

MEMO

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SJ-17

San Juan Water Commission

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To: John Whipple
From: Jacqueline Allcorn ~~_____~~
Subject: 'Draft' White Paper on Navajo Settlement Proposal
Date: Tuesday, March 09, 2004

Mr. Whipple,

Please find the attached eight-page 'Draft' San Juan Water Commission White Paper on Navajo Nation Water Rights Settlement Proposed December 5, 2003

Please contact the San Juan Water Commission office at 505-564-8969 if you have any questions.

**San Juan Water Commission
White Paper on Navajo Nation Water Rights Settlement
Proposed December 5, 2003**

INTRODUCTION

We understand that the legislation that will implement the Navajo Nation's settlement is currently scheduled to be introduced in the U.S. Congress on April 1, so it is crucial to examine the issues at this time. The settlement of the Navajo Nation's reserve water rights is critical to the basin and State, and we favor resolving it without rancorous litigation and without disrupting the existing economy. We appreciate the State of New Mexico and the Navajo Nation's effort to propose a final settlement. However, we are concerned about certain details in the proposal. Following are concerns that the San Juan Water Commission believes should be addressed before Congress finalizes the legislation.

SUMMARY OF NAVAJO SETTLEMENT PROPOSAL

The proposed settlement of the Navajo Nation's water rights claims is complex and far-reaching. Much like the settlements of the Jicarilla Apache and Colorado Ute Indian claims, it will require a Settlement Agreement, a Contract with the United States, federal legislation and significant federal dollars. This brief summary does not attempt to explain the complexity, but rather to lay out the major points of the proposal.

In exchange for giving up its *Winters* reserved water rights, the Navajo Nation would receive water rights for the Navajo Nation Irrigation Project ("NIIP"), the Fruitland and Hogback irrigation projects, the Animas-La Plata Project, historic use, future municipal use and the Navajo-Gallup Water Supply Project ("NGWSP"). Like the Jicarilla settlement, the water rights would have an early (1868) priority date, but that priority would be subordinated to the rights of the Secretary of the Interior for the Navajo Reservoir Supply (priorities of 1955 and later) and the Animas-La Plata Project (1956). This will allow existing and authorized non-Indian uses to continue without interruption, but it also means that no non-Navajo water will be available in the future for appropriation in the San Juan Basin.

The Nation also would receive funding to pay for completion and repair of NIIP, rehabilitation of the Fruitland and Hogback irrigation projects, groundwater wells, a hydrographic survey to document historic uses and a \$50 million Water Development Trust Fund. The federal government would pay \$25 million toward the trust fund, and the State of New Mexico would pay the other half.

The following tabulation, taken from the Executive Summary, is a summary of the reserved rights that the Navajo Nation would have under the proposed Settlement Agreement.

	<u>Diversion</u>		<u>Depletion</u>	
	<u>Amount</u> <u>(af/yr)</u>	<u>Rate</u> <u>(cfs)</u>	<u>(AFY)</u>	<u>Priority</u>
Irrigation Projects:				
- Navajo Indian Irrigation Project	508,000	1,200	267,000	Subordinated
- Fruitland-Cambridge Irrigation Project	15,940	100	7,970	1868
- Hogback-Cudei Irrigation Project	42,200	225	21,100	1868
- San Juan River supplemental irrigation	14,500	55	0	2004
- Tributary irrigation projects, including storage	Determine by Hydrosurvey		1868	
Municipal, Industrial, Commercial and Domestic Uses:				
- Navajo-Gallup Water Supply Project	22,650	48	20,780	Subordinated
- Animas-La Plata Project	4,680	13	2,340	Subordinated
- San Juan River municipal diversions	2,000	3	1,000	1868
- San Juan River supplemental M&I diversions	14,500	40	0	2004
- Tributary groundwater diversions	2,000	N/A	2,000	1868
- Tributary recreation and livestock uses	Determine by Hydrosurvey		1868	

The Settlement Act would authorize appropriations for the construction or rehabilitation of the following water development projects and purposes to benefit the Navajo Nation, and would require that associated project construction and funding milestones be achieved by specified completion dates. (Table taken from Executive Summary.)

