

3J-17  
Navajo Settlement



Date: November 6, 2007

To: Sen. John Arthur Smith, Chairman, Legislative Finance Committee  
Rep. James Roger Madalena, Co-Chairman, Interim Indian Affairs Committee  
Sen. John Pinto, Co-Chairman, Interim Indian Affairs Committee  
Sen. Phil A. Griego, Chairman, Water and Natural Resources Committee

From: John R. D'Antonio, Jr., State Engineer  
Estevan Lopez, Interstate Stream Commission Director

Re: **2007 Indian Water Rights Settlement Fund Report**

The 2005 Indian Water Rights Settlement Fund Act requires the State Engineer and the Interstate Stream Commission to report by November 15<sup>th</sup> every year to the Interim Indian Affairs Committee and to the Legislative Finance Committee on the following three subjects:

1. The status of proposed Indian water rights settlements requiring state financing;
2. The distribution of funds from the Indian water rights settlement fund to implement approved settlements; and
3. Recommendations on appropriations to the fund necessary to timely implement Indian water rights settlements.

2005 N.M. Laws, ch. 172, §1.B; NMSA 1978, § 72-1-11 (B). This memorandum presents the report of the State Engineer and the Interstate Stream Commission for 2007.

**1. Status of Proposed Indian Water Rights Settlements – § 72-1-11 (B)(1)**

New Mexico presently has three Indian water rights settlements pending: the Navajo Nation Settlement in the San Juan River adjudication, the Settlement Agreement with the Pueblos of Nambé, Pojoaque, Tesuque, and San Ildefonso in the *Aamodt* adjudication, and the Taos Pueblo Settlement in the Rio Pueblo de Taos/Rio Hondo adjudication.

For each of these three settlements, a settlement agreement was executed in 2005 or 2006 by the affected tribe or Pueblos, the State of New Mexico, and in some cases other local water right owning parties. Copies of the three settlement agreements and related documents can be found at: [www.ose.state.nm.us/legal\\_ose\\_proposed\\_settlements.html](http://www.ose.state.nm.us/legal_ose_proposed_settlements.html). The United States, though a participant in the negotiations that led up to the Taos Pueblo and the *Aamodt* agreements, has not yet signed any of the three settlement agreements. Representatives of the United States will not

sign any settlement agreement until Congress has passed specific settlement legislation authorizing and directing the Secretary of the U.S. Department of the Interior to sign.

#### A. Navajo Nation Settlement

On April 19, 2005, the Navajo Nation and the State of New Mexico executed a settlement agreement to resolve the claims of the Navajo Nation for the use of waters in the San Juan River Basin in northwestern New Mexico. When fully implemented, the Navajo settlement will provide associated water development projects for the benefit of Navajo Nation and non-Indian communities in exchange for a release of Navajo claims to water that potentially could have displaced existing non-Indian water rights in the basin. One of the primary elements of the settlement is the Northwestern New Mexico Rural Water Supply Project (also known as the Navajo-Gallup Water Supply Project), which includes a pipeline to be constructed by the Bureau of Reclamation to bring a renewable surface water supply from Navajo Reservoir to Navajo and non-Indian communities in northwestern New Mexico.

The Navajo settlement agreement includes proposed Partial Final Decrees for entry in the San Juan River adjudication, *State of New Mexico ex rel. State Engineer v. United States, et al.*, San Juan County Dist. Ct. No. CV-75-184, and proposed federal settlement legislation. It also includes a proposed Settlement Contract to provide for deliveries of water to the Navajo Nation under Bureau of Reclamation water projects, namely the Navajo Indian Irrigation Project, the Northwestern New Mexico Rural Water Supply Project, and the Animas-La Plata Project.

Developments regarding the Navajo Settlement since the November 15, 2006 Report on Indian Water Rights Settlements include:

- Federal Legislation. On December 7, 2006, Senator Bingaman (S. 4108) and Representative Udall (HR 6436) introduced legislation to authorize and fund the settlement. On April 19, 2007, the legislation was re-introduced by Senators Bingaman and Domenici (S.1171) and Representative Udall (HR 1970).

