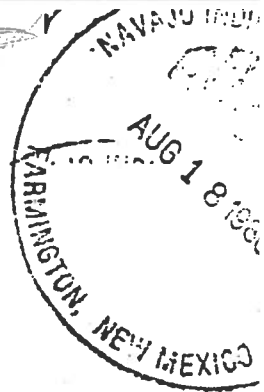




UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240



JUL 30 1980

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Memorandum

To: Secretary

From: Solicitor

Subject: Navajo Indian Irrigation Project — Water Entitlement of Navajo Tribe

TAKE CAREER
ANTA F. H.M.

SJ
Navajo Irrig

The Navajo Indian Irrigation Project, authorized by the Act of June 13, 1962, 43 U.S.C. 615ii et seq. will deliver water from the Navajo reservoir on the San Juan River to irrigable lands on the Navajo Reservation. Section 2 of the Act, 43 U.S.C. 615 jj, provides in pertinent part:

[T]he Secretary of the Interior is authorized to construct, operate, and maintain the Navajo Indian Irrigation Project for the principal purpose of furnishing irrigation water to approximately one hundred and ten thousand six hundred and thirty [110,630] acres of land, said project to have an average annual diversion of five hundred and eight thousand [508,000] acre feet of water.

Originally planned as a gravity distribution system, the project has been converted to a sprinkler system which may require less than 508,000 acre feet to irrigate the 110,630 acres.

You have requested my opinion on the following questions: (1) whether the Navajo Tribe is entitled to divert 508,000 or such lesser amount as will result in a net stream depletion of 252,000 acre feet and (2) whether project productive acreage of 110,630 should be reduced by 5% in accord with ordinary procedures of the Water and Power Resources Service.

I conclude that (1) the Tribe is entitled under the Act to the use of as much water as is reasonably necessary to carry out the irrigation purposes of the project up to a maximum average annual diversion of 508,000 acre feet, and (2) that the productive acreage in the project is a maximum of 110,630 acres specified by Congress. My reasoning is set forth below.

1974 Opinion

On December 6, 1974, Deputy Solicitor David Lindgren issued an Opinion (copy attached) which concluded that (1) the Tribe is entitled under the Act to use so much project water as is reasonably necessary to irrigate the 110,630 acres — whatever that amount may be; and (2) the Tribe may use Section 2 water only for the principal purpose of the project, i.e., irrigation. I have reviewed the 1974 Opinion and concur in its legal conclusion. Unfortunately, that Opinion did not resolve the issue of project sizing because BIA

and the Water and Power Resources Service do not agree on the amount of water reasonably necessary to irrigate 110,630 acres. BIA maintains that depending on the cropping pattern chosen it could well take a diversion of 508,000 acre feet to irrigate 110,630 acres. Accordingly, BIA argues that the project must be built so that it is capable of diverting 508,000 acre feet.

The Water and Power Resources Service points to certain statements in the legislative history of the Act which reflect Congressional concern with the impact of the Navajo Indian Irrigation Project (NIIP) on other projected uses of San Juan River water. See, e.g., House Report Number 635, 87th Cong., 1st Sess., p. 7. From this it is asserted that the Department is constrained by the Act to insure that net stream depletion does not exceed 252,000 acre feet. This is the estimated net depletion which would have occurred with a gravity system and an annual diversion of 508,000 acre feet. Accordingly, it is argued that there is no occasion to size the project to deliver 508,000 acre feet.

