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Testimony before the United States Senate
Committee on Energy and Natural Resources

Hearing on

Water Supply Issues in the Arid West

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Introduction

Chairman Domenici, Ranking Member Bingaman, and members of the Committee, thank you for your invitation to testify today on the devastating impact the Western drought has had on Indian tribes. It is the NCAI's position that through cooperation and collaboration between the federal, state, and tribal governments, the impact of the drought can be alleviated. The most important need we have is for increased funding that will strengthen the abilities of these governments to enhance infrastructure and programs, and adhere to well-established principles of federal law. However, I want to make it very clear that it is also the position of the NCAI that this funding must not come from the already dwindling Bureau of Indian Affairs budget or existing programs.

The Drought's Impact on Indian Tribes

Indigenous people have experienced natural drought cycles for thousands of years. In modern times however, these natural drought cycles are extremely exacerbated by the inappropriate management of scarce water resources. As I am sure you are aware, the Indian tribes of this country are very diverse in culture, geography, and economy. As such, the drought has impacted the tribes in very different ways. For agrarian cultures it means reduced farm crops or modifying farming practices. For fishing cultures it could mean a stressed fishery that forces tribes to modify their harvests. However, in the case of the present water crisis, Indian tribes have already altered their practices to accommodate for the lack of water resources. It has been through the action or inaction of the federal or state governments that Indian tribes have been affected. I want to share with you specific instances of how the Western drought has had a profound impact on Indian tribes throughout the region.

In northern California, drought has brought out the worst-case scenario of water allocation at the expense of the Tribal fisheries in the Klamath Basin. The federal government's water management practices over the past century have taxed the federally reserved fishing rights of tribes in the region, culminating in devastating effects on both the tribes and the surrounding agricultural community. The upper Klamath Basin historically was an arid region, yet development of irrigation and reclamation projects have created a non-sustainable situation of producing crops such as potatoes and alfalfa that require high volumes of water. Likewise, on the Trinity River, a major tributary to the Klamath system, water has been exported out of the basin for decades causing a stressed fishery and over-dependence by agriculture. This development contributed to the many factors causing the decline of

tribal fisheries and the eventual listing of several fish species on the federal endangered species list. Drought in 2001 forced the federal government to curtail irrigation deliveries in order to uphold its responsibilities under the Endangered Species Act. Political backlash to this decision in the following drought year contributed to curtailed river and lake levels resulting in a tragic unprecedented fish kill of over 35,000 adult salmon. This massive fish kill was devastating to the Klamath Basin tribes, specifically the Yurok Tribe.

In New Mexico, the Middle Rio Grande Pueblos are being deprived of valuable water needed to continue traditional farming and related ceremonies due to the drought. This deprivation not only threatens the Pueblo economies and social structure, but also the very basis of traditional Pueblo lifeways. Because the Rio Grande has been seriously over-engineered with many dams and reservoirs, the federal and state governments have been required to enforce senior water rights in accordance with the prior appropriations system. They have had to resort to this strict enforcement in order to protect the silvery minnow, which is listed as an endangered species. Despite the Pueblo's senior water rights, many traditional farming families are not able to use their lands for subsistence farming because of a lack of available water. The Pueblos should not be deprived of water at the expense of the silvery minnow. Under well-established principles of water law, the federal and state governments must apportion the water based on seniority. The Pueblos should be the first entity to receive what they need to continue their existence as self-sustaining subsistence farmers and carry on their traditional ways of life.

The Bishop, Big Pine, and Lone Pine Tribes of Owens Valley, California have suffered devastating loss to plant and animal life in their tribal homelands due to the drought. Owens Valley is on the east side of the Sierra Nevada Mountain range, which supplies the City of Los Angeles with approximately 70% of its drinking water which comes from run-off and groundwater pumping. Last year, the City of Los Angeles Department of Water and Power (LADWP) pumped over 86,000 acre feet of groundwater from the Owens Valley. This tremendous amount of groundwater pumping--coupled with current drought conditions--has resulted in increased adverse impacts on tribes in the Owens Valley. The tribes in the Owens Valley are in desperate need of financial and technical resources to monitor the water tables and vegetation status to ensure that conditions do not further deteriorate.

In Arizona, traditional Hopi farmers are known to grow beautiful, bountiful crops even in the driest of climates. However, recently, Hopi tribal farmers have witnessed a dramatic decrease in productivity and

sustainability of their crops. The canyon country of the Colorado Plateau is currently suffering from one the most severe, prolonged droughts in history. The drought, coupled with the draining of the Navajo Aquifer (N-Aquifer), is threatening the ancient farming traditions of the Hopi people. Also in Arizona, the White Mountain Apache Tribe has been affected by the wildfires in the White Mountains. The fires significantly impacted this Tribe's economic viability since forestry is a major source of revenue for the Tribe.

