SJ-17
Navajo Settle

Responses to Remarks Made by Mr. Gary Horner at the July 21, 2004,
Special Farmington City Council Work Session

By John Whipple, New Mexico Interstate Stream Commission Staff
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Remark 1. The Navajo Nation's reserved rights are not subject to loss for non-use, as compared to rights of other users.

Federally-based reserved rights are by law different than appropriative rights under state law, and are not subject to historic use standards or loss for non-use. The Navajo Nation and Jicarilla Apache Nation have reserved rights.

Remark 2. The Navajo Nation's reserved rights would all have an 1868 priority date and be senior to other uses, such that all non-Navajo water uses would be curtailed before any Navajo uses.

The Navajo Nation's reserved rights would have an 1868 priority. However, as per the Settlement Agreement, the reserved rights for diversions from the direct flow of the San Juan and Animas rivers would be supplied under contract with the Secretary of the Interior and administered in accordance with the following priority dates:

1955 for the Navajo Indian Irrigation Project;
1968 for the Navajo-Gallup Water Supply Project diversions of inflow below Navajo Dam and 1955 for Project diversions of flow above Navajo Dam; and
1956 for the Animas-La Plata Project.

Water previously stored in priority and currently available for release from reservoir storage to the Navajo Nation would be delivered pursuant to contract. The three projects would share in shortages with other contractors.

In addition, when the direct flow is insufficient to meet the demands under the Hogback and Fruitland irrigation projects, the Navajo Nation under the settlement would agree to use up to 15,000 acre-feet of its 1955 priority NIIP contract water in any year to supply the needs of these two projects and would not request a priority call against other users that are junior to 1868 to meet the needs of the two projects unless and until the contract water is completely used. The amount of contract water to be used for this purpose would be reduced in the event of shortages to NIIP.

Remark 3. The Navajo Nation may lease its water off its reservation, including for uses in the Lower Colorado River Basin.

The proposed Partial Final Decree recognizes uses on Navajo lands. The Navajo Nation under the settlement may lease its water on or off reservation to non-

Navajo entities, just as the Jicarilla Apache Nation pursuant to its water rights settlement leases water off reservation to the Public Service Company of New Mexico for use at the San Juan Generating Station. Any lease off reservation requires a State Engineer permit. Under the current Law of the River, water rights in the Upper Basin may not be leased interstate or to the Lower Basin. Neither tribe is prevented from litigating, however, to what extent the Law of the River applies to them. Even if it is later determined that the Navajo Nation may lease its New Mexico water rights for use outside the State, the settlement would require the consent of the State of New Mexico to do so in addition to compliance with applicable law.

Remark 4. The Navajo Nation gets 85 percent, not 56 percent, of New Mexico's compact apportionment based on diversion rights.

New Mexico's compact apportionment is of consumptive use or depletions. The difference between diversions and return flow is depletion. With settlement, the table of anticipated depletions in New Mexico through 2060 indicates that Navajo Nation uses would account for approximately 56 percent of the total depletions. Also with settlement, it is anticipated that diversions by the Navajo Indian Irrigation Project would average approximately 340,000 acre-feet per year, plus or minus depending on acreage irrigated and water conservation, to make the beneficial consumptive use for the Project even though a diversion right of up to 508,000 acre-feet per year is provided consistent with the authorizing legislation for the Project. The difference between 340,000 acre-feet and 508,000 acre-feet could not be transferred to other uses separate from the consumptive use right for the Project. Total diversions from the San Juan River and its tributaries in New Mexico therefore would average approximately 750,000 acre-feet per year by 2040, approximately 58 percent of which would be Navajo Nation diversions.

Remark 5. New Mexico's compact apportionment is 838,000 acre-feet, but is limited by the Bureau of Reclamation to 669,000 acre-feet.

