



Chapter VIII

PERMITS, APPROVALS, AND REGULATORY REQUIREMENTS

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INTRODUCTION

This planning report and final environmental impact statement is intended to provide decisionmakers and the public with information regarding the environmental effects of the construction, operation, and maintenance of the proposed Navajo-Gallup Water Supply Project (proposed project), as part of the Bureau of Reclamation's (Reclamation) compliance with the National Environmental Policy Act (NEPA). In addition to NEPA compliance, a number of permits must also be obtained and/or complied with in order to implement the proposed project.

This chapter discusses the permits, approvals, and regulatory requirements that would be necessary for the construction, operation, and maintenance of the San Juan River Public Service Company of New Mexico (SJRPNM) Alternative. When future water uses (i.e., residential and commercial developments on Tribal lands) are implemented, NEPA compliance and similar regulatory requirements would have to be met as well; however, the specific regulatory requirements would vary depending on the developments proposed. These requirements are not detailed in this chapter.

Reclamation is required to ensure compliance with the Endangered Species Act (ESA), Clean Water Act (CWA), National Historic Preservation Act (NHPA) of 1966, Migratory Bird Treaty Act, Fish and Wildlife Coordination Act (FWCA), and Bald Eagle Protection Act. At the Federal level, required permits and approval authority outside of Reclamation's jurisdiction also include compliance with the Clean Air Act (CAA). Each of these statutes has been taken into account in the preparation of this document. The State of New Mexico and the Navajo Nation may require additional State-Tribal review.

ENDANGERED SPECIES ACT

Section 7 of the ESA, as amended, states that any project authorized, funded, or conducted by any Federal agency should not “. . .jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined. . .to be critical. . .” [16 USC 1536 9(a)(2)(1998)]. Reclamation is required to consult with the U.S. Fish and Wildlife Service (Service) to determine whether any federally listed or proposed endangered or threatened species or their designated critical habitat occur in the vicinity of the proposed project. If, upon review of the existing data, Reclamation determines that these species or habitats may be affected by the proposed action, Reclamation is required to prepare a biological assessment to identify the nature and extent of adverse impacts and to recommend mitigation measures that would avoid the habitat and/or species or that would reduce potential impact to acceptable levels. If, however, Reclamation determines that no federally listed or proposed endangered or threatened species or their designated critical habitat would be affected by the proposed project, no further action is necessary.

Consultation was initiated on the proposed project during the early planning stages. Formal consultation was initiated with the submission of a final biological assessment from Reclamation to the Service on August 22, 2005. Formal consultation was completed on February 26, 2009, with the Service’s issuance of a final biological opinion. The opinion is included as part III of appendix C in volume II.

CLEAN WATER ACT

Reclamation would submit applications to the U.S. Army Corps of Engineers under section 404 of the CWA for activities involving the discharge of dredge or fill material into waters of the United States. Where possible, Reclamation would request authorization under existing Nationwide or Regional General Permits. In the event that an individual 404 permit application is necessary, Reclamation would also request CWA section 401 (Water Quality Certification) from the State of New Mexico and the Navajo Nation Environmental Protection Agency. Section 404 permit conditions, including compensatory wetland mitigation requirements, would be incorporated as environmental commitments. Permit requirements normally include Best Management Practices to minimize and avoid impacts to water quality, wetlands, and special aquatic sites.

CULTURAL RESOURCE LAWS AND POLICIES

The NHPA, as amended, requires Federal agencies to identify cultural resources within areas of proposed Federal undertakings to assess the eligibility of such resources for

inclusion in the *National Register of Historic Places (National Register)* and to take steps to mitigate potentially adverse effects to cultural resource sites. Section 106 of the NHPA requires Reclamation to take into account the effects of its undertakings on properties listed on, or eligible for listing on, the *National Register*, including prehistoric or historic sites, districts, buildings, structures, objects, or properties of traditional religious or cultural importance, and to afford the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on the undertaking.

The criteria used to evaluate the cultural resource sites that might be affected by construction of the proposed project follow guidelines set forth by NHPA regulations for determining eligibility to the *National Register*. The process for determining the eligibility of a property must be evaluated referencing the *National Register* Criteria for Evaluation (36 CRF Part 60) in order to determine the property's eligibility to the *National Register*. The criteria are as follows:

- (1) Association with events that have made a significant contribution to the broad pattern of our history
- (2) Association with the lives of persons significant in our past
- (3) Embodiment of the distinctive characteristics of a type, period, or method of construction, or representing the work of a master, or possessing high artistic values, or representing a significant and distinguishable entity whose components may lack individual distinction
- (4) Having yielded, or having the likelihood to yield, information important in prehistory or history

All negative impacts, whether direct or indirect, to cultural resource sites that are eligible or recommended eligible or potentially eligible for inclusion on the *National Register* would be considered significant.