On June 27, 2007, the Senate Energy and Natural Resources Committee held a hearing on the settlement legislation. On July 24, 2007, the House subcommittee on Water and Power of the Natural Resources Committee held a hearing on the legislation. The State Engineer and Chairman of the Interstate Stream Commission presented testimony at those hearings.

- Hydrologic Determination. On June 5, 2006, the Upper Colorado River Commission passed a resolution providing its support for Department of Interior's draft hydrologic determination confirming that sufficient water is reasonably likely to be available to

satisfy the water supply necessary for the Navajo Settlement. The draft determination was reviewed by engineers and hydrologists from all of the Colorado River Basin States, (California, Nevada, Arizona, Colorado, Wyoming, Utah and New Mexico). On May 23, 2007, the Secretary of the Interior approved and signed the Hydrologic Determination, and by letter dated June 8, 2007, the Secretary of the Interior transmitted the determination to the Governors of each of the Colorado River Basin states.

- Draft Environmental Impact Statement. In March of 2007, the Bureau of Reclamation issued a draft of the Environmental Impact Statement for the Navajo-Gallup pipeline project. The federal government held public meetings regarding the draft and received comments regarding the draft. A link to the EIS documents is: <http://www.usbr.gov/uc/envdocs/eis/navgallup/DEIS/index.html>. A final draft of the EIS is anticipated in 2008.
- Discussions with the Department of the Interior. Representatives of the State and the Navajo Nation have continued to meet with representatives of the Department of the Interior to review their concerns regarding the settlement and the legislation.
- Coordination with the City of Gallup and other stakeholders. In addition to the Navajo Nation, the two other beneficiaries of the Northwestern New Mexico Rural Water Supply Project are the City of Gallup and the Jicarilla Apache Nation. The State has coordinated with the representatives of Gallup regarding the federal legislation to authorize the settlement. The City of Gallup and the Navajo Nation have recently entered into a Memorandum of Understanding relating to an agreement to provide a water supply to Gallup.
- Settlement Project Costs. The settlement is currently estimated to cost a total of over \$900 million. The largest portion of this cost is for construction of the Navajo-Gallup pipeline project, and the latest estimate of the cost of the Navajo-Gallup project is \$864.4 million (which is an increase from the prior estimate of \$716 million in 2005). The City of Gallup and the Jicarilla Apache Tribe will provide at least 25% of the construction costs of the portions of the project attributed to those entities, for a total of at least \$30 million. The State has committed to contribute \$25 million toward the costs of the project. New Mexico's congressional delegation has requested that the State increase its contribution to \$50 million. In addition, under the settlement, the State would contribute \$10 million toward non-Indian irrigation improvements.

## **B. *Aamodt* Pueblos Settlement**

On May 3, 2006, at a signing ceremony held in the offices of Governor Bill Richardson in Santa Fe, the State of New Mexico, the Pueblos of Nambé, Tesuque, Pojoaque, and San Ildefonso, the County of Santa Fe and the City of Santa Fe executed a settlement agreement designed to resolve the claims of the four Pueblos to the use of waters in the Nambé-Pojoaque-Tesuque stream system in north central New Mexico.

When fully implemented, the settlement agreement will finally adjudicate the water rights of the four Pueblos in the ongoing adjudication of water rights in the Nambé-Pojoaque-Tesuque stream system ("N-P-T"), *State of New Mexico ex rel. State Engineer v. Aamodt, et al.*, U.S.D.C. No. 66cv06639 MV/LCS. For the most part, these Pueblo water rights will be adjudicated with senior priorities. The settlement also will protect non-Pueblo junior water rights from future Pueblo priority calls through a complex set of agreements based on four major concepts. First, the Pueblos agree to forbear from making priority calls against non-Pueblo surface water rights except under certain circumstances, thereby preserving existing surface water uses in the N-P-T. Second, the United States will acquire 2,500 acre feet of additional water for the Pueblos' economic development, intended, in part, to compensate them for the water they would not be able to take as a result of their forbearance. Third, a pipeline will be constructed to deliver water to Pueblo and non-Pueblo users in the basin from the Rio Grande. Fourth, non-Pueblo parties currently using domestic wells may choose to stop using groundwater and instead hook up to the pipeline for their domestic water uses.