	<u>Service</u> <u>Acres</u>	<u>Federal</u> <u>Funds</u>	<u>Completion</u> <u>Date</u>
Irrigation Projects:			
- Navajo Indian Irrigation Project	110,630	\$277.4 million	Dec. 2015
- Fruitland-Cambridge Irrigation Project	3,335	\$ 5.7 million	Dec. 2010
- Hogback-Cudei Irrigation Project	8,830	\$ 12.0 million	Dec. 2015
Municipal, Industrial, Commercial and Domestic Uses:			
- Navajo-Gallup Water Supply Project	N/A	\$463.4 million	Dec. 2016
- Navajo Nation Municipal Pipeline	N/A	\$ 5.0 million	Dec. 2009
- Conjunctive use groundwater wells	N/A	\$ 77.6 million	Dec. 2016
Other Purposes:			
- Joint Hydrographic Survey	N/A	\$ 5.0 million	Sep. 2008
- Navajo Nation Water Development Trust Fund	N/A	\$ 25.0 million	Dec. 2016

As noted above, the State of New Mexico would provide an additional \$25 million to the Trust Fund over 10 years (Settlement Agreement ¶6.1).

Following are issues of concern for the San Juan Water Commission.

1. Legislated Settlement Ends Further Significant Negotiations

Under a normal case in an adjudication, the *inter se* process can result in changes to the subfile order, which is how the proposed settlement has been described. That description is reasonable because the settlement will be agreed to between the OSE and the Navajo Nation/Interior representatives, which is what occurs in any subfile order. However, in this case, the agreement over the subfile order will be authorized (if not settled) by federal legislation long before the *inter se* process is even begun. The proposed Settlement Act, in Sec. 303(c), provides that the Congress "approves, ratifies, and hereby incorporates by reference the Settlement Agreement and the Settlement Contract." The Act also authorizes the Secretary of the Interior to enter into the Settlement Agreement and Settlement Contract and take actions to fulfill these agreements. Sec. 303(a),(b),(d).

Realistically, the issue becomes whether the settlement embodied in the subfile order can be changed after the legislation is passed. That is, does any New Mexico state district judge have the authority or will to change a settlement agreed to and endorsed by the United States Congress, and would the Navajo Nation agree to a final order in a New Mexico adjudication that diverges from that authorized by federal legislation? We think the answer to both of these questions is "No," which means that the SJWC must be comfortable with the legislation and its proposed settlement, because it is unlikely we will be able to significantly influence the settlement after definitive legislation is passed. For the short term, it may be better to craft legislation that is a "placeholder" for the settlement and gives the parties more time to work out their concerns.

2. Priority Date Issues

- Concern with one priority date for the entire water right

The Nation and its boundaries in New Mexico are a product of treaty and executive order from 1868 through at least 1917. As we read the 1908 *Winters* decision and its progeny, federal reservations, including Indian reservations, represent a reservation of water from the date of the order or treaty establishing the reservation of lands. The priority date should be modified to be consistent with the dates of the relevant boundary changes to the Navajo reservation, and not given a blanket priority date of 1868 (Proposed Decree, ¶2). For example, the priority date for allotments in the area described in Executive Order No. 709, as amended by Executive Order No. 744, should be no earlier than the date Order No. 709 was signed, or 1908.

- Early priority date for Navajo-Gallup Water Supply Project

The proposed Decree indicates the priority date for the Navajo-Gallup Water Supply Project ("NGWSP") will be the same as for agricultural uses such as NIIP (Decree ¶2(b)), and that its subordinated priority date will be the same as for the pre-existing projects, such as NIIP (Decree ¶4(a)). The Nation should provide justification for the 1868 date for the NGWSP. The NGWSP priority date should be subordinated to the actual date of the filing of the notice to appropriate water for the NGWSP with the Office of the State Engineer, to comport with New Mexico law regarding federal projects, NMSA 72-5-33. Otherwise, this action would fly in the face of the prior appropriation doctrine as it applies to similar federal water projects.

- Priority of combined permits should be determined

The proposed Settlement does not specify which permit would be used for each particular project, and it should. Reference is made to a combined permit held by the Bureau of Reclamation, and it has a range of priorities from 1955 to 1968. The Bureau applied to appropriate various amounts of water during that time and later combined the permits. A determination of the "Priority of Priorities" is essential, especially since the same permit was used for the Jicarilla Apache settlement. In order to administer the permit, the specific allocation of water from the permit – and its particular priority date – for each project within the Settlement must be specified. Because the priority dates come before and after the 1956 priority date of the ALP, this is an important issue for the Commission.

Further, as many commentators noted, the Hammond Conservancy District's permit, No. 2848, should be deleted from the list of permits that will be used to supply water to the Navajo projects.

