



**City of Española**  
**Office of the Mayor**

Richard Lucero, Mayor  
Ray V. [unclear] City Manager  
405 Paseo De Oñate, Española, NM 87532  
505-747-6100 Fax 505-747-6113

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SJ-17

January 16, 2004

John D'Antonio, Jr., P.E.  
New Mexico State Engineer  
Office of the State Engineer  
P.O. Box 25102  
Santa Fe, NM 87504-5102

Re: City of Española Comments on Proposed Navajo Water Rights Settlement

Dear Mr. D'Antonio:

The City of Española has been discussing this matter with the San Juan/Chama Contractors and in particular with the City of Albuquerque. The City of Española's water attorney has been working diligently with the City of Albuquerque to provide comments on the Proposed Navajo Water Rights Settlement. As a result, the City concurs with Albuquerque's comments and would like to incorporate them on behalf of the City of Española.

The comments reflect our understanding of the settlement, but we have not had adequate time to evaluate all the potential ramifications to the San Juan-Chama project. As you know, the City owns 1,000 acre-feet of San Juan-Chama water and is concerned how this settlement affects the current and future operation of the project. The City's San Juan-Chama water is vital to our future from a water resources perspective and more importantly for economic vitality in Northern New Mexico.

Please be advised that the City fully supports the Navajo-Gallup Pipeline project and would like to commend the Navajo Nation for the project. However, we would like to opportunity to meet with you and discuss our comments on the proposed settlement.

Sincerely,

Richard L. Lucero  
Mayor

cc: Bill Hume, Governor's Office  
Hillary Tompkins, Governor's Office  
Estevan Lopez, Director, Interstate Stream Commission  
John Leeper, Navajo Nation Department of Water Resources  
John Whipple, NM Interstate Stream Commission

CITY OF ALBUQUERQUE'S COMMENTS  
ON NAVAJO-GALLUP SETTLEMENT

**INTRODUCTION**

On December 5, 2003, the State Engineer Office released the draft Water Rights Settlement with the Navajo Nation. The Settlement Agreement is of interest to the City of Albuquerque and the San Juan-Chama contractors because it implicates San Juan-Chama water.

The City of Albuquerque ("City") supports the Navajo-Gallup Pipeline and the settlement of Navajo water rights claims. The City has no comments on the Navajo-Gallup Pipeline project and supports full implementation. However, there are other elements of this settlement that the City is concerned about and the potential effects on the current and future operation of the San Juan-Chama Project.

As a preliminary matter, an extremely short comment phase has been provided by the State. Negotiations lasted for six years or longer. The official comment period was only five weeks. Formal comments are to be submitted by January 15, 2004, although the State Engineer and members of his staff have indicated that comments could be received or supplemented after that date. The City reserves the right to supplement these Comments.

As set forth below, the City has specific recommendations for amending the proposed legislation which will confirm that there is "available water" for the settlement that will not take water from the San Juan-Chama Project.

**COMMENTS**

***Reserved rights claims were previously waived, resulting in the diversion schedule and by-pass requirements for the San Juan-Chama Project in Section 8 of the San Juan-Chama Project Act.***

The Executive Summary for the proposed Settlement Agreement states that "[t]he proposed Settlement Agreement is intended to provide water rights in associated water development projects, including the Navajo-Gallup Water Supply Project, for the benefit of the Navajo Nation in exchange for a release of claims to water that potentially might otherwise displace existing non-Navajo water uses in the basin and in New Mexico." However, the legislative history clearly indicates that with the exceptions of the Fruitland, Hogback, Cudai, and Cambridge Projects, that waiver occurred some forty plus years ago, with the enactment of the San Juan-Chama Act in 1962, as evidenced by resolution of the Navajo Tribal Council No. CJ-1-55.<sup>1</sup>

The legislative history of the San Juan-Chama Project Authorization Act contains other examples in which the passage of the San Juan-Chama Project Authorization Act was taken as the basis for

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<sup>1</sup> See *Navajo Project New Mexico Feasibility Report* ( United States Department of the Interior, Bureau of Indian Affairs, January 1955) at 394-95.

