

## John Whipple

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**From:** ljh  
**Sent:** Thursday, January 15, 2004 3:36 PM  
**To:** johnleeper; John Whipple  
**Cc:** spollack; Perry Abernethy; rbc; ljh  
**Subject:** Comments of the Cities of Aztec, Bloomfield and Farmington

**Importance:** High



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Farmington, L...

Dear Dr. Leeper and Mr. Whipple,

Please see attached comments from the Cities of Aztec, Bloomfield and Farmington in response to the January 15, 2004 deadline for comments regarding the proposed Navajo Nation settlement documents. Please let us know if you cannot open this document.

Thank you,  
Lisa Holmes for Richard Cole

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January 15, 2004

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**RE: Comments of the Cities of Aztec, Bloomfield, and Farmington on the Proposed Navajo Nation Water Rights Settlement and Entry of Partial Final Decree in *State of New Mexico on Relation of the State Engineer v. United States of America et al, and Jicarilla Apache Tribe, No. CV 75-184-1 (San Juan River General Stream Adjudication)***

**VIA ELECTRONIC MAIL**

Dear Dr. Leeper and Mr. Whipple,

These comments are submitted on behalf of the Cities of Aztec, Bloomfield, and Farmington ("Cities") on the Navajo Nation Water Rights Settlement in the above-referenced adjudication. The Cities may submit additional comments individually, which address their unique concerns, such as the interconnection issues and costs to construct and connect the Navajo Nation municipal pipeline from its current point of delivery with the City of Farmington's water treatment plant. Additionally, Mr. Mike Arnold, a Councilor of the City of Aztec, submitted comments on behalf of Aztec at the December 15, 2003 public meeting in Farmington, New Mexico.

The Cities commend the representatives of the Navajo Nation and the State of New Mexico for their efforts to resolve and settle the claims of the Navajo Nation to the use of waters of the San Juan River Basin in New Mexico. Dwindling water supplies must somehow be stretched to meet uncertain and growing demands. Planning future developments in the San Juan Basin that use water is risky business. Without quantification of the Navajo Nation's water rights, all non-Indian water users are vulnerable until the exact magnitude of these rights is determined. Indeed, as then Tribal Chairman Peter McDonald testified in 1975 hearings before the United States Senate Subcommittee on Energy Research and Water Resources of the

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Committee on Interior and Insular Affairs, the Navajo Nation has asserted a claim to “all of the waters that flow in the San Juan Basin” and stated further that if it is just “five percent (5%) of the Navajo Nation which is irrigable – it will take close to 3.5 million acre-feet annually to meet the Nation’s reserved rights.”

Although not 3.5 million acre-feet per annum, an annual diversion of approximately 626,470 acre-feet per year (not including tributary irrigation projects, or tributary recreation and livestock uses), as set forth in the proposed settlement, however, is the lion’s share of the water available and apportioned to the State of New Mexico (to include Indian rights), under the Upper Colorado River Basin Compact. The Executive Summary acknowledges that approximately sixty percent (60%) of the minimum apportioned to New Mexico would go to the benefit of the Navajo Nation under the settlement. It is therefore important for all parties to the adjudication to have their questions answered about the settlement before it is acted upon by Congress.

Our first concern is that the time period provided from the December 5, 2003 issuance of the proposed settlement documents,<sup>1</sup> until the expiration of the comment period on January 15, 2004 is woefully inadequate as a good faith period of time for interested parties to understand the settlement and provide meaningful comments. Providing only six weeks, over the holiday period, to analyze the settlement leads us to question the settling parties’ sincerity in obtaining any analysis by the other parties to the adjudication.

However, rather than being frustrated by these arbitrary timeframes, the Cities intend to supplement these comments and questions as they continue their analysis of the settlement documents. Those supplements will be provided to the State of New Mexico, the Navajo Nation, as well as to our Congressional delegation to assist in evaluating this important issue for not only all residents of the San Juan River Basin, but indeed for many other citizens of the State of New Mexico.

Two fundamental questions must be answered: (1) Is sufficient water reasonably likely to be available for Navajo and non-Navajo uses under the settlement?, and (2) Is the proposed annual diversion amount under the settlement for the Navajo Nation reasonable, compared to the diversion amounts that might be proven at trial under a “practicably irrigable acreage” (PIA) analysis? We do not currently have the information to answer either question.

1. Is sufficient water reasonably likely to be available?

For Congress to approve this settlement contract, the Secretary of the Interior will need to make a determination that sufficient water is reasonably likely to be available to New Mexico for

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<sup>1</sup> The settlement proposal includes the following documents: I. Executive Summary, II. Navajo Nation Water Rights Settlement Agreement, III. Appendix 1 – Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, IV. Appendix 2 – A Bill to authorize construction of the Navajo-Gallup Water Supply Project in New Mexico, and to authorize the settlement of water rights claims of the Navajo Nation in the San Juan River Basin in New Mexico, V. Appendix 3 – A Contract Between the United States and the Navajo Nation pursuant to the San Juan River Basin in New Mexico Water Projects Settlement Act, and VI. Depletion Schedule.

both authorized Navajo and non-Navajo uses from the San Juan River Basin, under the apportionment made by the Upper Colorado River Basin Compact. To answer that question, the Cities are interviewing hydrologists to undertake a review and analysis of the Depletion Schedule attached to and relied upon in arriving at the settlement. We will provide you our comments on that issue once that analysis is completed.

