

SJ-17
Navajo Sett

Testimony of Mark Sanchez, Executive Director
Albuquerque Bernalillo County Water Utility Authority
June 27, 2007

Senate Committee on Energy and Natural Resources
Senate Bill 1171

The Albuquerque Bernalillo County Water Utility Authority (Authority) was created by the New Mexico State Legislature in 2003 as a partnership between the City of Albuquerque (City) and Bernalillo County. The Authority is the successor in interest to the City for rights to the San Juan-Chama project which was authorized in Public Law 87-483.

The Authority would like to thank the Committee for the opportunity to testify on Senate Bill 1171 and specifically the leadership of Chairman Senator Bingaman and Senator Domenici on this important settlement and legislation. We also would also like to recognize the State of New Mexico, the Navajo Nation and others who have worked very hard on negotiating this settlement.

We understand that S. 1171 settles the Navajo Nation's water rights claims on the San Juan River in New Mexico in addition to providing water supplies for the Navajo-Gallup water supply project. The Authority supports settling the Navajo's claims and strongly endorses the need for providing drinking water under the Navajo-Gallup water supply project. We understand that resolving the Navajo's claims reduces the risk from potentially larger claims which could and most likely would affect the available water supply in the San Juan River for non-Indian uses.

My testimony today is focused on the impacts of the settlement on the long-term availability of water from the San Juan-Chama project. The San Juan-Chama project was authorized in Public Law 87-483 along with the Navajo Indian Irrigation Project (N.I.I.P.).

Our comments include a background on Albuquerque's involvement in the San Juan-Chama project, the need for the water, discussion about the requirements in the authorizing legislation, concerns about S. 1171 and some proposed recommendations. We would like to continue working with our Congressional delegation, the State and Navajo Nation in addressing our concerns and recommendations to preserve and protect the San Juan-Chama project.

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Background on Albuquerque's Involvement in the San Juan-Chama Project

A conceptual layout of importing Colorado water into the Rio Grande basin, from the San Juan River into the Rio Chama (hence San Juan-Chama) was developed in the technical documentation for dividing the waters of the Rio Grande in 1928. The Bureau of Reclamation at that time recognized that the City of Albuquerque was going to need additional supplies in the future and conceptually designed a couple of options for importing the water.

The legislative history for the San Juan-Chama project clearly shows that the City was the primary beneficiary of the project. The water was needed because the Albuquerque was not specifically provided any native water supplies under the Rio Grande Compact. In 1963, the City signed the first contract for an annual amount of 53,200 acre-feet of San Juan-Chama water that was reduced in a contract amendment in 1965 to 48,200 acre-feet per year (during Senator Domenici's tenure on the City Commission).

Under the City's and now Authority's contract, we are required to fully repay the United States all the cost for municipal and industrial supplies apportioned under the San Juan-Chama project including interest during construction. We are also required to pay our proportional share of the operation and maintenance costs for the project on an annual basis. To date, we have invested more than \$ 50 million for San Juan-Chama water and will continue to make payments until 2020.

Albuquerque's Need for San Juan-Chama Water

In the early 1960's, the technical understanding in the Middle Rio Grande region was that the aquifer was an limitless supply that would meet the needs of the City in perpetuity. The City was required to provide surface water supplies to offset the impacts of using ground water and signed the contract for San Juan-Chama water to provide that offset. In 1994, the United States

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Geological Survey published a report that completely changed our understanding of the aquifer, the relationship between the Rio Grande and the aquifer, and that sole reliance on the aquifer will lead to widespread land surface subsidence.

In 1995, the City immediately began a water conservation program and began looking at alternatives for providing a sustainable supply. In 1997, the City Council adopted a new strategy to use San Juan-Chama water as a drinking water source. Since 1997, we have been working to use San Juan-Chama as a drinking water source which will become a reality in July 2008.

The \$ 375 million Drinking Water Project will come on-line in 2008 and will represent 90% of our supply in 2008 and will be our primary source of supply well into the future. The DWP includes a new diversion on the Rio Grande, water treatment plant and forty-six miles of raw water and transmission pipelines to integrate the surface water into the existing water system.

Other San Juan-Chama Contractors

In addition to Authority, there are more than fifteen San Juan-Chama contractors including the City of Santa Fe and the City of Espanola that are planning and developing direct diversion and use of San Juan-Chama water. From a population perspective, San Juan-Chama water will meet the demands of more than one-third of the State of New Mexico in the Rio Grande valley. It is critical that the interests in the Rio Grande are protected in this settlement.

Authorizing Legislation – Public Law 87-483

Under Section 11 on the authorizing legislation, the San Juan-Chama project and the N.I.I.P. project and other contracts entered into for delivery from Navajo Reservoir were required to share in the available supply in any year in which the Secretary anticipated a shortage.

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Specifically, the Secretary was required to determine that sufficient water to fulfill said contract is reasonably likely be available and also the following:

Section 11, (a), paragraph 2:

“The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 2 and 8 of this Act.”

