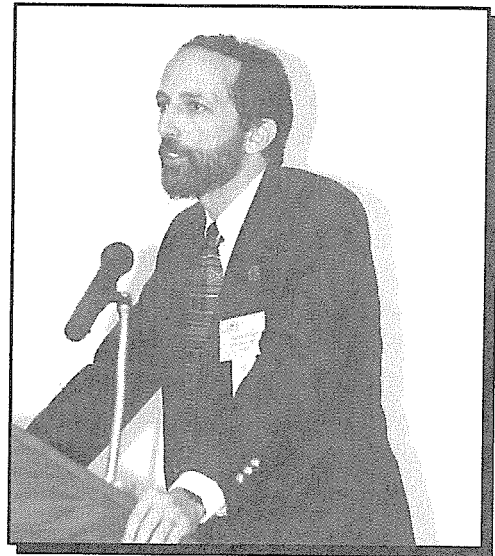


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INTEGRATED WATER RESOURCES MANAGEMENT IN THE SAN JUAN BASIN THE NAVAJO PERSPECTIVE

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“The Navajos feel the San Juan is their river.”
- Navajo Tribal Chairman Sam Akheah, 1951.¹

Navajo Interests in the San Juan River

I am here to talk about the Navajo Nation's interests in the San Juan River Basin and how that perspective fits into the overall concept of integrated water management. The Navajo interests, as President Hale mentioned this morning, are clearly very vast in the San Juan River Basin. Based on President Hale's speech this morning, not much has changed since Chairman Akheah's statement in 1951. The Navajos still feel that the San Juan is their river. What is significant is that in addition to saying “this is our river,” we also have said it is time to talk about resolving the allocation of the river. President Hale referred to his letter of September 9, to Governor Johnson to initiate a dialogue to try and resolve the Navajo quantification of water rights in the San Juan

River.² This is an historic event; an event whose time has come.

As I said before, the Navajo Nation has vast interests in the San Juan Basin. Dr. Semken showed you slides of coal mining and mineral development in the basin. There are a lot of Navajo water needs in the San Juan River Basin. In terms of mineral development, there are almost two billion tons of proven coal reserves on Navajo land in the San Juan River Basin. It takes water to develop minerals, and it takes water to turn minerals into energy.

In addition, the Nation has substantial agricultural interests along the San Juan River, including historic irrigation projects at Fruitland, Cudei and Hogback. These projects are recognized in the authorizing legislation for the Navajo Indian Irrigation Project (NIIP) as being valid appropriations of water in the San Juan River.³ More significantly, the NIIP is designed to eventually irrigate 110,630 acres. The project has a

recognized entitlement to the diversion of 508,000 acre-feet of water from the San Juan River.⁴ It is a huge project; it is a huge amount of water.

Water is needed to develop coal, water is needed for growing crops, and most importantly, water is needed for people, for domestic use and for municipal and industrial development. One of the projects moving forward is the proposed Gallup-Navajo pipeline, or as I prefer to call it: "the Navajo-Gallup pipeline." This ambitious proposal would bring water from the San Juan River to the Eastern Agency communities on the Navajo Reservation in northwest New Mexico and ultimately the city of Gallup.

From the Navajo perspective, integrated water resources management must be considered within the framework of satisfying a lot of needs. You will hear discussion this afternoon about the needs of the endangered fish in the basin. Fish need water; fish need to swim, but from the Navajo perspective people need water; people need water to drink. It may surprise you that in the Eastern Agency of the Navajo Reservation approximately half of the people lack running water in their homes. This is something that most Americans take for granted, but for many Navajos this is a fact of life. When we talk about integrated water resources management, meeting basic human needs must come first. That does not mean we are intolerant of water for other purposes, such as habitat for endangered fish, but there must be a balanced allocation of this precious resource.

Navajo Water Rights Claim

When President Hale speaks of settlement of the Navajo Nation's San Juan River water right, he is speaking of the Navajo Nation's right to assert a very, very large claim in an adjudication, a potential lawsuit, to determine the water rights to the San Juan River. So let's just talk about that for a minute.

What does a potential Navajo water rights claim look like? You have heard discussions of the Navajo claim to every drop of water in the San Juan River. When one looks at the applicable case law that governs water rights, you must start with the *Winters* doctrine.⁵ In the *Winters* decision⁶ the United States Supreme Court held that Indian reservations are entitled to the water that is necessary to create permanent homelands for their members. These water rights are not lost through non-use. That case was decided

in 1908, but it was not until 1963 that the Supreme Court actually answered the questions: what does it mean to create a permanent homeland for Indian people and how much water does that require?

