noting that the charge is proportionately assessed against all CAP water users to pay for fixed operation costs. He said that “without proper operation, maintenance and replacement of the CAP, there would be no CAP canal and no CAP water.” This is not a double charge for water deliveries, contrary to Interior’s position, because all CAP users, not just the Tribe, are also responsible for paying expenses relating to their own delivery systems as a separate and distinct charge.

Arizona strongly supports S. 1770, as the settlement resolves the Tribe’s claims to the Colorado River and replaces groundwater use with a renewable water supply “consistent with the State’s policy of preserving non-renewable groundwater supplies for use during drought conditions.” It also avoids the costs and risks of litigation, provides certainty to water users in the state, and allows the Tribe to maximize its economic development on the reservation.