

55-17
Navajo Settlement

**STATEMENT OF THE HONORABLE
HERBERT R. GUENTHER
REPRESENTING THE STATE OF ARIZONA**

**BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES**

UNITED STATES SENATE

On

S. 1171

NORTHWESTERN NEW MEXICO RURAL WATER PROJECTS ACT

JUNE 27, 2007

Mr. Chairman and Members of the Committee,

Good afternoon and thank you for the opportunity to present the views of the State of Arizona on S. 1171, the Northwestern New Mexico Rural Water Projects Act of 2007.

S. 1171 represents another important step toward the settlement of long standing water rights claims held by the United States government on behalf of American Indian Tribes. The Navajo Nation is the largest Tribe in Arizona measured both in terms of population and land area. The Navajo Reservation lies within the boundaries of three states: Arizona, New Mexico and Utah. It also lies within one of the most arid regions of the United States and the lack of water development and infrastructure has created a great hardship on the Navajo Nation's residents, both in terms of economic opportunity and general lifestyle. The geography of the Reservation is also complicated in a hydrologic sense because it encompasses land which is located in both the Upper and Lower Colorado River Basins.

S. 1171 contains provisions that will greatly aid the portion of the Navajo Reservation within New Mexico and, potentially, within a portion of Arizona. Arizona is supportive of the efforts of the State of New Mexico and the Navajo Nation in

completing a water rights settlement agreement. We are supportive of the provisions of S. 1171 that create a funding mechanism to ensure that necessary water development projects will be constructed in a timely manner. We are supportive of the creative efforts of the New Mexico congressional delegation to ensure that there will also be non-Indian beneficiaries who will receive water from the rural water projects, and we are generally supportive of the opportunity for the State of New Mexico to make full use of its Upper Colorado River Compact entitlement. The Committee should remember that the San Juan River is part of the Colorado River system as defined in the 1922 Colorado River Compact (1922 Compact) approved by all seven Colorado River Basin States. In this regard programs and settlements in the San Juan Basin affect the Colorado River as a whole, and vice versa.

While generally supportive of this settlement, we cannot support S. 1171 as it has been introduced because we have several concerns about the implications of certain provisions to the existing "Law of the Colorado River," and about the provisions that relate to uses of water from the Northwest New Mexico Rural Water Supply Project (Navajo-Gallup Pipeline Project) within Arizona and in portions of New Mexico located in the Lower Colorado River Basin. Specifically, as introduced, S. 1171 would violate provisions of the 1922 Compact related to the use of Colorado River water allocated "exclusively" to the Upper Basin to be used in the Lower Basin. The bill does not make provisions for the proper accounting of water deliveries under the Compact at Lee Ferry. S. 1171 does not specify how the accounting and delivery of water for tribal use in Window Rock, Arizona would be handled. S. 1171 would also set a precedent in that it would subordinate Arizona's share of water in the Lower Basin of the Colorado River to allow new uses in the Lower Basin.

Arizona and Arizona water users believe there is an opportunity to provide even more certainty for the Navajo Nation and the Hopi Tribe by including additional Titles which will settle water rights claims within the Lower Mainstem Colorado River and Little Colorado River basins within Arizona. The two Tribes are actively participating in ongoing negotiations with governmental and non-governmental interests in those basins. We are optimistic that the parties will complete a water rights settlement agreement in a timely manner so that S. 1171 can be amended to become a more comprehensive

solution. Therefore, we believe Congress should not take final action on S. 1171 until we have a chance to see if Arizona tribal and non-Indian parties can achieve this Arizona settlement goal.

Additionally, an impetus for Arizona (as well as governmental and non-governmental entities in California and Nevada) to negotiate with the Navajo Nation is a direct response to the Navajo Nation lawsuit against the Secretary of the Interior about operation of programs on the Colorado River, including interim surplus guidelines, interstate water banking, overrun and payback provisions, certain Colorado River allocations, and protections of Lakes Mead and Powell. This 2003 U.S. District Court lawsuit has been stayed pending negotiations among the parties over Navajo Nation Colorado River claims. The lawsuit is a cloud over the programs to conserve and deliver Colorado River water to all the Basin States; threatening operations that benefit all seven Basin States. It is a logical conclusion that the recent historic agreement of the Seven Basin States of the Colorado River on shortage guidelines and the coordinated operations of Lakes Mead and Powell would also be challenged. Failure of that new agreement could mean years of dispute among the States. Of course a successful Arizona water rights settlement would remove this cloud. Therefore, we believe that Congress should not take final action on S. 1171 without a resolution and dismissal of the Navajo Nation lawsuit concerning the Colorado River.

