6.0 LEGAL ISSUES

Introduction

This section of the San Juan Hydrologic Unit Regional Water Plan discusses legal issues that directly or indirectly constrain the region's water supply in terms of both water availability and use. In addition, this section and its appendix provide a general overview of federal, state, local and tribal laws that compose the body of water law pertinent to the San Juan Hydrologic Unit. Although some readers may already be familiar with water law, this section is written with the average citizen-planner in mind, who may have no familiarity with the intricacies of water law in New Mexico.

The San Juan Hydrologic Unit is unique in New Mexico in that only a very small percentage of the water used in the Unit is groundwater, and the availability and use of its surface water is constrained primarily by the federal "Law of the Colorado River," including an international treaty, interstate compacts, and federal water projects. Further, federally mandated water quality standards and protection for endangered species constrain water supply and use in the region and may have even greater impacts in the future. Finally, significant Indian water rights claims that have not been resolved also may, in the future, have a major impact on water availability in the region. Thus, while water supply issues in other parts of New Mexico are often governed primarily by state statutes and caselaw, as well as State Engineer administration, the water supply in the San Juan Hydrologic Unit is limited to a great extent by the federal concerns identified above.

The *Regional Water Planning Handbook* published by the New Mexico Interstate Stream Commission ("ISC") provides a template for this section and identifies each of the topics that should be addressed to provide the average citizen-planner with a primer on water law and policy for the region. Considering the unique characteristics of the San Juan Hydrologic Unit, each applicable template topic is addressed in this section within the following organizational scheme:

I. Water Rights in General (§6.1)
  A. Creation of Water Rights (§6.1.1)
    1. State Prior Appropriation System (§6.1.1.1)
      a. Practical Constraints for Municipalities (§6.1.1.1.1)
    2. Federal Reserved and Indian Water Rights (§6.1.1.2)
  B. Administration of Water Rights (§6.1.2)
    1. State (§6.1.2.1)
      a. Water Rights Adjudications (§6.1.2.1.1)
    2. County (§6.1.2.2)
    3. Tribal (§6.1.2.3)

II. Federal Legal Issues (§6.2)
  A. Federal Compacts and Obligations (§6.2.1)
    1. Colorado River Compact (§6.2.1.1)
    2. Upper Colorado River Basin Compact (§6.2.1.2)
    3. Animas-La Plata Project Compact (§6.2.1.3)
    4. La Plata River Compact (§6.2.1.4)
    5. Laws and Operational Criteria (§6.2.1.5)

For ease of reference, headings in this section contain a footnote referring to the specific ISC template topics addressed.

Discussion

6.1 Water Rights in General

6.1.1 Creation of Water Rights

6.1.1.1 State Prior Appropriation System[1]

The New Mexico Constitution declares that all surface and ground water belongs to the public.[2] However, a person (whether an individual, corporation or other entity) may obtain a water right by appropriating (taking) water and putting it to beneficial use.[3] A water

[1] This section addresses ISC template topic "a."
[2] N.M. Const. art. XVI, §2; NMSA 1978, §§ 72-1-1 to -2 (1907); *McBee v. Reynolds*, 74 N.M. 783, 787-88, 399 P.2d 110, 114 (1965).
[3] N.M. Const. art. XVI, §§ 2, 3; NMSA 1978, §72-5-1 (1907).

right obtained under this "prior appropriation" system does not mean that the appropriator owns the water, however. Rather, the appropriator simply has a right to continue to use the amount of water he has diverted or impounded and actually put to beneficial use.[4] Further, a superior right is given to the person who first appropriated water.[5]

A more detailed discussion of the history of the prior appropriation system in the West, and its application in New Mexico in particular, can be found in Appendix D.

6.1.1.1.1 Practical Constraints for Municipalities

Given the prior appropriation doctrine's emphasis on beneficial use, it is very difficult for municipalities and other water suppliers to "stockpile" water rights for future use. Water planners must recognize this tension between planning for future growth and the mandate to put water to beneficial use.

New Mexico has addressed this issue in a statute providing that municipalities and counties may appropriate or acquire sufficient water to meet their needs for a forty-year planning horizon.[6] Under the statute, water rights do not have to be purchased piecemeal and immediately put to beneficial use. Rather, anticipated new demand may be included in an application to appropriate or change the place or purpose of use of water rights.[7]

This issue has been addressed in San Juan County through the creation of the San Juan Water Commission ("SJWC"), which is playing an important role in securing water supplies for current and future municipal and industrial uses in San Juan County. Created in 1986 pursuant to the state Joint Powers Agreements Act,[8] the SJWC is comprised of the main municipal and industrial water suppliers in the County: the towns of Aztec, Bloomfield and Farmington, the San Juan Rural Water Users Association, and the County of San Juan.

6.1.1.2 Federal Reserved and Indian Water Rights[9]

The doctrine of federal reserved rights means that whenever the United States sets aside land for a specific purpose (thereby withdrawing the land from the general public domain), there is implied, if not expressed, a concomitant intent to reserve the amount of water required to fulfill the purpose for which the land was set aside.[10] In the San Juan Hydrologic Unit, federal reservations, in addition to Indian reservations, include land set aside for national forests, the Bureau of Land Management, and the Bureau of Indian Affairs.[11]

Federal reserved water rights include Indian reserved water rights, and those rights are of paramount importance to present and potential appropriators of water in the San Juan Hydrologic Unit because of their potential size. Federal reserved water rights for Indians

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[4] *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981); *State ex rel. Erickson v. McLean*, 62 N.M. 264, 270, 271, 308 P.2d 983, 987 (1957).
[5] NMSA 1978, § 72-1-2 (1907).
[6] NMSA 1978, § 72-1-9 (1985, as amended through 2000).
[7] *Id.*
[8] NMSA 1978, §§ 11-1-1, *et. seq.* (1961, as amended through 1999).
[9] This section addresses ISC template topics "a" and "b."
[10] *Cappaert v. United States*, 426 U.S. 128, 138 (1976).
[11] The amount of water rights reserved for these uses will be determined in the San Juan River Adjudication, which is discussed in more detail below at section 6.1.2.1.1.

were established in *Winters v. United States*.[12] Essentially, the *Winters* doctrine states that whenever a parcel of land is withdrawn from the public domain and reserved for Indian use, the minimum amount of water rights necessary to fulfill the purposes of the reservation are also reserved.[13] Clearly, because Indian reserved water rights are not based on the application of water to beneficial use, the *Winters* doctrine is the antithesis of the prior appropriation doctrine, which creates a clash of rights in the San Juan Hydrologic Unit. A detailed discussion of the tension between the two doctrines is provided in Appendix D.

