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A BILL TO APPROVE THE SETTLEMENT OF THE WATER RIGHTS CLAIMS OF THE ZUNI INDIAN TRIBE IN APACHE COUNTY, ARIZONA AND FOR OTHER PURPOSES

OCTOBER 8, 2002.—Ordered to be printed

Mr. INOUYE, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 2743]

The Committee on Indian Affairs, to which was referred the bill (S. 2743) to approve the settlement of the water rights claims of the Zuni Indian Tribe in Apache County, Arizona and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of the bill is to resolve all claims in the Zuni Indian Tribe to water rights in the Little Colorado River basin and elsewhere in Arizona and to provide resources to restore riparian wetlands on the Zuni Heaven Reservation that are of great religious and cultural significance to the tribe and its members.

BACKGROUND

Congress considered the history of the Zuni Indian Tribe in detail when it enacted the Zuni Claims Settlement Act of 1990, P.L. 101–486 (104 Stat. 1174). As the House Committee on Interior and Insular Affairs noted in its report, H. Rep. 101–727, 101st Cong., 2nd Sess. (1990), on a companion bill (H.R. 4143) to the legislation that was enacted into law (S. 2203), the Zuni Tribe and its probable ancestors-the Anasazi and Mogollon—inhabited an area as large as 15 million acres in what is now the States of Arizona and New Mexico. This area was inhabited as early as 5000 B.C., and between 1250 A.D. and 1540 A.D. large pueblos were constructed in this area. By 1450 A.D., this was a cultural and economic center

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for the Zuni, who used the entire 15 million areas for hunting, gathering, and farming as well as other life-sustaining activities.

Spanish explorers learned of the Zuni and the "Kingdom of Cibola" in the late 1530s, and the first major contract with Europeans took place when Coronado's expedition encountered the Zuni as he searched for Cibola's "Seven Cities of Gold." Spanish missionaries recorded the cultivation of corn by the Zuni in 1581, and an expedition in 1583 noted the Zuni's irrigation and hunting practices. In 1598, Spain officially recognized the Zuni Province when the Zuni acknowledged Spanish sovereignty over them. Under Spanish law, the Zuni retained ownership of their lands and were treated as autonomous and self-governing notwithstanding the overriding sovereignty of Spain. The Zuni maintained their autonomy under the government of Mexico after that nation achieved its independence from Spain in 1821.

The 1848 Treaty of Guadalupe Hidalgo offered the Zuni the same legal protections they had received under Spanish and Mexican rule. Subsequently, however, the Zuni were deprived of all but about 3% of the land they had earlier controlled. In 1877, the Zuni Reservation was established by executive order, consisting of 408,000 acres of land in McKinley and Valencia Counties in western New Mexico. Notwithstanding this diminution of their lands, the Zuni have continued to make religious pilgrimages from their reservation in New Mexico to the area now included within the Zuni Heaven Reservation in Arizona. [1]

The Zuni Heaven Reservation was recognized by statute in 1984, P.L. 98–408, 98 State. 1533 (1984), as amended by P.L. 101–486, 104 Stat. 1174 (1990), to protect long-standing religious and subsistence activities by the Zuni Indian Tribe on certain lands in Apache County, Arizona, located upstream of the confluence of the Little Colorado and Zuni Rivers. The rights of all water users in the basin of the Little Colorado River in Arizona have been in litigation since 1979 before the Superior Court of the State of Arizona in and for the County of Apache in an action encaptured In re The General Adjudication of All Rights to Use Water in the Little Colorado River. Public policy favors the resolution of such claims by means of negotiated settlements, rather than through lenghty and costly litigation.

After more than four years of negotiations amongst representative of the United States, the Zuni Tribe, the State of Arizona, the Salt River Project, Tucson Electric Power Company, local irrigation companies, and neighboring non-Indian communities located in the Little Colorado River basin, on June 7, 2002, the parties entered into a settlement agreement (Settlement Agreement) to resolve all of the tribe's claims to water rights, to assist the tribe in acquiring surface water rights, to provide for the tribe's use of groundwater, and to provide for the restoration of riparian wetlands of great cultural and religious significance to the tribe. The proposed legislation ratifies and confirms that Settlement Agreement, and authorizes the appropriation of funds necessary to carry out its terms. The legislation also approves, ratifies, and confirms various related agreements among the parties.

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[1] See, *United States on behalf of the Zuni Tribe of New Mexico* v. *Platt,* 730 F. Supp. 318, 318–21 (D. N.M. 1990).

Because of the unique nature of the Zuni Heaven Reservation and the purposes for which it was established, the terms of the Settlement Agreement and the provisions of S. 2743 which seek to implement the Settlement Agreement in some instances represent a departure from standard principles of Federal-Indian law. The Committee recognizes these unique circumstances and the history which gives rise to them, and further recognizes that the provisions of the Settlement Agreement and the implementing legislation are intended to address the unique circumstances as well as the respective positions of the parties to the Settlement Agreement, and are not intended to establish a precedent for other settlements of tribal claims to land and water rights.

LEGISLATIVE HISTORY

S. 2743 was introduced on July 17, 2002, by Senator Kyl, for himself and Senator McCain, and was referred to the Committee on Indian Affairs. The Committee held a hearing on S. 2743 on July 18, 2002. On October 1, 2002, the Committee, by voice vote, ordered the bill favorably reported to the Senate with an amendment in the nature of a substitute, with the recommendation that the Senate do pass S. 2743 as reported.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, in an open business meeting on October 1, by voice vote approved S. 2743, with an amendment in the nature of a substitute, and ordered the bill, as amended, to be reported favorably to the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

Section 1 cites the short title of the bill as the Zuni Indian Tribe Water Rights Settlement Act of 2002.

Section 2.—Findings and purposes

Section 2(a) sets forth 9 Congressional findings that provide the rationale and basis for the decision by all parties, including the United States, to resolve the tribal water claims by negotiated settlement.

Section 2(b) describes the purposes of S. 2743, which include to approve, ratify, and confirm the Settlement Agreement entered into by the tribe and neighboring non-Indians, to authorize and direct the Secretary of the Interior (Secretary) to execute and perform the Settlement Agreement and related waivers, to authorize and direct the United States to take legal title to certain lands and to hold such lands in trust for the benefit of the tribe, and to authorize the actions, agreements, and appropriations as provided for in the Settlement agreement S. 2743.

Section 3.—Definitions

Section 3 provides 11 definitions for terms employed in the bill. These terms are: "Eastern LCR Basin," "Fund," "Intergovernmental Agreement," "Pumping Protection Agreement," "Reservation" or "Zuni Heaven Reservation," "Secretary," "Settlement Agreement,"

"SRP," "TEP," "Tribe," "Zuni Indian Tribe," or "Zuni Indian Tribe," and "Zuni Lands."

Section 4.—Authorizations, ratifications, and confirmations

Section 4(a) approves, ratifies, confirms, and declares to be valid the Settlement Agreement, to the extent it does not conflict with the provisions of S. 2743. It also authorizes and directs the Secretary to execute the Settlement Agreement and any necessary amendments thereto to make the Settlement Agreement consistent with this legislation.

Section 4(b) authorizes the appropriation, to the Zuni Indian Tribe Water Rights Fund established in § 6(a), $19,250,000, to be allocated by the Secretary as follows: $3,500,000 in FY 2004 for the acquisition of at least 2,350 acre-feet per year of water rights and associated lands and for related activities, the acquisition to be completed by the deadline set forth in § 9(b), and $15,750,000, to be appropriated in three equal installments in FY 2004, 2005, and 2006, to restore, rehabilitate, and maintain the Zuni Heaven Reservation, including the Sacred Lake, wetlands, and riparian acreas. The Committee has been advised by the parties that in the event the deadline set forth in the Settlement Agreement is in conflict with the schedule of funding set forth in this subsection, the Settlement Agreement will be amended to conform to the provisions of S. 2743.

Section 4(c) provides that, except as provided in § 9, the following three agreements, including amendments, are approved, ratified, confirmed, and declared to be valid: the agreement between the Salt River Project Agricultural Improvement and Power District, the tribe, and the United States on behalf of the tribe dated June 7, 2002; the agreement between Tucson Electric Power Company, the tribe, and the United States on behalf of the tribe dated June 7, 2002; and the agreement between the Arizona State Land Department, the tribe, and the United States on behalf of the tribe dated June 7, 2002.

