

# NAVAJO NATION'S WATER RIGHTS AND MISCELLANEOUS WATER SUPPLY ISSUES

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## HEARING BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE ONE HUNDRED TENTH CONGRESS

FIRST SESSION

TO

RECEIVE TESTIMONY ON S. 1171, A BILL 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 TO RESOLVE THE NAVAJO NATION'S WATER RIGHTS CLAIMS IN THE SAN JUAN RIVER BASIN IN NEW MEXICO

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JUNE 27, 2007



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\*Senator Thomas passed away on June 4, 2007.

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## **NAVAJO NATION'S WATER RIGHTS AND MISCELLANEOUS WATER SUPPLY ISSUES**

**WEDNESDAY, JUNE 27, 2007**

U.S. SENATE,  
COMMITTEE ON ENERGY AND NATURAL RESOURCES,  
*Washington, DC.*

The committee met, pursuant to notice, at 2:30 p.m. in room SD-366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

### **OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO**

The CHAIRMAN. OK, why don't we go ahead and start the hearing.

It's a pleasure to welcome everyone this afternoon, we have a large contingent of people from New Mexico and Arizona who have traveled across the country to be here, and we appreciate everyone's efforts to be here today.

The purpose of the hearing is to receive testimony on S. 1171, that's a bill that I'm sponsoring, and that Senator Domenici's sponsoring. It authorizes a settlement of the Navajo Nation's water rights claims in the San Juan River Basin in New Mexico.

Key features of the legislation include amendments to the law of the Colorado River, an authorization to construct the Navajo Gallup Rural Water Project, and an authorization to use the reclamation fund to ensure that this settlement, as well as other similar matters can be fully implemented.

A settlement as complex as this has many moving parts, a number of the most critical ones have been delayed for years, such as the environmental impact statement for the Navajo Gallup Project. Secretary Kempthorne and his staff have worked hard to get the process moving again, I'd like to take the opportunity to acknowledge their hard work, and express my appreciation for that effort.

Unfortunately, as the administration's testimony makes clear, the Federal Government does not have a consistent view on these matters. Over the last 4 years, the Federal Government has committed almost \$2.5 billion to settle water rights claims in other parts of the West and has spent \$1.6 billion to address water issues in developing countries. We've even spent \$2.3 billion on water infrastructure and management in Iraq. But now the administration is strongly opposing S. 1171 due to its cost, which is less than a billion dollars, to be expended over 15 to 20 years.

The basis of the legislation that we have introduced is an April 2005 settlement agreement between the State of New Mexico and

the Navajo Nation, declaring the extent of the Nation's water rights in the San Juan Basin. The agreement was long in the making, but now appears to have a wide base of support. Once again, it's clear that negotiated settlements are much more productive than endless litigation.

As is evident from today's testimony, though, there's much work left to be done, the bill involves a number of big issues. First, it implicates the Colorado River. Accordingly, as with everything involving the Colorado River, there are a number of people trying to ensure the bill does not undermine their interests, and others viewing this as an opportunity to further issues that are best left to other contexts.

The hearing also involves the Federal Government's dealings and responsibilities toward Native Americans, a relationship the U.S. Supreme Court once characterized as, "Moral obligations of the highest responsibility and trust." Unfortunately, the administration will be adding another sorry chapter to that ongoing story.

At the heart of today's hearing, and hopefully not lost in the discussion, are the people who will be affected by this legislation and this project. For too long, a large percentage of Navajo people have gone without readily accessible drinking water supplies. That's a convenience that other Americans take for granted.

I hope that we can do justice to this issue today, and have a productive hearing that will address the needs of these individuals, and bring a settlement that will benefit all New Mexicans.

With that, let me turn to Senator Domenici for his opening statement, and then we'll turn to the first panel of witnesses.

#### **STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO**

Senator DOMENICI. Thank you very much, Mr. Chairman.

I wonder, before I proceed, if I might as just a matter of personal privilege, call to your attention, and to those that are here, the fact that this young man behind us here, an Albuquerquean, Nate Gentry, today is his last day. Maybe he could stand up, and you and I could at least say thanks to him, by applause.

[Applause.]

The CHAIRMAN. Yes, let me just interject, that Nate has done great work for you on the committee, and has been a great resource for the entire committee. He's doing what a lot of us look forward to doing some day, and that is, going back to New Mexico.

Senator DOMENICI. He is. He's going to practice law, and he's going to practice, predominantly, water law, and he'll be good at it. He's stayed as long as I could ever expect for somebody as talented, and had other opportunities. That happens to us, it happens to those who work for us. He knows what I think of him, and I just wanted everybody to know that it's young, talented people like this that make us look good sometimes, like in this settlement that we're talking about here, they've come up with some exciting ideas that are going to make this settlement work, and he's been a part of that. So, I'm proud of him.

Thank you, Senator Bingaman, for having this session, and for permitting me to participate in a few opening remarks.

First, in a water-short State like New Mexico, decisions regarding water use and allocation are too important to leave up to the courts. As with all litigation, the outcome is uncertain. Some argue against the settlement because they believe the courts would allocate them more water than a settlement would provide. While this may be true, it's quite possible that the court could award a party much less.

An enormous benefit of Indian water rights settlements is that they allocate water in a way that keeps everyone whole. This settlement, when signed into law, will forever resolve the water rights claims of the Navajo Nation in New Mexico.

Since my first term in office, I have dreamt of bringing a reliable source of water to the Navajo Nation, and the city of Gallup. The lack of water infrastructure on lands the Navajo Nation owns and occupies is deplorable.

As we hear today, 40 percent of the Navajos have to haul water. Since 1974, I've worked to further the Navajo Gallup Water Supply Project, and I am particularly pleased that this legislation provides for the construction of that project.

This settlement is expensive, however, when viewed in the context of the Arizona Water Settlement Act, Mr. Chairman, and the Snake River Settlement, signed into law by the President, I believe that the proposed Federal contribution is reasonable.

I'm interested to hear from our administration witnesses today as to why those settlements received the support of the administration, and this settlement does not.

Secretary Kempthorne made a commitment to me before this committee that he would make the New Mexico Indian water rights settlements a priority—not just this one, there are two others, or three others. He has kept that commitment.

He and his staff also deserve credit for advocating for New Mexico Indian water rights settlements within the administration. They have done so, and I am aware of that. However, it has become clear that despite my repeated requests, the Office of Management and Budget is not willing to provide funding—at least the funding that we think is necessary—to fulfill the terms of the New Mexico settlements.

Now, they are willing to put up some money, they just don't believe that it's worth as much as we do, and we can't possibly settle for what they're talking about.

I recently introduced legislation that would, in another way, create a fund so that money for the New Mexico settlements will be there when the settlements are ultimately approved by Congress. Senator Bingaman has also proposed a way to fund this settlement, contained in the bill that we're considering today.

While the two approaches differ somewhat, I am confident that we can reach an agreement on how to ensure that New Mexico settlements—this one and the others we have—are funded as prescribed by the agreements and the court decrees.

I know that some have concerns with this settlement, but please rest assured that I am committed, and I'm sure our Chairman is, to work with all parties to address their concerns as the bill proceeds through Congress.

I would like to welcome our witnesses, as our chairman has, and look forward to their testimony.

I thank you, Mr. Chairman, and hopefully we'll finish this today. Thank you.

The CHAIRMAN. Well, thank you very much.

Before I introduce the first panel, let me just do one house-keeping matter. The committee has received a number of additional statements and exhibits and testimony regarding the bill that is before us today, and those items—as well as the written submissions of all witnesses that testify today—will be made part of the official record of the hearing.

Our first panel consists of two representatives from the Department of Interior, Bob Johnson, who is the Commissioner of the Bureau of Reclamation, and Carl Artman, who is the Assistant Secretary for Indian Affairs. We welcome both of you. Please go ahead and summarize your written statements. If you would do so, after that, I'm sure each of us will have some questions.

**STATEMENT OF CARL ARTMAN, ASSISTANT SECRETARY FOR  
INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR**

Mr. ARTMAN. Thank you, Mr. Chairman Bingaman and Ranking Member Domenici, for inviting us to this hearing.

This is Commissioner Bob Johnson, from the Bureau of Reclamation, and I am Carl Artman, Assistant Secretary for Indian Affairs. We look forward to speaking to you about the proposed S. 1171, and the water issues impacting the Navajo Nation. We seek permission to submit our formal comments for the record.

The water issues faced by the Navajo Nation, along with other tribes and pueblos, throughout the West, are critical. We are very aware of this fact by the nature of our responsibilities, the work we've done in this area, and our visits to the impacted reservations.

In fact, in a recent visit to the Navajo Nation, the children shared with us some pictures they drew that highlight the needs in very simple terms. "No good water, need fresh water."

Secretary Kempthorne has committed himself to engaging in the resolution of Indian water rights claims. He's committed to bring his energy and experience to the table to achieve forward progress, and tangible results. This commitment has not wavered, and his actions—and those of the Department of Interior—support this assertion.

S. 1171 proposes answers to important questions. Our opposition to the bill, as drafted, is based in part on the fact that we have not yet had a chance to assess and analyze these issues, and develop our own baseline answers to these matters. We seek to do this.

We believe that this analytical process—coupled with the history of collaborative negotiation with all of the stakeholders—will result in a settlement beneficial to all, and cost-effective for the American taxpayer.

Again, thank you for holding this hearing, and for bringing together all of the parties to partake in this necessary discussion.

[The prepared statement of Mr. Johnson and Mr. Artman follows:]



JOINT PREPARED STATEMENT OF ROBERT JOHNSON, COMMISSIONER, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR AND CARL ARTMAN, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Chairman Bingaman and Ranking Member Domenici, we would like to thank you for the opportunity to appear today to present the Administration's views on S. 1171, 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 S. 1171 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 S. 1171, 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.

S. 1171 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. You will recall, Mr. Chairman, that Secretary Kempthorne committed during his confirmation 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.

Mr. Chairman 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, Mr. Chairman, 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 S. 1171, 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 S. 1171

We would like in the remainder of this statement to provide a synopsis of substantive concerns regarding S. 1171. 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, S. 1171 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. S. 1171 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 S. 1171 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 S. 1171 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 S. 1171 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.

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

The CHAIRMAN. Mr. Johnson, did you wish to give us some testimony?

#### STATEMENT OF ROBERT JOHNSON, COMMISSIONER, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR

Mr. JOHNSON. Just a short statement, Mr. Chairman.

It's a pleasure for me to be here and offer some oral remarks on the settlement and S. 1171.

I might just say that it's been my personal pleasure to work with the Navajo Nation for a long time. Parts of the Navajo Nation are located within the lower Colorado region of the Bureau of Reclamation, where I served as Regional Director for approximately 11 years. I have visited the Nation a number of times, and am familiar with the water needs of the Navajo people.

When I was regional director, we provided technical assistance and funding for a number of programs and projects on the reservation, most notably, the rehabilitation of the Ganado and many farms irrigation projects.

Similarly, Reclamation's Upper Colorado Region has provided significant planning, technical and construction assistance to the Nation. That office has been involved in managing the construction of Navajo Indian Irrigation Project, and will also be constructing the water supply pipeline to serve the Navajo Nation from the Animus La Plata Project.

Most recently, our Upper Colorado Region has led the effort on the planning and environmental analysis for the Navajo Gallup Water Supply Project, which is contemplated in S. 1171.

This spring, Reclamation issued a planning report draft Environmental Impact Statement for the project, and very recently, conducted public hearings on the project. The public comment period ends this week, and over the next several months, we will be evaluating those public comments, and preparing a final Environmental Impact Statement and a Record of Decision.

In addition to that, we're working hard on updating the cost estimate, we're going back and trying to provide some more detail into updating the pricing of the project. Our schedule calls for us to have that completed by September of this year.

We've also, in a parallel effort, completed a hydrologic analysis, to affirm the availability of water supply for the project, as required in the Navajo Indian Irrigation Project in San Juan Chama Projects Act of 1962. After careful consultation with all 7 Colorado River Basin States, Reclamation has concluded that adequate water supplies are available to meet the additional water needs contemplated in the Navajo Gallup water supply pipeline.

Secretary Kempthorne signed that hydrologic determination just a few weeks ago.

While we do not support S. 1171, as written, we are committed to working with the Congress, and other parties involved in the settlement, to find common ground on the multitude of issues identified in our written testimony.

Mr. Chairman, this concludes my oral statement, we would be glad to answer questions.

The CHAIRMAN. OK, thank you very much.

Let me start, and just ask a few questions. Obviously, I'm disappointed with the position that the administration has taken. As I understand part of the justification for your opposition, the administration's opposition is that you've indicated the Federal Government has not been involved in settlement drafting, and therefore opposes the legislation. I have a letter dated December 2001, where I requested the Federal Negotiating Team be appointed to

work on this, and we also have a letter in June of the following year, 2002, agreeing to the appointment of a Negotiating Team, to work with the Navajo Nation and the State of New Mexico to try to get this resolved.

So, I'm not clear what has happened in the 4 years since that Negotiating Team was appointed, I guess they have not been involved, is what you're now testifying, is that correct?

Mr. ARTMAN. Thanks for the question, Senator.

You're correct—a team was appointed in 2002 to examine these issues, and there has been engagement with the tribe on these matters. Engagement has taken the form of the hydrological study that was referenced, the draft Environmental Impact Statement, public hearings, five separate meetings, recently, with the Navajo Nation to discuss these specific issues, and more meetings scheduled to come ahead.

In drafting any settlement, we haven't reached the point yet where we have the settlement that we participated in, with all of the parties around the table, and that's something that's certainly necessary for us.

The bill, S. 1171, represents a possible solution. But, a solution that—at the moment—doesn't have the administration's concerns reflected in it. Concerns about our trust responsibilities—what are the parameters of those trust responsibilities? In order to ascertain those sorts of issues, we need to have discussions with the tribe and other parties at the table and go through our own assessments and analysis of that.

There may be other parties, Federal parties at the table, such as IHS, for the drinking water response, the drinking water pipeline, and those related responsibilities.

So, we are currently engaged in the process, but we haven't reached the point where we've come up with a collaborative settlement, which is what we would request to do at this point.

The CHAIRMAN. Well, I guess my frustration on this—of course, I think anyone who gets involved in water settlement issues knows that it's going to take many years. Certainly, this did take many years. The Navajo Nation worked hard at it, and the State of New Mexico worked hard at it, and everybody sort of agreed 2 years ago, in 2005, on a settlement of these various issues. Of course that's what's happened, and now it's almost as though the Federal Government's parachuting into this situation and saying, you know, "What about us?"

It's just not a credible response to come in 2 years after a settlement has been negotiated, and 4 years after a Federal Negotiating Team was appointed to work on this issue, and say, "We need to get involved." I mean, I don't know—at some point there's got to be closure to this, and it seems to me that the Navajo Nation and the State of New Mexico have worked in very good faith to try to bring this to closure, and the Federal Government's been AWOL, is essentially what you're saying.

Mr. ARTMAN. I certainly agree that the parties have—the State of New Mexico and the Navajo Nation have—come to the table and have discussed this settlement. As has been noted, Secretary Kempthorne committed to, and has exemplified a commitment to settling water issues in New Mexico—this one or others that are

currently in discussion right now. I think that if you look at the actions of the Department of Interior, now and going forward, and in the recent past, we have exhibited that sort of forward-progress desire, and a desire for results. Also one for collaboration.

The CHAIRMAN. I don't know how quickly you're expecting results, but this administration will be in office another 18 months, and then we're on to a new administration. I have great difficulty seeing why we can't proceed on the basis of what has been agreed to by the Navajo Nation and the State, and proceed with this legislation.

Let me ask about one other issue, and then defer to Senator Domenici. You also expressed grave concern about the use of these revenues from the Reclamation Fund as a way to help ensure implementation of the settlement. You object that our legislation on the use of these funds would bind future Presidents and Congresses. Why didn't you take that same position when considering the Lower Colorado River Basin Fund, and the Arizona Water Settlement Act? That certainly binds future Presidents and Congresses, as I understand it. The same question, as I understand it, the San Joaquin Water Settlement, that is currently pending in this committee, involved direct spending obligations, which bind future Presidents and future Congresses. Why object to that kind of a provision here, when you don't object to it in those circumstances?

Mr. JOHNSON. I guess the first point that I would make is—and I've been involved in a lot of Indian settlements, and a lot of water settlements over the years, and—there's no two of them that are alike, they're all unique, they all have a unique set of circumstances, and you have to evaluate those projects on a case-by-case basis.

In the case of the San Joaquin, that's not an Indian settlement, it's a settlement of a longstanding environmental litigation where a judge had ruled against us, and where we needed to settle with the local parties on that issue, or risk substantial losses in other ways.

The amount there is quite a bit smaller, and there was a significant amount of non-Federal cost-sharing, cost matching, in fact, that helped bring that one together.

The monies that do come out of the Reclamation Fund are actual moneys that are part of a repayment obligation of the Friant Water users, so it's revenues that are flowing in from that project, that are being tapped to help fund that project over a period of time.

So, that's the differences as it relates to that.

The Central Arizona settlement was also, you know, very large, very complicated, no question about it. There we had a longstanding litigation over repayment of the project, which was a very complicated issue where there was a lot of Federal financial interests at stake. There was a significant new amount of water supply that was being obtained for Indian settlements in the future that had very significant value that made that project more attractive. Although, quite frankly, from the administration perspective, when that got passed, there was also concerns about costs there, as well.

So, anyway, they're all unique, they're all complicated, and we have to evaluate them on a case-by-case basis.

The CHAIRMAN. Senator Domenici.

Senator DOMENICI. Well, I don't think it does much good to tell us that Secretary has really been interested, and has really been positive. He talked to me publicly during his confirmation process, and he talked to me in my office before the confirmation process.

But, so he's interested—all of this time has passed, and here come his two chief people, and all they have to tell us is that we're not ready, that there's still a lot of work to be done. I tell you, for 5 years, I've been pleading with the administration to work with the parties to the New Mexico Indian Water Rights Settlement.

Now, you state in your testimony that the administration is unable to support this settlement, because you were not involved in the negotiations relating to the settlement. I tell you, I find this very frustrating. From my standpoint, if the Chairman is ready, I'm ready to proceed. We'll see if you are needed, or not. Whether we need further consultation, as you speak about, or not.

I believe that these rights are long overdue, and this settlement is long overdue. I think we have found the source of money that we will let the Congress pass on, here. You say it shouldn't be used, we say it's OK. You say it binds future Presidents, all direct spending binds future Presidents, and we'll just take our chance at it as we move through here. We may do it a little differently, but from my standpoint, it's the best source of money we've found.

Mr. Chairman, I'm ready to—instead of relying on them, I think I'm ready to rely upon the Senate and the House, and hope they pass it, and then see what the President does. I believe that the President had this matter before him, he doesn't know anything about it, because nobody tells him.

I mean, this case is stopped by the OMB, not you all. Just tell us the truth. OMB doesn't want this much money spent on this case, and they've done it on every water case in New Mexico. Now they've got a new fellow over there. I know him well, too. Believe it or not, just today I told him, we've got some water cases that might, you know, just might be that you won't get confirmed. But, we're going to find out what you have, what kind of guts you have in that, with reference to the water cases. I'm telling you the truth—I don't expect OMB to get in the middle of this case again, it's too late. From my standpoint, they've had their shot, and they have not been very constructive from what I can see.

So, I don't have any further questions, because I don't know what to ask you, because you don't know anything. I mean, you weren't there, you aren't there, you weren't invited. I don't know what to ask.

I don't know what to ask you, Commissioner. You know all about this—these kind of things, but I really, honestly, don't know—why don't you tell me, why can't we proceed with this case, quickly—why should it take very long? Based upon the facts as we understand them?

Mr. JOHNSON. Well, I think all the concerns are laid out in the written testimony, but I think we are prepared to renew our commitment to sit down and work. I think that Secretary Kempthorne is, in fact, very sincere in his statements and in his desire to move forward on Indian settlements, all of the interaction that I have



had with him, that's been reinforced. So, you know, I think we are ready to sit down and engage in a dialog.

Senator DOMENICI. Maybe that's the case, and maybe dialog is what's needed. I kind of feel like we're past dialog, but maybe we're never past dialog until it's finished. But, we'll see.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Let me ask one other question before we go to the second panel.

In your testimony, you also raise the question of whether this settlement can be met by alternative, and potentially less expensive means. You've made reference to this EIS, Environmental Impact Statement that identifies what they've called "the superior alternative" from an economic, and an environmental, and an overall perspective. What else is there that you're thinking of? I mean, I thought that that was what the EIS was focused on, was determining what is the best way to accomplish this objective, but your testimony seems to be suggesting that there's something else that should be done to determine what the best alternative is. Could you clarify what you've got in mind?

Mr. JOHNSON. Well, there's no question we did identify a preferred—what we call a preferred alternative, in the draft EIS. That's usually the case when we put out an EIS, we evaluate a draft, a draft alternative—or a preferred alternative.

I suppose I would differentiate between what we would call a preferred alternative among the alternatives that we evaluated, and given the planning objectives that were laid out and jointly worked on with all of the parties. Maybe contrast that with the proposed alternative. I don't think we could say, at this point, it's a proposed alternative, it's a little bit of a different beast than a preferred alternative.

Again, I think we're ready to sit down with all of the folks that are involved and talk about that in more detail on what, if anything, can be done to reduce the costs of the project. I think a lot of it comes back to the costs, and the level of costs, and is there any way that we can find to reduce those costs. I think that's really what's being referred to.

The CHAIRMAN. But, you're conceding that if you want to accomplish the objectives that have been agreed upon by the parties, you have already identified the preferred way to do that, through this Environmental Impact Statement.

Mr. JOHNSON. Preferred among the alternatives that were evaluated, yes.

The CHAIRMAN. But you're saying that you didn't evaluate the right alternatives?

Mr. JOHNSON. Well, you know, I think that's something that we can, you know, have some dialog around and, again, you know, see if there's anything at all that's out there that's a way to reduce the costs. I don't know if there is or not, but I think that's part of the dialog that we think we can have.

The CHAIRMAN. Well, to the extent that you want to have dialog, I would urge that it's long overdue, and I would urge that you do it quickly. Because we're planning to go ahead with this legislation, and if you have input that we haven't heard that is specific, we need to hear it, quickly.

All right, thank you both very much for being here, and we'll just have the second panel come forward.

Senator DOMENICI. Mr. Chairman, who would they do that with? Who would they get with, the Navajo Nation?

The CHAIRMAN. I would assume, the Navajo Nation and the State of New Mexico.

Senator DOMENICI. That's it, right?

Mr. JOHNSON. That's primarily it, and you know, to the extent that there's other parties that have interests, certainly they could, would be part of that, too, if there's issues that affect them.

The CHAIRMAN. Let me just check here.

We're advised there's going to be a vote quickly, but knowing the way this place works, why don't we call the second panel forward and get started, and we'll see if the vote actually occurs when it's supposed to.

OK, thank you all for being here, this second panel is made up of John D'Antonio who is our New Mexico State engineer, thank you for being here. President Joe Shirley of the Navajo Nation, thank you for being here, President Shirley. Herb Guenther is the Director of the Arizona Department of Water Resources. Patricia Lundstrom is a State representative from New Mexico, also the Executive Director of the Northwest New Mexico Council of Governments, and Mark Sanchez is here as the Director—Executive Director of the Albuquerque Bernalillo County Water Utility Authority.

So, we welcome all of you, and we will include your entire testimony in the record, as I stated before, but why don't you summarize, in a few minutes, the main points you think we ought to understand. We'll just start with our State engineer and go right across.

We may have to interrupt things in order to go vote. In fact, I see a light on up there. Before we start, should we go ahead and vote? I think, clearly we're not going to be able to get through all of the testimony, so why don't we give you all a break here, we'll go vote, and we'll be back in about 10 minutes, and then we'll proceed with the testimony. Thanks.

[Recess.]

The CHAIRMAN. All right, thank you all very much. We apologize for the delay, but why don't we go right ahead, and each of you summarize your testimony, and then I'm sure Senator Domenici and I will each have questions.

So, Mr. D'Antonio, thank you again for being here, and go right ahead.

**STATEMENT OF JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER, SANTA FE, NM**

Mr. D'ANTONIO. Good afternoon, Chairman Bingaman, Ranking Member Domenici. Thank you for your supportive comments just a few minutes ago.

My name is John D'Antonio, I'm the New Mexico State Engineer. I appreciate 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 Projects Act.

The Act will authorize construction of an important rural water system for the Navajo Nation, the Jicarilla Apache Nation, and the

city of Gallup, and will resolve the Navajo Nation's claims in the San Juan Basin of New Mexico.

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

By 2040, the project is expected to serve approximately a quarter of a million people, including the residents of Gallup, and will serve a very large area, requiring over 800 miles of pipeline. The cost of the project is high, but the project costs can be appropriated over several years, and can be supplemented through the Reclamation Settlement Fund, created by title II.

New Mexico has already stepped up to the plate by investing approximately \$25 million toward settlement-related projects. Our legislature recently created the Indian Water Rights Settlement Fund, and has appropriated \$10 million this past session.

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, as with other settlements around the West.

New Mexico is disappointed with the administration's position regarding the Navajo Settlement and this legislation, however, New Mexico is willing to discuss the administration's issues through the process proposed in their testimony.

The legislation will approve a comprehensive settlement of the Navajo Nation's water rights claims in the San Juan Basin in New Mexico. After years of difficult negotiations, the State of New Mexico and the Navajo Nation entered into a settlement agreement in 2005 that represents a fair and equitable resolution.

The settlement protects existing water uses within the Basin, and protects the San Juan-Chama Project. I firmly believe that we have come as close as possible to a resolution that provides maximum benefits and protections for all water users.

New Mexico is willing to confer with water users to clarify any issues in this legislation. An important benefit of the settlement is that water supply will fit within New Mexico's Upper Colorado River Compact apportionment without displacing any existing water uses within New Mexico, and the Upper Colorado River Commission has already expressed support for the settlement project, and the legislation.

The Secretary of the Interior recently confirmed that sufficient water is available for the settlement project without harm to other Federal projects, including the San Juan-Chama Project.

In response to the issues raised by the State of Arizona, New Mexico believes that the settlement agreement in Senate bill 1171, preserves Arizona's rights to negotiate its own settlement for the Navajo Nation, and New Mexico encourages Arizona, and the Navajo Nation as they continue to work toward a resolution of their outstanding issues.

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. New Mexico is willing to confer with any of the Col-

orado River Basin States, as necessary, to explain the settlement agreement, or discuss their concerns.

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 operations 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 Ranking Member Domenici, the State of New Mexico asks for your support for Senate bill 1171, I know you do, and thank you for your time and consideration of this important piece of legislation that authorizes this critical project for New Mexico.

That concludes my presentation.

[The prepared statement of Mr. D'Antonio follows:]

PREPARED STATEMENT OF JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER,  
SANTA FE, NM

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 op-

erations 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 on-going 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.

The CHAIRMAN. Thank you very much.  
President Shirley, please go right ahead.

#### **STATEMENT OF JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION, WINDOW ROCK, AZ**

Mr. SHIRLEY. The Honorable Chairman, Senator Bingaman, Ranking Member, the Honorable Senator Pete Domenici, the Committee on Energy and Natural Resources, thank you for the oppor-



tunity to testify concerning the Northwestern New Mexico Rural Water Projects Act.

I would also like to thank both the State of New Mexico and the Department of Interior for their efforts to facilitate a settlement.

As an initial matter, I want to make one point very clear. The Navajo Nation overwhelmingly supports the settlement of our water rights claims on the San Juan River, the Navajo/Gallup Water Supply Project, and the framework to provide sustainable water to the Navajo Nation, the city of Gallup, and the Jicarilla Apache Nation. In placing their marks on the Treaty of 1868, our predecessors pledged to keep the peace with the United States. In return, the United States promised to assist the Navajo people in the creation of the permanent homeland. I believe history will review this legislation as the most significant act of Congress concerning the Navajo people since the ratification of our Treaty, and a major step toward self-sufficiency and independence.

As I speak to you now, many of the 80,000 Navajo men, women and children who live within the Project Service Area are hauling water in the backs of their pickup trucks for drinking, cooking and washing. The centerpiece of S. 1171 will authorize the construction of the Navajo-Gallup water supply projects, which will supply water to thousands of Navajo people.

While the Project will not entirely eliminate water hauling on the Navajo Nation, it is a giant step toward that goal, and provides the foundation that is essential for economic development.

Last month I spoke at an EIS hearing in support of the Navajo-Gallup Water Supply Project. As I listened to the stories of the Navajo people who have spent their scarce economic resources hauling water for basic domestic use, it was impossible not to be moved. One of those people, Frank Chee Willetto, a Navajo Code Talker, and recipient of the Congressional Silver Medal, is here with us today.

[Applause.]

The CHAIRMAN. Very good. We welcome you to this hearing, thank you for coming.

Mr. SHIRLEY. Recently, representatives from the administration have witnessed firsthand, the hardships endured by Navajo families who haul water from public watering points.

While I believe these officials were moved by what they saw and heard, I understand that there are concerns that the Project is too expensive.

While the anticipated \$714 million cost is a significant sum, the cost is that the project and the settlement must be put into perspective. OMB's assertion that S. 1171 is too expensive, may be based on an overly restrictive interpretation of the criteria and procedures for participating in Indian Water Rights Settlements. This view—as noted by Senators Bingaman and Domenici—is inconsistent with three water rights settlements signed into law by President Bush, and the Rural Water Supply Act of 2005. Further, the ramifications of not passing this legislation could force the Navajo Nation into litigation to determine its water rights. Such litigation could jeopardize the allocations made by interstate compacts concerning the Colorado River Basin. Congress simply cannot afford to let this settlement fail.

Currently, 40 percent of the families in the Navajo Nation lack potable water in their homes. In the wake of Hurricane Katrina, Congress rightly recognized the emergency conditions faced by New Orleans residents, deprived of drinkable water, and quickly authorized billions of dollars to restore the water systems. The tragic circumstances experienced by these citizens are faced by the Navajo people every day. But yet, OMB didn't ask Congress to consider the limits of its liability, or its Federal Trust responsibility, before spending money to fix the problem.

Congress was right to act to help the Katrina victims. We ask you to do the same with the Navajo people.

Finally, we understand that the State of Arizona has concerns about both the settlement agreement and legislation, and is advocating a comprehensive settlement to protect its interests, including resolution of the litigation in Navajo Nation versus the United States. We strongly disagree. The settlement with New Mexico does not impair Arizona's ability to reach a settlement with the Navajo Nation, concerning its Lower Basin claims.

While the settlement of the business of delivery of water to the Lower Basin in Window Rock, Arizona fund the project, nothing diminishes the right of Arizona to negotiate all of the terms for water delivery to Window Rock, as part of a separate agreement with the Navajo Nation.

The Navajo Nation has attempted to quantify its Lower Basin claims with Arizona in the Navajo Nation versus the United States litigation. Settlement discussions with Arizona are ongoing, and will continue, regardless of the outcome of this settlement with New Mexico. However, resolution of Navajo claims in Arizona will likely take several years. If such a settlement can be reached without delay, or impairment of our settlement with New Mexico, we would not object to including an Arizona settlement in this bill. But to require an Arizona settlement in order for New Mexico to move forward, the Navajo Nation and the State of New Mexico will be punished for their good faith efforts that resulted in this concrete settlement.

This settlement would keep the Navajo Nation rights within New Mexico's compact apportionment. As such, this settlement benefits all 7 Colorado River Basin States, and we should not jeopardize this achievement, by trying to settle unrelated issues with Arizona.

The Navajo Nation and its people have respected their treaty obligations. In times of crisis, brave Navajo men and women have rushed to their country's aid, and fought and died, not only for the preservation of the American ideal, but also to preserve our Navajo culture, and to secure a Navajo homeland for our children. A homeland for the Navajo people is not merely a piece of land between our four sacred mountains, but is a place where our culture, our language, and our way of life and our people can live and grow.

Without water, viable economic and social communities wither and die. So, I ask you today to honor the Treaty of 1868, and to help bring water to the Great Navajo Nation.

Thank you very much.

[The prepared statement of Mr. Shirley follows:]

PREPARED STATEMENT OF JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION,  
WINDOW ROCK, AZ

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 Domenici 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 Willetto 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 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 Willetto, 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 firsthand 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

\* Documents have been retained in committee files.

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.

The CHAIRMAN. Thank you very much.  
Mr. Guenther, go right ahead.

#### **STATEMENT OF HERBERT R. GUENTHER, DIRECTOR, ARIZONA DEPARTMENT OF WATER RESOURCES, PHOENIX, AZ**

Mr. GUENTHER. Thank you. Mr. Chairman, Ranking Member Domenici, thank you for the opportunity to present the views of the State of Arizona on S. 1171.

This bill represents another important step toward the settlement of longstanding water rights claims of American Indian Tribes. The Navajo Nation lies within the boundaries of three States—Arizona, New Mexico, and Utah. The Navajo Nation is the largest tribe in Arizona, both in terms of population and land area.

Senate bill 1171 contains provisions that will greatly aid that portion of the Navajo Nation in New Mexico, and potentially within a portion of Arizona, as well.

Arizona is supportive of the efforts of New Mexico and the Navajo Nation in completing a water rights settlement agreement. We are supportive of the creation of the much-needed funding mechanism, to ensure that the associated water development projects are constructed in a timely manner. We are supportive of your creative efforts to include non-Indian beneficiaries, who will receive water from these proposed projects.

But Arizona does have several concerns about S. 1171 as it was introduced. Arizona believes that the bill is in conflict with provisions of the Law of the River, including the 1922 Colorado River Compact. We believe the bill should contain an explicit exception to the provisions of the compact reserving the right to use Upper Basin water exclusively in the Upper Basin, to allow the diversion and use of that Upper Basin Water in Gallup, New Mexico, located in the Lower Basin.

Arizona would like to build to make a clear that the water from Window Rock, Arizona, should come from the CAP water that was set aside in the Arizona Water Settlements Act of 2004.

Senate bill 1171 also needs to include specific provisions for accounting for that water at Lee Ferry, and authorizing the Secretary of the Interior to contract for the water at delivery point in the Upper Basin, which authority is currently lacking.

Arizona and Arizona water users would like to see the bill amended to include additional titles which would settle water rights claims on the lower main and Colorado River, and the Little Colorado River in Arizona. We currently have ongoing negotiations

and we are optimistic that the parties may reach consensus in a timely manner.

We are also concerned about the Navajo Nation's lawsuit. As President Shirley mentioned a short while ago, that is against the Secretary of the Interior challenging operational programs of the Colorado River. That lawsuit is currently stayed pending settlement negotiations, but casts a serious cloud over the programs to conserve and deliver water to all of the basin States. We believe that resolution and dismissal of that lawsuit should be a prerequisite to final action on Senate bill 1171.

In 2004, Congress passed the Arizona Water Settlements Act, we would like the assistance of the Navajo Nation to bring that Act to a full enforceability stage. If we do not reach full enforceability for that Act, the benefits of that Act will become null and void, and that would include the potential supply for Window Rock, as well as the benefits accruing to Gila River water users in New Mexico.

Again, Arizona remains willing to meet with the committee's staff, and the representatives of the other six Basin States, if necessary, to further discuss the suggested changes, and obviously we stand ready to meet with the Navajo Nation, as well. We would like to make sure that any proposed amendments are acceptable to all affected parties, and consistent with the Law of the River. We were successful in negotiating with you and your staff on the Arizona Water Settlements Act to satisfy your concerns before that Act was passed, and we think we can do the same here, without a delay of the process.

Mr. Chairman and Senator Domenici, I stand ready to answer questions at the appropriate time. Thank you.

[The prepared statement of Mr. Guenther follows:]

PREPARED STATEMENT OF HERBERT R. GUENTHER, DIRECTOR, ARIZONA DEPARTMENT OF WATER RESOURCES, PHOENIX, AZ

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

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

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



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

Arizona and Arizona water users believe there is an opportunity to provide even more certainty for the Navajo Nation and the Hopi Tribe by including additional Titles which will settle water rights claims within the Lower Mainstem Colorado River and Little Colorado River basins within Arizona. The two Tribes are actively participating in ongoing negotiations with governmental and non-governmental interests in those basins. We are optimistic that the parties will complete a water rights settlement agreement in a timely manner so that S. 1171 can be amended to become a more comprehensive solution. Therefore, we believe Congress should not take final action on S. 1171 until we have a chance to see if Arizona tribal and non-Indian parties can achieve this Arizona settlement goal.

