TESTIMONY OF MARTIN KOWEMY, JR.

GOVERNOR OF THE PUEBLO OF LAGUNA

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

REGARDING S. 4898

THE PUEBLOS OF ACOMA AND LAGUNA WATER RIGHTS SETTLEMENT ACT OF 2022

NOVEMBER 16, 2022

Good afternoon Chairman Schatz, Vice-Chairwoman Murkowski and members of the Committee. My name is Martin Kowemy, Jr. and I am the Governor of the Pueblo of Laguna. The traditional name of the Laguna people is *Kawaika,* meaning lake people.

I'm here today to discuss S. 4898, the Pueblos of Acoma and Laguna Water Rights Settlement Act of 2022. I'm going to tell you about the history of our Pueblo and changes in our basin necessitating this settlement. I'll then highlight the major elements of the settlement legislation and the benefits it will provide to the Pueblo.

Before I start, I'd like to note that the lack of water in the Rio San Jose Basin is over 150 years in the making. As it stands, our basin is one of the driest in the State of New Mexico, if not the country, and without Congressional action things will only get worse.

1. **The Pueblo's long history of agriculture on the land base we have occupied since time immemorial.**

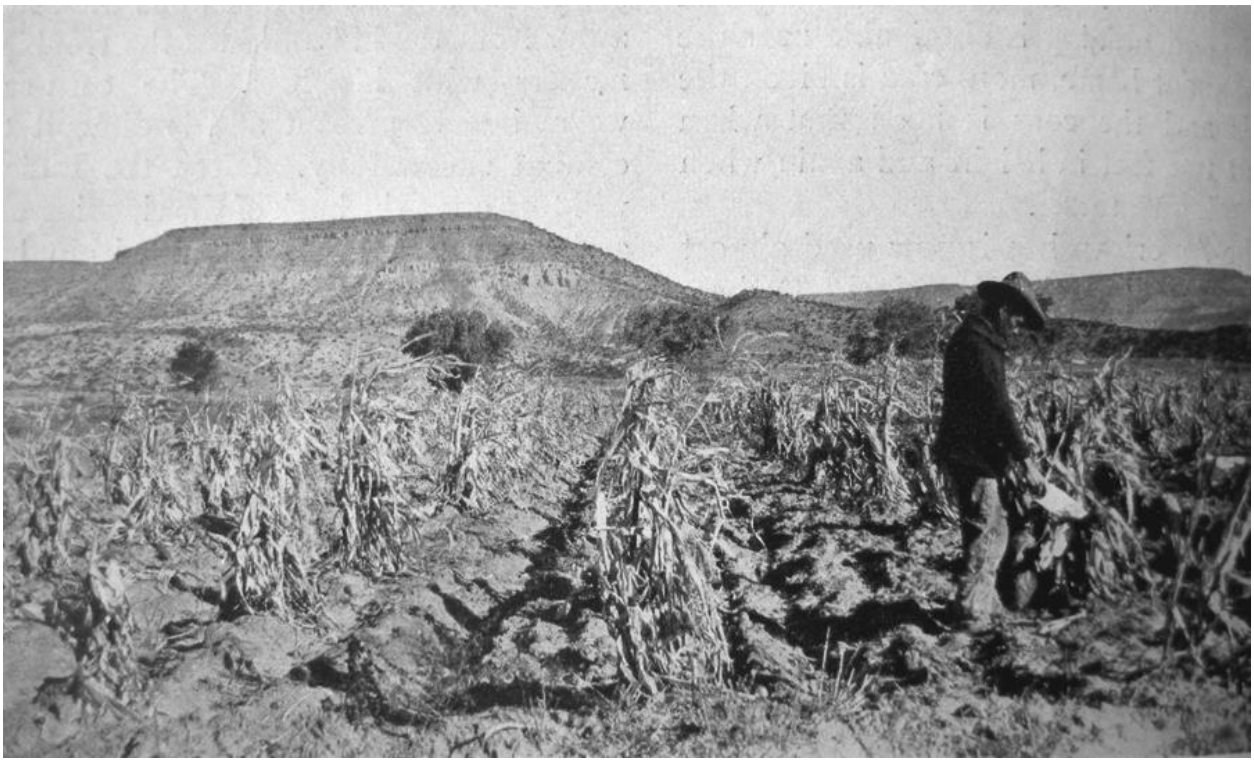
The Pueblo of Laguna's economy has historically relied heavily on agriculture, particularly subsistence style farming and trade.[1] We used the water available to us to produce food to feed our families and to sell or trade for items we could not produce ourselves.

