

**WRITTEN TESTIMONY OF THOMAS BUSCHATZKE
DIRECTOR
ARIZONA DEPARTMENT OF WATER RESOURCES
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER, OCEANS, AND WILDLIFE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R 7633, HUALAPAI TRIBE WATER RIGHTS SETTLEMENT ACT OF 2022**

May 12, 2022

Chairman Huffman, Ranking Member Bentz, 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 H.R. 7633, the Hualapai Tribe Water Rights Settlement Act of 2022. The State of Arizona strongly supports this important legislation.

II. Importance of settling Indian water rights claims in Arizona

There are 22 federally recognized Indian tribes within Arizona. According to the 2020 U.S. Census data, the total population of all Indian tribes in Arizona as of 2020 was 319,512, which is the third highest among all states. The total area of all Indian reservations in Arizona is approximately 20 million acres, which is second only to Indian landholdings in Alaska. Arizona ranks first among all states in the percentage of tribal land – 27.7 percent. Indian tribes have some of the oldest and largest claims to water in the State.

Eleven of the 22 federally recognized Indian tribes in Arizona still have unresolved water rights claims. Resolving these claims through settlement is a priority for the State. Settlement avoids the cost and uncertainty of litigating the claims, and it provides certainty to both tribal and non-tribal water users in the state regarding available water supplies. In many cases, a settlement will also provide the tribe

with needed funding to construct and operate the infrastructure necessary to put its water supplies to beneficial use.

III. Hualapai Tribe's water rights claims

The Hualapai Tribe is one of the eleven Indian tribes in Arizona with unresolved water rights claims. The Tribe's main reservation covers approximately one million acres in the northwestern portion of the state. The Colorado River forms the northern boundary of the reservation, and the Grand Canyon National Park is located immediately north of the reservation. The Tribe also has reservation and trust lands south of its main reservation in the Bill Williams River watershed.

The Tribe has asserted claims to both groundwater and surface water for its reservation and trust lands. The Tribe's claims include a claim to water from the Colorado River, a critical water supply for agricultural, municipal and industrial water users along the Colorado River, as well as water users in Central Arizona, to whom the water is delivered through the Central Arizona Project ("CAP").

The Tribe claims a right to Colorado River water for domestic, municipal and industrial uses on its reservation and trust lands, including use at Grand Canyon West. Grand Canyon West is a major tourist attraction located adjacent to the Grand Canyon on the Tribe's main reservation. One of the main features of Grand Canyon West is the Skywalk, a glass walkway overhanging the Grand Canyon where tourists can walk out and look through the glass walkway to the bottom of the Canyon. Over one million people visit Grand Canyon West each year, making it a major source of income for the Tribe and a key employment center in the region.

IV. Settlement Negotiations with Hualapai Tribe

In late 2011, the State of Arizona, Freeport Minerals Corporation ("Freeport"), the Central Arizona Water Conservation District, the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association (collectively referred to as the "State Parties") began negotiating with the Hualapai Tribe for a comprehensive settlement of the Tribe's water rights claims. The United States participated in the settlement negotiations through a negotiating team appointed by the Secretary of the Interior ("Secretary").

Early in the settlement negotiations, the Tribe and State Parties agreed that as part of a comprehensive settlement of the Tribe's claims, the Tribe should receive an

allocation of CAP water from the volume of Non-Indian Agricultural (“NIA”) priority CAP water set aside for future Indian water rights settlements in Arizona in the Arizona Water Settlements Act of 2004 (Public Law 108–451, Section 104(a)). The Tribe and the State Parties also agreed that the settlement should include an authorization by Congress of an appropriation of monies to construct a pipeline to carry the CAP water from the Colorado River to Peach Springs, the Tribe’s main residential center, and Grand Canyon West.

In 2012, the parties agreed to bifurcate the settlement into two phases, with Phase 1 resolving only the Tribe’s water rights claims in the Bill Williams River watershed and Phase 2 settling all the Tribe’s remaining water rights claims in Arizona, including its claims to water for its main reservation. The settlement was bifurcated so that the Phase 1 settlement could become effective by December 31, 2015. Finalization of the Phase 1 settlement by that date was necessary to expedite a water rights transfer as part of the settlement.