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

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

Many of the water rights being contested throughout the West are rights that were "reserved" by the United States at the time of the creation of the Indian reservations. In many instances, the United States has failed to fulfill its intent in reserving that water for the Reservations and has left the Tribes without the means to create a true tribal homeland. In Arizona and other Western states, many of the Tribes have recognized that they will have a better chance to obtain the necessary funding which will lead to on-Reservation development by entering into a water rights settlement rather than pursuing their claimed rights through lengthy and expensive litigation. In most instances the Tribes have settled for less water than they had claimed in Court, but they were provided with the funding mechanism to actually put that water to near-term beneficial use. This trade-off is essential for a Tribe to make such a major concession regarding their valuable water rights claims.

Having a dedicated water rights settlement fund with a dedicated funding source will allow not only the Northwest New Mexico Rural Water Supply Project to be built but also many other worthy projects in other states. The Committee should look at expanding Title II so that the Reclamation Water Settlements Fund can have even greater potential for dedicated revenues. The time frame for those deposits should be at least fifty years. Withdrawals from the Settlements Fund for projects other than the Northwest New Mexico Rural Water Supply Project will still be subject to the conditions placed upon them by Congress when future settlements

and projects are authorized. We urge the Committee to explore opportunities to build on the Settlement Fund concept by contacting the Western Governor's Association and the Western States Water Council. At a minimum, S. 1171 should contain provisions for the funding of a Navajo Nation/Hopi Tribe settlement in the Lower Basin of the Colorado River if a settlement is authorized by Congress. It would greatly benefit the Navajo Nation and Hopi Tribe in their water development plans.

In addition to the need to first resolve the Navajo lawsuit and water rights claims in Arizona, Arizona is concerned that S. 1171, as currently drafted, conflicts with the Law of the River. S. 1171 contains several provisions related to deliveries of water through the Northwest New Mexico Rural Water Supply Project to locations in the Lower Colorado River Basin, including the Window Rock area of the Navajo Reservation within Arizona. In an attempt to be non-committal about the source of water to be used for the Arizona component, the bill's drafters have created confusing and potentially troubling language. The problem arises because Window Rock, Arizona and Gallup, New Mexico are located in the Lower Basin of the Colorado River as defined in the 1922 Compact, but the point of diversion of the water from the San Juan River is in the Upper Basin portion of the Colorado River. Arizona believes that the terms of the Colorado River Compact prohibit the use of an Upper Basin water allocation in the Lower Basin, and vice versa. However, the State of Arizona can accept an explicit exception to this prohibition as long as it is clear that the use of water across the basin boundary is for a specific project and that the project is within the same state that holds the allocation. Arizona does not believe that the language of paragraph 303(g), which describes consistency with the Upper Colorado River Basin Compact adequately addresses the issue or meets the requirements of the Colorado River Compact. We believe that an explicit congressional exception to the provisions of the 1922 Colorado River Compact is required.

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

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

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

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

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

The Law of the River has been under attack for decades. For example, in the early 1980s, a private group made what is known as the Galloway Proposal. It would have allowed the transfer of Upper Basin water rights to a California entity without regard to the prohibitions of the 1922 Compact. The Seven Basin States were united in fighting the proposal and rejecting this notion that the 1922 Compact was irrelevant. It now appears that New Mexico is not as concerned about the precedent that would be set if Congress does not address each 1922 Compact issue explicitly. Arizona remains very concerned and will utilize all means available and necessary to protect its rights under the Compact and the Law of the River.

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

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

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

#### ATTACHMENTS

ARIZONA DEPARTMENT OF WATER RESOURCES  
Phoenix, AZ, April 5, 2007.

Mr. JOHN D'ANTONIO, P.E.,  
Office of the State Engineer, 130 South Capitol Street, Concha Ortiz y Pino Building,  
P.O. Box 25102, Santa Fe, NM.

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 have 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.

HERBERT R. GUENTHER,  
*Director.*

#### 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 of 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.” Its not clear what this means. This provision should be deleted.

d. Section 303(d)(2) of the bill provides that water used by the Navajo Nation in Arizona counts against Arizona’s Colorado River entitlement. Again, the bill should clarify that this water counts against Arizona’s Lower Basin entitlement.

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

(d) CONDITIONS FOR USE IN ARIZONA.—

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

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

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

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

(A) shall be accounted for as a part of the 2.8 million acre-feet of Colorado River water apportioned to the State of Arizona in Article II(B)

(1) of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340); and

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

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

#### COMMENTS ON DRAFT NAVAJO-GALLUP PIPELINE BILL

##### *General Comments*

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

##### *Specific Comments*

1. *Priority within the San Juan River system*.—The priority of the Navajo-Gallup pipeline water within the San Juan River system is not clear. Section 102(b) of the bill provides that the Secretary shall “allocate the shortage” to the Navajo Reservoir water supply, with first priority going to the water for the Navajo-Gallup pipeline. This seems to say that the water for the pipeline is the first to be shorted. But this section of the bill is amending §11 of Pub. L. 87-483, which directs the Secretary to apportion the water that is available during shortage on the San Juan, suggesting that the pipeline might be first to receive available water during a shortage. The bill should be revised to clearly express the intended result. See suggested changes in No. 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 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 No. 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 of 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 No. 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.

#### ATTACHMENT

STATE OF NEW MEXICO,  
OFFICE OF THE STATE ENGINEER,  
Santa Fe, NM, June 5, 2007.

HERBERT R. GUENTHER,  
*Director, Arizona Department of Water Resources, 3550 North Central Avenue, Phoenix, AZ.*

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 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, Sec-

tion 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 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 predetermine 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.*

The CHAIRMAN. Thank you very much.

Representative Lundstrom, we're very glad to have you here.

**STATEMENT OF PATRICIA A. LUNDSTROM, MEMBER OF THE  
NEW MEXICO HOUSE OF REPRESENTATIVES AND EXECUTIVE  
DIRECTOR, NORTHWEST NEW MEXICO COUNCIL OF  
GOVERNMENTS, GALLUP, NM**

Ms. LUNDSTROM. Thank you, and good afternoon Chairman Bingaman, and Ranking Member Senator Domenici. It's very good to see both of you today.

As you know, I'm Patty Lundstrom and I'm the Executive Director of the Northwest New Mexico Council of Governments and



that's been since 1985. I'm currently serving the fourth term in the New Mexico House of Representatives. Senators, with me today are Gallup Mayor pro tem, Bill Nechero and Gallup City Counselor Jay Azua, as well as our COG Deputy Director Jeff Kiely.

Senators, I'd like to thank you for inviting me to participate in this historic hearing today.

I come before you to speak in favor of Senate Bill 1171. This legislation is the essential instrument for authorizing and financing the Rural Water Project we have been working on for decades. We have known it as the Navajo Gallup Water Supply Project. Since 1991, I have served as chair of the Steering Committee for this project. The need for the project has been known to Congress and the Department of Interior for over 50 years. Scientific studies have made it clear that the only hope for sustainable water supply for eastern Navajo land and Gallup lies in a surface water supply from the San Juan River.

After years of work, through a minefield of legal, technical, political, environmental, and financial issues, we are finally at the point of bringing to you our plan for getting this water supply conveyed to this parched region. The Federal Government, through the involvement and support of the Congress, the Bureau of Reclamation and Indian Affairs, and the Fish and Wildlife Service, has been an active and constructive part of this consensus plan.

The Steering Committee has been a unified working group with participation by State and Federal agencies, the Navajo and Jicarilla-Apache Nations, the city of Gallup, and technical partners in the process. In my 22 years as COG Director, this has been the most ambitious and complex project I've seen in our region. It has also invoked the highest levels of cooperation, professionalism, and commitment by the individuals and agencies involved.

The needs for the project are clear. Many Navajo reservation households have never had a public water system. The Navajo economy already struggles well below poverty. It stands no chance of development without a sustainable public water supply for its communities. The Jicarilla-Apache Nation has a water rights settlement, but needs economic development in order to tap the fullness of these rights, as well as a way to obtain a water supply from the river. The city of Gallup's water table is dropping 20 feet a year and the city will face peak use shortages within 5 years and chronic shortages within 15 years.

Since I work closely with Gallup in both my public service roles, I will briefly outline Gallup's role in the project. Gallup is a transportation hub for the southwest and a major commercial center for the Navajo reservation. Within a few decades Navajos will likely make up one-half of Gallup's population. The partnership between Gallup and the Navajo Nation on this project has been remarkable. The Gallup regional water system, at the back-end of the Navajo-Gallup pipeline, is now under development in full cooperation with the Navajo Nation and the State of New Mexico.

Under this system, city infrastructure will be used to convey water to neighboring Navajo communities, both now and the future when the rural water supply project is complete. The State has committed over \$9 million to this regional system. Gallup also supported the State's commitment of over \$15 million in funding for

the regional water infrastructure on the east side of the project area, which is, will ultimately tie into the Cutter reservoir. These regional system partnerships have generated broad commitment to the motto, "Real water to real people in real time."

Since shortages are likely in Gallup, even before the project is completed, Gallup has proactively worked to secure its water future in both the short and long-term. It has adopted an aggressive water rate structure to spur conservation and to finance local water infrastructure and new water supplies. It has started developing a waste water reuse system using reverse osmosis technology. It is working to develop new ground water sources previously used by extractive industries and has worked on cooperative agreements with Navajo and Jicarilla to ensure a water source for the city's participation in the rural water supply project.

The city of Gallup stands in support of this legislation. The city concurs, in particular, with the concept of a 75 percent Federal cost share for the city's portion of project costs as reflected in Senate bill 1171. The affordability for the city is affected by a number of unique factors, most predominantly its commercial hub status for a broad rural area and the existence of pockets of high poverty, both within and outside the city. The city will need a water supply for its share of the project and the city is dependent on the project's two Indian tribes or alternatively, the Secretary of Interior for that supply. The city's purchase of its own water rights in the San Juan River would be high in cost, high in controversy, and low in feasibility at this point.

Overall, this legislation represents a perfect storm of opportunity for the Federal Government to join forces with its State and local partners, to meet the critical water needs of this region of New Mexico, while settling the Navajo Nation's water rights claims. The project is essential to the economic viability of northwestern New Mexico.

On behalf of the Steering Committee, the Council of Governments, and the New Mexico State Legislature, I urge your support for Senate bill 1171. The estimated costs for this legislation are high, but the State and the project partners are totally committed to getting this done with your help. 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 timely and favorable consideration. Thank you, Senators.

[The prepared statement of Ms. Lundstrom follows:]

PREPARED STATEMENT OF PATRICIA A. LUNDSTROM, MEMBER OF THE NEW MEXICO HOUSE OF REPRESENTATIVES AND EXECUTIVE DIRECTOR, NORTHWEST NEW MEXICO COUNCIL OF GOVERNMENTS, GALLUP, NM

Mr. Chairman and Members of the Committee, 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 Senate Bill 1171. 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 U.S. 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 of 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 concerned about the cost of its participation in 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 afford to self-fund its share of the project.

A number of factors mitigate against such a 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.
- 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 is essentially at the mercy of 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 a high level of Federal funding support for its share of the project costs.

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 Senate Bill 1171, 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 Senate Bill 1171.

The CHAIRMAN. Thank you very much.

Mr. Sanchez, you're the cleanup hitter here, go right ahead.

**STATEMENT OF MARK SANCHEZ, EXECUTIVE DIRECTOR, ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY, ALBUQUERQUE, NM**

Mr. SANCHEZ. Thank you, Senator Bingaman, Ranking Member Senator Domenici. My name is Mark Sanchez. I'm the Executive Director of the Albuquerque Bernalillo County Water Utility Authority, which provides water and waste water service to the Albuquerque metropolitan area. The Authority is successor in interest to the city of Albuquerque's rights to the San Juan-Chama Project, authorized in Public Law 87-483. I stand before you today to clearly support settling the Navajo claims and strongly to endorse the need for providing drinking water under the Navajo-Gallup Water Supply Project.

My testimony today is focused on the impact of the settlement, on the long-term availability of water from the San Juan-Chama Project, which diverts water from southern Colorado into New Mexico by way of the San Juan River in Rio Chama. Specifically, I'd like to provide some background on the project and explain why it's so critical to our future and share some concerns and recommendations on Senate bill 1171.

First some background on the project. The city signed a contract for 48,200 acre-feet of San Juan-Chama water in 1965, which Senator Domenici, I'm sure, recalls. To date, we have invested more than \$50 million for the San Juan-Chama water and will continue to make payments until 2020. At the time the contract was signed, the surface was intended to offset impacts of using ground water. The belief was that the San Juan-Chama water being diverted into the Rio Grande would continually recharge Albuquerque's aquifer, thereby ensuring adequate ground water supplies in perpetuity.

However, in 1994 USGS published a report that completely changed our understanding and thinking about the aquifer. The recharge effect was not occurring as we had believed and the conclusion was that sole reliance on the aquifer would lead to its eventual depletion and wide-spread land surface subsidence.

In 1995, the city immediately began a water conservation program and began looking at alternatives to ground water. The solution was to use surface water from the San Juan-Chama project as our new drinking water source and we have since undertaken a \$450 million locally funded effort to make that a reality.

This effort, which we call the San Juan-Chama Drinking Water Project, includes a new diversion dam, pump station on the Rio Grande, state-of-the-art water treatment plant, 46 miles of raw water and transmission pipelines to enscrate the surface water into the existing water system. The project will come online in 2008 and will represent 90 percent of our drinking water supply. It will be our primary water source well into the future. From a population perspective, San Juan-Chama water will meet the demands of almost 40 percent of the State of New Mexico in the Rio Grande valley.

It is critical that these interests are protected in the settlement. The authority does have some very specific comments and recommendations about the legislation. I have provided detailed discussion of these for inclusion in the record. I will attempt to briefly summarize our major concerns and recommendations for the committee.

The CHAIRMAN. Why don't you do that very briefly, since we're about halfway through a vote and we're going to have to take another short recess.

Mr. SANCHEZ. Very quickly, Senator.

First on the issue of shortages, how they are portioned and calculated is of critical importance. In our opinion the legislation remains unclear on this point. The authority has commissioned and independent hydrological analysis of the settlement impacts and we look forward to providing that to all the parties.

Second on the role of the State, the legislation includes language that allows the State of New Mexico to reduce the amount of water for the Navajo reservoir contractors in the San Juan-Chama project. We believe this should either be deleted or substantially clarified.

Last, on the Bureau of Reclamation, they have produced many hydrologic analysis of water supply. It's unclear how much water will be available. It should also be noted that the Bureau is not operating the San Juan-Chama project to its maximum efficiency.

Our view is that if that efficiency was increased, the impacts of shortages in the future would be minimal.

In the interest of time, Mr. Chairman, I'll conclude my remarks.  
[The prepared statement of Mr. Sanchez follows:]

PREPARED STATEMENT OF MARK SANCHEZ, EXECUTIVE DIRECTOR, ALBUQUERQUE  
BERNALILLO COUNTY WATER UTILITY AUTHORITY, ALBUQUERQUE, NM

Mr. Chairman and members of the committee, my name is Mark Sanchez. I am the executive director of the Albuquerque Bernalillo County Water Utility Authority (the Authority). The Authority was created by the New Mexico State Legislature in 2003 as a partnership between the City of Albuquerque (the City) and Bernalillo County. The Authority is the successor in interest to the City for rights to the San Juan-Chama project which was authorized in Public Law 87-483.

The Authority would like to thank the Committee for the opportunity to testify on Senate Bill 1171 and specifically the leadership of Chairman Senator Bingaman and Senator Domenici on this important settlement and legislation. We also would also like to recognize the State of New Mexico, the Navajo Nation and others who have worked very hard on negotiating this settlement.

We understand that S. 1171 settles the Navajo Nation's water rights claims on the San Juan River in New Mexico in addition to providing water supplies for the Navajo-Gallup water supply project. The Authority supports settling the Navajo claims and strongly endorses the provision of drinking water under the Navajo-Gallup water supply project. We understand that resolving the Navajo's claims reduces the risk from potentially larger claims which could and most likely would affect the available water supply in the San Juan River for non-Indian uses.

My testimony today is focused on the impacts of the settlement on the long-term availability of water from the San Juan-Chama project, which diverts water from southern Colorado into New Mexico by way of the San Juan River and the Rio Chama. The San Juan-Chama project was authorized in Public Law 87-483 along with the Navajo Indian Irrigation Project (N.I.I.P.). Specifically, I'll be providing some background on our involvement with the project and why it is so critical to our community. I will also be making you aware of the Authority's concerns about certain sections of the legislation as it is written. I wish to make it clear that we are committed to continue working with our Congressional delegation, the State, and the Navajo Nation in addressing our concerns and recommendations to preserve and protect the San Juan-Chama project.

BACKGROUND ON ALBUQUERQUE'S INVOLVEMENT IN THE SAN JUAN-CHAMA PROJECT

A conceptual framework for importing Colorado water into the Rio Grande basin from the San Juan River into the Rio Chama (hence San Juan-Chama) was developed in the technical documentation for dividing the waters of the Rio Grande in 1928. The Bureau of Reclamation at that time recognized that the City of Albuquerque was going to need additional supplies in the future and conceptually designed a couple of options for importing the water.

The legislative history for the San Juan-Chama project clearly shows that the City was the primary beneficiary of the project. The water was needed because the Albuquerque was not specifically provided any native water supplies under the Rio Grande Compact. In 1963, the City signed the first contract for an annual amount of 53,200 acre-feet of San Juan-Chama water that was reduced in a contract amendment in 1965 to 48,200 acre-feet per year.

Under the City's and now the Authority's contract, we are required to fully repay the United States all the costs for municipal and industrial supplies apportioned under the San Juan-Chama project, including interest during construction. We are also required to pay our proportional share of the operation and maintenance costs for the project on an annual basis. To date, we have invested more than \$50 million for San Juan-Chama water and will continue to make payments until 2020.

ALBUQUERQUE'S NEED FOR SAN JUAN-CHAMA WATER

In the early 1960s, the technical understanding in the Middle Rio Grande region was that the aquifer was a limitless resource that would meet the needs of the City in perpetuity. The City was required to provide surface water supplies to offset the impacts of using ground water and signed the contract for San Juan-Chama water to provide that offset.

In 1994, the United States Geological Survey published a report that completely changed our understanding of the aquifer, the relationship between the Rio Grande



and the aquifer, and which concluded that sole reliance on the aquifer will lead to widespread land surface subsidence.

The City's response was almost immediate. In 1995, the City immediately began a water conservation program and began looking at alternatives for providing a sustainable supply. In 1997, the City Council adopted a new strategy to use San Juan-Chama water as a drinking water source. Since 1997, we have been working toward using surface water from the San Juan-Chama project as a drinking water source. The \$450 million San Juan-Chama Drinking Water Project will come on-line in 2008 and will represent 90% of our supply at that point and will be our primary source of supply well into the future. The Drinking Water Project includes a new diversion on the Rio Grande, a state-of-the-art water treatment plant, and 46 miles of raw water and transmission pipelines to integrate the surface water into the existing water system.

#### OTHER SAN JUAN-CHAMA CONTRACTORS

The Authority's customers are not the only ones relying on San Juan-Chama water. In addition to Authority, there are more than fifteen San Juan-Chama contractors, including the City of Santa Fe and the City of Espanola, that are planning and developing direct diversion and use of San Juan-Chama water. From a population perspective, San Juan-Chama water will meet the demands of more than one-third of the State of New Mexico in the Rio Grande Valley. It is critical that these interests in the Rio Grande are protected in this settlement.

#### AUTHORIZING LEGISLATION—PUBLIC LAW 87-483

Under Section 11 on the authorizing legislation, the San Juan-Chama project and the N.I.I.P. project and other contracts entered into for delivery from the Navajo Reservoir were required to share in the available supply in any year in which the Secretary anticipated a shortage.

Specifically, the Secretary was required to determine that sufficient water to fulfill said contract is likely to be available and also the following:

Section 11, (a), paragraph 2:

The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 2 and 8 of this Act.

The April 2007 Hydrologic Determination was signed by Secretary of Interior, Dirk Kempthorne on May 23, 2007, fulfilling the obligation to determine that sufficient water is likely to be available for the settlement. However, the second requirement specifically relates to the sharing of shortages and the water supply that would be available to both the N.I.I.P. and the San Juan-Chama project. To date, we have not reached an understanding with the Bureau of Reclamation or the State of New Mexico regarding a determination about the water that could be available to the San Juan-Chama project during a shortage and how new contracts could affect the water supply.

In the Section 8 of the authorizing legislation, Congress imposed several operational conditions for operating the San Juan-Chama project. Under paragraph (a) the project diversions are limited to 1.35 million acre-feet in any ten year period and the maximum diversion in one year is 270,000 acre-feet. Paragraph (b) states that the project shall not cause injury, impairment, or depletion of existing or future beneficial uses of water within the State of Colorado. Under paragraph (b), each of the three diversions in Colorado have monthly bypass flow requirements which provide for passing water to downstream users in Colorado for uses in Colorado under the Upper Colorado River Basin compact.

#### HYDROLOGIC ANALYSIS OF SETTLEMENT

The Authority has hired a consultant to complete an independent hydrologic analysis of the impacts of the Settlement on the San Juan-Chama project as it relates to the frequency and extent of shortages. The Authority anticipates completion of the hydrologic analysis within the next few weeks and would like to share that information with interested parties at that time. There may be changes to the legislation which may affect our hydrologic analysis so we reserve the right to provide additional feedback during this process.

*Section 101—Navajo Reservoir Water Bank*

The creation and utilization of excess capacity in the Navajo Reservoir provides flexibility for users in the San Juan basin specifically downstream of the reservoir. It is unclear what water qualifies to be placed in the water bank and more importantly how that water is to be administered to prevent unintended consequences of reducing the ability to store native water in the Navajo Reservoir. Although the legislation states that the water bank shall be operated in a manner that “does not impair the ability of the Secretary of the Interior to deliver water under contracts entered into under Public Law 87-483,” more specific language should be developed to address what impairment means. Does impairment mean that water that could be stored in the reservoir is lost because there is no capacity to store it? Although the water stored in the water bank is not subject to shortages or releases to meet environmental needs, could this banked water be used to exchange for offsetting implementation of shortages?

*Section 102—Amendments to Public Law 87-483*

*Section 102(a)(2)(b)(1)*—the legislation provides for a maximum diversion right over a ten year period for the Navajo Indian Irrigation Project to be the lesser of 508,000 acre-feet per year or the quantity of water necessary to supply an average depletion of 270,000 acre-feet per year. Although these figures were the subject of intense negotiations, it seems that because there are two different figures that an effort to clarify how these are to be used or what they represent should be specified so as to avoid future misinterpretation.

*Section 102(a)(2)(b)(2)*—this provision allows an increase of diversion, but does the 270,000 acre-feet of depletions still apply? It is unclear whether this provision allows for increases in consecutive years or just one year in a ten year period. If a shortage was declared for two years in a row, would increased diversions be allowed in the following years to make up the difference? We suggest adding language that this increase in diversion not be allowed in any year where the Secretary determines that the increase may increase the likelihood of a shortage in subsequent years.

*Section 102(a)(2)(d)*—the language in this section does not appear to limit the use of Navajo Indian Irrigation Project water to New Mexico. As the water for the settlement is from New Mexico’s apportionment of Upper Colorado River water, any use of the water should be limited exclusively in New Mexico. We suggest the addition of a provision limiting the uses to New Mexico.

*Section 102(b)—Runoff Above Navajo Dam*

It appears that this section was intended to clarify the language in the original legislation, but the original language is left in the bill, which may lead to some confusion. Also, the additions that are provided in the section don’t necessarily clarify how shortages are to be determined or apportioned. One of the Authority’s primary concerns regarding this settlement is the potential for increases in shortages and who participates in the available supply when shortages are shared. The Authority would like to work with everyone involved to develop language that clarifies who participates in the available supply, how shortages are to be calculated, and specifically limiting the ability to add more shortage partners in the future.

*Section 102(b)(d)(1)*—the term “normal” diversion requirements is used in describing the method of apportionment of water. It is not clear in the paragraphs following what “normal” diversion requirements mean except for the San Juan-Chama project, which provides a definite figure.

*Section 102(b)(d)(1)(A)*—it is not clear who “contractors” are in this section and it appears that the language should clarify that the diversion requirement is either the normal diversion requirement or in accordance with cropping plans prepared, whichever is lower.

*Section 102(b)(d)(1)(B)*—if we know who and what the water delivery contracts are, they should be specified in the legislation rather than referred to in general language so as to avoid confusion in the future and to provide certainty for those contracts that are part of the sharing of shortages.

*Section 102(b)(d)(3)*—this new language allows the State to arbitrarily reduce the amount of water for Navajo contractors and the San Juan-Chama project to meet the Upper Colorado River Basin Compacts. The State of New Mexico has stated on a number of occasions that they have the ability to limit diversions under State law to meet compact requirements. In addition, this provision is unconstitutional because this provides the state the opportunity to avoid priority administration by arbitrarily deciding to reduce diversions by only some entities and not others. The

Navajo Reservoir and San Juan-Chama contractors are not the only uses of the basin and should not be singled out to meet compact obligations nor pay the price for over-diversions by others. This language does not appear in the Jicarilla water rights settlement nor any other settlement and does not belong in this legislation. It should be deleted.

*Section 102(b)(e)(1)*—this language attempts to prioritize how shortages are allocated, but could also be read to say that this is the order in which entities get water. This should be clarified to meet the intent that Arizona, aquifer storage and recovery, etc., are the lowest priorities.

*Section 102(b)(e)(3)(g)*—this section gives the Secretary the ability to revise a shortage, but it is unclear how water is to be physically administered. For example, if the early runoff predictions are low and a shortage percentage is applied during spring runoff and later in the summer months rainfall allows for removing the shortage, how can the San Juan-Chama project increase diversion given the bypass flow requirements? In other words, the San Juan-Chama project could suffer a shortage because of early runoff predictions while others don't suffer a shortage when intermittent rainfall allows for increased diversion later in the year and San Juan-Chama is not allowed to increase diversions due to bypass flow requirements.

*Section 102(b)(e)(3)(h)*—the Authority advocates that a sharing-of-shortage agreement between the parties be developed and approved such that the Secretary has specific direction as to how and when to apply shortages. This would simplify this difficult situation and would provide certainty to all of the parties about how and when shortages are to be applied.

*Section 303—Delivery and Use of Northwestern New Mexico Rural Water Supply Project Water*

*Section 303(b)(3)*—the ability to increase allocations is very troubling as additional uses from the Navajo Reservoir will obviously increase the likelihood of shortages to other contractors including the San Juan-Chama project. Why would the new users and contractors for the reservoir have the right to increased allocations when other contractors do not have the same ability? This should be clarified.

*Section 307—San Juan River Irrigation Projects*

*Section 307(a)(1) and (2)*

Under Section 11, paragraph (a) of Public Law 87-483, the water requirements for the existing Fruitland, Hogback, Cudia and Cambridge Indian irrigation was limited to a total amount of irrigation of 11,000 acres. These two new sections increase that amount to more than 12,200 acres of land, thereby increasing the amount that is not subject to sharing of shortages. We assume that the original language would govern the amount for sharing of shortages, but this should be clarified.

*Section 401—Agreement*

*Section 401*—it is unclear whether this legislation defines the Navajo Nation's water rights or if there are additional documents that supplement their right. If in accordance with Section (a)(1), this legislation governs over other agreements, court decrees, etc., then we would suggest that this legislation be amended to avoid future confusion.

*Section 401(b)(1)(b) and (c)*—this is the same comment as previous as it relates to how sharing of shortages are to be calculated. Which is the correct figure and how is it to be used for determining apportionments?

*Section 401(f)(2)(iv)*—it is unclear what happens to the agreement, sharing of shortages, etc., if the agreement is null and void. If titles I and III are void, does that also void the authorization in Public Law 87-483? Does the acreage for Fruitland, etc. remain at 11,000 acres? It seems that clarification is needed to provide direction about what happens in the event that titles I and III are void.

ADDITIONAL COMMENTS

1. In earlier drafts of the legislation, the Authority expressed concerns about protecting the use of San Juan-Chama water in the Rio Grande under Public Law 108-447 (2004). We would like to ensure that nothing in this settlement affects that legislation.

2. The Authority, other San Juan-Chama contractors and the State of New Mexico have expressed concerns about how efficiently the San Juan-Chama project is being operated. The Secretary of Interior should be directed to efficiently operate the San Juan-Chama project to maximize diversions on the San Juan River that are allowed under Public Law 87-483. The impacts from any future reductions in San Juan-Chama diversions as a result of this settlement

could be significantly reduced by requiring the Secretary of Interior to maximize the operations of the San Juan-Chama project. For example, the Bureau of Reclamation UC Regional Director arbitrarily increased the bypass flow requirements for the Little Oso diversion in 1977 which had the effect of reducing firm yield by 400 acre-feet per year. There are other operational issues that affect the project which should be examined and reported to the San Juan-Chama contractors.

3. The Bureau of Reclamation has produced many different hydrologic analyses of the available water supply for San Juan-Chama project diversions. The most recent average annual diversion for the San Juan-Chama project as shown in the Bureau's Hydrologic Determination signed by the Secretary of Interior states that 105,200 acre-feet would be available on an average basis. It is not clear whether the Draft 1999 Hydrology Report to examine the San Juan-Chama Firm Yield used that figure or something higher or lower. It is critical that the hydrology that the Bureau is using on the San Juan river match the figures used by the Bureau in the Rio Grande. This is very important as the State and others are negotiating other Indian and non-Indian water rights settlements based on the availability of the 2,990 acre-feet of uncontracted-for-water. The question is whether the revised hydrology shows whether the 2,990 acre-feet is really available or whether that use will cause shortages for other San Juan-Chama contractors.

4. The two legislative acts, the Settlement Act and Senate 1171, are supposed to complement each other as they relate to Navajo water rights. There is differing language between the two Acts as to how available supplies will be calculated and how shortages will be allocated. The two Acts should use the same language or be merged into one Act to avoid discrepancies.

I would like to thank the members of the Committee for taking the time to hear the Authority's input on behalf of the community we serve.

The CHAIRMAN. Thank you very much.

Thank you all for your excellent testimony. We do have to take another short recess because of the ongoing vote and we'll be right back to ask a few questions.

[Recess.]

The CHAIRMAN. OK.

Again we apologize for another interruption. Let me start with State Engineer D'Antonio and ask you to comment on Mr. Guenther's testimony. As I understand the position of the State of Arizona, it objects to S. 1171 for three reasons. No. 1, the Navajo Nation has ongoing litigation with Arizona concerning the Colorado River in Arizona and it wants to put off the New Mexico settlement until it settles those issues. I believe that's the first objection.

No. 2, Arizona believes its interests are being disadvantaged by New Mexico using its full compact entitlement to the Colorado River.

No. 3, as I understand, is that provisions in the bill need to be revised to more correctly address inconsistencies with the law of the river. I was going to just ask you, John, to give us your view on those objections as to whether you take issue with those.

Mr. D'ANTONIO. Mr. Chairman, thank you. I do take issue with some of the objections brought up by the State of Arizona. Know the, I feel that they're unreasonable in that the New Mexico settlement, this legislation does not prejudice them in any way and neither does New Mexico's use of our Upper Basin apportionment. We're using that Upper Basin apportionment in the Lower Basin of New Mexico. It's within our State boundaries and we think that's something we're entitled to.

The, you know, the construction, the settlement also would authorize the construction of a pipeline to deliver water to Window Rock, Arizona, but it doesn't require that. So, and it doesn't specify

what water should be used. So again, we feel like the New Mexico settlement doesn't prejudice Arizona regarding how to structure its settlement and really leaves the door open for them to be able to do that.

We feel like we do need to settle our—it's a State issue with respect to settling our water rights issues in New Mexico. The Arizona issues could take years. We have, you know, half of, half or 40 percent of the 80,000 residents on Navajo Nation don't have drinking water in New Mexico and it's really urgent that we get a jump on this as quickly as we can.

Senators, I think, you know, I really like your comments early on and I think the process that, that the administration suggested earlier may be too lengthy for us to kind of follow through with the administration's process. You know, if our delegation's ready to go with legislation, we're all for it to move it along. So, I just think we are, we do have issues with all of Arizona's statements.

We actually, and maybe let me expand a little bit further. We did introduce some language in 303 G of the legislation, which we felt would specify that the water used by the project of New Mexico, again being part of New Mexico's Upper Basin apportionment, some of the language that Arizona wanted instead would cause problems with other basin States within the seven basin arena. So, for those reasons we refute Arizona's comments.

The CHAIRMAN. Well, thank you very much.

We've just been notified they've started another vote, so this is not a good day for us as far as this hearing. I think I'll just ask one or two more questions quickly and then defer to Senator Domenici for his questions. Then we'll conclude the hearing before we go vote and submit more questions to you in writing.

But, let me ask Patty Lundstrom, are you confident the city of Gallup can afford the 25 percent cost share that is called for in this, in this legislation if we are able to pass this bill?

Ms. LUNDSTROM. Thank you, Mr. Chairman. I believe that the city stands behind the 25 percent cost share. We've already started to talk about innovative financing and I believe, Mr. Chairman and Senator Domenici, between innovative city financing and the State of New Mexico's Water Trust Fund and our Indian Water Rights Fund that we set up through the New Mexico legislature that we'll be able to come up with that cost share.

The CHAIRMAN. Let me ask one other question of President Shirley, and also Patty Lundstrom. Obviously, one of my objectives, I think one of Senator Domenici's objectives from the beginning on this was to try to provide some type of sustainable water supply for the city of Gallup, in addition to meeting the water needs of the Navajo people, which clearly is a priority. I know there was recently something in the newspaper in Gallup reporting that one of the committees of the Navajo Council had rejected a Memorandum of Understanding with Gallup and with the Jicarilla Nation that related to this. Are we confident that we can work out any disagreements between the Navajo Nation and the Jicarillas and the city of Gallup so that we don't have problems, if we're able to pass this legislation, in getting everyone's water needs addressed?

President Shirley, did you have a view on that?

Mr. SHIRLEY. Certainly Senator Bingaman and Senator Pete Domenici. Sir, I'm very confident that we can work things out between the Navajo Nation, the city of Gallup and the Jicarilla-Apache Nation. I had two honorable legislators from the Navajo Nation Council sitting on the, one sitting on the Budget and Finance Committee Chairman, Lorenzo Bates. He's here with me.

Mr. BATES. Gentlemen.

The CHAIRMAN. Welcome.

Mr. SHIRLEY. Then the honorable Mr. George Arthur, who is Chairman of the Resources Committee. These are the two gentlemen sitting on the Inter-governmental Relations Committee. They have redrafted the MOU such that, it's actually just calling for a working together to get at a water supply for the Gallup, city of Gallup. Working together, like we have been, we will get there. I'm very confident.

The CHAIRMAN. Well, we appreciate that reassurance because I would certainly hate for us to go through this effort and pass legislation and then find that there's still a need out there that hasn't been adequately addressed. That would certainly not be ideal.

Ms. Lundstrom, did you have any comment on that?

Ms. LUNDSTROM. Mr. Chairman and Senator Domenici, my direct experience has been positive with many of the Navajo elected officials. I have been in communication with the city of Gallup and I understand that the Memorandum of Understanding is moving forward, that they've all agreed to continue working on it as quickly as possible. I just believe that this hearing committee, Mr. Chairman and Senators, is that we've gone through much and so many kinds of obstacles that is just one of many that we'll be able to work through.

The CHAIRMAN. Thank you very much.

Senator Domenici.

Senator DOMENICI. Senator Bingaman, you hit the nail right on the head. It will serve very little for us to pass this and then not find that, or find that the Gallup arrangement didn't take place. I'm going to add this one and ask you about it, President Shirley, and/or that water pipeline, the big one will be there, but we won't have an infrastructure to deliver it.

This project and its dream was to put the big pipelines down so that where we have thousands of acres with no water, you would have major trunk lines. But, that won't serve the Navajo people if there is not watering facilities, the little pipelines, actually how you hook the water on.

I personally want to know quickly, Mr. President, do you intend to, does the Navajo Nation intend to proceed with a plan to make available the delivery system so the Navajo people won't be hauling water from these big pipes, but rather the water will get delivered in a normal way through little pipes like they do in all cities, with the infrastructure? Is that going to happen?

Mr. SHIRLEY. That is the plan, absolutely, Senator Domenici. That is the plan. I venture to say we're going to get there as planned.

Senator DOMENICI. Well, I take it—

Mr. SHIRLEY. You wouldn't do us any good and you wouldn't do my people any good to just have that water line.

Senator DOMENICI. No.