In accordance with ACHP procedures, Reclamation, as the lead agency, is required to consult with the appropriate State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officers (THPO), affected American Indian (Indian) Tribes/Tribal Nations, and other governmental entities on the potential effects of the undertaking on *National Register* listed or eligible cultural resources.

Another applicable law and policy includes the Navajo Nation Cultural Protection Act for Tribal lands. This includes following Navajo Nation policies concerning the protection of archaeological sites and traditional cultural properties and guidelines for the treatment of historic, modern, and contemporary abandoned and in-use sites.

In and around the city of Gallup, and on other privately held lands affected by the proposed project, certain provisions of the New Mexico Cultural Properties Act apply.

Preceding implementation of the proposed project, a programmatic agreement would be formulated with the ACHP, the New Mexico SHPO, the Bureau of Land Management, the Bureau of Indian Affairs, the city of Gallup, and the Navajo THPO. A programmatic agreement similar to the one developed for the Animas-La Plata Project would be signed by all parties prior to implementation of the proposed project. This programmatic agreement would set forth the procedures that must be followed in order to ensure compliance with cultural resource laws and policies.

The programmatic agreement would stipulate the procedures for development, review, and implementation of mitigation plans. It would describe measures to minimize and avoid impacts to cultural resources, such as in-place preservation, monitoring, distribution of information, and public and Native American involvement. If cultural resource sites could not be avoided and protected in-place, a program to compensate for losses to sites as a result of project construction would be needed. This program would include archaeological excavations and publications and reports detailing the findings of those excavations. All work would meet Archaeological Resource Protection Act Permit requirements and the permit requirements of other applicable jurisdictions.

Under the Native American Graves Protection and Repatriation Act (NAGPRA), the Navajo Nation Policy for the Protection of Jishchaa', and State burial laws, Federal agencies must consult with potentially affected Tribal Nations and/or State agencies, depending on land status, concerning the appropriate treatment and disposition of any gravesites or human remains and cultural items that may be encountered on the proposed project. Pursuant to these laws and policies, a NAGPRA Plan would be formulated prior to project construction.

OTHER REGULATORY REQUIREMENTS

In addition to Reclamation's requirements for a Record of Decision, other Federal, State, local, or Tribal regulatory agencies may have permit or approval authority over portions of the proposed project (table VIII-1). In addition, table VIII-2 lists contracts and agreements that may apply to the SJRPNM and NIIP Amarillo Alternatives.

Federal requirements of the CWA include compliance under sections 401 and 402. Water quality certification (section 401) has recently been delegated to the Navajo Nation. The Navajo Nation Environmental Protection Agency and/or Navajo Nation would determine if a National Pollutant Discharge Elimination System (NPDES) Permit (section 402) would be needed for discharges into Navajo Nation waters.

Ambient air quality is protected by Federal regulations under the CAA. These regulations include compliance under the New Source Performance Standards and the requirements for the Prevention of Significant Deterioration. The Federal permitting process for the CAA has been delegated to the Navajo Nation.

Table VIII-1.—Federal, State, local, and Tribal permit approval and consultation requirements

Agency	Permit/action	Agency action
Federal and Tribal		
Advisory Council on Historic Preservation	Section 106, NHPA of 1966–programmatically agreement	Provide comments to Reclamation’s identification of cultural resources within areas of proposed Federal undertakings and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites.
Council on Environmental Quality (CEQ)	NEPA compliance–environmental impact statement	Provide coordination with CEQ regulations (40 Code of Federal Regulations Parts 1500–1508).
Affected Indian Tribes/Tribal Nations	Secretarial Order 3175 and Indian Policy of Reclamation American Indian Religious Freedom Act of 1978, Executive Order 13007 of 1997 NAGPRA	Consult with Indian Tribal Governments on Indian Trust Assets. Identify and avoid impacts to sites sacred to the practice of Native American religion. Coordinate with Tribes/Tribal Nations. In conjunction with Tribes/Tribal Nations, involve project-area affected Tribes in developing a plan to treat Native American human remains encountered during project construction.
Affected Minority Groups and Low-Income Populations	Executive Order 12898, Environmental Justice, of 1994	Comply with Executive order.
U.S. Department of the Interior, U.S. Fish and Wildlife Service	FWCA Section 7, ESA Migratory Bird Treaty Act Bald Eagle Protection Act	Evaluate impacts; recommend mitigation for fish and wildlife habitat. Provide biological opinion on species of wildlife and plants that are federally listed; this act applies to all project features that may affect federally listed species or their critical habitats.
Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms	Explosive User’s Permit	Consider issuance of permits to purchase, store, and use explosives for site preparation during construction.

