

Comments Related to the July 21 Session

Assertions regarding San Juan Basin
&
Proposed Navajo Settlement

*San Juan Water Commission - 7/28/04 presentation to the
Commission City Council*

*55-17
Navajo Settlement*

Winters Reserve

Loss by non-use/ Priority

- New Mexico surface water is subject to the doctrine of prior appropriation
 - "first in time first in right"
- A legal right to use water is obtained when water is put to beneficial use
- Federal reserved water rights vest on the date a federal reservation of land is created

Winters reserve (cont.)

- “Federal reserve water rights are senior to the claims of all water rights acquired under state law after the creation of the federal reservation – even if the state water right holders put water to beneficial use before the federal water right holders do”. At 72 (citing

Cappaert v. United States, 207 U.S. 564 (1908); Arizona v. California
373 U.S. 546 (1963)

Winters reserve (Cont.)

- In addition, federally reserved water retains priority despite non-use.
- The court explained:
 - “In this sense, a federally reserved right is preemptive. Its creation is not dependent on beneficial use, and it retains priority despite non-use.” (General Adjudication of All Right to Use Water in the Gila River System and Source, 35 P.3d 68 (“Gila River”) (Arizona S. Ct. 2001)

Off Reservation Leasing

- Colorado Ute Indian Water Rights Settlement Act of 1988, PL 100-585

- "... The Agreement is hereby modified to provide that a (Ute) Tribe may voluntarily elect to sell, exchange, lease, use or otherwise dispose of any portion of a water right confirmed in the Agreement and final consent decree off its reservation." (The water may not be used outside Colorado, unless all other Colorado water users are afforded the same opportunity.)

- Jicarilla Apache Nation, Contract Sec. 11a

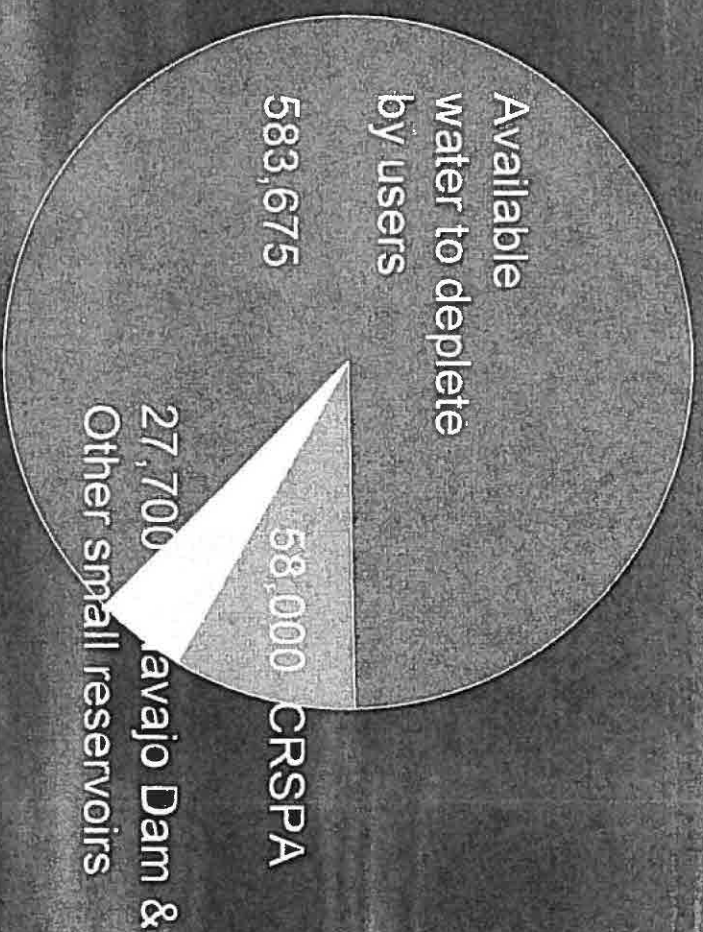
- "When water made available under this contract is not being used by the (Jicarilla) Tribe, the Tribe may subcontract with third parties, subject to approval of the Secretary in accordance with this section, to supply water for beneficial use outside the Reservation, subject to and not inconsistent with the same requirements and conditions of State law, and any applicable Federal law, interstate compact, and international law as apply to the exercise of water rights held by non-federal, non-Indian entities;"

New Mexico's Upper Basin

Allocation is 669,375 acre-feet

Some of New Mexico's allocation goes toward reservoir evaporation.

Only 583,675 acre-feet is available for use by New Mexico.



