

Committee on Resources

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and
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Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on the Silvery Minnow Impact on New Mexico

September 6, 2003

1. The silvery minnow water needs and related federal actions threaten the survival of traditional Pueblo life.

For the first time in history, the silvery minnow water crisis and the current drought will require the federal and state governments to enforce senior water rights in accordance with the prior appropriation system. Because the United States has seriously over-engineered the Rio Grande with many dams and reservoirs, the natural ecosystem is in crisis and the silvery minnow is on the brink of extinction. At the same time, federal mismanagement of the river and water delivery systems has made it very difficult for the Middle Rio Grande Pueblos to continue our ancient customs and traditions that depend upon our precious water.

The current actions and inactions of the United States with regard to the silvery minnow are causing tremendous negative impacts to the cultural, religious and social structure of the Pueblo of San Felipe. The United States is refusing to act in accordance with well-established principles of federal reserved water rights law and the federal trust responsibility owed to Indian tribes and pueblos, as explained below. Simply put, the United States is trying to solve the silvery minnow water crisis without regard for the senior federal reserved water rights of the Middle Rio Grande Pueblos.

When you visit our Pueblo, you will not see any golf courses, public parks, or residential grass lawns. Rather, the Pueblo highly values water and thus uses this precious resource only for consumption, cooking, growing food, and bathing. The Pueblo does not waste water.

Despite the Pueblos' senior water rights entitlements, many traditional Pueblo farming families are not able to use their lands for subsistence farming because of a lack of available water. This lack of available water is caused by the actions and inactions of the United States. Because the Pueblo economy and social structure has survived for centuries on the strong foundation of traditional farming and related ceremonies, the United States' actions and inactions aimed at dismantling this foundation threaten the very existence of traditional Pueblo life.

In our traditional ways, the fields, the crops, and the water provide answers and solutions to challenges we must face as a community, including family stability, community violence, education, youth development, and elderly issues. When the crops and the water are not available on our lands, our traditional community becomes fractured, and additional social problems emerge.

We want the future generations to work our lands and learn our traditions from our elders. We want Pueblo life to stay strong and healthy. Without our water, none of this is possible. Without our water, our traditional roots will dry up and our Pueblo community will wither away.

2. The Bureau of Reclamation must use water otherwise contracted to municipalities and non-Indian farmers to ensure survival of the silvery minnow.

The 10th Circuit Court of Appeals recently held that the delivery of water pursuant to federal contracts to municipalities and non-Indian farmers must be curtailed in order to ensure the survival of the silvery minnow, in accordance with the Endangered Species Act. This means that municipalities and non-Indian farmers have less water available from federal reclamation projects than they would like to have.

Because a water shortage was anticipated when the current water delivery contracts and construction funding contracts were drafted, these contracts include drought and shortage clauses which limit the amount of water to be delivered to non-federal contracting parties in a time of shortage. These contract provisions are well summarized in the 10th Circuit opinion. See *Rio Grande Silvery Minnow v. Keys*, 333 F. 3d 1109;

2003 U.S. App. LEXIS 11672 (10th Cir. 2003).

Despite these clear contract limitations and conditions, the municipalities and non-Indian farmers continue to maintain that water is being denied to them illegally in violation of their federal contracts. As the 10th Circuit clearly explained, that claim is simply not true. The municipalities and the non-Indian farmers do not have a right to receive contract water when that water is not available. Under the current conditions, the water desired by the municipalities and the non-Indian farmers is not available due to the drought and federal needs related to the flow requirements for silvery minnow survival pursuant to the Endangered Species Act.

Currently pending are proposed federal appropriation riders that are intended to prevent the Bureau of Reclamation from expending funds in any manner that deprives municipalities and non-Indian farmers of contract rights to receive water without a voluntary sale or lease. However, as the 10th Circuit Court of Appeals plainly explained, these users do not have any rights to receive contract water in times of shortage, and are not somehow entitled to sell or lease water to the federal government in times of shortage. Rather, the relevant contracts expressly condition all delivery on the availability of water (which is not currently available). Moreover, as the Court explained, the contracts contemplate the application of subsequent federal laws, including the Endangered Species Act and its water flow limitations.

For these reasons, there is no contract right for municipalities or non-Indian farmers to receive contract water when it is needed for federal purposes such as the minnow, or when it is unavailable due to drought. Thus, the proposed riders requiring "willing sellers" are not in accordance with either federal water law or the express language of the contracts signed by the municipalities.

