

WRITTEN TESTIMONY OF
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FOR A HEARING ENTITLED
"TRIBAL WATER AGREEMENTS"

BEFORE THE
WATER, WILDLIFE, AND FISHERIES SUBCOMMITTEE
LEGISLATIVE HEARING

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INTRODUCTION

Chairman Cliff Bentz, Ranking Member Jared Huffman, and Members of the Subcommittee,

I want to first thank you for inviting and giving me the opportunity to testify today before the House Committee on Natural Resources Subcommittee on Water, Wildlife and Fisheries regarding HR 3977- The Navajo-Gallup Water Supply Project Amendments Act of 2023.

My name is David Eason and I am the City Attorney for Gallup, New Mexico. The City of Gallup is composed of approximately 20,000 diverse individuals. Gallup lies in the heart of Native American ancestral homelands. Tribal members -- members of the Navajo, Hopi, and Zuni tribes -- make up 49.1% of the population. Today, I am here to support and provide an overview of The Navajo Water Supply Project and to underscore the critical need for passage of H.R.3977, introduced by Rep. Teresa Leger Fernandez on June 9th of 2023. H.R. 3977 recognizes and addresses the pressing need to provide sustainable water resources, improve infrastructure, and promote the well-being of the communities in the region.

Water is essential for healthy and fulfilling lives. Long-standing water uncertainties and shortages undermine public health and economic development, and touch virtually all aspects of daily life. Water settlements protect Tribal Nations' senior water rights, ensuring reliable and safe water for drinking, cooking, and sanitation. They improve public health and the environment on reservations, support growing and sustainable economies, promote Tribal sovereignty and self-sufficiency, and fulfill the U.S.'s trust responsibilities.

Areas served by the Project currently rely on a depleting, expensive, and low quality groundwater supply

that is inadequate both for current and future needs. Passage of the Bill is crucial to avoid delays in Project completion, thereby ensuring ample supplies of clean water for Navajo and other native communities into the foreseeable future and beyond. Having invested approximately \$46 million in Project capital, together with other expenses and countless hours of personnel time, the City of Gallup has pegged its future and the future of its residents (about 45% of whom are Navajo) on the successful completion of the Project. If the Bill does not pass, the City's future is in substantial doubt. This Bill must pass before its funding runs out. It's time to finally fulfill promises and secure water rights for the Navajo Nation and surrounding communities.

The importance of this Bill's passage is underscored by its bipartisan support in both the Senate and House, with co-sponsorship from both Democrats and Republicans. The Senate Bill uniquely includes provisions to extend water supplies to Navajos residing in Utah, highlighting its comprehensive approach to addressing water needs across state lines. Bipartisan backing reflects the universal recognition of the necessity and urgency of ensuring water security and fulfilling the nation's commitments to Tribal communities.

BACKGROUND

CONCEPT OF WATER AGREEMENTS

The law governing Tribal water rights was first established in *Winters v. United States*, a case concerning the Milk River in Montana, which bordered the Fort Belknap Indian Reservation.¹ Non-Indians had diverted the river's waters for irrigation, depriving the reservation of water. The United States sued to stop the diversion.² The Supreme Court eventually heard the case and determined that, although there was no specific treaty regarding the Milk River, an agreement existed that designated the reservation as a permanent home for the tribes. The Court noted that the reservation lands were arid and "in order to make them productive require large quantities of water."³ The Court held that the tribes did not give up their water rights when establishing the reservation, and that their rights superseded those of non-native landowners who obtained state law rights after the tribes' agreement.⁴ The Court further held that in interpreting Indian treaties "ambiguities occurring will be resolved from the standpoint of Indians."⁵ Following *Winters*, courts have generally held that "tribes have a reserved right to water sufficient to fulfill the purpose of their reservations," which rights are effective as of "the date the reservations were

¹ Leonard R. Powell, *The Supreme Court and Tribal Water Rights*, AMERICAN BAR ASSOCIATION, (Jan. 22, 2024), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/native-american-issues/supreme-court-and-tribal-water-rights/.

² Id.

³ *Winters v. United States*, 207 U.S. 564 (1908).