Mr. SHIRLEY. Water going to the communities, that's the intention.

Senator DOMENICI. No, it wouldn't. I want to say that, you know, we're in control of this legislation up here, but we can probably finish it in 1 month or 6 months. The one thing I would like to see and I, Mr. Chairman I'd ask if we could ask the Navajo Nation to submit this. I would like to see some evidence of what you're going to do and where you're going to get the money to provide water. You know, you don't have to provide it every single acre, but somehow the Navajo Nation has to think through where we're going to get the resources. Are you going to charge the people for water? I think we ought to know that. That's the big one because the water is useless if that isn't done and I'm not critical, I just have been there and I'm, that you can wait and fight for 10 years over issues like this, that's not what we want.

Mr. Guenther, I thought I recognized your name when I saw you there, but I wasn't sure. Now I kind of know you because whenever Arizona's involved in this, there you are. You're like Mr. Steve Reynolds from New Mexico who's gone, but was everywhere.

I just want to tell you I hope your claims in this are really good or no good at all. Because we've done too much, both of us, to help Arizona, in fact, we helped them with a giant settlement just a couple years ago. It was right when Senator Kyle wanted it, needed it, and we didn't look for nits and nats. I hope you do the same for us. I'm not going to ask you to give away anything, but I am asking you not to think that we're going to take up, in this committee, frivolous things just to delay things. It's not going to happen. So, you better have them right or you better come and tell us we're your partners like you've been with us here before. That would be a good thing to have. You want to comment on that?

Mr. GUENTHER. Thank you, Mr. Chairman and Senator Domenici. It's good to see you again as well.

We take, we take issues with the Law of the River and the Colorado River Compact, obviously very seriously. Obviously, none of us, none of us in any of the seven States would want to see a breach in that Compact or that Law of the River that would jeopardize our share of the water. Arizona depends on the Colorado River for over a third of its annual water supply, so it's very dear and precious to us. But we also take our friendship with our neighbors to the east very seriously. We will do everything we can to work with you to make sure that our concerns are well founded.

We have a lot of legal scholars. We have probably too many legal scholars dealing with water river issues, but we will, again, sit down with Mr. D'Antonio and his staff and Mr. Connor, your staff and see what we can work through and resolve, just as we did in that Arizona Water Settlement Act and dealt with some very difficult issues right toward the end of that one. So, we look forward to working with you and your staff.

Senator DOMENICI. Mr. Chairman, I'm sure we have to leave, but let me say to Patty Lundstrom and representatives from Gallup, I'm going to, by coincidence, it's not planned, I'm going to be in Gallup next week and probably you will be getting notice that I'd like to meet with COG. I think I ought to take this opportunity to

meet with some of the Gallup officials just to talk publicly about this obligation they have to come up with the money or we're doing something that's not worth, not worth much, you know. We really want Gallup to end up with water, right.

Ms. LUNDSTROM. Thank you.

Senator DOMENICI. Thank you very much, Mr. Chairman.

The CHAIRMAN. Well, thank you very much.

Thank you all for your testimony. This has been a little disjointed with our need to go back and forth to the floor and vote, but I think we made a good record here and we appreciate your participation.

Thank you.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]



## APPENDIXES

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### APPENDIX I

#### Responses to Additional Questions

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RESPONSES OF JOE SHIRLEY, JR., TO QUESTIONS FROM SENATOR BINGAMAN

*Question 1.* In its testimony, the Administration indicates that it needs to determine what the Navajo Nation's specific goals are for the settlement.

For the record, please articulate the Navajo goals for the settlement.

Answer. As we told the federal assessment team and the federal negotiation team, the Navajo Nation seeks a water rights settlement that provides:

- **CERTAINTY.**—Certainty as to what our water rights are, including the water rights for the Navajo Indian Irrigation Project which were not fully described in the 1962 Act. To fully develop a permanent homeland for the Navajo People requires knowing the full extent of our water resources.
- **WET WATER.**—A “paper” water right does not benefit people who must haul their drinking water. The Navajo Nation is forgoing a large paper water right in exchange for a smaller paper water right, conditioned on the wet water development outlined in the settlement legislation, including the Navajo Gallup Project.
- **PEACE.**—We want a settlement that will reduce the possibilities of future conflicts with our neighbors. Our settlement is structured to create partnerships between the Navajo Nation and its neighbors—the City of Gallup, the Jicarilla Apache Nation, and the City of Farmington, which has passed a resolution in support of the settlement.

*Question 2.* The Administration's testimony, as well as other testimony submitted for the record, indicate that there might be cheaper and more efficient means to deliver water to the Navajo Reservation.

Has the Navajo Nation considered other alternatives to supplying water to the eastern part of the Reservation? If so, what problems exist with those alternatives?

Answer. The Bureau of Reclamation, in the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project (DEIS), identified various alternatives, including additional groundwater development, water conservation and water re-use. The DEIS concluded that these alternatives would not be sufficient to provide a sustainable, reliable water supply. See: DEIS at IV-4. Wherever groundwater can be utilized, the Navajo Nation plans to utilize those resources and S. 1171 includes authorization to develop conjunctive groundwater wells wherever possible to reduce costs. However, the analysis in the DEIS confirms that groundwater will not provide a sustainable long-term solution. The Navajo people have already perfected water conservation and water re-use through generations of water hauling. While water hauling ensures that water is conserved and re-used to the maximum extent possible, water hauling is not sufficient to provide the Navajo people with an adequate and reliable water supply.

*Question 3a.* Part of the Administration's reasoning for objection to S. 1171 is that it claims that the likely cost of the settlement exceeds the Federal government's underlying liability. This issue has not been discussed much because so much of the focus has been on the critical need for water on the Navajo Reservation.

Does the Navajo Nation believe that the Federal government has significant liability associated with the Navajo water rights claims? If so, can you generally summarize the basis for that liability? Are the Navajo water rights claims in the underlying adjudication significant enough to potentially displace non-Navajo water users in the basin?

Answer. As you correctly point out, this settlement is about addressing basic human needs; it is not about “counting beans” by the federal bureaucracy. The federal government’s trust responsibility and treaty obligations are difficult to quantify in dollar terms, but we are prepared to do so.

We will provide the Administration with a more detailed analysis outlining how the federal government would be subject to significant liabilities in the event this settlement fails. We believe that the United States has substantial exposure for liabilities to the Navajo Nation for failing to protect our water rights, for failing to enjoin others from using water to the detriment of the Navajo Nation, and for encouraging non-Indian water development within the San Juan River basin. In addition to liability to the Navajo Nation, the United States faces potential liability not just to the Navajo Nation but to many other parties within and outside the San Juan River basin. Under almost any litigation outcome, the United States would be exposed to significant liability.

In the event that the settlement fails, and the Navajo Nation were forced to litigate its water rights claims, the Navajo Nation would claim all of the water necessary to ensure a permanent homeland for the Navajo people. Such claims would include not only past and present water uses, but additional water for mining and energy development, domestic and municipal uses, commercial and industrial development, and additional irrigation. Experts working for the Navajo Nation and the United States have identified a number of water claim scenarios that range from modest to substantial claims. We believe that any litigation outcome would award the Navajo Nation more water than they would receive by way of the settlement. The water awarded to the Navajo Nation in this settlement is surely less than water that the Nation could obtain through litigation. (The water in the settlement is essentially: (1) water for existing Navajo irrigation projects at Hogback and Fruitland; (2) water for the Navajo Indian Irrigation Project promised by the 1962 Act of Congress; and (3) about 22,000 acre-feet of “new water” for the Navajo-Gallup Water Supply Project.) Therefore, any litigation displaces existing water users and potentially creates federal liability with respect to those users.

With the settlement the State of New Mexico will be extremely close to full water development under its compact apportionment. Therefore, any water the Navajo Nation would obtain over and above the water specified in the settlement threatens existing water users and jeopardizes the ability of New Mexico to stay within its compact apportionment. It does not take a significant claim by the Navajo Nation to achieve this result. For example, the settlement agreement limits Navajo acreage at the Hogback and Fruitland irrigation projects to 12,165 acres, but the Congressional record on Public Law 87-483 makes reference to a possible 26,000 acres of irrigable land at just these two sites. See: Senate Report No. 2198. The water for this additional acreage would have to either come from existing water users or from water in excess of New Mexico’s compact apportionment. In addition, experts for the Navajo Nation and the United States have identified additional irrigable acreage upon which substantial claims could be based. Even a modest award of additional acreage would cause disruption of existing water uses.

Recent decisions in various water adjudications confirm that Indian tribes are entitled to all the water necessary to make their reservations livable as permanent homelands. Such water uses include water for municipal, commercial and industrial purposes. The Navajo Reservation has a substantial population and continued population growth can be expected if the Navajo Nation had sufficient water resources. The municipal water in the settlement agreement is based on a projected forty (40) year projection. If the Navajo Nation were to litigate its claims, it would seek a supply for a much longer period of time. In addition, the Navajo Nation possesses an abundance of natural resources including coal, oil and gas, and uranium. The Navajo Nation claims the waters necessary to develop these resources, including water for energy generation.

Even a modest award of water to the Navajo Nation would prove disruptive to existing water users, including upstream irrigation uses, water diversions for two coal fired generating stations, and the water for the municipalities in the basin. In addition to impacts on these run-of-the river diverters, in order to meet additional downstream Navajo uses, water that would have otherwise been stored at Navajo Reservoir and in the Animas-La Plata Project would be bypassed creating potential shortages to the various federal interests that rely on this water including the Animas-La Plata Project, the Hammond Conservancy District, the Jicarilla Apache Nation, and the San Juan-Chama Project. With respect to the San Juan-Chama Project, it provides a portion of the water supply for the cities of Albuquerque and Santa Fe, and Project water is proposed as the supply necessary to settle the water rights claims of Taos Pueblo and the four Pueblos in the Aamodt litigation. By any

measure, the United States cannot afford to let the settlement fail, even if the Navajo Nation were only to receive a modest amount of additional water.

The scenarios for even greater exposure could accrue if the Navajo Nation were successful in bringing a more substantial claim in the adjudication. Numerous law review articles have been brought concerning the potential Navajo claims. These articles suggest that were the Navajo Nation to prevail on its claims, the implications on the entire Colorado River water system could be devastating. For example, some commentators refer to the unquantified rights of the Navajo Nation as posing a "hypothetical shock" to the Colorado River. Allen V. Kneese and Gilbert Bonem, *Hypothetical Shocks to Water Allocation Institutions in the Colorado Basin*, *NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY* at 97 (Weatherford & Brown, eds. 1986). See also William Douglas Back & Jeffrey S. Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 *NATURAL RESOURCES JOURNAL* 71, 74 (1980) ("If Navajo Winters rights ever are adjudicated, the potential award is staggering.") Therefore, the proposed settlement not only benefits the Navajo Nation and the State of New Mexico, but the entire Colorado River system. If the settlement fails, the potential liability of the United States for disruption of water uses within the Colorado River system is too massive to calculate.

*Question 3b.* If there is no settlement, will the Navajo Nation challenge the water rights claims of other parties in the adjudication? Has that already occurred?

Answer. In the event that there is no settlement, the Navajo Nation would claim all of the water in the river as necessary to satisfy its homeland needs, including water for municipal, commercial, industrial, mining, livestock and agricultural uses. Because the Navajo Nation lands are largely downstream of all other water users, the upstream water uses would be aggressively challenged.

The State Land Office recently made a claim for reserved water rights in the San Juan River basin. The Navajo Nation, together with several major claimants and the New Mexico State Engineer, has challenged such claims.

*Question 4.* The State of Arizona objects to moving S. 1171 until it has a chance to negotiate a settlement on Navajo and Hopi water rights claims in Arizona. Your testimony indicates that the Navajo Nation does not view a settlement of those claims as imminent.

What is your perspective on how a delay in moving S. 1171 might impact the negotiations? Would it help facilitate a resolution of issues or slow the process down even further?

Answer. The Navajo Nation is committed to good faith water rights negotiations with the State of Arizona. In the late 1990's we engaged in serious settlement discussions with the Arizona water users concerning the Navajo Nation's water rights in the Little Colorado River basin. Those discussions broke down, but were revived only after the Navajo Nation filed its lawsuit in *Navajo Nation v. United States* concerning Navajo claims to the mainstream of the Colorado River in the Lower Colorado River Basin in Arizona.

Although we are negotiating in good faith, we are not certain whether a negotiated settlement Arizona is even possible, let alone imminent. We have a settlement with the State of New Mexico because it is based on identifying and satisfying the needs of the Navajo people in New Mexico. We are disappointed that the Arizona testimony talks about the need to resolve litigation with the Navajo Nation, but no acknowledgment of the real needs of the Navajo Nation to obtain sufficient water rights to create a permanent homeland. And, continue to be frustrated in our settlement efforts with the Arizona parties because there is no real discussion of the needs of the Navajo Nation. Instead all discussions with Arizona focus only on the limited resources the Arizona parties are willing to offer. Frankly, we are unsure of whether a settlement is possible with Arizona given that the state parties insist that a Navajo settlement fits within the parameters of the Arizona Water Settlements Act which contains only a limited amount of water and money.

If a settlement with Arizona can be achieved without compromising or delaying the New Mexico settlement, then we would be happy to have a more comprehensive settlement, but the New Mexico settlement is crafted in a manner that does not require resolution of the Navajo water rights issues with the State of Arizona, and Arizona's ability to reach a settlement with the Navajo Nation will not be impaired if a New Mexico settlement moves forward separately. Frankly we believe that Arizona is simply attempting to leverage a settlement with the Navajo Nation that fails short of meeting the Navajo Nation's needs, by demanding that the New Mexico settlement include a partial settlement with Arizona.

Requiring a settlement with Arizona gives too many parties without an interest in New Mexico, including the Hopi Tribe, and various non-New Mexico interests, veto power over our New Mexico settlement. In short, it is our view that linking

the New Mexico settlement to the Arizona negotiations will only serve to slow the Arizona negotiations even further.

*Question 5.* The Gallup Independent recently reported that the Intergovernmental Relations Committee of the Navajo Council rejected a proposed MOU with Gallup and the Jicarilla Apache Nation outlining a process to help Gallup secure a water supply for its share of the Project. Obviously, that's a strong concern if the partners to the Project are not working cooperatively with each other.

What was the basis for the Committee's action and is there a process underway to resolve this issue to everyone's satisfaction?

Answer. The Intergovernmental Relations Committee (IGRC) consists of the chairs of each of the eleven standing Committees of the Navajo Nation Council. As the President of the Navajo Nation, I am not a member of the IGRC. I have discussed the Committee's actions with the Chairperson of the Resources Committee, Delegate George Arthur. The Resources Committee is responsible for overseeing the management of the natural resources of the Navajo Nation.

The Resources Committee unanimously approved the MOU in May; at a meeting where Chairperson Arthur was not present. The MOU was then presented to the IGRC in June. Subsequently, Chairperson Arthur was concerned that some of the language in the MOU created the impression that Project facilities—even those currently being constructed with State funding—could not deliver water to Navajo users until a water supply for Gallup for the San Juan Lateral of the NGWSP was identified. As you know, there are several phases of the Cutter Lateral and that Navajo/Gallup Regional System which are currently being constructed. The troubling language of the MOU has been deleted.

The IGRC also expressed that although the staffs from the City of Gallup, the Navajo Nation and the Jicarilla Apache Nation had worked extensively on drafting the MOU, there have not been any recent meetings among the political leadership of the three entities. Because of the of the recent changes in leadership at the City, the Jicarilla Apache Nation, and among the eighty-eight delegates of the Navajo Nation Council, the IGRC felt very strongly that meetings among all the leaders were critical to ensure that the next steps in this process will be successful.

I am pleased to report that since the June IGRC meeting a process has been developed to address these concerns. On June 22, Chairperson Arthur met with the City of Gallup and assured that the MOU would be put into place. On June 25, Chairperson Arthur met with Jicarilla Apache Nation (JAN). JAN indicated that it is supportive of the settlement and is still engaged in negotiations with the City of Gallup. On July 11, a meeting was held among all three parties. At that meeting, a schedule was developed to finalize the MOU and Chair Arthur committed to getting the MOU processed by mid-August.

#### RESPONSE OF JOE SHIRLEY, JR., TO QUESTIONS FROM SENATOR DOMENICI

*Question 1.* President Shirley, the Navajo-Gallup Water Supply Project would provide the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup with a long-term water supply. I was very disappointed to learn that the Navajo Nation Council's Intergovernmental Relations Committee recently rejected a MOU that would establish a framework for acquiring water for the City of Gallup. I have made it clear that I will not support a settlement that does not ensure a water supply for Gallup. Are you aware that nearly 30 percent of Gallup residents are Navajos?

Answer. Yes, according to the 2000 Census data 36 percent of the Gallup residents are Native American. Furthermore, more than 85 percent of the students at the public schools within the City's boundaries are Navajo.

*Question 2.* Do you share the views of the Intergovernmental Relations Committee?

Answer. The Navajo Nation Council overwhelmingly approved of the Settlement Agreement. I support the position of the Navajo Nation Council on the Settlement.

The Intergovernmental Committee (IGRC) is a committee of the chairpersons of each Standing Committee of the Navajo Nation Council for a total of eleven members with the Speaker of the Council sitting as the Chair. It appears that the positions of the Delegates on the IGRC reflect their personal views and not the views of the Council. In addition, it appears that at least one Delegate was concerned with language in the Memorandum of Understanding the created the impression that Project facilities, even those currently being constructed, would not be able to serve Navajo water users until a number of complicated water arrangements are resolved. I do agree that Navajo water users should not be prevented from benefiting from the infrastructure currently under construction.

With respect to identifying a water supply for the City of Gallup, we all understand that this important issue needs to be resolved for the Project to move forward.

I appreciate this need and will do what I can to live up to the Council's commitment to the Settlement Agreement.

*Question 3.* How do you plan to ensure that a water supply is made available for the City of Gallup?

Answer. I am committed to finding a water supply for the City of Gallup. Since the June IGRC meeting a process has been developed to address these concerns. On June 22, Chairperson Arthur met with the City of Gallup and assured that the MOU would be put into place. On June 25, Chairperson Arthur met with Jicarilla Apache Nation (JAN). JAN indicated that it is supportive of the settlement and is still engaged in negotiations with the City of Gallup for a long-term water lease. On July 11, a meeting was held among all three parties to discuss all water leasing options in the MOU, including leases between the Navajo Nation and the City of Gallup. At that meeting, a schedule was developed to finalize the MOU and Chair Arthur committed to getting the MOU executed by the middle of August.

*Question 1.* The Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project does not include distribution systems.

How do you plan to distribute the water supplied by the Navajo-Gallup Water Supply Project?

Answer. The Navajo Gallup Water Supply Project is guided in part by a Steering Committee that includes the Indian Health Service, the Navajo Department of Water Resources, the City of Gallup, the Navajo Tribal Utility Authority, the Bureau of Reclamation, the Bureau of Indian Affairs, the Jicarilla Apache Nation, and the Northwest New Mexico Council of Governments. One of the primary technical objectives of this group is to make sure the Project as it is planned and developed meets the real needs of the people in the region. This Steering Committee is coordinating the programmatic resources as they become available as much as possible. For example, to date the State of New Mexico has committed approximately \$17 million in the infrastructure that will convey water from the Cutter Lateral through the local Navajo Tribal Utility Authority public water systems, and approximately \$7 million in the infrastructure that will regionalize the public water systems in the Gallup area. In addition, the Indian Health Service, through its P.L. 87-121 program, is spending resources to meet the distribution needs of the Navajo Nation's drinking water infrastructure and will continue to do so.

The Navajo Gallup Water Supply Project will convey water to a service area that is largely served by the Navajo Tribal Utility Authority (NTUA). NTUA operates more than 90 public water systems on the Navajo Nation with more than 30,000 customers. As proposed in the Environmental Impact Statement appraisal level planning reports, the water conveyed from the San Juan River through the Project will be delivered to the NTUA's systems at more than 20 locations. At each location a tank and booster pump will ensure that the treated water can be further conveyed by NTUA through the current distribution network. As these plans are further refined through feasibility and final design level studies, every effort will be made to fully incorporate the existing NTUA infrastructure into the Project.

*Question 2.* To what extent will the Navajo-Gallup Water Supply Project reduce water hauling on the Navajo Reservation in New Mexico?

Answer. Many of the 80,000 Navajo men, women, and children in the Project service area presently do not have clean potable drinking water delivered to their homes; they must haul water, in some cases over many miles, for drinking and cooking. Although construction of the Project will not necessarily eliminate all water hauling on the reservation, the Project will allow the Indian Health Service to expand distribution systems to provide potable water delivery to more homes and would create growth corridors within the Navajo Nation where future communities can be built with ready access to roads, electricity and potable water.

*Question 1.* Mr. President, you state in your testimony that the Navajo-Gallup Water Supply Project "represents a critical component of the Navajo Nation's economic strategy."

Please explain the economic development strategy and how the Project will further economic development for the Navajo Nation.

Answer. The Navajo Nation adopted the Water Resource Development Strategy for the Navajo Nation in July 17, 2000. That document concludes that "the lack of a reliable and affordable potable water supply stifles economic growth throughout the reservation" and that "[t]he lack of infrastructure, the lack of economic development and the sustained poverty are closely connected." Without developed water infrastructure economic development infrastructure is impossible. The Project will provide a backbone of water infrastructure for the Eastern portion of the Navajo Reservation.

The Navajo Nation has identified economic development growth centers through the Nation, such as Shiprock, Crownpoint, and Window Rock. They are large popu-

lation bases which have the potential to benefit from an economy of scale in infrastructure development. The Project will deliver in such a way to stimulate economic development in these growth centers.

*Question 2.* What health benefits will the Navajo-Gallup Project bring to the Navajo People?

Answer. For those families who will be relieved of water hauling, there should be a decrease in waterborne communicable diseases and other communicable diseases including Hepatitis A, Shigella, and Impetigo are associated with the limited hand washing and bathing practices often found in households lacking adequate water supplies. "The Navajo-Gallup Water Supply Project will ultimately provide water to over 100,000 people who would otherwise haul water, for an estimated total savings in medical expenses exceeds \$318 million over the life of the project." See Economic Benefit/Cost Analysis, Navajo Gallup Water Supply Project, Dornbusch Associates, April 11, 2006, found at Appendix D of the Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project, March 2007.

*Question 1.* According to the Draft EIS for the Navajo-Gallup Water Supply Project, the Navajo Nation would receive roughly 27,000 acre feet of water per year.

Do you believe this amount is adequate to meet the Navajo Nation's long-term needs?

Answer. The design criteria used in the Draft EIS for the Navajo-Gallup Water Supply specifies capacity of 29,062 acre-feet per year for the Navajo Nation including, 6410 acre-feet in Window Rock, Arizona. These capacities are based on a projected forty (40) year demand in the project service area. Certainly this quantity of water will not be sufficient to meet the long-term needs; however, if the settlement is implemented, the Navajo Nation would have 325,670 acre-feet of annual depletions and the right to put those depletions to any beneficial use, including municipal and domestic uses.

*Question 1.* Mr. President, the Navajo-Gallup Water Supply Project would provide water to the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup.

Have you developed any agreements with Gallup and the Jicarilla Apaches for the operations and maintenance of the Project?

Answer. The MOU between the Project entities contemplates that an agreement concerning the operation and maintenance of the Project is required. This agreement will be developed after the MOU is executed. We anticipate that the Navajo Tribal Utility Authority will have an important role in operating the Project. We are also looking at various joint utility options for the Project.

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#### RESPONSE OF MARK SANCHEZ TO QUESTION FROM SENATOR BINGAMAN

*Question 1.* Your testimony seems to raise a number of concerns with the settlement that the State seems to think have been addressed.

Do you disagree with the State's analysis? So you believe that you can work through any remaining issues with the State so that you can support the settlement?

Answer. Our primary concerns are the hydrologic impact on the San Juan-Chama project and how shortages are to be calculated and shared. Given that no formal hydrologic analysis on the impacts to the San Juan-Chama Project from the settlement has been completed, the Authority has engaged Daniel B. Stevens to examine the potential for increased frequency and magnitude of shortages. The Authority will be pleased to share this information with all parties when the work is complete. The extraordinary powers granted to the State Engineer provided in the bill need to be amended out of the legislation or substantially clarified. The Authority is committed to working with the State and feels that all of the issues raised can be addressed.

#### RESPONSES OF MARK SANCHEZ TO QUESTIONS FROM SENATOR DOMENICI

*Question 1.* Mr. Sanchez, I appreciate you identifying portions of the bill that you believe need greater clarification. I look forward to working with you on these provisions. As you are aware, litigation to determine Indian reserve water rights has, in some instances, resulted in large awards for the Indian nations.

Are you concerned that, if litigated, the Navajo Nation's court-awarded water rights could ultimately result in a reduction of water diverted by the San Juan-Chama Project?

Answer. The Authority is concerned about anything that could affect the San Juan-Chama project and understand that the settlement has the advantage of reducing the uncertainty that comes from litigation and court-awarded water rights.

*Question 2.* Do you believe that settling the Navajo Nation's water rights claims is in the best interests of the Authority and other San Juan-Chama contractors?

Answer. As stated in our comments, we are concerned about the frequency and magnitude of shortages and how shortages are to be calculated and implemented. The Authority would like to work out a sharing of shortages agreement in parallel with the legislation. We agree that resolving the Nation's water rights claims and the certainty that comes with that is in the best interest of the Authority and other San Juan-Chama contractors.

You raise the concern that, pursuant to Public Law 87-483, the Secretary of the Interior, before entering into additional contracts at or below Navajo Reservoir, must make a determination that there will be "a reasonable amount" of water for the San Juan-Chama project.

*Question 3.* Based on your independent assessment, will the new contracts issued pursuant to this settlement adversely affect the amount of water provided to San Juan-Chama contractors?

Answer. The Authority's assessment is not yet complete, but the Secretary and more specifically the Bureau of Reclamation should be required to address this issue. For example, the Bureau has used different figures for the amount of water that will be available for diversion by the San Juan-Chama project. These different hydrologic analysis and water availability needs to be rectified so that everyone is clear on what is to be diverted and how much water is available to divert on an average annual basis. In addition, the Authority supports adding language that provides for the Secretary to operate the San Juan-Chama project as efficiently as possible to ensure the maximum possible yield provided in the legislation. If the Bureau operated the project as efficient as possible, then the impact from this settlement will be significantly reduced or eliminated.

*Question 4.* Do you agree with the assumptions underlying the April 2007 hydrologic assumption signed by Secretary Kempthorne?

Answer. We understand the hydrologic analysis to be a correct determination on the amount of water available for the settlement as it relates to New Mexico's apportionment under the Upper Colorado River Basin Compact. The average amount of water available for the San Juan-Chama project, however, is different than the amount the Bureau has used to determine the amount available for contracts from Heron Reservoir (see previous discussion).

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#### RESPONSES OF PATRICIA LUNDSTROM TO QUESTIONS FROM SENATOR BINGAMAN

*Question 1.* The Administration suggests that the Navajo and State should stop and revisit the goals of the settlement, and consider whether those goals can be met by alternative and less expensive means. That would seem to throw away almost 2 decades of work.

What do you think of the Administration's suggestion? Are there other alternatives out there that the Steering Committee has overlooked?

Answer. I share the Senator's concern about "revisiting" the goals of the Settlement and of the Navajo-Gallup project, as well as the preferred alternative that has been so rigorously vetted over "almost two decades of work." Now is not the appropriate time for Administration officials to be recommending a return to the drawing boards, in that there has been ample opportunity all along to consider, negotiate, revise and evaluate all possible alternatives. If there are better ways to go ("by alternative and less expensive means"), then it would have behooved Administration officials to recommend specific alternatives well before the current 11th hour.

If cost-cutting is indeed the issue of the hour, and if the Administration officials are on a "mission" to reduce cost for its own sake, then our technical partners are primed for further research and analysis in this regard. It should be noted, however, that the Navajo Nation and the State of New Mexico, in particular, have been literally begging the Administration to participate in substantial dialogue on the project's critical cost parameters, with disappointing results until this current nexus point.

We believe the selected alternative to be appropriate to meet project goals, and given the criteria and information from which the Bureau of Reclamation (BOR) cost estimate was derived, the estimate is understandable and defensible.

However this does not necessarily mean the project cannot meet its goals at a reduced price. Although the BOR work has been reviewed by an independent third party (Boyle 2004) and is currently undergoing an independent Design, Estimate & Construction (DEC) review process, these reviews have not—or may not—identify cost-cutting alternatives.

The issue of cost cutting has been the topic of discussion at countless meetings and conversations of the Project's technical committee and its members. The general consensus of the committee members is that considerable cost savings might be achieved through a value engineering process, whereby alternative pipe materials, bedding requirements, building materials, design standards, treatment processes and other project components are analyzed.

Committee members have also discussed taking a third-party design/build approach to the project. However, this would not fit the standard BOR model and would require that BOR take a role of project management & oversight rather than its own internal design/build approach.

With all due respect to the BOR, whose Western Colorado Area Office staff have served this Project with professionalism and effectiveness, the technical participants from the Project beneficiary entities have advocated a more aggressive look at engineering and cost alternatives, as well as a less bureaucratic and tentative approach to value engineering than would be suggested by BOR's procedures related to "appraisal-level" and "feasibility-level" analyses. Some of our internal technical reviewers have been disappointed that BOR engineers have not been more interested in following up on various on-the-ground projects in the region for information on soils and other issues associated with the particular terrain of this region. Rather, their sense has been that BOR has been in a conservative, tentative and protective mode in its design work, as opposed to being motivated to "build the best and most cost-efficient project."

It is possible that a shift toward private engineering contracts under BOR's general oversight may generate designs and estimates that are more economical, while at the same time realistically meeting project objectives, given known work done in this region—for example, to lay natural gas pipeline, as well as the work currently being done on the local water pipeline projects in the "Cutter Lateral" area of the Project under State funding. Our technical representatives have expressed confidence in the high-level expertise and experience of, as well as the quality of work done by, a number of private firms working in the Four Corners region.

*Question 2.* You note that it is the City's position that it will need a high level of Federal funding support for its share of the project costs.

Can the City afford at least the 25% cost-share for the Project that is contemplated in the bill?

Answer. The short answer is that the City of Gallup should be able to plan and carry out a financial strategy that meets the 25% cost share commitment. However, there are some unique factors to be addressed and resolved.

On the surface, it appears that Gallup's rate-payers can afford 25% of Gallup's share of the project costs. However, the economic analysis work done as part of the Navajo-Gallup EIS leaves out one large component of Gallup's current and future expense, which is its need to replace aging infrastructure.

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 becomes due.

Gallup has not stood idly by while its water system deteriorated. On the contrary, Gallup has always had a relatively vigorous capital improvement program, and more recently (2005) it leveraged increased water utility revenue projections to pass \$21 million in revenue bonds (\$10 million for water and \$11 million for wastewater) to address some of the more critical water and wastewater needs.

It is also important to be mindful of the rising cost of other non-discretionary household expenses such as wastewater, power, solid waste, natural gas and fuel when considering the ability of Gallup's rate-payers, a large segment of whom are at or below poverty level, to pay higher costs for this utility.

Due to Gallup's aggressive capital improvement program and steeply inclining rate structure (well above the state average for the average user and second only to Santa FE for those in the top tier), Gallup's bonding capacity and rate-payers' capacity may be at their limits.

Nevertheless, to proactively deal with the water financing challenge, Gallup is currently re-evaluating its financial position and developing its long-term strategy with respect to the Navajo-Gallup project. 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 COG representatives met in Gallup on July 9th 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, such



as via amendment or regulatory stipulation to the Indian Water Rights Settlement Fund and the Water Trust Fund.

With regard to the City's own commitment to the project cost share, several options are currently under consideration, including:

- inviting the financial partnership of the County of McKinley;
- potential utilization of local taxation and bonding options;
- earmarking a portion of utility revenues for a project sinking fund, to be accelerated in the years 2014 and 2019 when current long-term bond debts are retired;
- user surcharges, possibly ramped upward over time; and
- systematic increases in water rates over time.

It is the City's plan to provide a preliminary report on its financial strategy to Senator Domenici on the occasion of his visit to Gallup on August 15th, 2007.

However, until such time as factors such as the cost of water, final OM&R (operations, maintenance & replacement) and capital costs, and construction scheduling are determined, it will be difficult for Gallup to determine what its ultimate financial strategy will be and what its citizens can afford.

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 the 25% local cost share.

*Question 3.* The Gallup Independent recently reported that the Intergovernmental Relations Committee of the Navajo Council rejected a proposed MOU with Gallup and the Jicarilla Apache Nation outlining a process to help Gallup secure a water supply for its share of the Project.

How has this action affected Gallup's perceptions of the Project? Is the situation being addressed so the issues with the MOU will be resolved?

Answer. City officials understand that these kinds of agreements have to go through an extensive consultative process within the Navajo Nation bureaucracy, and it is not uncommon to see concerns raised in the parties' respective legislative forums, even after literally hundreds of technical, legal and jurisdictional details have been discussed and negotiated by experts and officials from all parties concerned.

Some of the Navajo legislators' comments reported in the local press reflect long-lingering sentiments still held by various elements of that Nation's elected leadership. On the other hand, the majority of Navajo leaders, including President Shirley himself, appear to have seen the positive evolution in the relationship between the City of Gallup and its tribal neighbors, to be aware of the cooperative nature of the "Gallup Regional System" projects, and to be convinced that cooperation and partnership is the best policy going forward—especially in sharing the resources of the region's "water commons."

City of Gallup and tribal officials from the Navajo and Jicarilla Apache Nations have met twice recently to discuss this issue. In step with Navajo Nation President Joe Shirley per his June 27th testimony, the City of Gallup is likewise confident that the issues with the MOU can and will be resolved.

#### RESPONSES OF PATRICIA LUNDSTROM TO QUESTIONS FROM SENATOR DOMENICI

*Question 1.* Ms. Lundstrom, as you point out in your testimony, the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup would all be served by the Navajo-Gallup Water Supply Project.

What operational structure do you propose to ensure that the Project is maintained and operated properly so that all Project beneficiaries receive water from the Project?

Answer. I would propose formation of a multi-jurisdictional authority, perhaps similar in nature to the model adopted by the Bernalillo Water Authority. We are in the process of researching models and preparing for consultation with our Steering Committee entities.

Under funding appropriated by the 2006 New Mexico State Legislature, the Steering Committee (with staffing by the Council of Governments) is currently considering operational structure alternatives, with no conclusive recommendations to date. Although a secondary issue during the EIS planning stages, this question is now emerging as an important item to be addressed by the Project parties. The cooperative history of the Steering Committee entities has set a strong foundation for future planning and problem-solving in this arena.

Clearly, residents of the Navajo Reservation stand in primary position to reap the Project's benefits, while another substantial Navajo population will be among the City of Gallup's project beneficiaries (possibly approaching 50% of the City's popu-

lation during the course of the Project). Additionally, it is the settlement of the Navajo Nation's water rights claims in the San Juan River Basin that will serve as the primary vehicle for the authorization and financing of the Navajo-Gallup project. Thus, the Navajo Nation stands to have a role in defining the operational structure to ensure water delivery to all project beneficiaries.

On the other hand, the Navajo-Gallup project has progressed as a multi-party and multi-jurisdictional initiative, and the other key players represented on the Steering Committee—including most prominently the City of Gallup, the Jicarilla Apache Nation and the State of New Mexico—will likewise have a role in helping to define operational structure, just as they have contributed to most other aspects of project planning. Notably, the City of Gallup has both the financially strongest customer base and the most highly developed water infrastructure among the Project parties, and it will also have a pivotal role in serving as a conduit for Navajo-Gallup project water, through its municipal system, to the rural Navajo communities neighboring the City. Thus, the City will undoubtedly be active in helping to pursue a suitable operational structure for the project.

*Question 2.* Without the Navajo-Gallup Water Supply Project, please describe the water supply outlook for the City of Gallup.

Answer. The status and trend of Gallup's dwindling groundwater reserve have been well documented, and it has been projected that given the status quo, Gallup may start experiencing water shortages during peak demands as soon as 2010 (Well Production Planning Report, Sterling & Mataya, 1998). It is no secret that groundwater sources within the Gallup region are being depleted and that none of these sources will provide a permanent supply for Gallup or other users in the region.

