

**MINUTES OF THE  
NEW MEXICO INTERSTATE STREAM COMMISSION**

**August 17-18, 2004**

The regular meeting of the State of New Mexico Interstate Stream Commission (ISC) was called to order on August 17, 2004, by Chairman Jim Dunlap at 10:10 a.m. at Exhibit Hall #2, Farmington Civic Center, 200 West Arrington, Farmington, New Mexico.

**Quorum of Members Present:**

Chairman Jim Dunlap  
Patricio Garcia  
Phelps White  
Buford Harris  
Judith Espinosa  
Secretary John D'Antonio

**OSE/ISC Staff Present:**

Director Estevan López  
Tanya Trujillo  
John Whipple  
Tim Murrell  
Alex Salazar  
Herman Garcia  
Karin Stangl  
Shawn Williams  
Craig Roepke

**ISC Contractors:**

John Utton  
M. Lee Pease

**Others:**

Paul Aguilar

**AGENDA ITEM #1 – COMMISSION CONVENES:**

Chairman Jim Dunlap convened the regular meeting of the Interstate Stream Commission at 10:10 a.m.

**AGENDA ITEM # 2 - APPROVAL OF THE AGENDA [Attachment 1]:**

Director López stated that there would be some extra time in the morning session due to the Gila portion of the agenda being abbreviated and recommended that agenda item #12 be moved up before the lunch hour.

**Commissioner Espinosa moved, Secretary D'Antonio seconded, to approve the meeting agenda as amended. The motion carried unanimously.**

**AGENDA ITEM #3 – APPROVAL OF CONSENT AGENDA:**

Commissioner White requested that for the July 12<sup>th</sup> minutes reference to individuals should be to their last names with appropriate salutation.

**Commissioner White moved, Commissioner Espinosa seconded, to approve the consent agenda as amended. The motion carried unanimously.**

**AGENDA ITEM #4 – SECRETARY REPORT:**

Secretary D'Antonio reported on the following items:

**Active Water Resource Management Initiative**

On July 27<sup>th</sup> there was a presentation made on Active Water Resource Management to the Water and Natural Resources Interim Committee. We anticipated a lot of opposition to this initiative from members of the Committee. Staff did a good job in preparing answers for questions that we anticipated based on questions that we had received from people who had concerns with Active Water Resource Management. We were able to answer the concerns by stakeholders across the State and we feel we received an endorsement from the Committee to move forward.

**Gallinas River**

We have been actively managing this river and the river has received some benefit from the recent monsoons. The flow level has increased from 4 cfs to 28 cfs which is above the amount needed to satisfy the City of Las Vegas and the Gallinas River irrigators. Storrie Lake has also benefited from the rain and is about 70% full. Also Conchas Lake gained about 10,000 acre-feet of storage from heavy rains but it is still about 30 feet below the spillway to the Arch Hurley ditch so there is still no irrigation water available to 580 irrigators.

Chairman Dunlap asked what level the lake had to reach to allow for water to get to the irrigators.

Craig Roepke responded that it still needs another 20 feet before it will spill into the ditch.

**Ruidoso**

We had an emergency request from the Village of Ruidoso which was partially approved to receive effluent credit for water diverted from the North Fork well field.



## **Staff**

Staff was involved with a presentation on infiltration and injection in a symposium in Albuquerque in July.

The District 1 office has taken about 4 of their staff members to go down to the District 4 Las Cruces office to help with a flood of applications, especially supplemental well applications, and they processed about 21 of the applications for changing the location of a well and for supplemental wells.

We are performing water master activities on the Jemez according to Schedule A which is 6 days for the Indian communities and 1 day for the non-Indian communities. The District 1 office has been involved in both in an official and unofficial capacity for the last 5 years.

Regarding the District 2 office, the CID Board on the 13<sup>th</sup> of July increased the surface water allotment to 2.2 acre-feet in the Carlsbad Basin.

Regarding the District 3, office they put together a really nice GIS model of the Virden Valley and also of the Mimbres Basin. They completed links from the primary surface groundwater rights to points of diversion so that we have in place a working model that is on a GIS format that makes available ownership information and priority dates, points of diversion, places of use and ownership so we can tie everything together when we actively start managing the Mimbres River. The water master will have a tool in place that can be taken out into the field on a laptop and show people lands that are affected to a priority call. We are moving forward in developing more of these models around the State to assist with our initiative for Active Water Resource Management.

## **Domestic Wells**

When we issue a domestic well permit we have a condition that allows for more restrictive covenants from the City or County. On June the 24<sup>th</sup> the Village of Ruidoso approved an ordinance that restricted the drilling of domestic wells within the Village of Ruidoso boundaries. Ruidoso Downs on July 19<sup>th</sup> had a declaration of emergency, Phase 3 water rationing. Their stream flow decreased nearly 50% from their historical average and the City's well production dropped to about 50 gallons per minute and well pumping was limited to 4 hours per day. There have been some residents without water in that area.

## **San Juan Basin**

The administration of flows on the San Juan River is proceeding in accordance with the Shortage-Sharing Agreements and is continuing through this reporting period.

## **WATERS**

We have a contract with the University of New Mexico for "Train the Trainer" programs so we can start being uniform in how we train everybody around the State. We have WATERS abstracting and imaging capabilities throughout all of our District offices and we want to ensure that everybody is doing things consistently. That training has started and will continue through October. The WATERS progress has been phenomenal. We have many areas that continue to be imaged and abstracted. The Gallinas River and the Rio Chama are 100% completed in WATERS. The San Juan River system, the domestics are 100% and the groundwater in this area is 96% complete. The Los Pinos, the Navajo and miscellaneous areas are 100% complete. The Animas phase 1 and 2 is 100% complete and on the San Juan main stem we are about 60% complete. The Citizens Ditch is 100% complete. In the Lower Rio Grande system we have water rights that are 100% complete and on the Lower Pecos we have completed abstracting Fort Sumner Ditch.

### **Mimbres Basin**

The Hydrology Bureau has conducted an analysis of technical aspects of a petition filed by the San Lorenzo Community Ditch to try to impel priority administration. That is one of our Active Water Resource Management areas. That technical memorandum will assist us in management of that area.

We continue to meet with the Environment Department to discuss mapping projects and sharing of data relating to wells that are contaminated and ownership information.

### **Governors Border Conference**

The conference was in Santa Fe which includes the ten border governors, 6 Mexican states and 4 U.S. states. Water was a focal point of the conference. One of the studies that Governor Richardson sponsored through the Utton Center was to look at states cooperating with states in lieu of the federal governments, on both sides of the border. What it would allow New Mexico to do is to get bi-lateral agreements with Texas which is really folding right into our Lower Rio Grande strategy on how we are going to deal with Lower Rio Grande issues and pumping in the Elephant Butte Irrigation District. We are attempting to avoid interstate litigation through a collaborative approach. From that standpoint the conference was successful because now we have some pressure that we feel both the State of New Mexico and the State of Texas can apply to their irrigation districts, El Paso #1 on the Texas side and we will be working with Elephant Butte Irrigation District, to allow them to get together and get their operating agreement in place. That is the primary step that we need before we can look at the overarching compact delivery obligations.

As a follow-up to the Border Conference, we will be meeting with Elephant Butte Irrigation District Board to roll out some of the strategies on working with them and hope we will get something in place that they and El Paso #1 will start the dialogue for the operating agreement.

### **Indian Liaison**

Mr. Myron Armijo, formerly with Santa Ana pueblo, has been appointed as the State Engineer Indian Liaison.

### **Questions from the Commissioners:**

Chairman Dunlap commended the Secretary on moving people from the Albuquerque office to Las Cruces to handle the emergency well permits. The Chairman said he believed that is good government.

Chairman Dunlap requested a briefing for the Commission to explain how the WATERS Program works.

Secretary D'Antonio responded that he would be happy to do that.

Commissioner Espinosa said she would be interested in attending a briefing on the mapping and WATERS Program. She asked if the information in WATERS would be available to the other state agencies and the public.

Secretary D'Antonio stated that at present it is a state and federal agency coordinated effort. If we get money through Senator Domenci's office it is meant to share inter-agency both federal and state and it would be available on a web platform for everybody.

Commissioner Espinosa asked if domestic wells and agricultural areas would be included.

Secretary D'Antonio responded that it is for all water uses both surface and ground.

### **AGENDA ITEM #5 – STAFF REPORT:**

Director López reported on the following items:

#### **Senator Domenci Visit**

With respect to Senator Domenci's visit, it was notable that the Senator mentioned that in his view water was the most important issue facing New Mexico at the present time. In addition to his encouragement and support for the State Engineer's Active Water Resource Management initiative, he also

mentioned many of the things that this Commission has been considering for a number of months. He talked about the Gila settlement and the importance to the State and how he intends to protect New Mexico's position. He talked about the importance of the Navajo settlement to the state. Although this Commission has been less involved, he talked about the Taos settlement discussions that are ongoing and the possibility of an Aamodt settlement. Clearly Senator Domenci is focusing on a lot of the same issues that have been before the Commission.

### **Governors Border Conference**

Governor Richardson's initiative on water issues was not endorsed by the Border Governors. However, in addition to opening the door to some discussions with Texas, it also had the affect of energizing the International Border Water Commission in that they had reviewed the initiative and they were present at Water Subcommittee meetings and very vocal about all of the things that they are doing.

Late last year the Environment Committee of the Border Conference created a Water Subcommittee and that continues to be active and there is some interest in making that a full committee of the Border Governors Conference.

### **Acequia Construction Program**

The construction programs that we work in conjunction with the Corps of Engineers on are moving quite a lot of projects along. Dennis Romero, who works for Craig Roepke, has been doing an excellent job of really organizing the expenditure of those projects and making sure the acequias are getting all of the information that they need to move their projects along. To an extent, perhaps he is doing too well in that he expects that all of the money that we have available will be committed by the end of this coming October.

### **Pecos River Basin**

Late in July we had a meeting of the Lower Pecos River Basin Committee. We had not had a meeting of that group since last January. We updated them on all of the things that we are doing regarding trying to implement the settlement given the objections that are outstanding and the limitations to our spending money on purchases. The members appreciated the information, although we had heard beforehand that some of them were getting antsy about the pace of things. All of them were very supportive of our efforts and the efforts of the Commission. At the end of the meeting we reported to them that we intend to request in our current budget request the final \$30 million that we need to implement the settlement in full. They were also informed that we have gotten, particularly from LFC staff, some indications that our chances funding are much better if there is some sort a local contribution. They were asked to mobilize a subcommittee to consider that question. Although there was some resistance to the idea,

ultimately the committee took us up on that challenge and hopefully they will be able to come to some useful conclusion. Their willingness to take on that issue is encouraging even if it comes back with them telling us that they do not see a way around it, at least they will have explored the issue more fully. We have continued to negotiate lease agreements with an option to purchase. We were able to execute the agreement for the Cottonwood Walnut Creek that is from the New Mexico State Parks. The objection phase is continuing and discovery is ongoing, with all parties participating. The hearing continues to be set for November. The settlement calls for a determination of the settlement status in September of this year so we anticipate that we are going to have to convene discussions with all of the various parties and determine if we are going to extend the deadlines. At this point, that seems to be the most viable alternative. All of the parties remain engaged in the effort and there is every indication that support will be there to continue implementation of the settlement.

We have been blessed with some rain, both on the Pecos and the Rio Grande and that has helped us to keep some endangered species issues particularly on the Pecos on the back burner. Our 2004 undelivered allotment water lease agreement with CID has been fully executed and because of continued wet weather CID has not been delivering water from Avalon Dam. There is a fair amount of storage available in the Pecos River System. There is over 55,000 acre-feet in the Santa Rosa Reservoir, almost 4,000 acre-feet in Ft. Sumner, almost 11,000 acre-feet in Brantley with just over 2,000 acre-feet in Avalon for a total storage in that system of just over 72,000 acre-feet. It appears that we are in fairly good shape on that stream system. For our delivery obligations to Texas, given the way the compact works, we are not exactly sure where we are. The last indication that we had from the USGS they are still working the numbers for that April storm that took out the gage, however the last adjustment that they made was in New Mexico's favor by a significant amount.

### **Eagle Nest Reservoir**

There has been considerable dispute over the rights of the various parties to storage water and storage space in that reservoir. There had been a hearing that was set for August 12<sup>th</sup> to deal with a number of motions that were outstanding. At the eleventh hour the parties agreed to postpone that hearing given that there is a settlement proposal out that has received a fairly good reception by the parties. We are hopeful that settlement will continue to be discussed. The agreement was to postpone the hearing for forty-five days. Mr. Roepke has done a good job in keeping discussions going and hopefully the parties will be able to resolve the issue outside of litigation.

### **Rio Grande River Basin**

Although we have been getting some rain and some of that water has been reaching Elephant Butte nevertheless the Rio has begun to dry down below

reaches of the middle valley. Given the endangered species issues with the minnow, salvage efforts have been underway as the river dries. To date there was a report of over 7,000 minnows having been rescued with minimal take. Earlier in the year there was some concern by the Fish and Wildlife Service about whether or not there had been a spawn this year because when they went out at the time that they had anticipated it, they were unable to find any eggs. Given the rescue effort and that quite a number of the salvaged minnows are young of year, it appears that there had been a spawn. The Middle Rio Grande Endangered Species Act Collaborative Executive Committee, that I am a member of continues to work on defining the scope of that whole program. Most recently, our discussions have gone towards being tailored to San Juan endangered species efforts where we are going to try an combine all efforts that is the Biological Opinion, the restoration plan and collaborative efforts into a single program. What we, on behalf of the State, are most interested in is making sure that if we combine all those efforts, that the state's financial obligation won't become too big for us to handle. Previously, we had been talking about the collaborative program having a total shared cost of \$120 million with the State picking up \$30 million. If we look at combining all of these programs we are talking about a total cost upwards of \$230 million so our discussion with the federal entities has been that if we are going to combine all these things all our cost contribution still has to be capped at about \$30 million because given all of the other things that the State is facing we probably can't do any more than that.

### **La Plata River and Long Hollow Reservoir**

Last week we attended a meeting with our counterparts in Colorado regarding issues on the La Plata, including Colorado's proposal to build a Long Hollow Reservoir and how that might impact our water users and ongoing issues of compact compliance. It was a useful meeting and it gave Secretary D'Antonio and us the opportunity to become more familiar with that particular stream system and that particular compact. John Whipple will be giving a presentation about some of the issues that came up this afternoon.

### **AGENDA ITEM #6 – PRESENTATION ON GILA SETTLEMENT:**

Mr. Roepke that they did not have complete success to report at this time but they are moving ahead and believe they can see the light at the end of the tunnel. Mr. Roepke stated that Ms. Trujillo would give the Commission an update on the settlement terms and agreements as they stand today.

Ms. Trujillo reported that since the last Commission meeting on July 20<sup>th</sup> we have continued to negotiate almost on a daily basis back and forth with the Arizona parties. We have been working to develop the agreements that will result from the term sheets that we presented to the Commission in July. The structure that we have focused on is negotiation of two agreements. One



agreement is called "New Mexico Consumptive Use and Forbearance Agreement" and that is an agreement between the Gila River Indian Community, the San Carlos Irrigation and Drainage District, the United States and several non-Indian water users, irrigation districts and canal companies in Arizona, and some cross over the border into New Mexico. We are still working on that agreement. The latest draft was over 100 pages long and some of that will probably be cut down as we move through the final details. We are continuing to make progress with the Arizona parties. The second agreement contemplated is an agreement between the Secretary of the Interior and a water user or water user groups in New Mexico, and that contract will not be specifically negotiated at this time, but we will have flexibility in the future when decisions are made regarding what types of projects will be implemented in the Gila Basin. With respect to that agreement we are focusing on the provisions that we want to insist are included in that agreement so we are getting the Secretary of Interior pinned down with respect to certain provisions.

Some of the significant debate that has occurred has centered on whether the State of New Mexico or water users within the State of New Mexico should be the parties to the first agreement, the Consumptive Use and Forbearance Agreement. Our latest position on that issue is that we will not have a New Mexico based signatory party to that agreement but that agreement would still be completely subject to Interstate Stream Commission approval, and based on Senator Domenci's statements, none of the Arizona settlement will go forward until New Mexico is satisfied with the terms of the agreements that affect New Mexico. We still have a strong position with respect to finalizing these agreements and making sure that they give us the flexibility and assurances that we need. Both of the agreements tie into several additional agreements that are being negotiated among the Arizona parties. There are twenty-nine different agreements that encompass the settlement from the Arizona side and so it is a very complicated series of contracts that will be entered into. Our agreements will fit into that scheme.

As has been noted to the Commission in the past, the San Carlos Apache Tribe which has a reservation on the Gila River in Arizona is not a party to the settlement and so they will not be one of the signatories and their claims are yet undecided with respect to some issues they have on appeal with the Arizona Supreme Court. That is one of the loose ends that exist with respect to both New Mexico and the Arizona parties. What we have done to deal with that potential outstanding San Carlos claims, is that we have negotiated a risk allocation agreement with the Arizona parties to accommodate additional claims that may be made by the San Carlos tribe or by other water users in Arizona so that our agreement with the Arizona parties with respect to New Mexico's uses of water will be protected.

