

**TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS
S. 1649, OJITO WILDERNESS ACT
FEBRUARY 12, 2004**

Thank you for the opportunity to testify on S. 1649, the Ojito Wilderness Act. This legislation would designate as wilderness the nearly 11,000 acre Ojito Wilderness Study Area (WSA). The bill also proposes to transfer certain public lands managed by the Bureau of Land Management (BLM) to trust status for the Pueblo of Zia (Pueblo) to become part of the Pueblo's Reservation. The administration supports the designation of the Ojito wilderness. However, we do have some significant concerns with the legislation as drafted. Several issues related to the proposed transfer of these BLM-managed lands into trust status remain unresolved and should be considered by Congress if it chooses to move forward with this legislation. We would like the opportunity to work with the Committee to resolve these issues.

Ojito Wilderness Designation

Forty miles northwest of Albuquerque, New Mexico, the Ojito WSA provides a respite from the city and offers a world of steep canyons, multi-colored rock formations and sculptured badlands. Rugged terrain and geologic anomalies attract an array of visitors. This area is home to a diverse community of plant and animal populations including mule deer, a small band of antelope, feline predators, and a wide range of raptors who nest in the steep cliffs.

The Ojito WSA contains extensive cultural resources. Both Archaic sites and several prehistoric sites are scattered throughout the WSA. More than 7,000 years ago Archaic hunters and gatherers inhabited the badlands of the Ojito. Archaeologists are just beginning to decipher the clues to their lives. Around 1200 A.D., the prehistoric Puebloan people moved to this area. Excavation of multi-roomed pueblos in this area has expanded our knowledge of these people and their agricultural lifestyle. Additionally, pre-19th century evidence of Spanish and Navajo use is apparent in areas of the WSA.

Scientific excavations of important dinosaur fossils can and have been conducted in ways that protect both the important specimens and the wilderness values of the area. The secrets of this ancient past are just beginning to be unearthed within the Ojito.

S. 1649 would designate the entire 10,794 acres of the WSA as wilderness. In a report issued in September 1991, the BLM's New Mexico State Office recommended the entire WSA for wilderness. That recommendation was subsequently sent to Congress by President George H.W. Bush in May of 1992.

We support this wilderness designation. We would like the opportunity to work with Senators Bingaman and Domenici, as well as Committee staff, to address both substantive and technical issues within the wilderness section. For example, the Department strongly recommends that the legislation be amended to clarify that the wilderness designation not constitute or be construed to constitute either an express or implied reservation of any water rights. Additionally, we would request changes to make the legislation consistent with other wilderness laws, such as the complete withdrawal of the land from the mining, and mineral leasing laws. Finally, we would like to complete work on a single map to be referenced in the legislation that accurately represents both the designated wilderness and the lands proposed to be transferred to the Pueblo as described below.

Transfer of Public Land to Pueblo of Zia

As with previous Zia Pueblo transfer legislation enacted in 1978 (P.L.95-499) and 1986 (P.L.99-600), S.1649 arises from a desire by the Pueblo to protect religious and cultural sites in the area and to consolidate its land holdings. S. 1649 proposes to transfer certain lands currently managed by the BLM

into trust status. The lands proposed to be transferred to trust status in S. 1649 contain numerous sites of religious and cultural significance to the Pueblo and other nearby Pueblos. The transfer would increase the ability of the Pueblo to protect the abundant religious, cultural, and archaeological resources in the area, but raises questions about the nature and extent of the Secretary's trust responsibilities.

Over the past several years, the Department has devoted a great deal of time to trust reform discussions. The nature of the trust relationship is now often the subject of litigation. Both the Executive Branch and the Judicial Branch are faced with the question of what exactly does Congress intend when it puts land into trust status. What specific duties are required of the Secretary, administering the trust on behalf of the United States, with respect to trust lands? Tribes and individual Indians frequently assert that the duty is the same as that required of a private trustee. Yet, under a private trust, the trustee and the beneficiary have a legal relationship that is defined by private trust default principles and a trust instrument that defines the scope of the trust responsibility. Congress, when it establishes a trust relationship, should provide the guideposts for defining what that relationship means.