V. Hualapai Phase 1 Settlement

Phase 1 settled water rights claims in the Bill Williams watershed between the Tribe, the United States as trustee for the Tribe, the members of the Tribe and allottees, the Secretary, Freeport and the Arizona Game and Fish Commission. The Phase 1 settlement was approved by Congress in December 2014 and became law on December 16, 2014 (Public Law 113-223). The settlement became effective in December 2015 after all the conditions for the settlement were met.

Although Phase 1 was not a comprehensive settlement of the Hualapai Tribe’s water rights claims, it included the following provisions designed to facilitate a comprehensive Phase 2 settlement that would include an allocation of CAP water to the Tribe:

1. First, an agreement by Freeport to transfer \$1 million to the Tribe as a contribution toward the cost of the Tribe’s study of alternative infrastructure projects to transport CAP water from the Colorado River to the Tribe’s main reservation (“Study”). Freeport transferred the \$1 million to the Tribe before the Phase 1 settlement became effective and the Tribe used the monies to help pay an engineering firm to conduct the Study. The Study was completed in December 2014 and concluded that the most feasible project was a pipeline carrying the CAP water from Diamond Creek, located near the

southeastern portion of the Tribe's reservation, to Peach Springs and then on to Grand Canyon West – a total of 70 miles.

2. Second, an agreement by Freeport to contribute money to the Hualapai Tribe Economic Development Fund to enable the Tribe to acquire additional Colorado River water rights with the intent to further secure the Tribe's water rights, and to otherwise facilitate the use of water on the Tribe's reservation. After the Phase 1 settlement became effective, Freeport made a multimillion-dollar contribution to the Hualapai Tribe Economic Development Fund for use by the Tribe to acquire additional Colorado River water supplies.
3. Third, an acknowledgement that Freeport's contribution to the Hualapai Tribe Economic Development fund will be considered a non-federal contribution that counts toward any non-federal contribution associated with a settlement of the claims of the Tribe for rights to Colorado River water.

VI. Hualapai Phase 2 Settlement

After the Tribe's engineering firm completed its study of alternative infrastructure projects to transport CAP water from the Colorado River to the Tribe's main reservation in December 2014, the Tribe, the State Parties and the United States began meeting to discuss finalizing a Phase 2 settlement, which would be a comprehensive settlement of all the Tribe's remaining water rights claims and would include as parties the Tribe, the State Parties and the United States ("Hualapai Phase 2 Settlement"). Representatives of Mohave County were eventually included in the settlement meetings because of the Tribe's desire to have certain fee lands in the county brought into trust status for the Tribe through the legislation approving and authorizing the settlement.

A. 2016 Settlement Agreement Between Tribe and State Parties and Objections by the Department of the Interior

In June 2016, the Tribe and the State Parties, but not the United States, agreed to the terms of a Hualapai Phase 2 settlement. The agreement included the following provisions:

1. An allocation of 4,000 acre-feet per year (“AFY”) of NIA priority CAP water. The United States and the State of Arizona would each firm 557.50 AFY of the water to the equivalent of the higher priority CAP municipal and industrial priority water during water shortages.
2. An authorization of an appropriation of \$134.5 million for construction of a project to convey at least 3,414 AFY of the Tribe’s Colorado River water from Diamond Creek to Peach Springs and Grand Canyon West for municipal, industrial and commercial uses on the Tribe’s Reservation.
3. An authorization of an appropriation of \$39 million for operation, maintenance and replacement costs for the project, including technical assistance to prepare the Tribe for the operation of the project.
4. The Tribe would have the right to use all groundwater under, and all surface water on, its Reservation and trust lands.
5. The Tribe and the United States, as trustee for the Tribe, would waive the right to assert claims for injury to water rights against persons pumping groundwater off the Reservation.
6. Certain lands near the Tribe’s main Reservation would be brought into Reservation status and certain lands owned in fee by the Tribe would be brought into trust status.
7. There would be a limited waiver of the Tribe’s and the United States’ sovereign immunity to allow actions to be brought against the Tribe and the United States for the interpretation or enforcement of the settlement agreement and authorizing legislation by any party to the settlement agreement, any landowner or water user in the Verde River Watershed or the Colorado River Basin within Arizona, and the States of California and Nevada.