Chairman Dunlap asked whether future requests for San Carlos will affect the apportionment to New Mexico in this agreement.

Ms. Trujillo responded that was the intent of the agreements that we are negotiating. We have concerns that we may be subject to claims by the San Carlos Apache Tribe and that they would not be precluded from bringing claims against New Mexico or the New Mexico water users, but we hope that the agreement we have with the Arizona tribes is essentially a defense. If San Carlos brought a claim against New Mexico or New Mexico water users, the protection would be that we would have the ability to bring in Arizona water users and make them responsible for the additional claims. It is a cumbersome process but that is the best protection that we have been able to obtain in lieu of getting some kind of congressional declaration of apportionment for New Mexico's water uses. It is not the best solution, but we were not able to achieve the best solution through a legislative determination of this issue. Attorney's for San Carlos Apache Tribe came to New Mexico and met with Mr. Roepke and Ms. Trujillo and met separately with Mr. Hume and Governor Richardson relating San Carlos' claims and relating to the dynamics of the settlement process that is ongoing in Arizona. We were not asked to take any specific position with respect to any San Carlos issues but we reiterated to the attorney's that we were not opposed to any settlement with San Carlos and that we would be happy if the settlement could include San Carlos' claims. We have not heard anything from the Arizona parties that indicated they were close to reaching an agreement with the San Carlos Tribe but San Carlos representatives have been meeting with the other Arizona parties as well.

Some of the difficult issues that we are still working on include the risk allocation agreement that was alluded to earlier. We want to be sure that the Arizona parties will be pinned down with respect to coverage of additional claims that may be made against New Mexico. We also are finalizing issues with respect to the dispute resolution process and whether or not New Mexico or a New Mexico party is a signatory to the agreement has a big effect on what the final dispute resolution process will be. If the final resolution is that no New Mexico party will sign the Consumptive Use and Forbearance Agreement, then the dispute resolution process is somewhat simplified and would contemplate that claims would be made against the Secretary of the Interior with a right of intervention on behalf of the State and New Mexico water users. That is the current structure that we are working with right now. The other issue that is that we want to hopefully amend the legislation to make it clear that claims against New Mexico could not include claims for impairment to groundwater uses in Arizona. We want to clarify that this was the original intent of the 1968 Act with respect to New Mexico having to address injury claims from Arizona downstream water uses. We are hopeful that we will be able to resolve that outstanding issue as well.

We are proceeding with the intent that we will be able to reach final agreement with Arizona parties. We continue to make progress during each telephone conversation that we have and during each draft that we review but we still have a lot of work to do in the next several weeks. We have been informed that a



mark-up will occur on September 15<sup>th</sup> in Washington and we have been given deadlines of August 23<sup>rd</sup> to have the agreements completed. That deadline comes from the congressional staff in Washington and is the latest deadline that we are working with. After we complete the agreements we will need to update the draft legislation so that it is consistent with the agreements that were negotiated. So that is another task that is still outstanding.

We traveled to Virden on July 26<sup>th</sup> and met with the Southwest Water Planning Group at one of their regularly scheduled meetings. We presented the status of the settlement agreement and actions to date at that time. Since that time we have had follow-up telephone conferences with members of that Planning Group in order to make sure that they are up to speed with respect to the negotiations.

Ms. Trujillo stated she would also like to point out that they did respond to a public records request from the Center for Biological Diversity and produced some computer files, modeling files, flow analysis and the term sheet and draft legislation that the Commission approved during the July meeting.

The other issue that we wanted to discuss concerns the memorandum from Mr. Roepke relating to additional potential environmental language that would be submitted in the committee report. Mr. Roepke and I both have spoken with Allyson Siwik and Todd Lopez regarding this ongoing issue and Mr. Roepke will brief you on this point.

Commissioner Espinosa asked to be reminded of what the Commission is approving on the settlement, the Consumptive Use and Forbearance Agreement and what other parts will we be approving.

Ms. Trujillo responded that at the July 12<sup>th</sup> meeting the Commission approved the term sheet and the draft legislation that existed to that date. What we have been working on is finalizing the actual contracts and we what we would like to do is present those actual contracts to the Commission for approval prior to September 15<sup>th</sup>.

Commissioner Espinosa whether we would be required to take any action prior to August 23<sup>rd</sup>.

Ms. Trujillo responded that August 23<sup>rd</sup> is the staff deadline to get information to the congressional staff.

Commissioner Espinosa commented that sometime between the present and September 15<sup>th</sup> the Commission would have to be approving what might be a settlement.

Ms. Trujillo responded that if all goes well that is what we would be asking for Commission action on this agreement.

Chairman Dunlap stated that he believed the September 15<sup>th</sup> date could be moved if it has to. That is not our choice but they might make that decision because there is a lot of other bills pending at the same time that have to come in and it may have nothing to do with the Gila settlement. The Chairman clarified that we should not expect the date to move, but he is just saying that it could happen.

Ms. Trujillo concurred with the Chairman's comment and stated that we do not have any control over that process.

Mr. Roepke stated that at a past Commission meeting the staff was directed to work with environmental interest groups and the Southwest Water Planning Group to try to craft some language that was agreeable that addressed environmental interests and the ecology of the Gila Basin. At the meeting we attended in Virden he presented the draft language. In the memorandum you have before you the first quote was presented to the Planning Group **[see attachment 2]**. That language was soundly rejected by the Southwest Water Planning Group. Their main objection to that language was not so much the recognition of the ecology of the Gila Basin but the fact that it left out any consideration of their own cultures and histories and traditional uses of water and they wanted to include some language as well. Mr. Roepke stated that he and Mr. Hume drafted up the language in the second quote in the memorandum and sent it to the Gila Conservation Coalition and asked if they could agree to that and they said if there was any mention of anything other than environmental interests they could not accept the language. Mr. Roepke said that this is extremely dismaying to him. We have an opportunity here to both improve the ecology of the basin and also serve some water needs. We have a great deal of money to do that and I do not think that it is too ambitious to say that we could accomplish both ends. But if these two interest groups cannot work together we are not going to get anywhere and the surest way I think to stop any cooperative work is for one side on an issue to say that they refuse to recognize the interests of the other side. We are still working with both groups and as Ms. Trujillo said we have been in contact with the Gila Conservation Coalition and encouraged them to re-think their position and also with the Southwest Water Planning Group and we are making progress there but I am not sure where it is going to go. There are people who wish to take an extreme position on both sides of that issue and that will be unproductive. Staff's recommendation at this time is to continue working with both groups and try to get them to agree on something, but absent that agreement staff, at the next meeting will bring to the Commission language somewhat similar to the second quote in the memorandum recognizing both the unique and diverse ecology of the Gila Basin and also the other valid interests in that region and ask the Commission to adopt that as a general policy statement.

Commissioner Espinosa stated that she was also dismayed with the inability to get the parties to agree. She said she could see both parts of this. Considering the fact that there are some overriding laws like the NEPA process that is going to have to be done on the Gila and considering that we have a long way to go it seems to be a fairly good middle place. Commissioner Espinosa said she would imagine that the hardest part about this added language might be the "equally consider" part when it comes to the environmental side. Hopefully you can get the groups together and work this out because she would like to have something in the bill coming from the Commission and we will make the decision if it cannot be made by the parties.

Mr. Roepke responded that in the Gila everything takes three times as long as he would think it would and it is five times as complex.

Commissioner Espinosa said that from an environmental standpoint and just from a cultural standpoint, cultural being preservation of our rivers and streams, this is the only river that doesn't have dams or diversions and many of us want to see it kept as wild and useful that way as possible understanding the historic uses as well as other traditions and the need for future water use, but it is a difficult situation because when we start talking about putting projects in people get very excited about this. If we have a chance to save one thing in this State it would be very nice to try and do that, so I hope that we can get to this language to satisfy both parties.

Commissioner White inquired as to if there would be another meeting required to approve the language prior to September 15<sup>th</sup>.

Mr. López responded that the last item on the agenda tomorrow is to set the meeting date and one of things that I was going to bring up then is that we have tried to stay consistent with the 3<sup>rd</sup> Wednesday of the month. September is going to be difficult for us to do that. Both Secretary D'Antonio and myself are going to be gone out of state that 3<sup>rd</sup> Wednesday and we have been discussing if the Monday before the 13<sup>th</sup> of September might be a meeting date that could be considered. If the only issue before the Commission is the Gila settlement we could try to do a phone in conference for the afternoon of the 13<sup>th</sup> however it is still likely that we are going to have other business to deal with. I know that there has been some discussion about a meeting in Las Cruces hinging around the acceptance of the Lower Rio Grande Regional Water Plan. The Director stated he was not sure of the status of that plan and any adjustments that may need to be made, so it is premature to say that we could be meeting in Las Cruces.

Chairman Dunlap encouraged Ms. Trujillo and Mr. Roepke to continue the negotiations and also that he would be willing to sit down with the two parties and see if we can bring this to a satisfactory conclusion.

Commissioner Harris commented that agricultural and environmental issues should not be mutually exclusive and that he hoped that staff could achieve common ground.

Ms. Trujillo concluded her report by stating that this is a very important issue. It was the first topic that Senator Domenci brought up in his presentation and it is a good opportunity for New Mexico. What we have done is to try and preserve as much flexibility as possible with respect to future uses and future development.

**AGENDA ITEM #7 – PUBLIC COMMENT ON GILA SETTLEMENT:**

No public comment.

**AGENDA ITEM #8 – POSSIBLE COMMISSION ACTION ON GILA SETTLEMENT:**

No action taken.

**AGENDA ITEM #12 – RE-LOAN COMMITTEE STATUS REPORT:**

Mr. Murray stated that he would provide a brief status report regarding the Re-Loan Program. He referred the Commissioners to two handouts that were before them [see attachments 3 and 4]. The first of those handouts contain a summary of the correspondence staff has received regarding the program and correspondence from the Soil and Water Conservation Districts.

Director López requested that Mr. Murray present a brief explanation of what the Re-Loan Program is.

Mr. Murray stated that the Re-Loan Program is a low interest source of funding provided by the General Appropriations Act and funded through the Irrigation Works Construction Fund for water conservation projects. The Commission is authorized to make these loans pursuant to New Mexico statutes and under that authority the Commission may make loans where then the districts re-loan to individuals at that point. The Commission has been managing this program for a number of years.

In addition to the first handout I provided a second handout that provides three versions of the re-loan policy. You will see a "v.3" on the most recent version. In May members of the Commission and staff met with the districts working on the technical details of the program. Unfortunately, we could still not come to a resolution. The main issue blocking that is the irrigation districts' interpretation of efficiency and staffs' interpretation of depletions. Following that meeting I started meeting with the Pecos Bureau, the Rio Grande Bureau technical staff, the State Engineer Water Rights Bureau and the Litigation and Adjudication Bureau to maintain clarity and consistency between the ISC and OSE as this program goes

forward. Following those meetings I drafted the version one (v.1) of the policy that you have in the handout. At that point I received comments from senior staff and made a few adjustments. I submitted the draft policy to Commissioners who have been working with me on this program and I received some very good comments from Commissioners White and Stafford. Those comments were incorporated into version two (v.2). Following that I requested a meeting with the districts to go over the draft policy and I told them that it was my intent to bring this draft policy to the Commission for approval or discussion/guidance at this meeting. The meeting occurred about two weeks ago. Commissioner White was in attendance as well as Director López and the State Engineer. So you can see the various changes that have occurred in the policy but unfortunately we have been unable to resolve this and bring a draft policy to the Commission that is acceptable to both the districts and the staff.

Director López requested that Mr. Murray outline for the Commission what our work plan is going forward.

Mr. Murray stated that he would be working with the Technical Committee to contact the districts and get a thorough understanding of their process of how they review and approve loan requests to an individual farmer. The purpose of this effort is to prevent duplication of effort and to streamline the approval process. The second item was to look at improvements that may be easier to approve and look at the issues regarding efficiencies and depletion with that.

Director López stated that the reason he had asked Mr. Murray to discuss that was that there are some disagreements among some of our staff and some of the districts that utilize this program about how a policy ought to be shaped. But part of the issue with respect to any Commission policy has to do with a clear understanding the districts and the ISC as to how a process will work and what sort of projects might be done without a lot of jumping through any hoops so that is part of the reason why we want to try and see if there are some that there is no disagreement about and make sure we outline those and then begin to work on figuring on others that might require some detailed analysis.

Chairman Dunlap stated that he would like to see a copy of the statute that creates this opportunity for the Re-Loan Program.

Director López directed the Chairman's attention to the packet material which contained the language.

Chairman Dunlap said he would study that because he thought the first thing that we have to recognize with this Re-Loan Program is first we have to follow the law exactly, and if we are not doing that, it is something we have to determine. Chairman Dunlap urged the staff and the people negotiating on it to realize that we are not making much progress. We keep having this discussion and he

frankly would like to see a meeting of the minds. If we are following the legislation, lets get on with it.

Commissioner White stated he would make no apologies for being one individual that has delayed the action on developing the policy for this program. We are dealing with a paradox here. It is almost like being against motherhood to be against water conservation. The statutes that you have asked for refer to water conservation. The compact refers to net depletion. We have the paradox here that creates a conflict between those two phrases and there has been no resolution to this point. At the meeting we had recently there was a very compelling argument presented by one of the staff members that outlined the argument toward the issue of net depletion and it is very easy for me to see that compelling argument. I appreciated that being outlined on a chalkboard because it was the first time that has happened in over two years in that type of demonstration. Commissioner White had not yet had an opportunity to read all the response letters but he thinks you will find we are dealing with a very difficult question. I do not know what the answer is. Director López mentioned at that meeting we might find some projects that could be immediately approved, but I think there was a general consensus among the group present that any water conservation practice will lead to a increase in net depletion. The two phrases are opposite of each other and so we need to find a resolution if we are going to save this program. The program itself was put into place by a former State Engineer for the primary reason of enhancing state-line flows on the Pecos River. Now the argument is that that is not happening and if fact it may be a violation of the law, at least the Supreme Court Decree. And, if it is a violation then how do you address the question of all of these practices that are exercising water conservation. Water conservation is almost a national policy and so that is the dilemma. It is a serious problem for me and it is serious problem for my constituents and if we don't do it right we will lose this program and we may find ourselves in violation of the Supreme Court Decree.

Chairman Dunlap stated that he had tendency to over simplify things but the fact is if you follow the law as it is written right here he would like for somebody in very simple terms to tell him how that is a violation of the compact. If it is a violation of the compact then we need to do something. We cannot administer the law if it is a violation. We cannot implement this program if it is a violation. I would like to know exactly what that violation is.

Mr. Roepke stated that he thought the problem is somewhat of scale. On a farm scale putting in a sprinkler system for instance can conserve the amount of water that the farmer has to pump to grow three cuttings of alfalfa. At the same time if the farmer were to take the amount of water that he has allotted to him by PVACD for instance and was able to grow three cuttings of alfalfa in four years and then to be able to take the same amount of water that he used and put in a sprinkler system and grow four crops of alfalfa for five years, you lose that much more water in evaporation so while you are conserving the amount of water that



the farmer has to pump to grow a single crop of alfalfa you might be increasing the amount of water that is depleted out of the system. So in one sense you are conserving water and on another scale you are not conserving water. The scale where you are not conserving water has to do with the compact. The scale where you are conserving water has to do with how much water the farmer has available to pump and as Commissioner White pointed out that is the paradox. We are trying very hard to find a way to get the benefit to the farmer of this Re-Loan Program without putting the state in jeopardy of increasing man-made depletions in violation of the Supreme Court Decree.

Chairman Dunlap commented that if you had a farm net depletion for each one of those farms going in and coming out. If the farm doesn't increase its net depletion whether it is going to sprinkler or whatever type of conservation practice you do it would appear to me that you make the more efficient use of that water without necessarily increasing the depletion. If you can show that you are increasing the depletion you only have so much depletion that you can deplete. That is the law. But if you do not increase that per farm depletion they still should have the right to have those funds in this program to make those improvements.

Mr. Roepke stated that was exactly correct and that is what we are trying to develop a policy that gets us to. Where they are able to deplete the same amount of water but do it in a more efficient, energy and labor saving manner. But there is the potential that you need to protect against that we will use that same amount of water and evaporate more of it in essence through growing a larger area of crops and that would put us in violation of the compact.

Chairman Dunlap stated that if the farmer knows he cannot increase his net depletion you are still within the compact.

Commissioner Espinosa asked if the whole idea is not to increase the net depletion and if that has been the policy or has that changed with this new policy and where did the definition of conservation come from.

Mr. Murray stated the definition comes from the Office of the State Engineer glossary of terms and staff defines conservation as we have been discussing.

Commissioner Espinosa stated that the biggest issue is that we can conserve water but in the end if it increases the net depletion then this policy says that you cannot do that project.

Mr. Murray stated that ISC staff would not recommend approval of such a project.

Commissioner Espinosa asked if the ISC has a way of helping the farmers and ranchers and folks to assess that depletion standard.

