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**Whipple, John J., OSE**

**From:** Trujillo, Tanya, OSE  
**To:** Whipple, John J., OSE

**Sent:** Thu 7/26/2007 1:24 PM

**Cc:**  
**Subject:** Supplemental Answers regarding S 1171

**Attachments:**  Shirley A FTR.doc(74KB)  Guenther A FTR.pdf(380KB)  Lundstrom A FTR.doc(70KB)

**Questions for Mr. Shirley**  
Energy Committee Hearing- June 27, 2007

**Questions from Senator Bingaman:**

1. **In its testimony, the Administration indicates that it needs to determine what the Navajo Nation's specific goals are for the settlement.**

- *For the record, please articulate the Navajo goals for the settlement.*

As we told the federal assessment team and the federal negotiation team, the Navajo Nation seeks a water rights settlement that provides:

- **CERTAINTY.** Certainty as to what our water rights are, including the water rights for the Navajo Indian Irrigation Project which were not fully described in the 1962 Act. To fully develop a permanent homeland for the Navajo People requires knowing the full extent of our water resources.
- **WET WATER.** A "paper" water right does not benefit people who must haul their drinking water. The Navajo Nation is forgoing a large paper water right in exchange for a smaller paper water right, conditioned on the wet water development outlined in the settlement legislation, including the Navajo Gallup Project.
- **PEACE.** We want a settlement that will reduce the possibilities of future conflicts with our neighbors. Our settlement is structured to create partnerships between the Navajo Nation and its neighbors – the City of Gallup, the Jicarilla Apache Nation, and the City of Farmington, which has passed a resolution in support of the settlement.

2. **The Administration's testimony, as well as other testimony submitted for the record, indicate that there might be cheaper and more efficient means to deliver water to the Navajo Reservation**

- *Has the Navajo Nation considered other alternatives to supplying water to the eastern part of the Reservation? If so, what problems exist with those alternatives?*

The Bureau of Reclamation, in the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project (DEIS), identified various alternatives, including additional groundwater development, water conservation and water re-use. The DEIS concluded that these alternatives would not be sufficient to provide a sustainable, reliable water supply. See: DEIS at IV-4. Wherever groundwater can be utilized, the Navajo Nation plans to utilize those resources and S.1171 includes authorization to develop conjunctive groundwater wells wherever possible to reduce costs. However, the analysis in the DEIS confirms that groundwater will not provide a sustainable long-term solution. The Navajo people have already perfected water conservation and water re-use through generations of water hauling. While water hauling ensures that water is conserved and re-used to the maximum extent possible, water hauling is not sufficient to provide the Navajo people with an adequate and reliable water supply.

3. **Part of the Administration's reasoning for objection to S. 1171 is that it claims that the likely cost of the settlement exceeds the Federal government's underlying liability. This issue has not been discussed much because so much of the focus has been on the critical need for water on the Navajo Reservation.**

- ***Does the Navajo Nation believe that the Federal government has significant liability associated with the Navajo water rights claims? If so, can you generally summarize the basis for that liability? Are the Navajo water rights claims in the underlying adjudication significant enough to potentially displace non-Navajo water users in the basin?***

As you correctly point out, this settlement is about addressing basic human needs; it is not about "counting beans" by the federal bureaucracy. The federal government's trust responsibility and treaty obligations are difficult to quantify in dollar terms, but we are prepared to do so.

We will provide the Administration with a more detailed analysis outlining how the federal government would be subject to significant liabilities in the event this settlement fails. We believe that the United States has substantial exposure for liabilities to the Navajo Nation for failing to protect our water rights, for failing to enjoin others from using water to the detriment of the Navajo Nation, and for encouraging non-Indian water development within the San Juan River basin. In addition to liability to the Navajo Nation, the United States faces potential liability not just to the Navajo Nation but to many other parties within and outside the San Juan River basin. Under almost any litigation outcome, the United States would be exposed to significant liability.

In the event that the settlement fails, and the Navajo Nation were forced to litigate its water rights claims, the Navajo Nation would claim all of the water necessary to ensure a permanent homeland for the Navajo people. Such claims would include not only past and present water uses, but additional water for mining and energy development, domestic and municipal uses, commercial and industrial development, and additional irrigation. Experts working for the Navajo Nation and the United States have identified a number of water claim scenarios that range from modest to substantial claims. We believe that any litigation outcome would award the Navajo Nation more water than they would receive by way of the settlement. The water awarded to the Navajo Nation in this settlement is surely less than water that the Nation could obtain through litigation. (The water in the settlement is essentially: (1) water for existing Navajo irrigation projects at Hogback and Fruitland; (2) water for the Navajo Indian Irrigation Project promised by the 1962 Act of Congress; and (3) about 22,000 acre-feet of "new water" for the Navajo-Gallup Water Supply Project.) Therefore, any litigation displaces existing water users and potentially creates federal liability with respect to those users.

With the settlement the State of New Mexico will be extremely close to full water development under its compact apportionment. Therefore, any water the Navajo Nation would obtain over and above the water specified in the settlement threatens existing water users and jeopardizes the ability of New Mexico to stay within its compact apportionment. It does not take a significant claim by the Navajo Nation to achieve this result. For example, the settlement agreement limits Navajo acreage at the Hogback and Fruitland irrigation projects to 12,165 acres, but the Congressional record on Public Law 87-483 makes reference to a possible 26,000 acres of

irrigable land at just these two sites. *See*: Senate Report No. 2198. The water for this additional acreage would have to either come from existing water users or from water in excess of New Mexico's compact apportionment. In addition, experts for the Navajo Nation and the United States have identified additional irrigable acreage upon which substantial claims could be based. Even a modest award of additional acreage would cause disruption of existing water uses.

