

SJ-17
Navajo Settle

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SUBJECT: Excerpt from 7/21/04 Special Farmington City Council Work Session

Gary Horner: Thank you, Mr. Mayor. I think I was probably invited because relatively recently I filed a motion in the adjudication suit to enjoin the Settlement. I also filed a Motion for Ex Parte Temporary Restraining Order which then was seeking an immediate order to temporarily restrain the execution of the Settlement. A little bit of background for people that don't know. . . but probably most people do in reading the paper. . . the court has denied my motions at this point because I'm not a party. I filed a Motion to Intervene and I'm trying to get back in and get the motions reinstated. There's a hearing on Monday with regard to, at least, the Motion to Intervene and that's kind of the status there. What I would like to see is for the City to take a similar position to what I am taking and ask that the Settlement be enjoined and what I would really like to see is some sort of similar Motion for Temporary Restraining Order filed even this week that would be on the books for the hearing on Monday. I have a lot of problems with what is going on here. I have submitted my Motion to Enjoin to the City, I think. Hopefully you've all had a chance to read it. I know you've got a whole lot of stuff to read here lately. I don't know if you've had a chance to get through it but, anyway, I don't know that I want to go through all of the details in there but I would like to hit some of the high spots here of what I see as the problems. The Navajo Water Rights Settlement would give all these water rights to the Navajos with an 1868 priority date with the concept that there would be no loss of the right for non-use which is completely different than anybody else in the state has. They would also be given an 1868 priority date that moves ahead of all other water users in the Basin. They also get the right to lease their unused water off of the Reservation. Now, this concept in and of itself is really one of the worst points and there is no basis in any law, anywhere, for that concept that they be able to lease their water off the Reservation, that is not until this Federal legislation is passed. When the Federal legislation is passed associated with the Settlement Agreement, then you will have a law for the first time that allows them to lease this water off the Reservation. There has been some discussion in here that the Navajos will get 56 percent of the depletions in the Basin. If you add up all the diversions in the Settlement document, it comes to about 620,000 acre feet. In the executive summary it says that when you fully develop all the water in the New Mexico, per the agreement, that there will be about 730,000 acre feet of diversions. Well, 620 divided by 730's. . . about 85 percent, then, of all the diversions in New Mexico will be going to the Navajos, not 56 percent. What you also see is one of the big problems. . . there's several huge problems that are not even in the Settlement that relate to this stuff. And one of the big ones is the re-operation of Navajo Dam. The re-operation of Navajo Dam would have a big spring release of 5,000 cfs and then 250 cfs for the rest of the year. Now you need to look at the Animas-La Plata Project, too. . . the way they're going to operate that and that is, they would pump no water into the reservoir during the spring. And

during the summer when people are trying to use most of their water, they would allow 225 cfs to go past the pumping station. Which means, then, what you have with the re-operation of Navajo Dam in the Animas-La Plata schemes is coming into the valley, 250 on the San Juan and 225 on the Animas for less than 500 cfs. Well, the basis for the re-operation of Navajo Dam is the endangered fish and their requirement is a minimum of 500 cfs flowing through a critical habitat which is basically below the confluence with the Animas. They will ultimately. . . and what they're currently measuring it at is at Shiprock where there's not a whole lot of use below Shiprock. . . so that 500 cfs needs to be flowing out of the system but they're only allowing 500 cfs to flow in. So with only 500 cfs flowing in and 500 flowing out, you're in a position where all of the uses in the Basin are subject to being cut off. That's what the re-operation of Navajo Dam means. While currently the way that's working is if they actually went to 250 through Navajo Dam and held it, people along the San Juan River would continue to take water and the first entities to get shorted water, then, would be the fish because people would continue to use the water and the fish wouldn't get any water. So with the whole basis for the re-operation being for the fish, they have to release water in order to cover all the uses and the fish, currently. But that's about to change with the water master. So they've hired the water master. The water master is supposed to start administering the river next year. At that point it becomes the water master's job to see that 500 cfs flows out for the fish. So now then, if you've got only 500 coming in and they're enforcing 500 going out, the water master has the authority to cut everybody off. Now, is everybody going to be cut off? Well, it's just kind of a matter of how much the Bureau decides they're actually going to allow to be released. . . that they're going to increase the flows above 250. Right now they have to because they don't have the authority to cut anybody off. With the water master, they can restrict the flows and start cutting people off. And so they've put the water master on the river. . . his only job. . . he has one job and that is cutting people off and that's what he's going to be doing next year. So you can expect somebody to be cut off next year based on the re-operation of Navajo Dam. The system in the San Juan Basin produces, on average, about two million acre feet a year. About a million acre feet a year flows into Navajo Dam. . . or into Navajo Reservoir. Navajo Reservoir has a capacity for 1.7 million acre feet. New Mexico's share under the Compacts, assuming that the Upper Basin should get 7.5 million acre feet. . . New Mexico's share would be 838,000 acre feet. The Bureau has unilaterally decided we should only have 669,000 acre feet and that 60,000 of that, approximately, should be allocated to storage in other places which means we only have 600,000 acre feet to use under the Bureau's determination. But we're only using about 400,000 acre feet. So any way you look at it, there's plenty of water for everybody right now, including all of the existing Navajo uses. . . including everybody else's uses. But when they start re-operating Navajo Dam, the squeeze is on and people get cut off. And that's coming very quickly. So now then, when you factor in what's going on with the Navajo Settlement and the Navajos are getting huge amounts of water rights. . . hundreds of thousands of acre feet more than they are currently using that won't be lost for non-use with an 1868 priority date that moves above everybody else. . . when the water master starts cutting off people, it's going to be. . . well, it's not going to be Navajos and it's going to be your junior users. And so one of the most junior users on the river is the City of Farmington with their 1959 permit for 7,200 acre feet. So the next most junior users, then, are the power plants and they're in the process of making deals with the Indians for replacement water, essentially leasing some of this

