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NAVAJO



United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

Memorandum

To : Under Secretary

From : ~~DEPUTY~~ Solicitor

Subject: Navajo Indian Irrigation Project -- Water entitlement of Navajo Tribe

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 (a tributary of the Colorado River) to various irrigable uplands on the Navajo Reservation.

Section 2 of the Act (43 U.S.C. 615jj) provides, in pertinent part, as follows:

Pursuant to the provisions of the Act of April 11, 1956 [Colorado River Storage Project Act], as amended, the 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



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You have inquired whether the Navajo Tribe is entitled under Section 2 to divert from the river all of the average annual diversion of 508,000 acre-feet, without regard to the purpose for which such diversion is made, or whether the Tribe is limited by the Act to use only so much of the 508,000 acre-feet as is reasonably necessary to irrigate 110,630 acres of land.

The issue has become critical now because of the pending proposal to convert from a gravity distribution system -- as originally planned for in the Navajo Indian Irrigation Project -- to a sprinkler system. Under the gravity system, it was estimated that to irrigate the 110,630 acres there would be an average annual diversion of 508,000 acre-feet from the river, and that about 256,000 acre-feet would find its way back to the river in the form of return flows; thus, the average annual depletion from the river for a gravity system would be about 252,000 acre-feet. By the conversion to a sprinkler system, it is estimated that only 370,000 acre-feet of water would be required to be diverted to irrigate the same amount of acres and that there would be a return flow of 140,000 acre-feet, with a net depletion of only about 230,000 acre-feet. The question has been raised whether, in connection with a sprinkler system, the Tribe is entitled to divert and to consumptively use for any purpose an additional 138,000 acre-feet -- i.e., the difference between the 508,000 acre-feet diversion authorized in

Section 2 of the Act and the 370,000 acre-feet diversion required for irrigation of the lands by a sprinkler system.

My conclusion is that the Tribe is limited to the use of so much project water as would be reasonably necessary to irrigate the 110,630 acres, except to the extent it contracts to purchase other waters for municipal and industrial purposes under the separate procedures established in Section 4 of the Act, 43 U.S.C. 615-11. Thus, if the amount required to irrigate the 110,630 acres with a sprinkler system is 370,000 acre-feet the Tribe is limited to that amount. An argument for a contrary conclusion has been advanced, based on the language of Section 2 which states that the Navajo Indian irrigation project shall be operated "for the principal purpose of furnishing irrigation water to approximately" 110,630 acres. It is argued that this, standing alone, may create the inference that other uses of diverted water are permissible, so long as irrigation is the "chief" purpose.

Any such inference, however, is completely negated by the language of both Section 4 and Section 8 of the Act, as well as its legislative history. Section 4 states:

In developing the Navajo Indian irrigation project, the Secretary is authorized to provide capacity for municipal and industrial water supplies or miscellaneous purposes over and above the diversion requirements for irrigation stated in section 2 of this Act [emphasis added], but such additional capacity shall not be constructed and no appropriation of funds for such construction shall be made until contracts have been executed which, in the judgment of the Secretary, provide satisfactory assurance of repayment of all costs properly allocated to the purposes aforesaid with interest as provided by law.

This section limits the 508,000 acre-foot diversion authorization in Section 2 to irrigation. Any other uses of water are "over and above" the irrigation diversion and, in addition, are to be pursuant to a contract that contains repayment provisions.

The repayment scheme, while present in Section 4, is not applicable to Section 2 because of the provision therein that repayment is subject to Section 4(d) of the act of April 11, 1956, 43 U.S.C. 620c. The latter Act, in turn, incorporates the so-called Leavitt Act (Act of July 1, 1932, 47 Stat 564) which defers repayment of construction costs for irrigating Indian lands. That Section 2 was thus made subject to the provision for deferment of Indian irrigation costs confirms my conclusion as to its limited purpose.