Table VIII-1.—Federal, State, local, and Tribal permit approval and consultation requirements (continued)

Agency	Permit/action	Agency action
Federal and Tribal (continued)		
Environmental Protection Agency	NPDES Permit (section 402), CWA	In conjunction with States and Tribes, review and issue NPDES Permit for discharges to State waters.
	Storm Water Discharge Permit, CWA	In conjunction with States and Tribes/Tribal Nations, review and issue Storm Water Discharge Permit for activities associated with construction activities.
	Section 401, Water Quality Certification, CWA	In conjunction with States and Tribes/Tribal Nations, consider issuance of Water Use and Crossing Permits.
	Section 404(r) Certification, CWA	
Department of the Army, U.S. Army Corps of Engineers	Section 404, CWA, permit issuance	Issue authorization for discharge of dredge or fill material into waters of the United States, including wetlands.
U.S. Department of the Interior, Bureau of Reclamation	Archaeological Resource Protection Act	Conduct archaeological excavations.
U.S. Department of the Interior, Bureau of Land Management	Rights-of-way construction approval	Consider issuing approval for the construction of the proposed project.
	Regulations of mining operations and gravel pits	Consider approval of activities involving construction of borrow pits.
U.S. Department of the Interior, Bureau of Indian Affairs (BIA) (with Tribal approval)	Rights-of-way construction approval	Consider issuing approval for the construction of the proposed project.
	Regulations of mining operations and gravel pits	Consider approval of activities involving construction of borrow pits.
	Road Crossing Permits	Consider issuance of permits for construction across BIA roads.
Navajo Nation Tribal Council	Rights-of-way construction approval	Consider issuing approval for the construction of the proposed project.
Navajo Nation Environmental Protection Agency	Water quality certification, CWA	Consider issuing certification for the construction of the proposed project.
	Air Quality Permit, CAA	Consider issuing permits or waivers for construction and operation emissions to the air.

Table VIII-1.—Federal, State, local, and Tribal permit approval and consultation requirements (continued)

Agency	Permit/action	Agency action
Federal and Tribal (continued)		
Navajo Nation Fish and Wildlife Department	Wildlife coordination, Navajo Nation Endangered Species Act	Consult on wildlife impacts involved with the construction of the proposed project.
Navajo Nation Historic Preservation Office	Section 106, NHPA of 1966; NAGPRA	Provide comments to Reclamation's identification of cultural resources within areas of proposed Federal undertakings, assess the eligibility of such resources for inclusion in the <i>National Register</i> , and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites.
Navajo Nation Department of Water Resources	Water use permit	Consider issuance of water use permit
Navajo Tribal Utility Authority (NTUA)	Transmission and powerlines	Consider issuance of permits for crossing and connecting to existing NTUA facilities.
Navajo chapters	Local approvals	Develop information-sharing process.
Indian Tribal Councils	Indian Self-Determination and Education Assistance Act (Public Law 638)	Consult on level of involvement for design and construction.
New Mexico		
New Mexico Bureau of Mines and Mineral Resources	Regulation of mining operations and gravel pits	Consider approval of activities involving construction of borrow pits.
New Mexico Department of Game and Fish	FWCA, State-sensitive species coordination	Make recommendations of activities involving State-listed sensitive species.
New Mexico Environment Department, Air Quality Bureau	Air Quality Permits, CAA	Consider issuance of permits or waivers for construction and operation emissions to the air.
New Mexico Environment Department, Surface Water Quality Bureau	Section 401, Water Quality Certification, CWA	Consider issuance of Water Use and Crossing Permits.
	NPDES Permit, Section 402, CWA	Review and issue NPDES Permit for discharges to State waters.
	Storm Water Discharge Permit, CWA	Review and issue Storm Water Permit for activities associated construction activities.
	River, Stream Crossing Permit	Consider issuance of permits for crossing rivers, streams, and lakes in New Mexico.

Table VIII-1.—Federal, State, local, and Tribal permit approval and consultation requirements (continued)

Agency	Permit/action	Agency action
New Mexico (continued)		
New Mexico Office of Cultural Affairs (SHPO)	Section 106, NHPA of 1966, NAGPRA	Provide comments on Reclamation’s identification of cultural resources within areas of proposed Federal undertakings, assess the eligibility of such resources for inclusion in the <i>National Register</i> , and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites. Coordinate on other Native American issues.
New Mexico Department of Transportation	Road Crossing Permits	Consider issuance of permits for construction across State roads.
New Mexico Office of State Engineer	Diversion and Water Use Permits	Consider issuance of permits or waivers for water users.
New Mexico Archaeological and Historic Preservation (SHPO)	Comply with State burial law	Acquire permit to perform excavations on State or private lands where burials are anticipated.
County and local agencies		
San Juan County Commissioners	Road use and crossings	Coordinate agreement.
San Juan County Planning Department	Use Permits	Consider approval of activities where use is conditional in a particular zone.
McKinley County Commissioners	Road use and crossings	Coordinate agreement.
McKinley County Planning Department	Use Permits	Consider approval of activities where use is conditional in a particular zone.
City of Gallup	Use Permits	Consider approval of activities where use is conditional in a particular zone.
County/city governments	Local approvals	Develop information-sharing process.