unused water right so that they move from the end of the line to the head of the line. And so in that situation what you have, then, is the junior users and the power plants won't be the ones to get cut off. But what you're also seeing is that they're acquiring unused water rights so, as the squeeze is on, somebody still is to be cut off so the next most junior guy down the line priority-wise is going to be the one who gets cut off. So he's going to be forced to make a contract with the Navajos in order to be not cut off, which means the next guy is going to have to make a contract with the Navajos to not get cut off, which means the next guy. . . and so on, and so on, and so on. . . until everybody is having to buy their water from the Navajos. And when you get down to the point, then, where you've got the senior users. . . the irrigators on the river who can't afford to lease the water from the Navajos. . . they are the ones who will get cut off because the squeeze is still on and somebody's going to get cut off. And so what you have then is the situation where the whole system is being turned upside down and prior appropriation in the New Mexico Constitution is being thrown out the window. And what you see in that regard is, recently, the State has come up with their Active Water Resource Management Regulations (AWRM) and they have submitted them for comments. . . they have not actually implemented them at this point. But there are a whole lot of concepts in there that are reflected in this Navajo Water Rights Settlement and some of those concepts are storage water beats senior rights, period, flat out. And the way that is working, then, is. . . and it actually comes from what's going on in the San Juan Basin and it actually comes from what the San Juan Water Commission has done over the years. In the San Juan Basin here, the first time I ever heard of this issue of storage versus senior rights was with regard to the Animas-La Plata Project. So here we're going to cut the flow back to 225 cfs and then, when there's even less water than that in the river, the Water Commission is going to call for its water from Animas-La Plata. . . from Ridges Basin. . . and at that point when they release the water from Ridges Basin to the San Juan Water Commission, they're not actually going to get it because there's a whole lot of senior users between here and there that divert the water. So when they need the water, they can't get it which means their storage water in Ridges Basin has no value which means there's no business in being involved in the Animas-La Plata Project in the first place. Well, in order to counter this, what they have done is come up with the concept of the way that's supposed to work now, in their minds, is that water that has been released into the river that was storage water has to be protected from senior users and now you're seeing that that concept is being applied on the San Juan River and has now been incorporated into these AWRM Regulations. And now there's a law out there. . . or the court case is the Luna case that says water that's in the river is public water. It's not private water. It's not earmarked for the guy who stored it. He can't protect it from everybody else. But they disregard that law and that's what they're trying to do. Now over and above that, there's another law that says. . . or another case. . . City of Raton vs. the Vermejo Conservancy District. . . that talks about when somebody has stored water in excess of their needs, that a junior user or any user below the dam that needs water can put a call on that storage right on the storage owner for release of that water to him when there's water stored in excess of their need. So on Navajo Reservoir where there's a million acre feet flowing in a year. . . 1.7 million acre feet of storage and then all these senior users below the river. . . the way it should work is these guys should be able to say, "just send us your excess water and we're in fine shape." And that's the way it has been done since Navajo Dam was built. I mean, you didn't have to put a call in. They just released plenty of water for everybody to use it.

