

**STATEMENT
OF ROBERT JOHNSON
COMMISSIONER, BUREAU OF RECLAMATION
AND
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ASSISTANT SECRETARY FOR INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
ON S. 1171**

June 27, 2007

Chairman Bingaman and Ranking Member Domenici, we would like to thank you for the opportunity to appear today to present the Administration's views on S. 1171, the Northwestern New Mexico Rural Water Projects Act. The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has concerns that S. 1171 would increase mandatory spending, delay the full cost of the legislation beyond the 10 year Congressional scorekeeping window, not provide for adequate cost sharing by non-Federal interests, and likely include costs that exceed the Federal government's underlying liability. The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

S. 1171 would amend Federal statutes that relate to the Bureau of Reclamation and the use of water in the Colorado River basin. Major provisions include: (1) authorization for the Bureau of Reclamation to construct and operate a pipeline (formally

titled the “Northwestern New Mexico Rural Water Supply Project”, but generally known as the “Navajo-Gallup Pipeline Project”) to bring water from the San Juan River to the eastern portion of the Navajo Reservation, the Jicarilla Apache Reservation, and the City of Gallup, New Mexico; (2) creation of a Reclamation Water Settlements Fund in the Treasury that could be used to fund activities under this bill and future Indian water rights settlements, to be funded by the diversion of revenues from the existing Reclamation Fund; (3) authorization for the Secretary of the Interior to reserve up to 26 megawatts of power from existing reservations of Colorado River Storage Project power for Bureau of Reclamation projects for use by the Northwestern New Mexico Rural Water Supply Project; and (4) authorization for the Secretary to rehabilitate existing irrigation projects, develop groundwater wells, and establish other funds for the benefit of the Navajo Nation. The bill also includes provisions that would resolve the Navajo Nation’s Federal Indian reserved water rights claims in the San Juan River in New Mexico, although the United States was not party to the final negotiations on this issue.

The Role of the Criteria and Procedures

The Administration has been actively engaged in the New Mexico water settlements. You will recall, Mr. Chairman, that Secretary Kempthorne committed during his confirmation to bringing his energy and concern to the pending water settlements in New Mexico. Consistent with this pledge, we have made it a high priority to better understand the complex issues that must be resolved in each of the proposed New Mexico settlements. Our water rights team has made several trips to New Mexico to visit with the Pueblos, Tribes, the State, local communities, water users, and other

constituencies to these proposed settlements. A few months ago, at the Secretary's request, key officials from the Departments of Justice and the Interior and the Office of Management and Budget traveled to Navajo country to observe first-hand the difficult issues related to water delivery on the Reservation.

Mr. Chairman and members, we are keenly aware of the needs in this area of the United States. On the Navajo Reservation, some people routinely haul water for 20-30 miles several times a week to provide for their basic household needs. Families must travel extended distances to do laundry because washing machines require water hookups which they do not have. There is no question that the Administration officials who traveled to the Reservation came away with powerful and indelible images as well as a better understanding of the needs of Reservation inhabitants seeking access to basic services that are taken for granted by all but a few Americans.

Nonetheless, despite our understanding of the human needs on the Navajo Reservation, we firmly believe that the resolution of substantive and procedural problems raised by this bill will require the active involvement of all parties to the proposed settlement. It is important to have an open and full discussion on all aspects of the settlement, including the specific goals of the Navajo Nation and the State of New Mexico for the settlement of these claims and whether these goals can be met by alternative and potentially less expensive means. This settlement was developed largely without Federal involvement, and, consistent with Secretary Kempthorne's commitment to address these issues, we would welcome the opportunity to continue to engage with the Committee and proponents of this settlement to see if we can identify areas of common ground sufficient to move forward with the full support of the Administration.

One of the first steps in this process, Mr. Chairman, is for us to acknowledge the three New Mexico settlement proposals that are now being advocated to Congress. While the Navajo settlement in the San Juan River is the subject of today's hearing, there are other settlements proposed in New Mexico, as well as in other western states, that require active Federal participation in negotiations. If enacted, the cost of S. 1171, alone, is estimated to exceed 1 billion dollars. If the other two proposals from New Mexico, Aamodt (involving the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque) and Abeyta (involving the Pueblo of Taos), about which the Administration also has raised serious concerns, were to be enacted as currently envisioned by their proponents, total expenditures for Indian water rights settlements in New Mexico alone are likely to exceed \$1.5 billion.

