



**PRESENTATION TO THE
INTERIM WATER & NATURAL RESOURCE COMMITTEE
AND DROUGHT SUBCOMMITTEE**

AUGUST 28-30, 2013

Bounds vs. NMOSE

New Mexico Office of the State Engineer &
Interstate Stream Commission
August 28, 2013

The Bounds case centers on the intersection of domestic well permits in areas where the water supply has been determined to be fully appropriated.

THE BOUNDS CASE

- Prior to the 1953, the requirements for obtaining a domestic well permit for the State Engineer were the same as those required for all applications for new appropriations of water. The State Engineer required publication of the notice of the application so water rights owners had the opportunity to object the application, if opposed, a state engineer hearing was required. Whether protested or not the application could be granted only upon a finding that no existing water rights would be impaired.
- However, the small amounts of groundwater diverted to meet household domestic needs, in the opinion of the State Engineer, could not impair existing water rights.
- Due to the State Engineers opinion, this much more complex, thorough, and lengthy administrative process was eliminated with the enactment of the Domestic Well Statute in 1953 (now codified at 1978 NMSA, Section 72-12-1.1, 2003 (DWS)).
- The New Mexico State Engineer has granted tens of thousands of domestic well permits since the DWS was enacted into law.
- With population growth came subdivision growth and domestic wells were and are used to meet the domestic needs of planned subdivisions.
- As domestic wells proliferated, senior water rights owners and smart growth advocates began to question the constitutionality of the DWS.
- The constitutionality of the DWS was examined when Horace Bounds Jr. filed suit against the State Engineer in 2006.
- Horace Bounds Jr. claimed that the DWS created an exception to the prior appropriation doctrine. He argued this exception allowed for new appropriations in fully appropriate stream systems and consequently deprived him of his property right without due process.

2013 SUPREME COURT RULING

- The Bounds case was litigated for seven years. In 2013, the New Mexico Supreme Court (NMSC) ruled that the DWS is facially constitutional violating neither the doctrine of prior appropriation as set forth in the New Mexico Constitution nor the guarantees of due process of law. The NMSC did not reach to question of whether the DWS was constitutional under an “as applied test” because Bounds abandoned that argument when he could show no harm under the facts of his case.
- The New Mexico Supreme Court closely examined and supported the State Engineer’s domestic well rules which protect senior water rights owners from impacts related to diversions from domestic wells.
- The NM Supreme Court also found that in addition to the state engineer’s efforts, the legislature has also taken steps to protect seniors when it enacted amendments to the two acts governing the approval of subdivisions to place limits on when domestic wells may be used as the source of water for a subdivision.



OFFICE OF THE SECRETARY
**U.S. Department
of the Interior**

www.doi.gov

News Release

Date: December 12, 2012

Contact: Blake Androff (DOI) 202-208-6416

Kip White (Reclamation) 202-513-0684

Secretary Salazar Releases Colorado River Basin Study Projecting Major Imbalances in Water Supply and Demand

Comprehensive study developed by Interior and seven basin states looks at water supply and demand over the next 50 years; includes range of proposed strategies from stakeholders to mitigate projected imbalances

WASHINGTON, D.C. – Secretary of the Interior Ken Salazar today announced the release of a study – authorized by Congress and jointly funded and prepared by the Bureau of Reclamation and the seven Colorado River Basin states – that projects water supply and demand imbalances throughout the Colorado River Basin and adjacent areas over the next 50 years. The *Colorado River Basin Water Supply and Demand Study*, the first of its kind, also includes a wide array of adaptation and mitigation strategies proposed by stakeholders and the public to address the projected imbalances.

The average imbalance in future supply and demand is projected to be greater than 3.2 million acre-feet by 2060, according to the study. One acre-foot of water is approximately the amount of water used by a single household in a year. The study projects that the largest increase in demand will come from municipal and industrial users, owing to population growth. The Colorado River Basin currently provides water to some 40 million people, and the study estimates that this number could nearly double to approximately 76.5 million people by 2060, under a rapid growth scenario.