The Supreme Court's historic decision in *Arizona v. California*⁷ set forth a number of very important principles, among them the notion that most of the Indian reservations in the American west were created to promote an agricultural lifestyle, and the amount of practicably irrigable acreage provides the appropriate measure of the water necessary to fulfill the purposes of the reservation. This quantification is known as the PIA standard.⁸ That standard recognized in *Arizona v. California* has been adopted by New Mexico courts in the *Lewis* decision dealing with the Mesca-lero Apache Tribe in the Rio Hondo Adjudication.⁹

Applying that standard in the San Juan River Basin, it is easy to see that with an area as large as the Navajo Nation, there is sufficient practicably irrigable acreage to claim not only every drop of water in New Mexico's share of the river, but every drop of water that is in the San Juan River. That necessitates a discussion of the significance of the various interstate compacts Professor Utton discussed earlier.

Recall that the states determined their allocations of water in the Colorado River Basin among themselves. Pursuant to the Upper Colorado River Basin Compact of 1948, New Mexico is entitled to 11.25 percent of the flow of the Colorado River.¹⁰ The question is asked, how do you fit the Indian water rights into the allocation of water between the states?

From my perspective, this question should be examined in the following context: the tribes were not invited; they were not welcome; they were not at the table when the water was divided in 1922.¹¹ In fact in 1922, Indians did not even have the right to vote in the United States.¹² To claim that the tribes are bound by these compacts, when their rights as United States citizens were not fully recognized, is a proposition that cannot stand. In fact, the negotiators of the compacts recognized this problem. Article VII of the Colorado River Compact of 1922 specifies that nothing in the compact is intended to bind the Indian tribes.¹³ Nevertheless, as a practical matter, the compacts may bind the tribes because the west has developed pursuant to the compacts and challenging those allocations is a difficult proposition.

Wrestling that water away from the interests that have already developed the water is a difficult one. Indeed, when President Hale refers to the need for a negotiated settlement, another reason is to avoid the horrendous litigation that will drain the resources of all parties. The idea of litigating a claim that may have the effect of unraveling compact allocations upon which western water development has been based is a difficult proposition. Not one that I look forward to. The Navajo Nation is willing to litigate if it has to, but first it is proposing to sit down to talk with the State of New Mexico to see if a negotiated settlement is possible.

The Navajo Nation has a large claim, with an early priority based on the *Arizona v. California* decision. New Mexico State Engineer Tom Turney referred to the ditches in New Mexico that have priority dates of 1870 and 1880, but you will recall the Navajo Reservation was established in 1868¹⁴ and the Navajo people were certainly here long before 1868. As a result, I believe that the Navajo Nation has the paramount water right in the San Juan Basin.

NIIP and the Alleged Waiver of Navajo Water Rights

Mr. Turney also discussed the importance of the NIIP authorizing legislation which recognized the Navajo Nation's agreement to share shortages with other projects from Navajo Reservoir. It has been said by some that by agreeing to share shortages, the Navajo Nation waived its *Winters* rights in return for the NIIP.¹⁵ That is a proposition I do not accept.

From the Navajo standpoint, what was given up in return for the NIIP was the right to assert the paramount water claim to every drop of water in the river; specifically, to the water authorized for the San Juan-Chama interbasin diversion. The legislation authorizing NIIP also authorized the transbasin diversion of 110,000 acre-feet of water out of the San Juan River, to which the Navajos claim the senior paramount water right, and diverted it out of the basin for the benefit of people in the Rio Grande Valley.¹⁶ What the Navajo Nation gave up was the right to assert a paramount water claim to that chunk of water—110,000 acre-feet. So, the *quid pro quo* for NIIP was the Navajo Nation's agreement not to claim the water for the San Juan-Chama diversion; not a waiver of the Navajo *Winters* right.¹⁷

These are all legal theories and legal theories are great for lawyers to discuss and to sue each other over, but the message of President Hale's letter of September 9 was "let's set the legal theories aside so we can talk about developing real solutions that will solve all of our water needs." President Hales's letter not only says "let's sit down and talk," he proposes certain ground rules to make such talks productive.

