

John Whipple

From: Perry Abernethy
Sent: Thursday, January 15, 2004 10:53 AM
To: John Whipple
Subject: FW: Comments on Proposed Navajo Settlement Documents



Navajo Settlement
Comments.doc..

Attached are the Comments of Bloomfield Irrigation District

-----Original Message-----

From: risley
Sent: Thursday, January 15, 2004 10:42 AM
To: spollack; Bradley.S.Bridgewater; adamatronics; david.gehlert;
etaylor; felix; risley; jdraper; jmccaleb; ltaylor; mob;
Abernethy.Perry; rbc; sgreetham
Cc: bid5
Subject: Comments on Proposed Navajo Settlement Documents

Please find attached the comments submitted on behalf of the Bloomfield Irrigation District. The document is in Word format. If you have trouble opening the attachment, let me know and I will make alternative arrangements.

Thanks.

Yours truly,

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BLOOMFIELD IRRIGATION DISTRICT
COMMENTS ON
NAVAJO WATER SETTLEMENT PROPOSAL

January 15, 2004

Gary Risley of the Miller Stratvert P.A. law firm submits the following comments concerning the proposed Navajo Water Settlement on behalf of the Bloomfield Irrigation District ("BID"). Because of the short timeframe allowed for comments, these comments will be limited to significant "global" issues, and technical matters will be addressed later. These comments are submitted through the informal process of email to expedite their distribution to all interested parties. Nothing in these comments implies that the Bloomfield Irrigation District will approve of the proposed Settlement if these changes are made since that determination will be made at such time as the Settlement documents are finalized, but these are significant issues of concern to the BID.

1. Mutuality of the Settlement. It may be implied, *but the settlement agreement needs to expressly state that the Navajos, or any party acting in their interest or on their behalf, will not attack, challenge, or seek to set aside previous adjudications of water rights in the San Juan Basin; particularly, the Echo Ditch Decree, nor will they challenge the water rights granted under those decrees unless upon a claim of forfeiture of the water right by the water right holder subsequent to the date of the decree.* The settlement needs to create a mutual benefit for parties on both sides of the settlement. While one of the key concerns overhanging the San Juan Adjudication has been the amount of water the Navajos will receive and its priority date, a second significant concern has been the threatened challenge by the Navajo Nation of all prior adjudicated rights upon the basis that it was not a party to the earlier adjudications. The proposed settlement will not be legally or politically acceptable unless it truly settles *all* issues between the Navajo Nation and other parties holding water rights in the San Juan Basin, and recognition by the Navajos of the legitimacy of those earlier adjudicated rights is key to that resolution.
2. The Hogback and Fruitland Diversion Rates Are Excessive Or Out of Priority. It is believed that the diversion rate for the Navajo Ditches is excessive or the priority dates need to be adjusted. It is understood that the proposed diversion rate is based upon estimated historical use. There are three problems with utilizing that methodology of determination: *1. Historical use is not relevant* to determining the amount of water that needs to be diverted. As was once humorously stated at a BID Board meeting, the fact that you have been stealing water for 50 years does not mean you have a right to continue to do so in the future. The same can be said for historical diversion. The fact that a certain amount has been diverted does not mean that the ditches have not been over-diverting. *2. There has been no accurate measurement of the Navajo Ditches* to the knowledge of the BID. It has been the BID's experience that so-called experts who have estimated ditch flows greatly over-estimate the diversion rates. The BID has been accused of over-diverting, but when the rates were subsequently measured, the estimates of over-diversion were shown to be highly inaccurate, and it is reported that the results from other ditches yielded similar results as well. So, as a matter of fact, *the historical use numbers are no more than guesses as to the diversion rate.* *3. Inefficiency should not be rewarded with a higher diversion rate.* The reputation in the San Juan Basin is that the Navajo Ditches are in need of significant improvements and repair. This, of course, creates

the need for higher diversion rates to reach the end of the ditch. The proposal contains very significant sums of money for taxpayer funded improvements for these ditches, and these *ditches should not be awarded diversion rates based upon their current inefficiencies* and then be allowed to retain those rates once the ditches are made more efficient through the improvements. It is believed that the Fruitland maximum diversion rate should be 83 cfs, and maximum diversion rate of 115 cfs on a 1868 priority for the Hogback and a maximum rate of 110cfs on a 1909 priority. (The proposed priority split is based upon permit filings with the State Engineer. See file number 401 and 758.) *As a compromise, the ditches could be allowed the proposed diversion rates, but the rates would be reduced as the ditches are made more efficient through the aforementioned improvements.* A scale could be developed for each stage of the improvements.

