

**H.R. 2515, “LOWER COLORADO
RIVER MULTI-SPECIES CON-
SERVATION PROGRAM ACT” &
H.R. 1970, “NORTHWESTERN
NEW MEXICO RURAL WATER
PROJECTS ACT”**

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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**LEGISLATIVE HEARINGS ON H.R. 2515, TO
AUTHORIZE APPROPRIATIONS FOR THE
BUREAU OF RECLAMATION TO CARRY OUT
THE LOWER COLORADO RIVER MULTI-
SPECIES CONSERVATION PROGRAM IN THE
STATES OF ARIZONA, CALIFORNIA, AND
NEVADA, AND FOR OTHER PURPOSES.
“LOWER COLORADO RIVER MULTI-SPECIES
CONSERVATION PROGRAM ACT;” AND
H.R. 1970, TO AMEND THE COLORADO
RIVER STORAGE PROJECT ACT AND PUBLIC
LAW 87-483 TO AUTHORIZE THE CONSTRUC-
TION AND REHABILITATION OF WATER
INFRASTRUCTURE IN NORTHWESTERN NEW
MEXICO, TO AUTHORIZE THE USE OF THE
RECLAMATION FUND TO FUND THE REC-
LAMATION WATER SETTLEMENTS FUND, TO
AUTHORIZE THE CONVEYANCE OF CERTAIN
RECLAMATION LAND AND INFRASTRUC-
TURE, TO AUTHORIZE THE COMMISSIONER
OF RECLAMATION TO PROVIDE FOR THE
DELIVERY OF WATER, AND FOR OTHER
PURPOSES. “NORTHWESTERN NEW MEXICO
RURAL WATER PROJECTS ACT.”**

**Tuesday, July 24, 2007
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 10:02 a.m. in Room 1334, Longworth House Office Building, Hon. Grace F. Napolitano [Chairwoman of the Subcommittee] presiding.

Present: Representatives Napolitano, Costa, Heller, Lamborn, and Udall.

**STATEMENT OF THE HON. GRACE F. NAPOLITANO, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF
CALIFORNIA**

Mrs. NAPOLITANO. Good morning ladies and gentlemen, and welcome to the hearing on two significantly different yet major issues of importance to the future of water in the western United States.

We will hear testimony on H.R. 2515, a bill that would put in place a proactive approach to the preservation of habitat while ensuring continued water deliveries in the lower Colorado River Basin.

And also on H.R. 1970, legislation that will implement the Water Settlement Agreement between the Navajo Nation and New Mexico and the United States.

Both of these bills address critical water topics that can no longer be overlooked or ignored. Habitat restoration and preservation concerns now have a seat at the table, as they well should have, and Indian water rights, although created and vested as of the date of the reservation, were often left behind as major water deals to benefit non-Indians were developed in the decades past.

I support the general premise of both bills but I do have a number of questions and concerns. With regard to H.R. 2515, I am concerned about the 50-year term of the agreement proposed in the legislation which many, including myself, feel is too long. Nobody can predict what the lower Colorado River might look like 50 years from now, and I am also concerned that some of the limitations in the bill effectively immunize water users from future changes to the Endangered Species Act.

H.R. 1970, introduced by our colleague from New Mexico, Congressman Tom Udall, is certainly the most significant Indian water rights legislation to come before this subcommittee since 2005 when we enacted the Arizona Water Rights Settlement Act. This legislation includes a number of provisions that have drawn criticism from the Administration, and we have tried to address some of those issues in today's hearing. I hope our questioning of the witnesses this morning will help to resolve some of these points.

Commissioner Johnson, I am particularly concerned that the Bureau of Reclamation has been very closely involved in many of these projects contemplated, especially in H.R. 1970, but yet you step away from that in your statement including indicating that the Administration did not participate in the drafting of Water Rights Settlement embodied in H.R. 1970 and does not support a water settlement under these circumstances. What exactly is the role of the Administration when it comes to Indian water settlements?

Let me welcome all the witnesses. First of all, our acting Ranking Member, Mr. Lamborn, and Representative Heller and, I believe, Representative Mitchell. I welcome our guests to the Subcommittee today. Congressman Tom Udall is not here yet. I do not see him. Congressman Harry Mitchell is here. Thank you, and Representative Raul Grijalva who will be joining us, and thank you for those that are here.

I ask unanimous consent that Representatives Harry Mitchell and Tom Udall be allowed to sit on the dais with the Subcommittee this morning to participate in Subcommittee proceedings, and with-

out objection so ordered. I will begin the meeting with a brief statement. I am sorry. My opening statement I have given, and I would now recognize the Ranking Member, Mr. Lamborn, for his statement.

[The prepared statement of Mrs. Napolitano follows:]

**Statement of The Honorable Grace F. Napolitano, Chairwoman,
Subcommittee on Water and Power**

Today's hearing will consider two significantly different, yet major issues of importance to the future of water in the Western United States. We will hear testimony on H.R. 2515, a bill that will put in place a proactive approach to the preservation of habitat while ensuring continued water deliveries in the lower Colorado River Basin; and also on H.R. 1970, legislation that will implement the water settlement agreement between the Navajo Nation in New Mexico and the United States.

Both bills address critical water topics that can no longer be overlooked or ignored. Habitat restoration and preservation concerns now have a seat at the table, as they should. And Indian water rights, although created and vested as of the date of the reservation, were often left behind as major water deals to benefit non-Indians were developed in decades past.

I support the general premise of both bills but I do have a number of questions. With regard to H.R. 2515, I am concerned that the 50 year term of the MSCP agreement proposed in this legislation may be too long. Nobody can predict what the Lower Colorado River might look like fifty years from now. I am also concerned that some of the limitations in the bill effectively immunize water users from future changes to the Endangered Species Act.

H.R. 1970, introduced by our colleague from New Mexico, Congressman Tom Udall, is certainly the most significant Indian water rights legislation to come before this Subcommittee since 2005, when we enacted the Arizona Water Rights Settlement Act. This legislation includes a number of provisions that have drawn criticism from the Administration, and I hope our questioning of witnesses this morning will help to resolve some of these points. Commissioner Johnson, I am particularly concerned that the Bureau of Reclamation has been very closely involved in many of the projects contemplated in H.R. 1970, but you step away from that in your statement, indicating that the Administration did not participate in the drafting of the water rights settlement embodied in H.R. 1970, and does not support a water settlement under these circumstances. What exactly is the role of the Administration when it comes to Indian water settlements?

We welcome our witnesses this morning and look forward to their testimony. I am pleased to now yield to my friend from Colorado Springs, the acting Ranking Minority Member of our Subcommittee, Congressman Doug Lamborn, for any statement he may have.

**STATEMENT OF THE HON. DOUG LAMBORN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF COLORADO**

Mr. LAMBORN. Thank you, Madame Chairwoman, and it is good to be here for this subcommittee meeting this morning. I will be standing in for a short while for the Ranking Member, Cathy McMorris Rodgers of Washington State, and in a minute I am going to introduce the sponsor of the bill, and ask him to actually take over for this portion of the hearing because it is his bill that we will be considering, Dean Heller of Nevada.

But these bills being considered today try to resolve water issues in the Colorado River Basin. Throughout the west water and power users have legitimately asked for certainty in their supplies. Certainty has been hard to find with an ongoing drought and with constant litigations surrounding the Endangered Species Act. However, Mr. Heller and Mr. Mitchell's bill provide for certainty and Endangered Species protection at the same time. It proves that en-

vironmental protection and the water needs for people can truly be met together outside of the courts.

I also noticed that Mr. Udall's bill attempts to provide water for his constituents. I commend my colleague from New Mexico for introducing his bill. However, I am concerned that neighboring states are not completely on board with this effort, and that the Federal government was not party to the agreement referenced in the bill.

But I look forward to hearing from my colleagues and today's witnesses about these important bills, and at this point I would like to turn, with the permission of the Chairwoman, things over from my perspective to the member from Nevada, Dean Heller.

Mrs. NAPOLITANO. Please.

**STATEMENT OF HON. DEAN HELLER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEVADA**

Mr. HELLER. Thank you. First of all, thank you, Madame Chairwoman, for holding this hearing. I thank acting Ranking Member—I will be the acting Ranking Member here in a few minutes—for the hearing today on the Lower Colorado Multi-Species Conservation Act. I introduced this legislation to authorize the Department of Interior to manage and implement the Lower Colorado River Multi-Species Conservation Program and authorize sufficient funding to meet the program's obligations without creating any new Federal spending.

The Colorado River water and power resources supplies more than 20 million people in the lower basin states of Nevada, Arizona and California. The Department of the Interior agencies as well as various non-Federal stakeholders and water and power agencies along the Colorado River formed a multi-regional partnership to develop the Lower Colorado River Multi-Species Conservation Program.

The goal of this program is to protect sensitive, threatened and endangered fish and wildlife species and their habitat while providing sufficient environmental benefits and reliable water and power supply along the Colorado River. This legislation achieves several necessary steps to further codify the responsibilities of this program and the roles of the various stakeholders.

The legislation provides a specific authorization of appropriations sufficient for the Secretary to meet specified obligations under the program documents. Obtaining specific authorization assures the long-term availability of the funding. The legislation provides continuity of the program by ensuring that it is fully implemented, enforceable, and that it remains viable for the next 50 years.

Finally, this legislation enjoys the support from members of the Congress from Nevada, Arizona and California, demonstrating that this program is important to the long-term water supply needs of all three states. Again, Madame Chairwoman and Ranking Member, thank you for holding this important hearing. I look forward to the testimony from our witnesses. I want to welcome everybody that is here. Thank you very much for your hard work and effort so that we can be here today and those in the audience who also participated in the hearings to produce this program. So I will yield back the balance of my time. Thank you.

Mrs. NAPOLITANO. Thank you, sir, for your opening statement, and now I would like to recognize Mr. Mitchell for his opening statement.

STATEMENT OF THE HON. HARRY MITCHELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. MITCHELL. Thank you, Madame Chair. I would like to thank you and members of this subcommittee for holding today's hearing on House Bill 2515, the Lower Colorado River Multi-Species Conservation Program Act, and for allowing me to take part in it. I also would like to thank Representative Dean Heller, and I am grateful for his partnership on this important piece of legislation, and finally I want to thank a distinguished former member without whose help H.R. 2515 would not be before us today, and that is Congressman Jay Rhodes. He has been a tireless advocate, and I am grateful for his efforts.

From the start, H.R. 2515 has been a bipartisan bill, and to me that is the best way to legislate. This bill has been more than a decade in the making, and I believe that it is a worth bipartisan compromise. The bill provides for a long-term, comprehensive, cooperative program to protect 26 endangered, threatened and sensitive species on the lower Colorado River, and to provide assurances to the affected water and power agencies of Arizona, California and Nevada, that their operations may continue upon compliance with the requirements of this program.

The program will create over 8,100 acres of riparian, marsh and backwater habitat for protected species and include plans for the rearing and stocking of more than 1.2 million fish to augment populations of two endangered fish covered by this program. The program will operate on and around the Colorado River from Lake Mead to the U.S./Mexico border but like most water issues related to the Colorado, its effects will be felt throughout Arizona and across the southwest United States.

The program's cost will be divided 50-50 between the Federal government and the non-Federal participants. California participants will pay 50 percent of the non-Federal share, and Arizona and Nevada will participate and will pay 25 percent of the non-Federal share. I look forward to today's hearing and to continue working with this committee on this important piece of legislation, and I yield back the balance of my time. Thank you.

[The prepared statement of Mr. Mitchell follows:]

Statement of The Honorable Harry Mitchell, a Representative in Congress from the State of Arizona, on H.R. 2515

Thank you Madam Chairwoman.

I would like to thank you and the members of this subcommittee for holding today's hearing on H.R. 2515, the Lower Colorado River Multi-Species Conservation Program Act—and for allowing me to take part in it.

I would also like to thank Rep. Dean Heller. I am grateful for his partnership on this important legislation.

Finally, I want to thank a distinguished former Member—without whose help H.R. 2515 would not be before us today: Congressman Jay Rhodes. He has been a tireless advocate, and I am grateful for his efforts.

From the start, H.R. 2515 has been a bipartisan bill, and to me that is the best way to legislate. This bill has been more than a decade in the making, and I believe it is a worthy, bipartisan compromise.

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The program will create over 8100 acres of riparian, marsh and backwater habitat for protected species, and includes plans for the rearing and stocking of more than 1.2 million fish to augment populations of two endangered fish covered by the program.

The program will operate on and around the Colorado River from Lake Mead to the U.S.-Mexico border, but like most water issues relating to the Colorado, its effects will be felt throughout Arizona, and across the southwestern United States.

The program's cost will be divided 50-50 between the federal government and the non-federal participants. California participants will pay 50 percent of the non-federal share, and Arizona and Nevada participants will pay 25 percent of the non-federal share.

I look forward to today's hearing, and to continuing to work with this committee on this important legislation.

Mrs. NAPOLITANO. Thank you, sir. Mr. Udall.

**STATEMENT OF THE HON. TOM UDALL, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW MEXICO**

Mr. UDALL. Thank you very much, Chairwoman Napolitano, and I guess Ranking Member McMorris Rodgers is going to be here at some point. Thank you for holding this hearing on H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. This important legislation will have a lasting impact on my constituents in northwestern New Mexico, the Jicarilla Apache Nation and the Navajo Nation.

The bill addresses the basic need for water and sanitation that I believe is the right of every individual and which are long overdue in this region of New Mexico. It also expressly ratifies the Navajo Nation's water rights and eliminates uncertainty over how those rights may impact others. I am pleased to have had the opportunity to participate in the careful negotiations that led to the introduction of this bill, and I am thankful for your interest in building on these efforts to make these projects a reality.

Water tenure has long been a volatile issue in the arid southwest. As communities in the region have grown, the strain on water resources has increased. It is the responsibility of the basin states and the southwestern tribal nations to formulate working agreements on how this very precious resource is utilized. The Northwestern New Mexico Rural Water Projects Act will ratify one such accord, the San Juan River Settlement Agreement.

This agreement was signed by the Navajo Nation and the State of New Mexico on April 19, 2005, and was the culmination of years of work. The settlement agreement seeks to provide for the development of a rural water system to address the water needs of numerous New Mexicans, many of them members of the Navajo Nation and the Jicarilla Apache Nation. H.R. 1970 would ratify this agreement, thereby resolving the water rights of the Navajo Nation, the largest Federally recognized tribe in the United States.

It would also provide a water supply for Gallup, New Mexico, as well as recognize and authorize existing uses of the San Juan River Basin Water. In exchange for relinquishing some of their claims to water from the San Juan River Basin, the Navajo Nation will ben-

efit from water development projects including the Navajo Gallup project and the Navajo Nation Municipal Pipeline.

This much needed infrastructure will allow for efficient and reliable municipal and agricultural water deliveries. Additionally, the projects will be implemented in a manner consistent with environmental laws and existing agreements which ensure compliance with the ESA. Incredibly, even now in the 21st century more than 70,000 Navajos must still haul water daily for residential use. These water projects will go a long way toward rectifying this unacceptable situation.

I understand that some have raised concerns regarding provisions in the bill relating to New Mexico's apportionment of the Colorado River. I am pleased that in the late spring of 2006, the upper Colorado River Basin and Commission, which includes representatives from all upper basin states unanimously endorsed the Navajo Water Settlement. This river is of vital importance to populations throughout the southwest.

I am well aware that stipulations in the bill relating to the Colorado River have the potential to impact all of the basin states. It is my hope that the testimony you will hear today from the distinguished panel will bring valuable insight on this issue and help allay those concerns. Please know I am committed to working with the Subcommittee and the Subcommittee Chairman to ensure that this legislation is in compliance with existing compacts among basin states.

The Navajo Nation and the State of New Mexico and many other residents of northwestern New Mexico put a tremendous amount of effort into reaching an agreement that will provide a more secure future for many vulnerable communities. For years these groups have worked to finalize this agreement. The next step necessary is passing legislation to finalize the agreement and begin the implementation of long overdue water distribution projects.

Senator Bingaman, Senator Domenici and I have introduced companion legislation to bring about this step, and I look forward to working with all of you to bring this hard work to fruition, and let me thank once again the Chairwoman. I know she is a real advocate of the Colorado River and California's water rights, and I know she very much understands these issues and I am very excited about her bringing her attention to these issues. Thank you, Madame Chair, and I yield back.

Mrs. NAPOLITANO. Thank you, sir. I appreciate the comments, and we will proceed to hear from our witnesses. We have two panels today. The first panel will testify on H.R. 2515, and the second panel will testify on H.R. 1970. Each one of the panelists will be introduced just before they testify. Once the testimony is concluded we will begin a question and answer period of those witnesses prior to proceeding to the next panel.

All your prepared statements, witnesses, will be entered into the record, and you are asked to summarize your high points so as not to waste time because if you read sometimes it takes longer and you cannot get to the meat of what you are trying to bring to this committee, and please limit your remarks to five minutes, the little timer, and I do hold people to five.

We will be using the timer of course. It applies to questions also. Five minutes of questions and answers from each of the members will be allowed. If there is time, we will have an additional second round or more as necessary. I would like to begin with our first panel to testify on H.R. 2515, the Lower Colorado River Multi-Species Conservation Act.

First we have Robert Johnson, Commissioner of Bureau of Reclamation. Welcome again, Commissioner, and you know you are on the hot seat again. Two, Susan Bitter Smith, President of the Central Arizona Project Board of Phoenix. Welcome. George Caan, Chairman of the Lower Colorado River Multi-Species Conservation Program from Las Vegas, Nevada. Welcome.

Gerald Zimmerman, Executive Director of the Colorado River Board of California in Glendale, California. Welcome. And finally, Kara Gillon, Senior Staff Attorney with Defenders of Wildlife in Albuquerque, New Mexico. If you will start, Mr. Johnson, we will begin with you.

**STATEMENT OF ROBERT JOHNSON, COMMISSIONER,
BUREAU OF RECLAMATION, WASHINGTON, D.C.**

Mr. JOHNSON. Thank you, Madame Chairwoman. It is a pleasure to be here to address you and members of the Subcommittee on this bill. While the Department of Interior has clear authority to administer this program under existing statutes we also understand the interests of our partners in seeking this legislation. The Department supports the Lower Colorado River Multi-Species Conservation Program as well as the intent of H.R. 2515 to further this program.

There are, however, some concerns about language in sections 2, 4[b], 5[c] and 5[d] of the bill, and I will quickly summarize our concerns in that regard. Quickly I would just say that the MSCP program is a very important program for the three states that are delivered water supplies from the Colorado River. There are millions of people and hundreds of thousands of acres of irrigated farmland that are dependent on the river, and the multi-species plan provides certainty for the long-term use of those important water supplies.

Quickly to summarize the concerns that we have. First, section 2 of the bill provides a definition of the lower Colorado River. That definition that is in the bill does not exactly coincide with the definition that is included in some of the program documents. We believe that the bill ought to be modified to be consistent with those documents. We think that this is a minor technical issue but nevertheless something that can cause confusion in the future if we have different definitions.

Next the Administration cannot support language in section 4[b] of this bill allowing the Secretary to invest appropriated monies that are not required to meet current program expenditures. In addition, we are concerned about section 5[c] which addresses judicial review of the program documents. We are advised that this provision could expand Federal litigation exposure in significant respects and set unacceptable precedents for the United States.

Last, section 5[d] which seeks an explicit exemption from the Federal Advisory Committee Act is not necessary as the program

was determined by the Director of the U.S. Fish and Wildlife Service to be an ecosystem recovery and implementation team pursuant to the ESA, and as a result is already exempt from that Act.

We appreciate that there has been some progress in discussions with our partners on section 5[c] of the Act, and we look forward to continuing to try to work through these issues with our partners. The lower Colorado River is a critical resource to citizens of the west. Maintaining compliance with the ESA, and avoiding water supply conflicts that we have seen in other basins in the west is critical to the Department of Interior.

Reclamation will continue to support the Lower Colorado Multi-Species Conservation Program and looks forward to working with the Subcommittee and the bill's sponsors on this issue. Madame Chairwoman, thank you again for allowing me to testify. This concludes my oral remarks.

[The prepared statement of Mr. Johnson follows:]

**Statement of Robert Johnson, Commissioner, U.S. Bureau of Reclamation,
U.S. Department of the Interior, on H.R. 2515**

Madam Chairwoman and members of the Subcommittee, my name is Robert Johnson and am here today to present the views of the Department of the Interior on H.R. 2515, a bill to authorize a habitat conservation program on the lower Colorado River in the States of Arizona, California, and Nevada.

H.R. 2515 authorizes the Lower Colorado River Multi-Species Conservation Program (LCR MSCP) and addresses issues associated with implementation of the program, including Colorado River water use, investment of appropriated funds, and the enforceability of program documents. The Lower Colorado River is a critical resource to citizens of the southwest. Maintaining compliance with the Endangered Species Act and avoiding water supply conflicts that have been occurring in other areas of the West is critical to the Department. The Department supports the LCR MSCP as well as the intent of H.R. 2515 to further this program. However, the Department remains concerned about language in Section 2, 4(b), 5(c), and 5(d), which I will discuss below.

The LCR MSCP was developed through a collaborative partnership with State leaders, local stakeholders and the Administration. This innovative program addresses the needs of threatened and endangered fish and wildlife on the lower Colorado River while assuring greater reliability of water deliveries and hydropower production. By meeting the needs of fish and wildlife listed under the Endangered Species Act, as well as preventing the need to list additional species, the plan provides greater certainty of continued water and power supplies from the river for Nevada, California and Arizona—and is designed to allow future water transfers within or among water users for a 50-year period.

Reclamation began work to develop the LCR MSCP in 1997 and the program was formally approved and adopted by Secretary Norton in 2005. Under existing authorities, Reclamation has been implementing activities that are similar in nature to those described in this program since 1997 when the U.S. Fish and Wildlife Service issued a Biological Opinion for southwestern willow flycatcher, bony tail chub, Yuma clapper rail and razorback sucker fish. In 2001, Reclamation adopted interim Surplus Guidelines that define when water operations can provide surplus water to water users in the Lower Colorado River Basin, and the Biological Opinion for that action is being implemented through the LCR MSCP. With these and other actions, Reclamation has been meeting the requirements of the Endangered Species Act (ESA) for over a decade.

Reclamation has spent a total of \$9.5 million in FY2004 and FY2005, and spent \$13 million in FY2006 from both Federal and non-Federal sources pursuant to the Program's Funding and Management Agreement with non-Federal entities. The LCR MSCP Steering Committee supports a budget of over \$16 million for FY 2007. In addition to establishing over 270 acres of new habitat along the Colorado River, Reclamation has stocked 46,079 razorback suckers and 14,836 bony tail chub into the lower Colorado River since 2004. A significant amount of money has been spent on the research and monitoring needed to develop a sound scientific foundation for this 50-year program. Accomplishment reports for FY2004 and FY2005 have been approved by the MSCP Steering Committee, reviewed by the U.S. Fish and Wildlife

Service, and found to be in compliance with the LCR MSCP ESA Section 10 Permit. The FY2006 report has been approved by the Steering Committee and U.S. Fish and Wildlife Service. All reports can be found on Reclamation's website at www.lcrmscp.gov.

In Reclamation's FY2008 budget, which is awaiting Congressional approval, \$7 million has been identified from Federal funding for the program, with a \$7 million match from non-Federal partners.

Since presenting testimony on H.R. 5180 last year, the Department is pleased to report progress toward resolving issues surrounding section 3(b). As written, this Section would direct the Secretary to enter into an agreement with the States of Arizona, California and Nevada providing for the use of Colorado River water specifically for habitat creation and maintenance purposes. The Department believes that through existing contract terms, willing seller transactions, and current policies, Reclamation can utilize Colorado River (and non-Colorado River) water to implement the program. However, Reclamation has made progress with our funding partners in the Lower Basin States to develop an agreement acceptable to all parties on the use of Colorado River water for program purposes. Such an agreement could facilitate program implementation, and we look forward to continuing productive efforts with our partners on this proposed agreement.

We do have a couple of concerns with provisions contained in H.R. 2515. The geographic definition of the Lower Colorado River in section 2 should be clarified to match that contained in the MSCP Program Documents. The Administration cannot support the language in section 4(b) of this bill allowing the Secretary to invest appropriated moneys that are not required to meet current program expenditures. Investing appropriations provides additional monies to finance a governmental purpose outside of the normal appropriations process.

We are also concerned about section 5(c), which addresses judicial review of program documents. We note that this provision has been modified from the language introduced in the last session of Congress, and that language has been added clarifying that the United States would not be liable for claims for money damages. Nevertheless, we have been advised by the Department of Justice and we are concerned that this provision could expand Federal litigation exposure in significant respects and open the door for judicial intrusion into administrative decision making. We would appreciate the opportunity to continue to work with the committee to address our concerns regarding section 5(c).

Section 5(d) seeks an explicit exemption from the Federal Advisory Committee Act. The Department believes that this exemption is not necessary as the program was determined by the Director of the U.S. Fish and Wildlife Service to be an Ecosystem Recovery and Implementation Team (ECRIT) pursuant to section 4(f)(2) of the ESA, thereby making the LCR MSCP Steering Committee exempt. Therefore, we believe section 5(d) is superfluous and we recommend deleting it.

The Department already has clear authorities to administer this program under existing statutes, and Reclamation began actively implementing the full LCR MSCP program in 2005. Through implementation of this program, the likelihood of a water conflict on the lower Colorado River is reduced.

The Department supports the LCR MSCP and will continue to work with interested stakeholders that seek to enhance the program. Thank you for the opportunity to comment on this legislation. We look forward to working with you on the various concerns we have. I am happy to take any questions.

Mrs. NAPOLITANO. Thank you, sir. Ms. Susan Bitter Smith.

**STATEMENT OF SUSAN BITTER SMITH, PRESIDENT,
CENTRAL ARIZONA PROJECT BOARD, PHOENIX, ARIZONA**

Ms. BITTER SMITH. Madame Chairwoman, Congressman Heller, Congressman Mitchell, Congressman Udall, I too am pleased to be here on behalf of the Central Arizona Water Conservation District.

Mrs. NAPOLITANO. Can you pull the mic a little closer please?

Ms. BITTER SMITH. I will do that. Usually my children say they can hear me from any distance in the room. The CAP, as you know, is operated by the Central Arizona Water Conservation District, and we have an aqueduct system that stretches 330 miles from Lake Havasu all the way along the Colorado River to central and southern Arizona.

In 1994, users of water and power from the lower Colorado River began to become concerned about our ability to continue to rely on the river's resources in the face of growing concerns about the endangered species, and as a result we have now spent the last 10 plus years working together with Federal and non-Federal participants to complete the documents now to put the Lower Colorado River Multi-Species Conservation Program into place.

The Secretary approved the program in April of 2005, and of course in August of that year the White House recognized the program as an exemplary environmental initiative. Fifty Federal and non-Federal entities have come together to craft and fund a program that protects 26 endangered, threatened and sensitive species, and provides for the acquisition, creation and maintenance of over 8,000 acres of high quality habitat and then provides for the rearing and stocking of hundreds of thousands of two species of endangered fish.

Before the Federal government would approve the program, however, the non-Federal participants were required to agree unconditionally to fund half of the total program, which is a cost of about \$626 million, indexed for inflation over 50 years. The CAP of course is one of those funding mechanisms. In return for this commitment, non-Federal water and power users were granted a Federal permit under the ESA Act that allows for the essential functions as water and power providers to continue as long as we comply with the program requirements.

The Federal government has agreed to fund the 50 percent of program costs, and we do appreciate that commitment but we believe it is absolutely necessary that appropriations for the Federal share be explicitly authorized by Congress, hence the reason for this Act, particularly since the program must continue to be carried on long after all of us are out of office.

H.R. 2515 provides necessary authorization for the Federal share of program costs and brings certainty and stability to the program in other ways. First, it requires Congress to authorize the Secretary to manage and implement the program, and there are documents that all of the parties have prepared and signed evidencing a commitment to the program.

Second, the bill directs and authorizes the Secretary to enter into an agreement with the lower basin states about how we will provide water for the MSCP. Without this explicit authorization, the law of the river may preclude us and other water providers from some of the water management activities we believe are very essential and need to be necessary.

The provisions of the bill also help protect expectation of the parties. The CAP strongly supports H.R. 2515, and we very much appreciate the leadership by the Arizona, California, Nevada delegations in bringing the bill to this point in the process. We especially thank Mr. Heller for his sponsorship and you, Madame Chairwoman, for allowing this bill to come to committee. I especially want to commend the Arizona delegation and my own Member of Congress, Mr. Mitchell, for his leadership on this issue.

H.R. 2515 is critical to our ability to continue to provide our water services to our customers. CAP is the lifeline for the State

of Arizona, and we want to make sure that continues to be the case. We urge the Subcommittee to approve this bill.

[The prepared statement of Ms. Bitter Smith follows:]

**Statement of Susan Bitter Smith, President, Board of Directors,
Central Arizona Water Conservation District, on H.R. 2515**

I am pleased to present testimony on behalf of the Central Arizona Water Conservation District ("CAWCD") in support of H.R. 2515, the Lower Colorado River Multi-Species Conservation Program Act. H.R. 2515 protects and implements the Lower Colorado River Multi-Species Conservation Program ("MSCP"). The MSCP is a comprehensive, cooperative effort among 50 federal and non-federal entities in Arizona, California and Nevada to protect 26 endangered, threatened and sensitive species along the Lower Colorado River and to provide assurances to the non-federal entities involved that their essential water and power operations on the River may continue if they comply with the Program's requirements. The participants in the Program include The Metropolitan Water District of Southern California, the Southern Nevada Water Authority and the Central Arizona Project.

CAWCD is the Arizona political subdivision responsible for operating the Central Arizona Project ("CAP"), and is the underwriter of Arizona's share of the costs of the MSCP. The CAP is a massive water delivery project, constructed under the authority of the Colorado River Basin Project Act of 1968, to enable Arizona to make full use of its Colorado River entitlement. In a normal water supply year, the CAP will deliver about 1.5 million acre-feet of Colorado River water to the citizens of Arizona, at the rate of 3,000 cubic feet of water per second, almost two billion gallons per day. The CAP is the largest single source of renewable water supplies in the State of Arizona, serving 80 percent of the State's water users and taxpayers, including the Phoenix and Tucson metropolitan areas.

CAWCD strongly supports H.R. 2515 because the bill assures continued compliance by the United States with the requirements of the MSCP. That, in turn, provides protection to the non-federal participants in the Program, who, like CAWCD, have agreed to provide substantial amounts of non-federal monies for the conservation of endangered species in return for receiving a permit under the Endangered Species Act for their water and power operations.

The Secretary of the Interior approved this 50-year conservation initiative on April 2, 2005. The overall Program costs, \$626 million, will be adjusted for inflation, with the three lower basin states paying 50 percent of the costs and the federal government paying 50 percent. Of the states' share, Arizona and Nevada will each pay 25 percent, while California will pay 50 percent. In return for their funding commitments, the non-federal participants have received a 50-year permit, issued by the U.S. Fish and Wildlife Service under Section 10 of the Endangered Species Act, which authorizes their existing and future water and power operations to continue. All of the Arizona participants have made a financial commitment to the MSCP, but CAWCD has agreed to guarantee payment of Arizona's share of the Program costs.

Although the MSCP is already in effect, this bipartisan legislation has been introduced by Congressman Dean Heller of Nevada to protect the substantial financial commitments that the non-federal parties are making to species protection. The bill specifically authorizes federal appropriations to cover the federal share of the Program costs, directs the Interior Secretary to manage and implement the Program in accordance with the underlying Program Documents, and provides a waiver of sovereign immunity to allow the non-federal parties to enforce the agreements they have entered into with the federal agencies, should that become necessary. The bill does not allow money damages.

The bill is co-sponsored by Congressmen Harry Mitchell, Trent Franks, John Shadegg and Rick Renzi of Arizona, Congressman Jon Porter and Congresswoman Shelley Berkley of Nevada, and Congressmen Ken Calvert and George Radanovich of California. A companion bill has been introduced in the Senate (S. 300) by Senators Jon Kyl of Arizona, Dianne Feinstein of California, and Harry Reid and John Ensign of Nevada. Since the time that similar legislation was introduced last year, two significant developments have occurred. First, subject to final review and approval within the Interior Department, the non-federal parties have reached agreement with the United States on an agreement to provide Colorado River water for MSCP purposes, as authorized by Section 3(b) of the bill. Second, Section 5(b) of the bill, which relates to the impact of future legislative actions on the MSCP, has been modified and narrowed significantly to meet the concerns of some members.

The MSCP is a worthy and important program for protection of endangered species. It provides for the creation of over 8,100 acres of riparian, marsh and back-

water habitat for the species covered by the Program, and includes plans for the rearing and stocking of over 1.2 million fish to augment populations of two endangered fish covered by the Program. The MSCP also provides for maintenance of existing, high-quality habitat, and a research, monitoring and adaptive management effort to ensure that Program elements are effective in helping covered species. At the White House Conference on Cooperative Conservation in August 2005, the MSCP was recognized as an "Exemplary Initiative." Implementation of the MSCP is critical to the long term needs of those of us in the southwest that depend on the Lower Colorado River for a major portion of their water and power. As the Secretary said in her Record of Decision approving the Program—

"The importance of the Colorado River to the southwestern portion of the United States cannot be overstated: the Colorado is the lifeblood of the southwest. The Colorado River provides water and power to over 20 million people (in such cities as Los Angeles, San Diego, Las Vegas, Phoenix and Tucson), irrigates over 2 million acres, and generates up to 10 billion kilowatt hours of electricity annually."

The MSCP represents a fifty-year commitment by all of the parties involved. It is essential that that commitment be fully and faithfully met. H.R. 2515 will help ensure that that occurs.

**Statement of Susan Bitter Smith, President, Board of Directors,
Central Arizona Water Conservation District, on H.R. 1970**

I am pleased to present this statement on behalf of the Central Arizona Water Conservation District ("CAWCD") regarding H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. CAWCD is the Arizona political subdivision responsible for operating the Central Arizona Project. The Central Arizona Project is a massive water delivery project, constructed under the authority of the Colorado River Basin Project Act of 1968, to enable Arizona to make full use of its Colorado River entitlement. In a normal water supply year, the Central Arizona Project will deliver about 1.5 million acre-feet of Colorado River water to the citizens of Arizona, at the rate of 3,000 cubic feet of water per second, almost two billion gallons per day. The Central Arizona Project is the largest single source of renewable water supplies in the State of Arizona, serving 80 percent of the State's water users and taxpayers, including the Phoenix and Tucson metropolitan areas.

CAWCD cannot support this bill as introduced because (1) it fails to resolve the Navajo Nation's claims to the Lower Colorado River and Little Colorado River in Arizona and (2) it fails to resolve litigation filed by the Nation challenging Interior Department initiatives that are vital to the Central Arizona Project and other Colorado River water users in the Lower Basin. The legislation also fails to address critical issues related to its potential impact on the Law of the Colorado River. All of these matters must be addressed before the bill is permitted to move forward.

This bill would authorize a settlement of the water rights claims of the Navajo Nation to the San Juan River in New Mexico and also provide funding for projects to deliver San Juan water to Window Rock and Gallup. The San Juan River is a tributary to the Colorado River, and the bill affects the accounting for Colorado River water required by the 1922 Colorado River Compact and the United States Supreme Court's 1964 Decree in *Arizona v. California*, the decision that confirmed that Arizona is entitled to 2.8 million acre feet of water each year from the Lower Colorado River. Most of that water is delivered to central and southern Arizona through the Central Arizona Project. While the New Mexico bill would affect Arizona's Colorado River entitlement, it fails to resolve the claims of the Navajo Nation to Arizona's water supplies or to require, as it should, that those claims be settled before the Nation receives the benefits of any water rights settlement.

The Navajo Nation has asserted that it has rights to water from the Colorado River that are superior to the rights of the Central Arizona Project. The Nation has sued the United States in federal district court in Phoenix in an effort to compel the Secretary of the Interior to assert those rights on the Nation's behalf. Unless and until the Secretary takes steps to resolve the Nation's claims to the Colorado River, the Nation seeks to stop the Secretary from implementing important programs put in place to better manage the water supplies of the Lower Colorado River for the benefit of the Central Arizona Project and others.

In a separate action, the Navajo Nation has also sought to prevent the required court approval of another Indian water rights settlement that is vital to the citizens of central Arizona, a comprehensive water rights settlement with the Gila River Indian Community. That settlement, which was decades in the making, was authorized by the Arizona Water Settlements Act of 2004, but if the Navajos succeed in

their challenge, all of the Arizona water settlements authorized by that act, including the Gila River settlement, will fail. Since the water rights of the Navajo Nation are not affected by the Gila River settlement, as a lower court has already found, one can only conclude that the Navajo Nation is seeking to hold the Gila River settlement hostage until its own water rights claims are resolved.

These actions by the Navajo Nation lead us to conclude that we could support authorization of a New Mexico settlement with the Navajo Nation only if an Arizona settlement with the Nation is also concluded and included in the authorizing legislation. While New Mexico may object to this, it shouldn't. After all, New Mexico demanded and received significant benefits, in the form of project authorizations and money for that state, in the Arizona Water Settlements Act of 2004.

From a public policy perspective, an Arizona settlement of the Navajo Nation's water rights claims should proceed hand in glove with a New Mexico settlement. As it stands, the New Mexico bill fails to deal comprehensively with the Navajos' claims to the river systems that cross or border the Navajo Reservation. The Navajo Reservation is the largest Native American reservation in the United States. It occupies parts of three states, but by far the largest part of the Reservation, as well as the greatest share of the Reservation population, is situated in Arizona. Within Arizona, the northwestern portion of the Navajo Reservation is near the mainstream of the Lower Colorado River, and the Little Colorado River traverses the southern portion of the Reservation. If anything, priority should be given to settlement of the Nation's claims to the waters of these rivers. Including a settlement of the Nation's Arizona claims in the New Mexico bill would go a long way toward fixing the public policy problems associated with the current version of this legislation.

