JAN 19 2010

The Honorable Tom McClintock
Ranking Member
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Representative McClintock:

We are responding on behalf of the Departments of the Interior and Justice to your letters dated September 25, 2009, and October 19, 2009, regarding the four Indian water rights settlements that are currently pending in Congress: the White Mountain Apache Tribe Water Rights Quantification Act (H.R. 1065 and S. 313), the Aamodt Litigation Settlement Act (H.R. 3342 and S. 1105), the Taos Pueblo Indian Water Rights Settlement Act (H.R. 3254 and S. 965), and the Crow Tribe Water Rights Settlement Act (H.R. 3563 and S. 375). Consistent with our legal responsibilities and longstanding policy that we do not discuss non-public aspects of pending or potential litigation, we are responding to the fullest extent possible.

You asked whether these settlements represent a net benefit to taxpayers when balanced against what you describe as the "consequences and costs of litigation." These consequences, some of which were discussed in Administration testimony presented on these bills, are not susceptible to simple quantification. They include the rancor between neighbors that contested litigation can cause, which may last long after the water rights have been adjudicated, as well as the prolonged uncertainty due to the time it takes to litigate complex stream adjudications. Both rancor and uncertainty can have substantial economic consequences. The existence of unquantified water rights claims casts a shadow over all water users in a water basin, as no other water user in the basin can ever be certain when these rights may be used and how this will impact other users. It is the Administration's considered view, as explained in testimony on these bills, that settlement would be preferable to litigation of these claims, although we do continue to have certain concerns with each of the pending settlements. These views are laid out in statements of July 21, 2009, September 9, 2009, and September 22, 2009, as well as in letters dated October 22, 2009, November 10, 2009, and November 18, 2009.

Your letter requested "guidance" from the Departments of the Interior and Justice regarding the merits of these settlements. We are attaching copies of the Administration views letters sent by Michael L. Connor, Commissioner of Reclamation, providing updated

views and estimates of the Administration on the above-referenced bills. Like the Administration testimony presented by Commissioner Connor at the hearings on these bills, these letters reflect the views of the Administration on these pending bills. Each of the tribes and pueblos whose rights would be settled through these settlements has claims to significant amounts of water that may be vindicated through litigation. As the Administration statements have explained, for over 20 years spanning both Democrat and Republican administrations, the Federal Government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation.

If you have further questions on this matter, please contact Mr. Christopher Mansour at (202) 208-7693.

Sincerely,

Christopher Mansour
Director
Office of Congressional and
Legislative Affairs
Department of the Interior

Ronald Weich
Assistant Attorney General
Office of Legislative Affairs
Department of Justice

Enclosures

cc: The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power

United States Department of the Interior
BUREAU OF RECLAMATION
Washington, DC 20240

NOV 18 2009

IN REPLY REFER TO:

The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power
Committee on Natural Resources
House of Representatives
Washington, DC 20515

Dear Chairwoman Napolitano:

In response to your request, this letter presents the views of the Administration regarding H.R. 3563, the "Crow Tribe Water Rights Settlement Act of 2009." For overall views regarding the background and purposes of this settlement, I would refer the Committee to testimony I delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on this bill on September 22, 2009.

I want to begin by emphasizing, as I did in my testimony, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by H.R. 3563 would resolve a long-standing dispute about the scope and quantity of the Crow Tribe's water rights and would also resolve water rights litigation concerning this issue that has been on-going since 1975. The Department has worked with the Crow Tribe and the State of Montana for a number of years in an effort to reach agreement on Federal legislation that would approve the Compact and provide funds for the Tribe to put its water rights to use. After a hearing on a predecessor bill (S. 3555 in the 110th Congress) at which the last Administration raised a number of monetary and non-monetary concerns with the bill, both the Tribe and the State worked cooperatively with the Department to address many of these issues. A number of important issues were addressed when Senate companion S. 375 was introduced and additional positive changes were made in the legislation during the Senate

mark up, which are incorporated in H.R. 3563. We would like to continue to work with the parties and the sponsors to address certain remaining concerns to make this a settlement that the Administration could support. I will not reiterate the entire statement I made during the September 22, 2009 hearing but instead will focus this set of comments on the areas in this legislation that were improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, the Administration notes with approval that Section 6(g) of H.R. 3563 now requires that title to the municipal, rural and industrial (MR&I) water system to be constructed under the settlement to deliver clean water to communities and businesses in most parts of the Crow Reservation be conveyed to the Tribe after construction is complete. This is consistent with other recently enacted water rights settlements. The Administration believes that transferring title to infrastructure is consistent with concepts of self-determination and tribal sovereignty. We would like to work with the Tribe and Congress to refine the language of Section 6(g) to ensure that the title transfer is appropriately structured.

Second, we also note with approval that changes were made in section 13 to address concerns raised by the State of Wyoming about the impact of the legislation on the Yellowstone River Compact. We appreciate the efforts of the Tribe and the states of Wyoming and Montana to work together to resolve these issues. It appears that this language is consistent with the rights of the Tribe as set forth in the Compact.

Third, notwithstanding significant improvement in the legislation, the high costs of the infrastructure projects and other benefits called for in the bill and the large disparity between the local and State cost share and the Federal settlement contribution remain of concern. H.R. 3563 authorizes more than one half billion dollars in federal appropriations, making the settlement, if enacted, one of the largest to date. As a practical matter, the size of the Federal obligation created under H.R. 3563 in relation to the Bureau of Reclamation's budget presents significant challenges. Currently, Reclamation has a backlog of more than $2 billion in authorized rural water projects, many of which have a significant tribal component. Moreover, the breadth of the many benefits that would flow to the Crow Tribe under the settlement at almost exclusively federal cost, such as the rehabilitation, improvement, and expansion of the Crow Irrigation Project, the design and construction of water diversion and delivery systems to serve vast areas of the Crow Reservation, and significant funding for unspecified and open-ended water and economic and water development projects, raises serious concerns because of the precedent that enactment of such a large settlement could set for future Indian water rights settlements.

