


MEMO

JTB.
Jim Dunlop
SJ-17
Navajo Settlement

To: Mayor and Council
From: Jay Burnham, City Attorney 
Date: July 20, 2004
Re: Proposed Navajo Water Rights Settlement

City Manager Bob Hudson has asked me to supply the Council with an analysis of how the new (July 9, 2004) draft documents concerning the proposed Navajo water rights settlement addressed the City's comments submitted in response to the initial December, 2003 draft documents.

The City's official comments were approved by the City Council and submitted to the Interstate Stream Commission and the Navajo Nation in a letter from Community Development Director Joe Schmitz dated January 14, 2004 (copy attached). In this memo I will outline each of those comments and give a synopsis of the response given in the new draft documents. If there are changes in the documents that reflect our comments, I will so note.

In the introductory paragraph of Joe's letter, he emphasized the City's concerns about the very short deadline for comments. The draft documents were released to the public on December 5, 2003. Comments were due by January 15th. This comment was addressed in Section 1 (pages 6-7) of the Interstate Stream Commission's July 9, 2004 staff memo addressed to the ISC. (John Whipple's Memorandum entitled "Responses to Public Comments Received on the December 5, 2003 Discussion Draft San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement), hereinafter referred to as "Whipple's Memo," which was included in the documents released on July 9, 2004 and provided to the Council.

Whipple's response is that the short comment period was necessary in order to ensure "fair consideration" of comments prior to the submission of the documents to Congress for action. Obviously, the original plan was to submit the proposed settlement to Congress in the spring and that didn't happen. As it turned out, the timetable was pushed back and we are being given another chance to comment on the new draft documents, so this is somewhat a moot point.

The first enumerated comment (see paragraph (1) in Joe's letter) pointed out that it is difficult to assess the reasonableness of the proposed settlement without some idea of what the Navajo Nation would be entitled to receive if its rights were adjudicated. We know that under the "Winters v. United States" doctrine it would be entitled to receive reserved rights with the priority date of the date the reservation was created. But the quantity of those rights would be based on the number of "practicably irrigable acres" included in Navajo lands. We asked if there were studies or other information on what that number may be.

The ISC staff's response can be found beginning at p. 51 of the Whipple Memo. Whipple speculates that it would "be reasonable to anticipate" that, if the issue were litigated, the Court would include the NIIP Project and ALP water because they have already been authorized by Congress. He also assumes that the Court would include the acreage that could be farmed with water from the Hogback and Fruitland ditches, existing uses on San Juan tributaries, existing municipal and industrial (M&I) uses served by NTUA, and future M&I uses for the foreseeable future. He mentions that the Navajos have a consultant report that estimates the acreage that could be irrigated by the Fruitland and Hogback ditches at 49,000 acres of land. This is something we had not heard previously. Evidently, the Nation has referred to this study in the negotiations, but has not shared the results of the study with the State. (See middle of page 51 of Whipple's memo.)

However, the "bottom line" is that the quantification of all of these uses (except the projects already authorized by Congress) is subject to dispute. The most forthright comment in the response memo is probably the sentence on p. 52 which says, "(T)he amounts of water that would be adjudicated to the Navajo Nation without settlement cannot be known at this time." The documents do not show any changes that I can attribute to the City's comment.

The City's second enumerated comment pointed out that the 508,000 acre feet allocated to NIIP is not needed in this day of sprinkler irrigation. The ISC staff reply to this is found at pages 12 to 14 of Whipple's memo. Basically, the response is that the Navajo Nation cannot divert and use any more water for NIIP than what is necessary to irrigate the maximum project acreage, 110,630 acres. He estimates that amount as averaging somewhere in the range of 337,500 to 372,000 acre feet per year. The settlement, as proposed, allows the Navajo Nation to divert up to 353,000 acre feet per year for the project. This amount is "self-administered" by the Nation. However, if they use any more than that amount, they must apply for a permit from the State Engineer. This comment and others like it may have caused this to be clarified in the documents, but the amount of total allocation still reflects the 508,000 acre feet in the original. As a matter of fact, the depletion amount for the Project actually increased 3,000 acre feet from 267,000 to 270,000 acre feet.