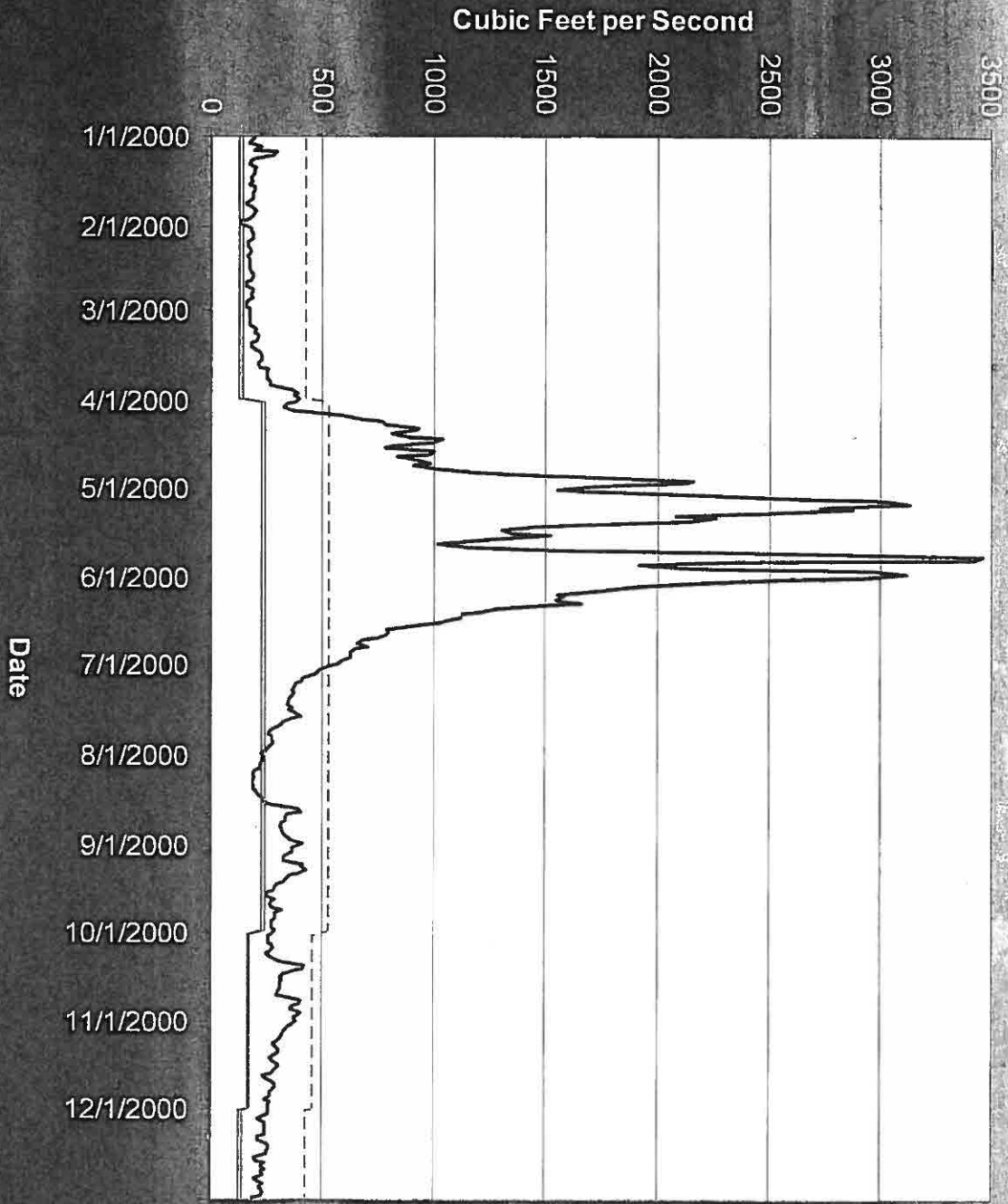
1 acre-foot = 325,851 gallons

ALP Operations, July 2000 FEIS

“ After satisfying all downstream senior water rights demands and downstream ALP Project water demands, pumping would be further limited to allow the following bypass flows in the Animas River at the pumping plant intake: October through November – 160 cfs; December through March – 125 cfs; and April through September – 225 cfs. ”

“ (ALP) Downstream demands on the Animas River are met first by stream flow available after meeting historic demand, including project return flow entering above the diversion point, and then by releases from Ridges Basin Reservoir. . . . ”

Animas River at Durango



— 2000 Flow
— Bypass Flow Limits
— +14 above Bypass Flow Limits
- - - +280 above +14 Bypass Flow Limits

Draft FEIS Re operation of Navajo Reservoir (June 2003 Vol. 1)

- "...releases would range from 250 cfs to 5,000 cfs. Minimum releases would not fall below 250 cfs."
- . . . reflect a priority desire to augment a 250 cfs minimum release during the irrigation season, maintaining minimum irrigation-season releases between 350 and 500 cfs while assuring a spring release as. . . ."

