



*San Juan - 17
Navajo Settlement*

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**FAX MEMORANDUM
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CC: Mike Hamman Via Email

FROM: Susan G. Jordan NO. OF PAGES: 6 (incl. this page)

DATE: February 11, 2004 IN HOUSE CC: 100.127.003

Re: Jicarilla Apache Nation staff comments on San Juan River Basin Navajo
Nation Water Rights Settlement Draft Documents

MESSAGE:

The attached reflect our recent discussions. Please call us if you have any questions.

CONFIRMATION NO.: (505) 982-3622 ORIGINAL WILL BE MAILED: YES NO

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**Jicarilla Apache Nation Staff Comments on
the December 5, 2003 Navajo Nation/New Mexico Staff Draft Documents
for the
San Juan River Basin in New Mexico Navajo Nation Water Rights
Settlement
February 11, 2004**

The Jicarilla Apache Nation generally supports the proposed settlement with the State of New Mexico of the Navajo Nation's water rights claims as presented in the draft documents. The participation by the Jicarilla Apache Nation in the Navajo Gallup Water Supply Project, including the Jicarilla Apache Nation's willingness to negotiate a subcontract with the City of Gallup for the use of a portion of the Jicarilla Apache Nation's settlement water rights in the San Juan basin, illustrates the Jicarilla Apache Nation's interest in a successful outcome to the settlement process. The Jicarilla Apache Nation's direct participation is an important piece of the authorization bill and our following comments are provided to help clarify the Jicarilla Apache Nation's involvement and to assist with the Navajo Nation and State of New Mexico review of the draft settlement documents. The Legislative Council of the Jicarilla Apache Nation will consider the settlement documents as approved by the Navajo Nation and the State of New Mexico. Further discussion and revision are anticipated as the Jicarilla Apache Nation continues to address these issues on a government-to-government basis with the United States, the Navajo Nation, and the State of New Mexico.

Settlement Agreement:

Page 12, Section 8.2. Insert at the end of the third sentence "provided that such sharing shall not impair the water rights of any other Indian tribes or limit new appropriations by other Indian tribes." Insert at the end of the fourth sentence "provided that the supply to the additional allocation shall not impair deliveries to existing contractors to the Navajo Reservoir Supply, including the Jicarilla Apache Nation."

Appendix 2 – Draft Authorization Bill:

Page 8 - Insert new subparagraph (5) in SEC. 103(d) : "(5) the Secretary has approved a water supply subcontract between the Jicarilla Apache Nation and the City of Gallup, in accordance with SEC. 105(c) of this Act, demonstrating a sufficient water supply to meet the delivery requirements for the City of Gallup by the Project."

Page 9- SEC 103(g)(2). It appears that payments from third party users for use of unused capacity in the Project would help buy down the construction cost. We wonder why such payments could not be used to reduce the construction cost

repayments by Project contractors. We suggest you consider deleting "construction repayment requirements or".

Page 10 – SEC. 104(c). Further revision and probably a reference to project documents will ultimately be needed in the legislation to clarify that losses are not shared project-wide but rather within segments of the project. Insert "respective" after "through the" and before "pipelines" near the end of line three. Add new sentence "Contractors will share losses only from the facilities utilized for delivery of their respective water supplies."

Page 14 – SEC. 105(c). Delete phrase "for a period of not fewer than 50 years" from the end of the second line and beginning of third line. At the end of this section insert "Nothing in this title shall be construed to obligate the Jicarilla Apache Nation to enter into a water delivery subcontract with the City of Gallup, to require particular terms in any such subcontract, or to prevent the Jicarilla Apache Nation from making alternative uses of its water if the Nation and the City do not reach agreement or if the City finds an alternate water supply for part or all of its Project demands."

Page 16 – SEC. 105. The Nation shares the concern with the City of Gallup about the construction cost burden the draft legislation places on the Nation and the City given the uncertainty about the formula that may be used to determine "ability to pay". This formula may play a significant role in how terms and conditions of a water supply agreement between the Nation and Gallup are negotiated. Further discussion and revision will be needed to address these concerns as the bill moves through the legislative process, and it may be appropriate for the legislation to refer to cost allocations in the project documents. The bottom line is we need to have certainty regarding the "ability to pay" formula and want some credit for off-project investments. We suggest the following initial revisions as a placeholder for these concerns: SEC. 105(c) (2). Delete "greater" and insert "lesser". SEC 105(e)(1). Insert "less the amount of cost-share funding from non-federal sources for the planning and construction of facilities to distribute the Nation's Project water ." Delete "and may receive income from the subcontracting of its water under the settlement contract between the United States and Jicarilla Apache Tribe authorized by the Jicarilla Apache Tribe Water Rights Settlement Act (106 Stat. 2238, Public Law 102-441)".

Page 17 SEC. 105(f). Insert "SERVICE" before "CONTRACT" in the section heading. Insert after the first sentence: "The Jicarilla Apache Nation shall have no obligation to pay any Navajo Indian Irrigation Project operation, maintenance and replacement costs that might otherwise be allocable to the Jicarilla Apache Nation for use of the Navajo Indian Irrigation Project facilities to convey water to the Jicarilla Apache Nation via the Navajo-Gallup Water Supply Project." Further discussion and revision may be needed to address the operations, maintenance

and replacement costs obligations and a reference in the Act to the project documents may be appropriate.

Page 18 - SEC. 106(d). Insert "or any other Indian tribe" after "Navajo Nation."

