



NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

LOUIS DENETSOSIE
ATTORNEY GENERAL

January 12, 2004
Hand Delivered

Duane H. Yazzie, President
Shiprock Chapter
P.O. Box 3810
Shiprock, NM 87420

Re: Proposed San Juan River Settlement

Dear Mr. Yazzie:

Thank you for your comments concerning the proposed settlement of the Navajo Nation's water rights claims in the San Juan River Basin in New Mexico. (Statement of Duane H. Yazzie on the Proposed Navajo Water Rights Settlement, 05 January 2004.) Shiprock Chapter would receive significant benefits if the proposed settlement were implemented; therefore, it is very important to ensure that the Chapter's concerns are fully addressed. By this letter, I am providing responses to various comments and concerns raised in your statement. (The *italicized* statements are taken from your statement.)

1. ***"I do not believe that we are getting the best deal possible."***

You and I have known each other for many years, and I have great respect your opinion. However, with all due respect, in this instance, I do not believe you have enough information to evaluate whether this is the "best deal possible." In all fairness to you, you seem to concede this point in your final paragraph – "*without independent analysis, I don't know.*" In order to evaluate the merits of a proposed settlement it is necessary to also evaluate the strengths and weaknesses of the litigation claims that are being settled. In order to reach the conclusion that the settlement is not "the best deal possible," it would be necessary to conclude that the most likely result in the litigation would be superior to the proposed settlement. One of the shortcomings of public meetings to discuss proposed settlements is the lack of information presented concerning the strengths and weaknesses of the litigation claims, against which the settlement must be evaluated. It is simply not possible to present such information in a public setting without revealing confidential information and potentially undermining the litigation claim. I understand that you are planning to meet with staff from the Water Management Branch in the near future. I would be happy to attend that meeting and share with you information concerning the litigation claims that I can not provide in a public forum.

2. ***“It is reported that the settlement has been in the making for eight years. It is extremely troublesome that we are made party to the discussions at the last moment.”***

The proposed settlement is the result of various initiatives that have been pursued since 1996. Substantive settlement discussions commenced with the execution of a Memorandum of Understanding on October 31, 2001. Nevertheless, the Navajo Nation is a long way away from the “last moment” in the settlement process. The proposed settlement of the Navajo Nation’s water rights claims in the San Juan River Basin in New Mexico does not become effective until the proposed partial final settlement decree is entered in 2010. The Commission believes that there is a unique opportunity for the Navajo Nation to obtain substantial water development benefits if Senator Domenici is able to introduce legislation authorizing the settlement in March. Admittedly, there is not much time between now and March 1st, and the Navajo Nation Water Rights Commission takes the concerns about public input very seriously. In response to these concerns, I have initiated discussions with the attorneys for the State of New Mexico and with the Senate Energy and Natural Resources Committee, which would have jurisdiction over the settlement legislation, to determine if the proposed settlement legislation could still be introduced on March 1, 2004, even if the Navajo Nation has not approved the entire Settlement Agreement by that time. Based on the preliminary discussions, it may be possible to introduce the legislation on March 1, 2004 if the Navajo Nation and the State of New Mexico enter into a “Settlement Process Agreement” that defines deadlines for approving and executing a the Settlement Agreement. In all likelihood, the Settlement Agreement would need to be approved and executed by the Navajo Nation and the State of New Mexico prior to “mark up” of the final settlement legislation. We hope to have a better understanding of whether such a process is viable by the end of next week.

3. ***“I cannot help but think that the proposed settlement may be only a vehicle, a means to accomplish an agenda that is of more urgent priority, which is to assure delivery of more water to the Rio Grande and to deliver water to Gallup.”***

The proposed settlement is structured in a manner that does not allow Navajo water to be used by the San Juan-Chama Project. The presentations made by the Water Rights Commission in Shiprock included diagrams that illustrate that the Navajo Nation would own and control approximately 55% of the water available for depletion in New Mexico. All of the remaining water is tied up by permit and the San Juan-Chama Project is limited to a maximum average annual diversion of 110,000 acre-feet. There is no other water available to the Rio Grande, nor is any water available to Gallup. As Dr. Leeper from the Water Management Branch has stated, “when Intel wants water to build another chip manufacturing plant, it will have to build the plant in Shiprock, not in Rio Rancho.”

The presentation also explained how the City of Gallup must look to existing water right holders in the San Juan River basin for its water supply. Thus, Gallup would have to purchase water from an entity holding water rights – the non-Indians, the Jicarilla Apache Nation or the Navajo Nation. Under the proposed settlement, the Navajo Nation would have 322,190 acre-feet of authorized depletions. Gallup needs a depletion of 7,500 for its municipal water supply. The Navajo Nation could lease water to the City of Gallup; however, the most likely source for this water at this time is the Jicarilla Apache Nation.