In my home State of North Dakota and all along the Missouri River Basin in Montana, South Dakota and Nebraska, the protection and management of tribal water and land resources in the Missouri River watershed are among the most critical priorities facing the twenty-eight basin Indian tribes. Indian tribes control more than 15 million acres of land within this watershed, geographically distributed from the headwaters in Montana to the mouth of the Missouri River in Kansas and Missouri. Yet despite their proximity to this great body of water, the Standing Rock reservation ran out of water this year because of mismanagement of the Missouri River Basin. The drought that has gripped the northern Plains has given us record breaking high temperatures year after year, and resulted in a greatly reduced snowpack in the Northern Rockies that drastically reduces stream flows all along the Missouri River. North Dakota has been operating under a Drought Emergency Proclamation issued by Governor Hoeven since 2002. The drought directly impacts tribal members' livestock, crops, and is threatening the health of the cold water fisheries in Lake Sacagawea. In January, the town of Parshall on the Fort Berthold Reservation had to have an emergency pipeline built just so they could continue to draw water from Lake Sacagawea, but will need a permanent fix that will cost \$3 to \$4 million dollars.

Despite historical and legal rights to the water, Missouri River Basin tribes have been excluded from the benefits of the Missouri River water resources and its tributaries. Twenty-three percent of the 1,499,759 acres taken for the construction of the dams and reservoirs under the Pick-Sloan plan were Tribal lands. More than 350 families - 1,700 from my Tribe alone - were relocated because of the flooding caused by the Garrison Dam. Although the federal government promised irrigation development and participation in electricity generation over fifty years ago when these lands were taken, the Tribes are only now beginning to receive some of these benefits. The Mandan, Hidatsa & Arikara Nation never received the 20,000 kilowatts of free power we were promised nor did the United States ever rebuild the hospital we lost, a promise that was made over 50 years ago. My grandfather was Vice Chairman and present at the signing of agreement in 1948 that took away our lands -

so I have a strong personal commitment to seeing that the United States honors its word. The flooding caused by the Dam took away so much. It was more than just the land -- it was the language, it was the culture, it was the history. It was more than just a simple flooding. Although our reservation was promised \$70 million in water development projects, my tribal members still must haul their drinking water. We now estimate it will take \$86 million to provide adequate drinking water throughout the reservation, but funding -- when it comes -- seems like it is only a few dollars at a time.

The tribes seek meaningful participation in resource management within the Missouri River Basin, but lack the resources to do so. Our tribes' natural resource and water resource offices depend on discretionary funding from federal agencies for maintenance of their operations. Like most tribal programs throughout Indian country, they derive the bulk of this funding from the Bureau of Indian Affairs and other governmental agencies, with annual funding priorities mandated by Congress. The tribes are vulnerable to annual fluctuations in federal funding, which inhibit long-term planning. Congress should also appropriate full funding for Garrison Diversion projects that allow for the continued development of critical municipal, rural and industrial (MR&I) water projects on our Indian Reservations. _

Legal Background

Federal law requires a measurement of tribal water rights that will provide enough water for the present and future homeland needs of Indian tribes. The United States Supreme Court has long held that federal Indian reservations were set aside as permanent homelands for Indian people to live upon in a self-sustaining fashion into the indefinite future, with enough water reserved for tribal use now and for all the future generations.

In the landmark case of *Winters v. United States*, 207 U.S. 564 (1908), the United States Supreme Court held that Congress by creating the Indian reservation, impliedly reserved "all of the waters of the river necessary for the purposes for which the reservation was created." *Winters*, 207 U.S. at 576. The Court further declared that this reservation of water was not only for the present needs of the tribe, but "for a use which would be necessarily continued through the years." *Winters*, 207 U.S. at 577.

This principle outlined in *Winters* is now well-established in federal water rights jurisprudence: the United States, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the

purpose of each federal reservation, including the residential, economic development, and governmental needs of Indian tribes. See *Arizona v. California*, 373 U.S. 546, 599- 601 (1963), *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *In re The General Adjudication of All Rights to Use Water In the Gila River System and Source*, 35 P.3d 68 (2001). Importantly, this type of federal reserved water right is “superior to the rights of future appropriators.” *Cappaert*, 426 U.S. at 138.

Not only must the federal government acknowledge the seniority of Indian tribes’ reserved water right, it also has a trust responsibility to ensure that water resources are maintained for the Indian tribes. Federal law imposes trust duties of the highest standard on the United States that require the Department of Interior to take all actions necessary to protect and maintain Indian water rights. The United States Supreme Court has long held that, as Indian tribes’ trustee, the United States must act to “preserve and maintain trust assets,” using “reasonable care and skill to preserve trust property.” *United States v. White Mountain Apache Tribe*, 123 S.Ct. 1126, 1133- 34 (2003). See also *United States v. Mitchell*, 463 U.S. 206 (1983). These trust duties require protection in circumstances such as ours where “water rights constitute the trust property” which the federal government has the duty to preserve by performing “all acts necessary.” *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991). Failure to comply with these federal trust duties will result in a monetary award against the United States for breach of trust.