The Administration believes that the policy guidance found in the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("Criteria") (55 Fed. Reg. 9223 (1990)) provides a flexible framework in which we can evaluate the merits of this bill. The *Criteria* provide guidance on the appropriate level of Federal contribution to the settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the *Criteria* call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government. As we have testified previously, the *Criteria* is a tool that allows the Administration to

evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

Provisions of Particular Concern in S. 1171

We would like in the remainder of this statement to provide a synopsis of substantive concerns regarding S. 1171. We will start with the high cost of this settlement. The Administration has concerns about the costs associated with this legislation, and currently opposes the nearly \$1 billion financial commitment embodied in this bill. We are also concerned about the large number of authorizations that the bill contains, including the indefinite amount authorized for construction of the Navajo-Gallup Pipeline. We have not yet been able to fully analyze the costs of this legislation. In 2005, the Bureau of Reclamation estimated that the price of the Navajo-Gallup pipeline would be approximately \$716 million. Reclamation is in the process of updating this appraisal-level price estimate to better reflect current construction conditions, and expects an upward adjustment to nearly \$1 billion for this feature alone. In addition, S. 1171 would authorize Federal expenditures of \$30 million for groundwater wells, \$23 million for rehabilitation of Fruitland-Cambridge and Hogback-Cudei irrigation projects, \$11 million for other irrigation projects, \$5 million for hydrographic surveys, and \$50 million to be placed in a Navajo Nation Water Resources Development Trust Fund to be used by the Navajo Nation for water facility construction and maintenance or implementation of water conservation measures.

The Administration has serious concerns regarding the proposal contained in Title II of this bill to establish a “Reclamation Water Settlements Fund” within the United

States Treasury. Title II provides that revenues of up to \$100 million a year for fiscal years 2018 through 2028, which is a time period outside the Congressional scorekeeping window, be diverted from the Reclamation Fund into the Water Settlements Fund. S. 1171 provides that moneys in the Water Settlements Fund would be available without further appropriation to fund water supply infrastructure authorized under this bill if there turns out to be insufficient funding available through the regular appropriations process to meet the funding and construction deadlines established in this bill. The second priority for the Water Settlements Fund would be to implement other Indian water rights settlements approved by Congress, including water supply infrastructure, rehabilitation of water delivery systems, fish and wildlife restoration or environmental improvement. The Reclamation Water Settlements Fund would terminate in 2030 and any remaining balance would be transferred to the General Fund of the Treasury.

We believe the sponsors of this legislation are looking for stable mechanisms to ensure the availability of funding for Indian water rights settlements around the West. We are concerned, however, that this proposal would allow direct spending not subject to further appropriations for future settlements, preventing future Presidents and Congresses from setting their own priorities with regard to budgeting and appropriating Federal tax dollars. At the present time, use of monies from the Reclamation Fund are discretionary and subject to annual appropriations by Congress.

While S. 1171 does require some cost-sharing in the form of a requirement for partial reimbursement of construction costs from the City of Gallup and the Jicarilla Apache Nation, it is limited. The City of Gallup and the Jicarilla Apache Nation would be required to repay the portion of the construction costs for the pipeline and associated

facilities that the Secretary would allocate to them as their responsibility, but only to the extent of their ability to pay, or alternatively, a minimum of 25% of such allocated construction costs, within 50 years of project completion.

Project proponents assert that the Navajo-Gallup Pipeline Project would qualify as a rural water project under the rural water program being established by the Bureau of Reclamation pursuant to the Rural Water Supply Act of 2006 (P.L. 109-451), legislation which was passed in December of 2006. However, the proposed pipelines envisioned by this bill have not received the level of scrutiny that this newly established program will provide. Under the rural water program, each project must be investigated prior to authorization, and the Secretary must consider whether the non-Federal project entity has the capability to pay 100 percent of the costs associated with the operations, maintenance, and replacement of the facilities constructed or developed as part of the rural water supply project. The Secretary must also recommend an appropriate non-Federal cost-share for the proposed rural water project based on the capability-to-pay of project sponsors, or at least 25% of total construction costs. The program allows the Secretary to consider deferring construction costs allocated to Indian tribes. Under this new program, the Secretary is to forward to Congress recommendations regarding whether or not the proposed rural water project should be authorized for construction based upon appraisal level and feasibility studies and the eligibility and prioritization criteria developed pursuant to the Rural Water Supply Act. The rural water program is intended to target communities of 50,000 inhabitants or fewer. The Secretary may require larger communities to pay a higher portion of project costs. Since Reclamation's rural water program is still under development, we have not evaluated the activities proposed in S.

1171 under the rural water project eligibility and prioritization criteria; these criteria are currently being developed by Reclamation. Upon development, we will actively evaluate whether this project would meet such criteria and could be recommended to Congress for authorization as a rural water project.