The Colorado River Compact requires the Upper Basin to deliver 75 million acre-feet of water during any ten-year period on the Colorado River at Lee Ferry, plus half the deficiency in deliveries to Mexico under the Mexican Treaty. Using a conservative estimate that the deficiency is equal to the entire Mexican Treaty delivery obligation, the Bureau of Reclamation made a hydrologic study and determination that the yield available to the Upper Basin for use is at least 6.0 million acre-feet annually. The Upper Colorado River Commission, while not agreeing with all of Reclamation's assumptions, agreed for planning purposes that the yield available to the Upper Basin is at least 6 million acre-feet per year. Of this amount, the Upper Colorado River Basin Compact apportionment to New Mexico is at least 669,400 acre-feet per year. About 58,000 acre-feet of Colorado River Storage Project reservoir evaporation is chargeable to New Mexico's apportionment pursuant to Article V of the Compact, leaving about 611,400 acre-

feet for depletion by New Mexico. The depletions apportioned by the Compact are of the flow at Lee Ferry.

Remark 6. Releases from Navajo Dam will be only 250 cfs during the irrigation season and winter months with reoperation of the dam to meet endangered fish flows.

Reclamation will bypass inflows to Navajo Reservoir as necessary to meet downstream senior water rights. Reclamation will further bypass inflows or release water from reservoir storage as necessary to meet demands under contracts for water from the Navajo Reservoir supply. In addition, Reclamation will bypass inflows or release water from reservoir storage as necessary to provide for the San Juan River Basin Recovery Implementation Program's flow recommendations for endangered fish habitat below the confluence of the San Juan River and Animas River, or a reasonable alternative, to be satisfied. If the amount of release necessary for these purposes at any time is less than 250 cfs because of inflows below the dam, then Reclamation will still release at least 250 cfs at a minimum anyway. Typically, summertime releases from Navajo Dam may be as high as 600 cfs to 1000 cfs to satisfy downstream water rights and maintain fish habitat during periods of low flow, as has occurred during recent years. This reoperation of Navajo Dam is not a part of the settlement, and will occur with or without settlement in accordance with the Environmental Impact Statement for Navajo Dam operations.

Remark 7. The State Engineer hired a watermaster to curtail water rights below Navajo Dam during the summer to make water available for endangered fish.

The watermaster as part of the State Engineer's Active Water Resources Management will protect the bypass of inflows to Navajo Reservoir and inflows to the San Juan River below Navajo Dam to ensure that the inflows are available for diversion to satisfy senior direct flow water rights in priority. If inflow to the reservoir is less than 225 cfs but the total amount of water in storage at the end of May exceeds 1 million acre-feet, then the watermaster will protect 225 cfs of the release from the dam as if inflow was 225 cfs (this operation would be approved only with the settlement and would not impair contract uses). When inflow to the reservoir exceeds the amount necessary to be bypassed to meet downstream senior water rights, Reclamation in priority may store inflow in the reservoir. The watermaster will protect from diversion by direct flow users the subsequent releases of water from reservoir storage made for delivery to downstream contractors of that water or to benefit endangered fish species. This administration of Navajo Reservoir inflows and releases is consistent with Section 11 of Public Law 87-483, which provides that no person or entity is entitled to water from Navajo Reservoir storage without a contract for such water; and, it is similar to administration of river and reservoir operations on other river systems throughout the western United States, including the Rio Chama, Rio Grande, Pecos River, Cimarron River and Costilla Creek in New Mexico and the planned operation and administration of the Animas-La Plata Project on the Animas River.

Administration of Navajo Dam releases in this manner will occur with or without settlement; except, that the settlement under certain storage conditions would allow at least 225 cfs of the release from the dam to be made available to senior direct flow users without contract when inflow to the reservoir actually is less than 225 cfs, and that this provision would not be in place without the settlement.

Remark 8. Court cases determined that waters in rivers in New Mexico that are released from reservoir storage are public waters available to any user and cannot be protected for contractors.