Mr. Murray responded that in the past there was not and this is one of the items that staff has been working towards with the districts and the NRCS with their calculations and once again one of the items is that we have unfolded this whole program and taken a look at it. We realized that the NRCS calculations of what the districts use are all geared at efficiency and they use a calculation that is a very broad efficiency calculation. They do not take a hard look at the depletions. We are working with the districts on that and with the ISC/OSE technical staff now to take a closer look at that. Mr. Murray said that what he would like to send a copy of Technical Report No. 49 accompanied by a memo identifying the pages that discusses the issues of where we are at. Mr. Murray expressed the thought that he wished there was a simple solution to the problem but each time they look at it it becomes more complicated and maybe providing the Technical Report may help resolve some of that.

Commissioner Espinosa said that her last question is that she had noticed there are copies going to Rosendo Trevino, the State Conservationist for the feds. Have you had any feedback from them?

Mr. Murray responded that they have not. They just had a meeting two weeks ago. He organized our technical staff to work on the calculations and going forward with what the Director has stated. Mr. Murray said it was his intent to work with the districts off the Rio Grande and Pecos and in turn have them recommend their NRCS representative to start working with directly.

Commissioner Espinosa commented that she believed the Commission needs to protect the compact and our ability to work under that compact and not be found in violation of that. Even though the state law might say conservation is what the program is about if that isn't going to protect our efforts with the compact, making sure we stay within what we need to, then the law needs to be changed. We cannot violate that compact.

Secretary D'Antonio said he sees as something analogous with the domestic well problem. By statute the State Engineer Office shall continue to issue domestic well permits and depending on how close they are to a stream connected aquifer that involves a compact delivery we are creating additional depletions to the system with every one of those new domestic wells. We have a conflict within the state law and where I am not suppose to be appropriating any new water and we continue to appropriate new water because we are increasing the depletions on that system by the additional domestic wells. When we realized that if you are going to produce an extra cutting in a given year you are essentially using that consumptive irrigation requirement and we get back to the problems of efficiency and conservation. In the agricultural business if the farmer goes through the expense of putting in a more efficient drip irrigation system, he is not allowed to use that additional water saved and has less water to divert because his or her water right is defined as that consumptive irrigation requirement and if we are



going to transport that amount of water of recognized water rights, the only portion that we transfer off is the consumptive irrigation requirement. The Secretary stated that at the meeting he expressed the concern of how to continue to make this loan program available to farmers because we do not want to discontinue it, but how to account for additional depletions to the system. We are trying to come up with creative solutions such as using the strategic river reserve as a potential tool for the ISC to perhaps go in and account for additional depletions for ESA or compact deliveries and make up the difference. We are considering increasing the domestic well fee to help the state cover those additional depletions by going out and acquiring and drying up some agricultural land somewhere.

Commissioner White stated that in talking about the efficiency of these systems, for example flood irrigation is 70% efficient and sprinkler systems are 90% efficient. When you apply that efficiency factor to the amount of water that is required for the crop you come up with a figure that 90% that is returning less water to the aquifer or to the stream and that is called an increase in net depletion. That is the paradox. Commissioner White stated he would like the Commission to look at a basin wide condition which would more than offset these water conservation practices because the water conservation practices throughout the state whether it be Roswell or Farmington are practices that are designed to make the crop and the farm operation more efficient and that he couldn't imagine that we would develop a policy that would detract and attack the ability of the farmer to have a more efficient operation. If we are going to have an assault on the farming operations, then what can we do about domestic wells, what can we do about mountain development that is taking much more water from the system than it was 40 or 50 years ago, what can we do about watershed management that is taking much more water that it did 50 years ago and how do you put all those factors together to make it equitable for everyone.

Commissioner Harris said he had a rhetorical question to ask and that is whether an individual grower is violating interstate compact by using new and improved varieties and high yielding varieties. We have to be careful; we can't put the farmer back into the 19<sup>th</sup> century.

Chairman Dunlap commented that this will make the net depletions of each farm more economical to that farmer without increasing that net depletion whether you are flood irrigating or whether you are sprinkler irrigating. If you are flood irrigating you have to divert more water to do the same thing as you do with the sprinkler irrigation. Agreeably the sprinkler is going to evaporate water but if you set a table; it's a little bit like the return flow credits that rural water people have to deal with. We talked to the State Engineer's Office and if you want a return flow study done to show how much water is going to be returning on a diversion for a rural district that is further away from the river, the State Engineer historically says you do the study and we will see if we accept it. We need to set some kind of parameters on what these particular conservation methods are so

that we maintain that net depletion, then we proceed with the job, otherwise I can see the State Engineer's Office or ISC filing suit on anybody that puts in a sprinkler irrigation system. We have to determine what those depletions are and make them as part of the on farm delivery that we do. We got a Navajo Nation settlement out here that could divert up to 580,000 acre-feet and we are talking about diverting 338,000 acre-feet simply because we are using a different type of irrigation system. Do we want them to go to the flood irrigation....no; why, because it increases the salts, it increases the minerals, it tears our delivery up down below. We are better off to do the sprinkler. I believe the agreement says that we are not going to increase the net depletions and that is the same type of thing we need to do with this re-loan program. Going back to the simple solution, do not increase your net depletions, but I do not care what your conservation is, if it makes that farm more economically efficient so the farmer can have a better chance of surviving in today's business, that is what we have to do.

Director López stated that the staff intent is not to try and kill this program. It is not our staff intent to take away an opportunity for farmers to become more efficient, we feel like those are good things. But we are faced with a dilemma in terms of our charge relative to compact compliance and that is what we are trying to work out. So we will take all of this commentary and try and head in the right direction with it.

Commissioner Harris commented that we have seen the advent of enterprise zones and foreign trade zones and I believe this is an important program to help the agricultural community in this state.

**AGENDA ITEM #9 – LUNCH:**

The Commission recessed for lunch.

**AGENDA ITEM #10 – PRESENTATION AND DISCUSSION OF COLORADO'S PROPOSED LONG HOLLOW RESERVOIR AND LA PLATA COMPACT COMPLIANCE:**

Mr. Whipple briefed the Commission as follows:

The La Plata River Compact is an equitable apportionment of the waters of the La Plata River drainage. The State of Colorado is not free to deprive New Mexico users of the water owed New Mexico by compact.

New Mexico has raised concerns for many years regarding the State of Colorado's performance in making deliveries of water at the Interstate Station under the La Plata River Compact. Colorado to date largely has not acted to address New Mexico's concerns.

Causes of difficulties in meeting the La Plata River Compact Article II.2 daily Interstate Station delivery requirement may include natural and man-made factors, including diverting the flow of the La Plata River at Hesperus, changes in location of irrigation water uses and associated return flows, development of ground water, and construction of stock ponds and reservoirs throughout the La Plata River drainage.

Under the compact the Colorado ditches may construct reservoirs and deliver stored waters in exchange for flow of the river. There is no restriction or limitation upon the character or source of the waters to be delivered to New Mexico. Water from any source satisfies the compact. Colorado has the right to develop the water apportioned to them by the compact. The State of New Mexico is not required to request or approve how Colorado operates to make its Compact Article II.2 deliveries but New Mexico expects to receive its apportionment pursuant to the La Plata River Compact.

We have raised several concerns about the proposed Long Hollow Reservoir Project and last week the New Mexico and Colorado State Engineer's and their staffs met in Durango to discuss the project further. Our concerns include the following:

The water supply modeling performed by Wright Water Engineers for the Long Hollow Reservoir project incorporates certain assumptions regarding Colorado's administrative record, including its split river operations, historic compact calls, accrual of credits and debits in Interstate Station deliveries, and maximum Interstate Station delivery requirements. New Mexico does not agree that such assumptions accurately reflect the La Plata River Compact Article II.2 daily Interstate Station delivery requirement or constitute acceptable alternatives pursuant to Article II.3.

Based on the water supply studies provided to the State of New Mexico for the proposed Long Hollow Reservoir project, New Mexico does not believe that the operation of the project, in conjunction with other operations in Colorado, as modeled fully addresses New Mexico's concerns regarding performance in making deliveries of water at the Interstate Station under the La Plata River Compact regardless of the labeling or proposed operation of any "compact reserve pool". The water supply modeling studies appear to indicate that Colorado's water users anticipate operating diversions and the reservoir conjunctively in a manner that would hasten and worsen the dry river condition above the confluence of the La Plata River and Cherry Creek already influenced by man-made factors and making Interstate Station deliveries through the summer months more difficult to achieve when reservoir storage reserved or otherwise made available by Colorado for compact deliveries is exhausted. Regardless, Colorado's obligation to comply with Article II.2 of the Compact does not cease when such storage is exhausted.

In any case, it is the State of Colorado's responsibility to operate in compliance with the La Plata River Compact Article II.2 Interstate Station delivery requirement. Any risk associated with imprecision or uncertainty in water supply modeling assumptions, including Colorado diversion and return flow assumptions, Long Hollow Reservoir project planning, river losses, or actual river and reservoir operations must be borne by Colorado water uses.

General impacts to New Mexico water uses of Long Hollow Reservoir on a seasonal basis include the following:

December 1 - February 15:

Colorado stores all water on Long Hollow to the detriment of stock uses in New Mexico, irrigation and fish and wildlife uses at Jackson Lake Wildlife Refuge, and recharge to domestic wells in New Mexico.

February 16 - April 30:

Colorado stores water on Long Hollow that is in excess of the Interstate Station delivery requirement to the detriment of fish and wildlife habitat, including federal candidate and state listed round-tail chub, aquifer recharge in the La Plata River drainage in New Mexico that supports shallow domestic wells, and possibly uses on the San Juan River due to depletion impacts below the confluence of the rivers. Also, Colorado's storage of water on Long Hollow during this period is to the detriment of irrigation and fish and wildlife uses at Jackson Lake when delivery to the Interstate Station might otherwise be in excess of 100 cfs.

May 1 - June 30:

Colorado diverts flows of the La Plata River at Hesperus and releases water from Long Hollow Reservoir as necessary to make the Article II.2 delivery obligation by exchange, resulting in the same or less amount of water available for uses in New Mexico. The diurnal at the Interstate Station would be expected to be less than historic, thus impacting the distribution of water within New Mexico such that the supply to junior uses would be decreased.

July 1- November 30:

Colorado bypasses inflow to Long Hollow Reservoir plus releases up to 270 acre-feet from Long Hollow Reservoir storage as necessary to make the Article II.2 delivery obligation, resulting in compliance with Article II.2 for part or all of the period. In about one-third of the years, based on Colorado's operating, return flow and compact administration assumptions, reservoir storage would be insufficient and Colorado would revert to its historic river split after storage is exhausted, which builds La Plata River Compact non-compliance into Colorado's modeled Long Hollow Reservoir operation. In more than one-third of the years, inflow to the lower La Plata River may be greater than historic flows due to higher

return flows assumed by Colorado, unless the assumed return flows are depleted by ground water uses or other diversions. Colorado protects its senior uses to the extent that it uses reservoir storage to make compact deliveries. During the period that Colorado chooses to release reservoir storage to make its Article II.2 delivery, New Mexico receives no benefit as compared to Colorado curtailing its uses to make that delivery. New Mexico is injured, however, from Colorado choosing to revert to its historic river split operations once such reservoir releases are terminated to the extent that the Article II.2 obligation goes unmet.

General impacts to New Mexico water uses of Long Hollow Reservoir on an annual basis include the following:

The water available at the Interstate Station for use in New Mexico would be reduced based on Colorado's modeling and assumptions. In addition, Navajo Reservoir may have to release about 1,000 acre-feet of water per year to offset depletion impacts of Long Hollow Reservoir on the San Juan River as modeled by Colorado. This may be necessary to provide a reasonable and prudent alternative for Long Hollow to avoid jeopardy to endangered fish in the San Juan River and to comply with the Endangered Species Act. Planned uses in New Mexico from Navajo Reservoir may consequently be reduced by 1,000 acre-feet per year also because the yield from the reservoir is not sufficient for both the planned uses, including completion of NIIP and Navajo-Gallup Water Supply Project, and meeting the current San Juan Recovery Implementation Program flow recommendations.

#### **Questions from the Commissioners:**

Commissioner Espinosa inquired how far behind Colorado is on their compact deliveries or do they typically meet their compact obligations?

Mr. Whipple responded that if you ask Colorado they have complied with the compact. If you ask New Mexico staff they haven't. It has been a bone of contention. Currently we are operating on rotation that both State Engineers have agreed to for purposes of collecting data and seeing how the river responds to rotation at the very low flows that we are dealing with. In past years there has been no such agreement as to how to operate during these low flow conditions which means that the Article II-2 delivery obligation has been in effect and they have not met that.

Commissioner Espinosa asked how far behind Colorado is on their deliveries.

Mr. Whipple responded that he did not have that information but typically during the summer low flow periods when they should be delivering somewhere on the order of 3 to 10 cfs they are typically delivering about half of that or about 4 to 5 acre-feet per day under delivery for periods of 1 to 3 months.

Commissioner Espinosa asked how many years this has been going on.

Mr. Whipple responded that it has been going on ever since the compact, but beginning in the early 90's when the Hesperus gage flows and the state line gage flows were available to us on a daily basis via satellite technology, Colorado's operations became more transparent.

Commissioner Espinosa inquired if we have a record of notifying Colorado that they have not been meeting their delivery requirements.

Mr. Whipple responded that staff responds every year when we document our concerns about the state line delivery not being met with letters to the State of Colorado requesting adjustments in their operations.

Commissioner Espinosa asked what process the State of Colorado had to go through to build Long Hollow Reservoir.

Mr. Whipple responded that he suspected it would be a few years before they could have a dam constructed. Right now they are trying to secure a Section 404 permit to construct the dam in Long Hollow from the Corps of Engineers and the Corps of Engineers has to go to formal consultation with the Fish and Wildlife Service on issuance of that permit.

Commissioner Espinosa asked if it was true that Colorado does not consult with New Mexico.

Mr. Whipple responded that was correct. If they are successful in getting a Section 7 consultation that it would not threaten any endangered species then at that point the Corps could issue a permit. There may be other Colorado law that they will need to comply with but they do have the appropriations from the state to construct the dam.

Commissioner Espinosa asked how the State of New Mexico could insert itself into the process.

Mr. Whipple responded that staff has expressed New Mexico's concerns to Colorado. Colorado desires New Mexico support for the Long Hollow Reservoir project but for reasons we have identified it is very difficult for us to do when we weigh the pluses and minuses. But the State of Colorado has the right to develop the waters apportioned to them by the La Plata Compact regardless of negative impacts on New Mexico. However, we have also asserted to the State of Colorado that they have an obligation to deliver to New Mexico what is ours in accordance with the compact. We have made it clear to them that we are going to hold them to their compact delivery obligations.



Commissioner Espinosa stated that we haven't done that to this point. They haven't met compact deliveries and we haven't had them account for that so why would they care what we say. If we cannot stop from going ahead with the Long Hollow Reservoir Project even when it will be to our detriment, especially during a drought, then what can we do.

Mr. Whipple stated that this year they have received a completely different response from Colorado with respect to their operations and their river split operation that they chose not to implement this spring. Certainly there is a record constructed over the past 10 years showing what our concerns are and what our evaluation of the situation is recognizing that the State of Colorado have some differences of opinion.

Chairman Dunlap commented that if Mr. Whipple were an attorney he would have already sent them a letter with a suit behind it.

Commissioner Espinosa said that is what she is getting at. How long can we go before you finally do something about the situation.

Chairman Dunlap said that is what he believes all of the New Mexico irrigators would like to have answered also but that he understood the frustration that Mr. Whipple is dealing with.

Mr. Whipple commented that there is a lot of time that would be involved a suit and there may be other ways to try to effectuate the changes that need to be made.

Commissioner Espinosa said that she understood that but if they have never met their compact obligations since the commencement of the compact then there comes a time where you start preparing for litigation and then maybe they will pay attention to us a little more and I do not know when that time might be but I do not think that it is a bad thing for us to start looking at this as a Commission or as a State because I do understand that litigation takes years and years and it is going to be very difficult and very costly. But, we ought to start preparing ourselves for that because I am not sure that they are ever going to meet their compact obligations and unless their hand is forced in some way where they know we are serious about this and they will still be in noncompliance.

Mr. Whipple responded that one of the things that they are trying to address through a designated storage pool for meeting the compact delivery is meeting compact requirements. Again, we do not agree with some of the modeling assumptions as to how far that reservoir storage would carry them in meeting the compact obligation or to the extent that they develop more irrigation water supply how much return flows from that irrigation water supply in other portions of the year will help them in meeting the compact deliveries. That is another component that they are assuming will assist them in meeting that obligation.

