

MEMO

To: Mayor and Council
From: Jay Burnham, City Attorney *JB*
Date: July 28, 2004
Re: Proposed Navajo Water Rights Settlement

After meeting with Bob Hudson and Joe Schmitz and consulting with our attorney in the San Juan River water rights adjudication case, Richard Cole, I am forwarding on to you some collective thoughts on the Navajo Water Rights Settlement documents that were released to the public on July 9, 2004. The new draft documents have addressed some, but not all of our concerns. The settlement, as a whole, contains some elements that are helpful to the City and some that may be detrimental. Therefore, it was decided that this information would be best presented in a "pro's and con's" format.

The "Pro's"-

1. Certainty- For a number of years, the Navajo Nation's claims for "Winters Doctrine" or "reserved" rights has cast a shadow of uncertainty over all the rights in the San Juan system. Everyone knew that the Nation would be making a substantial claim and that the priority of that claim would be 1868, a date senior to every other right on the river. Therefore, no one was certain what value any right had once the unquantified and senior rights took their place at the "front of the line." In a sense, the settlement of these claims, even if painful to non-Indian users, would remove a cloud on the rights of lawful users and allow a market to develop for valid, existing rights. This would allow existing and new water users to be able to effectively plan for new uses and the growth of existing uses. The settlement of the Navajo claims will also facilitate moving forward with the general adjudication of all rights on the San Juan, further clarifying the status of water rights within the basin.
2. The proposed settlement allocates very little "new" water to the Navajo Nation- The bulk of the water proposed to be allocated to the Navajo Nation is already being used or already allocated to the Nation. The Navajo Indian Irrigation Project (NIIP) was authorized by Congress in 1962 and was always projected to use 508,000 acre feet per year of diversion. The Fruitland and Hogback Projects are existing, functioning ditches currently irrigating. The ALP Project has been authorized. Current municipal and livestock watering and other miscellaneous uses are being recognized. Out of the total of over 600,000 acre feet allocated, only the 22,650 acre feet (diversion) designated for the Navajo-Gallup Water Supply Project (N-GWSP) is "new" water not currently being used.

3. The Navajo's 1868 priority is largely "subordinated" to the NIIP 1955 project priority and shortage sharing requirements- All of the NIIP water and the N-GWSP water is to be supplied from storage in Navajo Dam and is subject to that project's priority date (1955) and shortage sharing requirements as set forth in the project documents. The Navajo's ALP water is also subject to that project's priority date (1956) and shortage sharing requirements. Only the Hogback and Fruitland ditches and other existing uses will actually use the 1868 priority date for "priority call" purposes. The bulk of the water allocated to the Navajos would not have a senior right for practical purposes.

4. The Navajo's would agree that the Fruitland and Hogback ditches will take water out of the NIIP allocation in dry years rather than make a priority call on the river- In a new provision, the settlement agreement now provides that in a dry year, NIIP will forego the use of enough water to satisfy the needs of the Fruitland and Hogback ditches (up to 15,000 acre feet) so that those ditches would not have to make a call on the river and enforce their 1868 seniority. This would help all junior priority water users, including the City of Farmington.

5. The new settlement documents clarify that the Navajo Nation will not be allowed to divert NIIP water above 353,000 acre feet without applying for a permit and showing non-impairment. One of the comments the City raised in response to the December, 2003 draft was that the original 508,000 acre feet of diversion for NIIP was no longer necessary because NIIP is using sprinkler irrigation instead of the flood irrigation which formed the basis for calculating the needs of the project when it was authorized. The new draft documents recognize this and require the Navajo Nation not to exceed 353,000 acre feet of diversion without applying for and receiving a permit from the OSE and condition the issuance of the permit on a showing that the diversion of the additional amount will not impair any existing water rights. This effectively limits the Nation to a diversion amount of 353,000 acre feet under current circumstances, because the dam is operating to aid the Recovery Implementation Program and additional diversions would probably impair existing uses.

The "Con's"-

1. The water allocation for the Navajo-Gallup Water Supply Project is "new" water that may not be available during dry periods- As stated above, most of the water allocated to the Navajos under the settlement is currently being used. The exception to this is the water allocated for Navajo uses which is to be transported and delivered by the N-GWSP. There are two risks associated with allocating water not currently being used. First, that there might not be enough water available to supply the new use. And second, that the chance there will be water available for new non-Indian uses is diminished.

2. The 1868 priority on Navajo water places them ahead of every other water right on the system- Reserved rights are granted a priority date as of the date the reservation was set aside. The treaty with the Navajos was signed in 1868 and all the rights allocated to the Navajos bear this date. Although most of the water allocated to the Navajos under the proposed settlement is to be provided from project water with a junior priority date and shortage sharing requirements,

some uses are to be supplied with non-storage diversions that will have an 1868 priority date. This is the most senior priority date on the river and if there is a call on the river in times of drought, these rights will be satisfied first. This "bumps" all other rights down the priority list, including the City of Farmington. This has been mitigated somewhat, however, by the changes to the settlement discussed in "pro" number 4 above.

3. The proposed settlement does not provide any recognition of the City's "trust rights" decreed to the City in the Echo Ditch Decree- The City was decreed over 10,000 acre feet of water to be "held in trust for the benefit" of the owners of property within the City. The current draft of the proposed settlement contains a provision that the Navajo Nation will recognize irrigation water adjudicated in the Echo Ditch Decree. However, the language used limits this protection to allocations which are based on the consumptive irrigation requirements and farm delivery requirements determined in the Hydrographic Survey used in the Decree. Since the Court ordered that the trust rights would be "doubled" to take into account delivery losses caused by a large number of lots within the City, it is unclear whether this language is intended to recognize the City's trust rights. This language could easily be amended to clearly extend the protection to include the trust rights.

4. The Navajo Nation is allocated 50% of all water that is "discovered" to exist above and beyond what is necessary to satisfy New Mexico's Colorado River Compact requirements- The settlement provides that in the event it is determined that there is additional water that is not needed to satisfy Colorado River Compact requirements, that water will be split between the Navajos and the state for allocation to other users. This will obviously cut in half any water available in the future for non-Indian uses, including municipal and industrial water which could be applied to new business and industry.

5. The depletion schedule does not recognize that municipalities can "bank" water for future growth and does not show any growth for municipal and industrial uses in the future- The purpose of the depletion schedule provided with the settlement documents is to show that there is enough water to supply the water for the settlement in addition to the water needed to supply other uses on the river system. City of Farmington staff has raised concerns that the schedule does not show an adequate supply of water when you take into account the need to supply municipal and industrial water uses that will increase over time due to the need to serve a growing population.

xc: Bob Hudson, City Manager
Gina Morris, City Clerk
Joe Schmitz, Community Development Director
Richard Cole, Law Resources and Planning Associates
Paul Martin, City Engineer
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