Much of the current controversy over trust stems from the failure to have clear guidance as to the parameters, roles and responsibilities of the trustee and the beneficiary. As Trustee, the Secretary may face a variety of issues, including land use and zoning issues. Accordingly, the Secretary's trust responsibility to manage the land should be addressed with clarity and precision. Congress should decide these issues, not the courts. Therefore, we recommend the Committee set forth in the bill the specific trust duties it wishes the United States to assume with respect to the acquisition of these lands for the Pueblo. Alternatively, the Committee should require a trust instrument before any land is taken into trust. This trust instrument would ideally be contained in regulations drafted after consultation with the Tribe and the local community, consistent with parameters set forth by Congress in this legislation. The benefits of either approach are that it would clearly establish the beneficiary's expectations, clearly define the roles and responsibilities of each party, and establish how certain services are provided to tribal members.

While the legislation as introduced does not reference a map of the acres to be transferred, it is our understanding that the Pueblo seeks to acquire approximately 11,514 acres of public land located west of, and contiguous to, the main body of the Pueblo's current reservation. These lands would provide a connecting corridor with a second block of Zia Pueblo lands to the northwest of the main body of the reservation. Through previous acquisitions of public land in 1978 and 1986, as well as the recent purchase of private lands, the Pueblo now has control over 200 square miles of land.

S.1649 would allow the Pueblo to acquire all right, title and interest (including mineral rights) to additional public land located adjacent to the reservation and the Ojito Wilderness study area. Under the bill, the transfer would be subject to valid existing rights and the continuing right of the public to access the land for recreational, scientific, educational, paleontological, and conservation uses, subject to regulations adopted by the Pueblo and approved by the Secretary of the Interior. The use of motorized vehicles off of approved roads, mineral extraction, housing, gaming, and other commercial enterprises would be prohibited, and the Pueblo would be required to pay the Secretary fair market value for the lands.

We respect the efforts of the Pueblo to protect its religious and cultural sites in the area and to consolidate its reservation lands. However, we are concerned that several of the bill's provisions may be insufficient to protect the public interest. Currently, for example, public access to both the WSA and the two Areas of Critical Environmental Concern (ACECs) which overlap the area is across BLM-managed public lands that we believe are intended for transfer to trust status under the bill. Section 5(d) of the legislation, as noted earlier, makes the transfer subject to the continuing right of the public to access the land under regulations to be adopted by the Pueblo and approved by the Secretary. In practice, however, public access across those lands after their transfer into trust status, and continued use of the area by the public, may be inconsistent with Pueblo's interest in protecting the religious, cultural, and archaeological resources on the lands.

The only remedy S. 1649 offers to persons denied access to these areas is a right to sue the Pueblo in Federal Court. It seems inappropriate that day visitors seeking access to the Ojito wilderness area for recreational or scientific purposes would have no relief from restricted access save litigation.

Although Section 5(a) of the bill makes the transfer subject to valid existing rights and Sec. 5(f) addresses rights-of-way, the effect of these provisions to ensure continued access may be limited. The BLM is concerned about preserving access to and on six roads crossing current BLM-managed lands. Specifically, Cabezon Road (County Road 906), Pipeline Road (County Road 923), Gas Company Road, Marquez Wash Road, Chucho Arroyo Road, and Querercia Arroyo Road are roads currently used by the public to access BLM lands, but will be wholly or partially on trust lands following the proposed transfer. Although these roads are in public use, they do not have rights of way. We believe the public interest would be better served by amending the legislation to grant the BLM a permanent easement of adequate specified width for each of the corridors of land underlying these roads. Where these roads lie on or near the outskirts of the proposed Ojito Wilderness it may make sense simply to maintain BLM ownership of the lands from the wilderness to the far edge of the road corridor.

We would like to work with the sponsors of the legislation and the Committee to address these concerns.

Thank you for the opportunity to testify on S.1649. I would be pleased to answer any questions.