The legal issue then is the extent to which statements in the legislative history concerning depletion should be weighed. In this connection it is relevant that the statute authorizing the Navajo Indian Irrigation Project embodied an agreement among the Federal Government, the State of New Mexico and the Navajo Indian Tribe by which the Navajos agreed to relinquish their priority to San Juan River water under the Winters' Doctrine for purposes of the project and to permit the transbasin diversion into the Rio Grande of a substantial body of water to which they had a presumptively valid claim to prior and paramount rights. 1/

The Navajo Indian Irrigation Project was to be a significant portion of a major economic development program for the Navajos which would result in a viable, self sufficient economy. 2/ It has been asserted that the effect

1/ See, generally, U.S. Department of Interior, Issue Supporting Paper No. 70-5, Navajo Indian Irrigation Project which describes project evolution from the grandiose visions of 19th century engineers. The principal impetus for the project was New Mexico's desire to divert water from the San Juan to water-short areas in the Rio Grande Basin. Because of the Navajo's prior rights on the San Juan, their agreement was a necessary precondition to the authorization of the San Juan - Chama Project. Beginning in 1952 the Navajo Tribe, the State of New Mexico, the Bureau of Reclamation and the Bureau of Indian Affairs worked intensively for a decade developing plans for a Navajo Project and terms for an agreement which ultimately would be embodied in the authorizing legislation.

2/ E.g., A 1954 summary of the Navajo Project prepared by the Senate Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs explained (at p. 107) the purpose of the Act as follows:

of this legislation was to quantify and limit the San Juan River water rights of the Navajos under the Winter's Doctrine. 3/

In the 1950's the adult population of the Navajo Tribe was virtually illiterate. 4/ The Tribal Council held its meeting in the Navajo language and many members of the Council spoke little or no English. Persons addressing the Council did so through an interpreter and any document presented to the Council written in the English language was of necessity interpreted orally into Navajo. Accordingly, the rules evolved by the Supreme Court in interpreting agreements with the Indians are fully applicable in construing this Act.

The agreement embodied in the legislation is to be interpreted liberally and in a non-technical sense, as the Indians would naturally understand it, Worcester v. Georgia, 6 Pet. 515 (1833), and ambiguities are to be resolved in the Indians' favor. Winters v. United States, 207 U.S. 564, 574 - 577 (1908). These rules have been recently and repeatedly reaffirmed by the Court. E.g., Antoine v.

ft. nt. 2 cont./

The project is an integral part of the Indian Affairs program to bring relief to the Navajo Indians for their very low family incomes and to make them self-sustaining.

Secretary of Interior Stewart Udall testified to the Senate Committee on March 15, 1961:

The primary justification for the development of the Navajo project stems from the urgent need for expanded economic opportunity for the people living within and immediately adjacent to the project area The development of the project lands would also bring into the area the associated and allied industries of agriculture . . . which would provide, we calculate, a livelihood for an additional 2,240 Navajo families. Altogether, it is estimated that the Navajo project would provide the economic livelihood for some 18,000 to 20,000 Navajo people. Hearings on (S. 107) Navajo Indian Irrigation Project and San Juan Chama Project Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs. 87th Cong., 1st Sess. (1961).

3/ See, M. Price and G. Weatherford, "Indian Water Rights in Theory and Practice," 40 J of Law and Contemp. Prob. 97, 124 (1976).

4/ Special Subcommittee on Indian Education, Committee on Labor and Public Welfare, Indian Education; a National Tragedy -- a National Challenge, S. Rep. No. 501, 91st Cong. 2d Sess. XIV, 1969.

Washington, 420 U.S. 194, 199-202 (1975); United States v. Shoshone Tribe, 304 U.S. 111 (1938); Bryan v. Itasca County, 426 U.S. 373 (1976); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).

The Statute speaks of an average annual diversion of 508,000 acre feet, not the consumptive use of that amount. At the same time, economic development based on irrigation was the objective of the Act, not the diversion of 508,000 acre feet as an end in itself.

I do not ignore the evidence in the record that at least some members of the Congressional Committees considering this legislation and their staffs examined with care the depletion of San Juan River water which would be occasioned by the diversion of 508,000 feet for a gravity system irrigation project. Evidence of this concern seems clear. But the statute, on its face, does not speak of depletion but rather of average annual diversion.