The first ground rule is that by agreeing to talk to the State of New Mexico, the Navajo Nation is saying that for purposes of settlement negotiations, the Nation must recognize the constraints that New Mexico has under the various compacts it entered into with its sister states. In other words, a settlement cannot be based on a claim to every drop of water in the river because New Mexico does not have every drop of water to give. For a settlement to work, a claim must be developed consistent with New Mexico's compact allocation. So what President Hale is saying is, "we will come to the table with you and we will drop our rhetoric concerning claims to every drop of water in the river."

In return, the State of New Mexico must come to the table without its rhetoric that Navajo water rights were settled once and for all in return for NIIP. So that is President Hale's proposal for pursuing a negotiated settlement. From my perspective that probably beats litigation.¹⁸

The San Juan River General Stream Adjudication

I would like to talk about the litigation for a moment. The San Juan River General Stream Adjudication was filed in state court in San Juan County in 1975.¹⁹ After years of legal battles between the tribes, the state parties and the United States concerning whether the state court had jurisdiction to adjudicate Indian water rights claims, the issue was finally resolved by the U.S. Supreme Court in 1983 in a case called *Arizona v. San Carlos Apache Tribe*.²⁰ The Court held that the McCarran Amendment permits the United States and Tribes to be sued in state court to quantify tribal water rights as part of general stream adjudications.²¹ State courts are not required to take jurisdiction but they may have jurisdiction.

What is significant about this? The parties spent all those years fighting jurisdictional issues, but nothing has happened since. The case was filed in 1975, but 21 years later the case has not moved

forward one inch. Now, to a geologist like Steve Semken, 21 years is not much time in geological terms, but for a lawsuit, 21 years of inaction is quite a bit of time. So from an attorney's perspective, nothing will be lost if we have to spend some time in pursuit of a negotiated settlement.

Why should we settle the Navajo water rights? Litigation is extraordinarily expensive, extraordinarily time consuming and after 21 years, we have not come up with any kind of solution in the San Juan River Basin. It is costly, it is expensive, and who knows when it will end? What everybody in the San Juan Basin needs is certainty with respect to the water rights of all players. Certainty is what you need to plan for integrated water resources management.²²

As far as a settlement, what might a settlement of the Navajo claim look like? The settlement must include water for NIIP, and how much more? In the Navajo view, it is probably something that looks like NIIP, and so much more. In the State of New Mexico's view, it probably looks like NIIP, and perhaps not much more. But in any event, by definition a settlement will not yield the Navajo Nation every drop of water in the river.

Now having said that, and again I am telling you that the Navajo Nation is not waiving any rights that it may pursue in litigation, the Nation is faced with the difficult task of developing a negotiated settlement that provides the water necessary to create a permanent homeland for the Navajo people. What does such a settlement look like? Again, I am struck by Professor Utton's talk this morning about the Colorado River. Recall how at the turn of the century, the city of Los Angeles had a population of only 200,000 inhabitants. Well, the State of California obtained an allocation from the Colorado River of 4.4 million acre-feet of water. As you know the Navajo Reservation has about 200,000 inhabitants, so the California allocation provides a good starting point for what the Navajo Nation might expect to obtain from the San Juan River.

Let's move on to some of the issues requiring integrated water resources management in the San Juan River Basin. Resolution of each of these issues is made difficult by the unresolved quantification of the Navajo water right in the basin. Hopefully a discussion of these issues will illustrate the need for a settlement of the Navajo claim.

Endangered Fish

The first outstanding issue that I think is on everyone's mind is the effect of the Endangered Species Act (ESA)²³ on the ability to develop water in the San Juan River Basin. Although the total Navajo water right is unquantified, NIIP has a congressionally authorized right to divert 508,000 acre-feet of water. The presence of endangered fish creates uncertainty about the ability to complete the NIIP, let alone develop the other water to which the Navajo Nation may be entitled. Basic water law teaches that the Navajos possess huge reserved rights to water with a senior priority, but as a result of the application of the ESA, the ability to develop these rights is uncertain.²⁴

Very briefly, through the Section 7 process,²⁵ federal projects such as the Animas-La Plata Project (ALP) and NIIP must consult with the Fish and Wildlife Service, which is charged with rendering biological opinions as to whether these projects will jeopardize the continued existence and survival of endangered species. In the case of both of these projects, the Service issued jeopardy opinions saying the proposed water development will jeopardize endangered fish, and in both cases reasonable prudent alternatives have been developed.²⁶ But these reasonable prudent alternatives do not allow for the full development of the projects; they allow only partial water development.

