

PART FOUR: Water within sight, but out of reach

The Colorado, Little Colorado, and San Juan rivers wend through red mesas, creating ribbons of green river valleys that run up against the Navajo Nation's boundaries and occasionally cut through pieces of tribal lands. Water is both right at hand, and unavailable to tribal members.

Navajo people, who call themselves *Diné*, which means "the people", have made their homes for centuries in the high desert of what's now the Navajo Nation by shaping their lives around when and where water became available in a homeland they call *Dinétaah*

. For more than a century, they've watched water run by, downstream to cities and other farmers' fields, waiting for a way to access what's rightfully theirs.

More than 100 communities and settlements tuck along fins of sandstone and rise out of fields spotted with junipers. They crop up on stretches of flat scrublands, too, where trees rarely interrupt the sky or obscure views of distant spires like Shiprock, which floods with morning sun before the light touches any other piece of the landscape. Water threads sandy washes, the swooping corners of canyons, and the depressions where cottonwoods grow.

Livestock validate a family's occupancy of the land, according to custom and Navajo law. Livestock also lay an economic and food security baseline people built on by hunting, farming, and gathering. When they had access to all of their historic homeland, Diné ranchers moved herds of sheep, goats, and cattle, and horses too, to graze rangelands shared among extended families, their presence shifting with moisture.

The practice has been greatly reduced, but for some, still keeps people in touch with the needs of the land and deities to whom they pray for rain and grass.

A century of federal indifference left generations of Navajo homes without running water

Written by Elizabeth Miller New Mexico In Depth April 12, 2021
Friday, 04 June 2021 04:17

“People presently living on these Native lands are unique in American society as their traditional lifestyle requires intimate knowledge of the ecosystem, knowledge that has been passed on for generations through oral traditions,” reads a 2011 report on disaster risks from drought in the Navajo Nation, research for which was led by the U.S. Geological Survey and included interviewing 50 Navajo elders.

But the reservation system has impeded that practice. When some families moved herds north of the San Juan River, into Utah, during a drought in the 1950s, nearby white ranchers took the issue to the courts, which ruled Diné ranchers were trespassing. They then rallied U.S. Bureau of Land Management employees to remove Diné families who’d lived on the north side beyond reservation boundaries for generations. The employees posted notices first — written in English, neither read nor spoken by some of the Diné — and then rounded up and hauled away or killed livestock, handcuffing Diné ranchers and marching others south across the river, and setting their hogans and shade houses on fire.

Historically, the Diné relied on shallow aquifers in sand and gravel along rivers and floodplains, where water fluctuated with the season’s snow and rainfall.

Some of the drier lowlands receive just 150 millimeters of rain a year; wetter areas might see twice as much.

When the federal government established the reservation in 1868, Anglo and Hispanic settlers carved out the best rangelands for themselves, while the tribe retained the Chuska and Lukachukai Mountains. The federal government added to the reservation over the coming years, with it finally covering one-third of the traditional Dinétah, the driest, hottest piece of it.

An already delicate balance around water has only become more tenuous.

Decades of drought have turned year-round streams into seasonal pulses, dried out historic springs, and concentrated groundwater so wells become so saline that they corrode their own pipes and pumps. Vegetation has died, leaving loose sand that feeds dust storms thick enough to turn the sky red. The Navajo Nation now sees less than half the snowfall it did decades ago.

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The San Juan River also flows with half the water it did a century ago, and the entire Colorado River Basin is expected to dry further as the climate continues to change.

As colonists moved into this arid country, where rainfall could not be relied upon for water and rivers were turned to instead, they imported a “first in time, first in right” principle for allocating water that prioritized its earliest users. The U.S. Supreme Court read that “first in time” right as transferring to tribal nations in 1908, when it issued what’s now called the Winters Decision in a dispute over water for the Fort Belknap Reservation.

The Winters Decision stated that when Congress created reservations, it implied that water went with the land. That dates tribal water rights to the reservations’ establishment.

“This doctrine is grounded in the principle that in ceding millions of acres of land to the United States, tribes in no way intended to relinquish their ability to use water for the benefit of their homelands and reservations,” water rights attorney Jay Weiner summarized to Congress in 2015, testifying as assistant attorney general for Montana, home of the lawsuit that led to the Winters Decision.

In water rights parlance, the Navajo Nation has “paper water” — rights to some unquantified amount of water — but not “wet water.”

The Colorado River Compact, which allocates Colorado River Basin water, splits estimated annual river flows in two, half for upper basin states and half for lower basin states. No tribal members were represented when those negotiations were finalized in 1922.

In deference to Winters, the compact allows for separate dealings on indigenous water rights. New Mexico’s allocation of the Upper Colorado River Basin — 11.25 percent, or 669,000 acre feet per year — was granted with the expectation that the state would someday have to share a then-unquantified amount of water with tribes.

The federal government left tribes and states to determine how much, from where, and how to access that water through settlements approved by Congress or in the court system. That

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meant the Navajo Nation needed to negotiate with three different states — Arizona, Utah, and New Mexico — to settle how much the tribe acquired from each state's allocation.