Legislation authorizing and approving the settlement was introduced in the Senate in 2016 (S. 3300), in both the Senate and the House of Representatives in 2017 (S. 1770 and H.R. 4723), and in both the Senate and the House of representatives in 2019 (S. 1277 and H. R. 2459). The 2016 Senate bill was heard by the Senate Committee on Indian Affairs on September 14, 2016. The 2017 Senate bill was heard by the Senate Committee on Indian Affairs on December 6, 2017. The 2019 House of Representatives bill was heard by this Subcommittee on June 26, 2019.

Due in part to concerns raised by the Department of the Interior (“Interior”) regarding certain provisions in the settlement, none of the bills introduced in Congress in 2016, 2017, and 2019 were passed by Congress.

In written testimony submitted to this Subcommittee in June 2019, Alan Mikkelsen, Senior Advisor to the Secretary on Water and Western Resource, stated that Interior could not support H.R. 2459 because it had serious concerns with the legislation as introduced. Mr. Mikkelsen’s testimony stated that Interior was particularly concerned with the following: (1) the waiver of the right of the Tribe and the United States to object to any groundwater pumping outside the boundaries of the Reservation, even if the pumping interfered with the Tribe’s Federal reserved groundwater rights; (2) the size and cost of the project; and (3) the accuracy of the cost estimate. He also stated that the United States had significant concerns regarding the waiver of federal sovereign immunity in the legislation.

B. Resolution of Interior’s Objections

Following this Subcommittee’s hearing on H.R. 2459 in June 2019, the Tribe, the State Parties and Interior met multiple times to discuss Interior’s objections to the settlement. The parties ultimately agreed to make changes to the settlement to resolve Interior’s objections. H.R. 7633 reflects those changes. The changes are described below.

1. Size and cost of the project and the accuracy of the cost estimate – The parties agreed to change the settlement from a project-based settlement to a fund-based settlement in which Congress would authorize an appropriation of \$180 million to be deposited into the Hualapai Water Trust Fund Account. The Tribe will be authorized to use monies in the fund to pay for water projects, including the planning, design, and construction of the Hualapai Water Project – a project to divert, treat, and convey up to 3,414 AFY of water from the Colorado River in the Lower Basin in the State of Arizona, including locations on or directly adjacent to the Hualapai Reservation, for municipal, commercial, and industrial uses on the Reservation. The parties also agreed to the establishment of a Hualapai Water Settlement Implementation Fund Account and an authorization of an appropriation of \$5 million to be deposited into the account for use by the Secretary in carrying out the Act.

2. Off-Reservation groundwater pumping – The parties agreed that the Tribe and the United States, as trustee for the Tribe, will retain the right to assert claims for injury to the Tribe’s water rights resulting from the off-Reservation withdrawal or use of groundwater from new wells constructed in areas near the Tribe’s Reservation under the following circumstances:
- a. Areas outside the Truxton Basin – In areas outside the Truxton Basin, the Tribe and the United States will have the right to assert claims for injury to water rights resulting from the withdrawal or use of groundwater from wells constructed after the date of enactment of the legislation and located within two miles of the Tribe’s Reservation, except for wells that qualify as replacement wells.
 - b. Within the Truxton Basin – The U.S. Geological Survey will issue an estimate of groundwater withdrawals within the portion of the Truxton Basin outside the Reservation within one year after the date the legislation is enacted and will publish an estimate of groundwater withdrawals within that portion of the basin each year thereafter. The Secretary will provide written notice to the State if the total groundwater withdrawals within that portion of the basin exceed the initial estimate by 3,000 AFY or more, excluding any withdrawals from wells located on lands owned by the Tribe. If the Secretary provides such notice to the State, the Tribe and the United States will have the right to assert claims for injury to water rights resulting from the withdrawal or use of groundwater from the following wells:
 - i. Wells constructed for domestic purposes or stock watering after the date of the notice, except for wells that qualify as replacement wells.
 - ii. Wells constructed for purposes other than domestic purposes or stock watering after the date of enactment of the legislation, except for wells that qualify as replacement wells.
3. Limited Waiver of Sovereign Immunity – The parties agreed to narrow the scope of the limited waiver of sovereign immunity so that it will apply only to actions brought by the parties to the settlement agreement and landowners and water users in the Verde River Watershed.

