

**Testimony of Jonathan Nez
President
The Navajo Nation**

**Before the
United States House Natural Resources Committee,
Subcommittee on Water, Oceans and Wildlife**

Hearing on H.R. 644, the Navajo Utah Water Rights Settlement Act of 2019

June 26, 2019

Yá'át'ééh Chairman Huffman, Ranking Member McClintock, and members of the Subcommittee on Water, Oceans, and Wildlife. My name is Jonathan Nez. I am the elected President of the Navajo Nation. Thank you for this opportunity to present testimony on H.R. 644, the Navajo Utah Water Rights Settlement Act. I also wish to convey the gratitude of the Navajo Nation to Rep. Rob Bishop, Utah Governor Gary Herbert and Lt. Governor Spencer Cox, and the co-sponsors of this legislation for their support and leadership in ensuring that the Navajo People in southeastern Utah have the basic, modern convenience of running water.

The Navajo Nation has a large population of approximately 350,000 members and has the largest Indian reservation in the United States in the states of Arizona, New Mexico, and almost 1.2 million acres in Utah. The challenges of providing access to water on the Navajo Reservation are monumental and the conditions are dire. More than 40% of Navajo households in Utah lack running water or adequate sanitation in their homes. In some cases, such as in the community of Oljato on the Arizona-Utah border, a single spigot on a desolate road, miles from any residence, serves 900 people. The legislation provides the means to address these critical needs of the Navajo people.

The legislation ratifies an historic water rights settlement (“Settlement Agreement”) between the Navajo Nation (“Nation”), the United States, and the State of Utah, which quantifies the Nation’s water rights and provides critical funding for water infrastructure for Navajo Utah communities, including Mexican Water, Aneth, Teecnospos, Red Mesa, Naa’tsis’ áán, Oljato, and Dennehotso. The Settlement Agreement also addresses the United States’ trust obligation to the Nation to protect its water rights and provides greater certainty regarding the allocation of water use among the communities that inhabit this arid region of the Upper Colorado River Basin. The Settlement Agreement was approved by the Navajo Nation Council in January 2016. It reflects over a decade of negotiations involving officials from the Navajo Nation, the State of Utah, and since 2013, the United States.

The passage of this legislation will also advance the commitments made in the Treaty of 1868, where Navajo leaders pledged their honor to keep peace with the United States and, in return, the United States pledged to the Navajo People that their permanent homeland. The original Navajo Reservation on the border of present day Arizona and New Mexico was enlarged numerous times both by executive order and Congressional act to encompass lands where Navajos were already living. Land in Utah was added to the Reservation by executive orders in 1884 and 1905, and

additional acreage was added by the Act of March 1, 1933, 47 Stat. 1418. These Utah Reservation lands would be valueless without a water supply. In the arid West, it is clear—no lands can be a permanent homeland without an adequate supply of water, especially potable water.

As President of the Navajo Nation, I am unwavering in my commitment to protecting the Navajo people's fundamental human right to having access to the basic standards of living, including potable water supplies. The United States is likewise duty bound to make the Nation's permanent homeland inhabitable for the Navajo people. Together, we as sovereigns, along with the State of Utah, have reached a fair and equitable agreement which achieves these goals that we now present to you for ratification.

I. The Settlement Agreement

The Settlement Agreement achieves success for the Navajo Nation, the State of Utah, and the United States by quantifying the Navajo Nation's water rights in the Upper Basin of the Colorado River in Utah in a manner that will benefit not only the parties to the settlement, but all water users in the region. Without a negotiated settlement, conflict over these water rights could easily devolve into protracted, expensive, and divisive litigation. Choosing a more conciliatory and productive path, the State of Utah and the Navajo Nation devoted years to developing an agreement that would protect existing uses while at the same time guarantee the Navajo Nation a dedicated and perpetual supply of drinking water. We are grateful to Utah Governor Gary Herbert, Lt. Governor Spencer Cox, and their staff and advisors for their steadfast work to make this settlement a reality.

Of course, Indian water rights settlements require the involvement and approval of the federal trustee. In February of 2013, Interior Secretary Ken Salazar appointed a federal negotiation team to participate in the resolution of the Navajo Nation's claims in Utah. The Navajo Nation worked with the federal team to craft a settlement that comports with the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 FR 9223 (Mar. 12, 1990). The Nation is very appreciative of the hard work and support it has received from the federal negotiation team, which has been instrumental in formulating a sound and global settlement that all parties can support. The Nation is also appreciative of the work that the United States Bureau of Reclamation (Reclamation) has undertaken at the behest of the federal team to evaluate the water development projects analyzed by the Nation in determining the dollar amount of the settlement Fund. For example, Reclamation's *Design, Estimating and Construction Advisory Team Review Report: Navajo Nation/State of Utah Water Rights Settlement Projects*, a report completed in September 2013, made findings and recommendations that the Navajo Nation Department of Water Resources (NNDWR) has used to determine the best way to bring water to the Navajo people in Utah.