The supply of water available for other uses in the San Juan Hydrologic Unit will depend on the ultimate quantification of the water required to fulfill the purposes of the Navajo and Ute Mountain Ute reservations in New Mexico. For example, in some forums, the Navajo Nation has claimed it has a right to the entire flow of the San Juan River.[14] Reserved water rights for the Jicarilla Nation were negotiated and have been adjudicated.[15]

6.1.2 Administration of Water Rights

6.1.2.1 State[16]

New Mexico law charges the State Engineer with the duty of administering all matters relating to the appropriation, transfer, and distribution of water.[17] The State Engineer must approve all new appropriations of water for beneficial use, as well as changes in the place or purpose of existing uses.[18] The State Engineer also has the power to appoint water masters, to apportion water consistent with priorities, and to order the installation of headgates and meters for measuring the quantity of water being used.[19] In the San Juan Hydrologic Unit, only the La Plata River has an appointed water master. However, the State Engineer has stated his intent to begin metering and administering ditch diversions on the San Juan and Animas rivers in the next two years.

Unlike other regions in the state, there are no specific administrative criteria governing appropriation or transfer of ground or surface water in the San Juan Hydrologic Unit. Rather, the basis of administration is simply New Mexico's general statutory scheme. However, duty, water allotments and diversion rates were determined in the Echo Ditch

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[12] 207 U.S. 564 (1908).

[13] *Id.* at 576-77. In *Winters*, the United States sued to enjoin the construction of a dam on the Milk River in Montana, which would have prevented the flow of water downstream to the Fort Belknap Indian Reservation. The Reservation had been created by a treaty between the Indians and the United States with the consent of Congress. In affirming the issuance of an injunction prohibiting construction of the dam, the Court found that when the Fort Belknap Indians granted their vast domain to the United States, the Indians *did not* relinquish the waters appurtenant to the lands they retained. Noting that without water the lands retained by the Indians would be arid and practically useless, the Court found the Indian reservation of waters to be continuing against the states, the United States and their respective grantees. *Id.* at 565, 576-77. Courts also have applied the *Winters* doctrine to cases where an Indian reservation is created by Executive Order, as well as by Act of Congress. *Arizona v. California*, 373 U.S. 546, 598 (1963).

[14] A discussion of the issues surrounding quantification of Navajo water rights is set out in Appendix D.

[15] For details, see the discussion in section 6.1.2.1.1 below.

[16] This section addresses ISC template topics "a" and "e."

[17] NMSA 1978, § 72-2-1 (1907).

[18] NMSA 1978, §§ 72-5-1 to -39 (1907, as amended through 2002).

[19] NMSA 1978, §§ 72-2-1, 72-2-9, 72-3-2, 72-5-20 (1907).

Decree of 1948 and vary throughout the region.[20] For a more detailed discussion of the State Engineer's administration of water rights, including forfeiture, abandonment, and transfers, see Appendix D.

6.1.2.1.1 **Water Rights Adjudications**[21]

The formal process by which the ownership and extent of water rights is legally determined is the adjudication process. In a general stream adjudication (a lawsuit filed either by the Attorney General at the request of the State Engineer or by water users), a court determines the amount, type and priority date of every water right associated with a particular water source. Section 72-4-13 of the state Water Code mandates that the State Engineer make hydrographic surveys, beginning on those stream systems most used for irrigation, in order for the waters of the state to be adjudicated. He also is directed "to obtain and record all available data for the determination, development and adjudication" of the state's water supply.[22]

To date, one water rights adjudication has been completed in the San Juan Hydrologic Unit, and another currently is ongoing. The Echo Ditch Decree, issued by a New Mexico District Court in 1948, defined the water rights for approximately 26,000 acres of irrigated land and some municipal and industrial users in the San Juan Hydrologic Unit.[23] The State Engineer conducted the pertinent hydrographic survey in the summer of 1937 and issued his report in 1945. Because of that timing, several important categories of water claims were left out—Indian water rights, the federal projects developed later (the Animas-La Plata, the San Juan-Chama, the Hammond and the Navajo Indian Irrigation Project), and private water rights permitted and developed after 1938.

The water rights covered by the Echo Ditch Decree are being re-evaluated in a pending action, which ultimately will involve an estimated 8,000 water users.[24] The pending adjudication was filed in 1975.[25] To date, little has been accomplished in this adjudication with regard to non-Indian water rights because the State Engineer has not yet begun a hydrographic survey. However, as discussed below, a settlement agreement has quantified all of the Jicarilla Apache Nation's water rights, and the State currently is negotiating with the Navajo Nation to quantify its reserved water rights. Settlement of the Navajos' reserved water rights is essential to bringing certainty to the adjudication process in the San Juan Hydrologic Unit.[26]

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[20] *See* section 6.1.2.1.1 for a discussion of the Echo Ditch Decree. For an explanation of how the Regional Water Planning Committee quantified demands, *see* section 2.2.1.2.2 in the Water Demands Assessment Report.

[21] This section addresses ISC template topics "a" and "d."

[22] NMSA 1978, §§ 72-4-13, 72-4-15 (1907).

[23] Decree, No. 01690 (District Court, San Juan County, New Mexico, filed Apr. 8, 1948); State Engineer's Proposed Plan for Administrative Data Development to Complete the San Juan River Basin Adjudication, No. 75-184-1 (11th Jud. Dist., San Juan County, New Mexico, filed Oct. 10, 2001) at 7, 9 (hereinafter "State Engineer Plan").

[24] State Engineer Plan, *supra* note 23, at 5, 7.

[25] *New Mexico ex rel. Reynolds v. United States*, No. 75-184-1 (11th Jud. Dist., San Juan County, New Mexico, filed March 13, 1975).

[26] Although Indian water rights are established by federal law, they may be adjudicated in state court, as is the case in the ongoing San Juan River Adjudication. Congress has recognized that lack of state court jurisdiction over Indian water rights would make it very difficult for coordinated administration of state and federal water

Because the Legislature has not appropriated funds for the San Juan Adjudication, the adjudication process is not likely to conclude in the foreseeable future. In fact, the State Engineer has told the court that his current priorities are the Pecos Basin and the Lower Rio Grande Basin adjudications.[27] The ultimate effect of the readjudication probably will be significant for some individual users because, although the overall water supply to the area may not change, the allocation/priority of that supply could be significantly affected by the settlement obtained by the Navajo Nation.

One of the successes of the readjudication has been the issuance of a partial final decree for the Jicarilla Apache Nation's water rights, based on a negotiated settlement.[28] Under the settlement and decree, the Jicarilla Nation agreed to subordinate its reserved water right for future uses (based on an 1880 priority date) to contract water from the United States (with a priority date of June 17, 1955). The contract water provides for a total of 40,000 acre feet of water per year ("AFY"), comprised of 33,500 AFY from the Navajo Reservoir supply and 6,500 AFY from the San Juan-Chama Project. The Jicarilla Nation also agreed to share shortages along with other participants in the Navajo Reservoir and the San Juan-Chama Project. The Jicarilla Nation may lease its water to other in-state users, and in fact has a long-term contract for approximately 16,200 AFY of its Navajo Reservoir supply. The Nation's reserved and state law water rights were quantified based on historic use (about 5,680 acre feet per year).

The Navajo Nation has not settled its reserved water rights claims, but in 1996 the State and the Nation began exploratory discussions to determine whether a negotiated settlement of the water rights claims of the Nation might be possible.[29] In 2001, Governor Johnson and President Begaye of the Navajo Nation signed a Memorandum of Agreement committing the State and the Nation to enter formal negotiations for a water rights settlement.[30] The negotiations are ongoing.[31] The Ute Mountain Ute's claims in New Mexico also have not been quantified, but they are not expected to be extensive. The bulk of the tribe's claims, which are in Colorado, have been quantified and settled.