Section 5.—Trust lands

Section 5(a) provides that, upon satisfaction of conditions set forth in paragraph 6.2 of the Settlement Agreement and the requirements of § 9(a), the Secretary shall take the legal title to certain lands identified in this subsection into trust for the benefit of the tribe.

Section 5(b) provides that, following the acquisition by the tribe of certain lands identified in this subsection and upon satisfaction of conditions set forth in paragraph 6.2 of the Settlement Agreement and the requirements of § 9(a), the Secretarys shall take the legal title to those lands into trust for the benefit of the tribe.

Section 5(c) provides that, following the acquisition by the tribe of certain lands identified in this subsection and upon satisfaction of conditions set forth in paragraph 6.2 of the Settlement Agreement and the requirements of § 9(a), the Secretary shall take the legal title to those lands into trust for the benefit of the tribe and shall make such lands part of the Zuni Indian Tribe Reservation.

Section 5(d) provides that the Secretary shall have no discretion regarding the acquisitions described in subsection (a), (b), and (c).

Section 5(e) provides that no lands within Arizona, other than the land described in subsection (a), (b), and (c), shall hereafter be taken into trust by the United States for the benefit of the tribe except by authority of an Act of Congress enacted after the date of enacted of this legislation and specifically authorizing the taking of lands into trust for the benefit of the tribe.

Section 5(f) provides that any written certification by the Secretary under subparagraph 6.2.B of the Settlement Agreement constitutes final agency action under the Administrative Procedures Act and is reviewable as provided under chapter 7 of title 5, United States Code.

Section 5(g) provides that lands taken into trust pursuant to subsection (a), (b), or (c) shall not have Federal reserved rights to surface water or groundwater.

Section 5(h) provides that water rights and uses for lands taken into trust pursuant to subsections (a) or (c) must be determined under subparagraph 4.1.A and article 5 of the Settlement Agreement. The tribe retains any rights or claims to water associated with lands taken into trust pursuant to subsection (b) under State law, subject to the terms of the Settlement Agreement.

Section 5(i) provides that water rights appurtenant to lands taken into trust pursuant to subsections (a), (b), or (c) shall not be subject to forfeiture and abandonment.

Section 5(j) provides that, with respect to lands taken into trust pursuant to subsection (a) and (b), the tribe shall make payments in lieu of all current and future State, county, and local ad valorem property taxes that would otherwise be applicable to those lands if they were not in trust.

Section 5(k) provides that the tribe is authorized to enter the Intergovernmental Agreement with Apache County, Arizona, and the State of Arizona identified in § 3(3) and any intergovernmental agreement required to be entered into by the tribe under the terms of the Intergovernmental Agreement. The scope of the intergovernmental agreements to be entered into by the tribe under the terms of the Intergovernmental Agreement is as set forth in subparagraph 6.2.A of the Settlement Agreement.

Section 5(l) provides that the Secretary shall acknowledge the terms of any intergovernmental agreement entered into by the tribe under this section and shall not, in any administrative or judicial action, seek to abrogate the terms of any such intergovernmental agreement consistent with subparagraph 6.2.A of the Settlement Agreement and S. 2743. The subsection further provides that if the United States is permitted to intervene in a judicial action commenced during a dispute over any intergovernmental agreement entered under this section, the United States shall not remove the action to the Federal courts, except that the United States may seek removal if the action concerns the Secretary's action regarding the issuance of rights-of-way under § 8(c), the authority of a Federal agency to administer programs or the issuance of a permit under the Federal Water Pollution Control Act (33 U.S.C. § § 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. § § 300f et seq.), the Clean Air Act (42 U.S.C. § § 7401 et seq.), or any other Federal law specifically addressed in intergovernmental agreements, or if the intergovernmental agreement is inconsistent

with a Federal law for the protection of civil rights, public health, or welfare.

Section 5(m) provides that nothing in this legislation shall be construed to affect the application of the Act of May 25, 1918 (25 U.S.C. § 211) within the State of Arizona. Section 5(m) does not affect the application of *Jicarilla Apache Tribe* v. *State of New Mexico*, 742 F. Supp. 1487 (D. N.M. 1990), in the State of New Mexico, or the application of *Masayesva* v. *Zah*, 792 F. Supp. 1165 (D. Ariz. 1992), in the State of Arizona.

Section 5(n) provides that nothing in this section repeals, modifies, amends, changes, or otherwise affects the Secretary's obligation to the tribe pursuant to P.L. 98–408, 98 Stat. 1533, as amended by the Zuni Claims Settlement Act of 1990, P.L. 101–486, 104 Stat. 1174.

Section 6.—Development fund

Section 6(a) establishes the Zuni Indian Tribe Water Rights Development Fund (Fund) in the Treasury of the United States, to be managed and invested by the Secretary and to consist of funds appropriated under section 4(b), the appropriation to be contributed by the State of Arizona pursuant to paragraph 7.6 of the Settlement Agreement, and any other funds paid to the Secretary on behalf of the Zuni Tribe pursuant to the Settlement Agreement.

Section 6(b) provides that the Secretary, in the management, investment, and disbursement of the Fund, shall comply with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. § § 4001 et seq.) (Trust Fund Reform Act), S. 2743, and the Settlement Agreement.

Section 6(c) provides that investment of the assets of the Fund by the Secretary shall comply with the Act of April 1, 1880 (25 U.S.C. § 161), the first section of the Act of June 24, 1938 (25 U.S.C. § 162a), and subsection (b).

Section 6(d) provides that funds appropriated pursuant to § 4(b)(2) and funds contributed by the State of Arizona pursuant to paragraph 7.6 of the Settlement Agreement shall be available for expenditure or withdrawal only after the requirements of § 9(a) have been met.

Section 6(e) provides that the tribe may make withdrawals from the Fund only after the Secretary has approved a tribal management plan as described in the Trust Fund Reform Act which requires that funds be spent only for the purposes set forth in § 4(b). The Secretary is authorized to take judicial or administrative action to enforce the requirement that the assets of the Fund be used only in accordance with the provisions of S. 2743. Neither the Secretary or the Secretary of the Treasury shall have any liability for the expenditure or investment of monies withdrawn from the Fund (the inclusion of this provision is not intended to suggest, however, that existing law does not fully protect the United States from liability under these circumstances, as it is the Committee's view that 25 U.S.C. § 4022(c) would provide such protection). The tribe is to submit an expenditure plan for approval by the Secretary as to any monies held in the Fund that are not withdrawn pursuant to this subsection. The plan is to describe the manner in which, and the purposes for which, such monies will be used. The Secretary is to approve the tribal management plan if the Secretary

determines that the plan is reasonable and is consistent with the provisions of S. 2743. The tribe is to submit to the Secretary an annual report describing all expenditures from the Fund during the period of the report.

Section 6(f) provides that notwithstanding subsection (e), funds authorized to be appropriated pursuant to § 4(b)(1) shall be available for use upon appropriation in accordance with § 4(b)(1) and shall be distributed by the Secretary to the tribe upon receipt by the Secretary of a written notice from the tribe and a tribal council resolution describing the purposes for which the funds will be used. In the event the requirements of § 9(a) are not met and the Settlement Agreement becomes null and void pursuant to § 9(a), the United States may set off any funds expended or withdrawn from the amount appropriated pursuant to § 4(b)(1), together with any accrued interest, against any claims asserted by the tribe against the United States relating to water rights of the Zuni Heaven Reservation. Any water rights acquired with funds described in this subsection are to be credited against any water rights secured for the Zuni Heaven Reservation by the tribe, or by the United States on behalf of the tribe, in the Little Colorado River General Stream Adjudication or in any future settlement of claims for those water rights.

Section 6(g) provides that no part of the Fund shall be distributed on a per capita basis to members of the tribe.