Modeled San Juan River monthly

flows (pp 11-31)

- Archuleta Gage

- "Minimum flow 250 cfs; annual average flow 775 cfs; average July flow 385 cfs; average January flow 300 cfs"

- Bluff Gage

- "Minimum flow 500 cfs; average flow of 1,670 cfs; average June flow 4,680 cfs; average August flow 1,110 cfs"

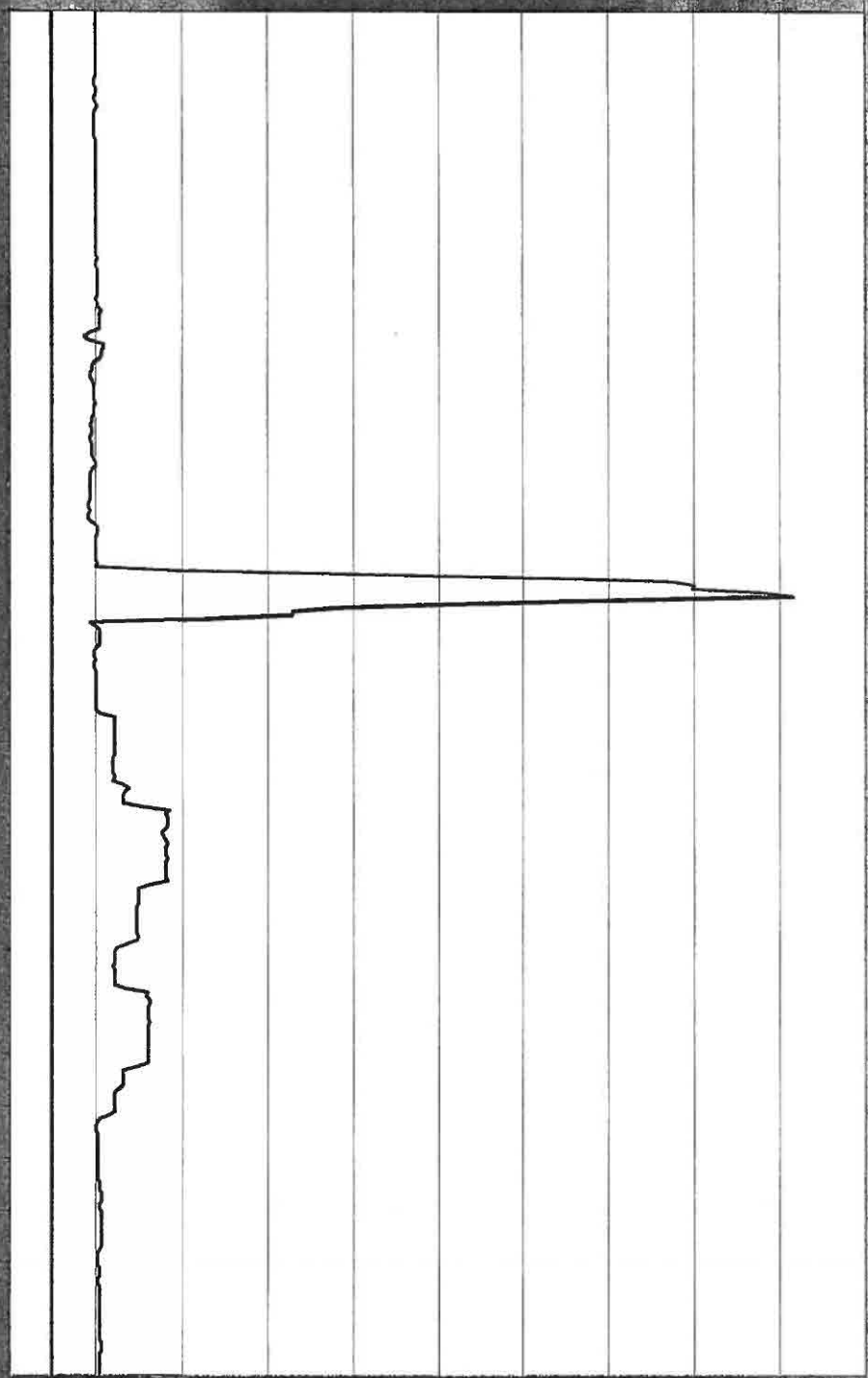
San Juan River near Archuleta

Cubic Feet per Second

0 500 1000 1500 2000 2500 3000 3500 4000 4500 5000

1/1/2000
1/15/2000
1/29/2000
2/12/2000
2/26/2000
3/11/2000
3/25/2000
4/8/2000
4/22/2000
5/6/2000
5/20/2000
6/3/2000
6/17/2000
7/1/2000
7/15/2000
7/29/2000
8/12/2000
8/26/2000
9/9/2000
9/23/2000
10/7/2000
10/21/2000
11/4/2000
11/18/2000
12/2/2000
12/16/2000
12/30/2000

