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Navajo Settle

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**From:** Whipple, John J., OSE **Sent:** Mon 10/5/2009 8:38 AM  
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**Subject:** draft settlement contract  
**Attachments:**  Settlement contract comments.docx(22KB)

Pat, Stanley and John L.:

Attached are my comments on the latest draft settlement water contract between the US and the Navajo Nation for your consideration.

John Whipple



Comments on the September 17, 2009, Draft Water Supply Contract  
between the United States and the Navajo Nation

prepared by John Whipple, ISC staff  
October 5, 2009

1. Page 13, line 26, through page 14, line 6. The amount of diversion rights for the Navajo Nation under File No. 2883 for the Animas-La Plata Project (ALP) as defined by the proposed partial final decree attached to the Settlement Agreement is for the diversion of water from the Animas River within New Mexico. This is similar to the amounts of diversion rights for other ALP participants in New Mexico under permits issued by the State Engineer. To be consistent with the proposed decree and water rights administration in New Mexico, the delivery quantities under subparagraph (a) should be measured against the permitted or decreed rights at the points of diversion. Subparagraph (b) indicates that the Navajo Nation may receive its ALP water at points of diversion on the Animas or San Juan rivers in New Mexico, which is not consistent with the draft contract specifying delivery points at the Durango pumping plant or Ridges Basin Dam. The draft contract at page 15, line 29, through page 15, line 2, suggests also that the points of delivery (ie, Ridges Basin Dam or Durango pumping plant) can be changed consistent with the proposed partial final decree, but the entire contract should be consistent with the decree so far as the water allocations and rights to divert water are concerned. This latter subparagraph (g) at the bottom of page 14 appears only to refer to obtaining Secretarial approval of a change in point of diversion in addition to State Engineer approval.

Also, diversions may be made from inflows arising below the Durango pumping plant by ALP contractors in New Mexico under ALP diversion permits and by non-ALP water uses in New Mexico. The ALP operators may consider bypassing additional water to meet the diversion demands of the ALP contractors after downstream senior non-ALP uses and channel losses. Further, the diversion, depletion and return flow amounts for ALP uses in New Mexico included in the July 2000 ALP Final Supplemental Environmental Impact Statement (FSEIS) are associated with diversions from the river in New Mexico (see, for example, the San Juan River Basin Hydrology Model schematics and point of diversion descriptions for the ALP diversions in the ALP FSEIS). As for releases of water stored in Lake Nighthorse back into the Animas River to augment the available direct flow, the incremental increases in channel losses caused by augmenting the direct flow with storage water between Ridges Basin Dam and the points of diversion within New Mexico may be accounted and deducted from the release amount to determine the amount of storage water available to the ALP contractors at the points of diversion. The State Engineer may protect releases of storage water from Lake Nighthorse, less incremental channel loss, for delivery to the targeted ALP contractor.

The proposed partial final decree states that the Nation's right to divert its ALP water is from the Animas River at the points of diversion for supplying water to the Navajo Nation Municipal Pipeline (NNMP), and the contract should be consistent with the decree. The State Engineer would have to approve any change in point of diversion for the Nation's ALP water. It is recommended that the contract water delivery provisions be modified to reflect the proposed partial final decree, and to reflect consistency with the water measurement and delivery provisions of paragraph 5(a) of the San Juan Water Commission's (SJWC) Amendatory Funding Agreement and Repayment Contract dated March 5, 2002, and paragraph 4(a) of the La Plata Conservancy District's (LPCD) Repayment Contract dated September 8, 2009 (exclusive of the LPCD option for diverting water directly from Lake Nighthorse). The contracts for ALP uses in New Mexico by the SJWC and the LPCD provide for measuring the amounts of water bypassed at the Durango pumping plant and released at Ridges Basin Dam to meet their statutory water allocations, and for measurement of the amounts of water delivered (diverted) at their points of diversion. These contracts provide that sufficient water will be bypassed

or released from project storage to ensure that the SJWC and the LPCD annually receive their statutory water allocations at their points of diversion.

2. Page 16, lines 18-23. While the draft contract would provide for the ALP Operator or the US Bureau of Reclamation (USBR) to make findings as to whether direct flow in the Animas River at any given time is physically available to supply ALP contract water demands, it must be recognized that such findings require determinations of the diversion demands under non-ALP water rights with priority dates senior to the ALP, including downstream senior rights in the Animas and San Juan rivers in New Mexico, and intervening channel losses. The State Engineer has the statutory authority for administering water rights in New Mexico, including for implementing any priority administration and for determining which direct flow rights are out of priority and how much direct flow is needed to satisfy beneficial uses under rights with priority dates senior to the ALP diversions in New Mexico. The State Engineer is not a party to the Intergovernmental Agreement (IGA) dated March 4, 2009.

