

SJ-17
Navajo Settle

ARIZONA DEPARTMENT OF WATER RESOURCES
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Mr. John D'Antonio, P.E.
Office of the State Engineer
130 South Capitol Street
Concha Ortiz y Pino Building
P.O. Box 25102
Santa Fe, NM 87504-5102

Dear Mr. D'Antonio:

Last January my staff met with your staff concerning the proposed "Northwestern New Mexico Rural Water Projects Act" (Act) introduced by the New Mexico delegation late last session as S. 4108. One title of the Act would confirm the water settlement for the Navajo Nation claims to water in the San Juan River basin.

We have examined the proposed Act and have reviewed the San Juan settlement agreement. There are provisions in the settlement agreement and Act that are in conflict with the 1922 Colorado River Compact, the Decree in *Arizona v. California*, the Colorado River Basin Project Act, and the Arizona Water Settlements Act. Specific comments on some of the issues are enclosed for your review. There are additional provisions, such as the "top water bank" that are confusing, and we question whether those provisions are in conformity with the Compact and the "Law of the River".

The Compact and Decree issues may only be resolved with the concurrence of Arizona and the other Lower Division States. Additionally, the most likely source of water for the Arizona portion of the San Juan settlement is specifically reserved in section 104 of Public Law 108-451 under certain conditions. Some issues associated with this transfer of water are similar to Compact and Decree issues on use of water in New Mexico.

We are currently consulting with water users in Arizona and may have other issues concerning the proposed settlement legislation. We would like to the opportunity to work with you and representatives of the Navajo Nation to address the concerns of Arizona. Should you have any questions please feel free to contact me, Tom Carr or Gregg Houtz.

Sincerely,

Herbert R. Guenther
Director

CC: Stanley Pollack
Enclosure

Comments on Draft 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.
 - Relieve the Upper Basin from any part of its Compact obligation to deliver 75 million acre-feet to the Lower Basin every 10 years.

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.** Section 303 of the bill should also include the following provision:

“(i) 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.