Recent decisions in various water adjudications confirm that Indian tribes are entitled to all the water necessary to make their reservations livable as permanent homelands. Such water uses include water for municipal, commercial and industrial purposes. The Navajo Reservation has a substantial population and continued population growth can be expected if the Navajo Nation had sufficient water resources. The municipal water in the settlement agreement is based on a projected forty (40) year projection. If the Navajo Nation were to litigate its claims, it would seek a supply for a much longer period of time. In addition, the Navajo Nation possesses an abundance of natural resources including coal, oil and gas, and uranium. The Navajo Nation claims the waters necessary to develop these resources, including water for energy generation.

Even a modest award of water to the Navajo Nation would prove disruptive to existing water users, including upstream irrigation uses, water diversions for two coal fired generating stations, and the water for the municipalities in the basin. In addition to impacts on these run-of-the river diverters, in order to meet additional downstream Navajo uses, water that would have otherwise been stored at Navajo Reservoir and in the Animas-La Plata Project would be bypassed creating potential shortages to the various federal interests that rely on this water including the Animas-La Plata Project, the Hammond Conservancy District, the Jicarilla Apache Nation, and the San Juan-Chama Project. With respect to the San Juan-Chama Project, it provides a portion of the water supply for the cities of Albuquerque and Santa Fe, and Project water is proposed as the supply necessary to settle the water rights claims of Taos Pueblo and the four Pueblos in the *Aamodt* litigation. By any measure, the United States cannot afford to let the settlement fail, even if the Navajo Nation were only to receive a modest amount of additional water.

The scenarios for even greater exposure could accrue if the Navajo Nation were successful in bringing a more substantial claim in the adjudication. Numerous law review articles have been brought concerning the potential Navajo claims. These articles suggest that were the Navajo Nation to prevail on its claims, the implications on the entire Colorado River water system could be devastating. For example, some commentators refer to the unquantified rights of the Navajo Nation as posing a "hypothetical shock" to the Colorado River. Allen V. Kneese and Gilbert Bonem, *Hypothetical Shocks to Water Allocation Institutions in the Colorado Basin*, NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY at 97 (Weatherford & Brown, eds. 1986). *See also* William Douglas Back & Jeffrey S. Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NATURAL RESOURCES JOURNAL 71, 74 (1980) ("If Navajo *Winters* rights ever are adjudicated, the potential award is staggering.") Therefore, the proposed settlement not only benefits the Navajo Nation and the State of New Mexico, but the entire Colorado River system. If the settlement fails, the potential liability of the United States for disruption of water uses within the Colorado River system is too massive to calculate.

- ***If there is no settlement, will the Navajo Nation challenge the water rights claims of other parties in the adjudication? Has that already occurred?***

In the event that there is no settlement, the Navajo Nation would claim all of the water in the river as necessary to satisfy its homeland needs, including water for municipal, commercial, industrial, mining, livestock and agricultural uses. Because the Navajo Nation lands are largely downstream of all other water users, the upstream water uses would be aggressively challenged.

The State Land Office recently made a claim for reserved water rights in the San Juan River basin. The Navajo Nation, together with several major claimants and the New Mexico State Engineer, has challenged such claims.

**4. The State of Arizona objects to moving S. 1171 until it has a chance to negotiate a settlement on Navajo and Hopi water rights claims in Arizona. Your testimony indicates that the Navajo Nation does not view a settlement of those claims as imminent.**

- ***What is your perspective on how a delay in moving S. 1171 might impact the negotiations? Would it help facilitate a resolution of issues or slow the process down even further?***

The Navajo Nation is committed to good faith water rights negotiations with the State of Arizona. In the late 1990's we engaged in serious settlement discussions with the Arizona water users concerning the Navajo Nation's water rights in the Little Colorado River basin. Those discussions broke down, but were revived only after the Navajo Nation filed its lawsuit in *Navajo Nation v. United States* concerning Navajo claims to the mainstream of the Colorado River in the Lower Colorado River Basin in Arizona.

Although we are negotiating in good faith, we are not certain whether a negotiated settlement Arizona is even possible, let alone imminent. We have a settlement with the State of New Mexico because it is based on identifying and satisfying the needs of the Navajo people in New Mexico. We are disappointed that the Arizona testimony talks about the need to resolve litigation with the Navajo Nation, but no acknowledgment of the real needs of the Navajo Nation to obtain sufficient water rights to create a permanent homeland. And, continue to be frustrated in our settlement efforts with the Arizona parties because there is no real discussion of the needs of the Navajo Nation. Instead all discussions with Arizona focus only on the limited resources the Arizona parties are willing to offer. Frankly, we are unsure of whether a settlement is possible with Arizona given that the state parties insist that a Navajo settlement fits within the parameters of the Arizona Water Settlements Act which contains only a limited amount of water and money.

If a settlement with Arizona can be achieved without compromising or delaying the New Mexico settlement, then we would be happy to have a more comprehensive settlement, but the New Mexico settlement is crafted in a manner that does not require resolution of the Navajo water rights issues with the State of Arizona, and Arizona's ability to reach a settlement with the Navajo Nation will not be impaired if a New Mexico settlement moves forward separately,

Frankly we believe that Arizona is simply attempting to leverage a settlement with the Navajo Nation that fails short of meeting the Navajo Nation's needs, by demanding that the New Mexico settlement include a partial settlement with Arizona.

Requiring a settlement with Arizona gives too many parties without an interest in New Mexico, including the Hopi Tribe, and various non-New Mexico interests, veto power over our New Mexico settlement. In short, it is our view that linking the New Mexico settlement to the Arizona negotiations will only serve to slow the Arizona negotiations even further.

