

**STATEMENT OF HERBERT R. GUENTHER
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WATER RESOURCES
REPRESENTING THE STATE OF ARIZONA**

BEFORE THE

**SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON RESOURCES**

UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 1970

NORTHWESTERN NEW MEXICO RURAL WATER PROJECTS ACT

JULY 24, 2007

Madam Chairwoman and Members of the Subcommittee,

Good morning and thank you for the opportunity to present the views of the State of Arizona on H.R. 1970, the “Northwestern New Mexico Rural Water Projects Act of 2007”.

H.R. 1970 represents another important step toward the settlement of long standing water rights claims held by the United States government on behalf of American Indian Tribes. The Navajo Nation is the largest Tribe in Arizona measured both in terms of population and land area. The Navajo Reservation lies within the boundaries of three states: Arizona, New Mexico and Utah. It also lies within one of the most arid regions of the United States and the lack of water development and infrastructure has created a great hardship on the Navajo Nation’s residents, both in terms of economic opportunity and general lifestyle. The geography of the Reservation is also complicated in a hydrologic sense because it encompasses land which is located in both the Upper and Lower Colorado River Basins.

H.R. 1970 contains provisions that will greatly aid the portion of the Navajo Reservation within New Mexico and, potentially, within a portion of Arizona. Arizona is supportive of the efforts of the State of New Mexico and the Navajo Nation in completing a water rights settlement agreement. We are supportive of the provisions of H.R. 1970 that create a funding mechanism to ensure that necessary water development projects will be constructed in a timely manner. We are supportive of the creative efforts of the New Mexico congressional delegation to ensure that there will also be non-Indian

beneficiaries who will receive water from the rural water projects, and we are generally supportive of the opportunity for the State of New Mexico to make full use of its Upper Colorado River Compact entitlement. The Committee should remember that the San Juan River is part of the Colorado River system as defined in the 1922 Colorado River Compact (1922 Compact) approved by all seven Colorado River Basin States. In this regard, programs and settlements in the San Juan Basin affect the Colorado River as a whole, and vice versa.

While generally supportive of this settlement, we cannot support H.R. 1970 as it has been introduced because we have several concerns about the implications of certain provisions to the existing "Law of the Colorado River," and about the provisions that relate to uses of water from the Northwestern New Mexico Rural Water Supply Project (Navajo-Gallup Pipeline Project) within Arizona and in portions of New Mexico located in the Lower Colorado River Basin. Specifically, as introduced, H.R. 1970 would violate provisions of the 1922 Compact related to the use of Colorado River water allocated "exclusively" to the Upper Basin to be used in the Lower Basin. The bill does not make provisions for the proper accounting of water deliveries under the Compact at Lee Ferry. H.R. 1970 does not specify how the accounting and delivery of water for tribal use in Window Rock, Arizona would be handled. H.R. 1970 would also set a precedent in that it would subordinate Arizona's share of water in the Lower Basin of the Colorado River to allow new uses in the Lower Basin.

Arizona and Arizona water users believe there is an opportunity to provide even more certainty for the Navajo Nation and the Hopi Tribe by including additional Titles which will settle water rights claims within the Lower Mainstem Colorado River and Little Colorado River basins within Arizona. The two Tribes are actively participating in ongoing negotiations with governmental and non-governmental interests in those basins. We are optimistic that the parties will complete a water rights settlement agreement in a timely manner so that H.R. 1970 can be amended to become a more comprehensive solution. Therefore, we believe Congress should not take final action on H.R. 1970 until we have a chance to see if Arizona tribal and non-Indian parties can achieve this Arizona settlement goal.

Additionally, an impetus for Arizona (as well as governmental and non-governmental entities in California and Nevada) to negotiate with the Navajo Nation is a direct response to the Navajo Nation lawsuit against the Secretary of the Interior about operation of programs on the Colorado River, including interim surplus guidelines, interstate water banking, overrun and payback provisions, certain Colorado River allocations, and protections of Lakes Mead and Powell. This 2003 U.S. District Court lawsuit has been stayed pending negotiations among the parties over Navajo Nation Colorado River claims. The lawsuit is a cloud over the programs to conserve and deliver Colorado River water to all the Basin States; threatening operations that benefit all seven Basin States. It is a logical conclusion that the recent historic agreement of the Seven Basin States of the Colorado River on shortage guidelines and the coordinated operations of Lakes Mead and Powell would also be challenged. Failure of that new agreement could mean years of dispute among the States. Of course a successful Arizona water

rights settlement would remove this cloud. Therefore, we believe that Congress should not take final action on H.R. 1970 without a resolution and dismissal of the Navajo Nation lawsuit concerning the Colorado River.

