

SJ-11
Navajo Settle

Subcommittee on Water and Power
Committee on Natural Resources
Tuesday, July 24, 2007, 10:00 a.m.
1334 Longworth House Office Building

AGENDA

Legislative Hearings on:

- **H.R. 2515** (Heller, R-NV), To authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program in the States of Arizona, California, and Nevada, and for other purposes. "*Lower Colorado River Multi-Species Conservation Program Act,*"
- **H.R. 1970** (Udall, D-NM), To amend the Colorado River Storage Project Act and Public Law 87-483 to authorize the construction and rehabilitation of water infrastructure in Northwestern New Mexico, to authorize the use of the reclamation fund to fund the Reclamation Water Settlements Fund, to authorize the conveyance of certain Reclamation land and infrastructure, to authorize the Commissioner of Reclamation to provide for the delivery of water, and for other purposes. "*Northwestern New Mexico Rural Water Projects Act.*"

WITNESSES

Panel 1: H.R. 2515

Robert Johnson, Commissioner, Bureau of Reclamation, Washington, D.C.
Susan Bitter-Smith, President, Central Arizona Project Board, Phoenix, AZ
George Caan, Chairman, Lower Colorado River Multi-Species Conservation Program,
Las Vegas, NV
Kara Gillon, Senior Staff Attorney, Defenders of Wildlife, Albuquerque, NM
Gerald R. Zimmerman, Executive Director, Colorado River Board of California,
Glendale, CA

Panel 2: H.R. 1970

Robert Johnson, Commissioner, Bureau of Reclamation, Washington, D.C.,
Mr. Johnson will also be accompanied by W. Patrick Ragsdale, Director, Bureau
of Indian Affairs, Washington D.C.
Joe Shirley, Jr., President, Navajo Nation, Window Rock, AZ
Jim Dunlap, Chairman, Interstate Stream Commission of the State of New Mexico,
Santa Fe, NM
Patricia Lundstrom, President, Northwestern New Mexico Council of Governments,
Gallup, NM
Gregg Houtz, Deputy Council, Arizona Department of Water Resources, Phoenix, AZ
Gerald R. Zimmerman, Executive Director, Colorado River Board of California,
Glendale, CA

**STATEMENT
OF ROBERT JOHNSON
COMMISSIONER, BUREAU OF RECLAMATION
AND
W. PATRICK RAGSDALE
DIRECTOR, BUREAU OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER AND POWER
ON H.R 1970**

July 24, 2007

Chairwoman Napolitano and members of the Subcommittee, we would like to thank you for the opportunity to appear today to present the Administration's views on H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has concerns that H.R. 1970 would increase mandatory spending, delay the full cost of the legislation beyond the 10 year Congressional scorekeeping window, not provide for adequate cost sharing by non-Federal interests, and likely include costs that exceed the Federal government's underlying liability. The Administration did not participate in the drafting of the water rights settlement embodied in H.R. 1970, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

H.R. 1970 would amend Federal statutes that relate to the Bureau of Reclamation and the use of water in the Colorado River basin. Major provisions include: (1) authorization for the Bureau of Reclamation to construct and operate a pipeline (formally

titled the “Northwestern New Mexico Rural Water Supply Project”, but generally known as the “Navajo-Gallup Pipeline Project”) to bring water from the San Juan River to the eastern portion of the Navajo Reservation, the Jicarilla Apache Reservation, and the City of Gallup, New Mexico; (2) creation of a Reclamation Water Settlements Fund in the Treasury that could be used to fund activities under this bill and future Indian water rights settlements, to be funded by the diversion of revenues from the existing Reclamation Fund; (3) authorization for the Secretary of the Interior to reserve up to 26 megawatts of power from existing reservations of Colorado River Storage Project power for Bureau of Reclamation projects for use by the Northwestern New Mexico Rural Water Supply Project; and (4) authorization for the Secretary to rehabilitate existing irrigation projects, develop groundwater wells, and establish other funds for the benefit of the Navajo Nation. The bill also includes provisions that would resolve the Navajo Nation’s Federal Indian reserved water rights claims in the San Juan River in New Mexico, although the United States was not party to the final negotiations on this issue.

The Role of the Criteria and Procedures

The Administration has been actively engaged in the New Mexico water settlements. Secretary Kempthorne committed during his confirmation before the Senate to bringing his energy and concern to the pending water settlements in New Mexico. Consistent with this pledge, we have made it a high priority to better understand the complex issues that must be resolved in each of the proposed New Mexico settlements. Our water rights team has made several trips to New Mexico to visit with the Pueblos, Tribes, the State, local communities, water users, and other constituencies to these

proposed settlements. A few months ago, at the Secretary's request, key officials from the Departments of Justice and the Interior and the Office of Management and Budget traveled to Navajo country to observe first-hand the difficult issues related to water delivery on the Reservation.

Madam Chairwoman and members, we are keenly aware of the needs in this area of the United States. On the Navajo Reservation, some people routinely haul water for 20-30 miles several times a week to provide for their basic household needs. Families must travel extended distances to do laundry because washing machines require water hookups which they do not have. There is no question that the Administration officials who traveled to the Reservation came away with powerful and indelible images as well as a better understanding of the needs of Reservation inhabitants seeking access to basic services that are taken for granted by all but a few Americans.

Nonetheless, despite our understanding of the human needs on the Navajo Reservation, we firmly believe that the resolution of substantive and procedural problems raised by this bill will require the active involvement of all parties to the proposed settlement. It is important to have an open and full discussion on all aspects of the settlement, including the specific goals of the Navajo Nation and the State of New Mexico for the settlement of these claims and whether these goals can be met by alternative and potentially less expensive means. This settlement was developed largely without Federal involvement, and, consistent with Secretary Kempthorne's commitment to address these issues, we would welcome the opportunity to continue to engage with the Committee and proponents of this settlement to see if we can identify areas of common ground sufficient to move forward with the full support of the Administration.

One of the first steps in this process, Madam Chairwoman, is for us to acknowledge the three New Mexico settlement proposals that are now being advocated to Congress. While the Navajo settlement in the San Juan River is the subject of today's hearing, there are other settlements proposed in New Mexico, as well as in other western states, that require active Federal participation in negotiations. If enacted, the cost of H.R. 1970, alone, is estimated to exceed 1 billion dollars. If the other two proposals from New Mexico, Aamodt (involving the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque) and Abeyta (involving the Pueblo of Taos), about which the Administration also has raised serious concerns, were to be enacted as currently envisioned by their proponents, total expenditures for Indian water rights settlements in New Mexico alone are likely to exceed \$1.5 billion.

The Administration believes that the policy guidance found in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("Criteria") (55 Fed. Reg. 9223 (1990)) provides a flexible framework in which we can evaluate the merits of this bill. The *Criteria* provide guidance on the appropriate level of Federal contribution to the settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government. As we have testified previously, the *Criteria* is a tool that allows the Administration to

evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

Provisions of Particular Concern in H.R. 1970

We would like in the remainder of this statement to provide a synopsis of substantive concerns regarding H.R. 1970. We will start with the high cost of this settlement. The Administration has concerns about the costs associated with this legislation, and currently opposes the nearly \$1 billion financial commitment embodied in this bill. We are also concerned about the large number of authorizations that the bill contains, including the indefinite amount authorized for construction of the Navajo-Gallup Pipeline. We have not yet been able to fully analyze the costs of this legislation. In 2005, the Bureau of Reclamation estimated that the price of the Navajo-Gallup pipeline would be approximately \$716 million. Reclamation is in the process of updating this appraisal-level price estimate to better reflect current construction conditions, and expects an upward adjustment to nearly \$1 billion for this feature alone. In addition, H.R. 1970 would authorize Federal expenditures of \$30 million for groundwater wells, \$23 million for rehabilitation of Fruitland-Cambridge and Hogback-Cudei irrigation projects, \$11 million for other irrigation projects, \$5 million for hydrographic surveys, and \$50 million to be placed in a Navajo Nation Water Resources Development Trust Fund to be used by the Navajo Nation for water facility construction and maintenance or implementation of water conservation measures.

The Administration has serious concerns regarding the proposal contained in Title II of this bill to establish a "Reclamation Water Settlements Fund" within the United

States Treasury. Title II provides that revenues of up to \$100 million a year for fiscal years 2018 through 2028, which is a time period outside the Congressional scorekeeping window, be diverted from the Reclamation Fund into the Water Settlements Fund. H.R. 1970 provides that moneys in the Water Settlements Fund would be available without further appropriation to fund water supply infrastructure authorized under this bill if there turns out to be insufficient funding available through the regular appropriations process to meet the funding and construction deadlines established in this bill. The second priority for the Water Settlements Fund would be to implement other Indian water rights settlements approved by Congress, including water supply infrastructure, rehabilitation of water delivery systems, fish and wildlife restoration or environmental improvement. The Reclamation Water Settlements Fund would terminate in 2030 and any remaining balance would be transferred to the General Fund of the Treasury.

We believe the sponsors of this legislation are looking for stable mechanisms to ensure the availability of funding for Indian water rights settlements around the West. We are concerned, however, that this proposal would allow direct spending not subject to further appropriations for future settlements, preventing future Presidents and Congresses from setting their own priorities with regard to budgeting and appropriating Federal tax dollars. At the present time, use of monies from the Reclamation Fund are discretionary and subject to annual appropriations by Congress.

While H.R. 1970 does require some cost-sharing in the form of a requirement for partial reimbursement of construction costs from the City of Gallup and the Jicarilla Apache Nation, it is limited. The City of Gallup and the Jicarilla Apache Nation would be required to repay the portion of the construction costs for the pipeline and associated

facilities that the Secretary would allocate to them as their responsibility, but only to the extent of their ability to pay, or alternatively, a minimum of 25% of such allocated construction costs, within 50 years of project completion.

