

Comment TG-04

navgal navGAL - Comments re PR/DEIS

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From: "Daryl Vitale" <dvitale@greenelawyer.com>
To: <navgal@uc.usbr.gov>
Date: Thu, Jun 28, 2007 4:52 PM
Subject: Comments re PR/DEIS

Attached are the Comments of the Southern Ute Indian Tribe on the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project (Mar. 2007).

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CC: "Cathy Condon" <ccondon@greenelawyer.com>

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Via E-mail and U.S. Mail

June 28, 2007

Rege Leach
Bureau of Reclamation
Western Colorado Area Office
835 East Second Avenue, Suite 300
Durango, CO 81301

Re: Comments of the Southern Ute Indian Tribe on the Planning Report and Draft
Environmental Impact Statement for the Navajo-Gallup Water Supply Project (Mar. 2007)

Dear Mr. Leach:

On behalf of our client, the Southern Ute Indian Tribe (the "Tribe"), we submit the following comments on the March 2007 Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project ("DEIS"). The Tribe strongly supports the Navajo-Gallup Water Supply Project ("Proposed Project") which is a component of the New Mexico-Navajo Nation Water Rights Settlement Agreement. The Tribe supports the efforts of other Tribes in settling their water rights claims. The Tribe also appreciates the support the Navajo Nation gave to the Tribe with respect to the Colorado Ute Indian Water Rights Settlement.

The Tribe is concerned, however, that the Bureau of Reclamation ("Reclamation") has not adequately analyzed or mitigated the impacts on the Tribe's own water rights. While the Tribe supports the Proposed Project to fulfill the United States' commitment to the Navajo Nation, the Tribe is concerned that Reclamation has not adequately analyzed the impacts to the Tribe's trust assets. In addition to the attached comments provided by Dr. Miller,¹ the Tribe has the following concerns with respect to the DEIS's description of the Proposed Project: (1) Reclamation's description of the environmental baseline; (2) Reclamation's analysis of the effects of the Proposed Project on the Tribe's waters rights; (3) the U.S. Fish & Wildlife Service's ("F&WS") seemingly sole reliance on the flow recommendations, rather than the San Juan River Basin Recovery Implementation Program ("SJRRIP"), in its analysis of the Proposed Project as set forth

¹See Memorandum of William J. Miller, Miller Ecological Consultants, Inc., to Catherine Condon, Greene, Meyer and McElroy (June 21, 2007), which is incorporated herein by reference.

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in the Draft Biological Opinion ("Draft BO"), DEIS, Appendix C; and (4) the description of the proposed depletion guarantee.

I. THE TRIBE'S WATER RIGHTS IN THE SAN JUAN RIVER BASIN

The Colorado Ute Indian Water Rights Final Settlement Agreement ("Settlement Agreement") was signed on December 10, 1986, and quantified the Colorado Ute Tribes' water rights from several rivers and projects, including the proposed ALP Project. The ALP Project included 29,900 AF per year (26,500 AF per year of M&I water and 3,400 AF per year of agricultural irrigation water) for the Southern Ute Indian Tribe, and 32,300 AF per year (6,000 AF per year of M&I water and 26,300 AF per year of agricultural irrigation water) for the Ute Mountain Ute Tribe. The Settlement Agreement was subsequently amended to eliminate the irrigation component and reduced the proposed water depletions and allocations for the ALP Project facilities required for settlement of the Tribe's rights. *See Colorado Ute Settlement Act Amendments of 2000.*

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The Settlement Agreement also quantified water rights on rivers in the San Juan and Dolores Basins other than the Animas and La Plata Rivers. With respect to the Southern Ute Indian Tribe, these water rights include the following:

