

**WRITTEN TESTIMONY OF THOMAS BUSCHATZKE
DIRECTOR
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BEFORE THE
HOUSE NATURAL RESOURCES COMMITTEE,
SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 8940, NORTHEASTERN ARIZONA INDIAN WATER RIGHTS SETTLEMENT ACT
OF 2024**

July 23, 2024

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee:

I. Introduction

My name is Thomas Buschatzke. I am the Director of the Arizona Department of Water Resources. Thank you for the opportunity to provide written testimony on behalf of the State of Arizona on the Northeastern Arizona Indian Water Rights Settlement Act of 2024 (Act). The State of Arizona strongly supports this important legislation, which approves and authorizes a settlement of the water rights claims of the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe in Arizona, ending decades of litigation and bringing much needed safe and reliable water supplies to all three Tribes.

II. Importance of settling Indian water rights claims in Arizona

There are 22 federally recognized Indian Tribes within Arizona. The total area of all tribal land in Arizona is approximately 20 million acres, which is second only to tribal landholdings in Alaska. Over one fourth of Arizona is tribal land. Indian tribes have some of the oldest and largest claims to water in the State based on the federal reserved rights doctrine articulated in *Winters v. United States*.

Eleven¹ of the 22 federally recognized Indian Tribes in Arizona still have unresolved water rights claims, including the claims of the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe, which we are seeking to settle through the Act. Resolving tribal water rights claims through settlement is a priority for the State. Settlement avoids the cost and uncertainty of litigation and provides certainty to both tribal and non-tribal communities in the State regarding available water supplies. In many cases, including here in the Act, settlement also provides critical funding for the water treatment and delivery infrastructure necessary to bring water to tribal nations and their members. Such infrastructure development often also enables much needed economic development projects.

III. In General: Navajo Nation’s, Hopi Tribe’s and San Juan Southern Paiute Tribe’s water rights claims

The Navajo Nation, Hopi Tribe, and San Juan Southern Paiute lands cover approximately 18,087.728 square miles in Arizona. All three Tribes have asserted claims to in-state surface water and groundwater for their lands. The Navajo Nation and the Hopi Tribe have also asserted claims to water from the Colorado River in both the Lower and Upper Basins. These water rights claims are some of the largest outstanding tribal water rights claims in Arizona.

The State of Arizona and key stakeholders² in the State have been involved in discussions with the Navajo Nation and Hopi Tribe to settle their water rights claims since the 1980s. Federal legislation authorizing a settlement of both Tribes’ claims to the Little Colorado River in Arizona was introduced in Congress in 2012. However, that legislation was never enacted. Negotiations actively resumed in late 2023, with the San Juan Southern Paiute Tribe joining the negotiations earlier this year.

¹ This number includes the Hualapai Tribe whose settlement was approved by Congress in 2022. The post-legislation amended and conformed Hualapai Tribe Settlement Agreement is anticipated to be executed by all parties later this year. This number also includes the San Carlos Apache Tribe and the Tohono O’odham Nation, whose claims have been partially settled. The other federally recognized Tribes with outstanding claims in Arizona are: the Havasupai Tribe, Kaibab Band of Paiute Indians, Pascua Yaqui Tribe, Tonto Apache Tribe, and Yavapai Apache Nation.

² Arizona State Land Department, Arizona Game and Fish Commission, Arizona Department of Transportation, Cities of Flagstaff, Winslow and Holbrook, Towns of Taylor, Snowflake, Show Low, Eagar, Springerville, and St. Johns, Salt River Project, Central Arizona Water Conservation District, Arizona Public Service Corporation, Atkinson Trading Company, Inc., U.S. Department of the Interior (will sign after being directed to by the Act) and numerous water districts, water companies and landowners in the Little Colorado River Basin.

After tireless efforts by representatives of the three Tribes, the State, municipalities and numerous other non-tribal water users, a comprehensive settlement of all the water rights claims of the three tribes in Arizona has been reached in the Northeastern Arizona Indian Water Rights Settlement Agreement (Settlement Agreement).