Project proponents assert that the Navajo-Gallup Pipeline Project would qualify as a rural water project under the rural water program being established by the Bureau of Reclamation pursuant to the Rural Water Supply Act of 2006 (P.L. 109-451), legislation which was passed in December of 2006. However, the proposed pipelines envisioned by this bill have not received the level of scrutiny that this newly established program will provide. Under the rural water program, each project must be investigated prior to authorization, and the Secretary must consider whether the non-Federal project entity has the capability to pay 100 percent of the costs associated with the operations, maintenance, and replacement of the facilities constructed or developed as part of the rural water supply project. The Secretary must also recommend an appropriate non-Federal cost-share for the proposed rural water project based on the capability-to-pay of project sponsors, or at least 25% of total construction costs. The program allows the Secretary to consider deferring construction costs allocated to Indian tribes. Under this new program, the Secretary is to forward to Congress recommendations regarding whether or not the proposed rural water project should be authorized for construction based upon appraisal level and feasibility studies and the eligibility and prioritization criteria developed pursuant to the Rural Water Supply Act. The rural water program is intended to target communities of 50,000 inhabitants or fewer. The Secretary may require larger communities to pay a higher portion of project costs. Since Reclamation's rural water program is still under development, we have not evaluated the activities proposed in H.R.

1970 under the rural water project eligibility and prioritization criteria; these criteria are currently being developed by Reclamation. Upon development, we will actively evaluate whether this project would meet such criteria and could be recommended to Congress for authorization as a rural water project.

We have identified a number of other concerns regarding this bill. These include potential interpretation conflicts concerning the Navajo Indian Irrigation Project; the timing of transfers of title to the Nation; the authorization of Federal grants to support the repair and rehabilitation of certain irrigation projects, and concern that this bill might give the State of New Mexico an inappropriate role in the operation of Federal facilities that are currently operated by the United States under the Colorado River Compact and Reclamation law. Also, the Department of Justice has concerns about the waivers and releases referred to in section 403. First, they are still reviewing these waivers and releases for adequacy. Second, waivers and releases should be stated in full in the legislation because they are critical to the finality of the agreements.

We also note that the bill should require the Secretary of the Interior, rather than the Secretary of the Treasury, to invest amounts in the proposed Reclamation Water Settlements Fund, in order to make use of the investment expertise of Interior's Office of the Special Trustee for American Indians.

Comparing this Bill with Other Water Rights Settlements

Much has been said about the position taken by the Administration on water rights and other settlements over the past few years, suggesting that not supporting H.R. 1970 as written would be inconsistent with the positions we have taken on previously introduced water settlement bills. We want to squarely address these issues.

First, we emphasize that each proposed settlement is unique. The Administration evaluates each proposed settlement individually. Just as we did with each of the water settlements that have been proposed in recent years, notably the Arizona Water Rights Settlement Act (P.L. 108-451), the Snake River Water Rights Settlement Act (P.L. 108-447), and the San Joaquin River settlement that is proposed in legislation pending in this Congress (S. 27 and H.R. 24), the Administration must evaluate this proposed settlement in its unique context to determine to what extent it is consistent with our programmatic objectives and our responsibility to American taxpayers as well as our responsibility to protect the interests of the Navajo Nation. All of these previous settlements encompassed multiple objectives, providing comprehensive solutions to multi-faceted problems.

In the case of the Arizona Water Rights Settlement Act, the settlement resolved a dispute over the financial repayment obligation of Arizona water users for the Central Arizona Project (CAP), with significant amounts of money at stake. Federal representatives recognized that the CAP operational flexibility necessary to resolve the dispute could only be granted if sufficient legal and legislative protection was achieved to assure tribal access to, and use of, CAP project water. Enactment of the Indian water rights settlements in that Act was key to resolving larger legal issues involving CAP repayments by Arizona water users. Achieving final settlement of these larger issues made the legislation generally acceptable to the Administration, although our testimony did express concern about the cost of the settlement.

The Snake River Settlement in Idaho entailed several complex Endangered Species Act components that allowed further water resources development to occur for

the Nez Perce Tribe and other water users in a manner that also fulfilled the Department's obligation to protect and recover listed species.

The other settlement that has been compared to this bill, the San Joaquin Restoration Program, is in fact not connected to any Indian water rights settlement. The San Joaquin Restoration Program implements a settlement of a lawsuit that had been ongoing for over eighteen years, where a Federal judge had concluded that Reclamation's operations violated a provision of California law. The San Joaquin restoration program also involves cost shares, authorizing up to \$250 million of new Federal appropriations but only as a match for non-Federal funding of the restoration costs. This means that the State of California and Friant water users are funding a significant portion of the restoration costs. Approximately \$200 million of State bond funds for projects that will directly contribute to restoration efforts have already been approved by California voters.

We wish to reiterate however that the Administration is committed to ensuring consistency with the *Criteria and Procedures*. The settlement of the Navajo claims to the San Juan River proposed in this bill has a high Federal cost without appropriate safeguards that carrying out the authorized activities would accomplish the goals and objectives of the proposed settlement. These kinds of analyses should be completed prior to the passage of such a large settlement proposal. In light of the goal of finality, it is especially troubling that this bill does not address the distribution systems that must be constructed before any water will actually reach the homes of those who need it.

Conclusion

The Administration and Secretary Kempthorne remain committed to supporting the Indian water right settlement process and ensuring that such settlements fulfill the

Federal Government's responsibilities to Indian Tribes while also protecting the interests of the taxpaying public. The Bureau of Reclamation, the Secretary's Indian Water Rights Office, and many others in the Department are vigorously working to develop the information and documentation necessary to support a full and open discussion of this settlement. This includes already having developed a draft environmental impact statement on the proposed pipeline and completing the hydrologic determination on water availability in New Mexico. We expect to have an updated appraisal-level estimate of the costs of constructing the pipeline completed in the near future.

The Administration hopes that the entities proposing this legislation, including the Navajo Nation, the City of Gallup, the State of New Mexico, and the Jicarilla Apache Nation, will agree to work together with us towards the common goal: a settlement that will ensure that the Navajo obtain a secure, economically beneficial water supply consistent with our obligations to the taxpaying public. A clean, reliable water supply is of utmost importance to the members of the Navajo Nation, as it is to all Americans, and the United States is committed to working towards achieving it. While much work remains ahead, we are hopeful that this hearing will assist in advancing a process that results in a successful outcome.

Madam Chairwoman, this completes our statement. We would be happy to answer any questions the Committee may have.

**Testimony of President Joe Shirley, Jr.
Navajo Nation
Before the House Committee on Natural Resources
Water and Power Subcommittee
Concerning H.R.1970 – Northwestern New Mexico Rural Water Projects Act**

June 27, 2007

Thank you Chairwoman Napolitano and members of the Water and Power Subcommittee of the House Committee on Natural Resources. My name is Joe Shirley, Jr., and I am President of the Navajo Nation, a federally recognized Indian nation with the largest reservation in the United States. I appreciate this opportunity to share with you the Navajo Nation’s strong support for House Bill 1970, the Northwestern New Mexico Rural Water Projects Act. I also wish to convey the gratitude of the Navajo Nation to Congressman Tom Udall for his commitment to improving the lives of the Navajo People and for his leadership in sponsoring this important legislation.

The Northwestern New Mexico Rural Water Projects Act serves two important purposes. First, it would authorize the Secretary of the Interior to execute, on behalf of the United States, the Settlement Agreement to quantify the Navajo Nation’s water rights in the San Juan River Basin in New Mexico. The Settlement Agreement was overwhelmingly approved by the Navajo Nation Council in December of 2004 and executed with the State of New Mexico in April of 2005. It reflects almost a decade of negotiations to carefully balance a variety of demands on a limited resource. Second, the Act authorizes construction of much needed water projects for the Navajo Nation. As such, this legislation represents an important step forward in moving the Navajo Nation towards self-sufficiency, and may represent the most significant act of Congress concerning the Navajo people since the ratification of our Treaty with the United States in 1868, 139 years ago this month.

As witnesses to this important event, I am here with Mr. George Arthur, Chair of the Resources Committee of the Navajo Nation Council, Mr. Lorenzo Bates, Chair of the Budget and Finance Committee of the Navajo Nation Council, Ray Gilmore, Chair of the Navajo Nation Water Rights Commission, and Lena Fowler, Vice-Chair of the Navajo Nation Water Rights

Commission. In the Treaty of 1868, the Navajo leaders pledged their honor to keep peace with the United States and, in return, the United States pledged to assist the Navajo People in creating a permanent homeland on their reservation lands. No lands can be a permanent homeland without an adequate supply of water, especially potable water.

The Settlement Agreement

When New Mexico Governor Richardson and I signed the Settlement Agreement in April 2005, the State of New Mexico and the Navajo Nation set into motion the means to resolve a century-old controversy concerning water rights in the San Juan River basin, which could have persisted for decades to come through long, protracted litigation. The State of New Mexico and the Navajo Nation spent years crafting a settlement that would protect existing uses from the San Juan River while ensuring that the Navajo Nation would receive a firm supply of drinking water to sustain the Navajo Reservation as a permanent homeland for the Navajo People. House Bill 1970 authorizes the Secretary of the Interior, on behalf of the United States, to join Governor Richardson and me in a Settlement Agreement that quantifies the Navajo Nation's water rights in the San Juan River Basin in New Mexico in a manner that represents a win-win outcome for all parties, including the Navajo Nation, the non-Navajo water users, the State of New Mexico and the United States.