“There’s no silver bullet to solve the imbalance between the demand for water and the supply in the Colorado River Basin over the next 50 years – rather, it’s going to take diligent planning and collaboration from all stakeholders to identify and move forward with practical solutions,” said Secretary Salazar. “Water is the lifeblood of our communities, and this study provides a solid platform to explore actions we can take toward a sustainable water future. While not all of the proposals included in the study are feasible, they underscore the broad interest in finding a comprehensive set of solutions.”

Authorized by the 2009 SECURE Water Act, the study analyzes future water supply and demand scenarios based on factors such as projected changes in climate and varying levels of growth in communities, agriculture and business in the seven Colorado River Basin states of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming.

The study includes over 150 proposals from study participants, stakeholders and the public that represent a wide range of potential options to resolve supply and demand imbalances. Proposals include increasing water supply through reuse or desalinization methods, and reducing demand through increased conservation and efficiency efforts. The scope of the study does not include a decision as to how future imbalances should or will be addressed. Reclamation intends to work with stakeholders to explore in-basin strategies, rather than proposals - such as major trans-basin conveyance systems - that are not considered cost effective or practical.

“This study is one of a number of ongoing basin studies that Reclamation is undertaking through Interior’s WaterSMART Program,” said Assistant Secretary for Water and Science Anne Castle. “These analyses pave the way for stakeholders in each basin to come together and determine their own water destiny. This study is a call to action, and we look forward to continuing this collaborative approach as we discuss next steps.”

WaterSMART is Interior’s sustainable water initiative and focuses on using the best available science to improve water conservation and help water-resource managers identify strategies to narrow the gap between supply and demand. The WaterSMART program includes Reclamation’s Water and Energy Efficiency grants, Title XVI Reclamation and Recycling projects, and USGS’s Water Availability and Use Initiative. “This study brings important facts and new information to the table so that we can better focus on solutions that are cost effective, practical and viable” said Bureau of Reclamation Commissioner Mike Connor. “We know that no single option will be enough to overcome the supply and demand gap, and this study provides a strong technical foundation to inform our discussions as we look to the future.”

Spanning parts of the seven states, the Colorado River Basin is one of the most critical sources of water in the western United States. The Colorado River and its tributaries provide water to about 40 million people for municipal use; supply water used to irrigate nearly 4 million acres of land, and is also the lifeblood for at least 22 Native American tribes, 7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks. Hydropower facilities along the Colorado River provide more than 4,200 megawatts of generating capacity, helping meet the power needs of the West.

Throughout the course of the three-year study, eight interim reports were published to reflect technical developments and public input. Public comments are encouraged on the final study over the next 90 days; comments will be summarized and posted to the website for consideration in future basin planning activities.

The full study – including a discussion of the methodologies and levels of uncertainty – is available at www.usbr.gov/lc/region/programs/crbstudy.html. Hard copies of the Executive Summary and a CD of the entire study are available at the Study booth in the exhibitors’ area during the Colorado River Water Users Association (CRWUA) conference in Las Vegas Dec. 12 – 14, 2012.

###

Important Navajo Settlement Benefits

The core of the Settlement is the recognition of the Navajo Nation's water rights based upon historic and authorized irrigation projects and the development of the Navajo-Gallup Water Supply Project to provide a reliable and renewable source of domestic water to Navajo households and the City of Gallup.

Benefits to the State of New Mexico include:

1. Economic benefits.

Construction of the Navajo-Gallup Water Supply Project (Pipeline Project):

- Brings construction jobs to the northwestern area of the state.
- Increases gross receipts tax revenue.
- Provides ancillary economic benefits to local economies.
- Provides municipal water supply for the City of Gallup.
- Increases certainty for non-Navajo water users regarding available water supply.

2. Avoids future litigation.

- Avoids costly lengthy litigation to quantify the Nation's water rights.
- Litigation costs for New Mexico could easily exceed its obligation for Pipeline Project costs.
- Litigation could also result in the court recognizing a greater amount of water rights with a senior priority date for the Navajo Nation.

3. Protects non-Navajo water users.

- Reduces potential amount of the Navajo Nation's water rights.
- The amount of water for the Navajo Nation's irrigation water rights is limited to the amount of water it currently has a right to use or develop under existing authorized projects.
- Provides water to satisfy the Navajo Nation's municipal and domestic water rights by construction of a pipeline to provide water with a junior priority.
- Senior irrigators are protected from priority calls by the administration of the Navajo Nation's water rights with a 1955 or 1956 (junior) priority date and use of up to 12,000 ac-ft from storage in dry years.
- Provides protections against curtailment for both the Animas La Plata and San Juan Chama projects.