3. Controlling Authority Concerning Diversions. It is not clear upon first reading which party has authority to control or enforce the diversion rates provided in the Settlement Proposal. It is believed that the Settlement should clearly state that the Office of *the State Engineer should have the authority to manage, measure, and control the diversion rates set forth in the agreement.* To state it another way, the Navajos gain control of the water awarded to them in the agreement for purposes of administration and other rights granted in the settlement once the water is one molecule's width past the diversion point. This would clearly give the State Engineer authority to measure and administer the diversion of the waters of the State of New Mexico as is his statutory mandate.
4. The Navajo-Gallup Project Should Not Be Awarded A 1868 Priority Date. It is the opinion of the BID that the water awarded to the Navajos under this proposed Settlement is very generous. The Navajos probably think to the contrary. One can understand an argument, without agreeing that it is a valid one, that the Navajo Irrigation Project could come within the scope of a possible Winters' Doctrine award. The same cannot be said for the Navajo Gallup water, in the BID's opinion. Gallup is approximately 90 miles from the proposed point of diversion. Gallup is approximately a 1000 feet higher in elevation than the proposed point of diversion. *It is extremely doubtful that a claim for the Navajo-Gallup Project under the Winters' Doctrine would prevail with an 1868 priority date in the BID's opinion.* It is understood that the 1868 priority would be subordinated to the late 1950's federal water, but *it is suggested that it would be more appropriate to award the Navajo-Gallup Project a late 1950's priority* which will come from the aforementioned federal waters. It is understood that the chances of the subordination being terminated upon the irretrievable loss of the project is very slim, but the rights granted under the decree should have some significant legal basis for the priority dates awarded. In the BID's view, subordination is an important compromise in exchange for the generous amount of water awarded, not exclusively for the priority date of the award.
5. Ten Year Averaging Does Not Comport With Water Law. It is understood that the ten year averaging language came from the federal statutory language creating the Navajo Irrigation Project. While the federal language sets the parameters or boundaries for the water to be used by NIP (in essence the maximum use of federal water to be allowed), it does not necessarily stand that state administration statutes and regulations are to be ignored. The water involved is covered by permits issued by the State. State water users are not allowed to effectively bank water through non-

use to be used the next year or to borrow water this year to be paid back the next. Averaging without strict limitations would create chaotic effects to water management plans for the Basin. An extreme example: NIP lies fallow one year, may the Navajo Nation draw 200 percent of the normal average the next year? Will double the annual depletion be allowed? *The administration should follow state water law with regard to annual deliveries. As a compromise, which probably would require a statutory change, it is suggested that a floor and cap be created of 2.5% in the variation to be "credited" in any given year, and providing that no more than one year's "credit" may be used at a time in any given subsequent year.* (By way of example – if 7.5% is "banked" during a given 10 year period, only 2.5% of that may be used in any one calendar year.) Any "borrowed" water should have a time parameter by which it must be "repaid" within the ten year accounting period. This would allow for reasonable fluctuations due to crop rotations or variances in rainfall without turning the current management system on its head.

Other Miscellaneous Concerns: The language needs to be amended to reflect that the current federal rights are not "water" rights, but "storage" rights. A water right belongs to the person who puts the water to beneficial use. There are concerns over how the depletion is going to be measured; particularly, following a letter by Navajo President Shirley written to the Interior Secretary in which he states the intent of the Nation not to allow return flows to the River. (*Letter of December 7, 2993 addressed to Gale A. Norton, Secretary of Interior, paragraph 14.*) Further technical points will be submitted in the near future if they have not already been raised by other parties.

Your consideration of these comments is appreciated.

Yours truly,

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