1. On the Pine River, the Tribe retained its reserved water right with an 1868 priority date for 181.7 cfs, as set forth in the 1930 federal decree and 1934 state decree, and was allocated a 1/6th interest in Vallecito Reservoir.
2. On the Florida River, the Tribe was allocated 563 AF per year of Florida Project water (in addition to the 2,000 AF per year previously allocated) and 1,090 AF per year of non-project reserved water rights.
3. On Stollsteimer Creek, the Tribe received a reserved water right with an 1868 priority date for storage of 1,850 AF per year in Pargin Reservoir, a reserved water right with a 1986 priority date for one refill in Pargin Reservoir in the amount of 1,850 acre-feet and two reserved water rights for a total of 5.5 cfs from Stollsteimer Creek.
4. On the Piedra River, the Tribe received a reserved water right with an 1868 priority date for direct flow diversions of 1,595 AF per year.
5. On Devil Creek, the Tribe received a reserved water right with an 1868 priority date subordinated to all rights with an adjudication date prior to 1976 for direct flow diversions of 183 AF per year.
6. On the San Juan River, the Tribe received a reserved water right with an 1868 priority date for direct flow diversion of 1,530 AF per year.

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7. On Round Meadow Creek, the Tribe received a reserved water right with an 1868 priority date for direct flow diversions of 975 AF per year.
8. On Cat Creek, the Tribe received a reserved water right with an 1868 priority date for direct flow diversions of 1,372 AF per year.

See Final Supplemental Environmental Impact Statement - Animas-La Plata Project, Table 1-1 (July 2000).

The District Court, Water Division 7, State of Colorado, issued various consent decrees adjudicating these rights. Some of the Tribe's settlement water rights are currently being put to use, while some are not. In every instance, however, water rights with types of uses, diversion points and places of use are identified in the relevant decrees.

II. ALL OF THE TRIBE'S SETTLEMENT WATER RIGHTS SHOULD BE IN THE ENVIRONMENTAL BASELINE FOR THE SAN JUAN RIVER BASIN

Table V-3 reflects the best available estimates of the existing and future projects that have valid water rights and environmental clearances and are included as depletions in the existing environmental baseline. DEIS at V-11 - V-12. The Tribe's ALP water rights are clearly in the baseline, together with all of its settlement water rights that are currently put to use. What is not clear from the information provided in the table is whether the Tribe's unused settlement water rights are in the baseline. Further confusion is provided by the statement that the "Colorado Ute Tribes have approximately up to 36,104 acre feet of future use direct diversion and groundwater that *may* not be included in the existing ESA baseline." DEIS at V-29 (emphasis added).

The Colorado Water Conservation Board contends that all of the Tribe's settlement water rights are in the environmental baseline. See letter from Colorado Water Conservation Board to Rege Leach (June 28, 2007). The Tribe agrees. If they are not in the environmental baseline, they are required to be included to implement the Tribe's settlement in much the same way as this Proposed Project is intended to implement the Navajo Nation's settlement. All of these rights are decreed water rights. The Tribe has met all the requirements necessary for these waters to be in the environmental baseline. It was agreed when the SJRRIP was established that the States would decide what water rights would constitute the baseline.

Assuming that all of the Tribe's water rights are in the environmental baseline, then the Proposed Project can move forward with little or no effect to the Tribe's trust resources. Table V-3 and the language set forth in the DEIS, however, must be revised to indicate that all of the Tribe's water uses are in the environmental baseline.

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**III. RECLAMATION HAS A TRUST RESPONSIBILITY
TO THE SOUTHERN UTE INDIAN TRIBE
TO PROTECT THE TRIBE'S WATER RIGHTS**

As an agency of the federal government, Reclamation has a trust responsibility to all Indian tribes and tribal members, including the Southern Ute Indian Tribe and its members:

The United States has a trust responsibility to protect rights reserved by or granted to Indian Tribes by treaty, statutes, and Executive orders. This trust responsibility requires that Federal agencies such as Reclamation take actions reasonably necessary to protect ITAs. Interior Secretarial Order Number 3215, dated April 28, 2000, further states:

The proper discharge of the Secretary's trust responsibility requires, without limitation, that the Trustee, with a high degree of care, skill, and loyalty: Protect and preserve Indian Trust Assets from loss, damage, unlawful alienation, waste, and depletion.

