**Testimony of**
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**Interstate Stream Commission Secretary**
**Before the House Committee on Natural Resources,**
**Subcommittee on Water and Power**
**Concerning H.R. 3342**
**Presented September 9, 2009 by**
**DL Sanders, Chief Counsel to the New Mexico the State Engineer**

Chairwoman Napolitano and Members of the Committee:

Thank you for the opportunity to present the views of my office on H.R. 3342, the "Aamodt Litigation Settlement Act." I share with Governor Richardson the conclusion that passage of this bill would produce a fair and long-overdue resolution of the water rights claims of four New Mexico Pueblos and it is highly deserving of Congressional support. I wish here to set forth for you some of the main reasons for that conclusion and then describe some of the substantial changes the Settlement Parties have agreed to make to their settlement, and this implementing legislation, in order to address concerns expressed by the Department of Justice and Department of the Interior. I hope that these comments will provide the Committee with a fuller understanding of the substance and significance of this settlement and why it merits your support.

Why the State of New Mexico Strongly Supports this Legislation

First, all New Mexicans, not just these litigants, have suffered the costs of the protracted litigation over the water rights claims of these four Pueblos. The *Aamodt* suit was filed over 43 years ago, with active litigation for the first thirty-three years, followed six years of ultimately successful negotiation to reach a settlement agreement. Litigation costs, direct and indirect, particularly for the State and the United States, have been enormous. The communities have borne the heavy costs of continued strife and conflict over water between Pueblos & non-Pueblos, senior and junior users, in the highly polarizing environment of litigation. The region has incurred the economic costs of lost opportunities for economic development, the inability to grow businesses or communities when the supply of the most fundamental resource - waters - is uncertain. The settlement reached by the parties, as implemented by H.R. 3342, will directly address all of these issues, by ending the unending stream of litigation costs and instead investing in this settlement, which will finally achieve judicial determinations of Pueblo water rights and lay foundations for Pueblo economic development and self-sufficiency.

Second, the proposed settlement is fair. It recognizes large first-priority water rights in the Pueblos commensurate with the acreage historically irrigated by them: depletions of more than 3,600 acre-feet annually for the *Aamodt* Pueblos. But this settlement also contains its own unique locally-suited mechanisms whereby centuries-old non-Indian uses will be allowed to continue as well as the Pueblo uses. In addition, water

for Pueblo economic development will be imported or purchased - about 2,300 acre-feet per year - with the last remaining uncontracted water from New Mexico's San Juan Chama Project (SJCP), developed by the United States, going to its Indian beneficiaries. Finally, infrastructure locally appropriate to this settlement, with substantial state and local cost share, will be provided to meet specific Pueblo health, safety and economic development needs.

The Settlement Parties' Actions to Address the United States' Expressed Concerns

H.R. 3342 is identical, in many of its substantive settlement terms, to legislation introduced in the second session of the 110th Congress, H.R. 6768 in the House and its companion bill in the Senate, S. 3381. H.R. 6768 and S. 3381 combined both the Taos Pueblo Indian Water Rights Settlement and the Aamodt Litigation Settlement in two Titles in each bill and they were the subject of hearings before this Committee and the Senate Indian Affairs Committee - on September 25, 2008 before this Committee and on September 11, 2008 before the Senate Indian Affairs Committee.

The legislation before you, H.R. 3342, does differ from the previous legislation in some ways, primarily as a result of extensive discussions between the Settlement Parties and representatives of the Departments of Interior and Justice in order to accommodate those Departments' requests for changes to better clarify the obligations of the United States and to better protect its financial, trusteeship and sovereign interests. I would like to show you, with just a few examples, the extent to which the state and the other Settlement Parties have done that.

On September 11, 2008, before the Senate Indian Affairs Committee, Mr. Michael Bogert, then Chairman of the Working Group on Indian Water Rights Settlements, provided the Bush Administration's views on S.3381 from the Department of the Interior, and by letter of September 26, 2008 to this Committee and the Senate Indian Affairs Committee, Mr. Keith B. Nelson, Principal Deputy Assistant Attorney General, provided the same on behalf of the Department of Justice.