CAWCD has long supported the comprehensive settlement of Indian water rights claims. Our organization has participated in a number of such settlements, including most recently, the settlement of the claims of the Gila River Indian Community, the largest Indian water rights settlement in Arizona's history. While successfully crafting a settlement agreement is never easy, we are fully committed to doing the hard work necessary to achieve an Arizona settlement with the Navajo Nation, and to accomplishing that in a timely way, so that congressional authorization of an Arizona settlement can be included in what is now a New Mexico only bill.

We look forward to the opportunity to work with you, the State of New Mexico, and the Navajo Nation to settle the claims of the Navajo Nation to the San Juan and the Lower and Little Colorado River basins, and to prepare a comprehensive settlement act that addresses the needs of all affected parties.

Response to questions submitted for the record by Susan Bitter Smith, President, Board of Directors, Central Arizona Water Conservation District, on H.R. 2515

(State Representatives) Has there been any effort to work with entities on the other side of the Mexican border to ensure successful recovery for the river system, not just the U.S. side?

Answer: Yes.

The United States is authorized by Section 8 of the Endangered Species Act to work cooperatively with other nations on species conservation efforts. The International Boundary and Water Commission¹ has adopted Minute 306 to the 1944 Mexican Water Treaty in order to establish a framework for cooperation between the United States and Mexico in the preservation of the riparian and estuarine ecology of the Colorado River in Mexico. These efforts are on-going and will continue.

Additionally, independent of these efforts, the Central Arizona Water Conservation District has been working with other stakeholders, including environmental groups, on a plan to operate the Yuma Desalting Plant ("YDP") while protecting the area commonly known as the Mexican Delta. The group working on this matter issued a white paper in 2005 that contains a blue print for operating the YDP while protecting the habitat contained in the Cienega de Santa Clara in Mexico.

The MSCP is an effort to make the operations of the Lower Colorado River within the United States comply with the Endangered Species Act. The needs of endangered species in Mexico are being addressed by other programs outside of the MSCP.

¹ The IBWC was established under the 1944 U.S.-Mexico Water Treaty between the United States and Mexico regarding the Colorado River and is made up of representatives of the Republic of Mexico and the U.S. State Department.

(State Representatives) Is it possible that neglect of habitat on the Mexican side could wipe out attempts by the MSCP to stabilize habitat and protect and recover species?

Answer: No.

The habitat needs of the species covered by the program were assessed independently of the number of individuals of the species or habitat that may exist in the Republic of Mexico and independently of actions that Mexico might or might not take to protect species or habitat located there. Sufficient habitat will be acquired and other conservation measures will be put into place in the United States under the MSCP to meet the needs of all of the species covered by the program. Thus, covered species will be protected and conserved whether or not any conservation actions are taken by the Republic of Mexico to protect members of the species or habitat that are located there.

The Environmental Impact Statement ("EIS") prepared in connection with the MSCP analyzed the impacts of the MSCP on environmental resources in Mexico as well as the obligations of the United States under the 1944 Treaty with Mexico regarding the Colorado River. The EIS concluded that no substantial adverse environmental impacts would occur in Mexico and that no reduction in deliveries of Colorado River water to Mexico would occur as a result of implementation of the MSCP. If anything, the MSCP should improve conditions for species that reside on both sides of the border by providing substantial amounts of new habitat for those species.

(State Representatives) Can you please discuss the specifics of the proposed federal-state water use agreement referenced in section 3(b) of the bill?

Answer: Section 3(b) provides the authorization and direction necessary for the Secretary of the Interior to enter into an agreement with the three Lower Basin States regarding how to provide water from the Lower Colorado River for MSCP purposes, but does not alter existing rights to use Colorado River water.

Under the Boulder Canyon Project Act of 1928 and the United States Supreme Court's decision and decree in *Arizona v. California*, a contract with the Secretary of the Interior is required for the use of water from the Lower Colorado River. Reclamation's Lower Colorado Regional Director enters into water delivery contracts on behalf of the Secretary. The water delivery contract constitutes an authorization to use Colorado River water in the Lower Basin. These contracts define the type of water use permitted by the contract, either for domestic or agricultural purposes. The use of Colorado River water for environmental purposes has been called into question from time to time. Because of this, Section 3(b) of H.R. 2515 provides explicit authorization for the Secretary to enter into an agreement with the Lower Basin States to provide Colorado River water for implementation of the MSCP.

The agreement does three important things. First, it permits the Secretary to apply Colorado River water to the purposes of the MSCP. Second, it specifies how the Secretary is to account for water that is used for MSCP purposes. Third, the agreement permits the Secretary to manage Colorado River water for other MSCP purposes, including providing marsh, backwater and other habitat.

Reclamation accounts for the diversion and consumptive use of water from the Lower Colorado River. Reclamation does not report as a diversion or consumptive use the natural depletion of Colorado River water by non-irrigated phreatophyte vegetation. Under the MSCP, some of this vegetation will be replaced with higher quality, native vegetation. The new, native vegetation will be using water previously used by the non-native vegetation, and under the agreement, the water use will not be treated as a new diversion or consumptive use of Lower Colorado River water. If additional water is needed for MSCP purposes, it will be acquired by lease or purchase from willing sellers.

Subject to final review and approval within the Interior Department, the non-federal parties have reached agreement with the United States on the agreement to provide Colorado River water for MSCP purposes, as authorized by Section 3(b) of the bill. However, representatives of the Interior Department have advised us that the United States will not be able to execute the agreement unless and until the Congress enacts H.R. 2515 or the companion Senate bill (S. 300). Thus, passage of the bill is critical to the success of the MSCP.

(State Representatives) Have the states reached agreement on how much water will be dedicated to the program?

Answer: Yes.

The Habitat Conservation Plan for the MSCP estimates that a little over 39,000 acre-feet per year will be needed for MSCP purposes; however, no new consumptive

use of Colorado River water will be permitted. Instead, the water needed for MSCP purposes will come from a reduction in water use by removal of existing non-native vegetation, the use of prior existing rights to water that run with the land acquired for MSCP purposes, or the acquisition of additional water rights, as necessary, from willing sellers. The MSCP participants have allocated \$50,000,000 of the MSCP funding to the costs of water acquisition.

(State Representatives) How does the MSCP address non-native species?

Answer: The conservation measures in the Habitat Conservation Plan for the MSCP include several elements that address non-native species, including maintenance of existing habitat, creation of new habitat, and population enhancement measures.

One of the goals of the MSCP will be to maintain and improve existing habitat for covered species. This could include protecting such habitat from invasive, non-native species, and removing undesirable species such as salt cedar and Arundo. A \$25,000,000 fund will be established early in the program to maintain existing, high quality habitat.

New habitat will also be created for covered species. This will include fuel load reduction (to reduce the risk of fires), removal of invasive, non-native flora and fauna, and replacement with high quality habitat types, such as cottonwood-willow. The Habitat Conservation Plan calls for the creation of 5,940 acres of cottonwood-willow habitat, 1,320 acres of honey mesquite habitat, 512 acres of marsh habitat, and 360 acres of backwater habitat. The participants in the MSCP have allocated over \$143,000,000 to the creation of new habitat for covered species.

Finally, population enhancement measures will be used to control non-native species and to improve the chances for survival and propagation of covered species. These activities would include controlling piscivorous fish and non-native amphibians in advance of releasing covered native fish into created backwaters. Other population enhancement activities could include controlling brown-headed cowbirds to reduce the adverse effects of nest parasitism on covered species.

Mrs. NAPOLITANO. Thank you very much, Ms. Smith. George Caan, Chairman of the Lower Colorado River Multi-Species Conservation Program, Las Vegas.

STATEMENT OF GEORGE CAAN, CHAIRMAN, LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM, LAS VEGAS, NEVADA

Mr. CAAN. Madame Chairwoman Napolitano, Congressman Heller, Congressman Mitchell, members of the Subcommittee, good morning. My name is George Caan. I am the Executive Director of the Colorado River Commission in Nevada. I am also proud to be the Chairman of the Lower Colorado River Multi-Species Conservation Program. Quite a mouthful, and I will refer to it as the MSCP.

This is a steering committee composed of the 40 plus agencies who have an interest in the health of the Colorado River system. I appreciate your invitation to speak to you today regarding H.R. 2515. I want to especially thank you, Madame Chairwoman, Congressman Heller, Congressman Mitchell, for your support and leadership on this bill.

I speak today on behalf of the State of Nevada and also as the Chairman of the Committee. Like our sister states of California and Arizona, Nevada fully supports this bill. I have submitted my written testimony to the committee but would like to offer brief remarks on why this legislation is so necessary, and hopefully I can convince my friend, Bob Johnson, to move from understanding why we need this bill to agreeing that we do need this bill.

The MSCP is critical to the states that enjoy the benefits of the water and power delivered by the Colorado River. As an example, southern Nevada receives 90 percent of its water supply from the

Colorado River and Lake Mead. The need for future certainty on this supply and a supply that we plan on using for quite some time is what drove us to work for the last decade in developing this program.

In order to comply with our responsibilities under the Endangered Species Act while continuing to use our water and power resources and develop them into the future, it was also the motivation for the non-Federal parties to contribute 50 percent of the \$626 million of program costs. This long-term program of 50 years needs the blessing of Congress through passage of this bill.

We need this legislation. Let me explain why. The legislation is needed because it provides authorization for the 50-year program. This provides the non-Federal parties the certainty to protect their substantial financial commitment for species protection over the 50-year period. The legislation is needed to uphold the Federal parties' end of the bargain by providing specific Federal appropriations to support the Federal parties' 50-year financial commitment.

The legislation is needed to provide specific direction to the Federal parties to comply with their commitments under the program documents. It provides remedies to the non-Federal parties to enforce the provisions of the program documents. The legislation is needed so that future changes to the Endangered Species Act will not modify the program unless specifically called for.

The term immunization was used I believe in your opening remarks. What we are looking for is that any future acts of Congress dealing with the Endangered Species Act specifically address the multi-species program so that there are no unintended consequences of future actions. Finally, the legislation gives specific authority to the Federal parties to use Colorado River water to sustain the various riparian habitats, fish rearing projects and related facilities provided under the program through an agreement with the non-Federal parties.

This is an extremely important effort for all of us. With your help in passing this legislation, the program is destined for great success.

In conclusion, Madame Chairwoman, members of the committee, I am extremely proud to be associated with a program of such quality. You can look at what we are doing today, the land and water we are acquiring, the habitat we are restoring, the fisheries we are rebuilding, the backwaters we are creating, the ecosystems that we are revitalizing. Look at the substantial financial commitments that we have made to this program.

We are developing solid science programs and embracing an adaptive management program to adjust and improve more efforts over the 50-year period so that we know what works and what does not work. We have sufficient time to go ahead and replan and redo and see the fruits of our efforts. The states, the tribes, the local governments, water and power agencies, those who rely on this precious resource, all of us are doing our part in this important and unprecedented effort.

The certainty of the success of this program and the populations who depend upon this important resource, the Colorado River, need this legislation passed by this Congress. Thank you, and I would be more than happy to answer any of your questions.

[The prepared statement of Mr. Caan follows:]

**Statement of George M. Caan, Executive Director,
Colorado River Commission of Nevada, on H.R. 2515**

Good morning Madam Chairwoman Napolitano, Congresswoman McMorris-Rodgers and Congressman Heller, members of the Subcommittee. My name is George Caan and I am the Executive Director of the Colorado River Commission of Nevada. I am also the Chairman of the Steering Committee charged with overseeing the Lower Colorado River Multi-Species Conservation Program. I appreciate your invitation today to speak to you regarding H.R. 2515. I want to especially thank you Madam Chairwoman and Congressman Heller for your efforts and leadership on this bill. This bill authorizes the Lower Colorado River Multi-Species Conservation Program. I speak today on behalf of the State of Nevada, one of the three lower basin states directly involved in the Program. Like its sister states of California and Arizona, Nevada fully supports this bill. I look forward to your comments and questions.

The Lower Colorado River Multi-Species Conservation Program is an unprecedented, robust 50 year, cooperative effort among 50 federal and non-federal entities in Nevada, California and Arizona designed to protect 26 endangered, threatened and sensitive species on the Lower Colorado River. The Program provides for the creation of over 8,100 acres of riparian, marsh and backwater habitat for the species covered by the Program, and includes plans for the rearing and stocking of over 1.2 million fish to augment populations of two endangered fish covered by the Program. The Program also provides for the maintenance of existing, high-quality habitat, and a research, monitoring and adaptive management effort to ensure that Program elements are effective in helping covered species. In exchange for species and habitat protection, the affected water and power agencies of the three states are provided with assurances that their operations may continue upon compliance with Program requirements.

This Program is particularly vital to the State of Nevada. The State, through the Colorado River Commission of Nevada, an agency of the State of Nevada, and the Southern Nevada Water Authority, a political subdivision of the State of Nevada, currently diverts its entire apportioned share of Colorado River water. This Colorado River water constitutes the overwhelming majority of the water supply for the Las Vegas Valley area, almost 90%, with the remaining water coming from a limited groundwater supply. There are currently more than one and a half million residents living in the Las Vegas area. Southern Nevada is the fastest growing urban area in the United States. In the last ten years alone the population increased by almost 70% and for the next ten-year period the population is projected to increase by an additional 50%.

Southern Nevada also relies on the Colorado River for hydroelectric power. On behalf of the State and as principal in its own behalf, the Colorado River Commission receives electric power generated by various federal hydroelectric projects on the Colorado River through delivery contracts with the Western Area Power Administration of the U.S. Department of Energy. These projects include the Boulder Canyon Project, the Parker-Davis Project and Salt Lake City Area Integrated Projects. The Commission, in turn, contracts to deliver electric power from one or more of these federal projects to the several companies comprising the Basic Industries in Henderson, Nevada, the Southern Nevada Water Authority and to five power utilities that together serve southern Nevada.

Consequently, the sustainability of the Colorado River System is absolutely critical to the vitality of southern Nevada's future. For this reason, the State of Nevada was a significant participant in the development of the Program and is now one of the primary non-federal party funding contributors to the Program. In short, the Program provides for a total of \$626 million in funding, indexed for inflation over 50 years, for the species conservation efforts that will be implemented under the Program. These costs are divided 50-50 between the state and federal entities covered by the Program. Accordingly, H.R. 2515 provides an authorization of appropriations for the federal share of Program costs and directs the Secretary of the Interior to manage and implement the Program in accordance with the Program Documents. These documents include the agreements that the parties have signed embodying their commitment to carry out the Program. As former Secretary Norton declared in the Record of Decision for the Program:

The importance of the Colorado River to the southwestern portion of the United States cannot be overstated: the Colorado is the lifeblood of the southwest. The Colorado River provides water and power to over 20 million people (in such cities as Los Angeles, San Diego, Las Vegas, Phoenix and

Tucson), irrigates over 2 million acres, and generates up to 10 billion kilowatt hours of electricity annually.

H.R. 2515 gives the necessary strength and integrity to this monumental federal and non-federal collaborative conservation Program and virtually assures its success over the next five decades. The State of Nevada supports this bill in its entirety and urges the Committee to approve the bill. Thank you again for the opportunity to speak with you today. I'd be happy now to answer any questions you may have.

**Response to questions submitted for the record by
George M. Caan on H.R. 2515**

(State Representatives) Has there been any effort to work with entities on the other side of the Mexican border to ensure successful recovery for the river system, not just the U.S. side? Is it possible that neglect of habitat on the Mexican side could wipe out attempts by the MSCP to stabilize habitat and protect and recover species?

There is significant continuing effort between the United States and Mexico through the International Water and Boundary Commission ("IBWC")¹ to deal with environmental issues along the Lower Colorado River (LCR) and the delta region in Mexico. In particular, the U.S. Bureau of Reclamation and United States Section of the IBWC are involved in "Fourth Working Group" activities that predominantly through the International Boundary and Water Commission ("IBWC") coordinate environmental investigations and activities along the Limitrophe Section of the LCR (i.e., the section between the northerly international boundary with California and the southerly international boundary with Arizona), as well as below the border. These activities include the development of a hydraulic model for the riverine corridor in Mexico, impacts of water management on the Cienega de Santa Clara, status of endangered Southwestern willow flycatcher and Yuma clapper rail, and other endangered species.

Additionally, there are several cross-border initiatives involving the U.S. Fish and Wildlife Service, Arizona Game and Fish Department, Native American tribes, and other non-governmental organizations that focus on habitat restoration activities and endangered species conservation programs. These efforts are addressing portions of the Lower Colorado River in Mexico, the delta region, and the adjacent Sonoran Desert habitats. Finally, there is a "working group" of interested governmental and non-governmental entities in Arizona that are involved in evaluating the potential impacts of partial or full operation of the Yuma Desalting Plant and potential impacts to the Cienega de Santa Clara and water quality impacts associated with Treaty deliveries.

These efforts are necessarily outside of the LCR MSCP since the Secretary of the Interior does not have the independent authority to alter river operations to provide more Colorado River water for the benefit of species or habitat in Mexico.² Furthermore, the United States alone has no ability to control water or land use in Mexico or be assured that its efforts would be supported or implemented by Mexican authorities. However, through the collaborative efforts described above progress may be made towards successful habitat restoration and species protection in Mexico.

With respect to the second question, it is not likely any degradation of habitats in the Mexican portion of the Lower Colorado would negatively impact the success of LCR MSCP activities and programs. If anything, the benefits provided through the habitat created by LCR MSCP projects will help assure that endangered species will not go extinct due to any failure to protect their habitat by Mexico.

(State Representatives) Can you please discuss the specifics of the proposed federal-state water use agreement referenced in section 3(b) of the bill? Have the states reached agreement on how much water will be dedicated to the program?

The LCR MSCP Conservation Plan includes an estimate that consumptive water use for program purposes will be 39,300 acre-feet per year. This water is expected to be provided through acquisition of lands for habitat creation that include water rights; although the program cost estimate includes \$50 million to acquire any additional water rights that may be needed. However, there is legal question about the authority of Reclamation to make use of Colorado River water for fish and wildlife

¹ The IBWC was established under the 1944 U.S.-Mexico Water Treaty between the United States and Mexico regarding the Colorado River and is made up of representatives of the Republic of Mexico and the U.S. State Department.

² *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003).

purposes. Section 3(b) is specifically intended to provide assurances for that authority so that the LCR MSCP may be fully implemented.

The proposed water agreement will accomplish three major purposes. First, it will permit the Secretary to apply Colorado River water to the purposes of the LCR MSCP. Second, it will specify how the Secretary is to account for water that is applied to LCR MSCP purposes. For example, the Secretary does not report as a diversion or consumptive use the natural depletion of Colorado River water by non-irrigated phreatophyte vegetation. Under the LCR MSCP, some of this vegetation will be replaced with higher quality, native vegetation. The new, native vegetation will use water previously applied to the non-native vegetation and so will not be treated as a new diversion or consumptive use of Lower Colorado River water. If additional water is needed for MSCP purposes, it will be acquired from willing sellers. Third, the agreement will permit the Secretary to manage Colorado River water for other MSCP purposes, including providing marsh, backwater and other habitat.

(State Representatives) How does the MSCP address non-native species?

There are many programs and activities contained within the LCR MSCP conservation measures that address the management and control of non-native plant and animal species. For example, control and management of non-native salt cedar (tamarisk) is a major part of the re-establishment and maintenance of native cottonwood and willow habitats along the LCR. The salt cedar is low quality habitat for migratory birds, and its replacement with native vegetation will improve conditions for nesting and breeding for these species. Another program within the LCR MSCP to benefit migratory bird species is the control of nest parasitism by the Brown-headed cowbirds, which has negatively impacted many birds, such as the endangered Southwestern willow flycatcher. To counter the predation by non-native fish on juvenile native endangered fish, the LCR MSCP participants have agreed to the rearing, stocking and management of nearly 1.2 million razorback suckers and bonytail in aquatic habitats within the LCR MSCP planning area along the LCR.

Mrs. NAPOLITANO. Thank you, Mr. Caan. Next I would like to recognize Kara Gillon, Senior Staff Attorney, Defenders of Wildlife, Albuquerque, New Mexico. Welcome.

**STATEMENT OF KARA GILLON, SENIOR STAFF ATTORNEY,
DEFENDERS OF WILDLIFE, ALBUQUERQUE, NEW MEXICO**

Ms. GILLON. Thank you, Madame Chairwoman, and members of the Subcommittee and Committee. I am Kara Gillon, Senior Staff Attorney with Defenders of Wildlife. Defenders of Wildlife is a national nonprofit membership organization dedicated to the protection of native animals and plants in their natural communities. Headquartered in Washington, D.C., Defenders has field offices in Albuquerque, New Mexico and throughout the basin states in Tucson, Sacramento and Denver.

Before summarizing our concerns with H.R. 2515, I will first touch on our concerns with the Multi-Species Conservation Program, or MSCP. Defenders appreciate the effort and resources put into the MSCP. At its inception, Defenders applauded the program for its long-term, large-scale habitat improvement and species recovery. In fact, Defenders was a member of the steering committee.

However, the MSCP falls short of these early goals and will not sustainably address the environmental degradation suffered by the Colorado River and delta. The plight of the big river fish highlights the extreme ecological degradation of the lower river. All four fish are listed as endangered under the ESA. The Colorado Pike Minnow has been extirpated from the lower basin. The bony tail has been virtually extirpated from the wild, and the razorback sucker populations are not self-sustaining.

And just as native wildlife finds survival more difficult, we too face increasing challenges from a highly regulated river system, in-

creasing water use over allocation, drought and climate change. The MSCP, however, does not address any of these pressures on the river. For this reason, habitat restoration and fish augmentation as proposed in the MSCP are much less likely to succeed.

Years of river restoration efforts have shown us that successful restoration is critically dependent on understanding and addressing the causes of a river's decline. It is also for this reason that several of the provisions of H.R. 2515 could result in adverse, unintended consequences for decades to come and present yet more challenges to wildlife conservation. To lock in the MSCP and provide the certainty contemplated here can only come at the expense of another user, the environment.

Instead, we suggest legislation that preserves the Secretary of the Interior's authority as water master and creates opportunities for flexibility and resiliency over the next 50 years. Simply put, there is no precedent for the constraints placed on the Secretary of the Interior in H.R. 2515. Defenders is concerned about those provisions that exceed a straightforward authorization to promote Federal participation such as authorization of appropriations, authorization to accept grants or provide grants or authorization to implement program activities.

Provisions that lock in the program documents, direct development of the water accounting agreement and require explicit reference to the MSCP in future laws if they are to apply exceed what is necessary. H.R. 2515 is far different from authorizing legislation for other endangered fish programs such as the one on the upper Colorado River. This is because key program documents were not made available for public review and comment.

Given the authority possessed by the Secretary as water master, requiring an agreement for water use is premature, and use of the section 10 habitat conservation plan and no surprises is inappropriate in light of the Federal nexus on the lower Colorado River, and finally because the MSCP steering committee refused to endorse an agreement where the MSCP would give good faith consideration to conservation opportunities in the Colorado River delta for the benefit of listed species there.

In conclusion, in its current form the MSCP program documents recognize the Secretary's role as water master. Defenders has long advocated for flexibility in river management in order to increase reliability and predictability of use of river resources. Such flexibility, however, should not come at the expense of the Secretary's environmental authorities.

Providing for increased levels of predictability will be critical to meeting the demands of both human and environmental water use in the future. Thank you very much. That concludes my testimony, and I will be happy to answer any questions.

[The prepared statement of Ms. Gillon follows:]

**Statement of Kara Gillon, Senior Staff Attorney,
Defenders of Wildlife, on H.R. 2515**

Madam Chairwoman and Members of the Subcommittee, I am Kara Gillon, Senior Staff Attorney with Defenders of Wildlife. Thank you for this opportunity to speak with you today on H.R. 2515, a bill to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program.

Defenders of Wildlife (“Defenders”) is a national, nonprofit membership organization dedicated to the protection of all native wild animals and plants in their natural communities. Headquartered in Washington, D.C., Defenders has field offices in Albuquerque, NM, where I am located, and throughout the Colorado River basin states, in Tucson, AZ, Sacramento, CA, and Denver, CO.

I will ask leave to supplement this with some documents that I am relying on for some of my comments today. Before summarizing our concerns with the Multi-Species Conservation Program, also known as the “MSCP,” and proposed authorizing legislation, I first want to address briefly the Lower Colorado River—how it has been managed over the last seventy years and why the MSCP could do a better job addressing the environmental degradation suffered by the Colorado River and Delta.

We appreciate the effort and resources put into the MSCP. At its inception, Defenders seized on the opportunity presented—long-term, large-scale habitat improvement and species recovery where before there was very little. Unfortunately, the final MSCP provides lesser protections for fewer species over a smaller area.

Ten years ago, the Bureau of Reclamation found in a biological assessment of its historic and ongoing operations that “[H]uman-induced change since the beginning of the century has resulted in an ecosystem having significantly different physical and biological characteristics. Such changes have taken place as a result of the introduction of exotic plants (such as salt cedar), the construction of dams, river channel modification, the clearing of native vegetation for agriculture and fuel, fires, increasing soil salinity, the cessation of seasonal flooding, and lowered water tables.”¹ It is as if man created an entirely different river.

Native wildlife is finding survival in an altered Colorado River basin more difficult. These changed processes no longer naturally sustain riparian forests and meadows, fail to provide young fish access to flooded lands and leave young fish more susceptible to predation by sight-feeding, non-native predators.

The plight of the “Big River Fishes” highlights this extreme ecological degradation. All four fish are listed as endangered under the Endangered Species Act—the Colorado pikeminnow; bonytail; razorback sucker; and humpback chub. The Colorado pikeminnow has been extirpated from the lower basin and is not even considered by the MSCP. The bonytail also has been virtually extirpated from the wild. Razorback sucker populations have declined from 50,000 to 5,000 fish over the last ten years with very small wild populations; they are not self-sustaining. There is only one small population of the humpback chub in the lower basin.

Habitat restoration and fish augmentation performed without regard to the well-known threats to listed species are likely to fail. Years of river restoration efforts have shown us that successful river restoration is critically dependent on understanding and addressing the causes of the river’s decline (Palmer et al., 2006; Aronson & Le Floch, 1996). The restored habitats and stocked fish will continue their decline because the MSCP does not address the root causes of habitat degradation and low fish survival—the impounding, storing, and diverting of the river’s waters without regard to the natural hydrograph that naturally sustains the cottonwood-willow forest, mesquite bosque, and backwaters that harbor razorback suckers, bonytails, southwestern willow flycatchers and other fish and birds, compounded by the stocking of non-native predatory fish.

Success of the conservation plan is also questionable because there are no goals or objectives for habitat restoration. Without goals or objectives, there are no metrics for measuring success. For example, we do not know if cottonwood-willow habitat is successful if we find one southwestern willow flycatcher, a flycatcher nest, or ten flycatchers. We also do not know that mitigation will occur prior to adverse impacts or if permanently lost habitat will be maintained in perpetuity. We also do not know how the MSCP will select habitat creation and restoration sites; thus we do not know if the MSCP will select sites that are off-channel or hydrologically connected to the river.

Lastly, the MSCP purports to ensure the survival of imperiled fish and wildlife for the next fifty years yet fails to address perhaps the largest threat wildlife will face in this century—global warming. In 2004, a report prepared for the Pew Center on Global Climate Change synthesized published global warming studies and concluded that there was “convincing evidence” that anthropogenic global warming had significantly affected natural systems and that “[t]he addition of climate change to the mix of stressors already affecting valued habitats and endangered species will

¹ Bureau of Reclamation, Description and Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River 83 (1996), available at <http://www.usbr.gov/lc/region/g2000/batoc.html>.

present a major challenge to future conservation of U.S. ecological resources" (Parmesan & Galbraith, 2004).

In fact, this year, Working Group II of the Intergovernmental Panel on Climate Change ("IPCC") issued a Summary for Policy Makers which states with medium confidence that 20-30% of plant and animal species assessed in the report have an increased chance for extinction if the average global temperature increases by more than 1.5-2.5° Celsius. According to the IPCC, an increase in temperatures above this range would drastically alter ecosystem structure and functions, species' ecological interactions, and species' geographic ranges (IPCC, 2007).

Colorado River fish and wildlife are particularly susceptible to adverse effects because of their concentrated habitat and their location in the Southwest. Global warming is likely to cause temperatures in the American West to increase above levels which increase a species' chances for extinction, according to the IPCC. Furthermore, the IPCC predicts with very high confidence that global warming will lead to decreased snow pack, more winter flooding, and reduced summer flows for the mountains of the American West. Global warming effects likely to affect the Colorado River fish include precipitation decreases in the lower-basin by mid-century, early snowmelt runoff in the upper-basin, decreased overall runoff, and increased evaporation rates (Garfin & Lenart, 2007). Therefore, global warming is likely to produce changes in stream flows, precipitation, water temperature, and ecosystem structure which could very well result in an increased probability of fish extinction in the Southwest, such as in the Colorado River (National Assessment Synthesis Team, 2001).

The imperiled status of many of these fish leave them less equipped to adapt to habitat modifications presented by global warming, making the possible effects upon them even more severe and leaving them more vulnerable to extinction. The MSCP is a rare, but foregone, chance to assist wildlife through the looming bottleneck of complex effects of global warming.

To institutionalize the MSCP, as called for in the proposed legislation, may instead present one more challenge to wildlife conservation in the lower Colorado River.

We too face increasing challenges from a highly regulated river system, increasing water use, drought, and climate change. The National Research Council has recently synthesized several studies that tell us historical conditions are no longer a reliable indicator of future conditions, with future droughts exceeding those of recent experience. First, our streamflow record in the basin is only a small subset within a range of greater variability than previously thought. For example, we are learning that although up to 16.5 million acre-feet of water has been allocated to users in the United States and Mexico, the river naturally yields 12.5 million acre-feet to 14.7 million acre-feet of water. In addition, studies show a trend of increasing temperatures across the basin and a reduction in future streamflow (National Research Council, 2007). The MSCP, however, does not confront any of these challenges. For this reason, the success of proposed habitat restoration and fish augmentation is highly uncertain.

In the face of growing challenges, the desire for certainty will increase. To provide the level of certainty contemplated here can only come at the expense of assurances for another—the environment. Instead, we suggest legislation that preserves the Secretary of the Interior's authority as "water master." Think instead in terms of flexibility and resiliency, where mechanisms may be created that create opportunities for all—whether through new opportunities and creative ideas for storage, instream flow, water acquisition programs, or reservoir re-operation. Certainty, whether over water supply or other resources and gained only at the expense of others, will create an untenable and unsustainable condition.

This legislation will have the effect of constraining the Secretary of the Interior at precisely the time we need more opportunities for the Colorado River system. Provisions that codify the Program Documents and No Surprises and direct the Secretary to perform certain functions are inappropriate.

There is no precedent for the constraints placed on the Secretary of the Interior

The legislation proposed here is far, far different from that for other endangered fish programs authorized by Congress. Nearby and oft-cited examples are the Upper Colorado River Endangered Fish Recovery Program and the San Juan River Endangered Fish Recovery Program.

Legislation for the MSCP should only do what may be necessary for federal participation in the program: authorize appropriations; authorize the federal party to acquire interests in land and/or water, accept or provide grants, and enter into contracts and cooperative agreements; and authorize the federal party to carry out

aspects of the program. Rather than simply authorize the Secretary's participation, H.R. 2515 directs the Secretary to take a certain course of action. Doing so confines the Secretary's authority as "water master" for the next fifty years.

Moreover, codifying the Program Documents would encourage other programs to emulate this legislative approach despite the fact that key documents—the Implementing Agreement and the Funding and Management Agreement—were not made available for public review and comment.

HR 2515 also constrains future Congresses. The bill contains what is, in effect, a legislative no surprises policy requiring future Congresses to explicitly state if legislation applies to the MSCP, turning traditional legislative drafting and interpretation on its head.

An HCP and "No Surprises" are Inappropriate due to the level of federal influence

The MSCP is a combination of Endangered Species Act ("ESA") sections 7 and 10, providing coverage for federal and non-federal participants. Use of a section 10 Habitat Conservation Plan, or HCP, is inappropriate in light of the federal nexus associated with nearly all lower Colorado River activities. Section 10 and use of the "No Surprises" policy are only appropriate where there is no federal nexus.

The provision in the bill directing the Secretary to act in accordance with the Program Documents not only enacts No Surprises assurances for the non-federal participants but also for federal parties. Neither the Endangered Species Act nor its regulations authorize extension of No Surprises to federal agencies.

The federal government is implicated in nearly every aspect of lower Colorado River operations, due to the Secretary of the Interior's role as "water master". The Bureau of Reclamation has been delegated responsibility for operating and maintaining the extensive network of dams, water diversions, levees, canals, and other water control and delivery systems on the River. Reclamation's authority and discretion are guided by a body of treaties, Congressional enactments, compacts, and other agreements known as the law of the river.

In 1928, Congress passed the Boulder Canyon Project Act which authorized the construction of a dam system on the River. Importantly, the Act reserved for the federal government broad authority over the operation of the dam system. As the Supreme Court in *Arizona v. California* explained, it was the United States' undertaking of this ambitious project and its concomitant assumption of responsibility for its operation, that "Congress put the Secretary of Interior in charge of these works and entrusted him with sufficient power...to direct, manage, and coordinate their operation."²

Unlike biological opinions for federal agencies pursuant to section 7, which could change in future consultations, section 10 HCPs include No Surprises assurances. In general, if the status of a species covered by an HCP worsens because of unforeseen circumstances, the Fish and Wildlife Service will not require conservation or mitigation measures in addition to those in the HCP without the consent of the permittee.

To obtain these assurances available only to non-federal parties, the MSCP parties employed a section 7/10 hybrid that pooled federal and non-federal actions and effects as interrelated. If No Surprises prohibits the Fish and Wildlife Service from requiring additional mitigation measures from non-federal participants in terms of land, water or other resources, the Fish and Wildlife Service may be equally constrained in requesting changes to federal activities.³

In other words, there is a high degree of federal influence in lower basin operations. Section 10 of the ESA relates solely to authorizing take of listed species by non-federal entities. Use of section 10 and the No Surprises policy are therefore inappropriate.

The degree of federal influence renders direction to the Secretary unnecessary

Similarly, given the authority possessed by the Secretary as "water master," directing a water accounting agreement is unnecessary and unwise. The Secretary has ample authority to provide for the comprehensive management and control of the Lower Basin system. Indeed, the Secretary need not be authorized or directed to enter into a water agreement any more than he needs authority to enter into the

² *Arizona v. California*, 373 U.S. 546, 589-90 (1963).

³ See Lower Colorado River Multi-Species Conservation Program Implementing Agreement at Sec. 7.2 (recognizing that federal and non-federal actions are so interconnected that a federal action could arguably be included in a section 10 permit), available at <http://www.usbr.gov/lc/lcrmscp/publications/FinalIA.pdf>.

Colorado River Water Delivery Agreement or to develop surplus or shortage guidelines. And again, to direct the Secretary to enter into this water agreement is problematic because the Program Documents do not mention the need for such an agreement, even after comment that the documents were vague as to the sources and use of water for the MSCP, and there will be no future opportunity to comment on such agreement.

The MSCP does not cover all listed species

Defenders was a member of the MSCP Steering Committee during the mid-1990s, during which we sought opportunities for the MSCP to include the Colorado River Delta within its coverage and conservation areas. After extensive negotiations with other MSCP participants and after the Steering Committee voted not to endorse an agreement where the MSCP would give good faith consideration of conservation opportunities in Mexico, Defenders withdrew in late 1998.

The Colorado River basin encompasses nine states: seven in the United States and two in Mexico. The MSCP planning area, however, only “comprises areas up to and including the full-pool elevations of Lakes Mead, Mohave, and Havasu and the historical floodplain of the Colorado River from Lake Mead to the Southern International Boundary.” Although these fish naturally occurred in this area, the MSCP wrongly excludes the Colorado pikeminnow from consideration; it offers no conservation measures for the fish. Moreover, the MSCP “Planning Area” does not encompass the entire area that may be affected by the covered actions—the Colorado River Delta. Several endangered species, including the razorback sucker, Yuma clapper rail, desert pupfish, and vaquita, find a home there, are affected by activities along the lower Colorado River, and deserve protection.

Conclusion

In its current form, the Lower Colorado River MSCP preserves the Secretary’s role as water master of the Colorado River. Defenders of Wildlife has long advocated for flexibility in Colorado River management in order to increase the reliability and predictability of use of river resources. Such flexibility, however, should not come at the expense of the Secretary’s environmental authorities and obligations nor should the Secretary relinquish his role as water master in lower Colorado River management in an attempt to achieve such flexibility.

Providing for increased levels of flexibility in river management will be critical to meeting the demands of both human and environmental water users in the future, particularly as Upper Basin use and the impacts of climate change decrease overall water availability in the Colorado River system. Defenders believes that H.R. 2515 goes beyond what is needed to authorize the MSCP and may limit our options to address future challenges.

Thank you very much for the opportunity to provide testimony today. I will be glad to answer any questions.

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**Response to questions submitted for the record by
Kara Gillon on H.R. 2515**

1. **H.R. 2515 establishes a 50-year term for the Lower Colorado Multi-Species Conservation Program. Fifty years strikes me as a long time, and it is certainly longer than is normally set for natural resource programs. For example, the Upper Colorado Recovery Implementation Program was authorized in 1988 and had to be reauthorized in 2005—after only 17 years. Is a 50-year term really appropriate for this program? Are you confident that conditions affecting the program will be essentially unchanged 50 years from now? What assurances are there?**

Response:

The 50-year time frame for the Lower Colorado River Multi-Species Conservation Program (“MSCP”) is cause for concern. The MSCP does not address existing threats posed by non-native predatory species and a drastically altered river ecosystem. One cannot safely predict future ecosystem conditions given the failure to tackle known threats, not to mention additional threats not discussed by the MSCP, such as those posed by climate change. For these reasons, there is little assurance the MSCP is equipped to deal with the challenges of the next half-century.