The San Juan River basin contains all the elements that have made Western water issues so contentious over the years: a limited supply of water, competition between Indian and non-Indian irrigators, the presence of federally protected endangered fish species, and not one, but four federal Reclamation projects. In other basins, that same mixture of interests has led to contentious litigation and even violence. But in the San Juan River basin, the Navajo Nation has worked in cooperation with its neighbors on issues such as native fish recovery, shortage sharing during periods of drought, and water development for municipal and power interests. The history of this cooperation is reflected throughout the Settlement Agreement.

For example, the Settlement Agreement contains provisions to protect the interests of the non-Navajo water users in the basin. The Navajo farmlands at the Hogback and Fruitland irrigation projects, downstream of the non-Indian water users on the river, possess the senior

priority on the river. Thus, during the dry summer months, when there is insufficient water in the river to satisfy all water uses, the Navajo Nation could exercise its senior priority to make a “call” on the river and stop the upstream diversions. To minimize the likelihood of calls on the upstream diversions, under the Settlement Agreement, the Navajo Nation has committed to utilize a portion of its Navajo Reservoir supply at the Hogback and Fruitland projects to ensure that more “run of the river” water would be available for the non-Navajo water users. Without the settlement, a call would be necessary during the irrigation season almost every two years, but with the settlement, the risk that a call will be made is less than one year out of twenty (20).

The Settlement Agreement also includes specific provisions to firm the water supply for existing federal Reclamation projects including the Animas-La Plata Project and the San Juan-Chama Project. The Animas-La Plata Project is an important project for the basin, and is a necessary component of the settlement approved by Congress for the Colorado Ute Tribes. The San Juan-Chama Project provides drinking water for the cities of Albuquerque and Santa Fe. This transbasin diversion also helps New Mexico meet its compact obligations to the State of Texas and provides a supply of water that can be used for two separate water rights settlements involving the Pueblo of Taos and four northern Pueblos in the *Aamodt* litigation.

In terms of protecting federal interests in New Mexico, including the San Juan-Chama Project, the importance of the Settlement Agreement to the United States cannot be overstated.

The Navajo-Gallup Water Supply Project

The centerpiece of the Bill, however, is the authorization for construction of the Northwest New Mexico Rural Water Project, commonly known as the Navajo-Gallup Water Supply Project. This project will provide a firm, sustainable supply of municipal water for the Navajo Reservation, the City of Gallup and the Jicarilla Apache Nation. Many of the 80,000 Navajo men, women, and children who live within the project service area, including Navajo Code Talker Frank Chee Willetto, presently haul water for drinking and cooking. Although construction of the project will not necessarily eliminate all water hauling on the reservation, this project will allow the Indian Health Service to expand distribution systems to provide potable water delivery to more homes, and creates growth corridors within the Navajo Nation where

future communities can be built with ready access to roads, electricity and potable water. As such, this project represents a critical component of the Navajo Nation's economic development strategy. While construction of the pipeline may not represent a condition sufficient to ensure economic prosperity for the Navajo People, surely such prosperity will never be possible in the absence of a sustainable potable water supply.

In March of this year, the Department of the Interior released the Planning Report and Draft Environmental Impact Statement for this project. I thank Secretary Kempthorne and his Counselor Michael Bogert for their leadership in releasing this critical document, in addition to the release of the hydrologic determination that there is sufficient water for the project.

Earlier this month, I spoke at the public hearing in Farmington, New Mexico, concerning the project in order to deliver the message that the Navajo Nation strongly supports the construction of the Navajo Gallup Water Supply Project. At the hearing, I was moved by the testimony of the Navajo people, most of them water haulers. I believe that the federal officials at the hearings were also moved by their testimonies. Mr. Frank Chee Willeto, a Navajo veteran and former Navajo Code Talker, who recently received the Congressional Silver Medal, eloquently testified that he and other veterans, despite financial assistance from the Veterans' Administration and the Navajo Nation, were unable to secure a loan for his home due to the absence of water in his community for fire protection. Ms. Gloria Skeet spoke eloquently about how Bread Springs Chapter, south of Gallup, needs the project because her community currently faces water shortages. Ms. Skeet, a former educator, sees that the construction of the project will allow our children to build productive and meaningful lives at home. I also viewed drawings by Navajo school children from Lake Valley Chapter depicting trucks hauling drinking water to their homes. These drawings will be submitted to the Committee in our supplemental statement. Based on these testimonies, I reiterate my message that the Navajo Nation strongly supports the construction of the Navajo-Gallup Water Supply Project.

OMB Concerns about Costs

We recently invited representatives from the Administration, including the Department of the Interior and the Office of Management and Budget, to witness first-hand the hardships

endured by Navajo families who must drive considerable distance to haul water from public watering points. They heard and saw everything I have just described to you. They also heard about the negative health effects that occur when they do not have access to potable water, including the story of Lucy Cayetano who suffers from various illnesses because she does not have easy access to potable water. Studies have shown empirically that the lack of potable water is a critical health issue for the Navajo people, but I also wonder what the psychological effects will be for our children who believe that water comes from trucks, rather than from drinking fountains or faucets.

We believe the Administration representatives received a realistic, first-hand understanding of the enormity of the problem the lack of water brings. However, we also understand that the Office of Management and Budget believes the Navajo-Gallup Water Supply Project to be "too expensive." Their belief is apparently based on the Planning Report for the project, in which the Bureau of Reclamation estimates that this project could cost as much as \$714 million or more. While this is unquestionably a huge amount of money, the anticipated cost of the project and the other components of the Navajo Nation's water rights settlement must be put into perspective.

As stated earlier, the Navajo Reservation is the largest Indian Reservation with the largest population of on-reservation members of any Indian tribe in the United States. Providing potable water for such a large reservation is indeed a costly venture, but studies conducted by the Bureau of Reclamation demonstrate that this project fares favorably when compared with other recently authorized water pipelines on a per/acre-foot and per capita basis. This information will be provided to the Committee in our supplemental statement.

We understand that OMB seeks to impose on this settlement an overly restrictive interpretation of the Administration's criteria and procedures for participating in this settlement. In particular, OMB apparently seeks to limit the federal contribution for this water rights settlement to their assessment of the monetary liability of the United States if it is sued by the Navajo Nation. Such a policy is a radical departure from previous Administrations, and is not even consistent with the position taken by the Administration in the three settlements recently

signed into law by President Bush – the Arizona Water Rights Settlement Act, the Snake River Water Rights Settlement and the Zuni Tribe Water Rights Settlement. This inconsistency was described in a recent joint letter to OMB from Chairman Bingaman and Senator Domenici. Once again, I thank the Senators for their dedication to this settlement by having pointed out to OMB these inconsistencies.

Moreover, OMB's interpretation flies in the face of the Administration's past support for the Rural Water Supply Act of 2005 in which the federal government would assume up to 75% of the cost of rural water projects. The federal contribution for such projects is not limited by any calculus of liability to the project participants. OMB's policy is especially appalling considering the trust responsibility and treaty obligations owed by the United States to the Navajo Nation. The United States Supreme Court has characterized these responsibilities as "moral obligations of the highest responsibility and trust." Simply put, the federal government should not be allowed to shirk its trust responsibility or its treaty commitments with Indian nations by hiding behind a veil constructed of legalese that can be applied to the detriment of the poorest of the poor in America.

Of particular concern to the Navajo Nation is that OMB is now objecting to the construction of infrastructure projects as a mechanism for settling Indian water rights, even though the Administration apparently supports the concept of encouraging Indian water rights settlements. In the desert Southwest, where the available water resources are largely exhausted, the only way for settlements to work is by infusing the limited natural resource pool with the financial resources to allow the existing water supplies be used more advantageously. As a general premise, these settlements do not reallocate water from existing non-Indian water users for the benefit of an Indian tribe. In the San Juan River basin, there is very little unused water for the purpose of settling the Navajo claims. Under the terms of the Settlement Agreement, the Navajo Nation is awarded only the water it has historically used, the water set aside for the Nation's use at the Navajo Indian Irrigation Project, and the water for the Navajo-Gallup Water Supply Project. The Settlement Agreement is premised on the Navajo Nation receiving a substantial amount of "wet water" development to forgo claims for additional water. In short,

without the federal government contributing the monetary resources to make this settlement work, the settlement would not be possible.

Although we do not believe OMB should apply the criteria and procedures for participating in settlements in such a restrictive way, we are confident that if OMB considers all of the ramifications of letting this settlement fail, the ultimate costs to the federal government could be staggering. Consider first, the claims of the Navajo Nation. The Navajo Nation's water rights claims are based on legal precedent established by the United States Supreme Court. The Navajo Nation's water rights claims could exceed the amount of water apportioned to New Mexico by the Upper Colorado River Basin Compact, which was ratified by Congress in 1949. These claims have been described by various legal scholars as "hypothetical shocks to the Colorado River system." If this is true, there are only two outcomes, neither of which are favorable to the United States. If the courts ultimately rule that the Navajo claims are limited by the compact because of the ratification by the United States, the Navajo Nation has a substantial claim against the United States for the lost water rights. On the other hand, if the courts ultimately rule that the Navajo Nation is entitled to water in excess of New Mexico's apportionment, then the entire system of allocation of Colorado River water would be in jeopardy exposing the United States to incalculable liability to a multitude of water users in the seven Colorado River states. The beauty of the Settlement Agreement is that by keeping the Navajo Nation's water rights within the State of New Mexico's compact allocation, the "hypothetical shocks to the Colorado River system" are avoided. But without the substantial water development infrastructure authorized by House Bill 1970, such a settlement is not possible.