The Bureau of Reclamation estimated a return flow on the project of 256,000 acre feet resulting in a net stream depletion of 252,000 acre feet. Other witnesses challenged these figures, and some of them doubted any return flow at all. Thus, the State of California's Department of Water Resources wrote:

It is probable that the stream depletion occasioned by the Navajo project would be substantially in excess of the estimated amount; consequently additional studies regarding actual stream depletion should be conducted. 86th Cong., 2nd Sess., House Document Number 424, June 20, 1960, at pg. 418.

If the Congress had wished to limit the Navajos to a certain stream depletion, it could have done so; instead it cast the Statute in terms of an average annual diversion. 5/

At the time of this legislation, moreover, it was contemplated that diversion of the full 508,000 acre feet would be necessary for project purposes. The efficiency made possible by the use of sprinklers emerged later. Under these circumstances it is hardly a strained construction to conclude that when Congress said 508,000 it meant 508,000.

In addition to the "plain meaning" reading of the language it is essential to consider the Navajo understanding of the Act. In January of 1952, the Navajo Tribal Council voted 60 in favor and 0 opposed on a resolution entitled San Juan Shiprock Project which provides as follows:

5/ Contrast the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057 which apportions water to California using the words "the aggregate annual consumptive use (diversions less returns to the river. . . .)" Section 4a. See also 82 Stat. 52, March 22, 1968 limiting the Utah Construction Co. to depletions which "shall not exceed the estimates set forth"

That the Navajo Tribe of Indians have and claim prior and preferential rights to all of the waters of the San Juan River and its tributaries for use on Navajo Tribal lands . . . (and) make claim to and request that a preferential right be established to divert and use annually six hundred and ten acre thousand feet of water . . . (emphasis added)

That resolution authorized the Tribal Chairman and the Chairman of the Tribe's Resources Committee to represent the Navajo Tribe in discussions and other meetings with the State of New Mexico, federal and other officials, for negotiations aimed at final enactment of the legislation for the Navajo project. In August of 1952 the Council discussed the proposed project, and their lawyer, Mr. Litell, in discussing the San Juan -- Chama project explained that the Tribe ultimately might have to make some compromise. On December 12, 1957, after a two day discussion, the Navajo Tribal Council put in resolution form its agreement with the State of New Mexico, federal officials and others, to urge "authorization by Congress of the Navajo Indian Irrigation Project and the San Juan -- Chama project in New Meixco and approving in principal legislation proposed for this purpose." In that resolution the Chairman of the Navajo Tribal Council was authorized to consider and make modifications in the legislation:

Provided the following principles are always adhered to:

- (1) The Navajo Indian Irrigation Project not be reduced below a net area of 110,630.
- (2) The authorized average annual diversion requirement of the Navajo Indian Irrigation Project not be reduced below 508,000 acre feet.

This resolution unambiguously sets forth the Navajo understanding of the legislation. The language adopted by Congress contains substantially the same language adopted by the Council. The language represents years of negotiations and sets forth the final compromise agreed to by the Navajo Tribe. 6/ Nowhere in the Navajo Tribal Council resolution is a net stream depletion condition mentioned nor does a review of the minutes of the Tribal Council minutes show any discussion of a consumptive use or net stream depletion limitation.

The explanation given to the Navajo Tribal Council by the State of New Mexico's Engineer is as follows:

This [water] supply is enough to furnish 508,000 acre feet per year for the Navajo Project, 23,000 acre feet for the Hammond Project and 110,000 acre feet required for the first stage of the San Juan - Chama project, and also furnish with reasonable shortages about 224,000 acre

6/ See, generally, Price and Weatherford, n. 3 supra at 119-131.

feet of water for municipal and industrial purposes over and above those requirements I have mentioned. Navajo Tribal Council minutes December 11, 1957.