A. Quantifying the Nation's Water Rights in Utah

Under the Settlement Agreement, the Navajo Nation has the right to deplete 81,500 acre-feet per year of surface and groundwater from the Upper Colorado River Basin in Utah. The Nation would also secure the ability to market its water rights to the same extent as other Utah water rights holders. The Nation's water rights under the Agreement would be held in trust and are not subject to forfeiture or abandonment. The bulk of the Nation's Utah water rights would have a priority date of 1884, when the Utah portion of the Reservation was first set aside for the Navajo people. Finally, the Settlement Agreement provides for a water development fund to be used for water infrastructure development to allow the Navajo Nation to put these water rights to use.

The quantification of the Nation's water rights brings certainty to both Navajo and non-Native water users in the region, and likewise, assists federal and state agencies in the management of water deliveries in the Upper Colorado River basin. The Nation's water rights under the Settlement Agreement will be confirmed in a decree in the pending Southeastern Colorado River General Adjudication.

The Navajo Nation water uses are diverted principally from the San Juan River, which is part of the larger Colorado River system. As you are aware, this region has endured numerous challenges from protracted drought, reduction in water storage levels, endangered species requirements, and interstate and international compact obligations, to name a few. The Settlement Agreement provides much needed certainty that maintains the delicate equilibrium that is the Law of the River in these challenging times. This Settlement Agreement embodies a unique, negotiated solution that avoids litigation, and an unparalleled level of cooperation where every party leaves something on the table.

For instance, the Nation's good will effort is reflected in our commitment to not impair existing non-Indian water uses. Non-Indian water development in the San Juan River Basin has been extensive. Under the Settlement Agreement, the Nation has agreed to subordinate its rights in times of shortages to ensure that perfected non-Indian water rights holders are not deprived of their water rights.

B. Value of the Settlement

I understand that the Administration and this legislative body have a keen interest in ensuring that water rights settlements are fiscally sound and do not unduly burden the U.S. Treasury and the American taxpayer. The proposed Settlement Agreement is a good investment for the United States for two reasons.

First, the Navajo Nation will forgo seeking legal confirmation for a larger amount of water rights in litigation even though we believe we are entitled to that amount under well-established legal principles. Using conservative estimates of the value of water in this water-stressed basin, at \$3,000 to \$10,000 per acre-foot for a perpetual supply of Colorado River water, the value of the water forborne by the Navajo Nation is in the range of \$250 million to more than \$850 million. These numbers provide clear evidence that the roughly \$211 million authorization of appropriations in the bill as introduced is an excellent value for American taxpayers.

Second, ratification of the Settlement Agreement will avoid protracted litigation and the potential for greater legal exposure for the United States. The United States, as trustee for the Navajo Nation, has a responsibility to protect the Nation's trust resources. The Settlement Agreement resolves claims that the Nation could bring against the United States for failure to develop and protect Navajo water resources. These claims include the alleged failure of the United States to ensure that the Upper Colorado River Basin Compact does not restrict Navajo uses of water in Utah.

The Settlement Agreement has the additional benefit of bypassing difficult legal questions. The Nation agreed to reduce the scope of its water rights to enable the State of Utah to stay within its Upper Colorado River Basin apportionment. In addition, the Nation agreed to avoid complex legal questions regarding the applicability of interstate compact obligations to senior Indian water rights, which could destabilize the delicate balance that exists among states and water users under the Law of the River. The costs of litigation on these issues would be incredibly high for all sides. These multiple benefits from the Settlement Agreement are undoubtedly very much in the interest of all taxpayers.

Finally, an additional, major benefit from the Settlement Agreement is the ability to implement important programmatic and policy priorities using the Settlement Agreement's water infrastructure development funding.

II. Water Development Fund

Funding for water management and delivery infrastructure is essential to improve living conditions for the Nation's citizens. The economic and human costs of hauling water—which consists of conveying water in non-sterile containers ranging from relatively clean watering sources to livestock storage facilities, often over very long distances—are significant. As the Nation's population increases, the need for water delivery and treatment infrastructure will only intensify over time. One study commissioned by the Nation found that while the Navajo Tribal Utility Authority, a Navajo government enterprise, delivers about 400 acre-feet of water per year for municipal and domestic use, meeting the projected water needs by the year 2050 would require more than a fifteen-fold increase, to about 6,700 acre-feet/year. Significant investments must be made now if the Nation has any chance of meeting these future demands for water.