**5. The Gallup Independent recently reported that the Intergovernmental Relations Committee of the Navajo Council rejected a proposed MOU with Gallup and the Jicarilla Apache Nation outlining a process to help Gallup secure a water supply for its share of the Project. Obviously, that's a strong concern if the partners to the Project are not working cooperatively with each other.**

- *What was the basis for the Committee's action and is there a process underway to resolve this issue to everyone's satisfaction?*

The Intergovernmental Relations Committee (IGRC) consists of the chairs of each of the eleven standing Committees of the Navajo Nation Council. As the President of the Navajo Nation, I am not a member of the IGRC. I have discussed the Committee's actions with the Chairperson of the Resources Committee, Delegate George Arthur. The Resources Committee is responsible for overseeing the management of the natural resources of the Navajo Nation.

The Resources Committee unanimously approved the MOU in May; at a meeting where Chairperson Arthur was not present. The MOU was then presented to the IGRC in June. Subsequently, Chairperson Arthur was concerned that some of the language in the MOU created the impression that Project facilities--even those currently being constructed with State funding--could not deliver water to Navajo users until a water supply for Gallup for the San Juan Lateral of the NGWSP was identified. As you know, there are several phases of the Cutter Lateral and that Navajo/Gallup Regional System which are currently being constructed. The troubling language of the MOU has been deleted.

The IGRC also expressed that although the staffs from the City of Gallup, the Navajo Nation and the Jicarilla Apache Nation had worked extensively on drafting the MOU, there have not been any recent meetings among the political leadership of the three entities. Because of the of the recent changes in leadership at the City, the Jicarilla Apache Nation, and among the eighty-eight delegates of the Navajo Nation Council, the IGRC felt very strongly that meetings among all the leaders were critical to ensure that the next steps in this process will be successful.

I am pleased to report that since the June IGRC meeting a process has been developed to address these concerns. On June 22, Chairperson Arthur met with the City of Gallup and assured that the MOU would be put into place. On June 25, Chairperson Arthur met with Jicarilla Apache Nation (JAN). JAN indicated that it is supportive of the settlement and is still engaged in negotiations with the City of Gallup. On July 11, a meeting was held among all three parties. At

that meeting, a schedule was developed to finalize the MOU and Chair Arthur committed to getting the MOU processed by mid-August.

**Questions from Senator Domenici:**

**President Shirley, the Navajo-Gallup Water Supply Project would provide the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup with a long-term water supply. I was very disappointed to learn that the Navajo Nation Council's Intergovernmental Relations Committee recently rejected a MOU that would establish a framework for acquiring water for the City of Gallup. I have made it clear that I will not support a settlement that does not ensure a water supply for Gallup.**

***Questions:***

**1. Are you aware that nearly 30 percent of Gallup residents are Navajos?**

Yes, according to the 2000 Census data 36 percent of the Gallup residents are Native American. Furthermore, more than 85 percent of the students at the public schools within the City's boundaries are Navajo.

**2. Do you share the views of the Intergovernmental Relations Committee?**

The Navajo Nation Council overwhelmingly approved of the Settlement Agreement. I support the position of the Navajo Nation Council on the Settlement.

The Intergovernmental Committee (IGRC) is a committee of the chairpersons of each Standing Committee of the Navajo Nation Council for a total of eleven members with the Speaker of the Council sitting as the Chair. It appears that the positions of the Delegates on the IGRC reflect their personal views and not the views of the Council. In addition, it appears that at least one Delegate was concerned with language in the Memorandum of Understanding the created the impression that Project facilities, even those currently being constructed, would not be able to serve Navajo water users until a number of complicated water arrangements are resolved. I do agree that Navajo water users should not be prevented from benefiting from the infrastructure currently under construction.

With respect to identifying a water supply for the City of Gallup, we all understand that this important issue needs to be resolved for the Project to move forward. I appreciate this need and will do what I can to live up to the Council's commitment to the Settlement Agreement.

**3. How do you plan to ensure that a water supply is made available for the City of Gallup?**

I am committed to finding a water supply for the City of Gallup. Since the June IGRC meeting a process has been developed to address these concerns. On June 22, Chairperson Arthur met with the City of Gallup and assured that the MOU would be put into place. On June 25, Chairperson Arthur met with Jicarilla Apache Nation (JAN). JAN indicated that it is supportive of the settlement and is still engaged in negotiations with the City of Gallup for a long-term water

lease. On July 11, a meeting was held among all three parties to discuss all water leasing options in the MOU, including leases between the Navajo Nation and the City of Gallup. At that meeting, a schedule was developed to finalize the MOU and Chair Arthur committed to getting the MOU executed by the middle of August.

**The Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project does not include distribution systems.**

***Questions:***

**1. How do you plan to distribute the water supplied by the Navajo-Gallup Water Supply Project?**

The Navajo Gallup Water Supply Project is guided in part by a Steering Committee that includes the Indian Health Service, the Navajo Department of Water Resources, the City of Gallup, the Navajo Tribal Utility Authority, the Bureau of Reclamation, the Bureau of Indian Affairs, the Jicarilla Apache Nation, and the Northwest New Mexico Council of Governments. One of the primary technical objectives of this group is to make sure the Project as it is planned and developed meets the real needs of the people in the region. This Steering Committee is coordinating the programmatic resources as they become available as much as possible. For example, to date the State of New Mexico has committed approximately \$17 million in the infrastructure that will convey water from the Cutter Lateral through the local Navajo Tribal Utility Authority public water systems, and approximately \$7 million in the infrastructure that will regionalize the public water systems in the Gallup area. In addition, the Indian Health Service, through its P.L. 87-121 program, is spending resources to meet the distribution needs of the Navajo Nation's drinking water infrastructure and will continue to do so.

The Navajo Gallup Water Supply Project will convey water to a service area that is largely served by the Navajo Tribal Utility Authority (NTUA). NTUA operates more than 90 public water systems on the Navajo Nation with more than 30,000 customers. As proposed in the Environmental Impact Statement appraisal level planning reports, the water conveyed from the San Juan River through the Project will be delivered to the NTUA's systems at more than 20 locations. At each location a tank and booster pump will ensure that the treated water can be further conveyed by NTUA through the current distribution network. As these plans are further refined through feasibility and final design level studies, every effort will be made to fully incorporate the existing NTUA infrastructure into the Project.