Section 7.—Claims extinguishment; waivers and releases

Section 7(a) provides that the benefits realized by the tribe and its members under this legislation, including retention of any claims and rights, shall constitute full satisfaction of all members' claims for water rights under Federal, State, and other laws (including claims rights in groundwater, surface water, and effluent) for Zuni Lands (as defined in § 3(11)) from time immemorial through the effective date set forth in § 9(a), and for injuries during that period to such rights (including also claims for damages for deprivation of water rights and for changes to underground water tables) under Federal, State, and other laws. The legislation is not intended to recognize or establish any right of a member of the tribe to water on the Zuni Heaven Reservation.

Section 7(b) authorizes the tribe, on behalf of itself and its members, and the Secretary, on behalf of the United States in its capacity as trustee for the tribe and its members, as part of their obligations under the Settlement Agreement, to execute a waiver and release of claims against the State of Arizona, any agency or political subdivision thereof, or any other person under Federal, State, or other law, for: (1) past, present, and future claims (from time immemorial to the effective date set forth in § 9(a) and any time thereafter) to water rights (including groundwater, surface water, and effluent) for Zuni Lands, except as provided in article 5 of the Settlement Agreement; (2) past and present claims (to the effective date set forth in § 9(a)) for injuries to water rights (including also claims for damages for deprivation of water rights and changes to underground water tables); and (3) past, present, and future claims for water rights and injuries to water rights (including also claims for damages for deprivation of water rights and changes to underground water tables) for lands outside of the Zuni Lands but lo-

cated within the Little Colorado River basin in Arizona and based upon aboriginal occupancy of lands by the tribe and its predecessors.

Section 7(c) authorities the tribe, as part of the performance of its obligations under the Settlement Agreement, to execute a waiver and release (subject to paragraphs 11.4 and 11.6 of the Settlement Agreement) for claims against the United States (acting in its capacity as trustee for the tribe and its members or otherwise acting on their behalf), its agencies, officials, and employees, for: (1) past, present, and future claims (from time immemorial to the effective date set forth in § 9(a) and any time thereafter) to water rights for Zuni lands (including groundwater, surface water, and effluent) and any claims for damages for deprivation of such water rights; (2) past and present claims (to the effective date set forth in § 9(a)) for injuries to and deprivation of such water rights for Zuni Lands; and (3) past, present, and future claims for water rights (including groundwater, surface water, and effluent) as well as for injuries to and claims for deprivation of such water rights for lands outside the Zuni Lands but located within the Little Colorado River basin in Arizona and based upon aboriginal occupancy of lands by the tribe and its predecessors.

Section 7(d)(1) authorizes the tribe, on behalf of itself and its members, to waive and release all claims against the State of Arizona, its agencies and political subdivisions, and any other person under Federal, State, or other law for claims of interference with the trust responsibility of the United States to the tribe arising out of the negotiation of the Settlement Agreement or S. 2743, as well as all claims against those same entities (subject to paragraphs 11.4, 11.6, and 11.7 of the Settlement Agreement) for past and present claims, including natural resource damage claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.) (CERCLA), the Oil Pollution Act of 1990 (33 U.S.C. §§ 2701 et seq.) (OPA), or any other applicable statute, for injury to water quality accruing from time immemorial through the effective date set forth in § 9(a) for lands within the Little Colorado River basin in the State of Arizona. The tribe is also authorized to waive future claims, including natural resource claims under CERCLA, OPA, or any other applicable statute, for lands within the Eastern Little Colorado River [LCR] basin (as defined in § 3(1) caused by the lawful diversion or use of surface water, the lawful withdrawal of water (except within the Zuni Protection Area as provided in article 5 of the Settlement Agreement), the parties' performance of any obligations under the Settlement Agreement, the discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law, the discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law, or any combination thereof.

Section 7(d)(2) authorizes the tribe, on behalf of itself and its members, to waive its right to request that the United States bring any claims for injuries to water quality under the natural resource damage provisions of CERCLA, OPA, or any other applicable statute, for lands within the Little Colorado River basin in the State of Arizona accruing from time immemorial through the effective date set forth in § 9(a), as well as future claims for injuries or

threat of injuries to water quality under the natural resource damage provisions of CERCLA, OPA, or any other applicable statute, for lands within the Eastern LCR basin caused by the lawful diversion or use of surface water, the lawful withdrawal of water (except within the Zuni Protection Area as provided in article 5 of the Settlement Agreement), the parties' performance of any obligations under the Settlement Agreement, the discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law, the discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law, or any combination thereof.

Section 7(d)(3) provides that notwithstanding the waivers of future water quality claims authorized in paragraphs (1)(B) and (2)(B) of this subsection, the tribe, on behalf of itself and its members, retains any statutory claims for injury or threat of injury to water quality under CERCLA and OPA as described in subparagraphs 11.4(D)(3) and (4) of the Settlement Agreement that accrue at least 30 years after the effective date set forth in § 9(a).

Section 7(e) provides that the United States, as part of the performance of its obligations under the Settlement Agreement, waives and releases past and present claims (subject to the limitations set forth in paragraphs 11.4, 11.6, and 11.7 of the Settlement Agreement) against the State of Arizona, its agencies and political subdivisions, and any other entity for: past and present common law claims accruing from time immemorial to the effective date set forth in § 9(a) arising for or relating to water quality in which the injury asserted is to the tribe's interest in water, trust land, and natural resources in the Little Colorado River basin in the State of Arizona; and all past and present natural resource damage claims accruing through the effective date set forth in § 9(a) based on injury or threat to natural resources in the Little Colorado River basin in Arizona, but only for those cases in which the United States, or any Federal official, would act on behalf of the tribe as a natural resource trustee pursuant to the Natural Resource Contingency Plan as set forth in 40 CFR § 300.600(b)(2) on the effective date of this legislation under § 9(a). This subsection further provides that the United States, subject to the retentions set forth in paragraphs 11.4, 11.6, and 11.7 of the Settlement Agreement, also waives and releases future common law claims against the State of Arizona, its agencies and political subdivisions, and any other entity arising from or relating to water quality in which the injury asserted is to the tribe's interest in water, trust land, and natural resources in the Eastern LCR basin in Arizona accruing after the effective date described in § 9(a) and caused by the lawful diversion or use of surface water, the lawful withdrawal of water (except within the Zuni Protection Area as provided in article 5 of the Settlement Agreement), the parties' performance of any obligations under the Settlement Agreement, the discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law, the discharge of associated with routine start-up and operation of well pumps not inconsistent with applicable law, or any combination thereof.

Section 7(f) provides that, subject to subsection (b) and (e), nothing in S. 2743 or the Settlement Agreement affects any right of the United States, or the State of Arizona, to take any actions (includ-

ing enforcement actions) under any laws (including regulations) relating to human health, safety, and the environment.

Section 8.—Miscellaneous provisions

Section 8(a) provides for the waiver of the sovereign immunity of the United States and the Tribe (except as to claims for money damages not specifically provided for in the Settlement Agreement) in the event any party to the Settlement Agreement or a Pumping Protection Agreement files a lawsuit only relating to the interpretation or enforcement of this legislation, certain agreements identified in § 4(c), or a Pumping Protection Agreement. this subsection also provides for a waiver of Federal and tribal immunity, with the same limitation, if a landowner or water user in the Little Colorado River basin in Arizona files a lawsuit only relating to directly to the interpretation or enforcement of Article 11 of the Settlement Agreement, the rights of de minimis users in subparagraph 4.2.D of the Settlement Agreement, or the rights of underground water users under Article 5 of the Settlement Agreement. The tribe is authorized to waive its sovereign immunity from suit in the superior Court of Apache County, Arizona (except with claims for monetary awards not specifically authorized in the Intergovernmental Agreement) for the limited purposes of enforcing the terms of the Intergovernmental Agreement and any intergovernmental agreement required to be entered into by the tribe under the terms of the Intergovernmental Agreement. Although the text of the legislation does not address the issue of a waiver of the sovereign immunity of the State of Arizona, the waiver of tribal sovereign immunity set forth herein is grounded in assurances made to the Committee that the tribe has adequate and reciprocal judicial remedies against the State. The Committee views S. 2743 as a contract, and the availability to the tribe of such remedies is a basic assumption of that contract.

