

December 10, 2004, Revised Draft – Navajo Nation Water Rights Settlement

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RESPONSES TO PUBLIC COMMENTS  
RECEIVED ON DRAFTS OF THE  
SAN JUAN RIVER BASIN IN NEW MEXICO  
NAVAJO NATION WATER RIGHTS SETTLEMENT

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70        Comment 29: There are two opposite extremes expressed as to who should have jurisdiction over the use of water under the Navajo Nation's water rights: (1) the State Engineer should have jurisdiction over all Navajo Nation uses of water in the San Juan River Basin; or (2) the Navajo Nation should be able to do whatever it wishes with its water rights without state oversight.

71        Comment 30: Clarity is needed with respect to the water rights of the Navajo Nation and the rights or claims of individual members of the Navajo Nation.

72        Comment 31: The Settlement Agreement should include a waiver that the Navajo Nation would not challenge in the San Juan River Adjudication rights adjudicated by the Echo Ditch Decree or other previous decrees unless upon a claim of forfeiture or abandonment subsequent to the decrees.

77        Comment 32: The alternate water source provisions for the Fruitland-Cambridge and Hogback-Cudei irrigation projects should not be conditioned upon how the Court determines irrigation rights or administers direct flow, and the conditions should not bind the Court to the annual diversion requirement quantities described by the hydrographic survey report approved by the Echo Ditch Decree or to the administration of flow suggested by the Act of June 13, 1962.

79        Comment 33: The Secretary of the Interior filings for federal water development projects in New Mexico need clarification, and water users, not the United States, own water rights.

81        Comment 34: The Settlement Agreement would not leave sufficient water available for dealing with the Ute Mountain Ute Tribe's water rights claims in the San Juan River Basin in New Mexico, and the Tribe should receive consideration because the Navajo Nation received an allocation of Animas-La Plata Project water under the Colorado Ute Settlement Act Amendments of 2000.

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## **BACKGROUND**

Representatives of the Navajo Nation and the State of New Mexico on December 5, 2003, released for public review and comment a draft Settlement Agreement and appendix documents that would resolve the rights of the Navajo Nation to the use of waters of the San Juan River Basin in New Mexico and provide water development projects for the benefit of the Nation. The Navajo Nation Department of Water Resources and the New Mexico Interstate Stream Commission received substantive public comments on the December 5 draft Settlement Agreement. A revised draft Settlement Agreement and appendix documents were released for public inspection on July 9, 2004. Additional comments from the public were received on the July 9 draft Settlement Agreement, and the final draft Settlement Agreement was made available to the public on December 10, 2004. A list of entities and persons that submitted written comments that were received by the Interstate Stream Commission is provided in Appendix A.

This document responds to substantive issues raised by the public comments on drafts of the Settlement Agreement using the following format: comments received are stated or summarized in bold typeface, and each comment is followed by the Interstate Stream Commission staff's response to the comment. Other issues and technical comments also were considered, and revisions were made to drafts of the Settlement Agreement, including its appendices, to reflect or address many of them, though each is not explicitly addressed herein. The responses presented herein do not necessarily reflect the views of the Navajo Nation or the United States, nor should any of the representations regarding the import of federal laws, regulations or any other matter be attributed to the Navajo Nation or the United States.

## SETTLEMENT PROCESS

**Comment 1: The public review and comment period was inadequate, non-Navajo interests did not have meaningful participation in the development of the Settlement Agreement, and further comments need to be considered.**

Response:

Unlike offers of judgment or consent orders on sub-files negotiated between the New Mexico State Engineer and non-Indian water users in the San Juan River Adjudication, drafts of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement were distributed for public review on December 5, 2003, and for public inspection on July 9, 2003, because contracts for water supply from Navajo Reservoir and federal funding for water projects require Congressional approval, and consequently, need political support. The December 5, 2003, draft Settlement Agreement, including appendix documents, was released for public review and comment when the Navajo Nation and the State Engineer felt that a settlement package had been negotiated to a point that water users and citizens in the San Juan River Basin could see the scope and details of what a settlement might entail. Nevertheless, the main components of the draft Settlement Agreement were the same as those presented by the State Engineer in public presentations to water users and citizens in the Basin in previous years, and the same as those that Interstate Stream Commission staff and Navajo Nation Department of Water Resources staff discussed in general concept with various parties in the Basin from time to time in the past.

