

SJ-17
Navajo Staff

**Hearing
before the Senate Energy and Natural Resources Committee**

**S. 1171
Northwestern New Mexico Rural Water Projects Act,**

**Statement of John R. D'Antonio, Jr.
New Mexico State Engineer**

June 27, 2007

Mr. Chairman and committee members, I am John D'Antonio, New Mexico State Engineer. 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, S. 1171.

This legislation will authorize construction of an important rural water system for 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. 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 the United States to join us as signatories to the settlement agreement.

We believe this legislation has been carefully crafted to address water supply needs within New Mexico and protect the long-standing Law of the Colorado River while building off the recent cooperation and agreements among the Colorado River Basin states.

I would like to discuss these issues in further detail.

Rural Water Supply 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. The project builds off of an existing Colorado River Storage Project Act reservoir, and is supported by a federal planning process that has been underway for over 30 years. The State of New Mexico looks forward to receiving the Bureau of Reclamation's feasibility level design cost estimates for the project in the near future so that progress can continue toward a final EIS and project construction.

As demonstrated through many of the comments presented to the Bureau of Reclamation in response to the draft EIS, 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 faced by Navajo families was highlighted in a recent PBS documentary, developed with the assistance of the State of New Mexico, and many viewers were shocked to realize the primitive conditions suffered by Navajo people, who currently have to travel many miles each day to fill up tanks at water supply stations and haul them home again. The BOR heard comments on the draft EIS from several Navajo citizens including a Navajo Code Talker who described his daily hardships and another veteran who lamented his inability to utilize the GI home loan program because of the lack of fire hydrants where he lives. During one public meeting, grade school children presented drawings of trucks carrying water tanks as description of their current water supply systems.

By providing the backbone for a regional water supply system, the project will enable the Navajos to receive water – a basic need that virtually all other U.S. citizens take for granted.

The project will also 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. Finally, the project will 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 over 800 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 S.1171, 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 initial contributions 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 rural water supply and Indian water rights settlement projects and looks forward to a federal commitment commensurate with the federal government's trust and statutory responsibilities. New Mexico commends Senators Bingaman and Domenici for their recent communications with the Office of Management and Budget regarding the need to treat New Mexico's water rights settlements 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, 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.

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 S. 1171.

Section 102 of S. 1171 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 from 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.

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. 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.

I have already mentioned the settlement confirms over 150,000 acre-feet per year of conservation of NIIP irrigation water. The settlement and S. 1171 further promote conservation of water by authorizing funding for rehabilitation and construction improvements to Navajo and non-Indian irrigation systems diverting from the San Juan River.

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.

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. S. 1171 and the Navajo settlement help protect and further the interests of New Mexico with respect to the Colorado River Compact and the Upper Colorado River Basin Compact and are consistent with the spirit of the recent agreements among the basin states.

A basic tenet of the recent agreement reached among the seven Colorado River Basin States is each state's right to develop its Colorado River water entitlement. The settlement and the project's use of a renewable surface water to meet domestic needs are consistent with the States' Agreement Concerning Colorado River Management and Operations and the States' joint comments to the Bureau of Reclamation in connection with the Environmental Impact Statement for the coordinated operations of Lakes Mead and Powell, which recognize that potential drought in the future could raise uncertainties regarding each state's water supply options. The Navajo Settlement resolves the Navajo Nation's water rights claims within the San Juan Basin in New Mexico while allowing New Mexico to develop water uses within its apportionment under the Upper Colorado River Compact.

New Mexico appreciates the Department of Interior's role in encouraging the recent agreement among the basin states and its recent engagement on Indian water rights settlements in New Mexico. Resolution of tribal water rights claims is important to states, tribes, and the federal government, particularly when the claims are 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.

S. 1171 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 hauling 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. New Mexico hopes that all Colorado River Basin states will support the Navajo Settlement and S.1171.

Because the Navajo Reservation extends beyond one state's boundaries, the settlement's water supply project contemplates a pipeline extension to the Navajo Nation's capital in Window Rock, Arizona, on the border with New Mexico. New Mexico believes the settlement agreement and S. 1171 preserve Arizona's right to negotiate its own settlement with the Navajo Nation, and New Mexico encourages Arizona and the Navajo Nation, as they continue to work toward a resolution of their outstanding issues. Through consultation with Arizona, 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 can only be addressed through agreement among all Colorado River 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. New Mexico recognizes the complicated nature of the Law of the Colorado River and has

worked with other basin states on mutually acceptable legislative provisions. The recent and ongoing cooperation among the Colorado River Basin states in connection with the coordinated operation of Lakes Mead and Powell has given rise to a new spirit of open communication and compromise that New Mexico hopes will continue for years to come.

Mr. Chairman and committee members, the State of New Mexico asks you to support S. 1171. 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 that casts a pall over the entire area, and in its place would provide certainty of water supply and economic development. It would also provide certainty regarding water rights for all water users of the San Juan River. Finally, it would authorize a regional rural water supply system that will afford the habitability and enjoyment of the land for generations to come.