We have always been farmers[2] and water engineers. We know from our oral traditions, and from recent geo-archaeological investigations, that our ancestors, in addition to being farmers, were master dam builders and water engineers.[3] They designed and built vast systems of irrigation ditches and massive reservoirs before the first Spanish contact with Pueblo people.

[1] Robert L. Rands, 1974, Laguna Land Utilization: an Ethnohistorical Report, pp. 211–407 in David Agee Horr, ed., *Pueblo Indians IV,* New York: Garland Publishing, pp. 328–329.

[2] The sweet corn grown today at our Pueblo is believed to be an aboriginal cultigen. George F. Carter, 1948, Sweet Corn Among the Indians, *Geographical Review* 38(2):218.

[3] *See* Gary Huckleberry, T. J. Ferguson, Tammy Rittenour, Christopher Banet, and Shannon Mahan, 2016, Identification and Dating of Indigenous Water Storage Reservoirs along the Rio San José at Laguna Pueblo, Western New Mexico, USA. *Journal of Arid Environments* 127:171–186; *see also* Julian Scott, 1893, Pueblos of Laguna, Acoma, and Zuni, in *Moqui Pueblo Indians of Arizona and Pueblo Indians of New Mexico: Extra Census Bulletin* by Thomas Donaldson. Government Printing Office, Washington, D.C., pp. 123–124.



A Laguna farmer husking corn into a sacking apron. This irrigated field is located in the old lake bed west of Laguna Pueblo. Source: Steece 1921, Corn Culture, p. 420. (Ferguson 2007)

Harvested corn being processed at Laguna Pueblo, including ears of roasted corn suspended by the husks and ears of corn being dried on the ground. Source: Steece 1921, Corn Culture, p. 421. (Ferguson 2007)

In fact, early Spanish explorers recognized our extensive water distribution and retention systems and made note of them. The first mentions of Pueblo irrigation systems in New Mexico were made in 1581 and 1582 by the chroniclers of the Chamuscado-Rodriguez and Espejo expeditions, respectively. Diego Pérez de Luxán's report of the Espejo expedition describes "many irrigated planted fields of corn, with their ditches and dams . . ." in the area between "a large lake [*una laguna grande*]" on the Rio San Jose and a place about four leagues (approximately thirteen miles) upstream.[4]

This laguna would have been the large reservoir behind a dam on the Rio San Jose built by our ancestors next to Old Laguna. The ditches in fields within this 13-mile area would have been on lands still held today by Laguna and Acoma.[5]

The Laguna people continued to rebuild and maintain our dams and ditches ourselves throughout the Spanish and Mexican periods and into the American period.[6] In 1846, Jacob Robinson, a member of the Doniphan expedition, described our reservoir at Old Laguna as follows:

