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FISCAL IMPACT REPORT

ORIGINAL DATE 2/4/08

SPONSOR Bandy LAST UPDATED 2/11/08 HM 43/aHAGC/aHFI#1

SHORT TITLE Approve Navajo Water Rights Settlement SM _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to SM 37, SJM 18.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Indian Affairs Department (IAD)
Office of the State Engineer (OSE)

SUMMARY

Synopsis of HFI#1 Amendment

As included on page 1, line 22; House Floor Amendment Number 1 to House Memorial 43, as amended, clarifies language. Specifically, the amended section now reads:

“WHEREAS, the priority date of these diversions, 1868, is significantly older than non-Navajo rights;”

The amendment adds no appropriation to the legislation.

Synopsis of HAGC Amendment

As included on page 2, line 10, House Agriculture and Water Resources Committee amendment to House Memorial 43 clarifies language. Specifically, the amended section now reads:

“BE IT FURTHER RESOLVED that, as part of the settlement, congress be requested to support provisions for storage up to thirty thousand acre-feet of water in Navajo lake to be used by non-Navajo irrigators in times of severe drought and water shortages;

The amendment adds no appropriation to the legislation.

Synopsis of Original Bill

House Memorial 43 requests that the New Mexico House of Representatives request the United States Congress to approve the Navajo Nation Water Rights Settlement negotiated by the State of New Mexico and the Navajo Nation.

SIGNIFICANT ISSUES

IAD advises that the State of New Mexico and the Navajo Nation, on April 19, 2005, signed a water rights settlement agreement to resolve the claims of the Navajo Nation for the use of waters of the San Juan River Basin in northwestern New Mexico.¹ Further, according to the Office of the State Engineer (“OSE”), the settlement agreement is intended to adjudicate the Navajo Nation’s water rights and provide associated water development projects for the benefit of the Navajo Nation.² This is in exchange for a release of claims to water that could potentially displace existing non-Navajo water users in the San Juan basin and seriously impact the local economy.³ Additionally, the settlement agreement would establish the water rights of the Navajo Nation in the San Juan Basin in New Mexico.⁴ The OSE further provides that the settlement agreement would draw to a close more than 20 years of efforts to adjudicate the Navajo Nation’s water right owners, protect existing uses of water, allow for future growth, and would do so within the amount of water apportioned to New Mexico by the Colorado River Compacts.⁵ The Settlement Agreement will become effective if the Congress passes the Settlement Act and the President signs the act into law.⁶ Currently, the Northwestern New Mexico Rural Water Supply Act, which would authorize the Settlement Agreement and authorize the construction of the Navajo-Gallup Water Supply Project, is pending in the United States Congress. As background, IAD offers the following timeline and commentary:

On December 7, 2006, Senator Bingaman and Representative Udall introduced legislation - S. 4108 and HR 6436 - to authorize and fund the settlement.⁷ On April 12, 2007, the legislation was reintroduced in the 110th Congress by Senators Bingaman and Domenici (S.1171) and Representative Udall (HR 1970).⁸

On June 27, 2007, Mr. John D’Antonio, New Mexico State Engineer, gave testimony⁹ to the Senate Energy and Natural Resources Committee regarding the settlement legislation.¹⁰ On July 24, 2007, Mr. Jim Dunlap, Chairman of the Interstate Stream

¹ http://www.ose.state.nm.us/legal_ose_proposed_settlements_sj.html, last accessed January 12, 2008.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Executive Summary of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement, April 19, 2005. Can be accessed at: <http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoExecutiveSummary.pdf>.

⁷ Office of the State Engineer and Interstate Stream Commission, 2007 Indian Water Rights Settlement Fund Report. The 2005 Indian Water Rights Settlement Fund Act (2005 N.M. Laws, ch. 172, §1.B; NMSA 1978, § 72-1-11 (B)) requires the State Engineer and the Interstate Stream Commission to report by November 15th every year to the Interim Indian Affairs Committee and to the Legislative Finance Council.

⁸ Ibid.

⁹ Mr. D’Antonio’s written testimony can be accessed at

http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1637.

¹⁰ The archived webcast can be downloaded at

Commission, gave testimony to the House Subcommittee on Water and Power of the Natural Resources Committee.¹¹ In general, Mr. D’Antonio believes “the Navajo settlement is fair to both Navajo and non-Indian water users in the San Juan Basin in New

Mexico because it removes the cloud of unsettled Navajo water rights and brings real promise of safe drinking water to Northwest New Mexico.”¹²

In his testimony before the United States Senate Committee on Energy and Natural Resources concerning S. 1171, Navajo Nation President Shirley testified that:

[m]any of the 80,000 Navajo men, women, and children who live within the project service area, including Navajo Code Talker Frank Chee Willetto, presently haul water for drinking and cooking. Although construction of the project will not necessarily eliminate all water hauling on the reservation, this project will allow the Indian Health Service to expand distribution systems to provide potable water delivery to more homes, and creates growth corridors within the Navajo Nation where future communities can be built with ready access to roads, electricity and potable water. As such, this project represents a critical component of the Navajo Nation’s economic development strategy. While construction of the pipeline may not represent a condition sufficient to ensure economic prosperity for the Navajo People, surely such prosperity will never be possible in the absence of a sustainable potable water supply.¹³