VI. The State of Arizona Supports H.R. 7633

The State of Arizona strongly supports H.R. 7633. The State believes that the Hualapai Phase 2 settlement authorized by the legislation is a reasonable and fair settlement that will benefit the Hualapai Tribe, the State of Arizona, Arizona water users and the United States.

A. Hualapai Tribe

For the Hualapai Tribe, the settlement provides a renewable water supply and money to construct the infrastructure to convey that water supply from the Colorado River to critical areas on the Tribe's reservation. Because there are no significant surface water streams on the reservation, water from the Colorado River is the only renewable water supply available to the Tribe. The water supply will serve the Tribe's main population center at Peach Springs, which is currently served groundwater from wells that are experiencing declining water levels. The water supply will also serve Grand Canyon West, the only viable economic development area on the Tribe's reservation. Grand Canyon West was historically served with groundwater from a low production well approximately 35 miles away, but due to the current drought, is served with groundwater hauled from the Peach Springs area.

A pipeline to bring Colorado River water to Grand Canyon West is essential for further economic development on the Tribe's reservation. The Tribe's reservation is in a location with magnificent views of the west rim of the Grand Canyon. This provides the Tribe with a unique asset that is a significant economic development resource. Over one million visitors come to Grand Canyon West each year to walk on the Skywalk and experience the views of the Grand Canyon. The Tribe would like to further develop Grand Canyon West to include additional tourist attractions that would significantly increase the number of visitors each year. However, development at Grand Canyon West, and the annual number of visitors, is essentially capped at current levels due to the lack of additional water supplies for the area. Construction of a pipeline to bring Colorado River to Grand Canyon West would remove that cap and allow the Tribe to fully utilize the unique asset on its reservation for economic development.

In addition, the current lack of water supplies at Grand Canyon West prevents the Tribe from constructing housing in that area for the employees who work there. As

a result, most of those employees live in Peach Springs and drive to work each day over a dirt road. The travel time is two hours each way in good weather, for a total travel time of four hours each day. Travel time is significantly longer in wet or snowy conditions. Construction of a pipeline to carry Colorado River water to Grand Canyon West would allow the Tribe to construct a residential community near Grand Canyon West where its employees can live. Housing closer to Grand Canyon West will benefit the employees and their families who would have more time together.

B. State of Arizona and Arizona Water Users

For the State of Arizona, the settlement is a major step toward resolving the outstanding water rights claims of Indian tribes in the state. Resolving the Hualapai Tribe's claims through settlement will avoid the costs and risks associated with litigating the claims and will provide certainty to water users in the state. Perhaps the main risk to water users in the state from litigating the Tribe's claims is the risk to their Colorado River water supplies. As mentioned previously, the Tribe's reservation is located adjacent to the Colorado River and the Tribe has asserted claims to water from the River. The water from the Colorado River that the Tribe will receive through the settlement will not affect the Colorado River entitlements of other water users in the State because the Tribe will receive a portion of the NIA priority CAP water being held by the Secretary for Indian water settlements in Arizona.

The settlement will allow further development of Grand Canyon West, which would result in additional employment on the reservation and an increase in tourism at that location. This, in turn, would benefit the economy of the region and would increase tax revenues for both local governments and the State of Arizona.

