

NAVAJO WATER RIGHTS PRE-DATE COLONIZATION PERIOD

This is written for those who will make a final one time decision on behalf of the Navajo People. First, I thank everyone who has been involved in this process, for their dedication and willingness to undergo certain criticism in regards to the formulation of the Draft settlement agreement and to those Navajo citizens who were not reluctant to speak out on this very important Navajo issue. I believe the Navajo Nation Water Rights Commission is near the end of the first phase of a possible settlement regarding Navajo water rights in the San Juan River. I also believe that the Navajo people have certain concerns that need to be addressed prior to the Navajo Nation Council's final approval. Approval of this monumental document should not be dictated by non-Navajo interest and should not be rushed as we are all aware per Navajo beliefs all good things are not acquired without some difficulty.

Matters of great magnitude such as this settlement agreement should have full review from the prospective of our history pre-dating the Colonization and Treaty Periods. Treaties are instruments of international law that recognizes the separate sovereignty of Nations that enter into treaties. The Draft San Juan Water Settlement document fails to acknowledge that the Navajo People have existed since time immemorial on lands that were bestowed upon the Navajos by the Holy People. First, Navajo Nation Water Rights pre-dates the Colonization Period. Secondly, the Settlement Agreement fails to reference or ignores Navajo Treaty rights. One of the official purposes of the 1868 Treaty Reservation is the *agricultural* purpose of the Reservation. Its mention of agriculture allows the Navajo Nation, under Federal law, to claim *not only past and existing* agriculture water rights, but *future* agricultural water rights for lands that could be irrigated. * PARADISE

Of all the tribes in Arizona and New Mexico, only Navajo Nation and Mescalero Apaches have treaties with the United States. Navajo have two Treaties with the U.S., 1849 and 1868 treaties. Failure to acknowledge rights that pre-date the Colonization Period and not using the 1868 Treaty between the Navajo Nation and United States Government as the foundation of Navajo water rights in New Mexico to the fullest extent is offensive to the Navajo people--past, present, and future.

Concerns about the "Settlement Agreement Summary Paper"

1. The Navajo Nation has rights to divert 787,000 acre feet per year for Navajo Indian Irrigation Project (NIIP). The tabulation table, page 2, Settlement Agreement Summary Paper shows diversion and depletion "rights," that Navajo has rights to divert 508,000 acre feet per year for NIIP. This amount was established by NIIP legislation in 1962. But, the history of the diversion "rights" for NIIP is not so simple. In the 1940s, the BIA suggested a diversion rate for the project of 787,000 acre feet per year. A few years later the Navajo Council was convinced to accept a diversion rate for the proposed project of 610,000 acre feet per year. When the NIIP legislation was passed in 1962, the 610,000 acre feet diversion rate was reduced to 508,000 acre feet level. Later, the BIA unilaterally decided that, because of sprinkler installation, a diversion rate of only about 370,000 acre feet should be applicable to NIIP. By the time the proposed settlement was announced, the 370,000 acre feet diversion was further reduced to 320,000 acre feet. This is confirmed in the 1st paragraph on page 9 of the Settlement Agreement Summary Paper.

Finally, in the past weeks, regional newspapers reported that the NIIP diversion has been reduced, yet again, by another 10,000 acre feet, to 320,000 acre feet. This is reportedly to allow a permanent diversion of that volume elsewhere in New Mexico. If these 10,000 acre feet of diversion water is coming out of Navajo Reservoir, it is a loss of \$100,000,000 (on hundred million dollars) worth of Navajo water.

Why is the misleading 508,000 acre feet diversion presented in the settlement documents, when the fine print of the settlement states that the real diversion is just over 300,000 acre feet?

It is important to remember that the Navajo Nation already paid for NIIP in 1962 when it gave up any claim to the 108,000 acre feet of water depleted from the San Juan Basin through the diversion into the San Juan-Chama project. That water is now worth over one billion dollars.

It is also important to remember that completion of NIIP is a promise that is over 40 years old. To suggest that the money delineated in the settlement for completing NIIP is something *new* for the Navajos is incorrect. The promise to complete NIIP was already overdue 20 years ago. In fact, the issue should have been resolved back then, instead of letting it fester for another 20 years. Still, the non-Indian population is viewing the inclusion of this and other past guarantees as modern-day windfalls for the Navajos, rather than as the legacy of unfulfilled promises.