If the settlement were to fail, and the Navajo Nation were forced to pursue the litigation of its claims, the United States would still be exposed to horrific liabilities even if the Navajo Nation were to obtain only modest water rights. The federal government historically promoted the utilization of waters from the San Juan River by non-Navajos through such projects as the San Juan-Chama diversion, the Hammond Irrigation Project, the Jicarilla Apache Water Rights Settlement, and the Animas-La Plata Project. However, because the Navajo Nation is the senior water user in the basin, an award of even a modest amount of water to the Navajo Nation would

disrupt the water supplies for each of these federal interests and leave the United States exposed to considerable liability. As I mentioned earlier, the San Juan-Chama Project serves a myriad of federal interests in addition to providing a water supply to the cities of Albuquerque and Santa Fe. While OMB may frame the issue in terms of whether we can afford this settlement, we believe the issue is whether we can afford not to have the settlement. Under any measure, the Congress simply cannot afford to let this settlement fail.

Currently, forty percent (40%) of the families on the Navajo Reservation are forced to transport water from regional water pumping stations to their homes to ensure that their families have potable water. In the wake of Hurricane Katrina, Congress rightly recognized the emergency that existed when so many people were deprived of potable water and infrastructure. Congress moved to fix this emergency through the authorization of billions of dollars to restore the water infrastructure in New Orleans and various coastal communities. The tragic circumstance experienced by the residents of New Orleans deserved swift and decisive action on the part of the federal government. Unfortunately, on the Navajo Nation, the lack of potable water and infrastructure is a condition that has existed for a long time. It appears that OMB is again applying a double standard when it comes to funding water infrastructure to remedy acute water supply problems. OMB did not ask Congress to consider the limits of its liability to victims of Katrina or to consider whether a federal trust responsibility required such action in order to avoid spending the money necessary to fix the problem. In the case of Katrina, Congress did the right thing. We ask Congress to do the right thing again by enacting House Bill 1970.

Arizona Concerns

Finally, we know that the State of Arizona has concerns about the language in H.R. 1171 that deals with delivery of water to Window Rock, Arizona. The Settlement Agreement and the provisions of H.R. 1171 preserve all rights for the State of Arizona to negotiate all of the terms and conditions for water delivery to Window Rock as part of a separate agreement with the Navajo Nation. We do not believe, as Arizona does, that a “comprehensive” settlement of all of the Navajo Nation’s water rights claims is necessary to protect Arizona’s interests. In the first instance, a “comprehensive” settlement should include all of the Navajo Nation’s interests in

Utah as well as the Upper and Lower Colorado River Basins in Arizona. The Navajo Nation has been actively attempting to quantify its Lower Basin claims through negotiations with Arizona water interests, but no negotiations concerning Upper Basin claims have been attempted. We have advised the Arizona water interests that we are willing to pursue a negotiated settlement of the Lower Basin claims, but we are not willing to jeopardize the authorization of our settlement with the State of New Mexico to accommodate the Arizona interests. Moreover, we have serious doubts whether a settlement of the Arizona claims can be achieved. It appears that after passage of the Arizona Water Settlements Act, there is very little Colorado River water remaining for purposes of a settlement with the Navajo Nation.

Frankly we believe that Arizona is simply attempting to leverage a settlement with the Navajo Nation that falls short of meeting the Navajo Nation's needs, by demanding that the New Mexico settlement include a partial settlement with Arizona. Nevertheless, we are committed to continued dialogue with the Arizona interests to determine if a settlement is possible and to resolve any remaining issues they may have concerning the settlement with the State of New Mexico.

Conclusion

For more than one hundred and thirty nine years, the Navajo Nation and the Navajo People have taken their treaty obligations seriously. In times of crisis, brave Navajo men and women have rushed to the country's aide, and fought and died not only for the preservation of the American ideal, but also to preserve the Navajo culture and to secure a Navajo homeland. A homeland for the Navajo People is not merely a piece of land between our four sacred mountains but a place where our culture, our language, our people can grow and live. Without water, viable economic and social communities wither and die. I am asking you today to honor the Treaty of 1868 and help bring water to the Navajo Nation.

**Hearing
before Subcommittee on Water and Power of the House Natural Resources
Committee**

**HR 1970
Northwestern New Mexico Rural Water Projects Act**

**Statement of Jim Dunlap
Chairman of the New Mexico Interstate Stream Commission**

July 24, 2007

Madame Chairwoman and members of the committee, I am Jim Dunlap. I am the chairman of the New Mexico Interstate Stream Commission, and I am a resident of the San Juan Basin in New Mexico. I appreciate very much the opportunity to appear before you today and provide comments on behalf of the State of New Mexico in support of the Northwestern New Mexico Rural Water Projects Act, HR 1970.

This legislation will authorize construction of an important rural water system for northwest New Mexico, including the Navajo Nation, the Jicarilla Apache Nation and the City of Gallup.

It will also resolve long-standing water issues between the Navajo Nation and the State of New Mexico in the San Juan River Basin of New Mexico by authorizing a comprehensive settlement agreement that will protect existing water rights within the state. The legislation clarifies provisions of existing law and provides guidance regarding regulations that will be developed to implement the settlement provisions.

The State of New Mexico and the Navajo Nation reached this settlement after decades of disagreement and many years of intensive settlement talks. It is no small matter that we appear before you today, together, urging you to pass this legislation. We believe this legislation has

been carefully crafted to address water supply needs within New Mexico while protecting the long-standing Law of the Colorado River.

I would like to discuss these issues in further detail.

The Project

The legislation would authorize the Northwestern New Mexico Rural Water Supply Project. This project is vital to solving the acute water supply conditions facing much of northwestern New Mexico, including a large portion of the Navajo Nation. The project is described in detail in the final draft Environmental Impact Statement recently released by the Department of Interior that builds off a federal planning process that has been underway for over 30 years. This Colorado River Storage Project Act project utilizes an existing reservoir and will provide a safe, reliable drinking water supply to New Mexico residents that currently haul water or rely on unsustainable groundwater.

Today more than half of rural Navajos in New Mexico must haul water for many miles to receive a basic domestic water supply. The reality of water hauling faced by those Navajo families is shocking considering the modern conveniences that most of us take for granted. By providing the backbone for a regional water supply system, the project will enable the Navajos to receive a clean, reliable supply of water.

The project will enable the City of Gallup to acquire a renewable surface water supply. Currently, Gallup faces quickly declining groundwater supplies with the prospect of severe shortages within 20 years. The project will also deliver water to the Jicarilla Apache Nation for use in the water scarce southern portion of the Apache reservation.

By 2040 the project is expected to serve approximately 250,000 people, including the residents of Gallup. The project would be the second biggest water utility in the state, smaller only than the Albuquerque Bernalillo County water utility.

Because the project will serve a very large area and contain hundreds of miles of pipeline, the cost of the project is high. But, the project costs can be appropriated over several years, and the Reclamation Water Settlements Fund, to be created by Title II of HR 1970, provides a reasonable means of funding project costs if sufficient appropriations have not been made by 2018.

In recognition that the state will incur costs associated with its Indian water rights settlement projects, including the Navajo Settlement, the State of New Mexico has made an initial contribution of \$10 million to the New Mexico Indian Water Rights Settlements Fund (NMSA 72-1-12). In addition, over the last 4 years, the state has invested approximately \$9.7 million in a Gallup regional distribution system and, this year, the New Mexico legislature appropriated \$15.3 million to be used for construction of the "Cutter Lateral" pipeline on the eastern side of the project. New Mexico recognizes the importance of funding this project and expects the federal administration to contribute funding for this project commensurate with the federal government's trust and statutory responsibilities. New Mexico expects to be treated fairly and consistently vis-a-vis other settlements around the country.

Benefits of the Navajo Settlement

In addition to authorizing a project that would provide a secure source of drinking water for Navajo and Apache communities and for the City of Gallup, the legislation would approve a comprehensive settlement of the Navajo Nation's water rights claims in the San Juan Basin in New Mexico. Navajo claims to the San Juan River have long-threatened the security of water rights of all other water users within the basin. After years of difficult negotiations, the State of New Mexico and the Navajo Nation entered into a settlement agreement in 2005.

The State of New Mexico strongly believes that the settlement represents a fair and equitable resolution, and we respectfully ask this Committee to support it. The San Juan River,

like most rivers in the southwest, does not produce enough water to meet all claims for current and future uses. Under the settlement, the Navajo Nation agrees to substantially reduce its claims in exchange for the wet water supplied by the proposed project.

Before signing the settlement agreement, the State of New Mexico carefully considered the needs of non-Navajo water users in the San Juan Basin, and over the course of several years, the state met many times with water user groups, took formal public comments, analyzed alternatives and worked tirelessly to negotiate the agreement in order to resolve the concerns voiced. Some of the most difficult negotiations centered on numerous changes to the settlement agreement that provide additional protections for third parties. The State of New Mexico has reviewed the settlement agreement and proposed legislation from a perspective of protecting all water users within the state, including San Juan-Chama Project water users, and the state believes the settlement benefits and protects those water users.

I firmly believe that we have come as close as possible to a resolution that provides maximum benefits and protections for all water users, given limitations of water supply and potential uncertainties of its allocation if the Navajo claims were litigated.

To underscore this point, I want to outline some of the most important provisions built into the settlement to protect non-Navajo water users.

Under the settlement, the Navajo Nation accepts compromises regarding both the quantity of its water rights and administration of its priority dates, with the result that Navajo claims fit within New Mexico's apportionment of the Upper Colorado Stream System and will not displace other existing uses and projects.

Under the settlement, the quantity of Navajo water rights would be made up of essentially three components. First, the settlement recognizes the existing uses of the Navajo Nation, including its old irrigation projects Hogback and Fruitland diverting directly from the San Juan

River for authorized irrigation of approximately 12,000 acres. Second, the settlement recognizes the Navajos' largest right, its right to irrigate over 110,000 acres that comprise the Navajo Indian Irrigation Project (NIIP), authorized by Congress in 1962 by Public Law 87-483. Finally, the only "new" water the Navajos will receive is almost 21,000 acre-feet a year of water to supply domestic and commercial uses for the Navajo portion of the Northwestern New Mexico Rural Water Supply Project.

