Navajo-Gallup Water Supply Project

In March 2009, Congress passed the “Omnibus Public Land Management Act of 2009” (Public Law 111-11). This thousand-page law consolidates and authorizes 152 natural resource initiatives, actions, and projects, some of which have been under consideration for several years. Several New Mexico matters are included in the law, and notable among them is authorization of the Navajo-Gallup Water Supply Project.

In December 2010, the Congress passed and President Obama signed into law the Claims Resolution Act, appropriating $180 M in funding toward the project.

“Navajo-Gallup” is to be a major endeavor for northwestern New Mexico. In one sense, authorization of the project culminates years of work. In another sense, it means the start-up of additional years of effort. There is much to be done to construct and carry the project forward to reality, including work for the federal government, the state of New Mexico, the Navajo Nation, and the City of Gallup.

In view of the project’s magnitude, this brief article can review only its major aspects.

Need for the Project

Navajo communities and the city of Gallup rely on a rapidly depleting and inadequate groundwater supply. Other water sources are needed to meet both current and future municipal and industrial demands of more than 43 Navajo chapters, including the communities of Window Rock and Fort Defiance in Arizona, the city of Gallup, and the Teepee Junction area of the Jicarilla Apache Nation. The approved project is meant to convey a reliable supply of water to these areas, by means of diversions and pipelines from the San Juan River.

The need for additional water is great. In the Navajo Nation, a poverty rate greater than 50 percent and a growing population – combined with inadequate infrastructure and widely dispersed communities and households – has created an urgent need for adequate water. Economic development, needed to break the cycle of chronic poverty, is largely dependent upon a reliable water supply and water infrastructure. Between 30 and 40 percent of households on the Navajo Nation do not have

“...I think the bill will matter a lot to many people. ... It’s hard to believe that in this country at this time in our history we still have people having to haul water every day, but that’s the unfortunate reality in parts of our state.”

Senator Jeff Bingaman, Albuquerque Journal, December 9, 2010
The Navajo tribal government has asserted a substantial claim to water in the San Juan, with a priority date of June 1868 – the date of the Navajo Reservation’s creation – under the Winters doctrine.

direct access to public water systems, while tribal population is expected to increase to nearly 500,000 by 2040.

Meanwhile, the city of Gallup’s groundwater is being depleted faster than it is being recharged, and the city’s water quality does not meet secondary water quality standards. Severe water shortages are anticipated within the next decade. Although Gallup stands atop geologic formations that contain water, only a tiny fraction of that water can economically be made available for municipal needs. The city currently has a well field several miles to the north, at Ya-Ta-Hey, where the water table is declining by 20 feet per year and water quality is worsening. The city is mining the water that it is currently using – that is, depletions are exceeding recharge. Local efforts are being made to increase the supply and improve the system, but Gallup’s citizens have become painfully aware that if something is not done soon, their water source may go dry in the next ten to fifteen years.

The Jicarilla Apache Nation also needs a reliable, high-quality water supply in areas outside Dulce, if tribal members are to continue diversifying their economy for on-reservation employment and if they are to live in a more dispersed manner – as they traditionally did and as they wish to do in the future.

San Juan River Water Rights
The San Juan River, an “Upper Basin” tributary of the Colorado River, drains nearly 16 million acres in the Four Corners area before flowing into Lake Powell. Under the Upper Colorado River Compact, New Mexico was allocated 11.25 percent of the Upper Colorado River basin’s yield, a percentage amounting to 669,000 acre-feet of consumptive use annually. This is a relatively large share inasmuch as only 3.25 percent of the river’s flow originates in New Mexico. The State’s allocation, however, is intended, in part, for the State to address the needs of the Navajos and other Native Americans in the region.

The Navajo tribal government has asserted a substantial claim to water in the San Juan, with a priority date of June 1868 – the date of the Navajo Reservation’s creation – under the Winters doctrine. The Winters legal doctrine is the cornerstone of most Native American water rights. It holds that the U.S. government has reserved water for the Indians’ present and future uses and exempts Indian reservations from state water law. The doctrine declares that when Congress reserved land for Indian reservations it also reserved the water needed to fulfill the purposes of the reservations.

But because the Navajo Nation was not made a party to the Colorado River Compact of 1922, its claim has been unquantified even though its rights are clearly senior to other rights on the river. This lack of quantification has cast a shadow of uncertainty over all water rights in the San Juan system. In recent years, however, the Navajo Nation has encouraged the State of New Mexico to negotiate a settlement rather than using litigation to resolve the issues among the various water users in the region. The Office of the State Engineer – the state agency most involved – has agreed that litigation is costly, divisive, and much more time-consuming than negotiation, especially when issues are so complex.