The Administration believes that several aspects of the costs of this legislation need additional analysis, including (1) the intended uses of the funds S.375 proposes to be placed in the Crow Settlement Fund established under this legislation for "economic development projects" and "water development projects," totaling altogether almost $93 million; (2) the potential for a non-Federal contribution, based on any non-Indian benefits

received, to the irrigation and M&I projects required under the settlement; and (3) the appropriate size of trust funds to subsidize the operation, maintenance and repair (OM &R) costs of Yellowtail Dam (the dam that created Bighorn Lake), the municipal water systems to be constructed under this legislation, and the rehabilitation of the Crow Irrigation Project. Given the very large size of the Federal contribution to the settlement and the number of benefits that it will provide to the Crow Reservation, heightened scrutiny must be given to the various trust funds that are created and the purposes for which they are established. Given the undefined nature of the purposes for the money slated for "economic development," the Administration questions whether any such fund is appropriate.

Fourth, the Administration is concerned that the legislation mandates that certain engineering reports be used to define the scope of the significant infrastructure development authorized in the settlement. These reports are not at the appropriate level of detail to be used as a mandate. The Administration will be working with the Crow Tribe and its technical experts to analyze, and achieve more clarity on, the infrastructure to be constructed, whether the work proposed is the most cost effective way to use the sizeable funds authorized in the legislation and if greater economies of scale that could be obtained through different configurations of the proposed rural water system.

Fifth, a critical element of our further analysis will focus on the rights of allottees vis a vis the priorities for the rehabilitation and expansion of the Crow Irrigation Project. H.R. 3563 would waive federal rights held by the allottees in exchange for outlined settlement benefits. The Administration has an obligation to allottees to assure the water rights waived and substitute benefits are of equivalent value. At minimum, we recommend that H.R. 3563 be amended to allow the proposed infrastructure projects to be modified to ensure that allottees are receiving fair benefits for rights surrendered.

Sixth, Section 12(b) of H.R. 3563 grants the Crow Tribe the exclusive right to develop power at the Yellowtail Afterbay Dam, a component of the Yellowtail Unit, Pick-Sloan Missouri Basin (PSMB) project. We are looking closely at the implications of this provision and whether it provides for consistency of cost allocation for other PSMB beneficiaries.

Seventh, the Administration remains concerned that key Compact documents remain incomplete or in dispute, including the list of existing water uses on trust land. If the parties do not wish to complete all the documents at this point, they can be negotiated after the legislation is enacted, but the bill should not ratify documents that have yet to be negotiated. Moreover, the list of existing uses is important to the Administration because it will be used to determine shortage sharing and priority rights for both the Tribe and allottees. Past Indian water right settlements that were approved by Congress in an incomplete status have been very difficult to implement, causing lengthy delays and, in some cases, the need to come back to Congress. The Administration believes the better course is to complete all aspects of the settlement agreement in advance of congressional approval.

Eighth, the financial structure and timing of the waivers as proposed in this settlement raise serious concerns for the Administration. The final effectiveness and enforceability of this settlement could occur as soon as the United States has appropriated only the funds authorized for the Crow Settlement Fund, which is about half of the total benefits called for in the settlement; the legislation provides no parameters establishing when the other aspects of the settlement are to be fulfilled. Under this settlement structure, the waivers by the Tribe and the United States of further claims for the Tribe's federal reserved water rights are uncoupled from final receipt by the Tribe of the central settlement benefits (rehabilitation and expansion of the Crow Irrigation Project and construction of a MR&I system for the reservation). The State of Montana and its water users will receive their most important settlement benefit – waivers – far in advance of the Tribe receiving its full settlement benefits. The Department of the Interior has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties at the same time. In this way, no entity benefits disproportionately in the event that all the major settlement benefits are not realized.

In conclusion, H.R. 3563 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This is a goal that the Administration emphatically shares. We are committed to working with the Tribe and the State of Montana to complete a full and robust analysis of the settlement in order assure that it is final and fair, will provide certainty to the State of Montana and non-Indian users, and will enable the Crow Tribe to put its water rights to use for the economic benefit of the Crow Reservation and its residents. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,

Michael L. Connor
Commissioner

cc: The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources

The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

The Honorable Tom McClintock
Ranking Member, Subcommittee on Water and Power, Committee on Natural Resources

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

IN REPLY REFER TO:

OCT 22 2009

The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power
Committee on Natural Resources
House of Representatives
Washington, DC 20515

Dear Ms. Napolitano:

In response to your request, this letter presents the views of the Administration regarding H.R. 3254, the "Taos Pueblo Indian Water Rights Settlement Act," as reported by the Subcommittee on Water and Power on September 30, 2009. For overall views regarding the purposes and importance of this settlement, I would refer to my testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 9, 2009, prior to changes made during the markup.

I want to begin by emphasizing, as I did in the testimony delivered at the September 9 hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by H.R. 3254 would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing since 1969, when the general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and the interrelated groundwater and tributaries was filed. Under the terms of the negotiated settlement, the Taos Pueblo (Pueblo) has a recognized right to a total of 11,927.71 acre-feet per year (AFY) of depletion, of which 7,249.05 AFY of depletion would be available for immediate use. The Pueblo has agreed to forebear from using 4,678.66 AFY in order to allow non-Indian water uses to continue without impairment. The negotiated settlement contemplates that the Pueblo would, over time, acquire the right to put its forborne water rights to use through purchasing and retiring state-based water rights from willing sellers with surface water rights. There is no guarantee that the Pueblo will be able to acquire enough state-based water to put all its

forborne water rights to use, however. The quantity of water secured under the settlement is a tremendous compromise on the quantity of water claimed by the United States and the Pueblo. If the claims asserted in litigation by the United States and the Pueblo were successful, the court could award the Pueblo rights to approximately 78,000 AFY of diversion and 35,000 AFY of depletion of water in the basin. This is very valuable water. The cost of water rights in northern New Mexico is extraordinarily high and has been estimated to be as much as $10,500 to $12,000 per acre-foot of consumptive use per year.