Title II of S. 1171 creates the Reclamation Water Settlements Fund. This Fund will be used to construct project features that are required to implement a congressionally authorized settlement agreement. The State of Arizona is supportive of the concept for funding that is described in Title II. However, we believe that the funding need is worthy of even greater consideration. Indian water rights settlements are being actively negotiated throughout the United States. Funding of these settlement agreements is the single greatest impediment to their successful completion. We believe it is time for Congress to address the funding issue on a more comprehensive basis.

Many of the water rights being contested throughout the West are rights that were "reserved" by the United States at the time of the creation of the Indian reservations. In many instances, the United States has failed to fulfill its intent in reserving that water for the Reservations and has left the Tribes without the means to create a true tribal

homeland. In Arizona and other Western states, many of the Tribes have recognized that they will have a better chance to obtain the necessary funding which will lead to on-Reservation development by entering into a water rights settlement rather than pursuing their claimed rights through lengthy and expensive litigation. In most instances the Tribes have settled for less water than they had claimed in Court, but they were provided with the funding mechanism to actually put that water to near-term beneficial use. This trade-off is essential for a Tribe to make such a major concession regarding their valuable water rights claims.

Having a dedicated water rights settlement fund with a dedicated funding source will allow not only the Northwest New Mexico Rural Water Supply Project to be built but also many other worthy projects in other states. The Committee should look at expanding Title II so that the Reclamation Water Settlements Fund can have even greater potential for dedicated revenues. The time frame for those deposits should be at least fifty years. Withdrawals from the Settlements Fund for projects other than the Northwest New Mexico Rural Water Supply Project will still be subject to the conditions placed upon them by Congress when future settlements and projects are authorized. We urge the Committee to explore opportunities to build on the Settlement Fund concept by contacting the Western Governor's Association and the Western States Water Council. At a minimum, S. 1171 should contain provisions for the funding of a Navajo Nation/Hopi Tribe settlement in the Lower Basin of the Colorado River if a settlement is authorized by Congress. It would greatly benefit the Navajo Nation and Hopi Tribe in their water development plans.

In addition to the need to first resolve the Navajo lawsuit and water rights claims in Arizona, Arizona is concerned that S. 1171, as currently drafted, conflicts with the Law of the River. S. 1171 contains several provisions related to deliveries of water through the Northwest New Mexico Rural Water Supply Project to locations in the Lower Colorado River Basin, including the Window Rock area of the Navajo Reservation within Arizona. In an attempt to be non-committal about the source of water to be used for the Arizona component, the bill's drafters have created confusing and potentially troubling language. The problem arises because Window Rock, Arizona and Gallup, New Mexico are located in the Lower Basin of the Colorado River as defined in

the 1922 Compact, but the point of diversion of the water from the San Juan River is in the Upper Basin portion of the Colorado River. Arizona believes that the terms of the Colorado River Compact prohibit the use of an Upper Basin water allocation in the Lower Basin, and vice versa. However, the State of Arizona can accept an explicit exception to this prohibition as long as it is clear that the use of water across the basin boundary is for a specific project and that the project is within the same state that holds the allocation. Arizona does not believe that the language of paragraph 303(g), which describes consistency with the Upper Colorado River Basin Compact adequately addresses the issue or meets the requirements of the Colorado River Compact. We believe that an explicit congressional exception to the provisions of the 1922 Colorado River Compact is required.