Section 8(b) provides that, with respect to water rights made available under the Settlement Agreement and used on the Zuni Heaven Reservation, such rights shall be held in trust by the United States in perpetuity and shall not be subject to forfeiture or abandonment. The subsection further provides that State law shall not apply to water uses on the Zuni Heaven Reservation, and that water rights and uses on the Zuni Heaven Reservation shall not be subject to State law or regulation, except that the court with jurisdiction over the decree entered pursuant to the Settlement Agreement or the Norviel Decree Court may assess administrative fees for delivery of this water.

Section 8(c) provides that land taken into trust pursuant to §§ 5(a) and 5(b) shall be subject to existing easements and rights-of-way and that, notwithstanding any other provision of law, the Secretary, in consultation with the tribe, shall grant additional rights-of-way or expansions of existing rights-of-way for roads, utilities, and other accommodations to adjoining landowners if the proposed right-of-way: (1) is necessary to the needs of the applicant; (2) will not cause significant and substantial harm to the Tribe's wetland restoration project or religious practices; and (3) will comply with the procedures in part 169 of title 25, Code of Federal Regulations (where not inconsistent with this subsection) and with

other generally applicable Federal laws unrelated to the acquisition of interests across trust lands.

Section 8(d) provides that the United States shall not seek reimbursement of costs arising out of the implementation of S. 2743 or of the Settlement Agreement against any Indian-owned land within the tribe's Reservation, or make any assessment against such lands in regard to such costs.

Section 8(e) provides that, except as provided in paragraph 5.3 of the Settlement Agreement (recognizing the tribe's use of 1,500 acre-feet per annum of groundwater), neither S. 2743 nor the Settlement Agreement create any vested right to groundwater under Federal or State law, or any priority to the use of groundwater under Federal or State law that would be superior to any other right or use of groundwater. Notwithstanding this limitation, the rights of parties to the intergovernmental agreements referred to §§ 4(c)(1), (2), or (3) and in paragraph 5.8 of the Settlement Agreement, as among themselves shall be as stated in those agreements.

Section 8(f) provides that nothing in the Settlement Agreement or in S. 2743 quantifies or otherwise affects the water rights, claims, or entitlements to water of any Indian tribe, band, or community, other than the Zuni Indian Tribe.

Section 8(g) provides that execution of the Settlement Agreement shall not constitute major Federal action under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA), however the Secretary shall comply with NEPA and shall carry out any other necessary compliance during the implementation of this settlement.

Section 9.—Effective date for waiver and release authorizations

Section 9(a) provides that the waiver and release authorizations contained in §§ 7(b) and 7(c) shall become effective as of the date the Secretary publishes in the Federal Register a statement of all of the following findings: (1) that this legislation has been enacted in a form approved by the parties in paragraph 3.1.A of the Settlement Agreement; (2) that the funds authorized by § 4(b) have been appropriated and deposited into the Fund; (3) that the State of Arizona has appropriated and deposited into the Fund the amount required by paragraph 7.6 of the Settlement Agreement; (4) that the tribe has either purchased or acquired the right to purchase at least 2,350 acre-feet per annum or surface water rights, or waived this condition pursuant to paragraph 3.2 of the Settlement Agreement; (5) that, pursuant to subparagraph 3.1.D of the Settlement Agreement, the severance and transfer of surface water rights that the tribe owns or has a right to purchase have been conditionally approved, or that the tribe has waived this condition as provided in paragraph 3.2 of the Settlement Agreement; (6) that, pursuant to subparagraph 3.1.E of the Settlement Agreement, the tribe and Lyman Water Company have executed an agreement relating to the severance and transfer of surface water rights acquired by the tribe and the United States, the pass-through, use, or storage of the tribe's surface water rights in Lyman Lake, and the operation of Lyman Dam; (7) that, pursuant to subparagraph 3.1.F of the Settlement Agreement, all parties to the Settlement Agreement have agreed and stipulated to certain Arizona Game and Fish abstracts of water uses; (8) that, pursuant to subparagraph 3.1.G of

the Settlement Agreement, all parties to the Settlement Agreement have agreed to the location of an observation well and that well has been installed; (9) that, pursuant to subparagraph 3.1.H of the Settlement Agreement, the tribe, Apache County, Arizona, and the State of Arizona have executed an Intergovernmental Agreement that satisfies all of the conditions in paragraph 6.2 of the Settlement Agreement; (10) that the tribe has acquired title to a particular section of land adjacent to the Zuni Heaven Reservation; (11) that the Settlement Agreement has been modified if and to the extent that it is in conflict with this legislation and such modification has been agreed to by all the parties to the Settlement Agreement; and (12) that a court of competent jurisdiction has approved the Settlement Agreement by a final judgment and decree.

Section 9(b) provides that if the publication in the Federal Register required under subsection (a) has not occurred by December 31, 2006, §§4 and 5, and any agreements entered into pursuant thereto (including the Settlement Agreement and the Intergovernmental Agreement) shall not thereafter be effective and shall be null and void. This subsection further provides that any funds and the interest accrued thereon appropriated pursuant to §4(b)(2) shall revert to the Treasury, and any funds and the interest accrued thereon appropriated pursuant to paragraph 7.6 of the Settlement Agreement shall revert to the State of Arizona.

COST AND BUDGETARY CONSIDERATIONS

At the time of filing this report, the cost estimate of the Congressional Budget Office on S. 2743 had yet been received. Compliance with Senate Rule XXVI, paragraph 11(a) is therefore impracticable at this time.

EXECUTIVE COMMUNICATIONS

The Committee received written testimony for the Bureau of Indian Affairs, Department of the Interior, for the hearing on S. 2743 held on July 18, 2002. The written testimony from the Administration is set forth below:

STATEMENT OF NEAL MCCALEB, ASSISTANT SECRETARY—INDIAN AFFAIRS

Good morning. Mr. Chairman and members of the Committee. I am Neal McCaleb, Assistant Secretary for Indian Affairs at the Department of the Interior. I appreciate the opportunity to appear before this Committee to discuss S. 2743, a bill to authorize a water rights settlement for the Zuni Heaven Reservation, in northeastern Arizona.

The Administration generally supports the bill but has some concerns with certain provisions. The Administration has concluded, however, that the unique context presented by the Zuni lands in Arizona may warrant provisions of this nature with some modifications. For three reasons, the Zuni Settlement presents a unique situation. First, the tribal lands at issue are primarily for ceremonial use and generally will not be used as a homeland or to accommodate tribal members. Second, the water rights and land area involved are relatively small. Finally, the Settlement

provides a benefit by allowing additional lands to be taken into trust and provides accompanying water rights. Based on the consideration of these unique circumstances, the Administration supports S. 2743 in concept. In general, many of the provisions found in S. 2743 are the exception rather than the rule and may not necessarily be appropriate in other Indian water settlements.

In general, the settlement reached by the parties is the product of a cooperative effort over the last five years among the Zuni Tribe, the State of Arizona, the United States, the Salt River Project and many other local water users. This effort was aided greatly by the work of the Honorable Michael C. Nelson, Presiding Judge for Apache County Superior Court, who has mediated the settlement discussions. The Settlement Agreement has been signed by the Tribe and is pending formal signature by the other parties.

Background

The Little Colorado River (LCR) Basin covers an area of approximately 17.2 million acres or 26,964 square miles in northeastern Arizona and northwestern New Mexico. The main stem of the Little Colorado River is entirely in Arizona. Therefore, this adjudication deals only with claims inside the borders of Arizona. Five different Indian tribes have reservations, or pending claims to reservation lands, within the Basin: the Navajo Nation, Hopi Tribe, Zuni Tribe, San Juan Southern Paiute Tribe and the White Mountain Apache Tribe.

The settlement agreement at issue here concerns only the Zuni Tribe's relatively small water right claims at the Zuni Heaven Reservation located in the south eastern section of the Basin, at the confluence of the Zuni and Little Colorado Rivers. Zuni Heaven is a unique reservation created fairly recently to accommodate the religious and cultural practices of the Zuni. The main Zuni reservation, in contrast, is located in New Mexico. The majority of the Zuni members reside on the main reservation.

