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THE JICARILLA APACHE NATION

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**Jicarilla Apache Nation
Testimony Submitted to the United States Senate
Committee on Energy and Natural Resources
on S. 1171
The Northwestern New Mexico Rural Water Projects Act
June 26, 2007**

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 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.

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.