

279. J. Whipple

5-17

Navajo Settlement



Colorado Water Conservation Board

Department of Natural Resources

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February 12, 2004

Mr. John D'Antonio
New Mexico State Engineer
Secretary, New Mexico Interstate Stream Commission
Bataan Memorial Building, Room 101
Post Office Box 25102
Santa Fe, New Mexico 87504-5102

Bill Owens
Governor

Russell George
Executive Director

Rod Kuharich
CWCB Director

Dan McAuliffe
Deputy Director

Ref: Navajo Nation Federal Reserved Water Right Settlement with the State of New Mexico

Dear Mr. D'Antonio:

The purpose of this letter is to provide the Colorado Water Conservation Board's concerns regarding the proposed settlement between the State of New Mexico and the Navajo Nation of the Navajo's federal reserved water rights in the San Juan River Basin of New Mexico. The Colorado Water Conservation Board was not informed of the availability of the draft proposed settlement documents, rather, we learned indirectly and well after the fact that the documents were posted on your website. Given the late notice, Randy Seaholm on my staff verbally requested an extension of time to comment from John Whipple and was told by Mr. Whipple that New Mexico felt no obligation to even request comments, although he did indicate that comments would be accepted after the deadline but gave no assurance that they would be fully considered. We offer the following comments on the proposed settlement documents and given the importance of the San Juan River water resources to both our states, strongly urge that they be given full consideration.

The Colorado Water Conservation Board considered the proposed settlement agreement documents during its January 27-28, 2004 meeting and expressed the following concerns:

1. Does the proposed settlement actually keep New Mexico within its compact apportionment under the current "Hydrologic Determination"? The settlement agreements claim to accomplish this, but New Mexico is advancing a depletion schedule that assumes that 5% of the irrigated land in the San Juan Basin will be fallow at any given point in time. If this does not occur, it appears that New Mexico would rely on certain subordination clauses in the settlement to remain within their compact apportionment. No accounting details on how this would be accomplished have been worked out and disclosed. This concern is compounded by the statement on page 4 of the Executive Summary that indicates individual members of the Navajo Nation that have been allotted land by the U.S. are not bound by the settlement agreement and may have additional claims that would have to be "offset" by corresponding reductions in use by the Navajo Nation. Furthermore, we are not aware of any settlements with the Ute Tribes in New Mexico and the

settlement of any federal reserved water rights that they may have would only cause New Mexico to exceed its compact apportionment under the current "Hydrologic Determination." The federal trust responsibilities to all tribal interests in the San Juan Basin should be fully considered in this settlement process given the magnitude of the proposed settlement. Therefore, we believe that adequate accounting and additional assurances are necessary to demonstrate that New Mexico will remain within its compact apportionment.

2. Under the settlement agreement, the Navajo Nation would administer rights on Navajo Lands subject to non-impairment of non-Navajo water rights. We are concerned that if this clause is not tightly written, that it could open up interstate water marketing, given that Navajo lands are located in several states. The fact that transfers of water by the Navajo Nation to non-Navajo lands are subject to approval by the New Mexico State Engineer lends some comfort, but may not be adequate to avoid the issue and uphold the integrity of the compact. Therefore, we request that specific language be added that clearly prohibits interstate water marketing.
3. The increased use of water and additional water development in the Little Colorado River (LCR) could adversely impact the population of Humpback Chub (HBC) in the LCR. No mention of HBC in the LCR is noted in the documents that we can see. We feel that it would be appropriate to at least acknowledge this fact. As we have discussed during the Glen Canyon Adaptive Management Program, a recovery program for the Colorado River and its tributaries between Glen Canyon Dam and the high water line on Lake Mead would be a good thing and this may be a good opportunity to establish such a program for this area, given that the HBC population in the LCR is pivotal to the recovery goals for these endangered fish. Both New Mexico and the Navajo Nation participate in the Glen Canyon Adaptive Management Program (GCAMP) through representation on the Adaptive Management Workgroup and the Technical Workgroup and understand the limitations of the GCAMP. This could be the ideal time to get the Navajo Nation to assist in this effort.
4. We are aware that the Ute Tribes have some lands in New Mexico and this settlement may foreclose any water development potential on those lands. Much as the Navajo Nation derived some considerations for lands that could be serviced by the Animas-La Plata Project, the Southern Ute and Ute Mountain Tribes may deserve similar considerations in this settlement process.
5. The resolution passed by the Upper Colorado River Commission in June 2003 pertaining to the use of Upper Colorado River Basin water in the Lower Colorado River Basin relates solely to a Navajo-Gallup Project in New Mexico. However, the settlement indicates, in footnote 4 on page 3 of the Executive Summary, that the delivery of water to the Window Rock area remains part of the Navajo-Gallup Project. This seems to not only exceed New Mexico's authority to settle the Navajo Nation's federal reserved water rights in New Mexico, but clearly exceeds the scope of the resolution passed by the Upper Colorado River Commission in June 2003.
6. Lastly, the settlement of federal reserved water rights in New Mexico should not impact the continued development of water resources in Colorado that are clearly within Colorado's compact apportionment. We are deeply concerned by many of the comments New Mexico, the Navajo Nation and Jicarilla have provided on the Long Hollow Reservoir project, particularly with respect to the San Juan River Recovery Implementation Program, that are either misleading to completely incorrect.

In closing, we recognize the vital importance of settling federal reserved water right issues within a state's compact apportionment and want to assure you that we will work with you as appropriate to accomplish this goal, while assuring that our interests under the compacts are protected as well. We would strongly encourage a meeting to further discuss these matters in the very near future.

Sincerely,



Rod Kuharich
Director

Cc:

Colorado Water Conservation Board Members
Upper Colorado River Commission Members
Stanley Pollack, Navajo Nation
Ernest House, Ute Mountain Ute Tribe
Dan Israel, Ute Mountain Ute Tribe
Leonard Burch, Southern Ute Indian Tribe
Scott McElroy, Southern Ute Indian Tribe
Les Taylor, Jicarilla Apache Nation
John Keyes, Commissioner, U.S. Bureau of Reclamation
Terry Virden, Director, U.S. Bureau of Indian Affairs
Rick Gold, Regional Manager, U.S. Bureau of Reclamation – Salt Lake City
Carol De Angelis, Area Manager, U.S. Bureau of Reclamation – Grand Junction
Joy Nicholopoulos, U.S. Fish and Wildlife Service – Albuquerque
Dan Law, Colorado Water and Power Development Authority
Ken Beegles, Division 7 Water Engineer
Sam Maynes & Janice Sheftel, Southwest Water Conservation District
Mike Griswold, Animas-La Plata Water Conservancy District
Brice Lee, La Plata Water Conservancy District
Randy Kirkpatrick, San Juan Water Commission, New Mexico
Stella Montoya, La Plata Conservancy District, New Mexico
John Whipple, New Mexico Interstate Stream Commission