Reading Section 2 and Section 4 together, it is my opinion that Congress intended the 508,000 acre-feet to be diverted under Section 2 to be used exclusively for the irrigation of the 110,630 acres and not for municipal and industrial purposes. This conclusion is buttressed by Section 8 (43 U.S.C. 615pp) which refers to the San Juan-Chama project (also authorized by the Act). Section 8 provides in pertinent part as follows:

Pursuant to the provisions of the Act of April 11, 1956, as amended, the Secretary is authorized to construct, operate, and maintain the initial stage of the San Juan-Chama project, Colorado-New Mexico, for the principal purposes of furnishing water supplies to approximately thirty-nine thousand three hundred acres of land in the Cerro, Taos, Llano, and Pojoaque tributary irrigation units in the Rio

Grande Basin and approximately eighty-one thousand six hundred acres of land in the existing Middle Rio Grande Conservancy District and for municipal, domestic and industrial uses, and providing recreation and fish and wildlife benefits [Emphasis added].

Section 8 also expressly states that the principal purpose of the San Juan-Chama project is for irrigation and then proceeds to list the other project purposes, which include in addition to "municipal, domestic and industrial uses," "recreation and fish and wildlife benefits." On the other hand, Section 2 mentions no purpose for the diversion other than the principal purpose of the project, irrigation.

Thus, from a reading of the three relevant sections of the Act together, it is clear that, in Section 2 (as well as Section 8) Congress used "principal purpose" in the sense of "principal purpose of the project," not in the sense of "principal purpose of the diversion." It is equally clear, both from a comparison with Section 8 and from the express language of Section 4, that the diversions authorized by Section 2 are to be only for the principal purpose of the Navajo Indian Irrigation Project, i.e., irrigation. Any diversion for any other purpose, as mentioned above, must be made pursuant to Section 4.

The conclusion reached in this opinion is further underscored by the focus in the planning of the project and in the legislative history of the Act on the amount of the 508,000 acre-foot diversion that would find its way back to the river as return flows.

The last sentence of Section 1 of the Act states:

The Navajo Indian irrigation project and the initial stage of the San Juan-Chama project herein approved are substantially those 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 the Interior on October 16, 1957, as conditioned, modified, and limited herein.

At page 275, the 1957 Report referred to in Section 1 of the Act described the Navajo Indian Irrigation Project as diverting 508,130 acre-feet and having an average annual stream depletion of 253,000 acre-feet (after adjusting for reservoir losses). In the Secretary of the Interior's April 5, 1961 letter to the Chairman of the House Committee on Interior and Insular Affairs recommending authorization of the project, which is part of the Committee Report (H. Rept. 685, 87th Cong., 1st Sess., p.16), the Navajo Indian Irrigation Project is similarly described as having an average annual diversion of about 508,000 acre-feet and an average annual stream depletion of about 252,000 acre-feet.

There were some differences in the course of the hearings on whether New Mexico might not exceed its entitlement under the Colorado River Compact and the Upper Colorado River Basin Compact if the Act was passed, and the House Committee requested its own engineering consultant, Sidney L. McFarland, to analyze that data. His findings appear at page 332, 348-49, of the hearings before the Subcommittee on Irrigation and Reclamation of the House Interior Committee, 87th Cong.,

1st Sess., April 24-25-26 and June 1, 1961. Mr. McFarland concluded that the Navajo Indian Irrigation Project would effect a diversion of 508,000, with 255,700 being returned to the river, for a net depletion of 252,300 acre-feet. He assured the Committee that based upon such a depletion, the Navajo Indian Irrigation Project could be authorized without causing New Mexico to exceed the amount of water available to it under the compacts.

The importance of the assurance provided by Mr. McFarland to the Congressional deliberations is highlighted by the following excerpt from page 7 of H. Rept. 685:

Based upon the study of committee members and staff and upon the testimony given, the committee concludes that water is physically available and within New Mexico's entitlement under the compacts for the successful operation of the Navajo Indian irrigation Project. At the same time, the committee points out that its studies indicate that, with these two projects in operation, water uses in New Mexico may be approaching New Mexico's expected compact entitlement. The committee has added language in the legislation to require that additional water uses from Navajo Reservoir be fully justified on the basis of additional hydrologic studies and to require that contracts covering such additional uses be approved by the Congress before such contracts are executed.