Regarding the large Navajo Indian Irrigation Project right, in 1962, Congress authorized an annual diversion of 508,000 acre-feet; however, the Navajos through conservation are agreeing to limit diversions to 353,000 acre-feet and could only exceed that amount by obtaining a State Engineer permit assuring that no other water users would be impaired by an increase. As a result, even with new diversions required by the proposed rural water supply project, the settlement's net effect is a decrease in annual diversion of over 130,000 acre-feet from the amount already authorized by federal law and state permits. In addition, depletion limits are included which provide additional benefits to other water users.

With respect to priority dates, under the federal reserved water rights doctrine, the Navajos could claim an 1868 priority, the date of their reservation. Under the prior appropriation doctrine, the Navajo Nation, as most senior water right holder, could call for all its water before anyone else on the San Juan River. Even with reduced quantities as provided under the settlement, an 1868 priority would threaten frequent curtailment of other water users. Consequently, the Navajos are agreeing that NIIP and the proposed rural water supply project will be supplied under the Navajo Reservoir's 1955 priority, instead of a reserved priority date of 1868. This concession means that 10 percent of Navajo rights will have an 1868 priority and 90 percent will be administered with a 1955 or later priority.

I have described two of the most important protections incorporated into the settlement, regarding quantity and priority, but there are several other protections conferred by the settlement I want to touch on.

The settlement has valuable shortage sharing provisions that protect other federal projects. As you know, the federal government has invested a great deal of resources in the Animas-La Plata Project (ALP) and the San Juan-Chama Project. These projects are vital to the State of New Mexico, but they have relatively junior priority dates of 1956 and 1955, respectively. In addition to the general protections I have already described, the Navajo Nation is agreeing to additional, specific protections for these two important federal projects.

ALP's 1956 priority in New Mexico makes it vulnerable to priority calls within the San Juan Basin. Most of the 13,520 acre-feet per year of ALP water allocated for use in New Mexico will supply the future needs of the three municipalities of Farmington, Bloomfield and Aztec. In the event that curtailment of New Mexico's water uses is required by the Upper Colorado River Basin Compact, the Navajos agree to provide protection to New Mexico contractors up to their project contract amount. Under this protection, the Navajos agree to forgo their uses in order to make water available to ALP at the same percentage supply available to the rural water supply project authorized by HR 1970.

Section 102 of HR 1970 would amend Public Law 87-483, which authorized the San Juan-Chama Project, to clarify that the normal annual diversion requirement for that project is 135,000 acre-feet for purposes of allocating annual water supply shortages between Navajo Reservoir contractors and the San Juan-Chama Project. That provision minimizes the potential for shortages to the San Juan-Chama Project, which on average diverts 105,000 acre-feet per year, or less, in dry years when less water is available for project diversions. This means that a

large reduction in Navajo Reservoir's physical supply would have to occur before the San Juan-Chama Project would begin sharing administrative shortages.

In addition, in order to protect federal project contractors, the state analyzed the risks associated with allowing additional water to be contracted from Navajo Reservoir to supply the proposed regional water project. The hydrologic determination recently signed by the Secretary of Interior confirms that additional water is available for the new contract uses without impairing existing uses. The additional risk of shortage to contractors from either the San Juan Chama-Project or Navajo Reservoir supply is minimal, and the State of New Mexico believes that other settlement and legislative benefits provided outweigh any additional risks of shortage.

Another category of protections I want to mention consists of specific protections for non-Navajo water users who are not supplied by federal projects. These users are direct flow irrigators, municipalities and power plants. Many non-Indian and municipal state-based rights were quantified in the 1948 Echo Ditch Decree, to which the United States and the Navajo Nation were not parties. Under the settlement, the Navajo Nation and the United States would agree not to challenge the elements of Echo Ditch Decree rights except on the basis of forfeiture, abandonment or illegal use occurring after entry of the Decree. This means that the U.S. and the Navajo Nation would not go behind this long-standing decree to challenge the water rights decreed at that time or challenge the validity of the decree. Similarly, in conjunction with the settlement, the Navajo Nation is agreeing to recognize water rights of the City of Farmington quantified by the Echo Ditch Decree.

An important protection for direct flow diverters is the Navajos' agreement to call on an alternate water supply stored in Navajo Reservoir before making a priority call against direct flow. Although, as I mentioned above, the settlement provides that 90 percent of the Navajos' rights would be supplied under Navajo Reservoir's 1955 priority, the Navajos' old direct flow

irrigation projects Hogback and Fruitland would retain an 1868 priority. In many years the demand of those projects would cause junior diverters to be shut off absent the additional protection secured by the settlement requiring the Navajos to use their alternate water supply. Under the alternate water supply provisions, the Navajo Nation agrees the Hogback and Fruitland projects will refrain from priority calls against upstream junior appropriators and instead will deliver up to 12,000 acre-feet in any year of NIIP contract water in storage in Navajo Reservoir when the direct flow is insufficient to meet water demands. If this amount is exhausted in any year, priority calls may occur at that time in that year. Based on the hydrologic record, this provision would mean that instead of priority calls in one out of two years, Hogback and Fruitland would only be entitled to make priority calls in one out of every twenty years, on average.

Another benefit of stored water for direct flow diverters is contained in paragraph 401(a)(4) of H.R. 1970. When there are at least a million acre-feet in Navajo Reservoir, this provision authorizes the State of New Mexico to administer water released from storage for use by direct flow diverters at a minimum of 225 cubic-feet-per-second, even when inflows to the reservoir are less than that amount. In other words, when the direct flow would otherwise drop below 225 cubic-feet-per-second, water released from the reservoir may be used to keep direct flows at that minimum amount, thereby increasing and making more reliable the supply available to direct flow diverters.

The settlement would also make the direct flow go farther by providing funding for ditch improvements. Under the settlement, the state will contribute \$10 million for ditch improvements and water conservation projects to benefit the direct flow ditches. Section 309(c) of H.R. 1970 authorizes over \$23 million to rehabilitate the Hogback and Fruitland projects and Section 309(d) authorizes \$11 million of matching funds to rehabilitate non-Navajo ditches.

These funds will mean that approximately \$45 million will be appropriated to improve the efficiency and promote conservation of water of the direct flow diversions, as part of the Navajo settlement.

The last category of protections I want to touch on includes administrative provisions to help assure that the San Juan River Basin is managed in an orderly fashion and within the supply available. Both the legislation and settlement confirm the State of New Mexico's authority to administer water. Under the settlement, the Navajo Nation agrees that the State Engineer has authority to serve as water master in the basin and to administer water rights in priority as necessary to comply with interstate compact obligations and other applicable law, thereby confirming authority in the state to comprehensively administer water usage in the basin. In addition, the State Engineer will have authority to make determinations of current beneficial uses for any changes in points of diversion and for any changes in purposes or places of use of Navajo water rights off of Navajo lands. The Navajo Nation also agrees to comply with state law regarding marketing of water rights.

The Navajo Nation further agrees not to pump groundwater so as to deplete the flow of the San Juan River by more than 2,000 acre-feet per year, unless the State Engineer approves use of Navajo surface water to offset depletions in excess of that amount. Any Navajo groundwater uses beyond those quantified in the settlement agreement also would be subject to non-impairment of existing water rights.

Outside the Navajo Reservation on lands allotted by the United States, there are numerous individual Navajos who could assert federal reserved claims in the pending San Juan River Adjudication. The Navajo Nation is agreeing to use its water rights decreed under the settlement to supply or offset any future uses that may be awarded in the adjudication to individual Navajos allottees in the San Juan Basin.

The proposed settlement is detailed and comprehensive. Although it is a creature of negotiation and compromise, I strongly believe that it represents the best result attainable for all New Mexicans who rely on the San Juan River. Without a settlement, the Navajo Nation would assert a right to much larger quantities, with the potential to displace junior non-Navajo water users. Under the settlement, those same water users are afforded numerous and substantial protections.

If the claims were litigated, the Navajos would seek large quantities of water under the *Winters* Doctrine or Federal Reserved Water Rights Doctrine. The Navajos would seek water for future use to make the Navajo reservation a permanent homeland, including by claiming enough water to irrigate all practicably irrigable acreage (PIA) on their lands in New Mexico. The quantity of water could be very large.

Under the settlement by contrast, as I have mentioned the only “new” water the Navajos will receive is almost 21,000 acre-feet a year of water to supply domestic and commercial uses for the Navajo portion of the proposed rural water supply project. The other major water components of the settlement consist of already existing or authorized irrigation, at the Hogback and Fruitland Projects and the Navajo Indian Irrigation Project.

As we move forward, the State of New Mexico looks forward to working with other parties on proposed legislative language to assure the protections intended by the settlement are realized.

The Colorado River Basin

New Mexico supports this legislation because it is good for New Mexico, the Navajo Nation, and the Colorado River Basin states.

The States’ Agreement Concerning Colorado River Management recently executed by California, Arizona, Nevada, Utah, Wyoming, Colorado and New Mexico provides extensive

benefits to the lower basin states in terms of protecting and increasing the water available for use in those states. The primary benefit of the agreement to the upper basin states is a reaffirmation of each state's right to develop its Colorado River water entitlement. The Navajo Settlement resolves the Navajo Nation's water rights claims within the San Juan Basin in quantities that fit within New Mexico's apportionment under the Upper Colorado River Compact. Resolution of tribal water rights claims is important to states, tribes, and the federal government, and it is particularly beneficial when the claims can be resolved within a state's compact apportionment.