Under the terms of the settlement, the Tribes will receive the right to use all surface water from the Little Colorado River and its tributaries flowing on their Reservations and all Underground Water beneath their Reservations, with certain limitations described below. "Underground Water" is defined in the Settlement Agreement and Act as all water beneath the surface of the Earth, within the State, other than Effluent and Colorado River Water.

The Navajo Nation and the Hopi Tribe will receive a total of 47,000 acre-feet of the State's annual 50,000 acre-foot apportionment of Upper Basin Colorado River water. Arizona's Upper Basin Colorado River water is the highest priority Colorado River water in the Upper Basin. The Navajo Nation will also receive Fourth Priority Lower Basin Colorado River water, and a portion of the Hopi Tribe's existing entitlement to Fourth Priority Lower Basin Colorado River water associated with land owned by the Hopi Tribe in La Paz County, Arizona.

The Act authorizes the Navajo Nation and the Hopi Tribe to divert their Upper Basin and Lower Basin Colorado River water supplies anywhere in the Upper or Lower Basin in Arizona, including Lake Powell, and use the water on or off their Reservations anywhere in the Upper or Lower Basin in the State. The Navajo Nation will also have the right to divert its Upper Basin and Lower Basin Colorado River water supplies in New Mexico and Utah for use in Arizona.

The Act authorizes the Navajo Nation and the Hopi Tribe to use, lease, exchange and store their Upper and Lower Basin Colorado River supplies on or off their Reservations in both the Upper and Lower Basins of the State. The Act also authorizes the Navajo Nation to store its Upper and Lower Basin Colorado River supplies in the Navajo Reservoir and Frank Chee Willetto, Sr. Reservoir in New Mexico for use in Arizona.

The three Tribes, and the United States as trustee for the Tribes, Navajo Allottees and Hopi Allottees, will waive claims for: (1) additional water rights for existing lands; (2) injury to water based on changes in or degradation of the salinity

or concentration of naturally occurring chemical constituents contained in water; and (3) injury to their water rights with certain exceptions. Those exceptions include retention of the right to make claims for injury caused by: (A) certain new surface water uses by means of direct diversion; (B) new reservoirs and reservoir enlargement (with limited exceptions); and (C) withdrawals of groundwater from certain wells within Buffer Zones adjacent to the southern and western boundaries of the Navajo Reservation (described below).

The Act provides for a limited waiver of sovereign immunity by the Tribes and the United States acting as trustee for the Tribes, the Navajo Allottees and the Hopi Allottees, so that they can be joined in actions involving the interpretation or enforcement of the Settlement Agreement and Act brought by the parties to the Settlement Agreement and landowners and water users in the Little Colorado River Watershed and the Gila River Watershed. The Tribes have consented to this limited waiver of sovereign immunity.

The Act approves, ratifies and confirms a treaty entered into by the Navajo Nation and the San Juan Southern Paiute Tribe in 2000 to settle land claims and other disputes between the Tribes, and an addendum to the treaty entered into by the Tribes in 2004. Additionally, the Act creates a reservation for the San Juan Southern Paiute Tribe, consisting of two non-contiguous areas in Arizona and Utah, within the boundaries of the Navajo Reservation. The Act and the Settlement Agreement resolve water rights claims only for the portion of the San Juan Southern Paiute Tribe Reservation in Arizona, known as the “Southern Area.”

The Act provides \$5 billion dollars in federal funding primarily for the construction, operation, maintenance and replacement of various water projects on the three Reservations, including a major pipeline to bring the Colorado River water from Lake Powell to the Navajo Reservation and the Hopi Reservation. The funding also includes money for the Navajo Nation and Hopi Tribe to use to purchase land within the State and associated Lower Basin Colorado River Water Rights.