The Arizona Water Settlements Act (AWSA) of 2004 (P.L. 108-451) contains a provision reserving for allocation 6,411 acre-feet per year of Central Arizona Project (CAP) water supply for use in the Window Rock area of the Navajo Nation pursuant to a future congressionally authorized settlement. This provision was agreed to by Arizona at the insistence of New Mexico. The terms and conditions for making this allocation are enumerated in §104(a)(1)(B)(ii) of the AWSA. This is the only water supply source that Arizona will agree may be utilized for delivery through the Northwest New Mexico Rural Water Supply Project to the Window Rock area. The CAP water is a Lower Basin Colorado River entitlement and the water will be used in the Lower Basin. We believe this comports with the provisions of the Colorado River Compact.

However, Arizona is concerned that this source of water for Window Rock may be at risk. As the Committee may know, the Navajo Nation opposed the AWSA, and they continue to oppose approval of the Gila River Indian Community Settlement which is a requirement for bringing the AWSA to a full enforceability stage. If AWSA does not become fully enforceable all the benefits of the AWSA will become null and void, including the source of water for Window Rock, and those benefits accruing to Gila River water users in New Mexico. Therefore, we believe Congress should not take final action on S. 1171 without the withdrawal of the Navajo Nation's opposition to the implementation of the provisions of the AWSA.

Assuming the CAP water source does prove to be available for Window Rock, the diversion of water from an Upper Basin location for use in the Lower Basin is unprecedented. Therefore, S. 1171 needs to include specific provisions authorizing and clarifying accounting methods and providing the Secretary of the Interior the authority to contract for delivery of CAP water from a new diversion point in the Upper Basin. Under current law, the Secretary has no authority to contract for delivery of Lower Basin Colorado River water at points of diversion above Lake Mead. Attached to this testimony, as part of a letter from myself to the New Mexico State Engineer, are proposed amendments which will correct this and other "Law of the Colorado River" problems Arizona finds with the bill as introduced.

In 1968, Arizona's rights to develop in the Lower Colorado River Basin were subordinated to pre-1968 rights in the Lower Basin States. S. 1171 sets a precedent that New Mexico and Utah can increase development in the Lower Basin and further jeopardize Arizona rights. While Arizona does not challenge the right of any Upper Basin state to develop their apportioned Upper Basin water for use in the Upper Basin, we do want to be treated equitably for use of Upper Basin water in Lower Basin development. S. 1171 does not address this concern and it sets a precedent that is inequitable to the State of Arizona. Specifically, the bill, subordinates Arizona's Central Arizona Project (CAP) water to new Lower Basin uses developed with an Upper Basin water allocation. This also subordinates the rights of Arizona Indian Tribes that utilize CAP allocations.

Staff from the Arizona Department of Water Resources has had an ongoing dialogue with the New Mexico State Engineer's staff for over a year on these issues, including those outlined in this testimony. I sent a letter to the Mr. D'Antonio several months ago about these issues. Mr. D'Antonio recently responded concerning Arizona's suggested bill changes. We have attached copies of both of these letters for the record. We do not agree with Mr. D'Antonio's response but we continue to be open to discussions with our friends in New Mexico to resolve these important Law of the River issues.

The Law of the River has been under attack for decades. For example, in the early 1980s, a private group made what is known as the Galloway Proposal. It would

have allowed the transfer of Upper Basin water rights to a California entity without regard to the prohibitions of the 1922 Compact. The Seven Basin States were united in fighting the proposal and rejecting this notion that the 1922 Compact was irrelevant. It now appears that New Mexico is not as concerned about the precedent that would be set if Congress does not address each 1922 Compact issue explicitly. Arizona remains very concerned and will utilize all means available and necessary to protect its rights under the Compact and the Law of the River.

Again, Arizona is willing to meet with Committee staff and the representatives of the other six Colorado River Basin States to further discuss our suggested changes, and to try to make sure that any proposed amendments are acceptable to all affected parties and consistent with the Law of the River.