According to Zuni religious beliefs, a lake formerly located on the Zuni Heaven Reservation is a window into heaven. That lake and the surrounding wetlands disappeared in recent history due to upstream diversions and groundwater pumping in the surrounding areas. The Settlement provides the Tribe with the water and land to restore the lake for use in future religious ceremonies.

The Zuni Heaven Reservation was established by Congress in 1984 through Public Law 98–498 and expanded in 1990 through Public Law 101–486 to further the religious and cultural needs of the Tribe. That legislation established the land base of the Reservation within the Tribe's aboriginal territory and facilitated the Tribe's regular pilgrimage from New Mexico to Arizona by authorizing the United States to obtain easements along the pilgrimage route.

Since 1979, water rights in the Little Colorado river basin have been the subject of an Arizona state general stream adjudication. The United States file a water rights claim on behalf of the Zuni Tribe in the state proceeding for water rights to Zuni Heaven. Mirroring most general stream adjudications, the litigation has moved very slowly. Recognizing that the Zuni claims lent themselves to settlement, the parties devoted significant effort to negotiations. The Settlement Agreement and S. 2743, which would ratify that agreement, are the fruits of that negotiation.

The draft legislation (S. 2743)

S. 2743 approves and authorizes federal participation in the main settlement agreement, which includes three subsidiary agreements with individual parties. When fully implemented, this agreement would constitute a final settlement of the water rights claims of the Zuni Tribe and the United States' claims on behalf of Zuni. The settlement agreement will secure a water budget of approximately 5,500 acre-feet per year, including both surface water and groundwater, for the rehabilitation and restoration of the Sacred Lake, wetlands and riparian areas of the Reservation. The surface water component of this water budget would be secured through the purchase of state law base water rights from willing sellers, as well as through flood flows of the Little Colorado River. To supplement surface flows in times of drought and to allow for the initiation of restoration activities while surface water rights are acquired, the settlement provides for a groundwater right of 1,500 acre feet per year.

The settlement involves significant cost sharing and cooperation among the federal government and the state and local parties. The Tribe's non-Indian neighbors have agreed to assist in the acquisition of water rights, to store surface water supplies for the Tribe, and to make other contributions to carry out the settlement. In addition, some water supplies for the settlement will be secured through up to $6 million in water protection grants funded by the State of Arizona. The federal contribution of $19.25 million to the settlement would be authorized. These federal funds would be used for the acquisition of water rights, as well as other actions necessary to restore the Sacred Lake, the wetlands and riparian areas of the Zuni Heaven Reservation.

We believe the federal contribution contemplated in S. 2743 is appropriate to facilitate resolution of the Zuni Tribe's claims. The settlement is designed to release the United States from any potential damage claims that might be asserted by the Tribe and to relieve the government of the obligation to litigate, at significant cost and over many years, the Tribe's water rights claims. At the same time, a final resolution of the Tribe's water rights claims would provide certainty to its neighbors, enabling them to plan and make necessary investments based on

the assurance that they have secure and stable water rights.

Concerns with the draft legislation

The Administration in concept supports the settlement set forth in S. 2743, but has a few areas of concern with the bill as drafted. We are committed to working with the Committee, Senator Kyl, and the settlement parties during the upcoming August recess in this regard to reach a mutually agreeable solution.

We believe through working with the Committee and Senator Kyl, we can improve the following areas of the bill: Our first area of concern are the water quality waivers. The broad waivers within S. 2743 need to be clarified to avoid future litigation regarding the distinction between the sovereign capacity and trust capacity of the United States and to safeguard the authority of the United States enforcement authority. Second, the provisions regarding rights-of-way across tribal trust land conflict with established law and may lead to unnecessary litigation. Third, the United States opposes any additional waiver of its sovereign immunity as there exist sufficient avenues to address the interpretation or enforcement of S. 2743. Fourth, S. 2743 raises a concern regarding the authority of the United States to remove actions to a federal court. Finally, S. 2743 treats land taken into trust as state lands for purposes of environmental regulation and permitting, contrary to current law and practice. The United States believes, however, that the intentions of the parties to the Settlement Agreement can be addressed thorough alternative language while reducing litigation risk.

Conclusion

Negotiated agreements among Indian tribes, states, local parties, and the federal government, in general, are the most effective way to resolve reserved water right claims in a manner that secures tribal rights to assured water supplies for present and future generations while at the same time providing for sound management of an increasingly scare resource. The known benefits of settlement generally outweigh the uncertainties that are inherent in litigation to the Tribe, the state, other interested parties and the United States. On balance, the very unique circumstances of the Zuni and their lands and the benefits of this settlement, with certain modifications, outweigh concerns regarding these unusual aspects of this settlement.

We appreciate Senator Kyl's commitment to working with us and look forward to working closely with the Committee and the settlement parties to refine and clarify the language of S. 2743 to ensure that this legislation can be enacted into a law that advances the interests of all parties.

On August 15, 2002, the Committee submitted several questions to the Secretary of the Interior regarding the proposed legislation, and on September 20, 2002, the Administration submitted its re-

sponse to the Committee's August 15, 2002, letter. The Committee's questions and the Administration's response are set forth below:

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC, August 15, 2002.

Hon. GALE NORTON,
Secretary, Department of the Interior,
Washington, DC.

DEAR SECRETARY NORTON: I am writing to enclose questions from the U.S. Senate Committee on Indian Affairs in following up to the Committee's hearing on S. 2743, a bill to approve the settlement of water rights claims of the Zuni Indian Tribe in Apache County, Arizona, and for other purposes.

The Committee would very much appreciate the Department's views on the legal issues implicated by a number of provisions of the bill.

Sincerely,

DANIEL K. INOUYE,
Chairman.

Enclosure.

QUESTIONS REGARDING S. 2473

1. Section 5(j)

Section 5 of the proposed legislation directs that certain lands shall be taken into trust by the United States on behalf of the Zuni Tribe. Section 5(j)(1) provides that "such lands shall not be considered lands within an Indian reservation or lands owned or held by any Indian for the purposes of Article 20, paragraph 5 of the Arizona Constitution, for the purpose of paying in lieu taxes pursuant to this subsection and the Intergovernmental Agreement between the Zuni Tribe, Apache County, Arizona, and the State of Arizona." Section 5(j)(2) provides that "the Zuni Tribe shall make payments in lieu of all current and future State, county, and local ad valorem property taxes that would otherwise be applicable to those lands if they were not in trust."

Article 20, paragraph 5, of the Constitution of the State of Arizona provides in relevant part that "no taxes shall be imposed by this State on any lands or other property within an Indian reservation owned or held by any Indian; but nothing herein shall preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress."

Congress certainly has the authority to allow a state to tax Indian lands that would otherwise be free from tax, and it can authorize states to impose payments in lieu of taxes as S. 2743 does in Section 5(j)(2). Congress can also determine whether or not particular lands shall be considered "lands within an Indian reservation or lands owned or held by any Indian" for purposes of Federal law. It does not however appear that Congress holds the power, under the Constitution, to direct the State of Arizona to charac-

terize these lands in any particular manner for purposes of determining the applicability of provisions of the Arizona Constitution, as Section 5(j)(1) purports to do, where none of the possible interpretations would infringe on any Federal law or right. While Congress can authorize Arizona to impose such a burden on Indian lands, it cannot override a prohibition on the exercise of such authority set forth in state law, if such exists, because "to the extent that a claimed bar to state jurisdiction * * * is premised on the [] state Constitution[], that is a question of state law over which the state courts have binding authority." *Arizona* v. *San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 561 (1983). The present wording of Section 5(j)(1) thus appears to intrude impermissibly into an area of state authority.

Question. In light of the above, is it the position of the United States that the proposed language of section 5(j)(1) is consistent with all constitutional limitations on the power of Congress?

Question. If Section 5(j)(1) as drafted is constitutionally inform, is substitute language ("notwithstanding the provisions of the Arizona Enabling Act * * *" or some similar language?) necessary to authorize the State of Arizona and its political subdivisions to require the Zuni Tribe to make payments in lieu of taxes on these lands (assuming but not determining that such authority would exist under Arizona law), or is the present language of Section 5(j)(2) sufficient to provide such authority?

