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Committee on Natural Resources
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on
Draft of H.R. ____ Water Rights Protection Act

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By Invitation of the Subcommittee, Not on Behalf of Any Client

Chairman Lamborn, Ranking Member Huffman and members of the Subcommittee, thank you for the opportunity to provide feedback on the draft Water Rights Protection Act. I am Vanessa L. Ray-Hodge, an enrolled member of the Pueblo of Acoma and a partner in the law firm of Sonosky, Chambers, Sachse, Mielke & Brownell (500 Marquette Ave., N.W., Suite 600, Albuquerque, NM 87111. Telephone: 505-247-0147), that regularly represents Indian tribes in water rights litigation and settlement negotiations. I previously worked as the Senior Counselor to the Solicitor at the Department of the Interior and actively participated in several federal negotiations teams for Indian water rights settlements as well as, water rights litigation on behalf of the Department.

I have some concerns with the bill as drafted and its impacts on Indian water rights and water settlements. Before commenting on the bill, I would like to first briefly describe the case law and then the process under which the Interior Department, in cooperation with western states and Indian tribes, has worked over the past four decades to facilitate settlement of Indian water rights claims approved by Congress. The bill as drafted could complicate and impede the settlement process, which has generally benefitted both tribes and states.

II. Background on the Legal Framework of Indian Reserved Water Rights

The landmark historic Supreme Court decision delineating the basis and scope of federally reserved Indian water rights is *Winters v. United States*, 207 U.S. 564 (1908), decided in 1908. *Winters* was a suit the United States filed as trustee for the Fort Belknap Indian Tribes in northern Montana to enjoin Henry Winters and other non-Indians from diverting water for irrigation upstream from the Tribes' reservation, because insufficient water was reaching lands on the Reservation which the Tribes and Bureau of Affairs wanted to develop for agriculture and related uses. *Id.* at 565-567. The Fort Belknap Reservation had been established by an agreement between the Tribes and the United States ratified by an act of Congress in 1888 "as and for a permanent home and abiding place of the [tribes]." *Id.* at 565. In the agreement, the Tribes had also ceded territory outside the Reservation to the United States. These ceded lands were quickly opened by the United States to non-Indian settlement. Non-Indians, including Mr. Winters, acquired ceded land upstream from the Reservation, irrigated that land, and obtained water rights under state law. *Id.* 568-569.

The legal systems of Montana and most western states generally follow the doctrine of "prior appropriation", under which the uses of prior appropriators are legally superior to those junior appropriators. Thus, in times of short water supply, a senior appropriator claiming water rights under state law is entitled to his or her full diversion before a junior user gets to use any water.

Despite the fact that the non-Indian irrigators had put the water of the Milk River to use, and those had senior rights under state law, the Supreme Court in *Winters* held that the Tribes had superior rights to water under federal law because the agreement between the Tribes and the United States and federal statute creating the Fort Belknap Reservation as "a permanent home" for the Tribes had reserved sufficient water from appropriations for the Tribes to use in the future on the Reservation when they needed it. The Supreme Court explained that when the reservation was created its "lands were arid and, without irrigation, were practically valueless," *id.* at 576, and that water had been reserved to the extent "necessary for . . . the purpose for which the reservation was created." *Id.* at 567.

In sum, *Winters* established that Indian reserved water rights are vested property rights held in trust for Indian tribes by the United States that exist independent of state substantive law and regulation and that the United States reserves a right in unappropriated water. The Indian reserved right vests, at least, as early as the date of the reservation and is therefore senior to virtually all the rights of appropriators under state law. *See e.g., Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-12 (1976).

For over more than a century, the legal framework of Indian water rights in the United States Supreme Court and in State Supreme Courts have consistently applied the principles of *Winters*. In *Arizona v. California,* 373 U.S. 546, 599-601 (1963), for example, the Court quantified the reserved water rights of the tribes involved in that case at nearly 1,000,000 acre feet of water – roughly 12 percent of the dependable flow of the lower Colorado River. In *Wyoming v. United States*, 753 P.2d 76 (Wyo. 1988), the Wyoming Supreme Court quantified the reserved rights of the tribes on the Wind River Reservation as approximately double the amounts that the tribes had historically used for irrigation. In *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001), the Arizona Supreme Court applied the principles of *Winters* and *Arizona* to hold that tribes have the right to sufficient water to attain an economically self-sufficient tribal homeland.

Given the doctrine of federal Indian reserved water rights along with existing federal obligation to protect Indian trust resources, the Interior Department's ability take legal and policy positions on the nature and rights of state based water rights vis a vis Indian tribes is critical to the United States ability to fulfill and honor its trust responsibilities and special commitments to Indian tribes. Because the United States holds the water rights of Indians in trust, any limitation on the Secretary of the Interior with respect to his ability to quantify, settle, protect or enforce those rights also as a practical matter, limits the ability of tribes to do the same.