The Navajo portion of the Animas-LaPlata project is also a pre-existing promise from an earlier time. To suggest that the millions of dollars of expenditures related to it in the current settlement proposal are something new for the Navajos is incorrect and promotes that "modern-day windfall" attitude among the non-Indians.

2. Why subject the Navajo water rights as subordinate to those rights that pre-date the Colonization and Treaty Periods? Footnote 1 on page three of the "Settlement Agreement Summary Paper" says the Navajo Nation has "reserved priority" rights of 1868 for NIIP, Navajo Gallup, and Animas-La Plata water, when it is clear that the settlement agreement waives, or "subordinates," those 1868 rights. They are not actually 1868 rights, which would have been the seniority date of the rights if they were officially based on the 1868 Treaty, but are instead 1962 and 1956 rights.
3. The Settlement Agreement confines and limits the Navajo Nation's water rights by imposing on the Navajo Nation all the restrictions and allocations made in the Colorado River compacts of 1922 and 1948. The Navajo Nation was not invited to participate in the compact negotiations. The compacts declare, that "Nothing in this compact shall be construed as: Affecting the obligations of the United States of America to Indian Tribes." By not acknowledging this special exemption for Navajo, the Settlement Agreement cuts off Navajo water rights and alternative settlement potentials that could involve more water and/or more revenue from, and control over the Nation's water rights.
4. Waiving of some 1868 depletion rights for Fruitland-Cambridge and Hogback-Cudei Irrigation in the settlement language. If the 1868 diversion rights established for these small irrigation projects are not sufficient to meet the 1868 depletion rights listed in the settlement, then the settlement allows "supplemental irrigation" to occur in order to meet the 1868 depletion rights. The problem with this proposed solution is that the supplemental irrigation is assigned a priority right of 2004, and not 1868. This is presented in the tabulation table on page 2 of the Settlement Agreement Summary Paper, and in footnote 2 on page 3 of the Paper.
5. States are able to transfer their water rights within their boundaries; the Navajo Nation should be allowed to do the same thing. A couple of decades ago, certain water laws of the state of Arizona were deceptively changed to allow Peabody to transport Navajo groundwater, not just out off the Reservation but out of the state, to Nevada, for their coal slurry pipeline. If the sovereign Navajo Nation has rights to water within its Reservation boundaries, it should also have the sovereign right to transport that water where it deems appropriate. If this right is denied through discriminatory settlement actions by certain parties, then the Navajo Nation should be well-compensated for the loss of that right.

6. The 2nd paragraph on page five of the Settlement Summary Paper says "the Navajo Nation would administer its rights on Navajo lands *subject to non-impairment of non-Navajo water rights*. It does not say subject to "senior" non-Navajo rights, just non-Navajo rights. This kind of language suggests that Navajo is being made junior to everyone under the terms of this paragraph.

7. In the same paragraph as mentioned in number 6, above, it says that "Transfers of water uses by the Navajo Nation to locations off Navajo lands would require approval of the State Engineer." The New Mexico State Engineer should have no say in the matter, or in any water subcontracting or water marketing that allows Navajo water to flow downstream through the Reservation and out of state, in the San Juan River channel. Transfer of Navajo Water within the jurisdiction of the Navajo Nation is Navajo Nation's exclusively authority and should not be subject to State Engineers.

8. The top of page 9 of the Settlement Agreement Summary Paper states that 320,000 acre-feet per year diversion for NIIP will be included in the San Juan diversions "so long as the sprinkler irrigation systems on the Project are maintained." This reduces control over unused water rights if the sprinkler system is not maintained.

9. Hydrographic surveys that are done in association with tribal reserved water rights cover not only *past* and *current* agricultural uses, but potential *future* uses as well. It is often true that the *future* potential uses add the greatest water volume to a tribe's rights. The hydrographic survey proposed in the settlement does not include potential *future* uses. This is not good for two reasons. To exclude potential water rights from land that could potentially be farmed in the future (e.g., a traditional "practicably irrigable acreage" or "PIA" approach) from the hydrographic survey eliminates the possibility of identifying even greater rights for the Navajo Nation. It also sets a negative precedent for future Navajo water rights settlements in Utah and Arizona. The Navajo Nation has the largest reservation and the largest amount of PIA of any tribe in the country. To exclude this approach to Navajo rights in this settlement, or any other major settlement, is to "subordinate" and reduce the Navajo Nation's potential rights and to place the Nation in a potentially *inferior* bargaining position, when the Navajo Nation has a *superior* position in regards to water rights.