We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns that could make this a settlement that the Administration could wholeheartedly support. I will not reiterate the entire statement made by the Administration during the September 9, 2009 hearing but instead will focus this set of comments on the areas in this legislation that were improved by the markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, we believe a closer look can and should be given to the costs of the settlement and the share and timing of those costs to be borne by the United States. H.R. 3254 authorizes a Federal contribution of $121,000,000, to be paid over 7 years. Of this total, $88,000,000 is authorized to be deposited into two trust accounts for the Pueblo's use. An additional $33,000,000, adjusted to reflect changes in construction cost indexes since 2007, is authorized to fund 75% of the construction cost of various projects that have been identified as mutually beneficial to the Pueblo and local non-Indian parties. The State and local share of the settlement is a 25% cost-share for construction of the mutual benefit projects ($11,000,000). The Settlement Agreement provides that the State will contribute additional funds for the acquisition of water rights for the non-Indians and payment of operation, maintenance and replacement costs associated with the mutual benefits projects. The Administration believes that this cost-share is disproportionate to the settlement benefits received by the State and local non-Indian parties. We believe that increasing the State and local cost share for the mutual benefit projects is both necessary and appropriate, and consistent with the funding parameters of other Federal water resources programs.

An unusual and problematic provision of H.R. 3254 would allow the Pueblo to receive and expend $25 million for the purposes of protecting and restoring the Buffalo Pasture, constructing water infrastructure, and acquiring water rights before the settlement is final and fully enforceable. The Department believes providing early settlement benefits is not good public policy and has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties only when the settlement is final and enforceable so that no entity can benefit if the settlement fails. Limited departure from this practice may sometimes be appropriate, but there should always be statutory provisions ensuring that the United States is able to recoup unexpended funds or receive credits or off-sets for the water and funding provided by the United States if the settlement fails and litigation resumes.

The amount of funding that would be provided to Taos before the settlement is final is also of concern. In previous settlements allowing early benefits, the funding was far more limited –less than $4 million. Although the Department understands the Pueblo's need for immediate access to funds, especially to halt deterioration of the condition of Buffalo Pasture, we remain concerned about the precedent that this would set for the many other pending Indian water settlements that are working their way toward Congress. We recommend that the bill be amended to significantly reduce the amount of early money that is authorized. In addition, we are of the view that the statutory provisions addressing our concern that the United States' ability to receive value for the settlement benefits it has provided in the event that the settlement fails should be strengthened. The Administration suggests that language be added to Section 10(h) to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement, including any water secured for the Pueblo, in the event that the settlement fails

The Administration notes an amendment made at markup to H.R. 3254 setting a more appropriate deadline for the Department to enter into the contracts. The new language requires the Secretary to enter into the contracts at the date that is 180 days after the date of enactment of H.R. 3254 into law. This language would allow the Secretary 6 months to complete the environmental compliance and other work that must be accomplished before the contracts can be executed. The Administration had recommended that the legislation allow 9 months to complete all necessary work. The new language is an improvement from the original language although we would still recommend building in an additional 3 months to recognize the need for adequate startup time and complete analysis.

We also recommend that the settlement legislation be amended to require Secretarial approval for all water leases and subcontracts. As currently written, section 7(e)(2) exempts leases or subcontracts of less than 7 years duration from the approval requirement. Secretarial approval is required for all existing San Juan Chama subcontracts and we believe there is no reason to depart from that practice here. With respect to leasing other types of water, the requirement of Secretarial approval has been the standard practice in Indian water rights settlements and allows for appropriate environmental compliance to be undertaken. H.R. 3254 as amended deletes the phrase "or subcontract" from this section but this does not address the Administration's concern regarding the appropriateness of Secretarial approval in these circumstances.

Additionally, the United States objects to Section 12(a) -- which waives the sovereign immunity of the United States for "interpretation and enforcement of the Settlement Agreement" in "any court of competent jurisdiction." This section should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in H.R. 3342, the Aamodt Litigation Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication.

Finally, the United States is concerned that after markup H.R. 3254 still fails to provide finality on the issue of how the settlement is to be enforced. The bill leaves unresolved

the question of which court retains jurisdiction over an action brought to enforce the Settlement Agreement. This ambiguity may result in needless litigation. The Department of Justice and the Department of the Interior believe that the decree court must have continuing and exclusive jurisdiction to interpret and enforce its own decree.

Overall, the negotiated settlement represents a positive step towards the resolution of historic water disputes in an area that has limited water resources and is struggling to support the population it has attracted. It is a settlement that contains many provisions that the Administration can support, which are described in detail in the testimony delivered before the House Subcommittee on Water and Power on September 9, 2009.

In conclusion, I would like to emphasize that this Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results. Neither the Pueblo nor their non-Indian neighbors benefit from continued friction in the basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblo and also ensures that the appropriate costs of the settlement are borne proportionately. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. In addition, we would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,

Michael L. Connor
Commissioner

cc: The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources

The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

The Honorable Tom McClintock
Ranking Member, Subcommittee on Water and Power, Committee on Natural Resources

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

NOV 10 2009

IN REPLY REFER TO:

The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power
Committee on Natural Resources
House of Representatives
Washington, DC 20515

Dear Chairwoman Napolitano:

In response to your request, this letter presents the views of the Administration regarding H.R. 1065, the "White Mountain Apache Tribe Water Rights Quantification Act," as reported by the Subcommittee on Water and Power on September 30, 2009.

I want to begin by emphasizing that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

At the heart of this bill are provisions ratifying and approving the White Mountain Apache Quantification Agreement dated January 13, 2009, a settlement reached between the tribe and other non-federal parties regarding the quantification of the Tribe's water rights in Arizona. H.R. 1065 requires the Bureau of Reclamation to plan, design, construct, operate, maintain, replace, and rehabilitate a rural water system to serve the White Mountain Apache tribe. The rural water system authorized through this bill would replace and expand the current water delivery system on the Reservation, which relies on a diminishing groundwater source and is quickly becoming insufficient to meet the needs of the Reservation population. The Reservation's need for reliable and safe drinking water is not in question. H.R. 1065 also establishes a trust fund for the operation and maintenance of the system to be constructed. This legislation is the culmination of

cooperative negotiations among the Tribe and many non-Indian water users throughout northern and central Arizona. The negotiations were focused on the need for a long term solution to the problems of an inadequate Reservation domestic water supply and quantifying the Tribe's water rights. The parties are to be commended for their determined efforts to reach an agreement as well as the work they have continued to put into amending the settlement legislation to address the Administration's concerns.