satisfying the Navajo Nation's claims for reserved water rights.<sup>2</sup> For example, in testimony before the Congress, Paul James, Chairman of the Navajo Tribal Council testified:

The Navajo Indian irrigation project, as described in the supplemental feasibility report, would consist of 110,630 acres of irrigated land for exclusive Navajo Indian use in San Juan County, N. Mex. All of the project except 19,640 acres will be on the present Navajo Indian Reservation. The additional acreage will be placed in reservation status, and the Navajo Tribe will pay the land acquisition costs. The purpose of adding this acreage to the reservation is to make the most compact and economical project feasible for Indian use.

The plan also calls for providing additional canal capacity for delivering water for industrial and municipal use from Navajo Dam, over and above the diversion requirement of the irrigation project. Such additional capacity would be paid for by the industrial and municipal water users with interest. All water uses from Navajo Dam would have equal priority. The Navajo Tribe has consented to this, and relinquished its rights under the *Winters* doctrine for the water necessary to irrigate the Navajo Indian irrigation project, in order to provide a practicable plan for comprehensive development of the resources and industrial potential of the San Juan Basin. We have done so because such development is necessary for our very survival.<sup>3</sup>

The relinquishment of Navajo claims resulted in the diversion schedules set forth in Section 8 of the San Juan-Chama Project Act, *i.e.*, Section 8 (a)'s schedule of diversions from the tributaries of up to 1,350,000 acre-feet in any consecutive ten year period and not to exceed 270,000 acre-feet in any year, and the by-pass schedule in section 8 (f) from the Navajo and Blanco Rivers for the preservation of fish and aquatic life. Without the waiver of tribal claims, the Bureau and the State of New Mexico would not have had the assurance of available water to enter into contracts.

The waiver of claims by the Navajo Nation established a hydrologic baseline that governs the operations of the San Juan-Chama project and sharing of shortages between the San Juan-Chama project and the N.I.I.P. This settlement proceeds to significantly alter the previously established hydrologic baseline by adding new demands on the system and establishing a new sharing of shortages baseline. Of particular concern is the addition of a new unquantified regulatory demand which appears at various points in the documents such as Section 309 of the proposed legislation.

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<sup>2</sup> J. Maurice McCabe, Executive Director of the Navajo Tribal Council testified to the Congress that:

The Navajo Tribe has consented to this, and relinquished its rights under the *Winters* doctrine for the water necessary to irrigate the Navajo Indian Irrigation Project, in order to provide a practicable plan for comprehensive development of the resources and industrial potential [of the Navajo Reservation].

<sup>3</sup> See Hearings on H.R. 2352, 2494, and S. 72, 86<sup>th</sup> Cong., 2<sup>nd</sup> Sess., May 20, 1960, at 64.

There is nothing in the settlement document that provides for an analysis of the proposed new hydrologic regime and the effects on the San Juan-Chama project or other users in the San Juan River.

### ***Available Water***

In accordance with the authorizing legislation for the San Juan-Chama Project and the Navajo Indian Irrigation Project (76 Stat. 96,99), the Secretary of Interior must submit to Congress, as determined through hydrologic investigations, that sufficient water to fulfill future contracts is reasonably likely to be available for use in the State of New Mexico. In addition, the Secretary shall not enter into contracts which will result in a reasonable amount of water not being available for the diversion requirements for the N.I.I.P and the San Juan-Chama Project.

The City is not aware that there have been any hydrologic investigations to determine if there is sufficient water available for implementation of this settlement. The settlement agreement is silent on the short and long-term effects of adding new demands and whether these new demands would result in a reasonable amount being available for the existing authorized projects. The settlement suggests that the depletion schedule shows that water is available, but there is no analysis that states whether the settlement would create shortages more frequently and how the additional shortages may affect the yield of the San Juan-Chama Project.

