



55-17
Navajo Settlement

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March 26, 2007

The Honorable Jon Kyl
United States Senate
Washington, D.C. 20510

The Honorable John McCain
United States Senate
Washington, D.C. 20510

The Honorable Ed Pastor
U.S. House of Representatives
Washington, D.C. 20505

The Honorable John Shadegg
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Jeff Flake
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Harry Mitchell
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Raul M. Grijalva
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Trent Franks
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Rick Renzi
U.S. House of Representatives
Washington, D.C. 20505

The Honorable Gabrielle Giffords
U.S. House of Representatives
Washington, D.C. 20505

Dear Arizona Senators and Representatives:

We write concerning the "Northwestern New Mexico Rural Water Projects Act." This legislation was introduced late last session as S. 4108. We oppose the legislation in its current form because (1) it fails to resolve the Navajo Nation's claims to the Lower Colorado River and Little Colorado River in Arizona and (2) it fails to resolve litigation filed by the Nation challenging Interior Department initiatives that are vital to the Central Arizona Project and other Colorado River water users in the Lower Basin. The legislation also fails to address critical issues related to its potential impact on the Law of the Colorado River. All of these matters must be addressed before the bill is permitted to move forward.

The Navajo Indian Reservation is the largest Native American Reservation in the United States. It encompasses approximately 16 million acres and overlies portions of northeastern Arizona, northwestern New Mexico, and southeastern Utah. Within Arizona, the Reservation is situated in both the Upper and Lower Basins of the Colorado River. According to the 2000 Census, there

were 104,565 residents living in the Arizona portion of the Navajo Reservation – a far greater population than that of any other Arizona Indian tribe. Within Arizona, the Navajo Reservation is near the mainstream of the Lower Colorado River in the northwest, and the Little Colorado River traverses the southern portion of the Reservation.

In March of 2003, the Navajo Nation filed an action in United States District Court for the District of Arizona challenging four of the Secretary of the Interior's critical water management programs in the Lower Basin of the Colorado River, including the Secretary's reallocation of Central Arizona Project water in furtherance of the Indian water rights settlements that have now been authorized by Congress in Public Law 108-451, the Arizona Water Settlements Act of 2004. The Nation alleges that these programs are invalid and must be enjoined unless and until the United States quantifies and asserts claims on the behalf of the Nation to the Lower Colorado River in Arizona. Numerous parties filed motions to intervene in the case, including the State of Arizona, the Central Arizona Water Conservation District, the Salt River Project, the Arizona Power Authority, the Colorado River Commission of Nevada, the Southern Nevada Water Authority, the Metropolitan Water District of Southern California, the Coachella Valley Water District and the Imperial Irrigation District in California. The Navajo Nation and the United States ultimately stipulated with all of the intervenor applicants to the granting of their interventions and to a two-year stay of the litigation so as to afford the Department of the Interior an opportunity to appoint an Indian water rights settlement team and to pursue efforts to resolve the case through negotiation and settlement. That stay was to have expired on October 13, 2006, but was recently extended for an additional year to permit negotiations to continue.

The Navajo Nation has also asserted a claim for 500,152 acre-feet of water in the ongoing adjudication of the Little Colorado River in Arizona. The United States, on behalf of the Nation, has asserted a claim for 544,625 acre-feet of water in that proceeding. Settlement discussions to resolve the claims of the Navajo Nation and the Hopi Tribe to both the Lower Colorado River and the Little Colorado River in Arizona are underway.

The Central Arizona Project has long supported negotiated settlements of tribal water rights claims. However, it has been our position that such settlements must be complete and comprehensive. The legislation proposed here would resolve only the Nation's claims to the San Juan River in New Mexico. The legislation must also resolve the Nation's claims to the Lower Colorado River and the Little Colorado River in Arizona, and the deficiencies in the bill related to its impact on the Law of the Colorado River must be corrected. An outline of those deficiencies, and our recommendations for correcting them, are included with this letter.

During the negotiation of the bill that became the Arizona Water Settlements Act of 2004, New Mexico asserted that it had vital interests at stake in the matters addressed in that legislation. The Central Arizona Project and others in Arizona worked hard to meet New Mexico's demands and to craft legislation that represented a "win-win" for all affected interests. We are ready to work once again with New Mexico to craft legislation that meets the needs of all parties. Those of us in Arizona who have been involved in negotiations with the Nation are fully committed to doing the hard work necessary to achieve an Arizona settlement with the Nation.

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We look forward to the opportunity to work with you, the State of New Mexico, and the Navajo Nation to settle the claims of the Navajo Nation to both the San Juan and Lower Colorado River basins, and to prepare a comprehensive settlement act that addresses the needs of all affected parties.

Sincerely,

Susan Bitter Smith
President

SBS:cv

Enclosures

CAWCD Comments on Navajo-Gallup Pipeline Bill

General Comments

- The bill is premised on a draft EIS and draft hydrologic determination, neither of which has yet been accepted by the Secretary of the Interior. This is not a good precedent, particularly when the Lower Basin States have expressed concern about the draft hydrologic determination.
- The bill leaves many unanswered questions about Colorado River accounting, water delivery contracting and priority of deliveries. The specific comments below attempt to clarify many of these issues.