I testified on this bill before the House Committee on Natural Resources, Subcommittee on Water and Power on July 21, 2009, prior to the amendments made during the markup. As reflected by the changes made in the marked up version of H.R. 1065, substantial work has been done and refinements made to this settlement by the parties and the Arizona delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns to make this a settlement that the Administration could support. This set of comments focuses on the areas in this legislation that were improved by the markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, we note with approval changes made in the Findings contained in section 2 of H.R. 1065. Although we do not consider a Findings section to be necessary and would prefer to omit it, if it is included, it should reflect Federal policy accurately. We especially appreciate the emphasis in section 2(a)(5) on the positive results of achieving certainty concerning the Tribe's water rights, which include assisting the Tribe in achieving self-determination and self-sufficiently, as well as providing opportunities for economic development for the entire region.

Second, new definitions of the Lower Basin Development Fund and Indian tribe are acceptable. Third, the Administration notes that changes in the wording at the beginning of section 5(a) do not change the substance of the Tribe's federal reserved water rights as quantified under this Act but could raise implementation questions. We would like to further discuss this section with the parties.

Fourth, the Administration's testimony on the bill raised serious concerns with the provision in section 7(e) of the authorizing legislation that provides that the WMAT Rural Water System will be held in trust by the United States. The unusual and explicit statement in the legislation establishing the trust has the effect of creating substantial financial and other obligations on the part of the United States. Moreover, as the testimony emphasized, the Administration believes transferring title to the domestic water supply system is more consistent with concepts of self determination and tribal

sovereignty and more in keeping with other recent legislation that provides tribes with assets and opportunities that they then can control as reservation economies and conditions evolve. We believe that this approach of offering assistance with the goal of tribal self-sufficiency is preferable to creating an expectation that the Federal government will be responsible for permanently operating and subsidizing reservation infrastructure.

Following the testimony, we are pleased to note that the sponsors and parties to H.R. 1065 have made changes to this provision of the bill that are a significant start in the right direction. New language in the bill as marked up authorizes the transfer of title to the Tribe once a series of criteria have been met. As we have explained to the proponents of this settlement, the new language is an improvement over the original language. However the bill should establish a clearer requirement that the Tribe assume ownership for the system and should be consistent with the processes laid out in the Aamodt settlement (S. 1105) and the Crow settlement (S. 375). An attachment to this letter includes language that we recommend to satisfy our concerns. We will continue to work with the parties to the settlement to achieve appropriate and workable language.

Fifth, we note with approval changes made following markup in section 7(g) providing appropriate requirements for the use of a contract under the Indian Self Determination Act in the context of this settlement. The amended language allows the Secretary of the Interior to require appropriate accounting and review measures so that the Secretary will have the tools to ensure that Federal funds are expended as intended if the Tribe exercises the option of constructing the rural water system itself through a Self Determination Act contract.

Sixth, while improvements have been made to the waivers contained in section 9 of H.R. 1065, including the addition of a retention section that is largely consistent with the retention section in other pending settlements, as well as a waiver of claims against the United States with respect to Freeport McMoran Copper and Gold, Inc.'s occupation of reservation lands, the Administration continues to have concerns about the waiver section. An attachment to this letter includes language that we recommend to satisfy our concerns.

Seventh, we have technical concerns regarding the edits made in section 10 regarding the White Mountain Apache Tribe Water Rights Settlement Subaccount. To be consistent with the provisions in section 7(g) that would apply if the Tribe exercises its option to enter into a contract with the Bureau of Reclamation under which it would plan, design, and construct the rural water system called for under this Act, this subaccount should consist of funds appropriated to the Secretary of the Interior. The provisions that have been added to this section at section 10(b)(1) allowing the Tribe to "withdraw any portion of the White Mountain Apache Tribe Water Rights Settlement Subaccount" are not consistent with the concept of a Self Determination Act contract as laid out in section 7(g). The Administration believes that the money authorized to be appropriated for planning, design, and construction of the rural water system in section 12(a) should be

appropriated to the Secretary to carry out the activities authorized in section 7. The funds should either be used by Reclamation to construct the rural water system or else be transferred to the Tribe within the sideboards of an Indian Self Determination Act contract as described in section 7(g). There should be no provisions in section 10 allowing the money appropriated for these purposes to be withdrawn by the Tribe. As the Administration stated in its testimony, the legislation needs to clarify whether the Secretary is being called upon to establish a trust fund to be controlled by the Tribe or to accomplish the construction through an Indian Self-Determination and Education Assistance Act (ISDEAA) contract.

Eighth, the United States objects to Section 11(a) -- which waives the sovereign immunity of the United States for "interpretation or enforcement of this Act or the Agreement" in "a United States or State court." This subsection should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in similar bills, such as S. 1105, the Aamodt Litigation Settlement Act, and S. 375, the Crow Tribe Water Rights Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication.

Ninth, the Administration has some concerns about section 12 of H.R. 1065 after markup. There are some aspects of this section that are improvements. For example, authorizing funding for water development activities to be carried out directly by the Tribe rather than the Secretary is consistent with the goals of self-determination and self-sufficiency and will allow the Tribe to prioritize what projects to carry out with available funds. The Administration also notes with approval section 12(f) of the bill, providing that if the Secretary determines that the amount authorized to be appropriated for planning, design, and construction of the rural water system is not sufficient, up to $25 million can be transferred from the trust fund established for tribal water development to the account being used to cover the costs of the rural water system. This provision puts the risk of a cost overrun upon the Tribe rather than upon the Federal government and reduces the risk to the Federal government of approving this settlement prior to the completion of further studies to better determine the true cost of developing the rural water system as called for under this Act.

However there are other aspects of this section that raise questions. Most critically, the Administration still has questions about what would constitute an appropriate amount of federal funding for the funds that would be established under section 12 of H.R. 1065. Our analysis of this would include consideration of (1) the uses to which the $113.5 million development fund would be put (which are not clearly specified, given the amount of latitude given to the Tribe in section 12(b)(2)(C) to spend the funds in a number of very different ways); (2) the potential for a non-Federal contribution, based on any non-Indian benefits received, to the settlement; and (3) the appropriate size of a trust fund to subsidize the operation, maintenance and repair (OM &R) costs of the domestic water supply system.