The initial comment deadline of January 15, 2004, was to ensure fair consideration of comments and concerns received prior to finalizing settlement negotiations so as to make a settlement agreement as acceptable to the public as possible before approving a settlement and going to Congress. Representatives of the Navajo Nation and the Interstate Stream Commission continued to receive written and oral



comments on the settlement after that date from numerous parties in the San Juan River Basin, and met to discuss the settlement with representatives of the cities in the Basin, the power plants, the agricultural water users, the San Juan-Chama Project, other Indian tribes and the public. A revised draft Settlement Agreement was prepared after consideration by the State of New Mexico and the Navajo Nation of the public comments received on the December 5, 2003, draft Settlement Agreement, and the revised draft was released for public inspection on July 9, 2004. Additional public comments were received on the revised draft, including at a meeting of the Interstate Stream Commission in Farmington on August 18, 2004, and at various other meetings with users of water from the San Juan River Basin.

Consideration of the additional public comments and input from New Mexico's Congressional delegation resulted in the final draft Settlement Agreement, dated December 10, 2004. The Settlement Agreement, including the appendices, substantially addresses the concerns raised by the public comments regarding the settlement of the water rights of the Navajo Nation and also regarding the administration of water rights in the Basin.

The Navajo Nation and the State of New Mexico must approve the Settlement Agreement, and the Settlement Agreement then would become effective only upon passage of the Settlement Act into law and the subsequent execution of the Settlement Agreement by the United States. Once the Settlement Agreement is effective, motions would be submitted to the Court requesting entry of the Partial Final Decree and, after completion of a hydrographic survey, the Supplemental Partial Final Decree to establish rights of the Navajo Nation to divert and use water in and from the San Juan River Basin in New Mexico. All water users that are party to the San Juan River Adjudication may file with the Adjudication Court objections to the provisions of the Partial Final Decree

and Supplemental Partial Final Decree. The Court through an expedited *inter se* process would consider the decrees and any objections to them, and may approve, modify or reject the decrees.

Separating the determination of the rights of the Navajo Nation into a Partial Final Decree, which would be submitted to the Court upon Congressional approval of the Settlement Agreement, and a Supplemental Partial Final Decree, which would be submitted to the Court after completion of a hydrographic survey to quantify certain tributary and state-based rights, would allow the Court to consider any objections to the substantial portion of the Navajo Nation's rights to divert and use water from the San Juan and Animas rivers, including under federal water projects, prior to the expenditure of a substantial portion of the federal funds authorized for construction and rehabilitation of water projects by the Settlement Act. If the decrees are not approved in substantially the same form provided in Appendices 1 and 2 to the Settlement Agreement, respectively, the Settlement Agreement and the water project authorizations provided by the Settlement Act will be revoked. In addition, further public review and comment on the proposed Navajo-Gallup Water Supply Project will occur during the formulation of the environmental impact statement for the project.

## RESERVED RIGHTS

**Comment 2: The Navajo Nation waived its reserved rights claims to the use of the waters of the San Juan River Basin in New Mexico, except for the San Juan River irrigation projects.**

Response:

The State of New Mexico and the Navajo Nation differ in their positions as to whether the Navajo Nation waived its reserved rights claims to the waters originating above Navajo Dam, except in relation to the Fruitland-Cambridge and Hogback-Cudei irrigation projects, in support of the Act of June 13, 1962. In any case, the Navajo Nation did agree to accept an amount of diversion needed to irrigate 110,630 acres under the Navajo Indian Irrigation Project and to share shortages between the Project, other Navajo Reservoir water supply contracts, and the San Juan-Chama Project, as opposed to asserting a senior priority for the water for the Navajo Indian Irrigation Project as against the San Juan-Chama Project and other uses of the Navajo Reservoir water supply. The Settlement Agreement recognizes a reserved priority date of 1868 for Navajo Nation uses supplied from the Navajo Reservoir water supply, but provides for a June 17, 1955, administrative priority date for such uses consistent with New Mexico State Engineer File No. 2849, under which the Secretary of the Interior supplies the uses out of the Navajo Reservoir water supply.