Under both New Mexico and western water law, stored waters released from reservoirs are reserved for use by the reservoir beneficiaries and may not be appropriated by others. The *Luna* case simply stated that the rights of the beneficiaries to divert and use such waters are subject to adjudication. The rights of the Navajo Nation and other contractors for use of water from Navajo Reservoir storage must be adjudicated, and the proposed settlement would adjudicate such rights for the Navajo Nation. The same thing applies to the diversion and use in New Mexico of water that will be released from Ridges Basin Reservoir storage under the Animas-La Plata Project. Further, the *Raton* case simply stated that storage of inflow to a reservoir must be accomplished in priority after downstream senior rights are satisfied. Protection of direct flows, including reservoir inflows, for diversion in priority and protection of deliveries of contract water from reservoir storage will be accomplished as described in responses to remarks 6 and 7 above with or without settlement.

Remark 9. The Navajo Indian Irrigation Project diversion right would be 1,800 cfs.

The Navajo Indian Irrigation Project canal as constructed has a physical diversion capacity of 1,800 acre-feet, and the proposed settlement was revised to reflect this capacity. Without settlement, the Project could divert at this rate. The diversion capacity amounts to about 1 cfs per 61.5 acres of irrigation rights, which is significantly less than the 1 cfs per 40 acres adjudicated by the Echo Ditch Decree for many of the non-Indian irrigation rights in the San Juan River Basin. The Project has historically diverted up to about 900 cfs, and the acreage irrigated by the project has been as much as about 55,000 acres, or about half the water right acreage.

Remark 10. The settlement does not allow challenges to proposed Navajo Nation water rights and sets forth how non-Navajo Nation water rights will be adjudicated.

Under the settlement, the Navajo Nation's reserved rights for the Hogback and Fruitland irrigation projects are limited yearly by the annual per-acre depletion and diversion amounts determined consistent with the hydrographic survey approved by the Echo Ditch Decree. Also, the settlement includes waivers by the Navajo Nation that it would not object to rights in the San Juan River Basin previously adjudicated by the Echo Ditch Decree, to which the Nation was not a

party, except on grounds of abandonment, forfeiture or illegal use since the time the rights were decreed. The limitations on the Hogback and Fruitland project rights and the waivers were included in the settlement in response to public comments submitted by agricultural and municipal water users requesting such limitations and waivers. However, the settlement does not bind the Court as to how to adjudicate the rights of the Navajo Nation or other water users. If the Court uses a methodology that differs from the Echo Ditch Decree, then the settlement provides that the Navajo Nation's rights may be increased accordingly and the Navajo Nation may object to rights for non-Navajos that exceed the Echo Ditch Decree amounts. If the Court through the *inter se* process makes substantial changes to the proposed Partial Final Decree, then the settlement would be voided.

In addition, the Navajo Nation agrees under the settlement that when the direct flow is insufficient to meet the demands under the Hogback and Fruitland irrigation projects, the Navajo Nation would use up to 15,000 acre-feet of its 1955 priority NIIP contract water in any year to supply the needs of these two projects and would not request a priority call against other users that are junior to 1868 to meet the needs of the two projects unless and until the contract water is completely used. If the Court adopts methodologies for quantifying rights that result in rights for non-Navajos that exceed the Echo Ditch Decree amounts, then the agreement of the Navajo Nation to use its NIIP rights to protect non-Navajo Nation users from priority calls to deliver water to the Hogback and Fruitland projects would be nullified. This condition recognizes a relationship between protection of direct flow uses and protection of the Navajo Reservoir water supply. The settlement also provides that the Navajo Nation will protect the Animas-La Plata Project uses in the event of compact calls, with a part of the protection being dependent upon the outcome of the adjudication. Again, while the settlement conditions certain protections that the Navajo Nation is willing to provide on the outcome or results of the San Juan River Adjudication, the settlement does not require that the Court adjudicate non-Navajo Nation water rights in a certain manner.