Settlement Agreement

With this background, a water settlement agreement for the San Juan River and its drainage basin was entered into on April 19, 2005 between the Navajo Nation and the State of New Mexico. Among its provisions is its proposal for construction of pipelines from the San Juan River, to be known as the Navajo-Gallup Water Supply Project. The
The San Juan River Settlement allocates approximately 55 percent of the water available for use in New Mexico from the San Juan River to the Navajo Nation.

southward, partly alongside U.S. Highway 550, to serve nearby Navajo communities and the southern part of the Jicarilla Apache Nation. The western pipeline will divert water from the San Juan River at the existing PNM San Juan Generating Station Diversion, and will convey water alongside Highway 491 south toward Gallup. Here, too, Navajo communities will be served, as well as Gallup. A water purification plant will be built at the head of each pipeline.

A spur pipeline will serve Window Rock, Arizona, which is the capital of the Navajo Nation and one of the larger Navajo communities. The water delivered to Window Rock, however, will be accounted for as Lower Colorado River Basin water apportioned to the Navajos by the 2004 Arizona Water Settlements Act, or as water of Arizona’s Upper Basin allocation, not New Mexico’s.

Costs
In 2008 the cost of the pipeline project was estimated at $870 million. That amount was authorized in the Omnibus Act for appropriation and expenditure by the federal Bureau of Reclamation. Gallup and the Jicarilla Nation will be obliged to repay portions of the construction cost, over periods of time. The State of New Mexico is to pay $50 million, some of which has already been contributed.

The Navajo-Gallup pipeline project will take water from the San Juan River at two points and deliver it southward through two lengthy pipelines.

The Navajo-Gallup Water Supply Project
Navajo-Gallup Water Supply Project

By Jerold Widdison for the Utton Transboundary Resources Center.
Concerns
Not everyone in the Four Corners area favors the settlement. Concerns have been voiced about the quantity of water allocated to the Navajos in the settlement. Also, several “non-signers” to the settlement have expressed some remaining concerns. In 2008, they questioned the settlement’s hydrological determination, believing instead that there is insufficient water for the settlement. In response, the Interstate Stream Commission clarified the hydrologic analysis and indicated that there is a 1-in-20-year chance of a shortage that would necessitate a priority call. The non-signers are also interested in confirming water-banking storage possibilities in Navajo Reservoir. Further, the San Juan Agricultural Water Users Association has wondered whether it is likely the Navajo Nation will market its water downstream to non-Navajos in California or Nevada. But provisions forbidding any such transfers were included in the Omnibus Act.

Federal Legislation
For several years the cost of the pipeline project was a stumbling block. In April 2007, New Mexico senators Bingaman and Domenici introduced the Northwestern New Mexico Rural Water Projects Act (S. 1171) that would provide federal funding over two decades to construct the project. But representatives of the Bureau of Reclamation and the Department of Interior objected in testimony before the Senate Energy and Natural Resources Committee:

If enacted, the cost of S. 1171, alone, is estimated to exceed 1 billion dollars. If the other two proposals from New Mexico, Aamodt (involving the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque) and Abeyta (involving the Pueblo of Taos), about which the [Bush] Administration also has raised serious concerns, were to be enacted as currently envisioned by their proponents, total expenditures for Indian water rights settlements in New Mexico alone are likely to exceed $1.5 billion. . . . The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances.

Senator Domenici then devised a plan to fund all three negotiated New Mexico Indian water rights settlements: Navajo Nation, Aamodt, and Abeyta. In June 2007, he introduced the Reclamation Water Settlements Fund Act of 2007 (S. 1643), which would authorize a 10-year funding schedule to generate an estimated $1.37 billion to pay for the three settlements after all the issues had been resolved and they were signed into law. The fund would be used for planning, design, and construction activities of the Bureau of Reclamation. At its hearing on May 7, 2008 the Senate Energy and Natural Resources Committee approved the bill.

Later in 2008, and again in 2009’s new Congress, Senator Bingaman included the Water Settlements Fund for all three settlements in the Omnibus Public Land Management Act. When this Act became law on March 30, 2009, it established the fund and also specifically approved the San Juan River Settlement and authorized the Navajo-Gallup Project, which will be a Bureau of Reclamation project. It is proposed that construction on the project start in 2010 and be completed by 2024.

In fiscal year 2010, the Energy and Water Appropriations Bill, signed by President Obama on October 29, 2009, appropriated $3 million for planning, design, and construction of the first phases of the project. Also in FY 2010, an additional $6 million was appropriated for the project in the Trust Fund created by the Omnibus bill.

A major breakthrough in obtaining funding for the project was achieved in 2010. President Obama signed the Claims Resolution Act on December 8, 2010 which provides $60 million per year for fiscal years 2012,
2013, and 2014 for deposit in the Reclamation Water Settlements Fund (Title VII).