Also, the Administration notes that only $4.95 million of the $113.5 million authorized to be appropriated in section 12(b)(2)(B) is tied to settlement implementation. Other than the $4.95 million provided for rehabilitation of irrigation systems on the reservation (which must be appropriated in order for a part of the tribal waivers to come into effect), the Administration does not believe the money authorized for the development fund is consideration for this settlement. Given the benefits being obtained by the Tribe under this settlement, the Administration would consider the approximately $109 million of additional funding for a development fund authorized under this bill to be excessive if it were viewed as settlement consideration. This $109 million of funding is subject to appropriations and not a part of the conditions precedent that must be accomplished in order for this settlement to be final.

In addition, we are still analyzing the provisions in section 12(d) mandating the transfer of any available funds up to $50 million from the Emergency Fund for Indian Safety and Health established by 22 U.S.C. 7601 et. seq.. This provision appears to place the settlement approved for the White Mountain Apache Tribe as the top priority for any funds made available from the Emergency Fund for Indian Safety and Health. This provision appears to directly undermine the provisions of the original authorization bill specifying that the funding be allocated in accordance with a Secretarial plan.

As an overarching issue that remains in the post-markup legislation, we note that the bill would require all of the funding for the rural water system to be appropriated by October 31, 2015. This is only two years later than in the bill as introduced. The bill seems to contemplate that all the funding will be appropriated before Reclamation, or the Tribe under an Indian Self Determination Act contract, is capable of actually completing construction. Given the realities of federal budgeting, it would be much more realistic to provide a longer period to budget for what are ultimately determined to the appropriate federal costs of this system. To the extent that one of the factors driving the settlement proponents to ask for this money upfront is a desire for waivers that come into effect earlier, we would suggest that they look at other settlements involving construction where waivers are able to come into effect but are subject to nullification if construction does not get completed within the time frame established in the settlement agreement and authorizing legislation.

The Administration does not object to two clarifying changes were made in sections 7(e)(2)(C) (eliminating language that set an apparent limit on the time period during which title to the rural water system can be transferred) and section 12(g) (clarifying that accrued interest as well as appropriated funds available in the Maintenance Fund would be accessible when the given criteria are met).

While we still have concerns with this bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

Thank you for the opportunity to present these views for the record.

Sincerely,

Michael L. Connor
Commissioner

cc: The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources

The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

The Honorable Tom McClintock
Ranking Member, Subcommittee on Water and Power, Committee on Natural Resources

Attachment 1: Title Transfer Language

(a) Conveyance of the WMAT rural water system.—

(1) IN GENERAL.—Subject to paragraph (2), on completion of the construction of the WMAT rural water system, the Secretary shall convey to the White Mountain Apache Tribe all right, title and interest to the system, including any land or interests in land located within the boundaries of the Reservation that is acquired by the United States for the construction of the WMAT rural water system.

(2) CONDITIONS FOR CONVEYANCE. — The Secretary shall not convey the WMAT rural water system under paragraph (1) until the Secretary makes a finding that:

(A) Operating Criteria, Standing Operating Procedures, an Emergency Action Plan, and first filling and monitoring criteria have been established for the system;

(B) the system is substantially complete;

(C) the funds authorized to be appropriated under section 12(b)(3)(B) have been appropriated and deposited in the WMAT Maintenance Fund; and

(D) the White Mountain Apache Tribe has been afforded a period not to exceed one year to operate the system with the assistance of the Bureau after the system is substantially complete and Standard Operating Procedures have been established.

(3) Liability. —

(A) In General. — Effective on the date of the conveyance under this subsection, the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to the land or facilities conveyed, other than damages caused by acts of negligence committee by the United States, or by employees or agents of the United States, prior to the date of conveyance.

(B) Tort Claims. — Nothing in this section increases the liability of the United States beyond the liability provided in chapter 171 of title 28, United States Code (commonly known as the "Federal Tort Claims Act").

Attachment 2

This document includes the edits that the Administration requests in the waiver section of the WMAT settlement legislation in redline form.

SEC. 9. WAIVER AND RELEASE OF CLAIMS.

(a) In General.—

(1) CLAIMS AGAINST THE STATE AND OTHERS.—Except as specifically retained in subsection (b)(1) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and its members, and the United States, acting in its capacity of trustee for the Tribe and its members, as part of the performance of their obligations under the Agreement, are authorized to execute a waiver and release of any claims against the State (or any agency or political subdivision of the State), or any other person, entity, corporation, or municipal corporation under Federal, State, or other law for all—

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(A)(i) past, present, and future claims for water rights for the reservation and off-reservation trust land arising from time immemorial and, thereafter, forever; and

(ii) past, present, and future claims for water rights arising from time immemorial and, thereafter, forever, that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors;

(B)(i) past and present claims for injury to water rights for the reservation and off-reservation trust land arising from time immemorial through the enforceability date;

(ii) past, present, and future claims for injury to water rights arising from time immemorial and, thereafter, forever, that are based on aboriginal occupancy of land by the Tribe and its members, or their predecessors; and

(iii) claims for injury to water rights arising after the enforceability date for the reservation and off-reservation trust land resulting from off-reservation diversion or use of water in a manner not in violation of the Agreement or State law; and

(C) past, present, and future claims arising out of or relating in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgement or decree, or this Act.

(2) CLAIMS AGAINST TRIBE.—Except as specifically retained in subsection (b)(3) and notwithstanding any provisions to the contrary in the Agreement, the United States, in all its capacities (except as trustee for an Indian tribe other than the Tribe), as part of the performance of its obligations under the Agreement, is authorized to execute a waiver and release of any and all claims against the Tribe, its members, or any agency, official, or employee of the Tribe, under Federal, State, or any other law for all—

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(A) past and present claims for injury to water rights resulting from the diversion or use of water on the reservation and on off-reservation trust land arising from time immemorial through the enforceability date;

(B) claims for injury to water rights arising after the enforceability date resulting from the diversion or use of water on the reservation and on off-reservation trust land in a manner not in violation of the Agreement; and

(C) past, present, and future claims arising out of or related in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgement or decree, or this Act.