This is a concern for the Pueblo of San Felipe because Reclamation has repeatedly informed the Pueblos that Pueblo water will be used for minnow purposes if Reclamation is unable to find enough junior users who may "agree" to become "willing sellers" of their contract water delivery rights. In accordance with federal law, the United States must exhaust all efforts to obtain minnow water from junior water users, and must not deprive the Pueblo of its senior water rights in that process. The "willing sellers" requirement creates an additional serious threat to the availability of water for Pueblo use because Reclamation will use Pueblo water if the junior users refuse to become "willing sellers."

Simply put, the junior water users with water delivery contracts have no vested water rights to sell to the federal government. The United States' desire to "buy" such non-existent water rights must not come before its respect for the senior federal reserved water rights held by the Middle Rio Grande Pueblos.

3. Permanent solutions will require significant federal funding and resources to allow a settlement of Pueblo water rights.

In order to create permanent solutions to water shortage and allocation issues in the Middle Rio Grande basin, it will be necessary to agree upon the amount of senior federal reserved water rights held by the Pueblos. This settlement can be accomplished best through the federal government's formal Indian water rights settlement process.

To move this process forward, the federal government must fund the technical engineering and legal work necessary to determine the amount of water to which each Pueblo is entitled. If the Pueblos receive the full federal funding necessary for meaningful participation in this federal process, a comprehensive settlement of Pueblo water rights could move forward quickly. Until such settlement of senior Pueblo water rights is accomplished, there will be no certainty regarding the availability of water for junior water users such as the City of Albuquerque and non-Indian farmers. Thus, it is in the best interests of all concerned for the federal government to provide adequate and immediate funding for the settlement process.

The total amount of Pueblo water rights best can be determined only through this type comprehensive settlement process. The only other alternative for resolving the Pueblo water rights is years of contentious and expensive litigation.

Federal law requires a measurement of Pueblo water rights that will provide enough water for the present and future homeland needs of the Pueblo. The United States Supreme Court has long held that federal Indian reservations were set aside as permanent homelands for Indian people to live upon in a self-sustaining fashion into the indefinite future, with enough water reserved for Pueblo use now and for all the future generations.

In the landmark case of *Winters v. United States*, 207 U.S. 564 (1908), the United States Supreme Court held that Congress, by creating the Indian reservation, impliedly reserved "all of the waters of the river ... necessary for ... the purposes for which the reservation was created." *Winters*, 207 U.S. at 576. The Court further declared that this reservation of water was not only for the present needs of the tribe, but "for a use which would be necessarily continued through years." *Winters*, 207 U.S. at 577.

This principle outlined in *Winters* is now well-established in federal water rights jurisprudence: the United

States, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each federal reservation, including the residential, economic development, and governmental needs of Indian tribes. See *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *In Re The General Adjudication of All Rights To Use Water In The Gila River System and Source*, 35 P.3d 68 (2001). Importantly, this type of federal reserved water right “is superior to the rights of future appropriators.” *Cappaert*, 426 U.S. at 138.

For these reasons, the settlement of Pueblo water rights will include the amount of water necessary for the present and future homeland needs of each particular Pueblo. There will not be certainty for the junior water users, or a permanent solution for minnow water, until after the Pueblos’ senior federal reserved water rights are settled in this manner.

4. The current El Vado Reservoir storage and release policies and procedures are an important part of the problem.

In 1928, Congress authorized and funded construction of a water delivery system to benefit Pueblo lands and non-Indian lands in the Rio Grande basin. This water delivery system was to be administered by the Middle Rio Grande Conservancy District (“MRGCD”). See 70 P.L. 169, 70 Cong. Ch 219, 45 Stat 312 (1928).

As part of the construction authorization, Congress directed MRGCD to deliver part of the Pueblos’ water entitlement through the MRGCD water delivery system, and agreed to pay for the operation and maintenance costs associated with that part of MRGCD’s delivery system. In 1981, the United States and the Pueblos agreed to store in El Vado Reservoir sufficient water to sustain this part of the Pueblos’ water entitlement to be released for delivery through the MRGCD system.