**Comment 3: The Navajo Indian Irrigation Project is not practicably irrigable acreage and should not have a reserved priority date, the federal municipal and domestic water supply projects also should not have a reserved priority date, and the priority date for uses of Navajo Reservoir water supply should be later than 1955.**

Response:

Congress by passing the Act of June 13, 1962, made the determination that the Navajo Indian Irrigation Project was practicable for the diversion of up to 508,000 acre-

feet per year for the irrigation of up to 110,630 acres of land. No other determination has been submitted. The Settlement Agreement recognizes that the water rights for the Project are Navajo Nation reserved rights and provides for administration of the Project rights with a June 17, 1955, priority date consistent with supplying the rights under New Mexico State Engineer File No. 2849. The priority date under File No. 2849 is the date of application to appropriate water consistent with state law.

The Navajo Nation in pursuing the authorization for the Navajo Indian Irrigation Project did not waive its reserved rights claims for waters of the San Juan River for municipal, domestic and other uses as needed to fulfill the purposes of a permanent homeland. As part of resolving such claims, the Settlement Agreement provides that the Navajo Nation's water rights for diversions and uses in New Mexico under the Navajo-Gallup Water Supply Project would have an 1868 reserved right priority for the municipal, domestic and other needs of its homeland, but that the Project uses would be served under New Mexico State Engineer File No. 2849 with a priority date of June 17, 1955, for water originating in the drainage of the San Juan River above Navajo Dam, and File No. 3215 with a priority of December 16, 1968, for inflow to the San Juan River arising below Navajo Dam. The Navajo Nation's water rights for diversions and uses under the Animas-La Plata Project would have an 1868 reserved right priority, but the Project uses would be served under New Mexico State Engineer File No. 2883 with a priority date of May 1, 1956, for water from the Animas River.

The subordination of the reserved right priority in all cases is in exchange for the benefits of federal wet water development to put the rights to use. The Navajo Nation could assert an 1868 reserved right priority for water for the Navajo Indian Irrigation Project and the Navajo-Gallup Water Supply Project if the ability to receive water for the projects under the Settlement Contract is irretrievably lost, such as due to removal of

Navajo Dam, in which case the Navajo Nation would have a senior right on paper with little physical capability to access significant amounts of wet water. It is not the intent of the Settlement Agreement that the subordination of the reserved right priority be nullified on an acre-foot per annum basis on account of shortages to the Navajo Reservoir water supply. The Navajo Nation agrees to take water for the two projects and share shortages under the priority dates of State Engineer File No. 2849 for the Navajo Reservoir water supply and File No. 3215 for inflows to the San Juan River below Navajo Dam. The Navajo Nation uses under the Animas-La Plata Project are further subject to the Animas-La Plata Project Compact.

## NAVAJO INDIAN IRRIGATION PROJECT

**Comment 4: The Navajo Indian Irrigation Project is not economically sound or profitable, and the United States should not complete construction of the Project or pay the operation and maintenance costs of the Project.**

Response:

Congress by passing the Colorado River Storage Project Act and the Act of June 13, 1962, made the determination that through construction and operation of Navajo Dam and the Navajo Indian Irrigation Project, it is practical and viable to provide for the irrigation of up to 110,630 acres of land. Congress also made the bargain that the Project would be built in exchange for the Navajo Nation agreeing to waive reserved rights claims to the waters arising above Navajo Dam, except in relation to the Fruitland-Cambridge and Hogback-Cudei irrigation projects. Construction of the Navajo Indian Irrigation Project remains uncompleted over 40 years later, while the San Juan-Chama Project also authorized by the Act of June 13, 1962, was completed within ten years from the date of the Act. The United States, acting through the Bureau of Indian Affairs, has prepared various planning and environmental impact studies for the Navajo Indian Irrigation Project since the mid 1950s, including the October 1976 Final Environmental Statement for the Project and the June 1999 Biological Assessment for the Project, and has completed consultation on the Project with the Fish and Wildlife Service under section 7 of the Endangered Species Act. In addition, negotiations have begun on a memorandum of understanding between the United States and the Navajo Nation that would include provisions for transferring ownership of the Project facilities to the Nation.

