

SJ-17
Nanajo Settlement

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION

**Post Office Box 39
Waterflow, NM 87421**

January 29, 2007

Hon. Jeff Bingaman
United States Senator
703 Hart Senate Office Bldg.
United States Senate
Washington, D.C. 20510

Re: Gallup Pipeline Project / NW NM Water Projects Act

Dear Senator Bingaman:

Thank you for giving us the opportunity to comment upon the proposed legislation entitled "Northwestern New Mexico Rural Water Projects Act." If carried out, this legislation would draw water from the San Juan River (the second largest tributary 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 in the San Juan-Colorado River system.

The San Juan Agricultural Water Users Association represents 36 of the 38 irrigation ditches in the San Juan Basin. The members of our association have water rights from the Echo Ditch Decree 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 consist of about 15,000 irrigators and their families.

With all due respect, the proposed legislation is so fundamentally flawed that it should not be proposed in anything like the present draft. 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.

The legislation will also threaten water supplies elsewhere in New Mexico, because 65% of the surface water in the state flows through San Juan County. As a surface 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.

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This letter outlines some of the major problems with the draft legislation and some of the unanswered questions which it raises. We would be glad to confer further with you and your staff about the problems with the draft legislation and ways to solve them. We believe your staff can play a very important role in gathering information on the basic public policy questions which must be analyzed and answered before sound legislation can be introduced.

1. **The draft legislation takes water out of the river at the expense of long-established users.** According to one study by the State Engineer, the proposed legislation would leave only 16% of the San Juan's water for non-Indian users in the San Juan basin. According to one set of projections by the State Engineer's staff, the legislation could force 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. 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 Gallup-Window Rock area, who have never depended upon or used water from the San Juan.

2. **The legislation would withdraw more water from the Colorado River system, which is already overdrawn.** The legislation would damage what remains of the Colorado River ecosystem, especially because the Gallup project takes water into an arid region more than 100 miles away from the River, where there will be no return flow to the River and no recharge to the aquifer along the River.

3. **The legislation threatens the supply of water to Albuquerque, Santa Fe and other communities on the Rio Grande,** which depend on the supply through the San Juan-Chama Project. The legislation is based on the false premise that there is enough water in the Colorado to satisfy this settlement and the needs of all the other communities that depend on San Juan water. This settlement is based upon unrealistic hydrological estimates of the amount of water that is 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.

4. **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.** 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

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River via the San Juan-Chama project. And both settlements demand unrealistic amounts of funding by the federal government.

5. **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 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.

6. **The legislation is based on a false interpretation of the Winters Doctrine.** 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 water in the San Juan River, with a priority over all non-Indian uses. This is a gross misconception and exaggeration of the Winters Doctrine.

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, insofar as it holds that some water is necessary to fulfill the original purposes for which the land was reserved.

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However, 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 Doctrine. 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 accepted, this misinterpretation of the Winters Doctrine would mean that Indian tribes will 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, it takes away the waters that our Anglo and Hispanic predecessors have used since they settled in this region.**

7. **The proposed settlement leaves no water rights for the lands of the New Mexico State Land Office, which serve 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. A hearing on the State Land Office's claims is now scheduled for February 17, 2007. No matter how the District Court rules, it is anticipated that there will be an appeal on this crucial issue.

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8. **The proposed settlement does not resolve the other claims of the federal government, or of the Ute Mountain Tribe.**

9. **The legislation does not deal with the water being wasted by NIIP and NAPI.** The situation on the San Juan River is becoming critical in large part because of the large amount of water devoted to NIIP and NAPI. NIIP diverts 508,000 acre-feet annually, with a depletion of 267,000 acre-feet. Much of this water is wasted, because NAPI has proved to be economically unviable. NAPI does not benefit the tribe, because it loses money year after year.

10. **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.

11. **The legislation is not supported by a PIA analysis.** This "settlement" seems designed to evade any objective analysis of the practicably irrigable acreage on the Navajo Reservation. If a PIA is prepared, it will demonstrate that this supposed "compromise" gives the tribe more water than a PIA can justify.

12. **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 population figure comes from the 2000 Census; it includes non-Indians as well as tribal members who live on the Reservation.) This works out to a depletion of 7.8 acre-feet per capita for a person 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 1,819,046 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, *2004-2006 State of New Mexico Integrated Clean Water Act § 303(d)/§ 305(b) Report* at 1-2. This means that there is about 1 acre-foot of river flow available for each person in this state, on the 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

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would allocate 7.8 acre-feet of depletion to each person in a very small group. 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 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. We believe that these analyses will show that this settlement gives an unfair amount of water to one 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.

13. **It is not clear how this legislation relates to the settlement of Navajo 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 claims. Furthermore, it should specify how these claims will be treated under the various compacts affecting the Colorado River system. This piecemeal settlement will simply generate more litigation.

14. **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. The State has not yet made this request, 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 those commitments first.

It should be noted that 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, 106 Stat. 2237. 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

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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. 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.

15. **The Gallup pipeline is an uneconomic public works project that will never be fully funded.** It would cost more than \$1.5 billion to complete the project, 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.

Therefore, before this legislation is introduced, it is imperative that the State of New Mexico and Congress set a long-term water strategy for the state as a whole. The first step should include independent studies by disinterested experts on key issues such as: the real cost of the project; the alternatives to the project; practicably irrigable acreage on tribal lands; the amount of reliable river flows in an era of climate change; the water needs of the rest of the state; and consistent guidelines for allocating water per capita.

This is just an outline of some of the problems with this legislation that we can see right now. The draft legislation is so complex that there are undoubtedly major issues that we have not been able to identify yet. And there are many other stakeholders who would have concerns besides the ones we have mentioned. Because this deal was negotiated in secret, most of the other stakeholders are not even aware that it would affect them.

As citizens of San Juan County, we depend on this river for our living, and we know that this legislation would devastate us. But we are being told to shut up, because this is a "done deal," due to support from you and Governor Richardson. We hope this is not true, because this bill does not come close to meeting the standards which you have set as a very careful and thoughtful Senator. We would be glad to discuss all the above issues with you and your staff at any time, and ways to solve them, along with any issues that we have overlooked.

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glad to discuss all the above issues with you and your staff at any time, and ways to solve them, along with any issues that we have overlooked.

Sincerely yours,



Michael B. Sullivan
Chairman
San Juan Agricultural Water Users Association

c: Senator Pete Domenici
Rep. Tom Udall
Rep. Heather Wilson
Rep. Steve Pearce
Nate Gentry
Michael Conner