

SJ-17
Navajo Settlement



THE JICARILLA APACHE NATION

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**Jicarilla Apache Nation
Detailed Comments for
Committee Staff on Energy and Natural Resources
on S. 1171
The Northwestern New Mexico Rural Water Projects Act
June 26, 2007**

Pages 8-11, Section 101(b), top water bank in Navajo Reservoir: The Jicarilla Apache Nation does not object to the concept of a top water bank, provided that its implementation not adversely affect the Nation's water rights, storage for the Nation, or costs under our contract for water from the Navajo Reservoir Supply, and provided also that the beneficiaries of the top water bank pay their fair share of construction and operation and maintenance costs associated with Navajo Reservoir. Page 9, lines 11-20, provides that the water bank shall be operated in a manner that does not impair delivery under contracts entered into under New Mexico State Engineer File Nos. 2847, 2848, 2849, and 2917. This list should not omit the additional permits – file Nos. 2873 and 3215 – that are included along with the listed file numbers in the definition of "Navajo Reservoir Supply" in the December 8, 1992 contract between the United States and the Jicarilla Apache Nation for delivery from this supply pursuant to the Jicarilla Apache Water Rights Settlement Act.

Page 10, lines 17-24, describes a requirement for the operation of the top water bank as follows:

water in the top water bank [shall] be the first water spilled or released for flood control purposes in anticipation of a spill, on the condition that top water bank water shall not be released or included for purposes of calculating whether a release should occur for purposes of satisfying releases required under the San Juan River Recovery Implementation Program [SJRRIP].

For clarity, this subsection should be divided into two separate requirements: (1) top water bank water shall be the first to be spilled or released for flood control purposes and (2) top water bank water shall not affect the calculation of the release required under the SJRRIP. Since the Flow Recommendations of the SJRRIP consider reservoir storage without the top water bank present, it is

appropriate to disregard the top water bank in calculating whether a release should occur. However, it is not appropriate to exclude top water bank water from the water that would be released. We do not believe that the intent is to exclude it, but as currently written, the provision could be misread to exclude top water bank water from a release.

The legislation should clearly require the beneficiaries of the top water bank to enter contracts with the United States for storage, including an obligation to pay their proportional share of construction and operations, maintenance and replacement costs. The cost shares of the Jicarilla Apache Nation and other contractors should be reduced accordingly.

Page 13, lines 10-22, use of the Navajo Indian Irrigation Project works to convey water: Planning for the Navajo-Gallup Water Supply Project has contemplated the use of NIIP works for conveyance. This provision authorizes that use, and importantly, prohibits the reallocation of NIIP construction costs because of such use. The legislation should also restrict the reallocation and repayment of NIIP operation, maintenance and replacement costs to the Navajo-Gallup Water Supply Project. The Jicarilla Apache Nation has expressed concern in the planning process for the possibility that NIIP OM&R costs that are unrelated to conveyance for the Nation's water through the Project might be charged to the Nation. We have felt assured that such costs would not be charged to us. The legislation should clarify this point.

Pages 14-17, shortage determinations and allocations: The bill would establish a *priority* of allocation of *shortages*, not water supply, in the event of a shortage determination. The bill further includes provisions for determining which uses in New Mexico will be counted as normal diversion requirements. The quantity of water that reliably can be anticipated to be diverted or delivered under a contract from inflows to the San Juan River arising below Navajo Dam under New Mexico State Engineer File No. 3215 would be excluded from the normal diversion requirements. We are concerned about how these potentially confusing provisions will be interpreted and applied in practice.

The provisions concerning shortages should be carefully reconsidered and redrafted in consultation with us to protect the Jicarilla Apache Nation's water rights, including entitlement to delivery in times of shortage, under the Jicarilla Apache Tribe Water Rights Settlement Act. We believe and expect that it is not Congress' intent to adversely modify the Nation's rights under our existing settlement. Indeed, the bill appropriately states that unless expressly provided, nothing in it modifies, conflicts with, preempts, or otherwise affects the Jicarilla Apache Tribe Water Rights Settlement Act (Section 103(1)), page 18 lines 2-4 and page 19 lines 1-2). The legislation must be crafted to protect the Nation from suffering a lower priority in time of shortage.

The provision on page 17, lines 13-17 that preserves the Secretary's ability to reallocate water in accordance with cooperative agreements between water users is important to ensure that the constructive shortage sharing recommendations of recent years, to which the Nation has been a signatory, can continue to foster solutions that avoid a Secretarial shortage determination and the attendant potential for disruptive litigation.

Page 27, lines 18-21: The bill states that the design and construction of the Project shall not be subject to the Indian Self Determination Act. The Jicarilla Apache Nation would like this section to be amended to allow the Nation to utilize the Act appropriately for our involvement in design and construction work.

Page 30, lines 11-24 and page 31, lines 1-12 provide for conveyance of Project facilities to the City of Gallup or the Navajo Nation. The legislation should expressly state that such conveyance shall not adversely affect the cost allocations or repayment obligations of the Project Participants, and should further provide for the continuation of the committee to establish and review budgets as recommended in our comment below on cost allocation.

Page 32, lines 11-18 provide, in part, that any payments for water under any subcontract with the Jicarilla Apache Nation shall not alter the construction repayments or operation, maintenance and replacement payment requirements of Project Participants. This language is important to clarify that our payment obligations will not be affected by revenues we may receive under a subcontract. However, when a payment is made for the use of unused Project capacity, the payments due from the Project Participants should be commensurately reduced.