The Pueblo of San Felipe, however, is not receiving its full allocation of water that is required to be delivered to the Pueblo through the MRGCD water delivery system pursuant to the 1928 Act and the 1981 Storage and Release Agreement. The Bureau of Reclamation routinely violates the 1981 Storage and Release Agreement by making unauthorized releases of Pueblo water resulting in the use of Pueblo water by junior, non-Indian downstream users. Reclamation also is failing to store sufficient water under the 1981 Storage and Release Agreement.

Further, the Pueblo is not presently using its full share of the native flow of the Rio Grande (and related groundwater) that the Pueblo is entitled to use for residential, commercial and governmental purposes. The Pueblo is not able to use its full allocation in large part because the water delivery system is in serious need of substantial improvements and repairs to allow adequate water delivery.

Despite the illegal reduction in the amount of Pueblo water stored and released from El Vado Reservoir, and despite the Pueblo not using its full entitlement to native flow directly from the Rio Grande, the Department of Interior is now threatening to deprive the Pueblo of its senior federal reserved water rights so that the junior municipal and non-Indian water users are spared from feeling the full impact of the current drought and silvery minnow water demands.

The current water crisis must not be resolved at the expense of the Pueblos, in violation of federal law. It is not fair or lawful for the United States to impose the burden of this drought and the silvery minnow water needs on the most senior water rights holders on the river. In accordance with well-established federal law, delivery of native flow and stored water to the Pueblo must receive priority over the junior non-Indian native flow and storage delivery before Endangered Species Act limitations could or should be applied to the Pueblo’s senior federal reserved water rights. This is consistent with the conclusions of the Department of Interior Working Group on the Endangered Species Act and Indian Water Rights that was formed to evaluate these issues in 1997.

5. Federal law imposes trust duties of the highest standard on the United States that require the Department of Interior to take all actions necessary to protect and maintain Pueblo water rights.

The United States Supreme Court has long held that, as the Pueblos’ trustee, the United States must act to “preserve and maintain trust assets,” using “reasonable care and skill to preserve trust property.” *United States v. White Mountain Apache Tribe*, 123 S.Ct 1126, 1133-34 (2003). See also *United States v. Mitchell*, 463 U.S. 206 (1983). These trust duties require protection in circumstances such as ours where “water rights constitute the trust property” which the federal government, as trustee, has the duty to preserve by performing “all acts necessary.” *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426(1991). Failure to comply with these federal trust duties will result in a monetary award against the United States for breach of trust.

As the Supreme Court recently explained, the United States’ federal trust duties are substantial when the

United States exercises direct control over tribal trust assets on a daily basis. In such circumstances, “a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” *White Mountain Apache*, 123 S.Ct. 1126, 1133.

Because the Bureau of Reclamation exercises daily control over Pueblo water storage and release, Reclamation has a heightened trust duty to protect Pueblo water from waste and unauthorized use by junior users, including municipalities and non-Indian farmers. Additionally, the Department of Interior has the trust obligation to take the affirmative steps necessary to settle and permanently protect Pueblo water rights in a comprehensive manner. This will require substantial federal funding, which must be provided to the Pueblos for this purpose.

To date, the United States has entirely failed to provide the Pueblos with the funds necessary for the technical engineering work and legal services that will be necessary to settle Pueblo water rights in the Rio Grande basin. Significant and immediate funding will be necessary to move this process forward in a comprehensive manner aimed at finding permanent solutions to the Rio Grande water crisis.

Additionally, the United States, acting through the Bureau of Reclamation, is breaching its federal trust responsibility by failing to store sufficient Pueblo water in accordance with the 1928 Act and the 1981 Storage Agreement. Reclamation is also violating the 1981 Storage and Release Agreement by making unauthorized releases of Pueblo water resulting in the use of Pueblo water by junior, non-Indian users. Further, Reclamation is threatening to commit an even greater breach of its trust responsibility through its intention to use Pueblo water for minnow purposes if the junior users refuse to become “willing sellers.”

Under well-established principles of federal water law, Indian tribes and Pueblos in New Mexico hold senior, federal reserved water rights that must be fulfilled before water is allocated to junior users such as municipalities and non-Indian farmers. Thus, even if the municipalities and non-Indian farmers had a contract right to receive federal water in times of shortage (which they do not), that right would be junior to the right of the Pueblo to receive its federally reserved senior water rights. In other words, Pueblo water rights must be fulfilled before the municipalities and non-Indian farmers are entitled to receive any contract water, or the native flow of the Rio Grande (including related groundwater), regardless of whether such junior users “agree” to become “willing sellers.”

