

MEMORANDUM

March 22, 2005

To: John R. D'Antonio, Jr., State Engineer

Copy: Bill Hume, Office of Governor Bill Richardson  
Steve Farris, Office of the Attorney General  
Jim Dunlap, Chairman, Interstate Stream Commission  
Estevan Lopez, Interstate Stream Engineer  
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John Whipple, Staff, Interstate Stream Commission

From: DL Sanders, Chief Counsel, Office of the State Engineer

Subject: San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement: Legal Effect of Proposed Amendment to Shortage Sharing Provisions of the Act of June 13, 1962, Public Law 87-483.

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**Introduction**

This memorandum addresses the changes requested by the City of Albuquerque to the existing provisions governing shortage sharing among the San Juan-Chama Project and the contractors to the Navajo Reservoir water supply. In its comments on draft legislation that is part of the proposed San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement, the City of Albuquerque requested that the Act of June 13, 1962, Public Law 87-483 (the "1962 Act" or "Act") be amended by exempting the San Juan-Chama Project from shortage sharing provisions contained in Section 11(a) of the Act.

As discussed below, to the extent the proposal seeks to exempt the San Juan-Chama Project from priority administration on the San Juan River in New Mexico, it should be rejected as contrary to New Mexico water law and long-standing federal deference to state jurisdiction over state water resources. If on the other hand, the proposal does not seek to preempt state water law and merely seeks to change the method by which shortage sharing is carried out, the change is unwarranted because it would likely place a significant administrative burden on the State without any discernable

benefit to San Juan-Chama Project contractors. In my view, the proposal would likely only serve to alter the allocation regime from an annual to a cumbersome method, which could include daily or other administration as determined by the State Engineer. I do not believe San Juan-Chama Project contractors should want such a change, because it would likely have the practical effect of reducing San Juan-Chama Project supply available to meet project water contracts held by the City and others.

Furthermore, the proposal is unacceptable to the extent that the City is attempting to use the Navajo settlement as a vehicle to modify San Juan-Chama Project contractors' position vis-à-vis Navajo Reservoir contractors, two of whom, the Jicarilla Apache Nation and the Hammond Conservancy District, are not signatories to the settlement. First, this is not the proper mechanism nor is it appropriate for the City to use this settlement to achieve that objective. Second, the effort to exempt the City from the shortage sharing provisions would surely create far greater opposition to the settlement than the City's concerns warrant.

The settlement would secure substantial protections for the San Juan-Chama Project. The City should support the settlement rather than potentially undermining it.

#### **Existing Law**

The 1962 Act establishes an annualized accounting of the water apportioned between the San Juan-Chama Project and Navajo Reservoir water supply contractors in years of shortage. Section 11(a) of the Act provides in pertinent part:

(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 2 and 8 of this Act, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of this Act. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, 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.*** In the case of contractors diverting above Navajo 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 requirement of all such contracts that have been made hereunder: *Provided*, That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

Public Law 87-483 (emphasis added).

Section 11(a)'s shortage sharing provisions reflect the equal priority date of the water rights underlying all of the federal contracts for water from either Navajo Reservoir or the San Juan-Chama Project. Under Notices of Intention Nos. 2847 and 2849 filed with the State Engineer, the Secretary appropriated respectively water for the diversion and use by the San Juan-Chama Project and for diversion and storage at Navajo Reservoir. File No. 2849 authorizes diversion of up to 630,000 acre-feet of water per year to the Navajo Project for irrigation, power and domestic purposes. Both Notices were filed with the State Engineer on June 17, 1955. The Act provides for both: (1) Navajo Reservoir operations to cover the administration of runoff as between the San Juan-Chama Project and Navajo Reservoir water supply contracts; and (2) a convenient mechanism for division of the available runoff above Navajo Dam in a year of shortage between uses of equal priority by adopting an annualized proportionate sharing regime.

The supply available for the San Juan-Chama Project and Navajo Reservoir contracts, under the Act, is not all of the runoff originating above the dam. Rather, the supply available to the contractors is the projected “runoff” reduced by the amount of water required to meet the demand of San Juan River water rights in New Mexico having a priority date earlier than June 17, 1955.