Secretary D'Antonio commented that this compact does not operate on a debit or credit total. It is a daily delivery. One of the things that I think that Mr. Whipple didn't say is that the State of Colorado doesn't need our approval to build that dam. It can go ahead and build that dam and do it on their own timetable. What Mr. Whipple did in looking out for the State of New Mexico is to put those letters in place to make sure that New Mexico is not just silent on what they are doing and not doing. Mr. Whipple made some comments on their 404 permit they are trying to get from the Corps of Engineers. In that 404 permitting process the federal government is asking why the State of New Mexico opposes the project if it is going to help Colorado make compact deliveries. We want to make sure if they go through with this expenditure and they build the dam they are not released from their La Plata River Compact obligations. We are in a protected position because we have made sure that the appropriate comments and letters were made along the way to protect New Mexico's interests and if it comes to us having to file suit we can. But my intention would be to work with them to see if we can come up with a solution and stay out of litigation and spend the money toward a collaborative solution just like we are trying to do with the State of Texas on possible under deliveries on the Rio Grande.

Chairman Dunlap asked Mr. Blasingame, a La Plata Conservancy Commissioner if he had a comment.

Mr. Blasingame stated that he appreciated the State Engineer and staff meeting with the Colorado people. He said that he had been on the board of the La Plata Conservancy District since the mid 80's and that he knew over the years that Colorado has always tried to talk us into Colorado's drying of the river. That has been our contention for years.

**AGENDA ITEM #11 – APPROVAL OF RESOLUTION ACCEPTING MIDDLE RIO GRANDE REGIONAL WATER PLAN:**

Mary Helen Follingstad introduced the Joe Quintana with Mid-Region Council of Governments, Mike Trujillo, County Manager for Valencia County formerly the water planning manager for the Middle Rio Grande Regional Water Plan, Bob Penderast with the Water Assembly, and Bob Wessely with the Water Assembly. The Middle Rio Grande Water Planning Region is where about half of the people of this state live and they have put together an heroic effort in getting this plan before the Commission. Between the ISC and the region the funding was shared and there were many in-kind hours put in by the Water Assembly and the Mid-Region Council of Governments staff. Mary Helen Follingstad explained that the Water Assembly was the steering committee for the Mid-Region and that they are in partnership with the Mid-Region Council of Governments in the development of the regional plan and their charge was public involvement. The water plan generally meets the ISC acceptance criteria and it is generally



responsive to the 1994 ISC Water Planning Handbook. The resolution before the Commission is for your consideration.

Mr. Wessely presented a power point presentation on the Middle Rio Grande Regional Water Plan. **[see attachment 5]**

Mike Trujillo and Joe Quintana commented on their efforts in developing the Regional Water Plan.

**Questions from the Commissioners:**

Chairman Dunlap commented about the follow-up money that was mentioned to implement the plan and that each planning district should determine what its needs are and how funds could be raised because it may get to a time where it is considered a local and not a state initiative.

Mr. Trujillo responded that from their perspective they have come out with their own implementation plan knowing it was an important aspect of what this meant to our region. From our perspective we would recommend the districts in the state develop their own implementation plans based on the needs of each respective district.

Chairman Dunlap asked if Mr. Trujillo thought Valencia County should be responsible to the rural water districts that are purveyors of water within their county.

Mr. Trujillo agreed the county has responsibilities including statutory provisions in terms of being the water provider and water supplier. He agreed that the county has a moral responsibility since agriculture covers a significant portion of the county.

Mr. Quintana commented that they had substantial local government input into the plan and they had matched ISC funds.

Chairman Dunlap inquired as to the size of the area that is covered by the Council of Governments.

Mr. Trujillo responded that it was a 4 county area consisting of Torrance County, which is in the Estancia Basin, Sandoval County, Bernalillo County and Valencia County and represents 40% of the state's population.

Chairman Dunlap asked where the Council of Governments gets their funding.

Mr. Trujillo responded that they get a small appropriation from the legislature every year. They get the majority of their funds from member governments who put in a set amount based on population.

Mr. Quintana stated that the Council of Governments is voluntary and that they cannot mandate membership.

Chairman Dunlap asked if the tribal governments were ever given a document that asked whether they wanted to sign on to this or not. You said previously that they were offered the opportunity to participate but chose to sit on the sidelines. Do you have any correspondence from them that states they did not want to participate.

Mr. Trujillo stated that they did not have correspondence but that the tribal governments comments were made verbally and that they had chosen to be observers. Two of the sovereign nations did participate in the Rio Puerco/Rio Jemez plan those were the Jemez and Zia pueblos. They have adopted resolutions. On the mainstem we do not have any resolutions at this time.

Chairman Dunlap asked if Mr. Cart was the team leader that was able to get those pueblos to participate.

Mr. Cart responded that he did that and introduced Governor Pino from the Zia Pueblo and invited him to comment.

Governor Pino stated that Zia chose to participate because they feel that they needed to protect their positions. He commented that every tribe is sovereign and approaches it a different way. The Governor elaborated on the position the Zia Pueblo has taken with respect to water and concluded his remarks by stating that he hoped the Commission would adopt the Regional Water Plan.

Commissioner Espinosa commented that developing the plan was a daunting task and the document represents a lot of work by the participants over the past 7 years and wanted to express her appreciation to all the parties. She went on that she had two particular issues and one of them is in regard to the tribes and that she had some of the same questions that Commissioner Sanchez expressed in his letter to the Commission **[see attachment 6]** regarding tribal representation. Commissioner Espinosa said she understood that tribal entities are all different and look at their sovereignty sometimes in different ways particularly when it comes to water rights and other real important issues that we are dealing with here. She said that sometimes she thought that to make that extra effort with the tribes is particularly important because you get what you can get with Governor Pino and with Jemez Pueblo, which is the input that you want, so that the document reflects what the tribes think and how the tribes want to position themselves in this plan and with the state. Commissioner Sanchez has asked the Commission if they would take his suggestion that we hold off on accepting the plan until the plan can be presented to the tribal entities and I know that you have sent them documents and I am not sure what the process has been to make the presentations to the tribes.

Commissioner Espinosa asked Governor Pino if he thought it would be more beneficial for the government to government process to come from the Interstate Stream Commission and the state rather than asking the local entities and the developers of the plan to go back to the tribes.

Governor Pino's response could not be heard on the tape of the meeting.

Commissioner Espinosa stated that a copy of Commissioner Sanchez' letter had been sent to Governor Pino and provided him a copy of the letter.

Commissioner Espinosa asked whether from a state perspective we can be helpful in moving a process forward; I know you have completed now but with that interface with the tribes or whatever. Commissioner Sanchez is from Isleta; he may have been able to get you a meeting with the Governor or the Council or other places. Commissioner Espinosa said the Commissioners are willing to step up when requested to help do that liaison or interface. If it helps to have a state person there while you are trying to look at various and sundry issues within the region I think many of the Commissioners are willing to do that. Commissioner Espinosa concluded by saying that she felt the Commission has to be respectful of the sovereignty of the tribes and take them at their word if they decide that they do not want to participate for whatever reason.

Mr. Trujillo commented that rather than being at the end of this effort he felt they are just beginning. We have to implement this plan, the problem that we have is real. That is why we are serious in wanting to keep this process moving ahead.

Commissioner Espinosa said with respect to implementing the plan that at some point the Commission should talk about some ideas on how the Commission looks at funding resources to help these regional plans become implementation realities, not just in the Mid-Region but all over the state because she felt it is extremely important.

Mr. Wessely commented with respect to Commissioner Sanchez' request that the ISC has tried as has the Water Assembly and the Mid-Region Council of Governments to involve the tribes, the mainstem tribes, in the process. We have given presentations to very few of them but to some of them, including the Sandia Pueblo. Isleta had a representative at the Water Board for quite awhile. We spoke non-formally with the San Filipe tribe. We have sent letters each year to each of the tribal governors of the year to offer to give presentations to them or to their tribal councils. The ISC actually tried to negotiate a contract with the tribes to get their participation and that negotiation fell apart. We have tried very vigorously and we will continue to try and what I would recommend to the Commission is to accept the plan and make more vigorous tribal involvement part of the early implementation process.

Commissioner White commented that he too had been concerned with Commissioner Sanchez' letter but after hearing the presentation he felt a higher comfort level that this plan provides for an ongoing, updating, modification, improvement process as we go along.

**Commissioner White moved to approve the resolution accepting the plan, Commissioner Espinosa seconded the motion.**

Governor Pino made a comment supporting the Commission accepting the plan.

Director López commented that to the extent that it is the desire of the Commission to accept the plan that he would recommend that the Commission consider the acceptance be in the form of the resolution that was provided in the packet and that resolution covers some appropriate caveats relative to the statements made in the plan.

Commissioner White indicated his agreement with the Director's comment.

Commissioner Espinosa commented on the caveats in the resolution with respect to chapters 5 and 9 of the plan that she understood were legal matters with which the ISC had a difference with the assembly. Commissioner Espinosa asked if staff could speak to what the different legal concerns were.

Chairman Dunlap asked if it was the recommendation of staff to accept the plan.

Commissioner Espinosa responded that the staff is recommending acceptance.

Mary Helen Follingstad responded to the concern about legal matters. She said the reason they developed the resolution was to cover the issues that were raised by our attorneys so that we did not have to go back into the plan with specific sentences and places in the plan that were apparently too many and it would take many dollars and hours to ask for changes that we would like to see and we did have the region agree to change some sentences in the plan that involve the compact.

Tanya Trujillo commented that the concerns were with respect to statements that were contrary to the ISC and the State Engineer policies. In particular there are references to compensation that would be provided in the event there were shortages due to compact compliance issues. In addition, there were statements in the plan that varied from positions that the State Engineer may take in future water rights adjudications specifically with respect to tribal water rights. Because there are ongoing adjudications and a lot of matters are still to be determined through the litigation process, the ISC staff was uncomfortable approving those particular provisions in the plan.

Secretary D'Antonio offered to the group making the presentation the services of the new Indian liaison, Myron Armijo that he could help set up some additional presentation opportunities for some of the tribes and pueblos.

**The motion carried unanimously.**

**Commissioner Garcia moved to approve Secretary D'Antonio's offer of assistance of the Indian liaison, Commissioner Espinosa seconded the motion. The motion carried unanimously.**

**AGENDA ITEM #13 – COMMISSION APPROVAL OF WEATHER MODIFICATION RULES AND REGULATIONS:**

Tanya Trujillo directed the Commissioners attention to tab 12 of the meeting packet for the weather modification rules and regulations. Ms. Trujillo presented a brief background on the amendment of the Weather Control and Cloud Modification Act passed by the legislature in 2003 that gave the Interstate Stream Commission authority over issuance of licenses and enforcement under the Act. Staff has developed a draft set of rules for weather modification licensing and the Commission formed a Weather Modification Committee. The set of proposed rules were sent out for public comment, posted on the web site, and available widely throughout the state. Staff received comments regarding the proposed rules and a public hearing was held on July 20<sup>th</sup>. Commissioner Sanchez presided as the Hearing Officer and ISC staff presented witnesses and members of the public also presented witnesses and made recommendations to the Hearing Officer regarding the proposed rules. Commissioner Sanchez issued findings of fact and conclusions of law that you have before you [see attachment 7]. The findings of fact and conclusions of law indicate that the ISC has jurisdiction to promulgate the rules, that the public notice was provided regarding the proposed rules and the findings of fact included some proposed revisions to the set of regulations that were submitted to the public that are summarized in the findings of fact. As a result staff is recommending approval of the proposed Weather Control and Precipitation Enhancement regulations. These regulations provide an application process for the issuance of a license for activities to "attempt to produce any form of modifying effect upon the weather in the state." The regulations provide for a hearing process in the event a license is not granted and the proposed operator wants to object. It also provides revocation criteria, so there are standards the Commission will use in determining whether somebody's license should be suspended, modified or revoked. Finally, the regulations propose operational reports on a 90 day basis and a summary report required at the conclusion of each series of operations.

Commissioner Sanchez has recommended approval of the rules and regulations.

Commissioner Garcia moved, Commissioner Harris seconded, to approve the weather modification rules and regulations. The motion carried unanimously.

**AGENDA ITEM #14 – RECESS UNTIL 10:00 AM, AUGUST 18, 2004:**

Commissioner Garcia moved, Commissioner White seconded, to recess. The motion carried unanimously.

Chairman Dunlap distributed information to the Commissioners regarding the Navajo Nation Water Rights Settlement.

The Commission recessed at 3:45 PM. The Commission reconvened at 10:10 AM, August 18, 2004.

**AGENDA ITEM #15 – PRESENTATION ON NAVAJO NATION WATER RIGHTS SETTLEMENT:**

Chairman Dunlap welcomed members of the public to the meeting and introduced the commissioners.

John Whipple presented a power point presentation regarding the current draft of the Navajo Nation Water Rights Settlement [see attachment 8].

John Utton stated that the summary Mr. Whipple provided reflected the July 9<sup>th</sup> draft that has gone out to the public. We are getting additional comments from people and we are expecting that there will be some changes to that draft before a final draft is brought before the Commission for approval, hopefully that will be sometime in early fall.

There are several items that the Commissioners should be aware of that are coming up that will effect the draft settlement. One of them that Mr. Whipple mentioned the waivers and objections, one of the big questions and comments we received were related to non-Navajos wanting Navajos to agree to the status quo on the Echo Ditch rights as they were decreed under that. So we drafted those up and now we are getting further comments on refining those so that is one item we will see some changes.

Another one does relate to the schedule. We have received comments from a number of people suggesting that this a long process from the time that you have enactment of the settlement legislation in 2006 and the time the court would act on this in 2015 and one possibility that we are considering is the possible splitting of the decree. The item that is really holding this up is the hydrographic survey that wouldn't be completed until 2011 and then after that there would be a motion for entry into final partial decree with the court and expedited inter se would occur with that culminating under this schedule by 2015. So that is a long way out.



The hydro-survey is going to analyze the tributary water rights. Those are smaller uses that are south of the river, in fact these are miscellaneous uses such as stock ponds, small irrigation and so forth. We are expecting that number is in the neighborhood of 5,000 acre-feet. It has been pointed out to us that we have all the numbers for most of the settlement except for a very small part, 5,000 acre-feet and it really that tail that is wagging this whole decree. So one possibility and the Department of Justice in particular has suggested we might consider, is going forward with the decree on 98% of this that we have the numbers for and they are not going to be hydro-surveyed because they are already existing and we know the numbers and go forward with that. Some of the comments we have received from the public is that there is not a formal process for taking comments. There is no formal legal process for their input. This would allow for that to occur sooner. Then once that hydro-survey occurs there would be a supplemental decree dealing with those smaller uses. Mr. Utton said he didn't think that would be particularly controversial but one question that raises is the notice process. We essentially would have to go perhaps through two notice processes and we are trying to avoid having to do that more than we have to. So one thing we might consider is noticing in the first notice the fact that there could be a supplemental decree a second time around. We would have to think whether that would be sufficient notice. It may be by the time that the hydro-survey is done that everyone will be in the case in already and the notice would be distilled to a simpler process. In the Jicarilla case, because not everyone was joined, the state had to provide notice to every land owner in San Juan County. That was quite an arduous process. But even if we had to do that twice it would be worth doing it to move this process up sooner rather than having a long drawn out schedule.

The third one that John Whipple mentioned is that we are beginning to get feedback from the congressional delegation. Senator Domenci spoke on the costs of the settlement just this past week in Santa Fe. One thing that we might be hearing from them is that we perhaps we might have too many things packaged together. One preliminary comment that we have received is that why NIIP is in the settlement with respect to funding; it has to be in the settlement with respect to water rights but NIIP is already authorized and those cost issues could be addressed outside the settlement. So one possibility is that the funding that would be authorized in the settlement would be focused primarily on the Navajo-Gallup project as the main expense which would bring down the cost of the settlement quite a bit perhaps even down to \$700-\$750 million. We have not gotten far enough along and it really is a federal issue and we do not believe it is the State of New Mexico's position to go and ask the Navajos to include or not include certain funding. As Mr. Whipple suggested we are going to reserve judgment or action on that until we hear back from our delegation and if that is the position that they are going to take it really needs to come from our two senators. We are going to have a preliminary meeting with their staff later this month to try and talk about that. Getting that issue straightened out is very important before we have a final draft of this so when we have a signing

ceremony we know that we have the congressional delegation supporting those funds that are called for in the settlement.

Mr. Utton concluded his comments by saying that Judge Sanchez will hear the pending motions on Friday at 10:00 AM in Aztec on a couple of motions that have been filed, one by Gary Horner, one by the San Juan Agricultural users to "restrain the State Engineer from moving forward with this settlement" and the United States, Navajo Nation and State of New Mexico have all filed briefs in opposition to that and we will have to see what the judge does but we believe that the state's position clearly is that we have the full right to engage in settlement discussions with other parties in litigation. The judge cannot interfere with that and we believe that is "black and white" in the letter of the law. There will be a formal legal process in front of the court where those parties can state objections and can enter into their own negotiations with the Navajo Nation and we think the suggestion that somehow the court will have no alternative but to accept the settlement, or it somehow doesn't have authority or discretion to address those concerns, is an insult to the court.

#### **Questions from the Commissioners:**

Chairman Dunlap commented with respect to the process where people may protest at a later date that he would like an explanation of that process.

