

55-17
Navajo Sett

Written Testimony

**San Juan Agricultural Water Users Association
Mike Sullivan, Chairman**

**Before the Committee on Energy and Natural Resources
United States Senate**

**Hearing
June 27, 2007**

Senate Bill 1171

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.

1. 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.

2. 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:

<u>User</u>	<u>Allocation</u>	<u>Comment</u>
Navajo Nation	50%	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 Gallup-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.

3. 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. 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.¹

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 request² 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,

¹ 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.

² 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.

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.³

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.

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

³ 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.

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?

4. 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, 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.

5. 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-1116-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.

6. 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.

7. 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.

8. 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.

9. 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.

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.

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.

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.***

10. 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.

11. 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.

12. 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.