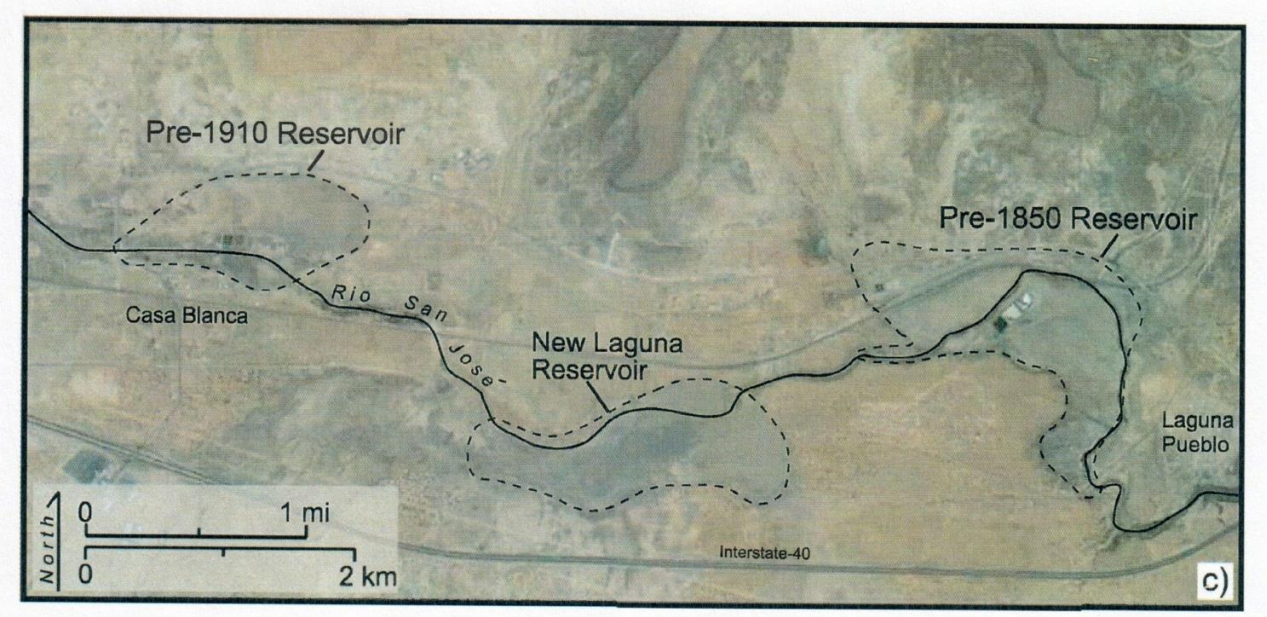
> Here is one of the most singular marks of civilization ever seen among the Indians. Across a ravine is built a dam of rock 150 feet long, and 50 feet high; this stops the water that comes down from the mountains in the rainy season, and forms a lake six or eight miles in circuit, where otherwise here would be a dry plain. In the dry season they let out the water as they need it upon their lands, and thus raise good crops, and support two thousand inhabitants with large flocks, where but for this contrivance would have been nothing but the wild and arid desert.[7]

We continued to irrigate our lands using our traditional systems into the early 20th century. Then in the early 1900's, the U.S. Indian Irrigation Service began replacing our centuries-old irrigation systems with concrete structures but neglected to maintain or rebuild the concrete structures they imposed on us. We could not maintain these replacement structures using our traditional methods and materials.[8]

The Laguna reservoir built and maintained by our ancestors stood the test of centuries. Yet if you visit our Pueblo today, you will not see a reservoir next to the Village of Laguna, the principal village of the six traditional villages that comprise our vibrant community. The New Laguna Reservoir built by the U.S. in replacement of our reservoirs on the Rio San Jose

[4] *See* Richard Flint, 2015, Laguna Pueblo History Revisited, *New Mexico Historical Review* 90(1):7–30 at 20-21; *see also* Richard Flint, *Translation and Analysis of Spanish Documentary Sources: Supplemental Report*, Expert Report, *Kerr-McGee*, 5–8 (Jun. 22, 2012).
[5] *See* Flint 2015 at 21.
[6] *See* Flint 2015 at 23-24.
[7] Jacob S. Robinson, Journal of the Santa Fe Expedition (Narrative Press, 2001), at 23.
[8] *See* T. J. Ferguson, *Traditional Farming at the Pueblo of Laguna,* Expert Report, *Kerr-McGee*, at 14 (Jan. 24, 2007).

sedimented in and its dam was breached decades ago.[9] It still has not been replaced by our trustee.



Overlay of three former reservoirs on Google Earth image of Pueblo of Laguna lands in the vicinity of the Village of Laguna: 1) the lake (reservoir) at Old Laguna built by the people of Laguna and designated the "Pre-1850 Reservoir" by researchers, 2) the reservoir in the Laguna community of Casa Blanca built by the people of Laguna, and 3) the New Laguna Reservoir, the most recent, constructed by the U.S. Indian Irrigation Service in the 1930s. Source: Huckleberry *et al.* 2016 at 172, Figure 1.c)

2. The history of major upstream water development by junior users.

While the Pueblo increasingly suffered from the cumulative effect of the U.S. neglect of replacement irrigation structures, junior upstream users increasingly accessed our water without challenge from the United States until it was too late to prevent the devasting impacts to our water supply and our people.