Mr. Utton responded that the typical adjudication proceeds in two phases. There is what is called the sub-file phase and then there is the inter se phase. In the sub-file phase what you essentially have is the State of New Mexico trying to work out with the individual claimants some agreement or resolution of what their water right is and of course in these cases the state serves not as a water right owner but as a regulator attempting to through the court adjudicate all the water rights so that they can be administered in priority so the state is the plaintiff and all the claimants are defendants in the case. The state attempts to work out with each claimant a sub-file order with that claimant. Ultimately all the claimants in the case may have claims against each other because one neighbor may disagree with what the neighbor next door has claimed or is being decreed. So there is this inter se phase which is Latin for "as among and between" where essentially all of the claimants become cross-claimants and can object to anyone else's water right and this only fair because it recognizes that all of these water users are extracting water from the same source and what your neighbor does can affect you and so you have the right to object to that claim. So in the inter se everyone has a chance to object to each other and so where are at this point is we are at that first phase of the Navajo Nation and the State of New Mexico is trying to clarify what are your water rights Navajo Nation as between the State of New Mexico and the Navajo Nation and the United States is involved as trustee for the Navajos. Everybody in this case will have the chance to object to everyone else's water right and the Navajo Nation won't be treated any differently in that respect. They will have to come before all of the other water rights



claimants and those claimants are not bound by whatever the agreement is or the order at that sub-file, at the first phase, they only become bound once the court opens it up for consideration by all the other claimants and those claimants can come in and have their day in court. They can have their say and present evidence, they can say "your honor while the state may have agreed to this priority date or this quantity we have got evidence and we have an argument that it is something else." The judge is required to hear that as evidence valid as good as anyone else's is. The claimants also have the right to negotiate with the other parties.

Chairman Dunlap stated that another question he has heard is that there is concern about the part in the draft settlement where the Nation would have a right to object to the Echo Ditch Decree as far as forfeiture, abandonment and unauthorized uses. The Chairman asked where in the law may the parties find a definition of forfeiture, abandonment and exactly how those would be applied to the water rights.

Mr. Utton responded that the forfeiture provision is a statutory provision and it is found in the Water Code in Articles 5 and 8. Article 5 deals with surface water forfeiture and Article 12 with groundwater and when the legislation was first adopted non-use for 4 years could constitute forfeiture. In 1965 the New Mexico legislature decided that was too harsh, that did not give people a long enough period to try and use their water and as a result required from 1965 forward that if one were to be subject to forfeiture the State Engineer would have to go out and give written notice and offer a one year opportunity for the potential forfeited right to be put back to beneficial use. Since 1965, Mr. Utton stated he was unaware of any instance where the State Engineer has given such a notice. In effect forfeiture has not be applied in New Mexico after 1965. There is a second doctrine and that this is the common law court created doctrine of abandonment. Essentially that is if you go long enough without using your property, if you left the state and moved to Montana, there would be a presumption after an unreasonably long time is the standard that you have given up your ownership claim to that right and that applies to water rights. There is a federal court decision on the Jemez that suggests that around 16 years of non-use creates a presumption of abandonment but that is a rebuttal presumption. You could come in and show that even if you didn't use your water right for 16 years, which is a long time, that you had good reason for it. There is a whole list of defenses. Municipalities are exempt from both of the described doctrines if they can show that they need that water supply for a 4-year planning horizon to meet the demands of the town.

The Navajo Nation is agreeing not to go behind the decree and they like anyone else, even though they were not bound by the decree, would have the opportunity to object to water rights being decreed if they haven't been used for a long time. So that provision that is now in the current draft was placed in there

by the request of a lot of the agricultural users and so we have put that in there and the Navajo Nation is agreeing to abide by that.

Mr. Utton explained that unauthorized use would be for example if you received a permit, a post-Echo Ditch Decree permit, and it was to irrigate 10 acres in a certain location and you instead irrigate 20 acres or you irrigate 10 acres somewhere else in the valley without having a permit then that kind of use may also be objectionable.

Chairman Dunlap asked if there is such a time as a federal reserve water right once it is assigned to the sovereign nation, the Navajo Nation, is it still a federal reserve right or does it become a state right that is administered by the state. Is there a break in there when it changes color.

Mr. Utton responded that there is a break in terms of the administration the right is still a federal reserve right. It would be decreed as a federal reserve right but the McCarron Amendment which waives sovereign immunity and one of the reasons that Navajos were not part of the Echo Ditch Decree is that the McCarron Amendment wasn't adopted by the U.S. Congress until 1952 and congress recognizes a problem where Indian tribes and other federal entities are saying we have immunity from water rights adjudications and administrations. Congress took care of that and so now we are in state court, we are in the San Juan County court and Judge Sanchez is the state judge overseeing that. Both the United States and the Navajo tribe are subject to that administration. So the Navajo rights are going to be administered along with all the other rights and they are going to be treated no different once their elements are decreed they will be administered according to those elements and the State Engineer will be the water master.

Chairman Dunlap commented that the proper relief if this settlement is not supposedly being administered properly would be back through the district court.

Mr. Utton responded that was correct but under the administrative scenario that Mr. Whipple described where the Navajos have some authority over some areas of their land and the State Engineer has authority over the others. If there was any appeal it would be to the state district court and that court retains jurisdiction to resolve those disputes.

Chairman Dunlap commented that the Arizona diversion of water through the Navajo-Gallup pipeline will take some miles from Bluff, Utah where we measure the endangered species flow. Will we have to replace that flow in between or will we receive credit in Bluff, Utah.

Mr. Whipple responded that there are two types of flows that are being maintained for the endangered fish habitat purposes from Farmington to Lake Powell. One is the high spring peak release that is made from Navajo Reservoir

and to try to match statistically designated peak flows in the middle of the spring run-off and those are typically modeled over a period of record to get statistics at the Four Corners gage. For the remainder of the year there is a flow recommendation to maintain a base flow from 500 to 1000 cfs, a flow in that ranges through the reach of critical habitat. Typically we are looking at maintaining a minimum base flow of 500 cfs that is measured as the minimum of three out of four gages including gages on the San Juan River at Farmington, Shiprock, Four Corners and Bluff. It is not just measured at one point at Bluff. Under the proposed settlement agreement moving forward with the Navajo-Gallup Water Supply Project is contingent upon that project complying with all aspects of NEPA and the ESA. The implication of that is that there will have to be a Section 7 consultation on the Navajo-Gallup Water Supply Project with respect to potential impacts of that project on the endangered fish species in the critical habitat. If in moving that project forward it would impair the flow recommendations that have been provided by the San Juan River Basin Recovery Implementation Program then it is possible as a result of that Section 7 consultation the Navajo Nation may have to agree to reduce some other uses elsewhere to allow the flow recommendations to be met. However the Fish and Wildlife Service has indicated that the flow recommendations are not necessarily inviolate and it remains to be seen if there are other reasonable and prudent alternatives that could be provided to avoid jeopardy to the endangered fish or adverse impacts to critical habitat if the flow recommendations could not be met with that project coming online.

Chairman Dunlap said that the next question he has heard is that the Navajo Nation has the authority to change the use within the project area if diversions do not exceed 353,000 acre-feet a year if there is no impairment to other uses. How will it be determined and who will determine and who will monitor the possible impairment if the Navajo Nation can do that within their boundaries.

Mr. Whipple responded if the Navajo Nation is using the NIIP contract rights solely for irrigation on NIIP or for other uses within the 353,000 on trust lands then there would be an administrative process that the Navajo Nation would use for determining impairment. As part of the process they would have to consult with the State Engineer and then if there were decisions that either the state or other parties disagreed with those could be appealed to the adjudication court. With respect to diverting, if they are using any water for other than for irrigation and they wish to divert more than 353,000 acre-feet per year, they would file an application with the State Engineer and the State Engineer would have his administrative process to go through and evaluate whether or not increasing the diversion above 353,000 would result in impairment to any existing water rights including contract rights for water deliveries from the Navajo Reservoir storage.

Chairman Dunlap commented that they could increase the diversion right as long as it does not increase their depletion right.

Mr. Whipple responded that their depletion right will still be 270,000 acre-feet as proposed.

Chairman Dunlap asked how the dollar amounts were arrived at; where did they come from.

Mr. Whipple responded that the rehabilitation costs were estimated by the consultant to the Bureau of Indian Affairs for rehabilitating Fruitland and Hogback. The Bureau of Indian Affairs and Bureau of Reclamation and their consultants had some input into this. They estimated the amount of additional funding required to complete the Navajo Indian Irrigation Project and to refurbish some of the existing facilities on that project and the estimated cost for the Navajo-Gallup Water Supply Project was prepared by the Bureau of Reclamation. In fact you may notice between the December 5 draft and the July 9 draft there was increase in the estimated cost for the Navajo-Gallup project of approximately \$100 million which is largely a result of the Bureau of Reclamation reevaluating the cost and being more conservative in the cost estimate and adding larger contingencies as a result of the experience on the Animas-La Plata Project.

Chairman Dunlap said another question he gets is why don't we just do away with the settlement and let them go to court and we will use the Winters doctrine and the Practically Irrigatable Acreage (PIA) claims.

Mr. Whipple responded that is certainly one of the issues that has been raised of what would the Navajo water rights be determined through the adjudication if their claims were litigated. Of course we do not know the exact answer without going through litigating what the PIA claims may be however he said he thought it was important to note that their claims may not necessarily be limited to PIA claims but their federal reserve rights claims may not necessarily be limited to PIA claims. For example in reserving lands to be set aside as a permanent homeland for the Navajo Nation clearly part of the permanent homeland would be people residing on that land and they need domestic water supplies and so forth. One of the things that we have looked at in the settlement is that if we are going to have a settlement with the Navajo Nation there is some minimal elements that would need to be included in that settlement. One is recognition of the congressional authorization for the Navajo Indian Irrigation Project that was made in 1962. The 1962 Act authorized the San Juan-Chama Project and the Navajo Indian Irrigation Project. The San Juan-Chama Project was completed within 10 years the NIIP has had construction going on for 40 years now and is approximately 70% complete. But this is a commitment that the Navajo Nation feels that the United States made to them to provide that project, the irrigation of 110,630 acres. One could argue as to how much PIA there was in 1962. Of course it was determined to be practicable to provide for a gravity feed diversion out of Navajo Reservoir and Navajo Reservoir has about 670,000 acre-feet +/- of inactive storage in it just to provide for that gravity feed for the NIIP and then with

the associated canals and water ponds. The PIA under that system may be 110,000 or it may be more. Issues of economics over the project in management could be argued and debated probably for a long time. But nevertheless if you are going to have a settlement the Navajo Nation needs to recognize the authorization by Congress for that project. The second piece is adjudication of the rights, the senior priority rights of the Hogback and Fruitland projects. They are under this settlement would be limited to 12,100 + acres combined which is the farm acreage existing under the current canal systems. If you look at the 1962 Act that approved the NIIP, section 11c of that Act actually refers to an expansion of those projects by 11,000 acres and that water to supply that expanded acreage could be made available from flow above Navajo dam. They would be senior direct flow rights. If you go to the congressional record behind that Act there are references to a total of 26,000 acres compared to the 12,000 acres that we are providing in the settlement agreement. The Navajo Nation has also had a consultant, they have not shared the report with us, but they report to us that the consultant to the Nation has estimated that there is about 37,000 acres in addition to the 12,000 provided in the settlement of lands between generally Shiprock and Four Corners that are irrigatable. To what extent those would be practicably irrigatable is unknown. Again the settlement also recognizes the couple thousand acre foot depletion allocation that was already allocated to the Navajo Nation by the Ute Settlement Enactment of 2000 and with respect to the Navajo-Gallup Water Supply Project this is to provide for the domestic water needs of the Navajo Nation that have been identified by their studies through the year 2040. It is my estimate that that amount of water will carry them beyond the year 2040 to some point in time whether it is 2060 or something else. At some point they too like other users in the basin will have to look for conversion of their irrigation rights to supply domestic water supply needs. What other claims the Navajo Nation could make certainly you will note in our responses to comments there is a suggestion of perhaps some water for a power plant and based on some theories with respect to NIIP depletion rights and certainly in the settlement if they choose to transfer some of their irrigation rights on NIIP to a power plant they are free to do that but we do not provide additional water for a power plant over and above the NIIP rights. What other additional claims or what PIA claims would be we could speculate on but I am not sure that does a whole lot of good. The bottom line is a settlement has to include certain minimal elements and that is what we have in this settlement.

Commissioner White asked if the 2,000 acre-feet groundwater rights that was mentioned was artesian water or is it water that some day will be completely depleted.

Mr. Whipple responded that by and large it is probably non-tributary groundwater. It depends on where they choose to pump it and the closer they are to the river the more the possibility is of river impacts. If they were diverting down by Crownpoint the effects would be minimal.

Commissioner White asked if the Navajo Nation has agreed to the authority of that is granted within this agreement to the State Engineer.

Mr. Whipple responded that they will have agreed if they approve the settlement and the Navajo water rights staff is working with their Water Rights Commission and their Natural Resources Council and members of the Navajo Nation Council on education and they cannot begin the actual approval process until we get a more finalized settlement.

Commissioner White stated that his specific question is whether they recognize the State Engineer's authority to administer the water rights within the confines of the settlement.

Mr. Whipple responded that yes, they do.

Commissioner White commented that there was mentioned exportation of water to another state would have to be approved by the State Engineer's Office or by the State of New Mexico and didn't we run into this problem down in El Paso with the El Paso-Las Cruces question several years ago.

Mr. Utton responded that the settlement documents are drafted with that particular El Paso decision in mind. Of course the City of El Paso sought to export groundwater from New Mexico for use in El Paso County and New Mexico had on the books at that time an anti-export statute. El Paso challenged that it was a violation of the Commerce Clause and Judge Bratton determined that El Paso was correct and we could not ban the export of water if otherwise applicable law did not prohibit it. As a result of that the decision in 1983 the New Mexico legislature adopted a new statute that is 72-12-B in the Water Code that allows for the export of water from New Mexico and there are six criteria that have to be met but essentially state regulation has to be even-handed and allow for the export of water as an article of commerce. Right now Mr. Utton stated that he thought it would be very difficult to market water from the San Juan Basin out of New Mexico however those federal laws are somewhat beyond the control of the State of New Mexico although they could change over time. What we have provided for in the agreement is to address that is that in addition to the requirement that the Navajo Nation must obtain a Section 72-12-B permit from the State Engineer in addition to that we have agreed as a matter of contract that the State of New Mexico would have to consent through the ISC to an export. That is an extra protection that we have put in the agreement that would survive even if the federal law changed and even if the State Engineer permit was issued.

Commissioner White commented that he noted the final completion is 18 years from now and recognizing that the irrigation project is still not complete. What can be done to expedite the process.



Mr. Whipple responded that the completion date for the Navajo-Gallup Water Supply Project is based on the Bureau of Reclamations anticipated construction schedule and how long it will take to complete the project and we added a few years to that for a cushion. In the settlement documents there is no completion date associated with the NIIP for reasons of competing funding. So there is a little bit of conservatism built in but you do not want to build in too much conservatism and let the Navajo-Gallup project for domestic needs to drag along too long.

Commissioner Garcia asked if the motions just submitted will affect the settlement progress.

Mr. Utton responded that he did not believe the judge would rule favorably on the motions but that he could be surprised. But if the court did that and there is a problem with that because I believe it would be a separation of powers issue where the judiciary would be telling the executive you could not have discussions with somebody, but lets say the court did that. Even if we sought the New Mexico Supreme Courts intervention to prohibit that and we loss then the case would just have to be litigated. If we cannot settle the case then it would have to be litigated and then we would find out what additional PIA they would claim. One of the reasons that we have not quantified what PIA there might be is that the Navajos are settling for the existing projects for NIIP and for their existing uses south of the river and for Hogback and Fruitland and they are not claiming any additional PIA land so we have really not concerned ourselves with trying to quantify that because they are waiving that claim.

Commissioner Espinosa stated that she would like to see the schedule moved up so that we can receive some sort of partial decree from the courts. What is the feeling of the congressional delegation with respect to the settlement?

Mr. Utton responded that they have had ongoing discussions with the congressional staff and the staff specifically Mike Connor who is Senator Bingaman's chief aide on water issues and Eric Webb and Nate Gentry who are with the Senate Energy and Water Committee and report to Senator Domenci. Congressman Udall's office has been involved with this as well. We have worked over the last year and a half with those individuals and getting comments from them on the legislation. We have had weekly meetings and we are meeting again on August 31<sup>st</sup> to go these documents and they are very helpful. Our impression is that the congressional delegation is very supportive of getting the settlement done, that they want it to be a very good and fair settlement. They like New Mexico want it to be good for both the Navajos and non-Navajos. The biggest concern is the price tag. We are hoping they will give us some clear direction on that federal share issue in the next month so any adjustments we need to make we can do that quickly.

Commissioner Espinosa asked what the chances were for getting the agreement before a committee of the current congress.

Mr. Utton responded that if we could get a signed agreement it is possible that we could submit legislation this fall and it could be introduced and get a committee assignment that would likely carry over to the 109<sup>th</sup> Congress. Of course even if the legislation were introduced this year it would have to be re-introduced and so we are really looking at the 109<sup>th</sup> Congress which will go through the end of 2006. But the fact that we may get a committee assignment this year argues for trying to get something introduced this fall.