Since last year's Report, developments regarding the *Aamodt* Settlement include:

- Federal Legislation. The settlement parties submitted an initial draft of federal legislation to New Mexico's Congressional delegation. In April, and again in July, certain of the settlement parties, including the State and the Pueblos, traveled to Washington, D.C., and met with members of the delegation and their staffs, as well as officials at the Departments of Interior and Justice, and the Office of Management and Budget, regarding the *Aamodt* Settlement and legislation to authorize and fund it. On August 13, 2007, the settlement parties met with representatives of Senator Domenici and Congressman Tom Udall in Albuquerque to review the draft legislation. The parties continue to work with the delegation and the executive branch to address concerns related to funding and other issues.

The settlement parties continue to work on a Cost Sharing and System Integration Agreement. The document is substantially completed. The question of settlement costs and the allocation of those costs between the federal government and the other parties are essentially the only issues which remain outstanding. The *Aamodt* settlement parties are

currently engaged in an ongoing dialogue with the New Mexico congressional delegation and the federal executive branch on this question.

- San Juan-Chama Project Water. In response to interest by both the *Aamodt* and Taos Pueblo settlements in using the remaining unallocated water from the San Juan-Chama Project as a source to fulfill settlement water supply needs, representatives of the Department of the Interior made clear in 2007 that the two settlements would have to agree on a division of the available San Juan-Chama Project water. Talks between the two settlement groups culminated in early June in a conceptual agreement on the division of this water. The two settlement groups agreed that 1,079 acre-feet could be used for water supply contracts pursuant to the *Aamodt* settlement, and that 2,621 acre-feet could be used for water supply contracts pursuant to the Taos Pueblo settlement.
- Process for Court Approval. On November 1, 2006, the Mediation Parties filed a Process Motion with the Court requesting entry of an order adopting procedures through which Court approval of the settlement agreement could be obtained, and for the entry of an Interim Administrative Order that would make operative the terms of the settlement agreement. The Process Motion also addressed notice procedures and the process by which water right claimants in the stream system could ultimately join in or object to the settlement agreement. The Court granted the motion in 2007, and entered an Order adopting the operative terms recommended by the settlement parties. These will go into effect, and the process leading to Court approval will commence, once Congressional action on the settlement agreement has taken place.
- Settlement Project Costs. Since the 2006 session, preliminary revised cost allocation figures for *Aamodt* show a total fifty-year cost for the project, including projected OM & R costs of \$99.2 million, of \$309.4 million, of which the proposed federal cost-share would be \$192.5 million, and a proposed non-federal cost share of \$111.9 million, of which \$61.9 million is proposed to be borne by Santa Fe County, and \$50 million by the State. The non-federal funding would pay for the non-Indian portion of the proposed pipeline that would deliver potable water from a purification plant near Otowi, through the Nambé-Pojoaque-Tesuque valley to each of the Pueblos and non-Indian communities along its route.

### **C. Taos Pueblo Settlement**

On May 30, 2006, in a signing ceremony at Taos Pueblo, the Pueblo, the State of New Mexico, and several Taos-area water right owning parties executed a settlement agreement designed to resolve the claims of Taos Pueblo to the use of waters in the Rio Pueblo de Taos and Rio Hondo stream systems in north central New Mexico. In addition to the Pueblo and the State, the local

settlement parties include the Taos Valley Acequia Association, the Town of Taos, El Prado Water and Sanitation District, and twelve Taos area mutual domestic water consumer associations. The Taos settlement agreement, when fully implemented, will adjudicate Taos Pueblo's claims and expedite the adjudication of non-Pueblo claims to water rights in the ongoing Taos area water rights adjudication suit, *State of New Mexico ex rel. State Engineer v. Abeyta, et al.*, U.S.D.C. No. 69cv07896 BB and 69cv7939 BB, Consolidated. In addition to the resolving claims of Taos Pueblo, the settlement agreement addresses several issues of concern to non-Indian water right owners, including the preservation of existing acequia water uses, preservation of historic water sharing arrangements between the Pueblo and non-Indian acequias on the Rio Lucero and Rio Pueblo, and the allocation of San Juan-Chama Project water available for the settlement.