The United States has an ongoing commitment to complete the Project, although the funding ceiling for the Project will need to be increased and further appropriations will need to be made to complete it. However, the authorization of funding needed to complete construction of the Project that was included in the drafts of the Settlement

Agreement is not included in the Settlement Act, and completion of the Project would have to be accomplished in accordance with the authorizing legislation for the Project and separate funding authorizations and appropriations. The Settlement Agreement would not establish any timeframe or deadline for completing the funding and construction of the Project. Under the current pace of construction, approximately 2,000 acres of land are added to the Project's service area each year and the Project may be anticipated to be completed sometime after 2020. Alternatively, the Navajo Nation in the future may desire to reduce irrigated acreage on the Project and transfer rights to other water uses in the San Juan River Basin for economic or political reasons.

The Project has struggled economically for various reasons; however, the Bureau of Indian Affairs continues to help implement improved farm management and water conservation measures on the Project. Also, the current water delivery contract for the Navajo Indian Irrigation Project between the Secretary of the Interior and the Navajo Nation does not require the Navajo Nation to pay for the water delivered to the Project or the operation and maintenance costs of the Project. The Settlement Agreement provides for the Navajo Nation to take ownership of the Navajo Indian Irrigation Project upon its completion to the full authorized acreage, or to a lesser acreage if the Navajo Nation agrees. The Settlement Agreement also has been revised to require the Navajo Nation to assume full responsibility for operation and maintenance of the Project, including funding the annual operation and maintenance costs of the Project, once it receives ownership.

**Comment 5: The acres of water right for the Navajo Indian Irrigation Project should be reduced even without consideration of economics.**

Response:

The March 1957 Bureau of Indian Affairs' Supplemental Report to the Feasibility Report for the Navajo Indian Irrigation Project indicated that 5 percent of a total Project

area of over 110,000 acres would be in roads, buildings, farmsteads, and other non-productive areas, leaving some 105,000 acres of land with irrigation service. The Navajo Nation argues that the Act of June 13, 1962, may be read to allow for construction of Project facilities to an irrigation service area exceeding 110,630 acres, so long as the acreage irrigated in any year does not exceed 110,630 acres. The Settlement Agreement would allow construction of facilities to a total irrigation service area of 110,630 acres of land.

**Comment 6: The diversion right for the Navajo Indian Irrigation Project exceeds the diversion required to irrigate Project lands, and should be reduced to reflect the sprinkler redesign for the Project.**

Response:

The Act of June 13, 1962, authorized the irrigation of 110,630 acres on the Navajo Indian Irrigation Project, and the Settlement Agreement would provide the Navajo Nation with the right to irrigate that amount of acreage on the Project. With the Project now built for sprinkler irrigation instead of flood irrigation and consolidation of the acreage further east than was originally planned, the Bureau of Indian Affairs in its 1999 Biological Assessment for the Navajo Indian Irrigation Project estimated that the diversion requirement to irrigate the total Project acreage will average about 337,500 acre-feet per year assuming that each acre is irrigated each year and that further water conservation measures are implemented as currently planned. A 1974 opinion of the Deputy Secretary of the Office of the Solicitor concluded that the Navajo Nation is entitled to divert for irrigation on the Project no more water than is necessary to irrigate 110,630 acres of land, whatever that amount is, regardless of the authorization in the Act to divert up to 508,000 acre-feet per year as necessary for the principal purpose of irrigation of the Project lands. For example, with the redesigned Project and water conservation measures, the Project would be entitled under the opinion to divert up to



about 337,500 acre-feet per year of the 508,000 acre-feet per year authorized. The amount of diversion required could change depending upon Project conditions. For example, if planned water management changes and water conservation measures are not implemented or fail to result in as much savings of water as is anticipated, then the diversion requirement to irrigate all project lands each year could be as high as about 372,000 acre-feet per year, according to the 1999 Biological Assessment for the Project. The 1974 opinion of the Deputy Secretary of the Office of the Solicitor referred to a diversion requirement of 370,000 acre-feet per year for the Project under the sprinkler design.