We have identified a number of other concerns regarding this bill. These include potential interpretation conflicts concerning the Navajo Indian Irrigation Project; the timing of transfers of title to the Nation; the authorization of Federal grants to support the repair and rehabilitation of certain irrigation projects, and concern that this bill might give the State of New Mexico an inappropriate role in the operation of Federal facilities that are currently operated by the United States under the Colorado River Compact and Reclamation law. Also, the Department of Justice has concerns about the waivers and releases referred to in section 403. First, they are still reviewing these waivers and releases for adequacy. Second, waivers and releases should be stated in full in the legislation because they are critical to the finality of the agreements.

We also note that the bill should require the Secretary of the Interior, rather than the Secretary of the Treasury, to invest amounts in the proposed Reclamation Water Settlements Fund, in order to make use of the investment expertise of Interior's Office of the Special Trustee for American Indians.

Comparing this Bill with Other Water Rights Settlements

Much has been said about the position taken by the Administration on water rights and other settlements over the past few years, suggesting that not supporting S. 1171 as written would be inconsistent with the positions we have taken on previously introduced water settlement bills. We want to squarely address these issues.

First, we emphasize that each proposed settlement is unique. The Administration evaluates each proposed settlement individually. Just as we did with each of the water settlements that have been proposed in recent years, notably the Arizona Water Rights Settlement Act (P.L. 108-451), the Snake River Water Rights Settlement Act (P.L. 108-447), and the San Joaquin River settlement that is proposed in legislation pending in this Congress (S. 27 and H.R. 24), the Administration must evaluate this proposed settlement in its unique context to determine to what extent it is consistent with our programmatic objectives and our responsibility to American taxpayers as well as our responsibility to protect the interests of the Navajo Nation. All of these previous settlements encompassed multiple objectives, providing comprehensive solutions to multi-faceted problems.

In the case of the Arizona Water Rights Settlement Act, the settlement resolved a dispute over the financial repayment obligation of Arizona water users for the Central Arizona Project (CAP), with significant amounts of money at stake. Federal representatives recognized that the CAP operational flexibility necessary to resolve the dispute could only be granted if sufficient legal and legislative protection was achieved to assure tribal access to, and use of, CAP project water. Enactment of the Indian water rights settlements in that Act was key to resolving larger legal issues involving CAP repayments by Arizona water users. Achieving final settlement of these larger issues made the legislation generally acceptable to the Administration, although our testimony did express concern about the cost of the settlement.

The Snake River Settlement in Idaho entailed several complex Endangered Species Act components that allowed further water resources development to occur for

the Nez Perce Tribe and other water users in a manner that also fulfilled the Department's obligation to protect and recover listed species.

The other settlement that has been compared to this bill, the San Joaquin Restoration Program, is in fact not connected to any Indian water rights settlement. The San Joaquin Restoration Program implements a settlement of a lawsuit that had been ongoing for over eighteen years, where a Federal judge had concluded that Reclamation's operations violated a provision of California law. The San Joaquin restoration program also involves cost shares, authorizing up to \$250 million of new Federal appropriations but only as a match for non-Federal funding of the restoration costs. This means that the State of California and Friant water users are funding a significant portion of the restoration costs. Approximately \$200 million of State bond funds for projects that will directly contribute to restoration efforts have already been approved by California voters.

We wish to reiterate however that the Administration is committed to ensuring consistency with the *Criteria and Procedures*. The settlement of the Navajo claims to the San Juan River proposed in this bill has a high Federal cost without appropriate safeguards that carrying out the authorized activities would accomplish the goals and objectives of the proposed settlement. These kinds of analyses should be completed prior to the passage of such a large settlement proposal. In light of the goal of finality, it is especially troubling that this bill does not address the distribution systems that must be constructed before any water will actually reach the homes of those who need it.

Conclusion

The Administration and Secretary Kempthorne remain committed to supporting the Indian water right settlement process and ensuring that such settlements fulfill the

Federal Government's responsibilities to Indian Tribes while also protecting the interests of the taxpaying public. The Bureau of Reclamation, the Secretary's Indian Water Rights Office, and many others in the Department are vigorously working to develop the information and documentation necessary to support a full and open discussion of this settlement. This includes already having developed a draft environmental impact statement on the proposed pipeline and completing the hydrologic determination on water availability in New Mexico. We expect to have an updated appraisal-level estimate of the costs of constructing the pipeline completed in the near future.

The Administration hopes that the entities proposing this legislation, including the Navajo Nation, the City of Gallup, the State of New Mexico, and the Jicarilla Apache Nation, will agree to work together with us towards the common goal: a settlement that will ensure that the Navajo obtain a secure, economically beneficial water supply consistent with our obligations to the taxpaying public. A clean, reliable water supply is of utmost importance to the members of the Navajo Nation, as it is to all Americans, and the United States is committed to working towards achieving it. While much work remains ahead, we are hopeful that this hearing will assist in advancing a process that results in a successful outcome.

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