

Testimony of President Joe Shirley, Jr.
Navajo Nation
Before the House Committee on Natural Resources
Water and Power Subcommittee
Concerning Indian Water Rights Settlements
April 16, 2008

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 perspective on Indian Water Rights Settlements, a topic of vital importance to the Navajo Nation.

The Navajo Nation has considerable experience with Indian Water Rights Settlements. Most recently, I was pleased to provide testimony before this subcommittee on H.R. 1970 – the Northwestern New Mexico Rural Water Projects Act which would authorize a settlement of the Navajo Nation's water rights in the San Juan River basin in New Mexico, and would authorize the Navajo-Gallup Water Supply Project to provide much needed potable water supplies to the Navajo Nation. The Navajo Nation is currently involved in discussions with the states of Arizona and Utah to quantify our water rights through negotiated settlements, rather than through the adjudication process.

Chairwoman Napolitano has posed several questions to frame the discussion of Indian Water Rights settlements, and I will address each one using the experiences of the Navajo Nation as a foundation for my testimony.

First, what do you see are the respective roles of the federal government including Congress, as well as state, local and tribal governments in dealing with Indian Water Rights adjudication and settlement?

The role of the federal government, including the Congress, is to be an aggressive trustee of our water rights. The Navajo Nation is concerned that the present application of the *Criteria and Procedures for the Participation of the Federal Government in Negotiations* creates incentives for the United States to oppose the interests of Indian tribes in both the litigation and settlement of tribal water rights claims. As a general proposition, minimizing the claims of the tribes reduces the United States' potential liability and thereby reduces the level of federal contribution to water rights settlements under the current interpretation of the Criteria and Procedures which almost always looks solely to the question of federal liability in determining the merits of a particular settlement.

In the case of Arizona, the United States has neglected the Navajo Nation's water rights claims to the Colorado River and has pursued a wide variety of activities concerning the management and allocation of the waters of the river without accounting for the needs of the Navajo Nation. As a result of this neglect, the Navajo Nation sued the Secretary of the Interior in March of 2003. Since that time, we have been engaged in settlement discussions with the

United States, the State of Arizona, and others concerning a possible quantification through a negotiated settlement. The Navajo Nation believes that its position in these discussions would be enhanced if the United States were to affirmatively pursue the adjudication of these claims in federal court; however, the United States has refused the request of the Navajo Nation to pursue such claims. Nevertheless, a federal negotiation team has been appointed pursuant to the aforementioned *Criteria and Procedures* and settlement discussions are on-going. The effectiveness of the federal team is severely hampered by the conflict between the role of the Department of the Interior as trustee for the Navajo Nation and its job under the *Criteria and Procedures* to minimize federal financial responsibility, as well as the lack of federal resources to devote to the settlement effort.

The tribal role in the quantification of water rights is difficult and challenging. The objective of the Navajo Nation in the adjudication and negotiation process is to obtain a water supply that meets the needs of future generations of Navajos to live and thrive on the Navajo Nation as their permanent homeland. These efforts, whether through litigation or negotiation, require the expenditure of significant resources for attorneys and experts. Over the past several decades, the federal funding to pursue these efforts has been reduced significantly. Tribes can no longer rely on the United States to fund the tribal efforts and the funding for the federal government's participation in this process has been significantly reduced as well.

The state governments play a vital role in the quantification efforts, including the adjudication of water rights in state courts. However, the states face the same fiscal limitations as the federal government, and as a result, most of the water rights adjudications proceed at a snail's pace. This serves to continue the status quo in terms of the utilization and allocation of water supplies which typically favor the non-Indian water users to the detriment of Indian tribes. In the settlement process, the Navajo Nation seeks to form partnerships with the states in order to build necessary water infrastructure on our homeland, while seeking a balance between the needs of the Navajo People and the water needs of our neighbors. This is a difficult exercise because the water supplies available are generally over-allocated. The federal government can greatly assist in this process by providing the resources to help pay for the water infrastructure needed to equitably allocate the use of water among all of the water users. Again, we are concerned that by focusing almost exclusively on the issue of federal liability, the current interpretation of the *Criteria and Procedures* is being used to limit the role of the United States, rather than to further the announced federal policy in support of settlements..