For example, the Program Documents’ hydrologic modeling of potential flows over the next fifty years is based on the assumption that future hydrology will resemble historic patterns. Defenders of Wildlife and others commented, therefore, that the model fails to account for the likelihood that climate change will affect the hydrology of, and demand within, the Colorado River basin. Climate change impacts could reduce inflows by as much as 20 percent, with resultant adverse impacts on habitat and listed species (Nash, L.L. and P. Gleick. 1991. The sensitivity of streamflow in the Colorado basin to climatic changes. *Journal of Hydrology* 125: 221-241; Nash, L.L. and P. Gleick. 1993. *The Colorado River Basin and Climatic Change: The Sensitivity of Streamflow and Water Supply to Variations in Temperature and Precipitation*. Report EPA 230-R-93-009. Washington, DC: Environmental Protection Agency).

There has been and continues to be a great deal of research on the effects of climate change on water resources in the Colorado River basin (Garfin & Lenart, 2007; Christensen, N.S., A.W. Wood, N. Voisin, D.P. Lettenmaier, and R.N. Palmer. 2004. The Effects of Climate Change on the Hydrology and Water Resources of the Colorado River Basin. *Climatic Change* 62(1): 337-363). The studies predicted, and continue to predict, higher temperatures, decreases in streamflow, less snow and more precipitation, reduced storage, and less hydropower production. As the United States Geological Survey succinctly stated, “We need to look at a large range of possible futures for water and [evaluate] how well will our designs, plans and allocations work under a whole range of climate scenarios—because we can’t narrow it down.”¹

After the Bureau of Reclamation rejected climate change as an important problem that merits analysis, the subsequent Program Documents failed to even mention the possibility of climate change over the next 50 years.

Furthermore, the MSCP is not a recovery program, but a program to offset impacts from current and future activities. If the MSCP were geared toward recovery, rather than the status quo, the fish and wildlife of the Colorado River basin might possess long term assurances on par with those sought by the MSCP permittees.

Due to concerns over the length of the MSCP and its focus on mitigation of impacts rather than recovery of species, Congress may wish to authorize the program without the additional provisions of H.R. 2515 that would also direct the Secretary to implement the MSCP as written today, in Sections 3(a) and 5(b). Congress may also authorize the program in increments, as is proposed with the Platte River Recovery Implementation Program.

2. **This program was roughly modeled upon the Upper Colorado Recovery Implementation Program; did water and power users and the states in the Upper Colorado Basin receive the same assurances that are being provided in the MSCP?**

Response:

Defenders of Wildlife has not been a participant in the Upper Colorado River Recovery Implementation Program (“RIP”), but the following response is based on my understanding of the RIP’s beginning and implementation.

¹Lucy Kafanov, Water Managers Must Gird for Extreme Conditions, E&E News PM (April 27, 2007).

From its beginning in 1988, the RIP sought to do more than offset impacts of water development activities; the RIP instead developed a plan to implement a set of actions to address aspects of the recovery plans for listed species.

The RIP serves as the "reasonable and prudent alternative" for projects undergoing Endangered Species Act section 7 consultation. In other words, the RIP avoids jeopardizing the existence of listed species and destroying or adversely modifying species' critical habitat. The Fish and Wildlife Service retains ongoing responsibility to determine whether the RIP is making sufficient progress toward recovery. The Fish and Wildlife Service also retains the ability to fashion a new reasonable and prudent alternative in the event sufficient progress is not being made or if the RIP cannot continue to serve as the reasonable and prudent alternative.

In contrast to the MSCP, the Upper Colorado River RIP does not cover a period as long as 50 years. The RIP does not guarantee No Surprises assurances to the non-federal participants, nor does the RIP simply mitigate for the adverse impacts of current and future activities, in essence maintaining the status quo. Unlike MSCP parties, participants in the RIP do not have assurances that their Recovery Action Plan or obligations thereunder will never change. However, they do have assurance that although the Fish and Wildlife Service makes the final decision, the agency will work with them in measuring the progress of the RIP and, if necessary, in developing new reasonable and prudent alternatives.

Mrs. NAPOLITANO. Thank you very much, Madame. I appreciate your testimony and found it of great interest. Next would be Mr. Gerald Zimmerman, the Executive Director of the Colorado River Board of California in Glendale, California. Welcome.

STATEMENT OF GERALD R. ZIMMERMAN, EXECUTIVE DIRECTOR, COLORADO RIVER BOARD OF CALIFORNIA, GLENDALE, CALIFORNIA

Mr. ZIMMERMAN. Thank you, Madame Chairperson or Chairwoman and members of the Subcommittee. I want to thank you for the opportunity to provide both written and oral testimony today on H.R. 2515. The Colorado River Board of California is the agency in California created by state statute to protect California's rights and interest in the resources provided by the Colorado River and to represent California in discussions and negotiations regarding the Colorado River and its management.

California's rights and interest in the water and power resources of the Colorado River system are vital to the state's economy. Seven counties in southern California, more than half the state's population, are supported by the water and power resources from the Colorado River to support the economy in excess of \$850 billion per year. The Colorado River Board of California supports passage of H.R. 2515 because if passed it assures continued compliance by the United States with the program documents and agreements that have been developed as part of the lower Colorado River Multi-Species Conservation Program.

From California's perspective, H.R. 2515 as written provides several key elements that are important toward ensuring the long-term, effective implementation of this important program. First, H.R. 2515 provides an authorization of appropriation for the Federal share of the cost and directs the Secretary of Interior to manage the program in accordance with the program documents and agreements that have been developed.

These documents and agreements that were executed by the Federal and non-Federal parties reflect a long-term commitment to implement this program through 2055. California believes that through this legislation it is important that Congress formally rec-

ognize the value of the program to the citizens of the United States and the overarching responsibilities of the Secretary of Interior and the Bureau of Reclamation and the responsibilities that they have toward long-term program implementation.

Second, H.R. 2515 establishes a process for the Secretary of Interior and the Bureau of Reclamation to acquire and provide adequate water supplies associated with restoration and maintenance of habitats created pursuant to the program documents. In these times of limited water supplies in the lower basin, this process will allow for the creation and maintenance of 8,132 acres of aquatic wetland and riparian habitat within the program planning area along the lower Colorado River, while ensuring lawful entitlement holders in each of the three lower basin states can continue to manage and effectively utilize their important Colorado River apportionments throughout the 50-year period.

Specifically there is language in H.R. 2515 ensuring that habitat water acquisition and water use policy established by the Secretary of Interior will not impair any rights to mainstream water established by any compact, treaty, law or decree in effect as of enactment of this act.

Finally, H.R. 2515 acknowledges that a long-term, cooperative effort involving Federal and non-Federal participants will be required in order to successfully implement this program over the 50-year period. This will be accomplished through periodic meetings of the Lower Colorado River Multi-Species Conservation Program steering committee and Reclamation staff. These meetings, several of which have already occurred since the inception of the implementation program in April 2005, are the primary focal point for decision-making regarding preparation and adoption of the annual work plans, budgets and program implementation status reports.

It is a steering committee where the consensus-based decisions are made based on the results of ongoing monitoring and research. Utilization of adaptive management in suggesting modifications that need to be made should be based on the best available science. I believe that this is a key element of the program, and we are already spending over 25 percent of the program cost to adapt to potential change that may occur.

Madame Chair, I want to thank you for the opportunity to be here today. I want to indicate that California is fully committed to carrying out its responsibilities toward the long-term implementation of this program. Thank you.

[The prepared statement of Mr. Zimmerman follows:]

**Statement of Gerald R. Zimmerman, Executive Director,
Colorado River Board of California, on H.R. 2515**

Madam Chairwoman and Members of the Committee and Subcommittee, thank you for the opportunity to submit written testimony regarding H.R. 2515. As the subcommittee is aware, H.R. 2515 authorizes appropriations associated with long-term implementation the Lower Colorado River Multi-Species Conservation Program ("LCR MSCP"). The LCR MSCP is a comprehensive, cooperative effort among fifty federal and non-federal entities in Arizona, California and Nevada to protect 26 endangered, threatened and sensitive species along the Lower Colorado River and to provide assurances to the non-federal entities involved that their essential water and power operations on the River may continue if they comply with the Program's requirements and agreements.

As background, I am the Executive Director of the Colorado River Board of California (CRB); I served as the Chairman of the LCR MSCP Steering Committee

throughout the program-development phase and the first two years of the implementation phase. The CRB is the agency in California created by State statute to protect California's rights and interests in the resources provided by the Colorado River and to represent California in discussions and negotiations regarding the Colorado River and its management. California's rights and interests in the water and power resources of the Colorado River System are vital to the State's economy. Seven counties in Southern California, with more than half of the state's population, nearly 20 million residents, receive water and hydroelectric energy from the Colorado River, in support of a service area economy in excess of \$850 billion per year. All ten members on the Colorado River Board of California are appointed by the Governor.

It should be pointed out that in a normal water year California is entitled to the use of up to 4.4 million acre-feet of water from the mainstream of the Colorado River. This valuable water supply is utilized by several large southern California agricultural districts, as well as The Metropolitan Water District of Southern California, the wholesale distributor of water supplies to municipal providers that meet the needs of nearly 18 million residents in Southern California.

The CRB strongly supports H.R. 2515, because this legislation, if passed, assures continued compliance by the United States with the program documents and agreements that have been developed as part of the LCR MSCP. That, in turn, provides protection to the non-federal participants in the Program, who like the CRB, its member agencies, and all of the Colorado River water and hydroelectric power contractors, have agreed to provide substantial amounts of non-federal monies for the conservation of endangered species in order to receive an incidental take permit under the terms of the Endangered Species Act for their continued water and power operations.

On April 2, 2005, Secretary of the Department of the Interior, Gale A. Norton, approved this major collaborative and innovative 50-year conservation initiative. The overall Program costs, \$626 million, will be annually adjusted for inflation, and will be shared by the three lower basin states paying 50 percent of the costs and the federal government paying 50 percent. Of the states' share, Arizona and Nevada will each pay 25 percent, while California will pay the remaining 50 percent. In return for their funding commitments, the non-federal participants have received a 50-year incidental take permit, issued by the U.S. Fish and Wildlife Service under Section 10 of the Endangered Species Act, which authorizes their existing and future water and power operations to continue. All of the California participants have made a significant long-term financial commitment toward the implementation of the LCR MSCP that has been memorialized in a California LCR MSCP Funding Agreement, executed on April 2, 2005.

From California's perspective, H.R. 2515, as written, provides several key elements that are important toward ensuring the long-term effective implementation of this important Program. First H.R. 2515 provides an authorization of appropriations for the federal share of Program costs and directs the Secretary of the Interior to manage and implement the Program in accordance with the executed Program Documents and Agreements. These documents and agreements, executed by all of the federal and non-federal parties reflect the long-term commitment to implement this important Program through 2055. California believes that, through this legislation, it is important that the Congress formally recognize the value of the Program to the citizens of the United States and the overarching responsibilities that the Secretary of the Interior and the Bureau of Reclamation (Reclamation) have toward long-term Program implementation.

Second, H.R. 2515 establishes a process for the Secretary of the Interior and Reclamation to acquire and provide adequate water supplies associated with the restoration and maintenance of habitats created pursuant to the Program documents. In these times of limited water supplies in the Lower Basin States, this process will allow for the creation and maintenance of the 8,132 acres of aquatic, wetland, and riparian habitats within the Program planning area along the Lower Colorado River, and yet ensure that lawful entitlement holders in the three states can continue to manage and effectively utilize their important Colorado River apportionments over the fifty-year period. Specifically, there is language in H.R. 2515 ensuring that the habitat water acquisition and use policies established by the Secretary of the Interior will not impair any right to mainstream water established under any compact, treaty, law, decree, or contract in effect as of enactment of this Act.

Third, H.R. 2515 acknowledges that a long-term cooperative effort, involving the federal and non-federal Program participants, will be required in order to successfully implement this Program over the fifty-year period. This will be accomplished through periodic meetings of the LCR MSCP Steering Committee and Reclamation's LCR MSCP Office staff. These meetings, several of which have occurred since incep-

tion of Program implementation in April 2005, are the primary focal point for decision-making regarding the preparation and adoption of annual work plans, budgets, and Program implementation status reports. It is in the Steering Committee where consensus-based decisions will be made associated with the results of ongoing monitoring and research activities and the utilization of adaptive management in suggesting modifications to implementation activities based upon the best available science.

Finally, since the time that similar legislation was introduced last year (i.e., H.R. 5180), two significant developments have occurred. First, subject to final review and approval within the Department of the Interior, the parties have reached agreement with the United States on an agreement to provide Colorado River water for LCR MSCP habitat restoration and maintenance purposes, as authorized by Section 3(b) of the bill. Second, Section 5(b) of the bill, which relates to the impact of future legislative actions on the LCR MSCP, has been modified and narrowed significantly to meet the concerns of some members.

California is fully committed to carrying out its responsibilities toward long-term implementation of the LCR MSCP over the fifty-year period, and looks forward to working with representatives and agencies within the States of Arizona and Nevada, as well as the participating federal agencies in carrying out those goals and meeting our collective obligations. Toward this end, California believes that H.R. 2515 is of vital importance to all of the LCR MSCP participants committed to the Program's success. California urges the Subcommittee and the Committee, as well as the full House to approve this important legislation.

It is worth noting that at the White House Conference on Cooperative Conservation in August 2005, in St. Louis, Missouri, the LCR MSCP was recognized by the Administration as an "Exemplary Initiative." Implementation of the LCR MSCP is critical to the long-term needs of those in the southwest that depend on the Lower Colorado River for a major portion of their water and power resources. As Secretary Norton said in her April 2005 Record of Decision approving the Program:

"The importance of the Colorado River to the southwestern portion of the United States cannot be overstated: the Colorado is the lifeblood of the southwest. The Colorado River provides water and power to over 20 million people (in such cities as Los Angeles, San Diego, Las Vegas, Phoenix and Tucson), irrigates over 2 million acres, and generates up to 10 billion kilowatt hours of electricity annually."

The LCR MSCP represents a fifty-year commitment by all of the parties involved. It is essential that this commitment be fully and faithfully met. H.R. 2515 will help ensure that this occurs. Again, I would like to thank this Subcommittee and the Committee for the opportunity to provide this testimony regarding H.R. 2515, legislation considered by the CRB to be very important to California's long-term interests and rights in the water and power resources of the Colorado River System. Should the Subcommittee or Committee require any clarification of these comments, or additional information, you may reach me at (818) 500-1625, extension 308.

**Response to questions submitted for the record by
Gerald R. Zimmerman on H.R. 2515**

(State Representatives) Has there been any effort to work with entities on the other side of the Mexican border to ensure successful recovery for the river system, not just the U.S. side? Is it possible that neglect of habitat on the Mexican side could wipe out attempts by the MSCP to stabilize habitat and protect and recover species?

There are several significant efforts underway involving federal, non-federal, and non-governmental agencies in both countries to address environmental issues along the Lower Colorado River (LCR) and the delta region in Mexico. The U.S. Bureau of Reclamation and United States Section of the International Boundary and Water Commission are involved in the International Boundary and Water Commission Minute 306 and the "Fourth Work Group" activities that coordinate environmental investigations and activities along the Limitrophe Section of the LCR (i.e., the section between the northerly international boundary with California and the southerly international boundary with Arizona), as well as below the border. Specifically, the Minute 306 process provides a conceptual framework for cooperation by the United States and Mexico through the development of studies and recommendations concerning the riparian and estuarine ecology of the Colorado River in its Limitrophe Section and its associated Delta. These activities include the development of a hydraulic model for the riverine corridor in Mexico, impacts of water management on the Cienega de Santa Clara, status of endangered Southwestern willow flycatcher

and Yuma clapper rail, and other endangered species. Additionally, there are several cross-border initiatives involving the U.S. Fish and Wildlife Service, Arizona Game and Fish Department, Native American tribes, and other non-governmental organizations that focus on habitat restoration activities and endangered species conservation programs. Collectively these efforts are addressing portions of the Lower Colorado River in Mexico, the delta region, and the adjacent Sonoran Desert habitats. Finally, there is a “working group” of interested governmental and non-governmental entities in Arizona that are involved in evaluating the potential impacts of partial or full operation of the U.S. Bureau of Reclamation’s Yuma Desalting Plant and potential impacts to the Cienega de Santa Clara and water quality impacts associated with Mexican Water Treaty deliveries.

With respect to the second question, it is not likely that any degradation of habitats in the Mexican portion of the Lower Colorado would negatively impact the success of LCR MSCP activities and programs. If anything, the benefits provided through the habitat created by LCR MSCP projects will help ensure that endangered species will not go extinct due to any failure to protect their habitat in Mexico.

(State Representatives) Can you please discuss the specifics of the proposed federal-state water use agreement referenced in section 3(b) of the bill? Have the states reached agreement on how much water will be dedicated to the program?

The LCR MSCP Conservation Plan includes an estimate that consumptive water use for program purposes (i.e., habitat restoration and maintenance) will be 39,300 acre-feet per year. This water is expected to be provided through acquisition of lands for habitat creation that include water rights. Although the program cost estimate includes \$50 million to acquire any additional water rights that may be needed, there is a legal question about the authority of Reclamation to make use of Colorado River water for fish and wildlife purposes. Section 3(b) of H.R. 2515 is specifically intended to provide assurances for that authority so that the LCR MSCP may be fully implemented.

The proposed water agreement commits the Lower Division States and Reclamation to allow Colorado River water to be used for the LCR MSCP notwithstanding any contractual or other legal restrictions that may apply to the water used. Reclamation is further authorized to enter into voluntary agreements for the use or assignment of water for conservation purposes. In addition, the agreement encourages removal of non-native vegetation, like saltcedar, by providing that any water used by replacement native vegetation planted for program purposes will continue to be accounted as a system loss by Reclamation.

(State Representatives) How does the MSCP address non-native species?

There are many programs and activities contained within the LCR MSCP conservation measures that address the management and control of non-native plant and animal species. For example, control and management of non-native salt cedar (tamarisk) is a major part of the re-establishment and maintenance of native cottonwood and willow habitats along the LCR. The salt cedar is low quality habitat for migratory birds, and its replacement with native vegetation will improve conditions for nesting and breeding for these species. Another program within the LCR MSCP to benefit migratory bird species is the control of nest parasitism by the Brown-headed cowbirds, which has negatively impacted many birds, such as the endangered Southwestern willow flycatcher.

With respect to non-native aquatic species, it should be pointed out that the three Lower Basin state wildlife resource agencies have not, for some time, stocked any non-native aquatic species in the waters of the Lower Colorado River. To counter the predation by non-native fish on juvenile native endangered fish, the LCR MSCP participants have agreed to the rearing, stocking and management of nearly 1.2 million razorback suckers and bonytail in aquatic habitats within the LCR MSCP planning area along the LCR. Finally, as part of the LCR MSCP, the Program participants are in the process of creating “predator-free” aquatic environments in order to facilitate rearing, management, and long-term conservation of stocks of native endangered fishes, including the razorback sucker and bonytail.

Mrs. NAPOLITANO. Thank you, Mr. Zimmerman. We will begin with the question and answer, and I will start off with anybody that wants to answer this particular question that I have. It deals with the 50-year term for the program. It strikes me—as it does others—that it is really excessive. I know there is precedent in

some areas but it is kind of difficult for this type of an agreement as far as I am concerned because it will have to take in a lot of other issues such as temperature change, climate change, the low flows of the river, many of the things that we are beginning to see that have never in decades happened in our areas.

It is certainly longer than normal set for natural resources programs. As an example, the upper Colorado Recovery Implementation Program authorized in 1988 had to be reauthorized 17 years later, in 2005. A 50-year term is somehow questionable as being appropriate. Are you confident that these conditions affecting the program will be essentially unchanged 50 years from now, and what assurances can you give this subcommittee?

Mr. CAAN. Madame Chairwoman, let me begin attempting to answer your multifaceted question. This program is really unprecedented and unlike other programs that we have looked at, and let me quickly explain why. There are two parties essentially who have an interest in the Colorado River system with respect to Endangered Species Act issues. There are the Federal parties who require a section 7 consultation to deal with listed threatened and endangered species.

There are also the private parties, the non-Federal parties, the ones who take the water and power, not the power so much but the water, who require a section 10 permit to continue operations. What we have done—and we started this 10 years ago—we decided that instead of having a separate effort for the Federal parties and a separate effort for the non-Federal parties, we would combine those efforts and try to do a comprehensive long-term program that would provide coverage for the currently listed and threatened species and future listed species by combining a section 7 and section 10 hybrid that the states, the non-Federal and Federal parties agree to contribute to and have one plan that addresses all of the habitat, the 8,000 acres, the riparian habitat and fisheries for the 50 years.

So it is not unprecedented in terms of 50 years. It is unprecedented, I believe, in attempting to combine those two programs to provide for the long-term. With respect to the long-term, I think that is an advantage to the program.

Mrs. NAPOLITANO. Could you speed it up?

Mr. CAAN. I am sorry. Let me summarize very quickly. Where some may see constraints over the lack of flexibility or the 50 years, we see the certainty of the program, the ability to provide adaptive management to look at change in the river conditions that will provide us the opportunity to continue to do what we believe is working and yet have 50 years so that if things are not working the way we think we can modify our program, implement new procedures, and then look at the success of the program over the 50 years. Thank you.

Mrs. NAPOLITANO. With whose oversight?

Mr. CAAN. The oversight of this program will be conducted by the Federal and non-Federal parties over a steering committee that will be in existence for 50 years. We will delegate that to our future generations to take care of what we built into this program. As Mr. Zimmerman said, 25 percent of the budget is devoted to monitoring, reviewing, improving and managing.

Mrs. NAPOLITANO. Thank you. Somebody else?

Mr. JOHNSON. Madame Chair, it is the beginning of the program. We did look at a 75-year program life similar to the multi-species or the habitat conservation program for central Orange County looking at resources. In discussions with the Fish and Wildlife Service on the activities, species, and resources that were going to be covered, it was determined that a 50-year program would be more appropriate.

I believe, Madame Chair, that you have compared this with the upper Colorado River Implementation Program. That is an implementation program, not a habitat conservation program. What they are trying to do with that is to move the species toward recovery. They are not developing a habitat based plan as we are within the MSCP. For the cottonwood willows, et cetera, they need a longer term in order to determine whether the habitat is being provided for the species, and so being habitat based I believe that the 50-year term is appropriate.

Mrs. NAPOLITANO. But are they not trying to move it to recovery?

Mr. JOHNSON. Through the MSCP that is the objective is move each of the species toward recovery, yes.

Ms. BITTER SMITH. Madame Chair, if I just might briefly add on behalf of one of those entities which is a water user, my board is a financial contributor in a very large sense to this project; and one of the key elements in them reaching that decision was the sense of certainty in the 50-year term of the program. That was a very key component in the discussion that happened at the CAP board level.

Mr. JOHNSON. Madame Chairwoman, I would just say that I think everybody has summarized quite well, and I think we agree with most of the comments that have already been made. We support the 50-year period. We think the adaptive management approach allows plenty of flexibility to address anything that may happen in the future.

Mrs. NAPOLITANO. Then I will have another question. What is the term of the Platte River Recovery Implementation Program, and was this program looked at as a possible model for the MSCP, and what of other HCPs?

Mr. JOHNSON. Madame Chairwoman, I will take a shot at that. Actually I think the MSCP preceded the Platte River. I think the MSCP is probably a little bit ahead of the Platte River program in its development. I think the initial phase of the Platte River program is 13 years but I think it is anticipated that that will be modified over time, and in fact it has an expectation for a much longer life.

Mrs. NAPOLITANO. Anybody else want to address that? Ms. Gillon, I am just wondering how open or public was the process of developing the Lower Colorado Multi-Species Conservation, and did all the stakeholders have a chance to participate fully, and how confident are you that there will be adequate public and stakeholder involvement 45, 50 years from now?

Ms. GILLON. Well, as I mentioned, Defenders had been a steering committee member initially and during the development, the MSCP steering committee in meetings have been fairly open to the public. I think one of the challenges presented by the MSCP and

lots of programs like it is the sheer volume. I mean, a 10-year development period with a steering committee, several subcommittees, multiple meetings, it is quite a challenge for a nonprofit to keep up with and meaningfully participate in that sort of program.

So while Defenders and other environmental groups made efforts to participate, I think in the past it was difficult but we did to the best of our ability. In the future, I do not know how that is going to look. I know that there have been attempts and the MSCP maintains a website where it puts out public documents. I think that there would be a fear that in about 20 or 25 years there will be less need for public participation. By that point, I believe they will be done with the planting and the stocking, and will be mainly monitoring. However, one of the challenges we have with a 50-year program is that recent history is not a very accurate indicator of what the future holds for us. So it is hard to say what will happen over the next 50 years in the MSCP.

Mrs. NAPOLITANO. Thank you. I will now yield to the acting Ranking Member, Mr. Heller.

Mr. HELLER. The acting, acting. Thank you, Madame Chairwoman. Again thank you for this hearing. I certainly do appreciate the opportunity to discuss these issues, and to Congressman Mitchell for his input and efforts on this bill also. George, I want to go back to the question that the Chairwoman brought up. Again getting back to this 50 years. Why not 25 years? Why not 100 years? Where did the 50 years come from?

Mr. CAAN. Thank you, Congressman Heller. I presume that if we could have 100-year program we probably would take it. We expect to be utilizing the resources of the Colorado River in perpetuity, far beyond my tenure as Chairman and Executive Director. Fifty years was what we believed was consistent with the direction that the steering committee wanted to have with respect to the longevity, the habitat restoration, what we needed in order to both begin the program, to evolve it, to acquire the land, acquire the water, see the fruits of our labor, develop for instance planting techniques and backwater restoration, see how it works.

If it does not work, we will have to go back, revise our plans and move forward. Fifty years was the kind of certainty that in order for us to provide this level of investment for the \$626 million where Nevada is paying roughly \$78 million of that share that we wanted the long-term certainty frankly to see the fruits of our ability and to see the project be a success.

Forty years from now, Congressman Heller, there will probably be people back at Congress asking for additional legislation to extend this program to let you know how well it succeeded and to get the Congress to endorse a program that will continue to restore the environment.

Mr. HELLER. Let me just raise one question. Was there any discussion during your deliberation on debt management or capital outlay from power companies and water companies as to part of the reason for the 50 years or any kind of time period?

Mr. CAAN. Congressman Heller, Madame Chairwoman, in Nevada—I will just speak for Nevada—the water and power customers who rely on this river system fully understand the challenges that the Endangered Species Act could pose without a level

of certainty that we have done our best to comply with that. So those who receive an allocation of hydropower, those who receive an allocation of water are fully supporting the longevity and long-term program, which is why they are the ones who are contributing.

In Nevada, two-thirds of the \$78 million that Nevada is contributing is coming from water customers. One-third of the contributions are coming from those in southern Nevada who receive an allocation of Federal hydropower. It was initially a challenge for them to understand what the Endangered Species Act does. Once they understood what it could do if not planned for proactively, they were very willing to support contributing to this program and funding it. In fact, they are the members of the steering committee and plan to be there for the 50 years to monitor the success of this program.

Mr. HELLER. Very good. Thank you. I yield back.

Mrs. NAPOLITANO. Thank you, sir. Let us see. We have Mr. Costa.

Mr. COSTA. Thank you very much, Madame Chairperson, for holding this hearing this morning and the proposed legislation. I have several different questions, and let me begin I guess first of all with Mr. Johnson. If adopted into law, do you see any proposed, or any potential impact I guess is a better way to rephrase it, with regard to the Quantification Settlement Agreement that we reached several years ago on the Colorado River as it relates to water use impacting primarily California but other shared users as it relates to the record of decision?

Mr. JOHNSON. This program actually supports the Quantification Settlement Agreement. Without ESA compliance, we would not be able to implement that. So I think that this program is very integral to that agreement and ensuring the long-term viability of that agreement.

Mr. COSTA. In the definition of again this proposed legislation while it looks toward protection of the Multi-species Conservation Program, does it include—and I guess you would divide between the northern or the southern reaches of the Colorado River—the Grand Canyon area? By definition it is below Lee Ferry, is it not?

Mr. JOHNSON. Right. The lower basin.

Mr. COSTA. The lower basin.

Mr. JOHNSON. The lower basin river starts at Lee Ferry. This program only covers the river from the upper reaches of Lake Mead to the Mexican border and the flood plain. The Grand Canyon is covered under the adapted management program associated with Glen Canyon Dam, and there is lots of activity related to the Grand Canyon and how the river is operated through the canyon. It is a separate program, a separate process that addresses the ecosystem.

Mr. COSTA. Well that brings another question. As it relates to Glen Canyon and with great fanfare both Secretary Babbitt a number of years ago created the release program to improve the beaches and habitat and so forth. The report that was done on that seemed to indicate that notwithstanding the best intentions, it was less than successful. What have we learned about our ability to restore multi-species efforts with these types of various programs like the ones that are being proposed here?

Mr. JOHNSON. Well I think it is an ongoing effort, and I think as we get information and as the science becomes more accurate and more complete we make adjustments to ensure that we are doing the right thing to protect and enhance the species, and to try to move them toward recovery. That has been an ongoing process in the Glen Canyon effort.

We are embarking on a new EIS related to the operation of Glen Canyon Dam. That is scheduled to be completed in about a year and a half, and we are looking at options in the Grand Canyon on how we operate that system and how we protect species. We are looking at things like a temperature curtain at Glen Canyon Dam that could increase temperatures and in fact enhance the production of the native species in the canyon.

Mr. COSTA. But are there not limitations? I mean, we are in a conundrum, are we not, I mean, when you think about it as to what our abilities are to recreate habitat? We have two very important reservoirs with Lake Mead and Lake Powell as well. We now have extended periods, both on the upper basin and the lower basin, as it relates to drought conditions, and we know that the seven-party agreement as it relates to the river and the allocation of water is oversubscribed. So how do we pursue this effort?

Mr. JOHNSON. Well I think that we have to manage the river system to accommodate.

Mr. COSTA. As best we can but realizing we cannot, unless you want to eliminate the two reservoirs, which some would argue. You cannot turn back the clock completely.

Mr. JOHNSON. Absolutely not. Those two reservoirs are absolutely critical to meeting the water needs of the southwest, and certainly it does not make any sense to not continue to have those. At the same time, we have to comply with the Endangered Species Act, and quite frankly, this program and what we are doing in the Glen Canyon effort, what is being done in the Upper Colorado River Recovery Program are all activities that are enhancing species and improving the species and addressing the needs of the species.

Mr. COSTA. My time has expired.

Mr. JOHNSON. We have to know how to manage the river system to meet human needs and to also meet the needs of the species. It is an ongoing effort, and we have to adapt our approach to doing that as necessary over time as we get new information.

Mr. COSTA. Thank you, Madame Chairman. My time has expired. I guess at the end of the day we will continue to have this discussion as to whether or not the glass is half full or half empty, no pun intended.

Mrs. NAPOLITANO. OK. Do you have a question?

Mr. HELLER. Thank you, Madame Chairwoman. Commissioner, in your opinion the MSCP agreement, has that been an open process?

Mr. JOHNSON. Yes, I believe it has. I think we have worked hard to be inclusive and to invite the public to participate in the process. Absolutely.

Mr. HELLER. It has been raised in writing that some of the key documents such as the implementing agreement was not shared with the public. Can you respond to that?

Mr. JOHNSON. I was not involved in the details of developing that agreement, and I would like to defer that to some of the other parties that were involved in that if I can.

Mr. HELLER. Sure.

Mr. CAAN. Thank you. Thank you for the question, Congressman Heller. I have been involved in the process since 1996. It has been open. It has been available. Documents have been available for the public to look at. I could say that directly because our office initially operated the website that put all these documents for public review, public inspection.

The Bureau of Reclamation now operates the website with our help. To address a previous question with respect to the public participation, the program documents—the documents that we are asking for in this legislation—provide for compliance and will provide assurance that for the 50 years of implementation this will be an open process. This will have a steering committee for the next 50 years that will look at monitoring plans and science plans and yearly budgets so that in the future, to the extent that we can agree that the program documents will be complied with, which is one of the reasons we are asking for this legislation, this process will have that kind of oversight in the future.

Everything is made public. It is all in the website. Our meetings are open to the public. We have a huge stakeholder committee, and it is clearly the interest of the stakeholders to make sure that each and every step is open to the public frankly because we get a lot of good comments and suggestions by having it as open as it is.

Mr. HELLER. Thank you. Changing subjects just for a minute, Ms. Bitter Smith, on the 26 species, prior to this agreement how were they protected?

Ms. BITTER SMITH. Madame Chairwoman, Congressman, nothing was happening with any great regard, and we have had great humor in talking about those species at my board level, as you can imagine. Hence the concern about making sure that we have met the Federal mandate because it does require us to do that in order to continue our water deliveries. So this is key, as you are alluding to in your question, for us to continue our mission in providing water resources to Arizona because up until that point we had no ability to manage and deal with the Federal requirements.

Mr. HELLER. Thank you. I will yield back.

Mrs. NAPOLITANO. Thank you. Mr. Udall.

Mr. UDALL. I will pass. I do not have any questions. Thank you.

Mrs. NAPOLITANO. Mr. Costa, any more questions?

Mr. COSTA. Yes. I want to ask Mr. Zimmerman, and it is kind of a twist on—not a twist—but a follow up on the question I asked Mr. Johnson regarding the Quantification Settlement Agreement. Obviously that came with great pain and effort for California as a partner among the basin states, and I have heard part of your testimony but have not had a chance to read it. I wonder whether or not you believe that there will be any impacts, positive or negative, with regards to either pieces of legislation if they are implemented into law.

Mr. ZIMMERMAN. Related to H.R. 2515, the Multi-Species Conservation Program, all of the parties to the Quantification Settlement Agreement are parties to the MSCP. They are participants.

All of the covered programs that are associated with the quantification settlement agreement are covered programs within the MSCP. So all of the California water and power contractors from the Colorado River are providing California's funding for the 50-year life of the MSCP, and so I believe that I can say without reservation the State of California, the administration as well as all the contractors within southern California fully support implementation of the MSCP and passage of this legislation.

Mr. COSTA. You and I know the folks in southern California say with great pride that you were able to achieve the milestones earlier than stated in the record of decision with regards to the Quantification Settlement Agreement.

It is a little off track as it relates to these two pieces of legislation but I am wondering whether or not in working on the Colorado River Board there is a sense that with the current drought conditions impacting the Colorado River and again the point that I made earlier, the oversubscription of the river with regards to the contractors and the allocation of water, whether or not there is long-term consideration—you talk about the 50 years with these proposals and your other agreements—as to whether or not as we are continuing to gather more information with regards to climate change, whether or not we are moving into prolonged periods of droughts.

There is some indication based on tree rings in the Sierra that the last 100 years have been particularly wet. If the next 100 years are particularly dry, what does that mean to those of you on the Colorado River Board and your allocation of water and your ability to try to balance all of these issues?

Mr. ZIMMERMAN. We believe that the MSCP is a key element in addressing whatever may come about through climate change. We understand that through climate change, global warming, as you have further development on the Colorado River there will be more shortages to the water users within the lower basin. That is being provided for by the MSCP as far as providing the ESA compliance to continue operations, to continue some of the innovative programs that we have been able to implement within the lower basin to meet each of our critical water supply needs.

So we believe that this legislation and this program is a key element to address that. We also have within the MSCP, as George Caan has indicated, the adaptive management aspects that we would be continuing to look at that so that we can maintain the compliance so that the water and power users can continue their operations.

Mr. COSTA. Mr. Caan, you are a big believer in adaptive management?

Mr. CAAN. Thank you for your question. I think adaptive management is absolutely critical to put together a 50-year program. There is no sense in moving forward and spending the money that we are spending without having sufficient resources devoted to understanding the effects of what we are doing. Those things that are working, let us continue, let us improve. Those things that are not working, let us agree that they are not working. Let us—

Mr. COSTA. It is in the agreements the difficulty oftentimes.

Mr. CAAN. I think that this program if you look at the participants—the scientists and biologists—and the work that is going on, that we have been provided throughout this process, I have a lot of faith that these scientists and biologists are committed to making what works work, and we have a sufficient amount of funding to be able to change in midstream. We are not looking at situations where someone is going to say this is not working, and we are all struggling to find dollars to try to fix it.

Mr. COSTA. My time has expired.

Mr. CAAN. We already indicated—

Mr. COSTA. And I think yours has too.

Mr. CAAN. OK. Thank you.

Mr. COSTA. Midstream. No pun intended. Thank you, Madame Chairperson.

Mrs. NAPOLITANO. You are very welcome. Representative Heller.

Mr. HELLER. Thank you, Madame Chairwoman. One more question here. Ms. Gillon, I was looking at your written testimony. I just want to quote a sentence here. It says, "Lastly the MSCP purports to ensure the survival of imperiled fish and wildlife for the next 50 years yet fails to address perhaps the largest threat wildlife will face in this century is global warming." Do you consider this bill to be a global warming bill?

Ms. GILLON. Congressman, no, I do not believe that this bill directly relates to global warming. The concern though is that because the MSCP as written assumes that past history is an indication of what will happen over the next 50 years and because this bill directs implementation of the program in accordance with those program documents as written two years ago to five years ago, that global warming will go unaddressed over the next 50 years and will continue to impact species in ways that we are not fully aware of what those impacts will be, and there is a concern that we do not know how the MSCP will address those impacts or whether the MSCP will address those impacts since they are not addressed at all in the program documents.