Date



— 2000 Flow
- - - Average Flow

Water Master

Proposed

- **General Authority of a Water Master: The Water Master shall have the immediate charge of the Administration of waters within his Water District, and shall so regulate and control the waters within his district to prevent Waste. . . . The Water Master may as necessary to effect Administration**
- **G. adjust headgates and restrict diversions or pumping as required to administer water in accordance with principles of prior appropriation and beneficial use, to prevent illegal use of water, and to prevent Waste; . . .**

Priority Administration

- If current available direct flow water (native water) is sufficient for distribution for a specific use water right, then the right is in-priority, and may be exercised.
- If a water right has a priority date that is senior to the Administrative Date (based upon available water supply), determined by the OSE, that water right is in priority, and may be exercised.
- The amount of the total inflow into a reservoir that exceeds the volume of water that must flow past through (past) the dam to meet the senior water right downstream is in priority for storage, and may be stored, provided the specific storage right is not exceeded.

Rivers can be used to deliver stored water.

▪ One 10th Circuit Court of Appeals case from Colorado makes the point that rivers can be used to convey stored water, and the stored water is protected from appropriation by senior water users.

- Delivery of storage water to its place of use can be by either of two methods: (1) delivery through an artificial ditch or pipe, or (2) delivery through a natural stream channel. Our focus on the second method, delivery through a natural stream channel, which generally has been recognized as a valid delivery method in prior appropriation states (New Mexico). *"It is elementary that a stream may be used as a part of the ditch system and that a person adding the water has the right to divert it from the stream at the place where it is needed for use"*

(Trelease, Reclamation Water Right, 32 Rocky Mtn. L. 464, 471 (1960))

Luna Case/City of Raton

- The *Luna* case stands for the proposition that water that flows into New Mexico from an upstream Arizona reservoir is subject to adjudication in New Mexico. It does say "waters flowing in a natural stream are not subject to private ownership," the issue there was that Arizona had recognized that the water was "private" because it was in an Arizona reservoir, and that the Arizona's findings were not binding on New Mexico
- The *City of Raton* case does hold, that if a water rights owner stores water in excess of its decreed rights, downstream users can force the release of the excess water. However, for that case to apply here, the amount stored would have to be *in excess* for the amount allowed. It does not address what the result would be if a New Mexico court had determined the water was private because it had been stored in a reservoir.

Storage of water, concept and practice.

- Every water right permit from the OSE has specific purposes of use attached to it, and if “storage” is not listed as a use, the water cannot be stored in a reservoir, even if the water passes through a reservoir. Unless a water right owner has a specific right to store water in Navajo Reservoir, that owner cannot store water there or use water stored. (N.M. Stat. Ann. Sec. 72-5-1 through 72-5-4; Cartwright v. Pub. Serv. Co. of N.M., 66 N.M. 64, 343 P.2d 654, 671 (1958) (noting application to store water).

Supremacy of New Mexico District

Court to alter Settlement

- Under the proposed settlement, the U.S. Congress will pass legislation to authorize the Secretary of the Interior to sign the Settlement Agreement and Contract.
- After that approval, the terms of the settlement will be filed with the New Mexico District Court in the pending adjudication of the San Juan River system in the form of a “proposed partial final decree.”
- The settlement documents state that if the final decree is not “substantially” the same as the parties submit, the settlement is off.
- The judge will not be bound, therefore, by the legislation that has been passed. The judge will have the authority to change the decree if it is not legal and if it does not protect the water rights in the basin.

Judicial Review is not a new concept.

- Judge Stanley Frost changed the decree requested by the Jicarilla Apache Indian Nation, the federal government and the OSE when it was offered in this same adjudication. The other parties in this adjudication had significant impact on the final wording of the decree, in an effort to protect existing users.

Regarding the Settlement

- It is quickly reaching the moment to let our New Mexico Congressional Delegation know our thoughts, but please, let us make them factual.
- A settlement of the reserve claims of the Navajo Nation will increase the certainty and value of all our water rights.