The Settlement Agreement recognizes that beneficial use is the limit to the right to use water in New Mexico, including under the Navajo Nation's rights that would be adjudicated under the Partial Final Decree. Based on the 1999 Biological Assessment for the Navajo Indian Irrigation Project, the amount of diversion required for beneficial consumptive uses by the Project currently is anticipated to average between 337,500 acre-feet per year and 372,000 acre-feet per year if all 110,630 acres were to be irrigated each year, depending on the implementation and effectiveness of planned water management changes and water conservation measures. The difference between the 508,000 acre-feet per year diversion authorized by the Act of June 13, 1962, for the flood irrigation project that was originally planned and the estimated average diversion required for the sprinkler irrigation project that is actually constructed is not separable from the consumptive use right for the Project, and therefore, is not transferable by itself to other uses. Under the Settlement Agreement, the Navajo Nation would be able to change the purpose or place of use of its rights for the Project on Navajo trust lands without State Engineer approval so long as the total average diversion for all uses under said rights in the aggregate does not exceed 353,000 acre-feet per year, and any such

changes to other uses must not impair other water rights. This amount of diversion assumes that either: (1) planned water conservation measures on the Project are about half as effective as anticipated; or (2) water conservation measures either do not occur or realize any benefits, and about 5 percent of the Project acreage, on average, is fallow. If the rights under the Project are not used solely for irrigation, the Navajo Nation would have to file application with the State Engineer to increase the total average diversion by all uses under the water rights associated with the Project above 353,000 acre-feet per year.

Also, the Bureau of Indian Affairs in 1999 pursuant to section 7 of the Endangered Species Act consulted with the Fish and Wildlife Service on completion of the Navajo Indian Irrigation Project. The consultation was for an average annual diversion of 337,500 acre-feet per year for the Project, with a near-term average annual depletion of the San Juan River of 280,600 acre-feet per year until return flows from deep percolation reach equilibrium conditions, after which the long-term average annual depletion would be 270,000 acre-feet per year. The Bureau of Indian Affairs or Bureau of Reclamation would have to consult with the Fish and Wildlife Service under section 7 of the Endangered Species Act prior to making an increase in diversions under the rights for the Project. Under the Settlement Agreement, the Navajo Nation would have to schedule bringing lands into production and cropping patterns on the Project in a manner so as to not exceed a maximum depletion of the San Juan River of 310,500 acre-feet in any one year or 270,000 acre-feet per year, on average, in any period of ten consecutive years. Any transfer of rights for the Project to other uses would be subject to not causing depletions to exceed these annual maximum and ten-year average amounts.

The maximum diversion rate for the Project pursuant to the Partial Final Decree would be 1,800 cfs, which is the existing physical diversion capacity of the Navajo Indian

Irrigation Project main canal. Historically, the diversion rate of the Project has been as much as about 900 cfs, and the acreage irrigated by the Project has been as much as about 55,000 acres. The maximum diversion rate per acre would amount to about one cfs per 61.5 acres of irrigation rights, which is significantly less than the one cfs per 40 acres maximum diversion rate adjudicated by the Echo Ditch Decree for ditches on the San Juan River. The annual diversion amount for the Project as redesigned for sprinkler irrigation would average in the range of 3.1 to 3.4 acre-feet per acre per year, depending upon the effectiveness of water conservation measures, which is substantially less than the annual diversion requirements of between 5.0 and 5.3 acre-feet per acre per year identified for ditches on the San Juan River near Bloomfield and Kirtland in the report of hydrographic survey that was approved by the Echo Ditch Decree.