Up until the late 19th Century, the Pueblos of Acoma and Laguna (collectively "Pueblos") irrigated thousands of acres of agricultural fields along the Rio San Jose.

Upstream diversions on the mainstem Rio San Jose began in the late 19th Century, depriving both the Pueblo of Laguna and Acoma of surface water. These diverters included Fort Wingate in the 1860s, a railroad construction camp in the 1880s that became the City of Grants, and the Bluewater Toltec Irrigation District which built the original Bluewater Dam on the headwaters of the Rio San Jose in 1894.

[9] *See* Huckleberry *et al.* 2016 at 176.

In the 20th century, municipalities in the valley grew and other groups came to the Rio San Jose Valley. Various junior users began to exploit groundwater and by the mid-20th Century were making major groundwater withdrawals:

- the City of Grants drilled its first municipal well in 1929;
- Grants and other municipal users' increased substantially starting in the mid-20th Century;
- Bluewater-Toltec Irrigation District started tapping groundwater in the 1940s, and through extensive groundwater irrigation Grants became known as the Carrot Capital of the United States;
- in the 1950s, uranium mining started up on Mt. Taylor, and uranium mills opened in the Rio San Jose Valley and started pumping yet more groundwater; and
- a regional coal-fired power plant started pumping groundwater in the 1980s.[10]

Over a century of unimpeded diversions by junior users resulted in irreversible damage to the water supply. The Pueblos have suffered the permanent loss of most of the flow from Rio San Jose that has sustained our people since time immemorial.

Major junior users pumped so much groundwater that the water stopped spilling from the springs at Ojo del Gallo and reduced the flow from Horace Springs—both Ojo del Gallo and Horace Springs are major sources of water for the Rio San Jose historically. The stream flow has been dramatically reduced from an estimated 16,400 AFY, equivalent to 22.6 cubic feet per second[11] prior to upstream development to a mere 2.4 cubic feet per second in 2020 at the upstream boundary of the reach flowing through the Pueblos.[12]

This loss of water has had a profound effect on the Pueblo community and its culture. Depleted stream flows substantially reduced the Pueblo's ability to irrigate its agricultural fields on the mainstem Rio San Jose and forced members of the Pueblo to purchase food instead of growing it and selling or trading it for other needed items.[13] We have important ceremonies that require a flowing river, but at times now the Rio San Jose is dry and this is heartbreaking. Equally devastating is the effect of lost flow on our riparian zone that has nurtured native plants

[10] *See* Frenzel, P. F., *Simulation of Ground-Water Flow in the San Andres-Glorieta Aquifer in the Acoma Embayment and Eastern Zuni Uplift, West-Central New Mexico*, USGs Water Resources Investigation Report 91-4099 (1992).
[11] Wolf, Cristopher, *Hydrogeology and Geochemistry of Horace Springs, Pueblo of Acoma, New Mexico.* New Mexico Geological Society Guidebook, 67th Field Conference, Geology of the Belen Area, 397-403 (2016).
[12] Between October 1990 and October 2004, the average flow had dropped to 4.21 cfs, and was only about 3.5 cfs in 2004. Based on the 15-minute measurements at the USGS gage the decline has continued, and in water year 2020 the average flow was only 2.42 cfs. *See* USGS 08343500 Rio San José at Acoma Pueblo, NM, https://waterdata.usgs.gov/monitoring-location/08343500/#parameterCode=00065&period=P7D.
[13] *See* Ferguson 2007 at 145-149; *see also* Paul V. Hodges, *Report on Irrigation and Water Supply of the Pueblos of New Mexico in the Rio Grande Basin,* National Archives RG 75, E657 (1938) at 362; John J. Ward, *Rebuttal Opinion: Analysis of the Undepleted Flows in the Rio San Jose and Tributaries, Acoma and Laguna Pueblos,* Expert Report prepared for the United States, *Kerr-McGee,* at 18-23 (Nov. 29, 2010).

and medicines we harvest for our ceremonies. Intermittent stream flow, and shortages and loss of traditional-use plants on our lands, affects how we conduct our traditional ceremonies.