Mr. HELLER. Is that accurate, George?

Mr. CAAN. The effects of climate change are not addressed. However, we have established a priority use for water for environmental purposes. Forty to 50,000 acre feet of water are going to be either acquired through either changing vegetation or acquiring the water directly as a priority use for the environment, and that is because in order to obtain our Fish and Wildlife permit we as a group had to agree that this water would be made available.

So if you look at 40,000 acre feet in the lower reaches out of 7.2 million acre feet and the one and a half million acre feet delivered, we expect that we will be able to ensure that we could provide that priority water use.

Mr. HELLER. Thank you. Yes, Commissioner?

Mr. JOHNSON. Could I just add on that question? The MSCP has been formulated to consider a range of operations of the river, and that includes both dry periods as well as wet periods. On the Colorado River we are in the process of putting shortage guidelines in place that would define how shortages will be administered when there is not enough water to go around, and in fact the MSCP takes into consideration and actually covers that kind of an activ-

ity. So to that extent we have considered the range of potential conditions out there that may exist on the river system.

Mr. HELLER. Thank you. Thank you, Madame Chairwoman.

Mrs. NAPOLITANO. Commissioner Johnson, if you consider that it has been information that the last 100 years have been wet years, then we are heading into a continued drought pattern, was that taken into consideration?

Mr. JOHNSON. Certainly it is being considered in our shortage analysis. We are doing a separate EIS on the shortage guidelines on the Colorado River, and we are looking at the long-term tree ring, a much longer period of record on the Colorado River system, and we are doing some evaluations that has been and will be displayed in our EIS process for that. I cannot say that explicitly the MSCP did that same kind of analysis but it certainly did consider a range of potential operations on the system including dry years, certainly within the range of what we are anticipating for our shortage guidelines on the Colorado River.

Mrs. NAPOLITANO. Well, all is well and good except in 50 years it is well into the 100-year drought. So if we are assuming that we are going to still have wet years and we continue on the drought pattern that we have seen, that should affect what happens with some of the water delivery, would it not?

Mr. JOHNSON. Certainly dry conditions on the Colorado River are expected. I think the Colorado River is over-allocated. I think we have always anticipated that the day would come when there is not enough Colorado River water to go around. That is why we are developing our shortage guidelines today as to put procedures in place to deal with that when it occurs.

Again I think that there is enough adaptive management worked into the process that we can deal with over a 50-year period and make adjustment if in fact conditions become worse than we have anticipated.

Mrs. NAPOLITANO. But that really has not been specifically addressed in this project?

Mr. JOHNSON. I do not believe that when we did all of the hydrologic analysis on the MSCP that we took that longer period of record into consideration. We certainly took dry cycles that have occurred in the last 100 years, and in fact we have had some pretty significant dry cycles on the Colorado River over that 100-year period, and we certainly considered the dry cycle that we are currently in but to say that we have done the same analysis that we have done in that shortage EIS, no, we did not get that explicit in the MSCP hydrology.

Mrs. NAPOLITANO. OK. I will stop for a moment. I see people taking photographs. You do have to get permission from the Subcommittee to be able to take photographs. So I will stop now and ask anybody who wants to take photographs do them now. You will get a couple of minutes, and then after that I will ban you from taking photographs because they are very distracting.

When I see a light, it takes away from my focus, and if you want to go ahead and take photographs. I know there were a couple of people earlier who had asked. You do have to get permission for either camera or picture taking because this is a committee hearing, and it is not a problem asking. Just let us know ahead of time

so that we are able to accommodate those individuals. Did you have a question, sir? You want to answer. OK.

Mr. ZIMMERMAN. If I might, Madame Chairwoman, I would further respond to Bob's comment on your latest question. I was the Chairman of the MSCP during the 10-year program development phase. As part of that, when the Bureau of Reclamation, as Bob has indicated, ran the models, they ran a couple different scenarios. One was looking at one set of shortage guidelines, another one at another level of shortage guidelines which would have greater impacts on the river, and so in part using the historic data and the past drought cycles there were two alternatives that were analyzed within the MSCP.

One of the things I would like to point out is that the major water demands on the Colorado River are at the bottom of the system, our 1.5 million acre foot annual delivery to Mexico, as well as the delivery to the Imperial Valley, Coachella Valley, which is over 3 million acre feet plus the delivery on the opposite side of the river in Arizona, which is another million acre feet.

So most of the demands on the Colorado River system are at the bottom of the river, and so the water that is available, whether it is in a good hydrology or bad hydrology will be flowing in the river. Most of the conservation areas that will be developed will be developed in that stretch of the river. So there will be water, as George has indicated, to provide the 40 to 50,000 acre feet of water to develop the habitat and, second, to maintain the habitat.

Mrs. NAPOLITANO. Sir, I hope you are right. I hope you will be here in 50 years to back up that statement, and when you talk about Mexico, there are some issues there because of the Rio Grande that we also have great concerns about how that water is not being delivered to the Rio Grande Valley. Ms. Gillon and Mr. Caan, is there a precedent for the language in section 5[b] which says that future changes to the ESA will not affect the lower Colorado MSCP unless the changes are specifically made applicable to it. Now why should Congress agree to that?

Ms. GILLON. Madame Chairwoman, as far as I know—and I cannot say that I have read every statute ever passed by Congress—there is no precedent that I can find for Congress limiting itself in that way, and I would imagine that if it were to become quite unwieldy over the next 50 years to ensure that if you want a law to apply to the MSCP you specifically say that though.

Mr. CAAN. Madame Chairwoman, in the development of the MSCP, one of the overriding principles we had was trying to provide certainty for the water and power users, the Federal and non-Federal parties. I do not know of language specifically like this in other bills. I do know issues like no surprises to provide a level of certainty has been part of policy.

This language is and we debated this language considerably—should it be all acts of Congress? Should it be related specifically to the Endangered Species Act? And we agreed that when it comes to modifications to the Endangered Species Act what we want to make sure based on the investments that we made because a lot of these investments are being made up front to require land and water and other habitat is that if there are changes to the Endangered Species Act that those changes will not affect the MSCP un-

less Congress specifically addresses it so that way there can be a full vetting of the affects that a change might have to the \$626 million effort.

We are not saying there cannot be changes. We are just saying that if there are changes we want the opportunity to come before you and your Committee to express what concerns we may have with those changes and then let you make a decision. We do not want it to be an unintended consequence of legislation that is acted upon without addressing specifically the MSCP.

Mrs. NAPOLITANO. Thank you. Mr. Johnson, Ms. Gillon, if the Bureau of Reclamation is running this program since 2005, why is this legislation necessary?

Mr. JOHNSON. We think that the legislation is helpful. It provides a long-term commitment to fund and carry out the program. We have authority to implement this program without further legislation. That is in my written testimony. It was also in my oral testimony. So we have that authority. We have to comply with ESA, and we will do that, and that is part of implementing this program.

That said, we think that this legislation is helpful in that it puts the Congressional stamp of approval on the program and commits us for the long-term effort and Congress as to the long-term effort of trying to implement the program.

Mrs. NAPOLITANO. Thank you. To any of the representatives, has there been any effort to work with the entities on the other side of the Mexican border to ensure successful recovery for the river system, not just on the U.S. side, and is it possible that neglect of habitat on the Mexican side will wipe out attempts by the MSCP to stabilize habitat, and protect and recover species on the U.S. side?

Mr. JOHNSON. I could take a shot at that, and I am sure these folks can add in. Mexico is another country. We have a separate process for dealing with the country of Mexico as it relates to the Colorado River. We have an international boundary and water commission that we work through under a treaty to address issues with Mexico. There is a provision that is a minute to the treaty, minute 406 that actually established a basis for cooperation between the two nations as it relates to the ecosystem and addressing the Colorado River delta and environmental issues in Mexico. So there is an ongoing process to work with Mexico to address those issues.

We believe that that is separate. That is an international process. A separate process from the MSCP, and the MSCP addresses the needs in the United States. We have an international process to work with Mexico.

Mrs. NAPOLITANO. Would you not think it might have some affect?

Mr. JOHNSON. Well I think we are concerned about dealing with environmental issues in Mexico as well. There is lots of habitat down there and lots of species and having cooperative programs with Mexico to address that certainly is a beneficial thing. But there are ongoing, separate programs on separate processes.

Mrs. NAPOLITANO. Was there not a suit filed against the U.S. by Mexican environmentalists and U.S. environmentalists over that water?

Mr. JOHNSON. Yes, there was, and that suit has been dismissed.

Mrs. NAPOLITANO. OK. So there still is a concern.

Mr. JOHNSON. Out of comity we work very hard with the country of Mexico to address their issues through the IBWC associated with water quality, water quantity and also environmental issues through this minute 406 that I was talking about, and so certainly we are concerned about the country of Mexico, and we want to work with them as best we can to address issues that they may have.

Mrs. NAPOLITANO. Thank you, Mr. Johnson, and with that we will conclude this panel. Thank you for your testimony. It was very—how would I say—insightful.

Mr. HELLER. I also want to thank you for this opportunity for this hearing. I want to let you know there is a companion bill on the other side with Senator Kyl that is supported by Senators Ensign and Reid, and also Senator Feinstein from California. Thank you so much for your time on this bill.

Mrs. NAPOLITANO. You are very welcome. Panel, you are dismissed. Again, thank you for your service. We will be submitting some questions to you. We would appreciate your response. The members may have some questions so we will keep the file open for 10 days to be able to have more input. So you are welcome to submit any comments that you wish. With that, thank you panel, and we will move to the second panel. Mr. Johnson, you may as well keep your seat. Mr. Joe Shirley, Mr. Jim Dunlap, Patricia Lundstrom, Gregg Houtz and Gerald Zimmerman.

[Pause.]

Mrs. NAPOLITANO. While the panel is taking their seat, I will ask Mr. Johnson, you stated that the Bureau is not a participant in the Settlement Agreement, and I would like to include six letters for the record that verify the Bureau's involvement in the process. If you wish, we will give you a copy of them.

Mr. JOHNSON. Thank you.

Mrs. NAPOLITANO. And these are for the record, Mr. Johnson.

Mr. JOHNSON. Thank you.

Mrs. NAPOLITANO. OK. I think we will continue the Subcommittee hearing on H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. We have Commissioner Robert Johnson still in the hot seat, accompanied by W. Patrick Ragsdale, Director of the Bureau of Indian Affairs. Second we have Joe Shirley, Jr. from Window Rock, Arizona. Welcome. President of the Navajo Nation.

Third, we have Mr. Jim Dunlap, Chairman of the Interstate Stream Commission of the State of New Mexico in Santa Fe. Welcome. And fourth, Patricia Lundstrom, President of Northwestern New Mexico Council of Governments, based in Gallup, New Mexico. Welcome to you too. Number five is Gregg Houtz, Deputy Council for the Arizona Department of Water Resources in Phoenix, Arizona, and finally Mr. Gerald Zimmerman of Colorado River Board of California in Glendale, California, staying with us and again thank you. If you will start, Mr. Johnson.

STATEMENT OF ROBERT JOHNSON, COMMISSIONER, BUREAU OF RECLAMATION, WASHINGTON, D.C.; ACCOMPANIED BY W. PATRICK RAGSDALE, DIRECTOR, BUREAU OF INDIAN AFFAIRS, WASHINGTON, D.C.

Mr. JOHNSON. Madame Chairwoman, it is a pleasure to be here again and testify on H.R. 1970. I have got Bureau of Indian Affairs Director Pat Ragsdale with me, and he has just a few short comments as well. We have submitted written testimony for the record, and we will limit our oral comments to just a short summary.

First, let me express my personal appreciation for the needs of the people of the Navajo Nation for water. Much of the Nation is without potable water supplies, except for what is literally hauled to many of the remote locations of the reservation. Reclamation has a long history of working with the Nation to provide technical assistance and some financial assistance in addressing water needs. I am proud of my personal involvement. Over the years as Regional Director of the Lower Colorado River Region, I visited the reservation and personally worked with them on many of these issues.

Notwithstanding our understanding of the water needs of the Nation, the Administration cannot support the legislation as currently written. Our written testimony provides details of our concerns, and I will not reiterate those here. Suffice to say that the cost and funding mechanisms for the project are of concern. In addition, there are other provisions of the bill that are also cause of concern for Reclamation.

I am, however, happy to report that the Indian Water Rights Office of the Department of Interior and Reclamation's staff are participating with the State of New Mexico and the Navajo Nation in discussions regarding our concerns.

A meeting was held just yesterday here in Washington and another is scheduled for next week in Santa Fe. The state and the Nation have been very forthcoming in those discussions, and we appreciate their efforts to consider our concerns. We look forward to continued dialogue. That concludes my oral testimony, Madame Chairwoman, and I would be happy to answer questions.

[The prepared statement of Mr. Johnson follows:]

Statement of Robert Johnson, Commissioner, Bureau of Reclamation, and W. Patrick Ragsdale, Director, Bureau of Indian Affairs, U.S. Department of the Interior, on H.R. 1970

Chairwoman Napolitano and members of the Subcommittee, we would like to thank you for the opportunity to appear today to present the Administration's views on H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has concerns that H.R. 1970 would increase mandatory spending, delay the full cost of the legislation beyond the 10 year Congressional scorekeeping window, not provide for adequate cost sharing by non-Federal interests, and likely include costs that exceed the Federal government's underlying liability. The Administration did not participate in the drafting of the water rights settlement embodied in H.R. 1970, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written. We would like to work with Congress and all parties concerned in developing a settlement that the Administration can support.

H.R. 1970 would amend Federal statutes that relate to the Bureau of Reclamation and the use of water in the Colorado River basin. Major provisions include: (1) authorization for the Bureau of Reclamation to construct and operate a pipeline (formally titled the "Northwestern New Mexico Rural Water Supply Project", but gen-

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

The Role of the Criteria and Procedures

The Administration has been actively engaged in the New Mexico water settlements. Secretary Kempthorne committed during his confirmation before the Senate to bringing his energy and concern to the pending water settlements in New Mexico. Consistent with this pledge, we have made it a high priority to better understand the complex issues that must be resolved in each of the proposed New Mexico settlements. Our water rights team has made several trips to New Mexico to visit with the Pueblos, Tribes, the State, local communities, water users, and other constituencies to these proposed settlements. A few months ago, at the Secretary's request, key officials from the Departments of Justice and the Interior and the Office of Management and Budget traveled to Navajo country to observe first-hand the difficult issues related to water delivery on the Reservation.

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

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

One of the first steps in this process, Madam Chairwoman, is for us to acknowledge the three New Mexico settlement proposals that are now being advocated to Congress. While the Navajo settlement in the San Juan River is the subject of today's hearing, there are other settlements proposed in New Mexico, as well as in other western states, that require active Federal participation in negotiations. If enacted, the cost of H.R. 1970, alone, is estimated to exceed 1 billion dollars. If the other two proposals from New Mexico, Aamodt (involving the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque) and Abeyta (involving the Pueblo of Taos), about which the Administration also has raised serious concerns, were to be enacted as currently envisioned by their proponents, total expenditures for Indian water rights settlements in New Mexico alone are likely to exceed \$1.5 billion.

The Administration believes that the policy guidance found in the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria") (55 Fed. Reg. 9223 (1990)) provides a flexible framework in which we can evaluate the merits of this bill. The Criteria provide guidance on the appropriate level of Federal contribution to the settlements, incorporating consideration of calculable legal exposure plus costs related to Federal trust or programmatic responsibilities. In addition, the Criteria call for settlements to contain non-Federal cost-share proportionate to the benefits received by the non-Federal parties, and specify that the total cost of a settlement to all par-

ties should not exceed the value of the existing claims as calculated by the Federal Government. As we have testified previously, the Criteria is a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.

Provisions of Particular Concern in H.R. 1970

We would like in the remainder of this statement to provide a synopsis of substantive concerns regarding H.R. 1970. We will start with the high cost of this settlement. The Administration has concerns about the costs associated with this legislation, and currently opposes the nearly \$1 billion financial commitment embodied in this bill. We are also concerned about the large number of authorizations that the bill contains, including the indefinite amount authorized for construction of the Navajo-Gallup Pipeline. We have not yet been able to fully analyze the costs of this legislation. In 2005, the Bureau of Reclamation estimated that the price of the Navajo-Gallup pipeline would be approximately \$716 million. Reclamation is in the process of updating this appraisal-level price estimate to better reflect current construction conditions, and expects an upward adjustment to nearly \$1 billion for this feature alone. In addition, H.R. 1970 would authorize Federal expenditures of \$30 million for groundwater wells, \$23 million for rehabilitation of Fruitland-Cambridge and Hogback-Cudei irrigation projects, \$11 million for other irrigation projects, \$5 million for hydrographic surveys, and \$50 million to be placed in a Navajo Nation Water Resources Development Trust Fund to be used by the Navajo Nation for water facility construction and maintenance or implementation of water conservation measures.

The Administration has serious concerns regarding the proposal contained in Title II of this bill to establish a "Reclamation Water Settlements Fund" within the United States Treasury. Title II provides that revenues of up to \$100 million a year for Fiscal Years 2018 through 2028, which is a time period outside the Congressional scorekeeping window, be diverted from the Reclamation Fund into the Water Settlements Fund. H.R. 1970 provides that moneys in the Water Settlements Fund would be available without further appropriation to fund water supply infrastructure authorized under this bill if there turns out to be insufficient funding available through the regular appropriations process to meet the funding and construction deadlines established in this bill. The second priority for the Water Settlements Fund would be to implement other Indian water rights settlements approved by Congress, including water supply infrastructure, rehabilitation of water delivery systems, fish and wildlife restoration or environmental improvement. The Reclamation Water Settlements Fund would terminate in 2030 and any remaining balance would be transferred to the General Fund of the Treasury.

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

While H.R. 1970 does require some cost-sharing in the form of a requirement for partial reimbursement of construction costs from the City of Gallup and the Jicarilla Apache Nation, it is limited. The City of Gallup and the Jicarilla Apache Nation would be required to repay the portion of the construction costs for the pipeline and associated facilities that the Secretary would allocate to them as their responsibility, but only to the extent of their ability to pay, or alternatively, a minimum of 25% of such allocated construction costs, within 50 years of project completion.

Project proponents assert that the Navajo-Gallup Pipeline Project would qualify as a rural water project under the rural water program being established by the Bureau of Reclamation pursuant to the Rural Water Supply Act of 2006 (P.L. 109-451), legislation which was passed in December of 2006. However, the proposed pipelines envisioned by this bill have not received the level of scrutiny that this newly established program will provide. Under the rural water program, each project must be investigated prior to authorization, and the Secretary must consider whether the non-Federal project entity has the capability to pay 100 percent of the costs associated with the operations, maintenance, and replacement of the facilities constructed or developed as part of the rural water supply project. The Secretary must also recommend an appropriate non-Federal cost-share for the proposed rural water project based on the capability-to-pay of project sponsors, or at least 25% of total construction costs. The program allows the Secretary to consider deferring construction costs allocated to Indian tribes. Under this new program, the Secretary is

to forward to Congress recommendations regarding whether or not the proposed rural water project should be authorized for construction based upon appraisal level and feasibility studies and the eligibility and prioritization criteria developed pursuant to the Rural Water Supply Act. The rural water program is intended to target communities of 50,000 inhabitants or fewer. The Secretary may require larger communities to pay a higher portion of project costs. Since Reclamation's rural water program is still under development, we have not evaluated the activities proposed in H.R. 1970 under the rural water project eligibility and prioritization criteria; these criteria are currently being developed by Reclamation. Upon development, we will actively evaluate whether this project would meet such criteria and could be recommended to Congress for authorization as a rural water project.

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

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

Comparing this Bill with Other Water Rights Settlements

Much has been said about the position taken by the Administration on water rights and other settlements over the past few years, suggesting that not supporting H.R. 1970 as written would be inconsistent with the positions we have taken on previously introduced water settlement bills. We want to squarely address these issues.

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

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

The Snake River Settlement in Idaho entailed several complex Endangered Species Act components that allowed further water resources development to occur for the Nez Perce Tribe and other water users in a manner that also fulfilled the Department's obligation to protect and recover listed species.

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

State bond funds for projects that will directly contribute to restoration efforts have already been approved by California voters.

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

Conclusion

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

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

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

Mrs. NAPOLITANO. Thank you, Mr. Johnson, and next I would like to call upon Mr. Joe Shirley, Jr., President of Navajo Nation, Window Rock, Arizona.

STATEMENT OF JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION, WINDOW ROCK, ARIZONA

Mr. SHIRLEY. Thank you, Madame Chairwoman Napolitano, Committee members. Thank you for the opportunity to testify. As I speak to you now many of the 80,000 Navajo men, women and children who live within the proposed Navajo Gallup Water Supply Project service area are hauling water in the backs of their pickup trucks for drinking, cooking and washing. The centerpiece of H.R. 1970 would authorize the construction of the Navajo Gallup Water Supply Project which will supply water to thousands of Navajo people.

While the project will not entirely eliminate water hauling on the Navajo Nation, it is a giant step toward that goal, and it is the foundation that is essential for economic development. Last month I spoke at an EIS hearing in support of the Navajo Gallup Water Supply Project. As I listened to the stories of the Navajo people who have spent their scarce economic resources hauling water for basic domestic use, it was impossible not to be moved. At the hearing a local community presented drawings by Navajo school-children who have never known running water.

Recently, representatives from the Administration witnessed firsthand the hardships endured by Navajo families who haul water from public watering points. While I believe these officials were moved by what they saw and heard, I understand that there are concerns that the project is too expensive. While the anticipated \$714 million cost is a significant sum, the cost of the project and the settlement must be put into perspective. OMB's assertion that H.R. 1970 is too expensive may be based on an overly restrictive interpretation of the criteria and procedures for participating in Indian water rights settlements.

This view is inconsistent with the three water rights settlements signed into law by President Bush in the Rural Water Supply Act of 2005. Further, the ramifications of not passing this legislation could force the Navajo Nation into litigation to determine its water rights. Such litigation could jeopardize the allocations made by interstate compacts concerning the Colorado River basin. Congress simply cannot afford to let this settlement fail.

Finally we understand that the State of Arizona has concerns about both the settlement agreement and legislation and is advocating a comprehensive settlement to protect its interests including a resolution that the litigation in *Navajo Nation v. United States*. We strongly disagree. The settlement with New Mexico does not impair Arizona's ability to reach a settlement with the Navajo Nation concerning its lower basin claims.

While the settlement envisions the delivery of water to the lower basin in Window Rock, Arizona, from the project, nothing diminishes the right of Arizona to negotiate all of the terms for water delivery to Window Rock as part of a separate agreement with the Navajo Nation. The Navajo Nation has attempted to quantify its lower basin claims with Arizona in the *Navajo Nation v. United States* litigation.

Settlement discussions with Arizona are ongoing and will continue regardless of the outcome of the settlement with New Mexico. However, resolution of Navajo claims in Arizona will likely take several years. If such a settlement can be reached without delay or impairment of our settlement with New Mexico, we would not object to including an Arizona settlement in this bill. But to require an Arizona settlement in order for New Mexico to move forward, the Navajo Nation and the State of New Mexico will be punished for their good faith efforts that resulted in this concrete settlement.

This settlement would keep the Navajo Nation rights with the New Mexico's compact apportionment. As such, this settlement benefits all seven Colorado River basin states, and we should not jeopardize this achievement by trying to settle unrelated issues with Arizona. The Navajo Nation and its people have respected their treaty obligations. In times of crisis, brave Navajo men and women have rushed to their country's aid and fought and died not only for the preservation of the American ideal but also to preserve our Navajo culture and to secure a Navajo homeland for our children.

A homeland for the Navajo people is not merely a piece of land between our four sacred mountains but is a place where our culture, our language, our way of life and our people can live and grow. Without water, viable economic and social communities with-

er and die. So I ask you today to honor the treaty of 1868 and to help bring water to the great Navajo Nation. Thank you very much.

[The prepared statement of Mr. Shirley follows:]

**Statement of President Joe Shirley, Jr.,
Navajo Nation, on H.R.1970**

Thank you Chairwoman Napolitano and members of the Water and Power Subcommittee of the House Committee on Natural Resources. My name is Joe Shirley, Jr., and I am President of the Navajo Nation, a federally recognized Indian nation with the largest reservation in the United States. I appreciate this opportunity to share with you the Navajo Nation's strong support for House Bill 1970, the Northwestern New Mexico Rural Water Projects Act. I also wish to convey the gratitude of the Navajo Nation to Congressman Tom Udall for his commitment to improving the lives of the Navajo People and for his leadership in sponsoring this important legislation.

The Northwestern New Mexico Rural Water Projects Act serves two important purposes. First, it would authorize the Secretary of the Interior to execute, on behalf of the United States, the Settlement Agreement to quantify the Navajo Nation's water rights in the San Juan River Basin in New Mexico. The Settlement Agreement was overwhelmingly approved by the Navajo Nation Council in December of 2004 and executed with the State of New Mexico in April of 2005. It reflects almost a decade of negotiations to carefully balance a variety of demands on a limited resource. Second, the Act authorizes construction of much needed water projects for the Navajo Nation. As such, this legislation represents an important step forward in moving the Navajo Nation towards self-sufficiency, and may represent the most significant act of Congress concerning the Navajo people since the ratification of our Treaty with the United States in 1868, 139 years ago this month.

As witnesses to this important event, I am here with Mr. George Arthur, Chair of the Resources Committee of the Navajo Nation Council, Mr. Lorenzo Bates, Chair of the Budget and Finance Committee of the Navajo Nation Council, Ray Gilmore, Chair of the Navajo Nation Water Rights Commission, and Lena Fowler, Vice-Chair of the Navajo Nation Water Rights Commission. In the Treaty of 1868, the Navajo leaders pledged their honor to keep peace with the United States and, in return, the United States pledged to assist the Navajo People in creating a permanent homeland on their reservation lands. No lands can be a permanent homeland without an adequate supply of water, especially potable water.

The Settlement Agreement

When New Mexico Governor Richardson and I signed the Settlement Agreement in April 2005, the State of New Mexico and the Navajo Nation set into motion the means to resolve a century-old controversy concerning water rights in the San Juan River basin, which could have persisted for decades to come through long, protracted litigation. The State of New Mexico and the Navajo Nation spent years crafting a settlement that would protect existing uses from the San Juan River while ensuring that the Navajo Nation would receive a firm supply of drinking water to sustain the Navajo Reservation as a permanent homeland for the Navajo People. House Bill 1970 authorizes the Secretary of the Interior, on behalf of the United States, to join Governor Richardson and me in a Settlement Agreement that quantifies the Navajo Nation's water rights in the San Juan River Basin in New Mexico in a manner that represents a win-win outcome for all parties, including the Navajo Nation, the non-Navajo water users, the State of New Mexico and the United States.

The San Juan River basin contains all the elements that have made Western water issues so contentious over the years: a limited supply of water, competition between Indian and non-Indian irrigators, the presence of federally protected endangered fish species, and not one, but four federal Reclamation projects. In other basins, that same mixture of interests has lead to contentious litigation and even violence. But in the San Juan River basin, the Navajo Nation has worked in cooperation with its neighbors on issues such as native fish recovery, shortage sharing during periods of drought, and water development for municipal and power interests. The history of this cooperation is reflected throughout the Settlement Agreement.

For example, the Settlement Agreement contains provisions to protect the interests of the non-Navajo water users in the basin. The Navajo farmlands at the Hogback and Fruitland irrigation projects, downstream of the non-Indian water users on the river, possess the senior priority on the river. Thus, during the dry summer months, when there is insufficient water in the river to satisfy all water uses, the

Navajo Nation could exercise its senior priority to make a “call” on the river and stop the upstream diversions. To minimize the likelihood of calls on the upstream diversions, under the Settlement Agreement, the Navajo Nation has committed to utilize a portion of its Navajo Reservoir supply at the Hogback and Fruitland projects to ensure that more “run of the river” water would be available for the non-Navajo water users. Without the settlement, a call would be necessary during the irrigation season almost every two years, but with the settlement, the risk that a call will be made is less than one year out of twenty (20).

The Settlement Agreement also includes specific provisions to firm the water supply for existing federal Reclamation projects including the Animas-La Plata Project and the San Juan-Chama Project. The Animas-La Plata Project is an important project for the basin, and is a necessary component of the settlement approved by Congress for the Colorado Ute Tribes. The San Juan-Chama Project provides drinking water for the cities of Albuquerque and Santa Fe. This transbasin diversion also helps New Mexico meet its compact obligations to the State of Texas and provides a supply of water that can be used for two separate water rights settlements involving the Pueblo of Taos and four northern Pueblos in the Aamodt litigation.

In terms of protecting federal interests in New Mexico, including the San Juan-Chama Project, the importance of the Settlement Agreement to the United States cannot be overstated.

The Navajo-Gallup Water Supply Project

The centerpiece of the Bill, however, is the authorization for construction of the Northwest New Mexico Rural Water Project, commonly known as the Navajo-Gallup Water Supply Project. This project will provide a firm, sustainable supply of municipal water for the Navajo Reservation, the City of Gallup and the Jicarilla Apache Nation. Many of the 80,000 Navajo men, women, and children who live within the project service area, including Navajo Code Talker Frank Chee Willetto, presently haul water for drinking and cooking. Although construction of the project will not necessarily eliminate all water hauling on the reservation, this project will allow the Indian Health Service to expand distribution systems to provide potable water delivery to more homes, and creates growth corridors within the Navajo Nation where future communities can be built with ready access to roads, electricity and potable water. As such, this project represents a critical component of the Navajo Nation's economic development strategy. While construction of the pipeline may not represent a condition sufficient to ensure economic prosperity for the Navajo People, surely such prosperity will never be possible in the absence of a sustainable potable water supply.

In March of this year, the Department of the Interior released the Planning Report and Draft Environmental Impact Statement for this project. I thank Secretary Kempthorne and his Counselor Michael Bogert for their leadership in releasing this critical document, in addition to the release of the hydrologic determination that there is sufficient water for the project.

Earlier this month, I spoke at the public hearing in Farmington, New Mexico, concerning the project in order to deliver the message that the Navajo Nation strongly supports the construction of the Navajo Gallup Water Supply Project. At the hearing, I was moved by the testimony of the Navajo people, most of them water haulers. I believe that the federal officials at the hearings were also moved by their testimonies. Mr. Frank Chee Willetto, a Navajo veteran and former Navajo Code Talker, who recently received the Congressional Silver Medal, eloquently testified that he and other veterans, despite financial assistance from the Veterans' Administration and the Navajo Nation, were unable to secure a loan for his home due to the absence of water in his community for fire protection. Ms. Gloria Skeet spoke eloquently about how Bread Springs Chapter, south of Gallup, needs the project because her community currently faces water shortages. Ms. Skeet, a former educator, sees that the construction of the project will allow our children to build productive and meaningful lives at home. I also viewed drawings by Navajo school children from Lake Valley Chapter depicting trucks hauling drinking water to their homes. These drawings will be submitted to the Committee in our supplemental statement. Based on these testimonies, I reiterate my message that the Navajo Nation strongly supports the construction of the Navajo-Gallup Water Supply Project.

OMB Concerns about Costs

We recently invited representatives from the Administration, including the Department of the Interior and the Office of Management and Budget, to witness firsthand the hardships endured by Navajo families who must drive considerable distance to haul water from public watering points. They heard and saw everything I have just described to you. They also heard about the negative health effects that

occur when they do not have access to potable water, including the story of Lucy Cayetano who suffers from various illnesses because she does not have easy access to potable water. Studies have shown empirically that the lack of potable water is a critical health issue for the Navajo people, but I also wonder what the psychological effects will be for our children who believe that water comes from trucks, rather than from drinking fountains or faucets.

We believe the Administration representatives received a realistic, first-hand understanding of the enormity of the problem the lack of water brings. However, we also understand that the Office of Management and Budget believes the Navajo-Gallup Water Supply Project to be "too expensive." Their belief is apparently based on the Planning Report for the project, in which the Bureau of Reclamation estimates that this project could cost as much as \$714 million or more. While this is unquestionably a huge amount of money, the anticipated cost of the project and the other components of the Navajo Nation's water rights settlement must be put into perspective.

As stated earlier, the Navajo Reservation is the largest Indian Reservation with the largest population of on-reservation members of any Indian tribe in the United States. Providing potable water for such a large reservation is indeed a costly venture, but studies conducted by the Bureau of Reclamation demonstrate that this project fares favorably when compared with other recently authorized water pipelines on a per/acre-foot and per capita basis. This information will be provided to the Committee in our supplemental statement.

We understand that OMB seeks to impose on this settlement an overly restrictive interpretation of the Administration's criteria and procedures for participating in this settlement. In particular, OMB apparently seeks to limit the federal contribution for this water rights settlement to their assessment of the monetary liability of the United States if it is sued by the Navajo Nation. Such a policy is a radical departure from previous Administrations, and is not even consistent with the position taken by the Administration in the three settlements recently signed into law by President Bush—the Arizona Water Rights Settlement Act, the Snake River Water Rights Settlement and the Zuni Tribe Water Rights Settlement. This inconsistency was described in a recent joint letter to OMB from Chairman Bingaman and Senator Domenici. Once again, I thank the Senators for their dedication to this settlement by having pointed out to OMB these inconsistencies.

Moreover, OMB's interpretation flies in the face of the Administration's past support for the Rural Water Supply Act of 2005 in which the federal government would assume up to 75% of the cost of rural water projects. The federal contribution for such projects is not limited by any calculus of liability to the project participants. OMB's policy is especially appalling considering the trust responsibility and treaty obligations owed by the United States to the Navajo Nation. The United States Supreme Court has characterized these responsibilities as "moral obligations of the highest responsibility and trust." Simply put, the federal government should not be allowed to shirk its trust responsibility or its treaty commitments with Indian nations by hiding behind a veil constructed of legalese that can be applied to the detriment of the poorest of the poor in America.

Of particular concern to the Navajo Nation is that OMB is now objecting to the construction of infrastructure projects as a mechanism for settling Indian water rights, even though the Administration apparently supports the concept of encouraging Indian water rights settlements. In the desert Southwest, where the available water resources are largely exhausted, the only way for settlements to work is by infusing the limited natural resource pool with the financial resources to allow the existing water supplies be used more advantageously. As a general premise, these settlements do not reallocate water from existing non-Indian water users for the benefit of an Indian tribe. In the San Juan River basin, there is very little unused water for the purpose of settling the Navajo claims. Under the terms of the Settlement Agreement, the Navajo Nation is awarded only the water it has historically used, the water set aside for the Nation's use at the Navajo Indian Irrigation Project, and the water for the Navajo-Gallup Water Supply Project. The Settlement Agreement is premised on the Navajo Nation receiving a substantial amount of "wet water" development to forgo claims for additional water. In short, without the federal government contributing the monetary resources to make this settlement work, the settlement would not be possible.

Although we do not believe OMB should apply the criteria and procedures for participating in settlements in such a restrictive way, we are confident that if OMB considers all of the ramifications of letting this settlement fail, the ultimate costs to the federal government could be staggering. Consider first, the claims of the Navajo Nation. The Navajo Nation's water rights claims are based on legal precedent established by the United States Supreme Court. The Navajo Nation's water rights

claims could exceed the amount of water apportioned to New Mexico by the Upper Colorado River Basin Compact, which was ratified by Congress in 1949. These claims have been described by various legal scholars as “hypothetical shocks to the Colorado River system.” If this is true, there are only two outcomes, neither of which are favorable to the United States. If the courts ultimately rule that the Navajo claims are limited by the compact because of the ratification by the United States, the Navajo Nation has a substantial claim against the United States for the lost water rights. On the other hand, if the courts ultimately rule that the Navajo Nation is entitled to water in excess of New Mexico’s apportionment, then the entire system of allocation of Colorado River water would be in jeopardy exposing the United States to incalculable liability to a multitude of water users in the seven Colorado River states. The beauty of the Settlement Agreement is that by keeping the Navajo Nation’s water rights within the State of New Mexico’s compact allocation, the “hypothetical shocks to the Colorado River system” are avoided. But without the substantial water development infrastructure authorized by House Bill 1970, such a settlement is not possible.

If the settlement were to fail, and the Navajo Nation were forced to pursue the litigation of its claims, the United States would still be exposed to horrific liabilities even if the Navajo Nation were to obtain only modest water rights. The federal government historically promoted the utilization of waters from the San Juan River by non-Navajos through such projects as the San Juan-Chama diversion, the Hammond Irrigation Project, the Jicarilla Apache Water Rights Settlement, and the Animas-La Plata Project. However, because the Navajo Nation is the senior water user in the basin, an award of even a modest amount of water to the Navajo Nation would disrupt the water supplies for each of these federal interests and leave the United States exposed to considerable liability. As I mentioned earlier, the San Juan-Chama Project serves a myriad of federal interests in addition to providing a water supply to the cities of Albuquerque and Santa Fe. While OMB may frame the issue in terms of whether we can afford this settlement, we believe the issue is whether we can afford not to have the settlement. Under any measure, the Congress simply cannot afford to let this settlement fail.

Currently, forty percent (40%) of the families on the Navajo Reservation are forced to transport water from regional water pumping stations to their homes to ensure that their families have potable water. In the wake of Hurricane Katrina, Congress rightly recognized the emergency that existed when so many people were deprived of potable water and infrastructure. Congress moved to fix this emergency through the authorization of billions of dollars to restore the water infrastructure in New Orleans and various coastal communities. The tragic circumstance experienced by the residents of New Orleans deserved swift and decisive action on the part of the federal government. Unfortunately, on the Navajo Nation, the lack of potable water and infrastructure is a condition that has existed for a long time. It appears that OMB is again applying a double standard when it comes to funding water infrastructure to remedy acute water supply problems. OMB did not ask Congress to consider the limits of its liability to victims of Katrina or to consider whether a federal trust responsibility required such action in order to avoid spending the money necessary to fix the problem. In the case of Katrina, Congress did the right thing. We ask Congress to do the right thing again by enacting House Bill 1970.