The Secretary of Interior's recent hydrologic determination was developed by the Bureau of Reclamation in collaboration with engineers and hydrologists from the Upper Division states and was concurred with by the Upper Colorado River Commission (representing Colorado, Wyoming, Utah and New Mexico) through a resolution dated June 9, 2006. The Department of Interior consulted with all of the seven basin states, including Arizona, California and Nevada, regarding the final hydrologic determination. This hydrologic determination confirms that water is available for the Navajo Settlement within New Mexico's apportionment of water under the Upper Colorado River Basin Compact without displacing any existing water uses within New Mexico.

HR 1970 authorizes the Secretary of Interior to sign the Settlement Agreement and design and construct a project to bring a necessary, safe and reliable water supply to many New Mexican families who currently rely on hauled water or unsustainable, poor quality groundwater to meet their domestic needs. The Upper Colorado River Commission has already expressed support for the settlement project and this legislation through resolutions dated June 19, 2003 and June 9, 2006.

The settlement and the water supply project contemplates a pipeline extension to the Navajo Nation's capital in Window Rock, Arizona, on the border with New Mexico. HR 1970

preserves Arizona's right to negotiate its own settlement with the Navajo Nation and water cannot be delivered to Arizona until an agreement is reached within Arizona regarding the water supply allocation and additional approvals are received as may be required under the law of the Colorado River. New Mexico has been able to accommodate some of Arizona's concerns, but many of Arizona's concerns go beyond the scope of our settlement, raising complicated issues that are objectionable to other basin states. New Mexico is willing to continue conferring with any of the Colorado River Basin states as necessary to explain the settlement agreement or discuss concerns about the settlement, but New Mexico believes that each state should be entitled to develop its compact entitlement in the manner that best meets the needs within that state. In New Mexico, have worked hard to resolve complicated Indian water rights claims through a settlement that will address basic human needs. We hope the other states will support us in this effort.

Madame Chairwoman and committee members, the State of New Mexico asks you to support HR 1970. The costs of the Northwestern New Mexico Rural Water Supply Project and of the Navajo settlement are high. But the costs of delay in not addressing the vital and human needs of the communities of Northwestern New Mexico are much higher. This legislation would settle protracted and divisive litigation, and in its place would provide a clear, safe drinking water supply for northwest New Mexico.

TESTIMONY OF
PATRICIA A. LUNDSTROM
MEMBER
NEW MEXICO HOUSE OF REPRESENTATIVES
&
EXECUTIVE DIRECTOR
NORTHWEST NEW MEXICO COUNCIL OF GOVERNMENTS
SERVING AS
STEERING COMMITTEE CHAIR
NAVAJO-GALLUP WATER SUPPLY PROJECT

BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
of the COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 1970

“THE NORTHWESTERN NEW MEXICO RURAL WATER PROJECTS ACT”

Resolving the Navajo Nation’s Water Rights Claims
in the San Juan River Basin in New Mexico and
authorizing the construction and rehabilitation of
water infrastructure in Northwestern New Mexico

July 24, 2007

Mr. Chairman and Members of the Subcommittee, I am Patricia Lundstrom, member of the New Mexico House of Representatives in my fourth term serving House District 9, and Executive Director of the Northwest New Mexico Council of Governments since 1985.

State House District 9 encompasses about 3,000 square miles in northwestern New Mexico, including the western portion of the City of Gallup and 9 rural Navajo communities lying within McKinley and San Juan Counties. Navajos comprise about two-thirds of the population of this District.

The Northwest New Mexico COG is the regional planning agency designated by the State of New Mexico and the Federal government to serve the State's three counties of the Four Corners region: Cibola, McKinley and San Juan Counties. This is about 15,000 square miles of high desert territory, including large reservation areas for four Indian tribes and a population of about 225,000 people residing in 6 municipalities and 77 rural communities. About one-half of the land base and one-half of the population are Native American.

I want to thank you for inviting me to participate in this historic hearing today.

I come before you to speak in favor of the proposed Settlement of Navajo Nation water rights in the San Juan River and the other associated titles included in H.R. 1970. My primary interest in this bill and in the Settlement is that this legislation is an essential instrument for authorizing and financing the proposed rural water infrastructure project we have been working on for decades. We have known it as the *Navajo-Gallup Water Supply Project*, and in the context of this bill it is titled the *Northwestern New Mexico Rural Water Supply Project*.

Since 1991, I have served as Chair of the Intergovernmental Steering Committee for the *Navajo-Gallup Water Supply Project*. This project is the flagship of the proposed water rights Settlement, as it plans to construct primary water pipelines to deliver water from the San Juan River to rural Navajo communities in northwestern New Mexico, to the southwestern portion of the Jicarilla Apache Nation, and to the City of Gallup.

During these past 16 years, I have seen the Navajo-Gallup project revived from its prior stalemate condition and, with the consistent leadership and support of Senators Bingaman and Domenici, I have seen it sustained as a planning initiative to the present day through a minefield of legal, technical, bureaucratic, political, financial and environmental issues.

The Steering Committee has been the primary nexus and forum in which these issues have been addressed and resolved by a persevering coalition of partners, including:

- The Navajo Nation, with representatives from the Nation's Natural Resources Division, Division of Justice, President's Office, and Water Rights Commission;
- The Jicarilla Apache Nation, with staff and policy representation from the Nation's Water Rights Commission and from the Office of the President;
- The City of Gallup, which serves as a project beneficiary (for 20% of the project's eventual capacity) and as a hub distribution system for the project's water supply at its southern end, to water users not only within the City limits but also in a number of neighboring Navajo communities;

- The State of New Mexico, primarily through its State Engineer's Office and the Interstate Stream Commission; the State is a party to the interstate compacts affecting the Colorado River and its tributaries, as well as to a negotiated settlement of the Navajo Nation's water rights in the San Juan River, and (through its Legislature) the State is a major contributor to infrastructure improvements in support of the overall Navajo-Gallup Water Supply Project;
- The Bureau of Reclamation, which serves as federal lead for the project out of its Western Colorado Area Office; and
- The Bureau of Indian Affairs, which is federal administrator of the Navajo Indian Irrigation Project, and which has a substantial role with regard to real properties and rights-of-way affected by the project;
- The Navajo Tribal Utility Authority, the Navajo Nation's utility enterprise that operates all of the public water systems on the Navajo Reservation;
- The Navajo Area Indian Health Service, a division of the Public Health Service in the US Department of Health & Human Services, which is responsible for planning and constructing water facilities in service to Navajo communities; and
- The Northwest New Mexico Council of Governments, a federal- and state-designated regional planning agency which chairs the Steering Committee.

In addition to these Steering Committee groups, we have enjoyed the professionalism and cooperation of two agencies in particular that have also contributed greatly to the success of our planning efforts thus far:

- The Upper Colorado River Commission has worked thoughtfully and cooperatively with the State of New Mexico and the Navajo Nation in accommodating the unique needs and configurations of this project. In particular, in 2003 the Commission resolved to support and consent to diverting water from the Upper to the Lower Basin of the Colorado River for the purposes of the Navajo-Gallup project, and it certified its support for "such Congressional action as may be necessary to authorize the Navajo-Gallup Water Supply Project."
- The United States Fish and Wildlife Service worked cooperatively with all parties to complete appropriate planning studies in the San Juan River that would identify the depletions from the river that could be made without negatively impacting the recovery of endangered species of fish in the river.

This project is the most ambitious and complex of the many local and regional initiatives I have been a part of for over two decades. It has also evoked the highest levels of cooperation, professionalism and commitment by a group of agencies and individuals that I have ever seen. My Council of Governments staff and I have been working on this project continuously since the early 1990s, and there have been many other individuals from all the participating agencies who have worked with us on it for years at a time. For all of us, this is not just "any project"; it's

personal. Getting it done makes so much sense, at so many levels, that we are all committed to it for the long-haul.

Since the late 1950s, State and Federal officials have concurred with the Southwest region's top hydrologists that the only hope for long-term sustainable water supply for the eastern Navajo Reservation and for the City of Gallup lies in the surface water supply provided by the San Juan River. The San Juan is a tributary to the Colorado River, originating in the mountains of southwestern Colorado, flowing through a portion of northwestern New Mexico, and proceeding to join the Colorado River at Lake Powell in southern Utah and northern Arizona. Through allocations confirmed in the hydrologic determination recently approved by Interior Secretary Kempthorne, the San Juan River provides about 40% of New Mexico's surface water supply. The Navajo-Gallup project would divert nearly 38,000 acre-feet of water from the river, or about 5½ percent of New Mexico's river allocation.

The needs for the Navajo-Gallup Water Supply Project are clear and evident:

- For the Navajo Nation, there is a significant population of Navajo people in the northwestern New Mexico service area who do not have, and have never had, a public water system. To this day, nearly 40% of Navajo families in the service area still haul water to meet basic household and livelihood needs. It is also clear that the Navajo economy, already struggling well below the poverty line, stands no chance of development without the provision of water as the most basic of all human needs.
- For the Jicarilla Apache Nation, there is already in place a settlement agreement under which this neighboring tribal community has secured water rights, but for which significant economic and infrastructure development is needed in order to tap the fullness of these rights.
- For the City of Gallup, the water table is dropping 200 feet every ten years, and the City will be facing peak-use shortages within five years and chronic shortages within fifteen years.

To focus further on the needs of the City of Gallup: Gallup serves as a multimodal transportation portal for the Southwest and a major commercial center for the Navajo Reservation. As such, it is as much a "home" and integral part of Navajo life as most other places in the region. Within a few decades, we expect that Navajos will make up over 50 percent of Gallup's population. Despite a checkered history of relationships between Gallup and the Navajo people, with some residue of tension and mistrust even today, the partnership that has been forged between Gallup and the Navajo Nation in the context of this project has been remarkable. I foresee only further progress in this relationship as this project moves forward.