It is axiomatic under both constitutional and statutory law of New Mexico that the prior right holder has the superior right. *See* N.M. Const. art. XVI, § 2; NMSA 1978, § 72-1-2 (1907). As discussed in more detail below, federal Reclamation law requires the United States to obtain interests in water for federal Reclamation projects in conformity with state law. Therefore, the operations of both the San Juan-Chama Project and Navajo Reservoir are subject to pre-existing water rights in New Mexico, including senior federal reserved rights. As of June 17, 1955, under State Engineer File Nos. 2847 through 2849, the United States established its right to appropriate unappropriated surface water from the San Juan River above the then-proposed Navajo Reservoir, subject to prior existing water rights. Under these rights, the Secretary of the Interior may not divert for use or impound for storage water whose bypass is needed to satisfy downstream senior rights. Furthermore, under New Mexico law, rights of equal priority are subject to one another and as co-equals in priority must both be curtailed if necessary to satisfy the demand of prior and senior water rights. An upstream diverter of co-equal priority would be subject to its downstream co-equal, and the two would be required to be curtailed and to share shortages based upon proration of respective beneficial uses. In the instance of the San Juan-Chama Project and Navajo Reservoir supply, Section 11(a) of the Act specifies the method for prorating and sharing of shortages between the two.

In addition, Section 8(f) of the Act requires that the San Juan-Chama Project be operated so that, for the preservation of fish and aquatic life, the flow of the Navajo River

and the flow of the Blanco River shall not be depleted at the project diversion points below the values set forth at page D2-7 of Appendix D of the United States Bureau of Reclamation's 1955 report entitled: "San Juan-Chama Project, Colorado-New Mexico." Section 8(b) of the Act further requires that the San Juan-Chama Project must be operated so that there is no injury, impairment or depletion of existing or future beneficial uses of water within the State of Colorado, the use of which is within the apportionment made to the State of Colorado by Article III of the Upper Colorado River Basin Compact, as provided by Article IX of the Upper Colorado River Basin Compact. *See* NMSA 1978, § 72-15-26 (1949).

#### **Request to be Removed from Shortage Sharing**

By letter dated January 15, 2004, from Mayor Martin Chavez to State Engineer John D'Antonio, the City requests that the proposed Navajo settlement legislation be revised to remove the San Juan-Chama Project from the shortage sharing requirements of Section 11(a) of the Act. Representatives of the City have further explained the City's position in subsequent meetings with representatives of the State, most recently on March 2, 2005. At the meeting on March 2, City representatives stated that the City is not seeking to exempt the San Juan-Chama Project from priority calls by downstream seniors on the San Juan River system in New Mexico, but instead seeks to modify the project's shortage sharing obligations to its co-equal Navajo Reservoir contractors by only requiring the project to meet the terms of Section 8(f) of the Act. Despite the City's stated intent, the legislative language proposed by the City does not distinguish between its obligation to seniors or co-equals in priority in New Mexico. The proposed language arguably would only require the City to bypass water as needed to meet project obligations to Colorado, regardless of the demands downstream on the San Juan River in New Mexico.

Despite the City's recent disclaimers to the contrary, the amendatory language proposed by the City may be seen by other diverters from the San Juan River in New Mexico as an effort to preempt the application of New Mexico water law to the project's diversions, in whole or in part. On its face, the request does appear to seek exemption by the San Juan-Chama Project from demands of rights of equal priority, and possibly rights of senior priority, on the San Juan River in New Mexico, and perhaps also from the provisions of Articles IX and XIV of the Upper Colorado River Basin Compact, as long as the project is bypassing enough water to satisfy the Section 8(f) bypass requirements.

The City's requested modifications to the proposed settlement legislation consist of the additional language indicated by underlining below:

**SEC. 104. DELIVERY AND USE OF PROJECT WATER.**

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104(j) SHARING IN AVAILABLE WATER SUPPLY. -- Contract deliveries of water from the Navajo Reservoir water supply to the Navajo-Gallup Water Supply Project shall be subject to the provisions of section 11 of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483) and section 403 of Title IV of this Act, 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 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.

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**SEC. 203. NAVAJO INDIAN IRRIGATION PROJECT.**

(a) AMENDMENTS TO ACT OF JUNE 13, 1962. -- The Secretary is authorized to continue to construct, operate and maintain the Navajo Indian Irrigation Project, with the following amendments to the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483):

- (1) Irrigation works shall be constructed to serve no more than 110,630 acres of land defining the total serviceable area of the Navajo Indian Irrigation Project.

