



January 14, 2003

Dr. John Leeper
Navajo Nation Department of Water Resources
P.O. Drawer 678
Fort Defiance, AZ 86504

Mr. John Whipple
New Mexico Interstate Stream Commission
P.O. Box 25102
Santa Fe, NM 87504-5102

RE: Comments on Navajo Nation Water Rights Settlement

Gentlemen:

At the January 13, 2004 regular meeting of the Farmington City Council, the Council directed staff to submit the following comments regarding the Proposed Navajo Nation Water Rights Settlement.

While the City acknowledges that it may be in the interest of the City of Farmington, and all other water users in the San Juan Basin, for the water rights claims of the Navajo Nation to be resolved, the proposed settlement agreement, and its corresponding federal legislation, partial final decree and water delivery contract, is a fairly complex document. To evaluate the reasonableness of such a settlement and the potential impact on the City of Farmington and the San Juan Basin, it is necessary to fully understand all of the elements of the agreement, as well as the assumptions upon which the water rights calculations were based. However, the time available in which to conduct a review has been short. But even with additional time, it may still be difficult to piece together the interrelated sections of these multiple documents to fully understand their intent and effect.

With respect to the content of the Proposed Navajo Nation Water Rights Settlement, the following comments are offered:

- (1) The settlement agreement allocates about 630,000 acre feet of diversions and 330,000 acre feet of depletions to the Navajo Nation. This represents approximately 50% of the water available for depletion by New Mexico under its apportionment in the Upper Colorado River Basin Compact, according to the draft "State of New Mexico Schedule of Anticipated Upper Basin Depletions" prepared by the staff of the New Mexico Interstate Stream Commission. To determine the reasonableness of this allocation, it would seem appropriate to request information regarding what analysis has been done by the Navajo Nation, State of New Mexico, Bureau of Reclamation or Bureau of Indian

Affairs as to the estimated quantity of water rights that the Navajo Nation would be entitled to under the "*Winters v. United States*" doctrine. This would include an analysis of what the tribe could show they had in "practicably irrigable acreage" as it has been defined by the federal court cases. The Executive Summary states that the settlement is necessary in view of the large potential claims by the Navajo Nation. The nature and extent of these claims should be identified to allow evaluation of the reasonableness of this proposal.

- (2) The City also questions the amount of water rights necessary to fully develop NIIP. In the settlement, the Navajo Nation is allocated an approximate total of 630,000 acre feet. Of that, the extreme majority, 508,000, is reserved for NIIP to allow for full development of the project's 110,630 acres. The Executive Summary notes that 70% of the project has already been developed, yet the water diverted for the project in 2003 was about 200,000 acre feet and is projected to be about 215,000 in 2004 in order to place additional acreage into production for which infrastructure is already in place. If 200,000 acre feet currently can reasonably serve 70% of the project, then 300,000 acre feet should be able to support 100% of the project. Given the fact that there is new technology that did not exist in 1963 when the project was initially created and the improvements in crop management and farming that have occurred, the projected water demands for the project should be re-evaluated to determine if the 508,000 originally set aside for NIIP is still necessary to support a viable farm.
- (3) Another troubling aspect of the proposed settlement is that the Navajo-Gallup pipeline will transport water out of the San Juan River Basin. Moving water out of the basin eliminates any chance that this water will be available for use within the basin. With most water uses, the opportunity exists to improve efficiencies and reduce consumptive use. Once water is diverted out the basin, it is lost from the system and any improvements in efficiency do not benefit users within the basin, either directly or indirectly. Given the apparent need to maintain minimum river flows to protect endangered species, the diversion of this water without chance of any return flow potential could shift the burden for this to the other users in the basin without experiencing the economic benefit the transferred water supports. The effect of this proposed settlement agreement also needs to be evaluated in relation to the Navajo Reservoir Re-operation EIS to determine if the transfer of water to other basins would have an impact on how the reservoir would be operated to recover the endangered species.
- (4) There is significant concern regarding the depletion schedule itself. The depletion schedule shows existing Municipal and Industrial water use to be 8,900 acre feet per year. The footnotes to the schedule indicate that the schedule does not reflect post-1965 transfers from irrigation to municipal and industrial uses. To understand the impact of the settlement on Farmington, it would be helpful to know what part of these 8,900 acre feet is attributed to Farmington. Attempts to obtain this information have not yet been successful.