It is important to note that, in my 16 years with the Steering Committee, at no point has the City of Gallup attempted to insert its needs and priorities in front of those of the Navajo Nation. Rather, it has been a supporting partner, ensuring that its participation is mutually beneficial to the City and to its Navajo neighbors.

As an example of this partnership, there has been a joint effort to provide municipal water supply to Navajo households bordering the City of Gallup on its east side. Past bureaucratic

barriers to this service have been erased, and by this summer's end, those Navajo families will have running water for the first time.

Another example is the multilateral partnership between the City, the State of the New Mexico, the Navajo Nation, the Indian Health Service and the Navajo Tribal Utility Authority to finance and build components of the Gallup regional water system, with the specific objective of moving water through the City's system to the neighboring Navajo communities adjacent to the City. The State has committed over \$9 million to this initiative, which is being developed in accordance with the plans of the *Northwestern New Mexico Rural Water Supply Project*.

The Navajo-Gallup partnership was further extended when the City concurred with the request by the Navajo Nation, the Governor's office and other agencies for State funding in support of urgently needed water infrastructure serving five rural communities in the northeastern sector of the Navajo-Gallup project service area. Over \$15 million has now been committed by the State to what is referred to as the "Cutter Lateral" project, since this infrastructure will ultimately tie into and be served by the pipeline to be built under the *Northwestern New Mexico Rural Water Supply Project*.

These regional system partnerships have generated broad commitment to the motto: **"Real water to real people in real time."**

Realizing the shortages that are likely prior to the advent of surface water into the City's water supply, the City of Gallup has also risen to the challenge of the region's impending water crisis by exploring and implementing various initiatives to secure its water future – both leading up to and in conjunction with the completion of the *Northwestern New Mexico Rural Water Supply Project*.

- In 2003, the City sponsored a Town Hall on Water, co-facilitated by the public policy group New Mexico First, at which participants adopted a consensus plan to establish Gallup as a model town in the American West in terms of its commitment to secure its water future and cooperate with its neighbors in the "water commons" shared by all residents in the region.
- Emerging from the Town Hall was the formation the Gallup Water Board, which assisted the City Council in the radical revision of the City's water rate structure in support of conservation and the generation of local financing for water infrastructure and future water supply.
- Another initiative was a partnership with the Bureau of Reclamation to study the feasibility of implementing a comprehensive wastewater recycling program utilizing reverse osmosis technology.
- Yet further, Gallup has pursued a permit to develop water supply in water fields east of the City formerly owned and developed by extractive industries.
- Finally, a Memorandum of Understanding is in its final draft stages between the City, the Navajo Nation and the Jicarilla Apache Nation, by which the parties will commit

to ensure that the City is afforded legal access to a share of the water to be supplied by the Navajo-Gallup project.

Within the overall scenario of the Navajo-Gallup project, the City of Gallup remains in full support of the project and of the water rights settlement which is its primary facilitating instrument. At the same time, the City is proactively developing a specific long-range financial plan to be able to afford its share of the cost of the project.

The Economics analysis contained in the project's Planning Report and Draft Environment Impact Statement suggests that the City's ability to pay is fairly close to the threshold formula applied by the federal government in terms of median household income. The somewhat misleading conclusion that might be derived is that the City can readily afford to self-fund its share of the project.

A number of factors mitigate against such a foregone conclusion:

- Gallup's status as a hub commercial center for a broad geographic area results in a unique pattern of impact on the City's infrastructure. Although the current municipal population is about 22,000, the number of people moving around and doing business within the City may soar to between 70,000 and 100,000 people – especially on weekends and on ceremonial occasions. It is essential to understand that Gallup serves a broader service area than its municipal boundaries would indicate. Over 80 percent of the students in Gallup schools are Navajo. The Gallup Indian Medical Center serves the regional Native American population. Due to the lack of water service on the Reservation, area residents regularly use City laundry, car wash and other facilities that increase the demand for water. Higher rates resulting from the City's cost for participating in the new water supply project will be passed on to the low-income residents in the broader regional community, thus affecting the overall "affordability" of the project.
- Although the influx of visitors generates a disproportionately high level of gross receipts tax revenues in the City, the City and surrounding County are severely limited in the development of property tax revenues, and the City is virtually land-locked by public, non-taxable lands on all sides, for which compensation by such funds as Payment in Lieu of Taxes (PILT) is only a fraction of the revenue shortfalls actually occurring.
- Although Gallup's median household income is shown in the Economics report as only a shade or two below the "affordability level" of the project, yet this income figure is deceptive as well, since there is a large gap between the minority of well-to-do households and the majority of low and moderate-income households in the City. Not surprisingly, two-thirds of the City's residential water revenues come from the population group utilizing the lowest quantities of water, that is, fewer than 6,000 gallons per month. These lower water users are predominantly the City's lowest-income households. The City's inverted water rate structure provides some cost protections for these lower users, but these may be insufficient to keep rates within the affordable range for this population.

- The Economics analysis in the Final Report does not take into account the need for replacing aging infrastructure. Even with Gallup's new progressive water rate structure and at maximum bonding capacity, the City's funds are insufficient to meet even current operations, maintenance and replacement costs, much less to develop new infrastructure or participate in a new water supply initiative. Gallup presently has approximately 71 miles of water distribution piping installed prior to 1966, which will need to be replaced over the next 40 years at an estimated cost of \$42.4 million. In addition, a large portion of the remaining 157 miles of pipe currently in service will be 40 to 60 years old at the time Gallup's cost share comes due.
- The City's stake with respect to the Settlement of the Navajo Nation's water rights in the San Juan River is clearly secondary to that of the Nation, the State of New Mexico and the Federal government. With respect to accessing a legal water supply, the City first course of action is to pursue a water source in consultation with the two Indian tribes involved in the project. The City's pursuit of the independent purchase of water rights in the San Juan River would be high in cost, high in controversy and low in feasibility at this point.
- It is the City's position, therefore, that it will need significant Federal funding support for its share of the project costs.

The City is committed, nevertheless, to charting a strong financial course to meet the 25 percent threshold of its share of the project costs. One key piece of the strategy will undoubtedly be investment by the State of New Mexico in a portion of Gallup's share of the project costs. City, County, Tribal and Council of Governments representatives met recently with staff from the offices of the Governor and the State Engineer, and I was very encouraged by the spirit of collaboration in this regard. I will be working with the Governor's and State Engineer's Offices and with the State Legislature on a mechanism to specifically include financial commitments to Gallup over time.

With regard to the City's won commitment to the project cost share, several options are currently under consideration with bond counsel, with a preliminary strategy report to be ready for review by mid-August. However, until such factors as the cost of water, final operations, maintenance and replacement (OM&R) and capital costs, and construction scheduling are determined, it will be difficult for Gallup to determine what its ultimate financial strategy will be. In any event, the approach being pursued is that, in partnership with the State of New Mexico and McKinley County, the city will design and implement a strategy to meet 25% of its project cost share.

All in all, the *Northwestern New Mexico Rural Water Supply Project* represents a "perfect storm" of opportunity for the Federal government to meet the critical water needs of the people in this region of New Mexico, while settling the water rights claims of the Navajo Nation as an essential component of the overall initiative. The project's promise of "**real water to real people in real time**" forms a primary basis for the economic viability of the northwestern quadrant of New Mexico.

The Steering Committee for this longstanding and critical project effort, along with the institutions I represent – the Northwest New Mexico Council of Governments and the New

Mexico State Legislature – urge your support for H.R. 1970, and by implication, for authorization of the *Northwestern New Mexico Rural Water Supply Project*. I acknowledge that the projected costs for this project are high, but we dare not delay any longer in meeting the human and economic needs represented in this initiative.

For our Steering Committee, this worthy cause has been on our watch for a couple of decades, and we hope – now that it's on your watch as well – that you will not let this opportunity fail.

Thank you for your most favorable and timely consideration of H.R. 1970.

**STATEMENT OF HERBERT R. GUENTHER
DIRECTOR OF THE ARIZONA DEPARTMENT OF
WATER RESOURCES
REPRESENTING THE STATE OF ARIZONA**

BEFORE THE

**SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON RESOURCES**

UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 1970

NORTHWESTERN NEW MEXICO RURAL WATER PROJECTS ACT

JULY 24, 2007

Madam Chairwoman and Members of the Subcommittee,

Good morning and thank you for the opportunity to present the views of the State of Arizona on H.R. 1970, the "Northwestern New Mexico Rural Water Projects Act of 2007".

H.R. 1970 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.

H.R. 1970 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 H.R. 1970 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 H.R. 1970 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 Northwestern 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, H.R. 1970 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. H.R. 1970 does not specify how the accounting and delivery of water for tribal use in Window Rock, Arizona would be handled. H.R. 1970 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 H.R. 1970 can be amended to become a more comprehensive solution. Therefore, we believe Congress should not take final action on H.R. 1970 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 H.R. 1970 without a resolution and dismissal of the Navajo Nation lawsuit concerning the Colorado River.