In the case of the NIIP, construction can continue, but without the right to take any more water out of the river. The reasonable and prudent alternative for NIIP reconfigures how the lands will be irrigated. Some land must grow less consumptive crops; some land will be dedicated to "conservation set-aside acreage" meaning nothing can be grown there. "Through smoke and mirrors," construction has moved forward without diverting additional water. Most troubling to the Navajo Nation is that the water needed to complete NIIP is not included in the "environmental baseline."²⁷ Existing water uses are included in the baseline, but the Service has opined that any water development above that baseline will jeopardize the fish.

It is a well-established tenet of Indian water law that tribal water rights under the reserved water rights doctrine are not subject to the same constraints placed on state water rights. That is to say, they are not subject to the use-it-or-lose-it doctrine.²⁸ This means

tribes do not have to actually put the water to beneficial use to have a recognized water right. However, the environmental baseline only recognizes existing water uses. The environmental baseline does not recognize the nature of the tribal water rights which are senior and are not required to be developed in order to be vested. In a real sense, the environmental baseline subjects the tribe's water to the use-it-or-lose-it doctrine. Through the application of the ESA to the San Juan River, senior undeveloped tribal water rights have become junior to developed non-Indian water uses. Quantification of the Navajo water right would at least give the tribe the opportunity to place a call on the water currently used by junior water users.

The Fish and Wildlife Service has opined that further water development will not be possible from the San Juan River until there is sufficient progress toward the recovery of the endangered fish. As a result, the San Juan River Recovery Implementation Program has been established with dual objectives: to recover endangered fish while permitting water development to proceed. There will be a panel discussion this afternoon concerning this program. It is important for the Navajo Nation to play a prominent role in the recovery efforts for the endangered fish. The Navajo Nation is the largest water user in the basin, is the largest water claimant, and the majority of the critical habitat for these fish lie within the Navajo Nation.²⁹ In order to protect these interests, the Navajo Nation has repeatedly requested participation in this program.³⁰

Low Winter Test Flows

Tom Turney spoke about the proposed test of the environmental impact of reducing winter flows. The proposed test is very controversial in New Mexico right now. Low winter flows are believed necessary to store additional water in Navajo Reservoir so that releases can be made in the spring for the benefit of endangered fish. Ironically, it is the potential impact of the low winter flows on nonnative fish that have many fishermen concerned.

It should be kept in mind that if the State of New Mexico is to have full water development pursuant to its compact allocation, there will have to be low flows in the future. Full depletion of water for all water rights users will result in less water in the river. When

we talk about impacts on the trout and the trout fishermen, it must be acknowledged that there is a world-class trout fishery on the San Juan River, but it must also be acknowledged that this world-class trout fishery is not a result of natural conditions. From the perspective of the fishery, there is not anything unnatural or inherently wrong with performing flow tests or otherwise manipulating the flows of the river. Navajo Dam was built to facilitate water development. The trout fishery exists because the water released from the dam is much cleaner, much colder and much more regular in flow than the natural flow of the river. The trout fishery is an opportunistic water user; it does not have a protected water right. In contrast, there are parties, such as the Navajo Nation, who believe they have protected water rights in the basin and are entitled to develop that water. Those tests are important to the Navajo Nation which has supported the low flow testing.³¹ The low flow test is important to demonstrate the efficacy of full water development and to provide a tool for endangered species recovery.

The Fish and Wildlife Service believes that endangered fish recovery will require operation of Navajo Dam in a manner that mimics the natural hydrograph of the river. Under natural conditions, there is large runoff in the springtime resulting in large peak spring flows, with very little water flowing in the river at many other times of the year. In order to mimic these conditions, it is necessary to reduce winter flows so that more water can be impounded for releases in the spring. Although the low flow test appears to be part of an artificial manipulation of the river, it is intended to simulate the conditions of a more natural river. It is ironic that these flows are being opposed for so-called environmental reasons. It is even more ironic, that on this artificially manipulated river, those who advocate for the trout, argue that the river should not be manipulated even though it is the exotic trout that require artificial conditions. The endangered native fish need more natural conditions, and therein lies the conflict. The Navajo Nation supports the low flow test because we think it will ultimately help recovery of the fish and permit further water development.