4. ***“We should be receiving compensation for the water that has already gone down river; we have contributed greatly to the development of all interests down river.”***

It is a well-accepted principle of water law that a water right does not include ownership of the physical supply of water, rather a water right gives the water right owner the right to use water. Water that is not used by one water right holder is available for use by all others without compensation. These principles apply to all water rights whether they arise under state or federal law.

Even if a water right holder were entitled to compensation for the use of water by others, the Navajo Nation's water rights in the San Juan River basin in New Mexico have not been fully quantified. The proposed settlement would result in a final quantification of the Navajo Nation's water rights in this basin. The Navajo Nation Water Commission has been charged with pursuing the quantification of such rights. Without quantification of the Navajo Nation's water right, it is not clear how any claim can be made that the Nation should be compensated for the use of water by others.

5. ***“To offer \$17M for patch work renovation of our irrigation systems is not sufficient by far.”***

Surely you are not suggesting that the Navajo Nation is only receiving \$17 million in consideration for settling its water rights claims. The proposed settlement allocates approximately 55% of the water available in the San Juan River to the Navajo Nation and includes almost \$800 million in monetary resources in to put virtually all of this water to practical use (“wet water development”). The \$17.7 million for renovation of the Hogback and Fruitland irrigation systems can hardly be considered “patch work.” The rehabilitation costs for these projects were prepared by Keller-Bliesner Engineering (KBE), professional engineers hired by the Water Management Branch. The KBE Work was in response to a technical memorandum prepared by the Branch – *Shiprock Irrigation Projects Water Management and Conservation Plan, July 2002*, which was formulated after numerous meetings with the local Navajo farmers. If you have a technical basis to indicate that these sums are insufficient, please submit such information to the Branch.

We have received comments from farmers in the Fruitland Project requesting additional rehabilitation monies. Increasing the rehabilitation costs is not without risk. The more money needed for rehabilitation, the weaker the claim is for water on those projects. The proposed settlement requests \$17.7 million to rehabilitate projects with 12,165 acres. That translates into a rehabilitation cost of \$1,455/acre.

6. ***“We want to have a Shiprock Reservoir built to assure that we have independence from Farmington who now controls the pigot for our drinking water.”***

I am unaware of any technical study that demonstrates that a reservoir is feasible at Shiprock, either on or off the river. To the best of my knowledge there are no potential damsites on the San Juan River upstream of Shiprock below Navajo Reservoir. Even if a potential damsite could be identified,

much of that reach has been designated as critical habitat for endangered fish making dam construction an impossibility. Nor am I aware of any suitable site in the Shiprock area for offstream storage. Consideration was given to potential reservoir sites near Shiprock as part of the technical investigations for the Navajo-Gallup Project. No suitable reservoir sites were identified.

It is unclear how a new reservoir would enhance Shiprock's water supply. NTUA has pumps in the San Juan River, but these pumps are generally unreliable due to the high sediment load of the San Juan River at Shiprock. As a consequence, Shiprock currently receives most of its water from the City of Farmington through an existing pipeline between Farmington and Shiprock. The City of Farmington treats and sells its water to NTUA because NTUA does not have the capacity or ability to treat San Juan River water. In the future, this pipeline will be replaced so that the Shiprock and communities along the San Juan River will receive treated water from Farmington, but the water will be Navajo water secured by the contract with the Secretary out of the Animas-La Plata Project. Once the Navajo-Gallup Water Supply Project is built, a large water treatment plant will be built near the San Juan River and Shiprock will also have the ability to receive water from that project. (You will be interested to know that if NTUA operates the treatment plant as planned, NTUA will "control the spigot" for Gallup's drinking water. In addition, the unit cost of treating the water by NTUA will be reduced as a result of the added capacity for Gallup's supply.) In other words, if the proposed settlement is implemented, the community of Shiprock will have multiple water supply options – water will be available for direct diversion from the river, from the Farmington/Shiprock Pipeline and from the Navajo-Gallup Project.

7. ***"We should not agree to the inclusion of the funds needed to complete NIIP and the construction of the Farmington/Shiprock pipeline in the settlement, as the authorization of those projects were done through separate federal legislations. To allow this proposed water rights settlement to 'mop up' these outstanding federal obligations work to our detriment (sic) in the bottom line monetary calculations."***

You are correct that the Navajo Indian Irrigation Project (NIIP) and the Farmington/Shiprock pipeline were previously authorized by Congress. NIIP was authorized by the Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96 and the pipeline was authorized as part of the Animas-La Plata Project as part of the Colorado Ute Settlement Act Amendments of 2000 (114 Stat. 2763A-258; Public Law 106-554, Appendix D, Title III). However, Congress has never authorized the components that are included in the proposed settlement legislation.