It seems fair to conclude the Navajos viewed their position as having a legal claim on all the waters of the entire river but of necessity utilizing only a portion of their claim for 610,000 acre feet of water for the project and finally agreeing to a figure of 508,000 acre feet. Thus, even if engineers in the Bureau of Reclamation viewed the project in terms of net stream depletion, that understanding must yield to the Navajo understanding of the legislation as providing them an annual diversion of 508,000 acre feet.

One further point requires attention. The Bureau of Reclamation's estimates of net depletion presupposed a particular cropping pattern to which it applied consumptive use computations for each crop and calculated efficiencies for the project. The consumptive use of irrigation water will vary tremendously depending on the cropping pattern chosen.

Aside from the restriction on the delivery of water for the production of excessive basic commodities set fourth in section 6 of the Act, 43 U.S.C. 615nn, the act does not limit the Navajo to any particular cropping pattern. At the moment, the Navajo Nation faces serious problems of over-grazing which might be alleviated by the production of alfalfa, a highly water consumptive crop. Thus, a study entitled "Water Supply Availability in the San Juan River Basin as of 1975," prepared by the Bureau of Indian Affairs with the technical assistance of Morrison and Maierle, Inc., concludes that using the cropping pattern actually planned by the project operators, Navajo Agricultural Products Industries, a diversion of 610,000 acre feet would be required. While this is a technical rather than a legal matter, it does appear that the Navajos may require the full 508,000 acre feet authorized by the legislation for the purposes of irrigation, and nothing in the Act prohibits the Navajos from using the full amount.

Accordingly I conclude that the Navajo's are entitled to divert up to 508,000 acre feet for irrigation purposes. Whether, in fact, the full amount will be required is a technical, not a legal issue. But if there is a reasonable indication that the full amount may be required for irrigation purposes, the Department should take no action to prevent the Navajos from receiving the full benefits to which they are entitled under the Act.

Productive Acreage

The second question concerns an administrative practice developed by the Water and Power Resources Service of reducing acreage stated in authorizing legislation by 5% to allow for farmsteads, rights of way, fence rows and the like. The Water and Power Resources Service contends that the 110,630 acres of

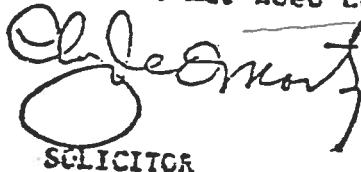
land should be reduced by 5% to 105,099 acres. The Water and Power Resources Service cites section 1 of the Act which states that the Navajo Irrigation Project is approved substantially as "... described in the proposed coordinated report of the Acting Commissioner of Reclamation and the Commissioner of Indian Affairs, approved and adopted by the Secretary of Interior on October 16, 1957, as conditioned, modified and limited herein." That report contained an acreage breakdown for gravity and pump irrigation totaling 105,099 acres or 55% of 110,630 acres.

The Bureau of Indian Affairs argues that there is no physical reason to reduce the number of acres in the project since there are substantial recurrent areas within each of the blocks of irrigated land which are undeveloped and which are suitable for farmstead and related purposes. The Bureau of Indian Affairs maintains that unlike projects constructed in a narrow valley, there is abundant land outside the service area so that as applied to the Navajo Indian Irrigation Project the diminishment of the 110,630 acres by 5% is an arbitrary administrative practice.

This is not an ordinary reclamation project. Section 7 of the Act authorizes funds to be appropriated to the Bureau of Indian Affairs, not the Water and Power Resources Service. In this instance the Water and Power Resources Service simply serves as a contractor. The authorizing legislation on its face speaks of 110,630 acres and this is the figure discussed and understood by the Navajo Indian Tribe. Under these circumstances, I do not construe the legislation as requiring a 5% reduction in productive acreage.

In summary, I reach the following conclusions:

- (1) The Navajo Tribe is entitled to divert up to an annual average of 505,000 acre feet to the extent needed for irrigation purposes;
- (2) productive acreage specified in the Act need not be reduced by 5%.



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