Arizona Concerns

Finally, we know that the State of Arizona has concerns about the language in H.R. 1970 that deals with delivery of water to Window Rock, Arizona. The Settlement Agreement and the provisions of H.R. 1970 preserve all rights for the State of Arizona to negotiate all of the terms and conditions for water delivery to Window Rock as part of a separate agreement with the Navajo Nation. We do not believe, as Arizona does, that a “comprehensive” settlement of all of the Navajo Nation’s water rights claims is necessary to protect Arizona’s interests. In the first instance, a “comprehensive” settlement should include all of the Navajo Nation’s interests in Utah as well as the Upper and Lower Colorado River Basins in Arizona. The Navajo Nation has been actively attempting to quantify its Lower Basin claims through negotiations with Arizona water interests, but no negotiations concerning Upper Basin claims have been attempted. We have advised the Arizona water interests that we are willing to pursue a negotiated settlement of the Lower Basin claims, but we are not willing to jeopardize the authorization of our settlement with the State of New Mexico to accommodate the Arizona interests. Moreover, we have serious doubts whether a settlement of the Arizona claims can be achieved. It appears that after passage of the Arizona Water Settlements Act, there is very little Colorado River water remaining for purposes of a settlement with the Navajo Nation.

Frankly we believe that Arizona is simply attempting to leverage a settlement with the Navajo Nation that falls short of meeting the Navajo Nation's needs, by demanding that the New Mexico settlement include a partial settlement with Arizona. Nevertheless, we are committed to continued dialogue with the Arizona interests to determine if a settlement is possible and to resolve any remaining issues they may have concerning the settlement with the State of New Mexico.

Conclusion

For more than one hundred and thirty nine years, the Navajo Nation and the Navajo People have taken their treaty obligations seriously. In times of crisis, brave Navajo men and women have rushed to the country's aide, and fought and died not only for the preservation of the American ideal, but also to preserve the Navajo culture and to secure a Navajo homeland. A homeland for the Navajo People is not merely a piece of land between our four sacred mountains but a place where our culture, our language, our people can grow and live. Without water, viable economic and social communities wither and die. I am asking you today to honor the Treaty of 1868 and help bring water to the Navajo Nation.

Response to questions submitted for the record by Joe Shirley, Jr., on H.R. 1970

(SHIRLEY) The Administration has referred to the C&P as the means to determine the federal role and contribution to the settlement. How do you see these criteria and procedures applying to this settlement?

The C&P require the federal government to look at numerous factors including, but not limited to, the liability of the United States. The Administration has never provided the Navajo Nation with its analysis of the C&P or how much the Administration is willing to support as a federal contribution to the settlement. We understand that the Administration may be interpreting the C&P in a manner that focuses solely on the liability of the United States while ignoring other aspects of the C&P. If this is true, such an interpretation by the Administration is overly restrictive and inconsistent with the positions taken by this administration with respect to other Indian water rights settlements signed into law by President Bush.

Even if the sole criteria for evaluating the United States' contribution to an Indian water settlement were the theoretical liability of the United States, I believe that the ramifications of letting the settlement fail are so widespread and pervasive, that the real question for the United States is not whether it can afford the settlement, but whether it can afford not to have the settlement. The Navajo Nation is in the process of developing a detailed analysis outlining how the federal government would be subject to significant liabilities in the event this settlement fails. This analysis will be provided to the Administration and can be made available to the Subcommittee.

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 come either 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, the project 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. The Navajo Nation's water rights claims threaten the water supply for the San Juan-Chama Project which diverts approximately 110,000 acre-feet of water per year from the San Juan basin into the Rio Grande Basin. San Juan-Chama Project water currently leases for \$100 per acre-foot per year. Perpetual water rights in the Rio Grande Basin have been selling for \$10,000 to \$20,000 per acre-foot. Thus, the value of 110,000 acre-feet as a permanent supply of water in the Rio Grande Basin is \$1.1 to \$2.2 billion. 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.

Aside from the potential liability of the United States in the event that the settlement were to fail, the proposed settlement is consistent with other provisions in the C&P that the Administration has ignored. For example:

First, the C&P require that the tribe receives equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement. There is very little unappropriated water within New Mexico's compact apportionment. In

order for a settlement between the State of New Mexico and the Navajo Nation to succeed, it is necessary that the Navajo Nation relinquish substantial claims for future water uses based on well-established federal law set forth by the United States Supreme Court in its *Winters v. United States* and *Arizona v. California* decisions. We believe the value of these potential water rights claims may actually exceed the cost of the settlement.

Second, the C&P require that the Indians obtain the ability as part of each settlement to realize value from the confirmed water rights resulting from the settlement. A confirmed “paper” water right has limited value for an Indian Nation where so many of its citizens lack the basic infrastructure to have running water in their homes. The centerpiece of the proposed settlement is the authorization and construction of the Navajo-Gallup Water Supply Project which would allow the Navajo People to realize true value from their confirmed water rights.

Third, the C&P require that settlements be structured to promote economic efficiency on reservations and tribal self-sufficiency. A report entitled *Water Resource Development Strategy for the Navajo Nation*, July 17, 2000 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. Economists from the University of New Mexico evaluated the socio-economic benefits from the proposed Navajo-Gallup Water Supply Project and concluded that the project would provide an “economic stimulus to the region” and in terms of the human need, the report states “[i]n terms of where money can be spent to improve people’s lives, you’d be hard-pressed to find another place in the country with greater need.” See: Quantum 2007 at 15, <http://research.unm.edu/quantum/quantum2007.pdf>, attached here as Attachment 1.

Fourth, the settlement is consistent with the principles in the C&P that disfavor United State’s “participation in economically unjustified irrigation investment.” The C&P affirmatively endorse “investments for delivery of water for households, gardens, or domestic livestock” and go on to say that such investments in such water deliveries may be exempted from the strict application of the criterion. See: 55 Federal Register at 9224 (March 12, 1990).

Finally, we note that the United States has spent considerable resources building rural water projects in the Western United States similar to the Navajo-Gallup Water Supply Project. The proposed project in our settlement compares favorably to these other water projects. The graph included here as Attachment 2 shows that the cost of the Navajo-Gallup Water Supply Project has a more favorable cost per person served than many other rural water projects, most of which have been authorized and funded by the United States. Similarly, the graph included here as Attachment 3 provides the same comparison with other projects on a cost per acre-foot of capacity basis. Again, the Navajo-Gallup Water Supply project compares favorably. If the United States can fund and build rural water supply projects throughout the West without requiring an Indian water settlement, surely a project that is included as part of an Indian water settlement should pass muster with the United States.

Under any measure, this settlement is justified by a fair reading of the entire C&P.

(SHIRLEY) For the record, could you please briefly state 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 Water Supply Project.
- **FAIRNESS.** The United States pledged to provide a permanent homeland on the Navajo Reservation in the Treaty of 1868. The federal government has a trust obligation to provide the Navajo People with the basic necessities of life, including potable water. By this settlement, the Navajo Nation is giving up valuable water rights in exchange for a water supply project that the United

States should have built for the Navajo People a long time ago. We expect to be treated fairly by our trustee.

- 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.

(SHIRLEY) How has the Navajo Nation dealt with Arizona's objections to moving H.R. 1970 until they negotiate and finalize their Indian water rights claims?

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.

(SHIRLEY) If the development of water resources improves the Navajo Nation's economy, will they repay a portion of the costs of the project?

As noted in my answer to the first question, economists from the University of New Mexico believe that the project would provide an "economic stimulus to the region." Notwithstanding the potential for improvement of the Navajo Nation's economy, the Navajo Nation has given up valuable water rights in exchange for the benefits outlined in the settlement. Were the Navajo Nation to repay a portion of the costs of the project to the United States, the Navajo Nation would be forfeiting the benefit of the bargain it made. Thus, the Navajo Nation has already contributed to the costs of the project through the relinquishment of greater claims to water from the San Juan River.

Moreover, the Navajo Nation will contribute additional value to the costs of the project. The Navajo Nation is already providing invaluable technical assistance to the Steering Committee for the project and it is anticipated that the Navajo Nation will waive rights-of-way consideration to almost 270 miles of pipeline.

(SHIRLEY) Mr. Shirley, will the project water be used for other industrial purposes?

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 for domestic and municipal water in the project service area. Certainly this capacity will not be sufficient to meet all the long-term needs domestic

and municipal water needs in the service area. There is simply no capacity in this project for the water to be used for industrial purposes; however, in the early years following construction, it is conceivable that the pipeline could be used to convey water for short-term industrial purposes until the domestic and municipal demands fully materialize. While the settlement agreement with the Navajo Nation allows project water to be used for a variety of purposes, it is highly unlikely that any industry would commit to using project water on a short-term temporary basis.

(To WHOEVER) The Jicarilla Tribe is currently receiving funds for the Jicarilla Apache Reservation Rural Water System rural water project. How do the funds from this legislation relate to the current project funds?

My understanding is that the funding for the Jicarilla Apache Reservation Rural Water System is intended to build a water distribution system for the community of Dulce, the tribal headquarters, and surrounding areas. The Northwestern New Mexico Rural Water Supply Project (Navajo-Gallup Water Supply Project) will deliver water to Counselor, New Mexico, near the Jicarilla Apache Reservation for use in the southern portion of the reservation.

(To WHOEVER) Who is responsible for the operation and maintenance costs? Who will own the infrastructure once it is completed?

Section 304 of H.R. 1970 provides that the three project beneficiaries, the Navajo Nation, the Jicarilla Apache Nation and the City of Gallup, will pay their respective allocable costs for operation, maintenance and replacement of the project. A limited waiver for up to ten years would be authorized for the Navajo Nation pursuant to subsection 304(f), if the Secretary of the Interior determines that the cost of OM&R allocable to the Navajo Nation exceeds its ability to pay. Subsection 302(f) authorizes the Secretary, upon completion of construction and execution of an operations agreement, to convey those portions of the project located within the Gallup city limits to the city and the rest of the project facilities to the Navajo Nation. No portion of the project will be located on Jicarilla lands. Paragraph 304(b)(5) requires financial assurances satisfactory to the Secretary if title is transferred to the city prior to repayment.

Mrs. NAPOLITANO. Thank you, sir. I appreciate you being here. Mr. Jim Dunlap, Chairman, Interstate Stream Commission of the State of New Mexico, Santa Fe, New Mexico.

**STATEMENT OF JIM DUNLAP, CHAIRMAN, INTERSTATE
STREAM COMMISSION OF THE STATE OF NEW MEXICO,
SANTA FE, NEW MEXICO**

Mr. DUNLAP. Thank you, Madame Chairwoman. I am Jim Dunlap, Chairman of the New Mexico Interstate Streams Commission. I appreciate the opportunity to appear before you today to provide comments on behalf of the State of New Mexico in support of the Northwest New Mexico Rural Water Projects Act. I want to say that I appreciate Representative Udall's efforts in proposing House Bill 1970, which will authorize construction of a very important rural drinking water system for northwest New Mexico and the Navajo Nation.

This project is vital in solving the acute water supply conditions facing much of northwest New Mexico including a large portion of the Navajo Nation. The project will provide the backbone of a regional water supply that will enable Navajo families to receive safe drinking water, a basic right that virtually all other U.S. citizens take for granted.

By 2040 this project is expected to serve approximately a quarter of a million people including the residents of Gallup, New Mexico, that currently rely on unsustainable groundwater supply. In 1868, the Federal government formed the reservation and placed the Navajo people on it with the promise of a water supply. Madame

Chairwoman, it is a disgrace that the citizens of this Nation do not have access to safe drinking water and still have to haul their water.

The Federal administration needs to acknowledge the human needs at issue in this settlement and the fact that the resolution of the Navajo Nation's claims is not going to get any cheaper by delaying an outcome. This is not a Third World country. We are not sending foreign aid. These are original occupants of this land.

As representatives of all western states know, resolution of tribal water rights can be very difficult and litigation of those claims can be very expensive. New Mexico is proud to have reached a settlement with the Navajo Nation that will resolve the Nation's water rights in the San Juan Basin while protecting the existing water uses within the basin.

As an agricultural water user from the San Juan Basin, I recognize the potential risk to existing water uses within the settlement, and I appreciate the protections negotiated to preserve this agricultural lifestyle. The settlement also protects the San Juan-Chama project that benefits some of New Mexico's largest cities. Title 2 of this act provides a funding mechanism that will tap into the existing surplus in the Reclamation fund and is supported by the 17 states represented by the Western States Water Council.

New Mexico has already funded over \$25 million toward the settlement related projects and our legislature has appropriated \$10 million toward an Indian water rights settlement fund. While I cannot speak for the legislature of New Mexico, they have already shown support for the solution to a major problem. Both the state and Federal governments will have to work together to make this important project work.

All western states appreciate the need to be able to develop the water they are entitled to. From an interstate water perspective, an important benefit of the water is that the water necessary for the settlement will fit within the New Mexico's upper Colorado River compact apportionment without displacing any existing water uses. Stability on the Colorado River is important to New Mexico, and we encourage the other Colorado River basin states to continue their cooperative efforts to support each other's right to fully develop our compact apportionment.

Madame Chairwoman and Committee members, the State of New Mexico asks your support for H.R. 1970. Thank you.

[The prepared statement of Mr. Dunlap follows:]

**Statement of Jim Dunlap, Chairman of the
New Mexico Interstate Stream Commission,, on H.R. 1970**

Madame Chairwoman and members of the committee, I am Jim Dunlap. I am the chairman of the New Mexico Interstate Stream Commission, and I am a resident of the San Juan Basin in New Mexico. I appreciate very much the opportunity to appear before you today and provide comments on behalf of the State of New Mexico in support of the Northwestern New Mexico Rural Water Projects Act, H.R. 1970.

This legislation will authorize construction of an important rural water system for northwest New Mexico, including the Navajo Nation, the Jicarilla Apache Nation and the City of Gallup.

It will also resolve long-standing water issues between the Navajo Nation and the State of New Mexico in the San Juan River Basin of New Mexico by authorizing a comprehensive settlement agreement that will protect existing water rights within the state. The legislation clarifies provisions of existing law and provides guidance regarding regulations that will be developed to implement the settlement provisions.

The State of New Mexico and the Navajo Nation reached this settlement after decades of disagreement and many years of intensive settlement talks. It is no small matter that we appear before you today, together, urging you to pass this legislation. We believe this legislation has been carefully crafted to address water supply needs within New Mexico while protecting the long-standing Law of the Colorado River.

I would like to discuss these issues in further detail.

The Project

The legislation would authorize the Northwestern New Mexico Rural Water Supply Project. This project is vital to solving the acute water supply conditions facing much of northwestern New Mexico, including a large portion of the Navajo Nation. The project is described in detail in the final draft Environmental Impact Statement recently released by the Department of Interior that builds off a federal planning process that has been underway for over 30 years. This Colorado River Storage Project Act project utilizes an existing reservoir and will provide a safe, reliable drinking water supply to New Mexico residents that currently haul water or rely on unsustainable groundwater.

Today more than half of rural Navajos in New Mexico must haul water for many miles to receive a basic domestic water supply. The reality of water hauling faced by those Navajo families is shocking considering the modern conveniences that most of us take for granted. By providing the backbone for a regional water supply system, the project will enable the Navajos to receive a clean, reliable supply of water.

The project will enable the City of Gallup to acquire a renewable surface water supply. Currently, Gallup faces quickly declining groundwater supplies with the prospect of severe shortages within 20 years. The project will also deliver water to the Jicarilla Apache Nation for use in the water scarce southern portion of the Apache reservation.

By 2040 the project is expected to serve approximately 250,000 people, including the residents of Gallup. The project would be the second biggest water utility in the state, smaller only than the Albuquerque Bernalillo County water utility.

Because the project will serve a very large area and contain hundreds of miles of pipeline, the cost of the project is high. But, the project costs can be appropriated over several years, and the Reclamation Water Settlements Fund, to be created by Title II of H.R. 1970, provides a reasonable means of funding project costs if sufficient appropriations have not been made by 2018.

In recognition that the state will incur costs associated with its Indian water rights settlement projects, including the Navajo Settlement, the State of New Mexico has made an initial contribution of \$10 million to the New Mexico Indian Water Rights Settlements Fund (NMSA 72-1-12). In addition, over the last 4 years, the state has invested approximately \$9.7 million in a Gallup regional distribution system and, this year, the New Mexico legislature appropriated \$15.3 million to be used for construction of the "Cutter Lateral" pipeline on the eastern side of the project. New Mexico recognizes the importance of funding this project and expects the federal administration to contribute funding for this project commensurate with the federal government's trust and statutory responsibilities. New Mexico expects to be treated fairly and consistently vis-a-vis other settlements around the country.

Benefits of the Navajo Settlement

In addition to authorizing a project that would provide a secure source of drinking water for Navajo and Apache communities and for the City of Gallup, the legislation would approve a comprehensive settlement of the Navajo Nation's water rights claims in the San Juan Basin in New Mexico. Navajo claims to the San Juan River have long-threatened the security of water rights of all other water users within the basin. After years of difficult negotiations, the State of New Mexico and the Navajo Nation entered into a settlement agreement in 2005.

The State of New Mexico strongly believes that the settlement represents a fair and equitable resolution, and we respectfully ask this Committee to support it. The San Juan River, like most rivers in the southwest, does not produce enough water to meet all claims for current and future uses. Under the settlement, the Navajo Nation agrees to substantially reduce its claims in exchange for the wet water supplied by the proposed project.

Before signing the settlement agreement, the State of New Mexico carefully considered the needs of non-Navajo water users in the San Juan Basin, and over the course of several years, the state met many times with water user groups, took formal public comments, analyzed alternatives and worked tirelessly to negotiate the agreement in order to resolve the concerns voiced. Some of the most difficult negotiations centered on numerous changes to the settlement agreement that provide ad-

ditional protections for third parties. The State of New Mexico has reviewed the settlement agreement and proposed legislation from a perspective of protecting all water users within the state, including San Juan-Chama Project water users, and the state believes the settlement benefits and protects those water users.

I firmly believe that we have come as close as possible to a resolution that provides maximum benefits and protections for all water users, given limitations of water supply and potential uncertainties of its allocation if the Navajo claims were litigated.

To underscore this point, I want to outline some of the most important provisions built into the settlement to protect non-Navajo water users.

Under the settlement, the Navajo Nation accepts compromises regarding both the quantity of its water rights and administration of its priority dates, with the result that Navajo claims fit within New Mexico's apportionment of the Upper Colorado Stream System and will not displace other existing uses and projects.

Under the settlement, the quantity of Navajo water rights would be made up of essentially three components. First, the settlement recognizes the existing uses of the Navajo Nation, including its old irrigation projects Hogback and Fruitland diverting directly from the San Juan River for authorized irrigation of approximately 12,000 acres. Second, the settlement recognizes the Navajos' largest right, its right to irrigate over 110,000 acres that comprise the Navajo Indian Irrigation Project (NIIP), authorized by Congress in 1962 by Public Law 87-483. Finally, the only "new" water the Navajos will receive is almost 21,000 acre-feet a year of water to supply domestic and commercial uses for the Navajo portion of the Northwestern New Mexico Rural Water Supply Project.

Regarding the large Navajo Indian Irrigation Project right, in 1962, Congress authorized an annual diversion of 508,000 acre-feet; however, the Navajos through conservation are agreeing to limit diversions to 353,000 acre-feet and could only exceed that amount by obtaining a State Engineer permit assuring that no other water users would be impaired by an increase. As a result, even with new diversions required by the proposed rural water supply project, the settlement's net effect is a decrease in annual diversion of over 130,000 acre-feet from the amount already authorized by federal law and state permits. In addition, depletion limits are included which provide additional benefits to other water users.

With respect to priority dates, under the federal reserved water rights doctrine, the Navajos could claim an 1868 priority, the date of their reservation. Under the prior appropriation doctrine, the Navajo Nation, as most senior water right holder, could call for all its water before anyone else on the San Juan River. Even with reduced quantities as provided under the settlement, an 1868 priority would threaten frequent curtailment of other water users. Consequently, the Navajos are agreeing that NIIP and the proposed rural water supply project will be supplied under the Navajo Reservoir's 1955 priority, instead of a reserved priority date of 1868. This concession means that 10 percent of Navajo rights will have an 1868 priority and 90 percent will be administered with a 1955 or later priority.

I have described two of the most important protections incorporated into the settlement, regarding quantity and priority, but there are several other protections conferred by the settlement I want to touch on.

The settlement has valuable shortage sharing provisions that protect other federal projects. As you know, the federal government has invested a great deal of resources in the Animas-La Plata Project (ALP) and the San Juan-Chama Project. These projects are vital to the State of New Mexico, but they have relatively junior priority dates of 1956 and 1955, respectively. In addition to the general protections I have already described, the Navajo Nation is agreeing to additional, specific protections for these two important federal projects.

ALP's 1956 priority in New Mexico makes it vulnerable to priority calls within the San Juan Basin. Most of the 13,520 acre-feet per year of ALP water allocated for use in New Mexico will supply the future needs of the three municipalities of Farmington, Bloomfield and Aztec. In the event that curtailment of New Mexico's water uses is required by the Upper Colorado River Basin Compact, the Navajos agree to provide protection to New Mexico contractors up to their project contract amount. Under this protection, the Navajos agree to forgo their uses in order to make water available to ALP at the same percentage supply available to the rural water supply project authorized by H.R. 1970.

Section 102 of H.R. 1970 would amend Public Law 87-483, which authorized the San Juan-Chama Project, to clarify that the normal annual diversion requirement for that project is 135,000 acre-feet for purposes of allocating annual water supply shortages between Navajo Reservoir contractors and the San Juan-Chama Project. That provision minimizes the potential for shortages to the San Juan-Chama Project, which on average diverts 105,000 acre-feet per year, or less, in dry years

when less water is available for project diversions. This means that a large reduction in Navajo Reservoir's physical supply would have to occur before the San Juan-Chama Project would begin sharing administrative shortages.

In addition, in order to protect federal project contractors, the state analyzed the risks associated with allowing additional water to be contracted from Navajo Reservoir to supply the proposed regional water project. The hydrologic determination recently signed by the Secretary of Interior confirms that additional water is available for the new contract uses without impairing existing uses. The additional risk of shortage to contractors from either the San Juan Chama-Project or Navajo Reservoir supply is minimal, and the State of New Mexico believes that other settlement and legislative benefits provided outweigh any additional risks of shortage.

Another category of protections I want to mention consists of specific protections for non-Navajo water users who are not supplied by federal projects. These users are direct flow irrigators, municipalities and power plants. Many non-Indian and municipal state-based rights were quantified in the 1948 Echo Ditch Decree, to which the United States and the Navajo Nation were not parties. Under the settlement, the Navajo Nation and the United States would agree not to challenge the elements of Echo Ditch Decree rights except on the basis of forfeiture, abandonment or illegal use occurring after entry of the Decree. This means that the U.S. and the Navajo Nation would not go behind this long-standing decree to challenge the water rights decreed at that time or challenge the validity of the decree. Similarly, in conjunction with the settlement, the Navajo Nation is agreeing to recognize water rights of the City of Farmington quantified by the Echo Ditch Decree.

An important protection for direct flow diverters is the Navajos' agreement to call on an alternate water supply stored in Navajo Reservoir before making a priority call against direct flow. Although, as I mentioned above, the settlement provides that 90 percent of the Navajos' rights would be supplied under Navajo Reservoir's 1955 priority, the Navajos' old direct flow irrigation projects Hogback and Fruitland would retain an 1868 priority. In many years the demand of those projects would cause junior diverters to be shut off absent the additional protection secured by the settlement requiring the Navajos to use their alternate water supply. Under the alternate water supply provisions, the Navajo Nation agrees the Hogback and Fruitland projects will refrain from priority calls against upstream junior appropriators and instead will deliver up to 12,000 acre-feet in any year of NIIP contract water in storage in Navajo Reservoir when the direct flow is insufficient to meet water demands. If this amount is exhausted in any year, priority calls may occur at that time in that year. Based on the hydrologic record, this provision would mean that instead of priority calls in one out of two years, Hogback and Fruitland would only be entitled to make priority calls in one out of every twenty years, on average.

Another benefit of stored water for direct flow diverters is contained in paragraph 401(a)(4) of H.R. 1970. When there are at least a million acre-feet in Navajo Reservoir, this provision authorizes the State of New Mexico to administer water released from storage for use by direct flow diverters at a minimum of 225 cubic-feet-per-second, even when inflows to the reservoir are less than that amount. In other words, when the direct flow would otherwise drop below 225 cubic-feet-per-second, water released from the reservoir may be used to keep direct flows at that minimum amount, thereby increasing and making more reliable the supply available to direct flow diverters.

The settlement would also make the direct flow go farther by providing funding for ditch improvements. Under the settlement, the state will contribute \$10 million for ditch improvements and water conservation projects to benefit the direct flow ditches. Section 309(c) of H.R. 1970 authorizes over \$23 million to rehabilitate the Hogback and Fruitland projects and Section 309(d) authorizes \$11 million of matching funds to rehabilitate non-Navajo ditches. These funds will mean that approximately \$45 million will be appropriated to improve the efficiency and promote conservation of water of the direct flow diversions, as part of the Navajo settlement.

The last category of protections I want to touch on includes administrative provisions to help assure that the San Juan River Basin is managed in an orderly fashion and within the supply available. Both the legislation and settlement confirm the State of New Mexico's authority to administer water. Under the settlement, the Navajo Nation agrees that the State Engineer has authority to serve as water master in the basin and to administer water rights in priority as necessary to comply with interstate compact obligations and other applicable law, thereby confirming authority in the state to comprehensively administer water usage in the basin. In addition, the State Engineer will have authority to make determinations of current beneficial uses for any changes in points of diversion and for any changes in purposes or places of use of Navajo water rights off of Navajo lands. The Navajo Nation also agrees to comply with state law regarding marketing of water rights.

The Navajo Nation further agrees not to pump groundwater so as to deplete the flow of the San Juan River by more than 2,000 acre-feet per year, unless the State Engineer approves use of Navajo surface water to offset depletions in excess of that amount. Any Navajo groundwater uses beyond those quantified in the settlement agreement also would be subject to non-impairment of existing water rights.

Outside the Navajo Reservation on lands allotted by the United States, there are numerous individual Navajos who could assert federal reserved claims in the pending San Juan River Adjudication. The Navajo Nation is agreeing to use its water rights decreed under the settlement to supply or offset any future uses that may be awarded in the adjudication to individual Navajos allottees in the San Juan Basin.

The proposed settlement is detailed and comprehensive. Although it is a creature of negotiation and compromise, I strongly believe that it represents the best result attainable for all New Mexicans who rely on the San Juan River. Without a settlement, the Navajo Nation would assert a right to much larger quantities, with the potential to displace junior non-Navajo water users. Under the settlement, those same water users are afforded numerous and substantial protections.

If the claims were litigated, the Navajos would seek large quantities of water under the Winters Doctrine or Federal Reserved Water Rights Doctrine. The Navajos would seek water for future use to make the Navajo reservation a permanent homeland, including by claiming enough water to irrigate all practicably irrigable acreage (PIA) on their lands in New Mexico. The quantity of water could be very large.

Under the settlement by contrast, as I have mentioned the only "new" water the Navajos will receive is almost 21,000 acre-feet a year of water to supply domestic and commercial uses for the Navajo portion of the proposed rural water supply project. The other major water components of the settlement consist of already existing or authorized irrigation, at the Hogback and Fruitland Projects and the Navajo Indian Irrigation Project.

As we move forward, the State of New Mexico looks forward to working with other parties on proposed legislative language to assure the protections intended by the settlement are realized.

The Colorado River Basin

New Mexico supports this legislation because it is good for New Mexico, the Navajo Nation, and the Colorado River Basin states.

The States' Agreement Concerning Colorado River Management recently executed by California, Arizona, Nevada, Utah, Wyoming, Colorado and New Mexico provides extensive benefits to the lower basin states in terms of protecting and increasing the water available for use in those states. The primary benefit of the agreement to the upper basin states is a reaffirmation of each state's right to develop its Colorado River water entitlement. The Navajo Settlement resolves the Navajo Nation's water rights claims within the San Juan Basin in quantities that fit within New Mexico's apportionment under the Upper Colorado River Compact. Resolution of tribal water rights claims is important to states, tribes, and the federal government, and it is particularly beneficial when the claims can be resolved within a state's compact apportionment.

The Secretary of Interior's recent hydrologic determination was developed by the Bureau of Reclamation in collaboration with engineers and hydrologists from the Upper Division states and was concurred with by the Upper Colorado River Commission (representing Colorado, Wyoming, Utah and New Mexico) through a resolution dated June 9, 2006. The Department of Interior consulted with all of the seven basin states, including Arizona, California and Nevada, regarding the final hydrologic determination. This hydrologic determination confirms that water is available for the Navajo Settlement within New Mexico's apportionment of water under the Upper Colorado River Basin Compact without displacing any existing water uses within New Mexico.

H.R. 1970 authorizes the Secretary of Interior to sign the Settlement Agreement and design and construct a project to bring a necessary, safe and reliable water supply to many New Mexican families who currently rely on hauled water or unsustainable, poor quality groundwater to meet their domestic needs. The Upper Colorado River Commission has already expressed support for the settlement project and this legislation through resolutions dated June 19, 2003 and June 9, 2006.

The settlement and the water supply project contemplates a pipeline extension to the Navajo Nation's capital in Window Rock, Arizona, on the border with New Mexico. H.R. 1970 preserves Arizona's right to negotiate its own settlement with the Navajo Nation and water cannot be delivered to Arizona until an agreement is reached within Arizona regarding the water supply allocation and additional ap-

provals are received as may be required under the law of the Colorado River. New Mexico has been able to accommodate some of Arizona's concerns, but many of Arizona's concerns go beyond the scope of our settlement, raising complicated issues that are objectionable to other basin states. New Mexico is willing to continue conferring with any of the Colorado River Basin states as necessary to explain the settlement agreement or discuss concerns about the settlement, but New Mexico believes that each state should be entitled to develop its compact entitlement in the manner that best meets the needs within that state. In New Mexico, have worked hard to resolve complicated Indian water rights claims through a settlement that will address basic human needs. We hope the other states will support us in this effort.

Madame Chairwoman and Committee members, the State of New Mexico asks you to support H.R. 1970. The costs of the Northwestern New Mexico Rural Water Supply Project and of the Navajo settlement are high. But the costs of delay in not addressing the vital and human needs of the communities of Northwestern New Mexico are much higher. This legislation would settle protracted and divisive litigation, and in its place would provide a clear, safe drinking water supply for northwest New Mexico.

**Response to questions submitted for the record by
Jim Dunlap on H.R. 1970**

(DUNLAP-NM) This legislation will enable a settlement between the New Mexico Navajo Nation and the Federal Government. What do you think of the Arizona's concerns regarding the implications of certain provisions to the existing "Law of the Colorado River?"

ANSWER: Arizona's objection relating to the "Law of the River" relates to New Mexico's use of a portion of its Upper Basin apportionment within the Lower Basin in New Mexico. Arizona's concern is unfounded because Section 303(g) of H.R. 1970 directly authorizes the use of a portion of the State of New Mexico's Upper Basin apportionment within the Lower Basin in New Mexico. The authorization in H.R. 1970 is consistent with the authorization in Section 303(d) of the 1968 Colorado River Basin Project Act of a project's use of a portion of the State of Arizona's Upper Basin apportionment within the Lower Basin in Arizona. In addition, the Upper Colorado River Commission, which administers the Upper Colorado River Basin Compact and has authority to determine uses of water from the Upper Basin, by unanimous resolution, approved New Mexico's proposed use of some of its Upper Basin water within the Lower Basin in New Mexico.

H.R. 1970 preserves the State of Arizona's right to negotiate its own settlement with the Navajo Nation, and most of the issues raised by Arizona go beyond the scope of the State of New Mexico's settlement with the Navajo Nation. Some of the provisions that Arizona has requested have raised objections from other Colorado River Basin states.

(DUNLAP-NM) Mr. Dunlap, the Bureau of Reclamation may categorize this project as a "rural water project" under P.L. 109-451. Would the State of New Mexico support that? Has the State ever considered this project to be a "rural water project?"

ANSWER: The Bureau of Reclamation's written comments regarding H.R. 1970 state it is confused about whether the Northwestern New Mexico Rural Water Supply Project is intended to be a rural water project. The project proposed by H.R. 1970 should not be categorized as a "rural water project" under the Reclamation Rural Water Supply Act of 2006, P.L. 109-451. As clearly stated in H.R. 1970, the project will be authorized as a Colorado River Storage Project Act participating project. But, H.R. 1970 is specifically tailored to the requirements of the Navajo settlement.

As Commissioner Johnson described in his testimony to the bill, Reclamation's rural water program under the Rural Water Supply Act is still under development, and eligibility and prioritization criteria have still not been promulgated. New Mexico understands that a field hearing is scheduled later this month before the Senate Energy and Natural Resources Committee regarding the Bureau of Reclamation's implementation of P.L. 109-451.

(DUNLAP) Mr. Dunlap, your testimony frequently refers to the hydrologic report. Who verified the hydrologic report? Was this report specific to this project, or for the entire State of New Mexico?

ANSWER: The Hydrologic Determination to which I refer is required by Section 11 of P.L. 87-483, and was finalized by the Bureau of Reclamation in April

2007 after consultation with all seven Colorado River Basin states, and signed by the Secretary of the Interior on May 23, 2007. A copy of the determination is attached to these responses for the record. The Upper Colorado River Commission had previously concurred in the findings of the determination in June of 2005. The 2007 Hydrologic Determination confirmed the finding of the 1988 Hydrologic Determination that the annual water yield available to the Upper Basin under the Colorado River Compact is at least 6.0 million acre-feet, including evaporation from Colorado River Storage Project reservoirs, based on the critical period of record. The 2007 Hydrologic Determination also found that sufficient water is reasonably likely to be available within the State of New Mexico's share of the Upper Basin yield that is apportioned to it by Article III(a) of the Upper Colorado River Basin Compact, and within the physical water supply available from Navajo Reservoir to service water contracts from the Navajo Reservoir supply for the Navajo Nation's uses under both the Navajo Indian Irrigation Project and the proposed Northwestern New Mexico Rural Water Supply Project.

(To WHOEVER) The Jicarilla Tribe is currently receiving funds for the Jicarilla Apache Reservation Rural Water System rural water project. How do the funds from this legislation relate to the current project funds?

ANSWER: The funds from H.R. 1970 do not relate to the Jicarilla Apache Reservation Rural Water System. The Jicarilla Apache Reservation Rural Water System project will provide a water distribution system to supply water to the northern portion of the Jicarilla reservation in the proximity of Dulce, New Mexico. The Northwestern New Mexico Rural Water Supply Project will deliver water to the Jicarilla Apache Nation near Counselor, New Mexico, for use in the southern portion of the reservation.

(To WHOEVER) Who is responsible for the operation and maintenance costs? Who will own the infrastructure once it is completed?

ANSWER: Section 304 of H.R. 1970 provides that the three project beneficiaries, the Navajo Nation, the Jicarilla Apache Nation and the City of Gallup, will pay their respective allocable costs for operation, maintenance and replacement of the project. A limited waiver for up to ten years would be authorized for the Navajo Nation pursuant to subsection 304(f), if the Secretary of the Interior determines that the cost of OM&R allocable to the Navajo Nation exceeds its ability to pay. Subsection 302(f) authorizes the Secretary, upon completion of construction and execution of an operations agreement, to convey those portions of the project located within the Gallup city limits to the city and the rest of the project facilities to the Navajo Nation. No portion of the project will be located on Jicarilla lands. Paragraph 304(b)(5) requires financial assurances satisfactory to the Secretary if title is transferred to the city prior to repayment.

Mrs. NAPOLITANO. Thank you, sir. We will move on to Patricia Lundstrom, President of the Northwestern New Mexico Council of Governments in Gallup, New Mexico.

**STATEMENT OF PATRICIA LUNDSTROM, PRESIDENT,
NORTHWESTERN NEW MEXICO COUNCIL OF GOVERNMENTS,
GALLUP, NEW MEXICO**

Ms. LUNDSTROM. Good morning, Madame Chair, and Congressman Udall. I am Patty Lundstrom. I am the Executive Director of the Northwest New Mexico Council of Governments since 1985, and a fourth term member of the New Mexico House of Representatives. With me today are Gallup mayor pro tem Bill Nachero, Gallup city councilor Elen Londabozo and the COG deputy director Jeff Kiley. We would like to thank you for inviting us to participate in this historic hearing today.

I come before you to speak in favor of House Bill 1970. This legislation is an essential instrument for authorizing and financing the proposed rural water project we have been working on for decades. We have known it as the Navajo Gallup Water Supply Project, and in the context of this bill it is titled the Northwestern

New Mexico Rural Water Supply Project. Since 1991, I have served as chair of the steering committee for this project.

The need for the project has been known to Congress and the Interior Department for 50 years, and scientific studies have made it clear that the only hope for a sustainable water supply for eastern Navajo land and Gallup lands is a surface water supply provided by the San Juan River. After years of work through a mine field of legal, technical, political, environmental and financial issues, we are finally at the point of bringing to you our plan for getting this water supply conveyed to this parched region.

Through the involvement and support of the Congress, the Bureau of Reclamation and Indian Affairs and the Fish and Wildlife Service, the Federal government has been an active and constructive part of this consensus plan. The opportunity for the government to shape, modify or otherwise advance this plan has been continuous and complete. The steering committee has been a unified working group with participation by state and Federal agencies, the Navajo and Jicarilla Nations, the city of Gallup and technical partners in the process.