In summary, the State of Arizona is supportive of the purposes of S. 1171 in settling tribal claims and will work collaboratively with the bill's sponsors and New Mexico's interested parties. We believe that the bill should be expanded to include additional water rights settlements in Arizona that are actively being negotiated with the Navajo Nation and the Hopi Tribe. We urge the Committee to explore opportunities to expand upon the concepts contained in Title II dealing with the Reclamation Water Settlements Fund so that it can become the mechanism for not only the proposed New Mexico Navajo settlement, but potentially many other western tribal settlements as well. Before final enactment of S. 1171, the Navajo Nation's challenge to the operation of the Colorado River must be resolved, and the Navajo Nation's opposition to the AWSA withdrawn. Finally, we cannot support the bill as currently drafted as it relates to the source of the water supply for the Window Rock area within Arizona, and certain provisions dealing with the Law of the River. Ambiguity about the water source and the Law of the River implications related to both Window Rock water delivery and Gallup water delivery must be clarified.

Thank you for the opportunity to present the views of the State of Arizona.

Attachments:

Director Guenther Letter w/attachments

State Engineer D'Antonio Letter

ARIZONA DEPARTMENT OF WATER RESOURCES
3550 North Central Avenue, Phoenix, Arizona 85012-2105
Telephone 602 771-8426
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Janet Napolitano
Governor

Herbert R. Guenther
Director

April 5, 2007

Mr. John D'Antonio, P.E.
Office of the State Engineer
130 South Capitol Street
Concha Ortiz y Pino Building
P.O. Box 25102
Santa Fe, NM 87504-5102

Dear Mr. D'Antonio:

Last January my staff met with your staff concerning the proposed "Northwestern New Mexico Rural Water Projects Act" (Act) introduced by the New Mexico delegation late last session as S. 4108. One title of the Act would confirm the water settlement for the Navajo Nation claims to water in the San Juan River basin.

We have examined the proposed Act and have reviewed the San Juan settlement agreement. There are provisions in the settlement agreement and Act that are in conflict with the 1922 Colorado River Compact, the Decree in *Arizona v. California*, the Colorado River Basin Project Act, and the Arizona Water Settlements Act. Specific comments on some of the issues are enclosed for your review. There are additional provisions, such as the "top water bank" that are confusing, and we question whether those provisions are in conformity with the Compact and the "Law of the River".

The Compact and Decree issues may only be resolved with the concurrence of Arizona and the other Lower Division States. Additionally, the most likely source of water for the Arizona portion of the San Juan settlement is specifically reserved in section 104 of Public Law 108-451 under certain conditions. Some issues associated with this transfer of water are similar to Compact and Decree issues on use of water in New Mexico.

We are currently consulting with water users in Arizona and may have other issues concerning the proposed settlement legislation. We would like to the opportunity to work with you and representatives of the Navajo Nation to address the concerns of Arizona. Should you have any questions please feel free to contact me, Tom Carr or Gregg Houtz.

Sincerely,

A handwritten signature in cursive script, appearing to read "Herbert R. Guenther".

Herbert R. Guenther
Director

CC: Stanley Pollack
Enclosure

Comments on Draft Navajo-Gallup Pipeline Bill

General Comments

- The bill is premised on a draft EIS and draft hydrologic determination, neither of which has yet been accepted by the Secretary of the Interior. This is not a good precedent, particularly when the Lower Basin States have expressed concern about the draft hydrologic determination.
- The bill leaves many unanswered questions about Colorado River accounting, water delivery contracting and priority of deliveries. The specific comments below attempt to clarify many of these issues.

Specific Comments

1. **Priority within the San Juan River system.** The priority of the Navajo-Gallup pipeline water within the San Juan River system is not clear. Section 102(b) of the bill provides that the Secretary shall "allocate the shortage" to the Navajo Reservoir water supply, with first priority going to the water for the Navajo-Gallup pipeline. This seems to say that the water for the pipeline is the first to be shorted. But this section of the bill is amending §11 of Pub. L. 87-483, which directs the Secretary to apportion the water that is available during shortage on the San Juan, suggesting that the pipeline might be first to receive available water during a shortage. The bill should be revised to clearly express the intended result.
2. **Colorado River Compact Issues.** Section 103 of the bill states that it does not amend the Law of the River "unless expressly provided in this Act." There is nothing in the bill that would expressly amend the 1922 Colorado River Compact. Accordingly, there is nothing in the bill that would:
 - Allow the diversion of water in the Upper Basin for use in the Lower Basin.
 - Relieve the Upper Basin from any part of its Compact obligation to deliver 75 million acre-feet to the Lower Basin every 10 years.

