

**Testimony of Russell Begaye  
President  
The Navajo Nation**

**Before the  
United States Senate Committee on Indian Affairs  
Hearing on S. 664, the Navajo Utah Water Rights Settlement Act of 2017**

**Wednesday, December 6, 2017**

Yá'át'ééh Chairman Hoeven, Vice-Chairman Udall, and members of the Committee. My name is Russell Begaye. I am the elected President of the Navajo Nation. Thank you for this opportunity to present testimony on S. 664, the Navajo Utah Water Rights Settlement Act. I also wish to convey the gratitude of the Navajo Nation to Senator Hatch for his commitment to improving the lives of the Navajo People and for his leadership in sponsoring this important legislation.

The Navajo Utah Water Rights Settlement Act accomplishes two things. First, the Act would authorize the Secretary of the Interior to execute, on behalf of the United States, the Navajo Utah Water Rights Settlement Agreement. 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, State of Utah, and since 2013, the federal government. Second, the Act provides funding for water supply infrastructure intended to address short-term and long-term water development needs in the Utah portion of the Navajo Nation. The challenges of providing access to water on the Navajo Reservation in Utah are monumental and the conditions are dire—more than 40% of Navajo households 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.

As this Committee is well aware, in the Treaty of 1868, Navajo leaders pledged their honor to keep peace with the United States and, in return, the United States pledged to assist the Navajo People to create a permanent homeland on their reservation lands. 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. The Navajo Nation will secure its water rights either through litigation or through settlement. As this testimony seeks to make clear, the advantages of settlement in this case far outweigh the costs, risks, and policy disadvantages of divisive litigation.

## **I. The Settlement Agreement**

The Settlement would result in a win-win for the Navajo Nation and the State of Utah 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 State of Utah and the Navajo Nation, but the federal government and all water users in the Colorado River basin. 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 the firm supply of drinking water we need for our reservation to function as a permanent homeland. We are grateful to Utah Governor Gary Herbert, Lt. Governor Spencer Cox, 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 has been working with the federal team to address their concerns about the terms of the settlement and to develop information required by 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 particularly 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 Navajo people in Utah.

### ***A. Quantifying the Nation's Water Rights in Utah***

Turning first to the quantification of the Navajo Nation's water rights in Utah, this settlement is a fair and comprehensive resolution to problems that affect not only the Navajo Nation, but also non-Indians in Utah and in other parts of the Colorado River Basin as well as federal interests such as Reclamation projects and endangered species. The work that has gone into this settlement has resulted in an agreement that is just and equitable to all parties.

As is typically the case in an Indian water rights settlement, the Navajo Nation would agree through this settlement to forbear use of senior water rights that the Nation would likely be able to establish in litigation. Less typically, the Navajo Nation has worked in partnership with the State of Utah to develop an agreement that will maintain the delicate equilibrium that is the Law of the River. The Navajo Nation recognizes that the San Juan River, the source of its Utah water rights, is part of the Colorado River system. The Colorado River is the subject of several interstate Compacts and has been a touchstone for some of the most complex water litigation of the last century. The settlement is constructed to avoid further divisive litigation, including

litigation over the applicability of those compacts to the reserved water rights of the Navajo Nation.

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 further has the right to divert and store this water right at a rate of 435 cubic feet per second. The Nation would also secure the ability to market its water rights to the same extent as other Utah water rights holders. 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 subordination provisions in the agreement are of substantial benefit to the non-Indians in Utah. Non-Indian water development in the San Juan River Basin has been extensive, especially in comparison to development on the Navajo Reservation. The records of the Utah State Engineer identify 1,510 state law based permits in the San Juan River Basin in Utah for water rights, with major surface diversions totaling more than 158,000 acre-feet per year. In the Navajo Utah settlement, as in virtually every Indian water rights settlement, the State sought to protect existing non-Indian uses from impairment by potentially senior Indian water rights. This result is possible only by the Navajo Nation agreeing to subordinate its water rights to existing non-Indian water users. As a result of this subordination, it is estimated that existing and proposed Navajo uses supplied by infrastructure constructed with the Fund will experience shortages between 1.8% and 11.6% of the time, depending on how Navajo Dam is operated upstream. When the Navajo Nation puts its entire 81,500 acre-foot per year right to use, the subordination of the Nation's water right to non-Indian uses could result in shortages for the Nation 11% to 46% of the time.

