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Navajo Settle
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Comments
Of
Thomas C. Turney
Before
San Juan Water Commission
Farmington, NM
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I appreciate you letting me address the commission this morning. I have wanted to do so for quite some time.

I would like to briefly introduce the following people who have accompanied me.

Norm Gaume, John D'Antonio, Robert Genualdi, John Stroud, John Whipple

There are several issues I wish to address this morning. All these issues are inter-related. I would like to talk about the application filed in January by the Commission. I want to address the State's ongoing negotiations with the Navajos, a preliminary hydrologic determination, the Animas La Plata Project, and finally close with a few words about metering and management of the Animas and San Juan River.

The San Juan Basin is important to the State of New Mexico. It contains the largest

surface water supply in the State, of about which 15%, is being exported for use by communities and agricultural uses within the Rio Grande Basin--including the cities of Albuquerque and the Santa Fe as well as the Middle Rio Grande Conservancy District.

The San Juan Basin includes many large cities as well as three Indian Tribes. About 5% of the entire United States natural gas supplies come from the San Juan Basin. The area produces many agricultural products, both from Indian and non-Indian lands.

The New Mexico Interstate Stream Commission has supported development of San Juan Basin waters for many decades. This was necessary to insure that New Mexico waters were protected from being used by other western states. The Interstate Stream Commission has been supportive of the development of Navajo Dam, the Navajo Indian Irrigation Project, the Hammond Irrigation Project, and the Animas-La Plata project.

Many water activities continue to occur in the San Juan Basin which have a direct impact on all water stakeholders. My office is entering into dialogue with many competing interests. It is very important that this commission have a good working knowledge of these activities. This is essential because of State's view that these activities will provide certainty to a region that has seen and will in all likelihood continue to see growth.

If you have further questions about this mornings presentation, and I am sure you will, we would like to extend an invitation for Commission representative to travel to Santa Fe to meet with us. With the exception of Mr. Dunlap, it has been literally years since I

have seen anyone from the Commission in my office. Alternately, you can visit with Robert Genualdi who heads up our Aztec Office. Robert is quickly coming up to speed, and is in charge of the ongoing Navajo Negotiations. This morning's meeting is just one of a series of meetings that the State has been conducting in the area. Farmington has invited us to meet with them in two weeks. We are willing to meet with other Cities and stakeholders if we are invited.

I want to turn now to the application filed in January by the San Juan Water Commission. This application has sparked considerable interest. It is probably not proper for me to speak on the merits of the application, but I see no problems in discussing administrative procedures.

I have intentionally directed John D'Antonio that it not be published at this time. I have done so because I need guidance from the Commission on how you wish to proceed. Many parties have already indicated that they intend to protest the application. These include the Navajo Nation, the Department of Interior and the Bureau of Indian Affairs. In addition, one municipality in this basin has indicated they are considering protesting the application.

I am willing to publish the application and assign a hearing officer to hearing the case. However, because of the large number of players involved, I think it is fairly safe to say that the hearing will be lengthy, sophisticated, and costly. I wonder if instead of going ahead with this application, it would be more in everyone's interest to consider alternate courses of action.

No matter what the decision the State Engineer makes on this application, an appeal is possible. In recent years, as we have begun working through the Agency backlog of applications, we have seen a number of my final decisions being appealed. This is done typically by either the applicant or the protestant, who is permitted to appeal. If an appeal is made there is a possibility the ultimate decision will somehow find itself thrust into the ongoing adjudication court. And in a recent court decision in an adjudication just north of Santa Fe, the Court overturned a special master's decision on a specific issue, ordering instead that the issue be addressed as a part of the global ongoing Indian, non-Indian settlement talks.

As the Commission deliberates on its decision to go ahead with the publishing of this application, I believe it is very important to understand the ongoing Navajo negotiations as well as a preliminary hydrologic determination which the Interstate Stream Commission has recently developed.