Title III of the bill uses the phrases "allocate water supply" and "allocation" in a way that may cause confusion. Section 301(2), page 24, lines 12-14 lists among the purposes of the subtitle "to allocate the water supply for the Project among the Nation, the city of Gallup, New Mexico, and the Jicarilla Apache Nation." Section 303(b)(2), pages 34-36, provides for "allocation" of the water diverted under the Project to these entities by specified amounts of water for use. These provisions should be revised to make it clear that they are specifying the use of delivery capacity, not the allocation of underlying water rights or contract rights to the Navajo Reservoir Supply. For instance, the bill describes an "allocation" of 7,500 acre-feet per year to the City of Gallup (page 35, lines 1-5), but if that water is to be supplied by a potential subcontract from the Jicarilla Apache Nation under our 1992 contract rights to the Navajo Reservoir Supply, then the water allocation remains the Jicarilla Apache Nation's and Gallup will be entitled to delivery under the subcontract through the Project.

Page 45, lines 11-13 provide the important clarification that the Jicarilla Apache Nation is not obligated to enter into a water subcontract with the City of Gallup. The phrase "nothing in this paragraph" is used, however, when the wording should be "nothing in this Act" (page 45, lines 1-2).

We wish to share a few concerns the Nation has regarding what we view as unclear language referring to cost share provisions in the Bill. The Secretary is directed to determine the share "based on the *ability of the Jicarilla Apache Nation to pay* the construction costs of the Project facilities that are *allocable* to the Jicarilla Apache Nation," and this share is specified to be *at least 25 percent* of the costs so allocable.

We have some concerns with how the portion "allocable" to the Nation will be determined. The Nation's staff have reviewed the items allocated to us as reflected in the March 2007 Draft Planning Report and Environmental Impact Statement for the Project ("PR-DEIS"), and if our understanding is correct, the allocation reflected in that document is appropriate. The legislation should make clear that a different allocation will not be imposed on us. While we are not concerned with the *items* contemplated to be allocated to us, we are concerned that the Bureau of Reclamation's cost estimates for these items are substantially greater than they should be. Notably, the PR-DEIS states that Reclamation is re-estimating costs and anticipates providing updated cost estimates through errata sheets to be made available during the public comment period on the PR-DEIS. To our knowledge, however, no such errata sheets have been made available and the public comment period ends on June 28, 2007. We are therefore reserving for further comment the issue of cost estimates in our comments on the PR-DEIS. To protect the continuing voice of the Project Participants in all cost determinations associated with the Project, the legislation should clarify that the construction costs reimbursable by the Jicarilla Apache Nation shall be reduced by the amounts that the Nation expends from its own funds or non-federal sources on pre-construction activities for the Project.

The draft legislation does not effectively define the "ability to pay" determination. This provision should specify that "ability to pay" will be determined on the basis of the per capita income, median household income, and poverty rate of the population on the Jicarilla Apache Reservation. This specificity will ensure that the determination of "ability to pay" reflects the true ability of our people to pay for the water supply.

The requirement that the Nation should pay a minimum percentage of 25 percent of the construction costs allocable to the Nation is inappropriate. A proper ability to pay determination based on the ability of our population will result in a cost share percentage below 25 percent. Indeed, this minimum leaves the Nation unacceptably exposed to the burden of a cost share far greater than 25 percent that has no relationship to ability to pay. Notably, the April 2006 study by Dornbusch Associates entitled "Social Impacts from the Navajo-Gallup Water Supply Project" (Appendix D-IV, page 12, to the PR-DEIS) found that the Jicarilla Apache people earn median incomes far below the New Mexico state average.

This requirement casts a shadow over the negotiating process in providing a leased water supply for the City of Gallup. Without fully understanding the entire

exposure the Nation has in paying for its portion of the Project, it is extremely difficult to proceed with substantive negotiations with Gallup and the Navajo Nation in finalizing a secure water supply for the City.

We would like to see in the bill a provision for establishment of a committee, including a seat for the Jicarilla Apache Nation, to set and review Project construction and operation, maintenance and replacement budgets and extraordinary expenditures.

Page 59, lines 17-21, Section 401(a)(4) provides that the State of New Mexico may administer releases of stored water from the Navajo Reservoir in accordance with subparagraph 9.1 of the Navajo Nation settlement agreement. The effect of this provision is unclear. The referenced subparagraph of the agreement states that the Navajo Nation and the United States will not challenge the State's making available water under specified circumstances. It seems that bill language should be revised to simply provide for the waiver by the United States of the objection as contemplated by the agreement.

Page 68, lines 24-25, and page 69, lines 1-3 and lines 14-19 literally require the court to enter the partial final decree and supplemental partial final decree described in the Navajo Nation settlement agreement by specified dates. The bill could be clearer on the effect of a failure to meet these deadlines.

Page 73, lines 9-13 states that "nothing in the Agreement, the Contract, or this section quantifies or adversely affects the land and water rights, or claims or entitlements to water, of any Indian tribe or community other than the rights, claims, or entitlements of the Nation." This provision should specify that nothing in the Act, rather than merely the section, quantifies or adversely affects, and should also specify that nothing in the hydrologic determination by the Secretary quantifies or adversely affects such rights, claims or entitlements.