To address these problems, the following should be added to the end of §303 of the bill:

"(h) COLORADO RIVER COMPACT. Notwithstanding any other provision of law, water may be diverted from the San Juan River in New Mexico for use within the Lower Basin, as that term is used in the 1922 Colorado River Compact, either in New Mexico or on the Navajo Reservation in Arizona. Water diverted from the San Juan River and delivered for use on the Navajo Reservation in Arizona shall be deemed to

have been delivered to the Lower Basin at Lee Ferry for purposes of Article III(d) of the Colorado River Compact.”

3. **Colorado River System Priority.** Section 303 of the bill should also include the following provision:

“(i) **PRIORITY.** Colorado River system water diverted in the Upper Basin for use in the Lower Basin, as those terms are used in the Colorado River Compact, shall have the same priority of delivery in time of shortage as the Central Arizona Project.”

4. **Allocation to Navajo Nation Communities in Arizona.** Section 303(b)(2)(D) of the bill should expressly state that the 6,411 acre-feet of water allocated for use in Arizona is the water identified in §104(a)(1)(B)(ii) of the Arizona Water Settlements Act (AWSA), Pub. L. 108-451—i.e., CAP non-Indian agricultural (NIA) priority water—and is subject to the provisions of the AWSA, including but not limited to §104(a)(1)(B)(ii), §104(a)(1)(B)(iii), §104(a)(3), and §104(e).

5. **Conditions for Use in Arizona.**

- a. Section 303(d)(1)(C) of the bill requires the Secretary to determine that the Navajo uses within Arizona are within Arizona’s Colorado River apportionment. The bill does not specify whether the water must be within Arizona’s 50,000 af Upper Basin entitlement (which was not the intent) or its 2.8 maf Lower Basin entitlement. This section should be deleted.
- b. In addition to any capital or OM&R costs associated with the use of the Navajo-Gallup pipeline, the United States or the Nation must pay CAP fixed OM&R costs for any water delivered to the Navajo Reservation for use in Arizona. The United States can pay those costs from the Lower Colorado River Basin Development Fund in accordance with 43 U.S.C. §1543(f), as amended by the AWSA.
- c. Section 303(d)(1)(A) of the bill requires the Secretary to “determine by hydrologic investigation that sufficient water is reasonably likely to be available to supply uses from water of the Colorado River system allocated to the State of Arizona.” It’s not clear what this means. This provision should be deleted.
- d. Section 303(d)(2) of the bill provides that water used by the Navajo Nation in Arizona counts against Arizona’s Colorado River entitlement. Again, the bill should clarify that this water counts against Arizona’s Lower Basin entitlement.

- e. In summary, section 303(d) of the bill should be revised to read as follows:

“(d) CONDITIONS FOR USE IN ARIZONA.—

(1) REQUIREMENTS.—Project water shall not be delivered for use by any community of the Nation in the State of Arizona under subsection (b)(2)(D) until all of the following conditions have been satisfied—

(A) the Nation and the State of Arizona have entered into a water rights settlement agreement approved by an Act of Congress that settles the Nation’s claims to water in Arizona; and

(B) the Secretary has entered into a contract with the Nation for the delivery of 6,411 acre-feet of Central Arizona Project non-Indian agricultural priority water in accordance with §104(a)(1)(B)(ii) of Pub. L. 108-451.

(2) ACCOUNTING FOR USES IN ARIZONA.—Any depletion of water from the San Juan River stream system in the State of New Mexico that results from the diversion of water by the Project for uses within the State of Arizona (including depletion incidental to the diversion, impounding, or conveyance of water in the State of New Mexico for uses in the State of Arizona)—

(A) shall be accounted for as a part of the 2.8 million acre-feet of Colorado River water apportioned to the State of Arizona in Article II(B)(1) of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340); and

(B) shall not increase the total quantity of water to which the State of Arizona is entitled under any compact, statute, or court decree.”