Second, what are the costs and benefits of the settlement process when compared to litigation?

The benefit of the settlement process is that the three sovereigns involve act like sovereigns. We sit down, negotiate, and find a solution that best meets the needs of the people we represent.

In addition to being extremely expensive, litigation forces the parties to push themselves into corners, bounded by the rules of litigation, rather than look for common solutions concerning the use of water, the most precious resource to human beings. In litigation we end up creating enemies whereas with settlement we create partners.

In litigation, the most the tribes can receive is a “paper water right” pursuant to a judicial decree. But through water settlements, tribes have been able create “wet water” through the development of infrastructure to put water to use on our homelands. In the case of the Navajo Nation, we need reliable, safe drinking water. All of our settlement efforts are premised on the proposition that we are willing to compromise our “paper water rights” in exchange for sustainable drinking water projects. These projects come at a significant cost, and we remain concerned that the *Criteria and Procedures* are not applied in a manner that undermines our settlement efforts.

Third, how has the settlement process helped remove water uncertainty for the tribes and the non-Indian communities?

This is a theoretical question for me, because the Nation does not currently enjoy a finalized settlement. I do know that where we have reached agreement with the State of New Mexico concerning the San Juan River, I see something that can be hard for some to believe. We have non-Indian friends in the basin, particularly in the City of Farmington. In the 1970s, the City of Farmington was the site for a very violent crime committed against Navajo people. Today, because of the settlement, we have friends in and around Farmington who support H.R. 1970 because the settlement is a good thing for the non-Indian water users, as well as for the Navajo Nation.

Fourth, how effective is the Department's Indian Water Rights Office and how can they be improved?

This is a difficult question, because at various times the Indian Water Rights Office has been extremely helpful and at other times has been an obstacle in the settlement process. In the case of the New Mexico settlement, the Indian Water Rights Office first appointed an assessment team and later appointed a full settlement team to participate in the negotiations between the Navajo Nation and the State of New Mexico. Despite the appointment of these teams, the United States was unable to formulate a position with respect to the settlement and typically advised that the Navajo Nation and the State of New Mexico would have to negotiate with the Office of Management and Budget. Eventually, the United States disappeared from the negotiations and the final agreement was hammered out without federal participation. The Navajo Nation and the State of New Mexico executed the settlement agreement on April 19, 2005.

With the appointment of Michael Bogart as the Secretary's Water Counselor, the level of federal participation in this process improved significantly, and we are grateful for the assistance of the Indian Water Rights Office in helping to revise and, in many instances, to improve the substance of our proposed settlement legislation. We are also grateful for Mr. Bogart and his staff for personally visiting our Navajo Nation on several occasions and for witnessing firsthand our critical need for drinking water infrastructure. Mr. Bogart personally traveled the route where the proposed Navajo-Gallup Water Supply Project will hopefully be built, and he met with many Navajo residents who currently haul water from distant water points in order to have potable water in their homes. Despite Mr. Bogart's efforts, we were disappointed when the Department of the Interior testified against H.R. 1970 before this subcommittee on June 27, 2007. We suspect that the Indian Water Rights Office is convinced that the proposed settlement represents an appropriate resolution of the water rights of the Navajo Nation; however, the

official position of the United States is not informed by the Indian Water Rights Office, but by the Office of Management and Budget (OMB) which is opposed to the expenditure of large amounts of federal dollars even in the face of the critical lack of drinking water infrastructure on the Navajo Nation.