Gallup has taken fairly drastic measures to extend its available supply by:

- strengthening and expanding the City's water conservation efforts;
- exploring additional interim groundwater supplies (Gallup's "G-22" application to appropriate up to 5,000 acre-feet per year from the San Andreas-Glorieta Aquifer is pending before the New Mexico State Engineer, and an exploratory well is under construction);
- converting major recreational facilities to synthetic turf;
- utilizing treated wastewater to irrigate two athletic fields and the municipal golf course;
- investigating the use of treated wastewater to augment the drinking water supply (study & design of a pilot "reverse osmosis" facility is underway); and
- implementing significant (nearly 60%) water rate increases and an aggressive inclining block rate structure, with the combined effect of reducing Gallup's annual usage from a high of 4,286.5 acre feet/yr in 1995 to 3,460 acre feet/yr in 2006 (nearly 20% reduction)—with the most substantial decline during the drought years of 2003 to the present.

The City has not yet quantified the potential effects of this reduced demand on Gallup's ability to meet projected demands beyond 2010. However, it is reasonable to predict that the effect would be positive—hopefully giving Gallup a few more years to develop alternatives.

It should also be noted that Gallup's projected water demands (10,267.7 acre feet/yr in 2045) would greatly exceed (by over one-third) the 7,500 acre-feet per year in Navajo-Gallup Water Supply Project water deliveries allocated to the City in the project's Planning Report. In this light, Gallup will need to continue its search for additional water sources, while accelerating its implementation of technologies such as reverse osmosis to utilize its supply in the most efficient manner possible.

*Question 3.* You state in your testimony that the City of Gallup is concerned with its ability to fund the portion of the Project benefiting Gallup. S. 1171 currently provides that the City would pay at least 25 percent of the portion of the Project that serves Gallup.

Do you believe that this amount exceeds what the City is able to pay?

Answer. [Please note that this response replicates the written response to a similar question posed by Senator Bingaman, documented above.]

The short answer is that the City of Gallup should be able to plan and carry out a financial strategy that meets the 25% cost share commitment. However, there are some unique factors to be addressed and resolved.

On the surface, it appears that Gallup's rate-payers can afford 25% of Gallup's share of the project costs. However, the economic analysis work done as part of the Navajo-Gallup EIS leaves out one large component of Gallup's current and future expense, which is its need to replace aging infrastructure.

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 becomes due.

Gallup has not stood idly by while its water system deteriorated. On the contrary, Gallup has always had a relatively vigorous capital improvement program, and more recently (2005) it leveraged increased water utility revenue projections to pass \$21 million in revenue bonds (\$10 million for water and \$11 million for wastewater) to address some of the more critical water and wastewater needs.

It is also important to be mindful of the rising cost of other non-discretionary expenses such as wastewater, power, solid waste, natural gas and fuel when considering the ability of Gallup's rate-payers, a large segment of whom are at or below poverty level, to pay higher costs for this utility.

Due to Gallup's aggressive capital improvement program and steeply inclining rate structure (well above the state average for the average user and second only to Santa Fe for those in the top tier), Gallup's bonding capacity and rate-payers' capacity may be at their limits.

Nevertheless, to proactively deal with the water financing challenge, Gallup is currently re-evaluating its financial position and developing its long-term strategy with respect to the Navajo-Gallup project. 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 COG representatives met in Gallup on July 9th 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, such as via amendment or regulatory stipulation to the Indian Water Rights Settlement Fund and the Water Trust Fund.

With regard to the City's own commitment to the project cost share, several options are currently under consideration, including:

- inviting the financial partnership of the County of McKinley;
- potential utilization of local taxation and bonding options;
- earmarking a portion of utility revenues for a project sinking fund, to be accelerated in the years 2014 and 2019 when current long-term bond debts are retired;
- user surcharges, possibly ramped upward over time; and
- systematic increases in water rates over time.

It is the City's plan to provide a preliminary report on its financial strategy to Senator Domenici on the occasion of his visit to Gallup on August 15th, 2007.

However, until such time as factors such as the cost of water, final OM&R (operations, maintenance & replacement) and capital costs, and construction scheduling are determined, it will be difficult for Gallup to determine what its ultimate financial strategy will be and what its citizens can afford.

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 the 25% local cost share.

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#### RESPONSES OF JOHN D'ANTONIO, JR., TO QUESTIONS FROM SENATOR BINGAMAN

*Question 1.* The state is making an up-front \$25 million contribution to this settlement. Also, as you note, over the past 4 years it has invested another \$25 million towards distribution systems that will ultimately hook up to the Project. That seems to be much more substantial contribution than other states have historically provided. This settlement is, however, substantially larger than most.

Is it possible that the State of New Mexico may be able to increase its cost-share commitment towards the Settlement to address at least a portion of the federal concerns? Are there other areas where the State is committing resources to move the settlement and project forward, which have not yet been recognized?

Answer. To help assure that the substantial benefits promised by the settlement are realized, the state of New Mexico is willing to discuss increasing its cost-share commitment, subject to approval of the governor and the state legislature. To date, the federal administration has not engaged in discussions relating to the costs of the settlement.

To expand on what was stated in my prior testimony, the state already appropriated \$10 million to the Indian Water Rights Settlement Fund, established by the New Mexico legislature in 2005 for the explicit purpose of paying the state's portion of costs associated with Indian water rights settlements, and it is anticipated that future legislatures will continue appropriations in future years. In addition, approxi-

mately \$25 million in funding from New Mexico's Water Trust Board and other appropriations will benefit the settlement and the pipeline project.

With regard to other state activities that benefit this settlement, the state has worked tirelessly to hold public meetings regarding the settlement agreement and to meet with interested persons to explain the settlement. The state also cooperated with the Bureau of Reclamation to issue a draft Environmental Impact Statement, and contributed significant resources toward the development of the hydrologic determination issued by the Secretary of the Interior in May 2007. In June 2005, the state obtained approval for the hydrologic determination from the Upper Colorado Compact Commission. The state also obtained the approval of the Upper Colorado Compact Commission to use water apportioned to New Mexico's upper Colorado basin compact allocation in the lower basin within New Mexico to enable delivery of water to the City of Gallup. Without the state's proactive involvement on these issues, the settlement would not be able to move forward.

New Mexico is anxious to see a federal commitment commensurate with the federal government's trust and statutory responsibilities for the benefit of Navajo communities that need water now. Again, 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.

*Question 2.* Reviewing Mr. Guenther's testimony, it appears that Arizona objects to S. 1171 because (1) the Navajo Nation has ongoing litigation with Arizona concerning the Colorado River in Arizona, and it wants to delay the NM settlement until it settles those issues; (2) Arizona believes its interests are being disadvantaged by New Mexico using its full compact entitlement to the Colorado River; and (3) provisions in the bill need to be revised to more correctly address inconsistencies with the law of the River.

What is your perspective on Arizona's objections? Are there certain objections that New Mexico is prepared to address through changes to the legislation? Are there other objections that would undermine the support that has already been secured from the other Basin states?

Answer. As I stated in response to a similar question from Senator Domenici during the hearing on June 27, 2007, I think Arizona's position is unreasonable. New Mexico's settlement with the Navajo Nation provides a large benefit to the state of Arizona because the settlement will authorize the construction of a drinking water pipeline to Window Rock, the Navajo Nation's capital, thus avoiding having to duplicate the cost of a pipeline to Window Rock in Arizona. New Mexico's settlement and S. 1171 preserve Arizona's right to negotiate its own settlement with the Navajo Nation. In general, the issues raised by Arizona do not require resolution through the New Mexico settlement, but should be more appropriately raised in connection with an Arizona settlement. Through consultation with Arizona, New Mexico has been able to accommodate some of Arizona's concerns. For example, New Mexico has proposed substitute language for Section 303(g) authorizing the use of New Mexico's upper basin water in the lower basin of New Mexico. Unfortunately, many of Arizona's requests go beyond the scope of the New Mexico settlement, and would raise objections from the other Colorado River Basin states.

*Question 3.* The Albuquerque Bernalillo County Water Authority's testimony suggests that there's been no analysis of how new contracts could affect the San Juan-Chama water supply. There are several other issues raised by the Authority that seem to indicate that the settlement may pose a threat to the San Juan-Chama project. Your written testimony suggests the opposite.

Has there been any analysis of the effect of new contracts? Do you still believe that the settlement protects the interests of the San Juan-Chama Project? And will you sit down with the Authority to provide clarification or resolve any differences that exist over the settlement?

Answer. The 2007 Hydrologic Determination takes into account current and projected uses of water from the San Juan Basin, including water allocated to the San Juan Chama Project. In addition, New Mexico has analyzed the possible impacts of the Navajo settlement on the San Juan Chama Project and we believe the project is protected. Attached to these supplemental responses is a memorandum prepared by staff of the New Mexico Interstate Stream Commission on this subject and presented to Congressional staff and Water Authority staff in 2005.\* To the extent necessary, New Mexico will work with the Albuquerque Bernalillo County Water Authority to clarify the shortage allocation procedures, or otherwise resolve any differences that exist over the settlement.

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\*The memorandum has been retained in committee files.

In evaluating the effects of the settlement, we need to think about the alternative: what would the potential effects be on San Juan Chama Project contractors and on other water users without settlement? As my testimony in answer to other questions describes, the amount of new water under the settlement is relatively small, much less than the amount conceivably claimable by the Navajos.

*Question 4.* Your testimony states that you believe the settlement benefits and protects the interests of all water users in the State.

Please identify the key aspects of the settlement that protect other water users in the San Juan River basin.

*Answer.* For decades Navajo claims to the San Juan River have threatened the security of water rights of all other water users within the basin. 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.

A key feature of the settlement is the Navajo's willingness to limit the demand of their large irrigation project, the Navajo Indian Irrigation Project (NIIP). In 1962, Congress authorized an annual diversion of 508,000 acre-feet to supply NIIP; however, the Navajos through conservation are agreeing to limit diversions to 353,000 acre-feet. The Navajos are also agreeing that both 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.

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. And supply of the two projects under a 1955 priority means that direct flow diverters, such as irrigators, municipalities and power plants, will be unaffected by the demands of either project. In addition, direct flow diverters will receive a substantial protection from priority calls by the Navajo Hogback and Fruitland projects, which retain an 1868 priority, because of the Navajos' agreement to call first on an alternate water supply from Navajo Reservoir of up to 12,000 acre-feet in any year. Based on the hydrologic record, Hogback and Fruitland priority calls would occur in one out of every twenty years instead of every other year.

With respect to water users receiving supply from the Animas-La Plata Project (ALP), the settlement has valuable shortage sharing provisions that protect those supplies. 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, but that supply is vulnerable because of ALP's 1956 priority in New Mexico. In the event the Upper Colorado River Basin Compact requires curtailment of ALP uses in New Mexico, the Navajos agree to provide protection to New Mexico ALP contractors up to their project contract amount. Under this protection, the Navajos agree to forgo their uses in order to make water available at the same percentage supply available to the proposed rural water supply project.

The settlement also benefits water users by promoting orderly administration of basin resources and conservation of water. The settlement provides that the State Engineer will serve as water master in the San Juan Basin and will 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 to over 150,000 acre-feet of conservation of NIIP irrigation water, S. 1171 further fosters conservation of water by authorizing funding for rehabilitation and construction improvements to Navajo and non-Indian irrigation systems diverting from the San Juan River.

I strongly believe the proposed settlement is comprehensive and fair, and represents a desirable outcome for all water users in the San Juan Basin.

*Question 5.* One set of testimony submitted for the record asserts that the Navajo settlement will allow the Tribe to export New Mexico's water to other states including Nevada.

Does the Navajo settlement and S. 1171 allow the Navajo Nation to export New Mexico's water to other States? What provisions of law exist to preclude that from happening?

*Answer.* Multiple state and federal approvals are required to export any water from New Mexico to another state. Under the settlement agreement, the Navajo Nation has agreed to comply with state law. Although it is unconstitutional for a state to prohibit the export of water to another state, New Mexico's export statute, 72-12B-1 NMSA 1978, requires a state engineer permit for export of water and sets strict criteria for evaluating any request to export water. Potentially impaired parties would be allowed to protest any application.

In addition, under the settlement agreement, the Navajo Nation has agreed that it will not seek to export water without the approval of the New Mexico Interstate Stream Commission.

With respect to federal constraints, it can be argued that the Colorado River compacts apportion uses to individual states and do not allow export of water from one state to another. Arguments have also been raised that water cannot be transferred from the Upper Colorado River Basin to the Lower Colorado River Basin. S 1171 would authorize the use of some of New Mexico's Upper Basin water in the Lower basin within New Mexico but this legislation would not authorize any export of water from New Mexico to any other state.

RESPONSES OF JOHN D'ANTONIO, JR., TO QUESTIONS FROM SENATOR DOMENICI

*Question 1.* Mr. D'Antonio, thank you for joining us today. The state of New Mexico has one of the most important and difficult decisions to make regarding this settlement. As you know, Congress is not responsible for approving the allocation of water in this settlement, the State is.

Do you believe that the water allocation agreed to by the state of New Mexico and the Navajo Nation adequately protects current non-Indian uses and provides for future needs?

Answer. The state of New Mexico believes that the Navajo settlement protects existing non-Navajo uses. 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.

As I have testified, the settlement contains numerous substantial provisions that protect existing water uses. In addition, the settlement affords an important protection for the future supply of the three municipalities of Farmington, Bloomfield and Aztec from the Animas-La Plata Project (ALP). Those cities will receive more than 10,000 acre-feet per year of ALP water for their future needs, but ALP's 1956 priority in New Mexico makes it vulnerable to priority calls. Under the settlement, the Navajos agree to provide protection to New Mexico contractors up to their project contract amount, in the event that curtailment of New Mexico's water uses is required by the Upper Colorado River Basin Compact.

To meet other demands in the future, water users in the basin, as in other basins in the state, can acquire existing rights and change their use by applying for a State Engineer permit. The settlement, combined with the existing adjudication, will give much more certainty to the status of existing rights and more readily will allow for a transfer of use. The settlement also authorizes the Navajos to market water within the basin and the state, further providing a source of supply for additional non-Navajo demands in the future.

*Question 2.* Are you convinced that non-Indians are better off with this settlement than they would be without it?

Answer. It is my firm belief that we have come as close as possible to a resolution that provides maximum benefits and protections for non-Navajo water users, given limitations of water supply and potential uncertainties of its allocation if the Navajo claims were litigated. 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, 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 (NIIP).

The state of New Mexico strongly believes that the settlement represents a fair and equitable resolution of Navajo claims, both for the Navajo Nation and for the other water users that depend on the San Juan River.

This settlement has enormous non-Indian benefits, including the construction of the Navajo-Gallup Pipeline that would serve the City of Gallup. Additionally, the

legislation removes the possibility that the Navajo Nation would receive a large water rights award from the courts, curtailing non-Indian uses.

*Question 3.* How do you respond to the San Juan Agricultural Users' Association's claim that they will be hurt by this settlement? Please describe the benefits of the settlement to them.

Answer. In order to fairly consider the settlement, a water user in the San Juan Basin must honestly evaluate the substantial risk of litigating the Navajo claims. I believe that such an evaluation will provide compelling support for the settlement.

I have previously described the two overarching protections incorporated into the settlement, regarding quantity and priority: the Navajo Nation accepts quantification of its water rights and administration of its priority dates, both so as to preserve other existing uses and projects.

In addition, the settlement confers other protections on non-Navajo water users. When we met early in the process with the San Juan Agricultural Users, they told us the most important protection they sought was recognition by the United States and the Navajo Nation of the 1948 Echo Ditch Decree. Most non-Indian and municipal state-based rights were quantified by the Echo Ditch Decree, but the United States and the Navajo Nation were not parties. As a result of the agricultural water users' concern, the settlement agreement was revised to include provisions prohibiting the Navajo Nation and the United States from challenging the elements or validity of Echo Ditch Decree.

In 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, the Navajos are subordinating 90 percent of their water rights. Nonetheless, the agricultural water users felt threatened by the prospect of priority calls by the Hogback and Fruitland Projects, which retain an 1868 priority. The agricultural users also expressed a desire to receive the benefit of Navajo Reservoir storage, even though they only have rights to direct flow. To address these additional concerns, the alternate water supply was defined and made a part of the settlement, requiring the Hogback and Fruitland projects to refrain from priority calls against upstream junior appropriators and instead to call on up to 12,000 acre-feet per year of NIIP water stored in Navajo Reservoir. This sizeable stored water pool will serve as a buffer to priority calls and will prevent curtailment of direct flow diversions the great preponderance of the time.

Another benefit of stored water for direct flow diverters like the agricultural water users is contained in paragraph 401(a)(4) of S. 1171. When there is at least a million acre-feet in Navajo Reservoir, this provision authorizes the state of New Mexico to administer releases of stored water at a minimum of 225 cubic-feet-per-second (cfs), even when inflows to the reservoir are less than that amount. In other words, when the direct flow would otherwise drop below 225 cfs, water may be released from the reservoir to keep flows at a 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 Section 10.0 of the settlement agreement, the state will contribute \$10 million for ditch improvements and water conservation projects to benefit the member ditches of the agricultural water users association. Section 309(c) of S. 1171 authorizes over \$23 million to rehabilitate the Hogback and Fruitland projects and Section 309(d) authorizes \$11 million of matching funds to rehabilitate the agricultural water users' 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.

In opposing the settlement, the San Juan Agricultural Water Users simply have not taken realistic stock of their litigation posture and of the potential jeopardy they face absent settlement. Although the settlement has required compromise on all sides, the state has worked hard to protect all existing uses in the basin and to advance a settlement that strikes an equitable balance of interests and maximizes the attainable benefits.

*Question 4.* Considering its enormous benefits to the state of New Mexico, do you believe that the State could contribute more towards the settlement?

Answer. Yes, we are willing to discuss increasing New Mexico's financial commitment to this settlement, with the concurrence of the governor and the state legislature. As stated in response to Senator Bingaman's question, New Mexico has already committed significant funding toward projects that will benefit the Navajo Settlement and we have also developed the Indian Water Rights Settlement Fund that will enable New Mexico to meet its spending obligations for Indian water rights settlements. New Mexico is depending on a commitment from the federal administration that it will support and fund this settlement commensurate with its obligations.

*Question 5.* Will you commit to working with the state legislature to secure more state money for the settlement?

Answer. Yes. This settlement is very important to the state of New Mexico and we will work very hard to secure the funds to meet the state's cost share obligations.

Public Law 87-483 requires that the Secretary of the Interior make a hydrologic determination that water will be available under New Mexico's allocation under the Upper Colorado River Compact before new contracts are issued at Navajo Reservoir. This settlement legislation would require new contracts at Navajo Reservoir.

*Question 6.* Are you confident that this water exists?

Answer. Yes. The Bureau of Reclamation's April 2007 Hydrologic Determination was signed by the Secretary of the Interior on May 23, 2007, after the Upper Colorado River Commission by unanimous resolution concurred in the findings of the determination and after consultation with all seven Colorado River Basin states. The 2007 Hydrologic Determination confirmed the finding of the 1988 Hydrologic Determination that the annual water yield available for development by the Upper Basin under the Colorado River Compact is at least 6.0 million acre-feet (maf), including evaporation from Colorado River Storage Project (CRSP) reservoirs, based on the critical hydrologic period of record ending 1978. The 2007 Hydrologic Determination analyzed both the existing contracts associated with Navajo Reservoir and the new contracts proposed by the settlement agreement and determined that the water is reasonably likely to be available to supply needs of those contracts as required by PL 87-483.

*Question 7.* Please describe the steps your office has taken to ensure that water will be available.

Answer. My office was instrumental in the preparation of the 2007 Hydrologic Determination, and in obtaining the support of the Upper Colorado Compact Commission. In addition, New Mexico participated and continues to participate in forums to protect its interests in Lake Powell operations pursuant to the Law of the Colorado River, and thereby to protect against possible years of Upper Basin use curtailments due to extended drought, and in forums to protect our interests in Navajo Reservoir operations so that water demands are met while still complying with federal environmental laws. Continued Congressional support for the San Juan River Basin Recovery Implementation Program helps allow New Mexico to proceed with development of its Upper Basin apportionment while also complying with the Endangered Species Act. We will continue to protect New Mexico's Colorado River apportionments as necessary to preserve future and existing uses.

*Question 8.* Do you believe that water would be available to accommodate growth in the Four Corners area? If so, for how long?

Answer. Yes. The 2007 Hydrologic Determination takes into account all existing uses in the San Juan Basin and will allow for growth in the basin for several decades. As is the case throughout the west, long-term continued and sustained growth will depend on increased conservation, market transactions, augmentation and development of new supplies utilizing technologies such as brackish water desalination. In particular, as I testified in answer to Senator Bingaman's question, ALP water to meet future needs of Aztec, Farmington and Bloomfield and water transfers and marketing facilitated by the settlement will help make substantial water available to accommodate growth in the future.

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ARIZONA DEPARTMENT OF WATER RESOURCES,  
Phoenix, AZ, July 12, 2007.

HON. JEFF BINGAMAN,  
*Chair, Senate Committee on Energy and Natural Resources, 366 Senate Dirksen,  
Washington, DC.*

DEAR CHAIRMAN BINGAMAN: Thank you for the opportunity to appear before your Committee and present the views of the State of Arizona on S. 1171, the Northwestern New Mexico Rural Water Projects Act, and the opportunity to answer additional questions from the Committee.

Enclosed are my answers to the Committee questions. I would like to reiterate that we stand ready to work with the Committee to make S. 1171 acceptable to the State of Arizona. Should you have any questions, please do not hesitate to call me or my staff.

Sincerely,

HERBERT R. GUENTHER,  
*Director.*



## RESPONSES OF HERBERT R. GUENTHER TO QUESTIONS FROM SENATOR BINGAMAN

*Question 1.* In 2003, the State of Arizona testified before this Committee that it should move forward with the Arizona Water Settlement notwithstanding the fact that the San Carlos Apache Tribe was not included in the Settlement. At the time Arizona indicated that the settlement need not be comprehensive since the Tribe's rights were preserved in the legislation. That is the same approach taken in S. 1171—preserving all of Arizona's rights and interests with respect to the use of water in Window Rock.

If the bill were modified to simply state that no water would be delivered to Arizona except in accordance with an agreement with Arizona and appropriate Federal legislation (including Compact accounting), wouldn't this be analogous to the San Carlos situation, allowing the bill to move forward without objection? Are the changes already proposed by the State of New Mexico (D'Antonio letter of June 5, 2007) sufficient to address the Compact issues you raised regarding water use in New Mexico?

Answer. The San Carlos Apache Tribe (SCAT) situation is very different. The primary settlements for the 2004 Arizona Water Settlements Act were the Central Arizona Project Repayment Settlement, the Gila River Indian Community Water Rights Settlement (GRIC), and Amendments to the Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA). The GRIC settlement comprehensively addressed all the GRIC claims. The SAWRSA amendments updated a previously congressionally approved settlement. These two tribal settlements were conditions for final approval of the CAP Repayment Stipulation and Settlement. No other tribal settlement was required under those terms. While the Arizona parties attempted to settle the SCAT claims, we were only able to provide a funding mechanism to the SCAT for further negotiations. In 1992 Congress enacted the San Carlos Apache Water Rights Settlement Act that only settled a portion of the claims of the SCAT. The State of Arizona opposed that legislation based on several factors, including that it was partial. Arizona should have pushed harder for a full settlement. Since that time implementation has been difficult, and litigation has continued non-stop. We do not believe it is in the best interests of the Navajo Nation or the parties to the litigation involving the Navajo water claims to have a partial settlement.

We believe that the better solution for the Navajo Nation would be a complete settlement of its claims in the Little Colorado River Basin and in the Colorado River for lands to be served by the Northwestern New Mexico Rural Water Project, especially in light of the ongoing Navajo Nation litigation against the Secretary. New Mexico states that Arizona's right to choose the source of water is preserved. We have chosen a source of water without hearing objection from the Navajo Nation. Additionally, the Secretary, in the August 25, 2006 Federal Register Notice (71 Fed. Reg. 50449, 50451) concerning Central Arizona Project (CAP) water allocations under the Arizona Water Settlements Act included 6411 acre feet of NIA priority CAP water for use in a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims for water in the State of Arizona. We believe there is no other source of water available for the Window rock portion of the Navajo Nation settlement. For some reason New Mexico, and maybe the other Upper Basin States believe that Arizona's meager 50,000 of allocation of Upper Basin water should be used for Window Rock. We do not agree.

Our issues with Compact accounting and specific congressional authorization for using Upper Basin water in the Lower Basin, or wheeling Lower Basin water through the Upper Basin can easily be addressed. New Mexico's language for section 303(g) is an attempt to meet some of our concerns. We stand ready to work with Congress to fully address our concerns and work on language to accomplish those goals.

One can argue that this could be left to another day, but we believe Arizona needs the protections that we have proposed as modifications to this legislation in order to prevent future violations of the Compact.

*Question 2.* Your testimony appears to endorse the concept of creating a Settlement Fund that can be used for this, as well as other settlements. That is the approach set out in Title II of the bill, which is intended to be used for this settlement, as well as other similar matters.

What expanded concepts, as set forth in your testimony, do you believe need to be incorporated into Title II?

Answer. Over the past decade Arizona has worked with the Western States Water Council and the Native American Rights Fund to find funding solutions for all water settlements. Title II is a creative way to meet all the western states needs. What should be explored is additional amounts of the Reclamation Fund be added to the Reclamation Settlement Fund, and making the Fund available to settlements out-

side of New Mexico. Arizona specifically wants a portion of the Reclamation Settlement Fund to be set aside for the Arizona Navajo Nation Lower Colorado River Basin and Little Colorado River Basin settlements. The needs of the Navajo Nation are greater than any dedicated funding that is available to Arizona to offer for settlement. With an adequate settlement funding mechanism, settlement in Arizona is likely.

*Question 3.* Your testimony states that “S. 1171 sets a precedent that New Mexico and Utah can increase development in the Lower Basin and further jeopardize Arizona rights.” Arizona seems to be raising a technicality to object to New Mexico making full use of its Compact entitlement. There is ample precedent for a basin state making use of its Compact allocation out of basin. New Mexico did it with the San Juan-Chama project. Utah and Colorado have several transbasin diversions and California takes Colorado River water to the coast. The bottom line is that despite New Mexico’s place of use in the State, the Upper Basin is still required to deliver an amount of water to the Lower Basin consistent with the Compact.

Given that background, how are Arizona’s rights being jeopardized by S. 1171?

*Answer.* The 1922 Colorado River Compact specifically states that the allocations made in Article III (a) and (b) to the Upper and Lower Basins were for exclusive use in each of those Basins. Only once Congress has authorized an exception to Article III of the Compact to specifically grant a modification of this requirement (see 1968 Colorado River Project Act, 43 U.S.C. 1523(d)). However, this congressional exception was never exercised.

It is true that the Upper Basin states transport water out of the Colorado River basin to other users within their states, but there is no case where Colorado River water is transported between the Upper and Lower Basins. We believe the Compact prohibits transfers from the Upper Basin to the Lower Basin and that the water allocations were intended for the exclusive use within each basin. The Compact definition for the term “Upper Basin” includes “and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry. The Compact negotiators recognized transfers out of basin such as the San Juan-Chama Project and others, which shows the negotiators intent in using the “exclusive use” provision.

Arizona fully supports the Upper Basin states’ right to develop their allocations made under the Compact, but only insofar as they are consistent with the Compact. Finding ways around the Compact that allow use of Upper Basin water in the Lower Basin, without first obtaining specific congressional recognition and authorization creates precedent for similar Compact violations in the future, thereby increasing the chance that Arizona will suffer the effects of a Lower Basin shortage. Under the 1968 Act the Central Arizona Project (CAP) and other post-1968 users are first to take shortages. CAP is a primary water source for the cities in the Phoenix and Tucson metropolitan areas. Congress should carefully weigh the equities before allowing such a change in the Compact. Arizona has offered language which would address our concerns, and allow the Northwestern New Mexico Project to go forward.

*Question 4.* Mr. Guenther, you oppose this settlement despite the fact that it would provide a reliable source of water to the water-short town of Window Rock, Arizona?

*Answer.* The San Juan settlement does not provide water to Window Rock. The settlement and legislation provide a pipeline that could carry water to Window Rock without a designated source of water. Under the present language in S. 1171, only an Arizona settlement with the Navajo Nation will provide water to Window Rock. Without an adequate funding mechanism for an Arizona settlement, as we suggest could come from Title II of S. 1171, we will not have an Arizona settlement and Window Rock will not receive water. The unintended consequence of S. 1171 will be to divide the Navajo Nation into two classes. One part of the Nation will have a clear right and the necessary finances to provide water to its members, and the other part of the Nation will not.

*Question 5.* As you’ll recall, Senator Bingaman and I worked diligently with Senator Kyl to pass the Arizona Water Rights Settlement Act of 2004. You state in your testimony that you would like to delay the legislation we are considering today until we include additional Arizona Indian water rights settlements.

Why did you believe it was appropriate to pursue the Arizona Water Rights Settlement Act of 2004 without including the Arizona Indian water rights settlements you reference in your testimony today?

*Answer.* We do recall the great assistance that Governor Richardson, Senator Bingaman and yourself gave in final passage of the Arizona Water Settlements Act, and we thank you for that assistance. However, we also recall that it was the issues

raised by New Mexico on the Gila River, both for additional water and new funding (a requested \$200 Million) from the Arizona legislation that delayed bringing the legislation to the full Committee and the Floor of the Senate.

That Act settled the CAP repayment litigation, settled the water rights claims for the Gila River Indian Community, and amended the Southern Arizona Water Rights Settlement Act of 1982 to settle the claims of the Tohono O'odham Nation for a portion of its reservation. While the state parties attempted to settle the San Carlos Apache Tribe (SCAT) claims, we were only able to provide a funding mechanism to the SCAT for further negotiations. Those were the only claims ready for settlement in 2004. The driving force for the Act was the CAP repayment litigation that involved billions of dollars. As we note below in the answer to another of your questions Arizona has settled the claims of 12 of the 21 Indian tribes within the state.

*Question 6.* Mr. Guenther, please describe for the Committee the status of the negotiations surrounding the resolution of Indian water rights claims on the Lower Mainstem Colorado River and the Little Colorado River basins in Arizona.

Answer. The negotiations among the state parties, Navajo Nation, Hopi Tribe and the United States are being conducted under a confidentiality order of the United States District Court for the District of Arizona. For that reason we are not at liberty to disclose the detail of those discussions. We can report that the state parties recently made a comprehensive settlement proposal to Navajo Nation, Hopi Tribe and the United States. All the parties will meet again on July 13. The state parties are struggling with the issues related to financing major water project construction to serve the western portions of the Navajo Nation. The state parties believe that it is a Federal obligation to fund these projects, but considering the difficulty in obtaining new appropriations, it may be unrealistic to expect that level of funding. Arizona is encouraged by the proposed Reclamation Water Settlements Fund contained in Title II of S. 1171, as we noted to Senator Bingaman in answer to his question. If the revenue sources for this Fund could be expanded and made available for Navajo and Hopi projects within Arizona, it is more likely that a settlement could be achieved fairly quickly.

*Question 7.* When do you estimate these negotiations will be completed?

Answer. It is hoped that with a funding solution we can complete the settlement quickly. Without a funding mechanism there will likely be no settlement.

*Question 8.* Mr. Guenther, you state in your testimony that we should expand on Title II of this legislation to include funding for a Navajo Nation/Hopi Tribe settlement in Arizona. As you'll recall, the Arizona Water Settlement Act of 2004 contained \$250 million for future Indian water rights settlements in Arizona.

For what Arizona Indian water rights settlements do you plan to use the \$250 million contained in the Arizona Water Rights Settlement Act for future Arizona Indian water rights settlements?

Answer. Arizona seeks additional help with an Arizona Navajo Nation settlement because the needs of the Navajo Nation far exceed the amount available from the settlement fund of the Arizona Water Rights Settlement Act settlement fund. Arizona has 21 federally recognized Indian Tribes. Four of those tribes have had their rights fully determined by the U.S. Supreme Court in *Arizona v. California*. Congressionally enacted settlements (including the pending implementation of the Arizona Water Settlements Act) have fully settled the claims of another six tribes. Two other tribes have had portions of their reservations settled pursuant to federal authorization. This leaves the Navajo Nation, Hopi Tribe, Hualapai Tribe, Havasupai Tribe, Kaibab-Paiute Tribe, White Mountain Apache Tribe, Pascua Yaqui Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, and portions of the San Carlos Apache Tribe and Tohono O'odham Nation. Even without the Navajo/Hopi settlement it is unlikely that the \$250 million set aside in the Arizona Water Settlements Act will be adequate.

*Question 9.* How much additional funding do you anticipate will be necessary for the Arizona Hopi and Navajo Indian water rights settlements?

Answer. As noted above, the confidentiality order constrains what we can say in response to this question. We can report that the Navajo Nation and the Hopi Tribe have both presented funding proposals based on their perceptions of the needs of people on the reservations. The state parties have countered with a much lower number. As yet, the United States has not proposed a funding amount. We believe that the Nation and the Tribe would be willing to confer with your staff about their funding needs.

## RESPONSES OF CARL ARTMAN TO QUESTIONS FROM SENATOR BINGAMAN

[Responses to the following questions were not received at the time the hearing went to press.]

*Question 1.* Does the Department recognize any responsibility for trying to address the serious drinking water crisis that exists on the Navajo Reservation? Does OMB? If so, what actions are being taken to address that situation?

*Question 2.* Your testimony expresses concern about the use of a small percentage of surplus revenues into the Reclamation Fund to help ensure implementation of the Navajo settlement or other water settlements involving the Bureau of Reclamation—a concept endorsed by the Western Governors Association. In particular, you object because use of the Fund in this matter would bind future Presidents and Congresses.

Does the Arizona Water Settlements Act involve direct spending? Does that spending bind future Presidents and Congresses? When was that bill signed into law?

Does the San Joaquin legislation currently pending before this Committee (S. 27) involve direct spending? Would the capital cost repayments that are contemplated to be expended in S. 27, otherwise be deposited in the Reclamation Fund? Did the Administration support or oppose that legislation? Would the direct spending in that legislation bind future Presidents and Congresses if the bill were enacted into law?

Should settlements involving the resolution of Federal issues in litigation, which have been approved by Congress, be implemented?

*Question 3.* Based on information supplied by Reclamation staff, it appears that over the last 5 years, revenues into the Fund averaged \$1.76 billion while appropriations from the Fund averaged \$925 billion—an annual difference of approximately \$834 million. The Fund is intended to be used to provide revenues to fund projects authorized under Reclamation law.

What happens with the surplus revenues flowing into the Fund which are not currently being expended for Reclamation purposes? Are they being used to fund other non-Reclamation governmental functions?

For fiscal years 2005 and 2006, please identify the revenue that flow into the Reclamation Fund from each state. Please be sure to include State-specific revenue streams from Accounts 5000.24; 5000.25; 5000.27; 5000.28; and 5000.29. For Account 5000.28, please include the following subaccounts: 601; 603; 604; 605; 609; 610; 611; and 614.

*Question 4.* The Administration recently put together a \$7 billion settlement proposal intended to resolve the Cobell trust fund litigation, and related matters. In announcing its proposal, Secretary Kempthorne indicated that the package was intended to strengthen the partnership between the Federal Government and Native Americans by transitioning to a relationship defined by “economic prosperity, empowerment, and self-reliance for tribes and individual Indians”. At this time, it doesn’t appear that the proposal is likely to result in a settlement.

A stable and reliable supply of water is fundamental to economic prosperity, empowerment, and self-reliance.

If the \$7 billion budgeted for a Cobell settlement is not going to be used for that purpose, is it possible to make that funding available to help implement Indian water rights settlements?

*Question 5.* The Administration testimony poses the question of whether or not the goals of the settlement can be met by alternative and potentially less expensive means. It’s very late to be asking that question. This study, first authorized in 1971, has been proceeding since at least 1998, and has expended over \$3.4 million in federal money (not counting the investment by New Mexico; Gallup; and the Navajo Nation). Moreover, the EIS finds that the Project as envisioned in the bill is the superior alternative from an economic, environmental, and overall perspective.

Given all the background and analysis already undertaken by Reclamation, the Navajo Nation, the State of New Mexico, City of Gallup, and Jicarilla Apache Nation, do you really think that a less costly alternative is available to meet the water supply needs that exist in Northwestern New Mexico? If so, why was that alternative not analyzed as part of the EIS?

*Question 6.* After earlier contemplating whether a cheaper settlement exists, your testimony then goes on to question whether or not S. 1171 will accomplish the goals of the settlement. You note it “especially troubling that the bill does not address the distribution systems that must be constructed before any water will actually reach the homes of those who need it.” Of course adding distribution systems would simply add more cost, which I assume, would simply result in an even stronger objection. Your statement also reflects a lack of understanding of the range of activi-

ties already being undertaken by the State of New Mexico, City of Gallup, and the Navajo Nation to address critical drinking water needs.