Page 19 – SEC 107: The Jicarilla Apache Nation is also deeply concerned about the lack of sufficient Congressional appropriations for the construction of water and wastewater facilities at the population, governmental and economic center of the Nation in and around Dulce New Mexico. The Jicarilla Apache Reservation Rural Water System Act (116 Stat. 2834, Title VIII of Pub. L. 107-331), signed into law December 13, 2002, was authorized to correct a serious public health and infrastructure problem caused by years of neglect by BIA and has not been funded to date. It is the Nation's desire to achieve a level of certainty that Congress will ultimately fund this Act by no later than 2016 and that all funds expended by the Nation for this purpose after authorization are eligible for reimbursement upon Reclamation's receipt of appropriations. Having to unilaterally fund this project, all off-reservation facilities to use Navajo-Gallup water, and having a significant repayment obligation for the proportional Project components places an undue burden on the Nation that cannot be tolerated.

Therefore, we are requesting that the following language be inserted as a new paragraph in SEC. 107: " (c) APPROPRIATIONS FOR THE JICARILLA APACHE RURAL WATER SYSTEM ACT - In accordance with the Jicarilla Apache Reservation Rural Water System Act (116 Stat. 2855, Title VIII), there is hereby authorized to be appropriated to the Bureau of Reclamation through fiscal year 2016 such sums as may be required for construction or rehabilitation of drinking water distribution and wastewater collection and treatment facilities in and around Dulce New Mexico. Funds expended after December 13, 2001 by the Jicarilla Apache Nation for the construction or rehabilitation of such facilities are hereby deemed eligible for reimbursement from these appropriations."

In the alternative to placing this language in the settlement bill, similar language in another federal appropriations bill would suffice. Assistance from the State and the Navajo Nation in achieving enactment of this provision prior to enactment of the settlement legislation would meet our goal. Senator Domenici was the prime sponsor of the Jicarilla Apache Reservation Rural Water System Act so discussing this with him and staff and the other delegates on this matter may be appropriate prior to presenting him with a draft bill that includes this language.

Page 19 – SEC. 108. Insert "AND DISCLAIMERS" after "LAWS" in the section heading.

Page 20 - SEC. 108(b). Delete "or" before "the Upper Colorado River Basin Compact (63 Stat. 31)" and insert ", or the Jicarilla Apache Tribe Water Rights Settlement Act (106 Stat. 2237), except as specifically provided in Section 104(j) of this Act".

Page 20 – SEC. 108. Insert a new subsection: “(c) RIGHTS OF INDIAN TRIBES. – Nothing in the Settlement Agreement, the Settlement Contract, the hydrologic determination by the Secretary referenced in Section 102 (a) (5), or this Act shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims or entitlements to water of any Indian tribe or community other than those of the Navajo Nation in, to and from the San Juan River Basin in New Mexico. Nothing in this Act shall be construed to limit any responsibility the United States may have under treaty, statute or otherwise to provide or operate water distribution or wastewater systems on the lands of any Indian tribe.”

Page 28 – SEC. 207. Insert “AND DISCLAIMERS” after “LAWS” in the section heading.

Page 29 - SEC. 207(b). Delete “or” before “the Upper Colorado River Basin Compact (63 Stat. 31)” and insert “, or the Jicarilla Apache Tribe Water Rights Settlement Act (106 Stat. 2237)”.

Page 29 – SEC. 207. Insert a new subsection: “(c) RIGHTS OF INDIAN TRIBES. – Nothing in the Settlement Agreement, the Settlement Contract, or this Act shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims or entitlements to water of any Indian tribe or community other than those of the Navajo Nation in, to and from the San Juan River Basin in New Mexico. Nothing in this Act shall be construed to limit any responsibility the United States may have under treaty, statute or otherwise to provide or operate water distribution or wastewater systems on the lands of any Indian tribe.”

Page 39 – SEC. 308(a)(6). Delete “and to the City of Gallup, New Mexico,” and insert “, to the City of Gallup, New Mexico, and to the Jicarilla Apache Nation”.

Page 43 - SEC. 310(a). Delete “or” before “the Upper Colorado River Basin Compact (63 Stat. 31)” and insert “, or the Jicarilla Apache Tribe Water Rights Settlement Act (106 Stat. 2237)”.

Page 43 – SEC. 310(b). Insert at the end of the paragraph: “Nothing in this Act shall be construed to limit any responsibility the United States may have under treaty, statute or otherwise to provide or operate water distribution or wastewater systems on the lands of any Indian tribe.”

Appendix 3 – Contract Between the United States and the Navajo Nation:

Page 28 – SEC 20. In the first sentence, insert “to the Navajo Nation” after “Prior to the delivery of water”.

Page 43 – SEC. 24(b). Delete “or” before “the San Juan River Basin” and insert “, or the Jicarilla Apache Tribe Water Rights Settlement Act (106 Stat. 2237)”.

Executive Summary:

Page 3, footnote 4: In the second sentence, delete "would" and insert "could".

Page 5, first paragraph: Delete the sentence: "Shortages include decreases in water availability caused by implementation of the Endangered Species Act."

Page 6, footnote 3: In the first sentence, insert "a portion" after "to repay" and insert "and other factors" at the end of the sentence.

Depletions Schedule:

We appreciate that the depletion schedule shows anticipated average annual depletions for planning purposes only, and is not a tabulation or determination of water rights. Nonetheless, it is essential that the settlement legislation state that nothing in the Secretary's hydrologic determination, which may be based in part on the depletions schedule, shall be construed to quantify or otherwise determine Indian water rights.