Mr. Bogert and Mr. Nelson repeatedly emphasized that the waivers contained in S. 3381 and H.R. 6768 did not adequately protect the United States from future liability, "including breach of trust claims." In Aamodt, Mr. Nelson noted that there was "no clear waiver of claims relating to damages to land and other resources caused by past loss of water and off-reservation water rights." He recommended that, in light of the previous waiver-related litigation problems the United States had experienced, the parties in their legislative drafting "should bring to bear here the lessons learned."

I responded at that time that the Settlement Parties had sought the active participation of the United States on this and other questions literally for years before these settlements were finalized, but had received no substantive participation or guidance, and that, in fairness, the time for consideration of the proposed United States' proposals regarding waivers was during settlement negotiations, not years after the settlement agreement was finalized. Nevertheless, the Settlement Parties recognize the

substantial interest of the United States in these provisions, and we have all made great efforts to accommodate them. Specifically, the revised waiver provisions in both H.R. 3342 and H.R. 3254, the "Taos Pueblo Indian Water Rights Settlement Act," presently also pending before this Committee, now very largely track the Department of Justice's "model waivers," which we understand is exactly implementing Mr. Nelson's belief that the legislation "should bring to bear here the lessons learned." That is not to say the waiver provisions are identical in the two bills, because the specifics of each settlement are to some extent reflected there. However, both bills' waiver provisions certainly contain the "clear waiver of claims relating to damages to land and other resources caused by past loss of water and off-reservation water rights" that the Department of Justice's letter said was prominently missing in HR 6768. It is my belief that the Settlement Parties have gone to extraordinary lengths, substantially modifying the terms of their agreement, to accommodate the United States' demands regarding these waiver provisions, but I am also confident that the result we have recently arrived at will fully achieve the expressed goals of clarifying and limiting the obligations of the United States, protecting it from future liability, and making clear that its interests and powers are properly recognized and preserved.

In addition to objecting to the terms of the waivers in HR 6768, both Interior and Justice Department representatives expressed concern over language in the Aamodt title of the bill which they believed would require the United States to "acquire" a specified quantity of water rights for the Pueblos irrespective of cost or difficulty and to "obtain" a New Mexico State Engineer permit to move the water rights to the Rio Grande point of diversion for the Regional Water System. The Settlement Parties have responded to that concern by agreeing that the obligations of the United States shall be limited to acquiring the identified water rights and no more, that the cost will be as specified and no more, and that the Secretary need only "seek" to obtain the necessary permits.

The Bush Administration also recommended that Congress more precisely clarify the United States' responsibility regarding delivery of the SJCP water contemplated for use in the two settlements, noting that the concern arose from the fact that this water supply is to be held in trust by the United States. The Settlement Parties agreed that this matter should be clarified and have directly addressed this issue by providing, in Sect. 103(d) of H.R. 3342 (and in Sec. 9(b)(3) of H.R. 3254) that these water supplies shall be subject to the San Juan-Chama Project Act (Public Law 87-483, 764 Stat. 97), and that "no preference shall be provided to the Pueblo(s) ... with regard to the delivery or distribution of San Juan-Chama Project water or the management or operation of the San Juan-Chama Project." We believe that this provision definitively answers any question of possible Indian preference and provides the certainty that the United States was seeking.

Remaining Issues

As of today, the settlement parties have agreed to every one of the United States' requested changes to H.R. 3354 except one – a modification of Sects. 203(e) and (f) to substitute a written Secretarial determination of "substantial completion" of the Regional

Water System, with limited review under the Administrative Procedures Act, for the Decree Court process contemplated by the Settlement Agreement and current legislative draft. The state is willing to continue discussions with the United States on this issue, but points out that it, and the other settlement parties, are still waiting to see some indication of support from the United States for this settlement. Compromise is a two-way street.

## CONCLUSION

In conclusion, the parties understand that this settlement commits the United States and the State of New Mexico to significant financial obligations. The Bush Administration claimed that it cost "too much," with arguments based on Interior's Criteria and Procedures ("C&Ps"). While recognizing that more factors than the calculated legal exposure to the United States are to be considered under the C&Ps, the testimony from the Bush Administration's failed to acknowledge that it had repeatedly refused to consider the value of or assign any value to fulfilling the prominent C&Ps "goal of long-term harmony and cooperation among all parties." That is a significant omission, because exactly that "long-term harmony and cooperation among all parties" is what these settlement parties have gone to extraordinary lengths to achieve, and it is from all perspectives - personal, local, and regional - one of the biggest goals and benefits of this settlement. This settlement creates complex and tightly interwoven water use, sharing and administration agreements among the parties. These parties have truly committed themselves to a water future based on harmony and cooperation and any fair evaluation of the cost of this settlement should not neglect this factor.