2. Sections 5(k), 5(l)

Section 5(k) authorizes the Zuni Tribe to enter into an Intergovernmental Agreement with the State of Arizona and Apache County and "any intergovernmental agreement required to be entered into by the Tribe under the terms of the Intergovernmental Agreement." Section 5(l) provides that the Secretary of the Interior shall "acknowledge the terms" of these agreements and prohibits the Secretary from seeking to abrogate their terms. Nothing in Section 5(k) limits the scope of the subject matter of these agreements. These documents have not been made available to the Committee, and it is unclear whether any binding agreement has yet been executed by the parties as to their content. Congressional authorization of the execution of these Intergovernmental Agreements, in advance of any final determination of their scope and contents, could deprive Congress of the ability to review Intergovernmental Agreements that, as ultimately negotiated by the parties, may have an impact on tribal lands or resources to which the United States hold legal title.

Question. Please provide copies of any agreements to be authorized by section 5(k), including evidence, if available, that the parties have entered into binding agreements as to their terms.

Question. If the parties to the agreements to be authorized by section 5(k) have not yet entered into binding agreements as to their terms, please identify any legally binding restrictions upon which Congress can rely to insure that its advance approval of agreements the terms of which are yet to be established does not subject the Zuni Tribe to the risk that other prospective parties to these agreements will refuse to bargain in good faith. Alternatively, please propose new statutory language that would preclude such a result.

3. Section 5(l)

Section 5(l)(3) prohibits the United States from removing an action to Federal court if the United States intervenes in an action regarding an intergovernmental agreement. The effect of this provision is closely linked to issues of sovereign immunity addressed below with regard to section 8(a), and questions regarding removal appear with the discussion of that provision.

4. Section 6(e)

Section 6(e) of the bill provides that neither the Secretary of the Interior nor the Secretary of the Treasury shall have any liability "for the expenditure of investment of the monies withdrawn" by the tribe from the Water Rights Development Fund. No mention is made of the liability of the United States itself.

Question. Is the language insulating the two Secretaries from liability also intended to protect the United States from liability and, if so, does it in fact have that effect?

Question. Does 25 U.S.C. 4022(c) already provide the protection from liability Section 6(e) is intended to provide?

5. Section 7(b)

Section 7(b)(5) waives the claims of the Zuni Tribe and of the United States in its capacity as trustee for the tribe for certain "future claims for injuries to water quality" accruing after the effective date of the legislation.

Question. Does the waiver of certain future claims for injuries to water quality contained in section 7(b), or any other provision of the bill, limit the authority of the Environmental Protection Agency, or any other Federal agency, to regulate water quality under the Clean Water Act or other legal authority or to seek compensation for damages to natural resources? If not, is the present language narrowly tailored and does it express that intention with sufficient clarity and specificity?

Question. What precedents exist in other legislation for a statutory waiver for future claims of this kind?

6. Section 7(c)(5)

Section 7(c)(5) of the bill authorizes the tribe to waive "claims for breach of the trust responsibility of the United States to the Zuni Tribe arising out of the negotiation of the Settlement Agreement or this Act."

The Restatement (Second) of Trust, 216(2) states that "The consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust, if * * * (b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew[.]" Furthermore, "where the trustee has an adverse interest in the transaction, the consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust not only under the circumstances stated in Subsection (2), but also if the transaction to which the beneficiary consented involved a bargain which was not fair and reasonable." Id., 216(3).

S. 2743 does not identify any particular breaches of trust that may have occurred or that may occur in the course of the negotia-

tion of the Settlement Agreement or the enactment of this legislation, and it is not evident that any particular actions by the United States have been brought to the attention of the tribe as potentially giving rise to a breach of trust action against the United States in this regard. Under these circumstances, it is not immediately apparent whether the proposed waiver would have any effect, as a demand for a general waiver of this sort, not limited to particular identified circumstances giving rise to the need for such a waiver, might well be inconsistent with the United States' trust responsibilities to the tribe.

Question. Please identify representative published judicial opinions in which the Department is or has been involved in which the validity of such a waiver of liability as to undisclosed breaches of trust has been upheld or rejected. If no published opinion is available adopting one or the other of these positions, please identify relevant unpublished opinions and provide copies for the use of the Committee.

Question. Please identify any particular circumstances or any general public policy justifying the proposed waiver of liability for unspecified breaches of trust with regard to the negotiation of the Settlement Agreement and the enactment of the proposed legislation that is now included in S. 2743.

7. Section 8(a)

Waiver of Federal and tribal sovereign immunity

Section 8(a)(1) of the bill waives the sovereign immunity of the United States and the tribe (except as to claims for money damages) to allow other parties to this settlement agreement to enforce certain rights against the United States and the Zuni Tribe. This provision does not specify, however, whether the waiver is applicable in state court as well as in Federal court. Section 8(a)(2) allows the tribe to waive its sovereign immunity (except with regard to money damages) in a particular state court for the purposes of enforcing various intergovernmental agreements. Waivers of sovereign immunity are interpreted narrowly. Accordingly, it could perhaps be argued that in the absence of any explicit mention of a waiver of immunity in state court, section 8(a)(1) should be interpreted as allowing suit to be brought in Federal court only. *Cf. Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 241 (1985) ("in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court").

Question. If it is intended that Section 8(a)(1) waives sovereign immunity to allow suits to be brought in state court, should the text be modified to make it explicit that state court jurisdiction is contemplated?

Waiver of tribal immunity to allow suits in State court

The McCarran Amendment, 43 U.S.C. § 666, has been interpreted as subjecting tribal water rights to the jurisdiction of state courts under certain circumstances. In general, however, public policy disfavors the adjudication of tribal rights in state courts. For the reason stated above, the extent to which S. 2743 would expand state court jurisdiction over tribal rights is unclear; nevertheless it

appears that at least some limitation on the ability the tribe would otherwise have to litigate its rights in Federal court is contemplated beyond that imposed by the McCarran Amendment itself.

Question. If it is indeed the intent that state court jurisdiction be extended over tribal rights beyond that granted in the McCarran Amendment, what public policy supports that extension of state authority?

Waiver of State sovereign immunity

Section 8(a)(1) of the bill waives the sovereign immunity of the United States and the Zuni Tribe to allow other parties to the settlement agreement to enforce certain rights against the United States and the tribe. There is, however, no reciprocal provision that waives the sovereign immunity of the State of Arizona to allow the tribe to enforce its rights against the State or its agencies. Although the Zuni Tribe's attorney did not express concerns about the tribe's ability to enforce its rights against the State based on existing law, the testimony of the Deputy Attorney General of the State of Arizona was contradictory as to whether or not the tribe could obtain judicial relief against the State. Furthermore, even if current Arizona law clearly allows the tribe all necessary enforcement rights in the courts of the State, changes in Arizona law could hinder the tribe's ability to enforce such rights in the future. Any waiver of tribal immunity should be fully reciprocated by the State, both now and in the future, and consideration should be given to whether the wavier should apply in the Federal courts.

While Congress cannot unilaterally abrogate the Eleventh Amendment immunity of the State of Arizona, *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996), it can condition the granting of a benefit on the waiver of such immunity by the State where, as here, the waiver is germane to the purpose of giving the benefit. *South Dakota* v. *Dole,* 483 U.S. 203 (1987). The State of Arizona will receive substantial benefits with the enactment of this legislation, in that it will receive certain authority over Indian lands that would otherwise be denied to it and will achieve the extinguishment of tribal claims to water that could otherwise be asserted against it. Under such circumstances, Congress can require the State to offer an irrevocable waiver of its sovereign immunity as a condition of receiving the benefits provided under this legislation.

Question. What additional language would be necessary to ensure that the tribe's right to enforce its rights against the State of Arizona in all appropriate courts is not restricted by the State's sovereign immunity, either now or in the future?