Another benefit to the State of Arizona is that the settlement will provide the Tribe with a renewable water supply to replace its current groundwater pumping. Use of renewable water supplies instead of groundwater is consistent with the State's policy of preserving groundwater supplies for times of drought. Additionally, because the aquifer beneath the Tribe's reservation extends to areas off the reservation, the Tribe's use of a renewable water supply will help preserve groundwater supplies for non-tribal water users in the region. This is especially

important in this area of the state where the groundwater supplies are limited and there is minimal groundwater recharge.

C. United States

For the United States, the settlement will avoid the costs and risks to the United States associated with litigating the Tribe's water rights claims. The risks include the possibility that the Tribe would prevail in an action in the Court of Federal Claims to recover damages against the United States for failing to protect its water rights.

In addition to avoiding the costs and risks of litigation, the settlement would likely result in a significant economic benefit to the United States Treasury. The Tribe contracted with Professor Joseph P. Kalt, Ford Foundation Professor (Emeritus) of International Political Economy at the John F. Kennedy School of Government at Harvard University, to prepare a report on the economic benefits of a pipeline to carry Colorado River water to Grand Canyon West. In his report, Professor Kalt concluded that the pipeline would result in significantly more visitors to Grand Canyon West, and that over a 50-year period, the benefits to the United States from increased federal tax revenues resulting from the additional visitors would greatly exceed the federal monies authorized to be appropriated for construction, operation, and maintenance of the pipeline. Professor Joseph P. Kalt, *Economic Impact of the Hualapai Water Rights Settlement and Proposed Diamond Creek Pipeline*, July 16, 2017.

D. Water users in the Bill Williams River Watershed

The Hualapai Phase 2 settlement agreement includes as an exhibit the Bill Williams River Phase 2 Water Rights Settlement Agreement ("Bill Williams agreement"). The Bill Williams agreement is an agreement between the Tribe, Freeport and the United States, acting solely on behalf of Interior and its constituent agencies the Bureau of Land Management and the Fish and Wildlife Service, to resolve certain water rights disputes among themselves in the Bill Williams River Watershed. Enactment of H.R. 7633 will authorize and approve the Bill Williams agreement, which will provide a substantial benefit to the parties to that agreement.

VII. Non-Federal Contribution

The State of Arizona believes that the State Parties are contributing a proportionate share of cost of the settlement in return for the benefits they will receive. As previously mentioned, Freeport made a multimillion-dollar contribution to the Hualapai Tribe Economic Development Fund as part of the Phase 1 settlement. The Tribe may use this money only for the purpose of facilitating settlement of its claims for rights to Colorado River Water by acquiring Colorado River water rights to increase the security of the Tribe's water supply, and to otherwise facilitate the use of water on the Tribe's reservation. As required by the federal legislation approving the Phase 1 settlement, Freeport's financial contribution to the Hualapai Tribe Economic Development Fund must be considered a non-federal contribution towards the Phase 2 settlement.

Freeport also provided \$1 million to the Hualapai Tribe to use toward a study of water project alternatives to bring water to the Tribe's reservation. This financial contribution should also be considered a non-federal contribution because it was made for the purpose of facilitating the Phase 2 settlement.

In addition to Freeport's large financial contributions, the State of Arizona has agreed to firm 557.50 AFY of the Tribe's 4,000 AFY allocation of NIA priority CAP water to the equivalent of CAP municipal and industrial priority water during water shortages until 2108. The cost of firming this water in today's dollars would range from \$4.9 million to over \$8 million based on 2022 CAP water delivery and storage rates and the current market rate to purchase long-term storage credits.

The financial contributions that will be made to this settlement by Freeport and the State of Arizona are substantial. The State believes that these contributions demonstrate that the State parties are providing cost-sharing proportionate to the benefits they will receive from the settlement.

VIII. Conclusion

The State of Arizona strongly supports H.R. 7633, the Hualapai Tribe Water Rights Settlement Act of 2022. The legislation authorizes a comprehensive settlement of the Hualapai's Tribe's water rights claims, including its claims to the Colorado River – a critical water supply for water users in the state. Settlement of the Tribe's water rights claims is an important step in achieving the State's goal of settling all

outstanding Indian water rights claims in the state. Settlement of the claims will avoid the costs and risks of litigation and will provide certainty to water users in the state.