The hydrographic survey should identify potential future agricultural uses for water rights to (a) strengthen the Navajo Nation's bargaining position, (b) potentially improve the Navajo Nation's final position in the settlement, and (c) generally help redeem the damage done to the Navajo people by the uninvited colonization of our land and our people for over 150 years.

The Money Value of Water Rights and Lease Rights, and the Marketing of Water

The NIIP water *coming out of Navajo Reservoir* has been appraised as being worth between \$7,000 and \$12,500 *for each acre feet* of water diversion rights. If we accept a basic value of \$10,000 an acre foot, that makes the current value of the NIIP diversion rights of 320,000 acre feet worth about 3.2 billion dollars.

Water diversion rights in Santa Fe are currently selling for \$10,000 an acre foot, while water diversion rights in the Big Thompson Irrigation Project in Colorado, which is roughly comparable to the Navajo Reservoir/NAPI situation, is selling for \$12,500 an acre foot. So, this NIIP water value estimation of \$10,000 an acre foot is not unreasonable.

The NIIP diversion was recently reported in a local newspaper as being reduced in the settlement agreement by 10,000 acre feet. If that is correct, and if the water is indeed Navajo Reservoir water, that 10,000 acre foot, with a value of \$10,000 dollars per acre foot, has a total value of \$100,000,000 (one hundred million dollars). This kind of reality is why all of the states surrounding the Navajo Nation have been referring to water as "liquid gold," and the reality should

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prevent Navajo leaders from casually allowing the reduction of any Navajo water rights. Every acre foot of rights is important, and is worth from \$2,200 to \$10,000 or more.

Water rights for irrigation along the San Juan River off the Navajo Nation, in the Farmington region, are currently selling for about \$2,200 per acre foot. This value is lower than the Navajo Reservoir water value because stored reservoir water is a more reliable and, therefore, a more valuable resource.

It has been reported that last year NAPI did not divert any more than 190,000 acre feet of water. This is about 130,000 acre feet less than the currently proposed diversion right and would mean that roughly about 100,000 acre feet of depletion rights went unused by NAPI.

If the Navajo Nation would have been able to market 100,000 acre feet to, say, Las Vegas last year for \$300 an acre foot, that would have totaled \$30,000,000 (thirty million dollars) for water that otherwise went unused. The Navajo Nation should not be limited to marketing any of its water rights if it deems such marketing is in the best interest of the Navajo people and the Navajo economy.

The water that went unused last year in the Fruitland-Cambridge and Hogback-Cudei Irrigation Projects could have been reasonably leased down stream, if the water rights settlement allowed it and had been in place, for approximately \$5,000,000 (five million dollars).

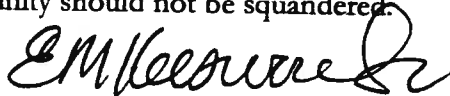
The proposed settlement documents generally suggest that the Navajo Nation will be permitted to "subcontract" unused NIIP water to areas in New Mexico only, but this is too restrictive. There is also too much authority allowed the State Engineer on this subject. The Nation's economic opportunities regarding its water rights should be made more flexible than the settlement currently allows.

Marketing of Navajo water should be consistent with the evolving water economy in the Southwestern states; especially the more populated states. The water marketing language in the settlement should reflect more marketing flexibility and Navajo Nation control than it currently does.

Page 2 of the proposed "contract" for water between the Nation and the Secretary of the Interior goes so far as to boldly mention the Navajo Nation's "right to market" unused NIIP water. But the other relevant language in the contract and the additional settlement documents is still too restrictive, and thus limits Navajo self-determination and sovereign control regarding its water rights.

Finally, the Navajo Nation and Navajo People need to have ultimate authority and control over its water rights through a change in the language of the Settlement documents. The language change should reinforce Navajo sovereignty, instead of subordinate or reduce it. Navajo water rights settlement should be about "Navajo Water" and not "New Mexico water" and "Arizona water." For all intents and purposes, the Navajos have been here throughout history. The states of Arizona and New Mexico did not exist prior to 1912. Morally and legally, if anyone should be subordinated, it is the states and not the Navajo Nation.

A genuine pro-tribal attitude requires nothing less than the above recommendations for the Navajo Nation's New Mexico/San Juan water rights settlement, which is a one-time forever decision. There is no other tribe in the United States with as much potential power to assert its rights as Navajo. The opportunity should not be squandered.



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