

**Hearing
before Subcommittee on Water and Power of the House Natural Resources
Committee**

**HR 1970
Northwestern New Mexico Rural Water Projects Act**

**Statement of Jim Dunlap
Chairman of the New Mexico Interstate Stream Commission**

July 24, 2007

Madame Chairwoman and members of the committee, I am Jim Dunlap. I am the chairman of the New Mexico Interstate Stream Commission, and I am a resident of the San Juan Basin in New Mexico. 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, HR 1970.

This legislation will authorize construction of an important rural water system for northwest New Mexico, including 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 that will protect existing water rights within the state. 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 you to pass this legislation. We believe this legislation has

been carefully crafted to address water supply needs within New Mexico while protecting the long-standing Law of the Colorado River.

I would like to discuss these issues in further detail.

The 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 that builds off a federal planning process that has been underway for over 30 years. This Colorado River Storage Project Act project utilizes an existing reservoir and will provide a safe, reliable drinking water supply to New Mexico residents that currently haul water or rely on unsustainable groundwater.

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 of water hauling faced by those Navajo families is shocking considering the modern conveniences that most of us take for granted. By providing the backbone for a regional water supply system, the project will enable the Navajos to receive a clean, reliable supply of water.

The project will 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. The project will also 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 hundreds of 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 HR 1970, 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 an initial contribution of \$10 million 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 this project and expects the federal administration to contribute funding for this project commensurate with the federal government's trust and statutory responsibilities. New Mexico expects to be treated 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, in 1962, 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. 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. In addition, depletion limits are included which provide additional benefits to other water users.

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 HR 1970.

Section 102 of HR 1970 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 stored in 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.

Another benefit of stored water for direct flow diverters is contained in paragraph 401(a)(4) of H.R. 1970. When there are at least a million acre-feet in Navajo Reservoir, this provision authorizes the State of New Mexico to administer water released from storage for use by direct flow diverters at a minimum of 225 cubic-feet-per-second, even when inflows to the reservoir are less than that amount. In other words, when the direct flow would otherwise drop below 225 cubic-feet-per-second, water released from the reservoir may be used to keep direct flows at that 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 the settlement, the state will contribute \$10 million for ditch improvements and water conservation projects to benefit the direct flow ditches. Section 309(c) of H.R. 1970 authorizes over \$23 million to rehabilitate the Hogback and Fruitland projects and Section 309(d) authorizes \$11 million of matching funds to rehabilitate non-Navajo 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.

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, thereby confirming authority in the state to comprehensively administer water usage in the basin. 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.

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. 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, as I have mentioned 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.

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.

The States’ Agreement Concerning Colorado River Management recently executed by California, Arizona, Nevada, Utah, Wyoming, Colorado and New Mexico provides extensive

benefits to the lower basin states in terms of protecting and increasing the water available for use in those states. The primary benefit of the agreement to the upper basin states is a reaffirmation of each state's right to develop its Colorado River water entitlement. The Navajo Settlement resolves the Navajo Nation's water rights claims within the San Juan Basin in quantities that fit within New Mexico's apportionment under the Upper Colorado River Compact. Resolution of tribal water rights claims is important to states, tribes, and the federal government, and it is particularly beneficial when the claims can be 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.

HR 1970 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 hauled 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.

The settlement and the water supply project contemplates a pipeline extension to the Navajo Nation's capital in Window Rock, Arizona, on the border with New Mexico. HR 1970

preserves Arizona's right to negotiate its own settlement with the Navajo Nation and water cannot be delivered to Arizona until an agreement is reached within Arizona regarding the water supply allocation and additional approvals are received as may be required under the law of the Colorado River. 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 are objectionable to other 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, but New Mexico believes that each state should be entitled to develop its compact entitlement in the manner that best meets the needs within that state. In New Mexico, have worked hard to resolve complicated Indian water rights claims through a settlement that will address basic human needs. We hope the other states will support us in this effort.

Madame Chairwoman and committee members, the State of New Mexico asks you to support HR 1970. 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, and in its place would provide a clear, safe drinking water supply for northwest New Mexico.