We believe that the Indian Water Rights Office is well-intentioned and committed to helping improve the conditions in Indian Country through the implementation of water rights settlements; however, the Office's effectiveness is severely constrained by OMB policies. Senators Bingaman and Domenici have raised concerns that the Administration's water policies are being dictated by OMB and that the *Criteria and Procedures* have been applied in an inconsistent manner that has favored certain settlements to the exclusion of others. The Navajo Nation shares these concerns and supports the Senators' request, that OMB reconsider its position, as expressed in the attached letter of June 15, 2007.

As a leader, I want us to move forward and not dwell on the past. We are committed to working with the Indian Water Rights Office, and we have pledged to provide Mr. Bogart with an analysis of the how H.R. 1970, despite its substantial costs, is consistent with the *Criteria and Procedures* and why the settlement should be supported by this Administration.

In addition to our settlement efforts with the States of New Mexico and Arizona, the Navajo Nation has enjoyed productive negotiation discussions with the State of Utah, but those settlement efforts are hampered due to the lack of any federal presence, and the Indian Water Rights Office is reluctant to appoint a Federal Team. In light of the Department's testimony on H.R. 1970 that it could not support a settlement that the United States did not actively participate in, both the Navajo Nation and the State of Utah are hesitant to proceed much further in the settlement process without the appointment of a Federal Team. We understand the huge commitment of resources that the Indian Water Rights Office has made in our efforts with the States of New Mexico and Arizona, but we cannot believe our trustee would allow a settlement to fail with the State of Utah for lack of any federal participation.

Fifth, most Indian Water Rights Settlements require Congressional approval or funding. When should representatives of the relevant Congressional and Committee Offices become involved in a particular settlement?

From our experience, there is no question that the availability of federal funding to pay for drinking water infrastructure is the key to whether a settlement will succeed or fail. After the local parties have reached a conceptual agreement, the relevant Congressional and Committee offices should become involved to provide advice on what level of federal funding may be achievable. The involvement by these offices should include a field visit to understand the resources involved, including the physical and human landscape.

As Madam Chairwoman knows, the Navajo Nation has enjoyed a close relationship with your staff and we appreciate the efforts of your staff to facilitate a hearing on H.R. 1970. We are grateful that your staff was able to visit the Navajo Nation and to witness firsthand, the plight of the Navajo People who lack potable water supplies.

Sixth, would it be helpful if Congress established a "budget" or a target amount for Indian Water Rights Settlements over a period of time, and if so, how would that budget be allocated between settlements?

We believe that Congress must set aside funds to be used exclusively for Indian Water Rights Settlements. In the absence of such set asides, funding for water rights settlements will compete with funding for other programs out of the Bureau of Indian Affairs budget which provides essential services in Indian Country. We do not wish to fund any Indian water settlement at the expense of other important programs to the Navajo Nation and to other Indian tribes. H.R. 1970 provides one such mechanism through the creation of a Reclamation Water Settlement Fund. This fund will not be sufficient to fund all future settlements but it represents the kind of approach that we favor because it does not take money from other tribal programs.

Finding monies to fund water settlements represents a significant challenge for Congress. Trying to ascertain a target amount of money is equally daunting. The Navajo Nation is a participant in the ad hoc group, the Joint Federal-Tribal Water Funding Task Force, which periodically meets with Congressional staff to discuss the funding needs for Indian Water Rights Settlements. We believe that constant dialogue with the tribes is essential. Finally, we suggest that any mechanism that creates a pool of money for funding settlements be viewed as a tool to facilitate settlements and not as an absolute barrier or limit to the amount of funding that can be made available. It is difficult to project all of the future needs of the tribes, and we respectfully suggest that settlements may become more difficult, and potentially more expensive, as the available water supplies become less and less.

The Navajo Nation appreciates the efforts of this Subcommittee to address the challenge of Indian Water Rights Settlements. We look forward to continued dialogue with the Subcommittee concerning the settlements throughout Indian Country and we hope that our discussions with the States of Arizona and Utah will also succeed so that we may bring these settlements to this Subcommittee for its consideration in the future.