Are you aware that the State of New Mexico has invested approximately \$25 million already for regional infrastructure and distribution systems over the last 4 years that will deliver groundwater for an interim period, but ultimately tie-into the Navajo-Gallup pipeline? Are Reclamation and the Department taking this activity into account when it questions achieving the goals of the settlement?

*Question 7.* Distribution systems that will eventually tie into the Navajo-Gallup Project, such as the Cutter lateral, are currently being constructed through mostly state and local efforts. BIA, however, is responsible for approving rights-of-way for the distribution lines that go through tribal and allotted lands. The approval process is critical to constructing the lines without undue delay.

What is the status of the right-of-way approvals currently pending before the BIA? Is BIA efficiently processing the right-of-way applications so that the distribution systems can be constructed without bureaucratic delays?

*Question 8.* The Draft EIS includes a detailed cost-breakdown for the Project.

What is the estimated cost of the lateral that will take water from the main pipeline to Window Rock, AZ?

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#### RESPONSES OF CARL ARTMAN TO QUESTIONS FROM SENATOR DOMENICI

[Responses to the following questions were not received at the time the hearing went to press.]

*Question 9.* Assistant Secretary Artman, for roughly 5 years, I have been pleading with the Administration to work with the parties to New Mexico Indian water rights settlements. You state in your testimony that the Administration is unable to support this settlement because you were not involved in negotiations relating to the settlement. I find this very frustrating.

Do you commit to working with the parties to this settlement and other New Mexico settlements from this date forward?

*Question 10.* In 1990, President George H. W. Bush's Administration published "Criteria and Procedures for the Federal Government's Participation in Indian Water Rights Settlement Negotiations." The "Criteria and Procedures" provide that federal contribution for Indian water rights settlements should consist of the sum of (1) calculable legal exposure and (2) federal trust responsibilities to the Indian nations.

Do the 1990 "Procedures and Criteria" reflect the current policy of this Administration?

*Question 11.* Do you believe that providing a reliable water supply to the Navajo people falls under the federal government's trust responsibilities to the Navajo Nation? If not, why?

*Question 12.* The Arizona Water Settlements Act of 2004 had an estimated cost of \$2.2 billion and the Snake River Settlement Act had an estimated cost of \$163 million. Both of these settlements were largely supported by the current Administration.

How are these two settlements distinguishable from the Navajo, Aamodt, and Abeyta Settlements, particularly with respect to federal contribution?

*Question 13.* Which of the components requiring federal funding in S. 1171 does the Administration oppose and which does it support?

*Question 14.* Mr. Artman, in your testimony, you state that the Administration has "serious concerns" with the funding proposal contained in Title II of this bill. I have also introduced legislation creating a fund to pay for New Mexico Indian water rights settlements. With current annual budgets of \$34 million for the Indian Land and Water Claims Settlement Fund, it has become very difficult to find the money for New Mexico Indian water rights settlements.

Absent a provision providing greater sums of funding for Indian water rights settlements, how do you propose we fund the settlements?



APPENDIX II  
Additional Material Submitted for the Record

SECRETARY OF THE INTERIOR  
*Washington, DC, June 8, 2007.*

Hon. BILL RICHARDSON,  
*Governor of New Mexico, Santa Fe, NM.*

DEAR GOVERNOR RICHARDSON: I am writing this letter to inform you that I have approved and signed the 2007 Hydrologic Determination (Determination) for a proposed contract from Navajo Reservoir to support the Navajo-Gallup Water Supply Project (Project). The Project, if authorized through legislation, has been proposed to settle the water rights claims of the Navajo Nation in the San Juan River Basin of New Mexico.

Each of the Colorado River Basin States has a vital interest in the Colorado River, and I wanted to personally inform you of the completion of the Determination in light of the importance of having direct and open communication on this valuable resource. A Determination for all proposed long-term contracts for water from Navajo Reservoir is mandated by Public Law 87-483, which requires the Secretary of the Interior to undertake an investigation of whether there is sufficient water within New Mexico's Compact apportionment to support any such long-term contract for water from Navajo Reservoir. That law further requires the Determination and the proposed contract be forwarded to Congress for its approval. Because the United States has not negotiated a contract with the Navajo Nation, the City of Gallup, or any other potential water users of the Project as of this time, it is premature to forward the Determination to Congress. As soon as such a contract(s) is(are) negotiated, we will forward them and the Determination to Congress.

The finding in the Determination that there is likely to be sufficient water to support the proposed contract removes any Department of the Interior concerns about potential limitations on water supply. This is in keeping with my commitment to the New Mexico Congressional delegation that we will attempt to resolve all procedural requirements in order to facilitate a fair and open debate on the merits of the proposed settlement, even though the Administration has no position on the settlement at this time.

In developing the Determination, the Bureau of Reclamation has worked closely with all of the Colorado River Basin States in a manner keeping with the spirit of cooperation the Basin is currently enjoying and is in compliance with the Colorado River Compact and the Law of the River. I am personally thankful for the assistance of all the Basin States in finding a way to allow the Determination to move forward.

Please contact me if you have any questions or concerns in this matter.

Sincerely,

DIRK KEMPTHORNE.

ATTACHMENT.—HYDROLOGIC DETERMINATION 2007

WATER AVAILABILITY FROM NAVAJO RESERVOIR AND THE UPPER COLORADO RIVER  
BASIN FOR USE IN NEW MEXICO

*I. Executive Summary*

Determination as to the availability of water under long-term service contracts for uses from Navajo Reservoir involves a projection into the future of estimated water uses and water supplies. On the basis of this hydrologic investigation, water depletions by the Upper Basin states from the Upper Colorado River Basin can be reasonably allowed to rise to an annual average of 5.76 million acre-feet (maf) per year, exclusive of Colorado River Storage Project (CRSP) reservoir evaporation from Lake Powell, Flaming Gorge Reservoir, and the Aspinall Unit. This depletion level can

be achieved under the same shortage criteria upon which the allowable Upper Basin yield was determined in the 1988 Hydrologic Determination.

This document determines the availability through at least 2060 of water from New Mexico's Upper Basin allocation and Navajo Reservoir to service a proposed contract for the Navajo Nation's consumptive uses in New Mexico under the Navajo-Gallup Water Supply Project in the annual amount of 20,780 acre-feet (af) and the Navajo Indian Irrigation Project (NIIP) in the amount of 270,000 af per year on average over any period of ten consecutive years. It also is likely that sufficient water will be available from Navajo Reservoir to service the proposed contract after the 2060 planning horizon, depending upon future storage, hydrologic conditions, and other factors. This determination does not guarantee that the United States will be able to deliver water under the proposed contract without shortages in deliveries, and does not obligate the United States to maintain storage facilities beyond their useful lives. The proposed contract is part of a Navajo Nation water rights settlement in the Upper Basin in New Mexico, and the settlement provides that uses made pursuant to the contract will be subject to administration in accordance with the Upper Colorado River Basin Compact and New Mexico state law. Implementation of the Navajo-Gallup Water Supply Project and the NIIP is subject to compliance with federal environmental laws including the National Environmental Policy Act and the Endangered Species Act.

## *II. Introduction*

The State of New Mexico has proposed the Navajo-Gallup Water Supply Project to provide a renewable water supply from the San Juan River for municipal and domestic uses for Indian and non-Indian communities located within New Mexico. Uses under the project by the Jicarilla Apache Nation and the City of Gallup would be supplied through the Jicarilla Apache Nation's Navajo Reservoir water supply contract approved by Congress in 1992. Uses in New Mexico under the project by the Navajo Nation would be supplied through a proposed new Navajo Reservoir water supply contract that is a component of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (hereinafter referred to as the Settlement Agreement) that the State of New Mexico and the Navajo Nation executed on April 19, 2005. The new contract also would supersede the existing Navajo Reservoir water supply contract for the NIIP.

On June 19, 2003, the Upper Colorado River Commission resolved that the States of the Upper Division consent to the Navajo-Gallup Water Supply Project, provided that water diverted by the project for use in New Mexico shall be a part of the consumptive use apportionment made to the State of New Mexico by Article III(a) of the Upper Colorado River Basin Compact. The maximum amount of consumptive use through the project by the Navajo Nation in New Mexico that would be permitted in any one year under the Settlement Agreement and the proposed contract is 20,780 acre-feet.

Public Law 87-483 at section 11(a) requires that no long-term contract, except contracts for the NIIP and the San Juan-Chama Project, shall be entered into for the delivery of water stored in Navajo Reservoir, or any other waters of the San Juan River and its tributaries to which the United States is entitled, until the Secretary of the Interior has determined by hydrologic investigation that sufficient water to fulfill such contract is reasonably likely to be available for use in the State of New Mexico under the allocations made in Articles III and XIV of the Upper Colorado River Basin Compact, has submitted such determination to Congress, and Congress has approved the contract. The last such hydrologic determination was approved by the Secretary on February 2, 1989 (Hydrologic Determination, 1988, Water Availability from Navajo Reservoir and the Upper Colorado River Basin for Use in New Mexico, hereinafter referred to as the 1988 Hydrologic Determination). The 1988 Hydrologic Determination evaluated the availability of water from the Navajo Reservoir water supply for the Jicarilla Apache Nation's Navajo Reservoir water supply contract. The State of New Mexico, by letter dated May 3, 2005, requested that the 1988 Hydrologic Determination be updated to evaluate the availability of water to service the proposed Navajo-Gallup Water Supply Project.

This hydrologic investigation is made for the purpose of contracting for water from the Navajo Reservoir water supply for the Navajo Nation's uses in New Mexico under the Navajo-Gallup Water Supply Project. The Bureau of Reclamation prepared this hydrologic investigation in consultation with the Upper Colorado River Commission because of the critical nature of this determination of the Upper Basin water supply. The Upper Colorado River Basin Compact created and defined several areas of responsibility for the Commission that directly and indirectly relate to this investigation.



### III. Upper Basin Yield

#### A. General Upper Basin Hydrology

Based on the Bureau of Reclamation's Colorado River Simulation System (CRSS), natural flows for the period 1906-2000, the natural runoff from the Upper Colorado River Basin averages about 15.3 maf per year at Lee Ferry. Of this amount, approximately 2 maf per year originates in the San Juan River Basin above Bluff, Utah. New Mexico can only develop its Upper Basin allocation from the San Juan River and its tributaries. The Bureau of Reclamation's Colorado River System Consumptive Uses and Losses Report for 1996-2000 indicates that current consumptive uses from the San Juan River Basin average about 382,400 af per year in New Mexico and about 192,500 af per year in Colorado. Only minor amounts of depletions are made in the San Juan River Basin in Utah and Arizona.

#### B. Approach

This hydrologic investigation considers and uses many of the same basic assumptions as the 1988 Hydrologic Determination. Both investigations assume use of the CRSS natural flows at Lee Ferry, minimum releases from Lake Powell of between 7.48 maf and 8.23 maf annually, an allowable overall shortage of no more than 6 percent for a critical period, either maintenance or use of the minimum power pools at CRSP units, reduced storage capacity in Lake Powell due to sedimentation, and inclusion of bank storage. The CRSS natural flows at Lee Ferry for the period 1971-1980 were increased to reflect recalculation of historic irrigation depletions in the Upper Basin using the Soil Conservation Service (SCS) modified Blaney-Criddle method with SCS effective precipitation. The revised CRSS natural flows for 1971-1980 are consistent with the CRSS natural flows at Lee Ferry determined for the remainder of the 1906-2000 period of record. Also, sedimentation in Lake Powell was adjusted to reflect a 2060 planning horizon, and a 4 percent bank storage factor was used in this investigation consistent with Reclamation's current CRSS model.

Neither the Lower Division states nor the Upper Colorado River Commission agree with the modeling assumption for the objective minimum release used in this report. At the request of the Commission, this hydrologic investigation considers for planning purposes both the objective minimum release of 8.23 maf and a minimum release from Lake Powell of 7.48 maf annually. However, this hydrologic determination does not quantify the Colorado River Compact Article III(c) requirement or make or rely on a critical compact interpretation regarding Article III(c). The 1988 Hydrologic Determination also showed the Upper Basin yields under these minimum release scenarios.

Mass balance analyses were used to analyze potential water use by the Upper Basin under 2060 conditions. The mass balance considers Upper Basin reservoir storage, natural flows at Lee Ferry, deliveries to the Lower Basin, consumptive use demands in the Upper Basin, and CRSP evaporation as a function of storage volume. All existing Upper Basin storage capacity was included in the analysis because all storage supports water use in the Upper Basin and impacts stream flows. The CRSP and non-CRSP reservoirs as groups were assumed to be the same percent full each year, and CRSP storage was assumed to be distributed between units in accordance with the average historic storage distribution. The CRSP reservoir evaporation that is used in the mass balance analyses includes evaporation from Lake Powell, Flaming Gorge Reservoir, and the Aspinall Unit that is shared among the Upper Division States, but excludes evaporation from Navajo Reservoir which is chargeable to the states based on use. Shared CRSP reservoir evaporation is modeled using a regression equation relating historic shared CRSP reservoir evaporation from Lake Powell, Flaming Gorge Reservoir, and the Aspinall Unit to the aggregate historic storage volume in these reservoirs plus Navajo Reservoir. Evaporation equations were developed for both active and live storage, and were applied to estimate annual shared CRSP evaporation based upon yearly reservoir storage volume (surface area). The 1988 Hydrologic Determination considered variations in shared CRSP reservoir evaporation with storage for conducting statistical trace analyses to evaluate possible frequencies and magnitudes of shortages; however, it deducted a long-term average shared CRSP reservoir evaporation of 0.52 maf per year from the critical-period Upper Basin yield of at least 6.0 maf/yr to determine the amount of water available for Upper Basin uses through the critical period.

#### C. Results

Mass balance analyses were performed for various combinations of storage, Lower Basin deliveries, and overall shortages to evaluate the allocation of water to the Upper Basin (see mass balance analyses provided in Appendix A). The following is a summary of the results of the analyses:

Storage Assumption	Minimum Lower Basin Delivery (maf)	Yield without Shortages (maf)	Yield with 6% Overall Shortages (maf)
Maintain minimum power pools .....	8.25	5.55	5.79
	7.50	6.30	6.57
Use minimum power pools .....	8.25	5.72	5.98
	7.50	6.47	6.76

The yield for this analysis is defined as the amount of water available at Lee Ferry for use, on average, by the Upper Basin, exclusive of shared CRSP reservoir evaporation. Shortages in the above table are defined as 6 percent or less overall computed shortage for any period of 25 consecutive years consistent with the 1988 Hydrologic Determination. Results are shown for minimum Lower Basin deliveries of 8.25 maf and 7.50 maf as was done in the 1988 Hydrologic Determination. The analyses in this investigation should not be construed to prejudice the positions of either the Upper Colorado River Commission or the States of the Lower Division as to the interpretation or administration of Article III of the Colorado River Compact.

For those analyses that use an allowable or tolerable overall shortage of 6 percent or less of the use over any period of 25 consecutive years, the results indicate that there would be 5 years of shortage to meet all demands on the Upper Basin out of 95 years of record used in this investigation. However, the annual amounts of computed shortages for those five years would not fully materialize because Upper Basin consumptive uses will be below average under critical period hydrology due to physical water supply shortages at the sites of use in the Upper Basin. For example, the natural flow at Lee Ferry for 1977 was only 5.55 maf, and severe water supply shortages occurred throughout the Upper Basin in that year. The computations of shortage in this analysis give conservatively large estimates of annual shortages at Lee Ferry and do not fully reflect all factors, including physical shortages in the Upper Basin that might contribute or relate to a shortage condition at any given time. The computed shortages in this investigation do not equate to administrative calls to curtail Upper Basin uses.

#### *D. Comparison to 1988 Hydrologic Determination*

The 1988 Hydrologic Determination concluded that the total Upper Basin yield, including CRSP reservoir evaporation, is at least 6.0 maf per year for the 1953-1977 critical period hydrology with a 6 percent allowable overall shortage for the period. Under the conditions assumed in the current investigation, the shared CRSP evaporation varies with CRSP storage assumptions and storage levels. Assuming an average annual Upper Basin use of 5.79 maf, an annual Lower Basin delivery of 8.25 maf, and maintenance of the power pools, the shared CRSP evaporation would range from an average of about 0.25 maf per year over the worst 25-year period of reservoir storage draw down (1953-1977) to an average of about 0.49 maf per year over the period of record used in the analysis (1906-2000). Thus, the total Upper Basin depletion, including both Upper Basin uses and CRSP reservoir evaporation, would average about 6.04 maf per year or more over any period of 25 consecutive years. The total Upper Basin depletion amount for this scenario for the 1953-1977 period is comparable to the total Upper Basin depletion of 6.0 maf per year determined to be available for the period by the 1988 Hydrologic Determination. The difference is due to the revisions made to the CRSS natural flows for 1971-1980. If the minimum power pools are used, the shared CRSP reservoir evaporation is reduced due to increased reservoir storage draw downs.

### *IV. Water Use Projections*

#### *A. Upper Basin*

The Upper Colorado River Commission last approved depletions schedules for the Upper Division States for planning purposes in 1999. The depletions schedules, dated January 2000, project that the total Upper Basin use exclusive of shared CRSP reservoir evaporation will average about 5.37 maf per year under 2060 development conditions. Unless additional Upper Basin water development occurs by 2060 as compared to the January 2000 depletions schedules, the Upper Basin use may average less than about 5.40 maf per year from now through 2060. The time required to develop the Upper Basin allocation reduces risk of shortage within the 2060 planning horizon.

### *B. State of New Mexico*

For use in this investigation, the New Mexico Interstate Stream Commission provided the Bureau of Reclamation with a preliminary revised schedule of anticipated depletions through 2060 from the Upper Basin in New Mexico dated May 2006 (see Appendix B). The revised depletions schedule includes irrigation depletions calculated using the SCS modified Blaney-Criddle method with SCS effective precipitation so that demands and supply for this hydrologic investigation are evaluated using consistent methodologies.

The irrigation depletions for the Navajo Nation's irrigation projects are water right depletion amounts provided by the Settlement Agreement. Both this hydrologic investigation and the 1988 Hydrologic Determination assume use of the full depletion amount for the NIIP. This is a conservative assumption because the total NIIP depletion right is not expected to be fully utilized under normal farm management practices. The revised depletions schedule does not include New Mexico's allocation of shared CRSP reservoir evaporation. The revised New Mexico depletions schedule shows a total anticipated depletion of 642,000 af per year, on average, for uses in New Mexico under 2060 development conditions. This represents an increase in New Mexico's total Upper Basin depletion, excluding shared CRSP reservoir evaporation, of 23,000 af per year, or about 0.02 maf per year, as compared to the January 2000 depletions schedules.

### *V. Probabilities of Calls to Curtail Upper Basin Uses*

The 1988 Hydrologic Determination included a probabilistic risk analysis of administrative calls to curtail Upper Basin uses that indicated that: (1) such calls would occur rarely at an Upper Basin demand level of 6.1 maf per year, though their effects could have significant impact to the Upper Basin; and (2) the frequency and magnitude of such calls would diminish rapidly below this demand level. The risk analysis was made using the CRSS model. It is not necessary for this investigation to duplicate such a risk analysis.

The computations of shortage in this current investigation give conservatively large estimates of annual shortages at Lee Ferry and do not fully reflect all factors, including physical shortages in the Upper Basin that might contribute or relate to a shortage condition at any given time. While this investigation uses a 2060 reservoir storage sedimentation condition for Lake Powell, a risk analysis should vary the storage development and sedimentation conditions over time. In addition, it will take decades to develop the Upper Basin allocation. Therefore, risk of shortage is reduced within a 2060 planning horizon. Even using the CRSS model, computed shortages would not necessarily equate to administrative calls to curtail Upper Basin uses.

### *VI. Physical Availability of Water from Navajo Reservoir*

The Bureau of Reclamation, using a detailed hydrologic model for the San Juan River Basin, has evaluated the physical availability of water from Navajo Reservoir and the San Juan River for the Navajo-Gallup Water Supply Project, taking into account, among other things, the habitat needs of San Juan River populations of fish species listed as endangered under the Endangered Species Act. The physical water supply analysis contained in the Biological Assessment, Navajo-Gallup Water Supply Project, dated August 16, 2005, indicates that sufficient water is likely to be available from the Navajo Reservoir water supply for the Navajo Nation's uses under the project. Although the depletions for individual uses in New Mexico that were used in the Biological Assessment differ slightly from those in New Mexico's May 2006 revised depletions schedule, the physical water supply analysis in the Biological Assessment assumes up to about 640,500 af per year of depletion, on average, in New Mexico from the San Juan River. This amount of total average depletion in New Mexico is not significantly different than the amount of total average depletion in New Mexico shown in the May 2006 revised New Mexico depletions schedule under 2060 development conditions.

### *VII. Conclusions*

It is concluded that based on the analysis performed by Reclamation in consultation with the Upper Colorado River Commission, the Upper Basin yield and New Mexico water allocation needed to support New Mexico's revised Upper Basin depletions schedule are reasonably likely to be available. The mass balance analyses results are sufficient to conclude that: (1) the Upper Basin yield is at least 5.76 maf per year, on average, excluding shared CRSP reservoir evaporation; (2) New Mexico's Upper Basin allocation is at least 642,400 af per year, excluding shared CRSP reservoir evaporation; and (3) the total anticipated average annual consumptive use in New Mexico from the Upper Basin, including Navajo Reservoir evaporation of

642,000 af per year as shown in the revised New Mexico depletions schedule is not likely to exceed New Mexico's Upper Basin allocation. This conclusion is reached assuming full use of the Navajo Nation's proposed depletion rights under the Settlement Agreement for both the Navajo-Gallup Water Supply Project and the NIIP.

Based upon this hydrologic investigation for a planning horizon through 2060, the May 2006 revised New Mexico depletions schedule, and the Biological Assessment for the Navajo-Gallup Water Supply Project, sufficient water is reasonably likely to be available from the Navajo Reservoir water supply through at least 2060 to fulfill the contract that is proposed by the Settlement Agreement to provide water for the Navajo Nation's uses in New Mexico under the Navajo-Gallup Water Supply Project and the NIIP. If the term of the contract extends beyond 2060, or is perpetual as proposed by the Settlement Agreement, the risk of shortages in deliveries under the contract may increase after 2060 depending upon future storage, hydrologic conditions, and other factors. Section 11(a) of Public Law 87-483 allows for contracting of water from Navajo Reservoir up to a total amount that, in the event of shortage, still results in a reasonable amount of water being available for the diversion requirements of the NIIP and the San Juan-Chama Project.

#### *VIII. Disclaimers*

##### *A. Interstate Compacts and Federal Laws*

Nothing in this report is intended to interpret the provisions of the Colorado River Compact (45 Stat. 1057), the Upper Colorado River Basin Compact (63 Stat. 31), the Water Treaty of 1944 between the United States of America and the United Mexican States (59 Stat. 1219), the decree entered by the Supreme Court of the United States in *Arizona v. California, et al.* (376 U.S. 340), the Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Project Adjustment Act (54 Stat. 774), the Colorado River Storage Project Act (70 Stat. 105), or the Colorado River Basin Project Act. (82 Stat. 885). Implementation of the Navajo-Gallup Water Supply Project and the NIIP is subject to compliance with federal environmental laws including the National Environmental Policy Act and the Endangered Species Act.

##### *B. Proposed Navajo Reservoir Water Contract*

This determination is not to be construed as acceptance by the Department of the Interior of the terms of the Settlement Agreement, including the terms of the proposed contract. This determination also does not guarantee that the United States would be able to deliver water under the proposed contract without shortages in deliveries on account of drought or other causes outside the control of the Secretary. Nothing in this determination shall be construed to impose on the United States any obligation to maintain CRSP storage facilities, including Navajo Dam and Reservoir, or NIIP or Navajo-Gallup Water Supply Project facilities beyond their useful lives or to take extraordinary measures to keep these facilities operating.

#### LIST OF APPENDICES

APPENDIX A—Mass Balance Analysis\*  
 APPENDIX B—Reservoir Storage\*  
 APPENDIX C—CRSP Evaporation Analysis\*  
 APPENDIX D—New Mexico Depletion Schedule\*  
 APPENDIX E—Upper Colorado River Commission Resolution\*\*

#### 2003 RESOLUTION OF THE UPPER COLORADO RIVER COMMISSION

REGARDING THE USE AND ACCOUNTING OF UPPER BASIN WATER SUPPLIED TO THE LOWER BASIN IN NEW MEXICO BY THE PROPOSED NAVAJO-GALLUP WATER SUPPLY PROJECT

WHEREAS, part of the State of New Mexico is within the Upper Basin and part is within the Lower Basin as defined in Article II of the Colorado River Compact (45 Stat. 1057); and

WHEREAS, New Mexico has proposed the Navajo-Gallup Water Supply Project to divert water from the Upper Basin to serve communities located within the Lower Basin in New Mexico; and

WHEREAS, New Mexico needs to provide a water supply for municipal, industrial, commercial and domestic purposes to Navajo and non-Indian communities lo-

\* Documents have been retained in committee files.

\*\* See Appendix 2.

cated within the Lower Basin in New Mexico that do not have an adequate Lower Basin source of water; and

WHEREAS, Subsection 303(d) of Public Law 90-537, the Colorado River Basin Project Act, authorized a thermal generating plant to be located within the State of Arizona and provided that if the plant was served by water diverted from the drainage area of the Colorado River system above Lee Ferry such consumptive use of water would be a part of the consumptive use apportioned to the State of Arizona by Article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31) regardless of whether the plant was located in the Upper Basin or the Lower Basin; and

WHEREAS, the states of Colorado, New Mexico, Utah and Wyoming all support the proposed Navajo-Gallup Water Supply Project, but the states are not in agreement as to whether, under the Law of the River, New Mexico may use a part of its Upper Basin apportionment to serve uses in the Lower Basin portion of New Mexico, without obtaining the consent of the other states. However, in the spirit of comity, and without prejudice to the position of any state regarding these unresolved issues, all the states support and to the extent necessary consent to the Navajo-Gallup Water Supply Project in New Mexico.

NOW, THEREFORE, BE IT RESOLVED by the Upper Colorado River Commission that the States of Colorado, New Mexico, Utah and Wyoming, support and to the extent necessary consent to the diversion of water from the Upper Basin for use in the Lower Basin solely within New Mexico via the proposed Navajo-Gallup Water Supply Project; provided, that any water so diverted by said project to the Lower Basin portion of New Mexico, being a depletion of water at Lee Ferry, shall be a part of the consumptive use apportionment made to the State of New Mexico by Article III (a) of the Upper Colorado River Basin Compact; and

BE IT FURTHER RESOLVED, that the use of any return flows which result from use of water through the Navajo-Gallup Water Supply Project within the Lower Basin shall be subject to applicable laws; and

BE IT FURTHER RESOLVED, that nothing resulting from the implementation of this Resolution shall limit the right or ability of any Upper Basin State to develop the full apportionment made to it under the Colorado River Compact and the Upper Colorado River Basin Compact; and,

BE IT FURTHER RESOLVED, that the construction and operation of, and use of water through, the Navajo-Gallup Water Supply Project shall be subject to all other applicable provisions of law; and,

BE IT FURTHER RESOLVED, that the Upper Colorado River Commission supports such Congressional action as may be necessary to authorize the Navajo-Gallup Water Supply Project.

#### CERTIFICATE

I, WAYNE E. COOK, Executive Director and Secretary of the Upper Colorado River Commission, do hereby certify that the above Resolution was adopted by the Upper Colorado River Commission at its Meeting held at the Half Moon Lake Resort near Pinedale, Wyoming on June 17, 2003.

WAYNE E. COOK,  
*Executive Director and Secretary.*

WITNESS my hand this 19th day of June, 2003.

#### 2006 RESOLUTION OF THE UPPER COLORADO RIVER COMMISSION

##### REGARDING THE AVAILABILITY OF WATER FROM NAVAJO RESERVOIR FOR NAVAJO NATION USES WITHIN THE STATE OF NEW MEXICO

WHEREAS, the State of New Mexico has proposed the Navajo-Gallup Water Supply Project to provide a needed renewable water supply from the San Juan River for municipal and domestic uses for Indian and non-Indian communities located within New Mexico in both the Upper Basin and the Lower Basin; and

WHEREAS, the State of New Mexico and the Navajo Nation on April 19, 2005, executed the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (the "Settlement Agreement"), which is conditioned upon, among other things, the implementation of the Navajo Nation components of the Navajo-Gallup Water Supply Project within New Mexico; and

WHEREAS, the source of water supply for the proposed Navajo-Gallup Water Supply Project would be Navajo Reservoir and the San Juan River in New Mexico; and

WHEREAS, water from Navajo Reservoir and the San Juan River would be delivered to the proposed Navajo-Gallup Water Supply Project to meet the water demands of Navajo Nation communities in New Mexico through a proposed Settlement Contract between the United States, acting through the Secretary of the Interior, and the Navajo Nation (Appendix 4 to the Settlement Agreement); and

WHEREAS, Public Law 87-483 at section 11(a) requires that no new long-term contracts “ . . . shall be entered into for the delivery of water stored in Navajo Reservoir or any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts”; and

WHEREAS, pursuant to Public Law 87-483, and in furtherance of the Jicarilla Apache Tribe Water Rights Settlement Act of 1992 and the Navajo Reservoir water supply contract approved by said Act, the Secretary of the Interior on February 2, 1989, approved the report on “Hydrologic Determination, 1988, Water Availability from Navajo Reservoir and the Upper Colorado River Basin for Use in New Mexico” (the “1988 Hydrologic Determination”); and

WHEREAS, the 1988 Hydrologic Determination evaluated the availability of water from the Navajo Reservoir supply for uses in New Mexico through the 2040 planning horizon; and

WHEREAS, an update and extension to the 1988 Hydrologic Determination is needed to evaluate the availability of water from the Navajo Reservoir supply through a 2060 planning horizon under the allocation of water made to the State of New Mexico by the Upper Colorado River Basin Compact for the purpose of furthering Congressional legislative approval of the Settlement Agreement, the authorization of the proposed Navajo-Gallup Water Supply Project, and the legislative approval of the proposed Settlement Contract for the Navajo Nation’s project uses in New Mexico; and

WHEREAS, the proposed Settlement Contract between the United States and the Navajo Nation would provide water supplies for Navajo Nation uses in New Mexico under both the Navajo-Gallup Water Supply Project and the Navajo Indian Irrigation Project which was authorized by Public Law 87-483, and would supersede the existing Navajo Reservoir water supply contract for the Navajo Indian Irrigation Project; and

WHEREAS, the U.S. Bureau of Reclamation has presented to the Upper Colorado River Commission for its consideration a draft hydrologic determination, dated May 2006, that evaluates the availability of water from the Navajo Reservoir supply through 2060 and shows: (1) at least 5.76 million acre-feet of water is reasonably available annually for use by the Upper Basin, exclusive of reservoir evaporation at Lake Powell, Flaming Gorge Reservoir and the Aspinall Unit reservoirs of the Colorado River Storage Project; and (2) sufficient water is reasonably likely to be available from the Navajo Reservoir supply to fulfill the proposed Settlement Contract for the Navajo Nation’s uses in New Mexico under the Navajo-Gallup Water Supply Project and the Navajo Indian Irrigation Project, in addition to existing Navajo Reservoir water supply contracts for other uses, under the allocations made to New Mexico in Articles III and XIV of the Upper Colorado River Basin Compact; and

WHEREAS, the Settlement Agreement would provide at subparagraph 9.3.1: “The Navajo Nation and the United States agree that the State of New Mexico may administer in priority water rights in the San Juan River Basin in New Mexico, including rights of the Navajo Nation, as may be necessary for New Mexico to comply with its obligations under interstate compacts and other applicable law”; and

WHEREAS, the Upper Colorado River Commission supports water resource development in the Upper Colorado River Basin to enable the Upper Division States to fully develop their compact apportionments of Colorado River water while meeting compact obligations relating to the flow of the Colorado River at Lee Ferry; and

WHEREAS, it is the position of the Upper Colorado River Commission and the Upper Division States that, with the delivery at Lee Ferry of 75 million acre-feet of water in each period of ten consecutive years, the water supply available in the Colorado River System below Lee Ferry is sufficient to meet the apportionments to the Lower Basin provided for in Articles III (a) and III (b) of the Colorado River Compact; and

WHEREAS, it is the position of the Upper Colorado River Commission and the Upper Division States that the obligation of the Upper Basin under Article III(c) of the Colorado River Compact to deliver water toward the Mexican Treaty obligation

does not require the delivery at Lee Ferry of 0.75 million acre-feet of water annually; and

WHEREAS, the Upper Colorado River Commission anticipates that the Upper Division States will take all actions necessary to ensure that all Upper Basin States have access to their respective apportionments as specified in the Upper Colorado River Basin Compact; and

WHEREAS, the Upper Colorado River Commission on June 19, 2003, resolved that: (1) "the States of Colorado, New Mexico, Utah and Wyoming, support and to the extent necessary consent to the diversion of water from the Upper Basin for use in the Lower Basin solely within New Mexico via the proposed Navajo-Gallup Water Supply Project; provided, that any water so diverted by said project to the Lower Basin portion of New Mexico, being a depletion of water at Lee Ferry, shall be a part of the consumptive use apportionment made to the State of New Mexico by Article III (a) of the Upper Colorado River Compact;" and (2) "the Upper Colorado River Commission supports such Congressional action as may be necessary to authorize the Navajo-Gallup Water Supply Project."

NOW, THEREFORE, BE IT RESOLVED by the Upper Colorado River Commission, that the Commission supports Congressional action to: (1) approve the Settlement Agreement; (2) authorize the proposed Navajo-Gallup Water Supply Project; and (3) approve the proposed Settlement Contract for the Navajo Nation's uses in New Mexico from the Navajo Reservoir supply under the Navajo-Gallup Water Supply Project and the Navajo Indian Irrigation Project.

BE IT FURTHER RESOLVED, that while the Upper Colorado River Commission does not endorse all of the study assumptions used by the Bureau of Reclamation in its May 2006 draft hydrologic determination, including an assumption of a 6 percent allowable overall shortage, and specifically disagrees with the modeling assumption of a minimum Upper Basin delivery of 8.25 million acre-feet annually at Lee Ferry, the Commission supports a determination by the Secretary of the Interior that at least 5.76 million acre-feet of water is available annually for use by the Upper Basin, exclusive of reservoir evaporation at Lake Powell, Flaming Gorge Reservoir and the Aspinall Unit reservoirs of the Colorado River Storage Project.

BE IT FURTHER RESOLVED, that the Upper Colorado River Commission supports a determination by the Secretary of the Interior that sufficient water is reasonably likely to be available to fulfill the proposed Settlement Contract for the Navajo Nation's uses in New Mexico from the Navajo Reservoir supply under the Navajo-Gallup Water Supply Project and the Navajo Indian Irrigation Project, in addition to existing Navajo Reservoir water supply contracts for other uses, under the allocations made to New Mexico in Articles III and XIV of the Upper Colorado River Basin Compact.

BE IT FURTHER RESOLVED, that nothing in this Resolution, or resulting from the adoption of this Resolution, shall limit the right or ability of any Upper Basin State to develop the full apportionment made to it under the Colorado River Compact and the Upper Colorado River Basin Compact.

BE IT FURTHER RESOLVED, that a copy of this resolution be transmitted to the Regional Director, Upper Colorado Region, Bureau of Reclamation, Salt Lake City, Utah.

#### CERTIFICATE

I, Don A. Ostler, Executive Director and Secretary of the Upper Colorado River Commission, do hereby certify that the Upper Colorado River Commission adopted the above Resolution at its regular meeting held in Jackson Hole, Wyoming, on June 5, 2006.

WITNESS my hand this 9th day of June 2006.

DON A. OSTLER,  
*Executive Director and Secretary.*

#### STATEMENT OF SUSAN BITTER SMITH, PRESIDENT, BOARD OF DIRECTORS, CENTRAL ARIZONA WATER CONSERVATION DISTRICT

The Central Arizona Water Conservation District (CAWCD) is pleased to present written testimony regarding S. 1171, the "Northwestern New Mexico Rural Water Projects Act."

CAWCD is a political subdivision of the State of Arizona, governed by an elected 15-member board of directors. CAWCD was created in 1971 for the purpose of repaying the reimbursable costs of construction of the Central Arizona Project, authorized by the Colorado River Basin Project Act of 1968. CAWCD has since assumed responsibility for operating and maintaining the Project.