Non-water related matters in intergovernmental agreements

Although the Committee staff has not been provided with drafts of the intergovernmental agreements, it may be that some provisions of these agreements may relate to matters that are not directly related to the water rights issues that are the subject of the general stream adjudication in the Apache County court. The language in section 5(l)(3) prohibiting the United States from seeking Federal court removal of litigation over such intergovernmental agreements indicates that at least some such cases will be litigated in the Arizona courts. Even if it is considered desirable to extend

the waiver of tribal or Federal sovereign immunity beyond that provided by the McCarran Amendment to allow all water-related issues to be litigated in the state courts, that does not necessarily mean that matters that do not directly relate to water rights should also be litigated in those courts.

Question. What matters not relating directly to water rights, if any, are to be addressed in intergovernmental agreements executed pursuant to the proposed legislation?

Question. If matters not directly relating to water rights are to be litigated in the Arizona courts, what policy considerations justify this limitation on the right the tribe would otherwise have to litigate those issues in Federal court?

Federal removal

If the United States intervenes in an action regarding a dispute over an intergovernmental agreement executed pursuant to section 5, section 5(l)(3) prohibits the United States from removing that action to Federal court. Section 8(a), on the other hand, imposes no restriction on the right of the United States to remove actions to Federal court.

Question. If it is intended that all litigation on matters set forth in section 8(a) is to take place in the Apache County court, should section 8(a) be modified to impose restrictions on the right of the United States to seek removal to Federal court if an action described in that subsection is filed against it?

8. Section 8(b)

Section 8(b)(1)(F)(i) requires the Zuni Tribe to adopt a tribal water code "that is reasonably equivalent to State water law (including statutes relating to dam safety and groundwater management)[.]" Section 8(b)(1)(F)(ii), in turn, provides that until a tribal water code is adopted, the Secretary, in consultation with the State, "shall administer water use and water regulation" on particular lands. While it is apparently the intent of the parties that "dam safety" would be regulated by the Secretary until such time as the tribal water code is adopted, regulation of "dam safety" is not unambiguously included within the authority over "water use and water regulation" granted to the Secretary in section 8(b)(1)(F)(ii).

Does section 8(b)(1)(F)(ii) need to be amended to more closely track the language of section 8(b)(1)(F)(i) with regard to "dam safety" so as to ensure that no gap in regulatory authority exists until the tribal water code is adopted, or is it necessary to include an explicit reference to dam safety in section 8(b)(1)(F)(ii)?

9. Section 8(c)

Section 8(c) provides that the United States and the Zuni Tribe "shall not unreasonably withhold consent for easements and rights-of-way for roads, utilities, and other necessary accommodations for adjoining landowners across [certain of its] lands * * * unless such easements and rights-of-way will cause significant and substantial harm to the Tribe's wetland restoration project or religious practices."

This provision does not provide any limiting principle to define the tribe's obligations and could be interpreted to impose substan-

tial burdens on the tribe's lands. The Zuni Governor's testimony indicated that he viewed this as a simple matter of "neighborliness" to accommodate purely local uses by existing adjoining landowners whose properties would otherwise be landlocked. The effect of the present broad language, however, is not limited to such matters and could, for example, require the tribe to acquiesce in the construction of major regional transportation corridors (highways, power lines, pipelines, etc.) across its lands, since the State or a gas or electric utility could become an "adjoining landowner" at some time in the future through purchase of adjoining lands or by the exercise of the power of eminent domain. There does not seem to be any justification for subjecting the tribe's sovereignty and property rights to such a limitation, unlike other tribal landowners. Nor does it seem desirable to restrict the authority of the Secretary of the Interior to exercise discretion in approving such potential future uses.

Question. Would it not be desirable to modify section 8(c) to place reasonable limits on the scope of this obligation so that the tribe is not permanently subjected to an unbounded and unreciprocated duty to provide others with access across its lands for uses that cannot now be anticipated?

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, September 20, 2002.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed are the Administration's response to questions submitted following the July 18, 2002, hearing on S. 2743, Zuni Heaven Water Rights Settlement Act.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

JANE M. LYDER,
Legislative Counsel, Office of Legislative Affairs.

Enclosure.

ADMINISTRATION RESPONSE TO INDIAN AFFAIRS COMMITTEE QUESTIONS

1. Section 5(j)

Question. In light of the above, is the position of the United States that the proposed language of section 5(j)(1) is consistent with all constitutional limitations on the power of Congress?

Section 5(j)(1) of S. 2743 as introduced is constitutionally infirm. Under the U.S. Constitution, Congress has the legislative power to regulate commerce with the Indian tribes, but has no power to direct a State on how the State shall construe the State's constitution, which Section 5(j)(1) purports to do.

Question. If Section 5(j)(1) as drafted is constitutionally infirm, is substitute language ("notwithstanding the provisions of the Arizona Enabling Act * * *" or some similar language?) necessary to

authorize the State of Arizona and its political subdivisions to require the Zuni Tribe to make payments in lieu of taxes on these lands (assuming but not determining that such authority would exist under Arizona law), or is the present language of Section 5(j)(2) sufficient to provide such authority?

Section 5(j)(2) would direct the Zuni Tribe to make certain payments to States, counties, and localities in lieu of taxes that would otherwise have been applicable with respect to the land. Section 5(j)(2) is consistent with the legislative power of Congress under the Constitution to regulate commerce with Indian tribes. Section 5(j)(2) would not expand or contract the power of Arizona or its political subdivisions to impose or collect taxes, would not pre-empt Section 20 of the Arizona Constitution, and would not constitute the consent of the United States for purposes of Section 20 of the Arizona Enabling Act (Act of Congress of June 20, 1910). In other words, section 5(j)(2) appears to be sufficient to bind the Tribe to its agreement to make payments in lieu of taxes to the extent taxes would otherwise be owed under Arizona law if the land had not been taken into trust under this bill.

2. Sections 5(k), 5(l)

Question. Please provide copies of any agreements to be authorized by section 5(k), including evidence, if available, that the parties have entered into binding agreements as to their terms.

To the best of our knowledge, the parties have not entered into any intergovernmental agreements.

Question. If the parties to the agreements to be authorized by section 5(k) have not yet entered into binding agreements as to their terms, please identify any legally binding restrictions upon which Congress can rely to insure that its advance approval of agreements the terms of which are yet to be established does not subject the Zuni Tribe to the risk that other prospective parties to these agreements will refuse to bargain in good faith. Alternatively, please propose new statutory language that would preclude such a result.

By our reading, sections 5(k) and 5(l) have four effects. First, section 5(k) authorizes the Tribe to enter into certain intergovernmental agreements, but otherwise expresses no congressional intent with respect to the content of these agreements. Second, section 5(l)(1) requires the Secretary of the Interior to acknowledge the terms of any intergovernmental agreement. Under the bill, the United States will not be a party to these agreements and any acknowledgment does not bind the Secretary to the terms of the agreements, but merely requires that she take notice of the agreements under the procedures for taking these lands into trust.

Third, Section 5(l)(2) of the bill states that the Secretary of the Interior "shall not seek to abrogate, in any administrative or judicial action, the terms of any intergovernmental agreement that are consistent with subparagraph 6.2.A of the Settlement Agreement and this Act." This section limits its affect to the particular provisions set forth in subparagraph 6.2A of the settlement agreement. Subparagraph 6.2A delineates the operative provisions to be contained in any intergovernmental agreement. In this way, the Secretary is only bound to those provisions currently set forth in the settlement agreement, rather than being subject to unknown future

provisions. In the same manner, subparagraph 6.2A provides certainty to the Tribe and the other parties as to the operative provisions of any intergovernmental agreement, thus limiting the extent of the future negotiations concerning these agreements.

Fourth, section 5(l)(3) of the bill provides that if the United States becomes a party-intervenor in a judicial action commenced during a dispute over any intergovernmental agreement entered into under the legislation, the United States cannot remove the judicial action to a Federal court. The Administration recommends that section 5(l)(3) be deleted from the bill. Federal policy, expressed in existing removal statutes, that allow the United States to litigate in Federal courts, should not be overridden by the bill.

3. Section 5(l)

This section did not direct a question to the Department for response. With respect to the removal provision in section 5(l)(3), see the above discussion.

4. Section 6(e)

Question. Is the language insulating the two Secretaries from liability also intended to protect the United States from liability and, if so, does it in fact have that effect?