6.1.2.2 **County**[32]

At the county level, the 1996 amendments to the state Subdivision Act require county governments to ensure new subdivisions have adequate water supplies.[33] Such regulation

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rights. Therefore, in 1952 Congress passed the "McCarran Amendment," 43 U.S.C. § 666, to waive federal sovereign immunity for the adjudication and administration of federal (including Indian) water rights. The McCarran Amendment forces the federal government and Indians to participate in state court adjudications. Because the Navajo Nation is a party to the ongoing San Juan River Adjudication, it will be bound by any final decision of the state court and, subsequently, subject to the priority system.

[27] State Engineer Plan, *supra* note 23, at 4-5.

[28] Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe, No. 75-184-1 (11th Jud. Dist., San Juan County, New Mexico, filed Feb. 22, 1999).

[29] Memorandum from John Whipple, Interstate Stream Commission ("ISC"), to Mary Helen Follingstad, ISC (Aug. 20, 2002).

[30] *Id.*

[31] *Id.*

[32] This section addresses ISC template topic "a."

[33] *See, e.g.*, NMSA 1978, § 47-6-11.2 (1996, as amended through 2002), which allows counties to require water permits for subdivisions.

constrains the supply of water available for other uses in the San Juan Hydrologic Unit. For example, each county has developed regulations that require developers to demonstrate that a subdivision has access to a real water supply for a specific time period (for example, 40, 70 or 100 years)—a requirement that clearly impacts both water and land use planning.[34] In San Juan County, the regulations require that developers have a 40-year water supply for domestic use and fire protection.

6.1.2.3 Tribal[35]

Tribes are free to administer their reserved water rights on tribal lands. However, it is important to remember that the State Engineer has the authority to administer non-trust Indian water rights that (1) have been acquired pursuant to state law and (2) are exercised off-reservation and outside of the tribe's scope of exclusive regulatory authority. The Navajo Nation has created its own water code to administer and regulate the use of water within its jurisdiction. The Navajo Water Code[36] establishes a comprehensive system of administering water within the territorial jurisdiction of the Navajo Nation. The Code provides for planning, as well as for distributing water within the Navajo Nation through a permit system.[37] The Jicarilla Apache Nation also has adopted its own water code, which established the trial water commission and provides generally for the comprehensive management of the Nation's water resources.[38]

6.2 Federal Legal Issues

6.2.1 Federal Compacts and Obligations[39]

6.2.1.1 Colorado River Compact

The States of Colorado, Nevada, New Mexico, California, Arizona, Utah, and Wyoming are bound by the Colorado River Compact of 1922 ("the Compact").[40] Although drafted in 1922, it did not become effective until 1929. The Compact covers the entire drainage basin of the Colorado River, including not only natural drainage areas, but also any other area to which Colorado River waters are beneficially applied.[41] The Compact divides the Colorado River into upper and lower basins, the dividing point being Lee Ferry, Arizona.[42] The Colorado River waters are apportioned between the two basins. The Compact does not apportion the water of each basin to the individual states, however.

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[34] In the past, a developer could declare that a subdivision would be "dry" and would not have an assured water supply. Now, the county must require information to demonstrate an assured water supply, and the State Engineer's office must review and approve the developer's water supply plan before the subdivision can receive final plat approval. The State Engineer's review includes a technical review of the water supply plan, as well as an opinion on whether the proposed water supplier (usually one of the many rural water users associations) has enough water rights to supply this additional demand. (Examples of the State Engineer's reviews can be found on the agency's website at www.seo.state.nm.us/water-info/subdiv-memos.)

[35] This section addresses ISC template topics "a" and "e."

[36] 22 NTC §§ 1107, *et seq.* (1984; revised 1995).

[37] *See, e.g.*, 22 NTC § 1604.

[38] *See* J.A.T.C §§ 21-1-1 *et seq*.

[39] This section addresses ISC template topics "a," "b" and "e."

[40] NMSA 1978, §72-15-5 (1923). The Colorado River Compact was approved by Congress in § 13(a) of the Boulder Canyon Project Act, 45 Stat. 1064 (1928), 43 U.S.C. § 617(l) (1986).

[41] NMSA 1978, § 72-15-5, art. II. (1923).

[42] *Id.*

The Compact allocates water between the upper and lower basins.[43] The only actual grant of water, in terms of obligatory guaranteed flow, is set out in Article III(d). This article states that the upper basin cannot deplete the flow of the river at Lee Ferry below 75 MAF in any period of ten consecutive years measured in continuing progressive series. This means that the upper basin must provide an average annual flow at Lee Ferry, Arizona, of 7.5 MAF. In addition to the 75 MAF obligation over a decade, Article III(e) prohibits the upper basin from withholding water that cannot reasonably be applied to domestic and agricultural uses. Conversely, Article III(e) also provides that the lower basin cannot require the delivery of water that cannot reasonably be applied to domestic and agricultural uses.

6.2.1.2 **Upper Colorado River Basin Compact**

The states of the upper basin apportioned the waters of the upper basin in the Upper Colorado River Basin Compact of 1948 ("the Upper Colorado Compact").[44] Arizona, having only a small part of its area in the upper basin, is given an outright allocation of 50,000 acre feet per year.[45] The Upper Colorado Compact apportions fixed percentages of the consumptive use of water legally available to the upper basin on the following basis: Colorado, 51.75%; New Mexico, 11.25%; Utah, 23% and Wyoming, 14%.[46]

The Upper Colorado Compact also makes provisions for sharing shortages in the delivery of water to the lower basin at Lee Ferry. The Upper Colorado River Commission is charged with determining the extent of any necessary curtailment in times of shortage.[47] Article V of the Upper Colorado Compact apportions reservoir losses among the states. These evaporative losses are not insignificant. Reservoirs existing in each state prior to 1948 are dedicated to use by those states, and losses from such reservoirs are charged to the respective states. Losses from new reservoirs whose purpose is to meet the Lee Ferry obligation are shared using a ratio of each state's consumptive use to total consumptive use. If a reservoir supplies water for use in the upper basin, states using the water will be charged with evaporation losses.