⁴ Leonard R. Powell, *The Supreme Court and Tribal Water Rights*, AMERICAN BAR ASSOCIATION, (Jan. 22, 2024), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/native-american-issues/supreme-court-and-tribal-water-rights/.

⁵ *Winters v. United States*, 207 U.S. 564, 576 (1908).

established.”⁶

Since 1990, the Department of the Interior's policy has been to resolve Indian water rights through negotiated settlements rather than litigation. The approach and implementation of these settlements require federal action.⁷ As of October of 2023, 39 Indian water rights settlements had been federally approved, the majority of which have been approved and enacted by Congress.⁸

Indian water rights are vested property rights as to which the United States has trust responsibilities.⁹ The United States Supreme Court has long recognized the "distinctive obligation of trust incumbent upon the Government in its dealings" with Native Americans and "under a humane and self imposed policy has found expression in many acts of Congress and numerous decisions of the court, it has **charged itself with moral obligations of the highest responsibility and trust.**"¹⁰ This trust doctrine has been at the center of dealings with Native tribes and is one of the most important principles in federal Indian law.¹¹

The Navajo Water Supply Project

Brief History

The Navajo Water Supply Project has a very long history dating back to the 1970s. In 1971 and 1984, two different studies were conducted to expand water supply to the Navajo communities and the City of Gallup.¹² In 1986, an appraisal-level estimate for a system with a main transmission line along Highway 371 was conducted, and by 2000, five viable alternatives for the project had been evaluated.¹³ The Omnibus Public Land Management Act of 2009 authorized this project as part of the Navajo Nation San Juan River Basin Water Rights Settlement, with a completion deadline of December 31, 2024, unless extended by agreement among the Navajo Nation, New Mexico, and the Department of the Interior.

The Navajo Gallup Water Supply Project spans about 300 miles of pipeline, with nineteen pumping plants and two water treatment plants. It provides sustainable water from the San Juan River to the eastern Navajo Nation, southwestern Jicarilla Apache Nation, and Gallup, New Mexico, meeting the long-term needs of approximately 250,000 people. Currently, these areas rely on a depleting groundwater supply that is expensive to access, of poor quality, and inadequate to meet the current and future demands of the served population. Over 30% of the Navajo Nation hauls water to meet their daily needs.

⁶ CHARLES STERN, CONG. RSCH. SERV., R44148, Indian Water Rights Settlements (2023).

⁷ CHARLES STERN, CONG. RSCH. SERV., R44148, Indian Water Rights Settlements (2023).

⁸ CHARLES STERN, CONG. RSCH. SERV., R44148, Indian Water Rights Settlements (2023).

⁹ CHARLES STERN, CONG. RSCH. SERV., R44148, Indian Water Rights Settlements (2023).

¹⁰ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

¹¹ U.S. DEP'T OF THE INTERIOR, WHAT IS THE FEDERAL INDIAN TRUST RESPONSIBILITY? (2017), <https://www.bia.gov/faqs/what-federal-indian-trust-responsibility>.

¹² Bureau of Reclamation, Navajo-Gallup Water Supply Project, [HTTPS://WWW.USBR.GOV/PROJECTS/INDEX.PHP?ID=580](https://www.usbr.gov/projects/index.php?id=580).

¹³ Bureau of Reclamation, Navajo-Gallup Water Supply Project, [HTTPS://WWW.USBR.GOV/PROJECTS/INDEX.PHP?ID=580](https://www.usbr.gov/projects/index.php?id=580).

In 2020, water deliveries to Navajo communities began on the Project's Cutter Lateral. Deliveries to the Jicarilla Apache Nation from the Cutter Lateral began in 2021. On the Project's San Juan Lateral, pipeline, pump station and storage construction is nearly complete, with construction of treatment and storage facilities slated for completion in 2028.¹⁴

The Project Construction Committee, comprising representatives from the Bureau of Reclamation, Gallup, the Navajo Nation, the Jicarilla Apache Nation, and New Mexico, sets the project schedule, which depends on funding from Congress and Project Participants.