**2. To what extent will the Navajo-Gallup Water Supply Project reduce water hauling on the Navajo Reservation in New Mexico?**

Many of the 80,000 Navajo men, women, and children in the Project service area presently do not have clean potable drinking water delivered to their homes; they must haul water, in some cases over many miles, for drinking and cooking. Although construction of the Project will not necessarily eliminate all water hauling on the reservation, the Project will allow the Indian Health Service to expand distribution systems to provide potable water delivery to more homes



and would create growth corridors within the Navajo Nation where future communities can be built with ready access to roads, electricity and potable water.

**Mr. President, you state in your testimony that the Navajo-Gallup Water Supply Project “represents a critical component of the Navajo Nation’s economic strategy.”**

***Questions:***

- 1. Please explain the economic development strategy and how the Project will further economic development for the Navajo Nation.**

The Navajo Nation adopted the *Water Resource Development Strategy for the Navajo Nation* in July 17, 2000. That document concludes that “the lack of a reliable and affordable potable water supply stifles economic growth throughout the reservation” and that “[t]he lack of infrastructure, the lack of economic development and the sustained poverty are closely connected.” Without developed water infrastructure economic development infrastructure is impossible. The Project will provide a backbone of water infrastructure for the Eastern portion of the Navajo Reservation.

The Navajo Nation has identified economic development growth centers through the Nation, such as Shiprock, Crownpoint, and Window Rock. They are large population bases which have the potential to benefit from an economy of scale in infrastructure development. The Project will deliver in such a way to stimulate economic development in these growth centers.

- 2. What health benefits will the Navajo-Gallup Project bring to the Navajo People?**

For those families who will be relieved of water hauling, there should be a decrease in waterborne communicable diseases and other communicable diseases including Hepatitis A, Shigella, and Impetigo are associated with the limited hand washing and bathing practices often found in households lacking adequate water supplies. “The Navajo-Gallup Water Supply Project will ultimately provide water to over 100,000 people who would otherwise haul water, for an estimated total savings in medical expenses exceeds \$318 million over the life of the project.” See Economic Benefit/Cost Analysis, Navajo Gallup Water Supply Project, Dornbusch Associates, April 11, 2006, found at Appendix D of the Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project, March 2007.

**According to the Draft EIS for the Navajo-Gallup Water Supply Project, the Navajo Nation would receive roughly 27,000 acre feet of water per year.**

***Question:***

- 1. Do you believe this amount is adequate to meet the Navajo Nation's long-term needs?**

The design criteria used in the Draft EIS for the Navajo-Gallup Water Supply specifies capacity of 29,062 acre-feet per year for the Navajo Nation including, 6410 acre-feet in Window Rock, Arizona. These capacities are based on a projected forty (40) year demand in the project service area. Certainly this quantity of water will not be sufficient to meet the long-term needs; however, if the settlement is implemented, the Navajo Nation would have 325,670 acre-feet of annual depletions and the right to put those depletions to any beneficial use, including municipal and domestic uses.

**Mr. President, the Navajo-Gallup Water Supply Project would provide water to the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup.**

***Question:***

- 1. Have you developed any agreements with Gallup and the Jicarilla Apaches for the operations and maintenance of the Project?**

The MOU between the Project entities contemplates that an agreement concerning the operation and maintenance of the Project is required. This agreement will be developed after the MOU is executed. We anticipate that the Navajo Tribal Utility Authority will have an important role in operating the Project. We are also looking at various joint utility options for the Project.

**ARIZONA DEPARTMENT OF WATER RESOURCES**  
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Janet Napolitano  
Governor

Herbert R. Guenther  
Director

July 12, 2007

The Honorable Jeff Bingaman  
Chair, Senate Committee on  
Energy and Natural Resources  
366 Senate Dirksen  
Washington, D.C. 20210

Dear Chairman Bingaman:

Thank you for the opportunity to appear before your Committee and present the views of the State of Arizona on S. 1171, the Northwestern New Mexico Rural Water Projects Act, and the opportunity to answer additional questions from the Committee.

Enclosed are my answers to the Committee questions. I would like to reiterate that we stand ready to work with the Committee to make S. 1171 acceptable to the State of Arizona. Should you have any questions, please do not hesitate to call me or my staff.

Sincerely,

*Herbert R. Guenther*

Herbert R. Guenther *e*

Enclosure  
CC: Ranking Minority Member Domenici

**Questions for Mr. Guenther**  
Energy Committee Hearing- June 27, 2007

**Questions from Senator Bingaman:**

1. In 2003, the State of Arizona testified before this Committee that it should move forward with the Arizona Water Settlement notwithstanding the fact that the San Carlos Apache Tribe was not included in the Settlement. At the time Arizona indicated that the settlement need not be comprehensive since the Tribe's rights were preserved in the legislation. That is the same approach taken in S. 1171 – preserving all of Arizona's rights and interests with respect to the use of water in Window Rock.
  - *If the bill were modified to simply state that no water would be delivered to Arizona except in accordance with an agreement with Arizona and appropriate Federal legislation (including Compact accounting), wouldn't this be analogous to the San Carlos situation, allowing the bill to move forward without objection? Are the changes already proposed by the State of New Mexico (D'Antonio letter of June 5, 2007) sufficient to address the Compact issues you raised regarding water use in New Mexico?*
- A. The San Carlos Apache Tribe (SCAT) situation is very different. The primary settlements for the 2004 Arizona Water Settlements Act were the Central Arizona Project Repayment Settlement, the Gila River Indian Community Water Rights Settlement (GRIC), and Amendments to the Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA). The GRIC settlement comprehensively addressed all the GRIC claims. The SAWRSA amendments updated a previously congressionally approved settlement. These two tribal settlements were conditions for final approval of the CAP Repayment Stipulation and Settlement. No other tribal settlement was required under those terms. While the Arizona parties attempted to settle the SCAT claims, we were only able to provide a funding mechanism to the SCAT for further negotiations. In 1992 Congress enacted the San Carlos Apache Water Rights Settlement Act that only settled a portion of the claims of the SCAT. The State of Arizona opposed that legislation based on several factors, including that it was partial. Arizona should have pushed harder for a full settlement. Since that time implementation has been difficult, and litigation has continued non-stop. We do not believe it is in the best interests of the Navajo Nation or the parties to the litigation involving the Navajo water claims to have a partial settlement.