6. Our water and our entire way of life are bound together through our traditional farming practices.

The Pueblo of San Felipe has a cherished name of *Katishthya*. This is the original name for the city. We call ourselves *Katishthyamé*. Our homeland in its current location dates back to the 1400’s. Before that, we can name our ancestors as the people of Chaco, Mesa Verde, Bandelier. We are the first city builders in America.

We were also the first in this land to develop our ancient water delivery systems, our traditional farming-based economy and closely related social structure. Our art and culture reflect our deep connection to our water, crops and lands. Our sophisticated system of traditional self-governance is necessary to administer and conserve the precious resources that the Creator has given us. It is this civilization – our civilization – that the anthropologists are constantly studying. We are repeatedly examined at the Smithsonian Institute. Universities and tourists from around the world come to study our homeland and our traditional way of life.

All this examination and study leaves us to wonder when we will truly be understood or acknowledged as humans who have human needs. Our families need to eat. We need to teach our youth the ways of our people. Our community needs to celebrate and honor our land and our crops. None of this is possible if the federal government continues to deny us our basic rights to water.

One source of inspiration for our lives comes from the challenges of food production in the arid environment in which we live. It is a spiritual concept, this idea of being able to survive and using simple tools to work the land. It seems like only yesterday when the tribes lived without the impact of Europeans. This memory – which is so close and still clear – makes us very unique in our concept of survival. The spiritual power of gratefulness has created beauty on our lands and a guarded presence each *Katishthyamé* possesses, as if our breath may be taken away at any moment. We place water on that same spiritual level.

For a human to exist, that human needs water, food, and perhaps shelter. But water is the number one need. For these many centuries we have survived. We have been prudent in our use of water, and we are grateful for the water provided to us by the Creator. But we are concerned about the survival of our crops and the future water needs of our children. We are farmers. Throughout history, our people have expressed the importance of our water and our crops in our traditions which can be seen by outsiders as designs in drawings, paintings, weavings, songs, dances, poetry, and theatre, and basically in every aspect of our cultural heritage.

These traditions are our cultural legacy. We share this immense cultural contribution with the United States,

the State of New Mexico, the universities that study us, the institutes that examine us, and all of the tourists who experience the artistic and psychological impact of our traditional Pueblo way of life when they visit New Mexico.

There is no corporate foundation or concept in our traditional farming. It is simply our way of life. Our farmers take great pride in providing well for their families, extended families, and the entire Pueblo community with our crops. Beyond food to eat, our Pueblo farmers often earn the basic necessities of life by selling produce to neighboring Pueblos or farmers markets, or through barter with other Pueblo families who will, in turn, share their goods as needed. This is how we often provide school clothes for our children, supplies for our artists, and non-food items essential to any household.

Children work with their parents to assist with our traditional farming. The elders pass down stories and lessons related to our farming traditions and thus teach our youth how to grow and accept the responsibilities adulthood will bring. As with our crops, this circle of life feeds our traditions, and provides the foundation for our entire way of life.

If our water is not protected, there will be no survival of these traditional practices. Children will not learn what they need to know from the elders. There will be no fresh produce for healthful eating. The farmers will have nothing to sell or trade for the non-food items that they need. Without water, a welfare state will be imposed on our traditional communities, and a rich culture dating back thousands of years will finally be extinguished.

We will not stand by and watch this destruction occur. As our trustee, the United States must not continue to cause our water to be taken by others, and our water delivery systems to fall into ruin. The silvery minnow water crisis is just one part of a very complicated water shortage in the Middle Rio Grande.

In order to avoid contentious and expensive litigation, the United States must diligently exercise its trust responsibility to protect and preserve our water rights. As discussed above, this will require significant and immediate federal funding to the Pueblos for the permanent settlement and protection of our water rights. Additionally, the Department of Interior must stop the unauthorized releases of Pueblo water from El Vado Reservoir, and must store sufficient Pueblo water in accordance with the 1928 Act and the 1981 Storage and Release Agreement.

There will not be certainty for the junior water users in the Middle Rio Grande - or a permanent solution for the silvery minnow water crisis - until after the Pueblos' senior federal reserved water rights are fully settled and permanently protected. Until that time, the United States must not create temporary band-aids that illegally deprive the Pueblos of water that is critical to sustain Pueblo homelands and the traditional Pueblo way of life.