Safe drinking water is a basic human need, and the consequences of lack of access to reliable potable water supplies can be staggering. The Indian Health Service (IHS) reports that for every dollar the agency spends on home sanitation facilities, at least a twentyfold return in health benefits is achieved. (See <https://www.ihs.gov/newsroom/index.cfm/factsheets/safewater/>.) The funding in the proposed Settlement Agreement will support the construction of modern, water infrastructure that will yield important health benefits, conserving federal health care dollars while sparing people the economic and human costs of illness directly attributable to contaminated water and lack of adequate sanitation facilities.

Specifically, H.R. 644 establishes the Navajo Utah Settlement Trust Fund (“Trust Fund”), which will be managed, invested, and distributed by the Secretary of Interior, including interested earned. There are two accounts established in the Trust Fund: one for planning, design and construction of water development projects, and the other for operation and maintenance purposes (O&M). The legislation authorizes the appropriation of approximately \$210 million dollars to these two funds, with \$198,300,000 dedicated to planning, design, and construction and \$11,100,000 dedicated to O&M. In addition, the State of Utah will contribute \$8 million dollars for planning, design, and construction purposes. The legislation also authorizes the appropriation of \$1 million for the hydrographic surveys to complete the quantification of the Nation’s water uses in Utah, a requirement for judicial approval of the settlement in the Utah state court.

With regard to the water infrastructure construction, the Nation has carefully analyzed and identified important projects that will provide Utah Navajos much needed water management and delivery services. In 2014, NNDWR produced a "White Paper" proposing a series of water development projects to address the water needs of Navajo communities in Utah. The White Paper was the culmination of work performed by NNDWR, the engineering firm of Brown & Caldwell, and Reclamation. After consideration of all viable alternatives, the Nation proposed a regional water infrastructure supply project as the primary method to meet the minimum needs for drinking water on the Navajo Reservation in Utah. The proposed project would rely on groundwater and San Juan River surface water conjunctively to most effectively utilize available supplies given seasonal variations in surface flows. The White Paper was comprehensive in scope, as it also proposed a package of smaller developments to address long overdue projects on the IHS Sanitation Deficiency List, address necessary short-term capital improvements, and implementation of an agricultural water conservation program. The estimated cost of the projects included in the White Paper formed the basis for the amount of the Trust Fund.

Lastly, the Trust Fund approach in this legislation is unique and reduces fiscal impacts on the U.S. Treasury by eliminating the possibility Reclamation would need to seek funding for cost over-runs on projects authorized under the Settlement Agreement. Rather, the Trust Fund is held by Interior until the Nation seeks withdrawals from the account, which is estimated to begin after the settlement is lodged with the court and the Nation submits implementation plans for expenditure of the Trust Fund. The Nation would be responsible for identifying upcoming projects and providing Interior with its management and expenditure plans. This approach is consistent with the United States’ policy in support of tribal self-determination and self-governance whereby the Nation is responsible for the design, construction, and management of the water infrastructure system. The Nation is entirely prepared and equipped with the requisite expertise to undertake this effort. The Nation’s Department of Water Resources possesses the technical capacity to manage these kinds of projects and to build them in the most cost-efficient manner.

The Trust Fund approach also provides for greater flexibility, where the Nation can make any necessary adjustments - whether due to change in population size, community development plans, water quality issues, or other unanticipated developments – to best address the Nation’s needs in real time. In summary, the Navajo Nation has the institutional capacity to manage these funds effectively, to adapt to unforeseen developments, and to produce results to address the needs of the Navajo people.

Conclusion

As President of the Navajo Nation, I appear before you on behalf of the Navajo people to ask for the passage of H.R. 644. The importance of this legislation cannot be overstated. Securing the Nation's water rights in Utah, and building infrastructure to convert paper water rights into wet water, is vital to the general health and welfare of the Navajo people.

Navajo tradition teaches us that we must be in balance with the universe, and that when we are out of balance, sickness and suffering will follow. The Navajo people have had to endure great tragedies with much suffering, but we remain strong and secure in knowing who we are and where we come from. Despite incredible odds, we continue to pass on from generation to generation our culture and way of life within the Four Sacred Mountains. Today I am asking you to ensure that we have access to water in fulfillment of a basic, fundamental human right and the commitments made by the United States in the Treaty of 1868. With this guarantee of water, we will be able to live in a more harmonious state in our permanent homeland for generations to come.

Thank you. Ahéhee'.