3. Page 16, lines 24-29. The provisions of this section (b) mingle conditions that apply if the IGA is in effect and if the IGA is not in effect, and also contain inconsistent references to annual or average depletions and delivery demands at the point of diversion (as compared to at Durango). The provisions should be segregated as follows:

(b) Pursuant to Part III Article I of this contract:

(i) If the IGA is in effect, the Nation may request and require of the United States the release of water from the Joint Storage Pool in Lake Nighthorse for delivery to its point of diversion of ALP water in the State of New Mexico as necessary to meet the diversion demands of the Nation under the ALP up to 4,680 acre-feet of diversion from the Animas River, or the amount of water necessary to supply a depletion of 2,340 acre-feet from the San Juan River stream system, whichever is less, in any one year.

(ii) If the IGA is not in effect, the Nation may request and require of the United States the release of any and all water that the Nation may have stored in Lake Nighthorse for delivery to its point of diversion of ALP water in the State of New Mexico as necessary to meet the diversion demands of the Nation under the ALP up to 4,680 acre-feet of diversion from the Animas River, or the amount of water necessary to supply a depletion of 2,340 acre-feet from the San Juan River stream system, whichever is less, in any one year.

4. Page 16, line 29, through page 17, line 3. The states of Colorado and New Mexico are party to the Animas-La Plata Project Compact, and it is the states that administer the interstate compacts to which they are party. The State of New Mexico is not a party to the IGA or the subject contract, and does not relinquish its responsibilities and interests under the compact. It is the states, not the ALP operator or the USBR, that have the authority to make "conclusive determinations" as to whether the ALP allocations during times of physical shortage are in compliance with the compact.

Further, how shortages to, or curtailments of, ALP uses are to be handled may differ depending upon the cause of shortage and the operational condition. If the IGA is in effect, then a physical shortage from the Lake Nighthorse Joint Storage Pool in any year might be addressed by proportionate reductions in ALP deliveries from storage for the remainder of the year beginning at the time the shortage is identified, or by reductions in total ALP deliveries for the remainder of the year to result in proportionate reductions in the annual ALP deliveries for the year. If the IGA is not in effect, then the direct flow available to the ALP at the Durango pumping plant during a time of physical shortage to the ALP should be proportionately distributed to the ALP contractors in accordance with their diversion demands, after which any contractor could request a release of supplemental water that it has stored in its reserved storage capacity within Lake Nighthorse to fully meet its ALP diversion demands up to its annual statutory water allocation. Under the latter condition, an overall shortage in supply, after consideration of both the available direct flow and water in storage, to one ALP

contractor in a given year as measured against its statutory water allocation would not be cause for other ALP contractors to share in said overall shortage. If the contract in other sections is to refer to conditional circumstances of whether the IGA is or is not in effect, it should do so consistently. Also, if ALP uses in one state might be curtailed in order for that state to meet its obligations under article IV of the Upper Colorado River Basin Compact, this should not constitute a shortage within the context of the contract that would have to be shared among all ALP contractors in both states.

5. Page 17, lines 10-17. Evaporation losses from Lake Nighthorse are in addition to, and are not charged against, any of the statutory water allocations of ALP contractors. Whether or not the IGA is in effect, the amount of water stored in Colorado's recreation pool should first be reduced for the amount of evaporation losses resulting from the surface area of the lake at the top of the pool. Then, if the IGA is not in effect, the amounts of water stored within each contractors allocated storage capacity may be reduced for their proportionate shares, determined by the amounts of water actually stored within their allocated capacities, of the incremental evaporation losses from all water actually in storage above the recreation pool. If the IGA is in effect, then the water stored in the active capacity of Lake Nighthorse, exclusive of that in the Colorado recreation pool and the Durango reserved pool, is in the Joint Storage Pool which does not belong to particular ALP contractors, and evaporation losses from the Joint Storage Pool do not need to be allocated to particular contractors in order to determine storage water availability to a particular contractor.

However, under the Upper Colorado River Basin Compact, the evaporation loss caused by the storage of water in one state for later delivery and use in a downstream state is chargeable against the downstream state's Upper Basin apportionment. Accounting for Lake Nighthorse reservoir evaporation resulting from the storage of water for ALP uses in New Mexico is, in principle, relatively straightforward if the IGA is not in effect. If the IGA is in effect, then the states must determine how to estimate the volumes of water in storage in Lake Nighthorse at any given time that is being held for, or that might eventually be required for, delivery for ALP uses in New Mexico. The states of Colorado and New Mexico have not agreed to an accounting of Lake Nighthorse reservoir evaporation among the states. Again, it is the states, not the parties to the IGA or the contract, which administer the interstate compacts to which they are party.