We believe that the better solution for the Navajo Nation would be a complete settlement of its claims in the Little Colorado River Basin and in the Colorado River for lands to be served by the Northwestern New Mexico Rural Water Project, especially in light of the ongoing Navajo Nation litigation against the Secretary. New Mexico states that Arizona's right to choose the source of water is preserved. We have chosen a source of water without hearing objection from the Navajo Nation. Additionally, the Secretary, in the August 25, 2006 Federal Register Notice (71 Fed. Reg. 50449, 50451) concerning Central Arizona Project (CAP) water allocations under the Arizona Water Settlements

Act included 6411 acre feet of NIA priority CAP water for use in a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims for water in the State of Arizona. We believe there is no other source of water available for the Window rock portion of the Navajo Nation settlement. For some reason New Mexico, and maybe the other Upper Basin States believe that Arizona's meager 50,000 af allocation of Upper Basin water should be used for Window Rock. We do not agree.

Our issues with Compact accounting and specific congressional authorization for using Upper Basin water in the Lower Basin, or wheeling Lower Basin water through the Upper Basin can easily be addressed. New Mexico's language for section 303(g) is an attempt to meet some of our concerns. We stand ready to work with Congress to fully address our concerns and work on language to accomplish those goals.

One can argue that this could be left to another day, but we believe Arizona needs the protections that we have proposed as modifications to this legislation in order to prevent future violations of the Compact.

2. Your testimony appears to endorse the concept of creating a Settlement Fund that can be used for this, as well as other settlements. That is the approach set out in Title II of the bill, which is intended to be used for this settlement, as well as other similar matters.

- *What expanded concepts, as set forth in your testimony, do you believe need to be incorporated into Title II?*

A. Over the past decade Arizona has worked with the Western States Water Council and the Native American Rights Fund to find funding solutions for all water settlements. Title II is a creative way to meet all the western states needs. What should be explored is additional amounts of the Reclamation Fund be added to the Reclamation Settlement Fund, and making the Fund available to settlements outside of New Mexico. Arizona specifically wants a portion of the Reclamation Settlement Fund to be set aside for the Arizona Navajo Nation Lower Colorado River Basin and Little Colorado River Basin settlements. The needs of the Navajo Nation are greater than any dedicated funding that is available to Arizona to offer for settlement. With an adequate settlement funding mechanism, settlement in Arizona is likely.

3. Your testimony states that "S. 1171 sets a precedent that New Mexico and Utah can increase development in the Lower Basin and further jeopardize Arizona rights." Arizona seems to be raising a technicality to object to New Mexico making full use of its Compact entitlement. There is ample precedent for a basin state making use of its Compact allocation out of basin. New Mexico did it with the San Juan-Chama project. Utah and Colorado have several transbasin diversions and California takes Colorado River water to the coast. The bottom line is that despite New Mexico's place of use in the State, the Upper Basin is still required to deliver an amount of water to the Lower Basin consistent with the

Compact.

- *Given that background, how are Arizona's rights being jeopardized by S. 1171?*

A. The 1922 Colorado River Compact specifically states that the allocations made in Article III (a) and (b) to the Upper and Lower Basins were for exclusive use in each of those Basins. Only once Congress has authorized an exception to Article III of the Compact to specifically grant a modification of this requirement (see 1968 Colorado River Project Act, 43 U.S.C. 1523(d)). However, this congressional exception was never exercised.

It is true that the Upper Basin states transport water out of the Colorado River basin to other users within their states, but there is no case where Colorado River water is transported between the Upper and Lower Basins. We believe the Compact prohibits transfers from the Upper Basin to the Lower Basin and that the water allocations were intended for the exclusive use within each basin. The Compact definition for the term "Upper Basin" includes "and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry. The Compact negotiators recognized transfers out of basin such as the San Juan-Chama Project and others, which shows the negotiators intent in using the "exclusive use" provision.

Arizona fully supports the Upper Basin states' right to develop their allocations made under the Compact, but only insofar as they are consistent with the Compact. Finding ways around the Compact that allow use of Upper Basin water in the Lower Basin, without first obtaining specific congressional recognition and authorization creates precedent for similar Compact violations in the future, thereby increasing the chance that Arizona will suffer the effects of a Lower Basin shortage. Under the 1968 Act the Central Arizona Project (CAP) and other post-1968 users are first to take shortages. CAP is a primary water source for the cities in the Phoenix and Tucson metropolitan areas. Congress should carefully weigh the equities before allowing such a change in the Compact. Arizona has offered language which would address our concerns, and allow the Northwestern New Mexico Project to go forward.

Questions from Senator Domenici:

*Question:*

1. Mr. Guenther, you oppose this settlement despite the fact that it would provide a reliable source of water to the water-short town of Window Rock, Arizona?

A. The San Juan settlement does not provide water to Window Rock. The settlement and legislation provide a pipeline that could carry water to Window Rock without a designated source of water. Under the present language in S. 1171, only an Arizona settlement with the Navajo Nation will provide water to Window Rock. Without an adequate funding mechanism for an Arizona settlement, as we suggest could come from

Title II of S. 1171, we will not have an Arizona settlement and Window Rock will not receive water. The unintended consequence of S. 1171 will be to divide the Navajo Nation into two classes. One part of the Nation will have a clear right and the necessary finances to provide water to its members, and the other part of the Nation will not.