As the Supreme Court recently explained, the United States’ federal trust duties are substantial when the United States exercises direct control over tribal trust assets on a daily basis. In such circumstances, “a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” *White Mountain Apache*, 123 S.Ct. 1126, 1133. Since the Department of Interior has direct control over the manner in which tribal water resources are maintained, utilized, and managed, it is the Secretary’s responsibility to protect tribal use of those waters. Additionally, she has the trust obligation to take the affirmative steps necessary to settle and permanently protect tribal water rights in a comprehensive manner.

In all of the examples that I gave you of how Indian tribes are affected due to the Western drought, in every instance, the federal government has had the duty and obligation to protect the Tribe’s interest and ensure use for future generations. In these examples, the federal government has breached that duty by allowing diversion of water for non- Indian and commercial use, apportioning the water to protect an

endangered species, not consulting with the affected tribes, and neglecting to adequately fund the tribal environmental programs needed to ensure healthy, sustainable communities.

Water Infrastructure

Nearly 7% of tribal homes continue to lack running water, a figure that is 14 times higher than the national average. In EPA Region 9 alone, which encompasses the westernmost Indian tribes, an estimated 68,000 tribal homes lack access to safe drinking water (including 40% of the families on the Navajo Nation that must haul or otherwise obtain their drinking water from unregulated sources), and there is only a 50% certainty that a tap turned on in a tribal home will consistently produce water in compliance with bacteriological monitoring and testing requirements. Based on the EPA Needs Survey, it is estimated that drinking water system construction and rehabilitation and upgrade needs in Indian Country have been estimated to be approximately \$350- 550 million.

Lack of funding for operations and maintenance for the continuing health and welfare of the tribal public water system is also a major concern for Indian tribes. The Western drought puts pressure on resources available to public water systems, thus implicating the funding for tribal water infrastructure needs. Routine water quality monitoring and operation and maintenance activities are absolutely essential to ensure the continued safety of drinking water in Indian country. Additionally, the absence of financial, managerial, and technical capacity often results in violations of the Safe Drinking Water Act and puts the public health at risk.

New federal requirements for drinking water protection, solid waste control, non- point source pollution abatement, and hazardous waste have affected Indian reservations. Tribes have been charged with implementing these legislative regulations and rules with inadequate federal funding. The tribes stand ready to take the lead in the development of these codes and regulations, but need the critical skills to carry out these programs pursuant to federal laws. Such skills include sound technical capabilities and administration, policy, and managerial skills.

Solutions—The Arizona Water Settlements Act as an Example

Under well-established principles of federal water law, Indian tribes hold senior, federally reserved water rights that must be fulfilled before water is allocated to junior users such as municipalities and non- Indian farmers. These rights must be acknowledged and adhered to by the

federal and state governments. One way of acknowledging these rights is by entering into settlement with willing Indian tribes in order to have water claims finally adjudicated. These adjudications will also clear up the confusion surrounding the delivery of water during times of drought in the future.

The Arizona Water Settlements Act is pending before your Committee to resolve permanently the water rights claims of the Gila River Indian Community. As you are aware, the quantification of rights to water and development of facilities needed to use tribal water supplies in an effective manner is essential to the development of viable Indian reservation economies, particularly in arid western States. Importantly, S. 437 recognizes the need to find sources of funding for Indian water settlements, and the construction of tribal water delivery systems authorized by those settlements, outside of the Bureau of Indian Affairs. In S. 437, the payments made by the State of Arizona to meet its repayment obligations to the federal government for the construction of the Central Arizona Project are deposited into the Lower Colorado River Basin Development Fund. The money will be made available directly from the Fund to tribal settlement costs, both those authorized in the bill and others such as those of the Hopi and other Arizona tribes that have not yet been enacted by Congress. This distribution will not be associated with the annual Congressional appropriations process and will not come from the Bureau of Indian Affairs budget. NCAI supports, as you do, creative approaches to funding Indian water settlements to allow Indian water settlements to be funded and bring certainty to water rights in western states without diluting the availability of much-needed BIA funds for critical Indian programs.

Conclusion

On behalf of NCAI, I would like to thank the members of this Committee for the opportunity to testify on how the drought has affected the Indian tribes of the West. Like federal, state, and local entities, many Indian tribes have been adversely affected by the drought. It is the NCAI's position that the impact of the drought can be decreased by providing more funding for tribal water infrastructure. Also, there is a need for an increase of funding for tribal, state and federal governmental agencies to ensure that the federal government's trust obligation is fulfilled even during these times of crisis. Settlement of tribal water claims such as the Arizona Water Claims Settlement Act are critical to creating and sustaining viable economies in Indian country and eliminating uncertainty of water apportionment during times of drought. Finally, any new funding should come from new sources and not from the Bureau of Indian Affairs budget.

Lastly, the notice I received concerning this hearing was very short and I have only given you examples of the effect of the drought on tribes that were able to respond on such short notice. I know there are other tribes that are suffering from the drought. It is my understanding that this Committee will have additional hearings on this subject and I would appreciate the opportunity to appear before you again to provide additional input to this Committee on tribes' view of the drought and water management in the West.