4. Provides for ditch improvements for non-Indian water users.

5. Will not displace other New Mexico water uses under New Mexico's Upper Colorado River Basin Compact allocation.

6. Restricts Navajo Nation from marketing water out of state.

In addition to the existing statutory requirement of obtaining a permit from the Office of the State Engineer, under the Settlement, in order to market water out of New Mexico, the Navajo Nation must also obtain a separate approval from the New Mexico Interstate Stream Commission. This is a higher standard than any other New Mexico water right owner.



Key Points of Settlement

- Construction will create between 400-650 jobs.
- Construction expenditures generate state and local tax revenue.
- Pipeline Project will provide 22,650 acre/feet of drinking water for residents of the Navajo Nation who currently must haul water to their homes.
- By 2040, the Pipeline Project is projected to serve 250,000 people.
- Federal legislation P. L. 111-11 enacted in 2009 authorizes the Navajo Settlement, including the Navajo-Gallup Water Supply Project.
- Settlement resolves the water rights of the Navajo Nation via entry of judgments and decrees in the San Juan River Basin Adjudication.
- Pipeline Project is the cornerstone of the Settlement and will bring a renewable surface water supply from Navajo Reservoir to Navajo and non-Navajo communities in northwest NM, including City of Gallup.
- Parties to the Settlement (signed in 2010) are the State, Navajo Nation and United States.
- New Mexico Governor Gary Johnson was the first Governor to pursue settling the Navajo's claims to water in the San Juan in 1996.
- Key concession by the Navajo Nation: Tribe agreed to settle its water rights claims in an amount far less than what otherwise could have been recognized under law, in exchange for construction of the Pipeline Project.

Project Costs

- Approximately \$1 billion (2011) to plan, design, implement Settlement and construct infrastructure.
- New Mexico cost share obligation (for non-Navajo benefits) is \$50 million.
- New Mexico has already contributed about \$40+ million.
- United States funding currently committed for the Pipeline totals \$215.2 million.

Construction Status

- Overall project consists of 2 main laterals (pipelines): Cutter Lateral and Gallup Lateral.
- Cutter Lateral serves eastern side of Navajo Reservation and a portion of Jicarilla Apache Reservation.
- Gallup Lateral serves the Navajo Reservation in northwest NM, the city of Gallup and Window Rock, AZ.
- Construction on Cutter Lateral began in 2011.
- April 2012: First construction contract awarded for Gallup Lateral.
- Pipeline Project is one of 14 "priority" infrastructure projects for Obama Administration.



Risks to New Mexico if the Navajo Nation Settlement Fails

Major long-term benefits to the State of New Mexico are provided by the Court entering the Proposed Decrees, which is a condition of the Navajo Nation Settlement. If the Court fails to enter the Proposed Decrees, New Mexico will lose the benefits negotiated in the Navajo Settlement, the Navajo Nation may litigate for more water without restrictions, and New Mexico will forego the economic growth and tax revenue from the Navajo-Gallup Pipeline construction.