(2) The average diversion by the Navajo Indian Irrigation Project from Navajo Reservoir shall not exceed 508,000 acre-feet per year, or the quantity of water necessary to supply an average depletion of 270,000 acre-feet per year, whichever is less, during any period of ten consecutive years for the principal purpose of irrigation of up to 110,630 acres of land; provided, that the quantities of diversion and depletion in any one year do not exceed the aforesaid ten-year average quantities, respectively, by more than 15 percent.

(3) The Navajo Indian Irrigation Project water supply described in subsection (a)(2) of this section and in Title III of this Act may be used for the following purposes, in addition to irrigation, within the area served by the Project facilities:

(A) aquaculture purposes, including rearing of fish in support of the San Juan River Basin Recovery Implementation Program authorized by the Act of October 30, 2000 (114 Stat. 1602, Public Law 106-392);

(B) domestic, industrial or commercial purposes relating to agricultural production and processing; and

(C) the generation of hydroelectric power as an incident to the diversion of water by the Project for the foregoing purposes.

(4) The San Juan-Chama Project shall no longer share shortages on the San Juan River under section 11 but shall continue to meet 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.

(5) The Navajo Indian Irrigation Project water supply described in subsection (a)(2) of this section and in Title III of this Act also may be used to implement the alternate water source provisions described in subparagraph 9.2 of the Settlement Agreement, and may be used for other purposes, including but not limited to municipal and industrial uses, and transferred to other places of use either within or outside the area served by the Project facilities in accordance with the Settlement Agreement, the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement, the Settlement Contract, and other applicable law.

(56) The Secretary is authorized to use capacity of the Navajo Indian Irrigation Project works to convey water supplies for purposes of the Navajo-Gallup Water Supply Project authorized by Title I of this Act and for purposes described in subsection (a)(4) of this section. Use of Navajo Indian Irrigation Project works to convey water for the Navajo-Gallup Water Supply Project or for other non-irrigation purposes

consistent with subsection (a)(4) of this section shall not be cause for the Secretary to reallocate, or to require repayment of, construction costs of the Navajo Indian Irrigation Project.

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(e) SHARING IN AVAILABLE WATER SUPPLY. -- Nothing in this Act shall be construed to modify section 11 of the Act of June 13, 1962 (76 Stat. 96) 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 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.

### Legal Conclusions

I conclude that the City's request should not be accepted because it appears that the proposed amendments to the settlement legislation may be used to argue the applicability of New Mexico water law and interstate compacts to the operations of the San Juan-Chama Project, and particularly that by federal fiat the project is exempt from priority administration on the San Juan River, in whole or in part. Such a change would be contrary to New Mexico water law and to long-standing deference by the federal government to the regulation and administration by states over their respective water resources.

Even if the effect of the proposed amendatory language were limited to exempting the San Juan-Chama Project only from shortage sharing with its priority co-equal Navajo Reservoir contractors, that result is objectionable. It is not conceivable that the Navajo Nation, the Jicarilla Apache Nation and the Hammond Conservancy District, all of whom would be affected, would agree to the proposal. Absent their agreement, the proposal could only take effect by congressional imposition. Aside from the fact that such an imposition would likely undermine the Navajo settlement, it would represent a federal infringement of three state water rights. Even though the State Engineer issued to the



United States the permits for the San Juan-Chama Project and the Navajo Reservoir, the State would oppose changes imposed by federal law that redound to the detriment of permit beneficiaries who now hold valid New Mexico water rights.

If the City's intent is not to exempt the San Juan-Chama Project from the operation of New Mexico law, then the proposed amendments would serve only to alter the allocation regime from what is now a manageable annual method to a potentially cumbersome one. Neither the State nor the City should endorse such a result.

**Conclusion No. 1.** Federal exclusion of the San Juan-Chama Project from all priority administration in New Mexico would require the preemption of state law. Likewise, federal exemption of the San Juan-Chama Project from shortage sharing with Navajo Reservoir contractors without their consent would contravene state water rights. The State should oppose either outcome as an improper federal infringement of state jurisdiction over water resources and administration.