While we have borne the brunt of the impacts of water development by junior users, located as we are at the bottom of the stream system, we did not stop maintaining our ditches and calling the water down from the mountains and from Bluewater Creek. We did not stop irrigating from our traditional ditches, and we did not stop our traditional ceremonies. We used, and continue to use, the little water that remains to grow our crops and follow our traditional practices.

Santiago Riley discusses the sweet corn, blue corn, chile, squash, cucumbers, pumpkins, and watermelons he grows in his irrigated field along the Rio San José in New Laguna. Photograph by T. J. Ferguson, September 28, 2005. (Ferguson 2007)

Hydrologic studies by the U.S. and the Pueblos indicate that even if all current junior water users stopped using water in the Rio San Jose basin, the system has been so depleted that the system would not recover to provide historical flow levels in the Rio San Jose in the Pueblos' reach for decades, if ever.

Yet we will continue to use what remains of the river's flow, even though it is not nearly enough to maintain our way of life. We need water for drinking and cooking, for everyday use, for ceremonial and cultural uses, as well as for the economic development needed to provide for our people.

We need your approval for this water rights settlement to recognize the senior water rights of the two Pueblos, and to protect what little flow is left in the Rio San Jose.

3. The Water Settlement Negotiations.

S. 4898 and the water settlement it ratifies is the product of over 40 years of litigation and eight years of negotiation.

The Pueblos, as the most senior water users in the stream system, implored the U.S. to protect our water supplies from these upstream users early in the U.S. superintendency following the Treaty of Guadalupe Hidalgo in 1848. It was over a century before the U.S. took action. Finally, in 1982, the U.S. filed a suit on behalf of the Pueblos of Laguna and Acoma against major junior groundwater users in federal district court claiming damages for trespass and seeking injunctive relief.[14] To protect themselves from the trespass suit, some of those users immediately filed lawsuits in state court to start a general stream adjudication of the Rio San Jose.[15]

In this way, the junior users started the water rights adjudication known as *New Mexico ex rel. Martinez v. Kerr-McGee Corp.,* and the trespass case was "deferred" by the federal court in favor of the general stream adjudication.[16] As a consequence, relief to the Pueblos was delayed another 40 years while the adjudication slowly ground forward.

In the spring of 2014, instead of continuing on a litigation path that chooses winners and losers in our stream system, we, along with the United States, the State of New Mexico, the Pueblo of Acoma and other major stakeholders, decided to look for a different, negotiated resolution for the Rio San Jose Basin.

Negotiations continued for eight years, resulting in a Settlement Agreement among various local parties that forms the basis of the settlement legislation before you. The parties who have signed the Agreement are:

- Pueblo of Acoma
- Pueblo of Laguna
- Association of Community Ditches of the Rio San Jose
- State of New Mexico
- City of Grants
- City of Milan
- Bluewater Toltec Irrigation District
- La Acequia Madre del Ojo del Gallo
- Moquino Water Users Association II
- Murray Acres Irrigation Association
- San Mateo Irrigation Association
- Seboyeta Community Irrigation Association

[14] *United States v. Bluewater-Toltec Irrigation. District*, No. 82-cb-1466 (D.N.M).
[15] *See United States v. Bluewater-Toltec Irrig. Dist.*, 580 F. Supp. 1434 (D.N.M. 1984).
[16] *See* Attachment 1, Map, Rio San Jose Settlement Adjudication Area and Pueblo Lands.

- Cubero Acequia Association
- Cebolletita Acequia Association
- Community Ditch of San Jose de la Cienega

The Navajo Nation has been active in the negotiations since 2018. As stated in the Settlement Agreement, the parties intend to reach a settlement with the Navajo Nation that will be an addendum to our Agreement, and the Nation will become a party and signatory to the Agreement upon written consent of the Nation and the parties.[17]

4. Key Provisions of the Settlement Agreement and Legislation.

We need a water rights settlement to recognize and protect the senior water rights of the two Pueblos, and to protect what little flow is left in Rio San Jose. But we understand that shutting down our neighbors will not solve the problem. After more than a century of our trustee failing us, it is too late for that solution.

Instead of seeking to curtail other water users, the Settlement approach is to find alternative sources of supply for the Pueblos.