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(3) CLAIMS AGAINST UNITED STATES.—Except as specifically retained in subsection (b)(2) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and its members, as part of the performance of the obligations of the Tribe under the Agreement, is authorized to execute a waiver and release of any claim against the United States, including agencies, officials, or employees of the United States (except in the capacity of the United States as trustee for other Indian tribes), under Federal, State, or other law for any and all—

(A)(i) past, present, and future claims for water rights for the reservation and off-reservation trust land arising from time immemorial and, thereafter, forever; and

(ii) past, present, and future claims for water rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors;

(B)(i) past and present claims relating in any manner to damages, losses, or injuries to water, water rights, land, or other resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights, claims relating to interference with, diversion, or taking of water, or claims relating to failure to protect, acquire, or develop water, water rights, or water infrastructure) within the reservation and off-reservation trust land that first accrued at any time prior to the enforceability date;

(ii) past, present, and future claims for injury to water rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors; and

(iii) claims for injury to water rights arising after the enforceability date for the reservation and off-reservation trust land resulting from the off-reservation diversion or use of water in a manner not in violation of the Agreement or applicable law;

(C) past, present, and future claims arising out of or relating in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgment or decree, or this Act;

(D) future claims relating in any manner to the availability and appropriation

of United States funds to carry out the provisions of the Agreement or this Act;

(E) past and present claims relating in any manner to pending litigation of claims relating to the water rights of the Tribe for the reservation and off-reservation trust land;

(F) past and present claims relating to the operation, maintenance, and replacement of existing irrigation systems on the reservation constructed prior to the enforceability date that first accrued at any time prior to the enforceability date, which waiver shall only become effective on the full appropriation and payment to the Tribe of $4,950,000 authorized by section 12(b)(2)(B);

(G) future claims relating to operation, maintenance, and replacement of the WMAT rural water system, which waiver shall only become effective on the full appropriation of funds authorized by section 12(b)(3)(B) and the deposit of those funds in the WMAT Maintenance Fund;

(H) past and present breach of trust and negligence claims for damage to the land and natural resources of the Tribe caused by riparian and other vegetative manipulation by the United States for the purpose of increasing water runoff from the reservation that first accrued at any time prior to the enforceability date; and

(I) past and present claims for trespass, use, and occupancy of the reservation in, on, and along the Black River that first accrued at any time prior to the enforceability date.

(4) EFFECT ON CLAIMS.—Nothing in this Act expands, diminishes, or in any way impacts any claim the Tribe may assert, or any defense the United States may assert, concerning title to lands outside the current boundary of the reservation.

(b) Reservation of Rights and Retention of Claims.—

(1) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY TRIBE AND UNITED STATES.—

(A) IN GENERAL.—Notwithstanding the waiver and release of claims authorized under subsection (a)(1), the Tribe, on behalf of itself and the members of the Tribe, and the United States, acting as trustee for the Tribe and members of the Tribe, shall retain any right—

(i) subject to subparagraph 16.9 of the Agreement, to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members of the Tribe under the Agreement or this Act in any Federal or State court of competent jurisdiction;

(ii) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe under the judgment and decree entered by the court in the Gila River adjudication proceedings;

(iii) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe under the judgment and decree entered by the court in the

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Little Colorado River adjudication proceedings;

(iv) to object to any claims by or for any other Indian tribe, Indian community or nation, or dependent Indian community,

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(v) to participate in the Gila River adjudication proceedings and the Little Colorado River adjudication proceedings to the extent provided in subparagraph 14.1 of the Agreement;

(vi) to assert any claims arising after the enforceability date for injury to water rights not specifically waived under this section;

(vii) to assert any past, present, or future claim for injury to water rights against any other Indian tribe, Indian community or nation, dependent Indian community, or allottee; and

Deleted: , or the United States on behalf of such a tribe, community, nation, or allottee

(viii) to assert any past, present, or future claim for trespass, use, and occupancy of the reservation in, on, or along the Black River against Freeport-McMoRan Copper & Gold, Inc., Phelps Dodge Corporation, or Phelps Dodge Morenci, Inc. (or a predecessor or successor of those entities), including all subsidiaries and affiliates of those entities.

(B) AGREEMENT.—On terms acceptable to the Tribe and the United States, the Tribe and the United States are authorized to enter into an agreement with Freeport-McMoRan Copper & Gold, Inc., Phelps Dodge Corporation, or Phelps Dodge Morenci, Inc. (or a predecessor or successor of those entities), including all subsidiaries and affiliates of those entities, to resolve the claims of the Tribe relating to the trespass, use, and occupancy of the reservation in, on, and along the Black River.

(2) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY TRIBE AGAINST UNITED STATES.---Notwithstanding the waiver and release of claims authorized under subsection (a)(3) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and the members of the Tribe, shall retain any right--

(A) subject to subparagraph 16.9 of the Agreement, to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the Agreement or this Act, in any Federal or State court of competent jurisdiction;

(B) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the judgment and decree entered by the court in the Gila River adjudication proceedings;

(C) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the judgment and decree entered by the court in the Little Colorado River adjudication proceedings;

(D) to object to any claims by or for any other Indian tribe, Indian community or nation, or dependent Indian community;

Deleted: , or the United States on behalf of such a tribe, community, or nation

(E) to assert past, present, or future claims for injury to water rights or any

other claims other than a claim to water rights, against any other Indian tribe, Indian community or nation, or dependent Indian community;

(F) to remedies, privileges, immunities, powers, and claims not specifically waived under this Act; and

(G) to assert any claim arising after the enforceability date for a future taking by the United States of reservation land, off-reservation trust land, or any property rights appurtenant to that land, including any water rights set forth in paragraph 4.0 of the Agreement.

(3) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY UNITED STATES.—Notwithstanding the waiver and release of claims authorized under subsection (a)(2), the United States shall retain any right to assert any claim not specifically waived in that subsection.