The staff recognizes that some of the municipal water may be accounted for under the category for irrigation use. However, without being able to confirm this, the impact of the settlement is difficult to assess. There is an underlying assumption that the depletion schedule represents all of the water available and all of the potential uses, therefore, any new use would require the transfer from one category to another. In addition, there is no growth shown in the Anticipated Depletions for the municipal and domestic use category except for water associated with the Animas La Plata Project and the Jicarilla Partial Final Decree. The Depletion Schedule reflects that all of the water available in the basin would be fully allocated to within less than one percent. This does not leave much of a margin for error. The settlement contract refers to an estimated depletion of 267,000 acre feet for NIIP, yet the Depletion Schedule appears to account for only 254,000 acre feet. A footnote to the schedule indicates that the schedule assumes that 5% of the total acreage would be fallow each year, but the settlement agreement contains no such limitation. The less than one percent margin between what is available for depletion and what is allocated for depletion is only 5,200 acre feet, which is less than the 13,000 acre feet difference for NIIP. If the Secretary of the Interior will be asked to determine if there is sufficient water within the basin to support the settlement and that determination is based on the Depletion Schedule, then it is important that the settlement agreement match the Depletion Schedule and the underlying assumptions behind the Depletion Schedule be detailed for review by interested parties.

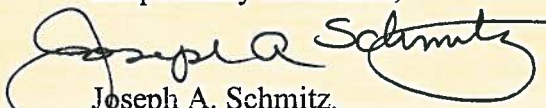
- (5) The Executive Summary points out that the total federal cost for the settlement is \$470.7 million. The settlement agreement assumes repayment contracts would be executed to support these projects as if these projects had already been committed to. If these repayment contracts are not forthcoming these federal cost estimates would not be accurate. The total cost of all projects identified in the settlement agreement is \$871.1 million, plus a matching contribution of \$25 million to a water trust fund by the State of New Mexico. The calculation of cost also appears to ignore the previous expenditures that have been made by the federal government to develop NIIP, without which the waters within the basin could not be beneficially used.
- (6) Section 205 of the proposed bill authorizes \$5.0 million in funding for construction of the Navajo Nation Municipal Pipeline from its current point of delivery to the City of Farmington's water treatment plant. While NTUA had approached the City some time ago and City staff has provided information to NTUA for conducting a preliminary engineering analysis of a replacement pipeline from Farmington to Shiprock, no formal commitments to serve have been made other than what is specified in the existing bulk treated water sales contract between the City and NTUA. A contract between the parties was initially executed in 1967. A new contract was executed in 1998 that carried a term of ten years, plus a ten year renewal, and provided for the delivery of treated water up to 3 million gallons a day. NTUA has expressed an interest in

purchasing up to 8 mgd peak through a new pipeline and an average delivery of about 4 mgd. NTUA has been advised that a commitment to serve would require the review and approval by the Farmington Public Utility Commission and City Council and the negotiation of a new contract. Such a contract would not only address the quantity of the treated water to be delivered over what period of time, but would need to include amortization of any costs incurred by the City to accommodate this additional demand. There are concerns that a demand of 8 mgd on the City's water system at this location could have detrimental effects if not properly addressed in the design phase. The Navajo Nation staff has assured the City that taking delivery from the City of Farmington, while the preferred option, is not the only option available to it. If this is in fact the case, the language in the settlement agreement and legislation should be modified to reflect the existence of other options, rather than specifically listing the City of Farmington as the only option, making it appear as if these agreements are already in place.

The City of Farmington also asked Mr. Richard Cole, the City's counsel in the San Juan River Adjudication, to forward his questions and comments on the proposed settlement directly to the State Engineer and Navajo Nation.

Because of the short deadline required for these comments, it was necessary to concentrate on the major and the obvious. It will undoubtedly be necessary to supplement them in the future. As other issues arise over the period of time the proposed settlement is being considered, we intend to continue to be in contact with Navajo Nation Department of Water Resources and the New Mexico Interstate Stream Commission. Due to the questions and concerns outlined above, the City of Farmington has not yet adopted a formal position in support of or in opposition to the Proposed Navajo Nation Water Rights Settlement. We look forward to receiving additional information to assist us in making an informed decision on this matter.

Respectfully Submitted,


Joseph A. Schmitz,
Community Development Director
City of Farmington

CC: Mayor William Standley
Councillor Mary Fischer
Councillor Hormuzd Rassam
Councillor Tommy Roberts
Councillor George Sharpe
Bob Hudson, City Manager
Jay Burnham, City Attorney
Gina Morris, City Clerk
Cy Cooper, San Juan Water Commission Member