### ***B. Value of the Settlement***

I understand that the Administration and this Committee have a keen interest in ensuring that water rights settlements, including this one, make sense for the United States and for the American taxpayer. I will address this concern briefly in this testimony, and I will be glad to provide additional follow up information to fully address any concerns expressed by members of Congress or the Administration's Office of Management and Budget. There are various ways of calculating the value of the settlement, and I will highlight two of them today.

First, the Navajo Nation will forgo the use of water that we would claim in litigation and to which we claim the senior right. 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.

A second approach to determining the value of this settlement is to look more closely at the potential liability of the United States, and the litigation and related costs that would be

anticipated in the absence of settlement. The United States, as trustee for the Navajo Nation, has a responsibility to protect the Nation's trust resources. In quantifying the Nation's reserved water rights claims within the State of Utah, the settlement resolves potential claims that could be brought against the United States for failure to develop and protect Navajo water resources. These claims include the failure of the United States to ensure that the Upper Colorado River Basin Compact (UCRBC) does not limit Navajo uses of water in Utah.

In the Settlement Agreement, the Navajo Nation made concessions to protect the State of Utah in two distinct ways. First, the Nation agreed to reduce the extent of its water right claim to enable Utah to stay within its Upper Colorado River Basin apportionment. Second, the Nation agreed not to make calls against upstream water users on the San Juan River in Colorado and New Mexico because the UCRBC does not allocate San Juan River water to Utah. By agreeing not to make calls against upstream water users, the Navajo Nation sidesteps the significant question of the effect of the interstate compacts on Indian tribes, and avoids the threat of litigation that could jeopardize the Law of the River.

The costs of litigation of these issues would be incredibly high for all sides. The value of this settlement, when viewed as necessary to maintain existing interstate allocations of the Colorado River, is practically incalculable, and when this value (of keeping the settlement within Utah's Upper Colorado River Basin Compact apportionment and avoiding the displacement of existing water rights) is added to the value of the water rights discussed above, enactment of S. 664 is undoubtedly very much in the interest of all taxpayers. Finally, the forgoing discussion of the return on investment from this settlement does not take into account the programmatic and policy priorities that would be fulfilled with the funding that this settlement proposes for water infrastructure development.

## **II. Water Development Fund**

The settlement includes a water development fund (Fund). Funding for water management and delivery infrastructure included in this settlement would 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 obtained from water sources ranging from relatively clean watering points to livestock storage facilities, often over very long distances—are significant. As the Navajo Nation's population increases, the need for water delivery and treatment infrastructure intensifies. S. 664 would establish two funds, one for planning, design and construction and the other for operation and maintenance. The bill authorizes the appropriation of approximately \$210 million dollars to these two funds. The State of Utah will contribute \$8 million dollars to the funds for planning, design, and construction. The United States is also authorized to appropriate \$1 million for the hydrographic surveys that are needed to complete the quantification of Navajo water rights.

Unfortunately, as a result of the hurricanes that wrought havoc in Houston, Florida, and Puerto Rico this fall, the terrible economic and social costs associated with the lack of safe water supplies were thrown into vivid relief for many Americans. Whereas less than 1% of Americans overall live in areas without safe water supply and waste disposal facilities, the corresponding

rate on the Navajo Reservation in Utah has been estimated to be at least 40%. Investment in basic water delivery infrastructure is essential for the Navajo people, as it is for all Americans; in the absence of the investment in human sustenance this settlement represents, more Navajo families will be consigned to living without running water. 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/>.) Accordingly, the water infrastructure the Nation plans to construct with funding provided in this settlement will yield important benefits that will conserve 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.