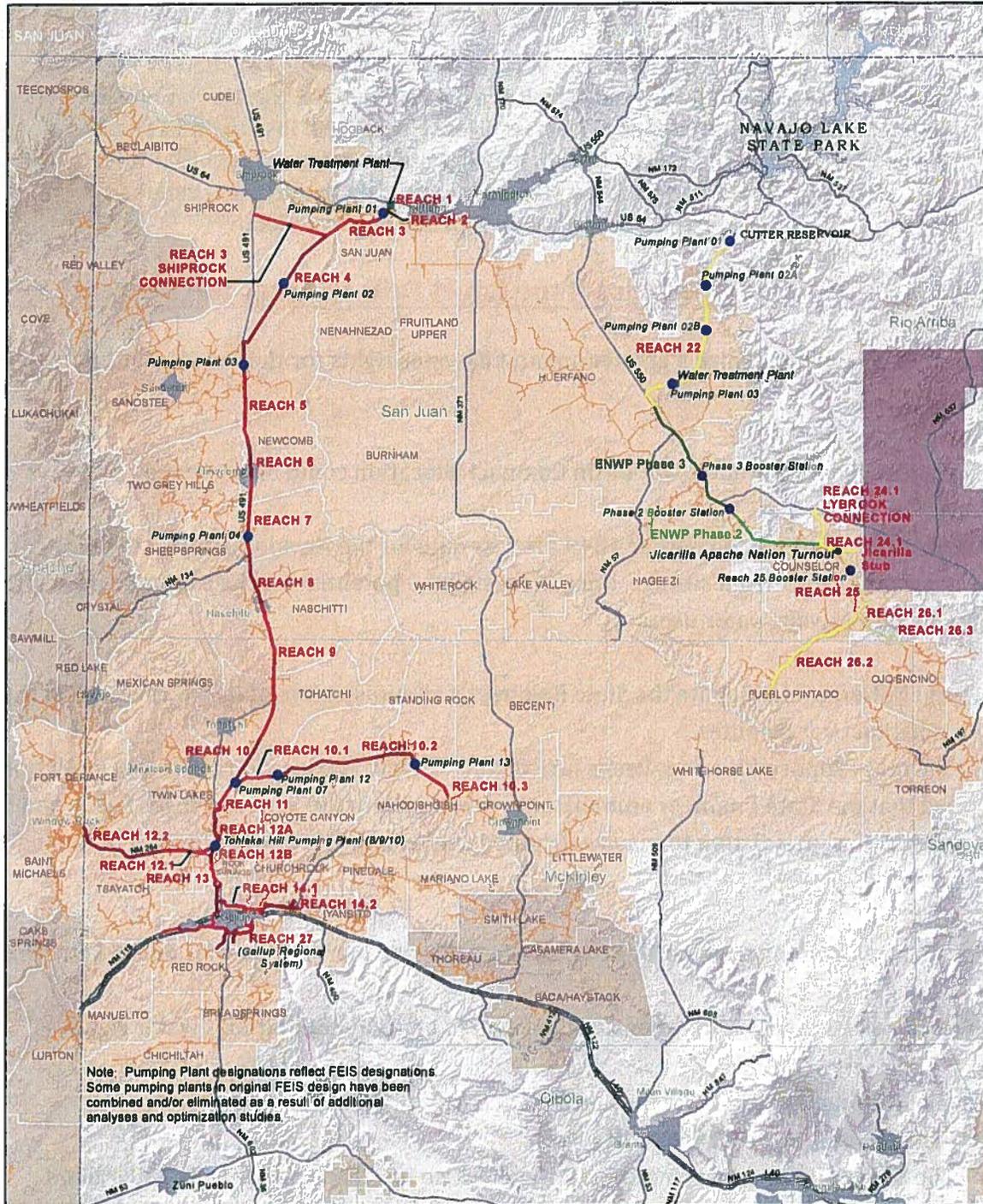
Risks to New Mexico if the Court Fails to Enter the Decrees:

1. The Court likely will recognize a greater amount of water rights for the Navajo Nation, displacing other water users.
2. New Mexico's Upper Colorado River Basin Compact allocation could be exceeded.
3. The Court could recognize an earlier 1849 priority date for the Navajo Nation to take water directly from the river rather than from storage, thus increasing the potential for the Nation to make priority calls against junior, non-Navajo water users .
4. The Navajo Nation could dispute the State Engineer's administration of its water uses and the State court's jurisdiction over disputes.
The current Proposed Decrees keeps jurisdiction in New Mexico court. The Navajo Nation has agreed that the State Engineer administers water rights in the San Juan River Basin, and that the state court has jurisdiction to resolve disputes between the Navajo Nation, the State Engineer, and other parties.
4. The Navajo Nation would have no additional restrictions on marketing water out of New Mexico.
5. New Mexico will be forced into expensive litigation to quantify the Nation's water rights.
6. The Navajo Nation may terminate the Settlement.

If this happens, New Mexico will lose:

- The \$40+ Million dollar investment New Mexico has made towards its \$50 Million cost share obligation. This state money leverages the approximately \$1 Billion Navajo Pipeline.
- Current construction of the Navajo-Gallup Pipeline.
- Municipal water supply for the City of Gallup and residents of the Navajo Nation.
- Economic development and millions in NM gross receipts tax revenue.
- Current and future construction jobs.
- Ancillary economic benefits to local economies.