While the City supports the implementation of the Navajo-Gallup Pipeline Project and has no comments with respect to the addition of this project, the settlement adds new unquantified demands on the sharing of shortages by adding regulatory shortages to the list of projects that would share in the available supply. Are the new environmental demands that are to be shared part of New Mexico's Upper Colorado apportionment or are they strictly limited to downstream delivery obligations?

Without quantifying the amount of water necessary to meet current and anticipated future regulatory shortages, the Secretary may not be able to provide a definitive statement whether there is available water for this settlement. In addition, the Schedule of Anticipated Upper Basin Depletions does not provide any water to meet current or future regulatory demands.

### ***Sharing of Shortages***

The addition of new demands at or below Navajo Reservoir, including unquantified regulatory demands, will have the twofold effect of increasing the number of years in which shortage is invoked and of reducing the amount of water available to San Juan-Chama contractors during shortage years.

The authorizing legislation for the San Juan-Chama Project and the N.I.I.P provides for a sharing in the available water in the event of shortages. This settlement agreement adds the Navajo-Gallup Water Supply Project to the N.I.I.P as a participating project under the sharing of shortages. However, the settlement also adds others to the list including Jicarilla Apache Nation and others in the "Navajo Reservoir Supply" other than the N.I.I.P. It is unclear why these additional projects are being added to the sharing of shortages under the 1962 authorization.

The settlement attempts to add undefined environmental demands to the sharing of shortages provision. The addition of these new unquantified demands, which were not accounted for the depletion schedule that New Mexico used to determine if water was available for this settlement, will certainly increase the frequency of when shortages occur and the amount to be shared. It is assumed that these projects will be operated in accordance with federal and state law, but it is unclear why this settlement attempts to add unspecified and unquantified demands to the sharing of shortages.

The legislative history of the Act of June 13, 1962, shows that sharing of shortages was to be undertaken entirely between the San Juan-Chama Project and a Navajo Indian Irrigation Project supplying water to 508,000 acres of land. Section 11(a) states:

“Such contracts [that is, contracts satisfactory to the Secretary and conforming to the provisions of this Act] . . . Shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements.” [Emphasis added.]

Section 11(a) also states:

“In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff apportioned to said group in the same proportion as the normal diversion requirement under said contract bears to the total normal diversion requirements of all such contracts that have been made . . .”

In other words, “the diversion to the two projects shall be in proportion to their diversion requirements as provided therein.” *See*, House Document 424 at XXXI.

The San Juan-Chama Project Act provides that “[t]he Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements of the Navajo Indian irrigation project and the initial stage of the San Juan-Chama Project as specified in sections 2 and 8....” It appears that this criteria cannot be met with the new demands projected at or below Navajo Reservoir.

Apart from the 37,000 acre-feet per year for the Navajo-Gallup Pipeline Project, the commitment to add new projects and provide unspecified amounts of water for regulatory purposes would make the operation of the San Juan-Chama Project uncertain by inducing more shortage years and reducing the amount of water available to San Juan-Chama contractors in shortage years.

It appears that implementation of this settlement may cause shortages to occur in every year following 2030. According to the depletion schedule, New Mexico will be fully utilizing its apportionment starting in 2030, but the schedule does not account for regulatory demands. If regulatory demands are added to the proposed depletion schedule, then it appears that the San Juan-Chama project will be sharing shortages in every year following 2030. Has the State considered the impact on the San Juan-Chama contractors? Why should a contractor like the City of Gallup in 2004 be allowed to share in the available water supply with the San Juan-Chama project that was authorized in 1962? Albuquerque contends that the summation of these issues translates into "unavailable water."

### ***Depletion schedule***

The depletion schedule developed for the settlement assumes that the diversion from the San Juan-Chama project will average 107,500 acre-feet over a ten-year period. The 107,500 acre-feet was derived (1989 Addendum to Hydrology Report San Juan-Chama Project Yield Update with subsequent updates) by dividing the total amount of water originating above the diversions over the number of years of record (approximately 50-years). The 107,500 acre-feet depletion in the schedule is not reflective of the actual hydrology above the diversions. For example, the amount available for diversion from the years 1978 to 1987 was 1,343,995 acre-feet or 134,399 acre-feet per year annually. This depletion schedule and settlement could be misinterpreted as follows:

- a. that the San Juan-Chama Project is limited to an maximum annual diversion of 107,500 acre-feet rather than the 270,000 acre-feet in the authorizing legislation;
- b. that the San Juan-Chama Project is limited to a maximum amount of 1,075,000 acre-feet over a ten year period.

