

**Navajo Nation Water Rights in the New Mexico San Juan Basin:  
Stakeholders, Progress, and Recommendations for the Future**



<https://intvkrqe.files.wordpress.com/2016/06/balloon-rally.jpg?w=650&h=366>

Photo: The San Juan Balloon Rally in Bloomfield, New Mexico

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ECL 290 – Prof. Schwartz & Prof. Pinter

## Introduction

Grand Canyon National Park (GCNP) is a world-renowned destination for tourism and outdoor recreation in the American Southwest. In 2017 GCNP had 6,254,238 visitors, and approximately 25,000 of those visitors came from 56 countries to spend time at the park's hallmark feature - the Colorado River (NPS, 2018; Sullivan, 2018). The Colorado River Basin (the Basin) is much grander than GCNP in that its reach spans seven states and touches two countries (USBR, 2012). It is one of the most critical sources of water in the American West because it is the lifeline for almost 40 million people (USBR, 2012). The Colorado River is inarguably a national treasure. Moreover, scholars and recreators alike must recognize that the Basin has been the livelihood and home of the Navajo people, and 21 other native tribes, for nearly 600 years (Loeffler & Loeffler, 2012).

Although thousands have the modern privilege to enjoy recreational activities along the Colorado River, it is humbling to remember that there are indigenous people forced to live without basic human needs within the same river basin (Birdsong, 2011). Native American tribes have historically suffered injustice at the hands of colonizing nations (Loeffler & Loeffler, 2012). Centuries of imperialism eventually lead to resource control and depletion within the basin and have since violated the modern human right to clean drinking water for the Navajo people, among other native tribes (Birdsong, 2011; Loeffler & Loeffler, 2012). However, recent court rulings and legislation regarding Native American water rights in the Basin have begun to change the status quo (Birdsong, 2011; Leeper, 2013; Marsh & Smith, 2015).

The *Winters V. United States (1908)* court ruling granted Native American tribes the federal right to water on their designated reservations (Marsh & Smith, 2015). Unfortunately, 110 years later, there is no standard process by which all Native American tribes can quantify or obtain their water (Marsh & Smith, 2015). Some experts herald independent settlements as a streamlined option for tribes to quantify and obtain “wet water,” or, a detailed plan of the funding and methods necessary to obtain water (Birdsong, 2011). This paper critiques the notion that settlements are efficient and fast. It does this with an in-depth case study of a settlement that allocated Native American water rights within the Colorado River's Upper Basin.

The central focus of this paper is the San Juan River Basin Navajo Nation Water Rights Settlement in New Mexico (the Settlement). It documents the arduous process by which the Navajo Nation has taken to claim its water rights in the southeastern part of the Colorado River's Upper Basin. The case study: (1) navigates the Settlement's timeline, (2) identifies the Settlement's key stakeholders, and (3) examines shortcomings in settlement enactment. Since settlements are the “gold standard” for Navajo Nation groups in the Basin, the paper also discusses and suggests potential solutions to mitigate delays in future water settlements and policy. It challenges the idea that settlements, in their current form, are a streamlined process of quantifying water rights. Finally, this paper overarchingly situates the Navajo Nation's modern battle for Native American life.

## Background

### *Significance of the San Juan River Basin*

The San Juan River Basin is part of the Colorado River's Upper Basin (the Upper Basin), and it is in the four-corners border region of New Mexico, Arizona, Utah, and Colorado (Figure 1) (USGS, 2000). The San Juan River originates as snowpack in the Rocky Mountains of Colorado, and its water meets the Colorado River in Glen Canyon, Utah (Chischilly, 1993). The San Juan River itself is integral to the Basin because it is the Colorado River's second largest tributary (Chischilly, 1993). Consequently, water allocations and decisions made within the San Juan River Basin can heavily impact water users downstream in the Colorado River's Lower Basin.



Figure 1. Map of the Colorado River Basin with other Inner Basins (USGS, 2000)

### *Legal Foundation for Native American Water Rights*

Native American tribes in the American Southwest began to lose sovereignty over their ancestral resources and lands about 400 years ago (Loeffler & Loeffler, 2012). Furthermore, they did not have a platform by which to seek their legal claim to water on their lands until 110 years ago (Marsh & Smith, 2015). In *Winters v. United States (1908)*, the United States Supreme Court ruled that the federal government ceded lands to Native American tribes to establish “civilized” communities (Marsh & Smith, 2015). The court upheld the notion that the new communities, or reservations, could not be “civilized” without water for irrigation, and therefore, Native American tribes held a legal right to the water on their reservations (Marsh & Smith, 2015). Judith Jacobsen (1992), a former geography professor at the University of Wyoming, highlights that this legal right to water begins on the date of reservation creation.