A. Settlement Provisions Concerning the Navajo Nation

(1) The Navajo Nation will have unlimited rights to withdraw Underground Water within the boundaries of its Reservation. However, the Navajo Nation and Hopi Tribe have entered into an Inter-Tribal Agreement (the terms of which are included in the Settlement Agreement), which limits

withdrawals of Underground Water from the N-aquifer, one of two aquifers beneath the Reservations, to protect aquifer storage and certain washes and springs on the Reservations.

Two buffer zones are established along the southern and western boundaries of the Navajo Nation Reservation. Buffer Zone 1, which extends two sections from the Navajo Reservation's boundary, and Buffer Zone 2, which extends an additional four sections from the southern and western boundaries of the Reservation. In Buffer Zone 1, the Nation retains the right to challenge new wells with a pump capacity greater than 35 gallons-per-minute (gpm) that cause injury to its groundwater rights. In Buffer Zone 2, the Nation retains the right to challenge new wells with a pump capacity greater than 500 gpm that cause injury to its groundwater rights.

(2) The Navajo Nation will have the right to divert and deplete any surface water from the mainstem of the Little Colorado River and its tributaries that reaches its Reservation, including quantified amounts and priority dates for specific historic Navajo irrigation projects totaling 40,780 acre-feet per year (afy).

(3) The Navajo Nation will have the right to use water on lands held in fee by the Nation in accordance with State law, and the right to use water on lands held in trust for the Nation as permitted by applicable law.

(4) The Navajo Nation will receive an allocation of 44,700 afy of the State of Arizona's annual 50,000 acre-foot apportionment of Upper Basin Colorado River water, which is the highest priority Colorado River water in the Upper Basin. This water may be used on and off the Navajo Nation Reservation anywhere in the Upper and Lower Basin in Arizona. The Navajo Nation will have the right to use the Colorado River and the San Juan River in the Upper Basin to convey its Upper Basin Colorado River water from the Upper Basin for use in the Lower Basin of the State.

(5) The Navajo Nation will receive an allocation of 3,500 afy of previously unallocated Fourth Priority Lower Basin water from the State of Arizona's annual Lower Basin entitlement. This water may be used anywhere in the Upper and Lower Basins in the State.

(6) The Navajo Nation will also receive an allocation of 100 afy from the Hopi Tribe's existing contract for Fourth Priority Lower Basin water currently being used for agricultural purposes along the mainstem of the Lower Basin Colorado River. This water may be used anywhere in the Upper and Lower Basins in the State.

(7) The Navajo Nation will be authorized to divert its Upper Basin and Lower Basin Colorado River water supplies anywhere in the Upper or Lower Basin in Arizona, including Lake Powell. The Navajo Nation will also have the right to divert its Upper Basin and Lower Basin Colorado River water supplies in New Mexico and Utah for use in Arizona.

(8) The Navajo Nation will be authorized to lease, exchange and store its Upper Basin and Lower Basin Colorado River water anywhere within the Upper and Lower Basins in the State. The Nation will also be authorized to store the water in the Navajo Reservoir and Frank Chee Willetto, Sr. Reservoir in New Mexico for use in Arizona.

(9) The Navajo Nation will have the right to use all effluent produced on the Navajo Reservation, off-reservation lands held in trust for the benefit of the Navajo Nation, and lands owned in fee by the Navajo Nation.

B. Settlement Provisions Concerning the Hopi Tribe

(1) The Hopi Tribe will have unlimited rights to withdraw Underground Water within the boundaries of its Reservation. Withdrawal of Underground Water from the N-aquifer, however, is limited in certain parts of the Reservation pursuant to the Inter-Tribal Agreement between the Navajo Nation and Hopi Tribe referenced above.

(2) Off-reservation groundwater pumping is subject to restrictions in Buffer Zones 1 and 2 and subject to a separate agreement with the Navajo Nation and other parties.³

³ The separate agreement is titled "Certain Agreements Among The United States, The Hopi Tribe, The Navajo Nation, Bar T Bar, And The Arizona State Land Department Concerning Underground Water And Related Rights And Obligations In The Navajo Hopi C-Aquifer Pumping Restriction Area And Bar T Bar Ranch" and included as Exhibit 9.10 to the Settlement Agreement.