DEIS at V-19. *See also* Attachment 5, Bureau of Reclamation, Indian Trust Asset Policy (Aug. 31, 1994) in Protection of Indian Trust Resources (notebook on file with the Department of the Interior).²

The Indian Trust Assets entitled to protection under the trust responsibility include water rights. *See id.* Thus, Reclamation has a trust responsibility to take all actions reasonably necessary to protect the Tribe's water rights, including its historic, existing and future use water rights. In fact, the United States' trust responsibility to the Tribe is of "the highest fiduciary standards," *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 678 (1986), *aff'd*, 877 F.2d 961 (Fed. Cir. 1989),³ and it does not wane because Congress has imposed upon it additional statutory obligations. *Nevada v. United States*, 463 U.S. 110, 128 (1983). Certainly, the United States may not subordinate its trust responsibility to protect the Tribe's water rights by claiming that it must protect the Navajo Nation's water rights.

²In February 1996, then Secretary of the Interior Babbitt and Assistant Secretary Deer transmitted to Interior employees a compilation of the policies and procedures adopted by the bureaus and offices of the Department of Interior relating to trust protection practices. This compilation notebook is referred to herein as "Protection of Indian Trust Resources."

³*See also In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 74 (Ariz. 2001).

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The Department of the Interior (“Department”) and Reclamation have adopted policies and procedures to ensure that their actions comply with the trust responsibility. The Department’s policy states:

It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.⁴

512 DM 2.2 (Dec. 1995).

The Department’s procedures implementing this policy require that “[a]ny effect [on Indian trust resources] must be explicitly addressed in the planning/decision documents, including, but not limited to . . . Environmental Impact Statements . . .” 512 DM 2.4(A). Such documents “shall . . . [e]xplain how the decision will be consistent with the Department’s trust responsibility.” 512 DM 2.4(A)(2).

Thus, if certain of the Tribe’s water uses are not in the baseline, the DEIS must explicitly address the Proposed Project’s impacts on the Tribe’s water rights and explain how the Proposed Project will be consistent with Reclamation’s responsibility to protect these water rights. To the extent that significant adverse impacts from the Proposed Project cannot be avoided, mitigation must be implemented to ensure that there is no interference with the Tribe’s ability to exercise its water rights. In other words, Reclamation must ensure that those uses will not be lost by allowing the Proposed Project to move forward.

3

IV. THE BIOLOGICAL OPINION NEEDS TO RECOGNIZE THE ROLE OF THE SAN JUAN RIVER BASIN RECOVERY IMPLEMENTATION PROGRAM AND NOT RELY SOLELY ON MEETING THE FLOW RECOMMENDATIONS FOR RECOVERY OF THE ENDANGERED FISH

The SJRRIP was established in 1991. The goals of the SJRRIP are to conserve populations of the Colorado pikeminnow and razorback sucker in the Basin consistent with the recovery goals while allowing water development to proceed in compliance with federal and state laws, interstate compacts, Supreme Court decrees, and federal trust responsibilities to the Southern Ute Indian Tribe, Ute Mountain Ute Tribe, Jicarilla Apache Nation and the Navajo Nation. On June 19, 2002, the Coordination Committee, SJRRIP, adopted the *Principles for Conducting Endangered Species*

⁴While Reclamation claims that it is in the process of consulting with the Tribal governments to identify and address the Indian Trust Asset issues and concerns, DEIS at V-20, Reclamation has not consulted with the Tribe.

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Act Consultations on Water Development and Water Management Activities Affecting Endangered Fish Species in the San Juan River Basin ("Principles").