**Comment 7: Navajo Indian Irrigation Project water rights should be leasable and transferable for municipal, industrial and other purposes on and off Navajo lands within New Mexico.**

Response:

The intent of the Settlement Agreement is not to prohibit transfers of use of water under the Navajo Nation's contract rights with the Secretary of the Interior for water from the Navajo Reservoir water supply or transfers of other of the Nation's reserved and state-based rights. The Settlement Agreement allows for the lease, through subcontracts, and transfer of the Navajo Nation's contract rights for the Navajo Indian Irrigation Project for other uses within New Mexico on or off Navajo lands, subject to non-impairment of other water rights in New Mexico. Language in drafts of the Settlement Agreement was modified in response to public comments to clarify this intent and to clarify the administrative requirements for effectuating transfers within Navajo Nation trust lands or off Navajo trust lands. Also, under the Settlement Agreement, interstate marketing or leasing of the Navajo Nation's water rights would require the consent of the

State of New Mexico and compliance with applicable law. The State of New Mexico at this time does not support interstate marketing or leasing of water.

**Comment 8: The settlement agreement should include water rights for the Navajo Nation in the amount of 24,000 acre-feet for savings in depletions of water due to conversion of the Navajo Indian Irrigation Project from flood irrigation to sprinkler irrigation and consolidating the Project acreage.**

Response:

The Deputy Secretary of the Office of the Solicitor in a 1974 opinion concluded that the Navajo Nation is entitled to the use of water for purposes other than irrigation on the Navajo Indian Irrigation Project in an amount corresponding to a net savings of 24,000 acre-feet per year of depletion which was anticipated to result from redesigning the Project for sprinkler irrigation. Based on the opinion, it has been suggested that the settlement should include 24,000 acre-feet of depletion right for the Navajo Nation to be served from Navajo Reservoir storage, of which about 20,000 acre-feet might be for use at a thermal electric power plant to be constructed near the BHP-Billiton coal lease area. However, the anticipated savings of depletion described in the 1974 opinion is not consistent with the depletions described in the 1999 Biological Assessment for the Navajo Indian Irrigation Project prepared for the Bureau of Indian Affairs.

Also, under the Settlement Agreement, the Navajo Nation's rights to water from the Navajo Reservoir water supply would include rights for the Navajo Indian Irrigation Project and rights for the depletion of up to 20,780 acre-feet per year from the San Juan River for uses in New Mexico under the Navajo-Gallup Water Supply Project. If rights are obtained within the State of Arizona for the use of 6,410 acre-feet per year of water as would be authorized under the proposed Settlement Act, then the total depletion from the San Juan River for Navajo Nation uses under the Navajo-Gallup Water Supply Project would be 27,190 acre-feet per year. Planning documents for the Project indicate that of

the 27,190 acre-feet of Navajo Nation uses, about 3,800 acre-feet would be diverted directly from Navajo Reservoir and the remainder would be diverted at the Project's San Juan River diversion near Kirtland and supplied by a combination of inflow arising below Navajo Dam and releases from Navajo Reservoir. Because inflows below Navajo Dam in most years will be available much of the year to meet the diversion needs of the Project at the San Juan River diversion near Kirtland, the demand for water from Navajo Reservoir for Navajo Nation uses under the Project may average approximately one-half the total demand for water for such uses.

The Navajo Nation may consider using its ground water rights or transferring a portion of its Navajo Indian Irrigation Project rights or other surface water rights for consumptive use at a new power plant consistent with the provisions of the Settlement Agreement.

**Comment 9: The Navajo Nation should not be allowed to reuse return flows from the Navajo Indian Irrigation Project.**

Response:

The Navajo Nation under the Settlement Agreement would be able to reuse irrigation tail water or other waste water to the extent that: (1) it recaptures the water before it escapes control and returns to the ground-water aquifer underlying the Navajo Indian Irrigation Project or natural surface water channels in the San Juan River Basin; or (2) it pumps ground water underlying the Project for the express purpose of maintaining the water table at a level below the root zone to prevent waterlogging damage to Project fields, as an alternative to the installation of tile drains and collection of tail water. Otherwise, once control of the water after use is lost and the water returns to a natural stream channel or aquifer via surface water discharge or seepage, the return flow is direct flow available for appropriation and diversion within priority. Under New Mexico State