I want to now discuss the Navajo negotiations. I have made several presentations in this area on the State's preliminary offer. Discussions to date with the Navajos have used this preliminary offer as a framework for possible settlement. Briefly, existing depletions by the Navajo Nation will be recognized. The completion of the Navajo Indian Irrigation Project will be supported, as well as depletions associated with the Navajo-Gallup project. A pipeline to serve Navajo Communities along the front range of the Chusca mountains and the City of Gallup will be constructed. Certain infrastructure projects relating to existing irrigation works for the Fruitland, Hogback and Cudei will be

constructed. In return, the Navajo will settle their water claims in the San Juan Basin.

The Navajos are placing strong pressure on the State to complete these settlement discussions. I have publicly taken the position that the State will support the construction of a Navajo-Gallup pipeline in the context of a settlement of Navajo claims in the San Juan Basin. Support for the building of this pipeline is gaining momentum in Congress. Certainty of Indian Water rights in the San Juan Basin will provide for the economic future of the basin. Without settlement, there will continue to be uncertainty of all water rights in the basin. Development of the Basin may be impaired in the decades to come because of the present cloud of uncertainty. This uncertainty may not be fully understood now, but as the region grows, it is safe to predict that this uncertainty will significantly hurt the growth of this Basin.

Settlement discussions with the Jicarilla Apache Tribe began in the late 1980's. After completion of settlement discussion, the settlement was brought before the San Juan Adjudication Court. This court subsequently produced an Order which defined the water rights of the Jicarilla. I suspect this will be the same path that will be followed if negotiations with the Navajos are successful. The Court will be asked to issue a partial final decree on the Navajo right. Ultimately, the State's intention is to completely adjudicate all rights in the San Juan Basin. The 1948 San Juan County Court Decree set forth rights by non-Indians in the Basin. It did not include the Navajo Nation or Jicarilla rights. The current San Juan Adjudication will cover claims by Indians, non-Indians, and the United States.

A water right that is defined by a Court provides much certainty. Adjudicated water rights are the key to providing a viable water market in this area. An adjudication provides certainty about the nature and extent of water rights because they are judicially determined. As challenges to New Mexico's water supply increase, and as more and more demand for new water sources arises from entities such as municipalities and commercial interests, only those rights that have been adjudicated will be marketable at low risk to the purchaser. Adjudicating New Mexico's water rights is essential to protect New Mexico water and will allow for orderly development to occur.

The recent 2000 census confirmed that the State of New Mexico is growing. Among the western states, New Mexico now ranks 8th in growth.

New Mexico is almost a desert. New Mexico's water resources for people to use are finite. And in a desert, not everyone can have all the water they want. As the State grows and water becomes more and more scarce, water availability will ultimately define the future of New Mexico.

New Mexico is experiencing a period of rapid population growth. Its population over the past 4 decades has almost doubled. The Denver Post recently carried a projection on its front page that New Mexico's population will grow by almost 85% over the next 50 years.

I want to move now to the hydrologic determination. One of the initial steps in an Indian

Settlement is a determination of where the water will come from for the settlement as well as for any infrastructure project that is a part of the settlement. This determination is typically done by the Bureau of Reclamation in concert with the State of NM. This determination is very important.

Last year, the City of Gallup and the Navajo Nation requested a new hydrologic determination be done. Although it appeared for a while that the Bureau was going to not work with the State in preparation of this new hydrologic determination, we are hopeful for a new spirit of cooperation with this Federal Agency. Because the state is a signatory to the Upper Basin and Colorado River compacts, it is appropriate that NM be involved in any hydrologic determination.

Recently, the Interstate Stream Commission has developed a preliminary hydrologic determination. The numbers inside this set of computations will form the basis of the Navajo-Gallup Water Supply project, which in turn is a key component to any Indian Water Right Settlement. The document is further key to the amount of water that is available for non-Indian water use in the Basin. John Whipple, who is a staff engineer with the Commission, will explain to you this draft document.

I now want to discuss the Animas La Plata Project. This is a project which has evolved over the decades. 50 years ago, this Project was envisioned to be an irrigation project. Through the years it transformed into a municipal and industrial water supply project for Indian and non-Indian communities in New Mexico. Throughout this evolution, the New Mexico Interstate Steam Commission has remained an avid supporter of this project—

specifically because it has the opportunity to provide a dependable water supply.