A similar preoccupation with the relationship between the depletions caused by the projects and New Mexico's entitlement under the compacts is reflected in the following finding at page 2 of Report No. 83 of the Senate Committee on Interior and Insular Affairs, 87th Congress,

1st Session:

That the combined average annual stream depletion of the two projects as proposed for authorization totaling 362,300 acre-feet, together with existing and other authorized uses, will keep New Mexico's authorized draft on the Colorado River system well within the State's average annual entitlement estimated at 838,000 acre feet.

The congressional concern that the authorization of the project not cause New Mexico to exceed its entitlement is reiterated in Section 11 of the Act, 43 U.S.C. 615ss, (where the Secretary is precluded from entering into longterm contracts for the sale of additional water from the San Juan River and its tributaries without additional congressional approval); Section 12, 43 U.S.C. tt, (where the Secretary is directed to operate the project so as not to divert more water than will exceed the water available to New Mexico and Arizona under the Upper Colorado River Basin Compact); Section 13, 43 U.S.C. 615uu, (which requires that the water used and diverted through the works authorized under the Act be subject to and controlled by the Colorado River Compact, the Upper Colorado River Basin Compact, and other pertinent statutes and treaties); and Section 14, 43 U.S.C. 615vv, (where the Secretary is further directed to operate and maintain the project in accordance with said authorities).

It is further important to keep in mind that the Act reflected the striking of a balance between Indian and non-Indian interests for the use of the waters of the San Juan River and that the Navajo Tribe

understood and consented to the limitations imposed upon its right under the Act to receive delivery of the waters from the San Juan River through project works. By resolution of the Navajo Tribal Council of December 12, 1957, the Tribe endorsed the 1957 Report, wherein the estimated diversion and depletion entitlements for the Navajo Indian Irrigation Project are explicitly set forth.

The Resolution also states on page 1 that the Tribe fully appreciated the compromise nature of the Act:

In return for the generous support of the State of New Mexico for the proposed Navajo Indian Irrigation Project, and in recognition of the fact that the maximum economic development of all parts of New Mexico is a benefit to all citizens of New Mexico, including Navajo citizens of New Mexico, the Navajo Tribal Administration has supported authorization of the proposed San Juan-Chama Transmountain Diversion at the same time the Navajo Indian Irrigation Project is authorized

Moreover, the Tribe agreed in the Resolution to the principle of sharing shortages with other project users, and Section 11 of the Act makes the right of the Tribe to the delivery of project water conditional upon its willingness to share such shortages.

It should be noted that the question of the Tribe's Winters rights in the San Juan River is neither being addressed nor decided in this memorandum. Our concern is limited solely to the question of what the Tribe's rights are to the delivery of project water under the Act.

The remaining question involves the availability to the Tribe of the approximately 24,000 acre-feet of water that, in terms of net depletion to the river, would be saved by the proposed conversion from a gravity to a sprinkler system. The Solicitor, in his memorandum of May 17, 1974, to the Under Secretary, has already noted that the Bureau of Reclamation (as well as the New Mexico Stream Commission) has agreed this water would be made available to the Tribe. It is clear that one way the Bureau may accomplish this and make such water available is under the authority of Section 4 by means of a contract executed pursuant to Section 11. In addition, the legislative history discussed above clearly demonstrates that it was the Congressional expectation that this 24,000 acre-feet of water would be consumptively used by the Tribe -- and not others. Therefore, to make it available to the Tribe under Section 4, or otherwise, would be consistent with the Congressional intent.

In summary, the conclusion of this opinion is that (1) the Tribe is entitled under the Act to the use of so much project water as could be reasonably necessary to irrigate the 110,630 acres -- whether that amount actually turns out in the operation of the project sprinkler system to be 370,000 acre-feet, or some other figure (either greater or less than 370,000 acre-feet); (2) the Tribe may use water authorized to be diverted by Section 2 only in relation to the principal purpose of the project, i.e., irrigation; and (3) the Department has

the authority (but not under Section 2) to make available to the Tribe the approximately 24,000 acre-feet net depletion saving resulting from the conversion to a sprinkler system.


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