CAWCD cannot support this legislation in its current form because (1) it fails to resolve the Navajo Nation's claims to the Lower Colorado River and Little Colorado River in Arizona and (2) it fails to resolve litigation filed by the Nation challenging Interior Department initiatives that are vital to the Central Arizona Project and other Colorado River water users in the Lower Basin. The legislation also fails to address critical issues related to its potential impact on the Law of the Colorado River. All of these matters must be addressed before the bill is permitted to move forward.

This bill would authorize a settlement of the water rights claims of the Navajo Nation to the San Juan River in New Mexico and also provide funding for projects to deliver San Juan water to Window Rock and Gallup. The San Juan River is a tributary to the Colorado River, and the bill affects the accounting for Colorado River water required by the 1922 Colorado River Compact and the United States Supreme Court's 1964 Decree in *Arizona v. California*, the decision that confirmed that Arizona is entitled to 2.8 million acre feet of water each year from the Lower Colorado River. Most of that water is delivered to central and southern Arizona through the Central Arizona Project. While the New Mexico bill would affect Arizona's Colorado River entitlement, it fails to resolve the claims of the Navajo Nation to Arizona's water supplies or to require, as it should, that those claims be settled before the Nation receives the benefits of any water rights settlement.

The Navajo Nation has asserted that it has rights to water from the Colorado River that are superior to the rights of the Central Arizona Project. The Nation has sued the United States in federal district court here in Phoenix in an effort to compel the Secretary of the Interior to assert those rights on the Nation's behalf. Unless and until the Secretary takes steps to resolve the Nation's claims to the Colorado River, the Nation seeks to stop the Secretary from implementing important programs put in place to better manage the water supplies of the Lower Colorado River for the benefit of the Central Arizona Project and others.

In a separate action, the Navajo Nation has also sought to prevent the required court approval of another Indian water rights settlement that is vital to the citizens of central Arizona, a comprehensive water rights settlement with the Gila River Indian Community. This settlement, which was decades in the making, was authorized by the Arizona Water Settlements Act of 2004, but if the Navajos succeed in their challenge, all of the Arizona water settlements authorized by that act, including the Gila River settlement, will fail. Since the water rights of the Navajo Nation are not affected by the Gila River settlement, as a lower court has already found, one can only conclude that the Navajo Nation is seeking to hold the Gila River settlement hostage until its own water rights claims are resolved.

These actions by the Navajo Nation lead us to conclude that we could only support authorization of a New Mexico settlement with the Navajo Nation if an Arizona settlement with the Nation is also concluded and included in the authorizing legislation. While New Mexico may object to this, it shouldn't. After all, New Mexico demanded and received significant benefits, in the form of project authorizations and money for that state, in the Arizona Water Settlements Act of 2004.

From a public policy perspective, an Arizona settlement of the Navajo Nation's water rights claims should proceed hand in glove with a New Mexico settlement. As it stands, the New Mexico bill fails to deal comprehensively with the Navajos' claims to the river systems that cross or border the Navajo Reservation. The Navajo Reservation is the largest Native American reservation in the United States. It occupies parts of three states, but by far the largest part of the Reservation, as well as the greatest share of the Reservation population, is situated in Arizona. Within Arizona, the northwestern portion of the Navajo Reservation is near the mainstream of the Lower Colorado River, and the Little Colorado River traverses the southern portion of the Reservation. If anything, priority should be given to settlement of the Nation's claims to the waters of these rivers. Including a settlement of the Nation's Arizona claims in the New Mexico bill would go a long way toward fixing the public policy problems associated with the current version of this legislation.

The Central Arizona Project has long supported the comprehensive settlement of Indian water rights claims. Our organization has participated in a number of such settlements, including most recently, the settlement of the claims of the Gila River Indian Community, the largest Indian water rights settlement in Arizona's history. While successfully crafting a settlement agreement is never easy, we are fully committed to doing the hard work necessary to achieve an Arizona settlement with the Navajo Nation, and to accomplishing that in a timely way, so that congressional authorization of an Arizona settlement can be included in what is now a New Mexico only bill.

We look forward to the opportunity to work with you, the State of New Mexico, and the Navajo Nation to settle the claims of the Navajo Nation to the San Juan



and the Lower and Little Colorado River basins, and to prepare a comprehensive settlement act that addresses the needs of all affected parties.

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CENTRAL ARIZONA PROJECT,  
Phoenix, AZ, June 21, 2007.

Hon. JEFF BINGAMAN,  
*Chairman, Senate Energy and Natural Resources Committee, 304 Dirksen Senate Building, Washington, DC.*

Subject: S. 1171, the "Northwestern New Mexico Rural Water Projects Act"

DEAR CHAIRMAN BINGAMAN: We cannot support this bill as introduced because (1) it fails to resolve the Navajo Nation's claims to the Lower Colorado River and Little Colorado River in Arizona and (2) it fails to resolve litigation filed by the Nation challenging Interior Department initiatives that are vital to the Central Arizona Project and other Colorado River water users in the Lower Basin. The legislation also fails to address critical issues related to its potential impact on the Law of the Colorado River. All of these matters must be addressed before the bill is permitted to move forward.

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The Navajo Nation has asserted that it has rights to water from the Colorado River that are superior to the rights of the Central Arizona Project. The Nation has sued the United States in federal district court here in Phoenix in an effort to compel the Secretary of the Interior to assert those rights on the Nation's behalf. Unless and until the Secretary takes steps to resolve the Nation's claims to the Colorado River, the Nation seeks to stop the Secretary from implementing important programs put in place to better manage the water supplies of the Lower Colorado River for the benefit of the Central Arizona Project and others.

In a separate action, the Navajo Nation has also sought to prevent the required court approval of another Indian water rights settlement that is vital to the citizens of central Arizona, a comprehensive water rights settlement with the Gila River Indian Community. This settlement, which was decades in the making, was authorized by the Arizona Water Settlements Act of 2004, but if the Navajos succeed in their challenge, all of the Arizona water settlements authorized by that act, including the Gila River settlement, will fail. Since the water rights of the Navajo Nation are not affected by the Gila River settlement, as a lower court has already found, one can only conclude that the Navajo Nation is seeking to hold the Gila River settlement hostage until its own water rights claims are resolved.

These actions by the Navajo Nation lead us to conclude that we could only support authorization of a New Mexico settlement with the Navajo Nation if an Arizona settlement with the Nation is also concluded and included in the authorizing legislation. While New Mexico may object to this, it shouldn't. After all, New Mexico demanded and received significant benefits, in the form of project authorizations and money for that state, in the Arizona Water Settlements Act of 2004.

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Arizona claims in the New Mexico bill would go a long way toward fixing the public policy problems associated with the current version of this legislation.

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We look forward to the opportunity to work with you, the State of New Mexico, and the Navajo Nation to settle the claims of the Navajo Nation to the San Juan and the Lower and Little Colorado River basins, and to prepare a comprehensive settlement act that addresses the needs of all affected parties.

Sincerely,

SUSAN BITTER SMITH,  
President, Central Arizona Water Conservation District (*The District operates the Central Arizona Project*).

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STATEMENT OF THE CITIZENS PROGRESSIVE ALLIANCE

RE: THE NORTHWEST NEW MEXICO RURAL WATER PROJECTS ACT ["S. 1171" or "Act"]

The Act, S. 1171, is a bipartisan scheme so bizarre that it is understandable that the only two Committee members attending this hearing on the 27th were the Democratic and Republican senators from New Mexico. The Committee's Ranking Member and Chairman, New Mexico Senators Domenici and Bingaman, Navajo Nation President Joe Shirley, Governor Bill Richardson, and the City of Gallup are all in a mad rush to get their hands on billions of Federal tax dollars! New Mexican politicians warn that if the Navajo Nation's claims to San Juan River water in New Mexico are not resolved quickly, existing non-Navajo water users in the San Juan Basin could be displaced or have their economic well-being seriously impaired because of the magnitude of the Navajo Nation's "unquantified" right to San Juan River water in New Mexico and a paralysis of uncertainty borne of endless litigation. State Engineer John R. D'Antonio testified before the committee that, "Navajo claims to the San Juan River have long-threatened the security of water rights of all other water users within the basin." Navajo Nation President Joe Shirley, Jr. warns the tribe's "water rights claims could exceed the amount of water apportioned to New Mexico by the Upper Colorado River Compact" and that this type of court ruling would "expose the United States to incalculable, horrific liabilities." They all may be blowing smoke. Nevertheless, use of the fear factor has worked wonders to secure other Indian water rights settlements, and promoters of the Navajo-Gallup Water Supply Project ["Project"] are betting such intimidation will be the winning ticket once again.

The New Mexico Senators, the State of New Mexico, and the Navajo Nation spoke at the Hearing with one voice to vilify the Office of Management and Budget ["OMB"], which in Shirley's words, "seeks to impose 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." What Shirley and these New Mexico politicians fail to acknowledge is that these "criteria and procedures" (which will be treated in some depth below) form the backbone of a longstanding policy designed to protect the interests of the taxpaying public while honoring the Federal Government's trust obligations to the tribes. OMB is obligated to provide financial justification for the Project based on these "criteria and procedures". Ironically (or maybe quite predictably), when OMB tries to exercise the proper budgetary oversight and restraint, they are excoriated by the Committee's Chairman and Ranking Member, the Navajo Nation, and, of course, their clients—the water development interests. Apparently, it is the intention of the Project promoters to sidestep or subvert the purposes of this Department of the Interior ["DOI"] policy, and by so doing cow the OMB and avoid the scrutiny this Project so richly deserves.

For their part, Bureau of Reclamation ["Bureau"] Commissioner Robert Johnson and Assistant Secretary for Indian affairs Carl Artman stated in testimony before the Committee that "the United States was not party to the final negotiations" of

the proposed Navajo Nation Water Rights Settlement on the San Juan River in New Mexico ["Proposed Settlement"]. These Administration spokesmen go on to say:

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.

Perhaps at least one fiscally responsible member of the Committee who will study the provisions of the Act and come to question its promotion as good and necessary public spending, while supporting the Administration's important evaluation criteria and procedures found in 55 Fed. Reg. 9223. Resultantly, provisions of S. 1171 which commit taxpayers to unnecessary and unreasonable burdens and fail to fairly address the United States' trust responsibilities to the Navajo Nation will be rejected by the Committee.

#### SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES

During the Committee's Hearing on S. 1171, the Northwestern New Mexico Rural Water Projects Act, ranking member Senator Pete Domenici, in his best "Iglesias" form, threatened Bureau Commissioner Robert Johnson ("I'm ready to proceed, and we'll see if you're needed."), whined about objections to the Project's high costs by the Office of Management & Budget, and could be heard muttering disgustedly off-mike that he ought to ask the Army Corps of Engineers to do what the Department of the Interior would not.

The Domenici/Bingaman bill seeks to raid the Reclamation Fund at a time when the balance of that account is extremely low due to reduced power revenues. Colorado River Storage Project ["CRSP"] power users will, no doubt, be less than thrilled with this prospect, as it would likely involve a spike in their utility rates.

Construction of the Project proposes to fully deplete most of the 35,893 AFY from the San Juan River Basin. Return flows would be essentially nonexistent, as the Project involves a major transbasin diversion. Colorado River Storage Project ["CRSP"] customers belonging to the Colorado River Water Users Association might like to know (indeed! the Committee should investigate) the value of lost power generation due to such large new Project depletions above Lake Powell/Glen Canyon Dam, and the predicted impact of such reduced revenues on Western Area Power Association rates.

#### HYDROLOGIC DETERMINATION

After decades of data collection and interpretation, including tree ring studies by the University of Arizona and the U.S. Geological Survey, it is well understood that when the Colorado River was first divvied-up, overly generous allocations to the seven Colorado River Basin States were based on erroneous predictions. Now, rather than conducting a more objective, honest analysis of water availability, the Bureau's water experts are tempting fate by repeating the same mistake with a logic so twisted as to defy reason. On June 8th Secretary of the Interior Dirk Kempthorne ["Secretary"] concurred with the Bureau of Reclamation's ["Bureau"] new Hydrologic Determination ["Determination"] that the amount of water needed for the Navajo-Gallup Water Supply Project ["Project"]—centerpiece of the proposed Navajo Nation water rights settlement on the San Juan River in New Mexico—is now available. This water has been found, magically as it were, by factoring in reduced evaporation rates due to our most recent drought. So, in a marvelous bit of circuitous reasoning, we are being asked by our government to accept the notion that we have more water because we have less water. That's right, because less water is evaporating from shrunken reservoirs, more water must be available. Eureka! Less is more!

Consider for a moment the unmitigated gall of Bureau hydrologists and New Mexico water managers demanding the Public take seriously such a spurious argument. How in the world could reduced evaporation rates from reservoirs at historically low

levels constitute proof that there is additional, “new water” in the already over-allocated Colorado River system? This magical math in the Bureau’s new Determination is most suspect, as it has all the earmarks of a preordained outcome designed primarily to satisfy the appetites of its client developers for rampant growth. If true, indictments would be in order.

Smoke and mirrors may work wonders to tilt the playing field toward benefit of corporate interests, but at the end of the day, the public cannot drink fuzzy math or the spiraling costs of political favors. This revamped Determination is essential for further water development of the San Juan River because New Mexico has bumped up against the ceiling of its share of Colorado River Compact Allocations. Based on controversial assumptions, the Determination represents a boon to development interests, as it invites New Mexico to further deplete and desiccate the San Juan River, jeopardizing the hydrologic future of the San Juan Basin and portending catastrophe for the Colorado River system. This new Determination is an assault on reason and represents the Bureau’s latest scheme to be foisted on the unwitting taxpayers of this country. To date there has been no resolution between San Juan-Chama Project contractors, the Bureau, and the State of New Mexico regarding a determination about the water that could be available to the San Juan-Chama Project during a time of shortage and how new contracts could affect the water supply. Given the high level of uncertainty and concern, it would be prudent of the Committee to call on the National Academy of Sciences to perform a critical review of the modeling and analysis which led to the Bureau’s Determination.

#### LONG HOLLOW RESERVOIR PROJECT & UTE MOUNTAIN UTE INDIAN TRIBE POWER GENERATING FACILITY

How will the intent to expand water use from the La Plata River in Colorado be reconciled with and integrated into the Proposed Settlement, the revised Hydrologic Determination and S. 1171? Is it the opinion of the Interior, using the rubric of less is more, that increased diversion and storage on the La Plata River in the proposed Long Hollow Reservoir with its concomitant and high evaporation rate will also result in an increased water supply in the Colorado mainstem? Put another way, is it the Secretary of the Interior’s view that substantial evaporative losses from the Long Hollow Reservoir would actually free-up more “new water” and allow for additional depletions downstream from the San Juan above Lake Powell?

Ute Mountain Ute Indian Tribe [“UMUT”] claims to San Juan River water are senior to the Navajo Nation claims. The Ute Mountain Ute Indian Tribe has filed a claim to water rights on the San Juan River, and neither the United States nor the State of New Mexico has initiated negotiations to settle these claims. The UMUT claim rights to between 7300AF and 9300AF of water for a power generation plant. The claim is being made at the same time the Navajo Nation is working to settle its claim on the San Juan River in New Mexico. How does the Ute Mountain Ute claim to water for a new power generating plant square with the Secretary’s Determination? How might it affect availability of water for the San Juan/Chama Project contractors and others in the San Juan Basin?

#### NAVAJO WATER RIGHTS CLAIMS

The Proposed Settlement between the Navajo Nation [“Nation”] and the State of New Mexico shows total diversions for Navajo water projects at 626,470 acre feet and total depletions at 322,190 acre feet annually. This massive allocation of New Mexico’s surface waters has yet to be justified to the Public from a technical standpoint. The citizens of New Mexico have a legal right to know the technical bases for the tribal entitlements proposed in a Navajo settlement, and officials have a fiduciary obligation to provide this documentation. New Mexico and the Nation have made a declaration of the extent of the Navajo water right, but this number is highly questionable, undocumented as it is, and should not be accepted as an article of faith. The technical component of any settlement entails the answers to scientific questions, such as, “How much water is needed by the Tribe?” and, “What are the bases for quantification of the Tribe’s entitlement to water?” While these questions have been asked, no answers have been provided.

No one—not the New Mexico State Engineer, not the Navajo Nation, not Bureau hydrologists—has the means to accurately measure or verify quantities of water depleted from a stream system. Only diversion quantities can be reliably calculated. The New Mexico State Engineer’s Office does not possess the methodology or technology necessary to calculate consumptive usage, just as it is unable to determine the magnitude or source of return flows to a system. The 10-year averaging of diversions/depletions provided for in the proposed settlement involves a carry-over allowance which is contrary to State law and the public interest.

On October 24, 1995, former Navajo Nation President Albert Hale opined that, “[t]he Navajo Nation possesses sufficient ‘practicably irrigable acreage’ [“PIA”], within the San Juan River Basin to fully utilize the entire flow of the San Juan River.” What is the State Engineer’s assessment of the Navajo Nation’s PIA in the San Juan Basin? What is the Bureau’s assessment of the Navajo Nation’s PIA in the San Juan Basin? If the Navajo Nation has as many practicably irrigable acres as it claims, why are so few being irrigated? It is no secret to New Mexico’s senators or Governor that the Navajo Indian Irrigation Project [“NIIP”] is a recurring fiscal nightmare. Recently the Navajo Nation was forced to allocate \$10 million to offset operating deficits associated with NIIP. NIIP and the Navajo Agricultural Products Industry’s [“NAPI”] audits reveal losses of millions of dollars annually on the operation of farm Blocks 1-8. The Navajo Nation is already the fifteenth largest recipient of Federal crop subsidies nationally.

Given the regularity of these losses, it seems only reasonable to predict that the irrigation of additional acreage in NAPI Blocks 9-11 would be similarly unprofitable, resulting in even greater losses. So, increasing irrigation on the NAPI/NIIP will only add to the staggering Public costs. In short, the evidence is clearcut that NIIP/NAPI lands are not practicably irrigable, and the Proposed Settlement is an affront to the sensibilities of any Committee member studious enough to give careful consideration, because NIIP/NAPI are rooted in waste and fraud.

Navajo PIA along with Navajo demographics in the San Juan Basin should be carefully evaluated in the determination of Navajo water entitlements for any realistic settlement agreement. While the variability of significant portions of Navajo reservation land within the San Juan Basin is indisputable, the actual “practicability” of irrigating much of that land remains highly debatable. This issue of “practicability” is not only central to Navajo lands checker boarded throughout the San Juan Basin. It is pertinent to the NAPI farm blocks themselves—both those in production and those to come, because the test of practicability speaks to the very heart of any Federal tribal trust responsibility in a Navajo settlement.

According to the Winters doctrine, as upheld in *Arizona v. California* by the Supreme Court, a Tribe shall have right to water sufficient to irrigate all of the practicably irrigable acreage within the borders of its reservation. The Supreme Court in *Arizona v. California* ruled that application of the PIA standard is the only “feasible and fair way” by which reserved water rights for a Tribe can be measured. It must follow that the only “feasible and fair” way to quantify the Navajo right on the San Juan—and the first and foremost task of State and Federal hydrologists—is to measure the PIA of the Navajo reservation lands in the San Juan Basin. This must be done as a matter of fairness and accuracy in order to determine the Navajo tribal water right at issue, but to date requisite technical studies for assessing Navajo PIA in the San Juan River Basin do not even exist, and the basis for the Project and Proposed Settlement is anybody’s guess. Instead, fear tactics by Project promoters regarding the possible outcome of “prolonged” and “contentious” litigation have become an old saw similar to the color-coded Terror Alerts of Homeland Security. A PIA analysis is pivotal as a basis for the negotiation of any settlement, and none yet exists.

#### NAVAJO INDIAN IRRIGATION PROJECT [NIIP]

The Navajo-Gallup Water Supply Project, which would cost as much as three billion dollars if typical Bureau cost overruns materialize, is designed to settle the Navajo Nation’s claims to the San Juan River in New Mexico. But it is hardly a secret, as we stated earlier, that the Navajo Indian Irrigation Project, the biggest straw in the San Juan River, habitually drowns in red ink.

For example, the American people still pay the annual operating costs of NIIP even though the project is several decades old and Department of Interior policy expressly forbids it. In a letter to then Secretary Gail Norton, Navajo President Joe Shirley asserted those costs come to about \$6 million annually and that they must continue indefinitely. The Navajo Nation leases NIIP irrigation land for farming by non-Navajo, and they have received well over \$15 million in Federal farm subsidy payments in the last few years. Even so, the Navajo Nation, a relatively poor tribe, recently had to come up with over \$10 million in bailout funds for the tribal farming enterprise. Does this look like the kind of operation worth an investment of hundreds of millions, if not billions, of dollars more? After decades of funding approaching one billion dollars, NIIP is still only seventy percent complete. What does this say about the practicality of irrigating the Navajo Reservation lands high above the San Juan River and the real extent of their water right under the Winters doctrine? Will the Navajo become accustomed to more and even greater losses? This would be a logical presumption knowing what is known about the history of this operation.

Thus a thorough, independent review of the NIIP/NAPI must be conducted before any more public money is squandered on it or its successors. Admittedly, NIIP/NAPI benefits a few Federal and Navajo bureaucrats, but it leaves little if anything for the average Navajo. Federal assistance should be tailored to benefit the people of the Navajo Nation, not designed to aggrandize worn out Federal bureaucracies such as the Bureau of Reclamation and the Bureau of Indian Affairs. A thorough study of federally funded Indian irrigation projects is long overdue, as is fiscal accountability to both the public and the tribes themselves.

#### THE NORTHWEST NEW MEXICO RURAL WATER PROJECTS ACT ["S. 1171" OR "ACT"]

The Northwestern New Mexico Rural Water Projects Act seeks to couple the Proposed Settlement of Navajo claims to water on the San Juan River with a free ride for those seeking to repair deteriorating rural water systems in northwest New Mexico. In S. 1171, Section 201, Reclamation Water Settlement Fund ["Fund"], certain provisions seem to be written to buy supportive silence for the Project and Proposed Settlement by providing subsidies to rehabilitate old facilities throughout northwest New Mexico. While this may be an effective means of squelching opposition, provisions in the Act directing the Bureau to administer the disbursement of funds for the repair of such rural water systems encroach on the mission of the Department of Agriculture, which has historically been charged with exclusive responsibilities for Rural Development.

Implementation of S. 1171 is in no way feasible if the Reclamation Fund, per se, cannot be relied on to be flush for decades. The Public must be provided with certification from OMB or others competent in reliable principles of accounting that the Reclamation Fund will, in fact, enjoy longterm solvency with the liquidity to withstand the eleven-year drawdown envisioned in the Act. If the Reclamation Fund is siphoned to foot a variety of proposed Indian water rights settlements in New Mexico, as foreseen in S. 1171, the nature of the impacts on other social programs currently dependent on the Reclamation Fund must be fully assessed and mitigated. In accounting for the impact of S. 1171, OMB must factor in the audacity of these two New Mexico Senators scheming to establish an exclusive Reclamation Water Settlements Fund in the Act, an exclusive fund which will literally double-drain the Bureau's Reclamation Fund. Operation of the Project would substantially reduce the Reclamation Fund due to lost power generation and increased salinity in the Colorado River, while funds for the Project would be allocated from that same depleted Reclamation Fund. Such a strategy is not only fiscally unsound, it is idiotic!

#### ANTICIPATED COST OF THE PROJECT

No one is being told how much this Project could cost, and a feasibility level, design cost estimate for the Project has not been completed. In order to protect any Federal taxpayer commitment to investment, a sensitivity analysis of cost estimates for this multi-billion dollar Project must be completed. The Committee should recall that the Bureau refused a similar request for such a sensitivity analysis of the Animas-La Plata Project ["ALP"], only to reveal within months that their cost estimates were off by fifty percent—this before construction had even begun. It is our understanding, with no users for most of ALP water and absolutely no way to deliver the water to these make-believe users, that the costs (even without the interest calculation) already exceed by 100 percent the original cost estimate. Further, all of the recent big Bureau projects have surpassed by at least 300 percent their original cost estimates. Reference the Dallas Creek Project, the Dolores Project, and Central Arizona Project. Given the dismal state of the Federal budget, adequate assurances are necessary to insure the cost estimates given to Congress are not grossly underestimated. To this end, an independent Peer Review must be incorporated into the review process. Publication of the interest on the public debt over the 100 year life of the project should also be documented and made public.

#### ALTERNATIVES

Robert Johnson and Carl Artman of the Department of the Interior conceded this week in Senate testimony that the process for selecting the various alternatives identified and analyzed in the Project DEIS was inadequate. The Project as proposed by the Bureau is too expensive and violative of existing policy. Based on this revelation that the Department of Interior will not support any of the Project alternatives examined in its Bureau's own DEIS, a new Environmental Impact Statement must be prepared. Despite the New Mexico senators' attempts to fast-track S. 1171, the Criteria & Procedures of 55FR9223 must be implemented with full participation by the Department of Justice and the Office of Management and Budget, in order to ensure that Federal Trust responsibilities are honored—not just to the Nav-

ajo Nation, but to the wider taxpaying public as well. The 55FR9223 Policy includes provisions for an economic evaluation with a high level of assurance that the Public's money is being well spent. The Criteria & Procedures of 55FR9223 represent a vital safeguard against fiscal waste and guarantee the negotiation of a just settlement for all parties.

#### ARIZONA ISSUES

The State of Arizona opposes the Act. The failure of the Department of the Interior to implement the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ["Criteria & Procedures"] in the Proposed Settlement subverts the State of Arizona's attempt to negotiate its own water rights settlement with the Navajo Nation. Window Rock, Arizona is located in the Lower Colorado River Basin. Inclusion of Window Rock or any other Arizona communities within the Project service area is at odds with the 1922 Colorado River Compact and at odds with a traditional interpretation of the Law of the River. Window Rock is eligible for water from the Central Arizona Project. Since it is unclear how allocations will be made under the Act, the Committee should request a full accounting of the water involved in the Project. What portion comes from New Mexico's Compact allocation? What portion comes from Colorado's Compact allocation? What portion comes from Arizona's Compact allocation?

#### CITY OF GALLUP

Apparently, New Mexico state representative Patti Lundstrom, who testified to the Committee this week, expects American taxpayers to join hands and march lock-step to ante-up at least seventy-five percent of the Project costs for the City of Gallup. This involves a breach of longstanding Reclamation law requiring all municipal & industrial water costs to be paid with interest by project beneficiaries.

How are the interests of the City of Gallup pertinent to the settlement of Navajo claims on the San Juan River? Claims by the Navajo Nation to the San Juan River have absolutely nothing to do with the City of Gallup. So, why is Gallup being shoehorned into this project and the proposed Settlement? They can't afford a project on the scale proposed in S. 1171, and they are not eligible for or entitled to the massive federal government subsidies this multi-billion dollar Project would require. Sure, if the Navajo Nation wants to send its NIIP irrigation water to Gallup, so be it, but if the Federal Government is to be an honest broker, American taxpayers should not be required to support any part of the Navajo-Gallup Water Supply Project that is illegal or economically infeasible.

#### NAVAJO DEPLETION GUARANTEE

A little-known mechanism in the Project, the Navajo Depletion Guarantee, should be analyzed in detail. How might fulfillment of the terms of the Navajo Depletion Guarantee curtail the full operation of the Project or interfere with San Juan-Chama Project diversions to a host of contractors in Rio Grande Basin?

#### PIPELINE LATERAL SYSTEM

Who will pay for the vast network of pipeline laterals necessary for communities in Navajo Chapters intended to be served by the Project, and how much will this cost? In his testimony, President Shirley contends that the Navajo Nation has both the capability and intention to construct a system of lateral water lines necessary to provide potable water to Navajo chapters and families in the Eastern Agency. Where will he find the money? In addition, it is the responsibility of the Indian Health Service ["IHS"], not the Navajo Nation, to provide such facilities for the delivery of safe water supplies. How would IHS obtain funding for these feeder lines, when would they be completed, and which Navajos would be left out of the Project?

THE CRITERIA AND PROCEDURES FOR THE FEDERAL GOVERNMENT'S PARTICIPATION IN THE NEGOTIATION OF INDIAN WATER RIGHTS SETTLEMENTS ["55FR9223/POLICY/CRITERIA & PROCEDURES"] FEDERAL REGISTER, VOL.55, NO.48, 9223 ET SEQ

Both the Navajo Nation and the State of New Mexico are well (some might say painfully) aware of the Department of the Interior's Criteria and Procedures for the Participation by the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims. Documents from former State Engineer Tom Turney's negotiation notebook, obtained through "New Mexico Inspection of Public Records Act" requests, provide a detailed description of these "Federal Negotiating Guide-

lines". Likewise, the Navajo Nation recognizes the overriding authority of these Criteria and Procedures, stating:

The projected costs of these [wet water] projects is substantial and the primary source of funding will invariably come from the federal government. However, the Department of the Interior's Criteria for Settlement of Indian Water Rights requires a substantial state and local contribution. The Navajo team understands that this settlement will require creative innovation, and that it may require a combination of Federal and State programmatic funding sources.

Federal employees assigned to a formal Negotiating Team are expected to adhere to and comply with the DOI's "Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims", Federal Register, Vol.55, No.48, 9223 et seq [see attached "Policy 55FR9223"], as prescribed in a formal executive "Policy Statement" March 12, 1990 ["Policy"]. The DOI Policy holds that, in settling Indian water rights claims, the Federal government shall ensure that Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement. The United States has pervasive Endangered Species Act and Tribal trust responsibilities within the San Juan River Basin. These are overlapping and interconnected concerns which were not adequately addressed in the negotiation of a Proposed Settlement.

The Office of Management and Budget is assigned a definite, indispensable role in the proper execution of the Federal Policy 55FR9223, but repeated FOIA requests have failed to produce any records showing OMB has been involved in evaluating the terms of the Proposed Settlement. The Government's Policy at 55FR9223, criterion no. 6, states:

Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties.

Language in S. 1171 authorizing the Navajo-Gallup Water Supply Project allows for Federal subsidies of up to 75 percent to both the City of Gallup and the Jicarilla Apache Tribe, requiring as little as 25 percent cost-share for the substantial benefits those non-Federal parties are to receive through construction of the Project. In fact, Gallup city officials have been to Washington to persuade Congress to pay for almost all of the proposed Navajo-Gallup Water Supply Project, claiming that even a 25 percent repayment obligation would be too rich for this City's blood.

Four years ago, the Secretary of the Department of the Interior established the "Navajo-San Juan River Federal Indian Water Rights Negotiation Team" ["Team"] for the purpose of negotiating a settlement of the claims of The Navajo Nation to waters within the San Juan River Basin of Northwest New Mexico. The Team, headed initially by DOI Solicitor Michael Schoessler (and subsequently by the Bureau's Brian Parry), in concert with Joy Nicholopoulos (Fish & Wildlife Service), Brad Bridgewater (Department of Justice) and the Bureau of Indian Affairs' John Cawley, have imposed absolute secrecy while conducting a series of closed-door meetings with the Nation and the State of New Mexico in the "Navajo-San Juan River Federal Indian Water Rights Negotiation". As a direct result many legitimate stakeholders, the Public, and representatives of the media have been arbitrarily excluded and denied due process rights—being barred, as they have been, from proceedings which may ultimately involve the expenditure of billions of State and Federal dollars and undermine the value of certain personal property holdings.

The binding DOI Policy for negotiating settlements of tribal water claims has been in force and preserved intact for some fourteen years—not once having been the subject of amendment, modification, supercession or revocation. Sadly, DOI has a dismal history of haphazard and selective enforcement of its Policy, resulting in the repeated, irreversible betrayal of the Public Trust. Although the Policy requires an integrated and concurrent examination of competing claims in the San Juan River system because four Indian Tribes having pending reserved rights claims to a severely restricted water supply, the DOI has grossly and methodically misapplied its own Criteria & Procedures by negotiating in piecemeal fashion with the Jicarilla Apache, the Ute Mountain Ute and the Southern Ute Indian Tribes. Now, apparently, this deliberate failure with respect to Policy execution is being repeated by the DOI Team in ongoing settlement negotiations with The Navajo Nation and the State of New Mexico.

In October 2003 the Western States Water Council and the Native American Rights Foundation held their biennial "Indian Water Rights Settlement Symposium" in Durango, Colorado. Timothy Glidden, author of the Federal Government's long-standing Policy Statement on the negotiation of Indian water rights claims (Criteria



& Procedures), stated that it would be impossible to make progress in tribal settlement if a variety of interest groups and stakeholders were made formal members of a Negotiation Team. In other words, Mr. Glidden (former Chairman, Working Group on Indian Water Rights Settlements, and now Contractor to the U.S. Department of the Interior, Secretary's Office of Indian Water Rights) contends that the political, technical and financial momentum for securing a settlement is generated, by-and-large, through the intentional exclusion of various parties with legal standing in the ultimate resolution and disposition of the tribal water claims. Glidden's pronouncement is at odds with the fact that nothing in the Policy's Criteria & Procedures direct the Interior Department to exclude any interested party with standing from participation in the process of negotiating the settlement of Indian water claims. As stated above, direct requests by legitimate stakeholders to participate in the settlement discussions were not granted. [see above "12/09/02 letter to Michael Schoessler".

Numerous Freedom of Information Act ["FOIA"] requests have confirmed that Federal Policy has not, in fact, been followed in the Navajo settlement negotiations, just as it was not followed in the settlement negotiations with the Jicarilla Apache, the Ute Mountain Ute, or the Southern Ute tribes. So, while an adopted federal policy setting forth the "Criteria and Procedures for Indian Water Rights Settlements" has been in place and binding for over a decade, it has been wantonly subverted in tribal negotiations in the San Juan River Basin—twisted and riddled with bias in order to advance special interests in Indian water claims at the expense of the environment, junior water right holders, and the taxpaying public. It has become increasingly obvious that the State and the Federal Government are allowing non-Indian water developers to successfully use the pretext of Indian water rights settlement negotiations as leverage and license to engage in water speculation, further strangling western rivers and crippling the taxpaying public.

Any settlement worth its salt must follow the guidelines established by the Department of Interior as set forth in its published policy for negotiating and settling Indian water rights, The Criteria and Procedures, 55FR9223, published in the Federal Register of March 12, 1990. Among other things this policy holds that Indian settlements involving a single river system, in this case the San Juan, must be done so as to simultaneously evaluate and negotiate all Indian claims on that river system. Obviously, the clear intent is to avoid the dreaded "unintended effect" through piecemeal negotiations, awards, and settlements, and the secondary taxpayer costs of undoing what was mistakenly done through ignorance and bureaucratic impetuosity.

When concerns about the judicious application of 55FR9223 were cited with regard to both the Animas-La Plata Project (Colorado Ute Indian Water Rights Settlement Act) and the Navajo Dam Reoperation EIS, they were dismissed as irrelevant. In fact, the Deputy Director of Interior's Indian Water Rights Office, Michael Conner, Esq., now a trusted aid to this Committee's Chairman, stated that while the policy still stood, it only had to be observed when the Department of the Interior found it convenient or appropriate to do so. Abuse of the Policy continues to open the door to graft and fraud. It is past time, whether convenient or not, for 55FR9223 to be taken seriously and for the Federal government to forthrightly fulfill its obligations to American citizens and the tribes.

55FR9223, the Criteria & Procedures reads as noticed as follows:

FEDERAL REGISTER / VOL. 55, NO. 48 / MONDAY, MARCH 12, 1990 / NOTICES PAGE 9223

#### DEPARTMENT OF THE INTERIOR

Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights Claims.

AGENCY: Department of the Interior.

ACTION: Policy Statement.

SUMMARY: It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.

EFFECTIVE DATE: March 12, 1990.

ADDRESSES: Comments may be addressed to: Mr. Tim Glidden, Department of the Interior, MS6217-MIB, 18th and C Streets, NW., Washington, D.C. 20240.

*FOR FURTHER INFORMATION CONTACT:* Mr. Tim Glidden, Chairman, Working Group on Indian Water Settlements, 202-343-7351.

*SUPPLEMENTAL INFORMATION:* These criteria and procedures were developed by the Working Group on Indian Water Settlements from the Department of the Interior.

These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

*Dated:* March 6, 1990, Timothy Glidden, Chairman, Working Group on Indian Water Settlements.

#### CRITERIA AND PROCEDURES FOR INDIAN WATER RIGHTS SETTLEMENTS

##### *Preamble*

Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.

It is the policy of this administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation.

Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlements of claims concerning Indian water resources. These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

##### *Criteria*

1. These criteria are applicable to all negotiations involving Indian water rights claims settlements in which the Federal Government participates. Claims to be settled through negotiations may include, but are not limited to, claims:
  - (a) By tribes and U.S. Government to quantify reserved Indian water rights.
  - (b) By tribes against the U.S. Government.
  - (c) By tribes and the U.S. Government against third parties.
2. The Department of the Interior will support legislation authorizing those agreements to which it is a signatory party.
3. Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.
4. The total cost of the settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.
5. Federal contributions to a settlement should not exceed the sum of the following two elements:
  - a. First, calculable legal exposure—litigation costs and judgment obligations if the case is lost: Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, and likelihood of loss.
  - b. Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence).—Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.
6. Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties.

7. Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.

8. Operating capabilities and various resources of the Federal and non-Federal parties to the claims negotiations should be considered in structuring a settlement (e.g. operating criteria and water conservation in Federal and non-Federal projects).

9. If Federal cash contributions are part of a settlement and once such contributions are certified as deposited in the appropriate tribal treasury, the U.S. shall not bear any obligation or liability regarding the investment, management or use of such funds.

10. Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdiction.

11. Settlements should generally not include:

a. Local contributions derived from issuing bonds backed by or guaranteed by the Federal Government.

b. Crediting to the non-Federal share normal project revenues that would be received in absence of a cost-share agreement.

c. Crediting non-Federal operation maintenance, and rehabilitation (OM&R) payments to non-Federal construction cost obligations.

d. Imposition by the Federal Government of fees or charges requiring authorization in order to finance the non-Federal share.

e. Federal subsidy of OM&R costs of Indian and non-Indian parties.

f. U.S. participation in an economically unjustified irrigation investment; however, investments for delivery of water for households, gardens, or domestic livestock may be exempted from this criterion.

g. Per capita distribution of trust funds.

h. Crediting to the Federal share existing annual program funding to tribes.

i. Penalties for failure to meet a construction schedule. Interest should not accrue unless the settlement does not get budgeted for as specified in item 15 below.

j. Exemptions from Reclamation law.

12. All tangible and intangible costs to the Federal Government and to non-Federal parties, including the forgiveness of non-Federal reimbursement requirements to the Federal Government and items contributed per item 8 above should be included in calculating their respective contributions to the settlement.

13. All financial calculations shall use a discount rate equivalent to the current water resources planning discount rate as published annually in the Federal Register.

14. All contractual and statutory responsibilities of the Secretary that affect or could be affected by a specific negotiation will be reviewed.

15. Settlement agreements should include the following standard language: Federal financial contributions to a settlement will normally be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation (e.g., for a settlement enacted into law in August 1990, funding to implement it would normally be contained in the FY 1992 Budget request and, if appropriated, be available for obligation on October 1, 1991).

16. Settlements requiring payment of a substantial Federal contribution should include standard language providing for the costs to be spread-out over more than one year.

#### *Procedures*

##### *Phase I—Fact Finding*

1. The Department of the Interior (Department) will consider initiation of formal claims settlement negotiations when the Indian tribe and non-Federal parties involved have formally requested negotiations of the Secretary of the Interior (Secretary).

2. The Department will consult with the Department of Justice (Justice) concerning the legal considerations in forming a negotiating team. If Department decides to establish a team, the Office of Management and Budget (OMB) and Justice shall be notified, in writing. Justice should generally be a member of any negotiating team.

- a. The Department's notification should include the rationale for potential negotiations, i.e., pending litigation and other background information about the claim already available, makeup of the team (reason that Justice is not a member of a team, if applicable), and non-Federal participants in the settlement process.
- b. The date of the notification marks the beginning of the fact-finding period.
- 3. Not later than nine months after notification, a fact-finding report outlining the current status of litigation and other pertinent matters will be submitted by the team to the Department, OMB, and Justice. The fact-finding report should contain information that profiles the claim and potential negotiations. The report should include:
  - a. A list of all involved parties and their positions.
  - b. The legal history, if any, of the claim, including such relevant matters as prior or potential litigation or court decisions, or rulings by the Indian Claims Commission.
  - c. A summary and evaluation of the claims asserted for the Indians.
  - d. Relevant information on the non-Federal parties and their positions to the claim.
  - e. A geographical description of the reservation and drainage basin involved, including maps and diagrams.
  - f. A review and analysis of pertinent existing contracts, statutes, regulations, and legal precedent that may have an impact on the settlement.
  - g. A description and analysis of the history of the United States' trust activities on the Indian reservation.
- 4. During Phase I, II, and III, the Government (through negotiating team or otherwise) will not concede or make representatives on likely U.S. positions or considerations.

*Phase II—Assessment and Recommendations*

- 1. As soon as possible, the negotiating team, in concert with Justice, will conduct and present to the Department an assessment of the positions of all parties and a recommended negotiating position. The purpose of the assessment is to (1) measure all costs presuming no settlement, and, (2) measure complete settlement costs to all the parties. The assessment should include:
  - a. Costs presuming no settlement—Estimates for quantifying costs associated with all pending or potential litigation in question, including claims against the United States and claims against other non-Federal parties together with an assessment of the risk to all parties from any aspect of the claim and all pending litigation without a settlement. A best/worst/most likely probability analysis of the litigation outcome should be developed.
  - b. An analysis of the value of the water claim for the Indians.
  - c. Costs Presuming Settlement—quantification of alternative settlement costs to all parties. This includes an analysis showing how contributions, other than those strictly associated with litigation, could lead to settlement (e.g., facilities to use water, alternative uses of water, and alternative financial considerations).
- 2. All analysis in the settlement should be presented in present value terms using the planning rate used for evaluating Federal water resource projects.

*Phase III—Briefings and Negotiating Position*

- 1. The Working Group on Indian Water Settlements will present to the Secretary a recommended negotiating position. It should contain:
  - a. The recommended negotiating position and contribution by the Federal Government.
  - b. A strategy for funding the Federal contribution to the settlement.
  - c. Any legal or financial views of Justice or OMB.
  - d. Tentative position on major issues expected to arise.
- 2. Following the Secretary's approval of the Government's negotiating position, Justice and OMB will be notified before negotiations commence.

*Phase IV—Negotiations Toward Settlement*

- 1. OMB and Justice will be updated periodically on the status of negotiations.

2. If the proposed cost to the U.S. of settlement increases beyond the amount decided in Phase III, if the negotiations are going to exceed the estimated time (or break down), or if Interior proposes to make significant changes in the Government negotiating position or in the U.S. contribution to the settlement, the original recommendation and negotiating position will be revised using the procedures identified above.

3. Briefings may be given to the Congressional delegations and the Committees consistent with the Government's negotiating position.

If nothing else, last week's Committee Hearing revealed that the requisite Criteria & Procedures are once again being twisted beyond recognition by proponents of the Project, the Act, and the Proposed Settlement. The fact that OMB, a necessary participant in any such negotiation, has been pointedly excluded from these proceedings, is an indication that the Proposed Settlement and the Project are not feasible and that S. 1171 constitutes abysmal legislation tailored to satisfy special, vested interests. The general Public, interested parties and a majority of legitimate stakeholders with their livelihoods and heritage on the line tried desperately for years to gain access to these closed, secret negotiations, to no avail.

Witness this letter to Michael Schoessler, DOI Team Leader Navajo-San Juan River Federal Indian Water Rights Negotiation Team from a group interested in good government and the thoughtful stewardship of natural resources:

ELECTORS CONCERNED ABOUT ANIMAS WATER—CAW  
*Farmington, NM, December 9, 2002.*

MICHAEL SCHOESSLER,  
*Team Leader, Navajo-San Juan River Federal Indian Water Rights Negotiation Team, U.S. Department of the Interior, Office of the Solicitor, 505 Marquette Ave. NW Suite 1800, Albuquerque, NM.*

SUBJECT: Navajo-San Juan River Federal Indian Water Rights Negotiation (Negotiation)

DEAR MICHAEL: Thank you for responding in advance of this week's meeting of your Navajo-San Juan River Federal Indian Water Rights Negotiation Team (Team). As you know, CAW has expressed an interest in the subject Negotiation, particularly regarding the Department of the Interior's (DOI) application of its policy for the negotiation and settlements of claims concerning Indian water resources, 55FR9223 (Policy). Your observation that this Policy has been inconsistently or haphazardly applied over the past decade confirms our worst fears.

At the same time, we are encouraged by your expressed intention to strictly adhere to the Policy as established in the "Criteria & Procedures" during your Team's ongoing two-year effort with the subject Negotiation. I suppose it would be reasonable to assume that, initially anyway, DOI personnel assigned to other negotiation teams had similar intentions of enforcing the required "Criteria & Procedures", but then, for one reason or another, found it more convenient, advantageous, or politically expedient to abandon their responsibility to uphold that Policy.

In our opinion, only a full and careful implementation of the Policy in the subject Negotiation will fulfill the Secretary's obligation under the federal Indian trust responsibility. Indian Trust Assets (ITAs) in connection with Navajo Nation water rights claims to the San Juan River cannot be accurately assessed and adequately protected if the DOI's slipshod approach to Policy enforcement resurfaces in the subject Negotiation. Certainly the American people will be ill-served by any perpetuation of this willy-nilly system which leaves so much to chance, if not outright subterfuge.

We sincerely appreciate your willingness to present the requests in CAW's October 22nd letter to the non-Federal parties for consideration and action at this week's negotiation session. However, your view that the Team has no independent ability or authority to provide for the involvement of additional non-Federal parties in the subject Negotiation seems to be incompatible with the "Criteria & Procedures" of the Policy.

In fact, the Policy does not make allowance for the arbitrary exclusion of individual stakeholders or entities with competing claims and interests as a prerequisite to the subject Negotiation. Neither does the Policy support your determination that the current negotiations shall be closed to the public and conducted in absolute secrecy.

If the subject Negotiation is to be kept free of bias and prejudice, the Team must act swiftly with authority to allow for the participation of additional interested parties, including legitimate stakeholders.

Once again, we appreciate your time and consideration in this matter.

Sincerely,

STEVE CONE AND VERA FORBES WILLSON.

THE OBJECT LESSON IN ALL OF THIS IS AS FOLLOWS: IF THE ADOPTED POLICY OF THE UNITED STATES GOVERNMENT FOR PARTICIPATION IN THE NEGOTIATION OF INDIAN WATER RIGHTS SETTLEMENTS, 55FR9223, IS NOT TO BE FAITHFULLY AND THOROUGHLY IMPLEMENTED TO REACH A JUST WATER RIGHTS SETTLEMENT WITH THE NAVAJO NATION, THEN LITIGATION IS MUCH PREFERRABLE TO THE SECRECY AND SUBTERFUGE WHICH HAVE CHARACTERIZED THE NAVAJO SETTLEMENT NEGOTIATIONS LEADING TO THE PROPOSED SETTLEMENT.

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STATEMENT OF THE JICARILLA APACHE NATION

S. 1171

The Jicarilla Apache Nation is pleased to submit this testimony supporting and commenting on S. 1171. The Jicarilla Apache Nation is a co-sponsor in the planning process for the Navajo Gallup Water Supply Project, a vital piece of this legislation and the Navajo Nation Water rights settlement package. We are a member of the Steering Committee for the Project. We have devoted substantial staff time and resources over the last several years to the planning and environmental compliance process for the Project.

The Nation's water rights in the San Juan River Basin are the subject of a 1992 settlement agreement and the Jicarilla Apache Tribe Water Rights Settlement Act, Public Law 102-441, 106 Stat. 2237. We traveled a long road to successfully negotiate our settlement, and we find ourselves on an equally long road to secure the implementation of the settlement in order to fully realize its benefits for our people. When faced with obstacles to the use of our settled water rights, we have consistently shown leadership in finding solutions that benefit not only our people, but also our neighbors in the San Juan River Basin. We have, for example, provided leased water supplies to large and small water users, ranging from individual farmers and the Elks Lodge to BHP Billiton and PNM. We have also served as a founding member of the San Juan River Recovery Implementation Program to protect endangered species while water development is pursued.

Most recently, we have stepped up to the plate to offer to negotiate a water lease, or subcontract, to the City of Gallup to provide their water supply for the Navajo-Gallup Water Supply Project that would otherwise be unavailable. The water rights that would be the subject of a subcontract to be negotiated between the Jicarilla Apache Nation and the City of Gallup are already adjudicated to the Nation. Consequently, these water rights are already within the recognized Upper Basin supply in New Mexico. It is important for the Committee to understand the Nation's pivotal role in the creative solutions that make the Project, and ultimately the Navajo Nation settlement, achievable.

We share with the Navajo Nation a common interest in bringing clean, reliable water service to grossly underserved areas of our reservations. The Jicarilla Apache people desire to pursue our way of life by making their homes on our reservation lands throughout the basin, and not being crowded into increasingly limited space in Dulce, New Mexico because of the lack of potable water. To meet this need, we have worked with the United States Bureau of Reclamation and the other Project Participants to provide for the connection of a water line at Counselor, New Mexico from the Cutter Lateral portion of the Project. We are also separately planning construction of the approximately eight-mile portion of the additional water line that will be needed from Counselor to our lands at TeePees on New Mexico State Highway 550 in order to deliver this water to our people, without the assistance of appropriations authorized under this bill. The water that would be delivered to us through the Project is water already adjudicated to us under the 1992 settlement and related Partial Final Decree. We will receive no additional water rights under this bill.

For these reasons, the Jicarilla Apache Nation has a demonstrated commitment to and interest in a successful outcome to this legislation and the associated Navajo-Gallup Water Supply Project. It is imperative that the legislation recognize and support the Nation's role in the Project.

In addition to the attached detailed comments that we are providing to the Committee staff, we share the following thoughts in the interest of ensuring that key provisions of the legislation are clarified. We look forward to continuing to work with members of the Committee and Congress, the State of New Mexico, the Navajo

Nation, the City of Gallup, and the Administration to refine and implement the legislation.

The Jicarilla Apache Nation does not object to the concept of a top water bank, provided that its implementation does not adversely affect the Nation's water rights, storage for the Nation, or costs under our contract for water from the Navajo Reservoir Supply, and provided also that the beneficiaries of the top water bank pay their fair share of construction and operation and maintenance costs associated with Navajo Reservoir.

The provisions concerning shortages should be carefully reconsidered and re-drafted in consultation with us to protect the Jicarilla Apache Nation's water rights, including entitlement to delivery in times of shortage, under the Jicarilla Apache Tribe Water Rights Settlement Act. We believe and expect that it is not Congress' intent to adversely modify the Nation's rights under our existing settlement. Indeed, the bill appropriately states that unless expressly provided, nothing in it modifies, conflicts with, preempts, or otherwise affects the Jicarilla Apache Tribe Water Rights Settlement Act (Section 103(1)), page 18 lines 2-4 and page 19 lines 1-2). The legislation must be crafted to protect the Nation from suffering a lower priority in time of shortage.

We wish to share a few concerns the Nation has regarding what we view as unclear language referring to cost share provisions in the Bill. The Secretary is directed to determine the share "based on the ability of the Jicarilla Apache Nation to pay the construction costs of the Project facilities that are allocable to the Jicarilla Apache Nation," and this share is specified to be at least 25 percent of the costs so allocable.

We have some concerns with how the portion "allocable" to the Nation will be determined. The Nation's staff have reviewed the items allocated to us as reflected in the March 2007 Draft Planning Report and Environmental Impact Statement for the Project ("PR-DEIS"), and if our understanding is correct, the allocation reflected in that document is appropriate. The legislation should make clear that a different allocation will not be imposed on us. While we are not concerned with the items contemplated to be allocated to us, we are concerned that the Bureau of Reclamation's cost estimates for these items are substantially greater than they should be. Notably, the PR-DEIS states that Reclamation is re-estimating costs and anticipates providing updated cost estimates through errata sheets to be made available during the public comment period on the PR-DEIS. To our knowledge, however, no such errata sheets have been made available and the public comment period ends on June 28, 2007. We are therefore reserving for further comment the issue of cost estimates in our comments on the PR-DEIS. To protect the continuing voice of the Project Participants in all cost determinations associated with the Project, the legislation should clarify that the construction costs reimbursable by the Jicarilla Apache Nation shall be reduced by the amounts that the Nation expends from its own funds or non-federal sources on pre-construction activities for the Project.

The draft legislation does not effectively define the "ability to pay" determination. This provision should specify that "ability to pay" will be determined on the basis of the per capita income, median household income, and poverty rate of the population on the Jicarilla Apache Reservation. This specificity will ensure that the determination of "ability to pay" reflects the true ability of our people to pay for the water supply.

The requirement that the Nation should pay a minimum percentage of 25 percent of the construction costs allocable to the Nation is inappropriate. A proper ability to pay determination based on the ability of our population will result in a cost share percentage below 25 percent. Indeed, this minimum leaves the Nation unacceptably exposed to the burden of a cost share far greater than 25 percent that has no relationship to ability to pay. Notably, the April 2006 study by Dornbusch Associates entitled "Social Impacts from the Navajo-Gallup Water Supply Project" (Appendix D-IV, page 12, to the PR-DEIS) found that the Jicarilla Apache people earn median incomes far below the New Mexico state average.

This requirement casts a shadow over the negotiating process in providing a leased water supply for the City of Gallup. Without fully understanding the entire exposure the Nation has in paying for its portion of the Project, it is extremely difficult to proceed with substantive negotiations with Gallup and the Navajo Nation in finalizing a secure water supply for the City.

We would like to see in the bill a provision for establishment of a committee, including a seat for the Jicarilla Apache Nation, to set and review Project construction and operation, maintenance and replacement budgets and extraordinary expenditures.

## STATEMENT OF THE JICARILLA APACHE NATION

## DETAILED COMMENTS ON S. 1171

Pages 8-11, Section 101(b), top water bank in Navajo Reservoir: The Jicarilla Apache Nation does not object to the concept of a top water bank, provided that its implementation not adversely affect the Nation's water rights, storage for the Nation, or costs under our contract for water from the Navajo Reservoir Supply, and provided also that the beneficiaries of the top water bank pay their fair share of construction and operation and maintenance costs associated with Navajo Reservoir. Page 9, lines 11-20, provides that the water bank shall be operated in a manner that does not impair delivery under contracts entered into under New Mexico State Engineer File Nos. 2847, 2848, 2849, and 2917. This list should not omit the additional permits—file Nos. 2873 and 3215—that are included along with the listed file numbers in the definition of “Navajo Reservoir Supply” in the December 8, 1992 contract between the United States and the Jicarilla Apache Nation for delivery from this supply pursuant to the Jicarilla Apache Water Rights Settlement Act.

Page 10, lines 17-24, describes a requirement for the operation of the top water bank as follows:

water in the top water bank [shall] be the first water spilled or released for flood control purposes in anticipation of a spill, on the condition that top water bank water shall not be released or included for purposes of calculating whether a release should occur for purposes of satisfying releases required under the San Juan River Recovery Implementation Program [SJRRIP].

For clarity, this subsection should be divided into two separate requirements: (1) top water bank water shall be the first to be spilled or released for flood control purposes and (2) top water bank water shall not affect the calculation of the release required under the SJRRIP. Since the Flow Recommendations of the SJRRIP consider reservoir storage without the top water bank present, it is appropriate to disregard the top water bank in calculating whether a release should occur. However, it is not appropriate to exclude top water bank water from the water that would be released. We do not believe that the intent is to exclude it, but as currently written, the provision could be misread to exclude top water bank water from a release.

The legislation should clearly require the beneficiaries of the top water bank to enter contracts with the United States for storage, including an obligation to pay their proportional share of construction and operations, maintenance and replacement costs. The cost shares of the Jicarilla Apache Nation and other contractors should be reduced accordingly.

Page 13, lines 10-22, use of the Navajo Indian Irrigation Project works to convey water: Planning for the Navajo-Gallup Water Supply Project has contemplated the use of NIIP works for conveyance. This provision authorizes that use, and importantly, prohibits the reallocation of NIIP construction costs because of such use. The legislation should also restrict the reallocation and repayment of NIIP operation, maintenance and replacement costs to the Navajo-Gallup Water Supply Project. The Jicarilla Apache Nation has expressed concern in the planning process for the possibility that NIIP OM&R costs that are unrelated to conveyance for the Nation's water through the Project might be charged to the Nation. We have felt assured that such costs would not be charged to us. The legislation should clarify this point.

Pages 14-17, shortage determinations and allocations: The bill would establish a priority of allocation of shortages, not water supply, in the event of a shortage determination. The bill further includes provisions for determining which uses in New Mexico will be counted as normal diversion requirements. The quantity of water that reliably can be anticipated to be diverted or delivered under a contract from inflows to the San Juan River arising below Navajo Dam under New Mexico State Engineer File No. 3215 would be excluded from the normal diversion requirements. We are concerned about how these potentially confusing provisions will be interpreted and applied in practice.

The provisions concerning shortages should be carefully reconsidered and redrafted in consultation with us to protect the Jicarilla Apache Nation's water rights, including entitlement to delivery in times of shortage, under the Jicarilla Apache Tribe Water Rights Settlement Act. We believe and expect that it is not Congress' intent to adversely modify the Nation's rights under our existing settlement. Indeed, the bill appropriately states that unless expressly provided, nothing in it modifies, conflicts with, preempts, or otherwise affects the Jicarilla Apache Tribe Water Rights Settlement Act (Section 103(1)), page 18 lines 2-4 and page 19 lines 1-2). The



legislation must be crafted to protect the Nation from suffering a lower priority in time of shortage.

The provision on page 17, lines 13-17 that preserves the Secretary's ability to re-allocate water in accordance with cooperative agreements between water users is important to ensure that the constructive shortage sharing recommendations of recent years, to which the Nation has been a signatory, can continue to foster solutions that avoid a Secretarial shortage determination and the attendant potential for disruptive litigation.

Page 27, lines 18-21: The bill states that the design and construction of the Project shall not be subject to the Indian Self Determination Act. The Jicarilla Apache Nation would like this section to be amended to allow the Nation to utilize the Act appropriately for our involvement in design and construction work.

Page 30, lines 11-24 and page 31, lines 1-12 provide for conveyance of Project facilities to the City of Gallup or the Navajo Nation. The legislation should expressly state that such conveyance shall not adversely affect the cost allocations or repayment obligations of the Project Participants, and should further provide for the continuation of the committee to establish and review budgets as recommended in our comment below on cost allocation.

Page 32, lines 11-18 provide, in part, that any payments for water under any subcontract with the Jicarilla Apache Nation shall not alter the construction repayments or operation, maintenance and replacement payment requirements of Project Participants. This language is important to clarify that our payment obligations will not be affected by revenues we may receive under a subcontract. However, when a payment is made for the use of unused Project capacity, the payments due from the Project Participants should be commensurately reduced.

Title III of the bill uses the phrases "allocate water supply" and "allocation" in a way that may cause confusion. Section 301(2), page 24, lines 12-14 lists among the purposes of the subtitle "to allocate the water supply for the Project among the Nation, the city of Gallup, New Mexico, and the Jicarilla Apache Nation." Section 303(b)(2), pages 34-36, provides for "allocation" of the water diverted under the Project to these entities by specified amounts of water for use. These provisions should be revised to make it clear that they are specifying the use of delivery capacity, not the allocation of underlying water rights or contract rights to the Navajo Reservoir Supply. For instance, the bill describes an "allocation" of 7,500 acre-feet per year to the City of Gallup (page 35, lines 1-5), but if that water is to be supplied by a potential subcontract from the Jicarilla Apache Nation under our 1992 contract rights to the Navajo Reservoir Supply, then the water allocation remains the Jicarilla Apache Nation's and Gallup will be entitled to delivery under the subcontract through the Project.

Page 45, lines 11-13 provide the important clarification that the Jicarilla Apache Nation is not obligated to enter into a water subcontract with the City of Gallup. The phrase "nothing in this paragraph" is used, however, when the wording should be "nothing in this Act" (page 45, lines 1-2).

We wish to share a few concerns the Nation has regarding what we view as unclear language referring to cost share provisions in the Bill. The Secretary is directed to determine the share "based on the ability of the Jicarilla Apache Nation to pay the construction costs of the Project facilities that are allocable to the Jicarilla Apache Nation," and this share is specified to be at least 25 percent of the costs so allocable.

We have some concerns with how the portion "allocable" to the Nation will be determined. The Nation's staff have reviewed the items allocated to us as reflected in the March 2007 Draft Planning Report and Environmental Impact Statement for the Project ("PR-DEIS"), and if our understanding is correct, the allocation reflected in that document is appropriate. The legislation should make clear that a different allocation will not be imposed on us. While we are not concerned with the items contemplated to be allocated to us, we are concerned that the Bureau of Reclamation's cost estimates for these items are substantially greater than they should be. Notably, the PR-DEIS states that Reclamation is re-estimating costs and anticipates providing updated cost estimates through errata sheets to be made available during the public comment period on the PR-DEIS. To our knowledge, however, no such errata sheets have been made available and the public comment period ends on June 28, 2007. We are therefore reserving for further comment the issue of cost estimates in our comments on the PR-DEIS. To protect the continuing voice of the Project Participants in all cost determinations associated with the Project, the legislation should clarify that the construction costs reimbursable by the Jicarilla Apache Nation shall be reduced by the amounts that the Nation expends from its own funds or non-federal sources on pre-construction activities for the Project.

The draft legislation does not effectively define the “ability to pay” determination. This provision should specify that “ability to pay” will be determined on the basis of the per capita income, median household income, and poverty rate of the population on the Jicarilla Apache Reservation. This specificity will ensure that the determination of “ability to pay” reflects the true ability of our people to pay for the water supply.

The requirement that the Nation should pay a minimum percentage of 25 percent of the construction costs allocable to the Nation is inappropriate. A proper ability to pay determination based on the ability of our population will result in a cost share percentage below 25 percent. Indeed, this minimum leaves the Nation unacceptably exposed to the burden of a cost share far greater than 25 percent that has no relationship to ability to pay. Notably, the April 2006 study by Dornbusch Associates entitled “Social Impacts from the Navajo-Gallup Water Supply Project” (Appendix D-IV, page 12, to the PR-DEIS) found that the Jicarilla Apache people earn median incomes far below the New Mexico state average.

This requirement casts a shadow over the negotiating process in providing a leased water supply for the City of Gallup. Without fully understanding the entire exposure the Nation has in paying for its portion of the Project, it is extremely difficult to proceed with substantive negotiations with Gallup and the Navajo Nation in finalizing a secure water supply for the City.

We would like to see in the bill a provision for establishment of a committee, including a seat for the Jicarilla Apache Nation, to set and review Project construction and operation, maintenance and replacement budgets and extraordinary expenditures.

Page 59, lines 17-21, Section 401(a)(4) provides that the State of New Mexico may administer releases of stored water from the Navajo Reservoir in accordance with subparagraph 9.1 of the Navajo Nation settlement agreement. The effect of this provision is unclear. The referenced subparagraph of the agreement states that the Navajo Nation and the United States will not challenge the State’s making available water under specified circumstances. It seems that bill language should be revised to simply provide for the waiver by the United States of the objection as contemplated by the agreement.

Page 68, lines 24-25, and page 69, lines 1-3 and lines 14-19 literally require the court to enter the partial final decree and supplemental partial final decree described in the Navajo Nation settlement agreement by specified dates. The bill could be clearer on the effect of a failure to meet these deadlines.

Page 73, lines 9-13 states that “nothing in the Agreement, the Contract, or this section quantifies or adversely affects the land and water rights, or claims or entitlements to water, of any Indian tribe or community other than the rights, claims, or entitlements of the Nation.” This provision should specify that nothing in the Act, rather than merely the section, quantifies or adversely affects, and should also specify that nothing in the hydrologic determination by the Secretary quantifies or adversely affects such rights, claims or entitlements.

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STATEMENT OF MIKE SULLIVAN, CHAIRMAN, SAN JUAN AGRICULTURAL WATER  
USERS ASSOCIATION

Thank you for giving us the opportunity to testify about the proposed legislation entitled “Northwestern New Mexico Rural Water Projects Act.” If carried out, this legislation would draw water from the San Juan River (one of the largest tributaries of the Colorado River) for a pipeline to be built to the Gallup area at a cost of more than \$1 billion in public funds. The legislation would also affect water rights throughout New Mexico and the entire Colorado River system.

The San Juan Agricultural Water Users Association represents 36 of the 38 irrigation ditches in the San Juan river system. Our members consist of about 15,000 landowners and their families. The members of our association have water rights from the Echo Ditch Decree (1948) and appropriations for approximately 35,000 acres of irrigated land with a farm delivery of over 110,000 acre-feet of water. We are also entitled to divert approximately 1,000 cfs from the rivers of the Basin. Our members also have water rights for household, livestock, and other uses, which have not yet been quantified by the court. The members of the association have been putting the waters of the San Juan to beneficial use for more than 100 years. Our ancestors, Anglo, Hispanic, and Navajo, were the first ones to divert water from the river, long before New Mexico became a state. Since then, our members have maintained our community ditches with their own labor and their own money, through ditch assessments, without government subsidies.

We appreciate the invitation to testify in person, but unfortunately our group cannot afford to send someone to Washington. So we are submitting testimony in writing. Although we are unable to be present with you, we ask that you give careful attention to the facts which we are outlining, because you will not hear these facts from anyone else. In our absence, our opponents will pooh-pooh these facts and our position, but we respectfully request that you and your staffers conduct an independent investigation of the points we outline here. Any objective inquiry will demonstrate that there are serious questions about this bill, which the proponents are trying to gloss over.

If this legislation is passed in its present form, it will hurt us and many other people in New Mexico. With all due respect, the proposed legislation is so fundamentally flawed that it should not be enacted in its present form. This legislation has been pushed by certain special interests as a solution to the problems all along the San Juan and Colorado Rivers, but in reality it will only make those problems worse. And this legislation as presently written will create new problems for the entire State of New Mexico, which increasingly depends on the San Juan River to supply its water.

THE LEGISLATION ATTEMPTS TO GIVE ONE-THIRD OF NEW MEXICO'S RIVER WATER TO A VERY SMALL GROUP—LESS THAN 40,000 PEOPLE—AT THE EXPENSE OF THE OTHER 1,800,000 CITIZENS WHO LIVE IN NEW MEXICO

The San Juan River provides 60% of all the surface water in New Mexico. As a water source for New Mexico, the San Juan River is twice as big as all the other rivers in the state, combined—the Rio Grande, Pecos, the Gila, etc. Cities and tribes on the Rio Grande are increasingly depending on water supplied from the San Juan via the San Juan-Chama Project, which carries water across the Continental Divide.

Albuquerque is finishing a \$275 million project to use San Juan water, while Santa Fe is spending \$145 million. Taos, Espanola, Los Alamos, San Juan Pueblo, and Belen are also counting on water from the San Juan River. The proposed settlements of Indian water rights for Taos Pueblo and Nambe-Pojoaque (the Aamodt case) also are demanding a share of water from the San Juan-Chama Project. But these communities may be disappointed, because there is a crisis on the San Juan that will soon affect the entire state.

This legislation is based on the false assumption that there is enough water in the Colorado to satisfy the claims of the Navajo tribe and the other tribes and communities that are competing for water from the San Juan. This proposed settlement, just like the proposals for Taos and Aamodt (and the unfulfilled settlement with the Jicarilla tribe), is based upon wishful thinking, which we can no longer afford in an era of global warming. The latest estimate by the Bureau of Reclamation is just another in a long series of unrealistic hydrological estimates of the amount of water that will be available for all uses in New Mexico. The sheer size of this proposed water deal makes it a threat to the rest of the state. If enacted in its present form, the statute would give a grossly unfair share to a very small group of people.

The ostensible purpose of this legislation is to settle a water rights claim for the portion of the Navajo reservation that lies within New Mexico. According to the 2000 census, there are only 44,636 persons who live on the reservation in New Mexico. U.S. Census Bureau, New Mexico—American Indian Area, GCT-PH1, Population, Housing Units, Area, and Density, <http://factfinder.census.gov>. The census figure includes non-Indians as well as tribal members, so it is almost certain that there are fewer than 40,000 tribal members living on reservation land in New Mexico. These are the only persons who would have claims under the so-called “Winters Doctrine.” This group amounts to only 2.5% of the total population of New Mexico, which is 1,819,046 according to the 2000 census.

The proposed legislation would give one-third of all the surface water in New Mexico to this very small group. The settlement proposes to give the tribe rights to 56% of the water in the San Juan River, which accounts for 60% of the state's stream water. So the settlement would allocate 33.6% of the state's entire supply to satisfy the claims of less than 2.5% of the population.

The legislation would give each tribal member much more river water, per person, than the other citizens of New Mexico. If this draft legislation were passed and fully implemented, the Navajo tribe would be entitled to a depletion of 348,550 acre-feet annually from the San Juan River for the 44,636 tribal members who live on the reservation in New Mexico. This works out to a depletion of 7.8 acre-feet per capita for a tribal member living on the reservation in New Mexico. On a per person basis, this is far more river water than would be left for the rest of the people who live in New Mexico.

According to the best estimates, which are admittedly imperfect, New Mexico has about 2.1 million acre-feet annually in stream flow, after meeting its commitments to other states. New Mexico Water Quality Control Commission, 2006-2008 State of New Mexico Integrated Clean Water Act § 303(d)/§ 305(b) Report at 4. This means that there is about 1 acre-foot of river flow available for each person in this state, on average. To keep some flow in the rivers, the amount of allowable depletion per person would be considerably less than 1 acre-foot. Yet the proposed legislation would allocate 7.8 acre-feet of depletion to each Navajo tribal member on the reservation in New Mexico. This is completely unfair to all the rest of the citizens of New Mexico. The legislation advances the special interests of a very small group, while it damages the long-term future of the entire state.

We request that your staff and the OSE prepare estimates of the per capita water amounts that would be allocated by the proposed settlements in New Mexico, and compare them to the per person amounts that would be left to the rest of the population in this state. These analyses will show that this settlement gives an unfair amount of water to one very small segment of the state's population, at the expense of the rest of the population.

As a matter of sound public policy and water planning, New Mexico's scarce river water should be shared equitably by all of the citizens in the state, so that all citizens have a roughly equal per capita share, whether they are tribal members or not. We support a fair share for everyone, but this legislation does not do this.

THIS LEGISLATION WILL IMPAIR THE WATER SUPPLIES OF LOCAL RESIDENTS WHO  
ALREADY DEPEND ON THE SAN JUAN RIVER

To make room for the proposed Navajo settlement, this legislation squeezes the non-Indian users of the San Juan River. It would leave only 16% of the river to the local people who have actually used the river for more than a century. Under New Mexico's Constitution and water laws, those who have actually put the water to beneficial use have priority, but the settlement tries to push these rights aside. Here is the allocation proposed by the supporters of this bill:

User	Allocation (Percent)	Comment
Navajo Nation .....	56	Irrigation and domestic uses.
Jicarilla Apache Nation .....	5	Most leased for power plants/municipal uses.
San Juan—Chama Project .....	17	Municipal/irrigation uses in Rio Grande Basin.
Power Plants .....	6	Use 9% of total including lease with Jicarilla.
Non-Indian uses in San Juan Basin.	16	Irrigation and municipal uses.

Executive Summary of the Navajo Nation Water Rights Settlement at 4 (Apr. 19, 2005).

The situation for local residents is even worse than these figures show. First, the tribal claims would be given a retroactive higher priority than many local users, even though local people put the water to actual beneficial use, in accordance with New Mexico law, while the tribes have never used most of the water allocated to them. Second, this legislation gives the Navajo Nation control of the entire river, from Navajo Lake at the top, to Shiprock at the bottom.

Third, to make this settlement fit, the OSE is trying to reduce our members' water rights under the 1948 Echo Ditch Decree. In the ongoing San Juan adjudication, the OSE is falsely claiming that our members have abandoned large parts of their water rights under the Echo Ditch Decree. To make this legislation look feasible, the projections by the OSE wrongly assume that non-Indians are only using about half of their Echo Ditch rights, so that non-Indian uses will be reduced from 16% to about 8%. To accomplish this, the OSE, the tribes, the United States, and the power plants are all litigating against our members, to cut back on our vested water rights.

According to one set of projections by the State Engineer's staff, the result will be a reduction of 40% in water use on the Upper San Juan River, a 36% reduction to ditches on the Animas River, and a reduction of 58% to ditches on the La Plata River. (The OSE now claims that these projections are no longer operative, because the OSE and the BOR keep changing their numbers to make them fit.) These reductions would ruin many water users who have depended on this water, and actually used it for more than a century, in order to give the water to new users in the Gal-

lup-Window Rock area, who have never depended upon or used water from the San Juan.