Table VIII-2.—Contracts, legislation, and agreements that may apply to the proposed project

Contract, legislation, or agreement	Purpose
Colorado River Compact of 1922, Public Law 84-485	Allocation and management of water between Upper and Lower Colorado River Basins.
Upper Colorado River Basin Compact of 1948	The compact apportions water of the Upper Basin to the States of Arizona, Colorado, New Mexico, Utah, and Wyoming and establishes certain obligations for the States of the Upper Division.
Colorado River Storage Project Act of 1956 (70 Stat. 105)	Authorized construction of Navajo Dam and Reservoir. The proposed project has potential to become a participating project of the Colorado River Storage Project (CRSP) Act.
Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Public Law 102-441 (Jicarilla Settlement Act)	The Jicarilla Apache Nation established legal rights to San Juan River Basin water rights that are based on the (1) 33,500 acre-foot per year (AFY) diversion and 25,500 AFY depletion from Navajo Reservoir or River and (2) 6,500 AFY diversion or 6,500 AFY depletion from the San Juan-Chama Project.
The Navajo Nation Treaty of 1849	Treaty placed Navajo people under the jurisdiction of the United States and ceased hostilities and promised perpetual peace.
Treaty of 1868	Navajo Nation lands were specifically set aside in the Treaty of 1868 (15 Stat. 667). An earlier treaty, signed and ratified in 1850 (9 Stat. 974), promised the Navajo people the designation of territories for their benefit.
Navajo Indian Irrigation Project (NIIP), Public Law 87-483	Public Law 87-483 (76 Stat. 96) authorized the Secretary of the Interior to construct, operate, and maintain the NIIP and initial stages of the San Juan-Chama Project as participating projects of the CRSP and for the purposes of furnishing water for the irrigation of irrigable and arable lands and for municipal, domestic, and industrial uses, providing recreation and fish and wildlife benefits, controlling silt, and other beneficial purposes. The Navajo Nation has a Navajo Reservoir water supply contract with the United States for the delivery of water to the NIIP for the principal purpose of furnishing irrigation water to 110,630 acres of land. The San Juan-Chama Project makes the average annual diversion of about 107,524 AFY from the upper tributaries of the San Juan River possible and conveys the water into the Rio Grande Basin in New Mexico.
Secretarial Contract No. 14-06-W-269	Agreement between the United States and Navajo Tribe of Indians for delivery of water from Navajo Reservoir, dated April 10, 1976.
Navajo-Gallup Water Supply Project	The Navajo Nation and the city of Gallup signed a Memorandum of Agreement on April 17, 1998, to proceed with project planning and resolve issues related to project development (attachment A). The Navajo Nation and the city of Gallup also executed a Memorandum of Understanding in October 2007 concerning water supplies for the proposed project (attachment B).

Table VIII-2.—Contracts, legislation, and agreements that may apply to the proposed project (continued)

Contract, legislation, or agreement	Purpose
<p>Omnibus Public Land Management Act of 2009, Public Law 111-11</p>	<p>The proposed project authorization was included in the recently enacted Omnibus Public Land Management Act of 2009, title X, part III (Public Law [P.L.] 111-11, March 30, 2009) (attachment P). The act authorizes the Secretary of the Interior (Secretary) to:</p> <ol style="list-style-type: none"> 1. Construct, operate, and maintain the proposed project 2. Allocate the capacity of the proposed project among the Navajo Nation and the city of Gallup 3. Enter into proposed project repayment contracts with the city of Gallup and the Jicarilla Apache Nation <p>In general, the Secretary, acting through the Commission of Reclamation, is authorized to design, construct, operate, and maintain the proposed project in substantial accordance with the preferred alternative in the draft environmental impact statement.</p> <p>The Omnibus Public Land Management Act of 2009 (P.L. 111-11) approved, ratified, and confirmed the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (Navajo Settlement Agreement) under title X, part IV of the act. This planning report and final environmental impact statement does not analyze the Navajo Settlement Agreement; however, the act requires that all proposed project features shall be completed no later than December 31, 2024. Under the act, the Secretary shall execute an agreement consistent with the provisions of the act by December 31, 2010.</p>