We believe that the intent of section 6(e) is to protect the United States from liability after moneys are withdrawn by the Tribe. This language mirrors section 11(f) of the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Public Law 106–263, 114 Stat. 737 (2000), and section 104(b)(2)(A) of the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act, Public Law 106–163, 113 Stat. 1778 (1999).

Question. Does 25 U.S.C. § 4022(c) already provide the protection from liability Section 6(e) is intended to provide?

Section 6(e) and 25 U.S.C. § 4022(c) may provide similar protection, however, section 6(e) would mirror provisions that the Congress determined were necessary in previous Indian water settlements and would ensure that no additional liability would attach to the United States as a result of the Zuni Heaven settlement.

5. Section 7(b)

Question. Does the waiver of certain future claims for injuries to water quality contained in section 7(b), or any other provision of the bill, limit the authority of the Environmental Protection Agency, or any other Federal agency, to regulate water quality under the Clean Water Act or other legal authority or to seek compensation for damages to natural resources? If not, is the present language narrowly tailored and does it express that intention with sufficient clarity and specificity?

Section 7(b) as currently drafted can be read as limiting the Environmental Protection Agency's enforcement authority. Based on revisions to this section made by the parties during the August recess, all authorities of the Environmental Protection Agency and other federal agencies under the Clean Water Act or any other federal statute have been preserved. A limited future waiver of claims under the natural resource damages provisions of CERCLA is included in the new language. This waiver is limited, however, to

those natural resource damage claims, caused by a defined list of otherwise lawful activities, that the Zuni Tribe could have brought itself or requested the United States to bring on its behalf as a natural resource trustee. This provision does not affect the United State authority to bring natural resources damage claims in other contexts as a natural resource trustee. The intent of this provision is to protect water users who are otherwise complying with the law from claims for natural resource damages brought by the Tribe or by the United States as a natural resource trustee on its behalf. However, even the limited waiver of the United States's authorities is troubling in this context. This provision departs from current Indian law and policy. We concluded that the unique nature of this settlement—particularly that the Zuni lands in Arizona involved in this settlement will not be used as a homeland, that the lands at issue are primarily for ceremonial use, that the water rights and land involved is relatively small and the fact that the Tribe negotiated and supports the agreement—weighs in favor of departure from otherwise settled law and policy.

Question. What precedents exist in other legislation for a statutory waiver for future claims of this kind?

We are unaware of any precedent for these sorts of water quality waivers. These waivers are workable in this settlement because of the unique context of the Zuni lands in Arizona.

6. Section 7(c)(5)

Question. Please identify representative published judicial opinions in which the Department is or has been involved in which the validity of such a waiver of liability as to undisclosed breaches of trust has been upheld or rejected. If no published opinion is available adopting one or the other of these positions, please identify relevant unpublished opinions and provide copies for the use of the Committee.

Since 1993, every Indian water rights settlement entered into by the United States has included such a waiver, including section 9.4 of the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Agreement, ratified by the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Public Law 106–263, 114 Stat. 737 (2000), section 5(c) of the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act, Public Law 106–163, 113 Stat. 1778 (1999), and the Confederated Tribes of the Warm Springs Reservation Indian Water Rights Settlement Agreement (Nov. 1997) (settled without federal legislation).

Question. Please identify any particular circumstances or any general public policy justifying the proposed waiver of liability for unspecified breaches of trust with regard to the negotiation of the Settlement Agreement and the enactment of the proposed legislation that is now included in S. 2743.

The provisions of the proposed settlement of the Zuni Tribe's water rights claims represent agreements that have been reached between the Zuni Tribe and the state parties. The general willingness of the Administration to support agreements reached between the Tribe and its neighbors is consistent with the cornerstone of modern Indian law and policy to facilitate tribal self-determination by "giv[ing] the Indians control of their own affairs and their own

property." See *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 152 (1973) (quoting 78 Cong. Rec. 11,125 (1934) (Rep. Howard)). Along with such control and self-determination comes the need to take responsibility for agreements entered into and decisions made. The policy of including these waivers in Indian water settlements over the last decade is consistent with this responsibility.

7. Section 8(a)

Question. If it is intended that Section 8(a)(1) waives sovereign immunity to allow suits to be brought in state court, should the text be modified to make it explicit that state court jurisdiction is contemplated?

The Administration objects to that portion of Section 8(a)(1) that waives the sovereign immunity of the United States and purports to make the U.S. subject to suit in state courts. With respect to the jurisdiction of state courts, State law defines the jurisdictions of State courts. State courts of general jurisdiction would have the authority, if otherwise applicable sovereign immunity is waived, to exercise jurisdiction of the claims Section 8 addresses. Along the same lines, we note that the waiver in S. 2743 does not broaden the McCarren Amendment's waiver of the United States' sovereign immunity in state court.

Question. If it is indeed the intent that state court jurisdiction be extended over tribal rights beyond that granted in the McCarren Amendment, what public policy supports that extension of state authority?

The United States does not support the broad waiver of sovereign immunity in S. 2743. We believe that existing statutory waivers of the United States' sovereign immunity are sufficient to ensure that the United States is accountable for agreements entered into in this settlement concerning tribal rights.

Question. What additional language would be necessary to ensure that the tribe's right to enforce its rights against the state of Arizona in all appropriate courts is not restricted by the State's sovereign immunity, either now or in the future?

This question perhaps should be directed to the State of Arizona.

Question. What matters not relating to water rights, if any, are to be addressed in intergovernmental agreements executed pursuant to the proposed legislation?

The provisions to be addressed in the intergovernmental agreements are set forth in subparagraph 6.2A of the Settlement Agreement, and include payment of in lieu of taxes; provisions related to rights-of-way; wildlife management; agreements by the Tribe with respect to the delegation of programs under federal environmental statutes; tribal waiver of sovereign immunity; recognition of Zuni religious practices by the State and local governments and their agreement not to unreasonably withhold any necessary approvals for activities on Zuni fee lands related to the Tribe's religious practices.

Question. If matters not directly relating to water rights are to be litigated in the Arizona courts what policy considerations justify this limitation on the right the tribe would otherwise have to litigate those issues in Federal court?

The removal authority of the United States in S. 2743 was modified during the August recess to allow removal by the United

States where federal issues are raised. The remaining provisions were agreed to by the Zuni Tribe and the State parties.

Question. If it is intended that all litigation on matters set forth in section 8(a) is to take place in the Apache County court, should section 8(a) be modified to impose restrictions on the right of the United States to seek removal to Federal court if an action described in that subsection is filed against it?

The removal authority of the United States in S. 2743 was modified during the August recess to allow removal by the United States where federal issues are raised. The remaining provisions were agreed to by the Zuni Tribe and the State parties.

8. Section 8(b)

Question. Does section 8(b)(1)(F)(ii) need to be amended to more closely track the language of section 8(b)(1)(F)(i) with regard to "dam safety" so as to ensure that no gap in regulatory authority exists until the tribal water code is adopted or is it necessary to include an explicit reference to dam safety in section 8(b)(1)(F)(ii)?

The intent of that provision appears to be that the Secretary's authority would cover all water related matters on these lands.

9. Section 8(c)

Question. Would it not be desirable to modify section 8(c) to place reasonable limits on the scope of this obligation so that the Tribe is not permanently subjected to an unbounded and unreciprocated duty to provide others with access across its lands for uses that cannot now be anticipated?

We agree that modifications to the current language of section 8(c) are needed. During the August recess, we worked out new language for the rights-of-way provision. The new right-of-way provision clarifies that existing federal regulations with respect to the granting of rights-of-way will remain in place, with the exception that the Zuni Tribe has agreed to limit its objections to rights-of-way so long as they do not substantially or significantly harm the Tribe's wetlands rehabilitation project and the Tribe's uses of the land for cultural and religious practices. This protects the Zuni from significant impacts to their lands. Pursuant to these modifications, the Secretary would retain authority to grant rights-of-way. The Tribe would need to inform the Secretary about encroachment on its cultural and religious practices. This process is not intended to allow the United States to second guess the religious beliefs of the Zuni or to require detailed or public inquiry into the nature of those beliefs.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory impact of S. 2743 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 2743 will not result in any changes in existing law.