

**Testimony of President Joe Shirley, Jr.
Navajo Nation
Before the Senate Committee on Energy and Natural Resources
Concerning S. 1171 – Northwest New Mexico Rural Water Projects Act**

June 27, 2007

Thank you Chairman Bingaman, Ranking Member Domenici, and members of the Committee on Energy and 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 the Senate Bill 1171, the Northwest New Mexico Rural Water Projects Act. I also wish to convey the gratitude of the Navajo Nation to Senators Bingaman and Domenci for their commitment to improving the lives of the Navajo People and for their 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 Katie Gilbert, Navajo Nation Water Rights Commissioner. In

addition, Navajo Code Talker Frank Chee Willeto from the Pueblo Pintado Chapter and Gloria Skeet from the Bread Springs Chapter have joined me as well. 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. Senate Bill 1171 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 *Aamodi* 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 Senate Bill 1171, 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 Senate Bill 1171.

Arizona Concerns

Finally, we know that the State of Arizona has concerns about the language in S. 1171 that deals with delivery of water to Window Rock, Arizona. The Settlement Agreement and the provisions of S. 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. 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.