(3) The Hopi Tribe is entitled to divert and deplete all surface water that reaches or flows within its Reservation.

(4) The Hopi Tribe will have the right to use water on lands currently held in fee by the Tribe and off-reservation lands currently held in trust for the Tribe as described in Exhibits to the Settlement Agreement. The Tribe will have the right to use water on new fee lands as permitted by State law and new trust lands as permitted by applicable law.

(5) The Hopi Tribe will receive an allocation of 2,300 acre-feet per year of the State of Arizona's annual 50,000 acre-foot entitlement to Upper Basin Colorado River water, which is the highest priority Colorado River water in the Upper Basin. This water may be used on and off the Hopi Tribe's Reservation and trust lands in the Upper or Lower Basin in Arizona.

(6) The Hopi Tribe currently holds a contract for a total of 5,928 afy of Lower Basin Colorado River water that is used to irrigate land owned by the Tribe along the Colorado River mainstem in the Cibola Valley Irrigation Drainage District in Arizona (Cibola Water). This contract includes 4,278 afy of Fourth Priority water. Under the terms of the Settlement Agreement, the Tribe will transfer 100 acre-feet of this Fourth Priority contract to the Navajo Nation. The retained Hopi Tribe Cibola Water may be used by the Hopi Tribe anywhere within Arizona and pursuant to its delivery contract with the United States.

(7) The Hopi Tribe will be authorized to divert its Upper Basin and Lower Basin Colorado River water supplies anywhere in the Upper or Lower Basin in Arizona, including Lake Powell.

(8) The Hopi Tribe will be authorized to lease, exchange and store its Upper Basin and Lower Basin Colorado River water anywhere in the Upper or Lower Basin in the State.

(9) The Hopi Tribe will have the right to use all effluent produced on the Hopi Reservation, off-reservation lands held in trust for the benefit of the Hopi Tribe, and lands owned in fee by the Hopi Tribe.

C. Settlement Provisions for the San Juan Southern Paiute Tribe

(1) The Act creates a reservation for the San Juan Southern Paiute Tribe consisting of two non-contiguous areas in Arizona and Utah, within the boundaries of the Navajo Reservation. The settlement provisions apply only to the portion of the Reservation located in Arizona, referred to as the “Southern Area.”

(2) The San Juan Southern Paiute Tribe will have unlimited rights to withdraw Underground Water within the boundaries of its Reservation.

(3) The San Juan Southern Paiute Tribe will have the right to divert and deplete all surface water that reaches or flows across its Reservation.

(4) The San Juan Southern Paiute Tribe will have the right to use water on lands held in fee by the Tribe as permitted by State law, and the right to use water on lands held in trust for the Tribe as permitted by applicable law.

(5) The San Juan Southern Paiute Tribe will have the right to receive up to 350 afy of water delivered from the Navajo Tribal Utility Authority.

(6) The San Juan Southern Paiute Tribe will have the right to all effluent developed on the Southern Area of the Reservation, off-reservation lands held in trust by the United States for the benefit of the San Juan Southern Paiute Tribe, and lands owned in fee by the San Juan Southern Paiute Tribe.

IV. Congressional Funding for the Northern Arizona Indian Water Rights Settlement

The Act provides \$5 billion dollars in Congressional funding for the settlement. The majority of the funding will be deposited into funds to be used for the construction of various water infrastructure projects on the three Reservations, and for the operation, maintenance and replacement costs associated with the infrastructure.

A list of projects to be funded by the Act is provided below⁴:

⁴ A complete list of all projects and fund accounts may be found in Section 13 of the Act.

(1) The iiná bá - paa tuwaqat'si pipeline is estimated to cost \$1.7 billion dollars and will be designed and constructed to bring Colorado River water from Lake Powell to the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Reservation.

(2) Several Navajo Nation-specific water projects have been included in the Settlement Agreement and Act totaling approximately \$2.4 billion dollars for the delivery of Colorado River water, Little Colorado River water and groundwater to communities on the Navajo Nation Reservation.