## The San Juan River Basin Navajo Nation Water Rights Settlement in New Mexico

### *Early Discussions*

The *Winters V. United States (1908)* case confirmed that Native American tribes had a federal right to water on their reservations; however, it lacked information for successful implementation (Jacobsen, 1992). The ruling did not provide direction on how to quantify Native American water rights, and it did not mandate federal, state, or local governments to immediately establish water allocations or adjudications for reservations (Marsh & Smith, 2015). The Colorado River Compact of 1922 held promise in that it allocated water between the Upper and Lower Basins (Birdsong, 2011). Unfortunately, the legislation actively excluded Native American tribes from receiving allocations from the Colorado River (Birdsong, 2011). As a result, the Navajo Nation was unsuccessful in broaching dialogue around its water rights for nearly 54 years.

The Navajo Nation's first chance to have a formal discussion about their water rights in the San Juan River Basin occurred in 1957 (Jacobsen, 1992). Interests in the Rio Grande Basin and the San Juan River Basin were irreconcilable until the Navajo agreed to give up 110,000 acre feet of water per year (Jacobsen, 1992). Thus, Congress authorized the Navajo Indian Irrigation Project (NIIP) in 1962 to increase access to water from the San Juan River (Jacobsen, 1992). Some legal experts claimed that the Navajo Nation quantified its water rights to the San Juan River Basin during NIIP negotiations because it ceded its rights to 110,000 acre feet of water per year (Jacobsen, 1992).

Jacobsen (1992)'s research into the history of Native American water rights revealed that the NIIP was not a complete adjudication of Navajo rights to the San Juan River. She argued that the NIIP's terms did not align with stipulations set by *Winters V. United States (1908)* because it set a priority date of 1957 for the Navajo Nation's water. The Navajo Nation's reservation was created in 1868, and therefore, the priority date would have needed to be 1868 for the NIIP to meet *Winters V. United States (1908)* conditions (Jacobsen, 1992). Furthermore, *Arizona V. California (1963)* created the foundation for water quantification with the term "practicably irrigable acreage" (PIA) (Jacobsen, 1992). The NIIP was ratified a year prior to the *Arizona V. California (1963)* ruling, and as a result, Jacobsen (1992) argues that there was no way to legally quantify the Navajo Nation's water rights in the San Juan River Basin.

The Navajo, Jicarilla Apache, the Ute Mountain Ute, and private water users continued to have disagreements about water claims for the San Juan River despite the progress of the NIIP. In response, New Mexico's state engineer filed the San Juan River's general stream adjudication in 1975 (Jacobsen, 1992). General stream adjudications are court proceedings that focus on the water claims disputes (Perramond, 2013). Importantly, these adjudications also allow all water users in a "system" to contest the rights of other users (Perramond, 2013). The result of a general stream adjudication is a final judicial determination of all parties' water rights within a system (Perramond, 2013). The San Juan adjudication seemed like progress for the Navajo Nation's ability to assert its water rights, however, 20 years would pass until the next step of progress.

### *From Settlement Discussions to Federal Legislation*

Despite the filing of the San Juan River's general stream adjudication in 1975, the Navajo Nation was unable to advance its cause for decades. This was problematic because some of the Navajo were underserved, or not served at all, in terms of access to clean drinking water, and yet they were entitled to water on their land (Birdsong, 2011; Marsh & Smith, 2015). The Navajo Nation's President Hale personally contacted New Mexico's Governor Johnson to reinstate negotiations for a formal settlement in 1996 (State of New Mexico, 1997; Leeper, 2013). Again, it was almost a decade before the final document, "San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement," was furnished for the federal government's review (State of New Mexico, 2005). Negotiations took so long that the signing Navajo President and New Mexico Governor were different from those who began the formal conversation (State of New Mexico, 2005). Still, the settlement agreement would quantify all the Navajo Nation's water rights in the San Juan River Basin, including the NIIP, if passed by congress.

The Settlement reached congress in 2006, but further obstacles prevented its ratification (Leeper, 2013). There were some expected delays such as the fact that the document needed to wait its turn in the congressional agenda, and it could only be discussed while congress was in session. Nevertheless, the document underwent many revisions due to disagreements about diversions for projects, language that did not favor private sector interests, and costs (Leeper, 2013). In 2009, the 111<sup>th</sup> Congress approved the settlement under the "Northwestern New Mexico Rural Water Projects Act," and U. S. President Obama signed it into federal law (Leeper, 2013). The adjudication itself was not finalized until New Mexico Appeals Court Judge Wechlser signed his final partial judgment and decree to uphold the Settlement in 2013 (State of New Mexico V. The United States of America, NM. App. 11d 2013b). Thus, it took almost 50 years of negotiations, court cases, and renegotiations for the Navajo Nation to have quantified water rights in the San Juan River Basin. The final amount was 633,532 acre feet per year in diversions (Pollack, 2014).