*Senator Domenici Comment:* As you'll recall, Senator Bingaman and I worked diligently with Senator Kyl to pass the Arizona Water Rights Settlement Act of 2004. You state in your testimony that you would like to delay the legislation we are considering today until we include additional Arizona Indian water rights settlements.

*Questions:*

1. Why did you believe it was appropriate to pursue the Arizona Water Rights Settlement Act of 2004 without including the Arizona Indian water rights settlements you reference in your testimony today?

A. We do recall the great assistance that Governor Richardson, Senator Bingaman and yourself gave in final passage of the Arizona Water Settlements Act, and we thank you for that assistance. However, we also recall that it was the issues raised by New Mexico on the Gila River, both for additional water and new funding (a requested \$200 Million) from the Arizona legislation that delayed bringing the legislation to the full Committee and the Floor of the Senate.

That Act settled the CAP repayment litigation, settled the water rights claims for the Gila River Indian Community, and amended the Southern Arizona Water Rights Settlement Act of 1982 to settle the claims of the Tohono O'odham Nation for a portion of its reservation. While the state parties attempted to settle the San Carlos Apache Tribe (SCAT) claims, we were only able to provide a funding mechanism to the SCAT for further negotiations. Those were the only claims ready for settlement in 2004. The driving force for the Act was the CAP repayment litigation that involved billions of dollars. As we note below in the answer to another of your questions Arizona has settled the claims of 12 of the 21 Indian tribes within the state.

2. Mr. Guenther, please describe for the Committee the status of the negotiations surrounding the resolution of Indian water rights claims on the Lower Mainstem Colorado River and the Little Colorado River basins in Arizona.

A. The negotiations among the state parties, Navajo Nation, Hopi Tribe and the United States are being conducted under a confidentiality order of the United States District Court for the District of Arizona. For that reason we are not at liberty to disclose the detail of those discussions. We can report that the state parties recently made a comprehensive settlement proposal to Navajo Nation, Hopi Tribe and the United States. All the parties will meet again on July 13. The state parties are struggling with the issues related to financing major water project construction to serve the western portions of the Navajo Nation. The state parties believe that it is a Federal obligation to fund these projects, but considering the difficulty in obtaining new appropriations, it may be

unrealistic to expect that level of funding. Arizona is encouraged by the proposed Reclamation Water Settlements Fund contained in Title II of S. 1171, as we noted to Senator Bingaman in answer to his question. If the revenue sources for this Fund could be expanded and made available for Navajo and Hopi projects within Arizona, it is more likely that a settlement could be achieved fairly quickly.

3. When do you estimate these negotiations will be completed?

A. It is hoped that with a funding solution we can complete the settlement quickly. Without a funding mechanism there will likely be no settlement.

*Senator Domenici Comment:* Mr. Guenther, you state in your testimony that we should expand on Title II of this legislation to include funding for a Navajo Nation/Hopi Tribe settlement in Arizona. As you'll recall, the Arizona Water Settlement Act of 2004 contained \$250 million for future Indian water rights settlements in Arizona.

*Questions:*

1. For what Arizona Indian water rights settlements do you plan to use the \$250 million contained in the Arizona Water Rights Settlement Act for future Arizona Indian water rights settlements?

A. Arizona seeks additional help with an Arizona Navajo Nation settlement because the needs of the Navajo Nation far exceed the amount available from the settlement fund of the Arizona Water Rights Settlement Act settlement fund. Arizona has 21 federally recognized Indian Tribes. Four of those tribes have had their rights fully determined by the U.S. Supreme Court in *Arizona v. California*. Congressionally enacted settlements (including the pending implementation of the Arizona Water Settlements Act) have fully settled the claims of another six tribes. Two other tribes have had portions of their reservations settled pursuant to federal authorization. This leaves the Navajo Nation, Hopi Tribe, Hualapai Tribe, Havasupai Tribe, Kaibab-Paiute Tribe, White Mountain Apache Tribe, Pascua Yaqui Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, and portions of the San Carlos Apache Tribe and Tohono O'odham Nation. Even without the Navajo/Hopi settlement it is unlikely that the \$250 million set aside in the Arizona Water Settlements Act will be adequate.

2. How much additional funding do you anticipate will be necessary for the Arizona Hopi and Navajo Indian water rights settlements?

A. As noted above, the confidentiality order constrains what we can say in response to this question. We can report that the Navajo Nation and the Hopi Tribe have both presented funding proposals based on their perceptions of the needs of people on the reservations. The state parties have countered with a much lower number. As yet, the United States has not proposed a funding amount. We believe that the Nation and the Tribe would be willing to confer with your staff about their funding needs.



Submitted  
7/16/07

**Questions for Ms. Patricia Lundstrom**  
**Senate Energy and Natural Resources Committee Hearing- June 27, 2007**

**Questions from Senator Bingaman:**

1. **The Administration suggests that the Navajo and State should stop and revisit the goals of the settlement, and consider whether those goals can be met by alternative and less expensive means. That would seem to throw away almost 2 decades of work.**

*Question: What do you think of the Administration's suggestion? Are there other alternatives out there that the Steering Committee has overlooked?*

**RESPONSE:**

I share the Senator's concern about "revisiting" the goals of the Settlement and of the Navajo-Gallup project, as well as the preferred alternative that has been so rigorously vetted over "almost two decades of work." Now is not the appropriate time for Administration officials to be recommending a return to the drawing boards, in that there has been ample opportunity all along to consider, negotiate, revise and evaluate all possible alternatives. If there are better ways to go ("by alternative and less expensive means"), then it would have behooved Administration officials to recommend specific alternatives well before the current 11<sup>th</sup> hour.