The legislation does not solve the problems associated with the Hogback-Cudei Project and the Fruitland-Cambridge Project. These projects draw water at the downstream end of the San Juan River in New Mexico, so they provide no return flow which can be used in the state. The legislation authorizes the diversion of more water than will be in the river on many occasions.

The Richardson settlement provides for the release of up to 12,000 acre-feet per year from Navajo Dam for use by the tribe for irrigation in the Hogback-Shiprock area. This provision is inadequate and ineffective: the maximum amount is 12,000 acre-feet in any one year, but this amount could be depleted in two or three weeks under really dry conditions. If the shortage in the river is 500 cfs, the water will be gone in about 3 weeks. To have an adequate buffer, there needs to be at least a 65-day supply for both Indian and non-Indian users. As proposed in this legislation, the 12,000 acre-feet is only for tribal users, so it does not increase the water that can be used by non-Indians. And in dry conditions it may still be necessary to place calls on upstream users in order to get this water to the Hogback-Shiprock area at the low end of the river. Under this legislation the tribe will effectively control both ends of the river—Navajo Dam at one end and Shiprock at the other.

THIS LEGISLATION CONTINUES A PATTERN OF UNREALISTIC PIECEMEAL SETTLEMENTS WITH INDIAN TRIBES, WHICH WILL MAKE IT IMPOSSIBLE FOR NEW MEXICO TO FORMULATE A COHERENT WATER POLICY

Unfortunately, New Mexico does not yet have a coherent and comprehensive master plan for the state's water resources. For example, the major rivers have not been fully adjudicated by the courts. Furthermore, there are 19 Indian pueblos, 3 tribes, and 3 Navajo bands in New Mexico. Tribal Map, New Mexico Indian Affairs Department, [www.iad.state.nm.us](http://www.iad.state.nm.us). Most of their water rights have not been settled or adjudicated. Passage of this legislation would make it virtually impossible for the state to develop a realistic long-term plan.

Throughout this process, we have asked some very basic questions, but no one has been able (or willing) to answer them. Some of the basic questions are:

- (a) How much stream water does New Mexico have?
- (b) After allowing for interstate obligations, rainfall variations, and climate trends, how much river water can be diverted for use within New Mexico?
- (c) How much water can New Mexico consume, while still leaving an adequate flow in our rivers?

Obviously, one cannot devise a water plan for New Mexico without some idea of the overall water resources available in the state. But the OSE and the ISC say they have no idea of the aggregate water supply and demand.

At the request of Senator Bingaman, the OSE and the ISC met with us on March 28, 2007, in Farmington. The purpose of this meeting was to give the state's technical experts an opportunity to answer these very basic questions. When we asked these questions, the OSE and ISC representatives said that they had absolutely no idea of the amount of water that might be available for use in New Mexico, not even a ballpark estimate. We repeatedly asked them to give us some idea of the water resources that might be available to the state, recognizing that such estimates are quite imperfect. The OSE/ISC said, repeatedly, that it had no idea whatsoever. The ISC representatives said that New Mexico was currently in compliance with its compact obligations, but the ISC had no idea of how much water would be left after those obligations were met, not even a range of figures from dry years to wet years.

We find this hard to believe. If the OSE and the ISC have no idea of the aggregate water resources of the state, then they are not doing their job. The first step in any long-term water plan is to use the best available and most current data to estimate future water flows, so the state can learn to live within them. Neither the state nor the federal government should make any long-term commitments until these rudimentary questions have been addressed and answered.<sup>1</sup>

<sup>1</sup> In our dealings with the OSE and the ISC, we have observed that they are reluctant to provide data and offer their best professional estimates about the proposed Indian settlements, because those purported settlements have been widely touted by Governor Richardson. Governor Richardson is running for president, and we believe that the OSE and ISC personnel understand that they must stick closely to the script for the Richardson presidential campaign, for fear that their best information and estimates might undermine the campaign. Of course, the personnel at OSE and ISC will deny this, but we have observed first hand that they are operating under political orders from candidate Richardson.

The legislation conflicts with other proposed water settlements that depend on water from the San Juan River, such as the proposed Aamodt and Taos settlements, and the incomplete Jicarilla settlement. There simply is not enough money, or water, to carry out all of these settlements proposed by Governor Richardson's administration. For example, both Aamodt and Taos are conditioned upon the supply of more water from the San Juan River via the San Juan-Chama project. And both settlements demand unrealistic amounts of funding by the federal government.

Under the Jicarilla settlement, the federal government is obligated to buy back 11,000 acre-feet of private water rights beginning in 2000, if requested by the State of New Mexico. For unexplained reasons, the state has not yet made this request<sup>2</sup> but this is likely to occur as pressure on the river increases. In short, the federal government already has outstanding commitments for the Jicarilla settlement, and it should fulfill its existing commitments first.

The Jicarilla settlement allots 32,000 acre-feet of depletion to the Jicarilla Apache Tribe. Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441. According to the 2000 Census, there are 2,755 persons (tribal and non-tribal) living on the Jicarilla reservation. So the Jicarilla settlement allocates an average of roughly 11.6 acre-feet to each resident on the reservation, which is more than 10 times the average amount available to each resident in the rest of the state. Also, the Jicarilla reservation has substantial water sources on the reservation itself. This settlement is grossly unfair and inequitable to the rest of the state. It illustrates the damage that can be done by water settlements that are negotiated in secret by special interests and lobbyists, without public scrutiny and without regard to the interests of the entire state as a whole.

When the Jicarilla allocation is added to the 33.6% share proposed by this legislation, the Jicarillas and the Navajos would control more than 40% of New Mexico's entire stream flow. New Mexico is already short on water, and passage of this legislation would allow these two tribes to corner the market of New Mexico's water. Once these two tribes control all this water, they will try to lease it to non-Indian users in the downstream states in the Lower Basin. To do this, the tribes merely have to let the water flow down the San Juan River to Lake Meade, which is right next to Las Vegas.<sup>3</sup>

To cover up the fact that the tribe will export New Mexico's water to other states, Governor Richardson and the tribe have agreed to mislead the public. In their settlement agreement, Richardson and the tribe added a provision that the tribe must apply to the New Mexico State Engineer for a permit to export water for use in other states. This provision is carefully calculated to create the false impression that New Mexico can prevent the Navajo tribe from selling New Mexico water to other states. Pointing to this provision, Richardson and his appointees have been quick to claim that they have protected New Mexico's interests by preventing the water from being exported. For example, in an Op-Ed article in *The Albuquerque Journal* on April 8, 2007, New Mexico State Engineer John D'Antonio claimed that the tribe has agreed not to export water without the approval of the OSE and the ISC. See attached Exhibit 7.\* The supporters of this bill repeated this deception in *The Albuquerque Journal* on June 24, 2007.

These assertions are false, and the Richardson administration knows that they are false. The Navajo tribe has not agreed that it needs permission from the State of New Mexico in order to export water. At our meeting on March 28, 2007, we asked the OSE and the ISC about this provision. We asked them what would happen if the tribe applies for permission to export water, and the OSE denies them a permit. They admitted that, under existing case law, New Mexico cannot prevent the tribe from exporting water to another state. And the tribe also takes the position that, once the tribe gets the water, the state cannot prohibit the tribe from selling or leasing the water to other states.

In the proposed partial final decree, there is a provision that purports to deal with the export of water, but the provision is unintelligible and self-contradictory: it allows the tribe to litigate its right to export water from New Mexico. Furthermore, the partial final decree will never be entered, because the pre-conditions laid down by the tribe will never be met.

<sup>2</sup>We believe that the OSE and the ISC are under political pressure from the Richardson administration not to make this request, because it would puncture the pretense that there is enough water for all the settlements that Governor Richardson has proposed.

<sup>3</sup>Candidate Richardson is campaigning hard for the Nevada caucuses in January 2008. As part of his campaign, Richardson has pledged to find ways to get Nevada more water from the Colorado River. Richardson's settlement is one way to get more water to Nevada—at New Mexico's expense.

\* Exhibits 1–7 have been retained in committee files.

In other words, Richardson and the tribe have tried to create the illusion that the tribe will not export water, but this is legal double-talk. Perhaps the tribe has agreed to apply for a permit to export water, but if it does not get one, it will still export the water. So the Richardson administration is just blowing smoke to cover up the tribe's plans to sell New Mexico's water to Lower Basin states—like Nevada. If the tribe is allowed to get all this water, it will export most of it.

Therefore, this bill is not just another public works project. This legislation poses a broad question of public policy that must be addressed to the collective wisdom of Congress: Is it the policy of Congress to give 40% of a state's entire water supply to a very small group of Native Americans, so that they can sell the water to other states?

#### THE PROPOSED LEGISLATION DAMAGES THE ENVIRONMENT BY DRAWING MORE WATER OUT OF THE COLORADO RIVER SYSTEM, WHICH IS ALREADY OVERDRAWN

This legislation will inflict severe environmental damage on the Colorado River, because the projects will draw down the river to pump water far away, where there is no return flow to the river, and no recharge to the soils in the river bed. When our members irrigate their lands along the river, a lot of the water is returned to the river by return flows and recharge. This is not the case with NAPI, or with the proposed pipelines.

The San Juan is one of the biggest tributaries of the Colorado River, which is already overdrawn. When New Mexico signed the Colorado River Compact in 1922, it was assumed that the water flow in the Colorado was 16.4 million acre-feet annually. But in 2007, a report from the National Academy of Sciences indicates the flow may be only 13 million acre-feet and dropping, due to global warming. Colorado River Basin Water Management: Evaluating and Adjusting to Hydroclimatic Variability, Executive Summary, [www.nap.edu](http://www.nap.edu), attached as Exhibit 1.\* When the BOR and the OSE offer their opinions that there is enough water, their opinions are not based on the best and most current scientific data from independent studies.

From an environmental point of view, this legislation simply repeats the mistakes of the Animas-La Plata project. The government told our members that we would benefit from that project, but the project has been a disaster.

#### THE PROPOSED LEGISLATION WILL GENERATE MORE LITIGATION

This legislation will not accomplish its objectives, which is to settle the competing claims to the San Juan River. Instead, passage of this legislation in its present form will simply produce more litigation. The legislation is not a comprehensive settlement, because it has not been agreed to by most of the people who have water rights in the San Juan.

These water rights are now being adjudicated in the San Juan Adjudication lawsuit, which is more than 30 years old. San Juan River Basin Adjudication, State of New Mexico, ex rel. The State Engineer v. The United States of America, et al. v. The Jicarilla Apache Tribe and the Navajo Nation, Eleventh J.D. Dist., No. D-111 6-CV-1975-184 (Mar. 12, 1975). If this bill passes, it will just prolong the lawsuit for many more years.

For example, the proposed settlement does not resolve the other claims of the federal government, or of the Ute Mountain tribe.

It is also our understanding that the legislation does not even settle all of the Navajo water claims in New Mexico, such as the claims for the Rajah Band, south of Gallup, in the basin of the Little Colorado River. We do not know whether it settles the claim of the To'hajiilee Band, near Albuquerque, in the Rio Grande Basin.

Moreover, this legislation will not even settle the claims of the Navajo tribe because the purported settlement is a "conditional settlement." The settlement is not effective until future conditions are performed, but it is unlikely that these conditions will be met. Congress has not fully funded the projects that must be completed before the settlement becomes final and binding. Nor has the State of New Mexico. It is highly unlikely that the federal and state governments will provide the money to complete these projects, so the purported settlement will never become final and binding on the Navajo tribe. However, in the meantime, the tribe will claim huge amounts of water for projects which will never be completed. Then the tribe will attempt to lease this water to non-Indian users off the reservation, a use that is contrary to the Winters line of cases. So this legislation will create a whole new set of legal controversies that will have to be litigated, on top of all of the difficult legal questions which already exist.

\*Exhibit 1 has been retained in committee files but is also available at <http://www.nap.edu/catalog/11857.html>.

THE PROPOSED SETTLEMENT LEAVES NO WATER RIGHTS FOR THE LANDS OF THE NEW MEXICO STATE LAND OFFICE, WHICH CONGRESS RESERVED AS AN ENDOWMENT FOR NEW MEXICO'S PUBLIC SCHOOLS AND COLLEGES

This unsettled issue is currently being litigated in the San Juan River Basin Adjudication. The District Court has ruled against the New Mexico State Land Office, and the case is currently being appealed to the New Mexico Court of Appeals. It is likely that the case will ultimately wind up in the New Mexico Supreme Court, and quite possibly in the United States Supreme Court, because it presents a question of overriding importance to New Mexico, Arizona, and the other Western states. The question is this: When Congress reserved sections of land as a permanent endowment for New Mexico's schools and colleges, did it impliedly reserve the water necessary to develop those lands?

The San Juan Agricultural Water Users Association does not take any position on this question. However, it seems inconsistent for the Richardson administration and Congress to say that the federal government impliedly reserved water for Indian tribes but not for public schools.

THE PROJECTIONS BY BOR AND OSE ARE FAULTY, BECAUSE THEY DO NOT ALLOW FOR ANY OTHER RESERVED WATER RIGHTS THAT THE UNITED STATES MIGHT CLAIM

The projections by the BOR and the OSE are incomplete, because they do not make any allowance for any other federal reserved rights. It is certain that the United States will assert claims for other reserved water rights for Indian tribes besides the Navajos. It is also possible that the United States will assert reserve rights for national forests, especially as global warming increases and the national forests dry up. The United States might also claim reserved water rights for other purposes.

Before this legislation proceeds any further, we request this committee to ask the following questions: Is the United States going to claim any other reserved rights against the Colorado River system? Is the United States going to claim any reserved rights for national forests, or national parks, or national monuments, or for any other purposes? How much is the United States claiming, or going to claim, on behalf of other Indian tribes in the Colorado basin?

If the answer to any of these questions is "yes," then these demands against the Colorado River need to be quantified and factored into the projections by the BOR and the OSE. These projections do not make adequate allowance for these claims. In finding that water supplies are likely to be adequate, the projections incorrectly assume that there will be no other claims for reserved water rights.

This question needs to be asked and answered for the entire Colorado River basin, not merely for New Mexico, because a federal reservation of water anywhere along the river will affect every other state. A federal reservation of water, when used, reduces the amount of flow in the river, so it creates shortages that must be adjusted in some fashion. However, the Colorado River compacts are silent on the issue of Indian water rights.

It makes no sense for one agency of the federal government—the BOR—to opine that water supplies will be adequate, without making any allowance for the reserved water rights that will be claimed by other federal agencies.

THE PROPOSED SETTLEMENT IS NOT SUPPORTED BY A PIA STUDY

This legislation creates a dangerous precedent, because it does not require a study of practicably irrigable acreage (PIA) to substantiate the Navajo water claims. Under the Winters line of cases, and as a matter of sound public policy, a tribe cannot be awarded water for irrigation of reservation lands unless it can demonstrate that the acreage can be practicably irrigated, that is that irrigation is economically viable.

This legislation sidesteps this requirement, because there has been no study analyzing the amount of acreage on the Navajo reservation in New Mexico that is viable for irrigation, and no analysis of the amount of water that would be necessary to irrigate those acres. Before this legislation precedes any further, an independent PIA must be conducted.

The New Mexico OSE has stated that the Navajo tribe insisted in its negotiations that no PIA would be performed. In fact, the Navajo tribe is trying to avoid a PIA because it will show that the reservation includes very little practicably irrigable acreage—acreage down in the river bottom around Shiprock.

From decades of personal experience, the San Juan Agricultural Water Users Association can testify that irrigation is a very hard way to make a living, even on the sheltered land down in the river valley. Up on the mesa lands, almost 1,000



feet above the river, irrigation is completely uneconomic, due to high winds, high evaporation rates, and short growing seasons. The experience of Navajo Agricultural Products Industries proves that irrigation is not economically viable. NAPI has been attempting to grow viable crops by irrigation on the mesa top, using pivot sprinklers and water supplied by the Navajo Indian Irrigation Project. Unfortunately, NAPI has been a complete financial failure, even though it is supplied with water at no cost from Navajo Dam, and even though NAPI is heavily subsidized by the federal government and the Navajo tribe. NAPI loses large amounts of money every year. The revenues from NAPI do not even cover its annual operating costs, much less all of the cost of water and the huge capital costs for Navajo Dam and the Navajo irrigation canal.

THE NAVAJO TRIBE HAS ALREADY RECEIVED MORE WATER THAN IT IS ENTITLED TO  
UNDER THE WINTERS LINE OF CASES

This legislation proposes to grant an additional 20,780 acre feet of water to the Navajo tribe in settlement of their claims under the so-called "Winters Doctrine." However, the Navajo tribe is not entitled to any more water from the San Juan River, because it relinquished its claims as part of the creation of the Navajo Indian Irrigation Project.

On May 20, 1960, Paul Jones, the chairman of the Navajo Tribal Council appeared before Congress, accompanied by his Washington attorney. The Navajo chairman testified in favor of the Navajo Indian Irrigation Project, which was ultimately enacted in 1962 as part of Public Law 87-483. In his prepared testimony, he described the Navajo Indian Irrigation Project and made the following statement\*:

All water uses from Navajo Dam would have equal priority. The Navajo Tribe has consented to this, and relinquished its right under the Winters doctrine for the water necessary to irrigate the Navajo Indian irrigation project, in order to provide a practicable plan for comprehensive development of the resources and industrial potential of the San Juan Basin.

The next year, the executive secretary of the tribe reiterated to Congress that the tribe was accepting the Navajo Indian Irrigation Project in satisfaction of its claims for water under the "Winters Doctrine." San Juan Reclamation Project and Navajo Indian Irrigation Project: Hearing on H.R. 2552, H.R. 6541, and S. 107 Before the House Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, 87th Cong. 33 (1961) (statement of J. Maurice McCabe, Executive Secretary, Navajo Tribal Council), attached as Exhibit 3.

Therefore, the tribe's claim for additional water under the "Winters Doctrine" is without merit. The tribe accepted an allocation of water for NIIP in satisfaction of its water claims, as part of the compromises that were necessary to pass the 1962 legislation. The tribe's current claims for water are inconsistent with its agreement almost 50 years ago. Instead of demanding more water, the tribe should honor the agreement it made to get water from NIIP.

Furthermore, the Navajo tribe has already received far more water than it would be entitled to under the Winters line of cases. The cases hold that tribes are entitled to water for irrigation only for practicable irrigated acreage within the boundaries of the reservation, that is, for irrigation that is economically viable. The cases also hold that tribes are not entitled to water for projects that are economically wasteful.

In every instance, an analysis of Winters claims necessarily depends upon the specific facts for each reservation, including its geography, its climate, and economic factors such as distance from major markets. In the case of the Navajo reservation, there is very little practicably irrigatable acreage in New Mexico. The original Navajo reservation was established by Congress as a reservation for a pastoral tribe, predominantly dependent on sheep herding. Congress did not impliedly reserve water from the San Juan River for irrigation of the original Navajo reservation, because anyone familiar with the terrain knows almost none of the reservation's acreage could have been viably irrigated from the San Juan River. Most of the land is too far from the river, too high, too dry, too hot, too cold, and too windy. Within the boundaries of the original reservation, there may be a few small plots that are suitable for irrigation from local water sources, but otherwise irrigation there is not even close to meeting any standards for economic viability.

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\*San Juan Reclamation Project and Navajo Indian Irrigation Project: Hearing on H.R. 2352, H.R. 2494, and S. 72 Before the House Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, 86th Cong. 64 (1960) (statement of Paul Jones, Chairman, Navajo Tribal Council), attached as Exhibit 2.

Some of the later additions to the reservation included land along the San Juan River, and some of this land is economically viable for irrigation. The rest of the reservation in New Mexico is not economically viable for irrigation, because it is too high and too dry. This fact is demonstrated by the complete failure of the Navajo Agricultural Products Industries. The Navajo Indian Irrigation Project was supposed to provide "1,120 family farms for Navajo Indians. It will give a livelihood in related service activities to another 2,240 families, thus providing a decent living for at least 12,000 Navajo Indians. These figures have been supplied by the Bureau of Indian Affairs. Actually, I feel they are excessively conservative." Testimony of Navajo Tribal Chairman Paul Jones on May 20, 1960, Exhibit 2, at 65.

The federal government built Navajo Dam in the 1950s and 1960s, during the happy days when everybody thought that the Colorado River would never run out of water. Navajo Dam supplies huge amounts of water to the Navajo Agricultural Products Industry (NAPI), which grows crops with sprinkler irrigation on the windy high desert, almost 1,000 feet above the river. Much of this water is wasted, because NAPI "has been a huge financial failure," as the Albuquerque Journal reported in a 1999 news article. This "Navajo farm project struggles financially despite millions of dollars in government funding." Even though NAPI loses money almost every year, the Journal also reported that the Navajo tribe wants to expand this money-losing operation in order to protect its water claims. "When more acreage is farmed, the project uses more water. If the tribe doesn't use the water, it is in danger of losing its right to it." Since this article was written, NAPI continues to lose money for the tribe and taxpayers. And despite all the money and water that has been showered on the project, NAPI employs only a few tribal members.

This is an absurd situation, where the tribe feels it must waste water to protect its rights. We believe that the present problem can be solved if the tribe is allowed to make better use of the water it now wastes on NAPI. The San Juan Agricultural Water Users Association is willing to work with the tribe, the OSE, and members of Congress to come up with a solution that allows the tribe to put this water to better use than trying to grow crops on the high mesa. The Navajo Gallup Pipeline might be one of these uses.

Proponents of this legislation contend that this legislation is a fair compromise because they claim that the so-called "Winters Doctrine" would otherwise entitle New Mexico's Indian tribes to virtually all of New Mexico's river water in the San Juan River, with a priority over all non-Indian uses. This is a gross misconception and exaggeration of the Winters line of cases.

In 1907, the Supreme Court ruled that when Congress established the Fort Belknap Reservation on the Milk River in Montana, Congress impliedly reserved some water to fulfill the basic purposes of the reservation, even though Congress said nothing about water rights in the act which created the reservation. The Winters decision might be a reasonable judicial extrapolation of congressional intent, for a particular reservation, but not for others.

The proponents of this legislation are asserting an exaggerated and self-serving version of the "Winters Doctrine." The legislation tacitly and wrongly assumes that the "Winters Doctrine" would give Indian tribes a priority over almost all non-Indian uses for whatever water the tribes could use for any purpose at any time after the reservation was established. The logic of this "pseudo-Winters" doctrine runs as follows:

When Congress established Indian reservations in this area in the 19th century, they impliedly reserved all the water that might be used, even though the Indians were using little, if any, river water at the time. Even though the water would not be used until indefinite times in the future, the priority of all those future uses would date back to the establishment of the reservation.

The problem with this "pseudo-Winters" doctrine is that it gives tribes a retroactive priority over all non-Indian settlers, taking water away from the settlers that have actually used and relied upon water from these rivers for more than a century. This is a bizarre misinterpretation of the Winters line of cases. This pseudo-Winters doctrine is the creation of a small group of lawyers, not Congress. Congress never intended such a result. When Congress opened the West to settlement, it intended the settlers to have permanent water rights, protected like other property rights. When Congress encouraged settlers to move West and develop the land, Congress certainly did not intend to confiscate the settlers' water, without compensation, after the settlers had toiled on the land for a century and a half. Yet this is the result of the pseudo-Winters doctrine that has been invented by a small group of water lawyers acting as advocates for tribal interests. If Congress accepts this misinterpretation of the Winters line of cases by passing this legislation, it would be ratifying the concept that Indian tribes have priority rights to all the waters in the Colorado River system, the Rio Grande, and most other major river systems in the West.

In short, this misinterpretation of Winters takes away the waters that our Anglo and Hispanic predecessors have relied upon since they settled in this region.

THE WATER WHICH THE FEDERAL GOVERNMENT PROVIDES TO THE NAVAJO TRIBE CANNOT BE CHARGED TO NEW MEXICO'S SHARE UNDER THE COLORADO RIVER COMPACTS

The State of New Mexico has no legal obligation to provide water to Indian tribes, so it cannot be charged with the water that is supplied to the Navajos. That water is the responsibility of the federal government, not the state. So the water provided to the tribe in settlement of their water claims must be charged to the federal government, not to New Mexico's share of the Colorado River under the various compacts.

The compacts do not deal with Indian water rights, except to say that they are the responsibility of the federal government. Article VII of the Colorado River compact states that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Article XIX of the Upper Colorado River Basin Compact states that "Nothing in this compact shall be construed as: (a) affecting the obligations of the United States of America to Indian tribes." NMSA 1978, § 72-15-26.

Furthermore, it is not clear how this legislation relates to the settlement of Navajo water claims in Arizona and Utah. Although this legislation is touted as a settlement, it appears that it does not settle the tribe's claims for Colorado River water in Arizona, where the majority of tribal members live, or in Utah. Under the Colorado River Compact, Arizona is a lower basin state, while Utah and New Mexico are upper basin states. If there is to be a settlement of Navajo water claims, it should be a comprehensive settlement of all Navajo claims at once. And any settlement must specify how these claims will be treated under the various compacts affecting the Colorado River system. Any comprehensive settlement must also specify how the federal government is going to obtain the water it needs to settle its obligations (if any) to Indian tribes.

THE GOVERNOR DOES NOT HAVE THE AUTHORITY TO SIGN AWAY WATER THAT BELONGS TO THE PUBLIC, NOT THE STATE

Although Governor Richardson has signed a proposed settlement with the Navajo tribe, it is doubtful that he has unilateral authority to sign away water that belongs to the public, not the State of New Mexico. Article XVI, § 2 of the New Mexico Constitution provides that "the unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Congress approved this and the other articles of the New Mexico Constitution as part of the process by which New Mexico was admitted to the Union in 1912.

NMSA 1978, § 72-1-1 says that "All natural waters flowing in streams . . . within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use." Therefore, the water in the San Juan belongs to the citizens who use it, not to the State of New Mexico. So how could the Governor have the authority to sign a binding deal that purports to commit water which the state does not own? Governor Richardson's unilateral attempt to sign away this water to the Navajo tribe poses serious questions under the New Mexico Constitution, its statutes, and the takings clause of the Fifth Amendment.

THE PROPOSED PIPELINE WILL NOT SOLVE THE WATER PROBLEMS ON THE NAVAJO RESERVATION

The Gallup pipeline would cost more than \$1.5 billion to complete, in current dollars without cost overruns, which are inevitable. As a preliminary step, Congress and the State of New Mexico should commission an independent engineering and cost study by experts who have no vested interest in the project, so that the federal and state governments do not start a project which they cannot finish at a reasonable cost. Without an independent analysis, this project resembles a typical military procurement project: the project boosters are trying to get Congress to buy into the project by using low-ball cost estimates.

Even if the Gallup pipeline is built, it will not supply drinking water to homes on the Navajo reservation. The legislation authorizes, but does not fund, a main trunk pipeline to Gallup and Window Rock. The legislation does not include the distribution pipelines that are necessary to supply water to homes on the reservation, so many tribal members will still be forced to haul water to their homes even if the main pipeline is built. A network of pipes to distribute water from the trunk line is likely to be more expensive than the main pipeline itself. For the amount of

money that would be spent building the main trunk line, Congress could deliver water to more households and communities across the reservation by funding local projects to supply and conserve water. These smaller scale projects would be based on the development of local ground and surface water, with strict conservation measures. This alternative approach has several major advantages:

- A. It actually delivers water to the households and communities that need it most.
- B. It is cheaper and much more cost-effective.
- C. It avoids drawing down the Colorado River.
- D. It encourages conservation rather than consumption.

The San Juan Agricultural Water Users Association could support legislation that provides an adequate supply of drinking water to the reservation and to the Gallup area, so long as it does not draw more water from the San Juan, which is already over-committed. This can be accomplished by a combination of local projects, conservation measures, and perhaps a pipeline that uses some of the water that currently goes to NAPI, where it is wasted.

#### CONCLUSION

In the 1950s, many of our families were removed from their homes and ranches to make way for Navajo Dam and Navajo Lake. All of us were told that the project would protect us from floods, and this has turned out to be true.

But we were also told that the dam would provide us with water in dry times. This has turned out to be untrue.

We were told that there was plenty of water in the Colorado for everyone. This has turned out to be untrue.

We were told that the project would satisfy the tribe's water claims. This has turned out to be untrue.

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STATE ENGINEER'S OFFICE,  
STATE OF WYOMING,  
*Cheyenne, WY, June 28, 2007.*

Hon. JEFF BINGAMAN,  
*Chairman,*

Hon. PETE V. DOMENICI,  
*Ranking Member,*  
*Committee on Energy and Water Development, United States Senate, 304 Dirksen*  
*Senate Office Building, Washington, DC.*

Re: Support for the Northwestern New Mexico Rural Water Projects Act—S. 1171

DEAR CHAIRMAN BINGAMAN AND SENATOR DOMENICI: The State of Wyoming is writing to express our support for enactment of S. 1171, the Northwestern New Mexico Rural Water Projects Act. We respectfully request the Committee's favorable consideration of this necessary authorizing legislation. The State of New Mexico's water rights settlement with the Navajo Nation and the Northwestern New Mexico Rural Water Supply Project will provide a secure, safe source of drinking water necessary to meet basic human needs for Navajo citizens. Thousands of Navajo citizens currently haul water from coin-operated filling stations to their homes and use that water as their only source of domestic supply. The proposed Water Project will also connect to a regional municipal water system to enable New Mexico communities to draw upon a renewable surface water supply, rather than continuing to rely on a depleting groundwater supply for water.

The water supply necessary for New Mexico's Navajo settlement fits within New Mexico's Upper Colorado River Basin Compact apportionment. The settlement provides only approximately 22,000 acre-feet of newly recognized water for the Navajo Nation that will be supplied out of Navajo Reservoir. The settlement confirms and limits the Navajo Nation's ability to use water for previously authorized irrigation projects. New Mexico's Navajo settlement resolves Indian reserved water rights claims and avoids prolonged litigation.

We are advised New Mexico's Navajo Settlement protects existing agricultural and municipal water uses within New Mexico. The Navajo reservation is very large and the reserved water rights claims of the Navajo Nation, absent the Settlement that has been negotiated, could have displaced many existing uses and jeopardized the water supply for some of New Mexico's largest cities. New Mexico's Navajo settlement contains administrative provisions that will enable New Mexico to administer the Navajo Nation's water rights in the event the state needs to curtail rights

pursuant to the Upper Colorado River Basin Compact or the Colorado River Compact.

The Secretary of the Interior has approved the hydrologic determination required by Public Law 87-483 confirming that sufficient water is reasonably likely to be available within New Mexico's Upper Colorado River Basin Compact apportionment. The Upper Colorado River Commission adopted resolutions dated June 19, 2003 and June 9, 2006 expressing support for New Mexico's Navajo Settlement and authorizing legislation to implement the provisions of the Settlement. Further, the April 23, 2007 Agreement Concerning Colorado River Management and Operations executed by the seven Colorado River Basin States affirms each State's right to develop its Compact apportionment.

Thank you for the opportunity to submit this letter in support of the Committee's favorable consideration of S. 1171, the Northwestern New Mexico Rural Water Projects Act. Should I be able to answer any questions, please don't hesitate to contact me.

With best regards,

PATRICK T. TYRRELL,  
Wyoming State Engineer,  
Wyoming Commissioner,  
Upper Colorado River Commission.

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STATEMENT OF GERALD R. ZIMMERMAN, EXECUTIVE DIRECTOR, COLORADO RIVER  
BOARD OF CALIFORNIA

Mr. Chairman and Members of the Committee, thank you for this opportunity to submit written testimony regarding S. 1171. Set forth below are initial comments regarding the provisions in S. 1171 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 S. 1171, and its companion bill H.R. 1970. From our initial review of the proposed legislation, CRB does not, in any way, 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 does have 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.

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. Furthermore, as provided in S. 1171, it should be the first water to be spilled.

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. While the CRB does not have any substantive concerns related to Section 102, it notes that the wording in 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.

#### 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 any decision to support or oppose 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.

#### 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. S. 1171 needs to specifically address: 1) the diversion and use authority in the context of the 1922 Colorado River Compact, and 2) 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 S. 1171 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 S. 1171.

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 water supply, the 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 S. 1171.

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.

#### 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.

The State of Arizona has taken the position that S. 1171 and H.R. 1970 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 S. 1171, 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 a rather rushed 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 its comments, if additional points of concern come out of this process.

On behalf of the CRB, I want to thank the subcommittee and committee for the opportunity to provide this testimony and for giving attention to the comments of the CRB.

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U.S. SENATE,  
COMMITTEE ON ENERGY AND NATURAL RESOURCES,  
*Washington, DC, June 15, 2007.*

ROB PORTMAN,  
*Director, Office of Management and Budget, 725 17th Street, N.W., Washington, DC.*

DEAR DIRECTOR PORTMAN: We are writing in hopes of initiating a constructive dialogue with the Office of Management and Budget (OMB) regarding several pending Indian water rights settlements in New Mexico. The settlements would resolve litigation involving the United States through a negotiated agreement of Indian water rights claims filed in several ongoing general stream adjudications, many of which were initiated by the United States. One such case has lasted more than 40 years. Resolution of these claims have numerous benefits, including (1) improving water management by providing certainty as to the rights of water users; (2) avoiding the direct and indirect costs of litigation to all parties; (3) acting consistent with the Federal trust responsibility to Native Americans; and (4) settling all liability issues associated with the claims.

As your staff is aware, we have three settlements in New Mexico for which we expect legislative action this year. The largest involves the Navajo Nation's water rights claims in the San Juan River basin. We have introduced legislation to implement this settlement (S. 1171) and expect to have a hearing before the Energy & Natural Resources Committee this month. The other settlements involve the Aamodt case, addressing the claims of four Pueblos in the Rio Pojoaque, and the Abcyta case, addressing Taos Pueblo's claims in the Rio Pueblo de Taos (see our earlier letter of May 22, 2007).

The Administration's recent testimony on the Duck Valley Water Rights Settlement Act, and statements by Administration officials regarding the New Mexico settlements, give us strong concern that the Administration is changing its policies on Indian water rights settlements to the detriment of New Mexico. In particular, it now appears that the Administration is interpreting its criteria and procedures for participating in settlements in an overly restrictive manner, unprecedented by any Administration.

The Duck Valley testimony is replete with statements asserting that the State of Nevada should pay a substantial portion of the costs of the settlement. With respect to New Mexico, Administration officials have also stated that there should be no federal contribution for any non-Indian benefits contained in a settlement. These statements are inconsistent with the Administration's position on three recent settlements signed into law by the President: (1) the Arizona Water Rights Settlement Act (P.L. 108-451); (2) the Snake River Water Rights Settlement Act (P.L. 108-447); and (3) the Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34). The Administration's testimony on these settlements did not raise these issues, nor did the testimony discuss federal liability as the basis for determining the level of federal contribution. Moreover, asserting that there should be no Federal contribution for non-Indian benefits in a settlement makes little sense when put into context. The Administration has actively supported legislation to authorize the Water 2025 and Rural Water programs which contain provisions to allow for a 50% and 75% federal cost-share respectively. The projects included in the New Mexico settlements all fall within those programs and, at a minimum, should not be held to different standards merely because they are associated with settlements. The contrary is true. They should engender more support since they are helping to resolve long-standing Federal claims and issues.

Finally, much has been made of the cost of the New Mexico settlements. Granted, they are expensive, but the delegation has worked closely with the parties to reduce the costs. Also, the federal contribution being sought will be spread out over 15-20 years. As noted earlier, over the past four years the President has signed into law three settlements that will ultimately cost the Federal treasury almost \$2.5 billion. The Administration has followed that with active support for a non-Indian water-related settlement involving the San Joaquin River in California that will cost approximately \$650 million. It's also worth noting that during this same time period, the Administration has invested over \$1.6 billion in international water supply programs and spent an additional \$2.3 billion on water infrastructure and management in Iraq. While these expenditures have been necessary to meet acute needs, the situation that exists on the Navajo Reservation, where over 40% of the residents must haul water and have incomes below the national poverty level, is no less acute.

We sincerely hope that OMB reassesses the position it's been signaling on the New Mexico settlements. Failure to support these settlements will result in endless litigation and do nothing to address the pressing need for water that exists in many areas of the country. These matters involve long-neglected federal responsibilities and it is unacceptable policy to have OMB arbitrarily determining winners and losers in the realm of western water. Having worked with you before, we are appealing to you for a better result. We appreciate your consideration of this matter and look forward to hearing from you in the near future.

Sincerely,

JEFF BINGAMAN,  
*Chairman,*

PETE V. DOMENICI,  
*Ranking Member.*