We studied alternative water sources and water infrastructure costs together with the Bureau of Reclamation in a detailed, year-long Value Planning Study process. As that study showed, finding, developing, and conveying to our Pueblo homelands replacement water in the Rio San Jose Basin today is not cheap.

In keeping with our tradition as water engineers, we are not asking the federal government to build a project for us. In our "fund-based" settlement *we* take on the management and responsibility of water infrastructure planning, permitting, development, operation and maintenance—instead of the federal government.

Our settlement trust fund established in the legislation is not attached to a particular water supply project because the Pueblo wishes to further assess the alternatives and exercise our self-determination in selecting sources of water to develop for our Pueblo lands and people.

In exchange for meaningful funding to secure and develop water, the Pueblos agree to:

- make no priority calls against non-Indian uses under existing water rights; and
- not impair other users in development and use of groundwater by the Pueblos on Pueblo lands.

The main elements of this comprehensive settlement of Pueblo water rights include the following:

- This Act fairly and finally settles the claims of the Pueblo of Laguna, and the United States acting as the trustee for the Pueblo of Laguna, in the general stream adjudication of the Rio San José Stream System entitled, *"State of New Mexico, ex rel. State Engineer v.*

[17] *See* Joint Status Report, *Kerr-McGee*, filed Oct. 28, 2022.

Kerr-McGee, et al.," pending in the Thirteenth Judicial District Court for the State of New Mexico.

- The Act also recognizes water rights of the Pueblo of Laguna, and the United States acting as the trustee for the Pueblo of Laguna, in the Rio Puerco Basin and limits future claims for the Pueblo's water rights in that basin.
- The legislation establishes a separate trust fund for each Pueblo. The following amounts are authorized for the Pueblo of Laguna:
    - $464 million in the Laguna Water Rights Settlement Account, to be used for water infrastructure development, acquiring water supplies, Pueblo Water Rights management and administration, watershed protection and enhancement, support of agriculture, water-related Pueblo community welfare and economic development, and settlement implementation costs, and $15 million of this amount is to be made available upon appropriation for installing groundwater wells on Pueblo lands to meet immediate domestic, commercial municipal, and industrial needs;
    - $26 million in the Water Infrastructure Operations and Maintenance Account; and
    - $3.25 million in the Feasibility Studies Account, to be made available upon appropriation, to facilitate our selection of alternative water sources.
- A further $50 million is authorized by the legislation for the Acomita Reservoir Works Trust Fund, a joint trust fund for the two Pueblos, to be made available upon appropriation for the purpose of rehabilitating this BIA-constructed reservoir and appurtenances that was built to provide water storage for both Acoma and Laguna but has been in disrepair for many years.
- Under the Settlement, each Pueblo's water rights will be administered on Pueblo lands under a Pueblo Water Code similarly to water rights administration by the New Mexico State Engineer on non-Indian lands.
- The Pueblo permit processes will include substantive and procedural protections for protestants, including the opportunity to appeal Pueblo water permitting decisions to the state court.
- The Acéquias will receive funding from the State for water infrastructure improvements and other purposes, and the City of Grants and the Village of Milan will receive funding from the State to improve their water and wastewater infrastructure. The hydrologic benefits of these improvements will, in turn, mitigate impacts of Pueblo water development.

In considering these costs of our settlement, it is essential to remember that we lost the abundant, low cost, renewable surface water in our homeland on the United States' watch, through no fault of our own.

