

SJ-17
Navajo Settle

STATEMENT OF GERALD R. ZIMMERMAN
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BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
OF THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

ON

S. 1171

NORTHWESTERN NEW MEXICO RURAL WATER
PROJECTS ACT

JUNE 27, 2007

Mr. Chairman and Members of the Committee, thank you for this opportunity to submit written testimony regarding S. 1171. Set forth below are initial comments regarding the provisions in S. 1171 from the perspective of the Colorado River Board of California.

I am the Executive Director of the Colorado River Board of California (CRB), the agency in California created by State statute to protect California's rights and interests in the resources provided by the Colorado River and to represent California in discussions and negotiations regarding the Colorado River and its management. California's rights and interests in the water and power resources of the Colorado River System are vital to the State's economy. Seven counties in Southern California, with more than half of the state's population, receive water and hydroelectric energy from the Colorado River. All ten members on the CRB are appointed by the Governor.

The CRB has reviewed S. 1171, and its companion bill H.R. 1970. From our initial review of the proposed legislation, CRB does not, in any way, oppose the Navajo-Gallup Project; and it fully recognizes the value and importance of the Project to the State of New Mexico and to the residents of the Navajo Nation. However, the CRB does want to ensure that legislation of this nature is consistent with the law of the river and is reflective of broader concerns of the State of California. In that regard, the CRB does have a number of comments on the proposed legislation, primarily from the perspective of the law of the Colorado River. These comments are listed in order of the topic's appearance in the legislation.

1. Section 101 – Top Water Bank – Arrangements of this nature are being utilized in various parts of the West where the reservoir circumstances facilitate this sort of interim water storage. However, in this situation the legislation does not clarify how the water to be stored in the top water bank must be developed. It is the position of the CRB that the legislation should be modified to provide that only water created through extraordinary conservation may be stored in the top water bank. In other words, water could only be stored if that water would have otherwise been beneficially used except for the implementation of extraordinary conservation measures. Furthermore, as provided in S. 1171, it should be the first water to be spilled.

2. Section 102 – Amendment of the 1963 Act – This section amends 43 USC 615 jj, which was enacted in 1962 as a component of the Navajo Irrigation Project and San Juan-Chama Project authorizing legislation. Section 2 of the 1962 Act is eliminated and a much more detailed provision has been substituted. While the CRB does not have any substantive concerns related to Section 102, it notes that the wording in subpart (b), relating to priorities in times of shortages is not clear as to whether the first rights listed are to have priority over the others or are the first to be cut back. Clarification of this provision would be useful in obtaining a full understanding of the intention behind the proposed legislation.

3. Section 201 – Funding via the 1902 Act Reclamation Fund – This section of the proposed legislation provides a creative mechanism for funding implementation of

settlement agreements and completion of the Navajo-Gallup Project. The CRB understands that Section 201 provides that \$1.1 billion would be deposited into the treasury before it is set to terminate on September 30, 2030.

Section 201 (c) (3) provides that completion of the Navajo-Gallup Project will be given a priority, for up to as much as \$500 million, if the federal share of Project costs has not been otherwise provided by January 1, 2018. Since the Reclamation Fund is made viable through the repayment of reclamation projects from around the West, many of which are in the State of California, the CRB questions the fairness of providing to the Navajo-Gallup Project a priority position to receive up to one-half of all funds designated for deposit into the new settlements fund. Prior to any decision to support or oppose this section of the bill, the CRB will need to consider this matter further accounting for the likely needs of California projects that are linked to settlement agreements involving the United States. One approach may be to have the new fund be a source of revenue for the Navajo-Gallup Project should additional federal funding be necessary by 2018 on a basis of sharing with other deserving projects in the West, instead of with a priority as set forth in Section 201.

4. Section 303 – Delivery and Use of Water – This section of the bill gets to the heart of the concerns of the CRB regarding the law of the Colorado River and the need to be consistent with the Colorado River Compact of 1922. One concern is the clear provision of authority to use water in the lower basin even though that water will be diverted in the territory of the upper basin. S. 1171 needs to specifically address: 1) the diversion and use authority in the context of the 1922 Colorado River Compact, and 2) water use in the lower basin both in New Mexico and Arizona.