And that's what everybody around here's familiar with. That's going to change. So in the AWRM, they're saying the concept is now, any water that gets put into storage. . . appropriately into storage. . . belongs to the guy who owns the storage. Period. Okay? It's his water and he can put into storage anything other than what has to go by. . . well, basically the in and out of priority business. So that if there's senior rights below the dam that have to be served, they have to be served if there's enough water running in the river which is your direct-flow concept. And any water above that, they can store and they can hold it and they can keep it from you forever because now it belongs to the guy who owns the storage. Now then, along with this is the concept, then, of direct flow. . . which you see a little bit reflected in the Settlement document. . . and the basic concept is that the guy below the dam should be entitled to the use of the water that would be in the river if the dam didn't exist. Which, then, you can say, "Okay, well, the guy below the dam should be able to have the water that is flowing into the reservoir." And that, then, in the Settlement document is defined as 225 cfs. But what actually happens here and throughout the state is the dams are owned by the Federal government. Okay? So the Navajo Dam is owned by the Bureau of Reclamation. And so where the guys below the dam should be entitled to this direct flow, the Bureau is coming along and saying, "we're only going to release 250 cfs because we're doing an EIS on the re-operation of Navajo Dam and we don't care, you know, what the direct-flow requirement is." They're saying 5,000 cfs in the spring and 250 cfs the rest of the year. Now then there's authority that says the State Engineer can tell the Bureau how to operate their project but the State Engineer for the history of New Mexico has not done that. And so, anyway, what you end up with, then, is your water's going to be restricted and the senior rights are going to go to the Navajos and so people are going to be cut off, and that's everybody else. Now, one of the big issues, then, is this out-of-state lease of water. So it's clear that they're giving them the authority to lease the water off the Reservation. What they're also doing in here is leaving the door open for out-of-state leasing. And apparently, as much as I'm familiar with, that authority really, for out-of-state leasing, hasn't really been nailed down. But they're working on it. And they're working on it because. . . I talked to a guy two nights ago who said that, currently, the IID (the Imperial Irrigation District in southern California) is leasing water to San Diego for \$280 an acre foot a year. A couple of years ago they were talking about leasing it for \$200 an acre foot. So in two years it's gone up 40 percent. That's where the market is for the water and when you've got hundreds of thousands of acre feet of water that you're trying to lease and make money on, when that's what this is all about, that's the market that they want. And that's where they're going to be trying to get it. Now, when you've got this water squeezed here with the re-operation of Navajo Dam so that the only water that's being used is Navajo water around here anymore and they lease that out of state, there's no more water for anybody at all. And that's where this is going. And that's why this is really an incredible problem. I've got a whole lot of points here that I haven't had a chance to get to. One of them is, in the December 5th draft they were talking about a diversion authority for NIIP of 1,200 cfs. In this draft they have increased that to 1,800 cfs. Now compare 1,800 cfs flowing down the NIIP canal with 250 or 225 in the river is all they're going to release. They're going to have eight times more water in the NIIP canal than they're allowing in the river and that's the kind of stuff that's in here. In this Settlement Agreement, then, they have put in not only water rights but how the river's going to be administered. They have also put in how the waters are going to be adjudicated for everybody else in the

adjudication suit. That then goes into Federal law. All of that then becomes. . . when the judge comes to consider it down the line some place. . . a matter that he can't even touch due to supremacy clause of the United States Constitution. At that point Mr. Cole said the judge can only go up or down. To me, the judge can only go up at that point. He has no "down" option. And certainly there is not even any possibility of considering any of this stuff in the adjudication case, ever, once this thing gets signed. Or at least once the legislation gets passed which means this is critical. It is critical right now that people get on board and try to get this thing stopped, at the very least until you can get on top of it and understand what's going on. Now one of the things I would like to do is. . . number one, say "There's no basis here for any of this stuff." Ultimately, you're going to have to figure out how to determine the Navajo rights. I really don't have a problem with the Navajo uses as they exist. I don't have a problem with them at all. And I think they should have rights for that. But hundreds of thousands of acre feet more. . . 1868 priority date taken in conjunction with the way the rivers are going to be operated that cuts everybody else off is just disaster. And my time is up and I'll skip the next three days' worth, I guess.

Copy: City Manager Bob Hudson