- Diversion points for NGWSP could harm other users

Two points of diversion are identified in the Decree (¶2(b)) for the proposed NGWSP—Navajo Dam and the San Juan River at PNM's diversion (which is below the confluence with the Animas). The concern is that the priority of that water has not been specified, nor have diversions at the two locations been quantified or limited. Certain greater diversions at Navajo Dam will negatively impact diversions on the San Juan River above the confluence of the Animas River. Also of concern to ALP beneficiaries is the definition of the priority of the project relative to the ALP, as discussed above. This could be resolved by "boxing in" the amounts to be diverted and setting the priority for the NGWSP's water supply.

3. Water Rights/Allocation Issues

- 10-Year averaging creates problems, is contrary to state law

The 10-year averaging provision in the settlement threatens to leave the SJWC with no ability to divert water in a particular year. Although it is an extreme example, the Navajo Nation could, by following all of NIIP for one year (and not using any of its 508,000 acre-foot diversion), divert *all* of the flow of the San Juan River the next year. Establishing water rights in the Decree for NIIP (§2(a)), the Hogback-Cudei Irrigation Project (§2(e)) and the Fruitland Irrigation Project (§2(f)) based on a 10-year average sets a precedent that cannot be administered. At the extreme, it results in a right to take a maximum amount in a drought year to the detriment of other water users based on limited use during wetter water years. At the least, without strict limitations, it would make administration much more difficult because all other water users would have no idea how much the Navajo Nation, which would control more than half of New Mexico's water on the San Juan, would be taking.

Moreover, it is contrary to the New Mexico Water Code, which bases water rights on annual use. NMSA § 72-5-1. State law does not allow for the "banking" of water rights by averaging them over a multi-year period. Sen. Raymond Kysar asked Attorney General Patricia Madrid on January 12, 2004, for a formal opinion on whether the "average diversion" over a ten-year period comports with state law.

- Lack of water allocated to serve Navajos who live outside the Reservation

Concern exists that the proposed settlement may create a situation where the non-Indian communities of San Juan County will, within defined and reduced water supplies, continue to serve Navajo member who reside outside the reservation and effectively make their "homeland" here. The proposed settlement puts a finite limit on our future, under the foreseeable circumstances, and we must decide if it is an acceptable trade-off to providing the Navajo with a "homeland" on the Reservation. It appears that the Settlement provides water rights to fulfill the purposes of the Reservation assuming there will be a significant Navajo migration back to the Reservation. However, if such migration does not occur, and the Nation's population projections prove to be inaccurate, will the Nation assure the water needs of the Navajo members living in areas adjacent to the Reservation? Our population projections suggest that the majority of people in 40 years living outside the Reservation will be Navajo. How this issue will be addressed is not clear in the documents, and it needs to be explained.

- “Supplemental” water rights with no depletions create concern

The Executive Summary lists 29,000 acre-feet of “supplemental” water rights with no depletions that have a priority date of 2004. Issues of concern relating to these water rights are whether these rights allow storage, what is the water quality impact, and how do they impact the flow recommendations for the San Juan Basin Recovery Implementation Program. Also, if these additional diversions create additional carriage losses by evaporation and that, in turn, increase Compact depletions, they should be charged to the Navajo allocation.

- Transfers off the Reservation or out of New Mexico must comply fully with New Mexico state law

With regards to transfers of water off the Reservation, the phrase “in accordance with state law” in ¶15 of the Decree must be clarified to mean that these transfers will be administered under New Mexico state law by the State Engineer. In the 1988 Colorado Ute Settlement, for example, all marketing off the reservations requires compliance with Colorado state law. In Colorado, the State Engineer also is given the authority to administer water rights near the reservation.

Also, the use of any water outside the boundaries of the New Mexico, but within the Navajo Reservation, must be accounted for under that respective state’s Colorado River Compact share, as provided by Sec. 104(f) of the Settlement Act. In the Act, the language needs remain as it is, to be abundantly clear that under no circumstances can any of this water be used in Arizona without providing for accounting of that water in Arizona’s Compact allocation and other safeguards as provided in Sec. 104(g).

- Depletion Schedule must not become binding

The Settlement is unclear about the status of the depletion schedule. The so-called “draft” depletion schedule is not a document that has been agreed to by water users in the Basin, and it should not become a part of the settlement or its record such that it becomes a legally binding document.