At this point, we have successfully accommodated the vast majority of the United States' demands and those results are reflected in the language of the bill before you, as well as the very recent agreements to modify that language to accommodate, even at this late time, absolutely as many as possible of the United States' requests. Believing that we have in good faith fairly addressed all the non-monetary concerns raised by the United States insofar as possible given the structure of the settlement and that it fulfills the C&Ps "goal of long-term harmony and cooperation among all parties," I therefore strongly support and recommend passage of H.R. 3342 in its present form, without delay.

### Closing Comment

In the vein of the "lessons learned" argument favored by the Bush Administration to defend its efforts renegotiate the terms of certain settlements before Congress, I offer, with all due respect, a lesson that I have learned.

The state of New Mexico has learned that negotiations to settle the water rights claims of an Indian Tribe or Pueblo are limited to the participation of the United States through the Department of Justice with respect to any term

implicating its sovereignty or responsibility to protect the interests of the United States or Pueblo.

During the years of negotiations there was frustratingly little participation or guidance from the Bush Administration with respect to the interests of the United States, despite oft-repeated requests. The parties, therefore, were left to reach agreement without the participation of the United States.

Upon the successful negotiation of their settlement agreement, the parties drafted legislation that would implement the terms of that agreement. However, because the United States did not identify the legislative provisions to which it objected with any specificity to the parties until after they presented New Mexico's congressional delegation with the final settlements and asked that legislation be introduced, it has been very difficult for the parties to entertain United States' demands for legislative changes that revise the fundamental bargain of the settlement and fairly should have been raised years ago.

Even as the Bush Administration was testifying its objections to the Aamodt and Taos settlements in the fall of 2008, it emphasized the desire of the United States to work with the parties and Congress to develop settlements the Bush Administration could support.

While Department of Interior representation at negotiation meetings and communication with the parties somewhat improved at the end of the Bush Administration, that improvement did not occur until the Aamodt and Taos Pueblo settlements agreements were fully negotiated and signed by all the parties, including all the governmental parties except the United States.

In just these few short months of the Obama Administration there seems to be a genuine effort on the part of the United States to heighten the level of its participation over that of the previous administration. It is my early impression that the United States' being an active negotiating party and elucidating its positions, even if they cannot be accepted by another party, promotes informed decision-making, allows the parties to develop trust in the United States, and in the end requires all parties to recognize and consider the interests of the United States. This is merely my observation and having served as State Engineer for the Administration of Bill Richardson, a Democrat, and as Secretary of the Environment Department for the Administration of Gary Johnson, a Republican, I understand that reasonable people can adopt reasoned policies 180° degrees apart.

That said, there are six general stream adjudications pending in the Federal District Court for New Mexico and two more in state court, involving the water rights claims of eight Pueblos and the Navajo Nation. Excluding the Aamodt and Taos Pueblo settlements, for which implementing legislation is pending before this Committee, and the Navajo Nation settlement, for which

implementing legislation was recently passed by Congress, there are still pending five adjudications with Pueblo claims to first-priority water rights exceeding 100,000 acre-feet of depletion per year. Further, there is at present no adjudication action pending in the Middle Rio Grande, which will involve the claims of six more Pueblos. Litigation of Pueblo claims has proven to be resource- and cost-intensive for all parties, with a very high level of professional and technical expertise required. It is likely that the parties will agree to pursue settlement negotiations for those claims for which they agree that there is sufficient historical basis to support a claim. Therefore, I encourage the Obama Administration to maintain, if not increase, its current level of participation in negotiations, rather than sit and watch the parties reach a settlement and only then voice its positions and objections as was the United States' practice under the Bush Administration.

Again, thank you for this opportunity to present my views and please enact this Act authorizing the Aamodt settlement with all due speed.

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