Commissioner Espinosa asked what the benefit is to New Mexico and to the water users in this basin if we don't have a settlement and if we have to litigate this.

Mr. Utton stated that he thought the benefit is much greater than the downside. When I look at the calculus that makes this settlement work it is really the Navajos are giving up huge water rights claims and so the state is protecting its water resources and what are they getting in exchange for that. They are getting a lot of federal dollars, they are getting a drinking water project. The only new water that is in this settlement is the 21,000 consumptive use acre-feet for Navajo-Gallup. NIIP is not built out yet and people feel that the settlement may help to build it out but the fact is that it is already authorized and being built out. The other projects already exist and so the only new water is this domestic drinking water project. That is relatively small when compared to the overall claims and if we can get the Navajos to reduce their claims on our water resources by having Washington give them money to build this project that is a good trade for the State of New Mexico.

Commissioner Espinosa asked if we were to go to litigation how many years would it take.

Mr. Utton responded that these water cases can go on for a long time. The Aamodt case was filed in 1966 and it is still going on but they are trying to settle.

**AGENDA ITEM #16 – LUNCH:**

The Commission recessed for lunch at 12:15 PM and reconvened at 1:15 PM and Chairman Dunlap assured the public that they would have a full two hours for public comment.

**AGENDA ITEM #17 – PUBLIC COMMENT ON NAVAJO NATION WATER RIGHTS SETTLEMENT:**

Chairman Dunlap asked that public direct their comments to the item on the agenda and that is the Navajo Nation Water Rights Settlement. We would ask

you not to get into tangents that do not deal with that. In fact we are liable to ask you to yield the microphone if you cannot stay on the subject. The Chairman stated there were a good number of people that want to address the Commission and in fairness to all of them he asked that they keep their comments short and direct. Be aware that the Commission may ask questions of you before you take your seat. Whether you want to answer them or not will be your business.

### **Michael Sullivan**

Mr. Sullivan stated that do the fact that some of these issues were discussed through questions prior to the open action session is there a possibility that some of these may given some time on these issues that were discussed between the Commission and Mr. Whipple. We will go through it and I guess if it gets too lengthy you can stomp on my toe or something.

Chairman Dunlap stated he would do that.

Mr. Sullivan introduced himself as the President of the San Juan County Agricultural Water Users Association. We represent approximately 1,000 cfs within the valley. Most all of the ditches belong to the association with the exception of two, I think there is thirty-four out of thirty-six. On behalf of the San Juan County Agricultural Water Users Association I would like to thank you for the opportunity to comment. Of course as many of you are well aware the San Juan agricultural water users have tried to be pretty active in the drafting of these settlements. We raised some objections in the first settlement, we reviewed the first draft, we submitted our public comments in the timeframe that was allowed. Although we were the second largest water user in the basin to the Navajo Nation we haven't been allowed to sit at the table for negotiation purposes and it has really forced the association to take a negative position toward the settlement. The association feels that the new settlement, the draft that has been presented to the communities, which we did not receive ours until just a few weeks ago, but is not agricultural friendly and would be harmful to the operation of the ditches and the river system as a whole. There are some key issues in the new draft that were not in the first draft. I mean there has been implements in the new draft that just came out there were not in the first draft.

One of those is the annual diversion requirements on how the ditches operate.

The second one is the 15,000 acre-feet of shared storage water.

Number three that is a real concern to us is having everybody's information placed within the draft as to how they are going to operate and how they are going to be adjudicated and on some of these we feel like maybe that cuts into the new processes for the individual and the sub-file proceedings.

The annual diversion requirements on how the ditches operate, we use to operate with a flow in the ditches that was constant. What we did was to return excess to the river. Now in this new draft, as I understand it, it will be on a curve basis. The long and the short of it is they expect you to start at zero and work it up through the summer and then cut it back down and the ditches do not operate that way. The systems will not operate. It is just our ditches that will be operating that way, it will be the lower ditches on the Navajo system also.

The 15,000 acre-feet of water that is allowed through the shared shortages, we discussed this with Mr. D'Antonio and members of the Commission some time ago and this is a benefit to junior users on the system but we are not sure that it is as good of benefit to the agricultural systems simply for the fact that the number of caveats that are in there; for example in the adjudication process if somebody steps up to the plate and thinks they should have more water or different priority dates then the Navajos do not have to offer that 15,000 acre-feet up. I mean there is a lot of caveats and chances in there that if things happen they do not automatically have to give that water. If the level falls to 5,990 in the dam there are three or four different things in there where that doesn't come into play. They have listed in there how every system, the Echo Ditch Decree, how the Hammond, how the La Plata, how all these systems are going to operate. Those things should be taken care of in the adjudication process, not in the Navajo water rights settlement because I or Jimmy or anyone else that has an individual sub-file has the burden then of trying to overcome what is placed in there over the 15,000. If the municipalities are a benefit of the 15,000 acre-feet of shared storage water then I think maybe there is a reason that I should be able to file during the adjudication process to increase my water or change my priority date. If the Navajos do not like that they can protest that and they cannot file and give you the 15,000 acre-feet of shared water. So in a sense you have the individual sub-file holder in the inter se process then has the burden of all these other issues to overcome in dealing with his sub-file.

One of the things that was a concern from the very beginning was the split priority on the Hogback and the Cudei and the upper Fruitland. There is 325 cfs that they can control with a 1868 priority date. We asked that on the Hogback that they split that priority date and there wasn't any concessions given to that since the first draft and none in the second draft. So it is really led us to where we are at now. We have been to many meetings that the Navajos, the Council has stated or the representatives have stated that they have given up 44% of their claims to the river which they claim they claim they own 100% of the water. We in the agricultural community disagree with that. They are getting 56% now but if you claimed 100% that probably is a good move but if you only got 60 or 70% of that then 56% is an awful lot of water. So for this reason basically what the San Juan Agricultural Water Users Association has done is we have filed a motion to restrain or enjoin the execution of the proposed water rights settlement between the State of New Mexico and the Navajo Nation. We did that for various reasons, one we felt like we weren't getting all the cooperation and

communication that we needed to make a good judgment. If the settlement agreement has been reached among the negotiating parties in private then we have not been a party to those negotiations and do not feel that our membership of irrigators have been adequately represented in those negotiations then our concern is that the Navajo Nation will be receiving water that was not used in the past.

Our second argument is the agreement has been reached without the benefit of a hydrographic survey. In the case management order through the adjudication process in the courts there has been some discussion of about doing individual sub-files on the ditches and so forth. This case was filed in 1975 and there is no evidence that a survey was conducted. Prior to that date when a complaint that was brought forward the State Engineer has proceeded somewhat contrary than what is directed in the statutes. There is also no apparent evidence that there has been first consideration for assessing water supply most used for irrigation.

The third thing is you know after twenty-nine years this thing has set on the table. Now the Navajo Nation and the State Engineer want immediate approval and execution of the proposed Navajo water rights agreement. We as stated above do not feel we have been represented at the negotiating table. We feel like now one of the things that we have to do is that we need to go back and we need to be able to hire some experts to evaluate the rights that the Navajos are receiving as well as the rights that has been left for allocation to the irrigators. We have asked the courts along with that motion to restrain we have asked the courts to submit a motion for discovery to see what their PIA (practically irrigatable acreage) claim would be and we have requested that the court grant its right for more discovery than that which is contained in the proposal for interrogatories and request for production as required. That evaluation will include the comparison of water allocated to the Navajo Nation in the agreement with water rights to which the Navajo might be entitled under the concept of the PIA.

The other one was we are aware...we go through this every time we have a meeting...one of the issues that Mr. Utton brought up was everybody has a right during the inter se to attack each other. Well, you know that we learned in this state during the Jicarilla water rights settlement that that is not always the best place to be. As an example the Hammond Conservancy District they had listed their permit as part of the permits that settled the Jicarillo water rights settlement, they had forty-eight permits listed in it. We went to them early on and asked them to remove it and of course it had already come back from congress and they said no, we cannot send this back to congress. It is already been approved. So we had to go the court process and get the courts to go ahead and make the direction on that. But it cost the Hammond probably \$30 to \$40 thousand to get that done. The process is extensive and it is lengthy when you get involved in the inter se process. However, the inter se process will occur years from now. I heard today that the day will be moved up which is a benefit to most all of us. After the agreement has been executed by the Governor of the State of New

Mexico, the Navajo tribe and the federal legislation has been enacted then approximately \$1 billion of funds by congress to give for the water settlement, we realize realistically our changes then of being able to argue any kind of a PIA during the inter se is a mute point. We probably would have very little likelihood of success. If the courts will enjoin the execution of this agreement it will allow us to proceed with the discovery so that we could argue before the Governor, the Navajo Nation, the State Engineer and Congress that there could be a possibility that this agreement is flawed. If it is determined to be flawed by an inspection of the Navajo Nation's claims under the PIA, but however to do that we need to be able to do that before all the signatures of the parties have implemented it. Really that is going to be up to the courts to do that. The thing is it is not same when you talk about the inter se, it is not the same to argue that, will you know we have heard the argument will you are interfering in their individual sub-file. It is not the same when you have somebody with 40 acres discussing the issues of what is happening in the Navajo tribe with the size of the amount of claims that they have. Certainly the thing is the 40 acres of water is insignificant to the size of the 100,000 acres of water rights to be granted to the tribe. There was a question that was asked here the other day at the last meeting to the irrigators and it said "what have you given up as an individual irrigator?" Well the thing is it is not necessarily what we have given up, but what has been accomplished in the past. You know these irrigation rights here, some of which are over 100 years old and you know they were set up according to state law. They have been a part of the land owners adjudicated right following the law and everyone's property rights is established by law. What we stand to lose is the value of that property or value of that right and if not the value we stand to lose the paper right. There was a comment, "why we should we be punished for being self-sufficient." They do the same to the agricultural community on our side. Anytime we improve a ditch system our water rights change. It is strange but in meeting after meeting we have heard why is the people do not want the Navajo people to have the water. We have heard the comment it is because of the education, because they live on the reservation or simply because they are Indian people and none of these are true. To all of these statements, I would say they were not true, that the fact is we have a right to this water also through state statutes. We have beneficially used this water, we have put it to use. The fact is we have a right to this water and some of our families have been here for over 100 years. If we cannot come to a better sense of sharing than this then I do not know what kind of neighbors that we are. These people that have negotiated for both sides of the issue, they are attorneys, they are engineers and when they get involved in the process they forget about the irrigators. They forget about the person that hauls water for 35 miles, they forget about the shepherd, the cattle people. It is all about money. It is about power and about greed. I do not know what happens in the end to the little guy.



## **Jim Rogers**

Jim Rogers introduced himself as the Secretary of the San Juan County Agricultural Water Users Association. The only thing that I wanted to do is just briefly is try to give a little bit of the sense of the members, of our members as they regard this settlement. We have been involved with it for some time now. I think the main frustration that the members of our association who are most all who direct divert; receive the water from direct diversion of the river. It is a frustration of feeling that we haven't been consulted, that our views and needs haven't been addressed. A lot of that goes back to the building of the dam and the formation of the dam. These old time farmers and ranchers here were told that the reason that dam was being built was to give us water in times of drought and then when the drought finally did show up here a few years ago we found out that no that water was for us, to benefit them there. So I think there is a little bit of distrust and I think that goes to this document. One of the concessions that has been pointed out here today that benefit us, the non-Indian water users, is this 15,000 feet of shared water in the dam. But a lot of members view it the same way; they figure that if push ever comes to shove we will just kind of get finagled out of it. We are all direct diverters, we understand diverting water out of the river onto our land; we have been doing it like Mike said for over 100 years. We also understand the importance of priority. If you do not have priority you don't have water; it is just as simple as that. I think that is the way that most of our members look at that situation. Another thing is, as far as the agreement itself goes it is a little bit suspect because we were presented this agreement the first time and told what a good deal it was and now after we have made a lot of objections everywhere we could think of to raise objections, we are presented with another agreement which everybody says is a lot better than the first one. But we are also told again what a good agreement it is; the question that I would have liked to ask is what would have happened if we had not complained the first time; it would have already been signed and gone. This draft agreement is a lot different than the first draft. There is a lot of minutia in there, there is a lot of things that need to be understood for clarity and the timetable is continuing to be scrunched down. We got the official reply to our concerns on August the 6<sup>th</sup> that was the date of the letter. That is not very much time to evaluate this 80 some page document to see if the concerns that we had are included. That is the comments that I have. I just wanted to try to convey to you the sense that I believe, having met with them now for a year and one half on this matter, the sense that these people have concerning this settlement.

## **Michael Sullivan**

Mr. Sullivan stated he had one more short comment. The question that was asked about the political overtones of this earlier on and I agree that Senator Domenci and staff have been involved in it. There was an article in the paper just the other day. The one thing that they stressed is that there has to be community support and Senator Domenci said in that article that people on the

San Juan have serious concerns. Those are issues that are going to have to be addressed. Now we can address them before we sign it and send it off or we can follow it and address them later on. This association is geared to making it the best settlement we can. We know that the settlement is going to go forward. It wasn't our intention in the beginning to stall this settlement out. We asked for some concessions that would benefit the irrigators in this basin and we never received on particular ones of importance, we never received them. So therefore we have been following this thing too politically and with that I will turn it back to you Mr. Chairman.

**Questions from the Commissioners:**

Chairman Dunlap asked whether either one of the representatives could summarize what you want. What would like this agreement to say that it doesn't say; let's not talk about timelines or anything else, let's talk about what do you want see in this agreement. If you could draft the agreement today from the irrigators I would like to know exactly what you would like to have.

Mr. Sullivan said that they had met with you folks here a few weeks ago and I think the number one issue at that time was the split priority on the Hogback and the Cudei.

Chairman Dunlap asked Mr. Sullivan to explain that.

Mr. Sullivan responded that there is 225 cfs on the Hogback/Cudei and, it is the same one that we submitted in the beginning, it called for 110 cfs to be an 1868 priority and 115 cfs to be 1909 priority is what I think it was. The reason we felt like that was because that gives; we still have some control, we still have some right. For example, the thing that we have run into in this area is not a matter or shortage, because sometimes there is no water. When there is not any water in the dam and you don't have any water coming into the system with 325 cfs on an 1868 priority date, they can essentially take most all of the water. When you got this built in there with the 15,000 cfs but if there is not any water in the dam, then the 15,000 cfs doesn't come into play. So then they can actually take 100% of the water out of the river system and leave everybody else high and dry. With 110 cfs with an 1868, the split priority, most all of our ditches fall in under that so then we could still maybe have a right to some of that water.

Chairman Dunlap said for the Commission's benefit, where does the later date come from.

Mr. Sullivan responded stated he thought the later date came from the fact that on their filings with the State Engineer's office, on some of those ditches they weren't filed for until a later date.

Chairman Dunlap asked if the Hogback and Fruitland have two different filing dates.

Mr. Sullivan responded that he thought so.

Chairman Dunlap stated he had not been aware of that.

Mr. Sullivan stated it was the Hogback and Cudei.

Chairman Dunlap stated that was different from the Fruitland ditch. Chairman Dunlap asked John Whipple for some information on the split priority dates for those two ditches.

John Whipple responded stated that as he recalled there is a filing made to the State Engineer by the Bureau of Indian Affairs. I am not clear on the 1909 date the one that I find in our files is dated 1913 for a 110 cfs for the Hogback Canal. That is the state filing for that project. The settlement deals with the reserved water rights claims of the Navajo Nation. Federal reserve rights are under a different standard than state historic use rights.

Chairman Dunlap stated that the way he read the Winter's Doctrine, once there are reserve rights, the 1868 holds whether they use it or implement it or not. Is that not correct?

John Whipple responded that federal reserve rights are not subject to loss for non-use.

Mr. Rogers stated that one of the reasons that we thought the split priority was reasonable was that the 1868 priority that we are talking about them getting is for the amount of acres that they are irrigating now. Arguably they cannot irrigate those acres with that much water, but the reason we feel that they can't, is not because there is not enough water, it is because of that system. If they are going to get the money to fix the system, the idea is from our standpoint at least that the water they are getting on the 1868 priority would irrigate the acres that they got in production now and this water that would be subordinated to the later date as far as priority goes would be for other land that will be developed later with the money that they get I suppose.

Chairman Dunlap stated that he understood that and commented that he understood this problem when the December 5<sup>th</sup> draft came out and that was the first time I had seen any part of the settlement and I thought that working either to try and get storage rights or something in there to soften that 1868 call with those two ditches. After reading the Winter's Doctrine, and according to the way I read the doctrine, it says that the 1868 is going to hold whether they are using it now or somewhere in the future. If that is true then we had to do something to keep that call down and by adding the alternative water supply, and I could be

corrected about that, but the way I understand it all but about four years out of a hundred according to the information that has been given to me the 1868 priority won't be called. It will actually change those ditches to a 1955 priority because that water, the 15,000, and the 15,000 won't be called but ever so many years it will average out at about 3,000 I think every year and that is only during the latter part of August and September in the real low flows but I thought we had solved that problem. I was pretty happy with that solution because we couldn't get the additional storage. We didn't have the water to store anyway. Now, I will agree, and Michael I think mentioned, that that water is top water on that reservoir. If there is a spill, then that water comes out first the way I understand it, but if the reservoir is full that is not going to impact anybody. So that is not a big problem but I thought we had solved this problem of getting away from a split priority for the irrigators. I thought that was a pretty good solution and hear you are not happy with it and I am kind of concerned that what we did in that wasn't to suit your needs. That is what we did to take care of that particular situation.