Title II of H.R. 1970 creates the Reclamation Water Settlements Fund. This Fund will be used to construct project features that are required to implement a congressionally authorized settlement agreement. The State of Arizona is supportive of the concept for funding that is described in Title II. However, we believe that the funding need is worthy of even greater consideration. Indian water rights settlements are being actively negotiated throughout the United States. Funding of these settlement agreements is the single greatest impediment to their successful completion. We believe it is time for Congress to address the funding issue on a more comprehensive basis.

Many of the water rights being contested throughout the West are rights that were “reserved” by the United States at the time of the creation of the Indian reservations. In many instances, the United States has failed to fulfill its intent in reserving that water for the Reservations and has left the Tribes without the means to create a true tribal homeland. In Arizona and other Western states, many of the Tribes have recognized that they will have a better chance to obtain the necessary funding which will lead to on-Reservation development by entering into a water rights settlement rather than pursuing their claimed rights through lengthy and expensive litigation. In most instances the Tribes have settled for less water than they had claimed in Court, but they were provided with the funding mechanism to actually put that water to near-term beneficial use. This trade-off is essential for a Tribe to make such a major concession regarding their valuable water rights claims.

Having a dedicated water rights settlement fund with a dedicated funding source will allow not only the Northwestern New Mexico Rural Water Supply Project to be built but also many other worthy projects in other states. The Committee should look at expanding Title II so that the Reclamation Water Settlements Fund can have even greater potential for dedicated revenues. The time frame for those deposits should be at least fifty years. Withdrawals from the Settlements Fund for projects other than the Northwestern New Mexico Rural Water Supply Project will still be subject to the conditions placed upon them by Congress when future settlements and projects are authorized. We urge the Committee to explore opportunities to build on the Settlement Fund concept by contacting the Western Governor’s Association and the Western States Water Council. At a minimum, H.R. 1970 should contain provisions for the funding of a Navajo Nation/Hopi Tribe settlement in the Lower Basin of the Colorado River if a settlement is authorized by Congress. It would greatly benefit the Navajo Nation and Hopi Tribe in their water development plans.

In addition to the need to first resolve the Navajo lawsuit and water rights claims in Arizona, Arizona is concerned that H.R. 1970, as currently drafted, conflicts with the Law of the River. H.R. 1970 contains several provisions related to deliveries of water through the Northwestern New Mexico Rural Water Supply Project to locations in the Lower Colorado River Basin, including the Window Rock area of the Navajo

Reservation within Arizona. In an attempt to be non-committal about the source of water to be used for the Arizona component, the bill's drafters have created confusing and potentially troubling language. The problem arises because Window Rock, Arizona and Gallup, New Mexico are located in the Lower Basin of the Colorado River as defined in the 1922 Compact, but the point of diversion of the water from the San Juan River is in the Upper Basin portion of the Colorado River. Arizona believes that the terms of the Colorado River Compact prohibit the use of an Upper Basin water allocation in the Lower Basin, and vice versa. However, the State of Arizona can accept an explicit exception to this prohibition as long as it is clear that the use of water across the basin boundary is for a specific project and that the project is within the same state that holds the allocation. Arizona does not believe that the language of paragraph 303(g), which describes consistency with the Upper Colorado River Basin Compact adequately addresses the issue or meets the requirements of the Colorado River Compact. We believe that an explicit congressional exception to the provisions of the 1922 Colorado River Compact is required.

The Arizona Water Settlements Act (AWSA) of 2004 (P.L. 108-451) contains a provision reserving for allocation 6,411 acre-feet per year of Central Arizona Project (CAP) water supply for use in the Window Rock area of the Navajo Nation pursuant to a future congressionally authorized settlement. This provision was agreed to by Arizona at the insistence of New Mexico. The terms and conditions for making this allocation are enumerated in §104(a)(1)(B)(ii) of the AWSA. This is the only water supply source that Arizona will agree may be utilized for delivery through the Northwestern New Mexico Rural Water Supply Project to the Window Rock area. The CAP water is a Lower Basin Colorado River entitlement and the water will be used in the Lower Basin. We believe this comports with the provisions of the Colorado River Compact.