The depletion guarantee appears to be inconsistent with the Principles. These Principles provide the framework for consultations on new and existing water development and water activities in the Basin. Use of the depletion guarantee, in order to facilitate the modeling of the Proposed Project relative to the flow recommendations, does not adequately recognize the greater role of the SJRRIP as a whole, as the reasonable and prudent alternative for water development in the Basin.

4

If the Draft BO and DEIS had relied on the SJRRIP as a whole as part of the approach to mitigating impacts from the Proposed Project, rather than just using the depletion guarantee in order to ensure that the critical elements of the flow recommendations were met, it would have been consistent with the Principles. Because the Proposed Project includes a depletion guarantee to ensure it meets the critical elements of the flow recommendations, it is possible that the next proposed project will exceed the flow recommendations. Although the actual implications of not meeting the flow recommendations have yet to be determined, it is believed that not meeting the flow recommendations will, at the least, create problems for implementing a proposed project and may result in a jeopardy opinion.

5

**V. THE DEIS AND THE DRAFT BO NEED TO BE REVISED
TO CLARIFY HOW AND WHEN THE
DEPLETION GUARANTEE WILL BE TRIGGERED**

The Tribe is aware that concerns have been expressed regarding the depletion guarantee as described in the Draft BO which seems to imply that depletions will be borrowed from other unused water users in the Basin. Draft BO at 8-9. However, it is the Tribe's understanding that the depletions set aside for the other unused water users in the Basin have not been permanently allocated to the Navajo Nation's Proposed Project. Rather, once the Navajo Nation's depletions reach a certain level, the depletion for the Proposed Project will be offset by unused Navajo Nation depletions in the Basin. It is also the Tribe's understanding that the depletion guarantee is not binding on the use of water by any person or entity, other than the Navajo Nation.

6

The language defining the depletion guarantee is not as clear as it needs to be. Thus, the language must be revised. It is the Tribe's understanding that this issue is currently being discussed with the Navajo Nation and other water users in the Basin and that the parties intend to amend the language accordingly. If the language is modified to adequately reflect our understanding of how the depletion guarantee will be implemented, the Tribe has no further comments. However, in the event that the depletion guarantee issue is not resolved, the Tribe reserves the right to provide additional comments.

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VI. CONCLUSION

The Tribe does not wish to unduly delay issuance of the final environmental impact statement ("FEIS") for the Navajo-Gallup Water Supply Project. Indeed, the Tribe supports the Proposed Project. However, the Tribe believes that it is essential that Reclamation fully address the above-described issues regarding baseline depletions, the depletion guarantee, disclosure of impacts and sufficiency of mitigation for the FEIS to meet the intent and the legal requirements of NEPA and the trust responsibility. The Tribe would like to meet with Reclamation as soon as possible to discuss these comments and their resolution.

Sincerely,

A handwritten signature in cursive script, reading "M. Catherine Condon".

M. Catherine Condon

MCC/dav

enc. Memorandum of William J. Miller, Miller Ecological Consultants, Inc., to Catherine Condon, Greene, Meyer and McElroy (June 21, 2007)

cc: Clement Frost, Chairman
Jim Formea
Chuck Lawler
Steve Whiteman
William J. Miller
Monte Mills

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2111 S. College Ave., Unit D
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(970) 224-4505

MEMORANDUM

Date: June 21, 2007

To: Catherine Condon, Greene Meyer and McElroy
From: William J. Miller, Miller Ecological Consultants, Inc.
CC: Steve Whiteman, Chuck Lawler, SUIT
Subject: Comments on Navajo-Gallup Water Supply Project Draft EIS

My comments on the above referenced document are limited to the sections on Aquatic Resources, Special Status Species and the Draft Biological Opinion.

General Comments:

The supportive data used for the DEIS Aquatic Resources is generally from reports written in 2000 for data collected in 1999. The SJRBRIP has a monitoring program that occurs annually. It would be more appropriate to determine impacts using either the most recent final annual report (i.e. 2005) rather than rely on the older data sets. There should be a thorough review of the numbers stated for species occurrence. The current number of species varies within a page and even within a paragraph for the same species category. A table of the species with a designation as native or non-native would correct this inaccuracy.