II. Comments on the Draft Water Rights Protection Act

The bill as drafted has the potential to create some confusion for Indian water rights and water settlements. On the one hand, Section 5 provides that the draft bill does not do various things like: limit or expand any existing "legally recognized authority" of the Secretary of the Interior or the Secretary of Agriculture; interfere with Bureau of Reclamation contracts entered into pursuant to reclamation laws; affect the implementation of the Endangered Species Act; limit or expand any existing or claimed reserved water rights of the Federal government; limit or expand certain authorities under the Federal Power Act; or limit or expand any water right or treaty right of any federally recognized Indian tribe. Section 5 on its face thus appears to protect all existing legal rights to water, including the legal doctrine governing federal Indian reserved rights that has been consistently followed for over 100 years since *Winters.* However, as explained below, the remaining sections of the draft bill are confusing because they appear to not only deviate from and conflict with existing law, but could be viewed to restrict the negotiating authority of the Secretary in an Indian water rights settlement. This could lead to uncertainty and impede the enforcement and protection of Indian water rights as well as, the settlement of such claims with the collaboration of the Interior Department.

Section 2 of the draft bill defines "water right" to include water rights for federally recognized Indian tribes and bases the definition of a water right on actual beneficial use. This definition cannot be applied to Indian reserved water rights because such rights are exempt from appropriation under state law, and are measured by the amount of water needed by the tribe and not actual beneficial use. *Cappaert v. United States*, 426 U.S. 128, 145 (1976). The definition of "water right" in Section 2 conflicts with these established principles and could create uncertainty and confusion as between Indian and non-Indian water right holders.

Section 3's limitations on the Secretary appears to circumvent the Interior Secretary's authority to limit the use of state based water rights, including groundwater, even where those state law rights conflict with legally senior Indian water rights protected by federal law. This creates a tension between the trust responsibility and the ability of the Secretary to use federal authority to protect and preserve Indian reserved rights if, for example, the actions of the Secretary limit the use of state based water rights or conflict with state groundwater practices.

Section 3 of the bill as drafted is also overbroad and could also be interpreted to constrain the Secretary's authority to approve or participate in water settlements contrary to the United States' longstanding support for such settlements. Indeed, in 1990, the Department of the Interior issued policy guidelines for resolving Indian water rights through negotiated settlements and regularly plays a direct, substantial and integral role in those negotiations with state and local parties. *See Working Group in Indian Water Settlements, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims,* 55 Fed. Reg. 9,223 (Mar. 12, 1990) ("*Criteria and Procedures*"). The Committee has also recognized the United States policy that negotiated settlements are preferable to protracted litigation and has issued its own guidance to facilitate and expedite the Committee's consideration of Indian water rights settlements. *See* Chairman Rob Bishop Letter to Attorney General Jeff Sessions and Secretary Ryan Zinke on Indian Water Rights (Apr. 27,

2017); Chairman Rob Bishop Letter to Attorney General Eric Holder and Secretary Sally Jewell on Indian Water Rights (Feb. 26, 2015).

Indian water rights settlements invariably involve compromise and can impact water rights otherwise defined under state law or involve transfers of certain water rights between settlement parties, including requiring the transfer of such rights to the United States or in the name of the United States for the ultimate benefit of a particular tribe. For example, in the Blackfeet water settlement recently passed by Congress, the Secretary negotiated an agreement by which the Bureau of Reclamation and Tribe would enter into an agreement for an allocation of storage water rights to be held in the name of the United States and that allocation would be part the Tribe's reserved water right. But Section 3's limitations on conditioning various agreements on the application or acquisition of water rights to be held by the United States could be read to limit the future ability of the Secretary to negotiate similar agreements that are necessary to make a water rights settlement successful.

In addition, Indian water settlements sometimes depend on the ability of the Secretary and Indian tribes to limit or condition the use of state based water rights (surface and/or groundwater) by non-Indians. In exchange, Indian tribes agree to subordinate their legally senior water rights to protect all current non-Indian uses in existence at the time of the settlement (commonly referred to as grandfather provisions). But Sections 3 and 4 of the bill could be construed to prohibit the Secretary and Indian tribes from negotiating or taking positions that would conflict with or require state based water rights to be limited in any manner.

Moreover, as part of its trust responsibility for Indian water rights, the United States has an obligation to preserve, protect and enforce those rights.[1] Section 4 of the draft bill could be read to limit the ability of the Secretary of the Interior to establish policies, rules or guidance that would do just that if such actions conflict with any state based water rights. The limitations of the bill could have a chilling effect on water settlements contrary to policies of the Committee and make it impossible for state water users and tribes to have the tools needed to reach a mutually acceptable settlement.

III. Conclusion

I appreciate the opportunity to comment on the draft Water Rights Protection Act. I look forward to working with the drafters to ensure that the United States responsibility to tribes with respect to Indian water rights is upheld. I would be happy to answer any questions the Committee may have.

[1] For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, involving a water infrastructure project in Nevada, the Court found that the Federal trust responsibility created an obligation to protect the waters of Pyramid Lake for the Paiute Tribe. 354 F. Supp. 252, 256 (D.D.C. 1973).