Finally, Articles XI through XIV of the Upper Colorado Compact identify which streams the states can use to take their designated percentage of water. The San Juan River is given special treatment. Under article XIV, New Mexico is allowed to take its full percentage apportionment from the San Juan River and its tributaries arising in Colorado. Separate provision is made for curtailment of water usage on the San Juan during times of shortage, and final decision-making power is vested in the Upper Colorado River Commission.[48]

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[43] *Id.*, art. III.
[44] NMSA 1978, § 72-15-26 (1949).
[45] *Id.*
[46] *Id.*, art. III(a)(2).
[47] *Id.*, art. IV. The Upper Colorado Compact creates the Upper Colorado River Commission (a member from each state and a federal government representative), giving it broad power to determine the quantity of water in the upper river system, the quantity of water to be delivered at Lee Ferry, curtailments in times of drought and reservoir losses. *Id.*
[48] With regard to shortage sharing on the San Juan, a "first and prior right" is given to all uses existing in either state at the time of the signing of the Upper Colorado Compact (1948). *Id.*, art. XIV(a)(1). Significantly, as noted below, pursuant to the Animas-La Plata Compact between New Mexico and Colorado, Animas-La Plata uses in both Colorado and New Mexico have a 1938 priority date and thus should be given a "first and prior right" in times of shortage under the Upper Colorado Compact. For uses with a post-1948 priority date, the Upper Colorado Compact demands proportionate shortage sharing: the "resulting consumptive use in each state

6.2.1.3 **Animas-La Plata Project Compact**

New Mexico and Colorado entered into the Animas-La Plata Project Compact in 1969 in order to implement the operation of the ALP Project.[49] Pursuant to this Compact, water diverted from the La Plata and Animas river systems for uses in New Mexico under the ALP federal reclamation project are given an equal priority date (1938) with Colorado decreed rights for the ALP Project.[50] This 1938 priority date means that, with regard to San Juan Hydrologic Unit shortage sharing under the Upper Colorado Compact, both New Mexico and Colorado ALP uses have an equal first and prior right to the use of San Juan waters. Opinions diverge that the release of stored water in Colorado is protected from diversion by anyone other than ALP contractors. Opinions diverge on whether the priority date in New Mexico is different for ALP water diverted only from direct flow.

6.2.1.4 **La Plata River Compact**

Pursuant to the La Plata River Compact of 1923,[51] the states of New Mexico and Colorado apportioned the waters of the La Plata River generally, as follows: (1) between December 1 and February 15, each state may use all water flowing within its boundaries; and (2) between February 15 and December 1, Colorado must provide at least one-half of the mean flow of the river at the village of Hesperus, Colorado, up to 100 cfs, at the state line.[52] However, if the state engineers of the two states decide it is necessary because of shortages, the two states may agree to a rotating water use schedule.[53]

6.2.1.5 **Laws and Operational Criteria**

The Secretary of the Interior has administrative authority over federal water projects in the Upper Colorado River Basin. The Secretary's authority is important to the San Juan Hydrologic Unit because of the numerous federal projects in the region, all of which require contracts with the Secretary in order to use the water related to those projects. The Secretary's authority has been established by Congress in federal legislation applicable to the various projects.

6.2.1.6 **Treaty Commitments**

The Mexican Water Treaty of 1944[54] establishes a permanent commitment to provide Colorado River water to Mexico. Article 10 of the Treaty allots 1.5 MAF per year of Colorado River water to Mexico.[55] The Treaty further provides that an additional 200,000 acre feet per year of additional water will be provided if the United States determines there is

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will bear the same proportionate relation to the consumptive use made in each state during times of average water supply." *Id.*, art. XIV(c). Indian reserved rights are excluded from shortage sharing under the Compact, *id.*, although pursuant to the settlement agreement discussed above, the Jicarilla Apache Nation has agreed to share shortages in the Navajo Reservoir and San Juan-Chama Project.

[49] NMSA 1978, § 72-15-1 (1951).

[50] *Id.*, art. 1.

[51] NMSA 1978, § 72-15-16 (1923).

[52] *Id.*, art. II.

[53] *Id.*

[54] Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mexico, T.S. No. 994.

[55] *Id.*, art. 10(a).

a surplus.[56] The State's obligations under this treaty are reflected in the provisions of the Colorado River Compact, which constrains available water supply in the San Juan Hydrologic Unit.

6.2.2 Federal Water Projects[57]

6.2.2.1 Navajo Indian Irrigation Project

In 1962, Congress authorized the Navajo Indian Irrigation Project ((NIIP)), a 110,630-acre (11 blocks of approximately 10,000 acres each) irrigation project located in the northeastern corner of the Navajo Reservation, just south of Farmington.[58] A diversion of up to 508,000 AFY was authorized for the project, although, to date, the project has not been fully developed. Construction of the delivery canal from Navajo Reservoir commenced in 1964, and the first irrigation water was delivered to Block 1 in 1976.[59] In exchange for NIIP, the Navajo Nation agreed that NIIP will share water shortages with other Navajo Reservoir water contractors.[60]

NIIP is operated by the Navajo Agricultural Products Industry, which operates and maintains the project's water delivery system from Navajo Reservoir, irrigation works, and farming and marketing activities. Development of NIIP has progressed on a block-by-block basis, and currently NIIP has only about 62,000 irrigated acres.[61] In 2001, NIIP used approximately 195,000 acre feet of water. Part of the reason for delay in the completion of NIIP, in addition to a lack of funding for infrastructure, was a pending section 7 (Endangered Species Act) consultation between the U.S. Fish & Wildlife Service and the Bureau of Indian Affairs for blocks 9 through 11 of the project and for full irrigation of Blocks 1 through 8. This consultation was finalized in July 1999, when the Fish & Wildlife Service found that the project can be completed without jeopardizing the recovery of endangered fish in the San Juan River. Given the results of the consultation, the Navajo Nation is now able to complete development of NIIP without violating the Endangered Species Act, if Congressional appropriations can be secured for construction of Blocks 9 to 11.

6.2.2.2 San Juan-Chama Project

Pursuant to the Upper Colorado River Basin Compact, New Mexico has a right to use 11.25% of the Colorado River water apportioned to the upper basin.[62] In order to help New Mexico make use of its share of the Colorado River, in 1962, Congress authorized the San Juan-Chama Project and amended the Colorado River Storage Project Act of 1956 to permit the diversion of Colorado River Basin water into the Rio Grande Basin in New Mexico.[63]

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[56] *Id.*, art. 10(b).
[57] This section addresses ISC template topics "a" and "b."
[58] 43 U.S.C. § 615ii to -zz (2003). The language of the act does not actually appear in the Code. For the language, *see* Pub. L. No. 87-483, 76 Stat. 96 (1962).
[59] Pub. L. No. 87-483, §2.
[60] *Id.*, § 11.
[61] ISC 2000-2001 Annual Report (available at www.seo.state.nm.us/publications/00-01-annual-report/isc).
[62] NMSA 1978, §§ 72-15-5,art. III (1923), 72-15-26, art. III(a)(2) (1949)
[63] Pub. L. No. 87-483, 76 Stat. 96 (1962).