"This has the affect of pitting tribal nations against the states and all of the interests the states represent," Yazzie said, with Sixth World Solutions. "There's so many layers of conflicts this has created."

States often treat tribal water rights as a subtraction from what's theirs to use, instead of a provision for some of their most financially strained communities. Meanwhile, they've built farms and cities reliant on water tribes could claim as their own, and now, the looming prospect of tribal water rights clouds their future.

As tribes have negotiated settlements with states on how much water is theirs to use, lawmakers essentially trade money to build pipelines, pumping stations, and treatment plants to access "wet water" for an agreement that reduces tribal water claims and defers to current water users.

Water allocations also estimate need based on census population, rather than tribal membership, ignoring the possibility that if homes on reservations had running water and electricity, more people might want to live there.

"It's just manipulation of information and data to further minimize our claims," Yazzie said. "They know that we really need water and we really need water infrastructure, and we can't get that water infrastructure until we settle our claims. ... It's this way of manipulating this urgent need, this human right, in order to put in these conditions that further minimize tribal sovereignty."

When the Navajo Nation and New Mexico signed a settlement in 2005, it directed the federal government, with some money from the state, to fund and construct the Navajo-Gallup Water Supply Project to move water from rivers to homes. "A 'paper' water right does not benefit people who must haul their drinking water," former Navajo Nation president Joe Shirley, Jr. explained when the settlement went before Congress to approve in 2007. "The Navajo Nation is foregoing a large paper water right in exchange for a smaller paper water right, [and] conditions on the wet water development outlined in the settlement legislation."

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The Navajo-Gallup Project includes 300 miles of pipeline, multiple pumping plants, and two water treatment plants that will reach 43 Navajo chapters. The project splits into two major components. The Cutter Lateral serves Navajo communities along Highway 550 and reaches Jicarilla Apache communities near Teepee Junction. The San Juan Lateral parallels Highway 491 through a series of Navajo communities before a terminus at Gallup, where the city's tapped-out groundwater wells are putting long-term viability of their water supplies in question.

Spokes would stretch from Gallup to nearby Navajo communities, some with more than half of their residents without water at home. Spur lines will reach Crownpoint, farther east into New Mexico, and Window Rock, the Navajo Nation capital just across the state line into Arizona. The project will serve a population expected to reach 250,000 by 2040.

During congressional hearings in 2007, Bush administration staffers testified in opposition, calling the project too expensive.

Then New Mexico Senator Jeff Bingaman, a co-sponsor on the legislation, was quick to point out that the \$714 million requested was less than a third of the \$2.3 billion the Bush Administration spent on water infrastructure and management in Iraq. Shirley also pointed out that after Hurricane Katrina, Congress authorized billions to rebuild water systems for New Orleans residents. Now, the tribe was asking Congress to do the same for Navajo people.

Assistant Secretary for Indian Affairs Carl Artman, an enrolled member of the Oneida Tribe of Wisconsin, said the administration hadn't thoroughly analyzed the matter or completed their search for a more affordable option, even though a federal team had been investigating it for years.

"It's just not a credible response," Bingaman replied. "The Federal Government's been AWOL is essentially what you're saying."

Arizona's water resources department director, Herbert Guenther, also objected. He argued that piping San Juan River water, from the Upper Basin of the Colorado River, to Window Rock and Gallup, which lie in the Lower Basin, violated the Colorado River Compact. He also said

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supplying Navajo communities across the state line in Arizona would compromise Arizona's pending settlement with the Navajo Nation. He argued all of the Navajo Nation's claims to Colorado River water should be resolved before the project advanced.

Shirley disagreed: "We are disappointed that the Arizona testimony talks about the need to resolve litigation with the Navajo Nation, but [makes] no acknowledgment of the real needs of the Navajo Nation to obtain sufficient water rights to create a permanent homeland."

Still, Senator Jon Kyl, R-Ariz., inserted a clause that bars communities in Arizona from tapping into the Navajo-Gallup supply line until Congress approves a settlement for Navajo claims on the Little Colorado River and the Lower Basin of the Colorado River. That clause has stalled out the spur line to Window Rock for a decade and effectively trapped 6,411 acre feet of water, the amount the Navajo-Gallup project would have delivered to Navajo communities in Arizona.

An omnibus public land management act finally approved the New Mexico settlement in early 2009. It was signed by President Barack Obama just weeks into his first term. That passed a milestone Congress had foreseen a need for as early as 1971, when they authorized a feasibility study on the project.

A settlement between Utah and the Navajo Nation passed Congress this year, dedicating funding for 5,000 people living without reliable water supplies or relying on wells contaminated with heav(il)y mineralization, including arsenic. The largest part of the reservation and the greatest share of its population live(s) in Arizona. That state has yet to reach a settlement with the Navajo Nation for its water rights. Now the federal government is facing litigation for this failure.

"The United States Supreme Court has characterized these responsibilities as 'moral obligations of the highest responsibility and trust,'" Shirley told Congress in 2007. "The federal government should not be allowed to shirk its trust responsibility or its treaty commitments with Indian nations by hiding behind a veil constructed of legalese that can be applied to the detriment of the poorest of the poor in America."

Next week: PART FIVE: *More than what flows from the faucets*

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