- Possible future allocation of water and appropriation of groundwater undermines “finality” of settlement

The Settlement Agreement provision in ¶8.2 that the Navajo and non-Indians would share 50-50 in any additional allocation under the Colorado Compact gives the Navajos a possible additional claim on the River. The purpose of the Settlement is to resolve the Nations entire *Winters* claim to the waters of the San Juan River Basin in New Mexico, not just part of it with the future possibility of more water. The *Winters* rights provide the water necessary to fulfill the purposes of the reservation. Thus, it is inherent in this Settlement that the water

and other benefits provided meets all of the current and future *Winters* claims of the Nation once and for all, and the possibility that the Nation may be entitled to more water in the future undermines the notion of “finality” of the settlement.

Further, Sec. 106(e) of the Settlement Act, discussing conjunctive-use wells for the diversion of more than 1,600 AFY, states that the Act is not intended to settle groundwater rights. Does the Navajo Nation intend to claim more rights to groundwater, and when might it make that claim? This statement also undercuts the idea that the settlement is final.

Provisions that the Navajo Nation can “revoke” the Decree (at ¶18) if requirements are not met, which power lasts until 2020, also undermine the idea that the settlement is “final.” It seems unfair that the Nation could unravel the settlement years after it has been agreed to, and after years of reliance by the non-Indian community. Perhaps a less drastic remedy could be proposed that would protect the Navajo Nation’s interests, but not create a continuing risk for other water users. Similarly, the construction milestones in Sec. 308(a) of the Settlement Act and the deadline to pass the Settlement Act itself by October 31, 2006 (Settlement Agreement, ¶4.2), are laudable goals, but the documents are silent about the consequences for failure to meet those goals. Leaving the consequences ambiguous is unsettling to the non-Indian community.

4. Regulatory/Water Administration Issues

- Regulatory shortages should be shared

Regulatory shortages, e.g., environmental and ESA, are being added to the purposes of existing federal projects, and the Navajo Nation should proportionally share in these demands since they clearly are part of the demands allowing the continuation of the Nation’s homeland, as provided in the Settlement Act (Sections 104(j) for NGSWP and 203(f) for NIIP). Shortage because of these regulatory actions must be prorated to all federally authorized actions, not to state actions until and unless a determination of a taking is made.

- “Salvage by use” should be clarified

The depletion schedule on page 3 states that it does not reflect “salvage by use,” but the term is nowhere defined. If the Navajos are allowed to deplete excess water from, say, the NIIP by “salvage by use” with a senior priority, they would be further reducing the available water supply, against the Compact supply.

5. Navajo Settlement Will Compete with ALP for Scarce Dollars

An important issue to the SJWC is the competition for federal funding that will be created by adding the Navajo settlement to the list of projects that must be built. Currently the ALP is estimated to cost \$500 million-plus to build, or about \$300 million more than has already been appropriated. The Net Zero proposal for energy water use research is another \$50 million, and now the Navajo settlement will cost approximately an additional \$850 million. Based on the proposed schedules, the reality that the ALP will be a concurrent demand for federal dollars will create the problem that NIIP has suffered, insufficient funding to complete the project in a timely manner. The 2000 Amendments to the ALP project require completion in 2007-8, but reality is more in the realm of 2012-14, because of funding limits. Add the "claims" by the Ute Mountain Ute in the New Mexico San Juan basin for water and funds, and we have a major obstacle. The schedules need to be considered and recommendations made to allow a reasonable resolution.

CONCLUSION

The resolution of the reasonable *Winters* claims by the Navajo Nation with wet water projects and supplies is critical to the future of the Basin and the State. However, this must be done recognizing that the Navajo "homeland" is not confined to the boundaries of the Reservation. It was inspiring to watch the Southern Ute leader Leonard Burch and see his clear understanding of similar issues in the Colorado Ute Settlement. There continues to exist the need to be sure all residents of the Basins impacted understand the issues and "can live with the settlement." Maybe a simpler "placeholder" federal legislative authorization would serve this year as the details of the settlement are fully developed and understood. A series of workshop meetings among stakeholders and, finally, workshops with the communities as a whole could develop a meaningful settlement that could lead to legislation that would enjoy broad support in the San Juan Basin.

Where Do We Go from Here?

We understand that a new draft of the Settlement documents will be circulated soon, and we hope it addresses the issues raised by the Commission and other commentators. The next step is to meet with the sponsors of the settlement to work with them and gain a fuller understanding of the issues. Then, based on those conversations, the Commission should move to the Congressional arena to influence the legislation that will become the basis for any settlement.