This past year, in order to allow the project to move forward, the San Juan Water Commission agreed to reduce their depletions from the Project—specifically from 15,400 afy to 10,400 afy. Two weeks ago we received a letter from the Commission asking us to review a draft Amendatory Repayment Contract. Last week we received a copy of an alternate Contract from the Bureau of Reclamation. It is not the same as the contract we received from this Commission.

We have completed a preliminary review of documents. We would be happy to meet to discuss particular issues. I would, however, like to address some broad issues.

The intention of the ALP project is to provide a reliable supply of water. We are concerned that the contract does not meet this primary objective. Part of the issue revolves around the assignment of an earlier water right permit to the project beneficiaries.

We believe that this concern can be adequately addressed by initiating discussions with the State of Colorado on how they intend to protect Project water so that it arrives undiminished at the NM state line. The Animas La Plata Project Interstate Compact will provide the basis for these negotiations. We are concerned that Project water may be diverted by persons in Colorado who have water rights with post 1937 priority

This is an issue that we addressed on two other interstate rivers in recent years with

diversion dams being located in one state and project beneficiaries in another state. Working with Colorado on the Costillo Creek, we have been able to develop a document that describes the operation of the system—a document designed to insure that the downstream state does receive its fair allotment. On another project in the Lower Rio Grande, this exact issue is under considerable discussion and may ultimately lead to litigation between NM and Texas before the United States Supreme Court. From the complexities of this issue, we have learned one thing. It is better to address the issue now, rather than wait for it to surface many decades down the road.

The federal legislation that authorized the current Project states that upon the request of the State Engineer, the Secretary of the Interior shall, as soon as practicable assign to the NM ALP project beneficiaries , the Department of Interior's interest in Permit 2883 in order to fulfill the New Mexico non-Navajo purposes of the project.

We are willing to make this request. However, to do so, we must be able to have quantities to assign to New Mexico Project Beneficiaries—more specifically how is the 10,400 afy to be divided up. In adjudication litigation both in the Lower Rio Grande and the Carlsbad Irrigation District, we have successfully taken the position that it is not the United States, not the Irrigation Districts, but rather the farmers who have put the water to beneficial use who therefore own the water rights. This same principal applies to the ALP project beneficiary assignment. In this case, it is the Cities or the rural water associations who will put the project water to beneficial use and this is whom we will make the assignment to. We are well aware that the Cities and the County have entered into a joint powers agreement and this agreement will be considered in acting

on the assignment request.

As I recall, the original joint powers agreement forming the SJWC set forth the breakout of waters from the ALP project, but unfortunately the project that was envisioned a decade ago has now been downsized.

Because of the downsizing, Permits 4487 through 4501 are going to have be revisited so that they can be integrated with the final ALP Project authorized by Congress.

There are other areas of the proposed contract we have concerns over. As an example, we are concerned over the language that gives conclusive decision making authority to the United States during times of shortage. This provision may work against NM interests. Because of our experiences on this issue, we must insure that these types of protection for NM interests are included in any contract.

My last issue relates installation of metering and appointment of water masters. The waters of the State, as they become scarcer, will need to become actively managed. One tool of management is measurement. Monies have been appropriated to the Interstate Stream Commission to install measurement devices on irrigation works within the Basin. At some point in the future, a water master will have to be appointed through the Courts to actively regulate diversions within the Basin. This is necessary to protect both senior and junior water right holders.

In closing, this area has a number of major water issues. There are actives which the

State is involved within which will have a significant influence on water in this Basin. This activities are inter-related and the challenges are large. The next decade will be critical. To bring economic certainty, the State is moving rapidly forward with negotiations with the Navajo Nation. In the future, the San Juan River must be completely adjudicated. An adjudication will provide greater certainty about the nature and extent of water rights to farmers and other water right claimants in the region. This adjudication is necessary to build the proper and necessary foundation for a future efficient water market. Water markets are the key to meeting any future water supply needs of the region. Until the adjudication is complete, my office will work this Commission, the cities, the County, the Navajo Nation, the State of Colorado , the Bureau of Reclamation, and other entities in the region, within the constraints of state water law, to offer interim solutions for their nearer-term water supply needs.