If cost-cutting is indeed the issue of the hour, and if the Administration officials are on a "mission" to reduce cost for its own sake, then our technical partners are primed for further research and analysis in this regard. It should be noted, however, that the Navajo Nation and the State of New Mexico, in particular, have been literally begging the Administration to participate in substantial dialogue on the project's critical cost parameters, with disappointing results until this current nexus point.

We believe the selected alternative to be appropriate to meet project goals, and given the criteria and information from which the Bureau of Reclamation (BOR) cost estimate was derived, the estimate is understandable and defensible.

However this does not necessarily mean the project cannot meet its goals at a reduced price. Although the BOR work has been reviewed by an independent third party (Boyle 2004) and is currently undergoing an independent Design, Estimate & Construction (DEC) review process, these reviews have not – or may not – identify cost-cutting alternatives.

The issue of cost cutting has been the topic of discussion at countless meetings and conversations of the Project's technical committee and its members. The general consensus of the committee members is that considerable cost savings might be achieved through a value engineering process, whereby alternative pipe materials, bedding requirements, building materials, design standards, treatment processes and other project components are analyzed.

Committee members have also discussed taking a third-party design/build approach to the project. However, this would not fit the standard BOR model and would

require that BOR take a role of project management & oversight rather than its own internal design/build approach.

With all due respect to the BOR, whose Western Colorado Area Office staff have served this Project with professionalism and effectiveness, the technical participants from the Project beneficiary entities have advocated a more aggressive look at engineering and cost alternatives, as well as a less bureaucratic and tentative approach to value engineering than would be suggested by BOR's procedures related to "appraisal-level" and "feasibility-level" analyses. Some of our internal technical reviewers have been disappointed that BOR engineers have not been more interested in following up on various on-the-ground projects in the region for information on soils and other issues associated with the particular terrain of this region. Rather, their sense has been that BOR has been in a conservative, tentative and protective mode in its design work, as opposed to being motivated to "build the best and most cost-efficient project."

It is possible that a shift toward private engineering contracts under BOR's general oversight may generate designs and estimates that are more economical, while at the same time realistically meeting project objectives, given known work done in this region – for example, to lay natural gas pipeline, as well as the work currently being done on the local water pipeline projects in the "Cutter Lateral" area of the Project under State funding. Our technical representatives have expressed confidence in the high-level expertise and experience of, as well as the quality of work done by, a number of private firms working in the Four Corners region.

2. **You note that it is the City's position that it will need a high level of Federal funding support for its share of the project costs.**

***Question: Can the City afford at least the 25% cost-share for the Project that is contemplated in the bill?***

**RESPONSE:**

The short answer is that the City of Gallup should be able to plan and carry out a financial strategy that meets the 25% cost share commitment. However, there are some unique factors to be addressed and resolved.

On the surface, it appears that Gallup's rate-payers can afford 25% of Gallup's share of the project costs. However, the economic analysis work done as part of the Navajo-Gallup EIS leaves out one large component of Gallup's current and future expense, which is its need to replace aging infrastructure.

Gallup presently has approximately 71 miles of water distribution piping installed prior to 1966, which will need to be replaced over the next 40 years at an estimated cost of \$42.4 million. In addition, a large portion of the remaining 157 miles of pipe currently in service will be 40 to 60 years old at the time Gallup's cost share becomes due.

Gallup has not stood idly by while its water system deteriorated. On the contrary, Gallup has always had a relatively vigorous capital improvement program, and more recently (2005) it leveraged increased water utility revenue projections to pass \$21

million in revenue bonds (\$10 million for water and \$11 million for wastewater) to address some of the more critical water and wastewater needs.

It is also important to be mindful of the rising cost of other non-discretionary household expenses such as wastewater, power, solid waste, natural gas and fuel when considering the ability of Gallup's rate-payers, a large segment of whom are at or below poverty level, to pay higher costs for this utility.

Due to Gallup's aggressive capital improvement program and steeply inclining rate structure (well above the state average for the average user and second only to Santa Fé for those in the top tier), Gallup's bonding capacity and rate-payers' capacity may be at their limits.

Nevertheless, to proactively deal with the water financing challenge, Gallup is currently re-evaluating its financial position and developing its long-term strategy with respect to the Navajo-Gallup project. One key piece of the strategy will undoubtedly be investment by the State of New Mexico in a portion of Gallup's share of the project costs. City, County, Tribal and COG representatives met in Gallup on July 9<sup>th</sup> with staff from the offices of the Governor and the State Engineer, and I was very encouraged by the spirit of collaboration in this regard. I will be working with the Governor's and State Engineer's Offices and with the State Legislature on a mechanism to specifically include financial commitments to Gallup over time, such as via amendment or regulatory stipulation to the Indian Water Rights Settlement Fund and the Water Trust Fund.

With regard to the City's own commitment to the project cost share, several options are currently under consideration, including:

- inviting the financial partnership of the County of McKinley;
- potential utilization of local taxation and bonding options;
- earmarking a portion of utility revenues for a project sinking fund, to be accelerated in the years 2014 and 2019 when current long-term bond debts are retired;
- user surcharges, possibly ramped upward over time; and
- systematic increases in water rates over time.

It is the City's plan to provide a preliminary report on its financial strategy to Senator Domenici on the occasion of his visit to Gallup on August 15<sup>th</sup>, 2007.

However, until such time as factors such as the cost of water, final OM&R (operations, maintenance & replacement) and capital costs, and construction scheduling are determined, it will be difficult for Gallup to determine what its ultimate financial strategy will be and what its citizens can afford.

In any event, the approach being pursued is that, in partnership with the State of New Mexico and McKinley County, the City will design and implement a strategy to meet the 25% local cost share.

3. **The Gallup Independent** recently reported that the Intergovernmental Relations Committee of the Navajo Council rejected a proposed MOU with Gallup and the Jicarilla Apache Nation outlining a process to help Gallup secure a water supply for its share of the Project.