2. Is the proposed annual diversion amount under the settlement for the Navajo Nation reasonable compared to the diversion amount that might be proven at trial under PIA analysis?

Over eighty percent (80%) of the water proposed to be allocated to the Navajo Nation under this settlement is to be derived from the Navajo Indian Irrigation Project (NIIP), which was signed into law along with the San Juan Chama Diversion Project on June 13, 1962.<sup>2</sup> That proposed allocation is in lieu of being required to prove at trial the extent of water rights the Navajo Nation would be entitled to under a PIA analysis.

Because this case is in State Court, the New Mexico Courts' interpretation of PIA will be controlling. As you know, the Navajo Nation bears the burden of proof on this issue. The issue is one of substantial evidence, and there is no presumption in favor of the Navajo Nation. The New Mexico Court of Appeals in *State ex re. Martinez v. L.T. Lewis*, 116 N.M. 194, 861 P.2d 235 (Ct. App. 1993) gave an extraordinarily detailed and precise analysis of the proof required to demonstrate the elements of PIA.

The Court pointed out that the burden is threefold. First, there must be proof water can be applied to the land, second, that crops can be grown, and third, that the proposal for producing crops is practical from an economic standpoint. Citing *Big Horn I*, the Court of Appeals stated, "the PIA must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable "at reasonable cost." *Id.* at 206. In evaluating the economic feasibility, the Court found that reliance on Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (March 10, 1983) was not reversible error. These Guidelines provide a very restrictive view of how a tribe can prove what is economically feasible. The trial court also was circumspect about including any federal subsidies such as under the Leavitt Act forgiving tribal debt and other subsidies. That view was also upheld on appeal. Thus, agreeing with a prediction that the Navajo Nation could carry its burden of proof that it is entitled to a certain quantity of water is difficult, without information as to how that burden could be met. As discussed below, to ask the Cities to accept the proposition that the settlement is warranted based upon an estimate as to the success of the Nation on the PIA issue in and of itself requires an understanding of the logic of the cost / benefit balance. The Cities do not currently have the information to make such a decision.

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<sup>2</sup> Act of June 13, 1962, Pub. L. 87-483, 76 Stat. 96 (1962); 43 USCA § 615i-yy, 620-620f (supp. 1979).

A further complication involves the issue of groundwater, which under New Mexico law can provide an alternative source to meet the water right but in a conjunctively managed system, and cannot expand the Navajo Nation's water right.

To answer the PIA question, the Cities must obtain answers to the following questions to formulate their position on whether the level of rights allocated under the settlement is reasonable compared to the rights that might be proven at trial. This informal discovery is designed to expedite responses to the Cities, as opposed to use of formal discovery. Once responses are received, the Cities will advise you and their Congressional delegation as to their position concerning enactment of the settlement into law (proposed to be October 31, 2006).

- Has the Navajo Nation or the United States, pursuant to its trust obligations to the Navajo Nation or the State of New Mexico, prepared an analysis of the level of water rights that would be apportioned to the Navajo Nation pursuant to the PIA of *Winters v. United States*, 207 U.S. 564 (1908)?
- If the answer is yes, please provide a copy of the study and explanation of the assumptions made to arrive at the determination of water rights sufficient to irrigate all practicably irrigable acreage of the Navajo Nation. Please also explain in summary how much water would be available to the Navajo Nation pursuant to that analysis.
- If a study of PIA outcomes at trial has been performed what was the:
  - a. Source of water;
  - b. The crops to be grown;
  - c. The ratio of specialty crops to basic crops;
  - d. The market analysis performed;
  - e. The on-farm delivery costs;
  - f. Analysis of the effects of insects and disease;
  - g. Costs allocated to storage, transportation, carriage loss, and economies of scale related to drought;
  - h. The accounting system used to develop the cost benefit analysis;
  - i. The discount rate;
  - j. The final cost benefit ratio; and the
  - k. Accounting treatment of federal subsidies?
- Is it the Navajo Nation's position, that with the enactment of NIIP, that a portion of the Navajo Nation's *Winters* rights remained unimpaired? In particular, please see Section 13 (c) of the NIIP, which recognized the potential of the Navajo Nation having a remaining *Winters* right after the adoption of the law.
- Please provide the actual acre-feet per year diversion and depletion of water for the NIIP, from the years from its implementation through the current year. Please also

provide an estimate by year of the anticipated diversions and depletion for the current period, through completion of NIIP under the settlement (December of 2015).