However, Arizona is concerned that this source of water for Window Rock may be at risk. As the Committee may know, the Navajo Nation opposed the AWSA, and they continue to oppose approval of the Gila River Indian Community Settlement which is a requirement for bringing the AWSA to a full enforceability stage. If AWSA does not become fully enforceable, all the benefits of the AWSA will become null and void, including the source of water for Window Rock and those benefits accruing to Gila River water users in New Mexico. Therefore, we believe Congress should not take final action on H.R. 1970 without the withdrawal of the Navajo Nation's opposition to the implementation of the provisions of the AWSA.

Assuming the CAP water source does prove to be available for Window Rock, the diversion of water from an Upper Basin location for use in the Lower Basin is unprecedented. Therefore, H.R. 1970 needs to include specific provisions authorizing and clarifying accounting methods and providing the Secretary of the Interior the authority to contract for delivery of CAP water from a new diversion point in the Upper Basin. Under current law, the Secretary has no authority to contract for delivery of Lower Basin Colorado River water at points of diversion above Lake Mead. Attached to this testimony, as part of a letter from the Director of the Department of Water Resources

to the New Mexico State Engineer, are proposed amendments which will correct this and other “Law of the Colorado River” problems Arizona finds with the bill as introduced.

In 1968, Arizona’s rights to develop in the Lower Colorado River Basin were subordinated to pre-1968 rights in the Lower Basin States. H.R. 1970 sets a precedent that New Mexico and Utah can increase development in the Lower Basin and further jeopardize Arizona rights. While Arizona does not challenge the right of any Upper Basin state to develop their apportioned Upper Basin water for use in the Upper Basin, we do want to be treated equitably for use of Upper Basin water in Lower Basin development. H.R. 1970 does not address this concern and it sets a precedent that is inequitable to the State of Arizona. Specifically, the bill, subordinates Arizona’s Central Arizona Project (CAP) water to new Lower Basin uses developed with an Upper Basin water allocation. This also subordinates the rights of Arizona Indian Tribes that utilize CAP allocations.

Staff from the Arizona Department of Water Resources has had an ongoing dialogue with the New Mexico State Engineer’s staff for over a year on these issues, including those outlined in this testimony. I sent a letter to State Engineer John D’Antonio several months ago about these issues. Mr. D’Antonio recently responded about Arizona’s suggested bill changes. I have attached copies of both of these letters for the record. I do not agree with Mr. D’Antonio’s response but we continue to be open to discussions with our friends in New Mexico to resolve these important Law of the River issues.

The Law of the River has been under attack for decades. For example, in the early 1980s, a private group made what is known as the Galloway Proposal. It would have allowed the transfer of Upper Basin water rights to a California entity without regard to the prohibitions of the 1922 Compact. The Seven Basin States were united in fighting the proposal and rejecting this notion that the 1922 Compact was irrelevant. It now appears that New Mexico is not as concerned about the precedent that would be set if Congress does not address each 1922 Compact issue explicitly. Arizona remains very concerned and will utilize all means available and necessary to protect its rights under the Compact and the Law of the River.

Again, Arizona is willing to meet with Committee staff and the representatives of the other six Colorado River Basin States to further discuss our suggested changes, and to try to make sure that any proposed amendments are acceptable to all affected parties and consistent with the Law of the River.

In summary, the State of Arizona is supportive of the purposes of H.R. 1970 in settling tribal claims and will work collaboratively with the bill’s sponsors and New Mexico’s interested parties. We believe that the bill should be expanded to include additional water rights settlements in Arizona that are actively being negotiated with the Navajo Nation and the Hopi Tribe. We urge the Committee to explore opportunities to expand upon the concepts contained in Title II dealing with the Reclamation Water Settlements Fund so that it can become the mechanism for not only the proposed New

Mexico Navajo settlement, but potentially many other western tribal settlements as well. Before final enactment of H.R. 1970, the Navajo Nation's challenge to the operation of the Colorado River must be resolved, and the Navajo Nation's opposition to the AWSA withdrawn. Finally, we cannot support the bill as currently drafted as it relates to the source of the water supply for the Window Rock area within Arizona, and certain provisions dealing with the Law of the River. Ambiguity about the water source and the Law of the River implications related to both Window Rock water delivery and Gallup water delivery must be clarified.

Thank you for the opportunity to present the views of the State of Arizona.

Attachments:

Director Guenther Letter w/attachments

State Engineer D'Antonio Letter