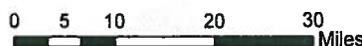
Note: Pumping Plant designations reflect FEIS designations. Some pumping plants in original FEIS design have been combined and/or eliminated as a result of additional analyses and optimization studies.

Legend

- Pumping Plants
- Water Treatment Plant
- San Juan Lateral
- Cutter Lateral
- Eastern Navajo Water Pipeline (ENWP) Phase 3
- Eastern Navajo Water Pipeline (ENWP) Phase 2
- Interstate
- State Highway
- US Highway
- NTUA Line
- Navajo Nation Non-Serviced Chapters
- Navajo Nation Serviced Chapters
- Jicarilla Apache Nation

Navajo Gallup Water Supply Project

RECLAMATION
Managing Water for the West



1695-529-537
Date: 5/1/2012

NAVAJO SETTLEMENT OVERVIEW

The Navajo Nation settlement provides benefits to the water rights owners in the San Juan Basin that would not be available without it. The Navajo Nation could assert a claim to a large quantity of water rights in the San Juan Basin, with a senior priority, which could displace existing water uses. Through settlement discussions, the State of New Mexico was able to negotiate a reasonable quantification of the water rights of the Navajo Nation by largely limiting the amount of the Navajo Nation's water rights to those already authorized under long-existing federal projects, while also placing restrictions on the exercise of those rights. One of the major benefits that the State was able to obtain is that the Navajo Nation's uses under the existing Navajo Indian Irrigation Project ("NIIP") and Animas La Plata Project ("ALP"), and the newly authorized Navajo Gallup Water Supply Project, which together comprise almost 90 percent of the Nation's diversion rights, will be administered with junior (1955 and 1956) priority dates rather than a senior priority date that could predate the 1868 date of the reservation the Navajo Nation could obtain in litigation. The Navajo Nation is also agreeing to share shortages with other users (including ALP) in times of drought and to first use up to 12,000 acre-feet per year ("afy") of stored water instead of making priority calls for the Fruitland-Cambridge and Hogback-Cudei irrigation projects (alternate water supply). This has the same effect as non-Navajo water users having access to 12,000 afy of storage rights since they will be able to continue using direct flows from the river while the Fruitland-Cambridge and Hogback-Cudei irrigation projects rely on water released from storage. These are all protections that are only afforded through a negotiated settlement.

The vast majority of the water rights for the Navajo Nation, of approximately 299,250 afy of consumptive use and 574,000 afy of diversion, is for existing federally authorized irrigation projects. Only 31,930 afy is for municipal, of consumptive use and domestic and industrial purposes. If you compare the amount of water to be delivered for irrigation per acre to that of similar irrigation projects in New Mexico, the amount of water per acre under the Navajo settlement is between 3.0 afy for NIIP to 3.3 afy for Hogback and Fruitland. This is comparable to the farm duty along the middle Rio Grande valley, which ranges from about 3.2 to 3.5 afy per acre.

Similarly, the amount of 31,930 afy for municipal and industrial uses for the Navajo Nation under the settlement is comparable to that of cities in the San Juan Basin. The amount of water for the Navajo Nation's municipal, domestic and industrial uses was based upon an average per-capita water use rate of 160 gallons-per-capita-per-day ("gpcd") projected through 2040. For comparison, based on the Office of the State Engineer's water use reports, the water use rates for the cities of Farmington, Aztec and Bloomfield averaged about 260, 226 and 147 gpcd, respectively, in 2000 and about 336, 162 and 161 gpcd, respectively, in 2005.

The settlement also contains restrictions on the Navajo Nation's ability to sell or lease water for use out of the state to help ensure that water is conserved for meeting water demands in New Mexico first. In addition to applying for a permit from the State Engineer to export water, as is the right of all water rights owners, under the settlement the Navajo Nation must first obtain a separate approval from the Interstate Stream Commission which is not required of any other water rights owners. Also, the Colorado River Compact and Upper Colorado River Basin Compact do not provide for marketing of water rights between the states in the Upper Basin and the Lower Basin, or between the Upper Basin states, so the Navajo Nation would not be able to sell water to cities in the Lower Basin states of Nevada or California.