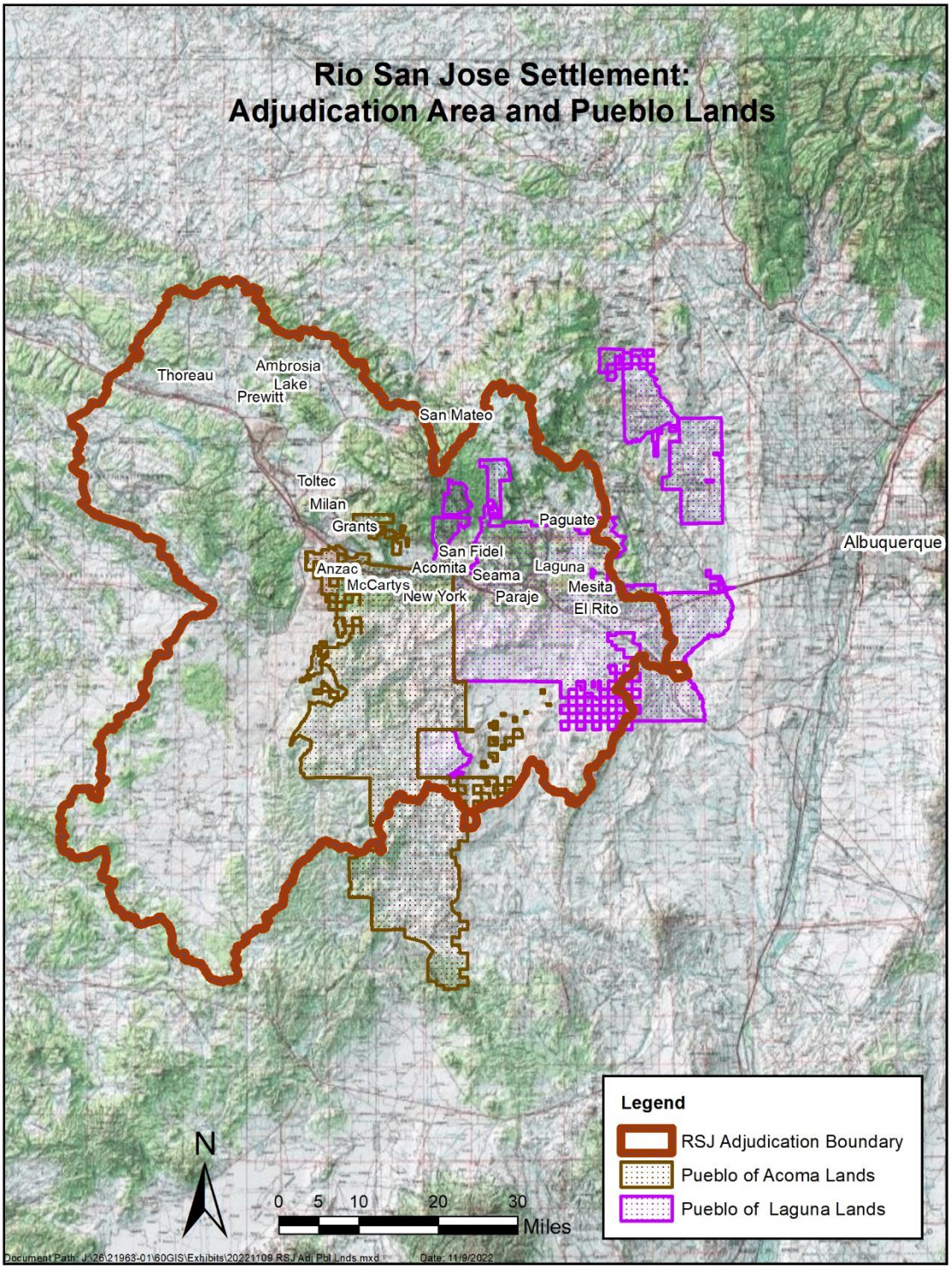
5. Conclusion

Passage of S. 4898 is absolutely necessary to secure the future of the Pueblo of the Laguna. We believe this fund-based settlement is the best opportunity for the Pueblo to determine its future by securing and developing ourselves appropriate water sources for our community.

This settlement will provide us with the means to procure the water needed for everyday uses and enable our people to survive and thrive on our homeland. Without a secure water supply, our ability to continue to live and work on our own land, as we have for centuries, is at risk.

Thank you for the opportunity to testify today. I'm happy to answer any questions the Committee may have.

Attachment #1


Rio San Jose Settlement:
Adjudication Area and Pueblo Lands
Thoreau
Ambrosia Lake
Prewitt
San Mateo
Toltec
Milan
Grants
Paguate
San Fidel
Anzac
Acomita
Seama
Laguna
McCartys
New York
Paraje
Mesita
El Rito
Albuquerque
Legend
RSJ Adjudication Boundary
Pueblo of Acoma Lands
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