(3) \$390 million dollars is allocated for the Hopi Arsenic Mitigation Project and Hopi Slide Rock Project.

(4) \$28 million dollars is allocated to the San Juan Southern Paiute Tribe for groundwater development, treatment, and delivery projects.

(5) Lower Basin Colorado River water acquisition funds of \$28 million dollars and \$1.5 million dollars for the Navajo Nation and Hopi Tribe, respectively, are provided to the two Tribes for the purchase land and associated Lower Basin Colorado River rights within the State.

(6) Agricultural conservation funds of \$80 million dollars, \$30 million dollars, and \$300,000 dollars for the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe, respectively, are allocated for agricultural efficiency improvement projects and well replacement.

V. Transbasin Use, Lease, Exchange and Storage of Colorado River Supplies

As mentioned above, the legislation authorizes the Navajo Nation and Hopi Tribe to use, lease, exchange and store their Upper and Lower Colorado River water supplies in both the Upper Basin and Lower Basin in Arizona. The ability of the Hopi Tribe and Navajo Nation to utilize these supplies in both the Upper and Lower Basins is of critical importance to the settlement. The Navajo Nation Reservation is located in both the Upper and Lower Basin in Arizona and the Nation must have the ability and flexibility to utilize water supplies as it determines necessary and practical throughout its Reservation. The Hopi Tribe Reservation is located entirely

in the Lower Basin and must have the ability to utilize its Upper Basin and Cibola water supplies on its Reservation. Authorization of transbasin use and leasing of Colorado River water supplies is a critical component of the legislation that supports the continued sovereignty and self-determination of the Navajo Nation and Hopi Tribe by affirming their autonomy over resource management.

Further, the ability of the Tribes to lease Colorado River water supplies for use in either the Lower or Upper Basins in Arizona will maximize economic opportunities for the Tribes. It will also provide flexibility in water management for both Tribes and the State.

The Act contains accounting provisions to ensure that the Navajo Nation's and Hopi Tribe's Upper Basin water supplies are accounted for as Arizona's Upper Basin water regardless of the place of diversion, use or lease of the water. Similar accounting provisions are contained in the Act for the Tribes' Lower Basin water to ensure that those water supplies are accounted for as Arizona's Lower Basin water regardless of their place of diversion, use or lease.

VI. Water Delivery Contracts

During the settlement negotiations, the United States Bureau of Reclamation informed the State and other settlement parties that water delivery contracts for the Colorado River supplies included in the Settlement Agreement could not be drafted within the Settlement Agreement completion timeframe contemplated by the Tribes. Typically, these contracts are completed and attached to a Settlement Agreement prior to its execution and introduction of authorizing legislation in Congress.

Because the Settlement Agreement will be executed in advance of the completion of the water delivery contracts, several express limitations on these contracts were included in the Settlement Agreement and the Act. These limitations include, but are not limited to: (1) prohibiting any alteration or reduction of the State's annual Lower Basin apportionment; (2) prohibiting any alteration or impairment of the State's rights, authorities, and interests under the Boulder Canyon Project Act of 1928 or the Upper Colorado River Basin Compact of 1948; (3) prohibiting any limitation on the State's ability to seek or advocate changes in the Colorado River system's operating rules, criteria, or guidelines for the State's Upper and Lower Basin apportionments; (4) such contracts may not

prejudice the interests of the State or serve as precedent against the State in litigation; and (5) such contracts must also provide that any Lower Basin water must be curtailed to the same extent as other Lower Basin delivery contracts for the same type and priority water regardless of whether used in the Upper or Lower Basin of the State.

These water delivery contracts will be unprecedented because they will permit the transbasin use of Upper and Lower Basin Colorado River by the Tribes and the lease, exchange and storage of the water by third parties in Arizona. These tools will give the Navajo Nation and Hopi Tribe access to new markets resulting in significant economic benefits.