Chairman Dunlap asked Mr. Sullivan what else he would ask for besides the split priority.

Mr. Sullivan responded stated that he thought in the new draft since it is somewhat different than the first draft, I think there are some issues raised in the second draft that were probably never discussed on our part on the new draft. One of the real critical issues probably coming up is going to be how these annual diversions are going to affect our ditches in comparison we how we have operated in the past. I think we are going to lose water probably in that. We still need to be able to get water to the end of the systems. That is a critical part of any ditch operation and under this new system I do not think it is going to allow for that.

Chairman Dunlap commented stated he wanted to pursue that issue. If you need carriage rights in that ditch there are provisions in the Echo Ditch Decree for those carriage rights. There is also in the Hogback, Fruitland and the Cudei; the carriage amount of water, the diversion and the on farm delivery is two different things and depending on the length of the ditch that makes a difference. Now would it not be possible if we are not getting that until we can improve our ditches so that the guy on the bottom, because I am on the bottom end, I know what it is to be on the bottom end; is there not a way to increase that carriage because that water returns to the river anyway.

Mr. Sullivan responded that this is the concern right here that we have. In the past we always run if you were timed 90 or 70 or whatever it was cfs and maybe the curve is as John says it is it goes like this through the summer months. But all of the water above that between that and the 90 cfs was return flow to the river. Well we are not getting return flow to the river credits now. He is saying you have to operate within the limits of what you have. Then with what you start here and there is nobody irrigating and it goes on up then you can get water to

the end of the system. I don't know why we can't go with return flows to the river and maybe John can answer that.

Chairman Dunlap stated that he thought the on farm deliveries is an obligation that we have to consider.

John Whipple commented that he was sure others have the same concern. First of all I think it is important to recognize that this is a settlement of the Navajos rights and it does not bind anybody else's rights that may be adjudicated through the adjudication. With respect to the annual diversion amounts that what have been adjudicated to the Hogback and Fruitland projects the State Engineer Office through the settlement adjudication intend to pursue adjudication of annual diversion rights for irrigation leases in the basin. We have provided that here for Hogback and Fruitland projects based on the diversion requirements estimated for irrigation uses in the basin. They were identified in the report of hydrographic survey that was approved by the Echo Ditch Decree with the caveat that if the adjudication court were to use a different standard for determination of what the diversion requirements are on an annual volume metric basis for the irrigation uses that the annual volumes of diversions for Hogback/Fruitland could be increased. One of the comments that we received repeatedly on the December 5<sup>th</sup> draft from agricultural water users is that the Fruitland/Hogback project rights need to be limited to what their beneficial consumptive use requirements are and the way you determine that is based on what the diversion needs are through the irrigation season. Clearly in the spring and in the fall the beneficial consumptive use for that to be met does not require as much diversion as is needed during the peak of the irrigation season which is what the maximum cfs diverting rights are sized for. Now a lot of what I am hearing also is that in response to the December 5 draft the agricultural users and others in the basin wanted the Navajo Nation to waive objections that had to the Echo Ditch Decree rights. This gets back to what I had indicated earlier. We have a section in the settlement agreement that provides those waivers and we are talking with parties with respect to language modifications to try to address concerns as to how those waivers are written and what implications you may get out of those waivers. That is something we are looking at and again these are waivers. One of the conditions that the Navajo Nation has looked at with respect to their agreement to use some of their Navajo Indian Irrigation Project water on the Hogback and Fruitland is that the court in the San Juan River adjudication not adjudicate rights to the Echo Ditch Decree rights that are greater than what they got in Echo Ditch. Logically the idea is that those with Echo Ditch Decree rights are asking the Navajos to waive objections in the San Juan River adjudication to quantifying their rights consistent with Echo Ditch and also requesting that Hogback and Fruitland projects be provided with rights consistent with the Echo Ditch rights. Now if the Echo Ditch folks come in and argue in the San Juan River adjudication court that their rights ought to be increased then the Navajo rights would be increased accordingly on the same standard but also to the extent that the direct flow rights are increased that results in a lessened opportunity to put water into

storage at Navajo Reservoir in priority which reduces potentially the supply available to meet the contracts out of the reservoir including under the Navajo Indian Irrigation Project. So the idea is that there are benefits to both protecting the Echo Ditch rights and in return protecting the Navajo Reservoir water supply which again helps protect the ditch rights. It is kind of circular thing here. But that is the intent of the waivers in section 9-6 and the conditions regarding alternate water sourcing for Hogback and Fruitland.

Chairman Dunlap asked Mr. Sullivan if he had any other specific things he wanted to address.

Mr. Sullivan responded that he would be happy to try and answer the Commission's questions.

Commissioner Espinosa said she would like to know specifically how they would change this document right now and how it doesn't satisfy what you told us in earlier comment periods that you needed. If we are going to take into consideration what you would like; the split priority discussion was very helpful and beyond that I would like to know what specifically you do want because we need to see if it has been addressed or not.

Mr. Sullivan responded that they have talked about the split priority. I think the annual diversion requirement, annual diversions needs to be looked at. I think the language that stresses how each individual system is going to operate and function needs to be looked at.

Commissioner Espinosa asked Mr. Sullivan that when he says "needs to be looked at" what does he mean.

Mr. Sullivan responded that they would like a section or have it taken completely out as to how these things; we feel like this is a settlement with the Navajo Nation not a settlement of the Echo Decree or the Hammond Conservancy District or the La Plata District and pre-1907 declaration rights. We feel like that if they want a settlement but the issues in there that pertain to the Navajo water rights settlement. If we are going to have a section lets have an independent section or something that discusses these other issues but it shouldn't burden an independent sub-file holder somewhere down the line because all these things are tied to caveats back through the Decree.

Chairman Dunlap commented that he understood the concern and that it was a good point.

Mr. Sullivan said that if Jim should not have to go down if he wants to challenge his right, whatever reason it is, it is not up to me or, he will go before the courts or deal with the state on that. If he doesn't agree with it he can go into to the special master or go to the courts and he can change that. But if that is



adjudicated any different than what it says in the Navajo water rights settlement then everybody, if he tries that, then the Navajos do not have to give up that additional water and everybody that is attached to that 15,000 acre-feet is probably going to file a protest against him and he shouldn't have that burden to overcome as an individual water rights owner.

Chairman Dunlap concluded that he had their three thoughts and we will sure look at them.

### **Linda Horn**

Ms. Horn introduced herself as a citizen of Farmington. She said her question goes back to the beginning...what the United States considers its obligations to be to the Navajo Nation under the 1868 treaty. At that time there were 100 square miles that were put into the reservation for the Navajo people and then there was an additional amount of land that was added to the reservation in 1875. Can you tell me why...is all of this land being considered with the 1868 priority date even though there were only 100 square miles that were actually put in reservation under the 1868 treaty and were the Hogback and Fruitland ditches in question within that boundary.

Mr. Whipple responded that the Navajo Nation's legal theory is that their rights date back to the treaty of 1849. As a compromise they agreed to a priority date of 1868 which is the date of the original reservation and it is true that there were additional lands that were set aside after 1868 within New Mexico. There have been arguments that perhaps the water rights ought to track the dates that the different lands were set aside. The negotiation that we concluded on was that the priority date would be 1868 for all of the reserve rights dating back to the time when Congress met to establish a permanent homeland for the Navajo Nation. Commissioner Espinosa asked where the 1849 date came from.

Mr. Whipple responded that 1849 was the original treaty between the United States and the Navajo Nation.

Ms. Horn asked if that was the treaty that had problems with it because the Navajos were off the reservation. I downloaded the Navajo Water Code because I was interested in finding out what the Navajos position was in their code. As far as I can read the Navajos do make a claim to the entire watershed of the Colorado River, is that your understanding. Has the code ever been upheld in a court other than in tribal court, the Navajo Code itself.

Mr. Utton responded that he did not believe that it has been upheld and further that he did not believe that it has been challenged. The Navajo Nation makes its claims through adjudication proceedings and that is what we are doing.

Ms. Horn commented that the Navajo Nation considers itself to be sovereign nation, but the United States government considers the Navajo Nation to be either a self-governance tribe or a dependent government, but not a sovereign nation.

Mr. Utton responded that they were a nation within the United States created by U.S. federal law.

Ms. Horn stated that her position is that there are way too many questions that are still up in the air. She said she seen a number of power point presentations today that I had not seen before and I had been to every meeting that I was aware of. I have a list of a number of power points that I would like a copy of and I have checked the web site for the State Engineer's Office and I have attempted to access some of the documents listed including Mr. Horner's suit. I cannot get beyond the first page.

Chairman Dunlap stated that he thought the entire document was accessible.

Ms. Horn responded that it wasn't on her computer. She said she would go to the library and try again.

### **Jay Burnham**

Mr. Burnham introduced himself as the City of Farmington attorney. On July 21<sup>st</sup> and again on July 28<sup>th</sup> the City Council hosted a two informational sessions in regard to the settlement and heard presentations from a number of people knowledgeable about the settlement and also some of those who had feelings one way or another for or against the proposal in an effort to gain as much information as possible as a City Council so that they could take a position with regard to the settlement. On August 10<sup>th</sup> the City Council at its meeting on that night discussed what action they wanted to pursue at that time and the consensus of the Council was to direct staff to continue to meet with staff of the ISC/OSE and with the Navajo Nation in order to address some concerns that the City of Farmington had in regard to its municipal water supply and how it would be protected under the proposed settlement. On August 16<sup>th</sup> I drafted a memo to Mr. Hudson, the City Manager, outlining and listing some of our concerns and I would like to briefly summarize that. We had some concerns about the depletion schedule and whether the depletion schedule properly accounted for some uses on the stream system. We pointed out that we had problems determining whether, for instance the Ute Mountain Ute claims that have recently come to light, would be accounted for in the depletion schedule, whether the Navajo Nation tributary irrigation rights were in there; also whether the assumption that certain acreage in the NIIP would be fallow each year is a correct assumption. Some of those concerns were addressed in a meeting we recently had with your staff and Mr. Utton. Our main concern however with the depletion is that it shows the municipal and industrial uses at a depletion of approximately 9,000

acre-feet per year and that number is static for the period of time covered by the depletion schedule and we wondered whether that provided growth in municipal and industrial uses for the next 30 or 40 years or whether that would be a problem if it was expected to remain static then obviously the depletion schedule is inadequate. Those concerns were also discussed and particularly in regard to the City's rights and how they were accounted for in the depletion schedule and we appreciate some of the information provided in that regard and we look forward to continued discussions with your staff. A second area that we discussed briefly is that we had some concerns about the NIIP allocations and whether the 270,000 acre-feet of depletion was properly accounted for and why it was necessary to allow the Navajos to average the 270,000 depletion over a 10 year period because as that fluctuates up and down may cause a problem for other users on the river. Some of those concerns have been addressed and explained why the averaging is in there. Another concern we had is in regard to the permit 2883 or the ALP rights (Animas-La Plata Project) that permit issued to the federal government for the ALP as you may know the project as it is being built will not use all the rights there were applied for in that permit and the beneficiaries of the ALP including the City of Farmington have always considered that the beneficiaries would be able to use that water that is excess of what the project is going to use. We have always depended on that and now the July 9<sup>th</sup> draft of the agreement does provide that 50% of the permit 2883 water will be allocated to the Navajo Nation. That is a change in the document that concerns the City of Farmington. Also, another area that we are concerned about is in the language that was just discussed a few minutes ago Mr. Whipple told the Commission about the paragraph 9.6 sections that have to do with the recognition of the Navajo Nation of the Echo Ditch Decree. Some of the language in there is not clear to the City of Farmington as to how it would handle a large portion of our rights where irrigation rights that were allocated to the City of Farmington to be held in trust for the residents of the city. There were irrigation rights in the Echo Ditch Decree however they were not treated the same as other irrigation rights in the Echo Ditch Decree and the City of Farmington is concerned that the language the Navajo Nation agrees to abide by the Echo Ditch Decree in regard to irrigation we are not sure how that applies to these trust rights which the City of Farmington has filed an application with the State Engineer's Office to transfer the purpose of use from irrigation to municipal and industrial for those what we call the trust rights. These issues which are quite technical and I understand the difficulty for people to understand and why and I have lived with them for the last 14 years that I have been with the city attorney's office in Farmington and I am still not clear on all of the questions. We might propose that there be some language changes to address our concerns in the next draft. This list of concerns I have outlined is not exhaustive. I am sure there are other concerns that we may have.

Chairman Dunlap thanked Mr. Burnham for the City of Farmington hosting all the meetings and seminars on the issue.

## **Mary Fischer**

Ms. Fischer commented that she was speaking as a citizen and not necessarily as a Farmington city council member. Within my district I represent approximately 10,000 and probably have the highest number of Navajo constituents than any other council member. There well being as Farmington citizens is paramount to my comments. I understand the importance of water to this area and I understand the disastrous effects of lack of water. She said she was no more comfortable with the conclusions that have been explained to me in this water rights settlement than I was a year ago. I still have to ask the basic question is can any of you assure me there is adequate water available to supply all the needs that are out there. Within this depletion schedule the Ute Mountain Ute claims which are 7,300 to 9,300 acre-feet and they have been filed with the court whether they are legitimate or not they are certainly on the table now. Those are not in the depletion schedule. None of the federal claims that are out there, whether they be BIA, BOR, whoever, they are not included in the depletion schedule. Recently Patrick Lyons, the Commissioner of Public Lands, has filed a claim on behalf of the public lands of New Mexico. He has not quantified what he feels he is entitled to but he feels he has legitimate claims with an 1850 priority date which would precede even the Navajo claims. One of the largest questions that I have is who is in charge. When we talk about growth for this area the City of Farmington has some significant concerns. If we have to buy the water that we are currently using, we only have a few options available to us either we start charging for the use of our recreation facilities or we simply let them go. The area of trust rights remains uncertain. Ms. Fischer commented that there is no funding in the settlement to get water lines out to the rural residences. The Navajo Dam is going to be re-operated and the flows are going to be so low that we will be unable to operate our hydro electric power plant. Ms. Fischer concluded her remarks by asking the Commission to hold off in making any decision in supporting the settlement to account for the changes that will be made.

## **Steve Cone**

Mr. Cone said that one of the questions he had was to Chairman Dunlap and that was that Chairman Dunlap also sits as the Vice Chairman of the San Juan Water Commission. At the last meeting of the San Juan Water Commission you said that if that commission were to take any action either pro or con on the proposed Navajo water rights settlement that you would essentially recuse yourself from that vote. What I am wondering is will that be true in terms of the action this committee may eventually take and if so why are you making that decision and are there others on this committee that may have to make the same kinds of decisions for the same reasons.

Senator Domenci was quoted just yesterday talking about that this settlement proposal is not percolating the way it should. He has in mind a high test,

espresso, water settlement bill where he can tie all of these things up in a nice package and force federal funding through Congress. Mr. Cone said he thought that was a poor choice and as you have heard today there are lots of questions about this July 9<sup>th</sup> draft. The public really has not had time to digest the stack of material that goes along with those documents and there are still ongoing negotiations. As a member of the public and just speaking for myself I would like to be able to formally comment on each iteration of this settlement as it is drafted down the road. I don't want to think that there can be major changes and then there is no option for the public to weigh in on what the possible repercussions of those changes might be. So I am asking that that happen.

Chairman Dunlap interjected that so far Mr. Cone hadn't addressed anything in the settlement. You have just criticized people and processes. Can you tell me what you don't like about the settlement; specifically.

Mr. Cone responded that one of the things is a letter which came out of the Interstate Stream Committee dated February 11<sup>th</sup> 1998. It is a letter from the Interstate Stream Commissioners and the San Juan Water Commissioners to Senator Domenci saying that they would not support any kind of settlement of the Colorado Ute water rights without a provision in the Act that would allow for the non-Indian beneficiaries of the ALP do have that additional water from state permit 2883 returned to them. Now we see in the July 9<sup>th</sup> draft that that water that by law is earmarked for the non-Navajo beneficiaries of the Colorado Ute settlement is now to be split 50-50. That is a huge departure from exists now as public law and I am not sure that we have heard the rationale behind that to satisfy those who it might most effect here in this community. Another concern that I have is the depletion schedule. I really believe it is illegitimate and it has been pointed out exactly why. It does not address claims, substantial claims, that are being to water within the San Juan Basin and because it doesn't address those claims there is a squeaky bit of room according to the depletion schedule itself; where is that water going to come from. One of the other things that I would like to share with the Commissioners is the federal government's policy for settling Indian water rights settlements and participating in the negotiation of the settlement of Indian water rights claims. This is the federal government's policy and I don't see anybody here today from the federal government. In all of the meetings that we have had in this basin for the last month not one federal agent has shown up to describe their participation in these negotiations and they have been directly involved over the last two years. We do not know where they stand but they do have a policy. The federal government does not follow there own policy and that should be a concern of this Commission. One other concern I have is there is a proposed memorandum of agreement by the Navajo tribe with the federal government for the disposition of the NIIP and the terms of that memorandum of agreement seem to be in conflict with some aspects of the settlement agreement proposal and I would like to see how that can be ironed out in public instead of trying to work on it in back rooms. The last price tag that we heard on this water rights proposed settlement is \$1.2 billion. When this July

9<sup>th</sup> draft came out it was below \$1 billion and we know the BOR projects run typically run 300% over and above the initial estimate so we are looking at is a \$3.5 billion federal settlement 99% of which will probably be picked up by the federal taxpayer. That is wrong.