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 assessing alternatives methods that might be employed to meet Navajo water needs. 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 project as proposed would rely on groundwater and San Juan River water conjunctively to most effectively utilize available supplies. In an attempt to meet water needs in Utah in a comprehensive manner, the White Paper also proposed a package of smaller developments that would address long overdue projects on the IHS Sanitation Deficiency List, address necessary short-term capital improvements, and implement an agricultural water conservation program. The estimated cost of the projects included in the White Paper formed the basis for the amount of the settlement Fund.

The Nation, together with the United States and the State of Utah, has expended significant time and effort to develop proposed uses of this funding that will give us the greatest return from the investment. However, there is flexibility built into the settlement, and once funds are appropriated under this Act, actual project design, construction, and management will be the full responsibility of the Navajo Nation. This Fund-based approach is unique. While other settlements authorize a federal agency to plan, design and construct water infrastructure projects, there are several reasons that we think a settlement fund is the right approach for this settlement. First, the Navajo Nation has an expert Department of Water Resources with the technical capacity to manage these kinds of projects and to build them in the most cost-efficient manner. Second, the water planning studies that have preceded this settlement make clear that future developments that cannot be accurately projected now—whether in population size, community

development, water quality, or others—and the Nation needs flexibility to adapt its water infrastructure plans on an on-going basis. Third, given the fact that the Navajo Reservation extends into multiple states, there are potential costs savings in constructing water projects that may cross-state lines. Fourth, Navajo management of the funds is consistent with the federal goal of tribal self-determination. While the Nation is aware that funding associated with this settlement is limited to use within the boundaries of the State of Utah, the flexibility to adopt project designs that take advantage of economies of scale is particularly important for this settlement. In summary, the Navajo Nation has the institutional capacity to manage these funds effectively, to adapt to unforeseen developments, and to produce results demanded by the Navajo people.

However ultimately configured, the projects that the Navajo Nation plans to undertake with the settlement Fund will make a lasting impact on the lives of the Navajo people in Utah. Together, a regional water supply project, coupled with short-term capital improvements and water/sanitation facilities connecting homes to the water supply project, though modest in terms of overall need, represent a comprehensive approach to meet current and future demands. The work on agricultural water conservation will help Navajo farmers deal proactively with the risk of water shortage, and allow for the potential leveraging of funds available from the USDA for water management. The Fund will make possible projects that will lead to improved water management and water availability, making the Navajo Reservation in Utah a place where people can live and work.

### **Conclusion**

I cannot emphasize enough that securing the Nation's water rights, and building infrastructure to convert paper water rights into wet water, are the necessary foundation for economic growth. S. 664 is important legislation that would confirm the settlement of the Nation's water rights and help build desperately needed water infrastructure. When I campaigned for President, the need for infrastructure development was constantly brought up as a priority by my constituents, the Navajo people. Infrastructure development is one of the Four Pillars of my administration, together with job creation, and programs for Navajo veterans, elders and youth. Your assistance in enacting S. 664 into law will help the Navajo people to realize our economic potential, creating jobs and improving living conditions in a part of the country that has been ignored for far too long.

Since signing the Treaty of 1868, the Navajo people have taken their treaty obligations seriously. When the United States needed us, brave Navajo men and women heeded the call to serve in all branches of the armed forces. The Navajo Code Talkers used our language to devise an unbreakable code; there could be no better example of the way the partnership between the United States and Native peoples strengthens us all. For my people, fighting to preserve American freedom is also fighting to preserve the Navajo homeland. The American ideal is not just an abstraction; it is a place where communities like those within the Navajo Nation have a chance to develop into viable economies, where our young people can learn our values, and where our culture can thrive. We have a saying, *tó bee iiná*—water is life; water helps us live. Without water and a means to get it to our people, we cannot survive.

This settlement legislation, if enacted, will help the Navajo Nation to build vital infrastructure and help our next generation to be our most successful generation yet. We are asking the United States to fulfill its promises under the Treaty of 1868 to work with us to create a viable homeland. We stand ready to work with Congress and the Administration, together with the State of Utah, to push this settlement to this finish line and to ensure that it is implemented. Again, we appreciate Governor Herbert's and Senator Hatch's leadership and the Committee's attention to this important issue. With your help, we can secure a bright and prosperous future for the Navajo Nation. Thank you. Ahéhee'.