***Question: How has this action affected Gallup's perceptions of the Project? Is the situation being addressed so the issues with the MOU will be resolved?***

**RESPONSE:**

City officials understand that these kinds of agreements have to go through an extensive consultative process within the Navajo Nation bureaucracy, and it is not uncommon to see concerns raised in the parties' respective legislative forums, even after literally hundreds of technical, legal and jurisdictional details have been discussed and negotiated by experts and officials from all parties concerned.

Some of the Navajo legislators' comments reported in the local press reflect long-lingering sentiments still held by various elements of that Nation's elected leadership. On the other hand, the majority of Navajo leaders, including President Shirley himself, appear to have seen the positive evolution in the relationship between the City of Gallup and its tribal neighbors, to be aware of the cooperative nature of the "Gallup Regional System" projects, and to be convinced that cooperation and partnership is the best policy going forward – especially in sharing the resources of the region's "water commons."

City of Gallup and tribal officials from the Navajo and Jicarilla Apache Nations have met twice recently to discuss this issue. In step with Navajo Nation President Joe Shirley per his June 27<sup>th</sup> testimony, the City of Gallup is likewise confident that the issues with the MOU can and will be resolved.

**Questions from Senator Domenici:**

**Ms. Lundstrom, as you point out in your testimony, the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup would all be served by the Navajo-Gallup Water Supply Project.**

***Questions:***

1. ***What operational structure do you propose to ensure that the Project is maintained and operated properly so that all Project beneficiaries receive water from the Project?***

**RESPONSE:**

I would propose formation of a multi-jurisdictional authority, perhaps similar in nature to the model adopted by the Bernalillo Water Authority. We are in the process of researching models and preparing for consultation with our Steering Committee entities.

Under funding appropriated by the 2006 New Mexico State Legislature, the Steering Committee (with staffing by the Council of Governments) is currently considering operational structure alternatives, with no conclusive recommendations to date. Although a secondary issue during the EIS planning stages, this question is now emerging as an important item to be addressed by the Project parties. The cooperative history of the Steering Committee entities has set a strong foundation for future planning and problem-solving in this arena.

Clearly, residents of the Navajo Reservation stand in primary position to reap the Project's benefits, while another substantial Navajo population will be among the City of Gallup's project beneficiaries (possibly approaching 50% of the City's population during the course of the Project). Additionally, it is the settlement of the Navajo Nation's water rights claims in the San Juan River Basin that will serve as the primary vehicle for the authorization and financing of the Navajo-Gallup project. Thus, the Navajo Nation stands to have a role in defining the operational structure to ensure water delivery to all project beneficiaries.

On the other hand, the Navajo-Gallup project has progressed as a multi-party and multi-jurisdictional initiative, and the other key players represented on the Steering Committee – including most prominently the City of Gallup, the Jicarilla Apache Nation and the State of New Mexico – will likewise have a role in helping to define operational structure, just as they have contributed to most other aspects of project planning. Notably, the City of Gallup has both the financially strongest customer base and the most highly developed water infrastructure among the Project parties, and it will also have a pivotal role in serving as a conduit for Navajo-Gallup project water, through its municipal system, to the rural Navajo communities neighboring the City. Thus, the City will undoubtedly be active in helping to pursue a suitable operational structure for the project.

2. ***Without the Navajo-Gallup Water Supply Project, please describe the water supply outlook for the City of Gallup.***

**RESPONSE:**

The status and trend of Gallup's dwindling groundwater reserve have been well documented, and it has been projected that given the status quo, Gallup may start experiencing water shortages during peak demands as soon as 2010 (Well Production Planning Report, Sterling & Mataya, 1998). It is no secret that groundwater sources within the Gallup region are being depleted and that none of these sources will provide a permanent supply for Gallup or other users in the region.

Gallup has taken fairly drastic measures to extend its available supply by:

- strengthening and expanding the City's water conservation efforts;
- exploring additional interim groundwater supplies (Gallup's "G-22" application to appropriate up to 5,000 acre-feet per year from the San Andreas-Glorieta Aquifer is pending before the New Mexico State Engineer, and an exploratory well is under construction);
- converting major recreational facilities to synthetic turf;

- utilizing treated wastewater to irrigate two athletic fields and the municipal golf course;
- investigating the use of treated wastewater to augment the drinking water supply (study & design of a pilot "reverse osmosis" facility is underway); and
- implementing significant (nearly 60%) water rate increases and an aggressive inclining block rate structure, with the combined effect of reducing Gallup's annual usage from a high of 4,286.5 acre feet/yr in 1995 to 3,460 acre feet/yr in 2006 (nearly 20% reduction) – with the most substantial decline during the drought years of 2003 to the present.

The City has not yet quantified the potential effects of this reduced demand on Gallup's ability to meet projected demands beyond 2010. However, it is reasonable to predict that the effect would be positive – hopefully giving Gallup a few more years to develop alternatives.

It should also be noted that Gallup's projected water demands (10,267.7 acre feet/yr in 2045) would greatly exceed (by over one-third) the 7,500 acre-feet per year in Navajo-Gallup Water Supply Project water deliveries allocated to the City in the project's Planning Report. In this light, Gallup will need to continue its search for additional water sources, while accelerating its implementation of technologies such as reverse osmosis to utilize its supply in the most efficient manner possible.

3. **You state in your testimony that the City of Gallup is concerned with its ability to fund the portion of the Project benefiting Gallup. S. 1171 currently provides that the City would pay at least 25 percent of the portion of the Project that serves Gallup.**

***Question: Do you believe that this amount exceeds what the City is able to pay?***

**RESPONSE:** *[Please note that this response replicates the written response to a similar question posed by Senator Bingaman, documented above.]*

The short answer is that the City of Gallup should be able to plan and carry out a financial strategy that meets the 25% cost share commitment. However, there are some unique factors to be addressed and resolved.

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