### **Settlement Stakeholders**

One might wonder how it took five decades for the Navajo Nation, the State of New Mexico, and the United States to quantify Navajo water rights in the San Juan River Basin. A glance at the different settlement stakeholders would solve this mystery. Aside from the three main parties, one can group the other stakeholders into four interest-categories: Native American tribes, major cities, natural resource companies, and water associations, districts, and ditches (Figure 2) (State of New Mexico V. The United States of America, NM. App. 11d 2009). Many of these stakeholders delayed the process by filing lawsuits and appealing court decisions over the course of those 50 years.

There were four main parties who opposed and did not settle with the final adjudication: Community Ditch, B-Square Ranch, Gary L. Horner, Robert E. Oxford (State of New Mexico V. The United States of America, NM. App. 11d 2013a). The Community Ditch party largely represented water associations, districts, and ditches. According to the B-Square Ranch website (2004), the entity is a privately-owned "12,000 acre... private wildlife refuge, working farm and ranch, and home of two museums." Gary L. Horner and Robert E. Oxford are both attorneys in

New Mexico who represented an amalgamation of individual water users. The most active groups who opposed the settlement were: the San Juan Agricultural Users Association (SJAUA), the Hammond Conservancy District, and the Bloomfield Irrigation District (State of New Mexico V. The United States of America, NM. App. 11d 2013a). These parties all oppose the settlement because they believe that it will negatively impact their current and future use of water from the San Juan River.

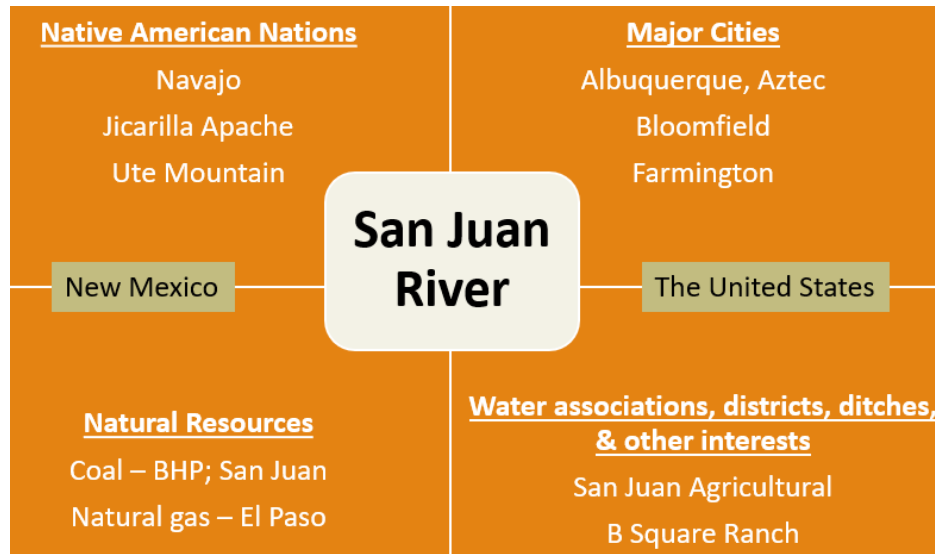


Figure 2. San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Key Stakeholders (State of New Mexico V. The United States of America, NM. App. 11d 2009)

### Settlement Shortcomings

To begin, the way a settlement becomes enacted can impact future settlements that quantify Native American water rights. In the case of the San Juan River Basin Navajo Nation Water Rights settlement, some question New Mexico's former Governor Richardson and his authority to sign the settlement. The parties who oppose the Settlement claim that it is null and void because New Mexico's state legislature did not sign it into law. The opponents are so unwilling to allow the Navajo Nation to claim their water rights that they successfully lobbied the support of three state representatives: Rep. Paul Bandy (R), Rep. Carl Trujillo (D), and Sen. Steve Neville (R) (State of New Mexico V. The United States of America V. San Juan Agricultural Water Users Association, et al. V. Navajo Nation, 2016).

