Department of Justice

STATEMENT

OF

SAM HIRSCH
ACTING ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

FOR THE
SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ON

"H.R. 4924, THE BILL WILLIAMS RIVER WATER RIGHTS SETTLEMENT ACT OF 2014"

PRESENTED ON

SEPTEMBER 19, 2014

STATEMENT FOR THE RECORD OF
ACTING ASSISTANT ATTORNEY GENERAL SAM HIRSCH
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The Department of Justice appreciates the opportunity to submit this Statement for the Record to further explain the Department's significant concerns about the waiver of sovereign immunity included in H.R. 4924. As Michael Black, Director of the Department of the Interior's Bureau of Indian Affairs, testified at the Committee's hearing on September 19, 2014, the Administration supports the goals of the bill, yet we have significant concerns about the waiver of sovereign immunity provision in H.R. 4924 that must be resolved before the Administration can support this legislation.

H.R. 4924 would address certain water rights issues in the Bill Williams River basin by approving two agreements, the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement. The Agreements, which are described in greater detail in Director Black's September 19 testimony, resolve certain water rights issues among Freeport Minerals Corporation, the United States and the Hualapai Tribe, but does not resolve any tribal water rights claims with finality. The Agreements resolve objections that the Department of the Interior filed to Freeport Minerals Corporation's application to sever and transfer certain water rights to serve its mining operations and provide for the long-term use of related water rights to benefit the Lower Colorado River Multi-Species Conservation Program (LCR MSCP). In addition, Freeport would agree not to object to water rights claimed for approximately 60 acres of unoccupied land held in trust for the Hualapai Tribe and approximately 560 acres of uninhabited lands held in trust for allottees. The Agreements are settlements among only some of the water users in the Bill Williams River basin. Other water users in the basin, and parties to the Agreement other than Freeport, would remain free to object to the water rights claimed for the tribal and allottee lands. We believe this is not an Indian water-rights settlement as the term is traditionally used, that is, a comprehensive settlement that resolves all tribal water rights in a basin with finality.

The Administration strongly opposes the waiver of federal sovereign immunity that is included in Section 7(a) of H.R. 4924. Because this is not a traditional Indian water-rights settlement, attempts to justify the waiver of sovereign immunity on the basis of past Indian water-rights settlements are unavailing. Moreover, these Agreements focus on objections to water rights claimed by a private company in a state administrative matter, and it is far from

clear that federal legislation is necessary to resolve this local water-rights dispute. Regardless of the need for legislation, however, there is no need for the bill to include a specific waiver of federal sovereign immunity. These Agreements, like other settlements that the United States enters into, can be enforced against the United States through existing legal mechanisms, including the waivers of sovereign immunity provided through generally applicable statutes, such as the Tucker Act, the Administrative Procedure Act, and the McCarran Amendment.

Such generally applicable waivers of sovereign immunity are preferable to the type of piecemeal waiver included in H.R. 4924. These existing waivers of sovereign immunity provide clear and well-established legal standards for judicial review. Use of generally applicable waivers fosters fair and equal treatment by ensuring that the same rules apply to all similarly situated parties. By contrast, the piecemeal waiver of sovereign immunity unbounded by such standards is likely to promote wasteful litigation and demands on the public fisc. These piecemeal waivers promote results that undermine important legal principles that generally govern litigation against the United States. The general problems with an ad hoc approach to waivers of federal sovereign immunity are exacerbated by the structure of Section 7(a), which appears to authorize civil actions against the United States *in state court*. The prospect that different parties could pursue claims in either state or federal court would leave open the possibility of conflicting outcomes. The Administration cannot support legislation that waives the immunity of the United States from suits for interpretation of these Agreements in state court.

The concept of sovereign immunity for the United States is a long and well-established principle that protects the ability of federal agencies to carry out their myriad and complex responsibilities in an orderly fashion, while providing for judicial review of claims against the government through specific procedures and mechanisms for redress. A form of this immunity was recognized as a protection so important for sovereignty that it was extended to the states and enshrined in the Constitution by the addition of the Eleventh Amendment. For this reason, both this Administration and prior Administrations have consistently objected to new or overly broad waivers of the United States' sovereign immunity. While Congress has chosen to include sovereign-immunity waivers in a few Indian water-rights settlement acts, those were settlements in which tribal water rights in a basin were quantified and resolved fully and finally. Such settlements help tribes obtain access to needed water while providing all water users in a basin with the certainty necessary to prevent future disputes. In contrast, this bill resolves no tribal water rights with finality and will not result in a court-approved water decree determining basin-wide water rights. Moreover, the bill does not reach all trust or other federally reserved claims in the basin and addresses only a partial recognition of limited tribal water rights associated with uninhabited lands that are not in the same water basin as the Tribe's main Reservation. In short, the Agreements lack the hallmarks of traditional Indian water-rights settlements. In this context, it is particularly inappropriate to include a new, and even broader, waiver of the United States' immunity.

The Administration has worked closely with the parties and with the sponsors of S. 2503, the Senate version of H.R. 4924, to find a way to move past our disagreements. We believe that there are several alternatives, including the use of already established waivers of sovereign immunity that would address the parties' enforcement concerns in a manner that is more consistent with existing law and precedent than the current language in the bill. We look

forward to continuing to work with the parties, the sponsors of the legislation, and the Committee to address the one remaining obstacle to the Administration's support for the bill.