Title II of H.R. 1970 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 Northwestern 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 Northwestern 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, H.R. 1970 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 H.R. 1970, as currently drafted, conflicts with the Law of the River. H.R. 1970 contains several provisions related to deliveries of water through the Northwestern 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 Northwestern 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 H.R. 1970 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, H.R. 1970 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 the Director of the Department of Water Resources

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. H.R. 1970 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. H.R. 1970 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 State Engineer John D'Antonio several months ago about these issues. Mr. D'Antonio recently responded about Arizona's suggested bill changes. I have attached copies of both of these letters for the record. I 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 H.R. 1970 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 H.R. 1970, 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

STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER
SANTA FE

John R. D'Antonio, Jr. P.E.
State Engineer



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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

Herbert R. Guenther, Director
June 5, 2007
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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

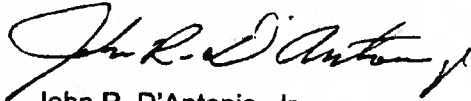
Herbert R. Guenther, Director
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that term is defined in the Gila River settlement agreement, for a future water rights settlement agreement with the Navajo Nation in Arizona. To my knowledge, there is currently no agreement among parties in Arizona regarding 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

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

April 18, 2007

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

ARIZONA DEPARTMENT OF WATER RESOURCES
3550 North Central Avenue, Phoenix, Arizona 85012-2105
Telephone 602 771-8426
Fax 602 771-8681



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
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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 black ink, 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.

**STATEMENT OF GERALD R. ZIMMERMAN,
EXECUTIVE DIRECTOR,
COLORADO RIVER BOARD OF CALIFORNIA,
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON WATER AND POWER,
ADDRESSING H.R. 1970,
THE NORTHWESTERN NEW MEXICO
RURAL WATER PROJECTS ACT**

July 24, 2007

Madam Chairwoman, and Members of the Committee and Subcommittee, thank you for this opportunity to submit written testimony regarding H.R. 1970. Set forth below are initial comments regarding the provisions in H.R. 1970 from the perspective of the Colorado River Board of California.

I am the Executive Director of the Colorado River Board of California (CRB), the agency in California created by State statute to protect California's rights and interests in the resources provided by the Colorado River and to represent California in discussions and negotiations regarding the Colorado River and its management. California's rights and interests in the water and power resources of the Colorado River System are vital to the State's economy. Seven counties in Southern California, with more than half of the state's population, receive water and hydroelectric energy from the Colorado River. All ten members on the CRB are appointed by the Governor.

The CRB has reviewed H.R. 1970, and its companion bill S. 1171. From our initial review of the proposed legislation, CRB does not oppose the Navajo-Gallup Project; and it fully recognizes the value and importance of the Project to the State of New Mexico and to the residents of the Navajo Nation. However, the CRB does want to ensure that legislation of this nature is consistent with the law of the river and is reflective of broader concerns of the State of California. In that regard, the CRB has a number of comments on the proposed legislation, primarily from the perspective of the law of the Colorado River. These comments are listed in order of the topic's appearance in the legislation.

1. Section 101 – Top Water Bank – Arrangements of this nature are being utilized in various parts of the West where the reservoir circumstances facilitate this sort of interim water storage. However, in this situation the legislation does not clarify how the water to be stored in the top water bank must be developed. It is the position of the CRB that the legislation should be modified to provide that only water created through extraordinary conservation may be stored in the top water bank. In other words, water could only be stored if that water would have otherwise been beneficially used except for

the implementation of extraordinary conservation measures and as provided in H.R. 1970, it should be the first water to spill.

2. Section 102 – Amendment of the 1963 Act – This section amends 43 USC 615 jj, which was enacted in 1962 as a component of the Navajo Irrigation Project and San Juan-Chama Project authorizing legislation. Section 2 of the 1962 Act is eliminated and a much more detailed provision has been substituted. The CRB notes that the wording in Section 102, subpart (b), relating to priorities in times of shortages is not clear as to whether the first rights listed are to have priority over the others or are the first to be cut back. Clarification of this provision would be useful in obtaining a full understanding of the intention behind the proposed legislation.

3. Section 201 – Funding via the 1902 Act Reclamation Fund – This section of the proposed legislation provides a creative mechanism for funding implementation of settlement agreements and completion of the Navajo-Gallup Project. The CRB understands that Section 201 provides that \$1.1 billion would be deposited into the treasury before it is set to terminate on September 30, 2030.

Section 201 (c) (3) provides that completion of the Navajo-Gallup Project will be given a priority, for up to as much as \$500 million, if the federal share of Project costs has not been otherwise provided by January 1, 2018. Since the Reclamation Fund is made viable through the repayment of reclamation projects from around the West, many of which are in the State of California, the CRB questions the fairness of providing to the Navajo-Gallup Project a priority position to receive up to one-half of all funds designated for deposit into the new settlements fund. Prior to taking a formal position on this section of the bill, the CRB will need to consider this matter further accounting for the likely needs of California projects that are linked to settlement agreements involving the United States. One approach may be to have the new fund be a source of revenue for the Navajo-Gallup Project should additional federal funding be necessary by 2018 on a basis of sharing with other deserving projects in the West, instead of with a priority as set forth in Section 201.

4. Section 303 – Delivery and Use of Water – This section of the bill gets to the heart of the concerns of the CRB regarding the law of the Colorado River and the need to be consistent with the Colorado River Compact of 1922. One concern is the clear provision of authority to use water in the lower basin even though that water will be diverted in the territory of the upper basin. H.R. 1970 needs to specifically address: 1) the diversion and use authority in the context of the 1922 Colorado River Compact, and 2) the attributes of the water use in the lower basin both in New Mexico and Arizona.

A related concern is with the use of such water in the territory of the lower basin within the State of Arizona so as to serve the community of Window Rock on the Navajo Reservation. The State of Arizona has asserted that such water will need to be viewed as a portion of Arizona's lower basin apportionment and should also come with certain attributes linked to the Central Arizona Project (CAP) such as priority date and repayment of project operations, maintenance, and replacement costs. Mr. D'Antonio for

New Mexico has asserted that H.R. 1970 should “leave open the determination of the source of water for use in Arizona” and that accounting for the water as a diversion of CAP water would “have to be agreed to by all basin states,” which has not yet occurred. This issue needs to be resolved among the Colorado River Basin states and the agreed upon solution included in H.R. 1970.

In the current era of pipelines being proposed to transport water from the upper basin to the lower basin, it is imperative that precedent-setting situations that will impact the law of the river in one form or another be appropriately addressed. In this regard, the transport of water from the upper basin into the lower basin within New Mexico is a rather significant matter, but the further transport of that water into Arizona is an additional significant step. The CRB suggests that legislation authorizing the transportation of water should be clear as to the attributes of the water to be used in such circumstances; for example, the source of water (including linkage to the Arizona Water Settlements Act if appropriate), the priority position of that supply, U.S. Supreme Court decree accounting arrangements, and any other important attributes such as project operations, maintenance, and replacement costs that may be associated, for example, with the CAP water supply. Thus, the CRB recommends that Section 303 of the bill be amended to provide these points of clarification. In the alternative, authorization for the construction of facilities that move water from the upper basin to the lower basin should be eliminated from H.R. 1970.

If the Arizona position regarding the use of CAP-related water is adopted, the CRB also suggests that attention be given to what additional authority may be needed so as to clearly provide that CAP-related water may be delivered by the Secretary to a portion of Arizona not contemplated as a part of the CAP service area at the time of its authorization in 1968.

5. Section 306 (f) (3) and Section 302 (f) (3) – Application of the Endangered Species Act – These sections of the bill address the “application of the” ESA, but it is unclear as to the intended effect of these provisions.

6. The State of Arizona has taken the position that H.R. 1970 and S. 1171 should not be enacted without a parallel settlement of the rights of the Navajo Nation in Arizona, arguing that all Indian water rights settlements should be comprehensive, if possible. Although the CRB understands and appreciates the position of Arizona on this issue, the CRB is not prepared to advance a position on this specific issue at this time.

Nevertheless, it is important to express our concern over the lawsuit filed by the Navajo Nation in 2003 in the United States District Court in Arizona. California agencies represented on the CRB have intervened in that litigation. That suit contains claims that challenge some very important lower basin water management programs. For example, the suit challenges a number of matters related to California’s Quantification Settlement Agreement (QSA): 1) that the National Environmental Policy Act (NEPA) compliance process for the QSA was flawed; 2) that the Record of Decision associated with the Secretary’s approval of the QSA and the Inadvertent Overrun and Payback

Policy (IOPP) is flawed; 3) that the NEPA compliance process for the IOPP is flawed; and 4) that the NEPA compliance process for the Interim Surplus Guidelines was flawed.

Similarly, the Navajo Nation has challenged the Arizona Water Banking Authority's interstate storage program and the federal regulations promulgated to facilitate that program. The Navajo Nation asserts these claims on the foundation that these kinds of water management actions have an impact on the Nation's claim to Colorado River water in Arizona and its eventual use of that water. However, in reality none of these actions or programs impacts the amount of water available to the Nation as a part of the Nation's federal reserved rights claims, as a practical matter (actual water supply) or in relation to the availability of Arizona's unused apportionment to satisfy the Nation's lower basin claims. This lawsuit presents a cloud over these important river management programs that are of benefit to the basin states. As a result, the CRB suggests that it be a high priority to obtain a dismissal of that suit whether in the context of the Arizona settlement, the New Mexico settlement, or both.

In closing, I want to reiterate that the CRB does not oppose the Gallup-Navajo Project; however, it does want to ensure that legislation, such as H.R. 1970, is consistent with the Law of the River and is reflective of the broader concerns of the State of California. Additionally, the comments set forth above have been advanced on the basis of its initial review of the proposed legislation and the comments of others. As such, the CRB would like to reserve its opportunity to revise any of the positions advanced above and to add to its comments, if additional points of concern come out of this process.

On behalf of the CRB, I want to thank the House Committee and Subcommittee for the opportunity to provide this testimony and for giving attention to the comments of the CRB. Should the subcommittee or committee require any clarification of these comments or additional information, you may reach me at (818) 500-1625, extension 308.