Consequently, the SJAUA and their supporters filed a legislative supreme court lawsuit in 2016 (SJAUA, 2018). It argued that only the New Mexico state legislature has constitutional power to bind the state to agreements with other states or Native American tribes (State of New Mexico V. The United States of America V. San Juan Agricultural Water Users Association, et al. V. Navajo Nation, 2016). The plaintiffs maintained that the *Clark V. Johnson (1995)* court ruling granted the New Mexico state legislature exclusive authority to sign the state into such agreements (State of New Mexico V. The United States of America V. San Juan Agricultural Water Users Association, et al. V. Navajo Nation, 2016). Even though their lawsuit was declined in 2016, they immediately filed an appeal with the New Mexico Court of Appeals

(SJAUA, 2018). The New Mexico Court of Appeals is due to hear the case in 2018. Nonetheless, SJAUA and their supporters filed a motion on February 27, 2018 to remove Judge Wechlser from the original Settlement case due to bias (SJAUA, 2018). Judge Wechlser upheld the San Juan River Basin Navajo Nation Water Rights Settlement and signed the adjudication in 2013 (State of New Mexico V. The United States of America, NM. App. 11d 2013b). So, although the settlement is part of federal law, opposing stakeholders continue to contest its enactment.

The opposition are not alone in their despair because Native American tribes can also suffer losses with water settlements. This may not be apparent, but the language and terms used in settlements can negatively impact a tribe's ability to reach an equitable settlement in other areas. In the case of the San Juan River Basin Navajo Nation Water Rights settlement, the language specifically limits the Navajo Nation's rights in other water basins and states. The approved settlement maintains that Navajo Nation water rights cannot be "exercised, transferred, leased or otherwise used" in the Little Colorado River Basin or the Rio Grande Basin (Navajo Nation, State of New Mexico, & the United States of America, 2009, p. 28). While this is not a problem at present, drought and climate change may render this a problem for the Navajo Nation in the future.

### **Policy Recommendations**

This case study demonstrates that an evident barrier to quantifying Native American water rights is opposition from other stakeholders (Cosens & Chaffin, 2016). This opposition originates in the fear and discontent that water use will be different from how it currently stands, and how it might be after Native American tribes assert their water rights. It was the federal government's decisions that stripped resources from Native American tribes, redistributed those resources to others, and subsequently delayed their return to Native American tribes (Birdsong, 2011). Hence, the federal government can and should take measures to mitigate conflict between opposing parties. It can start by gathering stories of successful negotiations and implementing those methods in future water policy.

One recommendation is to conduct a review of successful adaptive governance models for inclusion as a requirement in future water legislation. Cosens and Chaffin (2016) report that the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana participated in a collaborative process with non-Native American water users during its water rights settlement. Their result was bi-partisan water commission that acted on behalf of the state of Montana and its residents – as a whole (Cosens & Chaffin, 2016). Individual water users did not have representation as they did in New Mexico, and therefore, this reduced settlement delays from litigation (Cosens & Chaffin, 2016). Notwithstanding the small size of this water system, the Chippewa Cree Tribe of the Rocky Boy's Reservation quantified their water rights in about 20 years, rather than 50 years (Cosens & Chaffin, 2016).

Another recommendation is to *always* provide Native American tribes the option to lease their water in future legislation. The Navajo Nation's right to lease water was limited in its San Juan River Basin settlement; however, there have been cases in which Native American water leasing was quite successful for all users (Navajo Nation, State of New Mexico, & the United

States of America, 2009; Nyberg, 2014). For example, the Jicarilla Apache Nation in New Mexico successfully brokered its surplus water rights and leased water to public and private, non-Native American users (Nyberg, 2014). Nyberg (2014) purports that the Jicarilla Apache tribe's water customers are satisfied with their leases, and that water leasing did not negatively impact the tribe's access during times of drought. Furthermore, water leasing had a positive economic impact for the tribe (Nyberg, 2014). This demonstrates that water leasing can have a positive outcome for all water users within a system.

### **Conclusion**

Native American tribes have fought physically and legally for their resources and land for centuries (Birdsong, 2011; Loeffler & Loeffler, 2012). Fortunately, today, there are legal pathways for them to assert their rights to water on their assigned lands. This case study demonstrates that while those pathways exist, they are far from efficient. It took almost 50 years for the Navajo Nation to quantify its water rights in the San Juan River Basin in New Mexico, and yet those rights are still at risk of being removed due to ongoing opposition from other water users (Leeper, 2013; *State of New Mexico V. The United States of America V. San Juan Agricultural Water Users Association, et al. V. Navajo Nation*, 2016). As such, future water settlements should consider their processes and language to avoid negative impacts for later settlements. Furthermore, adaptive governance models and Native American water leasing show promise in decreasing opposition and delays for future water settlements. Additional research and implementation from the federal government on these two topics can be beneficial to Native American tribes as they strive to reconnect with their livelihood through water.



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