- Based on the fact that NIIP did not specify when the project would be completed, and capped spending at 80-100 million dollars, please explain how much of the 508,000 acre-feet per year diversion under this settlement would not be available to the Navajo Nation without implementation of the proposed settlement.
- Please provide an estimate of how many acre-feet per year allocated under this settlement would not be available to the Navajo Nation if the settlement is not approved.
- Based on the provision of Section 615tt of NIIP, please explain the amount of acre-feet per year of *Winters* rights that would be available to the Navajo Nation without the use of any NIIP works or structures.
- Is it the Navajo Nation's position under this settlement that it has the ability to change the purpose of use of any settlement waters allocated under the NIIP to uses other than irrigation purposes? If so, please explain.
- Please provide an estimate of how many acre-feet per year of water allocated to the Navajo Nation under this settlement will not be subject to any requirement to share shortages in the Navajo Reservoir supply, pursuant to Section 615ss(a) of NIIP.
- Does NIIP limit the Navajo Nation's use of water to the consumptive use required by modern water conservation technology (i.e., sprinkler irrigation), or is there an absolute right under NIIP for the Navajo Nation to divert 508,000 acre-feet per year?
- Has the Navajo Nation, as part of the negotiations resulting in the adoption of the NIIP, waived its right to any of its *Winters* rights in exchange for passage of NIIP, and if so, by how much?
- Please quantify under the settlement how much of the Navajo Nation's water rights will not be required to be used solely for irrigation purposes?
- Does NIIP allow the Navajo Nation the ownership right in any water saved (including return flow) as a result of use of the sprinkler irrigation system? Is that water held by the Navajo Nation as a *Winters* water right?
- Section 4 of NIIP provides for increasing the capacity of NIIP facilities to supply water for purposes "over and above the diversion requirements for irrigation stated in Section (2)." Does the Navajo Nation take the position under the settlement that the diversion amounts shown for NIIP, in excess of those currently being diverted, are diversions that can be used for purposes other than irrigation? If so, please explain.

- Does the settlement legislation, if approved, allow for use by the Navajo Nation for NIIP diversions for purposes other than irrigation?
- Under the proposed settlement legislation, has the purpose of NIIP been converted into the allowance of water rights for municipal and industrial purposes in addition to irrigation purposes? If so, please explain.
- Is any part of the proposed 277.4 million dollars in federal funds to be expended to complete the NIIP, subject to being repaid in part by the Navajo Nation to the extent the water is not applied to irrigation purposes?
- Has any party to the proposed settlement prepared a 40-year water plan, pursuant to NMSA 1978, § 72-1-1 (1941), for the proposed municipal and industrial uses? If the answer is yes, please provide a copy of that plan, even if in draft format.
- Are all of the water rights subject to this settlement, except for those being allocated under NIIP and the Animas La Plata Project, being appropriated pursuant to New Mexico law? Please explain.
- Will the New Mexico State Engineer be requested to approve the transfer of any of the water diverted as part of the Navajo-Gallup Water Supply Project (NGWSP), from the San Juan Basin to the Zuni Basin in New Mexico? Please explain, including what is the position of the New Mexico State Engineer on this issue.
- The diversion of water under the NGWSP for use by the Navajo Nation in the State of Arizona is contingent upon an accounting being made available to the State of Arizona of the use of the 1,200 acre-feet in Arizona being within the apportionments of the Colorado River Basin. If approval is not obtained for that use, or if such additional water is not available to the compact, please explain the consequences to the NGWSP.
- The settlement provides that transfer of water uses by the Navajo Nation to locations off Navajo lands would require approval of the State Engineer. Do such transfers include the lease of water by the Navajo Nation for use off of Navajo lands? Please explain, including whether such lease would require approval of the New Mexico State Engineer. What is the State Engineer's position on approval of such leases?
- The settlement provides that the Navajo Nation uses under the NIIP would share in shortages in the Navajo Reservoir supply on a *pro rata* basis among the San Juan Chama Project, the Navajo Nation, and other Navajo Reservoir supply contractors. Shortages include decreases in water availability caused by implementation of the Endangered Species Act (ESA). Since the Navajo Nation's water supply for the NIIP is not from flows released through the Navajo Reservoir, but through a pipeline

directly from the Reservoir itself, please explain how and if such water would be subject to a *pro rata* reduction required to meet ESA flow requirements below the Navajo Reservoir.

- Proposed completion date of the 277.4 million dollar project of the NIIP is December, 2015. Please explain what happens to the 508,000 acre-feet per year, or portion thereof, which cannot be diverted due to lack of completion of project structures if funds are not appropriated in a timely manner to meet that completion date?

If there are any questions or explanations necessary to clarify the above questions, please do not hesitate to contact the undersigned.

The Cities appreciate the Navajo Nation and State of New Mexico allowing us to provide these questions and comments concerning the proposed settlement agreement, and we understand that public discussion of the settlement will continue throughout the negotiation and legislative processes. Responses to our questions will enable the Cities to effectively participate in those public discussions, as well as arrive at a position at the hearing to be held to approve the partial final decree in the San Juan River Adjudication.

Very truly yours,

LAW & RESOURCE PLANNING ASSOCIATES,  
*A Professional Corporation*

By: \_\_\_\_\_  
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