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BRANDON GEBHART, P.E.
STATE ENGINEER

July 22, 2024

Honorable Cliff Bentz,
Chairman

Honorable Jared Huffman,
Ranking Member

Honorable Harriet Hageman,
Representative, State of Wyoming

RE: House Natural Resources Subcommittee on Water, Wildlife and Fisheries

July 23, 2024, Legislative Hearing on Northeastern Arizona Indian Water Rights Settlement Act of 2024 (H.R. 8940)

Dear Representatives Bentz, Huffman, and Hageman;

My name is Brandon Gebhart, and I am the Wyoming State Engineer and the Wyoming Governor's representative regarding the Colorado River. I am writing on behalf of the State of Wyoming to express some of Wyoming's concerns regarding the Northeastern Arizona Indian Water Rights Settlement Act of 2024 (H.R. 8940). Wyoming supports the efforts of Arizona, the Navajo Nation, the Hopi Tribe, the San Juan Southern Paiute Tribe, and the United States to comprehensively settle the water rights claims of those Tribes. However, various provisions of HR 8940 raise significant legal and technical concerns which will impact Wyoming and the other Basin States¹ which rely on the Colorado River, and which must be resolved prior to approval of the settlement.

Tribal water right settlements are extremely complex and difficult undertakings. The settlement offered by HR 8940 is certainly no exception. In fact, the typical complexities and difficulties are amplified due to the settlement's direct relation to elements of the "Law of the River." The nexus between the proposed settlement and the Law of the River, and the uncertainty about how provisions of the settlement will operate under the Law of the River, form the bulk of Wyoming's concerns.

The Law of the River is a complex legal framework negotiated, litigated, and developed over the last one hundred years. It apportions the beneficial consumptive use of water from the Colorado River system between the Upper and Lower Basins, among the seven Basin States, and between the United States and Mexico. The Law of the River also establishes the States' legal obligations, rights, and interests in the Colorado River Basin. The Basin States, including Wyoming, rely on

¹ The Colorado River and its tributaries supply water to the Upper Division States of Colorado, New Mexico, Utah, and Wyoming, and the Lower Division States of Arizona, California, and Nevada. Collectively, the Basin States.

the certainty of the Law of the River to effectuate and protect those obligations, rights, and interests, and to supply water to millions of people and millions of acres in the Colorado River Basin under various hydrologic conditions.

Each Basin State, including Wyoming, is affected by, and has been closely involved in, the development of the Law of the River. They have negotiated interstate compacts, litigated over the management and allocation of Colorado River water, and helped develop federal laws and regulations concerning the Colorado River system. The Basin States have also helped negotiate a water treaty with Mexico, implemented drought mitigation and salinity control measures in the Basin, and carried out environmental programs to recover endangered species endemic to the Basin. Every aspect of Colorado River water management, allocation, and operation affects the Basin States' interests.

The foundation of the Law of the River is the 1922 Colorado River Compact. The 1922 Compact divides the water of the Colorado River System between the Upper Basin and the Lower Basin. It apportions the "exclusive beneficial consumptive use" of water to each Basin, and clearly separates the two Basins to accomplish its purposes. Dividing the whole basin into two halves provides the fundamental framework for much of the law which has followed, and plays a significant role effectuating and protecting the Basin States' obligations, rights, and interests.

The clear line of separation between the two Basins does not follow state lines. The large majority of Arizona lies within the Lower Basin. Arizona has a separate, exclusive right to use Colorado River water within that portion. But a portion of Arizona's northeast corner lies within the Upper Basin. Within that northeast corner, Arizona has the exclusive right to use the 50,000 acre-feet of water per year apportioned to it under the 1948 Upper Colorado River Basin Compact.