6. **Forbearance.** Section 303(e)(2) of the bill should expressly state that the Nation may not forbear deliveries in the State of New Mexico to allow the delivery of water for use in Arizona when there is a shortage in the Lower Basin that reduces the availability of CAP NIA priority water. Deliveries to the Navajo Reservation through the Navajo-Gallup pipeline must be reduced in the same proportion as other CAP NIA priority water during a Lower Basin shortage.

Comments on Draft Navajo-Gallup Pipeline Bill

General Comments

- The bill is premised on a draft EIS and draft hydrologic determination, neither of which has yet been accepted by the Secretary of the Interior. This is not a good precedent, particularly when the Lower Basin States have expressed concern about the draft hydrologic determination. (Mike Conner has indicated that the final determination reference will be substituted when issued.)
- The bill leaves many unanswered questions about Colorado River accounting, water delivery contracting and priority of deliveries. The specific comments below attempt to clarify many of these issues.

Specific Comments

1. **Priority within the San Juan River system.** The priority of the Navajo-Gallup pipeline water within the San Juan River system is not clear. Section 102(b) of the bill provides that the Secretary shall "allocate the shortage" to the Navajo Reservoir water supply, with first priority going to the water for the Navajo-Gallup pipeline. This seems to say that the water for the pipeline is the first to be shorted. But this section of the bill is amending §11 of Pub. L. 87-483, which directs the Secretary to apportion the water that is available during shortage on the San Juan, suggesting that the pipeline might be first to receive available water during a shortage. The bill should be revised to clearly express the intended result. See suggested changes in #5(e).
2. **Colorado River Compact Issues.** Section 103 of the bill states that it does not amend the Law of the River "unless expressly provided in this Act." There is nothing in the bill that would expressly amend the 1922 Colorado River Compact. Accordingly, there is nothing in the bill that would:
 - Allow the diversion of water in the Upper Basin for use in the Lower Basin.
 - Relieve the Upper Basin from any part of its Compact obligation to deliver 75 million acre-feet to the Lower Basin every 10 years.

To address these problems, the following should be added to the end of §303 of the bill:

"(h) COLORADO RIVER COMPACT. Notwithstanding any other provision of law, water may be diverted from the San Juan River in New Mexico for use within the Lower Basin, as that term is used in the 1922 Colorado River Compact, either in New Mexico or on the Navajo Reservation in Arizona. Water diverted from the San Juan River and

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delivered for use on the Navajo Reservation in Arizona shall be deemed to have been delivered to the Lower Basin at Lee Ferry for purposes of Article III(d) of the Colorado River Compact.”

3. **Colorado River System Priority.** Section 303 of the bill should also include the following provision:

“(i) **PRIORITY.** Colorado River system water diverted in the Upper Basin for use in the Lower Basin, as those terms are used in the Colorado River Compact, shall have the same priority of delivery in time of shortage as the Central Arizona Project. However, the diversion from the San Juan River for the Project that is delivered for use in the lower Colorado River basin within the State of New Mexico is subject to shortages and priorities of water rights on the San Juan River, under the jurisdiction of the New Mexico State Engineer. The reductions in water use during shortage conditions on the San Juan River for the Project deliveries in the lower Colorado River basin mitigate the increased impacts caused by diversions of water from the upper Colorado River basin in New Mexico, therefore this Project diversion shall not be subject to lower Colorado River basin priorities of the Colorado River Basin Project Act.”

4. **Allocation to Navajo Nation Communities in Arizona.** Section 303(b)(2)(D) of the bill should expressly state that the 6,411 acre-feet of water allocated for use in Arizona is the water identified in §104(a)(1)(B)(ii) of the Arizona Water Settlements Act (AWSA), Pub. L. 108-451—i.e., CAP non-Indian agricultural (NIA) priority water—and is subject to the provisions of the AWSA, including but not limited to §104(a)(1)(B)(ii), §104(a)(1)(B)(iii), §104(a)(3), and §104(e). See, suggested changes in #5(e).