VII. Enforceability Date

The settlement will become enforceable, and the waivers and releases executed by the Parties will become effective, when certain conditions are met following enactment of the Act. Those conditions include: (1) the entry of a Judgment and Decree by the Little Colorado River Adjudication Court and Gila River Adjudication Court approving the portions of the settlement applicable to those adjudications; (2) the appropriation by Congress of \$5 billion dollars and the deposit of that money in the designated accounts for the Tribes pursuant to section 13 of the Act; (3) amendment of the Settlement Agreement to both conform to the Act and add as Exhibits the required water delivery contracts between the Secretary of the Interior and the Navajo Nation and the Hopi Tribe; and (4) execution of the amended Settlement Agreement by the Secretary of the Interior, the Tribes, the State and certain other parties.

If all the conditions of enforceability are not met by June 30, 2035, or such alternative later date as may be agreed upon by the Tribes, the Secretary, and the State, the Act will be repealed and the Settlement Agreement will be void, except that the San Juan Southern Paiute Tribe Reservation will remain in existence.

VIII. Non-Federal Contribution

The Settlement Agreement provides 47,000 afy of the State's 50,000 afy apportionment of Upper Basin Colorado River Water to the Navajo Nation and Hopi Tribe and 3,500 afy of unallocated Lower Basin Colorado River water to the Navajo Nation. The Upper Basin Colorado River water is an extremely valuable water

supply because of its high priority. The ability of the Navajo Nation and the Hopi Tribe to lease these supplies in either the Lower or Upper Basins of the State will provide a significant economic benefit to the two Tribes.

The Settlement will also provide the Tribes with a renewable water supply from in-state surface water as well as unlimited use of groundwater beneath each of the Reservations, subject to certain limitations agreed to between the Tribes. The Settlement's restrictions on groundwater withdrawals in Buffer Zones 1 and 2 adjacent to the exterior boundary of the Navajo Nation Reservation will protect finite groundwater supplies for communities on the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Tribe Reservations.

In addition, the State legislature has established three funds that provide for the development and implementation of projects designed to improve, protect and augment water supplies in the State, they include the Arizona Water Protection Fund, the Long-term Water Augmentation Fund, and the Water Supply Development Revolving Fund. State monies in these funds are available to any tribe with qualifying projects in Arizona. Both the Navajo Nation and the Hopi Tribes are recipients of grant monies from the Arizona Water Protection Fund.

IX. Importance of the Legislation to the Parties and the Entire State

Enactment of the legislation is of critical importance to all the parties to the settlement, as well as to the entire State. Settlement of the Tribes' water rights claims will put an end to decades of conflict and litigation over the Tribe's claims and will provide other important benefits to the Tribes and non-tribal water users throughout the State.

For all three Tribes, the settlement will provide reliable and sustainable water supplies for their lands. In particular, it will provide access to safe running water to the many households on the three Reservations that are without that basic water service. For the Navajo Nation and Hopi Tribe, the settlement will also provide an economic opportunity by allowing the Tribes to lease their Colorado River water supplies within the State. The settlement will provide a unique benefit to the San Juan Southern Paiute Tribe by creating a long-awaited Reservation for the Tribe from lands within the Navajo Reservation.

For other water users in the State, the settlement will provide water stability and security, ending decades of litigation and uncertainty. Further, the ability of the Navajo Nation and Hopi Tribe to lease their Colorado River water supplies across basin boundaries within the State is of great importance to the future of the State because it will facilitate the movement of water to extremely water-challenged areas of the State.

VIII. Conclusion

The State of Arizona strongly supports H.R. 8940, the Northeastern Arizona Indian Water Rights Settlement Act of 2024. The Act authorizes a comprehensive settlement of the water rights claims of the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Tribe in Arizona, including claims to the Colorado River. Settlement of the Tribes' water rights claims is an important step in achieving the State's goal of settling all outstanding Indian water rights claims and ensuring all Arizona residents have access to clean, reliable, running water. Settlement of the claims will end decades of litigation, provide certainty to tribal and non-tribal water users throughout the State, and at long last provide the Tribes with reliable, sustainable and safe water supplies.