The hydrologic modeling performed for the ALP FSEIS provides information on the amount of reservoir evaporation from Lake Nighthorse that might be anticipated to be chargeable, on average, against New Mexico's Upper Basin apportionment if the IGA is not in effect. New Mexico has requested information relating to determining the amount of reservoir evaporation from Lake Nighthorse that might be chargeable to New Mexico's Upper Basin apportionment if the IGA is in effect, and has yet to receive any such information.

Regardless of whether the IGA is or is not in effect, water released from Lake Nighthorse storage for delivery for uses in New Mexico are subject to reduction for incremental channel losses between the dam and the point of diversion in New Mexico that result from augmenting direct flows with storage water.

6. Page 19, lines 21-27. Neither the United States nor the Navajo Nation can be held responsible for the control, carriage, handling, distribution, measurement and use of water bypassed at the Durango pumping plant or released from Ridges Basin Dam between these two "delivery" points and the point of diversion from the Animas River in New Mexico. See comment 1 above.

7. Page 20, lines 24-31. The amount of diversion rights for the Navajo Nation under File No. 2849 for the NGWSP as defined by the proposed partial final decree attached to the Settlement Agreement is for the diversion of water from Navajo Reservoir at the Navajo Indian Irrigation Project (NIIP) intake or from the San Juan River (near Kirtland). To be consistent with the proposed partial final decree and water rights administration in New Mexico, the delivery quantities should be measured against the permitted or decreed

rights at the points of diversion. The draft contract at page 21, lines 9-12, suggests that the points of delivery (ie, Navajo Dam) can be changed consistent with the proposed partial final decree, but the entire contract should be consistent with the decree so far as the water allocations and rights to divert water are concerned. This latter subparagraph (c) at page 21 appears only to refer to obtaining Secretarial approval of a change in point of diversion in addition to State Engineer approval.

Also, diversions may be made from inflows arising below Navajo Dam by the NGWSP or non-project water uses. The USBR may consider bypassing or releasing additional water at Navajo Dam to meet the diversion demands of the NGWSP at the San Juan River diversion near Kirtland after senior non-project uses downstream from Navajo Dam and channel losses. Further, the diversion, depletion and return flow amounts for NGWSP uses in New Mexico included in the July 2009 NGWSP Planning Report and Final Environmental Impact Statement (FEIS) are associated with diversions from the NIIP canal into Cutter Reservoir for the Cutter lateral of the NGWSP and with diversions from the San Juan River near Kirtland for the main pipeline serving the river valley, the Highway 491 corridor, Gallup and Window Rock. As for releases of water stored in Navajo Reservoir back into the San Juan River to augment the available direct flow, the incremental increases in channel losses caused by augmenting the direct flow with storage water between Navajo Dam and the points of diversion within New Mexico may be accounted and deducted from the release amount to determine the amount of storage water available to the NGWSP or other targeted Navajo Reservoir supply contractor deliveries at the points of diversion. The State Engineer may protect releases of storage water from Navajo Reservoir, less incremental channel loss, for delivery to the targeted contractors.

It is recommended that the contract water delivery provisions for the Nation's uses in New Mexico under the NGWSP be modified to reflect the proposed partial final decree, to reflect consistency with the NGWSP FEIS, and to be consistent with the form of the water measurement and delivery (at the point of diversion) provisions for the Nation's ALP water allocation. See comment 1 above.

8. Page 22, lines 3-6. This subparagraph (b) should qualify the Project Construction Committee participation by the State of New Mexico to be subject to the state choosing to participate. New Mexico is not a party to the contract.

9. Page 26, lines 16-22. See comments 1, 6 and 7 above.

10. Page 29, lines 1-10. Any amendments to the contract must not be inconsistent with the water rights decreed to the Navajo Nation by the court in the San Juan River Stream Adjudication for uses under the NIIP, the NGWSP and the ALP, or with the administration of water rights under state law. It is recommended that this paragraph 5 include a statement to this effect.

11. Page 30, line 29, through page 31, line 5. It is not clear who the "affected water users" are that are referenced in this subparagraph (b). The USBR is not to operate the ALP or the Navajo Dam and Reservoir, including for the NIIP, the NGWSP, the Hammond project, the Jicarilla contract uses, or the SJCP by exchange, to the detriment of water rights with more senior priority dates. The City of Farmington's License No. 2995 is junior in priority to the ALP and the Navajo project, and the Bloomfield Irrigation District's License No. 2870 is junior in priority to the Navajo project but not the ALP. Also, it is not clear what is entailed in working with the "affected water users". Are the downstream resources that this subparagraph (b) seeks to maintain and protect while operating Navajo Dam, the NIIP, the ALP and the NGWSP limited to in-stream resources (ie, fisheries)?

12. Page 43, lines 14-20. This paragraph 19 should explicitly state that the Secretary shall operate and maintain treatment facilities for the NGWSP only until such time as ownership of the facilities is transferred to the Navajo Nation.