7

There is very little detail and no supportive information to verify any of the stated impacts to aquatic species. The technical memorandum or report that contains the analysis relied on for the stated impacts should be attached as an appendix. A report titled "Ecosystems Research Institute 2003. Navajo-Gallup Water Supply Project Aquatic Disturbance, U.S. Department of the Interior, Bureau of Reclamation" cited by the US Fish and Wildlife Service in the Fish and Wildlife Coordination Report may contain that analysis. The Biological Assessment for the project should be included as an appendix.

8

The report needs a thorough review by an editor for clarity and consistency.

Specific Comments:

Aquatic Resources Page V-63 : The number of fish species listed is inconsistent in this section. Paragraph one states 8 native species and 19 non-native species occur. These numbers total 27 species. The paragraph states there are 26 species. The "Native Fishes" paragraph states "seven" native species which differs from the "8" species stated above. The paragraph also states "four native" and "five rare or endangered native," which totals to nine species. List the species in a table and then insert the correct numbers in the paragraphs.

9

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Aquatic Resources Page V-64: Only two native species are described, page V-63 stated four would be described. The “Non-native fishes” paragraph states “twenty-one non-native fish.” This differs from the “19 non-native species” stated on page V-63. The statement that “12 non-native species are spiny-rayed and pose a documented choking hazard” is incorrect. Only channel catfish were documented as a choking hazard in the report cited in the DEIS. The DEIS should be revised to correct this statement.

9

Aquatic Resources, Page V-68: The first partial paragraph should be edited to clarify the statement regarding the duration of time the 2500 cfs criteria are missed.

10

Aquatic Resources, Page V-69: A report by Propst et al. (2003) is cited as the source for the amount of loss due to entrainment. That report did not calculate entrainment but report abundance of small bodied fish. What data was used and how were the entrainment values calculated? The calculation methodology and data should be included for review.

11

The third full paragraph describes loss of flannelmouth and bluehead larvae. Bluehead sucker have not been previously discussed in this section but should be added.

Aquatic Resources, Page V-70: The DEIS concludes that the NIIP Amarillo Alternative will have no effect on the native fish community or trout habitat below Navajo Dam. Yet the DEIS states that this alternative would have more impact on the flow recommendations than the SJRPNM alternative. It would seem that if the alternative has more impact on the flow recommendations, which were derived to benefit the native fish community, then there would be a greater impact to the native fish community.

12

Aquatic Resources, Page V-71: The aquatic mitigation measures are listed as BMPs for water quality and monitoring and reporting depletions. How does monitoring a depletion, which equates to a direct loss of aquatic habitat, mitigate for the loss? Reporting the loss does not offset the loss. The mitigation measure that offsets the loss in aquatic resources should be stated in this section.

13

Aquatic Resources, Special Status Species: This section is generally lacking in detail to support the stated conclusions. Several of the aquatic species are not fully described as to occurrence in the project area (past and present) nor are the potential impacts (or lack thereof) fully documented. As such, this section lacks credibility and major revisions should occur prior to the FEIS. As an example, the Impact Analysis for the SJRPNM alternative (page V-85) refers the reader to the Biological Assessment for detailed information. The Biological Assessment was not included as an attachment to the DEIS. It should be provided.

14

Several citations used as the basis for a statement do not support the statement. For example, the discussion of bluehead sucker impacts on page V-87 cites Propst et al. 2003 as the source for the number of Age 1+ individuals, yet the discussion is the entrainment of larval fish. The DEIS should use data from adult monitoring and larval studies in the San Juan River not just the immature fish, which are larger than could be entrained by the diversion.

15

There are no proposed mitigation measures to offset the loss the special status aquatic species.

16