In the case of NIIP, Congress authorized the Secretary of the Interior to construct, operate, and maintain NIIP for the purpose of irrigating 110,630 acres. The Secretary was only authorized to spend \$135 million (in June 1961 prices) for the construction. In other words, there is a budget ceiling that limits the size of the project. That budget ceiling was increased to \$206 million (April 1970 prices) by the Act of September 25, 1970, Public Law 91-416, 84 Stat. 867. The Bureau of Reclamation estimated that \$206 million (April 1970 prices) adjusted to 2001 dollars is approximately \$600 million. At that time approximately \$543 million had been spent, including funding for on-farm costs, O&M, roads and \$13 million for environmental compliance. The NIIP Project Manager has taken the position that only the construction costs should be charged against

the appropriation ceiling. Those costs as of 2001 were approximately \$474 million spent through FY 2000. Completion of the project will cost an estimated additional \$233 million. The proposed settlement includes an authorization of an additional \$252 million above the existing budget ceiling plus an additional \$25.4 million to rehabilitate the existing project facilities. These appropriations are supplemental to and not part of the existing authorizations for NIIP. In addition, since the existing authorization for NIIP only authorizes the construction subject to the amount of funds authorized, that legislation does not provide a date certain for completion of the project. The proposed settlement legislation requires NIIP to be completed by December 2015 in order for the settlement to become effective.

In the case of the Farmington/Shiprock Pipeline, the authorizing legislation authorized the Secretary to construct the pipeline consistent with the project described in the final Environmental Impact Statement (EIS). The description in the EIS did not include the reach from the Farmington water treatment facility to NTUA's meter box where the Navajo Nation takes possession of the water. While the position of the Navajo Nation is that the 2000 legislation authorized construction of this reach, in order to ensure that the project is completed in a timely manner, the proposed settlement legislation clarifies that this reach is authorized and includes an additional authorization of up to \$5 million to ensure that this reach is constructed. The proposed settlement legislation requires the pipeline to be completed by December 2009 in order for the settlement to become effective.

8. *“Therefore, it is a misrepresentation to laud this settlement as the largest water settlement in history.”*

Even if you are convinced that the \$277.4 million for NIIP and the \$5 million for the Farmington/Shiprock pipeline represent existing federal obligations, the proposed settlement is still the largest water settlement ever attempted, both in terms of the water supply and the appropriations for wet water development. Ultimately, whether this is or is not the largest water settlement in history is irrelevant. The real issue is whether it represents a fair resolution of the Navajo water right in the basin.

9. *“The terms of this water rights settlement may be the best deal we can get, I am saying that without independent analysis, I don't know. In all fairness we should have the opportunity to get that independent analysis.”*

I respect your desire for independent analysis and I have already consulted with several law professors and noted water law attorneys to inquire whether they would be interested in providing such analysis. I believe the Water Rights Commission will give serious consideration to authorizing a contract for this work. However, before you seek independent analysis, I respectfully suggest that you first make your own analysis after you have reviewed the information concerning the litigation claims as I offered to provide in the first paragraph above.

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10. ***“Finally my question of what difference our comments will make in the final settlement language remains unanswered.”***

It is impossible to evaluate how the settlement might change in response to the comments until all comments have been received and evaluated by the negotiators for the Navajo Nation and the State of New Mexico. I have already received comments from various non-Indian parties alleging that the Navajo litigation claims are not sufficient to justify the water and funding to be awarded in the settlement. These comments also argue that the priority date for much of this water should not be 1868. Other comments argue that since NIIP is not profitable, the water supply for NIIP cannot be justified under the practicable irrigable acreage test.

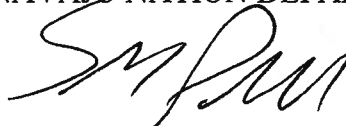
With respect to the comments you have provided, you have stated that you do not believe this is the “best deal possible.” However, dozens of Navajo farmers voiced their support for the settlement at the meetings in Shiprock on December 16 and January 5. Dozens of chapters passed resolutions in support of the Navajo-Gallup Project, the “wet water” centerpiece of the proposed settlement, and at least seventeen (17) chapters have already passed resolutions in support of the settlement. You must appreciate that it is impossible to craft a final settlement that will be responsive to every comment received. I hope that you will be heartened by the knowledge that efforts are underway to explore a mechanism that would allow the settlement legislation to be introduced in March without necessitating final approval of the entire settlement package by the Navajo Nation. Similarly, I have also advised that efforts are underway to obtain an independent legal analysis as you have requested.

As you can see by the length of this letter, I take all of your comments very seriously. I am always available to discuss water rights issues with you, and I hope you will take the opportunity to meet with me to discuss these issues.

I strongly agree with your assessment that the settlement will have profound and permanent impact on the Diné people. That is why so many people have fought hard on behalf of the Navajo Nation to ensure that this settlement obtains “the greatest measure of our Navajo Water Rights for the sake of future generations.”

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE



Stanley M. Pollack
Water Rights Counsel