In my 22 years as COG director, this has been the most ambitious and complex project I have seen in the region. It has invoked the highest levels of cooperation, professionalism and commitment by the individuals and agencies involved. The needs for the project are clear. Many Navajo reservation households have never had a public water system. The Navajo economy already struggling well below poverty stands no chance of development without a sustainable public water supply for its communities.

The Jicarilla Apache Nation has a water rights settlement but needs economic development in order to tap the fullness of these rights. The city of Gallup's water table is dropping 20 feet a year, and the city will face peak use shortages within five years and chronic shortages within 15 years.

Since I work closely with the city of Gallup in both my public service roles, I will briefly outline Gallup's role in the project. Gallup is a transportation hub for the southwest and a major commercial center for the Navajo reservation. Within a few decades Navajos will likely make up one-half of Gallup's population. The Gallup regional water system at the back end of the Navajo Gallup pipeline is now under development in full collaboration with the Navajo Nation and the State of New Mexico.

Under this system city infrastructure will be used to help convey water to neighboring Navajo communities both now and in the future when the Rural Water Supply Project is complete. The state has already committed over \$9 million to this regional system. Gallup also supported the state's commitment of over \$15 million in funding for regional water infrastructure on the eastern side of the project area which will ultimately tie into the Cutter Reservoir.

These regional system partnerships have generated broad commitments to the motto real water to real people in real time. Since shortages are likely in Gallup even before the project is completed, Gallup has proactively worked to secure its water future in both the short and long term and has adopted an aggressive water rate structure to spur conservation and to look at financing local water

infrastructure and a new water supply. It has started developing a wastewater reuse system using reverse osmosis.

It is working to develop new groundwater sources previously used by extractive industry. It has worked on cooperative agreements with the Navajo and Jicarilla to ensure a water source for the city's participation in the Rural Water Supply Project. The city of Gallup stands in support of this legislation. The city concurs in particular with the concept of a 75 percent Federal cost share for the city's portion of the project cost as reflected in House Bill 1970.

Affordability for the city is affected by a number of unique factors, most predominantly its commercial hub status. We are a broad rural area and the existence of pockets of high poverty both within and outside the city. The city will need a water supply for its share of the project, and the city is dependent on the projects two Indian tribes or alternatively the Secretary of Interior for that supply. The city's purchase of its own water rights in the San Juan River would be high in cost, high in controversy and low in feasibility at this point.

The city of Gallup is nevertheless committed to charting a strong financial course to meet the 25 percent threshold of its share of the project. We will be working closely with the offices of the Governor, the state engineer, as well as with the state legislature to design and implement a viable state and local financial strategy.

Overall this legislation represents a perfect storm of opportunity for the Federal government to join forces with its state and local partners to meet the critical water needs in this region of New Mexico while settling the Navajo Nation water right claims.

Mrs. NAPOLITANO. You need to wrap it up please, Madame.

Ms. LUNDSTROM. OK. The project is essential, and on behalf of the steering committee, the Council of Governments and the New Mexico state legislature, we urge your support for House Bill 1970, and again thank you very much for inviting us.

[The prepared statement of Ms. Lundstrom follows:]

Statement of Patricia A. Lundstrom, Member, New Mexico House of Representatives, and Executive Director, Northwest New Mexico Council of Governments, Serving as Steering Committee Chair, Navajo-Gallup Water Supply Project, on H.R. 1970

Mr. Chairman and Members of the Subcommittee, I am Patricia Lundstrom, member of the New Mexico House of Representatives in my fourth term serving House District 9, and Executive Director of the Northwest New Mexico Council of Governments since 1985.

State House District 9 encompasses about 3,000 square miles in northwestern New Mexico, including the western portion of the City of Gallup and 9 rural Navajo communities lying within McKinley and San Juan Counties. Navajos comprise about two-thirds of the population of this District.

The Northwest New Mexico COG is the regional planning agency designated by the State of New Mexico and the Federal government to serve the State's three counties of the Four Corners region: Cibola, McKinley and San Juan Counties. This is about 15,000 square miles of high desert territory, including large reservation areas for four Indian tribes and a population of about 225,000 people residing in 6 municipalities and 77 rural communities. About one-half of the land base and one-half of the population are Native American.

I want to thank you for inviting me to participate in this historic hearing today. I come before you to speak in favor of the proposed Settlement of Navajo Nation water rights in the San Juan River and the other associated titles included in H.R. 1970. My primary interest in this bill and in the Settlement is that this legislation is an essential instrument for authorizing and financing the proposed rural water infrastructure project we have been working on for decades. We have known

it as the Navajo-Gallup Water Supply Project, and in the context of this bill it is titled the Northwestern New Mexico Rural Water Supply Project.

Since 1991, I have served as Chair of the Intergovernmental Steering Committee for the Navajo-Gallup Water Supply Project. This project is the flagship of the proposed water rights Settlement, as it plans to construct primary water pipelines to deliver water from the San Juan River to rural Navajo communities in northwestern New Mexico, to the southwestern portion of the Jicarilla Apache Nation, and to the City of Gallup.

During these past 16 years, I have seen the Navajo-Gallup project revived from its prior stalemate condition and, with the consistent leadership and support of Senators Bingaman and Domenici, I have seen it sustained as a planning initiative to the present day through a minefield of legal, technical, bureaucratic, political, financial and environmental issues.

The Steering Committee has been the primary nexus and forum in which these issues have been addressed and resolved by a persevering coalition of partners, including:

- The Navajo Nation, with representatives from the Nation's Natural Resources Division, Division of Justice, President's Office, and Water Rights Commission;
- The Jicarilla Apache Nation, with staff and policy representation from the Nation's Water Rights Commission and from the Office of the President;
- The City of Gallup, which serves as a project beneficiary (for 20% of the project's eventual capacity) and as a hub distribution system for the project's water supply at its southern end, to water users not only within the City limits but also in a number of neighboring Navajo communities;
- The State of New Mexico, primarily through its State Engineer's Office and the Interstate Stream Commission; the State is a party to the interstate compacts affecting the Colorado River and its tributaries, as well as to a negotiated settlement of the Navajo Nation's water rights in the San Juan River, and (through its Legislature) the State is a major contributor to infrastructure improvements in support of the overall Navajo-Gallup Water Supply Project;
- The Bureau of Reclamation, which serves as federal lead for the project out of its Western Colorado Area Office; and
- The Bureau of Indian Affairs, which is federal administrator of the Navajo Indian Irrigation Project, and which has a substantial role with regard to real properties and rights-of-way affected by the project;
- The Navajo Tribal Utility Authority, the Navajo Nation's utility enterprise that operates all of the public water systems on the Navajo Reservation;
- The Navajo Area Indian Health Service, a division of the Public Health Service in the U.S. Department of Health & Human Services, which is responsible for planning and constructing water facilities in service to Navajo communities; and
- The Northwest New Mexico Council of Governments, a federal- and state-designated regional planning agency which chairs the Steering Committee.

In addition to these Steering Committee groups, we have enjoyed the professionalism and cooperation of two agencies in particular that have also contributed greatly to the success of our planning efforts thus far:

- The Upper Colorado River Commission has worked thoughtfully and cooperatively with the State of New Mexico and the Navajo Nation in accommodating the unique needs and configurations of this project. In particular, in 2003 the Commission resolved to support and consent to diverting water from the Upper to the Lower Basin of the Colorado River for the purposes of the Navajo-Gallup project, and it certified its support for "such Congressional action as may be necessary to authorize the Navajo-Gallup Water Supply Project."
- The United States Fish and Wildlife Service worked cooperatively with all parties to complete appropriate planning studies in the San Juan River that would identify the depletions from the river that could be made without negatively impacting the recovery of endangered species of fish in the river.

This project is the most ambitious and complex of the many local and regional initiatives I have been a part of for over two decades. It has also evoked the highest levels of cooperation, professionalism and commitment by a group of agencies and individuals that I have ever seen. My Council of Governments staff and I have been working on this project continuously since the early 1990s, and there have been many other individuals from all the participating agencies who have worked with us on it for years at a time. For all of us, this is not just "any project"; it's personal. Getting it done makes so much sense, at so many levels, that we are all committed to it for the long-haul.

Since the late 1950s, State and Federal officials have concurred with the Southwest region's top hydrologists that the only hope for long-term sustainable water

supply for the eastern Navajo Reservation and for the City of Gallup lies in the surface water supply provided by the San Juan River. The San Juan is a tributary to the Colorado River, originating in the mountains of southwestern Colorado, flowing through a portion of northwestern New Mexico, and proceeding to join the Colorado River at Lake Powell in southern Utah and northern Arizona. Through allocations confirmed in the hydrologic determination recently approved by Interior Secretary Kempthorne, the San Juan River provides about 40% of New Mexico's surface water supply. The Navajo-Gallup project would divert nearly 38,000 acre-feet of water from the river, or about 5 1/2 percent of New Mexico's river allocation.

The needs for the Navajo-Gallup Water Supply Project are clear and evident:

- For the Navajo Nation, there is a significant population of Navajo people in the northwestern New Mexico service area who do not have, and have never had, a public water system. To this day, nearly 40% of Navajo families in the service area still haul water to meet basic household and livelihood needs. It is also clear that the Navajo economy, already struggling well below the poverty line, stands no chance of development without the provision of water as the most basic of all human needs.
- For the Jicarilla Apache Nation, there is already in place a settlement agreement under which this neighboring tribal community has secured water rights, but for which significant economic and infrastructure development is needed in order to tap the fullness of these rights.
- For the City of Gallup, the water table is dropping 200 feet every ten years, and the City will be facing peak-use shortages within five years and chronic shortages within fifteen years.

To focus further on the needs of the City of Gallup: Gallup serves as a multimodal transportation portal for the Southwest and a major commercial center for the Navajo Reservation. As such, it is as much a "home" and integral part of Navajo life as most other places in the region. Within a few decades, we expect that Navajos will make up over 50 percent of Gallup's population. Despite a checkered history of relationships between Gallup and the Navajo people, with some residue of tension and mistrust even today, the partnership that has been forged between Gallup and the Navajo Nation in the context of this project has been remarkable. I foresee only further progress in this relationship as this project moves forward.

It is important to note that, in my 16 years with the Steering Committee, at no point has the City of Gallup attempted to insert its needs and priorities in front of those of the Navajo Nation. Rather, it has been a supporting partner, ensuring that its participation is mutually beneficial to the City and to its Navajo neighbors.

As an example of this partnership, there has been a joint effort to provide municipal water supply to Navajo households bordering the City of Gallup on its east side. Past bureaucratic barriers to this service have been erased, and by this summer's end, those Navajo families will have running water for the first time.

Another example is the multilateral partnership between the City, the State of the New Mexico, the Navajo Nation, the Indian Health Service and the Navajo Tribal Utility Authority to finance and build components of the Gallup regional water system, with the specific objective of moving water through the City's system to the neighboring Navajo communities adjacent to the City. The State has committed over \$9 million to this initiative, which is being developed in accordance with the plans of the Northwestern New Mexico Rural Water Supply Project.

The Navajo-Gallup partnership was further extended when the City concurred with the request by the Navajo Nation, the Governor's office and other agencies for State funding in support of urgently needed water infrastructure serving five rural communities in the northeastern sector of the Navajo-Gallup project service area. Over \$15 million has now been committed by the State to what is referred to as the "Cutter Lateral" project, since this infrastructure will ultimately tie into and be served by the pipeline to be built under the Northwestern New Mexico Rural Water Supply Project.

These regional system partnerships have generated broad commitment to the motto: "Real water to real people in real time."

Realizing the shortages that are likely prior to the advent of surface water into the City's water supply, the City of Gallup has also risen to the challenge of the region's impending water crisis by exploring and implementing various initiatives to secure its water future—both leading up to and in conjunction with the completion of the Northwestern New Mexico Rural Water Supply Project.

- In 2003, the City sponsored a Town Hall on Water, co-facilitated by the public policy group New Mexico First, at which participants adopted a consensus plan to establish Gallup as a model town in the American West in terms of its commitment to secure its water future and cooperate with its neighbors in the "water commons" shared by all residents in the region.

- Emerging from the Town Hall was the formation the Gallup Water Board, which assisted the City Council in the radical revision of the City's water rate structure in support of conservation and the generation of local financing for water infrastructure and future water supply.
- Another initiative was a partnership with the Bureau of Reclamation to study the feasibility of implementing a comprehensive wastewater recycling program utilizing reverse osmosis technology.
- Yet further, Gallup has pursued a permit to develop water supply in water fields east of the City formerly owned and developed by extractive industries.
- Finally, a Memorandum of Understanding is in its final draft stages between the City, the Navajo Nation and the Jicarilla Apache Nation, by which the parties will commit to ensure that the City is afforded legal access to a share of the water to be supplied by the Navajo-Gallup project.

Within the overall scenario of the Navajo-Gallup project, the City of Gallup remains in full support of the project and of the water rights settlement which is its primary facilitating instrument. At the same time, the City is proactively developing a specific long-range financial plan to be able to afford its share of the cost of the project.

The Economics analysis contained in the project's Planning Report and Draft Environment Impact Statement suggests that the City's ability to pay is fairly close to the threshold formula applied by the federal government in terms of median household income. The somewhat misleading conclusion that might be derived is that the City can readily afford to self-fund its share of the project.

A number of factors mitigate against such a foregone conclusion:

- Gallup's status as a hub commercial center for a broad geographic area results in a unique pattern of impact on the City's infrastructure. Although the current municipal population is about 22,000, the number of people moving around and doing business within the City may soar to between 70,000 and 100,000 people—especially on weekends and on ceremonial occasions. It is essential to understand that Gallup serves a broader service area than its municipal boundaries would indicate. Over 80 percent of the students in Gallup schools are Navajo. The Gallup Indian Medical Center serves the regional Native American population. Due to the lack of water service on the Reservation, area residents regularly use City laundry, car wash and other facilities that increase the demand for water. Higher rates resulting from the City's cost for participating in the new water supply project will be passed on to the low-income residents in the broader regional community, thus affecting the overall "affordability" of the project.
- Although the influx of visitors generates a disproportionately high level of gross receipts tax revenues in the City, the City and surrounding County are severely limited in the development of property tax revenues, and the City is virtually land-locked by public, non-taxable lands on all sides, for which compensation by such funds as Payment in Lieu of Taxes (PILT) is only a fraction of the revenue shortfalls actually occurring.
- Although Gallup's median household income is shown in the Economics report as only a shade or two below the "affordability level" of the project, yet this income figure is deceptive as well, since there is a large gap between the minority of well-to-do households and the majority of low and moderate-income households in the City. Not surprisingly, two-thirds of the City's residential water revenues come from the population group utilizing the lowest quantities of water, that is, fewer than 6,000 gallons per month. These lower water users are predominantly the City's lowest-income households. The City's inverted water rate structure provides some cost protections for these lower users, but these may be insufficient to keep rates within the affordable range for this population.
- The Economics analysis in the Final Report does not take into account the need for replacing aging infrastructure. Even with Gallup's new progressive water rate structure and at maximum bonding capacity, the City's funds are insufficient to meet even current operations, maintenance and replacement costs, much less to develop new infrastructure or participate in a new water supply initiative. 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 comes due.
- The City's stake with respect to the Settlement of the Navajo Nation's water rights in the San Juan River is clearly secondary to that of the Nation, the State of New Mexico and the Federal government. With respect to accessing a

legal water supply, the City first course of action is to pursue a water source in consultation with the two Indian tribes involved in the project. The City's pursuit of the independent purchase of water rights in the San Juan River would be high in cost, high in controversy and low in feasibility at this point.

- It is the City's position, therefore, that it will need significant Federal funding support for its share of the project costs.

The City is committed, nevertheless, to charting a strong financial course to meet the 25 percent threshold of its share of the project costs. 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 Council of Governments representatives met recently 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.

With regard to the City's won commitment to the project cost share, several options are currently under consideration with bond counsel, with a preliminary strategy report to be ready for review by mid-August. However, until such factors as the cost of water, final operations, maintenance and replacement (OM&R) and capital costs, and construction scheduling are determined, it will be difficult for Gallup to determine what its ultimate financial strategy will be. 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 25% of its project cost share.

All in all, the Northwestern New Mexico Rural Water Supply Project represents a "perfect storm" of opportunity for the Federal government to meet the critical water needs of the people in this region of New Mexico, while settling the water rights claims of the Navajo Nation as an essential component of the overall initiative. The project's promise of "real water to real people in real time" forms a primary basis for the economic viability of the northwestern quadrant of New Mexico.

The Steering Committee for this longstanding and critical project effort, along with the institutions I represent—the Northwest New Mexico Council of Governments and the New Mexico State Legislature—urge your support for H.R. 1970, and by implication, for authorization of the Northwestern New Mexico Rural Water Supply Project. I acknowledge that the projected costs for this project are high, but we dare not delay any longer in meeting the human and economic needs represented in this initiative.

For our Steering Committee, this worthy cause has been on our watch for a couple of decades, and we hope—now that it's on your watch as well—that you will not let this opportunity fail.

Thank you for your most favorable and timely consideration of H.R. 1970.

Mrs. NAPOLITANO. Thank you. Mr. Gregg Houtz, Deputy Council, Arizona Department of Water Resources in Phoenix, Arizona.

**STATEMENT OF GREGG HOUTZ, DEPUTY COUNCIL, ARIZONA
DEPARTMENT OF WATER RESOURCES, PHOENIX, ARIZONA**

Mr. HOUTZ. Madame Chairwoman, members of the Subcommittee, thank you for the opportunity to present the views of the State of Arizona on H.R. 1970. H.R. 1970 is another step toward resolving the longstanding claims of Indian nations in this country. As the Chairwoman knows well, Arizona has tried to be a leader in resolving these through settlements. The concept of ending up with wet water versus a paper water right that you get in litigation is not acceptable either to Indian tribes nor to other water users. We want to see real projects.

In this vein, we view this as a very important piece of legislation. The Navajo Nation is in three states and is the largest Indian tribe in the country. As a matter of fact, in Arizona it is the largest of all of our 21 tribes and is the largest in population and in land area. So we see this bill as both an opportunity as a great step in a national effort.

We applaud the efforts of New Mexico and the Navajo Nation to come to settlement. We applaud the partnerships that they are forming very much like we have done in the past. However, in its present form H.R. 1970 has problems. We believe that it conflicts with certain provisions of the law of the Colorado River and the 1922 compact. We have outlined these in our submitted testimony, and we have offered legislative solutions, and we will work with committee staff here and in the other body to try and resolve these issues of the law of the river. These are very important to Arizona. We do not take it lightly.

The compact, the Arizona v. California Supreme Court decree, the 1968 Act and other things in the law of the river protect Arizona water users. We do not take lightly ignoring those provisions. We have provided language that we think solves our issues in that regard.

An opportunity exists here. The Navajo Nation sprawls three states. We have been in ongoing negotiations with the Navajo Nation for the claims in the little Colorado River and in the main stem of the lower Colorado River for over a decade. The main impediment to it has been money and a Federal commitment to provide money so that we can provide wet water to the Navajo Nation.

We see this as an opportunity in that H.R. 1970 in title 2 provides a unique funding mechanism that should be expanded and used to provide funding for other settlements across the west but more importantly maybe specifically for the Arizona portion. We are diligently working with representatives of the Navajo Nation to try and come to resolution of the issues and hope that we are part of this bill when it is finally passed.

In the meantime though, should Congress choose not to wait, it is important that the issues raised in the Navajo Nation lawsuit against the Secretary on the operations of the Colorado River not be ignored. We find it hard to believe that Congress would approve this settlement yet leaving the states and the water users in the three lower basin states vulnerable to a lawsuit that would continue to go.

We have just concluded over the last two years the historic agreement among the seven basin states on conjunctive use of the two main reservoirs and shortage sharing in the lower basin. If that lawsuit is still in existence when those programs go into existence next year, they will be included in the lawsuit. We do not see how it could not. So we implore Congress to consider requiring that the lawsuit be dropped before enactment of this legislation.

In summary, we will continue to work with our friends in New Mexico to try and resolve these issues, and look forward to working with committee staff in this body and in the other body to come to a conclusion on dealing with the law of the river issue.

[The response to questions submitted for the record by Mr. Houtz follows:]

**Response to questions submitted for the record by
Gregg Houtz on H.R. 1970**

(HOUTZ) Mr. Houtz, Arizona is part of both the Lower and Upper Colorado River Basin. Has water from the Upper Basin ever been authorized to be transferred to the Lower Basin?

ANSWER: 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. This is true for Arizona as well as the other states. Only once has Congress 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)). This provision would have accounted the water used for a power plant as part of the Central Arizona Project as Upper Basin water regardless of whether the location of the plant was in the Lower or the Upper Basin. This power plant is located near Page, Arizona, in the Upper Basin, and uses Upper Basin water. Because of this, the congressional exception was never exercised.

It is true that the Upper Basin states transport water out of the Colorado River basin to users within their states that are located outside the Colorado River Basin, 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 Law of River. 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.

(To WHOEVER) The Jicarilla Tribe is currently receiving funds for the Jicarilla Apache Reservation Rural Water System rural water project. How do the funds from this legislation relate to the current project funds?

ANSWER: Not applicable to Arizona.

(To WHOEVER) Who is responsible for the operation and maintenance costs? Who will own the infrastructure once it is completed?

ANSWER: Not applicable to Arizona.

Mrs. NAPOLITANO. Thank you for your testimony. Mr. Gerald Zimmerman, Executive Director of the Colorado River Board of California, Glendale, California.

**STATEMENT OF GERALD R. ZIMMERMAN, EXECUTIVE
DIRECTOR, COLORADO RIVER BOARD OF CALIFORNIA,
GLENDALE, CALIFORNIA**

Mr. ZIMMERMAN. Thank you, Madame Chairwoman, and members of the Subcommittee. I want to thank you for giving me the opportunity to provide testimony before this hearing on H.R. 1970. I am going to confine my remarks to sections of the legislation that are of concern to the Board and its member agencies. First, I want the Subcommittee to know that from our initial review of H.R. 1970, the Board does not in any way oppose the Navajo Nation Gallup project, and it fully recognizes the value and impor-

tance of this project to the State of New Mexico and the Navajo Nation.

However, the Board does want to ensure that legislation of this nature is consistent with the law of the river and is reflective of the broader concerns of the State of California. In this regard, the Board does have a number of comments on the proposed legislation. With respect to section 101, it is the position of the Colorado River Board of California that this legislation should be modified to provide that only water created through extraordinary conservation may be stored in the top water bank, and that this is the first water to be spilled.

Regarding section 201[c][3], it provides that the completion of the Navajo Gallup project will be given priority for up to \$500 million if the Federal share of the cost has not been otherwise provided by January 1, 2018. Since the Reclamation fund is made viable through the repayment of Reclamation projects from around the west, many of which are within California, the Board questions the fairness of providing to the Gallup Navajo project a priority position to receive up to half of all of the funds designated to be deposited in this new settlement's fund.

Section 303 of H.R. 1970 essentially gets to the heart of the concerns of the Board regarding the law of the Colorado River and the need to be consistent with the 1922 Colorado River compact. One concern is the clear provision of authority to use water in the lower basin even though that water is diverted in the territory of the upper basin. That is above Lee Ferry.

The Board believes that H.R. 1970 needs to specifically address first the diversion and use authority in the context of the 1922 Colorado River compact, and second the attributes of the water use in the lower basin, both within New Mexico and Arizona, need to be clearly defined. In the era of pipelines being proposed to transport water from the upper basin to the lower basin, it is imperative that precedent setting situations that will impact the law of the river in one form or another be appropriately addressed.

In this regard, the transport of water from the upper basin into the lower basin within New Mexico is a rather significant matter but the further transport of that water into Arizona is an additional significant step. The Board suggests that legislation authorizing the transportation of water should be clear as to the attributes of the water to be used in such circumstances, and I will identify a couple examples.

The source of the water including linkage to any other acts such as the Arizona Water Settlements Act, the priority position of that water supply, the U.S. Supreme Court decree accounting arrangement and any other important attributes such as the operation, maintenance and replacement costs that may be associated with that project such as you could use the central Arizona project if it is an attached diversion from that project.

The Board recommends that section 303 of the bill be amended to provide this clear authorization and these points of clarification. In the alternative, authorization for the construction of facilities that would move water from the upper basin to the lower basin should be removed from H.R. 1970.

In closing, Madame Chair and members of the Subcommittee, I want to reiterate that the Board does not oppose the Gallup Navajo project. However, it does want to ensure that this legislation is consistent with the law of the river and reflective of the broader concerns of California. Thank you.

[The prepared statement of Mr. Zimmerman follows:]

**Statement of Gerald R. Zimmerman, Executive Director,
Colorado River Board of California, on H.R. 1970**

Madam Chairwoman, and Members of the Committee and Subcommittee, thank you for this opportunity to submit written testimony regarding H.R. 1970. Set forth below are initial comments regarding the provisions in H.R. 1970 from the perspective of the Colorado River Board of California.

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

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

1. Section 101—Top Water Bank—Arrangements of this nature are being utilized in various parts of the West where the reservoir circumstances facilitate this sort of interim water storage. However, in this situation the legislation does not clarify how the water to be stored in the top water bank must be developed. It is the position of the CRB that the legislation should be modified to provide that only water created through extraordinary conservation may be stored in the top water bank. In other words, water could only be stored if that water would have otherwise been beneficially used except for the implementation of extraordinary conservation measures and as provided in H.R. 1970, it should be the first water to spill.

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

3. Section 201—Funding via the 1902 Act Reclamation Fund—This section of the proposed legislation provides a creative mechanism for funding implementation of settlement agreements and completion of the Navajo-Gallup Project. The CRB understands that Section 201 provides that \$1.1 billion would be deposited into the treasury before it is set to terminate on September 30, 2030.

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

4. Section 303—Delivery and Use of Water—This section of the bill gets to the heart of the concerns of the CRB regarding the law of the Colorado River and the need to be consistent with the Colorado River Compact of 1922. One concern is the clear provision of authority to use water in the lower basin even though that water will be diverted in the territory of the upper basin. H.R. 1970 needs to specifically address: 1) the diversion and use authority in the context of the 1922 Colorado River Compact, and 2) the attributes of the water use in the lower basin both in New Mexico and Arizona.

A related concern is with the use of such water in the territory of the lower basin within the State of Arizona so as to serve the community of Window Rock on the Navajo Reservation. The State of Arizona has asserted that such water will need to be viewed as a portion of Arizona's lower basin apportionment and should also come with certain attributes linked to the Central Arizona Project (CAP) such as priority date and repayment of project operations, maintenance, and replacement costs. Mr. D'Antonio for New Mexico has asserted that H.R. 1970 should "leave open the determination of the source of water for use in Arizona" and that accounting for the water as a diversion of CAP water would "have to be agreed to by all basin states," which has not yet occurred. This issue needs to be resolved among the Colorado River Basin states and the agreed upon solution included in H.R. 1970.

In the current era of pipelines being proposed to transport water from the upper basin to the lower basin, it is imperative that precedent-setting situations that will impact the law of the river in one form or another be appropriately addressed. In this regard, the transport of water from the upper basin into the lower basin within New Mexico is a rather significant matter, but the further transport of that water into Arizona is an additional significant step. The CRB suggests that legislation authorizing the transportation of water should be clear as to the attributes of the water to be used in such circumstances; for example, the source of water (including linkage to the Arizona Water Settlements Act if appropriate), the priority position of that supply, U.S. Supreme Court decree accounting arrangements, and any other important attributes such as project operations, maintenance, and replacement costs that may be associated, for example, with the CAP water supply. Thus, the CRB recommends that Section 303 of the bill be amended to provide these points of clarification. In the alternative, authorization for the construction of facilities that move water from the upper basin to the lower basin should be eliminated from H.R. 1970.

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

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

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

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

Similarly, the Navajo Nation has challenged the Arizona Water Banking Authority's interstate storage program and the federal regulations promulgated to facilitate that program. The Navajo Nation asserts these claims on the foundation that these kinds of water management actions have an impact on the Nation's claim to Colorado River water in Arizona and its eventual use of that water. However, in reality none of these actions or programs impacts the amount of water available to the Nation as a part of the Nation's federal reserved rights claims, as a practical matter (actual water supply) or in relation to the availability of Arizona's unused

apportionment to satisfy the Nation's lower basin claims. This lawsuit presents a cloud over these important river management programs that are of benefit to the basin states. As a result, the CRB suggests that it be a high priority to obtain a dismissal of that suit whether in the context of the Arizona settlement, the New Mexico settlement, or both.

In closing, I want to reiterate that the CRB does not oppose the Gallup-Navajo Project; however, it does want to ensure that legislation, such as H.R. 1970, is consistent with the Law of the River and is reflective of the broader concerns of the State of California. Additionally, the comments set forth above have been advanced on the basis of its initial review of the proposed legislation and the comments of others. As such, the CRB would like to reserve its opportunity to revise any of the positions advanced above and to add to its comments, if additional points of concern come out of this process.

On behalf of the CRB, I want to thank the House Committee and Subcommittee for the opportunity to provide this testimony and for giving attention to the comments of the CRB. Should the subcommittee or committee require any clarification of these comments or additional information, you may reach me at (818) 500-1625, extension 308.

**Response to questions submitted for the record by
Gerald R. Zimmerman on H.R. 1970**

(To Whoever) The Jicarilla Tribe is currently receiving funds for the Jicarilla Apache Reservation Rural Water System rural water project. How do the funds from this legislation relate to the current project funds?

Answer—Not applicable to the Colorado River Board

(To Whoever) Who is responsible for the operation and maintenance costs? Who will own the infrastructure once it is completed?

Answer—Not applicable to the Colorado River Board

Mrs. NAPOLITANO. Thank you for the testimony, and now I move on to the question and answer. Before I start, there are a couple of little items that I wanted to touch base on. There are three renderings in the back of the room by children in regard to the water delivery, and I am going to enter into the record copies of those so that people will realize what it really means to those children. I think that is a very important point to make. So without objection I will order that to be.

Then, Mr. Houtz, you mentioned you wanted Arizona to be part of the agreement. How close are you to being able to reach consensus so that it possibly could be added if that were the case?

Mr. HOUTZ. I think it depends on whether the money is available. We have been meeting on a fairly regular basis. We have a meeting scheduled with the Navajo Nation in about three weeks, three and a half weeks, where they will submit another formal proposal to us. I cannot go into details because of the litigation.

However, the funding is the key, and if funding is available I am sure that we can reach an agreement. It is very hard to come up with funding in this Congress with so many things going on, and we think that the approach that New Mexico and the New Mexico delegation has taken is a very creative one, and we want to be part of it.

I cannot really put a timetable on it but if we can solve the funding issue I think we could be done quickly. We have been working on all the other issues over the years and can conclude quickly after that.

Mrs. NAPOLITANO. It is my understanding that the lower Colorado region is already over appropriated. Where will you get the water for Arizona?

Mr. HOUTZ. As we point out in our testimony, Congress reserved a portion of the water that was transferred to the Secretary under the Arizona Water Settlements Act, and they reserved 6,411 acre feet of the CAP water to be reserved for an Arizona Navajo settlement for delivery to Window Rock. So we believe that at least the Window Rock portion has already been designated out of the Arizona Water Settlements Act, and we have offered up a portion of the other water reserved under that Act to the Navajo Nation for settlement of the rest of the claims in Arizona. There is a question of the firmness and the ability to deliver that, and we are negotiating with them on that.

Mrs. NAPOLITANO. Thank you.

Mr. HOUTZ. But it would be out of existing sources and existing allocations.

Mrs. NAPOLITANO. If it were not for the fact that the Navajo Nation has been waiting for decades, I would tend to agree with many of the points that you have made but that would mean holding off for another decade probably, and that just does not seem quite the thing to do or the humane, how would I say, the legal thing to do.

Mr. HOUTZ. Madame Chairwoman, if we do not come to at least great progress on an Arizona settlement, we will be in litigation in October. The stay that the Court has granted us is only until October 12 of this year. So I am not thinking that we are waiting a decade. I think we are waiting a number of months to see where we are, and if we are not negotiating we will be in Court litigating.

Mrs. NAPOLITANO. And you have been in contact with the Senate and the authors?

Mr. HOUTZ. Yes. Last month the Senate Energy Committee had a hearing on this. We have been in close contact with their staff over there.

Mrs. NAPOLITANO. Mr. Shirley, comment?

Mr. SHIRLEY. Madame Chairwoman, I think the Navajo Nation and the State of New Mexico are ready to move forward at this point with H.R. 1970, and we would like to see it legislated and acted upon and monies put into it ASAP. Like you said, Madame Chairwoman, we have waited for a long time, and now that we are here we really need to be moving forward.

I think the settlement that we are negotiating with Arizona is going to take—I agree with you—more years. I do not think it can be negotiated and settled in short order. So I would like to see as President of the Navajo Nation that we move forward with this legislation H.R. 1970. Thank you.

Mrs. NAPOLITANO. What about your members in Arizona? Are they in agreement?

Mr. SHIRLEY. Yes, I believe so. I have some legislators representing the Navajo Nation council here with me. The Navajo Nation council is in full agreement with what we are doing. They are in full support, yes.

Mrs. NAPOLITANO. And I understand that the Navajo Nation has waived nearly half of their water claims in the settlement in exchange for water infrastructure. What other options do you have if this legislation is not passed?

Mr. SHIRLEY. If it is not passed, I think litigation is the thing that looms, and of course as President I am not one to fight any-

body. I think the goal of this is to settle it. We have with the State of New Mexico, the different users of the water, and these lawsuits, it takes millions of dollars, and rather than putting it in fighting we need to put it into infrastructure and serving the people. I think we have come a long ways toward settling this, and I think we need to get it on the books and get it behind us.

Mrs. NAPOLITANO. Thank you. Mr. Udall.

Mr. UDALL. Thank you, Madame Chair, and thank you for your interest in this. I just want to thank you once again for holding this hearing and your interest in it, and as you pointed out, I mean, the real issue here is children and children growing up like everybody else. Let me first thank all of the panelists for your testimony today. Patricia Lundstrom and President Joe Shirley and Jim Dunlap on the New Mexico side have done an awful lot to move this forward, and this piece of legislation had a large, large number of people that have worked and these three have been out there on the front, and I just thank you for your hard work and thank you for your leadership and also Mr. Houtz from Arizona and Mr. Zimmerman for your interest in trying to work things out here.

These pieces of art work from the children of Lake Valley School I think really say it all. You know these young people want to have water like everybody else, and I think that is the point, Mr. Johnson, that we are trying to get across to this Administration. I am happy you did not read your statement today because it is just full of inconsistencies, and it would fly in the face of what I think is a very good, positive settlement, and I am very disappointed in the Administration's position.

I cannot tell you that too strongly. If I expressed it as strongly as I felt, we might not have a chance to bring you around on this. So I just hope that you will take a look at this in terms of the big picture, and the first question I would like to ask you, Mr. Johnson, have you been to the Navajo reservation?

Mr. JOHNSON. Yes, I have.

Mr. UDALL. Yes. And have you seen the situation out there? Have you lived in a hogan and done like 70, 80,000 Navajos are where you have had to haul water to cook and to wash and prepare your daily needs? Have you kind of imagined how that would be?

Mr. JOHNSON. I have not lived on the reservation certainly but I have—

Mr. UDALL. Well we might like to host you out there for a day if you would like to come and get a real feel for the situation on the Navajo reservation. Do you think there is any other group of this magnitude that is in this water situation in the country? I mean, you look at the water situation for the whole country where you have kids that are living in a situation where they do not have water, where their families have to haul water, where there is probably a high level of unemployment, these kinds of things. Is there a water situation like this anyplace else in the country?

Mr. JOHNSON. Let me go back to your previous question. While I have not actually lived on the reservation in any of the homes, I have visited there, and I have personally seen the water conditions on the Navajo Nation, and in my previous job the Navajo Nation was part of the region of the Bureau of Reclamation that I

worked with, and so I am familiar with the issues of the Navajo Nation and the needs for water supplies, and I agree that certainly the needs are very great.

There are lots of other tribes and Indian reservations across the west where water is an issue, and I do not know that there is one that is as big. The Navajo Nation is certainly the biggest Indian tribe I believe in the west. So I do not know that there are any as big as the Navajo Nation but there are certainly others that are in need of water supplies in a similar way.

Mr. UDALL. Do you think that there is an obligation on the part of the Federal government when you have the treaty that President Shirley talked about where we agreed to really help them build a permanent reservation? I do not see how you build a permanent reservation without some kind of water supply. I think you doom their economic development and their daily living if you do not have a water supply situation. Would you agree this would be something to fulfill the treaty obligations and that it is long overdue at this point?

Mr. JOHNSON. I do not know that I am in a position to talk about what the formal obligations of the United States are. I am not familiar enough with that law and those provisions of the treaty to try to answer that.

Mr. UDALL. Well let me ask a little more specifically here because your objections seem to focus on—I noticed my time is up, Madame Chair.

Mrs. NAPOLITANO. That is OK.

Mr. UDALL. Let me focus here on your Administration's public support for what is called the Rural Water Supply Act of 2005. You know you have publicly been out there. That is a law that says that in rural water supply systems the Federal government steps up to the plate and pays 75 percent which is what is in this piece of legislation. So I think with your position on the one hand which is very different than many other Administrations in terms of water settlements, and then your position on rural water supply in this particular act just do not fit with me. So, I mean, can you explain to us how you rationalize that with the enormous needs that are out there?

Mr. JOHNSON. Well it is true that we have a Rural Water Supply Act that was passed. Was it last year? Yes, at the end of the last Congress that authorized Reclamation to work with rural areas in planning and assessing the needs for water supplies in the west. That legislation calls for us to develop criteria under which we would administer that program, and we have not yet developed that criteria.

We anticipate that that would be developed by the end of 2008, and so until we have got that criteria in place I do not think there is any basis for us to judge how this Act and how this settlement would fit under that criteria. I do not think we are saying that it would or it would not be viable under that criteria. I am just saying that we have not developed the criteria, and there is no basis for us to make that judgment at this time.