(c) Effectiveness of Waiver and Releases.—Except as otherwise specifically provided in subparagraphs (E) and (F) of subsection (a)(3), the waivers and releases under subsection (a) shall become effective on the enforceability date.

(d) Enforceability Date.—

(1) IN GENERAL.—This section takes effect on the date on which the Secretary publishes in the Federal Register a statement of findings that—

(A)(i) to the extent the Agreement conflicts with this Act, the Agreement has been revised through an amendment to eliminate the conflict; and

(ii) the Agreement, as so revised, has been executed by the Secretary, the Tribe, and the Governor of the State;

(B) the Secretary has fulfilled the requirements of sections 5 and 6;

(C) the amount authorized by section 12(a) has been deposited in the White Mountain Apache Tribe Water Rights Settlement Subaccount;

(D) the State funds described in subparagraph 13.3 of the Agreement have been deposited in the White Mountain Apache Tribe Water Rights Settlement Subaccount;

(E) the Secretary has issued a record of decision approving the construction of the WMAT rural water system in a configuration substantially similar to that described in section 7;

(F) the judgments and decrees substantially in the form of those attached to the Agreement as exhibits 12.9.6.1 and 12.9.6.2 have been approved by the respective trial courts; and

(G) the waivers and releases authorized and set forth in subsection (a) have been executed by the Tribe and the Secretary.

(2) FAILURE OF ENFORCEABILITY DATE TO OCCUR.—If, because of the failure of the enforceability date to occur by October 31, 2015, this section does not become effective, the Tribe and its members, and the United States, acting in the capacity of trustee for the Tribe and its members, shall retain the right to assert past, present,

Deleted: , or the United States on behalf of such a tribe, community, or nation.

Deleted: (F) to assert claims arising after the enforceability date for injury to water rights resulting from the drilling of wells or pumping of water from land located within national forest land as of the effective date of the Agreement in the south 1/2 of T. 9 N., R. 24 E.; south 1/2 of T. 9 N., R. 25 E.; north 1/2 of T. 8 N., R. 24 E.; north 1/2 of T. 8 N., R. 25 E., if—¶
(i) title to that land is no longer retained by the United States; or¶
(ii) water from that land is transported off the land for municipal or industrial use;¶
(G) to assert any claims arising after the enforceability date for injury to water rights not specifically waived under this section;¶

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and future water rights claims and claims for injury to water rights for the reservation and off-reservation trust land.

(3) NO RIGHTS TO WATER.—On the occurrence of the enforceability date, all land held by the United States in trust for the Tribe and its members shall have no rights to water other than those specifically quantified for the Tribe and the United States, acting in the capacity of trustee for the Tribe and its members, for the reservation and off-reservation trust land pursuant to paragraph 4.0 of the Agreement.

(e) United States Enforcement Authority.—Nothing in this Act or the Agreement affects any right of the United States to take any action, including environmental actions, under any laws (including regulations and the common law) relating to human health, safety, or the environment.

(f) No Effect on Water Rights.—Except as provided in paragraphs (1)(A)(ii), (1)(B)(ii), (3)(A)(ii), and (3)(B)(ii) of subsection (a), nothing in this Act affects any rights to water of the Tribe, its members, or the United States acting as trustee for the Tribe and members, for land outside the boundaries of the reservation or the off-reservation trust land.

(g) Entitlements.—Any entitlement to water of the Tribe, its members, or the United States acting as trustee for the Tribe and members, relating to the reservation or off-reservation trust land shall be satisfied from the water resources granted, quantified, confirmed, or recognized with respect to the Tribe, members, and the United States by the Agreement and this Act.

(h) Objection Prohibited.—Except as provided in subsection (b)(2)(F), the Tribe and the United States acting as trustee for the Tribe shall not—

(1) object to the usage of any well located outside the boundaries of the reservation or the off-reservation trust land, as in existence on the enforceability date; or

(2) object to, dispute, or challenge after the enforceability date the drilling of any well or the withdrawal and use of water from any well in the Little Colorado River adjudication proceedings, the Gila River adjudication proceedings, or any other judicial or administrative proceeding.

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

IN REPLY REFER TO:

OCT 22 2009

The Honorable Grace F. Napolitano
Chairwoman, Subcommittee on Water and Power
Committee on Natural Resources
House of Representatives
Washington, DC 20515

Dear Ms. Napolitano:

In response to your request, this letter presents the views of the Administration regarding H.R. 3342, the "Aamodt Litigation Settlement Act," as reported by the Subcommittee on Water and Power on September 30, 2009. For overall views regarding the purposes and importance of this settlement, I would refer to my testimony delivered to the House Committee on Natural Resources, Subcommittee on Water and Power, on September 9, 2009, prior to changes made during the markup.

I want to begin by emphasizing, as I did in the testimony delivered at the September 9 hearing, that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

The settlement that would be approved by H.R. 3342 would resolve a contentious water dispute in northern New Mexico, as well as a federal court proceeding that has been ongoing for over 40 years. We recognize that substantial work and refinements have been made to this settlement by the parties and the New Mexico delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns, such as ensuring an appropriate non-Federal cost share that could make this a settlement that the Administration could wholeheartedly support. I will not reiterate the entire statement made by the Administration during the September 9, 2009 House hearing but instead will focus this set of comments on the areas in this legislation that were improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, changes were made in section 101(f) of H.R. 3342 that limited the amount of funding to be expended by the Secretary of the Interior (Secretary) to construct the Pueblo Water Facilities under this Act to an amount certain, indexed based on construction cost fluctuations. Although the United States agrees with the concept that the amount it is required to pay should be known in advance of bill authorization and limited to an agreed upon figure, as we stated in our testimony in the House, the Administration is concerned about the validity of the cost estimates that the settlement parties are relying on for the regional water system. The parties rely on an engineering report dated June 2007 that has not been verified by the level of study that the Bureau of Reclamation would recommend in order to assure reliability. Much of the cost information contained in the engineering report was arrived at three years ago, none of the costs have been indexed to 2007, and the total project cost estimates cannot be relied upon.