"The primary purpose of [the Project] is to provide water for irrigation, municipal, domestic and industrial uses in the middle Rio Grande basin above Elephant Butte Reservoir."[64]

Originally, the San Juan-Chama Project contemplated a diversion of 235,000 AFY, with the initial phase of development diverting 110,000 AFY.[65] Ultimately, only the initial phase of the project was authorized and constructed, and it includes three diversion dams in the San Juan Basin of Colorado, three tunnels totaling 27 miles, Heron Reservoir, modifications to El Vado Reservoir, and Nambe Falls Dam, among other features. In essence, water is diverted from Colorado tributaries to the San Juan River and delivered to the Chama River drainage through a tunnel crossing the continental divide, where it is stored in Heron Reservoir until it is released to New Mexico contractors. On average, 108,000 to 110,000 AFY is diverted from the San Juan River Basin for a firm yield of 96,200 AFY from Heron Reservoir. This represents "a little less than 7% of New Mexico's share under the Upper Colorado River Basin Compact."[66]

San Juan-Chama diversions cannot exceed 270,000 AFY, with a ten-year total diversion of not more than 1.35 MAF.[67] The New Mexico Interstate Stream Commission is responsible for prioritizing the list of entities that can contract for San Juan-Chama water and the amount of their allocation. The largest contractor is the City of Albuquerque, with 48,200 AFY for municipal and industrial uses, followed by the Middle Rio Grande Conservancy District, with 20,900 AFY for irrigation. However, as discussed below, if a recently upheld ruling by Judge Parker of the federal district court in Albuquerque stands, the Bureau of Reclamation may be forced to release San Juan-Chama water for the protection of the endangered silvery minnow in the Middle Rio Grande Basin.

6.2.2.3 **Hammond Irrigation Project**

The Hammond Irrigation Project, built to serve the Hammond Conservancy District (the "District"), was authorized in 1956 as part of the Colorado River Storage Project Act.[68] The Bureau of Reclamation (the "Bureau") agreed to construct the Hammond diversion dam, a 28-mile canal, and a pumping plant serving two short highline laterals to replace old ditches that had fallen into disrepair.[69] The District, which serves approximately 3,900 acres of irrigated land, takes water from direct flow on the San Juan River when it is available, supplemented by storage in Navajo Reservoir.[70] In addition to a permit held by the Bureau for 23,000 AFY for irrigation, the District has a license to use about 3,700 AFY. Construction of project works took three years, finishing in 1963. The District signed a $450,000 repayment contract in 1959 that had a 50-year payment term, which began in about 1970.[71]

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[64] State Engineer Website (available at www.seo.state.nm.us/publications/waterlines/wl-fall-2001/pg04-rio-grande-water.html).
[65] San *Juan Chama Reclamation Project and Navajo Indian Irrigation Project: Hearings on H.R. 2352, H.R. 2494 and S. 72*, 86th Cong. 61 (May 20,1960) (Statement of John Burroughs, Governor of New Mexico).
[66] State Engineer Website (available at www.seo.state.nm.us/publications/waterlines/wl-fall-2001/pg04-rio-grande-water.html).
[67] Pub. L. No. 87-483, § 8(a).
[68] Ira G. Clark, *Water in New Mexico* 389 (1987).
[69] *Id.*
[70] *Id.*
[71] *Id.*

6.2.2.4 **Animas-La Plata Project**

Congress authorized the Animas-La Plata Project in 1968 as part of the Colorado River Basin Project Act.[72] The ALP originally was designed to provide irrigation and municipal and industrial ("M&I") water supplies to the Colorado Ute Tribes and other project beneficiaries, including the La Plata Conservancy District in New Mexico. In 1986, the Colorado Ute Indian Water Rights Final Settlement Agreement[73] was signed, which quantified the reserved water rights in Colorado for the Ute Mountain Ute and Southern Ute tribes. The reserved water rights date back to an 1868 treaty with the Utes, which would give the tribes one of the oldest priorities in the San Juan Hydrologic Unit, particularly in Colorado. The settlement allows the Colorado Ute Tribes to obtain water from several rivers and projects, including the ALP, without disrupting existing uses of the river.

In 1990, however, the Bureau determined that the ALP might affect the endangered Colorado Pikeminnow, and it reinitiated consultation with the U.S. Fish & Wildlife Service (the "Service").[74] The Service's biological opinion concluded that unless water depletions for the ALP were drastically cut back and other steps were taken, the project would jeopardize the pikeminnow and another endangered fish, the razorback sucker.[75] Ultimately, the Service agreed that the ALP could deplete 57,100 AFY—roughly one-third of the originally planned depletions of 198,200 AFY—if the parties participated in a Recovery Implementation Plan ("RIP") that included a seven-year study of the fishes' needs and a seven-year recovery period.[76] In 1998, the Clinton Administration, led by Secretary of the Interior Bruce Babbitt, proposed a revised ALP that would limit depletions to the 57,100 AFY limit proposed by the Service, while still fulfilling the promises made to the Ute tribes in the settlement.[77] The two tribes would be entitled to depletions under the ALP of 19,980 AFY each, and they would share equally in a $40 million fund to buy additional water rights to make up the difference between the ALP-supplied water and the amount agreed upon in the earlier settlement. In effect, almost all of the irrigation was shelved, and the ALP became an M&I project. The reductions for New Mexico beneficiaries were significant: the SJWC's share of immediately available depletions decreased from 15,400 AFY to 10,400 AFY, the Navajo Nation's share decreased from about 3,800 AFY to 2,340 AFY, and the La Plata Conservancy District's share decreased from about 5,900 AFY to 780 AFY.[78] As part of the agreement, the Navajo Nation also obtained a promise to build a new pipeline from the Farmington area to Shiprock to convey the Nation's water, at no capital cost to the Nation.[79]

After an additional round of environmental compliance and the issuance of a Final Supplement Environmental Impact Statement in July 2000, actual construction on the project

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[72] Pub. L. 90-537 (1968).
[73] *See* Colorado Ute Indian Water Rights Settlement Act, Pub. L. 100-585, 102 Stat. 2973 (1988).
[74] Elizabeth Newlin Taylor, *How the Colorado Squawfish Reeled in the Animas-La Plata Project*, 38 N.M. J. of Science 64, 66 (1998).
[75] *Id.*
[76] *Id.* at 66-67.
[77] The proposal, as modified, was ultimately passed in amendments to the 1988 Ute Settlement Act in Pub. L. 106-554, 114 Stat. 2763 (2000).
[78] *Id.*
[79] *Id.*

began in June 2002.[80] The current schedule anticipates seven years of construction to build Ridges Basin Reservoir (which will store approximately 120,000 acre feet of water), the pumping plant at the Animas River outside of Durango, Colorado, and the inlet-outlet conduit to convey water between the Animas River and the reservoir.[81] The cost is now estimated at about $300 million, and the SJWC already has signed a contract with the Bureau and paid its portion, or about $6.9 million, of the construction costs.[82]

6.2.2.5 Navajo-Gallup Water Supply Project

One other federal project currently in the planning stages, the Navajo-Gallup Water Supply Project, would supply about 37,800 AFY of municipal and industrial water to the New Mexico portion of the Navajo Nation south of the San Juan River, the Window Rock area in Arizona, the City of Gallup, and the southern portion of the Jicarilla Apache Nation.[83] In addition to the Navajo Nation and Gallup, other agencies involved are the Bureau, the Northwest Council of Governments and the Bureau of Indian Affairs.[84] The Bureau proposed two structural alternatives to supply the water from the San Juan River Hydrologic Unit in March 2000. One would take the water from Navajo Reservoir and use part of NIIP's canals to transport the water to a treatment plant and pumping station that would provide water through a new system of pipelines to the Navajo Nation and Gallup.[85] The other alternative would divert water directly out of the San Juan River at the same location as the Public Service Company of New Mexico's San Juan Generating Station diversion weir near Kirtland. From there, a treatment plant and pumping plant would send the water to the south through pipelines. This alterative also would construct an additional treatment plant and pipeline from Cutter Reservoir on NIIP to serve the eastern portion of the Navajo Reservation.[86]

One factor critical to the completion of this project is whether an additional 37,800 AFY can be depleted from the San Juan River under current limitations imposed by the Endangered Species Act, and that issue has not been resolved. A question also remains about whether the water from the San Juan River in the upper basin of the Colorado River can be used in parts of New Mexico and Arizona that are part of the lower basin.