The April 2007 Hydrologic Determination was signed by Secretary of Interior, Dirk Kempthorne on May 23, 2007 fulfilling the obligation that sufficient water is likely to be available for the settlement. However, the second requirement specifically relates to the sharing of shortages and the water supply that would be available to both the N.I.I.P. and the San Juan-Chama project. To date, we have not received anything or discussed with the Bureau or the State of New Mexico about a determination about the water that could be available to the San Juan-Chama project during a shortage and how new contracts could affect that water supply.

In the Section 8 of the authorizing legislation, Congress imposed several operational conditions for operating the San Juan-Chama project. Under paragraph (a) the project diversions are limited to 1.35 million acre-feet in any ten year period and the maximum diversion in one year is 270,000. In paragraph (b), the project shall not cause injury, impairment, or depletion of existing or future beneficial uses of water within the State of Colorado. Under paragraph (b), each of the three diversions in Colorado have monthly bypass flow requirements which provide for passing water to downstream users in Colorado for uses in Colorado under the Upper Colorado River Basin compact.

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Hydrologic Analysis of Settlement

The Authority has hired a consultant to complete an independent hydrologic analysis of the impacts of the Settlement on the San Juan-Chama project as it relates to the frequency and extend of shortages. The Authority anticipates completion of the hydrologic analysis within the next few weeks and would like to share that information with interested parties at that time. There may be changes to the legislation which may affect our hydrologic analysis so we reserve the right to provide additional feedback during this process.

Specific Comments on S. 1171

Section 101 – Navajo Reservoir Water Bank

The creation and utilization of excess capacity in Navajo Reservoir provides flexibility for users in the San Juan basin specifically downstream of the reservoir. It is unclear what water qualifies to be placed in the water bank and more importantly how that water is to be administered to prevent unintended consequences of reducing the ability to store native water in Navajo reservoir. Although the legislation states that the water bank shall be operated in a manner that “does not impair the ability of the Secretary of the Interior to deliver water under contracts entered into under Public Law 87-483”, more specific language should be developed to address what impairment means. Does impairment mean that water that could be stored in the reservoir is lost because there is no capacity to store it? Although the water stored in the water bank is not subject to shortages or releases to meet environmental needs, could this banked water be used to exchange for offsetting implementation of shortages?

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Section 102 – Amendments to Public Law 87-483

Section 102 (a)(2)(b)(1) – the legislation provides for a maximum diversion right over a ten year period for the Navajo Indian Irrigation Project to be the lesser of 508,000 acre-feet per year or the quantity of water necessary to supply an average depletion of 270,000 acre-feet per year.

Although these figures were the subject of intense negotiations, it seems that because there are two different figures that an effort to clarify how these are to be used or what they represent should be specified so as to avoid future misinterpretation.

Section 102 (a)(2)(b)(2) – this provision allows an increase of diversion, but does the 270,000 acre-feet of depletions still apply? It is unclear whether this provision allows for increases in consecutive years or just one year in a ten year period. If a shortage was declared for two years in a row, would they be allowed to increase diversions the following years to make up the difference? We would suggest adding language that this increase in diversion would not be allowed in any year where the Secretary determines that the increase may increase the likelihood of a shortage in subsequent years.

Section 102 (a)(2)(d) – the language in this section does not appear to prohibit the use of Navajo Indian Irrigation Project water to New Mexico. As the water for the settlement is from New Mexico's apportionment of Upper Colorado River water, any use of the water should be limited exclusively in New Mexico. We suggest to add a provision limiting the uses to New Mexico.

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Section 102 (b) - Runoff Above Navajo Dam

It appears that this section was intended to clarify the language in the original legislation, but the original language is left in the bill which may lead to some confusion. Also, the additions that are provided in the section don't necessarily clarify how shortages are to be determined or apportioned. One of the Authority's primary concerns on this settlement is the potential for increases in shortages and who participates in the available supply when shortages are shared. The Authority would like to work with everyone involved to develop language that clarifies who participates in the available supply, how shortages are to be calculated, and specifically limiting the ability to add more shortage partners in the future.

Section 102 (b)(d)(1) – the term “normal” diversion requirements are used as the method of apportionment of water. It is not clear in the paragraphs following what “normal” diversion requirements mean except for the San Juan-Chama project which provides a definite figure.

Section 102 (b)(d)(1)(A) – it is not clear who “contractors” are in this section and it appears that the language should clarify that the diversion requirement is either the normal diversion requirement or in accordance with cropping plans prepared whichever is lower.

Section 102 (b)(d)(1)(B) – if we know who and what the water delivery contracts are, they should be specified in the legislation rather than just general language so as to avoid confusion in the future and to provide certainty for those contracts that are part of the sharing of shortages.

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Section 102 (b)(d)(3) – this new language allows the State to arbitrarily reduce the amount of water for Navajo contractors and the San Juan-Chama project to meet the Upper Colorado River Basin Compacts. The State of New Mexico has stated on a number of occasions that they have the ability to limit diversions under State law to meet compact requirements. In addition, this provision is unconstitutional because this provides the state the opportunity to avoid priority administration by arbitrarily deciding to reduce diversions by only some entities and not others. The Navajo reservoir and San Juan-Chama contractors are not the only uses of the basin and should not be singled out to meet compact obligations nor pay the price for over diversions by others. This language does not appear in the Jicarilla water rights settlement nor any other settlement and does not belong in this legislation. It should be deleted.