IAD concludes that the City of Gallup and the Jicarilla Apache Nation would also be beneficiaries of the Northwestern New Mexico Rural Water Supply Project. According to State Engineer D’Antonio “[i]t is estimated that by 2040, the Navajo Settlement pipeline will serve approximately 250,000 people in Northwest New Mexico, including residents of Gallup.”¹⁴

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

IAD notes:

HM 43 relates to SM 37 in that the bill language is similar. However, HM 43 would be an expression of the New Mexico House’s desire to request the United States Congress to approve the Navajo Nation Water Rights Settlement. SM 37 would be an expression of the New Mexico Senate’s desire to do the same.

HM 43 relates to SJM 18 which would request both houses of the New Mexico Legislature to express its support of the Navajo Nation Water Rights Settlement Agreement and request Congress to approve the Northwestern New Mexico Rural Water

http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1637.

¹¹ Mr. Dunlap’s written testimony can be accessed at

http://resourcescommittee.house.gov/index.php?option=com_jcalpro&Itemid=32&extmode=view&extid=90.

¹² “Op-Ed: The San Juan Basin Settlement is Good for New Mexico” by John D. Antonio, NM State Engineer.

<http://www.ose.state.nm.us/PDF/News/2007/pr-2007-03-30-oped-SanJuanSettlement.pdf>.

¹³ Testimony of President Joe Shirley, Jr., Navajo Nation, Before the Senate Committee on Energy and Natural Resources Concerning S. 1171 – Northwest New Mexico Rural Water Projects Act. Can be accessed at:

http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1637.

¹⁴ Ibid.

Projects Act. HM 43 differs from SJM 18 in that SJM 18 was endorsed by the Interim Indian Affairs Committee.

TECHNICAL ISSUES

OSE advises that on page 1, line 22: *Change “1858” to “1868”, the correct priority date for the diversions referenced in that paragraph.*

OTHER SUBSTANTIVE ISSUES

OSE indicates that the Navajo Settlement Agreement would resolve the water rights claims of the Navajo Nation to the use of waters of the San Juan basin in New Mexico. Federal legislation for Congress to approve the Settlement Agreement was introduced in Congress early in 2007 (S. 1171 and H.R. 1970, the Northwestern New Mexico Rural Water Projects Act). Hearings on the legislation were held in June and July 2007. HM 43 requests that Congress support a provision for storage of water at Navajo Reservoir for the benefit of non-Navajo irrigators that does not currently exist in the Settlement Agreement or the federal legislation. Therefore, amendments may be required in the Settlement Agreement and/or federal legislation to fulfill the intent of HM 43. Under section 11(a) of Public Law 87-483 (authorizing the Navajo Indian Irrigation Project and the San Juan-Chama Project), no person or entity is entitled to water stored in Navajo Reservoir without a contract with the Secretary of the Interior. Therefore, no new contract for storage in Navajo Reservoir could be issued without negotiation with, and approval of, the United States. In addition, PL 87-483 provides that the Secretary of the Interior must certify to Congress that sufficient water is reasonable likely to be available to satisfy the terms of the contract.

OSE further indicates that the Hogback irrigation project has an 1868 priority date, which is senior to the non-Indian irrigation diversions in the basin, and thus priority administration under state law could cause non-Indian irrigation diversions to be curtailed so that the Hogback project's diversion needs are met first. To reduce the potential for such priority administration, an existing provision in the Settlement Agreement provides that the Navajo Nation would be required to transfer up to 12,000 acre-feet of its Navajo Reservoir storage water from the NIIP to the Hogback project in any one year as an alternative to meeting the Hogback project demands before any priority administration would occur. This alternative water supply for the Hogback project, in effect, provides a measure of protection to non-Indian irrigators against the possible occurrence of curtailment in all but the most severe drought years.

OSE concludes that further means of firming water supplies for existing non-Indian irrigation uses in the basin during times of severe drought, including the potential for additional storage at Navajo Reservoir, are being evaluated by the Interstate Stream Commission. Some of the issues currently being evaluated include: (1) limitations on the transfer of non-Indian irrigation rights to storage and on the utility of using a top water bank to store water for later use by the non-Indian irrigators; (2) possible rules and regulations for operating a top water bank; (3) conditions for the non-Indian irrigation ditches to ensure that storage water is used for supplemental irrigation of existing farmland and not project expansions; (4) identification of an appropriate contracting entity that can ensure payment for storage water and ensure that the non-Indian ditches and irrigators comply with any conditions for providing water under a contract; and (5) impacts of a Navajo Reservoir supply contract for supplemental irrigation uses under non-Indian ditches on other Navajo Reservoir supply contracts for uses in New Mexico; (6) impacts on flows for conservation of San Juan River populations of endangered fish species.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

IAD suggests that if HM 43 is not enacted, “the United States Congress may not be made aware of the support that the New Mexico House has expressed about the Navajo Nation Water Rights Settlement Agreement.”

BFW/mt