Although section 101(f) of the bill as reported by the Committee establishes a limit on the amount of funding that the United States can expend for construction of the Pueblo Water facilities, it is important for Congress to understand that the provisions of section 203 allow the settlement and this Act to be voided if the water system is not completed by 2021. This nullification provision creates the risk that, even if the United States, the County, the State, and the Pueblos all follow through on their commitments under the Agreement and this bill, the settlement could fail in the event that the costs for the system turn out to be higher than the current cost estimates contemplate or than the authorizations allow.

This is a scenario that all of the parties, including the United States, must strive to avoid, because it would mean a return to litigation and conflict after the expenditure of significant resources by all parties towards a failed solution. In order to reduce the risk of this outcome, I have committed that the Bureau of Reclamation will carry out additional studies and analyses of the proposed water system. These studies will be completed by the end of the year and should shed light on the current cost estimate and the possibility that actual costs could be higher than expected.

In order to distribute the risk of higher costs fairly while avoiding the possibility of entirely unraveling the settlement, the Administration believes that the legislation should provide that the parties to this settlement, including the State and the United States, should share proportionately any increases in construction costs beyond those currently contemplated. The Federal government should not bear the brunt of higher costs without proportionate increases by other Aamodt settlement parties based on the percentage of overall construction costs that the parties are committing to in the Cost-Sharing Agreement Moreover, either the Cost-Sharing Agreement should be executed before Congress ratifies it or its execution should be made a condition of beginning construction. To ensure open discussion and consideration of the reasons for any increased costs beyond those contemplated at this time, the legislation could also include language providing that the Bureau of Reclamation will consult with the State and the Pueblos regarding any cost increases.

Second, as currently written, section 103(e)(1)(C) of the bill would probably be interpreted to waive reimbursement to the Federal Government of operation, maintenance and repair (OM&R) costs associated with water to be provided from with the San Juan-Chama Project under the bill. This subsection reads "the costs associated with any water made available from the San Juan-Chama (SJC) Project which were determined nonreimbursable and nonreturnable pursuant to Pub. L. No. 88-293, 78 Stat. 171 (March 26, 1964) shall remain nonreimbursable and nonreturnable." The current language could make both the construction and the OM&R costs nonreimbursable. We do not believe it was the intent of the parties to make the OM&R costs nonreimbursable. Reimbursement of OM&R costs should not be waived, and to make that clear the section should be amended to read:

> (C) the construction costs associated with any water made available from the San Juan-Chama (SJC) Project which were determined nonreimbursable and nonreturnable pursuant to Pub. L. No. 88-293, 78 Stat. 171 (March 26, 1964) shall remain nonreimbursable and nonreturnable.

Third, the United States continues to have concerns about the language used in section 107(c)(2)(B). As amended, this provision states that "the amount authorized under subparagraph (A) shall expire after the date on which construction of the Regional Water System is completed and the amounts required to be deposited in the account have been deposited under this section by the Federal Government." This legislative language requires clarification. First, we assume that the account referenced is the Aamodt Settlement Pueblos' Fund, but this should be specified. Second, as introduced, H.R. 3342 provided that once the System was complete and an OM&R account was funded, "the Federal Government shall have no obligation to pay for the operation, maintenance, and replacement costs of the Regional System." This language had the advantage of clearly specifying that any obligation to pay for the operation, maintenance, and replacement costs ended when the specified criteria were met. The new language lacks that clarity. It would be a clearer statement of Congressional intent if the language stated both that the Secretary is authorized to pay operation, maintenance, or replacement costs for the Regional Water System until the Regional Water System is completed and the amount authorized in section 107(c) for the Aamodt Settlement Pueblos' Fund has been appropriated to that Fund, and that thereafter the Federal Government shall have no obligation to pay for the operation, maintenance, and replacement costs of the Regional System.

Fourth, the United States still has concerns with language used in section 203(f) providing generally that in the event the settlement is voided, the United States is entitled to return of certain funds and property. First, we note that similar but not identical provisions are included in section 105(d)(7)(C) and section 203(b). These provisions should be harmonized. The Administration suggests that language be added at the end of section 203(b) to clarify that the United States is entitled to recoup or obtain credit for its contributions to settlement, including any water secured for the Pueblos, in the event that the settlement fails.

Fifth, the United States notes with approval the changes made in section 203(a)(2) that ensure that the conditions precedent for the settlement to stay effective include appropriate issuance of permits by the New Mexico State Engineer to the Regional Water Authority to change the points of diversion to the mainstem of the Rio Grande for the diversion and consumptive use of water by the Pueblos and as part of the water supply for the Regional Water System.

Sixth, the Administration supports the decision to delete section 204(a)(9) of this bill, a provision to which we had objected in our testimony in the House hearing because of concerns that it would have the potential to erode important environmental safeguards and to create ambiguities as to the scope of the waivers.

Seventh and finally, the Administration supports the language added following section 203(e) regarding the process by which the Pueblos retain the right to withdraw the waivers authorized under this settlement and trigger nullification of the entire settlement agreement if the system is not substantially complete by 2021. The new language lays out a process under which substantial completion is determined by the Secretary of the Interior and, subsequently, subject to review under the Administrative Procedures Act. The new language includes (1) a definition of substantial completion; (2) a mechanism for determining when it has occurred; and (3) a clearly specified process for challenging that determination. By adopting this provision, the parties to this settlement have established a clear legal threshold for failure of the settlement. This clarity regarding the conditions and processes for determining finality will minimize the risk of futile litigation in the future.

In conclusion, I would like to emphasize that this Administration wants to avoid continued and unproductive litigation which, even when finally concluded, may leave parties injured by and hostile to its results. Neither the Pueblos nor their non-Indian neighbors benefit from continued friction in the Rio Pojoaque basin. We believe settlement can be accomplished in a manner that protects the rights of the Pueblos and also ensures that the appropriate costs of the settlement are borne proportionately. While we have some remaining concerns with the bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. In addition, we would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.

Thank you for the opportunity to present these views for the record. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these views for your consideration and the consideration of the Congress.

Sincerely,

Michael L. Connor
Commissioner

cc: The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources

The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

The Honorable Tom McClintock
Ranking Member, Subcommittee on Water and Power, Committee on Natural Resources