6.2.3 Endangered Species Act Issues[87]

The federal government first attempted to protect endangered wildlife with the passage of the Endangered Species Preservation Act of 1966.[88] In 1969, this Act was amended to confer more authority on the Secretary of the Interior.[89] The scope of the Act

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[80] Bureau of Reclamation, Western Colorado Area Office, *Animas-La Plata Project Update* 1 (July 2002) (available at www.uc.usbr.gov/progact/animas/pdfs/alp_update7_02.pdf).
[81] Bureau of Reclamation, Western Colorado Area Office, *Proposed Animas-La Plata Implementation Schedule* 1 (2003) (available at www.uc.usbr.gov/progact/animas/schedule.html).
[82] Amendatory Funding Agreement and Repayment Contract Between the United States and the San Juan Water Commission (Mar. 5, 2002) (available at ww.uc.usbr.gov/progact/animas/pdfs/5_ALPSJWCcontract35_02.pdf).
[83] Bureau of Reclamation, Upper Colorado Region, *Navajo-Gallup Supply Project* (available at www.uc.usbr.gov/ea_eis/dro/navajo-site).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] This section addresses ISC template topics "a" and "b."
[88] Pub. L. No. 89-669, 80 Stat. 926 (1966).
[89] Pub. L. No. 91-135, 83 Stat. 275 (1969).

was broadened again, in 1973, to establish a more comprehensive scheme of wildlife protection. Congress stated the purposes of the 1973 Act were "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…."[90] Further, the policy of the Act was articulated in sweeping terms: "[A]ll Federal departments and agencies shall seek to conserve endangered species and threatened species. . . ."[91] The 1973 Act for the first time contained a prohibition against the taking[92] of an endangered or threatened species.[93] Further, the Secretary of the Interior is required to "develop and implement plans . . . for the conservation and survival of endangered species and threatened species. . . ."[94]

6.2.3.1 **The Colorado Pikeminnow and Razorback Sucker**

In the case of the Colorado pikeminnow and razorback sucker, both of which are found in the San Juan River, the Endangered Species Act ("ESA") has created, in effect, "regulatory water rights" that seem to preempt all water rights under state law, as well as federal reserved water rights.[95] The designation of these fish as endangered species forced the development of a Recovery Implementation Plan ("RIP"), which has two goals: (1) recovery of the species; and (2) continued development of water resources in the San Juan Hydrologic Unit.

Developed in 1992, the RIP consisted of a seven-year study period and a seven-year implementation period. Efforts have focused on manipulating water releases from Navajo Reservoir in order to mimic a natural hydrograph of the river before the Navajo Reservoir was built. To date, the data have not shown that returning the river system to a natural hydrograph has improved survival, perhaps because there are equally plausible alternative explanations for the fishes' demise. These include the fact that: the pikeminnow were poisoned from the stream in earlier years when priorities were different; more than forty non-native species prey on the pikeminnow; spawning routes were interrupted by the construction of Lake Powell; and Navajo Reservoir inundated suspected spawning habitat.

However, stocking of the pikeminnow (since 1996) and the razorback sucker (since 1994) has been partially successful. Some of the stocked fish have survived, and even some razorback sucker spawning has been observed for the first time, whereas pikeminnow have been spawning all along. The current flow recommendations mimic the shape of a natural hydrograph with a peak in late May or early June followed by a descending limb to base flow in late July or early August. The flow regime was designed to provide the channel-forming and channel maintenance requirements for the San Juan River. However, there is some evidence that the flow regime has reduced habitat for the species. In addition, the severe drought of 2002 forced biologists to re-evaluate the flow recommendations under the RIP

[90] 16 U.S.C. § 1531(b) (2003).
[91] *Id*., § 1531(c).
[92] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.*, § 1532(19).
[93] *See* 50 C.F.R. § 17.21(c) (2001), which prohibits the taking of endangered wildlife.
[94] 16 U.S.C. § 1533(f)(1). Each plan is to incorporate site-specific management actions—objective criteria which, when met, would result in removal of the species from listing, with estimates of time and cost requirements for removal.
[95] A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Resources J. 769, 772 (2001).

and required that the Bureau try to balance the needs of the fish and the needs of the people along the San Juan River.

An important component of the RIP is the environmental baseline, which sets out the amount of water that has been and can continue to be used without affecting recovery of the endangered species. In effect, the baseline "freezes" the water supply available for use and thus limits any additional development of water rights or new appropriations of water. However, it is important to note that progress toward recovering the endangered species under the RIP has permitted projects to move forward, as well as allowed the continuation of existing uses without consultation with the Service.

6.2.3.2 Silvery Minnow Issues

An endangered species not even located in the San Juan Hydrologic Unit may also have a significant impact on the use of San Juan Hydrologic Unit waters. In a case that is now before the United States Court of Appeals for the Tenth Circuit, Judge James A. Parker of the United States District Court for the District of New Mexico ruled in April 2002 that the Bureau has the authority to use water from the San Juan-Chama Project to protect silvery minnow habitat.[96] In other words, according to Judge Parker, the Bureau has the discretion to reduce water deliveries to San Juan-Chama Project contractors (including the Jicarilla Nation) for the protection of the silvery minnow. Judge Parker's ruling also could establish a precedent that would permit the use of other federal project water, such as Hammond Irrigation Project water, for endangered species. The ultimate effect of the judge's ruling will remain uncertain until the appeal process is completed.

6.3 Water Quality Issues[97]

Water quality issues are moving to the forefront in both federal and state forums as a new constraint on all water supplies. A stream's water *quality* often is affected by the *quantity* of water in the stream, and new regulations may require that water remain in a stream in order to meet a water quality standard. Both federal and state water quality regulations, therefore, could easily affect the quantity of water available for use. The most common types of water quality regulation are discussed below.

6.3.1 Federal Laws and Regulations

6.3.1.1 NPDES Permit Process

Under section 402 of the federal Clean Water Act, any discharges by point sources, except in compliance with the limitations imposed in a National Pollutant Discharge Elimination System ("NPDES") permit, are declared unlawful.[98] In New Mexico, the NPDES permit program is the primary mechanism for controlling point source discharges to surface waters. EPA Region 6 in Dallas issues permits that specify the amount and concentrations of contaminants that a permittee can discharge into a surface water. EPA also enforces permit effluent limitations. In addition, pursuant to section 401 of the Clean Water Act[99] and section 74-6-5(E) of the New Mexico Water Quality Act, the New Mexico

[96] Memorandum Opinion and Order, No. CV 99-1320 JP/RLP-ACE (D. N.M. Apr. 19, 2002).
[97] This section addresses ISC template topics "a," "b" and "c."
[98] 33 U.S.C. § 1342 (2003).
[99] *Id.*, § 1341.