Mr. UDALL. If you are going to wait on the development of the criteria until the end of 2008, you all are going to be out of office. Your Administration is gone, and you have not made a step

forward to try to help us get this legislation passed and in a position that we can start helping people with water, is that not right? If you are going to wait.

It seems to me at a policy level in the department if you have made the decision that rural water situations it is OK for the Federal government to weigh in and pay 75 percent then I do not see why you cannot be given instruction or somebody in the department cannot say let us start working on the settlement and try to get these things worked out.

Mr. JOHNSON. Well I think that you know I mentioned in my oral testimony that we met yesterday, and we have scheduled next week more discussions with the state and the Navajo Nation. I think that some of those things are part of what is being talked about in those discussions. So I think we are interested in working with the Navajo, and I do not know that the development of our regulations on rural water necessarily precludes what might happen in a settlement of the tribe's Indian claims.

I mean, there are some difficult issues associated with this settlement. The cost and I think the funding mechanism are the primary ones that we have concerns about but there are others such as the reimbursement of the other parts of the project other than the tribal part, and those are part of what I think we are talking to the Nation and the state about in these discussions.

Mr. UDALL. Madame Chair, you have been very generous. I know you have other questions.

Mrs. NAPOLITANO. We have a vote pretty soon so you better wrap it up.

Mr. UDALL. OK. Let me ask about your understanding as far as other entities being involved because I know, Mr. Johnson, part of your testimony dealt with the idea that there were not adequate or significant contributions. Are you aware, as Mr. Dunlap said, that the State of New Mexico and Governor Richardson in past legislation, they have talked specific amounts? I mean, I have seen amounts from \$75 million and up in terms of making contributions to this, and I am sure if it was a critical part that they would be willing to step up to the plate further.

So I think it is really important for you to let us know in terms of numbers what is needed there in terms of moving this along. I mean, do you have any specific things you can tell us right now in terms of what you think is an adequate contribution in terms of the other parties to a settlement like this?

Mr. JOHNSON. We are aware of New Mexico's proposal for contributions. I am not in a position today to be able to give you an answer on what will be required. I am just not in a position to answer that now. I think that will be something that would be talked about in the discussions.

Mr. UDALL. OK. Well Madame Chair, thank you. I want to thank you very much for holding the hearing, and I know about your sympathy for children in this kind of situation. Because we have the votes and all of that, I hoped to go into more detail with some of the other witnesses, but I hope that we can submit some of our questions for the record and have the witnesses answer them. I look forward to visiting and spending significant time out there in New Mexico to assure the Federal government that New Mexico is

fully behind this, and we hope Arizona will also join us along the way, and thank once again Mr. Dunlap and President Joe Shirley and Patricia Lundstrom and all the panel.

Mrs. NAPOLITANO. Thank you, sir.

Mr. UDALL. Thank you.

Mrs. NAPOLITANO. Commissioner, do you think some of those questions might be answered in writing?

Mr. JOHNSON. Certainly we will respond to any questions that you submit. I am not sure that we may be able to go because we are in discussions. I am not sure how far, how much detail we will be able to provide in writing but certainly to the extent that we have information we will respond as best we can.

Mrs. NAPOLITANO. Clarify at least some of the questions that some of the members may have.

Mr. JOHNSON. Well I think particularly the question that Congressman Udall was asking about what is an acceptable cost share, I think I do not know what our timeframe is for establishing that. Certainly we will respond to that as best we can in writing, and I just do not want to commit to a lot of specifics as it relates to that.

Mrs. NAPOLITANO. You are the Commissioner.

Mr. JOHNSON. Yes, I am, but I work with a lot of other people on these issues as well including Mr. Ragsdale, Director of the Bureau of Indian Affairs, and certainly others as well.

Mrs. NAPOLITANO. Understood, and I know how it runs. That is precisely why we want it for the record.

Mr. JOHNSON. I understand.

Mrs. NAPOLITANO. In page 4 of your testimony you indicate that the CNP provide a flexible framework to evaluate the settlement but then you only focus on the underlying Federal liability in discussing the appropriate Federal contribution. The CNP, however, specifically talk about Federal and non-Federal exposure plus Federal trust or programmatic responsibilities as a measure of a Federal contribution. The CNP also refers to the overall value of the tribal claims to water. Is the Administration trying to reinterpret or amend the CNP in an attempt to reduce the Federal contribution to Indian water rights settlements?

Mr. JOHNSON. If I could, Madame Chairman, I would like to defer that question to Director Ragsdale.

Mrs. NAPOLITANO. Thank you. Mr. Ragsdale.

Mr. RAGSDALE. Thank you, Madame Chairwoman. I thought I was going to get off completely. The short answer to your question is no.

Mrs. NAPOLITANO. Explain please.

Mr. RAGSDALE. We are not trying to reinterpret the criteria and procedures that were published in the Federal Register in 1990 and subsequent Administrations have endeavored to follow since with regards to all of the water rights negotiations with Indian tribes.

Mrs. NAPOLITANO. OK. Well that is interesting. I will take that into consideration. I guess partly my concern in hearing how long it has been before something of this nature has to be brought up to Congress for action—I am talking about water deliveries and I understand that there are many other tribes that might not have water delivery—is it possible that the Bureau of Indian Affairs may

bring to the Congress other situations in the future so that we do not have to go through protracted discussions and be able to determine whether or not we can start setting aside funding to be able to provide potable water to people in the United States that should have had it a long time ago?

Mr. RAGSDALE. Well my understanding is that there are five specific negotiations ongoing in New Mexico right now with the Pueblo tribes. I think in Commissioner Johnson's and my statement we make reference to that, and that was one of the things that the Administration believes that should be taken into account in concern with this one.

Mrs. NAPOLITANO. Thank you. I will probably put one of the questions to your administration, sir. Mr. Houtz, could you please clarify a previous answer? Are you saying that in order to receive water under this settlement the Navajo Nation must give up some of its legal claims to water in Arizona?

Mr. HOUTZ. Our reading of what Congress passed in the Arizona Water Settlements Act is that if the water is to be made available for Window Rock under that Act that they have to come to a settlement with the State of Arizona on the Arizona claims. That might not answer all of your question. I am not sure I understood all of your question. We believe that they need to waive and release their claims to the main stem Colorado River for us to enter into a settlement on the Arizona side of the lower Colorado River basin on the reservation.

Mr. SHIRLEY. Let me perhaps shed a little light on that. In this Settlement Act, I believe any water that is diverted across the Arizona state line has to be settled separately and completely with Arizona and the Navajo tribe. It has nothing to do with we are not going to deliver any water across the Arizona line until Arizona and Navajo Nation reach an agreement on that, and I would remind Arizona that the infrastructure that we are asking for in this project to put the pipeline down to deliver some of Arizona's entitlement water to the Navajo tribe is a great benefit for the State of Arizona, and while I listened to Arizona and California both in their concerns about the law of the river, certainly New Mexico will follow the law of the river, and we will negotiate with them in those things but we do not believe that, as they will not believe that we should have any hold on any negotiations of the use of their water within California or Arizona.

That is their water. They are entitled to work that out as we are in New Mexico but we will work with them any way we can. Thank you.

Mrs. NAPOLITANO. Thank you. Just a last question. I think I might have to wrap this up but, Mr. Johnson, are Mr. Zimmerman and Mr. Houtz' concerns regarding the law of the river warranted, and what are your thoughts?

Mr. JOHNSON. I think that there are pieces of the settlement that does require clarification under the law of the river. I think that as a practical matter nobody is harmed. I don't mean physically. I mean, there is nobody that is being harmed by what is being proposed. However, I think that there are some places where what is being done is inconsistent with the law of the river as it currently exists.

I think that is something that can be worked out. I think I have heard the states say that there are ways to develop language that would go in the legislation that could satisfy folks' concern there, and I—like we usually do—encourage the states to get together and work that out. I think it is something that is solvable.

Mrs. NAPOLITANO. Well I would hope that they would sit and work with all the parties to be able to ensure that everybody is understanding why it was formulated and how it benefits everybody. With that, just a couple more comments I would like to tell Ms. Lundstrom, that I like your statement of real water to real people in real time, and real wet water since we do communicate that in terms of paper and water, real water. It is really the wet water that I found out and I am still learning so I was very interested in your motto.

Ms. LUNDSTROM. Thank you, Madame Chair. We will make that correction on our testimony.

Mrs. NAPOLITANO. That is just a comment because I am hearing wet water versus water, and to me water is supposed to be this not just comments and not just paper. With that, I would like to be able to conclude the Subcommittee's legislative hearing on H.R. 2515, the Lower Colorado River Multi-Species Conservation Act, and H.R. 1970, the Northwestern New Mexico Rural Water Projects Act.

I thank all of the witnesses for coming here today and offering their perspectives on both of these bills. Your comments, testimony and expertise has been very helpful. Under committee rule 4[h] additional material for the record should be submitted within 10 business days, business days, after the hearing, and I would appreciate the cooperation of all witnesses in prompt response and reply to any questions that have been put to you that were not answered.

With that, I would like to thank you and all the people for being so kind and accommodating. The hearing is adjourned.

[Whereupon, at 12:23 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[A statement submitted for the record by Elston Grubaugh, Acting General Manager, The Imperial Irrigation District, on H.R. 2515 follows:]

Statement submitted for the record by Elston Grubaugh, Acting General Manager, The Imperial Irrigation District, on H.R. 2515

Madam Chairwoman and members of the committee and subcommittee, thank you for the opportunity to submit written testimony regarding H.R. 2515, concerning the Colorado River Multi-Species Conservation Program (MSCP). The MSCP is an exceedingly important program to water and power users in southern California and therefore we urge you to strongly support H.R. 2515 as it moves through the Congress.

I am the acting general manager of the Imperial Irrigation District (IID). IID is the largest irrigation district in the United States in terms of water volume used. IID holds a right to almost three-fourths of California's 4.4 million acre-feet (maf) apportionment to the Colorado River. Growers within IID produce crops worth more than a \$1 billion a year, including much of the winter vegetables consumed throughout the United States. Because of its dependence on the Colorado River as its sole source of water supply, IID is very concerned about the MSCP and this effort to obtain congressional approval of this vitally important program.

I want to emphasize that the Colorado River is very important to the citizens of California as a whole. As you know, Colorado River water is used to supply water to about 20 million people in southern California and supplies water to hundreds

of thousands of acres of fertile farm land in that region. Although California is blessed with more abundant water supplies in the northern part of the state, providing water to the arid southern part of California has been a challenge throughout its history. Now that southern California is clearly dependent on the Colorado River as a source of supply, it is essential to see the MSCP as an important insurance policy that will hopefully protect California's Colorado River water and power users for decades into the future.

Stated differently, part of the effort behind the MSCP is to avoid the kinds of Endangered Species Act (ESA) disasters that have unfolded in the Klamath region of California and Oregon, on the Snake River system in the northwest and on the Rio Grande system in New Mexico. In this context, it is important for the Congress to recognize that California and the water and power agencies in our state have chosen in this situation to work within the structure of the ESA, as opposed to attempting to avoid its often burdensome regulatory requirements.

With the goal of protecting California's water and power supplies in mind, it is critical to take into account recent events occurring within California that have caused what some are calling a water crisis. With population growth and global warming as a backdrop, the Bay Delta region now faces a host of problems that are also tied to the ESA and the California Endangered Species Act (CESA). Facing the loss of a substantial supply of water from northern California via the California aqueduct, urban southern California must now brace for a very serious circumstance in 2008 and beyond. The significance of this water crisis for California cannot be overstated. It is therefore fundamental, in our view, to pay special attention to those areas in which we can bring security to the water supplies that feed southern California. In simple terms—that is the main purpose of the MSCP. In essence the MSCP is an insurance policy that protects southern California's use of Colorado River water, in the context of the ESA, for a period of 50 years. In light of recent ESA developments around the West, this form of protection for southern California should be viewed as an absolutely essential action based on sound public policy.

We recognize that some have suggested federal legislation to support the MSCP is not needed. In our view this is a mistaken perspective. It is the position of IID that federal legislation is indispensable. Here is a brief summary of the more important reasons for this legislation.

1. Authorization for appropriations—IID is familiar with the federal legislative process and with the annual difficulty of developing an approved federal budget. In this situation the MSCP agreements provide for 50 percent of the program funding to come from the federal government, via the Bureau of Reclamation. Even if Reclamation has been successful in obtaining appropriations for these purposes in recent years, MSCP participants like IID want the security of an authorization of appropriations for this program. Given the long-term contractual financial commitment of the non-federal agencies and states, requesting a parallel commitment from the federal government is not unreasonable. This is a significant long-term federal program—eventually costing more than \$1 billion—that deserves the security of an authorization for appropriations.

2. Cost sharing—the MSCP agreements provide for a 50/50 cost-sharing arrangement between the federal and non-federal parties. IID sees this as a fair arrangement, but to date that arrangement is only supported by the commitment of federal executive branch officials. Again, this is a long-term, expensive program that is of critical importance to the non-federal parties like IID. Something as important as the 50/50 cost-share arrangement should be blessed by the Congress.

3. Authorized program for the Bureau of Reclamation—the MSCP is to be implemented and managed on a day-to-day basis by the Bureau of Reclamation. IID is comfortable with that arrangement and, indeed, IID has confidence that Reclamation will do an excellent job in implementing the MSCP. Nevertheless, IID is aware of questions that have been asked about Reclamation "mission creep." In other words, in the light of evolving times the mission of the Bureau of Reclamation is also evolving. But some Members of Congress have suggested that substantial changes in the mission of Reclamation should be approved and sanctioned by Congress. IID agrees. The MSCP is a species and habitat restoration program. It is not the construction of a dam or canal or other such water supply feature—which is viewed as the original mission of the Bureau of Reclamation. In order to avoid any confusion over the 50-year period of this important ESA program, it will be very helpful for the Congress to expressly empower Reclamation to carry out this program and to implement the MSCP in accordance with the program documents.

4. MSCP water uses—the MSCP legislation provides authority for the Secretary of the Interior to enter into an agreement with the three lower basin states of California, Arizona and Nevada in order to legally support the kinds of water uses that will be essential for its implementation. Under the authority of the Boulder Canyon

Project Act (43 USC 617 et. seq.) the secretary has issued contracts for the use of water in the lower basin states. Those contracts routinely provide that the use of water will be for domestic or irrigation uses, or both. But here the use of water will be for the maintenance of protected species and for the maintenance of habitat. The result is that there could be tension between the underlying legal underpinnings of water acquired for MSCP program purposes and the unique nature of the MSCP water uses. In other words, without this provision in the MSCP legislation, a critical component of the MSCP program—application of water for the needs of species and habitats—could be on questionable legal ground. IID has personal experience with this issue in the context of the Quantification Settlement Agreement (QSA) and differing views as to what water uses might be allowed under certain water delivery contracts. IID strongly urges that reasonable action be taken to avoid that problem in this situation.

5. Waiver of sovereign immunity—the MSCP legislation provides for a narrow waiver of sovereign immunity to enforce program agreements. As you know, the MSCP is a combination of compliance under Sections 7 and 10 of the ESA. Section 10 is that part of the ESA that applies to non-federal parties and provides for the development of long-term habitat conservation plans (HCPs). The MSCP is in essence an HCP under Section 10 of the ESA. Part of the Section 10 HCP process is the execution of an implementation agreement between the U.S. Fish and Wildlife Service and the non-federal parties helping to fund the HCP. That agreement is, of course, a binding contract between the parties and in this case involves a great deal of money and lasts for a period of 50 years. The implementation agreement also specifically provides that the remedy of money damages is unavailable to any of the parties. Under these circumstances IID believes that it is reasonable to request the enactment of a waiver of sovereign immunity so that the non-federal parties have a clear opportunity for judicial enforcement against the Fish and Wildlife Service should this be necessary within the 50-year program term.

Along with its non-federal MSCP partners, IID has devoted more than 10 years and considerable resources to the development of the MSCP. Now IID faces substantial annual financial payments to help fund the MSCP. Even with that burden IID sees the MSCP as a very beneficial and well-structured program that is critical to its long-term plans to provide security for its water and power resources under the federal ESA and CESA. IID remains committed to its support of the MSCP, but the district would like to see that commitment matched by the congressional approval of H.R. 2515.

The reasons outlined above clearly demonstrate that there is a strong need for federal legislation in this regard. IID therefore urges the committee and the full House to enact this important legislation. Should the subcommittee or the committee require any clarification of these comments or additional information, please contact Mr. Brad Luckey at (760) 339-9785. Thank you again for the opportunity to submit this testimony.

[A statement submitted for the record by Herbert R. Guenther, Director, Arizona Department of Water Resources, on H.R. 1970, follows:]

Statement of Herbert R. Guenther, Director, Arizona Department of Water Resources, Representing the State of Arizona, on H.R. 1970

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

[NOTE: Attachments have been retained in the Committee's official files.]

[A statement submitted for the record by Herbert R. Guenther, Director, Arizona Department of Water Resources, on H.R. 2515, follows:]

Statement of Herbert R. Guenther, Director of the Arizona Department of Water Resources, Representing the State of Arizona, on H.R. 2515

Madam Chairwoman and Members of the Subcommittee:

Thank you for the opportunity to provide the following comments in support of H.R. 2515, "The Lower Colorado River Multi-Species Conservation Program (LCR

MSCP) Act". In April 2005, the Secretary signed the Record of Decision (ROD) and Program Documents that implemented this comprehensive program to address the needs of threatened and endangered species that rely on the Colorado River and adjacent habitat for their continued existence. I, along with representatives of California and Nevada, joined the Secretary in signing the agreement that became the ROD. I hope that you will support this important legislation that protects the substantial financial commitment of the non-federal parties to the protection of these species.

There have been other programs and individual efforts to improve the status of Lower Colorado River species and habitats. But the LCR MSCP differs from these other efforts in some significant ways. First, the Program includes most of the major water and power users on the Lower Colorado River. Second, the LCR MSCP is a coordinated, large-scale Program covering approximately 100 miles of the Colorado River. The opportunity to improve the status of these species to the point of down or delisting is greatly enhanced by the geographic scope, stakeholder participation and coordinated implementation of the Program.

Although Program implementation has already begun, federal authorizing legislation remains a final, very important goal. All of the LCR MSCP parties fully support implementation of the Program, but federal funding priorities change over time. The LCR MSCP is a long-term, 50-year program. Program costs are high in the early years when land and water acquisition and costly habitat restoration and enhancement work are underway. The value of this early investment is only secure if the federal contribution is assured for the full term of the Program.

The federal and state parties have agreed to share Program implementation costs totaling \$626 million, indexed for inflation over the 50-year term of the Program. Costs are split 50 percent federal/50 percent non-federal. H.R. 2515 will affirm this funding agreement by providing that the federal share of Program costs will be non-reimbursable, and cap the non-federal costs at the agreed upon amount. The State of Arizona has provided legislative authority to collect user fees to meet the Arizona portion of state parties funding obligation.

In addition to securing the Program financial agreements, this legislation includes several provisions that affirm the agreements of the federal and non-federal participants. H.R. 2515 provides that subsequent Congressional action will not modify the party's obligations, unless specific to the LCR MSCP. H.R. 2515 will secure the "no surprises" and permit revocation policies contained in the Program documents. It provides for a limited waiver of sovereign immunity to the extent that the non-federal parties would need to enforce their agreements with the federal government. H.R. 2515 also authorizes the Secretary to enter into an agreement with the Lower Division States to provide water for implementation of the LCR MSCP.

The LCR MSCP development and implementation has been an open and public process. The Draft Habitat Conservation Plan underwent independent scientific peer review, and the final Plan was modified to incorporate recommendations from the review panel. Steering Committee meetings are noticed and open to the public, and Program documents are available for review. Given the open and public nature of the Program, the legislation would exempt the LCR MSCP Steering Committee from Federal Advisory Committee Act requirements.

The important objectives of this Program can only be accomplished if Reclamation obtains adequate, long-term funding to implement the Habitat Conservation Plan. The LCR MSCP is the best program to address endangered species needs while preserving cities, farms, Indian tribes and power production uses of the Colorado River. Arizona supports H.R. 2515, the Lower Colorado River Multi-Species Conservation Program Act, and asks for its enactment by Congress.

Thank you for the opportunity to present Arizona's view on this important piece of legislation.

[A statement submitted for the record by the Jicarilla Apache Nation, on H.R. 1970 follows:]

**Statement submitted for the record by the
Jicarilla Apache Nation on H.R. 1970**

I. Introduction

The Jicarilla Apache Nation ("Nation") is pleased to submit this testimony supporting and commenting on H.R. 1970, the Northwestern New Mexico Rural Water Projects Act. The Jicarilla Apache Nation is a co-sponsor in the

planning process for the Navajo Gallup Water Supply Project ("Project"), a vital piece of this legislation and the Navajo Nation Water rights settlement package.

The Nation is a member of the Steering Committee for the Project, and we have devoted substantial staff time and resources over the last several years to the planning and environmental compliance process for the Project.

II. 1992 Jicarilla Apache Tribe Water Rights Settlement Act, the Nation's Contributions in the San Juan River Basin and Role in the Northwest New Mexico Rural Water Projects Act

The Nation's water rights in the San Juan River Basin are the subject of a 1992 settlement agreement and the Jicarilla Apache Tribe Water Rights Settlement Act, Public Law 102-441, 106 Stat. 2237. We traveled a long road to successfully negotiate our settlement, and we find ourselves on an equally long road to secure the implementation of the settlement in order to fully realize its benefits for our people. When faced with obstacles to the use of our settled water rights, we have consistently shown leadership in finding solutions that benefit not only our people, but also our neighbors in the San Juan River Basin. We have, for example, provided leased water supplies to large and small water users, ranging from individual farmers and the Elks Lodge to BHP Billiton and PNM. We have also served as a founding member of the San Juan River Recovery Implementation Program to protect endangered species while water development is pursued.

Most recently, we have stepped up to the plate to offer to negotiate a water lease, or subcontract, to the City of Gallup to provide their water supply for the Navajo-Gallup Water Supply Project that would otherwise be unavailable. The water rights that would be the subject of a subcontract to be negotiated between the Jicarilla Apache Nation and the City of Gallup are already adjudicated to the Nation. Consequently, these water rights are already within the recognized Upper Basin supply in New Mexico. It is important for the Subcommittee to understand the Nation's pivotal role in the creative solutions that make the Project, and ultimately the Navajo Nation settlement, achievable.

We share with the Navajo Nation a common interest in bringing clean, reliable water service to grossly underserved areas of our Reservations. The Jicarilla Apache people desire to pursue our way of life by making their homes on our reservation lands throughout the basin, and not being crowded into increasingly limited space in Dulce, New Mexico because of the lack of potable water. To meet this need, we have worked with the United States Bureau of Reclamation and the other Project Participants to provide for the connection of a water line at Counselor, New Mexico from the Cutter Lateral portion of the Project. We are also separately planning construction of the approximately eight-mile portion of the additional water line that will be needed from Counselor to our lands at Teepees on New Mexico State Highway 550 in order to deliver this water to our people, without the assistance of appropriations authorized under this bill. The water that would be delivered to us through the Project is water already adjudicated to us under the 1992 settlement and related Partial Final Decree. We will receive no additional water rights under this bill.

For these reasons, the Jicarilla Apache Nation has a demonstrated commitment to and interest in a successful outcome to this legislation and the associated Navajo-Gallup Water Supply Project. It is imperative that the legislation recognize and support the Nation's role in the Project.

In addition to the attached detailed comments that we are providing to the Subcommittee staff, we share the following thoughts in the interest of ensuring that key provisions of the legislation are clarified. We look forward to continuing to work with members of the Subcommittee and Congress, the State of New Mexico, the Navajo Nation, the City of Gallup, and the Administration to refine and implement the legislation.

III. Infrastructure Development on the Jicarilla Apache Reservation—The Jicarilla Apache Reservation Rural Water System Act, Title VIII of Public Law 107-331

In addition to the Nation's participation and role in The Northwestern New Mexico Rural Water Projects Act, we believe it is relevant and imperative that Congress and the Administration also meet existing federal statutory obligations in replacing the deficient water delivery and wastewater system serving the Jicarilla Apache Reservation. As background, in the 1920's the Federal Government, through the Bureau of Indian Affairs (BIA), initiated construction of a public drinking water and wastewater system on the Jicarilla Apache Reservation. Throughout the years, the BIA haphazardly extended the system and failed to maintain it, creating severe public health threats and community development barriers. Based on generations of federal neglect, the water system infrastructure serving the Jicarilla people is in severe disrepair and is the source of public health threats to tribal members.

In 2000, recognizing this looming crisis, Congressman Udall introduced a bill that Congress passed which directed the Secretary of the Interior, through the Bureau of Reclamation (BOR), to complete a feasibility study on this problem. The study recommended extensive repairs and replacement of the infrastructure. In 2002, Congressman Udall introduced another bill, which Congress ultimately passed and President Bush signed into law, entitled The Jicarilla Apache Reservation Rural Water System Act, Title VIII of Public Law 107-331, which directed the Secretary to repair and replace the water system infrastructure on the Jicarilla Reservation, and authorized the expenditure of \$45 Million to do so. Since the law's passage nearly five years ago, Congress has appropriated \$250,000 to fund this project. During this timeframe, the Administration has not requested any funds for our project in the President's annual budget submission to Congress.

The urgency to address the infrastructure needs on our Reservation has continued so we have been forced to incur substantial debt to expend more than \$20 million in repairs. Completion of this project is relevant to the legislation at issue now because the continued operation of the defunct infrastructure on our Reservation presents a harmful public health threat not only for our people but for downstream users. In addition, the deficiencies in the current infrastructure are causing waste of the water resources as there are leakage, seepage and breakdown problems through the system. Congress has a responsibility to correct this problem so that the water resources throughout the basin are secured and managed in a safe and efficient manner for the benefit of all of the stakeholders, including the project beneficiaries and partners in H.R. 1970.

IV. Specific Comments on H.R. 1970

With that backdrop, the Jicarilla Apache Nation does not object to the concept of a top water bank, provided that its implementation does not adversely affect the Nation's water rights, storage for the Nation, or costs under our contract for water from the Navajo Reservoir Supply, and provided also that the beneficiaries of the top water bank pay their fair share of construction and operation and maintenance costs associated with Navajo Reservoir.

The provisions concerning shortages should be carefully reconsidered and re-drafted in consultation with us to protect the Jicarilla Apache Nation's water rights, including entitlement to delivery in times of shortage, under the Jicarilla Apache Tribe Water Rights Settlement Act. We believe and expect that it is not Congress' intent to adversely modify the Nation's rights under our existing settlement. Indeed, the bill appropriately states that unless expressly provided, nothing in it modifies, conflicts with, preempts, or otherwise affects the Jicarilla Apache Tribe Water Rights Settlement Act (Section 103(1)), page 18 lines 2-4 and page 19 lines 1-2). The legislation must be crafted to protect the Nation from suffering a lower priority in time of shortage.

We wish to share a few concerns the Nation has regarding what we view as unclear language referring to cost share provisions in the Bill. The Secretary is directed to determine the share "based on the ability of the Jicarilla Apache Nation to pay the construction costs of the Project facilities that are allocable to the Jicarilla Apache Nation," and this share is specified to be at least 25 percent of the costs so allocable.

We have some concerns with how the portion "allocable" to the Nation will be determined. The Nation's staff have reviewed the items allocated to us as reflected in the March 2007 Draft Planning Report and Environmental Impact Statement for the Project ("PR-DEIS"), and if our understanding is correct, the allocation reflected in that document is appropriate. The legislation should make clear that a different allocation will not be imposed on us. While we are not concerned with the items contemplated to be allocated to us, we are concerned that the Bureau of Reclamation's cost estimates for these items are substantially greater than they should be. Notably, the PR-DEIS states that Reclamation is re-estimating costs and anticipates providing updated cost estimates through errata sheets to be made available during the public comment period on the PRDEIS.

To our knowledge, however, no such errata sheets have been made available and the public comment period ends on June 28, 2007. We are therefore reserving for further comment the issue of cost estimates in our comments on the PR-DEIS. To protect the continuing voice of the Project Participants in all cost determinations associated with the Project, the legislation should clarify that the construction costs reimbursable by the Jicarilla Apache Nation shall be reduced by the amounts that the Nation expends from its own funds or non-federal sources on pre-construction activities for the Project. The draft legislation does not effectively define the "ability to pay" determination. This provision should specify that "ability to pay" will be determined on the basis of the per capita income, median household income, and pov-

erty rate of the population on the Jicarilla Apache Reservation. This specificity will ensure that the determination of “ability to pay” reflects the true ability of our people to pay for the water supply.

The requirement that the Nation should pay a minimum percentage of 25 percent of the construction costs allocable to the Nation is inappropriate. A proper ability to pay determination based on the ability of our population will result in a cost share percentage below 25 percent. Indeed, this minimum leaves the Nation unacceptably exposed to the burden of a cost share far greater than 25 percent that has no relationship to ability to pay. Notably, the April 2006 study by Dornbusch Associates entitled “Social Impacts from the Navajo-Gallup Water Supply Project” (Appendix D-IV, page 12, to the PR-DEIS) found that the Jicarilla Apache people earn median incomes far below the New Mexico state average.

This requirement casts a shadow over the negotiating process in providing a leased water supply for the City of Gallup. Without fully understanding the entire exposure the Nation has in paying for its portion of the Project, it is extremely difficult to proceed with substantive negotiations with Gallup and the Navajo Nation in finalizing a secure water supply for the City. We would like to see in the bill a provision for establishment of a committee, including a seat for the Jicarilla Apache Nation, to set and review Project construction and operation, maintenance and replacement budgets and extraordinary expenditures.

V. Conclusion

The Jicarilla Apache Nation is pleased to support this historic legislation and to have a role as a participant in order to help provide solutions to the pressing water challenges in the region, and our participation will provide an avenue to provide water to the Southern part of our Reservation which abuts the Navajo lands and project area. The Nation has proven time and again to be a responsible steward of our lands and resources, and we have a strong track record as a reliable partner when working to address the critical water needs in the arid Southwest. Therefore, the Nation respectfully requests that the Subcommittee favorably consider our comments and recommendations as set forth herein, and further requests support from Congress provide funding for the Jicarilla Apache Reservation Rural Water System Act, as completion of this project will enhance and benefit the overall viability and success of the purposes and projects set forth in H.R. 1970.

[NOTE: “Detailed Comments on H.R. 1970” and drawing by Navajo children on the need for clean water submitted for the record have been retained in the Committee’s official files.]

[A statement submitted for the record by Evan Jones, Vice President, BHP Navajo Coal Company, on H.R. 1970 follows:]

Statement submitted for the record by Evan Jones, Vice President, BHP Navajo Coal Company, on H.R. 1970

Mr. Chairman and Members of the Committee:

My name is Evan Jones. I am Vice President of BHP Navajo Coal Company (“BNCC”). BNCC and its affiliate, San Juan Coal Company, own and operate significant coal mines in the San Juan Basin, New Mexico adjacent to the San Juan River. One of the mines is located on Navajo Nation lands to the south of the river (“Navajo Mine”) pursuant to a federal lease and the other is located on the north side on state land (“San Juan Mine”). Navajo Mine supports the generation of power at Four Corners Power Plant (“Four Corners”) which is owned by Arizona Public Service Company (“APS”), Public Service Company of New Mexico (“PNM”), the Salt River Project, El Paso Energy, Southern California Edison and Tucson Electric Power, and operated by APS. The San Juan Mine supports the generation of power at the San Juan Generating Station (“SJGS”) owned by PNM, Tucson Electric Power, TriState Generation and Transmission, Southern California Public Power Authority, Los Alamos County, Utah Associated Municipal Power Systems, the City of Anaheim, MSR Public Power Agency, and the City of Farmington, and operated by PNM. Collectively, Four Corners and SJGS generate approximately 3700 megawatts of power, supplying power to New Mexico, Arizona, Colorado and California.

BNCC is the owner of a significant water right from the San Juan River and related groundwater rights pursuant to New Mexico State Engineer Permit 2838 (“Permit 2838”). Based on its rights under Permit 2838, BNCC provides water to its mining operations, supplies the sole source of water to Four Corners (approx-

mately 25,000 acre-feet per annum) and approximately one third of the water supply to SJGS (approximately 8,000 acre-feet per annum).

BNCC supports the efforts of the State, the Navajo Nation and the federal government to settle the claims of the Nation to the waters of the San Juan Basin. Settlement of the Navajo Nation's claims in an equitable manner will provide a great benefit to all water users in the Basin. In particular settlement of Indian claims, particularly of the magnitude of the Nation's claims provides the certainty necessary to enable continued economic development and investment in the San Juan Basin.

BNCC believes that H.R. 1970 provides an opportunity to settle the Nation's claims in an equitable fashion that will provide the requisite certainty and opportunities to encourage and stimulate further economic development and support existing investment. The legislation as proposed protects, to a large extent, existing uses in the Basin. The legislation includes provisions requiring, under certain conditions, use by the Nation of Navajo Reservoir contract water in times of shortage to support otherwise senior mainstem irrigation rights, subordination of the majority of the Navajo's claims to senior rights on the mainstem to a more junior Navajo Reservoir contract right, and the creation of a "top water bank" in Navajo Reservoir available to direct flow users such as BNCC. All of these mechanisms are important pieces of the legislation to allow protection of essential existing uses such as BNCC's supply of water to its mines and to the power plants.

Most significantly the settlement allows for marketing of the Nation's water rights as proposed to be quantified by the legislation. The availability of the Nation's rights for marketing in the fully appropriated San Juan Basin will allow for supplemental supplies of water to BNCC and others in times of shortage, as well as to allow expansion of existing operations and investments in new endeavors within the Basin. This opportunity also provides great economic benefit to the Nation. All of these factors contribute to a fair and equitable settlement of the Nation's claims, provide certainty to important existing economic concerns and encourage new investment.

Additionally, the settlement of the Nation's claims provides a multitude of benefits to the Nation itself including provision of drinking water to more remote parts of the Navajo Nation through the Navajo-Gallup Water Supply Project, economic benefit and the certainty regarding the settlement of its longstanding claims.

In summary, BNCC supports the settlement of the Nation's claims as generally proposed in H.R. 1970. All water users in the Basin, not just the Nation, will benefit from the settlement of these claims.

Thank you for the opportunity to present the views of BHP Navajo Coal Company on this important matter.

[A statement submitted for the record by Jeffrey Kightlinger, General Manager, The Metropolitan Water District of Southern California, on H.R. 2515 follows:]

Statement submitted for the record by Jeffrey Kightlinger, General Manager, The Metropolitan Water District of Southern California, on H.R. 2515

Thank you for the opportunity to submit written testimony regarding H.R. 2515, the Lower Colorado River Multi-Species Conservation Program Act. I serve as the General Manager of The Metropolitan Water District of Southern California (Metropolitan), a cooperative of 26 cities and agencies serving water to 18 million people in six southern California counties. Metropolitan imports water from the Colorado River and northern California to supplement local supplies, and helps its members to develop increased water conservation, recycling, storage, and other resource-management programs. As one of the California agencies that use Colorado River water, Metropolitan is a participant in the Lower Colorado River Multi-Species Conservation Program (LCR MSCP) and a supporter of H.R. 2515 to authorize this program.

The LCR MSCP was developed through the cooperation of over fifty federal and non-federal agencies in Arizona, California and Nevada to protect endangered and threatened sensitive species, and improve environmental conditions for numerous other species. The environmental benefits of the program include creating of over 8,100 acres of riparian, marsh and backwater habitat, rearing and stocking over 1.2 million endangered fish to bolster local populations, and protecting existing habitat in the floodplain from destruction. The program provides scientific research to expand our knowledge of the aquatic and riparian environment on the Lower Colorado River. The information gained will be used through adaptive management to ensure that the program is effective in benefiting species and their habitat.

The LCR MSCP will cost a total of \$626 million (in 2003 dollars), and be implemented over the course of fifty years. To ensure the flexibility to address changes in conditions on the Lower Colorado River, 25% of the funding (nearly \$175 million) will be used for scientific research, adaptive management, and remedial measures. Through careful negotiations over ten years, all the participants have agreed that the LCR MSCP will be implemented by the Bureau of Reclamation, with equal matching funds provided by agencies from Arizona, California, and Nevada.

H.R. 2515 provides authorization of appropriations for the federal share of LCR MSCP costs and directs the Secretary of the Interior to manage and implement the program in accordance with the conservation plan, biological assessment, and biological opinion adopted in accordance with the Endangered Species Act. In addition, the bill provides express authority for the Secretary to utilize Colorado River water for LCR MSCP purposes, which might otherwise be open to legal challenge.

Metropolitan and the other non-federal participants are committed to funding one-half of the LCR MSCP by the terms of the Endangered Species Act (ESA) Section 10 incidental take permits issued for the LCR MSCP and the program implementing agreements entered into with the Bureau of Reclamation. The Section 10 permit provides regulatory assurances to anyone with an approved conservation plan that, as long as they remain in compliance with the permit terms, they will not be asked to commit additional funds, or other resources, to remedy unforeseen circumstances. To ensure that the Section 10 permit provisions and the non-federal funding commitments are preserved during the term of the LCR MSCP, H.R. 2515 includes provisions in Section 5 that protect against unintended changes in the legal status of the program.

H.R. 2515 provides the commitment of Congress to support the efforts of all the LCR MSCP participants, both federal and non-federal agencies. The program is important for the unique environment that the Colorado River creates in the southwestern United States, and for the economies of the States of Arizona, California, and Nevada. Metropolitan urges the Subcommittee to approve the bill.