5. **Conditions for Use in Arizona.**

- a. Section 303(d)(1)(C) of the bill requires the Secretary to determine that the Navajo uses within Arizona are within Arizona’s Colorado River apportionment. The bill does not specify whether the water must be within Arizona’s 50,000 af Upper Basin entitlement (which was not the intent) or its 2.8 maf Lower Basin entitlement. **This section should be deleted.**
- b. In addition to any capital or OM&R costs associated with the use of the Navajo-Gallup pipeline, the United States or the Nation must pay CAP fixed OM&R costs for any water delivered to the Navajo Reservation for use in Arizona. The United States can pay those costs from the Lower Colorado River Basin Development Fund in accordance with 43 U.S.C. §1543(f), as amended by the AWSA.

- c. Section 303(d)(1)(A) of the bill requires the Secretary to "determine by hydrologic investigation that sufficient water is reasonably likely to be available to supply uses from water of the Colorado River system allocated to the State of Arizona." It's not clear what this means. This provision should be deleted.
- d. Section 303(d)(2) of the bill provides that water used by the Navajo Nation in Arizona counts against Arizona's Colorado River entitlement. Again, the bill should clarify that this water counts against Arizona's Lower Basin entitlement. See suggested changes in #5(e).
- e. In summary, section 303(d) of the bill should be revised to read as follows:

"(d) CONDITIONS FOR USE IN ARIZONA.—

(1) REQUIREMENTS.—Project water shall not be delivered for use by any community of the Nation in the State of Arizona under subsection (b)(2)(D) until all of the following conditions have been satisfied—

(A) the Nation and the State of Arizona have entered into a water rights settlement agreement approved by an Act of Congress that settles the Nation's claims to water in Arizona;

(B) the Secretary has entered into a contract with the Nation for the delivery of 6,411 acre-feet of Central Arizona Project non-Indian agricultural priority water in accordance with §104(a)(1)(B)(ii) of Pub. L. 108-451; and

(C) delivery by the Secretary of the water referenced in (B) shall be in accordance with the rules and regulations promulgated for the provisions of the Colorado River Basin Project Act, 43 U.S.C. 1521 et seq.

(2) ACCOUNTING FOR USES IN ARIZONA.—Any depletion of water from the San Juan River stream system in the State of New Mexico that results from the diversion of water by the Project for uses within the State of Arizona (including depletion incidental to the diversion, impounding, or conveyance of water in the State of New Mexico for uses in the State of Arizona)—

(A) shall be accounted for as a part of the 2.8 million acre-feet of Colorado River water apportioned to the State of Arizona in Article II(B)(1) of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340); and

(B) shall not increase the total quantity of water to which the State of Arizona is entitled under any compact, statute, or court decree."

- 6. **Forbearance.** Section 303(e)(2) of the bill should expressly state that the Nation may not forbear deliveries in the State of New Mexico to allow the delivery of

water for use in Arizona when there is a shortage in the Lower Basin that reduces the availability of CAP NIA priority water. Deliveries to the Navajo Reservation through the Navajo-Gallup pipeline must be reduced in the same proportion as other CAP NIA priority water during a Lower Basin shortage.

April 18, 2007

STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER
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John R. D'Antonio, Jr. P.E.
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June 5, 2007

Herbert R. Guenther, Director
Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, Arizona 85012-2105

Dear Mr. Guenther:

All Colorado River basin states are to be congratulated regarding the execution of the Agreement Concerning Colorado River Management and Operations and the submission of joint comments to the Bureau of Reclamation regarding the coordinated operation of Lakes Mead and Powell and shortage sharing guidelines for the lower basin states. New Mexico hopes that the agreement will be a step toward continued cooperation among the basin states relating to each state's use and development of its share of water from the Colorado River system. For New Mexico, the Navajo Settlement and corresponding Navajo-Gallup pipeline are important projects to enable New Mexico to utilize its apportionment of water under the Upper Colorado River Basin Compact. Federal legislation relating to the Navajo Settlement has been re-introduced this Congress (S 1171 and HR 1970) and New Mexico hopes that in the spirit of the recent Agreement, all basin states will support the Navajo Settlement.

This letter responds to the State of Arizona's comments dated April 5, 2007, and April 20, 2007, relating to New Mexico's Navajo Settlement and the corresponding federal legislation. Discussions with representatives of Arizona have helped New Mexico understand the issues raised by Arizona, and although some of Arizona's issues can be addressed, New Mexico cannot agree to all of the changes proposed by Arizona. As noted in more detail below, many of Arizona's proposed changes require consultation and agreement by the Navajo Nation and the other basin states.