The Project includes two principal pipelines (referred to as “laterals”): the Cutter Lateral and the San Juan Lateral. The Cutter Lateral transports water from the Cutter Reservoir via pipelines and pumping stations to the Cutter Lateral Water Treatment Plant, from which treated water is supplied to communities on and around the Jicarilla reservation. The San Juan Lateral diverts water from the San Juan River at the San Juan Generating Station diversion point, transports the water to a nearby reservoir for storage, then conveys the water through pumping stations and pipelines to the San Juan Lateral Water Treatment Plant, from which treated water is delivered to Navajo communities in western New Mexico and to Gallup. At peak construction, the project is expected to create 600-650 jobs.

Navajo-Gallup Water Supply Project Amendments Act of 2023 (H.R. 3977)¹⁵

H.R. 3977 amends the Northwestern New Mexico Rural Water Projects Act to extend the Project’s completion date, provide additional funding, and add other improvements to the Act.

Highlights of H.R. 3977:

- I. Increase the authorized Project cost ceiling: The Bill increases authorized funding from \$870 million to \$2.175 billion.
- II. Deferred Construction Fund:
 - A. The Bill establishes a deferred construction fund for project facilities and allows for future construction or alternative facilities.
- III. Project Service Area Expansion: The Bill authorizes expansion of the project to service area to include communities within Rio San Jose Basin, New Mexico, and Lupton, Arizona, within the Little Colorado River Basin.
- IV. Land Trust Provisions: The Bill directs the Department of Interior to take specified land into trust for Navajo Nation's benefit, including land where various project facilities are located.
- V. Renewable Energy:
 - A. Provides up to \$6.25 million for renewable energy development and \$1.25 million

¹⁴ Bureau of Reclamation, Navajo-Gallup Water Supply Project, <https://www.usbr.gov/projects/index.php?id=580>.

¹⁵ Navajo-Gallup Water Supply Project Amendments Act of 2023, H.R. 3977, 118th Cong. (2023).

specifically for hydroelectric power development within project facilities.

VI. Management of Trust Funds:

A. **Navajo Nation Operations, Maintenance, and Replacement Trust Fund:**

Establishment of a trust fund for operations, maintenance, and replacement costs with a maximum appropriation of \$250 million.

B. **Jicarilla Apache Nation Operations, Maintenance, and Replacement Trust Fund:** A similar trust fund for the Jicarilla Apache Nation with a maximum appropriation of \$10 million.

VII. Eliminate Double Taxation:

A. Tribal land:

1. Activities related to construction, operation, or maintenance of project facilities on tribal land are subject to Navajo Nation taxation and exempt from state and local taxes.

B. Non-Tribal Land:

1. Such activities on non-tribal land are subject to state taxation and exempt from Navajo Nation taxes.

VIII. Deadline Extensions:

- A. The deadline for constructing project facilities is extended to December 31, 2029.
- B. Deadlines for waivers and releases are extended from 2025 to 2030.

In sum, the Bill's amendments are designed to enhance funding, expand service areas, manage land trust issues, promote renewable energy, and ensure long-term support for water infrastructure projects benefiting the Navajo Nation, the Jicarilla Apache Nation, and the City of Gallup.

WHY WE ARE HERE TODAY

We are here today to urge the performance of a promise long unfulfilled. In 1868, the U.S., after displacing the Navajo through a series of forced marches known as the Long Walk, entered into a treaty with the Navajo, recognizing their nation, their reserved land, and, under *Winters*, their rights to water. Yet currently, over 30% of the Navajo on the reservation lack running water, and must travel great lengths to collect it.¹⁶

We are here today because the United States, as trustee, holds and exercises fiduciary responsibilities respecting Native Tribes of the highest moral and legal order, including the obligation to protect the ability of Tribes and their citizens to sustain their communities and lives on ancestral lands.

¹⁶ Leonard R. Powell, *The Supreme Court and Tribal Water Rights*, AMERICAN BAR ASSOCIATION, (Jan. 22, 2024), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/native-american-issues/supreme-court-and-tribal-water-rights/.

We are here today because water is crucial for healthy and fulfilling lives and because long-standing uncertainties and shortages of water undermine public health and economic development, impacting all aspects of daily life.

We are here today because the City of Gallup, having invested \$46 million in project capital, depends on the Project's success for its future, with nearly 45% of its residents being Navajo.

We are here today because if the Bill does not pass, Gallup's future is in jeopardy.

We will do everything we can with your Subcommittee and the Congress. Thank you for the opportunity to present this testimony to you today.