The settlement proposed by HR 8940 blurs the clear line of separation between the two Basins and will therefore impact the Basin States' obligations, rights, and interests. It provides for the ability to use water apportioned to the Upper Basin within the Lower Basin. The primary reason driving this outcome is simple—a large portion of the affected Tribal reservations lie within the Lower Basin portion of Arizona. But the proposed settlement goes even further. It would also allow Upper Basin apportioned water to be used outside of the affected Tribal reservations within the Lower Basin portion of Arizona, for lease and exchange, delivered through non-tribal facilities to non-tribal uses. This marketing authorization ensures almost immediate use and the following immediate impacts. Even further, the proposed settlement provides for the delivery and accounting of Upper Basin water within the Lower Basin portion of Arizona water without first attempting to resolve the significant legal and technical issues the unprecedented proposal clearly, and predictably, raises. These concerns must be resolved, if possible, to avoid impacting Wyoming's obligations, rights, and interests under the Law of the River.

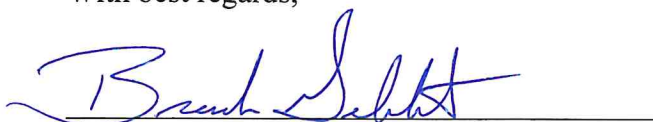
Unless properly limited, the unprecedented proposed settlement also promises to produce unintended consequences. There have been multiple proposals throughout the years which attempted to blur the line which separates the Upper and Lower Basins. The Basin States, except

in unique circumstances with clearly defined and agreed upon limitations,² have ultimately rejected those proposals. Many such proposals still exist, and those who speculate in water would welcome a dismantling of the protections provided to the Basin States' rights and interests and their existing water uses. The circumstances associated with the settlement proposed by HR 8940 are undoubtedly unique, as are other circumstances in the Basin. But the proposed settlement, to the extent it impacts the obligations, rights, and interests of the Basin States, should be approved only if it can be adequately limited by provisions developed through a consensus of the Basin States.

In addition to the Law of the River concerns identified above, the proposed settlement also raises a concern which is fundamental to western water law. It appears to grant the Secretary of the Interior, or the Tribes, unprecedented authority over state water resources. The proposed settlement appears to grant the Secretary of the Interior broad authority over water courses in Colorado, New Mexico, and Utah, including the authority to transport and store the settlement water in those states.³ It also appears to grant authority for the diversion of the settlement water in New Mexico and Utah.⁴ Colorado, New Mexico, and Utah are not parties to the settlement, and it does not appear they have agreed to those settlement provisions. Unlike the situation in the Lower Basin, the Secretary of the Interior is not the water master in the Upper Basin. By its terms, the provisions of 1948 Upper Colorado River Basin Compact, which apportions the settlement water to Arizona, cannot interfere with the right of any state "to regulate within its boundaries the appropriation, use and control of water[.]"⁵ Additionally, beginning more than one hundred years ago, Congress has deferred to state water law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and a myriad of other federal statutes. Any weakening of the deference to state water law would be inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states. Wyoming strongly opposes any weakening of this long-standing federal deference to state water law.

Wyoming supports the efforts to complete the Tribal water rights settlement embodied in HR 8940. But, for the reasons outlined above, Wyoming cannot support HR 8940 as written. The complicated issues related to the Law of the River can only be resolved through consensus agreement of all the Basin States. Wyoming is willing and ready to work with the Basin States, the Tribes, congressional staffers, and members of Congress to explore solutions which adequately address those issues.

With best regards,



Brandon Gebhart, P.E.
Wyoming State Engineer

² See Section 10603 of the Northwestern New Mexico Rural Water Projects Act, Public Law 111-11, March 30, 2009, 123 Stat. 1383.

³ For example, Section 6(f) of HR 8940.

⁴ For example, Section 6(b)(3)(a)(i) of HR 8940.

⁵ Article XV(b), Upper Colorado River Basin Compact.

Wyoming Governor's Representative to the Colorado River

cc:

Wyoming Governor Mark Gordon

Wyoming Senator John Barrasso

Wyoming Senator Cynthia Lummis

Tom Buschatzke, State of Arizona

JB Hamby, State of California

Becky Mitchell, State of Colorado

John Entsminger, State of Nevada

Estevan Lopez, State of New Mexico

Gene Shawcroft, State of Utah