The United States Supreme Court consistently has interpreted the acts of Congress to demonstrate a policy of deference toward state water law:

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

*See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982), (quoting *California v. United States*, 438 U.S. 645, 653 (1978)); *see also California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Federal Reclamation law requires the United States to obtain interests in water for federal Reclamation projects in conformity with state law. *See Nevada v. U.S.*, 463 U.S. 110, 122 (1983); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *California v. United States*, 438 U.S. 645, 672 (1978). In particular, Section 8 of the Reclamation Act of 1902 makes explicit that, in constructing and operating Reclamation projects, the federal government

cannot interfere with state “control, appropriation, use, or distribution of water . . . , and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such [state] laws.” *See* 43 U.S.C. § 383.<sup>1</sup>

One of the areas of water law where federal deference to state law has been the strongest is in the adjudication and administration of water rights. This policy was made the centerpiece of the McCarran Amendment of 1952. The McCarran Amendment provides in relevant part:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reasons of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

43 U.S.C. § 666 (1952).<sup>2</sup> The Court has declared that the McCarran Amendment represents “Congress’ judgment that the field of water rights is one peculiarly appropriate

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<sup>1</sup> Section 8 states:

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of 1902, 32 Stat. 388, § 8 (codified at 43 U.S.C. §§ 372, 383 (1994)).

<sup>2</sup> The Senate committee report on the McCarran Amendment underscored the form of federalism underlying State authority in the area of water resources regulation: “Down through the years, . . . the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West, without material aid from our United States Government until a much later time . . . .” *See* S. Rep. No. 755, 82nd Cong., 1st Sess. (1951) at 3. Even when the federal government did enter the picture, “Congress was most careful not

for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting within the state courts." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

The United States secured a water right for the San Juan-Chama Project by appropriating water under state law pursuant to State Engineer File No. 2847. That appropriation was born of state law and must remain a creature of it.

**Conclusion No. 2.** Absent preemption of state law, removal of the San Juan-Chama Project from the shortage sharing requirements of federal law would not eliminate the State's authority and responsibility to administer water rights in priority.

New Mexico is a prior appropriation state. The state Constitution succinctly provides: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." See N.M. Const. art. XVI, § 2. New Mexico's Water Code incorporates this fundamental principle: "Priority in time shall give the better right." See NMSA 1978, § 72-1-2 (1907). Water rights having the same priority date have a co-equal right to water. In a prior appropriation system, the right to use a certain quantity of water is inextricably linked to the priority date of that right. See *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 678 P.2d 1170 (1984).

The State Engineer "has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." See NMSA 1978, § 72-2-1 (1907); *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 99 N.M. 699, 700, 663 P.2d 358, 359 (1983). New Mexico statutes

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to upset, in any way, the irrigation and water laws of the Western States." *Id.* "It is therefore settled," the report concludes, "that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State." *Id.* at 4.

also grant the State Engineer the authority and obligation to supervise “the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts.” *See* NMSA 1978, § 72-2-9 (1907). He can “adopt regulations and codes to implement and enforce any provision of any law administered by him . . . to aid him in the accomplishment of his duties . . .” *See* NMSA 1978, § 72-2-8(A) (1953). The State Engineer can impose conditions on licenses and permits issued. *See Roswell v. Berry*, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969). The State Engineer has the power to appoint water masters, to apportion water consistent with priorities, and to install headgates and meters for measuring the quantity of water being used. *See* NMSA 1978, §§ 72-3-2 (1907), 72-5-20 (1907), 72-12-3 (1931), 72-12-7 (1931).

In the event the annualized shortage sharing regime provided for in Section 11(a) of the 1962 Act were removed, the State Engineer could not abdicate his duty to “apportion water consistent with priorities.” Water diverted for the San Juan-Chama Project and for uses of Navajo Reservoir water supply would continue to be subject to prior existing uses, including senior federal reserved rights, and would be administered accordingly. The two rights would also be subject to one another and would be required to share shortages in a manner acceptable to or determined by the State Engineer.

If the annual allocation method currently contained in Section 11(a) of the 1962 Act were modified to exclude the San Juan-Chama Project, the State would have to implement its own method of administering the Project’s June 17, 1955 priority vis-à-vis rights of the same priorities on the San Juan River system. In contrast to the current annual method, any other interval of administration would not appear to benefit the San Juan-Chama Project because it would result in more periods of regulation of project diversions and likely less water diverted by the project. Any other interval of

administration also would require substantial effort to carry out and could entail considerable controversy, with little apparent benefit to the City.