Neither of these interpretations is correct and would affect the operation and yield of the project. The Bureau hydrologic studies that provide for an average of 107,500 acre-feet being available for the San Juan-Chama Project assume that every drop of water above the bypass flow requirements is diverted into the Project. If the Project diversions are restricted further by implementation of this settlement agreement it will reduce the 96,200 acre-feet firm yield of the San Juan-Chama Project.

The State should clearly delineate how the 107,500 acre-feet per year was derived and how it should be utilized so as to avoid misinterpretation as described above. The San Juan-Chama project should still be governed under the original hydrologic operations specified in Section 8 of the San Juan-Chama Project Act (76 Stat 96,99).

### ***Upper Basin Yield***

Nothing in the Navajo Water Rights document discusses how this settlement is affected if there is a continued decrease in the hydrologic yield of the Upper Basins. Is it safe to assume that the yield of the Upper Basin States will remain static over the next 60 years when the yield has decreased by 20% over the last 70 years (7.5 million – 6.0 million / 2003 – 1929)? If the Upper Basin yield is reduced only by half as much (750,000 acre-feet) over the next 60-years, New Mexico's apportionment will be 590,625 acre-feet of which only about 530,000 (60,000 acre-feet reduction for evaporation in Glen Canyon and other reservoirs) will be available. The City is concerned about how this settlement affects the continued operation of the San Juan-Chama Project if New Mexico's apportionment is affected overtime and is not addressed in this document.

The settlement and depletion schedule should be re-evaluated based on the anticipated future reductions in Upper Basin Yield. If this is not necessary for the hydrologic evaluation of "available water", then the State should provide clear direction on the intent of this settlement and the San Juan-Chama Project.

### ***Regulatory Shortages***

The City recommends that the addition of regulatory shortages be removed from the sharing of shortages provision in the settlement. All of the projects called for in this settlement including existing projects must comply with all existing and future applicable federal and state laws. In addition, conditions on the San Juan River will change over time as will the regulations that govern them. If regulatory shortages are added, then this could alter New Mexico's apportionment of the Upper Colorado River Compact if New Mexico's water is used to meet the unquantified regulatory demands. Removing the unquantified regulatory demands also makes the hydrologic analysis that the Secretary of Interior is required to complete in order to determine if water is available much simpler. The addition of regulatory shortages may affect of the recently approved rider by Senators Bingaman and Domenici (Public Law No. 108-137 §208, 117 Stat. 1827 (12/1/03)). Finally, adding regulatory shortages may be a precedent for other rivers in the State.

### **RECOMMENDATIONS**

The City recommends that the State and Navajo Nation consider the following recommendations to reduce the impact on the current and future operation of the San Juan-Chama Project. The City recommends that the San Juan-Chama Project be removed from the Sharing of Shortages requirements in the authorizing legislation. That is, the City recommends that the San Juan-Chama project continue to be operated in accordance with the minimum bypass flow requirements set forth on page D2-7 of appendix D of the U.S. Bureau of Reclamation report entitled "San Juan-Chama Project, Colorado-New Mexico", dated November 1955. Each of the three diversions on the Navajo, Little Navajo and Blanco Rivers (tributaries to the San Juan River) in Colorado has specific minimum bypass flow requirements that vary month to month.