Developments regarding the Taos Pueblo Settlement since the November 15, 2006 Report on Indian Water Rights Settlements include:

- Federal Legislation. The settlement parties submitted to New Mexico's Congressional delegation in 2006 an initial draft of federal legislation that approves the settlement and authorizes federal funding for its implementation. The parties continue to work with the delegation and the executive branch to address the concerns of the federal government and to refine the draft legislation. Representatives of the State, the Pueblo, and the local Taos settlement parties traveled to Washington in April 2007 for a series of meetings to brief members of Congress and congressional staff and representatives of the Department of the Interior and the Office of Management and Budget on the settlement.
- San Juan-Chama Project Water. In response to interest by both the *Aamodt* and Taos Pueblo settlements in using the remaining unallocated water from the San Juan-Chama Project as a source to fulfill settlement water supply needs, representatives of the Department of the Interior made clear in 2007 that the two settlements would have to agree on a division of the available San Juan-Chama Project water. Talks between the two settlement groups culminated in early June in a conceptual agreement on the division of this water. The two settlement groups agreed that 1,079 acre-feet could be used for water supply contracts pursuant to the *Aamodt* settlement, and that 2,621 acre-feet could be used for water supply contracts pursuant to the Taos Pueblo settlement. This represents a reduction of 12% from the 2,990 acre-feet that the Taos Pueblo settlement parties had originally anticipated would be available for the Taos settlement.
- Settlement Project Costs. The settlement agreement estimated the total costs of settlement implementation would be approximately \$134 million. Of that amount, \$100 million would fund the Pueblo Water Development Fund and \$34 million would fund mutual benefit projects necessary to implement the settlement. The local settlement

parties would seek at least \$14.49 million of state funding for the mutual benefit settlement projects. The costs of settlement projects are expected to rise, but the cost-sharing formula in the settlement agreement calls for the state to bear 25% of any increased project costs.

**2. Distribution of monies from the Indian Water Rights Settlement Fund – § 72-1-11 (B)(2)**

The 2007 legislature appropriated \$10 million to the Indian Water Rights Settlement Fund (“fund”). 2007 N.M. Laws, ch. 42, § 88. This legislation required a certification by the Interstate Stream Commission to the Secretary of Finance and Administration that the water rights in the Navajo Nation, Taos and *Aamodt* cases have been settled. In September 2007, the director of the Interstate Stream Commission certified that the cases had been settled and requested that the monies be transferred to the fund. The Department of Finance and Administration requested additional information regarding the settlements that is currently being compiled. It is anticipated that monies from the 2007 appropriation will be deposited in the fund in the near future.

The \$10 million appropriated in 2007 is the first appropriation made to the fund since the fund was created in 2005. To date, no money has been distributed from the fund.

**3. Funding Recommendations – § 72-1-11 (B)(3)**

Governor Richardson continues to support an approach for funding the State's proposed share of the Navajo Nation, *Aamodt*, and Taos Pueblo settlements that is fiscally prudent while making a clear statement of the joint commitment by New Mexico's legislative and executive branches of government to meet the State's obligations. State funding needed for these settlements is significant – but expenditures will not be required until years into the future, and can be spread out over several years. In addition, the exact size of the state share for the settlements is not yet agreed upon.

The funding plan proposes that the two branches of government make a long-term commitment to fund the settlements on an advance-pay formula. This approach contemplates taking the anticipated size of the state share and dividing it by the number of years until the earliest anticipated commencement of construction. The anticipated state share, the amount already appropriated to the fund, the net anticipated state share, the years until anticipated construction, and the resulting annual payment amount recommended for each of the three settlements are as follows (all figures in thousands):

	<u>State Share</u>	<u>Appropriated</u>	<u>Net State Share</u>	<u>Years Out</u>	<u>Annual Payment</u>
• Navajo:	\$35,000.0	\$2,770.0	\$32,230.0	9 years	\$3,580.0
• <i>Aamodt</i> :	\$50,000.0	\$4,940.0	\$45,060.0	7 years	\$6,440.0
• Taos:	\$14,490.0	\$2,290.0	\$12,200.0	4 years	\$3,050.0
• Totals:	\$99,490.0	\$10,000.0	\$89,490.0	---	\$13,070.0

The State Engineer and the Interstate Stream Commission therefore recommend that the 2008 legislature appropriate a total of \$13.07 million to the Indian Water Rights Settlement Fund.