Where do we go with the ESA? The people who are in the San Juan Basin have an interest in the river, and when we talk about having the water for the fish we have to be concerned about where that water is

going to come from. This is a major concern of the Navajo Nation. Water is needed for the fish, which creates a water shortage for everyone. Quantification of water rights is important so that senior water users can enforce their priority against junior water users during times of shortage. The application of the ESA in the San Juan Basin emphasizes the imperative to have Navajo water rights quantified. The Navajo Nation cannot afford to have its water projects pay the price for shortages caused by the ESA.

Full Development of NIIP

This leads me to my third issue; the Navajo Nation needs full development of the NIIP. At this point, the project is barely half-built. NIIP is more than 20 years behind schedule, yet it was authorized at the same time as the San Juan-Chama Project in 1962.³² The San Juan-Chama Project was built; it was built on time; it was built to capacity; NIIP is behind schedule; and it is built under-capacity. Making matters worse, as a result of the ESA, it is going to be very difficult to move forward with the project. If we cannot move forward because there is not enough water in the river for additional development of NIIP, then in a very real sense a water shortage exists for the project.

The authorizing legislation for NIIP and San Juan-Chama states that in cases of shortage, these projects will share the shortages with the other contractors for water out of Navajo Reservoir. Aside from NIIP, the second-largest contractor of water is the San Juan-Chama Project. If there is a shortage and NIIP has to share that shortage ratably, then the State of New Mexico is going to see possible shortages for the San Juan-Chama Project. That is not a prospect to be taken lightly.

To date, the shortage-sharing provision of the NIIP authorization legislation has not been invoked. But when you talk about integrated water resources management you need to identify all of the components to be integrated. It cannot mean that when water is needed for the fish, the NIIP just stops and everyone else gets to keep their water. If we are going to look at these issues from an integrated management perspective, we must look at the entire resource, including the rights of all water users, the Navajo Nation and the San Juan-Chama Project. If we cannot figure out a solution where we help each other out—a

solution that serves all parties' needs—ultimately the courts will have to come in and figure out how the shortages will be shared. Again, that is why we need to look at a negotiated settlement.

Navajo Dam Water Contracts

The fourth set of recent issues involving the San Juan River involves the issuance and renewal of Navajo Dam contracts. As I said before, contractors for water out of Navajo Reservoir must share the water that is in the river and when water is short, they must share the shortages. The water contract for NIIP and the legislation authorizing NIIP prohibit the Secretary from entering into new contracts that would create shortages for the project.³³

This past year the Navajo Nation took the step of notifying the Bureau of Reclamation of the need to enforce those provisions with respect to the outstanding contracts it was considering.³⁴ The largest of those contracts is the Public Service Company of New Mexico (PNM) water contract for the San Juan Generating Station. The Bureau of Reclamation was advised that it could not issue or renew contracts because shortages currently exist on the river. The Fish and Wildlife Service also advises that additional depletions of water cannot be made for NIIP. If no more water is available for NIIP, there certainly is a shortage and the Secretary cannot issue or renew existing contracts.

This is yet another issue that must be resolved, and we are working hard to resolve this with the Bureau and with PNM. But these contracts make us nervous even without the issue of shortages because to the extent that the Navajos claim water in addition to the NIIP, those waters are probably waters that are subject to contracts with the Bureau of Reclamation. In other words, the Bureau is contracting Navajo water. That is why quantification of the Navajo water rights is needed.

Animas-La Plata Project

The last issue I wanted to talk about and perhaps the most contentious issue of all is the A-LP. I know many of you here are probably in favor of it and a lot of people here are against it. Let me tell you what the Navajo Nation's position is because we have recently developed a position. This is not going to sound like much of a position, so please listen carefully.

This position was developed as part of the Navajo Nation's participation in the Bureau of Reclamation's environmental compliance process. Specifically, the Bureau was required to perform an assessment of the impact of A-LP on Indian trust assets. We participated in that process and submitted comments to the Bureau of Reclamation. President Hale sent two letters to the Bureau of Reclamation describing Navajo interests in the basin, and as always, the Bureau was advised that Navajo water rights remain unquantified despite its huge water claims.³⁵ We claim every drop of water in the river based on the federal law as we understand it.