Specific Comments

1. **Priority within the San Juan River system.** The priority of the Navajo-Gallup pipeline water within the San Juan River system is not clear. Section 102(b) of the bill provides that the Secretary shall “allocate the shortage” to the Navajo Reservoir water supply, with first priority going to the water for the Navajo-Gallup pipeline. This seems to say that the water for the pipeline is the first to be shorted. But this section of the bill is amending §11 of Pub. L. 87-483, which directs the Secretary to apportion the water that is available during shortage on the San Juan, suggesting that the pipeline might be first to receive available water during a shortage. The bill should be revised to clearly express the intended result.
2. **Colorado River Compact Issues.** Section 103 of the bill states that it does not amend the Law of the River “unless expressly provided in this Act.” There is nothing in the bill that would expressly amend the 1922 Colorado River Compact. Accordingly, there is nothing in the bill that would:
 - Allow the diversion of water in the Upper Basin for use in the Lower Basin.
 - Reduce the Upper Basin’s Compact obligation to deliver 75 million acre-feet to the Lower Basin every 10 years, even if water is delivered to Arizona through the Navajo-Gallup pipeline.

To address these problems, the following should be added to the end of §303 of the bill:

“(h) COLORADO RIVER COMPACT. Notwithstanding any other provision of law, water may be diverted from the San Juan River in New Mexico for use within the Lower Basin, as that term is used in the 1922 Colorado River Compact, either in New Mexico or on the Navajo Reservation in Arizona. Water diverted from the San Juan River and

delivered for use on the Navajo Reservation in Arizona shall be deemed to have been delivered to the Lower Basin at Lee Ferry for purposes of Article III(d) of the Colorado River Compact.”

3. **Colorado River System Priority.** A new section 104 should be added, providing as follows:

“PRIORITY. Colorado River system water diverted in the Upper Basin for use in the Lower Basin, as those terms are used in the Colorado River Compact, shall have the same priority of delivery in time of shortage as the Central Arizona Project.”

4. **Allocation to Navajo Nation Communities in Arizona.** Section 303(b)(2)(D) of the bill should expressly state that the 6,411 acre-feet of water allocated for use in Arizona is the water identified in §104(a)(1)(B)(ii) of the Arizona Water Settlements Act (AWSA), Pub. L. 108-451—i.e., CAP non-Indian agricultural (NIA) priority water—and is subject to the provisions of the AWSA, including but not limited to §104(a)(1)(B)(ii), §104(a)(1)(B)(iii), §104(a)(3), and §104(e).

5. **Conditions for Use in Arizona.**

- a. Section 303(d)(1)(C) of the bill requires the Secretary to determine that the Navajo uses within Arizona are within Arizona’s Colorado River apportionment. The bill does not specify whether the water must be within Arizona’s 50,000 af Upper Basin entitlement (which was not the intent) or its 2.8 maf Lower Basin entitlement. This section should be deleted.
- b. In addition to any capital or OM&R costs associated with the use of the Navajo-Gallup pipeline, the United States or the Nation must pay CAP fixed OM&R costs for any water delivered to the Navajo Reservation for use in Arizona. The United States can pay those costs from the Lower Colorado River Basin Development Fund in accordance with 43 U.S.C. §1543(f), as amended by the AWSA.
- c. Section 303(d)(1)(A) of the bill requires the Secretary to “determine by hydrologic investigation that sufficient water is reasonably likely to be available to supply uses from water of the Colorado River system allocated to the State of Arizona.” It’s not clear what this means. This provision should be deleted.
- d. Section 303(d)(2) of the bill provides that water used by the Navajo Nation in Arizona counts against Arizona’s Colorado River entitlement. Again, the bill should clarify that this water counts against Arizona’s Lower Basin entitlement.

- e. In summary, section 303(d) of the bill should be revised to read as follows:

“(d) CONDITIONS FOR USE IN ARIZONA.—

(1) REQUIREMENTS.—Project water shall not be delivered for use by any community of the Nation in the State of Arizona under subsection (b)(2)(D) until all of the following conditions have been satisfied—

(A) the Nation and the State of Arizona have entered into a water rights settlement agreement approved by an Act of Congress that settles the Nation’s claims to water in Arizona; and

(B) the Secretary has entered into a contract with the Nation for the delivery of 6,411 acre-feet of Central Arizona Project non-Indian agricultural priority water in accordance with §104(a)(1)(B)(ii) of Pub. L. 108-451.

(2) ACCOUNTING FOR USES IN ARIZONA.—Any depletion of water from the San Juan River stream system in the State of New Mexico that results from the diversion of water by the Project for uses within the State of Arizona (including depletion incidental to the diversion, impounding, or conveyance of water in the State of New Mexico for uses in the State of Arizona)—

(A) shall be accounted for as a part of the 2.8 million acre-feet of Colorado River water apportioned to the State of Arizona in Article II(B)(1) of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340); and

(B) shall not increase the total quantity of water to which the State of Arizona is entitled under any compact, statute, or court decree.”

6. **Forbearance.** Section 303(e)(2) of the bill should expressly state that the Nation may not forbear deliveries in the State of New Mexico to allow the delivery of water for use in Arizona when there is a shortage in the Lower Basin that reduces the availability of CAP NIA priority water. Deliveries to the Navajo Reservation through the Navajo-Gallup pipeline must be reduced in the same proportion as other CAP NIA priority water during a Lower Basin shortage.