A related concern is with the use of such water in the territory of the lower basin within the State of Arizona so as to serve the community of Window Rock on the Navajo Reservation. The State of Arizona has asserted that such water will need to be viewed as a portion of Arizona's lower basin apportionment and should also come with certain attributes linked to the Central Arizona Project (CAP), such as priority date and repayment of project operations, maintenance, and replacement costs. Mr. D'Antonio for New Mexico has asserted that S. 1171 should "leave open the determination of the source of water for use in Arizona" and that accounting for the water as a diversion of CAP water would "have to be agreed to by all basin states," which has not yet occurred. This issue needs to be resolved among the Colorado River Basin states and the agreed upon solution included in S. 1171.

In the current era of pipelines being proposed to transport water from the upper basin to the lower basin, it is imperative that precedent-setting situations that will impact the law of the river in one form or another be appropriately addressed. In this regard, the transport of water from the upper basin into the lower basin within New Mexico is a rather significant matter, but the further transport of that water into Arizona is an additional significant step. The CRB suggests that legislation authorizing the transportation of water should be clear as to the attributes of the water to be used in such circumstances; for example, the source of water (including linkage to the Arizona Water

Settlements Act, if appropriate), the priority position of that water supply, the U.S. Supreme Court decree accounting arrangements, and any other important attributes such as project operations, maintenance, and replacement costs that may be associated, for example, with the CAP water supply. Thus, the CRB recommends that Section 303 of the bill be amended to provide these points of clarification. In the alternative, authorization for the construction of facilities that move water from the upper basin to the lower basin should be eliminated from S.1171.

If the Arizona position regarding the use of CAP-related water is adopted, the CRB also suggests that attention be given to what additional authority may be needed so as to clearly provide that CAP-related water may be delivered by the Secretary to a portion of Arizona not contemplated as a part of the CAP service area at the time of its authorization in 1968.

5. Section 306 (f) (3) and Section 302 (f) (3) – Application of the Endangered Species Act – These sections of the bill address the “application of the” ESA, but it is unclear as to the intended effect of these provisions.

6. The State of Arizona has taken the position that S. 1171 and H.R. 1970 should not be enacted without a parallel settlement of the rights of the Navajo Nation in Arizona, arguing that all Indian water rights settlements should be comprehensive if possible. Although the CRB understands and appreciates the position of Arizona on this issue, the CRB is not prepared to advance a position on this specific issue at this time.

Nevertheless, it is important to express our concern over the lawsuit filed by the Navajo Nation in 2003 in the United States District Court in Arizona. California agencies represented on the CRB have intervened in that litigation. That suit contains claims that challenge some very important lower basin water management programs. For example, the suit challenges a number of matters related to California’s Quantification Settlement Agreement (QSA): 1) that the National Environmental Policy Act (NEPA) compliance process for the QSA was flawed; 2) that the Record of Decision associated with the Secretary’s approval of the QSA and the Inadvertent Overrun and Payback Policy (IOPP) is flawed; 3) that the NEPA compliance process for the IOPP is flawed; and 4) that the NEPA compliance process for the Interim Surplus Guidelines was flawed.

Similarly, the Navajo Nation has challenged the Arizona Water Banking Authority’s interstate storage program and the federal regulations promulgated to facilitate that program. The Navajo Nation asserts these claims on the foundation that these kinds of water management actions have an impact on the Nation’s claim to Colorado River water in Arizona and its eventual use of that water. However, in reality none of these actions or programs impacts the amount of water available to the Nation as a part of the Nation’s federal reserved rights claims, as a practical matter (actual water supply) or in relation to the availability of Arizona’s unused apportionment to satisfy the Nation’s lower basin claims. This lawsuit presents a cloud over these important river management programs that are of benefit to the basin states. As a result, the CRB

suggests that it be a high priority to obtain a dismissal of that suit whether in the context of the Arizona settlement, the New Mexico settlement, or both.

In closing, I want to reiterate that the CRB does not oppose the Gallup-Navajo Project; however, it does want to ensure that legislation, such as S. 1171, is consistent with the law of the river and is reflective of the broader concerns of the State of California. Additionally, the comments set forth above have been advanced on the basis of a rather rushed review of the proposed legislation and the comments of others. As such, the CRB would like to reserve its opportunity to revise any of the positions advanced above and to add its comments, if additional points of concern come out of this process.

On behalf of the CRB, I want to thank the subcommittee and committee for the opportunity to provide this testimony and for giving attention to the comments of the CRB. Should the subcommittee or committee require any clarification of these comments or additional information, I can be reached at (818) 500-1625, extension 308.