Starting from the premise of what federal law tells us, we have a claim which can exceed New Mexico's allocation and conceivably take every drop of water in the river. To the extent that another project comes along and starts taking water out of the river, that causes problems for us. At the same time we know that Navajo water rights have not been adjudicated, they have not been quantified, and the fact that another project comes along simply means that they can take water but they may be taking water belonging to the Navajo Nation. We also are realistic enough to know that when you take water for another project, it makes it very hard as a political matter, as a practical matter, and ultimately as a legal matter, to later wrestle that water away even if you have the senior-most water right in the river.

Bound by those kinds of constraints, we have developed a position that is articulated as follows: *We do not oppose A-LP, but we do not support the project.* What does this mean? It means that *we support our sister tribes, we support the Utes, we support their water rights settlement.*³⁶ We would like to see the Utes get their water, but we do not go so far as to say we actively support the project because we know that by doing that it will be harder for us to assert Navajo water claims at a later time. The Ute tribes have water in their settlement that is important to them, and it is important for the Navajo Nation to support its sister tribes. There are those of you who are out there trying to fight this project, and I have heard a lot of you saying "the Utes drove a bad deal,—it is a bad deal for the Colorado Ute tribes so we should kill A-LP." From the perspective of the Navajo Nation, when a tribe makes a determination as a part of its sovereign interests, they have made a

decision that a project is in their best interests. That is the end of the discussion. It is not for anyone to second-guess the Utes as to whether this is the best deal. And it is not for anyone to second-guess the Navajo Nation as to whether the NIIP was the best deal. So please do not cite the Navajo Nation as supporting your position that you should oppose A-LP because it is not a good deal for the Utes.

There is a Ute water settlement and we will do whatever is necessary to get the Utes their water. If it means the A-LP goes forward, so be it, but it does not mean that we support the A-LP, but we do support the Utes getting their water. If A-LP does go forward, I want to make it perfectly clear to those non-Indians interests in A-LP, this does not mean that your water is safe from claims by the Navajo Nation. Again, the fact that you have the water contract in this project does not mean that you are legally entitled to take water from a party having the most senior and paramount water right. The Navajo Nation will support the Utes' efforts to get their water, whatever that will take. The Nation does not have significant interests in A-LP, only about 7,500 acre-feet of water with no delivery facilities contemplated. If A-LP is not the vehicle for the Utes to get their water and they need another vehicle to get the water, the Navajo Nation will certainly not stand in the way.

Again, the problem for the Navajo Nation is that its water rights are unquantified. We do not know what the full impacts are on Navajo water rights if A-LP is built. Navajo water rights are not going to be quantified through litigation within the time-frame necessary for A-LP. Therefore, the Navajo Nation is forced to walk a very, very thin line and I hope you can appreciate that. The thin line it walks is between support for sister tribes and at the same time, not wanting to jeopardize Navajo water rights.

Conclusion

President Hale has taken several important steps as he walks the fine line of the San Juan River water issues. He advised the Bureau of Reclamation to stop contracting for water from Navajo Dam. The Nation advised the Fish and Wildlife Service that it seeks participation in the recovery program. President Hale also advised the Bureau of Reclamation of the significant Navajo interests in the San Juan River Basin. And last, but surely not least, President Hale has

taken an important step by saying to the State of New Mexico "that the time has come to sit down and finally get these things resolved." A lot of people have referred to the Navajo Nation as the "sleeping giant" in the San Juan Basin. We have this huge water claim that has not been litigated. The time has come when we must start resolving those issues so that other projects can move forward, so the fish can get their water, so the Utes can get their water, so that the non-Indian interests in northwestern New Mexico can get their water, and most important from the Navajo perspective, so that the Navajo Nation can get its water.

If you come away from this conference with any kind of impression as to the Navajo perspective, I want you to think of 1996 as the year the sleeping giant finally stirred in the San Juan Basin. Thank you.