The City's third enumerated comment concerns the transfer of San Juan water out of the San Juan River Basin, noting that the Navajo-Gallup pipeline will provide for uses that are located in the Rio Grande and Little Colorado Basins, thus taking water out of the San Juan Basin that will not return flow back into the San Juan system. Mr. Whipple responded to this comment at pages 18 through 20 of his memo. He seems to say that the amount of water used in these other basins is minimal, and benefits the State because it minimizes Navajo claims in these systems. I'm not sure that this is a satisfactory answer to users within the San Juan Basin and no changes were made in response directly to this comment. However, in fairness, the new documents do more clearly provide that any water used in Arizona will be subtracted from Arizona's Colorado Compact allocation, not New Mexico's. This is a good clarification.

The City's fourth enumerated comment stated our concerns about the depletion schedule which was included in the original packet. We were critical of the depletion schedule for several reasons. A general response was that the depletion schedule is not part of the settlement

documents, is to be used for planning purposes only, and is not binding on anyone. Specifically, we questioned whether the allocation of 8,900 acre feet of water for municipal and industrial uses was sufficient and asked how this number was calculated. The new draft revises this figure to 9,700 acre feet, an increase of 800 acre feet. Whipple's memo further breaks this number down and allocates 7,200 of that specifically to Farmington. (See page 26 of Whipple's Memo.) Community Development Water Resources staff is in the process of evaluating these figures. However, Whipple notes that M&I uses will increase and irrigation uses will decrease over the life of the schedule (which goes to 2060). In other words, he assumes that M&I uses will be satisfied by water transferred from irrigation. This assumption was also made in the first draft, but not so stated.

Our fifth enumerated comment questioned the costs of the projects which form a part of the settlement. This comment was not addressed in the Whipple Memo. However, it is agreed by all parties that the total capital cost of this settlement is just short of one billion dollars, not an insignificant amount of money. This comment did not result in any changes in the settlement documents.

Our final comment pointed out that the original settlement documents seemed to assume that the City of Farmington would continue to treat Navajo Nation water for the municipal needs of the Shiprock area in the larger amounts contemplated by the settlement. Our comment pointed out that the treatment of water in addition to the amount we have already agreed to provide would require the City Council's approval and that such approval should not be presumed. This comment was taken to heart and the new documents clarify that the City of Farmington's approval and cooperation would be necessary prior to the increase of delivery amounts to Shiprock and the City is not required to treat and deliver water for the benefit of the Navajo Nation should it choose not to do so. (See draft Settlement Act (Bill) at page 35.)

Although they were not included in the City's original comments, the City staff endorsed several comments made by other entities during the comment process. For instance, the documents have been clarified to state that the Navajo Nation will not be entitled to receive any water "not then needed for beneficial use" (page 32 of the Partial Final Decree) and that water not being used by the Navajo Nation cannot be leased or contracted without the consent of the State and in accordance with law (page 41 of the Partial Final Decree). These clarifications were in response to comments that the use of the water by the Navajos must be in compliance with state law.

One very significant comment related to the Navajo Nation's position in regard to the Echo Ditch Decree. We joined other entities in a request that the settlement state that the Navajo Nation would not attack rights adjudicated in the Echo Ditch Decree. One of the significant changes in the new documents are the statements that the Navajo Nation would not question the priority dates of rights as determined in the Decree and would not question the amount of the rights decreed if the use does not exceed the formulas used in the allocation of irrigation rights in the Decree. (See pages 22 through 25 of the Settlement Agreement.) These statements are very valuable to the City of Farmington as many of our senior rights are based on rights adjudicated in the Decree to the City or others.

Another comment that the City certainly benefitted from came from water users (specifically irrigators) who questioned whether the Fruitland and Hogback ditches should have an 1868 priority date because part of the irrigated lands were added to the Navajo Reservation at a later date. The priority date was not changed as a result of this comment. However, to address concerns about the need for calls on the river (priority enforcement) due to the location of the most senior rights downstream from all other users, the Nation has agreed to forego such calls in dry years by meeting the needs of the two ditches from water taken from storage in Navajo Lake out of the allocation to NIIP, subject to some limits and conditions. (See pages 14 and 15 of the Settlement Agreement.) The ALP Project water is also protected in this same manner. These changes are very helpful to the City in that it will substantially reduce the number of years that the City would be curtailed to satisfy senior downstream users and would protect our share of ALP. This change, and the language protecting the Echo Ditch Decree, are probably the most significant changes in the documents that benefit the City of Farmington.

Hopefully, this information will help you in your analysis of the proposed settlement. If I can help answer any additional questions that you may have, please feel free to contact me.

xc: Bob Hudson, City Manager
Gina Morris, City Clerk
Joe Schmitz, Community Development Director
Paul Martin, City Engineer
Paul Montoia, Water Resource Manager