Engineer File No. 3215, the Secretary of the Interior appropriated 500 cfs of direct flow with a priority date of 1968 to supplement storage from Navajo Reservoir to meet water deliveries under Navajo Reservoir water supply contracts, the source of the direct flow being natural flow of the San Juan River and its tributaries downstream from Navajo Dam plus seepage and return flows. To the extent that the Navajo Nation may reuse irrigation tail water or waste water on the Navajo Indian Irrigation Project, the entitlement of the Navajo Nation to divert water from Navajo Reservoir to supply the current beneficial use needs of the Project would be reduced accordingly, and any depletion of water resulting from reuse on the Project would be chargeable against the depletion right of the Project. Any diversion by the Navajo Nation from the groundwater aquifer underlying the Project that cannot be classified as reuse would be chargeable against the Nation's rights to divert ground water. Revisions were made to drafts of the Partial Final Decree to clarify this matter.

## NAVAJO-GALLUP WATER SUPPLY PROJECT

**Comment 10: The amount of water delivered outside the San Juan River Basin under the Navajo-Gallup Water Supply Project may be too large or increase later, and there is no return flow of exported water.**

Response:

The Settlement Act would authorize deliveries of San Juan River Basin water to users in the Little Colorado River and the Rio Grande basins under the Navajo-Gallup Water Supply Project. The deliveries authorized are the water use demands of the Project participants projected to occur by 2040 based on the Project planning studies prepared by the Navajo Nation and the Bureau of Reclamation. Under the Settlement Agreement, the Navajo Nation would not be able to transfer its New Mexico consumptive use rights for the Project into Arizona, or vice-versa, but would be able to distribute and redistribute its New Mexico consumptive use rights for the Project within and between the San Juan River Basin and the other basins in New Mexico, and within and between the Navajo Reservoir and San Juan River diversion points for the Project. This provides flexibility in water management that the Navajo Nation may need in the future if the actual future population growth and community development patterns differ from the growth and development patterns assumed in the planning studies for the Project.

For example, actual population and economic growth on Navajo lands may concentrate in the Gallup and Shiprock regions, as opposed to being more uniformly distributed throughout the rural and urban areas of the Navajo reservation. For planning purposes, diversions for the uses under the Navajo-Gallup Water Supply Project that are not made within the local area of the San Juan River valley are considered to be full depletions of flow of the San Juan River whether the uses occur in the San Juan River Basin or other basins. This is why the diversion amount for Navajo Nation uses under the Project is not much greater than the Navajo Nation depletion right for the Project that

would be provided by the Settlement Agreement. If more use is made of the Navajo Nation's rights for the Project in the vicinity of Shiprock and the San Juan River valley, then more return flows will accrue to the river, likely below Shiprock, than is anticipated in the planning studies. Flexibility to divert more water from the San Juan River Basin than is planned would be limited, however, because the pipelines to be installed for the Project are to be sized for the amounts of water to be distributed to various locations in accordance with the Project planning studies.

Under the Project planning studies, the Navajo Nation's year 2040 water demands in the San Juan River Basin in New Mexico to be served by the Navajo-Gallup Water Supply Project are estimated to total about 13,230 acre-feet, and the Nation's water demands in the Little Colorado and Rio Grande basins in New Mexico to be served by the Project are estimated to total about 7,550 acre-feet. The Settlement Agreement does not attempt to quantify or adjudicate reserved or other rights that the Navajo Nation may have for the diversion and use of water in the latter two basins for its uses in those basins. Rather, the Settlement Agreement and Settlement Act provide for servicing from the San Juan River water demands that may be associated with such rights, as opposed to serving them from sources in the Little Colorado or Rio Grande basins. To the extent that the Navajo Nation uses its water rights under the Navajo-Gallup Water Supply Project to supply uses in other basins in New Mexico, some measure of protection may be afforded water uses in those basins, including uses made by the City of Gallup, against curtailment that might otherwise result from Navajo Nation reserved rights in those basins.

Questions arise as to the basis for claiming a reserved right from the San Juan River to service water rights that the Navajo Nation may have in the other basins. However, the Navajo Nation could claim reserved rights for municipal, domestic and other purposes for estimated water demands in the San Juan River Basin beyond the year