Endnotes

1. Stenographic Transcript of Proceedings Before the U.S. Department of the Interior in the Matter of the San Juan-Chama Conference, March 27-28, 1951.
2. Letter from President Albert H. Hale to Governor Gary Johnson, re Resolution of the Navajo Nation's Water Rights to the San Juan River, September 9, 1996.
3. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, Section 11(c).
4. *Id.* at Section 2(a).
5. See Michael R. Moore, *Native American Water Rights; Efficiency and Fairness*, 29 NAT. RESOURCES J. 763 (1989); Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U.L. REV. 639.
6. *Winters v. United States*, 207 U.S. 564 (1908).
7. *Arizona v. California*, 373 U.S. 546, 598-600 (1963).
8. See generally Steven J. Shupe, *Identifying Practicably Irrigable Acreage (PIA)*, INDIAN WATER 1985 at 103.
9. *New Mexico v. Lewis*, 861 P.2d 235, 244 (N.M. App. 1993).
10. Upper Colorado River Basin Compact of 1948, Act of April 6, 1949, Pub. L. No. 81-37, 63 Stat. 31 (1949).
11. See Norris Hundley Jr., *WATER AND THE WEST* 2 (1975).
12. Native Americans were not always considered citizens of the United States until 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (superseded 1940).
13. Similar language is contained in Article XIX of the Upper Colorado River Basin Compact of 1948.
14. Navajo Treaty of 1868, 15 Stat. 667.
15. See, e.g., C. DuMars & H. Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or Mirage?* 20 NAT. RES. J. 17 (1980).
16. See Elizabeth Checchio & Bonnie R. Colby, *INDIAN WATER RIGHTS - NEGOTIATING THE FUTURE*, 1993 at 28.
17. See, e.g., Judith E. Jacobsen, *The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights*, 32 NAT. RES. J. 827 (1992).
18. See *The Daily Times*, Farmington, N.M., September 11, 1996 *Hale wants to resolve rights to San Juan River's water*, ("These theories should be left to our lawyers in the event litigation is necessary.").
19. *New Mexico v. United States*, No. 74-184, Dist. Ct., 11th Judicial District, San Juan County, New Mexico.
20. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).
21. See Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States*, 27 ARIZ. ST. L.J. 597 (1995).
22. See Checchio & Colby, *supra*, at 21-25.
23. 16 U.S.C. § 1531, *et seq.* (1988).
24. See Adrian N. Hansen, *The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River*, 37 ARIZONA L. REV. 1305 (1995).
25. 16 U.S.C. § 1536 (1988).
26. Section 7 Consultation Biological Opinion and Conference Report for Navajo Indian Irrigation Project, Blocks 1 - 8, October 28, 1991 and Final Biological Opinion, Animas-La Plata Project, Colorado and New Mexico, October 25, 1991.

27. See 50 C.F.R. § 402.02 (“*Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are inter-related or interdependent with that action that will be added to the environmental baseline. The environmental baseline includes the past and present impact of all federal, state, or private actions and other human activities in the action area...”)
28. See Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, at 5780 (1982 ed.).
29. See *Final Rule, Critical Habitat for the Colorado River Endangered Fishes*, 59 FR 13374 (March 21, 1994).
30. See, e.g., Letter from President Peterson Zah to John G. Rogers, II, Regional Director, Region 2, U.S. Fish & Wildlife Service, re Navajo Participation in the San Juan River Basin Recovery Implementation Program, March 17, 1994.
31. See, e.g., Letter from President Albert Hale to Senator Pete V. Domenici, re Winter Flow Releases from Navajo Dam, March 7, 1995; Letter from Teresa M. Showa, Director, Department of Water Resources Management, Navajo Nation, to Rick Gold, U.S. Bureau of Reclamation, re NEPA Compliance for Low-Flow Tests on the San Juan River, July 31, 1995.
32. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, Section 8.
33. “The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 2 and 8 of this Act.” Act of June 13, 1962, P.L. 87-483, 76 Stat. 96. Identical language is contained in Section III of Water Contract No. 14-06-W-269 for the delivery of water to NIIP.
34. Letter from President Albert Hale to Eluid L. Martinez, Commissioner, Bureau of Reclamation, re Water Contracts from Navajo Reservoir, June 3, 1996.
35. Letter from President Albert Hale to Rebecca Westra, Public Involvement Specialist, Bureau of Reclamation, re Indian Trust Assets, National Environmental Policy Act, Animas-La Plata Project, Colorado and New Mexico, August 7, 1995 and letter from President Albert Hale to Rebecca Westra, Public Involvement Specialist, Bureau of Reclamation, re Supplemental Comments Concerning Indian Trust Assets, National Environmental Policy Act, Animas-La Plata Project, Colorado and New Mexico, October 24, 1995.
36. Colorado Ute Indian Water Rights Settlement Act, Pub. L. 100-585, 102 Stat. 2972 (1988).