Environment Department ("NMED") certifies that NPDES permits meet applicable requirements of the Clean Water Act and state law, regulations and water quality standards. If NMED certifies that additional or more stringent effluent limitations are necessary, EPA is obligated to incorporate them into an NPDES permit.

6.3.1.2 Nonpoint Sources

Under section 319 of the federal Clean Water Act,[100] states are required to identify water bodies in which water quality standards cannot be met without control of non-point source pollutants, and to establish management programs for these water bodies. The plans are to include "best management practices" for categories of sources, a schedule of implementation milestones, and appropriate regulatory measures. The plans must be approved by EPA.

6.3.1.3 TMDLs

The total maximum daily load ("TMDL") of a pollutant is the greatest loading or amount of the pollutant that may be introduced into a stream from all sources without resulting in a violation of water quality standards. The TMDL consists of the sum of load allocations (pollutant loads contributed by nonpoint sources and natural background sources) and point source load allocations. Pursuant to section 303(d) of the federal Clean Water Act,[101] TMDLs must be developed for streams where water quality does not meet applicable water quality standards even after point source discharges achieve required effluent limitations. Streams that do not meet applicable water quality standards are placed on a section 303(d) list, and the Environment Department prepares draft TMDLs for public review. After a public review and hearing process, the Water Quality Control Commission establishes final TMDLs for that stream.

6.3.2 State Water Quality Scheme[102]

The basic authority for state water quality management in the San Juan Hydrologic Unit is provided by the New Mexico Water Quality Act.[103] This Act establishes the New Mexico Water Quality Control Commission and specifies its duties and powers, which include adoption of a comprehensive water quality management program, development of a continuing planning process, adoption of water quality standards for surface and ground waters of the state, adoption of TMDLs, and promulgation of regulations to prevent or abate water pollution in the state.[104] Further, the Water Quality Control Commission is the state water pollution control agency for all purposes of the federal Clean Water Act and may take any action necessary to secure the benefits of the Act for this state. The Commission is composed of eight state agency heads (Environment Department, Game and Fish Department, State Engineer, Oil Conservation Commission, State Parks Division of Energy, Minerals and Natural Resources Department, Department of Agriculture, Soil and Water Conservation Commission, and Bureau of Mines and Mineral Resources), a municipal or county government representative, and three representatives of the public appointed by the governor.

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[100] *Id.*, § 1329.
[101] *Id.*, § 1313(d).
[102] This section addresses ISC template topics "a" and "c."
[103] NMSA 1978, §§ 74-6-4 to -17 (1967, as amended through 2001).
[104] *Id.*, §§ 74-6-3 to -4.

With regard to the Clean Water Act TMDL process discussed above, the State of New Mexico has developed TMDLs for some water quality limited streams. An April 1997 Consent Decree in *Forest Guardians v. Browner*[105] and a subsequent Memorandum of Understanding ("MOU") between EPA Region 6 and NMED resulted in a 20-year schedule for the development of TMDLs across New Mexico. Pursuant to the Consent Decree and the MOU, TMDLs for the San Juan River watershed are due by December 31, 2004. Currently, six stream segments in the San Juan River watershed are on the section 303(d) list for water quality limited streams and are due for TMDLs: (1) San Juan River from Cañon Largo to Navajo Dam (turbidity and stream bottom deposits); (2) San Juan River from the Animas River to Cañon Largo (stream bottom deposits and fecal coliform); (3) San Juan River from the Navajo Nation boundary at the Hogback approximately 10 miles east of Shiprock to the Animas River (stream bottom deposits); (4) Animas River from the mouth on the San Juan River to Estes Arroyo (stream bottom deposits); (5) Animas River from Estes Arroyo to the New Mexico-Colorado border (stream bottom deposits); and (6) La Plata River from the mouth on the San Juan River to the New Mexico-Colorado border (plant nutrients). Depending on the outcome of the TMDL process for the San Juan River watershed, the water supply may be constrained; *i.e.*, more water may need to remain in the stream.

6.3.3 Tribal Laws and Regulations[106]

In addition to state standards, the Navajo Nation may also be in a position soon to establish water quality standards on the San Juan River. In the Spring of 2002, the Navajo Nation petitioned the EPA for "treatment as a state" under the Clean Water Act. The petition requests authority to be treated as a state, and allowed to set water quality standards, for the following lands: all trust lands, all Bureau of Land Management land leased to Navajos, all state land leased to Navajos, all Navajo fee lands, and various private lands. The petition currently (January 2003) is being reviewed by EPA Region 9 in San Francisco. If the petition is granted, the Nation could establish standards more stringent than state standards, affecting both NPDES permit holders (such as the City of Farmington) and nonpoint sources. In a case that may be analogous, the Pueblo of Isleta asserted jurisdiction for water quality standards in its stretch of the Rio Grande, which is directly downstream of the City of Albuquerque. The Pueblo set standards for certain constituents (including arsenic) that were more stringent than the federal standards, creating difficulties for the City of Albuquerque.[107]

6.4 Special Districts[108]

6.4.1 Water and Sanitation Districts/Mutual Domestic Associations

Water and sanitation districts are quasi-municipal corporations that operate waterworks, sanitary sewers, sewage and garbage disposal systems or any combination of such systems.[109] These districts, operating through their boards, may enter into contracts and agreements, acquire property, borrow money, fix rates and charges for the use of facilities,

[105] No. 96-0826 LH (D. N.M. Apr. 1997).
[106] This section addresses ISC template topics "a" and "c."
[107] *City of Albuquerque v. Browner*, 97 F.3d 415, 423(10th Cir. 1996) (EPA's approval of Isleta Pueblo's more stringent standards in accord with powers inherent in Indian tribal sovereignty).
[108] This section addresses ISC template topic "f."
[109] NMSA 1978, § 73-21-3 (1943, as amended through 1977).

levy taxes on real property located within the district, and issue bonds.[110] There are no water and sanitation districts located in the San Juan Hydrologic Unit.

Another type of water association, known as a mutual domestic association, is a quasi-governmental entity that does not have the power to tax, but it can receive state funds to improve water and wastewater facilities from the New Mexico Environment Department.[111] There are no mutual domestic associations located in the San Juan Hydrologic Unit.