Chairman Dunlap interjected by asking Mr. Cone if he thought it should be paid for on a local basis.

Mr. Cone responded that you ought to take a close look at costs and I do not think that has happened yet.

Chairman Dunlap asked if Mr. Cone had heard him ask Mr. Whipple and Mr. Utton if they had anything to do with the numbers in the settlement and they said no.

Mr. Cone responded that he had not heard that as he just recently arrived at the meeting.

Mr. Cone commented that there has been recent publicity concerning Open Meeting Act violations.

Chairman Dunlap said that had nothing to do with this settlement.

Mr. Cone asked the question if the state has performed a quantification of the Navajo Nation's PIA in the San Juan Basin and if not why not. Mr. Cone distributed some additional questions to the Commissioners.

Commission Espinosa commented that it was not unusual to have different documents come out of negotiations because by the word negotiations that is typically what it is and typically what will happen is there is a document presented for public comment which is done in December and room for public comment. In some areas you only get 30 to 60 days of comment and we have gone to great lengths to in trying to get all public comments in. After that we have another document based on trying to deal with the comments that we have heard from all of you here and from others. We believe that the comments we have heard over the past six months are being re-drafted and re-negotiated to take care of those concerns in the current draft document. There will likely be another draft document.

### **Bernadette Tsosie**

Ms. Tsosie commented that she believed the settlement will provide certainty. We want to be able to have municipal uses, industrial uses and agricultural uses. Without the settlement that will not happen and we want as the Navajo Nation to be able to do that. We want to be able to have economic development and we want to have schools in our communities. Yes it is true that the cost involved in



the settlement does not include every home hooked up with running water but it will provide a better and closer system for the Navajos who continue to haul water to be able to have better water and a closer system of water. The settlement will make possible for us to do that. There was a comment that the Navajo Dam will not be able to meet the needs but I thought this is why we have the San Juan River implementation program so that we can work with the different agencies to try and recover the fish as well as water planning usage. Ms. Tsosie concluded her remarks by commenting on the lessons that were learned in the shortage-sharing agreement. She said there has been quite a bit more public comment on this settlement as compared to the Jicarilla settlement.

### **Glo Jean Todacheene**

Ms. Todacheene introduced herself as a member of the Navajo Nation Water Rights Commission. She said it was interesting to hear the comments about the land and water. She said she could remember her elders telling her that they could remember when the covered wagons first came and the Navajos were living right by the river and they got chased across the river. But this is the 21<sup>st</sup> century and we are neighbors. The populations are growing and the Navajo Nation realizes that the City of Farmington understands that plus the other communities of Aztec and Bloomfield. People in the United States out towards the east are suffering under harsh weather conditions. The hydrologists and the water resources with the Navajo Nation they are very well aware that they want certainty and I know that the Navajo Nation vice president has used that and it is a negotiation. Where are not radical and greedy and we don't want to get mean or anything and it is really amazing to see the State of New Mexico and the Navajo Nation coming together to work this out. The Navajo Nation wants the settlement because it is long overdue. We are not going to please everybody. I know it is difficult and we can get emotional, we might even lose friends over this but the bottom line is that there is a huge generation that is coming up and they are going to be moving in here and the drought is very serious. This is where the Navajos are willing to talk about a shortage agreement. Ms. Todacheene said she understood and appreciated the needs of the farming community.

Commissioner Espinosa asked if the Ute Mountain Ute claims have been taken care of the settlement.

Mr. Utton responded that the Ute's apparently have filed a claim with the court for about 7,500 acre-feet. The state has met with the Ute representatives including their lawyer, and has evaluated their claim and I do not think that we are about to agree with their claim in that amount. In evaluating the Ute lands in New Mexico there isn't even a member of the Ute tribe living on those lands. There does not appear to be any defensible large use of water on this land in terms of any PIA claims away from the river. If the Ute's are interested having recognized some stock uses and other ranch type uses on this land I think the state and the Ute's can come to an agreement that would not be a significant claim perhaps 200 or

300 acre-feet. If the Ute's believe they can claim 7,500 acre-feet they are going to have to prove that in court and the State of New Mexico will be opposing those claims. We do not believe it impacts the current settlement document with the Navajo Nation.

Commissioner Espinosa asked if it was true that the Navajo have an agreement with the federal government on the NIIP.

Mr. Whipple responded that it was his understanding that the Navajo Nation is interested in negotiating a memorandum of agreement with the United States with regard to the operation and transfer of NIIP facilities to the Navajo Nation. We are not privy to any negotiations that may be ongoing. Mr. Whipple said any agreement would not impact on the current settlement as it contemplates the transfer of the facilities.

### **Maria O'Brien**

Ms. O'Brien introduced herself as a water counsel for BHP and as most of you know BHP is the owner and operator of four coal mining operations and is the owner of a direct flow right to 51,000 acre-feet of San Juan River water, a 39,000 acre-foot depletion. So obviously we have a significant interest in the settlement of any claim on the river and how those rights are administered. We use that water to supply those four coal mining operations as well as supplying the entire water supply to the Four Corners power plant which is operated by the Arizona Public Service Company as well as part of the water for the San Juan generating station which is operated by the Public Service Company of New Mexico. If you had looked a previous comment that BHP submitted in conjunction with APS and PNM you know that we generally support very wholeheartedly the settlement of the Navajo Nation claim. We are continuing to work with your staff on the new draft and specifically we believe the alternate water supply as it has been referenced is a significant improvement to the settlement draft. We have some questions about operation and implementation of that alternate water supply but generally believe that it is a very positive aspect to the new draft. We are also looking at the marketing and leasing provisions and we believe again that those are a positive aspect of this settlement to provide the Navajo Nation as much flexibility as possible in utilizing its water resource and allowing other users in the basin access to that water resource. Ms. O'Brien commented on the waiver provisions, section 9-6, which are a new provision in the settlement which the Navajo Nation has apparently is agreeing to waive certain objections of Echo Ditch Decree rights. This is simply consistent with what the adjudication court has already decided in the San Juan Basin in terms of preservation of parts of the Echo Ditch Decree.

### **Jack Scott**

Mr. Scott stated there was a provision in the agreement for providing \$10 million for upgrading existing non-Indian ditches on the river systems. That is a great concept when you read it however it is subject to the legislature appropriating a million dollars a year over 10 years. The problem with that is there is not guarantee the legislature would appropriate and the other problem with it is that about 17 years ago it was going to take \$200 million to bring these ditches up to a standard that would probably take care of the diversions in Colorado on the Animas and that was only on the Animas ditches. So I think since everyone is asking for the ultimate hand-out from the federal government that there should be a price tag of about \$400 million in this from the federal government to upgrade the existing ditches on all rivers here and to provide the municipalities and rural water systems funds so that they can bring their systems into a form that they are now junior water rights after this settlement can be utilized. Mr. Scott concluded by stating that he did not believe the 15,000 acre-feet of storage would not be enough and that he believed a hydrographic survey was needed before the agreement moves forward.

### **Bob Oxford**

Mr. Oxford said he would limit his comments to the annual diversions. This appears not only in 9-6 of the settlement agreement but it appears in the partial final decree on page 14 and 15 and it deals with the Echo Decree as envisioned when I was hired there 16 years ago and I was hired by the Santa Fe office to manage the Aztec office and to know the Echo Decree back and forth so I could deal with any issues that come up on it. I worked there for 12 years and I have been retired 5 years. I would question whether Mr. Whipple's interpretation of the annual amounts that are limited to go down the Echo ditches and also the Navajo ditches. The question with the Echo ditches is whether that decree actually limited on an annual acre foot per acre basis. That was in a report that was in our office for the 12 years that I worked there and we never considered that was part of the adjudication. It was an exhibit that was put before the court to consider information in there to determine how much water could be delivered down that ditch but judge decided a cfs delivery was the only thing appropriate. This annual amount that Mr. Whipple and the State Engineer Office is suggesting would cut the cfs in half and the ditches cannot operate that way. So it is a very serious thing that now it seems like this is being...and the reason that it is in the partial final decree I guess is because if the Echo ditches are not limited to the annual acre foot per year flowing down that ditch the two Navajo ditches will not be bound by the amount of rights in this settlement. So actually if the thing works out in the court that the cfs is the only thing that was adjudicated in the Echo Decree then in this settlement the Navajos will not have any acre feet amount adjudicated to them on the two Navajo ditches. That is the way I read it. So I think there is a big problem and it going to cause major concerns. I worked there 12 years and that wouldn't come up too much but we never considered as I recall

any thing about an engineer's report that was a part of the court case but it was only used as an exhibit and the judge when he adjudicated those rights in the Echo Decree, you have to remember that those rights were all pre-1907 rights they may have been a few post-1907, they had not been before the court before, that water was acquired by historical use and so it wasn't acquired under 1 cfs for 40 acres or 1 cfs to 70 acres it was acquired by what ever it took to go down the ditch to get to the land to grow a crop and the judge at that time determined that it took 40 acres 1 cfs off of the river to operate those ditches. So I would say to Mr. John D'Antonio check with some of the other experts besides what you have been hearing from or an outside opinion and let's get this on a reasonable basis.

### **Carroll Crawford**

Mr. Crawford introduced himself as a member of the Bloomfield Irrigation District board. Part of what I say relates to the ditch and part is my own opinion. This settlement agreement is kind of like a marriage you speak now or forever hold your peace. We were concerned about key issues that might cut or impair the ditches off in the agreement. Since that haven't been resolved as of a week ago the BID ditch passed a motion to support the Agricultural Water Users and Mr. Horner in their motion to restrain signing until these issues were resolved. Only then were we invited to start talking about those issues in depth but I think that needs to carry on further until not only our ditch but the other ditches have the opportunity also. We are talking about waivers in the settlement that sometime we ought to wonder if we should have a waiver to the state agencies not to attack the Echo Ditch Decree because it seems like that is kind of the way it is headed. We are concerned that the settlement agreement did incorporate certain linkage in the partial final decree that could impair our rights or cut ditches off from their water. The Navajo water settlement amounts in priority should be about their rights not about the non-Navajo rights but we do expect even handedness for ours and theirs and that they be treated alike. So we would have to reject the concept that which short circuited our ditches rights to negotiate with the State Engineer on whatever our negotiation rights are actually perfected. The Navajo Nation and the BOR should not be agreeing to what non-Navajo rights are because this is the Navajo settlement. The next thing about the ditch operation that is not fully understood by those doing the negotiations is that those working for the ditch understand it but whatever your cubic foot diversion is a maximum limit whether it is 200 or 100 or whatever. But even when you look at our ditch 43 miles long it starts out wide and gets narrow at the end so your head gates are sized for the amount of water that that individual is suppose to receive. That ditch to operate has to be full whether you are taking only half of your diversion to get it to all of the customers or whether if it is the middle of the summer and you need to the full diversion to get the customers served. The ditch has to operate. It appears that the storage water will benefit the junior water right holders. The next thing that I would mention is the subordination dates in the agreement are probably the wrong dates which were picked using permits that were never perfected and March of 1958 would probably be the more perfect number.

Technically the BID can only support terms that comply with state law as that is our only protection for the ditch and members.

Commissioner White stated he wanted to respond to the comment Mr. Cone made regarding his suggestion that our Chairman should recuse himself from this Commission during those hearings. I would emphatically disagree because you are dealing with two separate kinds of organizations. The San Juan Water Commission represents users that may or may not be affected by this agreement he is a member of that organization and rightly he probably should recuse himself from that. In the case of this Commission, this Commission is the appropriate state agency for handling this agreement between the Navajo Nation and all of the other players and he is the Chairman of this Commission. This Commission in my opinion is the only citizen's oversight group in New Mexico that oversees interstate water issues as well as many other water issues state wide and he is in the appropriate position to chair this Commission. He has the knowledge, he has the background, and he has the experience to manage this Commission in behalf of the State of New Mexico and so from that point of view I emphatically I would encourage him never to recuse himself from this issue because he is in the right place at the right time.

Chairman Dunlap stated that concluded the public comment portion of the meeting and that he appreciated everyone's comments. He apologized for his haste in getting the comments in but that he thought everyone did very well. We covered a lot of ground and admittedly you brought up some things that I had not been aware of and whether we can do anything about them or not as far as the amendments or changes they will certainly be looked at.

**AGENDA ITEM #18 – POSSIBLE COMMISSION ACTION ON RESOLUTION APPROVING NAVAJO NATION WATER RIGHTS SETTLEMENT:**

**Commissioner White moved, Commissioner Espinosa seconded, to table this agenda item.**

Commissioner Espinosa commented that a lot of the comments that they had heard are very appropriate. We want to make sure that we get those into the record as well as into our negotiating team so that they can discuss them with the Navajo Nation and I presume that there will be another draft coming out and that too will be open for comment. Obviously there is going to come a time where we will have to close this off but as we continue to develop the documents these right now are living documents and we are trying to make sure we get comments taken care of as best we can and to negotiate those within the settlement agreement. Nobody is going to get everything they want.

**The motion carried unanimously.**

**AGENDA ITEM #19 – FINANCE COMMITTEE REPORT ON THE ISC FY06 BUDGET REQUEST:**

Herman Garcia presented information on the FY06 budget request for the Office of the State Engineer and the Interstate Stream Commission [see attachment 9].

**Questions from the Commissioners:**

Commissioner White asked if there are recurring expenditures from the Irrigation Works Construction Fund, contractual and cost sharing programs that we share with other agencies.

Mr. Garcia responded that was correct particularly with the Corps of Engineers.

Commissioner White stated that the point is that in a year or two those funds will not be available and the legislature is going to have to bite that bullet if we are going to continue the programs.

Mr. Garcia agreed with Commissioner White's analysis.

Chairman Dunlap stated that the Finance Committee had discussed this problem and there may be some alternatives that the Director and Secretary may want to bring up.

Secretary D'Antonio commented that the trust funds are important for our continued survival as an agency because they have replaced the general fund. What we are going to do is to ask for additional general fund even though we were suppose to maintain a flat budget. In the Finance Committee meeting we realized that New Mexico is in a pretty decent year for revenues based on oil and gas royalties and we thought that one solution might be for the Governor, to, in lieu of a general fund increase to our agency, to make a one time addition of perhaps \$20 million, and put \$15 million in one of the trust funds and \$5 million in the other. That would allow us to obtain a multi-year distribution of funds to help us through the next 4 or 5 years and that may be a way to do it and not impact the general fund. What we need to confirm is whether you can add funds to a trust fund.

Commissioner White commented that he believed that is possible and statute provides that other sources may be used.

There ensued a general discussion of possibilities of building up the trust funds and where the balance of the trust funds had been spent.



There was a general consensus that the Commissioners would lobby the legislature in the next session on behalf of the Commission to receive the funding necessary to support the programs of the Commission.

**AGENDA ITEM #20 – SET FUTURE MEETING DATES, OTHER BUSINESS AND INFORMATIONAL ITEMS NOT REQUIRING ISC ACTION:**

Chairman Dunlap stated that the next meeting will be September 13 in Las Cruces.

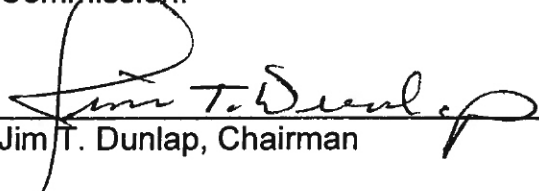
Director López suggested that an alternate location for the meeting if the LRG regional water plan is not ready would be in Santa Fe.

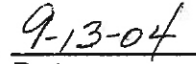
**Commissioner Espinosa moved, Commissioner Harris seconded, to meet on the 13<sup>th</sup> of September in Las Cruces if the LRG Regional Water Plan is ready and, if not, the meeting will be in Santa Fe. The motion carried unanimously.**

**AGENDA ITEM #21 - ADJOURN: Commissioner Garcia moved, Commissioner Harris seconded, to adjourn the meeting. The motion carried unanimously. The meeting was adjourned at 4:20 p.m.**

Minutes were prepared by M. Lee Pease and edited by Director López.

Approved at the September 13, 2004 meeting of the Interstate Stream Commission.

  
\_\_\_\_\_  
Jim T. Dunlap, Chairman

  
\_\_\_\_\_  
Date