[A list of documents retained in the Committee's official files follows:]

- Bureau of Reclamation to Senator Jeff Bingaman, Letter submitted for the record by The Honorable Grace Napolitano
- Citizens Progressive Alliance, Statement submitted for the record on H.R. 1970
- Department of the Interior to Senator Jeff Bingaman, Letter submitted for the record by The Honorable Grace Napolitano
- Secretary of the Interior Dirk Kempthorne to Governor Huntsman of Utah, Letter submitted for the record by The Honorable Grace Napolitano
- Drawings by Navajo children on the need for fresh water submitted for the record
- Senator Jeff Bingaman to Secretary of the Interior, Dirk Kempthorne, Letter submitted for the record by The Honorable Grace Napolitano
- Senator Jeff Bingaman to Secretary of the Interior, Gale Norton, Letter submitted for the record by The Honorable Grace Napolitano
- Southwestern Water Conservation District, Letter to Chairwoman Napolitano submitted for the record by The Honorable John T. Salazar

[A statement submitted for the record by the San Juan Agricultural Water Users Association, Mike Sullivan, Chairman, on H.R. 1970 follows:]

Statement submitted for the record by the San Juan Agricultural Water Users Association, Mike Sullivan, Chairman, on House Bill 1970

Thank you for giving us the opportunity to testify about the proposed legislation entitled "Northwestern New Mexico Rural Water Projects Act." If carried out, this legislation would draw water from the San Juan River (one of the largest tributaries of the Colorado River) for a pipeline to be built to the Gallup area at a cost of more than \$1 billion in public funds. The legislation would also affect water rights throughout New Mexico and the entire Colorado River system.

The San Juan Agricultural Water Users Association represents 36 of the 38 irrigation ditches in the San Juan river system. Our members consist of about 15,000 landowners and their families. The members of our association have water rights from the Echo Ditch Decree (1948) and appropriations for approximately 35,000 acres of irrigated land with a farm delivery of over 110,000 acre-feet of water. We are also entitled to divert approximately 1,000 cfs from the rivers of the Basin. Our members also have water rights for household, livestock, and other uses, which have not yet been quantified by the court. The members of the association have been putting the waters of the San Juan to beneficial use for more than 100 years. Our ancestors, Anglo, Hispanic, and Navajo, were the first ones to divert water from the river, long before New Mexico became a state. Since then, our members have maintained our community ditches with their own labor and their own money, through ditch assessments, without government subsidies.

Unfortunately our group cannot afford to send someone to Washington to testify on this bill. So we are submitting testimony in writing. Although we are unable to be present with you, we ask that you give careful attention to the facts which we are outlining, because you will not hear these facts from anyone else. In our absence, our opponents will pooh-pooh these facts and our position, but we respectfully request that you and your staffers conduct an independent investigation of the points we outline here. Any objective inquiry will demonstrate that there are serious questions about this bill, which the proponents are trying to gloss over.

If this legislation is passed in its present form, it will hurt us and many other people in New Mexico. With all due respect, the proposed legislation is so fundamentally flawed that it should not be enacted in its present form. This legislation has been pushed by certain special interests as a solution to the problems all along the San Juan and Colorado Rivers, but in reality it will only make those problems worse. And this legislation as presently written will create new problems for the entire State of New Mexico, which increasingly depends on the San Juan River to supply its water.

1. THE LEGISLATION ATTEMPTS TO GIVE ONE-THIRD OF NEW MEXICO'S RIVER WATER TO A VERY SMALL GROUP—LESS THAN 40,000 PEOPLE—AT THE EXPENSE OF THE OTHER 1,800,000 CITIZENS WHO LIVE IN NEW MEXICO.

The San Juan River provides 60% of all the surface water in New Mexico. As a water source for New Mexico, the San Juan River is twice as big as all the other rivers in the state, combined—the Rio Grande, Pecos, the Gila, etc. Cities and tribes on the Rio Grande are increasingly depending on water supplied from the San Juan via the San Juan-Chama Project, which carries water across the Continental Divide.

Albuquerque is finishing a \$275 million project to use San Juan water, while Santa Fe is spending \$145 million. Taos, Espanola, Los Alamos, San Juan Pueblo, and Belen are also counting on water from the San Juan River. The proposed settlements of Indian water rights for Taos Pueblo and Nambe-Pojoaque (the Aamodt case) also are demanding a share of water from the San Juan-Chama Project. But these communities may be disappointed, because there is a crisis on the San Juan that will soon affect the entire state.

This legislation is based on the false assumption that there is enough water in the Colorado to satisfy the claims of the Navajo tribe and the other tribes and communities that are competing for water from the San Juan. This proposed settlement, just like the proposals for Taos and Aamodt (and the unfulfilled settlement with the Jicarilla tribe), is based upon wishful thinking, which we can no longer afford in an era of global warming. The latest estimate by the Bureau of Reclamation is just another in a long series of unrealistic hydrological estimates of the amount of water that will be available for all uses in New Mexico. The sheer size of this proposed water deal makes it a threat to the rest of the state. If enacted in its present form, the statute would give a grossly unfair share to a very small group of people.

The ostensible purpose of this legislation is to settle a water rights claim for the portion of the Navajo reservation that lies within New Mexico. According to the 2000 census, there are only 44,636 persons who live on the reservation in New Mex-

ico. U.S. Census Bureau, New Mexico—American Indian Area, GCT-PH1, Population, Housing Units, Area, and Density, <http://factfinder.census.gov>. The census figure includes non-Indians as well as tribal members, so it is almost certain that there are fewer than 40,000 tribal members living on reservation land in New Mexico. These are the only persons who would have claims under the so-called “Winters Doctrine.” This group amounts to only 2.5% of the total population of New Mexico, which is 1,819,046 according to the 2000 census.

The proposed legislation would give one-third of all the surface water in New Mexico to this very small group. The settlement proposes to give the tribe rights to 56% of the water in the San Juan River, which accounts for 60% of the state’s stream water. So the settlement would allocate 33.6% of the state’s entire supply to satisfy the claims of less than 2.5% of the population.

The legislation would give each tribal member much more river water, per person, than the other citizens of New Mexico. If this draft legislation were passed and fully implemented, the Navajo tribe would be entitled to a depletion of 348,550 acre-feet annually from the San Juan River for the 44,636 tribal members who live on the reservation in New Mexico. This works out to a depletion of 7.8 acre-feet per capita for a tribal member living on the reservation in New Mexico. On a per person basis, this is far more river water than would be left for the rest of the people who live in New Mexico.

According to the best estimates, which are admittedly imperfect, New Mexico has about 2.1 million acre-feet annually in stream flow, after meeting its commitments to other states. New Mexico Water Quality Control Commission, 2006-2008 State of New Mexico Integrated Clean Water Act § 303(d)/§ 305(b) Report at 4. This means that there is about 1 acre-foot of river flow available for each person in this state, on average. To keep some flow in the rivers, the amount of allowable depletion per person would be considerably less than 1 acre-foot. Yet the proposed legislation would allocate 7.8 acre-feet of depletion to each Navajo tribal member on the reservation in New Mexico. This is completely unfair to all the rest of the citizens of New Mexico. The legislation advances the special interests of a very small group, while it damages the long-term future of the entire state.

We request that your staff and the OSE prepare estimates of the per capita water amounts that would be allocated by the proposed settlements in New Mexico, and compare them to the per person amounts that would be left to the rest of the population in this state. These analyses will show that this settlement gives an unfair amount of water to one very small segment of the state’s population, at the expense of the rest of the population.

As a matter of sound public policy and water planning, New Mexico’s scarce river water should be shared equitably by all of the citizens in the state, so that all citizens have a roughly equal per capita share, whether they are tribal members or not. We support a fair share for everyone, but this legislation does not do this.

2. THIS LEGISLATION WILL IMPAIR THE WATER SUPPLIES OF LOCAL RESIDENTS WHO ALREADY DEPEND ON THE SAN JUAN RIVER.

To make room for the proposed Navajo settlement, this legislation squeezes the non-Indian users of the San Juan River. It would leave only 16% of the river to the local people who have actually used the river for more than a century. Under New Mexico’s Constitution and water laws, those who have actually put the water to beneficial use have priority, but the settlement tries to push these rights aside. Here is the allocation proposed by the supporters of this bill:

<u>User</u>	<u>Allocation</u>	<u>Comment</u>
Navajo Nation	56%	Irrigation and domestic uses
Jicarilla Apache Nation	5%	Most leased for power plants/municipal uses
San Juan - Chama Project	17%	Municipal/irrigation uses in Rio Grande Basin
Power Plants	6%	Use 9% of total including lease with Jicarilla
Non-Indian uses in San Juan Basin	16%	Irrigation and municipal uses

Executive Summary of the Navajo Nation Water Rights Settlement at 4 (Apr. 19, 2005).

The situation for local residents is even worse than these figures show. First, the tribal claims would be given a retroactive higher priority than many local users, even though local people put the water to actual beneficial use, in accordance with New Mexico law, while the tribes have never used most of the water allocated to them. Second, this legislation gives the Navajo Nation control of the entire river, from Navajo Lake at the top, to Shiprock at the bottom.

Third, to make this settlement fit, the OSE is trying to reduce our members' water rights under the 1948 Echo Ditch Decree. In the ongoing San Juan adjudication, the OSE is falsely claiming that our members have abandoned large parts of their water rights under the Echo Ditch Decree. To make this legislation look feasible, the projections by the OSE wrongly assume that non-Indians are only using about half of their Echo Ditch rights, so that non-Indian uses will be reduced from 16% to about 8%. To accomplish this, the OSE, the tribes, the United States, and the power plants are all litigating against our members, to cut back on our vested water rights.

According to one set of projections by the State Engineer's staff, the result will be a reduction of 40% in water use on the Upper San Juan River, a 36% reduction to ditches on the Animas River, and a reduction of 58% to ditches on the La Plata River. (The OSE now claims that these projections are no longer operative, because the OSE and the BOR keep changing their numbers to make them fit.) These reductions would ruin many water users who have depended on this water, and actually used it for more than a century, in order to give the water to new users in the Gallup-Window Rock area, who have never depended upon or used water from the San Juan.

The legislation does not solve the problems associated with the Hogback-Cudei Project and the Fruitland-Cambridge Project. These projects draw water at the downstream end of the San Juan River in New Mexico, so they provide no return flow which can be used in the state. The legislation authorizes the diversion of more water than will be in the river on many occasions.

The Richardson settlement provides for the release of up to 12,000 acre-feet per year from Navajo Dam for use by the tribe for irrigation in the Hogback-Shiprock area. This provision is inadequate and ineffective: the maximum amount is 12,000 acre-feet in any one year, but this amount could be depleted in two or three weeks under really dry conditions. If the shortage in the river is 500 cfs, the water will be gone in about 3 weeks. To have an adequate buffer, there needs to be at least a 65-day supply for both Indian and non-Indian users. As proposed in this legislation, the 12,000 acre-feet is only for tribal users, so it does not increase the water that can be used by non-Indians. And in dry conditions it may still be necessary to place calls on upstream users in order to get this water to the Hogback-Shiprock area at the low end of the river. Under this legislation the tribe will effectively control both ends of the river—Navajo Dam at one end and Shiprock at the other.

3. THIS LEGISLATION CONTINUES A PATTERN OF UNREALISTIC PIECEMEAL SETTLEMENTS WITH INDIAN TRIBES, WHICH WILL MAKE IT IMPOSSIBLE FOR NEW MEXICO TO FORMULATE A COHERENT WATER POLICY.

Unfortunately, New Mexico does not yet have a coherent and comprehensive master plan for the state's water resources. For example, the major rivers have not been fully adjudicated by the courts. Furthermore, there are 19 Indian pueblos, 3 tribes, and 3 Navajo bands in New Mexico. Tribal Map, New Mexico Indian Affairs Department, www.iad.state.nm.us. Most of their water rights have not been settled or adjudicated. Passage of this legislation would make it virtually impossible for the state to develop a realistic long-term plan.

Throughout this process, we have asked some very basic questions, but no one has been able (or willing) to answer them. Some of the basic questions are:

- (a) How much stream water does New Mexico have?
- (b) After allowing for interstate obligations, rainfall variations, and climate trends, how much river water can be diverted for use within New Mexico?
- (c) How much water can New Mexico consume, while still leaving an adequate flow in our rivers?

Obviously, one cannot devise a water plan for New Mexico without some idea of the overall water resources available in the state. But the OSE and the ISC say they have no idea of the aggregate water supply and demand.

At the request of Senator Bingaman, the OSE and the ISC met with us on March 28, 2007, in Farmington. The purpose of this meeting was to give the state's technical experts an opportunity to answer these very basic questions. When we asked these questions, the OSE and ISC representatives said that they had absolutely no idea of the amount of water that might be available for use in New Mexico, not even a ballpark estimate. We repeatedly asked them to give us some idea of the water resources that might be available to the state, recognizing that such estimates are quite imperfect. The OSE/ISC said, repeatedly, that it had no idea whatsoever. The ISC representatives said that New Mexico was currently in compliance with its compact obligations, but the ISC had no idea of how much water would be left after those obligations were met, not even a range of figures from dry years to wet years.

We find this hard to believe. If the OSE and the ISC have no idea of the aggregate water resources of the state, then they are not doing their job. The first step in any long-term water plan is to use the best available and most current data to estimate future water flows, so the state can learn to live within them. Neither the state nor the federal government should make any long-term commitments until these rudimentary questions have been addressed and answered.¹

The legislation conflicts with other proposed water settlements that depend on water from the San Juan River, such as the proposed Aamodt and Taos settlements, and the incomplete Jicarilla settlement. There simply is not enough money, or water, to carry out all of these settlements proposed by Governor Richardson's administration. For example, both Aamodt and Taos are conditioned upon the supply of more water from the San Juan River via the San Juan-Chama project. And both settlements demand unrealistic amounts of funding by the federal government.

Under the Jicarilla settlement, the federal government is obligated to buy back 11,000 acre-feet of private water rights beginning in 2000, if requested by the State of New Mexico. For unexplained reasons, the state has not yet made this request² but this is likely to occur as pressure on the river increases. In short, the federal government already has outstanding commitments for the Jicarilla settlement, and it should fulfill its existing commitments first.

The Jicarilla settlement allots 32,000 acre-feet of depletion to the Jicarilla Apache Tribe. Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441. According to the 2000 Census, there are 2,755 persons (tribal and non-tribal) living on the Jicarilla reservation. So the Jicarilla settlement allocates an average of roughly 11.6 acre-feet to each resident on the reservation, which is more than 10 times the average amount available to each resident in the rest of the state. Also, the Jicarilla reservation has substantial water sources on the reservation itself. This settlement is grossly unfair and inequitable to the rest of the state. It illustrates the damage that can be done by water settlements that are negotiated in secret by special interests and lobbyists, without public scrutiny and without regard to the interests of the entire state as a whole.

When the Jicarilla allocation is added to the 33.6% share proposed by this legislation, the Jicarillas and the Navajos would control more than 40% of New Mexico's entire stream flow. New Mexico is already short on water, and passage of this legislation would allow these two tribes to corner the market of New Mexico's water. Once these two tribes control all this water, they will try to lease it to non-Indian users in the downstream states in the Lower Basin. To do this, the tribes merely have to let the water flow down the San Juan River to Lake Meade, which is right next to Las Vegas.³

To cover up the fact that the tribe will export New Mexico's water to other states, Governor Richardson and the tribe have agreed to mislead the public. In their settlement agreement, Richardson and the tribe added a provision that the tribe must apply to the New Mexico State Engineer for a permit to export water for use in other states. This provision is carefully calculated to create the false impression that New Mexico can prevent the Navajo tribe from selling New Mexico water to other states. Pointing to this provision, Richardson and his appointees have been quick to claim that they have protected New Mexico's interests by preventing the water from being exported. For example, in an Op-Ed article in *The Albuquerque Journal* on April 8, 2007, New Mexico State Engineer John D'Antonio claimed that the tribe has agreed not to export water without the approval of the OSE and the ISC. See attached Exhibit 7. The supporters of this bill repeated this deception in *The Albuquerque Journal* on June 24, 2007.

These assertions are false, and the Richardson administration knows that they are false. The Navajo tribe has not agreed that it needs permission from the State

¹ In our dealings with the OSE and the ISC, we have observed that they are reluctant to provide data and offer their best professional estimates about the proposed Indian settlements, because those purported settlements have been widely touted by Governor Richardson. Governor Richardson is running for president, and we believe that the OSE and ISC personnel understand that they must stick closely to the script for the Richardson presidential campaign, for fear that their best information and estimates might undermine the campaign. Of course, the personnel at OSE and ISC will deny this, but we have observed first hand that they are operating under political orders from candidate Richardson.

² We believe that the OSE and the ISC are under political pressure from the Richardson administration not to make this request, because it would puncture the pretense that there is enough water for all the settlements that Governor Richardson has proposed.

³ Candidate Richardson is campaigning hard for the Nevada caucuses in January 2008. As part of his campaign, Richardson has pledged to find ways to get Nevada more water from the Colorado River. Richardson's settlement is one way to get more water to Nevada—at New Mexico's expense.

of New Mexico in order to export water. At our meeting on March 28, 2007, we asked the OSE and the ISC about this provision. We asked them what would happen if the tribe applies for permission to export water, and the OSE denies them a permit. They admitted that, under existing case law, New Mexico cannot prevent the tribe from exporting water to another state. And the tribe also takes the position that, once the tribe gets the water, the state cannot prohibit the tribe from selling or leasing the water to other states.

In the proposed partial final decree, there is a provision that purports to deal with the export of water, but the provision is unintelligible and self-contradictory: it allows the tribe to litigate its right to export water from New Mexico. Furthermore, the partial final decree will never be entered, because the pre-conditions laid down by the tribe will never be met.

In other words, Richardson and the tribe have tried to create the illusion that the tribe will not export water, but this is legal double-talk. Perhaps the tribe has agreed to apply for a permit to export water, but if it does not get one, it will still export the water. So the Richardson administration is just blowing smoke to cover up the tribe's plans to sell New Mexico's water to Lower Basin states—like Nevada. If the tribe is allowed to get all this water, it will export most of it.

Therefore, this bill is not just another public works project. This legislation poses a broad question of public policy that must be addressed to the collective wisdom of Congress: Is it the policy of Congress to give 40% of a state's entire water supply to a very small group of Native Americans, so that they can sell the water to other states?

4. THE PROPOSED LEGISLATION DAMAGES THE ENVIRONMENT BY DRAWING MORE WATER OUT OF THE COLORADO RIVER SYSTEM, WHICH IS ALREADY OVERDRAWN.

This legislation will inflict severe environmental damage on the Colorado River, because the projects will draw down the river to pump water far away, where there is no return flow to the river, and no recharge to the soils in the river bed. When our members irrigate their lands along the river, a lot of the water is returned to the river by return flows and recharge. This is not the case with NAPI, or with the proposed pipelines.

The San Juan is one of the biggest tributaries of the Colorado River, which is already overdrawn. When New Mexico signed the Colorado River Compact in 1922, it was assumed that the water flow in the Colorado was 16.4 million acre-feet annually. But in 2007, a report from the National Academy of Sciences indicates the flow may be only 13 million acre-feet and dropping, due to global warming. Colorado River Basin Water Management: Evaluating and Adjusting to Hydroclimatic Variability, Executive Summary, www.nap.edu, attached as Exhibit 1. When the BOR and the OSE offer their opinions that there is enough water, their opinions are not based on the best and most current scientific data from independent studies.

From an environmental point of view, this legislation simply repeats the mistakes of the Animas - La Plata project. The government told our members that we would benefit from that project, but the project has been a disaster.

5. THE PROPOSED LEGISLATION WILL GENERATE MORE LITIGATION.

This legislation will not accomplish its objectives, which is to settle the competing claims to the San Juan River. Instead, passage of this legislation in its present form will simply produce more litigation. The legislation is not a comprehensive settlement, because it has not been agreed to by most of the people who have water rights in the San Juan.

These water rights are now being adjudicated in the San Juan Adjudication lawsuit, which is more than 30 years old. San Juan River Basin Adjudication, State of New Mexico, ex rel. The State Engineer v. The United States of America, et al. v. The Jicarilla Apache Tribe and the Navajo Nation, Eleventh J.D. Dist., No. D-1116-CV-1975-184 (Mar. 12, 1975). If this bill passes, it will just prolong the lawsuit for many more years.

For example, the proposed settlement does not resolve the other claims of the federal government, or of the Ute Mountain tribe.

It is also our understanding that the legislation does not even settle all of the Navajo water claims in New Mexico, such as the claims for the Rajah Band, south of Gallup, in the basin of the Little Colorado River. We do not know whether it settles the claim of the To'hajiilee Band, near Albuquerque, in the Rio Grande Basin.

Moreover, this legislation will not even settle the claims of the Navajo tribe because the purported settlement is a "conditional settlement." The settlement is not effective until future conditions are performed, but it is unlikely that these conditions will be met. Congress has not fully funded the projects that must be completed

before the settlement becomes final and binding. Nor has the State of New Mexico. It is highly unlikely that the federal and state governments will provide the money to complete these projects, so the purported settlement will never become final and binding on the Navajo tribe. However, in the meantime, the tribe will claim huge amounts of water for projects which will never be completed. Then the tribe will attempt to lease this water to non-Indian users off the reservation, a use that is contrary to the Winters line of cases. So this legislation will create a whole new set of legal controversies that will have to be litigated, on top of all of the difficult legal questions which already exist.

6. THE PROPOSED SETTLEMENT LEAVES NO WATER RIGHTS FOR THE LANDS OF THE NEW MEXICO STATE LAND OFFICE, WHICH CONGRESS RESERVED AS AN ENDOWMENT FOR NEW MEXICO'S PUBLIC SCHOOLS AND COLLEGES.

This unsettled issue is currently being litigated in the San Juan River Basin Adjudication. The District Court has ruled against the New Mexico State Land Office, and the case is currently being appealed to the New Mexico Court of Appeals. It is likely that the case will ultimately wind up in the New Mexico Supreme Court, and quite possibly in the United States Supreme Court, because it presents a question of overriding importance to New Mexico, Arizona, and the other Western states. The question is this: When Congress reserved sections of land as a permanent endowment for New Mexico's schools and colleges, did it impliedly reserve the water necessary to develop those lands?

The San Juan Agricultural Water Users Association does not take any position on this question. However, it seems inconsistent for the Richardson administration and Congress to say that the federal government impliedly reserved water for Indian tribes but not for public schools.

7. THE PROJECTIONS BY BOR AND OSE ARE FAULTY, BECAUSE THEY DO NOT ALLOW FOR ANY OTHER RESERVED WATER RIGHTS THAT THE UNITED STATES MIGHT CLAIM.

The projections by the BOR and the OSE are incomplete, because they do not make any allowance for any other federal reserved rights. It is certain that the United States will assert claims for other reserved water rights for Indian tribes besides the Navajos. It is also possible that the United States will assert reserve rights for national forests, especially as global warming increases and the national forests dry up. The United States might also claim reserved water rights for other purposes.

Before this legislation proceeds any further, we request this committee to ask the following questions: Is the United States going to claim any other reserved rights against the Colorado River system? Is the United States going to claim any reserved rights for national forests, or national parks, or national monuments, or for any other purposes? How much is the United States claiming, or going to claim, on behalf of other Indian tribes in the Colorado basin?

If the answer to any of these questions is "yes," then these demands against the Colorado River need to be quantified and factored into the projections by the BOR and the OSE. These projections do not make adequate allowance for these claims. In finding that water supplies are likely to be adequate, the projections incorrectly assume that there will be no other claims for reserved water rights.

This question needs to be asked and answered for the entire Colorado River basin, not merely for New Mexico, because a federal reservation of water anywhere along the river will affect every other state. A federal reservation of water, when used, reduces the amount of flow in the river, so it creates shortages that must be adjusted in some fashion. However, the Colorado River compacts are silent on the issue of Indian water rights.

It makes no sense for one agency of the federal government—the BOR—to opine that water supplies will be adequate, without making any allowance for the reserved water rights that will be claimed by other federal agencies.

8. THE PROPOSED SETTLEMENT IS NOT SUPPORTED BY A PIA STUDY.

This legislation creates a dangerous precedent, because it does not require a study of practicably irrigable acreage (PIA) to substantiate the Navajo water claims. Under the Winters line of cases, and as a matter of sound public policy, a tribe cannot be awarded water for irrigation of reservation lands unless it can demonstrate that the acreage can be practicably irrigated, that is that irrigation is economically viable.

This legislation sidesteps this requirement, because there has been no study analyzing the amount of acreage on the Navajo reservation in New Mexico that is viable for irrigation, and no analysis of the amount of water that would be necessary to

irrigate those acres. Before this legislation precedes any further, an independent PIA must be conducted.

The New Mexico OSE has stated that the Navajo tribe insisted in its negotiations that no PIA would be performed. In fact, the Navajo tribe is trying to avoid a PIA because it will show that the reservation includes very little practicably irrigable acreage—acreage down in the river bottom around Shiprock.

From decades of personal experience, the San Juan Agricultural Water Users Association can testify that irrigation is a very hard way to make a living, even on the sheltered land down in the river valley. Up on the mesa lands, almost 1,000 feet above the river, irrigation is completely uneconomic, due to high winds, high evaporation rates, and short growing seasons. The experience of Navajo Agricultural Products Industries proves that irrigation is not economically viable. NAPI has been attempting to grow viable crops by irrigation on the mesa top, using pivot sprinklers and water supplied by the Navajo Indian Irrigation Project. Unfortunately, NAPI has been a complete financial failure, even though it is supplied with water at no cost from Navajo Dam, and even though NAPI is heavily subsidized by the federal government and the Navajo tribe. NAPI loses large amounts of money every year. The revenues from NAPI do not even cover its annual operating costs, much less all of the cost of water and the huge capital costs for Navajo Dam and the Navajo irrigation canal.

9. THE NAVAJO TRIBE HAS ALREADY RECEIVED MORE WATER THAN IT IS ENTITLED TO UNDER THE WINTERS LINE OF CASES.

This legislation proposes to grant an additional 20,780 acre feet of water to the Navajo tribe in settlement of their claims under the so-called “Winters Doctrine.” However, the Navajo tribe is not entitled to any more water from the San Juan River, because it relinquished its claims as part of the creation of the Navajo Indian Irrigation Project.

On May 20, 1960, Paul Jones, the chairman of the Navajo Tribal Council appeared before Congress, accompanied by his Washington attorney. The Navajo chairman testified in favor of the Navajo Indian Irrigation Project, which was ultimately enacted in 1962 as part of Public Law 87-483. In his prepared testimony, he described the Navajo Indian Irrigation Project and made the following statement:

All water uses from Navajo Dam would have equal priority. The Navajo Tribe has consented to this, and relinquished its right under the Winters doctrine for the water necessary to irrigate the Navajo Indian irrigation project, in order to provide a practicable plan for comprehensive development of the resources and industrial potential of the San Juan Basin.

San Juan Reclamation Project and Navajo Indian Irrigation Project: Hearing on H.R. 2352, H.R. 2494, and S. 72 Before the House Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, 86th Cong. 64 (1960) (statement of Paul Jones, Chairman, Navajo Tribal Council), attached as Exhibit 2.

The next year, the executive secretary of the tribe reiterated to Congress that the tribe was accepting the Navajo Indian Irrigation Project in satisfaction of its claims for water under the “Winters Doctrine.” San Juan Reclamation Project and Navajo Indian Irrigation Project: Hearing on H.R. 2552, H.R. 6541, and S. 107 Before the House Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, 87th Cong. 33 (1961) (statement of J. Maurice McCabe, Executive Secretary, Navajo Tribal Council), attached as Exhibit 3.

Therefore, the tribe’s claim for additional water under the “Winters Doctrine” is without merit. The tribe accepted an allocation of water for NIIP in satisfaction of its water claims, as part of the compromises that were necessary to pass the 1962 legislation. The tribe’s current claims for water are inconsistent with its agreement almost 50 years ago. Instead of demanding more water, the tribe should honor the agreement it made to get water from NIIP.

Furthermore, the Navajo tribe has already received far more water than it would be entitled to under the Winters line of cases. The cases hold that tribes are entitled to water for irrigation only for practicable irrigated acreage within the boundaries of the reservation, that is, for irrigation that is economically viable. The cases also hold that tribes are not entitled to water for projects that are economically wasteful.

In every instance, an analysis of Winters claims necessarily depends upon the specific facts for each reservation, including its geography, its climate, and economic factors such as distance from major markets. In the case of the Navajo reservation, there is very little practicably irrigatable acreage in New Mexico. The original Navajo reservation was established by Congress as a reservation for a pastoral tribe, predominantly dependent on sheep herding. Congress did not impliedly reserve water from the San Juan River for irrigation of the original Navajo reservation, because anyone familiar with the terrain knows almost none of the reservation’s acre-

age could have been viably irrigated from the San Juan River. Most of the land is too far from the river, too high, too dry, too hot, too cold, and too windy. Within the boundaries of the original reservation, there may be a few small plots that are suitable for irrigation from local water sources, but otherwise irrigation there is not even close to meeting any standards for economic viability.

Some of the later additions to the reservation included land along the San Juan River, and some of this land is economically viable for irrigation. The rest of the reservation in New Mexico is not economically viable for irrigation, because it is too high and too dry. This fact is demonstrated by the complete failure of the Navajo Agricultural Products Industries. The Navajo Indian Irrigation Project was supposed to provide "1,120 family farms for Navajo Indians. It will give a livelihood in related service activities to another 2,240 families, thus providing a decent living for at least 12,000 Navajo Indians. These figures have been supplied by the Bureau of Indian Affairs. Actually, I feel they are excessively conservative." Testimony of Navajo Tribal Chairman Paul Jones on May 20, 1960, Exhibit 2, at 65.

The federal government built Navajo Dam in the 1950s and 1960s, during the happy days when everybody thought that the Colorado River would never run out of water. Navajo Dam supplies huge amounts of water to the Navajo Agricultural Products Industry (NAPI), which grows crops with sprinkler irrigation on the windy high desert, almost 1,000 feet above the river. Much of this water is wasted, because NAPI "has been a huge financial failure," as the Albuquerque Journal reported in a 1999 news article. This "Navajo farm project struggles financially despite millions of dollars in government funding." Even though NAPI loses money almost every year, the Journal also reported that the Navajo tribe wants to expand this money-losing operation in order to protect its water claims. "When more acreage is farmed, the project uses more water. If the tribe doesn't use the water, it is in danger of losing its right to it." Since this article was written, NAPI continues to lose money for the tribe and taxpayers. And despite all the money and water that has been showered on the project, NAPI employs only a few tribal members.

This is an absurd situation, where the tribe feels it must waste water to protect its rights. We believe that the present problem can be solved if the tribe is allowed to make better use of the water it now wastes on NAPI. The San Juan Agricultural Water Users Association is willing to work with the tribe, the OSE, and Members of Congress to come up with a solution that allows the tribe to put this water to better use than trying to grow crops on the high mesa. The Navajo Gallup Pipeline might be one of these uses.

Proponents of this legislation contend that this legislation is a fair compromise because they claim that the so-called "Winters Doctrine" would otherwise entitle New Mexico's Indian tribes to virtually all of New Mexico's river water in the San Juan River, with a priority over all non-Indian uses. This is a gross misconception and exaggeration of the Winters line of cases.

In 1907, the Supreme Court ruled that when Congress established the Fort Belknap Reservation on the Milk River in Montana, Congress impliedly reserved some water to fulfill the basic purposes of the reservation, even though Congress said nothing about water rights in the act which created the reservation. The Winters decision might be a reasonable judicial extrapolation of congressional intent, for a particular reservation, but not for others.

The proponents of this legislation are asserting an exaggerated and self-serving version of the "Winters Doctrine." The legislation tacitly and wrongly assumes that the "Winters Doctrine" would give Indian tribes a priority over almost all non-Indian uses for whatever water the tribes could use for any purpose at any time after the reservation was established. The logic of this "pseudo-Winters" doctrine runs as follows:

When Congress established Indian reservations in this area in the 19th century, they impliedly reserved all the water that might be used, even though the Indians were using little, if any, river water at the time. Even though the water would not be used until indefinite times in the future, the priority of all those future uses would date back to the establishment of the reservation.

The problem with this "pseudo-Winters" doctrine is that it gives tribes a retroactive priority over all non-Indian settlers, taking water away from the settlers that have actually used and relied upon water from these rivers for more than a century. This is a bizarre misinterpretation of the Winters line of cases. This pseudo-Winters doctrine is the creation of a small group of lawyers, not Congress. Congress never intended such a result. When Congress opened the West to settlement, it intended the settlers to have permanent water rights, protected like other property rights. When Congress encouraged settlers to move West and develop the land, Congress certainly did not intend to confiscate the settlers' water, without compensation, after the settlers had toiled on the land for a century and a half. Yet this is the result

of the pseudo-Winters doctrine that has been invented by a small group of water lawyers acting as advocates for tribal interests. If Congress accepts this misinterpretation of the Winters line of cases by passing this legislation, it would be ratifying the concept that Indian tribes have priority rights to all the waters in the Colorado River system, the Rio Grande, and most other major river systems in the West. In short, this misinterpretation of Winters takes away the waters that our Anglo and Hispanic predecessors have relied upon since they settled in this region.

10. THE WATER WHICH THE FEDERAL GOVERNMENT PROVIDES TO THE NAVAJO TRIBE CANNOT BE CHARGED TO NEW MEXICO'S SHARE UNDER THE COLORADO RIVER COMPACTS.

The State of New Mexico has no legal obligation to provide water to Indian tribes, so it cannot be charged with the water that is supplied to the Navajos. That water is the responsibility of the federal government, not the state. So the water provided to the tribe in settlement of their water claims must be charged to the federal government, not to New Mexico's share of the Colorado River under the various compacts.

The compacts do not deal with Indian water rights, except to say that they are the responsibility of the federal government. Article VII of the Colorado River compact states that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Article XIX of the Upper Colorado River Basin Compact states that "Nothing in this compact shall be construed as: (a) affecting the obligations of the United States of America to Indian tribes." NMSA 1978, § 72-15-26.

Furthermore, it is not clear how this legislation relates to the settlement of Navajo water claims in Arizona and Utah. Although this legislation is touted as a settlement, it appears that it does not settle the tribe's claims for Colorado River water in Arizona, where the majority of tribal members live, or in Utah. Under the Colorado River Compact, Arizona is a lower basin state, while Utah and New Mexico are upper basin states. If there is to be a settlement of Navajo water claims, it should be a comprehensive settlement of all Navajo claims at once. And any settlement must specify how these claims will be treated under the various compacts affecting the Colorado River system. Any comprehensive settlement must also specify how the federal government is going to obtain the water it needs to settle its obligations (if any) to Indian tribes.

11. THE GOVERNOR DOES NOT HAVE THE AUTHORITY TO SIGN AWAY WATER THAT BELONGS TO THE PUBLIC, NOT THE STATE.

Although Governor Richardson has signed a proposed settlement with the Navajo tribe, it is doubtful that he has unilateral authority to sign away water that belongs to the public, not the State of New Mexico. Article XVI, § 2 of the New Mexico Constitution provides that "the unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Congress approved this and the other articles of the New Mexico Constitution as part of the process by which New Mexico was admitted to the Union in 1912.

NMSA 1978, § 72-1-1 says that "All natural waters flowing in streams...within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use." Therefore, the water in the San Juan belongs to the citizens who use it, not to the State of New Mexico. So how could the Governor have the authority to sign a binding deal that purports to commit water which the state does not own? Governor Richardson's unilateral attempt to sign away this water to the Navajo tribe poses serious questions under the New Mexico Constitution, its statutes, and the takings clause of the Fifth Amendment.

12. THE PROPOSED PIPELINE WILL NOT SOLVE THE WATER PROBLEMS ON THE NAVAJO RESERVATION.

The Gallup pipeline would cost more than \$1.5 billion to complete, in current dollars without cost overruns, which are inevitable. As a preliminary step, Congress and the State of New Mexico should commission an independent engineering and cost study by experts who have no vested interest in the project, so that the federal and state governments do not start a project which they cannot finish at a reasonable cost. Without an independent analysis, this project resembles a typical military procurement project: the project boosters are trying to get Congress to buy into the project by using low-ball cost estimates.

Even if the Gallup pipeline is built, it will not supply drinking water to homes on the Navajo reservation. The legislation authorizes, but does not fund, a main trunk pipeline to Gallup and Window Rock. The legislation does not include the dis-

tribution pipelines that are necessary to supply water to homes on the reservation, so many tribal members will still be forced to haul water to their homes even if the main pipeline is built. A network of pipes to distribute water from the trunk line is likely to be more expensive than the main pipeline itself. For the amount of money that would be spent building the main trunk line, Congress could deliver water to more households and communities across the reservation by funding local projects to supply and conserve water. These smaller scale projects would be based on the development of local ground and surface water, with strict conservation measures. This alternative approach has several major advantages:

- A. It actually delivers water to the households and communities that need it most.
- B. It is cheaper and much more cost-effective.
- C. It avoids drawing down the Colorado River.
- D. It encourages conservation rather than consumption.

The San Juan Agricultural Water Users Association could support legislation that provides an adequate supply of drinking water to the reservation and to the Gallup area, so long as it does not draw more water from the San Juan, which is already over-committed. This can be accomplished by a combination of local projects, conservation measures, and perhaps a pipeline that uses some of the water that currently goes to NAPI, where it is wasted.

CONCLUSION

In the 1950s, many of our families were removed from their homes and ranches to make way for Navajo Dam and Navajo Lake. All of us were told that the project would protect us from floods, and this has turned out to be true.

But we were also told that the dam would provide us with water in dry times. This has turned out to be untrue.

We were told that there was plenty of water in the Colorado for everyone. This has turned out to be untrue.

We were told that the project would satisfy the tribe's water claims. This has turned out to be untrue.

[NOTE: The attachments referenced above have been retained in the Committee's official files.]