In related funding, the Animas-La Plata Project’s “Navajo Nation Municipal Pipeline” was awarded stimulus funding in November 2009 in the amount of $5.7 million. The State Legislature also appropriated significant funding for Navajo and non-Indian clean water supplies in the “checkerboard area” in 2007. Overall, the State has appropriated $31.2 million toward the Navajo Nation San Juan water rights settlement and pipeline project.

The San Juan Adjudication

Finally, the Settlement must be incorporated into the on-going San Juan Adjudication. The Court must conduct an expedited \textit{inter se} proceeding of the Navajo Nation’s rights and enter a Partial Final Decree by 2013.

The Court has entered an “Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree for the Water Rights of the Navajo Nation” (dated 8-19-10). The order describes the Navajo \textit{inter se} procedure during which the Court will determine whether to approve the settlement of the Navajo Nation’s water right claims and if the court does not approve the procedure, how to resolve the claims through addition litigation. In September 2010, the Court referred implementation of the procedural order to a Special Master. In preparation for the \textit{inter se} proceeding, the U.S. and the Navajo Nation must file a hydrographic survey of present and historic uses and a summary statement of claims. In addition, the settling parties are preparing to conduct five public meetings by early April 2011. The Joe M Stell Ombudsman Program is listed on the Notice to the public as a contact for additional information about the settlement.

In the box below is a synopsis of the Omnibus Act’s 30 pages of provisions for the Navajo-Gallup project and Navajo water rights.

By Jerold Widdison, revised through November 2009.
Updated by Susan Kelly December 2010.

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Navajo Water Rights Settlement and Navajo-Gallup Water Supply Project – What the Omnibus Act Says

**Navajo Nation (“Nation”) Water Rights**

Sec. 10701
- Congress approves, ratifies and confirms San Juan River Agreement; to be executed by Secretary of Interior by Dec. 31, 2010.
- Secretary and Nation to execute contract by Dec. 31, 2010.
- Court to enter Partial Final Decree by Dec. 31, 2013.

Sec. 10702
- Establishes trust fund for Nation’s water resources development, but fund not available to Nation until 2020. This is not the same fund as the settlements fund noted below.

Sec. 10703
- Nation waives all claims to other San Juan Basin water rights.

**Reclamation Water Settlements Fund**

Sec. 10501
- Establishes a fund within U.S. Treasury, to consist of $120 M plus interest, to be deposited in each of FYS 2020 thru 2029 (from revenues that would otherwise be deposited in Reclamation Fund). Same amounts may be expended in each of those years for the following projects in toto (spending to be in priority order 1 thru 4):
  1. Navajo-Gallup ($500 M total for 2020-2029).
  2. Aamodt & Abeyta (in each year, sufficient amount to pay federal share of implementing settlements if annual appropriations not otherwise available, if settlements are approved by Congress).
  3. Montana Indian settlements [not detailed here].
  4. Arizona-Navajo Lower Colorado River settlements [not detailed here].

**Navajo-Gallup Water Supply Project**

Sec. 10602
- Authorizes Secretary (through Bureau of Reclamation) to design, construct, operate, and maintain the project.
- Requires environmental compliance.
- Requires State of New Mexico to provide $50 M share of construction cost.
- Authorizes conveyance of facilities to Gallup and Nation, under several conditions.

Sec. 10603
- Allows incidental generation of hydro power, with proceeds to Nation.
- Authorizes diversion from San Juan River and Navajo Reservoir: 37,760 a-f, or river depletion of 35,890 a-f annually.
- Authorizes diversion of 6,411 a-f for use by Nation in Arizona [at Window Rock].
- Diversions are to be used in NM and charged against the NM consumptive use apportionment made by Colorado River Compact.

Sec. 10604
- Authorizes a contract between U.S. and Nation. Construction costs applicable to Nation are not to be reimbursed by Nation. O&M costs to be paid by Nation, but may be waived for 10 years.
- Authorizes a contract between U.S. and Gallup. City required to pay allocable share of construction and O&M costs, within 50 year period, except City not required to pay more than 35 percent of allocable share of construction costs. City to provide rights to water received.
- Authorizes a contract between U.S. and Jicarilla Apache Nation. Payment terms similar to Gallup, above.

Section 10609
- Authorizes appropriation of $870 M for FYS 2009 thru 2024 (subject to adjustment) to plan, design, and construct facilities. Additional sums for O&M authorized for ten years following completion.
- Participants’ construction committee to be formed.

Section 10606
- Bureau of Reclamation to assist Nation with construction/rehab of conjunctive use wells; $30 M authorized.

Section 10607
- Bureau of Reclamation to assist Nation with rehab of existing on-reservation San Juan irrigation projects; $23.1 M authorized.