6.4.2 Water Users Associations

Water users associations are private organizations formed around a common goal of creating a safe water system for domestic, commercial or industrial purposes.[112] Water users associations located in the San Juan Hydrologic Unit include but are not limited to:

- Blanco Water Users Association
- Flora Vista Water Users Association
- Lee Acres Water Users Association
- Lower Valley Water Users Association
- Morningstar Water Users Association
- North Star Water Users Association
- Navajo Dam Water Users Association
- San Juan River Dineh Water Users Association
- Southside Water Users Association
- Upper La Plata Water Users Associations
- West Hammond Water Users Association

Agricultural water users associations located in the San Juan Hydrologic Unit include but are not limited to:

- San Juan Agricultural Water Users Association

6.4.3 Irrigation/Conservancy Districts

The purpose of an irrigation district is to organize an effective irrigation system. An irrigation district is created pursuant to a petition signed by a majority of resident landholders owning more than half of the land included within the district, upon approval of the board of county commissioners.[113] An elected board of directors has authority to authorize the construction or purchase of canals, ditches, reservoir sites, water rights and rights of way; to maintain and operate those works; and to construct drainage facilities to prevent waterlogging.[114] The board also has authority to issue bonds and to levy taxes and assessments.[115] Irrigation districts located in the San Juan Hydrologic Unit include but are not limited to:

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[110] NMSA 1978, §§ 73-21-16 to -17 (1943, as amended through 1985).
[111] NMSA 1978, § 3-29-5 (1965, as amended through 2000).
[112] NMSA 1978, § 73-5-1 (1909).
[113] NMSA 1978, § 73-9-3 (1919).
[114] NMSA 1978, § 73-9-14 (1919).
[115] *Id.*

- Bloomfield Irrigation District
- Farmers Irrigation District
- Hillside Irrigation District

Conservancy districts also are organized to promote agriculture and have many of the same powers as irrigation districts.[116] Conservancy districts located in the San Juan Hydrologic Unit include but are not limited to:

- Hammond Conservancy District
- La Plata Conservancy District

6.4.4 Ditch Companies

Ditch companies are formed for the purpose of improving irrigation efficiency. The irrigation ditches themselves are the property of those who construct them, and the ditch companies are controlled by commissioners elected by those holding water rights in the ditch.[117] Ditch companies located in the San Juan Hydrologic Unit include but are not limited to:

- Aztec Ditch
- BID Citizens Ditch
- Cedar Ditch
- Cunningham Ditch
- Eledge Ditch
- Enterprise Ditch
- Farmers Mutual Ditch
- Farmington-Echo Ditch
- Graves-Atteberry Ditch
- Greenhorn Ditch
- Halford Ditch
- Helton Ditch
- Highland Park Canal
- Hillside Ditch
- Independent Ditch
- Jackson Ditch
- Jacquez Ditch
- Jewett Valley Ditch
- Kello-Blancett Ditch
- La Plata Indian Ditch
- La Pumpa Ditch
- Left Hand Ditch
- Lower Animas Ditch
- Manzanares-Turley Ditch
- Martin-Valencia Ditch
- McDermott Ditch

[116] NMSA 1978, § 73-14-39 (1927).
[117] NMSA 1978, §§ 72-2-1, *et seq.* (1874).

- North Farmington Ditch
- Pickering Ditch
- Pioneer Ditch
- Ralston Ditch
- Ranchmans Ditch
- Sargent Ditch
- Stacey Ditch
- Terrel Ditch
- Turley Ditch
- Twin Rocks Ditch
- Willett Ditch
- Wright-Leggett Ditch

6.4.5 Flood Control Districts

Flood control districts raise funds to develop flood control devices within a drainage basin.[118] There are no flood control districts located in the San Juan Hydrologic Unit. **[Confirmation is requested from the Regional Water Planning Committee and the public.]**

6.4.6 Soil and Water Conservation Districts

Soil and water conservation districts, which have no regulatory control over water resources, are influential in promoting sound range and water resource management practices. These districts have authority to conduct investigations and surveys concerning soil erosion, floodwater and sediment damage, and conservation and utilization of water resources.[119] In addition, they are required to cooperate with other government agencies engaged in the same type of work, and they may act as an agent for such agencies in acquiring, constructing, operating and administering conservation or development programs.[120] Soil and water conservation districts located in the San Juan Hydrologic Unit include but are not limited to:

- Cuba Soil and Water Conservation District
- McKinley Soil and Water Conservation District
- San Juan Soil and Water Conservation District
- Upper Chama Soil and Water Conservation District

6.5 Legal Issues Needing Resolution/Local Conflicts[121]

6.5.1 Significance of NIIP for Navajo Reserved Rights

In the San Juan Hydrologic Unit, one of the most significant issues needing resolution is the quantification of the Navajo Nation's reserved water rights. Those rights will be determined in the ongoing adjudication. One issue to be resolved there is whether the Navajo

[118] NMSA 1978, §§ 72-18-1 to -70 (1981, as amended through 1986).
[119] NMSA 1978, § 73-20-4 (1957, as amended through 1977).
[120] NMSA 1978, § 73-20-13 (1957, as amended through 1981).
[121] This section addresses ISC template topics "g" and "h."

Nation traded all or any part of its reserved water rights for NIIP. In the course of NIIP negotiations with the federal government and the State of New Mexico in the 1950s and 1960s, the Navajo Nation made certain concessions regarding its claims to reserved water rights in the San Juan River. It has been claimed by some observers that these concessions amount to a complete quantification of the Navajo reserved rights.[122] The Navajos strongly contest this position.

6.5.2 San Juan Hydrologic Unit Adjudication

This is an ongoing adjudication, as discussed more fully in section 6.1.2.1.1 above.

6.5.3 Endangered Species Act Issues

As noted above in section 6.2.3.2, legal precedents could be set in the Middle Rio Grande that impact water availability in the San Juan Hydrologic Unit and have far-reaching effects on the ability and obligation of the Bureau to operate projects for the benefit of endangered species.

At this time it is unknown what this action will have on endangered species in the San Juan Hydrologic Unit.

6.5.4 Title to Project Water Rights

It is not clear who owns the water rights to water diverted and impounded by federal water projects. Section 8 of the Reclamation Act of 1902[123] makes it clear that, for Bureau projects, state law governs the allocation of water rights, not federal law.[124] For this reason, it can be argued that, while the federal government may operate the project works, the rights to water are vested in the beneficial users under state law. The federal government, however, has argued in the ongoing San Juan River Adjudication that it owns the water rights associated with federal projects, including the Hammond Irrigation Project and Navajo Reservoir.[125]

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[122] *See, e.g.,* Charles DuMars and Helen Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage*? 20 Nat. Res. J. 17 (1980) (the authors of this article say that '"settlement' of Indian water rights on the San Juan, if it ever existed, now appears to be ephemeral indeed." *Id*. at 22. They present arguments on both sides of the issue. For the argument that the Navajos did *not* quantify their reserved rights with NIIP, *see id.* at 24-32; for the argument that they *did, see id*. at 35-39). *See also* Monroe E. Price and Gary D. Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 118 Law and Contemporary Problems 97, 119-130 (1976) (those authors write that with the passage of NIIP's authorizing legislation, "[a]n unquantified *Winters* right, with all its uncertainties, had been converted to the promise of water works that could be of use to the Navajo people. Something was surrendered . . . in exchange for a promise of substantial federal funds to develop a portion of the Navajo economy that was desperately in need of nourishment." *Id*. at 124.

[123] 43 U.S.C. § 383 (2003).

[124] *See United States v. City of Las Cruces*, 289 F.3d 1170, 1176 (10th Cir. 2002)

[125] The United States has filed a Position Statement indicating an intent to claim water rights to 23,000 AFY of water from the Hammond Irrigation Project and approximately 1.7 MAF of water from Navajo Reservoir. Eleventh Judicial District Court No. 75-184-1, Dec. 20, 2002.