## 1. Hydrologic Effect of Bypass Flow Requirements (in original legislation)

The practical hydrologic effect of the bypass flow requirements for the three diversions is that the San Juan-Chama Project naturally shares shortages in the available water supply. By adding the minimum bypass flows together (and assuming they could be met month to month), approximately 40,000 to 50,000 acre-feet of water must bypass the San Juan-Chama Project diversions before the project can take any water. The reality is that when there are shortages on the San Juan River, and sometimes during average years, the San Juan-Chama Project suffers shortages. The addition of new demands will increase the amount of water released from Navajo and will cause more shortages. Removing the sharing of shortages provision on the San Juan-Chama Project will provide for a natural sharing of shortages. There are many actual hydrologic examples of the fact that the San Juan-Chama Project already shares in shortages that resulted in the implementation of the bypass flow requirements. Two examples follow:

### Example 1 – How the San Juan-Chama Project has suffered shortage over the last ten-years

During the period from 1994 to 2003, the San Juan-Chama Project has diverted an average of 80,721 acre-feet from the San Juan River. Assuming that the long-term average annual yield of the San Juan-Chama is 107,500 acre-feet per year, the San Juan-Chama has suffered a 25% shortage over the last ten years. In fact, only three times over the last ten years has there been water available to meet the average depletion. That means that the San Juan-Chama Project suffered shortages 7 times in the last 10-years. By contrast, the demands for the users in the San Juan River have suffered little or no shortage over the last ten years and this includes additional releases for endangered species under the San Juan Recovery Implementation Plan.

### Example 2 – How the Bypass Flow Requirements Affect the Project During Low Flow Years

In 2002, the San Juan-Chama project diverted 6,300 acre-feet into the project. Compared to the average depletion for the San Juan-Chama Project of 107,500 acre-feet, the project suffered an incredible 94% shortage. In the same year, the users in the San Juan River suffered no shortage.

The advantages are as follows:

1. This recommendation avoids any impact of this settlement on the San Juan-Chama Project as it relates to additional sharing of shortages including the addition of new projects to the list of sharing of shortages;
2. It provides certainty about the operation of the San Juan-Chama project and the amount of water that can be diverted every year;
3. It avoids misinterpretation of the settlement and what is available for the San Juan-Chama Project currently or in the future;
4. It avoids difficult determination by the Secretary about what constitutes a shortage and how that is to be implemented in the San Juan River;
5. If the Navajo Nation agrees that regulatory shortages should be added to the sharing of shortages, then the computation for this is much simpler; and
6. Avoids unintended repeal of Public Law No. 108-137 §208, 117 Stat. 1827 (12/1/03).



## ***Proposed Legislative Revisions***

The proposed legislation in the settlement document should be amended in the following respects:

- p. 12, Section 104 (j): add” , *except that the San Juan-Chama Project shall no longer share shortages on the San Juan River under section 11 but shall continue to meet the by-pass requirements of section 8 (f) in accordance with the values set forth at page D2-7 of appendix D of the United States Bureau of Reclamation report entitled “San Juan-Chama Project, Colorado-New Mexico”, dated November 1955, and the historical operation of the San Juan-Chama Project.*

- p. 20, Section 108 (b) should be amended to include Public Law No. 108-137 §208, 117 Stat. 1827 (12/1/03)

- p.23, Section 203 (a), add a new “(4) *The San Juan-Chama Project shall no longer share shortages on the San Juan River under section 11 but shall continue to meet the by-pass requirements of section 8 (f) in accordance with the values set forth at page D2-7 of appendix D of the United States Bureau of Reclamation report entitled “San Juan-Chama Project, Colorado-New Mexico”, dated November 1955, and the historical operation of the San Juan-Chama Project.*

- p. 25, Section 203 (f): add “*except that the San Juan-Chama Project shall no longer share shortages on the San Juan River under under section 11 but shall continue to meet the by-pass requirements in Section 8 (f) in accordance with the values set forth at page D2-7 of appendix D of the United States Bureau of Reclamation report entitled “San Juan-Chama Project, Colorado-New Mexico”, dated November 1955, and the historical operation of the San Juan-Chama Project.*

- p.29, Section 207 (b) should be amended to include Public Law No. 108-137 §208, 117 Stat. 1827 (12/1/03).

- p. 43, Section 310 (a), has been amended by adding a reference to the Domenici rider removing the discretion of the Secretary to reduce, restrict, or reallocate water stored in Heron Reservoir