Section 102 (b)(e)(1) – this language attempts to prioritize how shortages are allocated, but could also be read to say that this is the order in which entities get water. This should be clarified to meet the intent that Arizona, aquifer storage and recovery and so on are the lowest priorities.

Section 102 (b)(e)(3)(g) – this section gives the Secretary the ability to revise a shortage, but it is unclear how physically water is to be administered. For example, if the early runoff predictions are low and a shortage percentage is applied during spring runoff and later in the summer months rainfall allows for removing the shortage, how can the San Juan-Chama project increase diversion given the bypass flow requirements? In other words, the San Juan-Chama project could suffer a shortage because of early runoff predictions while others don't suffer a shortage when intermittent rainfall allows for increased diversion later in the year and San Juan-Chama is not allowed to increase diversions due to bypass flow requirements.

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Section 102 (b)(e)(3)(h) – the Authority advocates that a sharing of shortage agreement between the parties be developed and approved such that the Secretary has specific direction as to how and when to apply shortages. This would simplify this difficult situation and would provide certainty to all of the parties about how and when shortages are to be applied.

Section 303 – Delivery and Use of Northwestern New Mexico Rural Water Supply Project Water

Section 303 (b)(3) – the ability to increase allocations is very troubling as additional uses from Navajo reservoir will obviously increase the likelihood of shortages to other contractors including the San Juan-Chama project. Why would the new users and contractors for the reservoir have the right to increase allocations when other contractors do not have the same ability? This should be clarified.

Section 307 – San Juan River Irrigation Projects

Section 307 (a)(1) and (2)

Under Section 11, paragraph (a) of Public Law 87-483, the water requirements for the existing Fruitland, Hogback, Cudia and Cambridge Indian irrigation was limited to total amount of irrigation of 11,000 acres. These two new sections increase that amount to more than 12,200 acres of land thereby increasing the amount that is not subject to sharing of shortages. We assume that the original language would govern the amount for sharing of shortages, but this should be clarified.

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Section 401 - Agreement

Section 401 – it is unclear whether this legislation defines the Navajo Nations water rights or are there additional documents that supplement their right. In accordance with Section (a)(1), this legislation governs over other agreements, court decrees, etc., then we would suggest that this legislation be amended to avoid future confusion.

Section 401 (b)(1)(b) and (c) – this is the same comment as previous as it relates to how sharing of shortages are to be calculated. Which is the correct figure and how is it to be used for determining apportionments?

Section 401 (f)(2)(iv) – it is unclear what happens to the agreement, sharing of shortages if the agreement is null and void. If titles I and III are void, does that also void the authorization in Public Law 87-483? Does the acreage for Fruitland, etc. remain as the 11,000 acres. It seems that clarification is needed to provide direction about what happens in the event that titles I and III are void.

Additional Comments:

1. In earlier drafts of the legislation, the Authority expressed concerns about protecting the use of San Juan-Chama water in the Rio Grande under Public Law 108-447 (2004). We would like to ensure that nothing in this settlement affects that legislation.
2. The Authority, other San Juan-Chama contractors and the State of New Mexico have expressed concern about how efficiently the San Juan-Chama project is being operated. The Secretary of Interior should be directed to efficiently operate the San Juan-Chama project to maximize diversions on the San Juan River that are allowed under Public Law 87-483.

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The impacts from any future reductions in San Juan-Chama diversions as a result of this settlement could be significantly reduced by requiring the Secretary of Interior to maximize the operations of the San Juan-Chama project. For example, the Bureau of Reclamation UC Regional Director arbitrarily increased the bypass flow requirements for the Little Oso diversion in 1977 which had the effect of reducing firm yield by 400 acre-feet per year. There are other operational issues that affect the project which should be examined and reported to the San Juan-Chama contractors.

3. The Bureau of Reclamation has produced many different hydrologic analysis of the available water supply for San Juan-Chama project diversions. The most recent average annual diversion for the San Juan-Chama project as shown in the Bureau's Hydrologic Determination signed by the Secretary of Interior states that 105,200 acre-feet would be available on an average basis. It is not clear whether the Draft 1999 Hydrology Report to examine the San Juan-Chama Firm Yield used that figure or something higher or lower. It is critical that the hydrology that the Bureau is using on the San Juan river match the figures used by the Bureau in the Rio Grande.

This is very important as the State and others are negotiating other Indian and non-Indian water rights settlements based on the availability of the 2,990 acre-feet of uncontracted-for-water. The question is whether the revised hydrology shows whether the 2,990 acre-feet is really available or whether than use will cause shortages for other San Juan-Chama contractors.

4. The two legislative acts, the Settlement Act and S. 1171 are supposed to complement each other as it relates to the Navajo's water rights. There is differing language between the two Acts as to how available supplies will be calculated and how shortages will be allocated. The two Acts should use the same language or be merged into one Act to avoid discrepancies.