



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2008

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
U.S. Senate
Washington, DC 20510

Dear Chairman Rahall and Chairman Dorgan:

This is to express the Department of Justice's views on H.R. 6768 and companion legislation S. 3381, which contain two titles, the "Aamodt Litigation Settlement Act" (Title I) and the "Taos Pueblo Indian Water Rights Settlement Act" (Title II). The Department of Justice opposes H.R. 6768 and S. 3381 because the provisions in the bills waiving tribal claims against the United States are not adequate to protect the United States from potential future liability.

We note that the testimony delivered by the Department of the Interior on these bills describes a number of concerns the Administration has with the bills and expresses the Administration's willingness to work with the settlement parties and sponsors of the bills to address Administration concerns. We recently have made efforts to reach out to the parties to seriously engage on these issues but the parties to the Aamodt settlement thus far have not done so. With respect to the Taos Pueblo settlement, although we have had productive negotiations with the parties, final waivers have yet to be agreed upon. Accordingly, the Department of Justice must now voice its opposition to the bills as they currently stand. The Department of Justice has repeatedly raised its substantial concerns with the waiver provisions with all parties but the parties have thus far opted not to accommodate these concerns. We remain willing to work with the parties and the sponsors of the legislation to address these concerns.

As currently drafted, the waivers set forth in the bills do not adequately protect the United States from future liability, do not provide the measure of certainty and finality that the proposed federal contribution should afford, and will engender additional litigation that can and should be avoided by careful drafting. The bills call for the United States to provide \$162.3 million to the Aamodt settlement and \$113 million to the Taos Pueblo settlement. Even though these amounts substantially exceed our assessment of the potential legal liability of the United States here, the bills would not adequately protect the United States from future litigation regarding these and closely related claims, including breach of trust claims analyzed in assessing what the United States might contribute to the settlement. In Aamodt, for example, the waiver language in the bill does not contain language clearly waiving claims relating to damages to land and other resources caused by past loss of water and off-reservation water rights are not unambiguously included. Ambiguous language regarding the nature of claims waived in past settlements has created problems for the United States, including conflicts over the interpretation and ultimately the implementation of those settlements. We should bring to bear here the lessons learned from conflicts over past settlements in order to avoid potential issues in the future, including litigation over the scope and meaning of the waivers that would defeat the goal of finality.

In addition, Title II waives the sovereign immunity of the United States for “interpretation and enforcement of the Settlement Agreement” in “any court of competent jurisdiction.” This waiver is unnecessary, as demonstrated by the absence of such a waiver in Title I. More importantly, it will invite more litigation -- and likely in competing state and federal forums -- rather than resolving the underlying adjudication.

Indian water right settlements should comport to the guidelines outlined in the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (“Criteria”)(55 Fed. Reg. 9223 (1990)). Instead, these settlements violate the tenets of the guidelines and potentially expose the Federal government to further litigation. The Administration also remains concerned about the substantial cost that these settlements would require, particularly in light of the fact that not all of the claims that could be asserted against the Federal government will be extinguished.

Again, we stand ready to work with the settlement parties and the sponsors of H.R. 6768 and S. 3188 to resolve our concerns. However, absent substantial changes to the waiver provisions and elimination of the sovereign immunity waiver in section 212, we must oppose the bills.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact this office. The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,



Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Don Young
Ranking Member
Committee on Natural Resources
U.S. House of Representatives

The Honorable Lisa Murkowski
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Grace F. Napolitano
Chairwoman
Subcommittee on Water and Power
Committee on Natural Resources
U.S. House of Representatives

The Honorable Cathy McMorris Rodgers
Ranking Member
Subcommittee on Water and Power
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