Arizona's general objection relates to the legislation's citation to the draft EIS and draft hydrologic determination. As you know, the basin states have agreed on language provided to the Secretary of the Interior for the draft hydrologic determination, and we expect the Secretary of the Interior to issue the final determination, at which point the legislation can be amended accordingly. Regarding the draft EIS, it is not uncommon for legislation to refer to a draft EIS or

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for a project to be authorized before the NEPA process begins, and this should not constitute a valid objection.

Arizona also objects that the Settlement Agreement and legislation conflict with existing law. New Mexico does not agree that the Settlement Agreement violates any law, compact or decree. With respect to one issue raised by Arizona, Section 303(g) of the legislation provides Congressional authorization of the use of upper basin water in the lower basin in New Mexico. The legislation also specifies that the water used by the project in New Mexico will be part of New Mexico's Upper Basin apportionment. New Mexico is willing to recommend to our congressional delegation that Section 303(g) be amended to state:

"(g) Colorado River Compacts. -- Notwithstanding any other provision of law, (1) water may be diverted by the Project from the San Juan River in the State of New Mexico for use in the lower basin, as that term is used in the 1922 Colorado River Compact, in New Mexico; and (2) water diverted under paragraph (1) shall be a part of the consumptive use apportionment made to the State of New Mexico by Article III(a) of the Compact."

Arizona also proposes that the legislation include a generic provision that water diverted in the upper basin for use in the lower basin must have the same priority date as the Central Arizona Project, but that the Navajo-Gallup project would be excluded from that requirement. There is no legal basis for Arizona's proposal and it is not appropriate or necessary to include Arizona's recommended language regarding priority in the legislation.

Arizona's other comment relating to priority concerns Section 102 of the legislation which amends Section 11 of the 1962 Act. Section 102(b) amends the 1962 Act to provide specific guidance to the Secretary of the Interior in allocating physical supply shortages out of Navajo Reservoir and is consistent with Article IX of the Upper Colorado River Basin Compact.

The remainder of Arizona's comments relate to the potential water supply to be allocated for Navajo Nation uses in Arizona. As you are aware, New Mexico's Settlement with the Navajo Nation includes a pipeline system from Navajo Reservoir to communities within New Mexico that also extends to Window Rock, the Navajo Nation capital city located in Arizona less than 30 miles from where the pipeline will service the City of Gallup in New Mexico. New Mexico's Navajo Settlement leaves open the determination of the source of water for uses in Arizona.

Arizona would like to specify that the water supply for uses in Window Rock through the Navajo-Gallup pipeline will be the water supply identified in Section 104(A)(1)(B)(ii) of the Arizona Water Settlements Act. That provision of the AWSA authorizes the Secretary of the Interior to retain 6,411 acre-feet of water, out of a pool of 67,300 acre-feet of Central Arizona Project "agricultural priority water", as

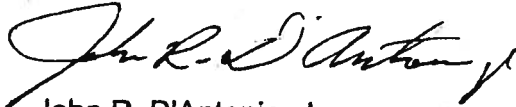
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that term is defined in the Gila River settlement agreement, for a future water rights settlement agreement with the Navajo Nation in Arizona. To my knowledge, there is currently no agreement among parties in Arizona regarding this issue, and therefore, it would be premature, at best, to specify a particular supply of water for the Window Rock uses until an agreement is reached within Arizona.

In addition, even if an agreement among parties in Arizona existed, accounting for diversion of Central Arizona Project water from of an upper basin tributary would have to be agreed to by all basin states. It would not be appropriate to pre-determine this issue through New Mexico's Navajo Settlement legislation without the agreement of the other basin states and discussion with the Department of Interior.

New Mexico hopes that this explanation will provide the basis under which Arizona can fully support New Mexico's settlement with the Navajo Nation. Please contact me if you have any questions.

Sincerely,



John R. D'Antonio, Jr.
State Engineer

JRD:rav